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The Alien Tort Claims Act Under Attack: Introductory Remarks

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THE ALIEN TORT CLAIMS ACT UNDER ATTACK

INTRODUCTORY REMARKS BY MARK A. DRUMBL*

The Alien Tort Claims Act, or Alien Tort Statute, provides that the district courts shall have original jurisdiction over any private civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.[1] The act dates from 1789 (the First Congress). It essentially lay dormant until the1980 decision by the Second Circuit in *Filártiga v. Peña-Irala*.[2]

Claims have since been filed under the act by alien plaintiffs for a variety of alleged violations of the law of nations, including torture,[3] genocide,[4] sexual violence,[5] war crimes,[6] enslavement and forced labor,[7] apartheid,[8] summary execution,[9] cruel and unusual treatment,[10] unsustainable development,[11] toxic gas disaster,[12] and environmental damage.[13] Some claims have been dismissed; others have led to substantial monetary damage awards. To be sure, the likelihood of collecting on these awards is small, although it might increase as corporations with assets in the United States become defendants.[14] That said, however, actually recovering damages often is not a central goal for many plaintiffs, for whom the process has important declaratory and cathartic goals.

Although modest in number, these lawsuits have triggered considerable controversy. The U.S. Supreme Court stepped into the fray on March 30, 2004, when it heard joint oral argument in the cases of *Sosa v. Alvarez-Machain* (No. 03-339) and *U.S. v. Alvarez-Machain* (No. 03-485).[15]

We are fortunate to have an outstanding panel to discuss litigation and policy aspects of the act. Issues to be covered include the current status of litigation under the act; whether the act is a jurisdictional statute or creates a private cause of action; the interplay of human rights litigation with accountability, international trade/investment, political transition, foreign policy, and national security; separation of powers; the construction of grievous human rights abuses as torts; and the reception of international human rights law by domestic courts.

On June 29, 2004—as these proceedings were in production—the Supreme Court issued its opinion in the *Sosa* litigation. The Court reversed the Ninth Circuit and denied petitioner Alvarez-Machain's claim under the act. The Court based its reversal on its conclusion that the alleged wrongdoing (brief detention) was not the genre of wrongdoing envisioned by the act. The majority of the Court (six judges, Justice Souter writing) held that the act recognizes claims

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[1] 28 U.S.C. §1350.

[2] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[3] *Id. See also* Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

[4] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

[5] *Id.*

[6] Hwang Geum Joo v. Japan, 332 F.3d 679 (D.C. Cir. 2003); Doe I v. Islamic Salvation Front, 993 F.Supp. 3 (D.D.C. 1998).

[7] Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp.2d 289 (S.D.N.Y. 2003); Doe I v. Unocal Corp., Nos. 00-56603 & 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003, vacated and rehearing granted).

[8] In re South African Apartheid Litigation, MDL No. 1499 (S.D.N.Y. 2004, pending litigation).

[9] Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

[10] *Id.*

[11] Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

[12] Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004).

[13] Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

[14] For a discussion of corporate liability under the ATCA, *see* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Sinaltrainal v. Coca-Cola Co., 256 F.Supp. 2d 1345 (S.D.Fla. 2003); Presbyterian Church, *supra* note 7.

[15] Certiorari to the Ninth Circuit Court of Appeals in Alvarez-Machain v. Sosa and the United States, 331 F.3d 604 (9th Cir. 2003).

for violations of contemporary norms of international character "accepted by the civilized world and defined with a specificity comparable to the features" of the paradigms familiar at the time of enactment in 1789. The Court rejected the claim that the act required additional legislative enactments that expressly adopted causes of action, noting that the First Congress did not pass the act to be "placed on the shelf" for a future legislature that might authorize the creation of causes of action. In other words, the act is not "stillborn." Rather, it was intended to have practical effect the moment it became law. Although the act continues to accommodate claims (including, apparently, against corporate actors), it only provides jurisdiction for a "relatively modest set of actions alleging violations of the law of nations." Looking forward, claims shall continue under the act and, in this sense, U.S. courts remain open to adjudicating human rights abuses committed elsewhere. This, in turn, means that many of the questions raised by the panelists remain starkly relevant as future courts assess whether an alleged rule of international law is of the requisite definiteness and specificity to ground a claim and, on a broader note, anticipate the repercussions of such claims.

REMARKS BY DOUGLAS N. LETTER*

The Ninth Circuit erroneously held that Alvarez-Machain has established an actionable claim against Sosa under 28 U.S.C. 1350 (Section 1350) for alleged violations of customary international law norms in connection with his arrest in Mexico.

The Ninth Circuit erred, as a threshold matter, in concluding that Section 1350 is anything other than a grant of jurisdiction. By its terms, Section 1350 simply confers jurisdiction on the federal courts over a specified class of cases. It does not expressly confer any private right of action, it contains no language from which it might be possible to *infer* a private right, and, in particular, it lacks the "rights-creating language" that is critical to the creation of a private right of action.[1] The conclusion that Section 1350 is purely a jurisdictional measure is supported by the fact that when Congress originally enacted the section it did so as part of the legislation that organized the federal courts and delineated their jurisdiction and that when Congress recodified Section 1350 in the past century, it did so, again, as part of comprehensive legislation addressed to the organization and jurisdiction of the federal courts.

The history of the use of Section 1350 also strongly suggests that it is strictly jurisdictional and does not, as the Ninth Circuit held, create a cause of action for the violation of the law of nations and treaties. From its enactment in 1789 until 1980, Section 1350 was invoked only rarely in the federal courts and then only as a potential alternative basis for jurisdiction. It was not until *Filártiga v. Peña-Irala*[2] that the modern conception of Section 1350—a far-reaching cause of action on behalf of aliens for violations of international law anywhere in the world—took life and then spread. As the Supreme Court has observed, the most logical reason that a "revolutionary" new meaning of an "old judiciary enactment" was not recognized by judges earlier is that "it is not there."[3]

If Section 1350 is interpreted consistent with its clear terms to provide a grant of jurisdiction, nothing more, there is no basis for finding a cause of action in *Alvarez-Machain*. Sources of customary international law, such as a UN resolution relied on by the Ninth Circuit, do not remotely provide a basis for inferring a cause of action. Indeed, far from finding any intent to

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[1] Alexander v. Sandoval, 532 U.S. 275, 288 (2001).

[2] 630 F.2d 876 (2d Cir. 1980).

[3] Romero v. International Terminal Operating Co., 358 U.S. 354, 370 (1959).

create a cause of action in an act of Congress, the Ninth Circuit relied on international agreements that the political branches had *refused* to ratify, like the American Convention on Human Rights, or had ratified only on condition that they were *not* privately enforceable, like the International Convention on Civil and Political Rights. That judicial exercise was profoundly out of line with the separation of powers. Likewise, nothing in Section 1350 provides a charge to federal courts to divine a federal common law of the law of nations akin to the constitutionally grounded practice in admiralty.

The Constitution commits to the political branches, not the courts, responsibility for managing the nation's foreign affairs. In particular, the Constitution commits to the legislative branch the authority to "define and punish . . . Offences against the Law of Nations."[4] That textual commitment was based on the framers' recognition of the indeterminate and malleable nature of customary international law. The Constitution also prescribes special procedures for the consideration and approval of treaties with foreign nations. The Ninth Circuit's decision in *Alvarez-Machain* permits a court to circumvent those constitutional procedures and both to define the law of nations that is enforceable in a damages action in United States courts and to recognize private rights that are at odds with the statements and actions of the political branches in deciding whether or not to ratify treaties and on what terms.

The nature and variety of the suits under Section 1350 that have proliferated in the lower courts in the two decades since the Second Circuit decided *Filártiga* underscore the potential that such litigation has for interfering with the conduct of sensitive diplomatic matters entrusted to the political branches. That experience magnifies the gravity of the separation-of-powers problems created by the Ninth Circuit's construction of Section 1350 and the need for the Supreme Court to correct the fundamentally mistaken understanding of Section 1350 that has emerged in the lower courts in the past two decades and that the Ninth Circuit applied in *Alvarez-Machain*.

The Ninth Circuit also erred in concluding that Section 1350 applies to alleged torts, such as the one in *Alvarez-Machain*, that occur outside the United States. The longstanding presumption is that, unless a statute contains a contrary expression or touches on certain special concerns, the statute applies only within the territory of the United States, or in limited circumstances on the high seas. That presumption is designed to prevent unintended clashes between the law of this country and those of other nations and thereby to prevent international discord. The presumption accordingly has special force in the context of Section 1350. There is no basis to conclude that Section 1350 establishes a roaming cause of action that permits aliens to come to United States courts and recover money damages for violations of international law anywhere around the globe.

Remarks by Beth Stephens*

The landmark decision in *Filártiga v. Peña-Irala*[1] held that victims of human rights abuses could seek damages in U.S. courts, thereby offering the hope of an effective means to hold accountable perpetrators of egregious human rights abuses. The doctrine received overwhelming support from the academic community and has been followed by every court to reach decision on the issue. Over the past few years, however, lawsuits filed against multinational corporations and foreign government officials have triggered a backlash. Corporate representatives and Bush administration officials protested that suits under the Alien Tort Claims Act (ATCA) threatened to bankrupt the world economy and seriously impede the conduct of foreign relations.

[4] Art. I, §8, cl.10.

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[1] 630 F.2d 876 (2d Cir. 1980).

This outsized controversy dwarfs the relatively modest body of successful ATCA lawsuits. Of approximately one hundred cases, over half have been dismissed in pretrial motions and fewer than twenty have resulted in final judgments, none against a corporate defendant or a current foreign government official. Only one case has resulted in a significant collection of damages.

Despite the controversy over the potential impact, real and imagined, of the ATCA, one issue is not debated: Regardless of the consequences, Congress had the power in 1789, and has the power now, to enact a statute authorizing civil lawsuits for damages for violations of international law, whether those violations occur in the United States or abroad. Thus, if Congress so intended, the courts must enforce the statute whether or not it disadvantages U.S. corporations operating abroad and whether or not it creates difficulties for executive branch conduct of foreign affairs. To the extent that opponents of the *Filártiga* interpretation of the statute raise policy arguments, they must direct their concerns to Congress, not the courts.

The question pending before the Supreme Court is therefore one of intent: Did the first Congress intend to authorize civil litigation for violations of the law of nations when it enacted the ATCA in 1789? The historical records are sparse; their interpretation is much contested. Nevertheless, the available history offers support for the conclusion that Congress did intend to authorize such claims without further legislative action. First, members of the first Congress and the framers of the Constitution had repeatedly expressed concern about ensuring redress for aliens injured by violations of the law of nations.[2] Second, an early report by the U.S. Attorney General described the ATCA as a means by which an alien injured by a violation of the international rules governing neutrality could sue for damages.[3] Third, two early federal court cases also referred to the statute as authorizing suit in proper cases.[4]

If Congress today passed a statute authorizing civil lawsuits for violations of the law of nations, it would, of course, look very different. It would look like the Torture Victim Protection Act (TVPA), enacted in 1992, which creates a cause of action for torture or extrajudicial execution, defines both claims, and provides a statute of limitations.[5] But when the ATCA was enacted, statutes often incorporated preexisting common law claims.

How should the courts apply a statute written 225 years ago in language that, if enacted today, would not create a right to sue? If the Court finds that the first Congress intended to authorize a cause of action, it faces two options. One view, urged by the U.S. government, is to read the statute according to modern standards and hold that it is purely jurisdictional because it does not clearly state that it creates a cause of action. For twenty-five years, however, the lower federal courts have taken the alternative approach: they have implemented congressional intent by reading the statute as sufficient to create a modern cause of action despite its now-obsolete terminology, using standard federal jurisprudence to fill the gaps. They have done so in part because Congress has acquiesced in this interpretation. Congress addressed exactly this issue when enacting the TVPA. Rather than repealing or restricting the ATCA, Congress instead extended the right to sue to U.S. citizens, issuing legislative reports that strongly endorsed the *Filártiga* interpretation of the ATCA.

Moreover, the executive branch has taken conflicting positions, with the Carter administration strongly supporting the modern application of the statute, the Reagan administration challenging it, the Clinton administration largely supportive, and the current Bush administration strongly opposed. The meaning of a congressional statute should not change with shifting

[2] *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 463–71 (2000).

[3] *Breach of Neutrality,* 1 OP. ATT'Y GEN. 57, 59 (1795).

[4] Bolchos v. Darrel, 3 F. Cas. 810 (1795); Moxon v. The Fanny, 17 F. Cas. 942 (1793).

[5] 28 U.S.C. §1350 (note).

political winds. If the executive branch now disagrees with the interpretation offered by its predecessors twenty-five years ago and applied by the courts since that time, the proper procedure is to seek a statutory change from Congress—something that the Bush administration has not attempted.

The administration suggests that the problems posed by the ATCA demand urgent action, but it consistently overstates the foreign policy implications of human rights litigation. First, the courts routinely dismiss problematic cases. Applying the standard federal doctrines of act of state, political question, *forum non conveniens*, and failure to state a claim, the majority of cases filed pursuant to the statute have been dismissed in the early stages.

Second, the examples most often cited by the government and other opponents of the statute are cases that were dismissed by federal courts—usually because of the very flaws about which the opponents complain. One pending set of cases has raised particular ire: lawsuits filed against companies that did business in South Africa under apartheid. Motions to dismiss are pending in those lawsuits; it is entirely inappropriate to attack the statute on the basis of claims that have not yet survived legal review. No one in our society can be insulated from the inconvenience of litigation, except to the extent that a frivolous lawsuit can result in sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Third, the courts routinely decide cases that are offensive to foreign governments or foreign corporations without triggering either foreign policy or economic crises. Political asylum cases require the courts to evaluate the human rights records of foreign governments, including allies like China. Antitrust cases, which involve enormous sums of money, have prompted vehement protests from foreign governments, again including our allies.

Finally, critics also overstate concerns about particular lawsuits. The government of China will not break relations with the United States because a handful of government officials have been sued in our courts. Neither will the government of Indonesia close its markets to U.S. investment because a corporation has been sued for human rights abuses committed in Indonesia. The global economy will not come to a screeching halt because corporations are sued, and perhaps one day held liable, for acts of genocide, murder, and torture.

Multinational corporations are fighting on multiple fronts to avoid legal liability for human rights violations, but they show a shocking lack of concern for allegations of complicity in these most egregious abuses. Their complaints about lawsuits that allegedly push too far would have much greater credibility if they were coupled with a willingness to address core violations. No person—whether a real person or an artificial corporation—has the right to commit genocide, murder, or torture. Compliance with such norms is not optional. Legal liability through both civil and criminal penalties should be the norm, not an aberration.

No matter what the outcome of the *Alvarez-Machain* case is in the Supreme Court, human rights litigation will continue pursuant to the TVPA. Under one or both statutes, courts will need to evaluate the views of the executive branch on the impact of litigation on foreign policy. It is therefore important to stress that the federal courts are the ultimate arbiter of their own jurisdiction and of the justiciability of cases brought before them. While great deference is given to the plausible views of the executive branch, overblown and illogical arguments need not be honored. As Justice Douglas warned over thirty years ago, unquestioning deference to executive branch complaints about the foreign policy implications of litigation would render the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."[6] When exaggerated complaints come from society's most powerful members, his warning about the potential subjectivity of such views is particularly salient.

[6] First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring).

REMARKS BY MARINN F. CARLSON*

Section 1350 of Title 28 of the U.S. Code is a mere thirty-three words long: "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." Those words entered U.S. law in substantially the same form over two hundred years ago as Section 9 of the Judiciary Act of 1789, but only in the last twenty-five years have we been squarely confronted with the question that brought us together as panelists today: What do those words actually mean? Do they, like the other provisions with which they were enacted, simply grant federal courts the jurisdiction to hear a category of cases? Or do they also go further to provide a cause of action for such cases?

This is no esoteric academic inquiry. In 1980, the U.S. Court of Appeals for the Second Circuit breathed life into the statute, which had lain essentially dormant since its enactment in 1789.[1] Since its rebirth, the Alien Tort Claims Act (ATCA) has been the basis for waves of litigation in U.S. courts by alien plaintiffs suing for damages for torts "in violation of the law of nations," first in suits against individuals accused of committing human rights violations and more recently against corporations doing business in countries where such violations have occurred.

The Supreme Court on March 30, 2004, heard oral argument in *Sosa v. Alvarez-Machain*,[2] a case that takes up the questions swirling around the statute, thereby, apparently, giving rise to the title of the panel: "The Alien Tort Statute Under Attack." In truth, it is far from clear who or what is wearing a target. As can be seen from some of the briefing at the Court in *Sosa*, multinational companies feel quite keenly that they are on the defensive, not the attack, in connection with the rapid proliferation of ATCA suits. Now that the Supreme Court has heard argument and taken *Sosa* under advisement, though, all sides can step back from the fray. The questions of what the ATCA means and how it is to be used are in the Court's hands, and soon enough it will (we hope) weigh in with the answer.

In this hiatus, it may be useful to step back and look at what underlies the discomfort of the business community, of a number of members of the international law community, and of any number of the judges attempting to apply the ATCA to cases before them: their discomfort with how the ATCA is being used and the trajectory for its future expansion. The source of much of that discomfort with the ATCA can be summed up with a single word: uncertainty.

That uncertainty takes several forms. The first emerges from the statute's terseness. A great deal more is known now about the ATCA's origins thanks to the *Sosa* parties' "archaeological dig" through the historical record, though of course the parties disagree on the meaning of the artifacts that each side has unearthed.

Quite apart from the historical record, it remains unclear how, in the most practical sense, the ATCA is to be applied. If the act is held to contain an implied cause of action (notwithstanding the lessons of *Alexander v. Sandoval*[3]), or if it is read to license judges to import causes of action under federal common law (notwithstanding *Erie R.R. v. Tompkins*[4]), what are those actions supposed to look like? Courts have had to embark on an ad hoc, sometimes erratic, search for answers because the statute itself says nothing at all about straightforward, important questions of litigation, including:

- Who is a proper defendant? Only natural persons, or corporations as well? Only state actors, or private entities as well?

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[1] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

[2] Certiorari to the Ninth Circuit Court of Appeals in Alvarez-Machain v. Sosa and the United States, 331 F.3d 604 (9th Cir. 2003).

[3] 532 U.S. 275 (2001).

[4] 304 U.S. 64 (1938).

- What is the geographical reach of the statute? Does it apply to international law torts only in the United States or anywhere in the world?
- What law governs the action? The law of the U.S. jurisdiction in which suit is filed, the law of the foreign country in which the alleged conduct took place, or customary international law?
- What are the standards of liability? When can private third parties be held liable for the misdeeds of government actors?
- What statute of limitations should apply?
- Must a plaintiff first exhaust available local remedies before turning to litigation in U.S. courts?
- What defenses are available? May, for example, qualified immunity or government contractor defenses be invoked?

Standing in stark contrast to the ATCA, which answers none of these questions, is the Torture Victims Protection Act (TVPA) enacted by Congress in 1992, which answers most of them. The TVPA contains an express cause of action for identifiable categories of plaintiffs to seek redress for a discrete set of torts, whose elements are carefully defined. It specifies a statute of limitations and requires exhaustion of local remedies. In ATCA cases, on the other hand, the courts must engage in exercises in divination to set the parameters for litigation.

A second key source of uncertainty may discomfit an audience of international law scholars: the uncertainty surrounding the identification and delimitation of torts "in violation of the law of nations." Without doubt, many behavioral norms can be confidently designated as specific, universal, and obligatory rules of customary international law, but even among those, there is room for disagreement on the specifics. The *Sosa* case presents examples: What constitutes "arbitrary" detention? Need arbitrary detention be "prolonged"? International law is constantly evolving, moreover, forcing judges to try to determine whether and when a given nascent norm of customary international law has crossed the threshold to a binding rule.

The Second Circuit is wrestling with the difficulty of these tasks. In its recent decision in *Flores v. Southern Peru Copper Corp.*, the very court that launched the ATCA explosion appears to be trying mightily to impose discipline on the process of analyzing and identifying customary international law.[5] Moreover, the Second Circuit in *Flores* was explicit that the courts of appeals want and need direction in resolving "the complex and controversial questions regarding the meaning and scope" of the ATCA, including "differing perspectives among judges and scholars" that "ultimately can be resolved only by Congress or the Supreme Court."[6] While one should always take care in reading into Supreme Court oral argument, several justices' questions in *Sosa* likewise suggested discomfort with the potential scope of the enterprise on which the ATCA has been launched. Justice Breyer in particular repeatedly pressed the parties to consider limits that the Court might impose on the reach of the ATCA.

Because of all of this uncertainty—not to mention the price attached to it, which has been estimated by the business community at $50 to $60 billion in trade with countries already named in ATCA suits—the international law community should not see it as a loss if the Supreme Court decides in *Sosa* to return the ATCA to its jurisdictional foundations. In the U.S. system, the codification of causes of action for international law violations has the advantage of overcoming serious separation-of-powers concerns and concerns for the conduct of the nation's foreign policy.

Of principal importance, we can all benefit from the clarity that can come with the codification of causes of action; here again, the TVPA is the showcase example. The U.S. government

[5] 343 F.3d 140 (2d Cir. 2003).
[6] *Id.* at 153.

has proven itself capable of opening its courts to the victims of human rights offenses, but doing so in measured, judicious, and above all clear terms. We should have faith in its ability to do so in the future as well.

REMARKS BY ERIC A. POSNER*

The term transitional justice refers to the moral and political ideals that guide the regime transition of a state, usually from authoritarianism to democracy. Transitional justice measures, including trials, truth commissions, reparations, and purges, have played important roles in transitions in the wake of World War II (Germany and Japan), in Southern Europe in the 1970s (Greece and Portugal, though not Spain), in Latin America in the 1980s (especially Argentina), often in eastern Europe in the late 1980s and early 1990s (the Czech Republic, Hungary, Poland), and in other places as well, such as South Africa.*

Even when transitional justice measures are not adopted, they are almost always debated, so their possibility shapes the politics of the transition. Every transitional government faces a dilemma. On the one hand, there are strong moral and political reasons to do backward-looking substantive justice. The leaders and officials of the old regime, and collaborators and spies among the public, are still at large. Many of them have amassed great wealth and retain power over institutions and resources, as well as influence in bureaucracies, including the military. The public seeks justice or vengeance for the misery it has undergone during decades of authoritarian rule. These reasons present a strong case for transitional justice measures, including trials, reparations, and purges.

On the other hand, there are strong moral and political reasons *not* to do justice—to draw a line between the past and the present, as is often said. Initially, one must understand that the transition is almost always made possible because of a deal between the old regime and its opponents. The old regime yields power peacefully in return for certain immunities. But it is not just a matter of words. The old regime almost always retains power—say, in the military or industry—and it can use that power to make life difficult for the new regime if it reneges on the deal. Every transitional government understands that it cannot satisfy all the calls for revenge or justice without risking resistance, perhaps instability, and maybe a coup.

A further point is that the transitional justice measures—trials, truth commissions, reparations, and so forth—are immensely expensive and disruptive; they unsettle property rights, burden the budget, use up scarce resources, and interfere with the establishment of market institutions. Finally, many people feel moral queasiness about punishing the perpetrators of the old regime and their many supporters. Vaclev Havel has been eloquent on this topic: in a totalitarian society, nearly everyone is complicit in the maintenance of the regime. Not everyone can be punished, and the selection of some to be punished while others are not will inevitably seem morally arbitrary.

All transitional states weigh the moral and political reasons for and against transitional justice measures. Most compromise. They engage in some backward-looking justice—often through trials, but also using reparations and purges—but they also issue amnesties or simply abandon transitional justice measures when the price is too high.

In Germany and Japan, the United States initially prosecuted war criminals and human rights abusers quite vigorously and executed a great number of them, but U.S. authorities eventually decided that members of the old regime were necessary for running the new democracy. Industrialists were needed to revive the economy; experienced judges and bureaucrats were needed; even military officials were needed in the face of the Soviet threat. Eventually, amnesties were issued.

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* For a discussion, *see* Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

In Argentina the Alfonsin government sought to prosecute the leaders of the old regime for human rights violations and even conducted a major trial, but the effort to exert judicial process over soldiers eventually failed because the soldiers refused to appear for trial. A rebellion was barely avoided, and Alfonsin's successor issued pardons. Out of this delicate compromise emerged the current democratic system.

In Chile, the Pinochet regime yielded power over the day-to-day running of the country but retained power in the military. Periodic efforts to prosecute Pinochet and his followers were cut short after they provoked civil instability.

In the Philippines, Aquino's government initially prosecuted military officials from the Marcos regime but the soldiers resisted and there were many attempts at coups. To solidify military support for her administration as well as against various insurrections, she cut back on the prosecutions.

In the former East Germany, initial enthusiasm for the prosecution of old regime leaders and minor wrongdoers like border guards gave way as the moral, political, and legal complexities of the litigation became clear.

Numerous Alien Tort Claims Act cases have arisen from regime transitions, all of them involving victims of the old regime suing officials and soldiers who tortured them or killed or tortured their families. There have been several cases from the Philippines and a few from Argentina, Haiti, Chile, Guatemala, South Africa, and the former Yugoslavia.

Is it a good thing for an American court to take jurisdiction over these disputes and award damages to successful plaintiffs?

One possibility is that it does not matter. The defendants will never pay the damages; the victory is symbolic. As a practical matter, the plaintiffs get a kind of vindication, and the defendants will not be able to keep assets in the United States. We might wonder whether this is a good use of judicial resources—imagine if every victim of every human rights abuse brought a case against his persecutor in U.S. courts—but I prefer to consider a world in which these cases do matter because there is a possibility that the awards will be paid, either by the defendant or by his government or by a corporation with assets in the United States.

The problem is that judgment of an American court unilaterally, without any careful consideration of the transitional bargain, interferes with the delicate negotiations that led to the transfer of power. The ATCA is a crude blunderbuss of a weapon for advancing human rights. The old regime officials know that if they give up power, they and their supporters are vulnerable to ATCA litigation in the United States; the liberal opponents who seek a transition have no way of assuring them that they will be immune. They can offer the old regime leaders only immunity under domestic law wherever they are—Argentina, Hungary, the Philippines—but not immunity under American law.

If the officials of the old regime cannot be immunized, either in the initial bargain leading to the transition or as a part of normal politics after the transition, they will be reluctant to give up power in the first place and to refrain from political opposition later. The ATCA deprives democratic leaders of a valuable tool—amnesty or immunity—for managing the transition to democracy. As a result, the transition is less likely to occur, or if it does, to occur well. This is why, in response to ATCA litigation in New York, the Justice Minister of South Africa sent a letter to the judge, saying that the government

> . . . believes that the issue of reparations is an issue which affects South Africians [sic] and should be dealt with by South Africians, if necessary, in South African courts. . . . We do not believe that the goodwill which exists in South Africa and the partnerships which have developed to deal with the past should be jeopardised by the litigation in New York.[1]

[1] Letter from Minister Penuell M. Maduna to Judge John E. Sprizzo, Exh. 1 (Sept. 11, 2003) (quoted in the Brief for the United States in Sosa v. Alverez-Machain, No. 03-339, at 26 n.9, *available at* <http://www.usdoj.gov/osg/briefs/2003/0responses/2003-0339.resp.pdf>).

This does not mean that the ATCA has no conceivable benefits. It is imaginable that it could deter human rights abuses in existing regimes. But this argument overlooks the exceptional nature of regime transition. Even in purely domestic law, we do not relentlessly enforce the law when it interferes with pragmatic compromises to enduring political problems. Our own transitions—think of the Civil War—have usually involved pardons and amnesty. In any event, American citizens made the decision; they did not have to worry about the British hearing lawsuits brought by former slaves against former slaveholders. There is real value in allowing citizens of a country to determine their own response to the past. The ATCA, as recently interpreted by the federal courts, is a lamentable example of American unilateralism and insensitivity to the needs and local conditions of the foreign countries in which we intervene.

None of what I have said is an argument that the United States should take no interest in human rights abuses in countries that have undergone a transition to democracy. My claim is only that the Alien Tort Claims Act is not a good tool for helping these countries.[2] There are many better ways.

Transitional governments face numerous problems. Their main political problem is maintaining and enhancing public support for democratic institutions. The old guard must be either suppressed or conciliated; the general public must be persuaded that democracy is preferable to the old system. Police, soldiers, and bureaucrats must be retrained. In the former communist countries, inefficient state enterprises must be liquidated. Courts must be expanded and professionalized. All this takes money and expertise; the major democracies can supply both, as well as moral and political support, including, if necessary, military assistance if the old guard attempts a coup, as happened in the Philippines.

One of the benefits of this approach is that if this form of help works, as it often appears to, at some point after institutions have stabilized, the state may be able to revisit the past. Once the general public enjoys the benefits of market democracy, political support for the old guard will decline and efforts to address human rights abuses are less likely to lead to political instability. To some extent, this has happened in countries like Argentina and Chile.

REMARKS BY CRAIG SCOTT*

My comments are intended to approach the *Sosa v. Alvarez-Machain* case at a somewhat abstract level, as may befit my status as northern outsider and my limited expertise in the arcane world of the ATCA. I argue that lawsuits in the domestic courts of the United States and other states that use the private-law category of tort to seek legal justice for public international law human rights violations will continue to produce both profound political conflict and unsatisfactory juridical analysis as long as quite stark dichotomies between "international law" and "national law," on the one hand, and "public law" and "private law," on the other, continue to structure both legal theory and legal doctrine—and, perhaps most important, the practical legal imagination.[1]

[2] For an argument that courts enforcing the ATCA should respect amnesties when they are "just" but not otherwise, *see* Jennifer Llewellyn, *Just Amnesty and Private International Law*, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION 567 (Craig Scott ed. 2001). I see no reason to think that courts, rather than the executive branch, should make this judgment.

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[1] TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL TORT LITIGATION (Craig Scott ed. 2001). *See especially* Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms, in* TORTURE AS TORT at 45, 52, referring to a strand of legal thought that "speak[s] of international law, public and private, in conjoined terms often using the term 'transnational law' to describe principles that are neither purely national nor international and which apply to private and public law relationships. What results, in effect, is law that is *neither* national nor international nor public or private at the same time as being *both* national and international, as well as public and private." A metaphor of the relationship between international and national law as well as private and public law (e.g., between "torture" and "tort") as "*a process of mutual translation*" is explored as one way to imagine 'transnational law'; *id.* at 61 (emphasis in original).

In my view, an openness to the possibilities of "transnational law" has a corollary of sorts: a willingness to conceive of transnational law in ways that emphasize the inevitable and thorough-going *argumentative* dimensions both of legal reasoning and of institutional decision-making by judges. Elsewhere I have sought to show (or rather argue) that the combination of the argumentative and the existential as features of the judicial landscape generate what can be called a "rhetorical responsibility"[2]—in this context, an inescapable (albeit unattainable) duty to persuade multiple audiences that they should be convinced by that judge's interpretations of the content of international human rights law, of the nature and extent of violations, and of her choice to provide remedial vindication of "public international law" human-rights wrongs through the vehicle of domestic tort law.

Such responsibility inevitably involves occasional (and maybe not-so-occasional) normative leaps of faith that, in my view, can be grounded in little more than a combination of two allegiances. There is first of all the substantive commitment to a transnational common project of pursuing "fundamental" human rights values through law, including 'reception' of international human rights rules and principles through what amount to acts of transformation by state judges in the form of common-law incorporations and both statutory and constitutional interpretations. There is secondly an ethos of transnational dialogue among courts in the world with respect to this common project, not only through the much-vaunted phenomenon of comparative constitutional dialogue but also through a core mechanism of private international law, namely the not-infrequent necessity for judgments in one state to be given effect only when formally recognized by judges in another state as having been properly rendered, jurisdictionally, procedurally, or substantively.

In some kind of matrix created by these two kinds of normative interplay—the *reception* of international law by domestic courts and the subsequent *recognition* by foreign courts of the judgments arising from such reception—I believe we may eventually arrive at a kind of transnationalization of our understanding of tort-based liability for infringements of human rights norms initially generated by public international law.

This, then, is the project in all its abstractness. In what follows, I seek to make it concrete: Though given the limits of space, I will likely only succeed in getting to the point of preparing to mix powder with water.

In the *amicus* brief in *Sosa* submitted by the Professors of Federal Jurisdiction and Legal History can be found a marvelous nugget of a quotation, which resonates with irony. The *amicus* writers first comment that in 1789, when the predecessor of today's ATCA was enacted, "The law of nations also applied as common law in civil cases."[3] They then go on to illustrate this claim by invoking Blackstone's Commentaries, published in 1769: "Blackstone reported, for example, that 'in mercantile questions, such as bills of exchange and the like. . . the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to'. . . . The same was true in America."[4]

From this short passage from Blackstone, penned almost 250 years ago, and the follow-on observations in the *amicus* brief, we catch a glimpse of a veritable lost world when one compares the commonplace assumptions of the late eighteenth century to the contemporary terms of debate and general discourse surrounding both the ATCA and the *Sosa* case. Two points in particular should be noted.

[2] Craig Scott, *Diverse Persuasion(s): From Rhetoric to Representation (and Back Again to Rhetoric) in International Human Rights Interpretation, in* HUMAN RIGHTS: THE INTERNATIONAL LEGAL CONTEXT (Philip Alston ed., forthcoming).

[3] Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Respondents, filed in the Supreme Court of the United States in Case No. 03-339, *José Francisco Sosa v. Humberto Alvarez-Machain*, et al., at 12 (Feb. 27, 2004).

[4] *Id.*, quoting 4 WILLIAM BLACKSTONE, COMMENTARIES at *67.

First, note the ease with which the "law of nations" is felt by Blackstone to include what in current times is almost universally cited as the best example of a body of transnational law blending the national and the international, as well as private law and public regulation (including public regulation by abstention and by acquiescence), namely *lex mercatoria.* As we debate what the ATCA means now partly in light of what it meant in 1789, we get a sense from Blackstone of how the framework of law beyond a single state in 1789 involved a far more hybrid and pluralistic body of law than is currently the case in mainstream international legal thought.

Second, the passage reveals how the ATCA was grafted onto a seamless interaction between the unwritten "law of nations" and the "common law," including the common law as it applied in civil (private) law relationships, and at the center of which was of course the judge as not just chief articulator but chief forger of law.

The irony I noted is that in some respects we were in 1789 exactly where we need to be heading in 2004. In what sense? In the sense that, in the interpretive and political debates about the ATCA, judicial agency is almost the reality that dare not speak its name. Some, if not most, readers will raise their eyebrows at this observation. After all, they may say, both the petitioner Sosa and the supporting U.S. government are taking the tack of arguing for an interpretive result by claiming that the body of interpretation is the result of judicial usurpation—obviously a form of judicial agency—and, not without inconsistency, asking the U.S. Supreme Court to engage in one gigantic paroxysm of judicial agency to overturn twenty-five years of gradual interpretive consensus among lower courts.

Granted, but my point is that what amounts to discussion of judicial agency seems to be spinning hopelessly on the tired old axis of judicial activism versus judicial restraint, as framed by the largely unhelpful metaphor of the separation (as contrasted to "balance" or, better, "interaction") of powers. Not enough of the debate seems to consciously address the following question: Exactly what kind of body of law is at stake here and just what kind of role for judges is appropriate for that kind of body of law?

Allow me to illustrate with one important example. In the field of torture, Article 14 of the United Nations Convention against Torture (CAT) is an important touchstone for interpreting both common-law causes of action in a country like Canada and statutory private law in an ATCA (assuming there is a cause of action in ATCA) or in, say, the delict provisions of a civil-law code. Article 14 reads in part:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. . . .
>
> Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.[5]

Even in the *amicus* brief of the European Commission, the *Sosa* brief that in my view is the most freshly and carefully reasoned (especially in terms of bringing public international law principles to bear on the analysis of states' private-law adjudicative jurisdiction), there is consideration only of the obligatory dimension of Article 14, found in Article 14(1), with a statement that it is unsettled ("there is disagreement") whether the Convention requires states to exercise universal jurisdiction (to provide a right to compensation for torture wherever the torture may be committed) or, rather, "simply jurisdiction over torture committed on their [own] territory."[6] The casual reader would get the impression that the only issue is what the

[5] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, 39 UN GAOR Supp. (No. 51), UN Doc. A/39/51 (1984).

[6] Brief of Amicus Curiae the European Commission in Support of Neither Party, filed in the Supreme Court of the United States in Case No. 03-339, José Francisco Sosa v. Humberto Alvarez-Machain, et al., at 18 (Jan. 23, 2004).

correct interpretation of Article 14(1)'s mandatory scope is or the scope of any parallel norm of custom.

Nowhere is there reference to the without-prejudice Article 14(2), which speaks in terms of the *permissive* jurisdictional space left open for legal systems either to have an ATCA or to have judges forging common-law tort claims with respect to acts of torture occurring abroad. Indeed, when one looks at the nature of the torture norm and the quasi-universalist structure of criminal-law cooperation in CAT, one can be forgiven for seeing Article 14(2) as not just permitting but *encouraging* states to enter that permissive normative space and help forge, by dint of example and the combination of reception and recognition I mentioned, the very consensus the European Commission notes does not yet exist.

Elsewhere in its brief, while the Commission does several times emphasize that international norms evolve and that domestic courts must take such evolution into account, it does not directly engage with the role of domestic judges as active participants of that evolutionary process, as a facilitative reading of Article 14(2) might suggest, as opposed to adopting an (implicitly) dualistic perspective that sees domestic judges primarily as recipients of international law only once it has evolved "out there."

However, I would be remiss if I were to end by making it seem the European Commission brief deserves to be singled out for criticism by example. In fact, of all the *amicus* briefs, it is the only one that consistently discusses the legal issues at stake in *Sosa* in terms that transcend the compartmentalization of private international law (with its attention to civil jurisdiction) and public international law (with its preoccupation with criminal-law or statutory economic-regulation jurisdiction). It is also the only brief to squarely address the similarities and differences between the purposes of civil liability (private law) and criminal responsibility (public law) in a way that seems implicitly designed to help inform the forging of a new body of law by national judges.

Perhaps most exciting in the European Commission's brief is an insightful and a fairly extended discussion of the mutually informative doctrines of exhaustion of local remedies originating in public international law and private international law doctrines of jurisdictional abstention, such as *forum non conveniens*. Although the connection between the two may be no more than what would be expected by those international lawyers who have always seen public international law and private international law as cut from the same cloth, I prefer to see this as the implicit beginning of transatlantic awareness that the future of translating torture into tort ultimately lies in transnational law.[7]

[7] In this respect, I find it significant that the sources of the principles the Commission suggests domestic judges draw upon to forge an appropriate jurisdictional discourse around international human rights torts include not only public international law and (comparative) private international law but also the statutory recognition by the U.S. Congress of exhaustion-of-local-remedies criteria in ATCA's cousin, the Torture Victim Protection Act.