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“BRING ME YOUR TIRED, YOUR POOR, YOUR EGREGIOUS TORTS YEARNING TO SEE GREEN:” THE ALIEN TORT STATUTE

Michael Dwayne Pettyjohn[†]

I. INTRODUCTION

Murder. Rape. Torture. Can an alien bring a civil suit in a U.S. federal court against a party (i.e. individual, corporation, government agency) who commits egregious acts? Even if the tortuous party is an alien and the act occurred on foreign soil? The answer is yes, through the use of the Alien Tort Statute which reads, “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.”¹ Created as part of the first Judiciary Act of 1789,² this little known statute lay moribund for 191 years until what some have referred to as the *Brown v. Board of Education*³ of international human rights,⁴ *Filartiga v. Pena-Irala*⁵ was decided in 1980. In *Filartiga*,⁶ the Second Circuit held that, through the Alien Tort Statute, a Paraguayan citizen could bring suit against

[†]J.D., University of Tulsa College of Law, Tulsa, Oklahoma, May 2004; B.A., History, University of Tulsa, Tulsa, Oklahoma, December 1990. I would like to dedicate this comment to my parents, Dwayne and Mary, and to my son, Samuel.

1. 28 U.S.C. § 1350 (2000). Since section 1350 jurisprudence has dealt almost exclusively with the “law of nations” aspect of the statute, so will this comment. Also, the law of nations is modernly known as international law, and the two terms will be used interchangeably throughout the comment.

2. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77, which reads in relevant part, the federal courts would have “[c]ognizance, 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.”

3. 347 U.S. 483 (1954).

4. William Dodge, *The Constitutionality of The Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687 (2002).

5. 630 F.2d 876 (2d Cir. 1980).

6. *Id.*

another Paraguayan citizen who, in his capacity as the Inspector of Police, kidnapped and tortured to death the plaintiff's son.⁷

A more difficult question: Can an alien sue a bank for lending money to a government the bank knows engages in torture, kidnapping and extra-judicial killings against its own citizens? Even when the government is only able to stay in power because of the bank's lending activity? This question is at the heart of a case filed in June 2002 with the Federal Court in the Southern District of New York, in which South African citizens have brought suit against Citibank, Union Bank of Switzerland and Credit Suisse for allegedly aiding and abetting the now defunct Apartheid government by lending it money, money the plaintiffs contend allowed the Apartheid to remain in power.⁸ Had this case been brought at the time of *Filartiga*, or shortly thereafter, there is little doubt that it would have been dismissed for lack of subject-matter jurisdiction. This is because section 1350's jurisprudence did not recognize third party liability in the early 1980s.⁹ In fact, despite its lengthy existence, section 1350's jurisprudence was underdeveloped by the time of *Filartiga* due to its lack of use.¹⁰

Consequently, since *Filartiga*, courts have wrestled with such issues as what torts violate international law, does the statute provide a cause of action, what substantive law should control (i.e. Federal Common Law, International Law, State Law, or Foreign Law), and what should the statute of limitations be? Regardless, what makes section 1350 case law so unique is its tethering to international law. While which torts are actionable under common law is well settled, what is actionable under the Alien Tort Statute is not. This is because the more international law expands, so do the number of torts actionable under the statute. It is this expansive nature that should give any U.S. citizen, whether an individual, corporation, or foreign corporation with significant economic ties with the U.S., pause. In fact, courts now recognize that under international law third parties may be held liable for another's tortuous acts.¹¹

This comment looks at the courts' treatment of section 1350 since *Filartiga* with a significant focus on how it is interpreted today. Section II

7. *Id.*

8. Jessica Tisch, *Profiting From Apartheid*, WALL ST. J., Aug. 2, 2002, available at 2002 WL 3402482.

9. *See, e.g.*, Guinto v. Marcos, 654 F. Supp. 276, 279-80 (C.D. Cal. 1986)(holding that, outside of torture, there lacked consensus among the international community as to what constitutes a violation of international law).

10. Prior to *Filartiga*, there existed only two cases in which the claims were held actionable under the Alien Tort Statute: *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

11. *See infra* pp. 538-542.

addresses the statute's construction and constitutionality. Section III addresses the statute's subject-matter jurisdiction. Finally, Section IV covers other substantive issues including choice of law, statute of limitations and remedies.

II. THE ALIEN TORT STATUTE'S CONSTRUCTION AND CONSTITUTIONALITY

A. *The Alien Tort Statute's Construction*

When compared to the legislative history of any act passed today, the legislative history of the Alien Tort Statute is virtually non-existent. This fact led the Ninth Circuit to declare that the First Congress left no intent as to the statute's purpose.¹² This dearth of congressional intent coupled with the statute's plain language has resulted in several theories that postulate what the statute's purpose is, as well as how the statute should be applied.¹³

One theory is that the statute's purpose was to improve the United States' economy. This belief is largely supported by James Madison's lamentation at the Virginia Convention, "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."¹⁴ Another theory is that the statute was created to prevent the U.S. from becoming a safe haven for pirates.¹⁵ A third theory is that the First Judiciary Act's drafters knew the United States, as a member of the international community, was expected to have such a statute.¹⁶ Admittedly, the statute addresses each of these issues; however, the stronger theory is that it was created to avoid a potential international crisis should a state court mishandle an alien's claim.¹⁷

In the late 18th century, international law required a sovereign power to make its civil courts available for claims of foreign citizens against

12. *Trajano v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984)(Edwards, J. concurring)("[T]he legislative history offers no hint of congressional intent in passing the statute . . .").

13. See, e.g., Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); William Dodge, *Which Torts in Violation of The Law of Nations?*, 24 HASTINGS INT'L & COMP. L. REV. 351 (2001).

14. *Tel-Oren*, 726 F.2d at 783 n.12 (citation omitted).

15. Peter Waldman & Timothy Mapes, *A Global Journal Report: Administration Sets New Hurdles for Human-Rights Cases*, WALL ST. J., Aug. 7, 2002, available at 2002 WL 3402908.

16. *Tel-Oren*, 726 F.2d at 783.

17. *Id.*

individuals within the sovereign's territory.¹⁸ The Alien Tort Statute's origin can arguably be traced back to 1781. In that year the Continental Congress passed a resolution that recommended that each State enact a statute that provided "expeditious, exemplary and adequate punishment for violations of the law of nations"¹⁹ and United States' treaties. Unfortunately, not all of the States complied with the recommendation.²⁰ The importance of having such a statute was highlighted by the Marbois affair of 1784.

On May 17, 1784, while at the home of the French Ambassador, a French citizen, the Chevalier De Longchamps, threatened another French citizen, French Consul General Francis Barbe Marbois.²¹ Two days later, De Longchamps fulfilled his threat when he assaulted Marbois on a Philadelphia street.²² "The French ambassador formally complained to the Continental Congress, and the Dutch ambassador threatened to leave the state unless appropriate actions were taken."²³ Fortunately, the Pennsylvania legislature had complied with half of the Continental Congress' recommendation: De Longchamps "was convicted by the Pennsylvania Supreme Court for an offense against the law of nations."²⁴ Although the criminal conviction of De Longchamps appeared to satisfy Marbois and France, and therefore, averted an international crisis, the fact remained that Marbois could not have sought a civil remedy because Pennsylvania failed to provide a civil remedy for a violation of international law.²⁵

With such a lack of uniformity by the States in upholding international law, the framers of the Constitution and the First Judiciary Act were concerned with avoiding future international incidents. The Supreme Court opined that the Federalist Papers recognized the "importance of national power in all matters relating to foreign affairs and the inherent danger of state action in this field . . ."²⁶ In Federalist No. 80, Alexander Hamilton argued fear of international incidents as justification for a Constitution that granted federal jurisdiction for all cases involving aliens:

18. *Id.*

19. Dodge, *supra* note 4, at 692.

20. *Id.* at 695.

21. *Id.* at 694.

22. *Id.*

23. *Id.*

24. *Id.*

25. Dodge, *supra* note 4, at 694.

26. Hines v. Davidowitz, 312 U.S. 52, 64 n.9 (1941).

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.²⁷

Accordingly, the courts have generally adopted the reason for avoiding an international incident as being the purpose of the statute: “[T]hat the intent of this section [1350] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.”²⁸

B. The Constitutionality of the Alien Tort Statute

The constitutionality of the statute has been attacked on three separate grounds: (1) whether under Article III Congress has authority to grant the Federal courts jurisdiction over cases dealing with the law of nations;²⁹ (2) whether application of the statute to torts occurring outside the United States with no nexus to the United States would exceed the constitutional limits on federal courts’ jurisdiction under Article III;³⁰ and (3) section 1350 is jurisdictional and to use it to provide a right of action is unconstitutional.³¹

1. Congress has the Constitutional Authority to Grant the Federal Courts Jurisdiction over Cases Dealing with the Law of Nations

The U.S. Constitution grants Congress the authority “[t]o define and punish . . . Offences against the Law of Nations.”³² In fact, it is well established that the Federal government enjoys complete supremacy in the field of foreign relations.³³ Therefore, Congress’ authority to provide a remedy for a violation of the Law of Nations is undisputed. What is disputed is the fact the Congress has failed to define what the Law of

27. THE FEDERALIST NO. 80, at 405 (1911).

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

29. *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 499-501 (9th Cir. 1992) [hereinafter *Estate I*].

30. *Id.*

31. *Id.*

32. U.S. CONST. art. I, § 8, cl. 10.

33. *Tel-Oren*, 726 F.2d at 783.

Nations is in its creation of the statute. This has forced the courts to interpret international law in order to determine what torts are actionable under the statute.³⁴ Consequently, opponents to this statute argue that because Article III fails to mention the law of nations in section two, federal courts lack the authority to hear a case based on the Law of Nations.³⁵

In *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Estate I)*,³⁶ the court concluded that of the nine categories defining federal judicial power in Article III, only two might authorize jurisdiction for the statute: the Foreign Diversity Clause, "which enables the federal courts to hear cases between a state, or its citizens," and the "Arising Under" Clause, which enables the federal courts to hear cases arising under the Constitution, laws of the United States, and treaties.³⁷ The court concluded that the Foreign Diversity Clause was inapplicable because jurisdiction cannot be predicated on an alien suing another alien (as in *Estate I*) under the clause.³⁸

The Supreme Court has recognized that the "Article III 'arising under' jurisdiction is broader than federal question jurisdiction under [28 U.S.C.] § 1331."³⁹ Accordingly, the court in *Estate I*⁴⁰ looked to the Supreme Court's holding in *The Paquete Habana*⁴¹ that "International law is part of our law . . . ,"⁴² and concluded that the Law of Nations is within the meaning of the Laws of the United States as found in the "Arising Under" Clause of Article III.⁴³ An alternative approach to finding that international law is within the scope of Article III "Arising Under" Clause

34. See *infra* pp. 532-535.

35. *Estate I*, 978 F.2d at 501.

36. *Id.*

37. *Id.*

38. *Id.*; see *Hodgson v. Bowerbank*, 9 U.S. 303 (1809) ("Though one party's alienage is averred, yet it is necessary also to aver that the other party is a citizen.").

39. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

40. *Estate I*, 978 F.2d at 502.

41. 175 U.S. 677 (1900).

42. *Id.* at 700.

43. *Estate I*, 978 F.2d at 502; see *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995).

[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law . . . to invoke § 1350 by alleging a violation of international law necessarily require federal courts to examine *federal* law at the threshold, insofar as international law *is* part of federal law. Such cases therefore contain an 'original federal ingredient' and fall well within the scope of Article III.

Id. (citations omitted)(emphasis in original).

is to look at the text of the Constitution. The term “the Laws of the United States” is found twice in the Constitution, once in Article III (the “Arising Under” Clause) and once in Article VI (the “Supremacy” Clause). The “Supremacy” Clause reads in relevant part, “This Constitution and the Laws of the United States *which shall be made in Pursuance thereof* . . . shall be the supreme Law of the land.”⁴⁴ The phrase “which shall be made in Pursuance thereof” refers to laws created by Congress through the authority granted to it by the U.S. Constitution.⁴⁵ In contrast, Article III simply refers to “[c]ases . . . arising under . . . the Laws of the United States.”⁴⁶ The inference that can be taken from this difference is that there is at least one category that is not “made in Pursuance” of the Constitution.⁴⁷ The most likely category is the Law of Nations, and hence, Article III “Arising Under” Clause includes the Law of Nations.⁴⁸

A third alternative is by interpreting the statute itself. “International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”⁴⁹ As noted above, the Constitution vests Congress with the authority “to define . . . Offences against the Law of Nations.”⁵⁰ It is well within Congress’ authority to adopt the definition of the Law of Nations as defined by the international community rather than attempt to craft its own. Therefore, through this statute, Congress has incorporated the Law of Nations into the laws of the United States. This is different from the first argument (which incorporates the Law of Nations through common law) and the second (which incorporates textual inference from the Constitution).

2. To Apply the Statute to Torts Occurring Outside the United States with No Nexus to the United States Does Not Exceed the

44. U.S. CONST. art. VI, § 2 (emphasis added).

45. Dodge, *supra* note 4, at 704.

46. U.S. CONST. art. III, § 2, cl. 1.

47. This argument is strengthened by the fact that the draft reported to the Convention on August 6, 1787 stated that the “arising under jurisdiction was limited to ‘cases arising under the laws passed by the Legislature of the United States,’” but that language was stricken on August 27 by vote of the delegates. Dodge, *supra* note 4, at 703.

48. *Id.* at 704.

49. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) [hereinafter RESTATEMENT (THIRD)] (emphasis added).

50. See U.S. CONST. art. I, § 8, cl. 10.

Constitutional Limits on Federal Court's Jurisdiction under Article III.

There is a substantial probability that the framers of the Alien Tort Statute never intended it to apply to torts occurring outside the United States. In 1789, it was considered improper for a nation to "regulate by statute the conduct of foreign citizens on foreign soil."⁵¹ "To do so would be wholly incompatible with the equality and exclusiveness of the sovereignty of any nation."⁵² In fact, the principal draftsman of the statute, Oliver Ellsworth, believed that the United States could not regulate conduct between foreign citizens on foreign soil.⁵³ However, the courts have not accepted this argument in its application of the statute. Consider *Filaritiga*,⁵⁴ the wellspring of modern section 1350 jurisprudence, which held it was appropriate to adjudicate a dispute between two aliens for a tort that occurred outside the U.S. because under common law, a nation has a legitimate right to ensure an orderly resolution between two parties within its borders.⁵⁵

Then there is the Ninth Circuit, which, as this comment will bear out, typically reaches the same conclusion as the other Circuits, but prefers to create a new legal path rather than travel down one established. In *Estate I*,⁵⁶ the Ninth Circuit looked at the paucity of legislative intent and the statute's plain language (e.g. section 1350 contains "no limitations as to the citizenship of the defendant, or the locus of the injury"⁵⁷) to conclude that the statute authorizes a foreign citizen to sue another foreign citizen for a tort committed outside the United States.⁵⁸

As to the issue of the constitutionality of allowing a foreign citizen to sue another foreign citizen for a tort committed outside and with no nexus to the United States, the court first looked to *Verlinden B.V. v. Central Bank of Nigeria*.⁵⁹ In *Verlinden*,⁶⁰ a foreign citizen sued an agent of a foreign sovereign on a nonfederal cause of action.⁶¹ The subject-matter

51. Bradley, *supra* note 13, at 594.

52. *Id.*

53. *Id.*

54. 630 F.2d at 885.

55. *Id.*; see *McKenna v. Fisk*, 42 U.S. 241, 248 (1843)(recognizing the English common law concept of "transitory actions").

56. 978 F.2d at 499.

57. *Id.*

58. *Id.* However, a plaintiff must show that the court has personal jurisdiction and venue over the defendant. *Id.* at 500.

59. 461 U.S. 480 (1983).

60. *Id.*

61. *Id.*

jurisdiction was predicated on the Foreign Sovereign Immunities Act (FSIA).⁶² The Supreme Court held that when Congress passed the FSIA, it did not “exceed the scope [the “Arising Under” Clause] of Article III of the Constitution by granting federal courts subject matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law.”⁶³ The court in *Estate I*⁶⁴ held that for the same reason established in *Verlinden*, Congress possessed the same authority to grant subject-matter jurisdiction in the Alien Tort Statute with regards to torts occurring on foreign soil between foreign citizens.⁶⁵

3. Section 1350 Provides Both a Private Cause of Action and Federal Jurisdiction

It is well established that “[t]he Judicial Code [title 28 of the United States Code], in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.”⁶⁶ It is also recognized that a jurisdictional statute can “not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster.”⁶⁷ These two rules presented the courts a serious problem: 28 U.S.C. § 1350 requires only a violation of the law of nations to invoke its usage, but the law of nations is not substantive law and, therefore, does not provide a cause of action.⁶⁸ “International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.”⁶⁹ Furthermore, “international law does not require any particular reaction to violations of law Whether and how the United States wished to react to such violations are domestic questions.”⁷⁰ So, if viewed as purely a jurisdictional

62. *Id.* 28 U.S.C. §§ 1330, 1602-11 (2000).

63. *Verlinden*, 461 U.S. at 491.

64. 978 F.2d at 501.

65. *Id.*

66. *Montana-Dakota Util. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 249 (1951).

67. *Mesa v. California*, 489 U.S. 121, 136-37 (1989); *Verlinden*, 461 U.S. at 495-97.

68. *In re Estate Ferdinand Marcos*, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) [hereinafter *Estate II*].

69. RESTATEMENT (THIRD) § 101.

70. *Estate II*, 25 F.3d at 1475.

statute, section 1350 would simply confer jurisdiction for suits without substantive law, and its usage would be unconstitutional.⁷¹

When the Alien Tort Statute was first enacted in 1789, a court, if required to adjudicate a suit brought under this statute, would not have faced this quandary for it was not until 1847 when American law required lawsuits to have a cause of action.⁷² Notwithstanding this point, the courts' solution has been to construe section 1350 as providing both jurisdictional authority and a private right of action. However, the courts have articulated different reasons for drawing such a conclusion. In *Filartiga*,⁷³ the Second Circuit, in dicta, "construe[d] the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."⁷⁴ *Filartiga's* progeny has interpreted this statement to mean section 1350 provides both a private cause of action and a federal forum for aliens who seek redress for violations of international law.⁷⁵ While most courts have been content to accept the Second Circuit's reasoning, the Eleventh Circuit required more: It looked to the legislative intent behind the Torture Victim Protection Act of 1991 (TVPA).⁷⁶ By enacting the TVPA, Congress endorsed *Filartiga*:

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing

71. See *supra*, note 67.

72. Dodge, *supra* note 4, at 704.

73. 630 F.2d at 887.

74. *Id.*

75. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995)("[The] Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture . . ."); *Estate II*, 25 F.3d at 1474-75 (holding that section 1350 "creates a cause of action for violations of specific, universal and obligatory international human rights standards . . ."), *cert. denied*, 513 U.S. 1126; *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996)("[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law."); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995)("§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . without recourse to other law as a source of the cause of action."); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993)("The plain language of the statute and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action].").

76. 28 U.S.C. § 1350. Since only an alien may bring suit under the Alien Tort Statute, Congress enacted the TVPA to afford U.S. citizens an equitable remedy in U.S. federal courts for torts that violate international law, particularly claims of extra-judicial killing and torture. *Id.*

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.”⁷⁷

As a result, the Eleventh Circuit held that through the enactment of the TVPA, Congress recognized that the Alien Tort Statute provides a right of action.⁷⁸

In deciding that section 1350 provides a right of action, the Ninth Circuit looked not to the TVPA or to *Filartiga* and its progeny, but distinguished the language found in sections 1331 and 1350.⁷⁹ Section 1331 reads in relevant part, “The district courts shall have original jurisdiction of all civil actions *arising under* the Constitution, laws, or treaties of the United States.”⁸⁰ So in order to invoke section 1331, the action must “arise under” the laws of the United States. By contrast, section 1350’s language is absent the “arise under” requirement; rather, it only requires a violation of the law of nations in order to invoke its application.⁸¹ Therefore, the Ninth Circuit concluded, when a plaintiff is able to show a violation of the law of nations, section 1350 creates a cause of action.⁸² Although the Ninth Circuit held section 1350 did not create a cause of action in *Estate I*,⁸³ it joined the Second Circuit’s holding in *Filartiga* by recognizing that it does in *Estate II*.⁸⁴ In fact, the circuits that have dealt with section 1350 commonly accept this rule.⁸⁵

III. SUBJECT-MATTER JURISDICTION

It is generally accepted that section 1350 subject-matter jurisdiction is met when “(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e., international law).”⁸⁶ Courts have also adopted

77. H.R. REP. NO. 102-367, pt. 1 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

78. *Abebe-Jira*, 72 F.3d at 848. (“Congress, therefore, has recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law.”).

79. *Estate II*, 25 F.3d at 1475.

80. 28 U.S.C. § 1331 (2000) (emphasis added).

81. *Id.* § 1350.

82. *Estate II*, 25 F.3d at 1475.

83. 978 F.2d at 501.

84. 25 F.3d at 1475.

85. *See supra* note 75.

86. *Kadic*, 70 F.3d at 238 (Second Circuit); *Jama v. Immigration and Naturalization Serv.*, 22 F. Supp. 2d 353, 363 (D.N.J. 1998)(Third Circuit); *Iwanowa v. Ford Motor Co.*, 67 F.Supp. 2d 424, 439 (D.N.J. 1999)(Third Circuit); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999); *Wong-Opasi v. Tennessee St. Univ.*, 229 F.3d 1155 (6th Cir.

*Filartiga's*⁸⁷ rule that when considering whether subject-matter exists under section 1350, a court must engage "in a more searching preliminary review of the merits than is required . . . under the more flexible 'arising under' formulation."⁸⁸ However, before addressing each subject matter's prong, this comment will address the first threshold issue a court must deal with prior to determining if subject-matter exists: Does either the Foreign Sovereign Immunities Act, the act of state doctrine, or the principles of international comity bar the plaintiff's claim?⁸⁹

A. FSIA

Many claims brought under section 1350 implicate foreign nations and their agents. This aspect can be problematic since sovereign states, and its agents, are generally immune from lawsuits.⁹⁰ In fact, until 1952 this immunity was absolute.⁹¹ However, following World War II, several nations adopted either socialist or communist governments.⁹² These governments in turn would nationalize major industries within their borders.⁹³ As a result, unfair trade practices arose between these state-owned companies and private companies (whenever litigation arose concerning a claim of non-performance of a contract or other wrongful conduct between a state-owned party and a private party, the state-owned party would often hide behind state immunity in order to escape liability).⁹⁴

In 1952, in an effort to correct this imbalance, the U.S. State Department promulgated a new policy and issued a memorandum defining it to the Justice Department.⁹⁵ This memorandum, known as the Tate Letter, rendered absolute immunity dead when it held that foreign

2000); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000)(Ninth Circuit); *Kyler v. Montezuma*, 203 F.3d 835 (10th Cir. 2000)(unpublished opinion)(in upholding the district court's dismissal because the plaintiff was a U.S. citizen, the Tenth Circuit includes this language); *Abeb-Jira*, 72 F.3d at 847; *Bao v. Li Peng*, 201 F. Supp. 2d 14, 19 (D.C. Cir. 2000).

87. 630 F.2d at 887.

88. *Id.*; see also *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 366 n.1 (E.D. La. 1997); *Jogi v. Piland*, 131 F. Supp. 2d 1024, 1026 (C.D. Ill. 2001).

89. 28 U.S.C. §§ 1330, 1602-11; see *Estate I*, 978 F.2d at 496-97 (the Ninth Circuit performed a FSIA analysis *sua sponte*).

90. See *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812)(establishing absolute immunity for foreign sovereigns).

91. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 268-70 (S.D.N.Y. 2001).

92. *Id.* at 270.

93. *Id.*

94. *Id.* at 271.

95. *Id.* at 270.

sovereign activities commercial in nature were no longer immune.⁹⁶ However, Congress's dissatisfaction with the State Department's application of the Tate Letter's policy led to the passage of the FSIA in 1976.⁹⁷ In codifying the Tate Letter through the FSIA, Congress transferred the "determination of sovereign immunity from the executive branch to the judicial branch."⁹⁸ The FSIA confers original jurisdiction to federal district courts in any nonjury civil action for only those claims enumerated in section 1605.⁹⁹ In *Verlinden*,¹⁰⁰ the Supreme Court held that

96. *Id.* at 271.

97. *Id.* at 272.

98. *Tachiona*, 169 F. Supp. 2d at 272.

99. 28 U.S.C. § 1330. Section 1605 provides in relevant part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

the FSIA “must be applied by the district courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.”¹⁰¹ However, courts have recognized exceptions to the FSIA in addition to those statutorily defined.

In *Estate I*,¹⁰² the court recognized that although an “agency or instrumentality of a foreign state for purposes of FSIA includes individuals acting in their official capacity,”¹⁰³ an official is neither entitled immunity for either acts not made in an official capacity (i.e. personal acts) nor acts

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party . . . ; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred . . . ; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States . . . when the act upon the claim is based occurred.

100. 461 U.S. at 493.

101. *Id.*; see also *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

102. 978 F.2d at 496.

103. *Id.* (internal quotes omitted).

that are beyond the scope of his authority (i.e. illegal acts).¹⁰⁴ In that case, the defendant, a governmental agent who was in charge of the Philippine military police, was sued “for false imprisonment, kidnapping, wrongful death, and a deprivation of rights”¹⁰⁵ The court held that the defendant acted beyond her scope of authority and, therefore, was not protected by FSIA.¹⁰⁶ In *Estate II*,¹⁰⁷ the Ninth Circuit commented that its previous ruling in *Estate I* was appropriate because “[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States Courts.”¹⁰⁸

Another exception is when a foreign state expressly waives immunity for one of its agents. In *Paul v. Avril*,¹⁰⁹ the Republic of Haiti waived immunity for the defendant, an ex-Lieutenant General in the Haitian Armed Forces who was being sued for acts of torture, cruel, inhuman and degrading treatment, and arbitrary detention committed by soldiers acting upon the defendant’s orders.¹¹⁰ In recognizing that the defendant was not entitled to immunity under FSIA, the court held that “immunity is a grant in a sense awarded at the sovereign’s discretion.”¹¹¹ A third exception to the FSIA is that it only applies to states formally recognized by the United States,¹¹² and therefore, organizations that meet the definition of state under international law but not formally recognized by the U.S. State Department do not enjoy protection under the FSIA.¹¹³

B. *The Act of State Doctrine*

The Act of State doctrine, when applicable, prohibits U.S. courts to sit in judgment of acts performed by a foreign state within its own territory.¹¹⁴

104. *Id.* at 497.

105. *Id.* at 496.

106. *Id.* at 498 n.12; *see also Xuncax*, 886 F. Supp. at 175 (holding the defendant’s activity was beyond his official authority, and, therefore, not entitled to FSIA immunity).

107. 25 F.3d at 1472.

108. *Id.*

109. 812 F. Supp. at 210.

110. *Id.*

111. *Id.* at 211; *see also Estate I*, 978 F.2d, at 498 n.11 (Philippine government waiving immunity for former president, Ferdinand Marcos).

112. *See infra* pp. 535-536.

113. *Kadic*, 70 F.3d at 244 (court holding that defendant was head of state not recognized by the United States, and, therefore, not protected by FSIA).

114. *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1183-84 (C.D. Cal. 2002).

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in

The doctrine's purpose is to maintain a separation of powers by preventing the judiciary from engaging in matters that may hinder the executive and legislative branches' ability to conduct foreign affairs.¹¹⁵ The Act of State doctrine is applicable "when the outcome of the case turns on the effect of official action by a foreign sovereign."¹¹⁶ Accordingly, a claim is barred by the Act of State doctrine when the following criterion is met: 1) there is an official act of a foreign state, 2) which is performed within the foreign state, and 3) the claim "seeks relief that would require the court to declare the foreign sovereign's act invalid."¹¹⁷

The courts have defined an "official act" as being one that is "public and governmental" in nature, as opposed to those being "private and commercial" in nature.¹¹⁸ However, even acts that are commercial on the surface can be held governmental if the activity is such that only a sovereign state can engage in it (e.g. the exploitation of natural resources found on public lands).¹¹⁹ Furthermore, acts by a private party, when acting under the color of law, can fall within the scope of the doctrine.¹²⁰ In *Banco Nacional de Cuba v. Sabbatino*,¹²¹ the Supreme Court held, "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, since the court can then focus on the application of an agreed principle to circumstances of fact"¹²² Thus, when a foreign state's act violates a norm of international law, which by definition requires consensus, courts have held that the act was "unofficial," and not accorded any protection under the Act of State doctrine.¹²³ Because of this aspect, the *Kadic*¹²⁴ court stated, "it would be a

judgment on these acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1186.

120. *Sarei*, 221 F. Supp. 2d at 1187.

121. 376 U.S. 398 (1964).

122. *Id.* at 428.

123. See *infra* p. 536. *Bodner v. Banque Paribas*, 144 F. Supp. 2d 117, 130 (E.D.N.Y. 2000); *Sarei*, 221 F. Supp. 2d at 1189.

124. 70 F.3d at 250.

rare case in which the Act of State doctrine precluded suit under section 1350.”¹²⁵

C. *International Comity*

In *Hilton v. Guyot*,¹²⁶ the Supreme Court defined international comity as follows:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its Territory to the legislative, executive, or judicial acts of international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.¹²⁷

International comity’s philosophical underpinning is that by showing deference to the executive, legislative, and judicial acts of another nation, it will “foster[] international cooperation and encourage[] reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations.”¹²⁸

Courts differ in how to determine if international comity should apply. Some courts have looked to the standards laid out in section 403 of the Restatement (Third) Foreign Relations Law of the United States, which reads, “a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.”¹²⁹ In determining if jurisdiction is reasonable, the Restatement (Third) articulates eight factors a court should consider.¹³⁰ The other method courts use is to simply query

125. *Id.*

126. 159 U.S. 113 (1895).

127. *Id.* at 164-65.

128. *Iwanowa*, 67 F. Supp. 2d at 490.

129. *Sarei*, 221 F. Supp. 2d at 1199.

130. RESTATEMENT (THIRD), § 403(2) denotes the following factors:

- (a) the link of the activity to the territory of the regulating state ;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;

if “there is in fact a true conflict between domestic [the Alien Tort Statute] and foreign law,”¹³¹ and if so, the principles of international comity apply. Furthermore, courts that employ this threshold method require defendants to show a specific legislative act or judicial statement from a foreign state or court that clearly articulates the existence of a conflict before the doctrine of international comity will apply.¹³² To illustrate, in *Iwanowa*,¹³³ the court held that since the German government specifically announced that foreign citizens might not bring a claim for wartime forced labor against German corporations, the plaintiffs’ use of the Alien Tort Statute would be in direct conflict with German law and was therefore barred by the principles of international comity.¹³⁴

D. *Alien and Tort Requirements*

The first requirement any plaintiff must meet is to be an alien (they can be a permanent U.S. resident, which is beneficial in overcoming a *forum non conveniens* motion, but not a U.S. citizen).¹³⁵ As noted below, disappearance and wrongful death torts have been held actionable.¹³⁶

- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood on conflict with regulation by another state.”

See *Sarei*, 221 F. Supp. 2d at 1204-05 (applying the Restatement factors in finding that the plaintiffs’ claims were barred by the principles of international comity).

131. *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 555 (Blackmun, J., concurring and dissenting); see *Iwanowa*, 67 F. Supp. 2d at 490; *Bodner*, 144 F. Supp. 2d at 129.

132. *Bodner*, 144 F. Supp. 2d at 129.

133. 67 F. Supp. 2d at 490-91.

134. *Id.* Germany’s policy reason for immunizing its private corporations for their use of forced labor during World War II was that since the war, Germany had paid reparations to many nations and “[I]t was incumbent upon the recipient states to especially compensate those of their citizens who were especially damaged as a result of the events of the war.” *Id.* at 490.

135. 28 U.S.C. § 1350; *Kadic*, 70 F.3d at 238; see *Kyler*, 203 F.3d at 835 (Alien Tort claim dismissed because plaintiff was U.S. citizen); *Friedman v. The Bayer Corp.*, 1999 WL 33457825 (E.D.N.Y. 1999)(same). See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000)(holding that a U.S. resident is accorded greater deference than a foreign alien in a *forum non conveniens* analysis); but see *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002)(affirming district court’s dismissal of the case on the grounds of *forum non conveniens*); *Abdullahi v. Pfizer, Inc.*, 2002 WL 31082956 (S.D.N.Y. 2002)(dismissing case on the grounds of *forum non conveniens*).

136. See *infra* p. 542.

Obviously in those cases, the victim cannot bring a claim on their behalf, and since the Alien Tort Statute is silent as to who may bring suit based on an injury to another person, determining what law to use to determine standing has been an issue. When a federal statute provides a right of action but does not address survivorship, courts typically look to analogous state law.¹³⁷ However, federal law should be used if use of state law would defeat the purpose of the federal law.¹³⁸ In *Xuncax*,¹³⁹ one of the plaintiffs sued on behalf of her older sister, who had been shot and beheaded by Guatemalan soldiers.¹⁴⁰ The court found the most analogous state law was Massachusetts's Wrongful Death Act.¹⁴¹ Unfortunately, Massachusetts's law prohibited the plaintiff from bringing suit for her executed sister because their parents were still alive, but unable to bring suit.¹⁴² Therefore, the court used the federal statute Torture Victim Protection Act (TVPA), which allowed the sister to bring a suit on her sister's behalf.¹⁴³ The second prong requires an alleged tort.¹⁴⁴ In *Filartiga v. Pena-Irala*,¹⁴⁵ the court defined the "tort" element under the Alien Tort Statute as "a wrong in violation of the law of nations, and not merely a wrong actionable under the law of the appropriate sovereign state."¹⁴⁶ Also, courts have further held that it is not enough that the alleged tort violates international law, but that they are "shockingly egregious" in order to invoke section 1350.¹⁴⁷

Before articulating those torts that have met the third prong (violation of the law of nations), it is appropriate at this time to identify those torts the courts have deemed not actionable under the Alien Tort Statute.¹⁴⁸ Claims based on contracts,¹⁴⁹ racial discrimination and wrongful

137. See 28 U.S.C. § 1652 (2000) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

138. *Xuncax*, 886 F. Supp. at 190.

139. *Id.* at 170.

140. *Id.*

141. *Id.* at 191.

142. *Id.*

143. *Id.* at 192. *But see* *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1334 (S.D. Fla. 2002) (using Florida law to determine standing).

144. See *supra* p. 523. See also *Jogi*, F. Supp. 2d at 1027 (plaintiff failed to allege a tort because plaintiff failed to show he suffered any damages).

145. 577 F. Supp. 860 (E.D.N.Y. 1984).

146. *Id.* at 862-64.

147. *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983); *Jogi*, 131 F. Supp. 2d at 1027.

148. However, courts can, and have, changed their position as to what torts are actionable. See *infra* p. 534-535.

149. *Wong-Opasi*, 229 F.3d at 1155.

termination,¹⁵⁰ to stay an execution,¹⁵¹ price fixing,¹⁵² environmental abuses and cultural genocide,¹⁵³ fraud, breach of fiduciary duty and misappropriation of funds,¹⁵⁴ and purchasing land from a government that wrongfully seized the land.¹⁵⁵

E. Violation of the Law of Nations

1. The Meaning of the Law of Nations

The third prong requires that the tort violated the law of nations.¹⁵⁶ In order to meet this requirement, courts mandate that the tort violate a norm of international law.¹⁵⁷ Courts define a norm of international law as being specific, universal, and obligatory.¹⁵⁸ In determining what a norm of international law is, courts have looked to two Supreme Court cases. In the first case, *U.S. v. Smith*,¹⁵⁹ the Supreme Court held that the law of nations “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.”¹⁶⁰ In the second case, *The Paquete Habana*,¹⁶¹ the Supreme Court further held that:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the

150. *Mendonca v. Tidewater*, 159 F. Supp. 2d 299 (E.D. La. 2001).

151. *Faulder v. Johnson*, 178 F.3d 741 (5th Cir. 1999).

152. *Kruman v. Christie's International PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001).

153. *Beanal*, 197 F.3d at 168 (environmental abuses and cultural genocide); *Aguinda v. Texaco*, 2002 WL 1880105 *1 (2d Cir. 2002)(affirming the district court's decision that environmental abuses are not actionable under the Alien Tort Statute); *Flores v. Southern Peru Copper Corp.*, 2002 WL 1587224 *11(S.D.N.Y. 2002)(environmental abuses).

154. *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995).

155. *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

156. *See supra* p. 523.

157. *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262, 266 (S.D.N.Y. 2002); *Estate II*, 25 F.3d at 1475.

158. *Estate II*, 25 F.3d at 1475.

159. 18 U.S. 153 (1820).

160. *Id.* at 160-61.

161. 175 U.S. 677 (1900).

speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹⁶²

Accordingly, the courts, when faced with whether an alleged tort violates the Law of Nations, have looked to the following works to determine if a tort violates a norm of international law: Restatement (Third), the Foreign Relations law of the United States,¹⁶³ United Nation's Charter and agreements,¹⁶⁴ Nuremberg Charter and Principles,¹⁶⁵ the Hague Convention of 1907,¹⁶⁶ American, European, and African

162. *Id.* at 700.

163. See *Abdullahi*, 2002 WL 31082956, at *4; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987)[hereinafter *Forti I*]; *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988)[hereinafter *Forti II*]; *Sarei*, 221 F. Supp. 2d at 1140; *Xuncax*, 886 F. Supp. at 185 n.27; *Kadic*, 70 F.3d at 240.

164. *Universal Declaration of Human Rights*, 3 U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948), cited as authority in *Alvarez-Machain*, 266 F.3d at 1052; *Wiwa*, 2002 WL 319887, at *6; *Filatiga*, 630 F.2d at 882; *Forti I*, 672 F. Supp. at 1542; *Forti II*, 694 F. Supp. at 710; *John Doe I v. Uncocal Corp.*, 2002 WL 31063976, *25 (9th Cir. 2002) [hereinafter *Doe I*]; *Bodner*, 114 F. Supp. 2d at 122; *Xuncax*, 886 F. Supp. at 185 n.27. *International Covenant on Civil and Political Rights*, art. 9, 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), cited as authority in *Alvarez-Machain*, 266 F.3d at 1052; *Wiwa*, 2002 WL 319887, at *7; *Forti I*, 672 F. Supp. at 1542; *Forti II*, 694 F. Supp. at 710; *Doe I*, 2002 WL 31063976, at *25; *Xuncax*, 886 F. Supp. at 185 n.27. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 2, 39 U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), cited as authority in *Wiwa*, 2002 WL 319887, at *6; *Cabello Barrueto*, 205 F. Supp. 2d at 1332; *Xuncax*, 886 F. Supp. at 185; *Kadic*, 70 F.3d at 240. *Convention Against Torture and Degrading Treatment*, art. 16, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), cited as authority in *Wiwa*, 2002 WL 319887, at *7. *Code of Conduct for Law Enforcement Officials*, Annex 34, U.N. GAOR, 34th Sess., Supp. No. 46, at 186, U.N. Doc. A/34/46 (1979), cited as authority in *Wiwa*, 2002 WL 319887, at *11. *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, *Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Principle 9, U.N. Doc. A/CONF. 144/28/Rev.1, at 112, (1990), cited as authority in *Wiwa*, 2002 WL 319887, at *11. *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A.Res. 3452, U.N. GAOR, 30th Sess., U.N. Doc. A/1034 (1975), cited as authority in *Kadic*, 70 F.3d at 240. *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951), cited as authority in *Kadic*, 70 F.3d at 240.

165. The "Nuremberg Code" cited by *Abdullahi*, 2002 WL 31082956, at *4. "Nuremberg Charter," annexed to the London Agreement on War Criminals, Aug. 8, 1945, art. 6, 59 Stat 1544, 82 U.N.T.S. 279, cited as authority in *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); *Bodner*, 114 F. Supp. 2d at 122. The "Nuremberg Principles" cited as authority in *Bodner*, 114 F. Supp. 2d at 122.

166. *Bodner*, 114 F. Supp. 2d at 122.

conventions,¹⁶⁷ International Tribunals,¹⁶⁸ Geneva Conventions,¹⁶⁹ and American Constitutional Law.¹⁷⁰ Additionally, the requirement that a norm of international law be universally accepted is a strict one.¹⁷¹ Absent this requirement, “the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”¹⁷² In *Filaritiga*,¹⁷³ the court looked to *The Paquette Habana* to conclude that international law is not stagnant but evolving.¹⁷⁴ In *The Paquette Habana*,¹⁷⁵ the Supreme Court recognized that although the rule prohibiting seizure of an enemy’s coastal fishing vessel during wartime was one of comity, it had developed over the preceding century into “a settled rule of international law” by “the general assent of civilized nations.”¹⁷⁶ As a result, *Filaritiga*¹⁷⁷ and its progeny define international law by today’s standards rather than by 1789 standards.¹⁷⁸

In *Xuncax*,¹⁷⁹ the court held that a norm is universal and obligatory if:

- (1) No state condone[s] the act in question and there is a recognizable “universal” consensus of prohibition against it; (2) there are sufficient

167. American Convention on Human Rights, O.A.S. Official Records, art. 7(2)-(3), OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970)(signed but not ratified by the United States), reprinted in 9 I.L.M. 673 (1970), cited as authority in *Forti I*, 672 F. Supp. at 1542; *Alvarez-Machain*, 266 F.3d at 1051; *Wiwa*, 2002 WL 319887, at *8; *Xuncax*, 886 F. Supp. at 185 n.27. American Declaration of the Rights and Duties of Man, O.A.S. Official Records, arts. 1, 8, Doc. OEA/Ser.L/V/II.65, Doc. 6, May 2, 1948, noted in *Alvarez-Machain*, 266 F.3d at 1052; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Nov. 22, 1984, 213 U.N.T.S. 221, 24 I.L.M. 435 (1985), cited as authority in *Xuncax*, 886 F. Supp. at 185 n.27; *Alvarez-Marchain*, 266 F.3d at 1052. African Charter on Human and Peoples’ Rights, art. 12, June 27, 1981, 21 I.L.M. 58, 60, cited as authority in *Alvarez-Machain*, 266 F.3d at 1052.

168. *Prosecutor v. Tadic*, 36 I.L.M. 908 (Case No. IT-94-1-T, May 7, 1997), cited in *Cabello Barrueto*, 205 F. Supp. 2d at 1333; *Wiwa*, 2002 WL 319887, at *9. *Prosecutor v. Rutaganda*, ICTR-96-3-T, 39 I.L.M. 557 (May 2000), cited in *Wiwa*, 2002 WL 319887, at *9. International Criminal Tribunal for the former Yugoslavia cited in *Cabello Barrueto*, 205 F. Supp. 2d at 1333; *Wiwa*, 2002 WL 319887, at *9.

169. *Kadic*, 70 F.3d at 242-43.

170. The Thirteenth Amendment cited as authority in *Doe I*, 2002 WL 31063976, at *9. The Eighth Amendment cited as authority in *Xuncax*, 886 F. Supp. at 187.

171. *Filaritiga*, 630 F.2d at 881.

172. *Id.*

173. *Id.*

174. *Id.*

175. 175 U.S. at 694.

176. *Id.*

177. 630 F.2d at 881.

178. *Id.*

179. 886 F. Supp. at 184.

criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; [and] (3) the prohibition against it is nonderogable and therefore binding at all times upon all actors.¹⁸⁰

Therefore, it is not enough for a tort to be recognized by the international community; there must exist a consensus among the international community as to the tort's definition in order to be actionable under the Alien Tort Statute.¹⁸¹ In *Forti I*,¹⁸² the court dismissed claims of causing disappearance, cruel, inhuman and degrading treatment because although they enjoyed universal condemnation, there lacked a consensus as to the definition of these claims.¹⁸³ Because these claims lacked universal definition, the court held they violated rule 12(b)(6) of the Federal Rules of Civil Procedure: failure to state a claim.¹⁸⁴ In *Xuncax*,¹⁸⁵ decided eight years after *Forti I*, the court found that while "cruel, inhuman or degrading treatment" held universal condemnation, it still lacked international consensus as to its definition.¹⁸⁶ However, instead of dismissing the claim, the court looked to the Eighth Amendment's jurisprudence to define the tort.¹⁸⁷ The court concluded that when an act "is proscribed by the Constitution of the United States and by a cognizable principle of international law[, it] plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this Court under § 1350."¹⁸⁸

Another method in which an alleged tort can be regarded as meeting the "specific, universal, and obligatory" requirement is to be a peremptory norm of international law, or *jus cogens* norm.¹⁸⁹ A *jus cogens* norm is a norm of international law that is binding on nations regardless of whether or not that nation agrees to it.¹⁹⁰ An example of a *jus cogens* norm is any of the principles in the United Nations Charter proscribing the use of force.¹⁹¹ Although "a *jus cogens* violation is, by definition, 'a violation of specific,

180. *Id.*; *Chiminya*, 216 F. Supp. 2d at 262; *Wiwa*, 2002 WL 319887, at *5.

181. See RESTATEMENT (THIRD) § 404 (recognizing that although terrorism is universally condemned there lacks a consensus as to its definability and therefore cannot be included among those crimes of universal concern).

182. 672 F. Supp. at 1543.

183. *Id.*; but see *Wiwa*, 2002 WL 319887, at *8 (finding cruel, inhuman, and degrading treatment definable and actionable under the Alien Tort Statute).

184. *Forti I*, 672 F. Supp. at 1543.

185. 886 F. Supp. at 186.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Doe I*, 2002 WL 31063976, at *8.

190. *Id.* at *8 n.14.

191. RESTATEMENT (THIRD) § 102.

universal, and obligatory international norms' that is actionable under the [Alien Tort Statute],"¹⁹² a violation can meet the requirement to be a "specific, universal, and obligatory international norm[]"¹⁹³ without being regarded as a *jus cogens* norm.

2. Torts Requiring State Action.

As a general rule, torts actionable under the Alien Tort Statute require state action. In fact, early in its jurisprudence "only individuals who have acted under official authority or under color of such authority may" invoke the Alien Tort Statute.¹⁹⁴ As stated above, formally recognized states and their agents can only be sued in a limited set of circumstances.¹⁹⁵ However, an organization not formally recognized by the U.S. State Department can still be found a state for purposes of section 1350.¹⁹⁶

In *Kadic*,¹⁹⁷ the plaintiffs sued the defendant, Radovan Karadzic, in his capacity as the leader of a self-proclaimed Bosnian-Serb government often referred to as "Srpska."¹⁹⁸ The plaintiffs alleged that military forces under the command of Karadzic committed acts of rape, forced prostitution, forced impregnation, torture and summary execution against them.¹⁹⁹ Since these torts generally require state action in order to be actionable under section 1350, the plaintiffs had the burden to show either "Srpska" was a state or Karadzic had acted in concert with another state.²⁰⁰ However, "Srpska" was not formally recognized by the U.S. State Department.²⁰¹

International law defines a state as "an entity that has (1) a defined territory and (2) a permanent population, (3) under the control of its own government, and (4) that engages in, or has the capacity to engage in,

192. *Doe I*, 2002 WL 31063976, at *8 n.15.

193. *Id.*

194. *Estate I*, 978 F.2d at 501-02; *Tel-Oren*, 726 F.2d at 791-95 (holding that there lacked universal consensus as to whether a private actor could be held liable for violating the law of nations).

195. *See supra* pp. 524-530.

196. *Kadic*, 70 F.3d at 236-37.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* "While 'Srpska' was found to be a state, the court also held that since Karadzic's acts of torture and summary execution were performed in furtherance of genocide and war crimes, these claims did not require state action." *Id.* at 244.

201. *Id.*

formal relations with other such entities.”²⁰² The court found that “Srpska” met these requirements and that proscriptions of international law apply to recognized and unrecognized states.²⁰³ The court further recognized that this definition simply requires the capacity to engage in formal relations with other states but not be formally recognized by other states.²⁰⁴ In fact, U.S. “courts have regularly given effect to the ‘state’ action of unrecognized states.”²⁰⁵ The difference between a recognized state and an unrecognized one is that a recognized state enjoys certain privileges and immunities with regard to judicial proceedings (e.g. FSIA).²⁰⁶

Absent acts committed by a state actor, state action can still be found through the acts of a private actor, when they have acted “under color of law.” To determine if a private actor acted under the color of law within the context of an Alien Tort claim, courts have employed the standards found in 42 U.S.C. § 1983.²⁰⁷ Under section 1983 jurisprudence, courts have applied a variety of tests to determine if conduct occurred “under the color of law:” 1) The Nexus test (“whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State

202. RESTATEMENT (THIRD) § 201.

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

204. *Id.*

205. *Id.* at 244; *see, e.g.*, *United States v. Insurance Cos.*, 89 U.S. 99, 101-03 (1875)(seceding states in Civil War); *Thorington v. Smith*, 75 U.S. 1, 9-12 (1868)(same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970)(post-World War II East Germany). *See also* RESTATEMENT (THIRD) § 202 cmt. B (“An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states.”). *But see Tel-Oren*, 726 F.2d at 791 n.21 (holding that the PLO failed to meet international law’s definition of a state).

206. *Kadic*, 70 F.3d at 244.

207. *Id.* at 246; *Wiwa*, 2002 WL 319887, at *13; *Sarie*, 221 F. Supp. 2d at 1146; *Unocal*, 110 F. Supp. 2d at 1305. 42 U.S.C. § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

itself”²⁰⁸); 2) The Symbiotic Relationship test (whether the State has “so far insinuated itself into a position of interdependence” with a private actor that there exists a “symbiotic relationship”²⁰⁹); 3) The Public Function test (when a private actor exercises “powers traditionally exclusively reserved to the State,”²¹⁰ State action is found.); and 4) Joint Action test (when a private actor is “a willful participant in joint activity with the State or its agents,”²¹¹ then State action is present.). It is the “joint action” test that has been most commonly used by courts dealing with Alien Tort claims: For purposes of an Alien Tort claim, a “private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”²¹²

Joint action can be found in two ways: 1) under either the “Conspiracy” test or 2) the “Cooperative Action” test. Under the “Conspiracy” test, state action is attributed to a private actor when “both public and private actors share a common, unconstitutional goal.”²¹³ Under the “Cooperative Action” test, state action is attributed to a private party when there is a “substantial degree of cooperative action” between a State and private actor,²¹⁴ or “overt and significant [S]tate participation” exists in the deprivation of the plaintiff’s Constitutional rights.²¹⁵ Through the use of the “joint action” test, private actors have been held to be state actors liable for torts committed either by themselves or not. The following two cases, which implicated Nigeria, illustrate this point.

In *Wiwa v. Royal Dutch Petroleum Co.*,²¹⁶ former citizens of Nigeria brought suit against two corporations, Royal Dutch Petroleum Company (a Dutch corporation) and Shell Transport and Trading Company (an English corporation).²¹⁷ In *Wiwa*,²¹⁸ the defendants moved for dismissal for

208. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974).

209. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972).

210. *Jackson*, 419 U.S. at 352.

211. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970); *John Doe I v. Unocal*, 963 F. Supp. 880, 891 (C.D. Cal. 1997) (“[W]here there is a ‘substantial degree of cooperative action’ between the state and private actors in effecting the deprivation of rights, state action is present.”); *Wiwa*, 2002 WL 319887, at *13.

212. *Kadic*, 70 F.3d at 245; see also *John Doe I*, 110 F. Supp. 2d at 1306-07 (using both “joint action” and “public function” tests); *Sarei*, 221 F. Supp. 2d at 1153-54 (same).

213. *Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107 (9th Cir. 1991).

214. *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989).

215. *Hoai v. Vo*, 935 F.2d 308, 313 (D.C. Cir. 1991).

216. 2002 WL 319887, at *2.

217. *Id.*

218. *Id.*

lack of subject matter jurisdiction.²¹⁹ Plaintiffs were members of an organization known as “the Movement for the Survival of the Ogoni People” (MOSOP).²²⁰ MOSOP opposed the defendant’s oil-excavation activities on land that was taken from the plaintiffs without adequate compensation.²²¹ To ensure that the development activities of the area would proceed as usual, the defendants recruited the Nigerian police and military to quash MOSOP’s opposition.²²² What resulted was a campaign of systematic attacks upon the local population of Ogoni, in which two of MOSOP’s leaders were summarily executed through hangings while other Ogoni residents “were beaten, raped, shot and/or killed during these raids.”²²³

Since the alleged torts were only committed by state agents (i.e. the Nigerian police and military), the plaintiffs had to demonstrate acts that, if proven true, would show “a substantial degree of cooperative action between” the defendants and the Nigerian officials in order to substantiate a claim.²²⁴ The plaintiff alleged the following: That in February 1993, the defendants met with Nigerian officials in England and the Netherlands to develop an anti-MOSOP campaign; that the defendants provided monies to the Nigerian police and military for the purpose of securing weapons; that the defendants provided intelligence to the Nigerian police and military in order to facilitate the campaign of terror; that the defendants actively participated in planning specific raids; that the defendants bribed or attempted to bribe witnesses to give false testimony against one of the plaintiffs; that the defendant supplied the Nigerian military with helicopters and boats to attack Ogoni villages; and that the defendants paid the Nigerian military to violently answer complaints regarding oil spills and to “contain” protests against the defendants.²²⁵ The court found joint action.²²⁶

The defendants in *Wiwa*²²⁷ argued that the plaintiffs must demonstrate that the defendants acted in concert with the Nigerian government for

219. *Id.* at *1 (in addition to the argument that plaintiff’s claim lacked subject matter jurisdiction, the defendants also moved for dismissal for claims that the plaintiffs failed to state a claim for which relief may be granted).

220. *Id.* at *2.

221. *Id.*

222. *Wiwa*, 2002 WL 319887, at *2.

223. *Id.*

224. *Id.* at *13.

225. *Id.*

226. *Id.*

227. *Id.* at *14.

each alleged tort.²²⁸ The court held that section 1983 jurisprudence provided that “individuals engaged in a conspiracy with government actors to deprive others of their constitutional rights” are not required to be an active participant in each tort to be held liable for each tort.²²⁹ Therefore, under section 1983 jurisprudence, the plaintiffs’ complaint is not required to aver that the defendants and the Nigerian governments acted in concert for each alleged act.²³⁰

In *Abdullahi v. Pfizer, Inc.*,²³¹ the plaintiffs alleged that Pfizer administered an experimental drug, Trovan, to their children without their consent.²³² As a result of this experimentation, plaintiffs claimed eleven children died while others suffered paralysis, deafness and blindness.²³³ The court recognized that the Nuremberg Code, the International Covenant on Civil and Political Rights, and FDA regulations prohibited using experimental drugs on humans without their consent and, therefore, was a violation of international law.²³⁴ Pfizer argued that in order to be held liable under the Alien Tort Statute this claim required state action and, since they acted alone, plaintiff’s claim should be dismissed.²³⁵ The court agreed that these claims required state action. However, through application of the “joint action” test, the court found Pfizer to be an agent of Nigeria because Nigeria 1) had provided a letter of request to Pfizer requesting the FDA allow exportation of Trovan, 2) had arranged for Pfizer’s accommodations in Nigeria, 3) assigned Nigerian doctors to assist Pfizer, 4) back-dated an “approval letter” required by international protocol prior to the test, and 5) silenced Nigerian physicians critical of Pfizer’s tests.²³⁶

The most recent development in Alien Tort law is the courts’ recognition of third party liability. In *Bodner v. Banque Paribas*,²³⁷ plaintiffs, descendants of defendants’ Jewish customers, brought suit against French banking institutions for aiding and abetting and conspiring with Vichy and Nazi regimes to steal the plaintiffs’ ancestors’ private

228. *Wiwa*, 2002 WL 319887, at *14.

229. *Id.*

230. *Id.* at *14.

231. 2002 WL 31082956.

232. *Id.* at *1-2.

233. *Id.*

234. *Id.* at *3.

235. *Abdullahi*, 2002 WL 31082956, at *4.

236. *Id.* at *6. Although the court found Pfizer could potentially be held liable, the court dismissed the case on the grounds of *forum non conveniens*. *Id.*

237. 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

property.²³⁸ The plaintiffs further alleged that the scheme to wrongfully seize the Jewish property was part of the Nazi regime's genocide program.²³⁹ In denying the defendants' motion to dismiss, the court held that the plaintiffs' claims, if substantiated with evidence, sufficiently demonstrated a violation of international law.²⁴⁰

More recently, the court in *Cabello Barrueto v. Fernandez Larios*²⁴¹ affirmed the appropriateness of aiding and abetting and conspiracy claims under the Alien Tort Statute.²⁴² In that case, the survivors of Winston Cabello brought suit against the defendant for his involvement in Cabello's murder by General Pinochet's soldiers.²⁴³ Although the defendant did not personally murder or torture Cabello, the plaintiffs claimed that since he was a member of the infamous "Caravan of Death" (a squad of soldiers that traveled from city to city, torturing and murdering individuals perceived to be enemies of the state) he was liable in tort for "indirect participation."²⁴⁴ In recognizing the plaintiffs' claims of aiding and abetting and conspiracy, the court cited recent Alien Tort case law and international case law in support of its decision.²⁴⁵ On September 18, 2002, the Ninth Circuit also recognized aiding and abetting as a claim.²⁴⁶ The

238. *Id.*

239. *Id.* at 122.

240. *Id.* at 128. Unfortunately, the court's analysis as to why aiding and abetting and conspiracy is recognized by international law is lacking. It appears that the court referred to U.N. resolutions and the Nuremberg tribunals but fails to specifically cite them.

241. 205 F. Supp. 2d 1325 (S.D. Fla. 2002).

242. *Id.* at 1333.

243. *Id.* at 1326.

244. *Id.* at 1329.

245. *Id.* at 1332-33. The court cited *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) ("affirming district court's jury instruction allowing foreign leader to be held liable upon finding that he directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance.'"); *Mehinovic v. Vuckovic*, 2002 WL 851751, at *24-25 (N.D. Ga. 2002) (holding defendant liable for aiding and abetting in acts that violate international law); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091-92 (S.D. Fla. 1997) ("asserting [Alien Tort] jurisdiction over claim of conspiracy between private defendant and state actors to cause plaintiff's arbitrary and inhuman detention"); *John Doe I v. Unocal Corp.*, 963 F. Supp. 880, 889-90 (C.D. Cal. 1997) ("permitting [Alien Tort] jurisdiction over plaintiff's allegations that defendants conspired to commit violations of international law"); *Prosecutor v. Tadic*, Case No. IT-94-1-A (July 15, 1999).

246. *John Doe I v. Unocal Corp.*, 2002 WL 31063976, at *13. Although applied to one of the unique torts not requiring state action, slavery, there is little doubt that Ninth Circuit would not recognize an aiding and abetting claim for torts requiring state action. This is because torts not requiring state action are recognized when state action exists; see RESTATEMENT (THIRD) §§ 404 (identifying torts of universal concern (i.e. not requiring

Ninth Circuit held that the standard for aiding and abetting under the Alien Tort Statute is to give "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime."²⁴⁷ In dicta, the Ninth Circuit further opined that joint venture, agency, negligence, and recklessness were viable theories for an Alien Tort case.²⁴⁸

To summarize, courts require state action for the following violations of international law: torture (to include rape),²⁴⁹ summary execution or extra-judicial killing,²⁵⁰ disappearance or abduction,²⁵¹ arbitrary detention,²⁵² cruel, inhuman and degrading treatment,²⁵³ crimes against humanity,²⁵⁴ right to life, liberty, and personal security,²⁵⁵ right to peaceful assembly and expression,²⁵⁶ aiding and abetting,²⁵⁷ and conspiracy.²⁵⁸

3. Private Action Torts

In *Tel-Oren*,²⁵⁹ Judge Edwards wrote in his concurring opinion that the Alien Tort Statute applied only to state activity because there lacked a consensus among the international community as to what torts required no state activity.²⁶⁰ Judge Edwards further wrote that in the 18th and early 19th centuries, writers and jurists believed that international law applied to

state action)), 702 (including torts of universal concern among torts states are obligated not to violate) (1987).

247. *Id.* at *10.

248. *Id.* at *10 n.20.

249. *Tel-Oren*, 726 F.2d at 791 n.20; *Xuncax*, 886 F. Supp. at 184; *Kadic*, 70 F.3d at 240; *Estate II*, 25 F.3d at 1473; *Abebe-Jira*, 72 F.3d at 847-48; *Wiwa*, 2002 WL 319887, at *6; *Tachiona*, 216 F. Supp. 2d at 266; *Forti I*, 672 F. Supp. at 1541.

250. *Tel-Oren*, 726 F.2d at 791 n.20; *Xuncax*, 886 F. Supp. at 184; *Kadic*, 70 F.3d at 243; *Estate II*, 25 F.3d at 1473; *Wiwa*, 2002 WL 319887, at *6; *Tachiona*, 216 F. Supp. 2d at 266.

251. *Estate II*, 25 F.3d at 1467; *Alvarez-Machain*, 266 F.3d at 1049; *Forti II*, 694 F. Supp. at 711.

252. *Alvarez-Machain*, 266 F.3d at 1052; *Wiwa*, 2002 WL 319887, at *6; *Xuncax*, 886 F. Supp. at 184; *Forti I*, 672 F. Supp. at 1541.

253. *Wiwa*, 2002 WL 319887, at *12; *Xuncax*, 886 F. Supp. at 184; *Abebe-Jira*, 72 F.3d at 847-48.

254. *Sarei*, 221 F. Supp. 2d 1116, 1151 (C.D. Cal. 2002).

255. *Wiwa*, 2002 WL 319887, at *12.

256. *Wiwa*, 2002 WL 319887, at *12.

257. *John Doe I*, 2002 WL 31063976, at *10; *Bodner*, 114 F. Supp. 2d at 128; *Cabello Barrueto*, 205 F. Supp. 2d at 1332-33.

258. *Bodner*, 114 F. Supp. 2d at 128.

259. 726 F.2d at 792.

260. *Id.*; see *Estate I*, 978 F.2d at 501-02; *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.D.C. 1985).

private actors but during the 19th century a view emerged that only states could be held liable under international law.²⁶¹ Despite this trend toward statism, one violation survived that could be held against a stateless actor: piracy.²⁶²

In the seminal case *Kadic*,²⁶³ the Second Circuit recognized that certain conduct, whether performed by a state or private actor, violated international law: genocide, war crimes, slavery, and piracy.²⁶⁴ To support its finding that a private actor could be held liable under international law, the court looked to the Restatement (Third): “Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”²⁶⁵ The court gave particular notice to the Restatement’s distinguishing between those violations that are actionable when committed by a state listed in section 702 from those violations defined as “universal concern” found in section 404.²⁶⁶ Although the Restatement defines section 404 violations as those offenses a “state has jurisdiction to punish without regard to territoriality or nationality of the offenders,” the

261. *Tel-Oren*, 726 F.2d at 794.

262. *Id.* The Restatement (Second) of the Foreign Relations Law of the United States recognized piracy as the only violation of international law to be one of universal concern. RESTATEMENT (THIRD) § 404 (reporter’s note 3).

263. 70 F.3d at 232.

264. *Id.*

265. *Id.* at 240 (quoting RESTATEMENT (THIRD) pt. II, introductory note.)

266. *Id.*

Section 702 provides:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

Section 404 provides:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

RESTATEMENT (THIRD) §§ 404, 702.

court interpreted this to mean offenses capable of being committed by non-state actors.²⁶⁷

To support their claims of genocide, the plaintiffs alleged that Karadzic personally planned and executed a plan to use "murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats."²⁶⁸ The court recognized that following the atrocities of World War II, the international community was quick to identify genocide as a crime, and as a result, this conviction was embodied in statutes, conventions, and charters.²⁶⁹ The court further acknowledged that every authority condemning genocide held private actors liable.²⁷⁰

The plaintiffs further alleged that since the acts of "murder, rape, torture and arbitrary detention of civilians"²⁷¹ were committed in pursuance of the civil war, Karadzic, in his capacity as overall commander, was liable for war crimes.²⁷² Looking to Geneva Conventions and the Nuremberg Trials as authority, the court held that individuals committing war crimes could be held liable under the Alien Tort Statute.²⁷³ The court also held that torture and summary executions, acts generally proscribed by international law only when committed by state officials or under color of law, could be attributed to a private actor when committed in furtherance of genocide or war crimes.²⁷⁴

In *Tel-Oren*,²⁷⁵ despite his refusal to find private actors liable under the Alien Tort Statute, Judge Edwards opined that one day it may be recognized that private actors may be held liable for certain violations of international law, such as slavery.²⁷⁶ *Kadic*²⁷⁷ recognized slavery as one of those "handful of crimes to which the law of nations attributes individual responsibility."²⁷⁸ In recent years, the courts have expanded the meaning

267. *Kadic*, 70 F.3d at 240.

268. *Id.* at 242.

269. *Id.*

270. *Id.* at 241-42. The court, in reaching its conclusion, specifically cited Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988).

271. *Id.* at 242.

272. *Id.*

273. *Kadic*, 70 F.3d at 242-43.

274. *Id.* at 244.

275. 726 F.2d at 794-95.

276. *Id.*

277. 70 F.3d at 240.

278. *Id.* (quoting *Tel-Oren*, 726 F.2d at 795 (Edwards, J. concurring)).

of slavery to include forced labor. In *Iwanowa v. Ford Motor Co.*,²⁷⁹ the court looked to the Hague and Geneva Conventions, the Nuremberg Tribunals, U.S. case law, and the Restatement (Third) to support its conclusion that forced labor not only violated international law but was a subset of slavery and therefore, attributable to private actors.²⁸⁰ The Ninth Circuit has since adopted *Iwanowa's* holding, labeling forced labor as the modern equivalent of slavery.²⁸¹

IV. MISCELLANEOUS SUBSTANTIVE ISSUES

A. *Choice of Law*

The overwhelming majority of Alien Tort cases have been brought in either the Second or Ninth Circuits. For the most part, these two circuits are in agreement on how the statute should be applied. However, one particular area not agreed on is how to determine what substantive law should be applied to Alien Tort claims (another issue due to the plain language of the statute, which fails to articulate what substantive law courts should apply in determining liability and damages).²⁸²

In *Filartiga*,²⁸³ the Second Circuit reversed and remanded, and in doing so, instructed the district court to perform a choice-of-law analysis per *Lauritzen v. Larsen*²⁸⁴ to determine what substantive law to apply (i.e. whether to apply international law, Federal Common Law, forum state law, or the foreign state's law) to *Filartiga's* claims.²⁸⁵ In *Lauritzen*,²⁸⁶ the Supreme Court articulated a seven factor-balancing test courts should use in conducting a choice-of-law analysis:

- 1) Place of wrongful act,
- 2) Law of the flag,
- 3) Allegiance or domicile of the injured,

279. 67 F. Supp. 2d 424 (D.N.J. 1999).

280. *Id.* at 439-40.

281. *John Doe I*, 2002 WL 31063976, at *9. Although it accepted *Iwanowa's* conclusion, the Ninth Circuit focused on the Thirteenth Amendment's jurisprudence to draw its conclusion. *Id.* See *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001)(reaching the same conclusion). But see *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000) (holding forced labor was not such an extreme form of egregious conduct as to confer jurisdiction).

282. *Tachiona*, 216 F. Supp. 2d at 268.

283. 630 F.2d at 889.

284. 345 U.S. 571 (1954).

285. 630 F.2d at 889.

286. 345 U.S. at 583-92.

- 4) Allegiance of the defendant,
- 5) Place of contact,
- 6) Inaccessibility of foreign forum, and
- 7) The law of the forum state.²⁸⁷

On remand, the district court held that Lauritzen's factors favored use of Paraguayan law because "(1) all of the events took place in Paraguay; (2) all of the parties lived in Paraguay when the events took place; (3) the parties' relationships with each other were centered in Paraguay; and (4) Paraguayan law prohibited torture."²⁸⁸ However, the language of *Wiwa*²⁸⁹ (decided twenty years after *Filartiga*) may cast doubt on the validity of *Filartiga's* mandate.²⁹⁰ The court recognized that the federal courts have never definitively resolved the choice-of-law issue and listed *Filartiga's* conclusion among the different views.²⁹¹ Since the court stated it declined to address the issue, because the appeal was based on other grounds, it may reasonably be inferred that the issue is not firmly settled in the Second Circuit.²⁹²

In *John Doe I v. Unocal*,²⁹³ the Ninth Circuit held that since only *jus cogens* violations were alleged ("violations of norms of international law that are binding on nations even if they do not agree to them"), it was preferable to apply international law to the plaintiff's claims instead of the law of any particular state.²⁹⁴ This is because "the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid."²⁹⁵ The court further held that its decision to apply international law was buttressed by the application of the choice-of-law consideration factors listed in Restatement (Second) of Conflict of Law § 6 (1969).²⁹⁶ The factors are as follows:

- 1) The needs of the interstate and international systems;

287. *Id.*

288. *Filartiga*, 577 F. Supp. at 864. See *Estate I*, 978 F.2d at 503 (approving the district court's use of the tort law of the state where the underlying events occurred).

289. 226 F.3d at 105 n.12.

290. *Id.*

291. *Id.*

292. *Id.* See *Tachiona*, 216 F. Supp. 2d at 268 (recognizing *Filartiga's* mandate and requiring both parties to submit briefs analyzing which law to apply).

293. 2002 WL 31063976, at *9.

294. *Id.*

295. *Id.*

296. *Id.* at *11-13.

- 2) The relevant policies of the forum;
- 3) The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- 4) The protection of justified expectations;
- 5) The basic policies underlying the particular field of law;
- 6) Certainty, predictability and uniformity of result; and
- 7) Ease in the determination and application of the law to be applied.²⁹⁷

The court recognized that international law has been developed largely in a criminal context rather than civil, and since every tort claim had a criminal equivalent, it was appropriate to look to the International Criminal Tribunals for the former Yugoslavia and Rwanda for the standards for aiding and abetting.²⁹⁸ However, the court admonished that its holding was limited to the facts of the case and that international law may not be appropriate in another case were facts are different.²⁹⁹

An alternative to the choice-of-law analysis employed by the Court of Appeals of the Second and Ninth Circuits is to simply apply international law to any Alien Tort claim. In reaching this conclusion, the *Xuncax*³⁰⁰ court articulated several reasons that favored this method.³⁰¹ First, domestic tort law is often inadequate in addressing Alien Tort claims such as genocide, war crimes, and crimes against humanity.³⁰² Second, to apply domestic tort law to an Alien Tort claim would “mute[] the grave international law aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort.”³⁰³ Third, while it may be difficult to forge “a remedy from the amorphous body of international law,”³⁰⁴ federal courts have successfully handled similar challenges in the past.³⁰⁵ Finally,

297. *Id.* at *28 n.6 (Reinhardt, J., concurring).

298. *Id.* at *12.

299. *Id.* at *12 n.25. However, see Judge Reinhardt’s concurring opinion. Judge Reinhardt considered the question of whether a third party may be held liable in tort for a government entity a violation of international law as an ancillary issue and therefore it should be decided using the Federal common law. *Id.* at *24-30. Judge Reinhardt further held that application of the Restatement’s factors favored Federal common law, not international law. *Id.*

300. 886 F. Supp. at 182.

301. *Id.* at 183.

302. *Id.*

303. *Id.* at 182.

304. *Id.*

305. *Id.*

this method would allow federal courts “to develop a uniform federal common law response to international law,”³⁰⁶ a uniformity that is in keeping with the Alien Tort’s intent.³⁰⁷

B. *Statute of Limitations*

The simple language of section 1350 does not contain a statute of limitations. When faced with a federal statute in which Congress failed to provide a statute of limitations, courts are required to apply the statute of limitations of the “most closely analogous statute of limitations under state law.”³⁰⁸ However, there is an exception to this rule: courts should apply a federal statute’s limitation period the statute “clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make the [federal statute] a significantly more appropriate vehicle for interstitial lawmaking.”³⁰⁹ Accordingly, courts have found the TVPA as the *closest* analogous statute to the Alien Tort Statute, closer than any available state law.³¹⁰

In *Wiwa*,³¹¹ the district court held that to apply New York’s one-year limitations period for assault, battery, and false imprisonment “would frustrate the federal policies at stake in the Alien Tort Statute,”³¹² which is “to allow victims of international law violations committed in a foreign country to redress those violations in United States courts.”³¹³ The court recognized that an Alien Tort Statute plaintiff faces obstacles normally not present in state tort claims: 1) evidence is often more difficult to gather, 2) witnesses may be hesitant to testify for fear of reprisal from corrupt governments, and 3) the continuation of human rights violations may cause delays.³¹⁴ In support of its decision, the *Wiwa*³¹⁵ court further recognized

306. *Xuncax*, 886 F. Supp. at 182.

307. *Id.* See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964) (citing section 1350 as a statute “reflecting a concern for uniformity in the country’s dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions.”).

308. *Wiwa*, 2002 WL 319887, at *18.

309. *Id.*

310. *Id.* at *19.

311. 2002 WL 319887, at *18.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Papa*, 281 F.3d at 1012.

the trend to adopt the TVPA's 10-year limitation's period by previous courts.³¹⁶

However, there are instances when the TVPA's generous ten-year limitation period is insufficient due to no fault of the plaintiff. Courts have used equitable tolling to cure this deficiency. The essence of equitable tolling is to suspend the limitation period from accruing because a plaintiff is either unaware of or unable to bring a claim through no fault of his or her own, particularly when the defendant actively misleads the plaintiff.³¹⁷ In *Cabello Barrueto*,³¹⁸ the victim's family was told by General Pinochet's military regime that Cabello Barrueto was killed while trying to escape.³¹⁹ However, they refused to disclose the location of the body and provided the family with three separate death certificates that further confused the issue concerning the circumstances around Barrueto's death.³²⁰ Because of General Pinochet's military regime's deliberate concealment of evidence as to the true nature of Barrueto's death, the court held that the limitation period tolled until 1990, when a civilian government replaced Pinochet's military regime.³²¹

In *Hilao v. Estate of Marcos*,³²² the Ninth Circuit stated that equitable tolling could be applied to periods when the defendant is either absent from the jurisdiction or is immune from lawsuits, or when the plaintiff is imprisoned or incapacitated.³²³ However, extraordinary circumstances outside the plaintiff's control should be present in order to apply equitable tolling.³²⁴ The defendant, former Philippine President Ferdinand Marcos, had the Philippine Constitution amended to make himself and his officials immune from lawsuits for acts committed while in power.³²⁵ Marcos exercised considerable control of the judiciary and suspended Habeas Corpus from 1972-1981.³²⁶ Furthermore, the plaintiffs had a reasonable fear of torture and reprisal if they tried to bring a suit against Marcos or his

316. *Id.* (adopting TVPA's limitation period as the standard for Alien Tort claims); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d at 1180; *Iwanowa*, 67 F. Supp. 2d at 462; *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996).

317. *Bodner*, 114 F. Supp. 2d at 135.

318. 205 F. Supp. 2d at 1327.

319. *Id.*

320. *Id.* at 1330.

321. *Id.*; see *Bodner*, 114 F. Supp. 2d at 135 (holding that under an alternative theory, equitable tolling could be applied because the defendants actively misled the plaintiffs).

322. 103 F.3d 767 (9th Cir. 1996).

323. *Id.* at 773.

324. *Id.*

325. *Id.*

326. *Id.*

officials in the Philippines.³²⁷ The Ninth Circuit held that these facts were sufficient to meet the “extraordinary circumstances” standard.³²⁸ Therefore, the limitation period tolled until 1986, when Marcos left office and moved to Hawaii and since the claim was filed in March 1986, well within the Hawaiian limitation period of two years, it was timely.³²⁹

Another method courts have used to allow plaintiffs to bring suit beyond either the TVPA’s or a state’s limitation period is to apply a rule most often used in employment discrimination cases, the continuing violation doctrine.³³⁰ The premise of the continuing violation doctrine is simple: “the limitations period for a continuing offense does not begin until the offense is complete.”³³¹ However, the reasons for employing this doctrine must be compelling.³³² As stated above, the plaintiffs claimed that the defendants plundered and confiscated French Jewish property entrusted to the defendants during World War II and that the defendants’ activity was part of an overall scheme to aide and abet the Nazi regime’s plan of genocide.³³³ The court held that, if the plaintiffs’ claims were correct, the defendants’ repeated denials of any wrongdoing and their failure to return the plaintiffs’ funds “constitute[d] a deliberate, continuous, and ongoing violation of international”³³⁴ Therefore, the court held that the TVPA’s statute of limitations had not begun to accrue, and the plaintiffs were allowed to bring suit for a claim that originated over a half-century earlier.³³⁵

C. Remedies

Unlike some torts actionable under federal law, there is not a statutory cap on damages awarded for a successful Alien Tort claim.³³⁶ Considering how egregious the claims can be, it is hardly surprising that compensatory damages often range in the millions. Furthermore, the Alien Tort Statute is silent on whether punitive damages are allowed.³³⁷ Again, considering the egregious nature of the violations (torts so heinous

327. *Id.*

328. *Hilao*, 103 F.3d 773.

329. *Id.*

330. *Bodner*, 114 F. Supp. 2d at 134 n.12.

331. *Id.* at 134.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.* at 134-35.

336. *See, e.g.*, 42 U.S.C. § 1981a(b)(3) (2000) (statutorily capping the amount a claimant can receive for compensatory damages in a Title VII discrimination suit).

337. 28 U.S.C. § 1350 (2000).

that the international community has agreed upon their proscription), the courts have exhibited no reservations in allowing punitive damages to be awarded.³³⁸

The following is an illustrative example of the damages (compensatory and punitive) awarded: *Filartiga*,³³⁹ for summary execution and torture, \$385,000 in compensatory and \$10,000,000 in punitive damages;³⁴⁰ *Xuncax*,³⁴¹ victims of summary execution \$2,000,000 in compensatory and \$5,000,000 in punitive damages and torture victims \$1,000,000 in compensatory and \$2,000,000 in punitive damages;³⁴² *Forti v. Suarez*, for arbitrary detention, torture and summary execution, \$3,000,000 in compensatory and \$3,000,000 in punitive damages;³⁴³ *Quiros de Rapaport, et al., v. Suarez-Mason*, “for torture and murder of one victim and disappearance of another,”³⁴⁴ \$15,000,000 in compensatory and \$15,000,000 in punitive damages;³⁴⁵ *Paul v. Avril*,³⁴⁶ for six victims of torture and arbitrary detention each awarded between \$2,500,00 and \$3,500,000 in compensatory damages and \$4,000,000 in punitive damages;³⁴⁷ *Trajano v. Marcos*, for torture and summary execution, \$4,161,000 in total damages.³⁴⁸

V. CONCLUSION.

From its inauspicious and innocuous beginning, the Alien Tort Statute has become a law, to be respected, if not feared, by multinational companies that engage in commercial activities with corrupt regimes.³⁴⁹ However, it appears that the ground-swell of cases brought under this statute over the past decade is about to subside. This is due in large part to

338. *Tachiona*, 216 F. Supp. 2d at 276.

339. 577 F. Supp. at 861.

340. *Id.*

341. 886 F.Supp. at 198.

342. *Id.*

343. *Tuchiona*, 216 F. Supp. 2d at 279.

344. *Id.*

345. *Id.*

346. 901 F. Supp. 330 (S.D. Fla. 1994).

347. *Id.* at 335.

348. *Xuncax*, 886 F. Supp. at 199 n.45.

349. On November 11, 2002, another lawsuit was filed (this time in the Eastern District of New York) on behalf of South Africans seeking relief for alleged acts of torture, murder, rape, arbitrary detention and inhumane treatment by the apartheid government of South Africa. *South Africa: NGO Files Apartheid Reparations Lawsuit in USA*, BBC MONITORING, Nov. 12, 2002, available at 2002 WL 102569068. Several major U.S. corporations were named as defendants: Citigroup, JP Morgan Chase, Exxon Mobil, Ford, General Motors, and IBM. *Id.*

the Bush administration. While the State Department under the Clinton administration generally avoided getting involved in Alien Tort cases, Bush's State Department is not.³⁵⁰ For a second time within a year, the State Department has intervened on behalf of a major corporation being sued for alleged violations of human rights by asking the court to dismiss the case on grounds of international comity (specifically, that if the suit went forward, it would impair U.S. foreign relations).³⁵¹ It remains to be seen, though, if defendants, particularly those that were significant campaign contributors to the Republican Party, will be able to use the Bush administration to shield them from liability in U.S. courts for engaging in human rights violations. Regardless, absent a legislative act or Supreme Court fiat to the contrary, the Alien Tort Statute is becoming an effective vehicle to remedy past and deter future egregious acts.³⁵² A vehicle to be used to pursue that "ageless dream to free all people from brutal violence."³⁵³

350. Waldman, *supra* note 15.

351. *Id.*

352. In the U.S. commonwealth Island of Saipan in September 2002, dozens of U.S. retailers, including notable retailers as Abercrombie & Fitch, Target, Gap Inc., and J.C. Penny Co. Inc., settled three lawsuits out of court for \$20 million dollars. Alexei Oreskovic, *\$20 Mil. Settlement in Sweatshop Suits*, THE LEGAL INTELLIGENCER, Vol. 227, No. 64, Sept. 30, 2002, available at 2002 TLI 4. The suits, brought in part under the Alien Tort Statute, alleged that the retailers would hire impoverished Chinese women and bind them to "shadow" contracts, which required the women to work 2 to 3 years in order to pay off special "recruitment fees." The contracts further prohibited activities such as dating, getting pregnant, attending church or criticizing their employers. *Id.* As part of the settlement, a monitoring system will be emplaced to ensure better working conditions. *Id.*

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