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The Alien Tort Statute and The Torture Victims' Protection Act: Jurisdictional Foundations and Procedural Obstacles

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FRONTIERS IN INTERNATIONAL HUMAN RIGHTS LAW: Article: THE ALIEN TORT STATUTE AND THE TORTURE VICTIMS' PROTECTION ACT: JURISDICTIONAL FOUNDATIONS AND PROCEDURAL OBSTACLES

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SUMMARY:
... Comparatively, human rights treaties such as the European Convention on Human Rights have recognized a right to compensation under international law for expropriations overseas. ... While Freeport does not tell us whether cultural genocide is a tort in violation of the law of nations, it seems that cultural genocide has some potential to acquire the status of an internationally recognized wrong at [*17] some point in the future. ... Returning to the ATS and TVPA, it is important to note that because the private torturer is not acting under state authority, there would be no violation of the law of nations for his acts, and thus no claim for liability under the ATS or under the TVPA. ... The first step in normalising Helms-Burton for application outside of U.S. territory would be to remove or waive the treble damages provision. claims in U.S. law, this article now considers the jurisdictional and procedural obstacles to the enforcement of those claims. ... Where there are no territorial contacts between the act and the state, states may nevertheless have jurisdiction to prescribe based on a theory of active personality, passive personality, protection, or territoriality (among others). ... In terms of forum non conveniens, the court pointed out that although the trial court usually has the discretion whether to apply it, in this case the trial court had failed to consider two interests when balancing the interests of plaintiff, defendant, forum and foreign jurisdictions: Namely, the interest of foreigners legally residing in the United States to have access to U.S. courts and remedies, and (probably more importantly) the policy interest implicit in federal statute law to provide foreigners a forum for adjudicating claims of violations of the law of nations. ... Pena-Irala, where a foreign government official tortured and murdered people outside of his governmental role, that official could not claim immunity a priori because torture is illegal under international law and a violation of jus cogens - and a fortiori because the foreign domestic law clearly stated that torture is illegal. prior to the FSIA was found in principles of grace and comity, not the Constitution.

TEXT:
I. Introduction

Though the United States is perceived as a chronic "non-joiner" of international human rights treaties, several U.S. laws permit individual citizens and aliens to prosecute overseas human rights violations in U.S. courts. Examples include the Alien Tort Statute (ATS), the Torture Victims' Protection Act (TVPA), the Racketeer Influenced and Corrupt Organisations Act (RICO), the Foreign Corrupt Practices Act (FCPA) and the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act (or "Helms-Burton Act"). Procedurally, however, the allowance of such claims are tempered by the Foreign Sovereign Immunity Act (FSIA) and the Anti-terrorism and Effective Death Penalty Act (AEDPA), both of which limit the availability of substantive remedies when the defendant is a state actor. This article focuses on the interaction between substantive human rights and their procedural limitations, and emphasises that, while procedural limitations on private actions under international law are significant, they can be overcome by good pleading.

Private rights of action (tort claims) based on universal jurisdiction are sometimes controversial. This is true not just in the United States, but throughout the Western World - in part because such statutes privatize acts that could otherwise be considered public functions done outside of the State in question on behalf of non-citizens. Thus, American efforts to codify these private rights of action can be (and often are) criticized as an example of the U.S. imposing its own unilateralist foreign policy on an unwilling world.

Such critiques are ill founded, however, because other States normally do not object to the extraterritorial application of U.S. tort law. In fact, apart from the unique exception of the Helms-Burton Act - a law that exists on paper but goes un-enforced - there has been little if any foreign opposition to America's efforts to apply its domestic law and jurisdiction to a case when it arises out of relative universal jurisdiction to adjudicate. Though it is controversial in some arenas, international law permits universal jurisdiction. Indeed, several allies of the U.S. have similar laws on their books, some of which go further than the American variety by invoking universal criminal jurisdiction for torture, war crimes, genocide, and crimes against humanity. Meanwhile, U.S. statutes that utilize universal jurisdiction merely enforce its minimum jus cogens obligations under international law, and impose a civil sanction on what is often criminal misconduct.

After some examination, it becomes clear that the primary obstacles to using private law remedies in the United States against those who violate human rights law do not present themselves in substantive international law; rather, the difficulties arise from complications of domestic U.S. procedural law. Thus, this article will first discuss substantive claims that may be plead in the United States under the laws mentioned above, and then proceed to address the procedural limitations that need to be overcome for a substantive claim to survive beyond a cursory procedural hearing. The purpose of this article is to describe these often case-ending procedural limitations in detail, with the hope that judges will be free to reach substantive dispositions on the merits of each claim, rather than being forced to decide cases on a default procedural basis.

II. Substantive Claims

1. Ordinary Tort Liability (Enterprise Liability)

Many plaintiffs with human rights claims can rely on the extraterritorial application of ordinary rules of tort law to vindicate their interests - rather than rely on "soft" or even established international law - if jurisdictional pre-requisites are met. Ordinary tort concepts in national law can be readily extended to cover international human rights violations by merely recasting the language involved. For example:
Summary execution? One might call it wrongful death. Torture? Battery, outrage, intentional infliction of emotional distress. Pollution around Indonesian mines or Ecuadorian fields? Nuisance, maybe trespass, maybe strict liability. You say slave labour, I say false imprisonment. When you mention treaty violations, I think of negligence per se. n16

Though there are some inherent limitations, a State's ordinary tort liability regime should not be ignored as a potential basis for holding various private actors accountable for their misfeasance and non-feasance in the third world. For example, Domingo Castro Alfaro (a Costa Rican employee of Standard Fruit Co.) and his colleagues were able to sue Dow Chemical Co. and Shell Oil Co. in Texas under ordinary tort law principles for workplace injuries. n17 In fact, tort-feasing multi-national enterprises can be and are subjected to liability under ordinary tort law as well as international human rights law. n18

There are some distinct disadvantages in relying upon an ordinary tort regime when seeking remedies to internationalized claims. Two such drawbacks include shorter statutes of limitation and jurisdictional limitations. For example, when a tort involving a foreign plaintiff and defendant occurs in a foreign country, the U.S. will typically not exercise jurisdiction. n19 While U.S. law is presumed to have no extraterritorial effect, this is a rebuttable presumption. n20 Several U. S. statutes expand the jurisdictional reach to protect human rights under various theories of extraterritorial jurisdiction. However, where jurisdictional reach is exceptionally extended, the basic requirements of jurisdiction and procedure remain the same and the burden of proof is on the plaintiff. n21 Since jurisdictional principles and procedural defenses are the same whether the rules of ordinary tort or of international law apply, this article uses cases applying international law to describe the jurisdictional and procedural defenses, whether for an ordinary tort or a tort, which can be the object of universal jurisdiction.

2. The Alien Tort Statute (ATS)

The Alien Tort Statute is a jurisdictional statute n22 that was enacted as a part of the first judiciary act of the United States in 1789. The ATS provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." n23

[*6] While the legislative history of the ATS is unknown, n24 it is likely that Congress may have had the fight against piracy n25 or possibly prize jurisdiction in mind. n26 This is because universal jurisdiction over pirates (and likewise, war criminals) has never been questioned by foreign states n27 Of course, another possibility is that it was enacted to demonstrate to foreign powers that the new U.S. government was in fact committed to the rule of law. Regardless of the motivation behind its creation, it is important to note that until it was "dusted off" for the case of Filartiga v. Pena Irala n28 in 1980, the ATS had been invoked only twice in its 209 year history. n29

In Filartiga the plaintiff, an alien, successfully sued Americo Norberto Pena-Irala, the former Inspector General of Police of Asuncion, Paraguay (who, for jurisdictional purposes, was importantly present in the U.S. but not a U.S. citizen). In his federally filed suit, Mr. Filartiga claimed that the inspector had tortured his son, Joeltó Filartiga, to death while in Paraguay. n30 The essence of his cause of action was that an alien had been the victim of a tort committed in violation of the law of nations (i.e., torture), and as long as other jurisdictional requirements were met, this violation gave him grounds to claim damages in U.S. federal court under the Alien Tort Statute. The court ultimately agreed with Mr. Filartiga, determining that torture was indeed a violation of the law of nations and could be used as a valid basis for an ATS claim. n31 The court held that while torture may not have been against the law of nations at the time the ATS became the law of the United States, international law had evolved to include it - and as a consequence of that evolution, the [*7] ATS could be applied to claims of torture. n32 In other words, the court concluded that the ATS grants a cause of action for violations of the law of nations as it is today, not as it was in 1789.

When defendant Pena-Irala appealed the circuit court’s decision, the U.S. Supreme Court did not grant certiorari to hear the case. n33 Though denial of certiorari has no binding legal effect in the U.S. federal court system, as a practical matter it does seem to imply that the Supreme Court did not believe the lower court misapplied the law in such an egregious manner as to warrant use of the Court's limited resources to rehear it. Thus, although there was no direct
"final word" on the matter from the Supreme Court at the time, Filartiga went down in human rights law history as the first modern U.S. case to resurrect and litigate the ATS successfully, and has further inspired litigation of a series of similar cases. n34

In that series of litigation, however, it became clear that there was some remaining confusion regarding whether the ATS granted an independent substantive cause of action for alien tort victims, or merely granted U.S. courts the jurisdiction to hear such a claim. Given another chance to hear an ATS case, the issue was recently decided by the U.S. Supreme Court. n35 In that case, the Court held that the ATS does not facially create an independent substantive cause of action. n36 Rather, the Court found that the statute grants jurisdiction in the United States to [*8] adjudicate torts in violation of the law of nations, n37 but only for that limited class of tort claims, only filed by defendants who do not hold U.S. citizenship. n38

The Supreme Court instructs that the plain meaning of the statute indicates that the tort must be in violation of the law of nations n39 and that the ATS (which has subsequently been renamed the "Alien Tort Claims Act" by the Court, in an effort to end any further confusion about its jurisdictional versus substantive nature) does not create a domestic claim independent of international law. Rather, it opens U.S. courts to hear substantive claims for torts that violate the law of nations, i.e., public international law. Depending upon which torts qualify as a violation of the law of nations, then, this holding could severely limit the viable use of the ATS in human rights litigation within the U.S.. Therefore, when considering the use of the ATS in future litigation, the question the litigants must investigate is this: what torts are also violations of the law of nations? How far can claimants go in pushing what a "violation of the law of nations" is? Though it is a newer violation than most on the recognized list of international wrongs, torture is not the only widely recognized crime against the law of nations. Genocide, waging wars of aggression, crimes against humanity, piracy, slavery, and probably conspiracy to commit any of these substantive offences are also crimes against the law of nations, especially when one takes into account the recent work of international criminal tribunals. n40 On a more domestic level, it is interesting to note that, in a common law system like that of the U.S., for every intentional tort there is a corresponding crime. Consequently, all of these crimes are also torts and, although courts do not seriously question this proposition, are potential grounds for legitimate ATS claims. While common law crimes and common law intentional torts do correspond to each other, a common law torture could only arise out of a crime under international law if international law is a part of the common law - which is the case in the United States and all common law countries examined by this author.

Filartiga has since inspired at least two dozen cases litigating ATS claims that directly address the question of whether or not the tort [*9] claimed is in violation of international law, and even more cases where the ATS was not the basis of the claim but was mentioned. n41 This issue is important enough that the Supreme Court has directly addressed the ATS in at least three contemporary cases, while refusing grants of certiorari in others. n42 For example, in the cases of Saudi Arabia v. Nelson, n43 Argentine Republic v. Amerada Hess, n44 and Sosa v. Alvarez-Machain n45 the Supreme Court did not question the legality of the ATS under international law. In all three cases however (two of which are discussed in detail infra) liability was denied.

Not only has the Supreme Court failed to reject outright the use of the ATS to litigate claims before U.S. courts, Congress has even expressed its approval of the use of the ATS and extended a remedy to U.S. citizens as well as aliens for torture and extra-judicial killing by enacting the Torture Victims Prevention Act (TVPA). n46 The TVPA establishes that violations of international law - specifically torture and extra-judicial killing - can be litigated before U.S. courts by private litigants, even where the victims are U.S. citizens. n47

a. The Limits of the ATS and Private Claims under International Law

While most of the law of the ATS is clear, there are some claims, which, while theoretically possible, the Supreme Court has yet to indicate if they are supportable under the ATS. These questionable or "exotic" theories of liability are briefly discussed here to expose the furthest possible reach of the ATS.
Can the ATS remedy an expropriation, i.e., a seizure or nationalisation of property without compensation? Is there a right under international law to just compensation for nationalisation of property? It can be argued that U.S. law does not recognize a right under international law to compensation for expropriations overseas. n48 Comparatively, human rights treaties such as the European Convention on Human Rights have recognized a right to compensation under international law for expropriations overseas. n49 For example, the cases of Loizidu v. Turkey n50 and Brumarescu v. Romania n51 recognized a right to compensation or restitution for nationalisations under the European Convention on Human Rights. n52

In Brumarescu, the plaintiff’s house was nationalised by the Romanian government in 1950. n53 That nationalisation was wrongful in the sense that under Romanian domestic law, the Brumarescus should have been exempted from nationalisation. n54 The State sold the house in 1974 to a third party, and the house eventually passed by inheritance to the Mirescus. n55 The European court recognised the right of the Brumarescus to compensation. n56 Similarly, in Loizidu, the plaintiff claimed that the Turkish government had wrongfully seized his property during the illegal invasion and occupation of northern Cyprus. n57 The action taken by the court in Loizidu - essentially holding that Turkey had wrongly taken the property without providing appropriate compensation under Article 50, and asking for further submissions from the parties - can arguably be seen as a recognition of the right to compensation for the wrongful seizure of land. n58

To be fair, the holding in Brumarescu could have been limited by the fact that the nationalisation was not in the public interest but in the interest of private persons. n59 Similarly, the result in Loizidu could have been affected by the fact that Turkey had no legal right to invade Cyprus, and thereby violated the Charter of the United Nations. n60 The reach or international applicability of these ECHR rulings can further be limited when considering the lead U.S. case on expropriation, Banco Nacional de Cuba v. Sabbatino. n61 In that case, which concerned the nationalisation of foreign assets in Cuba by the Cuban government, the United States Supreme Court was not willing to recognise a principle of compensation for expropriation as part of international law. n62 This was partly because the now defunct Soviet bloc clearly did not recognise such a right, which the court relied upon in making the case more a question of choice of law than a right to compensation. n63 In addition, it is important to note that Sabbatino was decided prior to the "rediscovery" of the ATS as a tool for litigation of international crimes in U.S. courts.

The case of Bigio v. Coca Cola is a better and more recent example of a direct attempt to use the ATS to remedy expropriation. In Bigio, Coca Cola bought land that was nationalized by Egypt and sought compensation for its loss. n64 As has been seen before in U.S. courts, the decision intimated that mere expropriation - even when based on religious discrimination - is not a violation of the law of nations, but again, without directly saying so. n65 In the end, the case was not decided on the question of whether an uncompensated expropriation would be a violation of the law of nations, but rather on the narrower issue of state action. n66

Thus, in Sabbatino and also implicitly in Bigio, it could be said that U.S. courts did not find that uncompensated takings constitute a violation of the law of nations under the ATS or any other theory of law. n67 It can be further argued that those decisions are evidence that no such principle exists as a custom of international law. However, those cases were not decided on the basis of U.S. domestic law, but rather on the U.S. opinion as to what "the law of nations" is. n68 Clearly, then, answering the question of what "the law of nations" consists of is essential to successfully making ATS expropriation claims in the future. At this point, it seems that in U.S. courts there is no right to compensation for expropriation. Meanwhile, there does seem to be such a right according to recent European cases - depending on the facts and circumstances. If Loizidou and Brumarescu are not limited either to Europe or to their facts (illegal nationalisations) and were, despite Sabbatino and Bigio, evidence of a general right to compensation or restitution under international law, the question of compensation or its correct measure still remains unanswered. n69 This is important because if "violations of the law of nations" can evolve over time, the unsettled areas of international
law present the most promise for future viable ATS claims.

ii. Can an Environmental Tort Violate the "Law Of Nations" under the ATS?

The human rights movement strives to protect not only procedural rights (due process), aesthetic interests (freedom of religion), and political rights (freedom of speech) but also substantive interests - including the right to a clean and healthy environment. International law clearly recognizes environmental protections - which raises the question whether an environmental tort under international law could also be a "violation of the law of nations."

Unfortunately, few ATS environmental cases have been litigated in the U.S. as yet, and of those few, this author is not aware of any that have reached the merits. Even still, while generally disposing of environmental claims on procedural grounds, several courts presented with such claims have indicated (in dicta or by implication) that an environmental tort might violate the law of nations - and thus be the basis for a claim under the ATS. One such example can be found in Aguinda v. Texaco, where the court noted that while "environmental torts are unlikely to be found to violate the law of nations," it did not say that such claims are impossible - just unlikely.

The leading ATS environmental cases are Jota v. Texaco, Aguinda v. Texaco and Beanal v. Freeport McMorrant. Although Beanal v. Freeport was dismissed summarily, it was not due to the impossibility to plead an environmental claim, but for failure to allege with sufficient specificity those facts, which would, if true, support a court's finding of the existence of an environmental tort in violation of the law of nations. Essentially the plaintiff's claims were too factually vague to support any legal argument. Thus, in Jota, it would be imprudent to exclude the possibility that a properly plead claim for an environmental tort would have legal validity, just as in its successor case, Aguinda. In that case - which was brought before the same court that had recently remanded Jota - Texaco was sued in the United States for the pollution caused by its petroleum operations in Ecuador. The court promptly dismissed it, although this time it did not dismiss for failure to state a claim, but rather based on forum non-conveniens grounds. Once again it seems that a procedural rather than substantive issue proved to be the death knell of the case. This fact still leaves the possibility that because it did not dismiss for failure to state a claim, then it remains arguably possible for an environmental tort to, at some point, be the basis of an ATS claim.

Perhaps the most famous case where an environmental tort was asserted as the basis of an ATS claim is Bano v. Union Carbide. This complaint was filed against the defendant due to a toxic gas leak that killed 1,000 people. Following the earlier lead of other U.S. courts faced with environmentally based ATS claims, the court in Bano did not reach the issue of whether an environmental tort could violate the law of nations. Again, the merits were left untouched for procedural reasons: the court found that the parties to the case had made valid settlements of several of the claims under Indian law, which explicitly precluded the ATS claim. Once again the question of whether an environmentally based violation could be the basis of an ATS claim was left unanswered.

The pattern does not stop there. In Beanal v. Freeport McMoran, a gold mining company operating in Indonesia was sued in Louisiana for an environmental tort, specifically relating to pollution caused by its gold mining operations in Indonesia. Once again the court dismissed the case because of a lack of specificity in the factual pleadings, and not the substance of the claim itself. This time, however, the court took care to point out in dicta that where the consequences of the tort remain within the territory of one sovereign State, there is no violation of the law of nations.

In Bano, Freeport, and Aguinda the consequences of the tort were all within the territory of one sovereign State - and thus, according to the 5th Circuit's reasoning, were not in violation of the law of nations. This raises the possibility that even if the courts in question had reached the merits, they may have found for the defendants anyway. In Freeport and Aguinda, though, the plaintiffs were dismissed because they did not aver facts with sufficient specificity and connect them to the relevant law. In other words, they were dismissed for vague pleading, not for failure to state a valid claim in the first place. But for the procedural problems, it could be concluded that these cases stood a chance for hearing on the merits; further, it may be that some procedurally sound environmental ATS case may be heard in the
At this point, it appears to be undetermined whether an environmental tort could be a violation of the law of nations, and if so whether such a violation would be sufficient to support a claim under the ATS. Whether an environmental tort is or isn't a valid basis for an ATS claim currently, it does seem that if such a tort qualified as a violation of international law then it could also qualify as the basis for a claim under the ATS in the future. While the U.S. is unlikely to recognize them as such in the near future, the chance that environmental torts could become a violation of international legal standards is reasonably high given that there are several international treaties on maintaining and even improving the environment. Per traditional rules of customary international law and as these treaties ripen over time, the U.S. will be bound by their terms - even as a nonsignatory, as is the case with most of these treaties - since it has yet to formally object to any of them. To the extent international law recognizes environmental torts an environmental tort basis for an ATS claim would be possible.

iii. Cultural Genocide?

Genocide - or killing with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" - is clearly a crime under international law. A question that remains unanswered is whether there is a corresponding crime of "cultural genocide" in international law, that is, targeted destruction with the intent to eliminate an entire culture, as such. While "Cultural genocide" may seem like an exotic idea to some, it isn't so hard to imagine a possible scenario: A Kurdish minority in country X is denied religious freedom by the elite governing Arab majority of country X. That minority has been subjected to chemical attack, and has seen their monuments and cultural manifestations systematically destroyed by the central government. Would the Kurds in country X have a claim for the destruction of their environment and/or cultural genocide? What about Kurds in neighbouring country Y?

In fact, as exotic as it may seem to bring such a claim in a U.S. court, "cultural genocide" was alleged (and rejected, due to defective pleading) in the Beanal v. Freeport McMoran complaint. While this effort at legal recognition of cultural genocide may have failed, human history is replete with attempts at destruction not only of various groups of people, but also of various cultures. One small example - albeit mild compared to government sponsored efforts in Australia and the United States designed to systematically assimilate and destroy native cultures - might be the people of Quebec, who for centuries lived as second class citizens under an officially monolingual regime. Might such linguistic repression constitute a form of cultural genocide? Given that genocide is a serious crime rising to the level of a jus cogens violation, the answer is probably not. However, suppression of minority language and destruction of religion, combined with other acts of "ethnic hygiene" such as forced sterilisation, forced adoption, and confinement on reservations might lead to a plausible claim of "cultural genocide." All of these acts have occurred in genocidal campaigns in the past. As noted above, many aboriginal peoples have suffered confinement on reservations and wars of extermination. This, in combination with linguistic repression and forced removal from the cultural group could fairly be called cultural genocide, if not qualify under the classic legal definition of genocide. The question really becomes this: is cultural genocide a wrong that rises to the level of international recognition, such that it should qualify as a tort in violation of the law of nations?

While Freeport does not tell us whether cultural genocide is a tort in violation of the law of nations, it seems that cultural genocide has some potential to acquire the status of an internationally recognized wrong at some point in the future. In truth, few litigants have dared to bring the claim into U.S. courts, probably based on a reasonable assumption that such a novel complaint is doomed to failure. Nonetheless, creative advocates may wish to try out this exotic sounding claim by alleging the required specificity of facts and linking those facts to legal texts and theories. As is increasingly the case with the "newer class" of international torts - such as human trafficking and ethnic cleansing - the more the facts and claims are alleged and discussed in court proceedings, the more likely they are to be accepted within the evolutionary customary international legal structure as internationally criminal wrongs. Of course, while there is reason to remain hopeful, it is also important to recognize that cutting edge claims like "cultural genocide" are unlikely to succeed in the very near future. Evolution of any kind, particularly of the international legal variety, takes time.
3. The Torture Victims Prevention Act (TVPA)

As mentioned above, Congress recognised, approved and expanded the court's ruling in Filartiga by enacting the Torture Victim Protection Act (TVPA). In sum, the purpose of the TVPA is to punish extra-judicial torture and killing. As a result, "private" torture may be recognised as a violation of the TVPA where the torture occurred "under color of law."

Unlike the ATS, which is limited to jurisdiction and only concerns aliens, the TVPA does not address jurisdiction alone and creates a cause of action in tort for U.S. citizens and aliens. While its intent and function may seem clearer on its face than the ATS, there is still considerable debate about whether a corporation - generally considered a legal person under U.S. law - can be liable under the TVPA. Determining whether or not the TVPA applies to corporations is deeply important to human rights litigation, for the simple reason that corporate entities are often confronted with allegations of extreme wrongdoing and often there is no one (or even human) person that can be held accountable for it. The TVPA unfortunately uses the term "individual" within its text, which tends to militate against finding that corporations may be liable for torture. While this vagueness may have been intentional or not, the purpose of the statute is to suppress torture and could theoretically be extended to actions of corporations in order to achieve that goal.

Like the ATS, the TVPA requires exhaustion of local remedies, but uniquely and specifically authorizes a generous ten-year statute of limitations for all claims. This is much longer than most standard tort claims statutes of limitation, which usually allow between two and three years to file a claim. Despite the fact that the ATS itself is silent as to any limitation, this ten year statute of limitations is now applied to the ATS due to the 2002 holding of the Third Circuit in Papa v. U.S. While this may have caused a bit of uproar at the time, the fact remains that at common law a legal claim has no time limitation. Thus, in exact opposition to those who believe that the ATS should be held to the same two-or three-year limit of all other tort claims, it could be argued that despite the holding in Papa, an ATS case is subject to no statute of limitations. In any event, the court held that ATS/TVPA claimants have a much longer statute of limitations than ordinary tort litigants not only for purposes of uniformity, but also due to the evidentiary difficulties in such cases.

The ATS and TVPA are the two principle weapons for private law claims before U.S. courts and should comprise the "core" of any such claim. This article now looks at other claims which also have at least theoretical potential for success but which are nonetheless not as likely to be recognised. These claims are presented in descending order of probability of their acceptance by the court.

a. Corporate Accountability

Does the TVPA create a cause of action against corporations? As stated above, the statute speaks of suits against an "individual" (the term used in the TVPA). Unfortunately, English is an imprecise language. Thus, rather than refer to "natural persons" and "artificial persons" to indicate human and corporate persons the law refers rather loosely to "persons," "individuals" and "corporations." This imprecision is unnecessary and the result of poor drafting. This produces a facial ambiguity as to whether the term "individual" in the TVPA means only natural persons or artificial persons as well. Given this ambiguity, one should look beyond the plain meaning of the term "individual" and examine the purposes of the legislation to determine its meaning. For instance, in enacting the Foreign Corrupt Practices Act (FCPA), the U.S. Congress demonstrated a willingness to extend the word "individual" to control the legality of U.S. corporations operating outside of U.S. territory. Thus, based on this information, the better argument is that the term "individual" was intended to subsume both natural and legal persons.

b. State Action/Color of Law
Generally speaking, private acts are not punishable under international law - and public actors are often immune. This legal "blind spot" explains why private law remedies have arisen to impute liability either to states (FSIA) or private actors (TVPA, ATS). However it is an open question whether and to what extent the ATS or TVPA requires state action to be invoked against non-state actors.

It is clear that for some violations of international law (such as piracy) no state action is required for the ATS to apply. However, this is not yet true of torture, which as a general rule provides that private acts are not violations of the law of nations since there is no state action. State action is required because, traditionally, only states are subjects of international law. However that rule increasingly admits of exceptions (certainly international organisations, but also perhaps multinational corporations, sub-state entities, and even private persons may enjoy limited international legal personality) such that it could be argued that even private acts in violation of international law could trigger ATS liability. At the same time, officially sanctioned public torture, such as occurred in Saudi Arabia v. Nelson may be subject to immunity on the questionable distinction that while the act of torture is illegal under international law, other states are not obligated to remedy it.

In Nelson, the plaintiff worked at a hospital in Saudi Arabia, and noted safety violations with the oxygen system. Local police subsequently imprisoned Nelson for several weeks, beaten, and kept him in shackles. While the defendant in the case was the government of Saudi Arabia, the court focused on the actions of police rather than the hospital and concluded that these actions were governmental and not commercial in nature. Thus the Saudi government was found to be immune from suit under the Foreign Sovereign Immunity Act.

A recent decision of the European Court of Human Rights (ECHR), Al-Adsani v. United Kingdom is factually similar to Nelson v. Saudi Arabia. Al-Adsani, a pilot in the Kuwaiti Air Force, was tortured by the Kuwaiti government apparently for distributing salacious tapes of an important sheikh. The plaintiff was not only beaten and threatened but was severely burned, ultimately requiring treatment in Britain. Aside from the gravity of his injuries, the facts of his case parallel those of Nelson. The legal issue in Al-Adsani was the immunity of a state (as opposed to an individual) for officially sanctioned torture. Citing Nelson and Amerada Hess (among others), the ECHR found Kuwait to be immune. Like the case of Sampson v. F.R.G., Al-Adsani relies on the tenuous distinction that while states themselves may not violate their jus cogens obligations, those obligations do not require states to create remedies for their breach by other states. Thus, as shocking as it may seem, a state can grant sovereign immunity for violations of even jus cogens norms. At least in theory, however, an erga omnes norm (by definition more egregious) cannot be immunized.

Though a state can grant immunity to a foreign state - and even to the officials of a foreign government - the defense of immunity is not absolute. There is an increasingly recognized principle of international law "aut dedire aut judicare" which provides that a state must either extradite or judge. In fact, this principle is explicitly incorporated into the Convention Against Torture. Thus, a State that denies jurisdiction due to immunity may still be required to extradite the defendant to a jurisdiction where they can be tried. Conversely, however, no State may extradite a defendant to another State, which commits torture.

Returning to the ATS and TVPA, it is important to note that because the private torturer is not acting under state authority, there would be no violation of the law of nations for his acts, and thus no claim for liability under the ATS or under the TVPA. Torture by non-state actors may create liability under the TVPA, however, if that party has acted "under color of state authority." Interestingly, the "color of state authority" doctrine has its roots in U.S. domestic law, and how or why its status under international law is relevant remains a mystery. Of course, the substantive claims of the TVPA are based on domestic U.S. legislation - but that is not the case with the ATS, which incorporates "violations of the law of nations" into its list of possible grounds for complaint. At any rate, the theory of liability for non-state actors acting under color of state authority is expressly incorporated into the text of the TVPA. Under the "color of state authority" theory, the non-state actor may be said to have acted under color of law, and thus meet the "state action" requirement where it acts in concert with state officials or with significant state aid.
Several tests have been suggested by courts to determine whether an action falls "under the color of state authority." These include the public function test (does the non-state actor fulfill a public function?), and the nexus test (how close are the contacts of the state and non-state actor?). Of course, with these tests, the closer the cooperation between the state and non-state actor, the more likely the finding of state action. Yet another test is the "state compulsion test," which examines whether the private non-state actor essentially was compelled to act by the state (did the non-state actor have a choice to act or refrain from acting?). Finally, the court may examine whether the action was undertaken jointly. If so, there is a greater likelihood of liability for the non-state actor.

4. Helms-Burton

The Helms-Burton Act is a U.S. law that attempts to punish the Cuban government and grant a remedy to expropriated property holders who lost title to their properties in Cuba due to nationalisation. Unlike the other private law remedies, the legality of Helms-Burton is hotly contested even by allies of the United States. Consequently though Helms-Burton exists on the books, it is not enforced and as a result the issues Helms-Burton raises have yet to be clarified.

Under Helms-Burton, "trafficking" in property expropriated by the Cuban government permits seizure of the converted assets - including treble damages, attorney's fees and court costs. Thus, Helms-Burton essentially creates a private claim against successors in interest to the expropriated property. Generally speaking the claimed property will not be found in, nor was the expropriation committed in, the United States. Further because Helms-Burton imposes treble damages, it is perceived as imposing criminal sanctions. Treble damages in tort are not recognized by civil law jurisdictions because compensation, not punishment, is the purpose of tort law in the civilian legal system.

This raises the question whether Helms-Burton is legal under international law. Generally speaking, international law in its sources and structure parallels civil law. Thus if treble damages are not allowed in tort under civil law they likely would not be allowed under public international law.

Additionally, some scholars argue that Helms-Burton is an example of extra-territorial jurisdiction gone too far. While those critiques recognise a right to compensation for expropriation under international law, they argue that the transfer of title, while wrongful and thus vesting a right to compensation, is nevertheless valid as an aspect of the state's sovereignty. Essentially criminalizing expropriations through the quasi-penal sanction of treble damages clearly goes too far as a matter of international law, which requires that the remedy of self-help must be proportional to the injury. While assessing attorney's fees and court costs would be legitimate under international law, treble damages would not because they are a penal rather than civil remedy. The first step in normalising Helms-Burton for application outside of U.S. territory would be to remove or waive the treble damages provision. claims in U.S. law, this article now considers the jurisdictional and procedural obstacles to the enforcement of those claims.

III. Universal Jurisdiction under U.S. and International Law

Laws such as the ATS which provide extra-territorial effect to private individual rights can be legal under international law. To evaluate when this occurs requires an examination of some basic principles of international law.

1. Universal Jurisdiction in International Law

The problem presented by private rights of action in international law is jurisdictional. To support the claim that these private rights of action are consistent with international law requires a brief discussion of the pertinent international jurisdictional principles.
Jurisdiction to Adjudicate, Prescribe and Enforce

Private international law - known in the United States as conflict of laws - normally distinguishes between jurisdiction to adjudicate, prescribe, and enforce. We examine each of these three aspects of jurisdiction in order to determine the international legality of the U.S. creating private rights of action under international law.

i. Jurisdiction to Adjudicate

Jurisdiction to adjudicate is the power of a court to hear a case regardless of the law, which the court applies (its own law, international law, or the law of a foreign state). The exercise of jurisdiction to adjudicate represents the smallest possible invasion to a foreign state's sovereignty, and as such is generally not problematic. Just to determine whether the parties belong in this court requires an exercise of jurisdiction to adjudicate, even if the decision is that the plaintiff must in fact go elsewhere.

ii. Jurisdiction to Prescribe

Jurisdiction to prescribe is the power of a court to apply its own national laws to a case before it. The problem here is that the exercise of jurisdiction to prescribe by the United States in cases with connections to foreign states or their nationals - either the parties or place of the transaction - infringes to some extent on the sovereignty of that foreign state.

Where there are no territorial contacts between the act and the state, states may nevertheless have jurisdiction to prescribe based on a theory of active personality, passive personality, protection, or territoriality (among others). In cases of active personality, the perpetrator is a national of the state seeking to exercise jurisdiction. In cases of passive personality, the victim is a national of the state, which seeks to exercise jurisdiction. In cases of the protective principle, extraterritorial jurisdiction is asserted over emanations of the legal personality of a state outside of its own territory, such as its embassies and currency. Though contentious, these principles can be the basis for the exercise of jurisdiction to prescribe under international law.

iii. Jurisdiction to Enforce

Jurisdiction to enforce is the exercise of the enforcement power of a state’s organs - usually the executive. Exercise of jurisdiction to enforce outside of U.S. territory is the greatest possible invasion of another state's sovereignty that an exercise of jurisdiction presents. Examples have included abducting a defendant rather than extraditing him, which was held to be an illegal exercise of jurisdiction to enforce. Fortunately, such examples are rare because extradition is normally available.

b. Relative and Absolute Universal Jurisdiction

Under what circumstances does international law permit extraterritorial jurisdiction? The concurring opinions in the recent decision of the International Court of Justice in Congo v. Belgium distinguishes between (absolute) universal jurisdiction and universal jurisdiction properly speaking. In that case Abdulaye Yerodia Ndombasi, the Congolese minister of foreign affairs, was indicted by Belgium for war crimes during his term of office. Although during the court proceedings his term of office ended, he raised the affirmative defense that at the time of indictment he enjoyed ministerial immunity. The court upheld that defense to the disappointment of human rights advocates. Critiques of this decision correctly point out that if this logic had been followed after the Second World War the International Court of Justice would have granted Nazi war criminals immunity for their atrocities.

Some judges make a novel distinction in separate opinions between "absolute" and "relative" universal jurisdiction ("compétence universelle" and "compétence universelle par défaut"). That distinction illuminates the
legality of ATS/TVPA type cases and the limits international law imposes on them.

According to these opinions absolute universal jurisdiction (competence universelle par defaut) is asserted when the state exercising jurisdiction to prescribe has no link to the act over which jurisdiction is asserted. For example, where neither the act occurred nor the defendant is located in the territory of the state, and it did not involve any of the states own nationals, there is a "defaut" (absence, default) of the defendant and any exercise of jurisdiction is considered universal in the widest sense of the term (i.e., "absolute"). In contrast, where there is some connection between the act over which jurisdiction is exercised, and the territory or nationals of the state exercising jurisdiction to prescribe, we can speak of relative universal jurisdiction or "competence universelle" (there is no absent defendant or absent act).

The ICJ in Congo v. Belgium implies that relative universal jurisdiction is permissible under international law and draws a distinction between absolute universal jurisdiction and relative universal jurisdiction. It does not determine when or whether absolute universal jurisdiction is permissible, though the ancient example of pirates and the modern example of war criminals indicates that in some instances absolute jurisdiction is admissible under international law. Pirates, like war criminals, are hostes humani generis, enemies of all mankind, and as such are subject to absolute universal jurisdiction. War criminals, mass murderers and those who torture are also enemies of mankind and as such are subject to absolute universal jurisdiction because they violate jus cogens norms. Relative universal jurisdiction, where the defendant is found on the territory of the aggrieved state, is a lesser infringement on another state’s sovereignty than absolute universal jurisdiction. An exercise of relative universal jurisdiction would therefore be more likely to be seen as consistent with a state’s international obligations.

While Congo v. Belgium does not address the issue of the permissibility of absolute universal jurisdiction, state practice is increasingly admitting absolute universal jurisdiction. Thus, a maiore ad minus, relative universal jurisdiction is probably valid under customary international law.

Absolute universal jurisdiction remains somewhat controversial, particularly in criminal cases. However in some cases, for example piracy and war crimes even absolute criminal jurisdiction is permissible under international law. States may legally exercise their power to prescribe outside of U.S. territory under 1) a theory of passive personality, wherein a state can prosecute crimes against its nationals 2) a theory of active personality, wherein it prosecutes its criminal nationals, or 3) under the protective principle which permits a state to defend emanations of its sovereignty outside of U.S. territory such as its currency against counterfeiters. While these are not the only theories under which jurisdiction to prescribe may be legally exercised, they are the primary examples. Absolute universal jurisdiction is less problematic in civil cases because there is no question of the state exercising power over a life or liberty interest but merely over a property right.

c. The Character of ATS Type Cases

i. Are ATS type cases criminal or civil?

The answer to this question helps to determine whether they assert relative or absolute universal jurisdiction. If they assert relative jurisdiction they are more likely to be valid under international law. Similarly, if they are civil and not criminal claims they will be more likely to be valid under international law.

Some aspects of the common law of torts seem penal to a lawyer in the civil law system particularly, for example, punitive damages. However it is important to note that a tort claim is initiated by a private person, not the state. This distinction is important because, unlike criminal suits, in tort there is no risk to the defendant of a loss of liberty. This explains why, despite the possibility of punitive damages, tort law is, from a common law perspective, civil and not penal. Regarding the question of whether an ATS type case is sustainable under international law, these statutes are more likely to succeed as a civil claim if punitive damages are waived or eliminated.

If an international tribunal such as the ICJ where to determine that an ATS type case was criminal and not civil
(because of the possibility of punitive damages) then the argument should be made that although criminal, they are admissible as examples of relative universal jurisdiction under the passive personality principle. However, although this approach may be successful, the better argument is that the ATS and TVPA are simply private civil claims and are not criminal claims because they do not propose to imprison defendants.

The U.S. does exercise passive personality criminal jurisdiction in cases of terrorist crimes. But it does not generally recognize passive personality jurisdiction for ordinary torts. Therefore the argument that the ATS and TVPA are exercising passive personality jurisdiction is generally not a strong one, though in the particular facts of a specific case it may be debatable. One such example of might arise where a U.S. citizen sues a foreign person for torture it could be argued that the statute is asserting passive personality jurisdiction.

ii. Are ATS type cases examples of relative or absolute universal jurisdiction?

The ICJ has recently developed the concepts of relative and absolute universal jurisdiction. Which of these two categories the ATS falls into is a yet unanswered question in U.S. law. Unlike relative jurisdiction, absolute universal jurisdiction does not require territorial presence for a state to exercise.

Under U.S. domestic law a defendant must have "minimum contacts" to the U.S. before the personal jurisdiction can be exercised over a defendant. In theory it could be possible to own property and transact business within the U.S. and thus have sufficient contacts for U.S. personal jurisdiction in rem or quasi in rem without ever being physically present in the United States. In that case the exercise of universal jurisdiction would be absolute. As a practical matter, however, U.S. procedural laws restrict jurisdiction such that one can presume that absent the physical presence of the defendant there will be no U.S. jurisdiction. Therefore the ATS is most commonly considered an example of relative universal jurisdiction.

One could argue that the TVPA, and possibly also the AEDPA and Helms-Burton, assert jurisdiction under the passive personality principle. The TVPA and AEDPA, unlike the ATS, grant remedies not only to foreign nationals but also to U.S. citizens. Although the legitimacy of passive personality jurisdiction in international law is controversial because it involves an extraterritorial application of a state’s criminal laws and thus infringes on other states' territorial sovereignty: several states including Germany, France, Belgium and the Netherlands allow it. Additionally, the national laws of such nations generally incorporate international human rights conventions.

iii. Conclusion: ATS type cases are examples of relative universal jurisdiction in civil, not criminal, law and are therefore legal under international law.

The ATS, TVPA and related statutes are more likely to be seen as civil rather than criminal and therefore more likely to be seen as asserting relative universal jurisdiction than absolute jurisdiction under international law. Because this characterisation may depend on the facts of the actual case at hand the author recommends understanding international law in order to correctly contextualise the facts. Though universal jurisdiction is more contentious than passive personality jurisdiction, relative universal jurisdiction is recognised as a permissible basis of jurisdiction under international law. The exercise of jurisdiction to prescribe in ATS type cases may be valid on the basis of the passive personality principle.

Policy considerations may also support interpreting the TVPA as an example of relative universal jurisdiction. Arguing that the TVPA asserts absolute universal jurisdiction might risk undermining the existing international acceptance of relative universal jurisdiction. The TVPA is already sufficiently controversial because it creates a private cause of action for individuals - traditionally not considered subjects of international law. However, as this article has pointed out, this generalized and arguably outdated notion is riddled with exceptions.

The better view is that private law causes of action in U.S law are examples of civil, not criminal law, and assert
relative universal jurisdiction to prescribe. As such they are consistent with international law. Even as examples of absolute jurisdiction they would be permissible as to jus cogens claims. In decreasing strength (i.e. from an exercise of jurisdiction most likely to be legal under international law to an exercise of jurisdiction least likely to be legal under international law) the claims could be supported as absolute jurisdiction either as: a) private law civil claims or b) as criminal claims under the passive personality principle. [*33] the protective personality principle, or possibly even the active personality principle.

A strong argument can be made that the U.S. has jurisdiction to prescribe in ATS type cases, at least as to those torts which are also violations of jus cogens, because these U.S. laws are consistent with U.S. obligations under customary international law. Although jus cogens obligations do not impose an obligation on states to remedy other state's violations of jus cogens n197 states certainly are allowed and even encouraged to enforce jus cogens obligations. This argument may tip the scales when the court balances competing interests to determine, for example, whether it has jurisdiction or whether the principle of comity should act as a bar to adjudication. Knowing that taking jurisdiction would affirm and support U.S. jus cogens obligations may persuade the court to hear the case.

Though there are few international obstacles to finding U.S. jurisdiction to prescribe in these cases there are formidable domestic procedural obstacles to litigating these private law claims. These procedural obstacles essentially limit the effectiveness of the statutes to provide compensation and or restitution for a defendant's injuries and to deter state or non-state actors. We now turn our attention to a detailed exposition of these domestic obstacles, which is intended to demonstrate how to overcome them and to show why and how they should be lowered.

2. Universal Jurisdiction and Procedural Defenses in U.S. Law

a. Jurisdiction

Internationally, the distinctions are clear: states may exercise jurisdiction to adjudicate (to hear cases before their own courts), to prescribe (to apply their own national laws to cases adjudicated before their courts) and jurisdiction to enforce (the exercise of executive power to enforce judgments). Nationally, U.S. federal jurisdiction distinguishes between subject matter and personal jurisdiction with personal jurisdiction being able to be obtained in personam, in rem or quasi in rem. Jurisdiction to adjudicate under U.S. federal law is the conjunction of personal and subject matter jurisdiction. n198

[*34] To obtain jurisdiction to adjudicate in the federal courts of the United States, n199 one must first prove that the court has subject matter jurisdiction. n200 Examples of federal subject matter jurisdiction include federal questions such as taxation or admiralty, or diversity of citizenship between plaintiff and defendant (whether between citizens of different U.S. states or between a U.S. citizen and a non-citizen). The Alien Tort Statute and the Foreign Sovereign Immunities Act both provide subject matter jurisdiction.

Having established subject matter jurisdiction the plaintiff must then prove the existence of personal jurisdiction. Personal jurisdiction in U.S. domestic law n201 is of three types: In rem, where the jurisdiction is obtained to determine the title to a specific object, in personam, which is jurisdiction to adjudicate any claim over the person, and quasi in rem wherein a piece of property within the U.S. owned by the defendant is attached and used as a basis to adjudicate a personal claim against the defendant. In all cases of personal jurisdiction minimum contacts must exist between the defendant and the forum state. n202

In cases of personal jurisdiction quasi in rem n203 the injury may have nothing to do with the property. However the remedy in cases of quasi in rem jurisdiction is limited to the value of the property used as the basis of jurisdiction. Because both in rem and quasi in rem jurisdiction are [*35] limited respectively to the value of the property concerned n204 in personam jurisdiction is preferred by plaintiffs.

In personam jurisdiction is itself of two types, either general or specific jurisdiction. n205 General jurisdiction
arises where the defendant has systematic and continuous contact with the particular U.S. jurisdiction. n206 In federal cases, the relevant jurisdiction is the United States, and not merely one of its states. n207 Specific jurisdiction arises when the defendant does not have systematic and continuous contacts, but rather, has merely sufficient, minimum contacts with the U.S. jurisdiction. n208

While general jurisdiction permits any and all claims to be litigated against the defendant, specific jurisdiction is limited to those claims, which arise out of, transpire in, or affect the forum. n209 Because of this, general jurisdiction is preferable: The more connections, whether by presence, property, or contract, the greater the likelihood of a finding of general jurisdiction. n210 If the defendant has no contacts there will be no jurisdiction.

These jurisdictional requirements are the first obstacle to finding liability under the ATS. For example, in the case of An v. Chun, n211 Young-Kae An sued (among others) General Doo-Whan Chun, General Tae Wooh Roh, and several other military leaders, alleging they tortured his father to death. The case, though factually similar to Filartiga, was dismissed due to a lack of minimum contacts (i.e. no personal jurisdiction because defendants had no property or business interests in the U.S.). Although, defendants did visit the United States occasionally, their visits as government employees did not trigger general jurisdiction. n212 Additionally, while the defendant visited the U.S. at least once on vacation, that was not considered a sufficient "minimum contact” for specific jurisdiction. n213 This is not the only case where substantive justice was denied for an ATS claim due to procedural reasons of domestic U.S. law. The presence of these procedural obstacles (and the practical limitation of reaching the assets of foreign defendants) explains why the ATS is not as effective a remedy as it could be.

Jurisdictional obstacles, however, do not always block remedies. An v. Chun should be contrasted with Wiwa v. Royal Dutch Petroleum. In Wiwa, jurisdiction was found over a petroleum company, which only maintained an investor relations office in New York and traded shares on the New York stock exchange, despite the availability of a forum in England. n214

An v. Chun may have been complicated not merely by the political fact that Korea is a close ally of the U.S., but also by the question of ministerial immunity. Although it was decided based on jurisdiction, comity, or perhaps even immunity, may have been possible defenses had the case gone forward. Plaintiffs must remember that while the district courts can hear ATS type cases they are under no obligation to do so. In sum, proving personal jurisdiction and subject matter jurisdiction are only the first obstacles to be surmounted when making an ATS type claim.

b. Exhaustion

In theory, plaintiffs making claims under the TVPA and possibly also the ATS must first exhaust their local remedies. In practice, however, the realities of lawless regimes indicate that the requirement of exhaustion of foreign remedies will not be problematic for litigants. n215 This obstacle is more theoretical than practical.

c. Comity

Comity is another common defense that defendants often raise. n216 International comity has been defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation," n217 however, comity is a discretionary doctrine. n218 In essence, the forum jurisdiction basically decides that principles of fairness and/or judicial economy make it more appropriate for a foreign court to hear the case. n219

Comity also appears to have played a role in the determination not to remedy expropriation in Banco Nacional de Cuba v. Sabbatino,, n220 And in Bigio v. Coca Cola n221 and Wiwa v. Royal Dutch Petroleum n222 the appellate court remanded for further evaluation as to whether the principle of comity applied. Thus, litigants must seriously consider the question whether comity would block their proceeding. Since comity is "discretionary," it is difficult to find a satisfying answer as to when comity will apply, but it appears that it is more likely to be exercised in cases involving allies and states friendly to the United States.
d. Forum Non Conveniens

Another discretionary jurisdictional defense is forum non-conveniens. A precondition for a finding of forum non-conveniens is the existence of a foreign forum with jurisdiction to adjudicate. If such a forum exists and would not refuse the suit for discretionary reasons, the court must then balance the competing interests of the foreign forum against those of its own judiciary and the interests of the parties. Ordinarily the plaintiff's choice of forum will be respected, but compelling circumstances can cause a court to reject plaintiff's claim due to inconvenience to the court or the defendant. Essentially the inquiry of the court is whether the choice of forum by the plaintiff is oppressive to the defendant. If not, and if there are no compelling issues of judicial economy, the plaintiff's choice of forum will be respected. Thus forum non-conveniens is more objectively predictable than comity. However like comity, forum non-conveniens considers the foreign state’s interests in order to reduce the likelihood of an exercise of extra-territorial jurisdiction from injuring U.S. foreign relations.

[*38] In Wiwa v. Royal Dutch Petroleum, where an Anglo-Dutch company was sued in the United States for a tort committed in Nigeria, the forum non conveniens objection was accepted at trial but then rejected on appeal. The appellate court in Wiwa considered the substantive English law and balanced the interests of the U.K., the U.S., Nigeria, the plaintiff, and the defendant, in determining whether forum non-conveniens applied. Jurisdictionally, the court pointed to the fact that Shell is listed on the New York Stock Exchange and that Shell organises ancillary activities in the United States. In terms of forum non-conveniens, the court pointed out that although the trial court usually has the discretion whether to apply it, in this case the trial court had failed to consider two interests when balancing the interests of plaintiff, defendant, forum and foreign jurisdictions: Namely, the interest of foreigners legally residing in the United States to have access to U.S. courts and remedies, and (probably more importantly) the policy interest implicit in federal statute law to provide foreigners a forum for adjudicating claims of violations of the law of nations. In other words, the U.S. commitment to the rule of law is so important that when balancing competing interests it may tip the balance in favor of adjudication in the United States.

In Price v. Libya, the plaintiffs alleged general claims of torture and hostage taking without adducing the specific facts necessary to overcome the FSIA. The court remanded on the issue of torture, noting that plaintiff could amend their claim with the required specificity of facts. The case was remanded and ultimately Libya's defenses were rejected.

The court also rejected the claim of the Libyan government to protection as a "person" under the Fifth Amendment to the U.S. Constitution. Thus forum non-conveniens, while a potential defense, does not inevitably block a claim under private tort law for the violation of international law.

The basic lesson to lawyers here is clear: allege the facts needed with specificity to avoid summary disposition. If you are arguing that the defendant has committed torture then you must provide evidence and establish that they are subject to immunity under the FSIA - even in your pleadings. As Price demonstrates, this procedural restriction must be accounted for when litigating ATS/TVPA cases even though the plaintiff's choice of forum is ordinarily granted deference making the defense of forum non conveniens not particularly useful to defendants.

e. The Act Of State Doctrine

The act of state doctrine is another jurisdictional defense available for those who seek to avoid claims in U.S. courts. Historically, the act of state doctrine is based on notions of comity - and as such was, and possibly still is, also a discretionary remedy. The act of state doctrine addresses the desire to avoid embarrassing or possibly hostile confrontations with foreign powers. In substantive terms, the act of state doctrine arises where the relief sought or the defense asserted requires a court in the U.S. to declare invalid the official act of a foreign sovereign performed in its own territory. In determining whether this doctrine applies the court also considers whether the foreign sovereign acted in public interest. Accordingly a mere commercial act (acto jure gestionis) is less likely to be found to be an "act of state" whereas a sovereign act (acto jure impere) is much more likely to be found an act of state.
It is important to note that the act of state doctrine is not a shield for illegal activity. An action taken by a state official in violation of the state's laws, or the law of nations, is not an "act of state" because the act is illegal. Further, because the use of the doctrine represents a refusal of the court's usual duty to adjudicate cases before it, judicial review of the application of the act of state doctrine is not deferential.

f. The Political Question Doctrine

The political question doctrine, part of domestic U.S. law, is another obstacle that may defeat a plaintiff's suit. For example, in *Kadic v. Karadzic*, Radovan Karadzic, purported head of state for the Republic of Srpska, argued that the principle of state immunity precluded his being tried in the United States. He also argued that his presence in the U.S. was incident to purportedly legitimate political functions and accordingly his trial was political rather than legal - that is, Karadzic (not a U.S. citizen) invoked the "political question" doctrine.

The trial court did not address the issue of the constitutional rights of a non-citizen before U.S. courts. Instead the central issue in *Karadzic* was jurisdictional: under what circumstances may a foreign head of state, being sued in the United States based on presence on U.S. territory fall under the jurisdiction of the court. The court answered this by evaluating whether Karadzic's actions were of a "political" nature and therefore better left to a political rather than the judicial branch. The court found that Karadzic's presence on the United States territory, unless transiting to or from or within the United Nation's was a valid basis for jurisdiction. The court granted that Srpska might be a de facto state, but pointed out that because Srpska was not recognised de jure, Karadzic could not be considered immune as head of state of a recognised government friendly to the United States.

It is important to note that while the political question doctrine prevents the court from deciding questions, which are not in fact judicial but rather political, that is not to say that the court cannot decide a controversial case where reasonable minds may differ. The political question doctrine concerns political questions not political cases.

When is a case considered a political question? As in many other areas of American law, no hard and fast rule exists, however the Supreme Court in *Baker v. Carr* provided a number of factors that are used to answer this question. First, a commitment of the issue to a coordinate branch of government (i.e. the legislature or executive) will be strong evidence that the question is political rather than judicial. Secondly, an absence of judicially manageable standards or the impossibility of deciding the case without also making a policy determination can indicate that the issue is in fact a political question. Additionally, a finding that the case requires unquestioning adherence to a political decision already made or that the court's decision risks potential embarrassment by creating multiple conflicting pronouncements from different branches of government will weigh in favour of a finding of a political question.

The political question doctrine, unlike comity and perhaps the act of state doctrine, is not discretionary: rather it is founded on separation of powers.

There were political overtones to the case of *Kadic v. Karadzic*. In political terms, there were claims of genocide; in legal terms the defendant claimed to be the head of state of Srpska, and though Srpska was not recognised de jure it had several attributes of statehood, such as territory, population, and functioning government, and may even have had some de facto recognition. Despite these factual and legal questions (whether there was a genocide; whether Srpska had de facto recognition) no political question was found in *Kadic v. Karadzic*. This was primarily because the court evaluated the factors listed above and found that these particular issues were not the task of another branch of the U.S. government.

We can thus conclude the following: while there are real domestic procedural obstacles to claims under the ATS and related claims, notably forum non conveniens and comity, the political question doctrine does not present an insurmountable obstacle to plaintiffs. The grant of immunity, in contrast, may well present the most serious obstacle to litigants and is the last procedural obstacle, which we explore in depth.

g. Immunity
Immunity is of two types: immunity of the state itself, sovereign immunity, and immunity of the state's agents, official immunity. Official immunity is also of two types, absolute or relative. As was earlier mentioned, ministers and heads of state enjoy absolute immunity during their terms of office and relative immunity for their official acts after their term is complete (i.e. Congo v. Belgium, ICJ). Official Immunity is not a valid defense where the act was illegal under the law of the state. Thus in Filartiga v. Pena-Irala, where a foreign government official tortured and murdered people outside of his governmental role, that official could not claim immunity a priori because torture is illegal under international law and a violation of jus cogens - and a fortiori because the foreign domestic law clearly stated that torture is illegal.

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In theory comity could allow courts to "duck" hard issues, and in practice this sometimes still occurs. In Sampson v. F.R.G., Sampson, who had been interned in a concentration camp and forced to work during World War II, sued Germany and the Conference on Jewish Material Claims Against Germany, Inc. for compensation. Germany was held to be immune under the FSIA. Sampson, a pro se litigant, and an amicus brief argued for an implied waiver of immunity for acts in violation of jus cogens, but the court held that there is no implied waiver of immunity under the FSIA for acts in violation of jus cogens.

The court in Sampson noted the immunity of a foreign state prior to the enactment of the FSIA in 1952 was not founded on the Constitution. This implies that comity was one justification for the immunity of Germany. The court did not reach the argument whether claims for acts prior to 1952 would have been automatically immune, but implies that would be the case.

The distinction between not violating jus cogens and having the right not to remedy violations of jus cogens can be defended on jurisdictional grounds, particularly because of the international rule "aut dedire aut judicare" which is the idea that states have a duty to extradite or punish those who violate jus cogens. Further, ATS and TVPA cases are, after all, exercises of jurisdiction outside of U.S. borders. But the approach taken by the court in Sampson undermines the force of jus cogens and thus reduces stability in the international system to the detriment of long term U.S. interests. Further, it ignores the common law maxim: "For every right there is a remedy".

What use is Filartiga? One obvious application would be the war on drugs - whether in Latin America or South Asia. If, for example, a drug "baron" tortured persons and his henchmen were the only effective government in the region, then combining Filartiga v. Pena-Irala with Kadic v. Karadzic leads to the conclusion that the "baron" and his henchmen could indeed be tried in the United States and their fortune distributed to compensate their victims and the victims' relatives.

Whether defendants could be tried in absentia is outside the scope of this paper, however it is worth pointing out that one difficulty in these cases is securing the defendant's presence before a U.S court. Abduction of defendants is clearly illegal under international law. However, the local government, not the abductee, holds the remedy for abduction. Though in Alvarez Machain, n253 and Eichmann, n254 there was protest, in Argoud, n255 and Noriega n260 the sovereign did not complain when foreign powers kidnapped undesirable persons resident on their soil for trial outside of U.S. territory. Furthermore, protests by Mexico in Alvarez-Machain v. Sosa regarding an illegal abduction did not stop the United States from taking jurisdiction.

However extradited, perpetrators still have legal rights. Although official immunity is no defense as to acts prior to or following one's office, it does apply to heads of state during their tenure. This explains why it is difficult to try foreign heads of state such as Ariel Sharon or Agosto Pinochet. Official immunity did not however prevent trial of Manuel Noriega. While there is an obligation under international law to respect the immunity of heads of state and ministers during their term of office, after their term of office has expired, any immunity to the acts of state officials, acts prior to their term of office, and even perhaps as to unofficial acts during their term of office, is
granted at the discretion of the jurisdiction trying the case. Noriega, like Eichmann, does however raise the question of how far one sovereign can invade the rights of another sovereign to extradite the accused. That question is discussed infra. of the state’s agents, private law claims may be blocked by the sovereign immunity of the state itself. The general rule both within the U.S. and internationally is that the state is immune for its sovereign acts (acto jure imperii) but not for its commercial acts (acto jure gestionis). This distinction is reflected in U.S. national law in the Foreign Sovereign Immunities Act (infra). For example, when a Liberian (neutral) vessel outside the zone of exclusion was attacked by the Argentine air force during the Falklands war, with resulting property loss, there was no liability under the ATS due to the sovereign immunity of the Argentine government for its sovereign act. n260 We now discuss the FSIA at length because it is a key procedural aspect of extra-territorial jurisdiction of U.S. courts.

i. The Foreign Sovereign Immunities Act (FSIA)

The Foreign Sovereign Immunities Act, like the ATS, is a jurisdictional act. n261 The FSIA is the only way to obtain jurisdiction in the United States over a foreign sovereign. n262 While the general rule of the FSIA is that the foreign state is immune, n263 there are several exceptions which can be summarised as either based on (1) waivers of immunity or (2) commercial acts.

(1) Waivers of immunity: The FSIA permits a suit against the state where the state has waived its liability. n264 Waiver may be implied, but implied waivers are strictly construed against the plaintiff. For example, [*45] the case of Sampson v. F.R.G. determined that there is no implied waiver of immunity under the FSIA merely because the act was a violation of jus cogens. n265 Other evidence to imply a waiver must be adduced. n266 For example, mere declarations by Germany of a desire to compensate compulsory labourers were not sufficient to implicitly waive Germany’s sovereign immunity. n267

(2) Commercial acts: The FSIA also provides for liability for purely commercial acts n268 which internationally are termed acto jure gestiones, although the statute uses the term "commercial" acts and does not rely on the (internationally recognized) Latin term. Claims are permitted where a tortious act either occurred in the United States or has direct effects in the United States. n269 Mere financial effects may not be sufficient to support a finding of "direct effects" for the FSIA. n270

The FSIA places the burden of proof on the defendant state to demonstrate that it is immune, n271 but places a burden of production on the plaintiff to demonstrate that one of the exceptions to the general rule of immunity applies. n272

ii. The Anti-Terrorism and Effective Death Penalty Act n273 (amending the FSIA)

The Anti-terrorism and Effective Death Penalty Act (AEDPA) amended the FSIA to permit claims against states, which are considered by the U.S. to be sponsors of state terrorism. n274 It creates a privately enforceable cause of action in tort in cases of extra-judicial killing and [*46] aircraft hijacking. n275 Thus "foreign states that have been designated as state sponsors of terrorism are denied immunity from damage actions for personal injury or death resulting from aircraft sabotage." n276 The victim must be a United States national n277 and the tort must not have occurred in the territory of the foreign state. n278 There is controversy as to whether the AEDPA has retroactive effect on pending cases, which began prior to and ended after the enactment of the AEDPA. n279

The obvious use of the AEDPA is against air pirates or hijackers. Thus the relatives of the victims of the Lockerbie disaster (civilian aircraft Pan Am 103 exploded in mid-flight over Scotland and Libya was accused of funding terrorists) used the AEDPA in Rein v. Libya to sue the government of Libya (no disposition on the merits; remanded to amend complaint and for further proceedings, where litigation continues in the U.K n280 and before the world court n281).

However the AEDPA may be a violation of international law because of the doctrine of sovereign equality.
Sovereign equality holds that “one state may not impose its sovereign will upon another sovereign state” n282 and this principle could be a basis for objection to the AEDPA under international law. n283

It is also important to briefly consider burdens of proof as to these procedural issues since in weaker cases it may be an obstacle that dismisses the claim before reaching the substantive merits.

h. Burdens Of Proof

Burdens of proof resolve doubtful cases and thus have a great practical importance. A brief list of relevant burdens of proof under the [*47] various claims and defenses follows:

1) The burden of proof that the plaintiff has exhausted all remedies is on the defendant, which underscores the almost perfunctory character of exhaustion.

2) The defendant must generally prove any immunity they presumed immune, the state actually must prove that no exception to sovereign immunity applies.

3) The plaintiff bears the burden of proving that both subject matter and personal jurisdiction exist. n284

4) The party asserting the applicability of the act of state doctrine must also bear the burden of proof as to its applicability. n285

Thus the burden of proof to some extent reduces the procedural obstacles facing plaintiffs in the private law actions.

IV. Conclusion

As we have seen there are a number of procedural obstacles to litigating claims under the Alien Tort Statute and Torture Victims Protection Act that litigators must take seriously if they are to have a successful claim. These obstacles often preclude liability (Sampson v. F.R.G.; Beanal v. Freeport McMoran; Byung Wha An v. Doo-Hwan Chun; Bigio v. Coca Cola). Sometimes they lead to remand for further litigation (Wiwa v. Royal Dutch Petroleum; Doe v. Unocal), however, sometimes they do not prevent litigation of the merits (Filartiga v. Pena Irala; Kadic v. Karadzic; Estate of Ferdinand Marcos n286). The fact that these procedural obstacles are also fatal in related international tort cases (e.g. Banco Nacional de Cuba v. Sabbatino; Bano v. Union Carbide) n287 indicates that winning cases are the exception, not the rule.

It is fair to say that private law remedies to international torts are therefore in their infancy. They are, however, one response to the failure of the Westphalian state system n288 which appears to be in the process of [*48] being replaced by a global multilateral trading system where non-state actors such as non-governmental organisations (NGOs), n289 multinational corporations (MNCs) combined with the growing trend towards institutionalisation of world governance via courts, and international organisations such as the U.N. will play an ever-greater role.

Given that violence still plagues the as yet unfinished transition into a post-Westphalian system, these remedies will continue to be necessary, hopefully will be strengthened - and definitely should be.

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Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewInternational LawSovereign States &
FOOTNOTES:


n8. France, Spain, Greece, and Israel all provide extraterritorial penal remedies for cases that would be litigated in the U.S. under the ATS or TVPA. See, e.g., Beth Stephens, Translating Filartiga: A Comparative And International Law Analysis Of Domestic Remedies For International Human Rights Violations, 27 Yale J. Int’l L. 1, 1-27, 57 (2002).

n10. Jurisdiction to adjudicate is the power of a court to legally hear an issue. It is possible for a court to have jurisdiction to adjudicate but not jurisdiction to prescribe. Jurisdiction to enforce is the most invasive act of jurisdiction, while jurisdiction to adjudicate is the least invasive. See, e.g., Alfred P. Rubin, Is International Criminal Law "Universal"?, 2001 U. Chi. Legal F. 351, 358-59 (2001).

n11. See Jon B. Jordan, Universal Jurisdiction In A Dangerous World: A Weapon For All Nations Against International Crime, 9 MSU-DCL J. Int'l L. 1, 2 (2000) (arguing that universal jurisdiction is an accepted norm of international law); But see Rubin, supra note 10, at 366 (arguing that jurisdiction to enforce has not expanded).


n13. See, e.g., Loi Relative à la repression des infractions graves aux Conventions de Geneve du 12 aout 1949 aux Protocoles I et II du 8 juin 1977 [Law relating to the suppression of grave violations of the Geneva Conventions of August 12, 1949 and Protocols I and II of June 8, 1977] (Jun 16, 1993, amended in 1999) (Belgium). This Belgian law is the most famous example of an exertion of universal criminal jurisdiction, though it was severely limited in scope in 2003. France and Spain also have similar laws asserting universal criminal jurisdiction [hereinafter Belgian Law].

n14. As recognized in American and international law, a jus cogens norm """"is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."""" See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.


n16. Id. at 384.

n17. Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 675 (Tex. 1990).

n19. Although there is a presumption that Congress does not intend a statute to apply to conduct outside the territorial jurisdiction of the United States, that presumption can be overcome when Congress clearly expresses its intent to do so. See Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949); and Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993).

n20. Foley Bros., 336 U.S. at 281; Sale, 509 U.S. at 188.

n21. Lew v. Moss, 797 F.2d 747, 751 (9th Cir. 1986) (explaining that plaintiff bears the burden of proof to establish that jurisdiction exists at the time of filing).

n22. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) [hereinafter Filartiga II].


n25. U.S Const. art. I, § 8, cl. 10 (“The Congress shall have Power ... To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”).


n28. Filartiga II, 630 F.2d at 879.

n29. See O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908) (denying ATS claim for expropriation of a personal monopoly right made against the State, with Court indicating personal liability of defendant might be invocable); Claflin v. Houseman, 93 U.S. 130 (1876) (finding ATS jurisdiction concurrent with state jurisdiction in dicta); and see Atkins v. Fibre Disintegrating Co., 85 U.S. 272 (1873) (concerning federal jurisdiction for an attachment in an admiralty case, but only addressing the issue in dicta).

n30. Filartiga II, 630 F.2d at 878.

n31. Id. at 878.

n32. Id. at 881.


n34. There are literally dozens of ATS cases that have reached the appellate level or higher. Among the cases mentioned in this article are: Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002); Sampson v. F.R.G., 250 F.3d 1145 (7th Cir. 2001); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); and Argentine Republic v. Amareda Hess Shipping Corp., 488 U.S. 428 (1989).

n35. See Wiwa, 226 F.3d at 105 n.12 ("In arguing for this principle, they assume that the law of nations necessarily provides the substantive standards for evaluating claims brought under the ATS in situations where the underlying claims involve human rights abuses. While they may well be right that such a principle is implicit in the ATS, the federal courts have never definitively resolved this choice-of-law question.").
n36. Wiwa, 226 F.3d at 105 n.12. Compare Xuncax v. Gramajo, 886 F. Supp. 160, 180-83 (holding that international law provides substantive law for ATS cases), with Tel-Oren v. Libyan Arab Republic, 726 F.2d at 777, 781-82 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that, while international law triggers jurisdiction under ATS, tort laws of forum state might provide substantive causes of action), and Estate of Ferdinand Marcos, 978 F.2d 493 at 503 (9th Cir. 1992) (approving district court procedure that based jurisdiction on international law but applied tort law of state where underlying events occurred); see also Filartiga II, 630 F.2d at 889 (holding that ATS establishes cause of action for violations of international law but requiring the district court to perform a traditional choice-of-law analysis to determine whether international law, law of forum state, or law of state where events occurred should provide substantive law in such an action).


n38. Id.


n40. See eg., Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) (defining Crimes against Peace, War Crimes, and Crimes against Humanity in Art. II, § 1(a),(b) and (c) respectively).

n41. Some of the most recent ATS cases include Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003); Alvarez-Machain v. U.S., 331 F.3d 604 (9th Cir. 2003); Deutsch v. Turner Corp., 317 F.3d 1005, (9th Cir. 2003); City of Charleston v. A Fisherman's Best, Inc., 310 F.3d 155 (4th Cir. 2002); and Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

n42. See, e.g., Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), and Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

n44. Argentine Republic v. Amareda Hess Shipping Corp., 488 U.S. 428 (1989) (finding no viable remedy for Argentina’s aerial attack on plaintiff’s neutral ship, which was outside the zone of hostilities during Falklands/Malvinas War, due to sovereign immunity).


n46. See TVPA, supra at note 2.

n47. Id. § 2 (establishing a civil cause of action for "an individual" regardless of nationality).

n48. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (noting, however, that "There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country."); and Tachiona v. Mugabe, 234 F.Supp.2d 401 (S.D.N.Y. 2002).

n49. European Convention on Human Rights, art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, ETS 5 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions.").


n52. But see Sabbatino, 376 U.S. 398.

n54. Id. at 210.

n55. Id. at 209.

n56. Id. at 210.


n58. Id.


n61. See Sabbatino, 376 U.S. 398.

n62. Id. at 429.

n63. Id.

n64. Bigio v. Coca-Cola, 239 F.3d 440 (2d. Cir. 2000).
n65. *Id. at 448.* ("If a plaintiff does not allege conduct that supports private liability under international law, he or she must plead that the conduct was "committed by state officials or under color of law").

n66. *Id.*

n67. See *Sabbatino*, 376 U.S. 398; and see *Bigio*, 239 F.3d 440.

n68. *Filartiga II*, at 887-88; *Bigio*, 239 F.3d at 447.


n74. *Aguinda*, 303 F.3d 470.

n75. 97 F.3d 161 (5th Cir. 1999).

n76. *Id.* at 168.

n77. *Id.* ("not only did the court give Beanal several opportunities to amend his complaint to conform with the minimum requisites as set forth in the federal rules, the court also conscientiously provided Beanal with a road-map as to how to amend his complaint to survive a motion to dismiss assuming that Beanal could marshal facts sufficient to comply with the federal rules. Nevertheless, Beanal was unable to put before the court a complaint that met minimum pleading requirements under the federal rules.").

n78. *Id.*

n79. Thomas Giegerich, Extraterritorialer Menschenrechtsschutz durch U.S. Gerichte: Sachwalterhaft für die Internationale Gemeinschaft oder judizieller Imperialismus?, in Menschheit und Menschenrechte: Probleme der Univalisierung und Institutionalisierung 159 (Eckart Klein & Christoph Menke (eds., 2001) ("It cannot be precluded that, in the future, environmental pollution by multinational concerns which threatens the basic preconditions for life in entire regions, especially for indigenous peoples, will be considered a "tort... committed in violation of the law of nations' under the ATS.")

n80. See *Jota*, 157 F.3d 153.

n81. 303 F.3d 470 (2d Cir. 2002).

n82. See *Aguinda*, 303 F.3d 470.
n83. Id.

n84. 273 F.3d 120 (2d Cir. 2001).

n85. Id.

n86. Id.


n88. Id.

n89. Id. at 165.

n90. Id. at 166-67 (implying that an environmental tort with international consequences can be the basis for an ATS claim).


n94. 197 F.3d 161.


n96. For a more specific definition of a jus cogens norm, see note 14, supra.


n98. See TVPA, supra note 2, at preamble ("To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.").

n99. Id., § 2(a) ("Liability-An individual who, under actual or apparent authority, or color of law, of any foreign nation.").

n100. See generally Kadic, 70 F.3d 232.

n101. TVPA, supra note 2, § 2. This section states that:
an individual who, under actual or apparent authority, or color of law, of any foreign nation -

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

(emphasis added). Note that the statute does not say "citizen" or "resident" or "alien" but merely "individual."

n102. See Beanal v. Freeport McMoran, 197 F.3d 161, 169 (5th Cir. 1999). The court did not reach the issue of whether a corporation may be liable under the TVPA and thus the question appears to be open. This is an issue because § 2 of the TVPA imputes liability to "an individual." The question then is whether a corporation is "an individual."

n103. TVPA, supra note 2, § 2(b).

n104. Id., § 2(c).


n106. Papa v. U.S., 281 F.3d 1004 (9th Cir. 2002).

n107. But see Papa, 281 F.3d at 1011-12 ("The ATS specifies no statute of limitations. In such situations, courts apply the limitations period provided by the jurisdiction in which they sit unless "a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaker."").

n108. Papa, 281 F.3d at 1012-13 ("The TVPA, like the ATS, furthers the protection of human rights and helps "carry out obligations of the United States under the United Nations Charter and other international
agreements pertaining to the protection of human rights.' Moreover, it employs a similar mechanism for carrying out these goals: civil actions. The provisions of the TVPA were added to the ATS, further indicating the close relationship between the two statutes. All these factors point towards borrowing the TVPA's statute of limitations for the ATS. In addition, the realities of litigating claims brought under the ATS, and the federal interest in providing a remedy, also point towards adopting a uniform - and a generous - statute of limitations. The nature of the violations suffered by those the ATS, like the TVPA, was designed to protect will tend to preclude filings in United States courts within a short time. Accordingly, we reject the district court's adoption of the California statute of limitations and adopt the ten-year statute of limitations provided by the TVPA instead. Applying that statute, the Papas' claims are timely.

n109. See generally Beanal, 197 F.3d 161.

n110. See generally FCPA, supra at note 4.


n113. See, e.g., Beanal, 197 F3d 161.


n115. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794-95 (D.C. Cir. 1984) (Edwards, J., concurring) (observing that while most crimes require state action for ATS liability to attach, there are a "handful of crimes," including slave trading, "to which the law of nations attributes individual liability," such that state action is not required.); Kadic, 70 F.3d at 242-43 (noting that genocide and war crimes, like slave trading, do not require state action for ATS liability to attach). Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), appeal dismissed per stipulation 403 F. 3d 708 (April 13, 2005).

n117. *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1150 (7th Cir. 2001) ("Although jus cogens norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity, e.g., the Nuremberg proceedings, jus cogens norms do not require Congress (or any government) to create jurisdiction.").

n118. See generally *Nelson*, 507 U.S. 349.

n119. *Id.*, at 353.

n120. *Id.*, at 358.

n121. *Id.*. One distinction here is important to remember: if Nelson had sued the actual people he claims tortured him, they may not have had been immune.


n123. *Id.*, P 10.

n124. *Id.*, P 13.


n126. *Id.*, P P 3, 21-22.

n128. 250 F.3d 1145 (7th Cir. 2001).

n129. Al-Adsani, 34 Eur. Hum. R. Rep., P 23 ("States are not entitled to plead immunity where there has been a violation of human rights norms with the character of jus cogens, although in most cases the plea of sovereign immunity had succeeded.").


n131. Id. at 153 (stating that erga omnes obligations are a consequence of general principles of international law). See also Barcelona Traction, Light & Power Co., Ltd., (Belg. v. Spain), 1970 I.C.J. 32 (Feb. 1970). (stating all states have an interest in the protection of an erga omnes norm).


n134. See Torture Convention, supra at note 135.

n135. Id.

n136. George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996) (citing Lebron v. National R.R. Passenger Corp., 513 U.S. 374, 1995, cert. denied, 513 U.S. 374 (1997), and noting that "cases deciding when private action might be deemed that of the state have not been a model of consistency."). The decision further took notice that "the Supreme Court has articulated four distinct approaches to the state action question: public function, state compulsion, nexus, and joint action." Id.

n137. 106 Stat. 73, at § 2 ("SEC. 2. ESTABLISHMENT OF CIVIL ACTION. (a) LIABILITY-An individual who, under actual or apparent authority, or color of law, of any foreign nation").

n138. Filartiga II, 630 F.2d 876, 878 ("We hold 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. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.").

n139. Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995) (noting that "courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights," citing Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989)).

n140. Kadic, 70 F.3d 232, 245 ("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.").


n143. Tahfs v. Proctor, 316 F.3d 584, 591 (6th Cir. 2003).


n145. Private actors who are "willful participants in joint action with the state or its agents" can be imputed to be state actors. Dennis v. Sparks, 449 U.S. 24, 27, (1980). An agreement between government and a private party can create joint action. See, e.g., Fonda v. Gray, 707 F.2d 435, 437 (9th Cir. 1983).

n146. It is an open question whether the tests used to determine when a non-state actor is acting under "color of law" are alternative tests, any of which, if found to be applicable, will lead to a finding of liability, or whether the different tests merely enumerate several factors all of which must be considered and balanced. In fact the "color of law" inquiry would have been completely illegal as a violation of the Westphalian principle of non-intervention, which explains the act of state doctrine. However, interventions in other states' affairs are now at least exceptionally permitted when those affairs are jus cogens violations.


n149. Id.

n150. 22 U.S.C. §§6021-6091, 302(a)1, 302(a)(3).

n151. Rheinisch, supra at note 152.
n152. Supra at note 151.


n154. Id.


n156. Reinisch, supra, at note 152.

n157. Fidler, supra, note 166.

n158. Alvarez-Machain v. U.S., 331 F.3d 604, 632-33 (9th Cir. 2003). The opinion noted that:

The few courts that have addressed damages under the ATS do not appear to have followed a consistent approach in determining the applicable law. Perhaps the most explicit treatment of the issue was offered by the district court in the Filartiga litigation. When faced with the question of damages on remand, the district court decided, in light of the ATCA's purpose, that federal choice of law principles should govern the initial determination of the remedy. Applying these principles in the broadest of terms, the court noted that virtually all of the contacts took place in Paraguay, and thus Paraguayan law appeared to be appropriate for setting compensatory damages. The court took a different tack, however, on punitive damages. Because Paraguay did not recognize punitive damages, which were deemed necessary "to give effect to the manifest objectives of the international prohibition against torture," the court turned to international law principles.

(internal citations omitted).

n159. Restatement (Second) of Conflict of Laws § 401 (1971).
n160. Id.

n161. Rubin, supra note 10, at 359.

n162. Id.

n163. Id.

n164. Id. at 365.

n165. Id.

n166. Id.

n167. Id.

n168. See Alvarez-Machain, 331 F.3d at 604.

n169. Id. But see U.S. v. Noriega, 117 F.3d 1206, 1222 (11th Cir. 1997).

n171. Id., P 13.

n172. Id., P 51.

n173. See generally Engle, supra at note 12.


The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1) Hague Convention; Article 3 (1) Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found, shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

Id.

n175. See, Congo v. Belgium, 2002 ICJ 121, P 9 (separate opinion of President Guillaume), P 41(separate opinion of Judges Higgins, Kooigmans and Buergenthal).

n176. Id.


n178. United States v. Amistad, 40 U.S. 518 (1841) (recognizing that it is the right and duty of all states to
hunt pirates as they are "common enemies of humanity").


n180. See generally *Amistad*, 40 U.S. 518.

n181. Thomas Giegerich, Extraterritorialer Menschenrechtsschutz durch U.S. Gerichte: Sachwalterschaft für die Internationale Gemeinschaft oder judizieller Imperialismus?, in Menschheit und Menschenrechte: Probleme der Univalisierung und Institutionalisierung 163 (Eckart Klein & Christopher Menke eds., 2001) ("Folterer, Mörder und Kriegsverbrecher sollten wie früher Piraten und Sklavenhändler als Feinde des Menschengeschlechts behandelt werden [Torturers, murderers and war criminals should, like the pirates and slavetraders of yore, be treated as common enemies of all humanity [hostes humani generis]]"). See also *Filartiga II*, 630 F.2d 876 (using similar "common enemies of all humanity" language).

n182. Cassese, supra note 182, at 856.

n183. Id. at 859-62.

n184. Reasoning from the greater to the lesser, e.g., if it is forbidden to kill then it is also forbidden to wound.

n185. Cassese, supra note 182, at 855-58.

n186. Id.

n188. The denial of immunity in cases of state sponsored terrorism might be justified if state terrorism is a violation of a jus cogens norm. See William P. Hoye, Fighting Fire With ... Mire? Civil Remedies And The New War On State-Sponsored Terrorism, 12 Duke J. Comp. & Int'l L. 105, 110 (2002); (noting that this point is "hotly contested")[hereinafter Hoye].


n190. See generally Cassese, supra at note 182.


n192. See, e.g., An v. Chun 1998 U.S. App. LEXIS 1303 (9th Cir. 1998); and Wiwa, 226 F.3d at 98.


n194. The Belgian statute appears to be the most wide reaching, allowing jurisdiction in absentia regardless of the locus of the delict. See Belgian Law, supra at note 13; and see Stefaan Smis & Kim Van der Borght, Belgian Law concerning The Punishment of Grave Breaches of International Humanitarian Law: A Contested Law with Uncontested Objectives, ASIL INSIGHTS (July 2003), available at http://www.asil.org/insights/insigh112.htm (last visited May 26, 2006).

n195. Id.


n197. Sampson v. F.R.G., 250 F.3d 1145, 1152 (2001) ("Although jus cogens norms may address sovereign
immunity in contexts where the question is whether international law itself provides immunity... jus cogens norms do not require Congress (or any government) to create jurisdiction.”


n202. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-292 (1980) ("[A] state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist "minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”).


n206. See generally International Shoe, 326 U.S. at 310.


n208. See generally World-Wide Volkswagen, 444 U.S. at 286.

n209. For an excellent synopsis of these points of law, see Pinker v. Roche Holdings Ltd., 292 F.3d 361 (3rd Cir. 2002).

n210. See Wiwa, 226 F.3d at 88.


n212. Id. ("Where service is made under § 1608 of the FSIA, the relevant area in delineating contacts is the entire United States, not merely the forum state. Appellees have not engaged in the necessary activity in the United States to confer either general or specific personal jurisdiction. They do not own property or conduct business anywhere in the United States. Their visits to this country have been almost entirely official visits on behalf of the Korean government, which do not confer general jurisdiction, and were unrelated to the cause of action in this case.").

n213. Id.

n214. See Wiwa, 226 F.3d at 88.

n216. See, e.g., Sabbatino, 376 U.S. at 398.


n218. Comity is discussed at length in Bigio v. Coca-Cola Company, 239 F.3d 440 (2nd Cir. 2000).

n219. See id.

n220. Sabbatino, 376 U.S. at 408-409 (stating that "principles of comity governing this country’s relations with other nations, sovereign states and [sic] allowed to sue in the courts of the United States."). See also Hilton, 159 U.S. at 163 (calling comity "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.")

n221. See Bigio, 239 F.3d at 440.

n222. See Wiwa, 226 F.3d at 88.

n223. See Id.

n224. Id. at 100.
n225. Id. at 101.

n226. Id. at 100.

n227. Id.

n228. Id.


n230. Id.

n231. Id.

n232. See, e.g., Bigio, 239 F.3d at 440.


n234. Sabbatino, 376 U.S. at 416.


n236. Here U.S. national law parallels international law. See, e.g., Prefecture of Voiotia v. F.R.G., Areios
Pagos [AP] [Supreme Court] (11/2000) (Greece) (discussing the acte jure gestionis and acte jure imperii in the context of jus cogens violations).

n237. Filartiga II, 630 F.2d at 889.

n238. See, e.g., Bigio, 239 F.3d at 451.

n239. Kadic, 70 F. 3d at 248-50 (discussing the requirements of the political question doctrine).

n240. Id. at 247, n.9 ("Conceivably, a narrow immunity from service of process might exist under section 11 for invitees who are in direct transit between an airport (or other point of entry into the United States) and the Headquarters District. Even if such a narrow immunity did exist - which we do not decide - Karadzic would not benefit from it since he was not served while travelling to or from the Headquarters District.").

n241. Id. at 249 (quoting Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 49 (2nd Cir. 1991)).


n243. Id.

n244. The court noted the distinction between a political case and a political question in the following "Baker Factors":

A nonjusticiable political question would ordinarily involve one or more of the following factors: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the
potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.


n247. *Filartiga II*, 630 F.2d at 884.

n248. Id. at 884 (citing Constitution of Paraguay, art. 45 (prohibiting torture and other cruel treatment)).

n249. *Sampson*, 50 F.3d at 1149 n.3.


n252. Id. at 162-163. See also *In re Mossavi*, 334 N.J. Super. 112 (2000).


Interestingly, Eichmann is not the only case where a national was kidnapped in a foreign state by a prosecuting state but had no remedy due to the fact that recourse could only be had in the state he was kidnapped from. See Re Argoud 45 I.L.R. 90 (Cass. Crim. 1964). See also Brigette Belton Homrig, Abduction As An Alternative To Extradition - A Dangerous Method To Obtain Jurisdiction Over Criminal Defendants, 28 Wake Forest L. Rev. 671 (1993) (noting that while abduction is unpleasant, assassination is more so).


n257. See Arrêt de la Cour D'Appel de Bruxelles, Sharon Ariel, Yaron Amos et autres, art 136 bis, al 2 et 235 bis CIC (June 26, 2002).

n258. See Regina v Bow Street Magistrate, Ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (H.L. 1999)).

n259. Noriega, 117 F.3d at 1211.


n261. Sampson, 250 F.3d at 1149.


n264. 28 U.S.C. § 1605 (a) (1).
n265. Sampson, 50 F.3d at 1151-54.

n266. Id. at 1150.

n267. Id. at 1147.


n270. See Argentine Republic v. Amareda Hess, 488 U.S. 428 (1989). See also Adler v. Federal Republic of Nigeria, 219 F.3d. 869 (9th Cir. 2000) (stating that mere financial loss in the United States does not constitute a direct effect); and Australian Govt. Aircraft Factories v. Lynne, 743 F.2d 672, 673-75 (9th Cir. 1984) (holding that when an American is killed in airplane crash abroad, the losses suffered by his family members in the United States as a result of his death were not direct effects for purposes of the FSIA).

n271. Doe v. Unocal Corp., 963 F. Supp. at 886 (citing Phaneuf v. Rep. of Indonesia, 106 F.3d. 302, 306 (9th Cir. 1997)).

n272. Id.


n276. Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 754 (2nd Cir. 1998).


n282. Hoye, Supra note 199, at 139 (citing Case of S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

n283. Hoye, Supra at note 199.

n284. See An, 134 F.3d. at 376

n286. *In re Estate of Ferdinand E. Marcos*, 978 F.2d at 493.

n287. *Bano v. Union Carbide*, 273 F.3d 120 (2nd Cir. 2001). This case was decided on procedural grounds, essentially citing to the settlement in India and thus did not touch upon the substantive merits of the ATS claim in the United States for the disaster at Bhopal where thousands died due to corporate negligence.
