Introduction

The Committee on International Human Rights of the Association of the Bar of the City of New York interprets the Alien Tort Statute (ATS)[1] as authorizing federal district courts to entertain claims by aliens alleging torts in violation of international law without requiring any additional federal statutory grant of a "cause of action." Our conclusion is based on the text, structure, history and purpose of the ATS, its nearly uniform interpretation by the courts, and recent congressional statements regarding the statute. As discussed herein, the Supreme Court's recent jurisprudence limiting implied private causes of action is consistent with this conclusion as the drafters of the ATS would never have conceived—given the pleading practices of 1789—of the need for a federal statute to refer explicitly to the grant of a cause of action for "tort."

This report comprises four parts. In Part I, we conclude that the First Congress intended, and subsequent recodifications did not alter, an authorization of federal district courts to entertain alien tort claims at law for money damages. Part II sets forth the decisions of federal courts over the past quarter-century, which have overwhelmingly found the statute to authorize a federal cause of action for alien plaintiffs. Part III discusses why courts may imply a cause of action as to the statute notwithstanding certain distinguishable Supreme Court precedent. Part IV reviews the recent legislative history of the Torture Victim Protection Act (TVPA) and reveals that, during the hearings

[1] The provision, found at 28 U.S.C. § 1350 (2000), has also been called the "Alien Tort Act" (ATA), *see, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), "Alien Tort Claims statute", *see, e.g., Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986), and "Alien Tort Claims Act" (ATCA), *see, e.g., Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 513 (S.D.N.Y. 2002). The use of "Alien Tort Statute" (or "ATS") in this report conforms to the practice of the Supreme Court. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432, 436-37 (1989).

preceding passage of the TVPA, Congress clearly demonstrated its support for, and affirmation of, the interpretation that the ATS is sufficient to provide a cause of action.[2]

I. The History and Purpose of the Alien Tort Statute[3]

In enacting the ATS and the other alien-party provisions of the Judiciary Act of 1789 (the 1789 Act), the First Congress granted the federal courts the power to redress certain claims by non-citizens. Although state courts were available for such claims, the remedies were inadequate and such inadequacy was a matter of national interest. The original wording of the ATS (and the federal circuit courts' overlapping jurisdiction in the area of suits by aliens) suggests that the drafters intended the ATS to incorporate and thereby "federalize" common law tort claims, and to allow courts to fashion remedies when such claims were combined with claims of international law violations.

It would defeat the statute's purpose to conclude today that federal courts should be denied all power to redress torts in violation of international law absent explicit statutory authorization of a private cause of action. Such a requirement might make sense for a twentieth-century statute, or perhaps even a mid-to-late-nineteenth-century statute enacted subsequent to the rejection of the common law forms of action by code-pleading innovations,[4] but is wholly anachronistic as to a 1789 statute.[5]

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[2] The International Human Rights Committee of this Bar Association testified in support of the TVPA and the ATS during Congressional hearings preceding passage of the TVPA. *See infra* note 110.

[3] This portion of the report and the part of the introduction dealing with the history of the ATS are excerpted, with the permission of the author, from Thomas H. Lee, The Hidden History of the Alien Tort Act: The National Interest and the Struggle in the First Congress between Debtor Protection and International Obligation (unpublished manuscript).

[4] New York's Field Code of 1848, named after David Dudley Field, was the first state code abolishing the common law forms of action in favor of one form of action on which the plaintiff was required to plead all facts sufficient to make out the elements of the pertinent causes of action. The Field Code and similar state pleading rules, adopted by the federal courts in the period before *Erie Railroad Co. v. Tompkins*, 304 U.S.

A. The ATS's Text, Structure, and Relationship to the 1789 Act

The ATS is as old as the federal judiciary. Originally the fourth clause of Section 9 of the 1789 Act, which inaugurated the basic structure and jurisdiction of the federal court system,[6] it provided that 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.[7]

The present version, dating back to 1948,[8] provides that 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 or a treaty of the United States."[9]

The language of the original ATS has been modified in three notable respects. First, in 1873, "jurisdiction" replaced "cognizance." It seems that "cognizance" had a meaning indistinguishable from that of "jurisdiction" in 1789,[10] but it would be inappropriate to conclude from this that the statute only authorized federal court

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64 (1938), and the promulgation of the Federal Rules of Civil Procedure, were an important intermediate step toward the liberal pleading regime of the Federal Rules.

[5] At the same time, this federal common law power to imply a cause of action is not without limitation, and judicial implications should be measured against the national interest.

[6] *See generally* WILFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 (1990).

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

[8] Congress first revised the 1789 Act in 1873 to read: "The district courts shall have jurisdiction as follows: . . . Of all suits brought by any alien for a tort only in violation of the law of nations, or of a treaty of the United States." Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873). A more minor 1911 revision clarified that this jurisdiction was "original" and otherwise modified punctuation only: "The district courts shall have original jurisdiction as follows: . . . Of all suits brought by any alien for a tort only, in violation of the law of nations or of a treaty of the United States." Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093 (1911).

[9] 28 U.S.C. § 1350 (2000).

[10] For example, Section 9 of the 1789 Act provides, *inter alia*, "[t]hat the district courts shall have . . . cognizance" exclusively of state courts for federal crimes, "cognizance" concurrent with state courts for ATS claims, and "jurisdiction exclusively" of state courts for suits against consuls or vice-consuls. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 76-77. Section 10, dealing with the district courts in Kentucky and Maine, refers to the prior section's enumerations of district court power coverage as "the jurisdiction aforesaid," without distinguishing between the "cognizance" and "jurisdiction" headings. *Id.*, § 10, 1 Stat. at 77-78.

jurisdiction.[11] The absence of language purporting to create a cause of action could be significant with respect to a twentieth-century statute, but it is anachronistic to expect the drafters of the 1789 Act to have included such language given that specific forms of action for tort existed at common law.[12] In any case, the statute did not, and does not, purport to create a *new* federal cause of action; rather, it federalized by incorporation a common law claim[13] by requiring that the tort state a "violation of the law of nations or a treaty of the United States."[14]

Second, while the 1789 Act provided for district court cognizance of "all *causes* where an alien sues for a tort only,"[15] the current version of the ATS refers to jurisdiction of "any *civil action* by an alien for a tort only."[16]

Third, in 1873, the reference to cognizance "concurrent" with federal circuit or State courts "as the case may be" was omitted, obscuring an important clue as to the ATS's original meaning. Inspection of the provisions of the 1789 Act dealing with circuit court jurisdiction in alien cases should illuminate the meaning of the ATS, which addresses only district courts.

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[11] The petitioner in an upcoming Supreme Court case dealing with the cause-of-action issue makes this argument. *See* Brief of Petitioner at 6-7, *Sosa v. Alvarez-Machain* (No. 03-339).

[12] Nor is there any indication from legislative history pertaining to the 1873 substitution of "jurisdiction" that Congress thereby intended to abolish any cause of action implicit in the original ATS.

[13] The Federal Tort Claims Act similarly incorporates the common law of tort in establishing limited tort liability for the federal government. 28 U.S.C. §§ 1346(b), 1402, 2401-02, 2412, 2671-80 (2000).

[14] Given the lack of an amount-in-controversy requirement in the statute, the international law violation may have been perceived as a necessary basis for investing federal judicial power in a sensitive area of overlap with the States' internal sovereignty. An alien plaintiff would thus have had to plead the violation of a specific provision in a United States treaty or a law-of-nations rule as a special allegation in the pertinent writ in tort.

[15] Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 77 (emphasis added).

[16] 28 U.S.C. § 1350 (2000) (emphasis added). The 1873 and 1911 versions referred to jurisdiction of "all *suits* brought by any alien for a tort only." Revised Statutes tit. 13, ch. 3, § 563, para. 16 (1873) (emphasis added); Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093 (1911) (emphasis added). Congress may have presumed equivalence in replacing the word "causes" in its 1873 and 1948 codifications, as there is no legislative history to illuminate the changes. In so doing, it would have neglected the technical significance of the original term in light of the dramatic evolution of pleading practice in the federal courts from 1789 to 1873.

Two provisions of the 1789 Act discuss cognizance in the federal circuit courts over "all suits of a civil nature at common law or in equity"—*not* "causes"—to which an alien is party.[17] These provisions (regarding the circuit courts) are more stringent than the ATS (regarding district courts) to the extent they include an amount-in-controversy requirement, but less restrictive inasmuch as they authorize federal circuit court cognizance of "all suits of a civil nature at common law or in equity." By contrast, the ATS authorizes suit in federal district court only of (a) "all causes where an alien sues for a tort only," and (b) "in violation of the law of nations or a treaty of the United States."

The area of overlap between circuit and district court cognizance comprised those causes where (a) the ATS's provisions were satisfied (i.e., "an alien sues for a tort only in violation of" international law) and (b) the amount in controversy exceeded five hundred dollars. In such a case, the cause might be brought either in the district court under the ATS or in the circuit court under Section 11 of the 1789 Act. Conversely, only the circuit courts would have cognizance of non-tort causes of action brought by aliens exceeding the amount in controversy, including, most significantly, contract claims like the writ for debt, even those alleging a colorable violation of international law.[18] On the other hand, only the district courts would have cognizance of tort causes with the additional

[17] Section 11 of the 1789 Act provides that "the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. at 78. Section 12 states that "if a suit be commenced in any state court against an alien . . . and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars," and the defendant shall "file a petition for the removal of the cause for trial into the next circuit court . . . and offer good and sufficient surety . . . , it shall then be the duty of the state court to accept the surety, and proceed no further in the cause . . . [which] shall there proceed in the same manner as if it had been brought [in the circuit court] by original process." *Id*., § 12, 1 Stat. at 79.

[18] For instance, an alien frustrated in the collection of a debt might plead a violation of Article 4 of the 1783 Treaty of Paris: "It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Definitive Treaty of Peace Between the United States of America and his Britannic Majesty, Sept. 3, 1783, U.S.-Gr. Brit., art. 4, 8 Stat. 80, 82 [hereinafter Treaty of Paris].

allegation of a violation of international law where the amount in controversy was five hundred dollars or less, exclusive of costs.

B. Defendants in ATS Suits and the Implications for Article III of the U.S. Constitution

Interpretation of the ATS (and also Section 11) is complicated by the statute's failure to specify defendants. It seems clear that, of the range of possible defendants, only State citizens and aliens are appropriate.[19] If possible defendants include aliens, then at least with respect to such cases, the constitutional basis must be the general "arising under" language of Article III, Section 2 of the U.S. Constitution,[20] since there is no constitutional provision for alien-versus-alien jurisdiction. The "arising under" constitutional basis would be explicitly satisfied to the extent an ATS claim involved a treaty violation, but a tort "in violation of the law of nations" would arise under federal law only if the "law of nations" is itself federal law.[21]

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[19] None of the other potential parties mentioned in Article III, Section 2 of the Constitution (i.e., the United States, a foreign state, a State, ambassadors and other public ministers, and consuls) would be an appropriate defendant under the ATS for the following reasons: (a) international law principles of the time would have precluded any suit by an alien against the U.S. or a foreign power (absent consent) in a U.S. court (more recently, in *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428 (1989), the Supreme Court has held that the Foreign Sovereign Immunities Act is the exclusive provision governing actions against foreign states in federal court); (b) although a State as defendant might have been a reasonable possibility in 1789, the Eleventh Amendment foreclosed suits against States by aliens; (c) Section 13 of the 1789 Act gave the Supreme Court original and exclusive jurisdiction as to suits involving ambassadors and public ministers, Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80; and (d) Section 9 of the 1789 Act—in a clause subsequent to the ATS—separately provided that the district courts would have exclusive jurisdiction of all suits against consuls or vice-consuls other than with respect to certain crimes. *Id*., § 9(c), 1 Stat. at 77.

[20] "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." U.S. CONST. art. III, § 2.

[21] Most commentators who argue that the law of nations is federal law assert that it is "Laws of the United States" as the term is used in Article III and the Supremacy Clause of Article VI. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1835 n.59 (1998). But Professor Lee speculates that the framers may have intended "Treaties made, or which shall be made, under their Authority," U.S. CONST. art. III, § 2; art. VI, cl. 2, to encompass not only current and future ratified treaties

It thus becomes acutely important whether the "law of nations"—a term commonly considered synonymous with the modern "customary international law"—specified in the ATS is federal, as is most widely held, or state law. If it is the common law of the States, then the ATS may apply only to suits by aliens against State citizens. However, that conclusion is unpersuasive, as the differing phrasing of Section 11 of the 1789 Act makes it seem doubtful that the term "law of nations" could have meant some aspect of state law.[22] The only possible conclusion to be drawn from a textual juxtaposition of the two provisions is that in drafting Section 9 of the 1789 Act, the First Congress intended district court cognizance with respect to a narrower subset of tort causes of action, namely, those that simultaneously alleged violations of international law. In terms of pleading under eighteenth century practice, this might be accomplished by filing a common law tort form of action (such as trespass, case, or trover) with an additional allegation of violation of the law of nations or a treaty of the United States.[23]

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but also the law of nations, which, to the eighteenth-century natural-law mind, was simply international law not yet but eventually to be codified by future "Treaties . . . which shall be made." Lee states that the informal law of nations as categorized by leading treatises "was just as legitimately a part of the unbroken natural fabric of international law as formal treaty law, and, unlike domestic common law, inhabitant of a sphere in which the absence of a central coercive authority rendered unwritten promulgation and enforcement an unreliable guarantee for a young, weak republic in a world of more powerful monarchies." *See* Lee, *supra* note 3 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 255 (Northampton, Mass., Simeon Butler, 4th Am. ed. 1820) (1758) (Bk. II, Ch. XII, § 152).

[22] Section 11 provides for circuit court cognizance, assuming the requisite amount in controversy, of "all suits of a civil nature at common law or in equity" without reference to a violation of international law at all. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 at 78. If "causes" in the ATS, Section 9 of the 1789 Act meant simply "causes at common law," then it is unclear why the drafters included the words "in violation of the law of nations or a treaty of the United States."

[23] *See generally* FREDERIC MAITLAND, THE FORMS OF ACTION AT COMMON LAW (1909). Consider a hypothetical example. A New York creditor attempts to collect from a Virginia debtor in Virginia on a bona fide five-hundred-dollar note that has come due. The debtor refuses to pay citing a Virginia statute nullifying the debt, calls his friend the county sheriff who roughs up the New Yorker and throws him in jail, causing damages in the amount of one hundred dollars. The creditor could plead a "debt" form of action against the debtor for five hundred dollars, and tort forms of action in trespass and case (for the modern torts of assault, battery, and false imprisonment) against the sheriff, for one hundred dollars. The creditor likely could not bring any of these causes in federal circuit court—whether in New York if he might obtain territorial jurisdiction over the debtor and the sheriff, or in Virginia— because determination

Such causes would satisfy Article III by "arising under" federal law, but with the additional statutory limitations that they be brought by aliens and allege tort claims.

It remains unclear what defendants were contemplated, but if the law of nations is federal law, then it is plausible that the ATS was intended to apply to alien-versus-alien suits as well as alien-versus-State-citizen suits, as long as either stated a violation of a treaty or the law of nations.

C. The Purpose of Constitutional and Statutory Extensions of Federal Judicial Power to Alien Cases

It is therefore important to determine why it was deemed necessary to extend federal judicial power to suits involving aliens at all, whether by statute or under the Constitution.[24] The Supreme Court recently gave a unanimous answer to the question as it applies to the Constitution:

> Both during and after the Revolution, state courts were notoriously frosty to British creditors trying to collect debts from American citizens, and state legislatures went so far as to hobble British debt collection by statute, despite the specific provision of the 1783 Treaty of Paris that

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of "the matter in dispute" for amount-in-controversy purposes would probably not have permitted aggregation of damages under both the contract and tort causes of action to cross the then-daunting "exceeding five hundred dollars" threshold. In any event, all the claims would be common law causes of action; they would not state violations of international law because the New Yorker and Virginian are citizens of one sovereign nation, the United States, and classical international law considered the relations among citizens within a sovereign nation beyond its scope.

If, however, the facts were the same but for that the creditor were a British subject, the same events would ground not only common law causes of action, but also, as to the debt claim, a possible violation of Article 4 of the 1783 Treaty of Paris, *see supra* note 18, and as to the tortious conduct, a transgression of the duty of hospitality toward "invited" foreigners with commercial intention under the law of nations, if not a specific provision of reciprocal treatment in any applicable treaty of amity and commerce. Under the explicit terms of the ATS, the British creditor might sue the county sheriff in federal district court for the "tort" causes of action in trespass and case "only," i.e., not for the underlying debt cause, so long as he indicated a violation of international law. Nor could he plead a debt writ of action in federal circuit court, falling a dollar short of the amount-in-controversy threshold.

[24] As the references to concurrent state court jurisdiction in the ATS and Section 11 indicate, aliens could sue in the courts of the several States, and such suits were often brought. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts,* 1989 DUKE L. J. 1421, 1438-49 (1989).

> creditors in the courts of either country would "meet with no lawful impediment" to debt collection. Ultimately, the States' refusal to honor the treaty became serious enough to prompt protests by the British Secretary of State, particularly when irked by American demands for treaty compliance on the British side.
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> This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution. . . . "[T]he proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary."[25]

The Court's statement does not address whether the underlying problem inspired overlapping federal judiciary power to fashion remedies even in the absence of a statute expressly enabling anything more than "cognizance." But taking the Court's cue, there is no reason to conclude that the ATS was intended to be limited to alien-versus-State-citizen civil disputes alone if the ultimate purpose of the constitutional alienage jurisdiction and 1789 Act alien-party provisions was to protect the national interest in sensitive disputes involving aliens—in the case of the ATS, by providing a forum for aliens with respect to torts in which the United States might be seen as in some way complicit. A tort committed against a British subject by a French citizen on U.S. soil, if unredressed, might cause as much damage to the national interest in international peace and harmony as one committed by a U.S. citizen. So, likewise, might a failure to provide a national judicial forum to a British subject injured at sea or abroad by a French citizen who subsequently sought refuge in the United States.[26] In the modern era of intractable American involvement and supremacy in international affairs, it is plausible to view the

[25] *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94-95 (2002) (citations omitted).

[26] Indeed, a similar regard for the national interest in international peace clearly inspired the authorization of constitutional and statutory federal jurisdiction in admiralty suits and suits involving foreign ambassadors, public ministers, and consuls.

redress of any violation of international law as implicating the national interest, as Congress recognized in enacting the TVPA.[27]

Applied to the modern context, the national interest is directly at issue in torts against aliens in violation of international law committed by (a) U.S. citizens under any circumstances, (b) aliens on U.S. soil, or (c) aliens on foreign soil who have subsequently sought refuge in the United States. Failure to provide an effective remedy in any of these three situations would cast the United States as, respectively, the responsible sovereign party, a lawless jurisdiction, or a haven for international law violators. Accordingly, the ATS recognized the power of the federal district courts to "imply"—in the modern, somewhat anachronistic sense—a tort cause of action in order to afford a remedy to an alien alleging a violation of international law where the suit implicates the national interest. The national interest rationale likewise undergirds the TVPA, where a modern-era Congress provided a federal forum for victims of international law violations.[28] The Supreme Court has similarly affirmed the "federal common law" power of the district courts to formulate rules and remedies in other contexts where the subject matter at issue directly implicates the national interest.[29]

II. The ATS in the Federal Courts

[27] See Part IV below.

[28] Whether the federal courts could have implied a private cause of action without Congressional authorization with respect to international law violations against U.S. victims raises separation-of-powers issues absent from judicial implications of tort causes to redress violations where the United States might be perceived as a perpetrator.

[29] *See, e.g., D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 457-58 (1942) (looking to federal common law in a suit brought by FDIC to recover on a note); *id.* at 467-68, 470-72 (Jackson, J., concurring); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (applying federal common law in a case where the United States sued to recover for conversion of a government check); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971) (district court can imply private cause of action to redress unconstitutional action by federal officers).

For the first 190 years of the ATS's existence, any discussion of the meaning of the statute or its history would have been academic; the ATS was invoked in only a handful of cases during that time, with jurisdiction upheld twice.[30] However, the number of cases has multiplied since 1980, following the *Filartiga* case discussed below.

During the past quarter-century, no federal circuit court of appeals has held that the ATS does not provide a cause of action as well as a grant of jurisdiction. The United States Courts of Appeals for the Second, Fifth, Ninth and Eleventh Circuits have concluded that it does, and district courts outside these circuits endorse this view virtually without exception. The Court of Appeals for the District of Columbia Circuit has yet to rule authoritatively on the issue.

A. Circuit Court Consensus Supports an ATS Cause of Action

The Second Circuit inaugurated the current line of ATS cases nearly twenty-five years ago with *Filartiga v. Pena-Irala*,[31] in which Paraguayan nationals successfully brought to justice a former torturer who had taken refuge in the United States. Judge Kaufman drew on constitutional principles and Supreme Court precedent to refute the claim that the court was out of bounds in hearing such a case, stating that the ATS "open[s] the federal courts for adjudication of the rights already recognized by international law."[32] Writing for a unanimous panel, Judge Kaufman held that individuals may sue under the ATS for violations against "well-established, universally

[30] *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588, nn. 4 & 5 (collecting cases).
[31] 630 F.2d 876 (2d Cir. 1980).
[32] *Id.* at 887.

recognized norms of international law."[33] Since *Filartiga*, in which the court was not directly presented with the cause-of-action issue, the Second Circuit has taken several opportunities to reaffirm the holding and make clear that the statute includes such a component.[34] In *Kadic v. Karadzic*,[35] for example, the court stated that the ATS "appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture."[36]

The most recent Second Circuit Court of Appeals case to deal with this issue was decided just months ago. After discussing the reception of *Filartiga* in other circuits, and particularly the unsettled nature of D.C. Circuit law in this regard, the court in *Flores v. S. Peru Copper Corp.*[37] stated clearly that: "*Filartiga* remains the law of this Circuit, and we analyze plaintiffs' claims under the framework set forth in that case and its progeny."[38]

The Ninth Circuit has received and further developed the line of cases that began with *Filartiga*.[39] In addressing the Ferdinand Marcos estate's position that the ATS did not provide a cause of action, the *Marcos II* court stated: "[N]othing more than a *violation* of the law of nations is required to invoke [the ATS]."[40] The *Marcos II* court went on to "join the Second Circuit in concluding that [the ATS] creates a cause of action for violations of specific, universal and obligatory international human rights

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[33] *Id.* at 888.
[34] *See*, *e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Amerada Hess Shipping Corp v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989).
[35] 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).
[36] *Id.* at 246.
[37] 343 F.3d 140 (2d Cir. 2003).
[38] *Id.* at 153.
[39] *See*, *e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) [*Marcos II*].
[40] *Id.* at 1475 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985)).

standards."[41] The Ninth Circuit has reaffirmed, on other occasions, that the ATS confers jurisdiction as well as a cause of action.[42]

The United States Court of Appeals for the Eleventh Circuit recognized a private right of action under the statute in a case involving former prisoners in Ethiopia suing a former official of that country.[43] In upholding the decision of the District Court for the Northern District of Georgia, Judge Hatchett reviewed existing precedent and noted that "[s]ince *Filartiga*, a majority of courts have interpreted [the ATS] as providing both a private cause of action and a federal forum where aliens may seek redress from violations of international law. . . . We read the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke [the ATS]. Moreover, the 'committed in violation' language of the statute suggests that Congress did not intend to require an alien plaintiff to invoke a separate enabling statute as a precondition to relief under [the ATS]."[44] The court then concluded that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."[45]

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[41] *Id.*; *cf. Filartiga*, 630 F.2d at 888 ("well-established, universally recognized norms").
[42] *See, e.g.*, *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003), *cert. granted*, 124 S. Ct. 821 (Dec. 1, 2003) (No. 03-485), *and cert. granted sub nom. Sosa v. Alvarez Machain*, 124 S. Ct. 807 (Dec. 1, 2003) (No. 03-339).
[43] *See Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996).
[44] *Id.* at 846-47 (citations omitted).
[45] *Id.* at 848. *See also Estate of Rodriguez v. Drummond Co*., 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003) (the ATS "creates both subject matter jurisdiction and a private right of action.") (internal quotations omitted) (quoting *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1354 (S.D. Fla. 2001)); *Cabello Barrueto v. Fernandez-Larios*, 291 F. Supp. 2d 1360, 1363 (S.D. Fla. 2003) (issue whether or not the ATS creates a federal cause of action "already settled by the Court"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1343-44 (N.D. Ga. 2002) ("The Eleventh Circuit has held that the [ATS] provides a federal remedy when (1) an alien sues (2) for a tort (3) committed in violation of the law of nations.") (citing *Abebe-Jira*, 72 F.3d at 846-48); *Estate of Cabello*, 157 F. Supp. 2d at 1365 (the ATS "had already provided aliens with a cause of action in federal court"); *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997), *citing Abebe-Jira*, 72 F.3d at 848. Even prior to the decision in *Abebe-Jira*, at least one United States District Court within the Eleventh Circuit produced a similar holding. *See Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("it is clear [the ATS] authorizes remedies for aliens suing for torts committed in violation of the law of nations").

The Fifth Circuit also has been favorably disposed toward finding a cause of action within the ATS, most notably in *Beanal v. Freeport-McMoran*,[46] where the district court determined that the environmental, cultural and other violations complained of did not constitute violations of the law of nations under the *Filartiga* framework.[47] In affirming the district court's decision, the unanimous Fifth Circuit panel noted that the ATS "confers subject matter jurisdiction when the following conditions are met; (1) an alien sues, (2) for a tort, (3) that was committed in violation of the 'law of nations' or a treaty of the United States."[48] The *Beanal* panel followed mostly Second Circuit precedent in determining that plaintiff Beanal had not, in fact, made a case for violations under international law.[49] The sole subsequent case within the Circuit to deal with the cause-of-action issue has held that the ATS is more than jurisdictional in nature.[50]

B. District Court Rulings Also Support a Private Cause of Action

Several United States district courts in circuits that have not had the opportunity to rule on the scope of the ATS have also commented favorably on the *Filartiga* line of cases, and no such case has ruled that the ATS does not provide a cause of action. The United States District Court for the Northern District of Illinois recently joined other courts in holding that the Torture Victim Protection Act ("TVPA"), codified at 28 U.S.C. § 1350 *note*, "does not supplant other causes of action that can be brought under [the

[46] 969 F. Supp. 362, 366 (E.D. La. 1997) (stating that the ATS "grants a federal cause of action as well as a federal forum in which to assert the claim. The Fifth Circuit has acknowledged the generally held view that [the ATS] is appropriately used by individuals asserting claims for violation of the international law of human rights.") (internal citations omitted), *aff'd*, 197 F.3d 161 (5th Cir. 1999).
[47] *Id.* at 373, 380, 384.
[48] *Beanal*, 197 F.3d at 164 (citing *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)).
[49] *Id.* at 165-68.
[50] *See Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299, 302 n.3 (E.D. La. 2001) (listing "[r]ecognized violations of the law of nations cognizable under the ATS"), *aff'd*, 33 Fed.Appx. 705 (5th Cir. 2002).

ATS's] jurisdictional umbrella,"[51] and that "[a]n alien plaintiff basing federal jurisdiction on the [ATS] need not also assert a claim under, or comply with the terms of, the TVPA—all that is required is that she allege a tort committed in violation of international law."[52]

Similarly, the United States District Court for the District of New Jersey has held in recent cases that the ATS provides a cause of action. In *Jama v. INS*,[53] that court noted both the wealth of precedent on the side of recognizing a cause of action as well as the fact that Congress recently left the ATS untouched while enacting parallel legislation (the TVPA—for a more detailed discussion of what the TVPA's history reveals about the ATS, see Part IV below); the court then held that "[t]he reasoning of *Filartiga* and cases which have followed it is sound, and it will be followed in this case."[54] The judge in the more recent case *Iwanowa v. Ford Motor Co.*[55] stated that the majority of courts have rejected the "jurisdiction-only" interpretation of the ATS and instead "concluded that the [ATS] provides both subject matter jurisdiction and a cause of action for claims alleging violations of customary international law."[56] After discussing the *Jama* decision and the fact, noted above, that Congress did not alter the ATS when it enacted the TVPA, the opinion went on to state: "[T]his Court finds that the [ATS] provides both subject matter jurisdiction and a private right of action for violations of the law of nations."[57]

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[51] *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003) (citing legislative history of TVPA).
[52] *Id.*
[53] 22 F. Supp. 2d 353 (D.N.J. 1998).
[54] *Id.* at 362-63.
[55] 67 F. Supp. 2d 424 (D.N.J. 1999).
[56] *Id.* at 441-42 (collecting cases).
[57] *Id.* at 442-43. *See also Bieregu v. Ashcroft*, 259 F. Supp. 2d 342, 352 (D.N.J. 2003).

Finally, in *Xuncax v. Gramajo*,[58] the United States District Court for the District of Massachusetts considered a case brought by Guatemalan expatriates against a Guatemalan former defense minister. The court noted, as have others, that a majority of federal courts presented with the issue had found that the ATS granted a private, federal cause of action, before holding that this was indeed the case, "without recourse to other law as a source of the cause of action."[59]

The broad uniformity of opinion in the above cases can be contrasted with the unsettled nature of this area of law within the District of Columbia Circuit.

C. No Binding Decision in the District of Columbia Circuit

The Court of Appeals for the District of Columbia Circuit has not issued a majority ruling with respect to the ATS cause-of-action issue. The source of any remaining doubts as to whether the ATS contains within it more than a mere jurisdictional grant is to be found mainly in the concurring opinion of Judge Bork in *Tel-Oren v. Libyan Arab Republic*,[60] and in scholarly commentary on the three virtually irreconcilable opinions in that splintered decision, rather than in holdings of subsequent cases. Judge Randolph filed a concurring opinion in 2003, discussed below, also questioning whether the ATS provides a cause of action.[61]

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[58] 886 F. Supp. 162 (D. Mass. 1995).
[59] *Id.* at 179.
[60] 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *Tel-Oren* was an action by survivors of and representatives of those killed during a terrorist attack in Israel. The court issued a *per curiam* decision of under 300 words affirming the district court's dismissal of the action for lack of subject matter jurisdiction and on statute of limitations grounds, followed by extended, separate concurrences of the three judges, whose opinions totaled some 37,000 words.
[61] *See Al-Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 124 S. Ct. 534 (Nov. 10, 2003) (Nos. 03-334 and 03-343).

The concurring opinions in *Tel-Oren* have limited precedential value, as no two circuit judges agreed on the grounds for dismissal of the case and therefore there was no majority.[62] None of the three alternate opinions in *Tel-Oren* has yet commanded a majority in any ATS case before the District of Columbia Circuit Court of Appeals.[63] Moreover, no other United States Circuit Court of Appeals accepts the reasoning of either Judge Bork[64] or Judge Robb[65] in *Tel-Oren*. In contrast, subsequent Circuit Court opinions have commented relatively favorably on the concurring opinion of Judge Edwards,[66] who indicated that the ATS "only mandates a 'violation of the law of nations'

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[62] "Judge Edwards found that there was no liability under the [ATS] for torture committed by non-state actors; Judge Bork opined that the [ATS] did not grant a cause of action in the first place; and Judge Robb concluded that the action presented a nonjusticiable political question." *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003) (citing *Tel-Oren*, 726 F.2d at 791, 795, 799, 823). It must be noted that the Bork concurrence in *Tel-Oren* is not altogether clear. Although he did not find an express or implied cause of action in the ATS, in treaties or in customary international law, Judge Bork also stated that his analysis would not necessarily foreclose a successful suit under *Filartiga*. *See Tel-Oren*, 726 F.2d at 819-20 (distinguishing *Filartiga* because the defendant was a state official acting in that capacity, whose actions were "wholly unratified by [his] government," and who was accused of torture, "a principle that is embodied in numerous international conventions and declarations, that is clear and unambiguous in its application to the facts in *Filartiga*, and about which there is universal agreement in the modern usage and practice of nations") (internal quotations omitted).

[63] Indeed, in the brief submitted by the United States in support of the petition for certiorari in *Sosa*, we find the admission that "no decision of the District of Columbia Circuit has commanded a single rationale for rejecting *Filartiga* (and the panel declined to reach the ATS issue in *Al Odah*)." Brief for the U.S. in Support of the Petition at 15, *Sosa v. Alvarez-Machain* (No. 03-339). The Executive Branch had supported ATS plaintiffs until the current administration. *See, e.g.,* Brief of United States as Amicus Curiae, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069); Memorandum for the United States as Amicus Curiae, *Filartiga*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (submitted by the Departments of State and Justice).

[64] *See Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring). Developments since the *Tel-Oren* decision have further undermined the precedential value of the Bork concurrence. First, in making his separation-of-powers argument against implying a cause of action under the ATS, Judge Bork repeatedly emphasizes the lack of instruction from Congress as to the scope of the ATS and the intent behind it. *See, e.g., id.* at 801 (citing constitutional factors counseling restraint absent Congressional instructions). Second, he highlights that defendants in that case were accused of terrorism, "an area of international law in which there is little or no consensus." *Id.* at 806-07. Since the case was decided twenty years ago, Congress has spoken (see discussion in Part IV below) and the status of terrorism in international law has become settled.

[65] *Id.* at 823-27 (Robb, J., concurring).

[66] *Id.* at 775-98 (Edwards, J., concurring). The Edwards concurrence largely endorses the *Filartiga* view and may have greater precedential weight than the opinions of his fellow panelists due to the comparative narrowness of the holding and its wide acceptance in other courts; at least one circuit court has adopted the rule laid down by the Supreme Court that when no single rationale explaining the result of a case commands a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. U.S.*, 430 U.S. 188, 193 (1977)

in order to create a cause of action."[67] As Judge Bork stated in his *Tel-Oren* concurrence, far from giving "guidance to the bar," "as matters have turned out, the three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of [the ATS] will have to await clarification elsewhere.... In the meantime, *it is impossible to say even what the law of this circuit is*."[68]

In the twenty years since *Tel-Oren*, the District of Columbia Circuit Court of Appeals has had the opportunity to discuss Judge Bork's concurrence only rarely in connection with an ATS case, [69] but has yet to rule firmly on the cause-of-action issue.

The first case to provide an in-depth discussion was *Al-Odah*. Judge Randolph dismissed the claims—including ATS claims—of various persons being held in detention pursuant to the war on terrorism on the grounds that the claimants were outside of United States territorial jurisdiction. He then went on to write a concurring opinion in which he was joined by neither of the two other judges on the panel, and in which he engaged in a lengthy disquisition on the *Filartiga* line of cases, with some attention to whether the ATS grants a cause of action.

The ATS portion of the concurrence is self-professed *dicta*. "I write separately to add two other grounds for rejecting the detainees' non-habeas claims",[70] Judge Randolph

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(internal quotations and citation omitted); *see also Okpalobi v. Foster*, 244 F.3d 405, 437 n.6 (5th Cir. 2001) (because a circuit judge's conclusion had not attracted a majority, "it is not controlling authority"), *citing Marks*, 430 U.S. at 193 (1977).

[67] *Id.* at 779. Cases commenting favorably on the Edwards concurrence include *Alvarez-Machain*, 331 F.3d at 611-12; *Abebe-Jira*, 72 F.3d at 847; *Marcos II*, 25 F.3d at 1475.

[68] *Tel-Oren*, 726 F.2d at 823 (emphasis added). See Part IV below for a discussion of Congressional reaction to this *Tel-Oren* concurrence.

[69] *Ramirez de Artillano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1994) is not discussed here because it bears only a tangential connection to the ATS, while *Sanchez-Espinosa v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) is inapposite because issues of federal sovereign immunity were in play.

[70] *Al-Odah*, 321 F.3d at 1145.

begins. "But first some words are in order regarding [the ATS]."[71] The ATS discussion[72] is otiose, given that Judge Randolph's own majority opinion had already presumably disposed of the ATS claims,[73] and it is only after pages of *dicta* that we get to the two additional holdings promised at the outset,[74] both of which are unrelated to the discussion of the ATS that precedes them.

The doubtful precedential value of the *Tel-Oren* and *Al-Odah* concurrences is brought into relief by the second, more recent District of Columbia Circuit Court of Appeals case to deal with the ATS in this context. In this case, decided after *Al-Odah*, Chief Judge Ginsburg wrote on behalf of a unanimous panel: "We need not decide *whether* the Alien Tort Statute creates a cause of action" because of foreign sovereignty concerns.[75] It is a testament to the relatively low precedential value of the concurring opinions in *Tel-Oren* and *Al-Odah* that a circuit panel would feel so comfortable leaving the issue ambiguous—indeed, undecided.

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[71] *Id.*

[72] Judge Randolph's argument against the ATS has three main components. First, he states that the ATS would grant aliens rights greater than those American citizens enjoy, implying that citizens' access to the courts for ATS purposes should be the same as that of aliens. But Judge Bork points out in his *Tel-Oren* concurrence that this argument is strained, as "international law's special concern for aliens might suggest to the contrary, and the restriction of [the ATS] to aliens might reflect that concern." *Tel-Oren*, 726 F.2d, at 811 n.19. Second, Judge Randolph disagrees with what he calls the *Filartiga* "theory that federal common law incorporates customary international law." *Al-Odah*, 321 F.3d at 1147. And third, he believes that the statute was intended to cover only a narrow class of cases in Admiralty, and is now moribund.

[73] As Judge Randolph himself admits, he would go ahead and discuss his interpretation of the meaning of the ATS but "it is unnecessary to do so" because he has already disposed of the cases in the majority opinion. *Id.* at 1149.

[74] "I would therefore hold that the detainees cannot invoke the [Administrative Procedure Act's] waiver of sovereign immunity. . . . I would also hold that the judicial review provisions of the [Administrative Procedure Act], including the waiver of sovereign immunity, do not apply." *Id.* at 1150 (citing 5 U.S.C. § 701(a)(2)).

[75] *Hwang Geum Joo v. Japan*, 332 F.3d 679, 681-82 (D.C. Cir. 2003) (emphasis added). The Government of Japan could not be a defendant in an ATS case because the Supreme Court has held that the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Hwang Geum Joo*, 332 F.3d at 682 (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)).

Absent an authoritative Circuit Court opinion, we might at least expect some cases in the District Court for the District of Columbia to have used the Bork reasoning as to causes of action under the ATS; however, no such case has done so. In *Doe v. Islamic Salvation Front (FIS)*,[76] the court noted Congressional intent to maintain the ATS intact as a forum for suits (due to passage of the TVPA—see Part IV below for further discussion). Following a short discussion of the *Tel-Oren* decision, the court stated that the "*Karadzic* court's analysis is directly on point and addresses the issues in this case more pointedly than the three conflicting opinions in *Tel-Oren*. The interpretation of international law in *Karadzic* in 1995 is far more timely than the interpretations set forth in *Tel-Oren*, which examined international law as it stood almost fifteen years ago."[77]

In a late 2003 opinion, District Judge Robertson noted the divergent concurrences on the *Tel-Oren* panel and stated flatly that: "The great majority of the federal courts outside this Circuit that have addressed the issue have held that the [ATS] does create a cause of action. Many of those decisions follow Judge Edwards's *Tel-Oren* concurrence, and so will I."[78] In view of the doubtful precedential value of both the Bork concurrence

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[76] 993 F. Supp. 3 (D.D.C. 1998).

[77] *Id.* at 8. *See also Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 21-22 (D.D.C. 2000) (commenting with approval on cases following the *Filartiga* line such as *Iwanowa*, on the extension of the ATS cause of action based on *Kadic*, and on the concurring opinion of Judge Edwards in *Tel-Oren*); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119-20 (D.D.C. 2003) (stating that the ATS "provides a cause of action in federal district court to any 'alien,'" but that D.C. Circuit law is unclear as to whether the ATS cause of action extends to claims against non-state actors); *Von Dardel v. USSR*, 623 F. Supp. 246 (D.D.C. 1985) (finding that ATS claims could be brought under all three theories advanced in *Tel-Oren*; this decision was vacated, 736 F. Supp. 1 (D.C. Cir. 1990), following the Supreme Court's ruling in *Amerada Hess*). No contemporary majority opinion in the circuit has stated that the circuit does not recognize a cause of action under the ATS; rather, judges have tended to note that the circuit law is unclear.

[78] *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 99 (D.D.C. 2003) (internal citations omitted). *Burnett* is a suit by victims or representatives of victims of the September 11, 2001 terrorist attacks against various entities alleged to have supported Al Qaeda. The Judicial Panel on Multidistrict Litigation has ordered this and five other actions (four from the Southern District of New York and one other from the District of Columbia) consolidated as *In Re Terrorist Attacks on September 11, 2001*, and transferred to the Southern District of New York for further proceedings. *See* 295 F. Supp. 2d 1377 (J.P.M.L. 2003).

in *Tel-Oren* and the Randolph concurrence in *Al-Odah*,[79] this and similar recent opinions may be an indicator as to the future direction the District of Columbia Circuit would have taken absent clarification from the Supreme Court.

In short, no federal circuit holds against finding a cause of action under the ATS, nor does any federal district court opinion that remains valid, even within the unsettled District of Columbia Circuit. The Supreme Court, which has never ruled on this issue, will be doing so in the upcoming *Sosa* case. But almost without exception, authoritative federal rulings going back nearly a quarter-century have found a private right of action under the ATS. In the context of a case under the Securities and Exchange Act of 1934, the Court found an implied right of action for securities fraud based largely on the consensus that had been established during thirty-five years of federal cases.[80] Given such a history, the Court wrote, "[t]he existence of this implied remedy is simply beyond peradventure".[81] With the *Filartiga* line of cases now in its twenty-fifth year with only isolated and non-binding dissents, an ATS cause of action may be similarly "beyond peradventure."

III. Implied Causes of Action

Some opponents of ATS litigation claim that under recent Supreme Court case law on implying rights of action from statutes, "a cause of action cannot be implied" under the ATS.[82] According to this argument, for the ATS to be the basis for a private

[79] In addition, there have been several cases in which judges have taken thoughtful exception to the Bork concurrence. *See, e.g., Xuncax*, 886 F. Supp. at 179-83.
[80] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1982).
[81] *Id.* at 380.
[82] *See* Brief of Petitioner at 9, *Sosa v. Alvarez-Machain* (No. 03-339).

cause of action, Congress would have had to use "'rights-creating' language."[83] However, this argument ignores the nuances of the Supreme Court's case law on implied private rights of action in statutes, which even under current standards, is supportive of the finding of a private right of action under the ATS.

Supreme Court case law on statutory implied rights of action is more complex than it might first appear. While Justice Scalia's decision in *Sandoval* reaffirms the Court's rejection of the view that "'it is the duty of the courts to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute,"[84] the actual holding of the case—that Section 602 of the Civil Rights Act of 1964 does not create a private right of action—is quite narrow. In an earlier decision, *Cannon v. University of Chicago*,[85] the Court held that Section 601 of the Civil Rights Act of 1964 implicitly created a cause of action for intentional discrimination on the basis of sex because the statute "explicitly confers a benefit on persons discriminated against on the basis of sex."[86] In contrast, the Court found in *Sandoval* that Section 602 has no such "rights-creating" language; rather it provides that federal agencies are authorized "to effectuate the provisions of [Section 601] … by issuing rules, regulations, or orders of

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[83] *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979)).
[84] *Id.* at 287 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964), reaffirming the Court's position in *Cort v. Ash*, 422 U.S. 66, 78 (1975)). In *Borak*, the Supreme Court found that Section 14(a) of the Securities Act of 1934, which prohibits the solicitation of proxy material in contravention of SEC rules, created a right of action. Although the 1934 Securities Act does not explicitly create a private right of action, the Court held that it was necessary to imply a private right of action because the creation of such right of action was necessary to effectuate the underlying federal policy of the statute. 377 U.S. at 433. The *Sandoval* Court expressly rejected the *Borak* Court's "habit of venturing beyond Congress's intent," 532 U.S. at 287, instead holding that an inquiry into Congressional intent, beginning with the text of the statute, was the touchstone of any analysis regarding implied private rights of action in a statute. *Id.* at 287-88.
[85] 441 U.S. 677 (1979).
[86] *Id.* at 694.

general applicability."[87] And, in looking only at the statute, the Court found that Section 602 was "twice removed from the individuals who will ultimately benefit from Title VI's protection":[88] the statute focused neither on the individuals protected nor on the funding recipients being regulated. Rather, it was "'phrased as a directive to federal agencies engaged in the distribution of public funds.'"[89] Moreover, the Court found that Congress's provision for administrative methods for enforcement of the regulations authorized under Section 602 contradicted a finding of congressional intent to create a private right of action: "The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."[90]

In *Gonzaga Univ. v. Doe,*[91] the Court addressed whether non-disclosure provisions in a federal spending statute (the Family Educational Rights and Privacy Act or "FERPA") created a right that could be enforced under 42 U.S.C. § 1983. The Court held that the key inquiry was whether or not the statute "confer[s] rights on a particular class of persons"[92] and that "[a]ccordingly, where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit."[93] The Court emphasized that FERPA was essentially a spending statute addressed to administrative agencies and, like the statute in *Sandoval*, was "two steps removed from the interests of the individual."[94] As in *Sandoval*, the Court stressed the fact that Congress had already created a "mechanism … for enforcing those

[87] *Alexander v. Sandoval*, 532 U.S. at 288 (quoting 42 U.S.C. § 2000d-1).
[88] *Id*. at 289.
[89] *Id.*
[90] *Id.* at 290.
[91] 536 U.S. 273 (2002).
[92] *Id.* at 285 (quoting *Cal. v. Sierra Club*, 451 U.S. 287, 294 (1981)).
[93] *Id.* at 286.
[94] *Id.* at 287.

provisions."[95] The Court found that this factor alone served to "squarely distinguish this case from [other cases finding enforceable rights in spending legislation], where an aggrieved individual *lacked any federal review mechanism*."[96]

Indeed, although Supreme Court decisions on implied private rights of action have in recent years stressed the importance of text in statutory interpretation, they also have been consistent in placing much of their weight on the question whether there is a federal statutory enforcement scheme already in place, such that a private right of action is not necessary. In both *Sandoval* and *Gonzaga*, such an enforcement scheme did exist; its existence not only reduced the importance of a private right of action as an enforcement method, but was also indicative of Congressional intent to provide for enforcement in a manner that did not include private rights of action.

This factor is a common thread throughout Supreme Court case law on implied private rights of action; it is even found in cases preceding *Cannon* and *Sandoval*. For example, in *Jones v. Mayer Co.*,[97] the Court found an implied right of action under 42 U.S.C. § 1982, which guaranteed equal treatment under law with respect to property regardless of race.[98] In that case, immediately after the Court granted certiorari Congress created "a complete arsenal of federal authority"[99] for the enforcement of rules forbidding discrimination with respect to housing by passing the Fair Housing Title of the Civil Rights Act of 1968. Nonetheless, the Court reasoned the statute's enactment had "no effect upon this litigation"[100] since the act did not apply to instances of discrimination

[95] *Id*. at 289.
[96] *Id.* at 290 (emphasis added).
[97] 392 U.S. 409 (1968).
[98] *Id.* at 413.
[99] *Id.* at 417.
[100] *Id.*

prior to 1968 (at issue in the case). The unavailability of the Fair Housing Title meant that there was no alternate remedial scheme; thus, implication of a private right of action was essential for the enforcement of the rights protected by Section 1982.[101]

The ATS is distinguishable from late-twentieth-century spending statutes like FERPA or provisions addressed to administrative agencies like Section 602 of the Civil Rights Act, which the Court held did not create private rights of action. The ATS is a 1789 statute that specifically addresses itself to "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[102] It directly contemplates a private right of action by aliens for torts violative of the law of nations, and, unlike FERPA, it describes the "class of persons,"[103] i.e., aliens, to whom the right pertains.

Unlike the situation in *Sandoval* and *Gonzaga*, there is no federal statutory enforcement scheme in place for violations of customary international law.[104] To the contrary, a private right of action under the ATS is the sole statutory mechanism under U.S. law available to enforce violations of customary international law against U.S. persons or foreigners using the U.S. as a haven. Given that these persons are located in

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[101] After *Mayer*, the Court decided *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Again, the Court held that Section 1982 implies a right of action for instances of discrimination predating the enactment of the Fair Housing Title. In *Sullivan*, the Court also held that Section 1982 permitted an award of monetary damages, stating that "a disregard of the command of the statute is a wrongful act and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." *Id.* at 239 (quoting *Tex. & Pacific Bell R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916)).

[102] 28 U.S.C. § 1350.

[103] *Gonzaga,* 536 U.S. at 285.

[104] To the extent that international fora exist where such claims might be brought, it is not clear that such fora are effective or accessible. Furthermore, as evidenced by the Congressional reports on the TVPA, those countries where torture is practiced do not "adhere[] to the rule of law" and most likely would not provide potential plaintiffs with a means of redress. H.R. REP. NO. 102-367, at 3 (1991), *microformed on* CIS No. 91-H523-18 (Cong. Info. Serv.); S. REP. NO. 102-249, at 5 (1991), *microformed on* CIS No. 91-S523-16 (Cong. Info. Serv.).

the United States, a U.S. federal court may be the only forum able to exercise jurisdiction over them.

IV. Recent Congressional Affirmation of a Right to Action under the ATS

The Torture Victim Protection Act of 1991 provides judicial remedies for victims of official torture and extrajudicial killing committed under color of official authority. As is clear from the legislative history of the TVPA, Congress was focused on extending to U.S. citizens the remedies available to alien victims of torture and extrajudicial killing under the ATS.[105] A review of the hearings indicates that Congress was very concerned with the future of the ATS and, in light of the confusion caused by Judge Robert H. Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic* (see discussion in Part II above), desired to reaffirm the ATA as interpreted by and applied under *Filartiga* and its progeny. As simply stated by Representative Gus Yatron, then-chairman of the House Foreign Affairs Committee's Subcommittee on Human Rights and International Organizations who, together with House Judiciary Committee Chairman Peter Rodino and Representative Jim Leach, first introduced the bill in March 1987 and reintroduced it in April 1989 and again in April 1991, the intent of the TVPA was "not to weaken [the ATS], but to strengthen and clarify it."[106]

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[105] Note, however, that there are some differences between the rights of aliens under the ATS and the TVPA. For example, under the TVPA, the plaintiff must first exhaust local remedies: "A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. 1350 *note*, § 2(b) (2000).

[106] *The Torture Victim Protection Act: Hearing and Markup before the House Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations (hereinafter "House TVPA Hearing")*, 100th Cong. 1 (1988) [hereinafter House TVPA Hearing]. As of the time of the first hearing on the bill by the Subcommittee on Human Rights and International Organizations in March 1988, there were 110 cosponsors. *Id.*

Addressing the specific issue whether the ATS provides a cause of action, the reports of the applicable House and Senate committees of the 101st Congress confirm that they considered the ATS to provide alien plaintiffs with a cause of action to sue for violations of customary international law. The reports refer to Judge Bork's questioning of the existence of a private right of action under the ATS in the *Tel-Oren* case and his "reasoning that separation of powers principles required an explicit grant—and preferably contemporary—by Congress of a private right of action for lawsuits which affect foreign relations"[107] but they do not give weight to his argument. Instead, both reports affirm the *Filartiga* reading of the ATS by clarifying that "[t]he TVPA would provide such a grant, and would also enhance the remedy *already available under section 1350* in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."[108] In addition, the reports both go on to emphasize Congress's support for the ATS's continued application, including for claims other than those of torture and summary execution: "Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."[109]

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[107] H.R. REP. NO. 102-367, at 4 (emphasis added). This language also appears in the Senate report except it does not include the words "and preferably contemporary." S. REP. NO. 102-249, at 5.
[108] S. REP. NO. 102-249, at 5; H.R. REP. NO. 102-367, at 4.
[109] H.R. REP. NO. 102-367, at 4 (footnote omitted). This language also appears in the Senate report except it does not include the second half of the final sentence (i.e., "to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law"). S. REP. NO. 102-249, at 5.

The House Foreign Affairs Committee (including its Subcommittee on Human Rights and International Organizations), the House Judiciary Committee and the Senate Judiciary Committee (including its Subcommittee on Immigration and Refugee Affairs) discussed drafts of the TVPA over a period of several years. The hearings of both the House and Senate committees included presentations and questions dealing with the ATS and the then-recent case law, including in particular *Filartiga* and the Bork opinion in the *Tel-Oren* case.[110] During the hearings, the Committees received comments from the Departments of Justice and State objecting to the passage of the Act. These comments included an argument—echoing the principal argument of Judge Bork in the *Tel-Oren* case—based on the separation of powers principle. However, while Judge Bork in *Tel-Oren* acknowledged that the separation of powers principles involve a balancing of various factors including the status of the particular area of international law and the importance of an issue for foreign relations, the Administration did not indicate any need for consideration of either factor.[111]

Instead, the State and Justice Departments urged Congress to reject the TVPA, asserting without qualification that suits brought under the TVPA would interfere with the "complex and multifarious foreign policy that [the United States] need[s] to

[110] The presentations and submissions of various expert witnesses included those of the Chair of this Bar Association's Committee on International Human Rights ("IHRC"). See IHRC report in House TVPA Hearing at 30-67. In fact, a substantial portion of the section entitled "Need for Legislation" appearing in both the House and Senate Reports was based on the written report submitted by the IHRC to the Congressional committees.

[111] In his *Tel-Oren* opinion, Judge Bork noted that he is "guided in large measure by the Supreme Court's observation in *Sabbatino* that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it … [and] the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 726 F.2d at 804.

conduct."[112] This absolute prioritization of foreign policy without regard to the type of violations at issue (i.e., torture and summary execution)—which also represents the approach taken by the petitioner in *Sosa* in its argument against reading the ATS to grant a cause of action for torts committed in violation of customary international law—conflicts with the Supreme Court balancing test followed by Judge Bork (see footnote 111 above).

Notwithstanding the Administration's objections, Congress passed the bill, underscoring that "[a] state that practices torture and summary execution is not one that adheres to the rule of law" and that the purpose of the TVPA was to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States."[113] According to Congress, this objective is *de facto* consistent with the overarching foreign policy objectives of the United States. However, this does not mean that the ATS's grant of a cause of action extends only to torture and summary execution. Congress rejected Petitioner's reliance on the separation of powers argument to justify a reading of the ATS as a jurisdictional statute only (i.e., one not granting a cause of action) with respect to *all* acts that "violate standards accepted by virtually every nation."[114] In fact, based on his

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[112] *Torture Victim Protection Act of 1989: Hearing before the Senate Subcomm. on Immigration and Refugee Affairs*, 101st Cong. 8 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice). *See also id*. at 19 (statement of David P. Stewart, Assistant Legal Adviser for Human Rights and Refugee Affairs, U.S. Department of State). The Administration urged Congress to follow the "multilateral approach" of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")—that is, with each state party providing a means of redress and compensation for acts taking place within its own territory—instead of having the federal courts provide a forum for claims of torture committed outside of the United States. Two other reasons given by the Administration in support of the multilateral approach were: (a) the U.S. would be subject to retaliation by countries whose citizens were sued in the U.S. under the TVPA, *id.* at 9, 19, and (b) the TVPA "may often lead to suits that are inappropriate for the U.S. forum due, in part, to the difficulty of gathering evidence and the likely absence of witnesses." *Id.* at 9.

[113] S. REP. NO. 102-249, at 3.

[114] *Id*. The Senate report cited the revised draft of the Restatement of Foreign Relations Law of the United States, which provided that "there should be a cause of action where a state practices '[summary] murder or causing disappearance [or] disappearance,' among other wrongs, because these practices violate the law of

opinion in *Tel-Oren*, Judge Bork himself appears to have drawn a similar line distinguishing the ATS's role in providing remedies for violations of customary international law from the inapplicability of the ATS with respect to violations of international law for which there is not a clear consensus.[115]

Congress's final and unambiguous word on the subject appears in the 1991 committee reports supporting the TVPA:

> The TVPA would establish an unambiguous and modern basis for *a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act),* which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' … *Section 1350 has other important uses and should not be replaced*.[116]

Conclusion

In sum, both the early history of the ATS and its recent treatment in Congress and in the federal courts strongly suggest that ATS claims may be heard without the need to refer to another federal statute for a cause of action. The First Congress appears to have intended that alien plaintiffs could bring suit based simply on violations of treaty law or the law of nations, combined with one of the tort writs recognized at the time under common law. Moreover, the vast majority of contemporary federal court opinions interpreting the ATS have found that the statute includes a cause of action component,

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nations." *Id.* at 4 (quoting RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE U.S., §§ 702, 703 (Tentative Draft No. 6, 1985)).

[115] Judge Bork listed three differences between the *Tel-Oren* case and *Filartiga*, none of which was taken into consideration either in the petitioner's brief in *Sosa* or in the arguments of the State and Justice Departments. One of these three differences is that "the international law rule invoked in *Filartiga* was the proscription of official torture, a principle that is embodied in numerous international conventions and declarations, that is 'clear and unambiguous' in its application to the facts in *Filartiga* … and about which there is universal agreement 'in the modern usage and practice of nations'. " *Tel-Oren*, 726 F.2d at 819-20 (omitting citations to the *Filartiga* case).

[116] H.R. REP. NO. 102-367, at 3 (emphasis added). This language, quoting the House report, is repeated in the Senate report (although the latter does not include the words "and modern" in the first sentence). S. REP. NO. 102-249, at 4.

and no circuit majority rejects this interpretation. There is no inconsistency between these opinions and Supreme Court jurisprudence regarding implied causes of action, in part because the age of the statute would render such an inquiry ahistorical, and also because potential plaintiffs do not have recourse to any federal statutory scheme as an alternative to the ATS. Finally, the legislative history of the TVPA evidences congressional intent to fortify the ATS and let it stand rather than to weaken the statute or question the line of cases following the *Filartiga* decision.