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ABSTRACT

From Grotius to Hobbes to Locke to an unconventional modern pop-culture manifestation in Ali G, the concept of “respect” has always been understood as important in human interaction and human agreements. The concept of mutual understanding and obligation pervades human interaction, and, for purposes of this Article, international relations. Almost all basic principles in English, United States, and other country’s laws that value human and individual rights have based, over time, the development of their laws on the philosophical principle of respect. So much of common and statutory law is designed to enforce respect for others. The principle question in this Article involves the idea of respect between nations in international reciprocity. Most importantly, it examines who should have the opportunity to enforce potential disrespectful actions in issues of international law and human rights. Due to a trend within the United States where litigation opportunities have allowed private individuals to attempt to enforce within the judiciary the obligations of “international law” for allegedly disrespectful actions, the question becomes whether it is wise to allow nations due respect to allow their citizens to enforce actions contrary to those international obligations. If, indeed, international agreements are between nation-states – reciprocity requires that the decisions to respect them should be made by the “contracting” parties and not third parties. Thus, third party civil litigation based on international agreements (or a nation’s allowance of them) is itself disrespectful.

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BOYAKASHA, FIST TO FIST: RESPECT AND THE PHILOSOPHICAL LINK WITH RECIPROCITY IN INTERNATIONAL LAW AND HUMAN RIGHTS

DONALD J. KOCHAN*

I. INTRODUCTION

From Grotius to Hobbes to Locke to an unconventional modern pop-culture manifestation in Ali G, the concept of “respect” has always been understood as important in human interaction and human agreements. In the United States, the Home Box Office (HBO) channel runs a series called “Da Ali G Show.”1 Despite its regular sardonic vulgarity, the show’s interviews often begin with “boyakasha”2 and end with a fist-to-fist proclamation of “respect.” The “respect” ending represents an “urban” recognition of a compliment and a “we agree” signal. It is a type of recognition of a mutuality mentality. Fists tap at the end to recognize, like a signature on a document, that you are my “homie,” complete with the expectation that a bilateral relationship has developed.3

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3. Several definitions of “respect” are instructive:

v. To feel or show deferential regard for; esteem. . . . n. 1. A feeling of appreciative, often deferential regard; esteem. 2. The state of being regarded with honor or esteem. 3. Willingness to show consideration or appreciation.


4. Deference to a right, privilege, privileged position, or someone or something considered to have certain rights or privileges; proper acceptance or courtesy; acknowledgement: . . . 5. The condition of being esteemed or honored: to be held in respect. . . . 13. to hold in esteem or honor: . . . 14. to show regard or consideration for.

RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1640 (2d ed. 1998).

2. To regard, consider, take into account. . . . 4. To treat or regard with deference, esteem, or honour; to feel or show respect for. b. To esteem, prize, or value (a thing).

Although “respect” in Da Ali G Show is all done under a ruse, the concept of mutual understanding and obligation pervades human interaction and, for purposes of this Essay, international relations. Fist to fist and a pronouncement of “respect” is a pronouncement of agreement. It is a matter of validation.

Almost all basic principles in the United Kingdom, United States, and other countries’ laws that value human and individual rights have, over time, based the development of their laws on the philosophical principle of respect. These systems have attempted to engrain in enforceable standards a version of the Golden Rule: do unto others as you would expect that they do unto you; if you or they do not, there will be legal consequences. Of course there are also social sanctions against the disrespectful. But much of common and statutory law is designed to enforce respect for others.

This Essay’s main focus is on the idea of respect between nations in international reciprocity. Most importantly, it examines who should have the opportunity to redress potentially disrespectful actions related to international law and human rights. Respect requires identifying and understanding the parties to an interaction and the nature of their relationship.

One trend within the United States provides private individuals with litigation opportunities to enforce “international law” for allegedly disrespectful actions. The question arises of whether it is wise to respect nations for allowing their citizens to enforce actions contrary to those international obligations. If international agreements are between nation-states, reciprocity requires that the decision to respect them should be made by the “contracting” parties rather than third parties. Therefore, third party civil litigation based on international agreements (or a nation’s allowance of them) is itself disrespectful.

Recognizing the pervasive influence of respect principles in the formation of personal, governmental, and institutional arrangements, this Essay will focus on the concept of reciprocity and its philosophical tie to respect values with particular emphasis on international relations. Part II introduces general principles of respect. Part III focuses on the legal, historical, and rights-based foundations of respect. Part IV discusses the relationship between nation-state reciprocity for human rights and international law and the concept of respect. Part V provides a brief overview of recent

litigation within the United States and how it interferes with the traditional means by which nations create sanctions for actions that may or may not be disrespectful of human rights or other international norms or agreements when appropriate, but allows deviations when pragmatic or necessary or otherwise justified. This Essay concludes that, at least in the realm of human rights and international law, the identification of respect or disrespect should be held almost exclusively in the hands of governmental bodies rather than in unaccountable private litigants. International relations require a certain amount of flexibility in defining what constitutes respect for human rights commitments that are frustrated when non-signatory private parties can upset the efficiency of the reciprocal flexibility available in diplomatic relations.

II. THE PERVERSIVE INFLUENCE OF RESPECT IN LAW

The concept of “respect” has a number of far-ranging philosophical and pragmatic implications throughout society.\(^5\) As previously explained, the word “respect” has been adopted in many urban cultures to mean a compliment, esteem, reverence, or consideration—fist to fist—after some event, story, or explanation with which the conversant agrees.\(^6\) The respecter is sending a “solid,” an acknowledgement of acceptance. This might fall under the category that Professor Stephen Darwall has called “appraisal respect.”\(^7\)

Similarly, gangs and the mafia enter a type of private law and ordering that, if disrespected, might lead to internal consequences, a turf war, or other confrontation.\(^8\) The “law” of the streets often involves the need for respect if the goals of competing or agreeing

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5. Consider, for example, the following passage on the moral philosophy of respect: Moral philosophers constantly remind us how very important it is to treat one another with respect. After all, we are persons; and persons have a special dignity. Persons are ends in themselves—and must be acknowledged as such. Experts on manners have a strikingly similar drum beat. They tell us how very important it is to treat one another respectfully. 

6. See supra note 3.


parties are to be accomplished. There is a reliance factor in the concept of respect that leads to certain consequences depending on the level of mutual compliance with these informal rules.9

Outside private ordering, in more formal, traditional areas of governmentally enforced law, there are also many examples of “respect” as a foundational principle. Few people would enter into a contract if they did not respect the promise made by the other party, knowing that there was a judicially enforceable remedy for disrespect of those promises.10 In property law, respect underlies the concept of *sic utere tuo ut alienum non laedas*, in which one may use his property as he wishes so long as he internalizes the costs of his actions while respecting neighbors and not causing negative externalities.11 Respect underlies tort law through a necessary respect for physical boundaries of person and property. For instance, doctrines of trespass and personal injury create a cause of action to remedy transgressions upon body or land.12 Similarly, the overriding premise of most criminal law lies in the punishment for the disrespect of another’s autonomy and rights.13 Corporate law is largely based in the idea that directors and managers must respect fiduciary duties to their investors.14 Family law in divorce fault-based jurisdictions places a great deal of emphasis on the competing parties’ respect for their vows.15 Copyright, trademark, patent, and other intellectual property laws center on boundaries that must be respected insomuch as one cannot appropriate the


11. See, e.g., Munn v. Illinois, 94 U.S. 113, 145 (1886) (“The doctrine that each one must so use his own as not to injure his neighbor—*sic utere tuo ut alienum non laedas*—is the rule by which every member of society must possess and enjoy his property . . . .”).

12. See, e.g., RESTATEMENT (SECOND) OF TORTS § 158 (1965) (creating liability for an intentional intrusion on land).

13. See, e.g., Schloendorff v. Soc’y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914) (Cardozo, J.) (explaining that an unconscious hospital patient had the right to determine what was done with her body), overruled on other grounds by Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957).


work or brand of another. U.S. constitutional law provides remedies for persons when the government disrespects its own statutory obligations or fundamental rights. Fundamental principles of international law require respect for sovereignty and boundaries in a system of Westphalian nation states. Much like contract law, nations would be unlikely to enter into trade agreements with other states if they did not have respect that the obligations would be honored.

These examples of private and public rules-related ordering might fall under what Darwall calls “recognition respect,” which he defines as “giving appropriate consideration or recognition to some feature of its object in deliberating about what to do.”

Respect is a foundational principle in societies based on individual autonomy and personal dominion, free exchange, and enforceability of private autonomy and agreements with both individuals and governments. In other words, whether in a private ordering system of law (formal or informal, legally recognized or not), in relationships between private individuals, in relationships between the government and its citizens, or in relationships between governments, “respect” is a penetrating philosophical and pragmatic concept in the efficient ordering in human relations and is underscored in the development of laws and the methods for legal enforcement of the concept when “disrespect” rears its head. Whether it be in unregulated community interactions, civilly enforceable actions, criminally enforceable actions, or government-citizen relations, the formation, application, and enforce-

16. See, e.g., Tom W. Bell, Indelicate Imbalancing in Copyright and Patent Law, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 2 (Adam Thierer & Wayne Crews eds., 2002) (noting the need of copyright and patent law to strike a delicate balance between public and private interests).


18. See generally Stephen D. Krasner, SOVEREIGNTY: ORGANIZED HYPOCRISY (1999) (identifying that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior); Leo Gross, The Peace of Westphalia, 1648–1948, 42 AM. J. INT’L L. 20, 20 (1948) (attributing to the Peace of Westphalia the idea of attempting to establish “world unity on the bases of states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority”).

19. See Darwall, supra note 7, at 38.

20. Id.

21. See generally id. at 36, 38, 39 (questioning society’s view that respect is “something to which all persons are entitled” and distinguishing between “appraisal respect” and “recognition respect”).
ment of private and public ordering has an extremely strong basis in the philosophical concept of respect.

III. PERSONAL AND PUBLIC SOVEREIGNTY NECESSITATES “RESPECT” AS A FOUNDATIONAL BASIS FOR LAW

Respect is founded in the concept of individual autonomy, individual sovereignty, and personal dominion. If one owns her body, her opinions, and generally has a right to exclude, then an invasion into that dominion without agreement or invitation is a matter of disrespect. If one invites someone into a personal realm, the other party must abide by the terms of the transactions and permissions so as not to cause disrespect. Respect requires that foisting one’s self or self-interest across the understood boundaries of another is unacceptable, and this principle forms so many justifications for the United States and others’ laws.

Madison’s description of property aptly describes the concept of dominion as follows:

[Property] in its particular application means “that domination which one man claims and exercises over the external things of the world, in exclusion of every other individual.” In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage. . . . In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights. Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions.22

The right to exclude and include others in one’s life and relations cannot exist without respect for this concept of personal dominion. Kant made a similar connection between the necessity to respect each man’s ownership, boundaries, and dignity when he stated that “[t]he respect which I bear others or which another can claim from me . . . is the acknowledgement of the dignity (dignitas) of another man, i.e., a worth which has no price, no equivalent for which the object of valuation (aestimii) could be exchanged.”23 Disrespect was therefore characterized as offensive to one’s being and inherent nature by both Kant and Madison.

Part of the problem recognized by Locke, Hobbes, and others was that in nature, respect would be unverifiable and unenforce-

able. The necessity of government was to add currency to promises and add sanctions to the violation of respect—for others’ rights and for voluntary commitments to others when consideration was agreed upon. First, one’s ability to demand respect for his dominion requires a system of enforceability, civilly and criminally. Second, one’s reliability, predictability, and certainty that is necessary for investment requires an enforceability of respect in exchange. If respect has no legally enforceable base, then the incentives for exchange are severely diminished. Those philosophizing about the basic necessities of a government realized that self-help remedies were not an efficient means for protecting rights or encouraging exchange and investment.

The same implications regarding respect of individual autonomy and regarding individual persons should apply to governmental autonomy and governmental sovereignty. The following Parts conclude that only through respect can international relations become operationally successful.

IV. RESPECT AND RECIPROCITY IN HUMAN RIGHTS AND INTERNATIONAL RELATIONS

Reciprocity is highly related to the principle of respect. This is a term that often identifies human interaction, negotiation,

24. *See generally* John Locke, *Two Treatises of Government* (Peter Laslett ed., 1988) (1632–1704) (explaining that every man in a state of nature is responsible for enforcing his rights against the world, but that many would lack the resources for effective enforcement); Thomas Hobbes, *Leviathan* 110 (Liberal Arts Press 1958) (1651) (arguing that so long as men remain in a natural state of war in which each does as he pleases, no man can be secure in his expectation that others will abide by his own decision to forgo a measure of his liberty to ensure peace).

25. Consider for example Madison’s famous line: “If men were angels, no government would be necessary.” *Federalist No.* 51 at 160 (Roy P. Fairfield ed., 2d ed. 1961).

26. *See, e.g.* Harold Demsetz, *Toward a Theory of Property Rights*, 57 *Am. Econ. Rev.* 347, 347 (1967) (“An owner [of property rights] expects the community to prevent others from interfering with his actions, provided that these actions are not prohibited in the specifications of his rights.”).

27. *See generally* Farnsworth on Contracts §§ 1.1–1.7 (2d ed. 1990). “Exchange is the mainspring of any economic system . . . .” *Id.* § 1.2.


If a society is to live by such primary rules alone, there are certain conditions which, granted a few of the most obvious truisms about human nature and the world we live in, must clearly be satisfied. The first of these conditions is that the rules must contain in some form restrictions on the free use of violence, theft, and deception to which human beings are tempted but which they must, in general, repress, if they are to coexist in close proximity to each other.

*Id.* at 89. *See also supra* note 24.

29. *See Confucius, The Confucian Analects, or Lun Yü,* in *The Sacred Books of Confucius and Other Confucian Classics* 23, 41 (Ch’u Chai & Winberg Chai eds., 1965)
exchange, relations, and, of course, respect. People, institutions,
and nations alike create agreements that provide for flexibility in
conduct with sanctions and rewards for behavior that are based on
respect for compliance and future negotiations. When making
agreements, parties cannot foresee all future conditions, partly due
to temporal or substantive changes in conditions, and also simply
due to altered preferences or new information. Therefore, reciprocity
is a critical concept in the future enforcement of agree-
ments and the maintenance of civil relations. As Hobbes stated, “a
man be willing, when others are so too, as far forth as for peace
and defense of himself . . . be contented with so much liberty
against other men as he would allow other men against himself.”

One must recognize that there are consequences to actions, espe-
cially when they involve agreements. As Rousseau stated:

There exists, undoubtedly, a universal justice which is the pure
product of Reason, but if mankind is to acknowledge its claims,
these must be reciprocal. If we confine ourselves to the human
aspect of the matter, we shall see at once that law and justice is
of no avail among men unless it be supported by natural
sanctions.

Human self-perpetuation induces agreements and human self-
preservation causes one to find ways to enforce and sustain the
same. So long as respect exists, mutually beneficial agreements
are likely to be created.

The self-interests and incentives of nations are institutionally
similar to those of individuals. The relations between nations fund-
amentally rely upon reciprocity, respect, and the flexibility
involved in ongoing relationships and enforcement or application

("Requitie injury with justice, and kindness with kindness."); see also ADAM SMITH, THE THE-
ORY OF MORAL SENTIMENTS 112 (Augustus M. Kelley 1966) (1759) ("Actions of a beneficent
tendency, which proceed from proper motives, seem alone to require a reward. . . .
Actions of a hurtful tendency, which proceed from improper motives, seem alone to
deserve punishment."); id. at 117 ("As every man doth, so it shall be done to him. . . . ").

30. HOBES, supra note 24, at 110.


32. Locke’s words on the matter capture this sentiment:

But forasmuch as we are not by ourselves sufficient to furnish ourselves with com-
petent store of things, needful for such a life as our nature doth desire, a life fit
for the dignity of man; therefore to supply those defects and imperfections which
are in us, as living singly and solely by ourselves, we are naturally induced to seek
communion and fellowship with others.

John Locke, An Essay Concerning the True Original, Extent and End of Civil Government, in
SOCIAL CONTRACT, supra note 31, at 1, 11.
Respect and Reciprocity in International Law

of prior agreements. As the U.S. Supreme Court has stated, “international law is founded upon mutuality and reciprocity.”

Nations can maintain the control to choose to enforce, not enforce, or otherwise act in relation to violations or compliance with deals. Only when nations negotiate \textit{ex ante} can the terms of an international norm deal be struck, and only when nations negotiate \textit{ex post} can those terms be altered or applied with prudence and political reality. International deals cannot be struck without some level of respect, and unilateral alterations or deviations from deals must take into account potential consequences between contracting nations. For this reason, reciprocity is critically linked with the concept of respect.

Law and economics scholarship has a deep history of examining the concept of reciprocity. For example, Professor Francesco Parisi and Maryland Appeals Court Clerk Nita Ghei discuss the impact of reciprocal relations in international law as follows:

The concept of reciprocity assumes peculiar importance in a world where there is no external authority to enforce agreements... Reciprocity generally involves returning like behavior with like. In Robert Axelrod’s terminology, reciprocity is a tit-for-tat strategy. Such a strategy permits cooperation in a state of nature, when no authority for enforcement of agreements exists. International law, in this sense, exists in a state of nature—there is no overarching legal authority with compulsory jurisdiction to enforce agreements. Inevitably, reciprocity has become an important element in the practice of sovereign nations and in the body of existing international law... [R]eciprocity constraints can resolve many issues in international law, but are not a panacea. However, given the nature of international law, with a fairly small number of repeat players, with low discount rates and institutional memory, it is reasonable to consider whether reciprocity can become an underlying principle of the system... [T]here is support for the hypothesis that reciprocity is a meta-rule for the system of international law.

Therefore, international agreements and the enforcement of international norms—including human rights—can only be accomplished successfully when nations trust that other nations

34. Francesco Parisi & Nita Ghei, \textit{The Role of Reciprocity in International Law} 1, 45 (Geo. Mason U., L. & Econ. Working Paper Series No. 02-08), available at http://www.gmu.edu/departments/law/faculty/papers/docs/02-08.pdf (last visited Oct. 7, 2005). “A basic principle of customary law... is reciprocity. Further, the Vienna Convention imposes reciprocity on all international law created by treaty.” \textit{Id.} at 44.
will respect the terms of the agreement and exercise reciprocal trust and flexibility.

V. PRIVATE HUMAN RIGHTS LITIGATION AND ENFORCEMENT
TRENDS IN U.S. COURTS

Civil litigation in U.S. courts is increasingly used as a means of enforcing international norms. But the benefits of reciprocal relations between nations (i.e. efficiency) are not sustained if we allow third-party civil enforcement of international agreements where none was anticipated by the original bargaining parties. Because of civil actions, no nations—aside from their judiciaries—maintain the same level of control exhibited in typical international relations.35

Self-interested civil litigants lack the same incentives and controls that constrain nation-states. With that in mind, is it desirable to allow third-party civil litigants to use customary international law outputs (CILOs), such as international resolutions, declarations, proclamations, and protocols, as evidence of enforceable liability if the CILOs were neither intended to be so used nor negotiated with an anticipation of being applied and enforced outside the constraints of reciprocity? Allowing civil third parties to “enforce” such agreements by recognizing that CILOs establish enforceable norms applicable to private or public conduct is a revolution in the previously recognized concept of nation-state international relations. Third party enforcement lacks the elements of respect, trust, and reciprocity—all related concepts in the “recognition respect” associated with international relations—that exist between original parties to any international agreement.36 It is principally an issue of the wisdom of a reconception of public international law: should public international law no longer only


In ATS litigation, U.S. courts are called on to lay blame for international controversies. The entry of judgment in an ATS case—including the summary dismissal at a preliminary stage based on a threshold defense such as sovereign immunity—may create the impression to citizens of other countries that the U.S. government has taken sides in an international dispute. This may interfere with the efforts of the executive branch and Congress to calibrate an appropriate foreign policy concerning a particular dispute.

Gregory G. Garre, Lower Courts Must Decipher Supreme Court Ruling on Resurrected Alien Tort Statute, LEG. TIMES, Sept. 6, 2004.

involves relations between nations with the concomitant flexibility in enforcement principally reinforced by the concept of reciprocity, or should it expand to norms enforceable by private individuals against private or public individuals or entities? Any attempt to provide civil third-party enforcement is fraught with the danger of circumventing the flexibility intended by reciprocity-effects expected by nations that sign international obligations and agreements.

The major vehicle for introducing international norms into the private litigation system in the United States is the Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA). Consequences of the ATS are increasingly far-reaching, yet recently unclear. ATS litigation has generally followed a continuously-expanding five-wave trend: (1) disuse and dormancy of the ATS; (2) acceptance of liability under the ATS for official state acts, including recognition of the statute as providing jurisdiction, a cause of action, and liability evidenced by noncompliance with customary international law outputs; (3) the movement toward an acceptance that quasi-states and private individuals could be liable for violations of customary international law; (4) suits against private individuals and corporations; and (5) the potential for expansive evolution and predictions for the future of ATS cases after the first guidance from the U.S. Supreme Court on these issues.
Wave one was dormancy. For over 200 years the ATS remained essentially unaccessed, or “dormant.” In essence, it remained undried ink that had never before been copied or applied.

The 1980 case of *Filartiga v. Pena-Irala*\(^{41}\) introduced the second wave. *Filartiga* breathed life and spurred evolutionary growth for the ATS from its previously dormant status.\(^{42}\) Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, former Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while Pena-Irala was in office.\(^{43}\) The alleged actions took place in Paraguay.\(^{44}\) The Eastern District of New York dismissed the action for lack of subject matter jurisdiction\(^{45}\) but the U.S. Court of Appeals for the Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law and that alleging such torture creates jurisdiction under the ATS.\(^{46}\) The decision sparked a multi-wave movement in which the strength of the ATS grew in the civil enforcement of international norms within the United States, even for extraterritorial actions.

The *Filartiga* court held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”\(^{47}\) The ATS was applied in the modern context of human rights for the first time. Furthermore, *Filartiga* established that modern concepts of “international law” were coterminous with previous concepts of the “law of nations,” and that this international law is an evolving concept to be ascertained by the courts.\(^{48}\) The Second Circuit held that courts ascertaining the law of nations “must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”\(^{49}\)

\(^{41}\) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

\(^{42}\) Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as “judicially will[ing] that statute a new life.” Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 827 (D.C. Cir. 1984) (Robb, J., concurring).

\(^{43}\) *Filartiga*, 630 F.2d at 878–79. Dr. Joel Filartiga, a citizen of Paraguay, was a named plaintiff in the suit. *Id.* In the complaint, Ms. Filartiga accused Norberto Pena-Iralia of “wrongfully causing [the death of her brother] by torture.” *Id.*

\(^{44}\) See *id.* at 878.

\(^{45}\) *Id.*

\(^{46}\) *Id.*

\(^{47}\) *Id.*

\(^{48}\) *Id.* at 880–81.

\(^{49}\) *Id.* at 881.
Wave three invited new opportunities for liability in *Kadic v. Karadzic*. The *Kadic* plaintiffs were Croat and Muslim citizens of Bosnia-Herzegovina. The plaintiffs alleged that they were victims and representatives of victims of atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces. The suit was brought against Radovan Karadzic, in his capacity as president of the Bosnian-Serb faction. The Southern District of New York dismissed the case for lack of subject-matter jurisdiction. The Second Circuit reversed this ruling, thereby significantly expanding the jurisdiction and scope of the ATS, at least within the Second Circuit.

The Second Circuit held that the ATS applies to actions by state actors or even private individuals who violate the most egregious of identified customary international law. As the Court reasoned in *Kadic*, state action is not necessary for a cognizable violation of the law of nations to exist. The Court expanded upon the principles it enunciated in *Filartiga*, noting that international law is constantly evolving. It consulted various authorities to ascertain the norms of contemporary international law, including international conventions, declarations, and resolutions. Review of these sources revealed that acts of genocide, torture, and rape constituted violations of generally accepted norms of international law and were therefore cognizable violations under the ATS. Other courts subsequently followed the Second Circuit’s interpretation.

Wave four came in 1997 when a federal district court in California issued its decision in the case of *Doe I v. Unocal Corp.*, upholding subject matter jurisdiction under the ATS based on allegations that

50. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh’g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 2524 (1996). Judge Newman highlighted the odd nature of the case in his opinion: “Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan.” *Id.* at 236.

51. *Id.* at 236.

52. *Id.* at 236–37.

53. *Id.*

54. *Id.*

55. *Id.* at 251.


57. *Kadic*, 70 F.3d at 239.

58. *Id.*

59. *Id.* at 238.

60. *See id.*

61. *See id.* at 241–45.

62. *See Kochan, Political Economy, supra note 35, at 258–61 (discussing post-Kadic cases in other courts).*

Unocal was then reviewed in a 2002 opinion by the U.S. Court of Appeals for the Ninth Circuit which reversed in part the district court’s decision to grant a motion for summary judgment in favor of Unocal.\footnote{Doe I v. Unocal Corp., 395 F.3d 932, 962–93 (9th Cir. 2002).} The Ninth Circuit held that there was sufficient evidence for a trial on plaintiffs’ allegations that Unocal had aided and abetted the Myanmar/Burmese government in forced labor, murder, rape, and torture.\footnote{Id. at 945.} The court again took a broad view of international law, citing many instruments to which the United States is not a party or for which the United States has adopted no implementing legislation.\footnote{Id. at 949.} Moreover, the court saw the application of international law as superior to state law, federal common law, or foreign law.\footnote{Id. at 949.}

Despite additional appeals, decisions, and settlement agreements, the foundational holding of Unocal and other similar cases—that corporations may be liable for violations of human rights under theories of customary international law—is the critical consequence of this case and the most significant and defining moment for the fourth wave of ATS litigation.

Since the original 1997 Unocal decision, dozens of private corporations, including many with ties to many countries including the United States and United Kingdom, have defended lawsuits based on international law claims.\footnote{See, e.g., Shannon O’Leary, Human Rights Case Sounds Alarm for U.S. Multinationals, CORP. LEG. TIMES, Dec. 2004, at 68; Robert Vosper, Conduct Unbecoming: No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts, CORP. LEG. TIMES, Oct. 2002, at 35.} Some of these cases involve aiding and abetting or vicarious liability theories; still others say that corporations should be responsible under customary international law for direct and independent corporate actions.\footnote{See Legal Matters: The Insidious Wiles of Foreign Influence, ECONOMIST, June 11, 2005, at 94 (ATS “is increasingly being invoked by foreigners in America to sue international companies for alleged wrongs suffered outside the United States. One can imagine the rumpus if such a law were invoked, abroad, against an American company.”); Vosper, Conduct Unbecoming, supra note 68, at 35.} A broad range of
suits have also been filed against state actors in the past few years.\footnote{See Correy E. Stephenson, 1789 Federal Pirate Law Revived by Paraguay Family’s Tragedy, Daily Rec. (Kansas City, MO), May 3, 2005 (“Since the Filartigas’ 1984 legal victory in the United States . . . more than 70 lawsuits have been filed using the Alien Tort Claims Act, and its use continues to grow.”); Vosper, Conduct Unbecoming, supra note 68, at 35.} An evolution of liability acceptance surrounding ATS litigation has not only fueled plaintiffs, trial lawyers, and human rights advocates; it has also increased the pool of potential defendants.

In wave five, for the first time in 215 years, the Supreme Court finally addressed the ATS in \textit{Sosa v. Alvarez-Machain}.\footnote{Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).} Alvarez-Machain, a Mexican national, alleged that he had been abducted and transported to the United States for investigation by U.S. Drug Enforcement Agency (DEA) officials.\footnote{Id. at 698.} Alvarez-Machain sued the United States and his abductor, Jose Sosa, under the Federal Tort Claims Act (FTCA) and the ATS.\footnote{Id.} The U.S. Supreme Court held that Alvarez was not entitled to recover damages from Sosa under the ATS because his abduction, lasting “less than a day,” did not clearly constitute a violation of the law of nations.\footnote{Id. at 712, 738.}

The Supreme Court further stated that “we agree the [ATS] is in terms only jurisdictional, [but] we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”\footnote{Id.} Therefore, although the majority opinion recognized the ATS as purely jurisdictional, it acknowledged that federal courts may allow some international norms to be enforced in some situations—a sort of endorsement for tort actions based on a “we know it when we see it” mentality.\footnote{Id. at 724–25.} The Supreme Court set certain standards but did not close the door to modern ATS litigation as it evolved in its first four waves.\footnote{Id. at 729.}

\section*{VI. Consequences and Conclusion}

The law of nations, like other relationships, is grounded in the concept of respect and the concomitant notion of reciprocity. Respect demanded by the international community for adherence to the law of nations is a relationship between \textit{nations}, not third party private individuals attempting to piggyback on international
agreements through the civil tort system. Yet the ATS revolution in
the United States has taken reciprocity control and decisions on
respect out of the hands of the original bargaining parties.

Although plaintiffs who allege human rights abuses evoke sympa-
thy, there are several dangers in allowing these allegations to be
decided in U.S. courts. The first concern is political insomuch as
the claims touch on constitutional, foreign policy, and economic
development interests. For example, to the extent private plaintiffs
are allowed to sue nation-states or corporations acting in concert
with such states for alleged human rights abuse, judicial decisions
necessarily make pronouncements regarding the appropriate
behavior of foreign countries. This could embroil the elected
branches in unwanted controversy and remove their negotiating
options and discretion on the world stage.

In addition, there needs to be a philosophical understanding of
the disruption of respect and reciprocity between nations when
third-party civil litigants are able to enforce agreements intended
to be implemented and applied only by the negotiating nations. If
two neighbors agree to plant a tree on their property line, it is up
to the two of them to decide if the agreement has been respected:
Was it the right kind of tree? Who takes care of the tree? Was the
tree properly placed? It is not appropriate for a resident of the
next block to decide whether the two neighbors have respected the
agreement.

Respect, I have argued, is grounded in the concept of autonomy.
In international law, sovereignty is closely analogous to respect. Yet
both individuals and nations have bargaining power and the ability
to make and enforce agreements—to guard their autonomy and to
give a little bit of it up voluntarily when desired. The level of
respect and the need for reciprocity are strong in both individual
and national relationships. We should be cautious when legal rules
develop that allow those outside an agreement or transaction to
decide what is respectful and what is disrespectful.

78. See generally Donald J. Kochan, Rein in the Alien Tort Claims Act: Reconstituted Law of
Donald J. Kochan, Foreign Policy, Freelanced: Suits Brought Under Alien Tort Claims Act Under-
mine Federal Government’s Authority, THE RECORDER (Cal.), Aug. 23, 2000, at 5; Donald J.
Kochan, After Burma, LEGAL TIMES, Aug. 21, 2000, at 54.