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Liability Laundering and Denial of Justice: Conflicts Between the Alien Tort Statute and the Government Contractor Defense

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Liability Laundering and Denial of Justice

CONFLICTS BETWEEN THE ALIEN TORT STATUTE AND THE GOVERNMENT CONTRACTOR DEFENSE

This Note explores the conflicts between two bodies of law implicated by a specific and growing class of cases. The Alien Tort Statute ("ATS") grants federal jurisdiction over cases brought by aliens alleging tortious violations of international law.[1] Victims and human rights groups have increasingly used the ATS as an enforcement tool against governmental and corporate human rights violators.[2] The government contractor defense extends sovereign immunity to contractors of the U.S. government in certain circumstances.[3] The conflicts between these two bodies of law arise when aliens injured in violation of international law sue government contractors such as the contractors involved in the Abu Ghraib scandal.[4] This Note addresses the conflicts that arise in this particular class of cases: suits brought by aliens against government contractors for torts in violation of international law. These cases are important because they often seek to redress human rights abuses such as torture, slavery, and genocide.[5] These cases are also increasing in frequency

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[1] 28 U.S.C. § 1350 (2005). The brief text of the ATS is as follows: "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."

[2] Plaintiffs claiming injuries in violation of international law have brought hundreds of suits under the ATS within the last two decades. Before 1980, the ATS was practically unnoticed. This Note will discuss this trend in greater depth *infra* Part II.B.

[3] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988) (adopting the government contractor defense as federal common law and setting forth the standard for when the Defense may be raised). This Note will refer to the government contractor defense simply as "the Defense."

[4] Courts have interpreted the ATS broadly to allow plaintiffs to use the Alien Tort Statute to deter human rights violations. Suits brought under the ATS against government contractors are likely to increase in number, but the Defense may bar these suits. *See infra* Parts III.B, IV.A.

[5] *See generally* Terry Collingsworth, *Boundaries in the Field of Human Rights: The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15

because the U.S. government's reliance on military contractors is at an unprecedented and growing level.[6] This Note concludes that Congress or the federal courts should disallow the Defense in cases brought under the ATS, subject to case-by-case exceptions where an executive order immunizes a particular defendant.

I. INTRODUCTION

The Alien Tort Statute[7] allows federal courts to exercise jurisdiction over "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."[8] The ATS thus grants federal subject matter jurisdiction when an alien alleges a tort and that the tort committed was in violation of "the law of nations" (now usually referred to as "international law").[9] The effect of this requirement is that cases using the ATS as a basis for jurisdiction tend to allege human rights abuses severe enough to violate international human rights norms.[10] This short Statute, enacted in 1789 by the first Congress, received very little attention until the late twentieth century.[11] Then, in

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HARV. HUM. RTS. J. 183, 186-95 (2002) (describing the history of the *Unocal* case and several similar ATS cases). *Unocal* and other examples are discussed in Part II.B, *infra*.

[6] For a discussion of the United States' growing reliance on private contractors, see *infra* Part IV.A.

[7] Commentators also refer to the Alien Tort Statute interchangeably as the Alien Tort Claims Act. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587 (2002) ("[Section 1350] is today commonly referred to as the 'Alien Tort Statute' or, sometimes less accurately, the 'Alien Tort Claims Act.'"). This Note will refer to 28 U.S.C. § 1350 as the Alien Tort Statute, the ATS, or simply, "the Statute."

[8] 28 U.S.C. § 1350 (2005). As will be discussed below, the meaning of "law of nations" has changed through the years. Currently, the international community interprets the "law of nations" to include law governing relationships among governments *and* law governing the rights of individuals. *See infra* note 77 and accompanying text.

[9] *See, e.g.*, Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004) ("Under the [Alien Tort Statute], therefore, federal subject matter jurisdiction exists when (1) an alien, (2) claims a tort, (3) was committed in violation of a United States treaty or the 'law of nations' – the latter now synonymous with 'customary international law.'") (citations omitted). This Note will use the term "ATS suits" to refer to those cases which base subject matter jurisdiction on the ATS, and the term "ATS plaintiffs" to refer to the alien plaintiffs in ATS suits (who by definition must allege a tort in violation of international law).

[10] A more specific history of these cases follows below. *See infra* Part II.B.

[11] Judiciary Act of 1789, § 9, 1 Stat. 73, 77 (1789) (currently codified at 28 U.S.C. § 1350). Congress has modified the ATS several times since its enactment, but

1980, a Second Circuit case, *Filártiga v. Peña-Irala*, opened the door for aliens to use this unique Statute to redress human rights abuses abroad.[12] The ATS is unique because it deviates from the traditionally-required nexus between a federal court's jurisdiction over foreign matters and the connection of the subject matter to the territory of the government that the court represents.[13] The ATS does not require such territoriality; it makes an unusual grant of *extra*territorial jurisdiction by allowing an alien to sue for a tort committed abroad by anyone, including another alien.[14] That is, it allows district courts to find subject matter jurisdiction without any connection between the facts of the case and American territory or citizens.[15] The ATS provides an increasingly important means by which aliens may sue for injuries they sustained in violation of international law against other alien individuals or corporations or against American individuals or corporations. For example, aliens have used the ATS to sue officers of an abusive foreign dictatorship using torture[16] and against companies using forced (slave) labor.[17] Human rights scholars and practitioners agree that the ATS has the potential to become an important human rights enforcement tool.[18] Another body of law, the government contractor defense,

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only slightly. *See* Bradley, *supra* note 7, at 587 n.2 (citing and quoting "minor alterations" to the Alien Tort Statute that were made in 1873 and 1911).

[12] Filártiga v. Peña-Irala, 630 F.2d 876, 889-90 (2d Cir. 1980) (reversing the district court, which had dismissed the case for want of subject matter jurisdiction).

[13] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (describing the various means through which territorial connections may confer jurisdiction in international matters).

[14] *See Filártiga*, 630 F.2d at 887-90; *see also* Andrea Bianchi, *International Law and US Courts: The Myth of Lohengrin Revisited*, 15 EUR. J. INT'L L. 751, 777 (2004) ("In many ways, given the general lack of inclination shown by US courts to pay due heed to international legal issues, litigation under the Alien Tort Claims Act is somewhat an anomaly.").

[15] *See, e.g.*, *Filártiga*, 630 F.2d at 887 (upholding jurisdiction over a case brought by Paraguayan plaintiffs against a Paraguayan defendant for actions taking place outside United States territory).

[16] *See, e.g.*, *id*. at 878 (alleging that defendant Paraguayan police official was responsible for torturing plaintiffs' son/brother to death).

[17] *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) (alleging that defendant multinational corporation was responsible for killings connected with suppression of union activities); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1295-96 (C.D. Cal. 2000) (alleging that defendant multinational corporation benefited from forced labor by Burmese villagers), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005).

[18] *See, e.g.*, Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 210 (2004); *see also infra* note 122.

threatens to prevent the ATS from realizing its full potential by barring otherwise valid ATS suits.

The Supreme Court adopted the government contractor defense as federal common law in 1988 in *Boyle v. United Technologies*.[19] The Defense bars suits against certain government contractors by preempting state tort law.[20] It extends the U.S. government's sovereign immunity to shield government contractors acting on behalf of the government.[21] For example, a military jeep manufacturer might be able to use the Defense to immunize against suits by passengers injured because of design flaws in the vehicle. Though the lower federal courts' rationales for applying the Defense varied,[22] the Supreme Court's reasoning in *Boyle* was that the Defense was necessary to protect the discretion of federal officials.[23]

The two bodies of law created by the ATS and the Defense clash in situations where aliens sue government contractors for torts committed in violation of international law. Human rights organizations, scholars, and practitioners who support the current, broad interpretation of the ATS see it as a human rights tool to deter illegal activity and compensate victims.[24] Allowing contractor-defendants to rely on the Defense in cases asserting jurisdiction under the ATS threatens the ATS's effectiveness as a human rights tool. This is because the Defense allows "liability laundering," a means by which the government may use its private contractors to diffuse or eliminate accountability for violations of international law committed by the government. Though this scheme may sound unusual, the U.S. government's increasing reliance on private contractors to provide an ever-broadening array of services, especially in military operations, makes this

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[19] 487 U.S. 500, 512 (1988). The *Boyle* majority analogized the Defense's immunity to the Federal Tort Claims Act, which generally waives the federal government's sovereign immunity while retaining it in certain circumstances. *See* 28 U.S.C. § 2680(a) (2005); *Boyle*, 487 U.S. at 511; *infra* text accompanying notes 151-54.

[20] *See Boyle*, 487 U.S. at 512 (explaining the government contractor defense and the test used to determine when a defendant may raise the Defense).

[21] *Id.*

[22] For example, the Supreme Court explicitly rejected the Fourth Circuit's reasoning that the Defense should stand as an extension of the *Feres* doctrine. *Id.* at 510. In *Feres*, the Supreme Court held that the federal government is not liable in tort to active duty military personnel under the Federal Tort Claims Act. Feres v. United States, 340 U.S. 135, 146 (1950). *See infra* notes 166, 168, 172 and accompanying text.

[23] *See Boyle*, 487 U.S. at 509-12 (reviewing the possible rationales for applying the Defense).

[24] *See infra* notes 66, 73, 74 and accompanying text.

a growing area of concern.[25] For example, some of the victims of the Abu Ghraib prison abuse scandal filed a suit against military contractors under the ATS.[26] If the contractor-defendants in that case are successful in raising the Defense, they will enjoy immunity from suit and the government will be able to use contractors as a cheap, reliable way to do its "dirty work."

Further, allowing the Defense would block all paths to redress for the victims of extraterritorial torts committed by U.S. government contractors. The government itself enjoys broad sovereign immunity to these suits.[27] Since sovereign immunity protects the government, and the Defense extends this immunity to the government's contractors, allowing the Defense will bar injured plaintiffs from suing either potential defendant. This means the plaintiffs will be unable to seek damages, and thus unable to deter future instances of similar behavior.[28] There are several ways to resolve the conflict between these two bodies of law,[29] but courts should not allow the government contractor defense to diminish the ATS's utility.

Part II of this Note will provide background information about the ATS, its history and related policies, the chain of cases leading up to its current interpretation, and examples of its modern applications. Part III will address the background of the government contractor defense, its rationale, and its

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[25] As of mid-2004, analyst Peter W. Singer estimated that over 20,000 private military contractors were working for the United States in Iraq. Bob Dart, *Pentagon's Reliance on Contractors Under Fire*, ATLANTA J.-CONST., May 8, 2004, at 9A.

[26] *See* Saleh v. Titan Corp., 353 F. Supp. 2d 1087 (S.D. Cal. 2004). This case was filed in September 2004 on behalf of the prisoners at the Abu Ghraib detention center. The Second Amended Complaint contains a disturbing series of allegations against the defendants, which were private interrogation services contractors. *See* Second Amended Complaint at 14-46, Saleh v. Titan Corp., (S.D. Cal. 2004) (No. 04 CV 1143 R (NLS)), 2004 WL 1881616.

[27] Several exceptions in the Federal Tort Claims Act could retain sovereign immunity to cases based on facts that are likely to underlie a suit brought under the ATS against a government contractor. *See infra* Part III.A.

[28] Though it may be argued that plaintiffs might seek redress in local courts or invoke occupation law to bypass sovereign immunity, these options are outside the scope of this discussion. Local courts are unlikely to be a reliable option in areas with a heavy concentration of government contractors, especially military contractors. Occupation law may provide an avenue for a suit against the government, but does not necessarily allow suits against the contractors themselves. *See* David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842, 858 (2003). For more on occupation law as a potential solution to the conflicts in ATS suits against government contractors, see note 242 and accompanying text.

[29] *See infra* Part IV.B.1.

applications. Part IV will discuss the conflict between the policies and case law of the ATS and the Defense and suggest a possible solution. Part V will conclude that the policies underlying the ATS should take priority over those underlying the Defense. Part V therefore suggests that Congress or the courts should disallow the Defense in cases brought under the ATS.

II. BACKGROUND OF THE ALIEN TORT STATUTE

The intended purposes of the ATS are unclear.[30] For years after its enactment, very few cases mentioned the ATS.[31] The Court of Appeals for the Second Circuit noted the ATS's obscurity in *IIT v. Vencap, Ltd.*: "This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."[32]

Though the ATS remained dormant for almost 200 years, it has enjoyed recent attention from the international human rights community for its potential as a human rights enforcement tool.[33] Courts have generally been amenable to this application of the Statute, so the trend for the past two decades has been to broaden the ATS.[34] Most commentators agree that the ATS now shows great potential for alien plaintiffs, but opinions are mixed as to whether the Statute is a white knight or an "awakening monster."[35] On one side,

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[30] *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (explaining that there is no widely accepted purpose for the Alien Tort Statute); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 209 (2004) ("Neither the Constitution nor ATCA expressly resolves the jurisdictional questions, and ATCA lacks legislative history that could provide illumination.").

[31] *See* Anthony D'Amato, *Preface* to THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, at vii (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) ("The [Statute] was adopted by the first Congress in 1789 and promptly went into hibernation for nearly two centuries."). For statistics on the use of the ATS over its 200 year history, see *infra* note 65.

[32] *IIT*, 519 F.2d at 1015 (citation omitted); *see also* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4-5 nn.15-17 (1985) (discussing the ATS's sparse pre-*Filártiga* history).

[33] *See infra* notes 118-20, 122-30, and accompanying text.

[34] *See* Linda A. Willett et al., *The Alien Tort Statute and Its Implications for Multinational Corporations*, BRIEFLY . . ., Sept. 2003, at 1, 16 ("Following the precedents it established in *Filártiga* and *Kadic*, the Second Circuit has continued to issue cutting-edge rulings that give broad interpretation to the Alien Tort Statute . . . .").

[35] *See* GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Institute for International Economics

human rights advocates endorse a broad interpretation of the ATS, such as the interpretation adopted in *Filártiga v. Peña-Irala*.[36] *Filártiga* established the precedent of reading the ATS broadly to allow a suit by an alien against another alien government official.[37] Multinational corporations and economists who oppose this broad interpretation of the ATS emphasize the potential negative effects on commerce and on corporate defendants.[38] The ATS is now a part of an increasingly heated international debate over the utility and desirability of extraterritorial jurisdiction.[39] To address the modern purposes of the ATS, a review of the theories of the origin and intended purposes of the Statute is in order.

A. Theories of the Origin and Purposes of the Alien Tort Statute

Scholars and historians have put forth several theories to explain the original purposes of the ATS.[40] There is no consensus on a single theory,[41] but all theories of the original purposes of the ATS share the notion that the ATS's drafters were concerned with the protection of a young nation in an unstable international political climate.[42] This Note now examines three of the prominent theories of the ATS's origin, the denial of justice theory, the diplomatic safety theory, and the international duty theory.

2003) (reviewing in detail the economic damage that may result from broadening use of the Alien Tort Statute).

[36] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); *see, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 461 (1989).

[37] *See* Willett, *supra* note 34, at 16.

[38] *See, e.g.*, HUFBAUER & MITROKOSTAS, *supra* note 35, at 37-43 (arguing that ATS suits will inhibit trade and foreign direct investment).

[39] Carmichael v. United Techs. Corp., 835 F.2d 109, 113 (5th Cir. 1988) ("The question of defining 'the law of nations' is a confusing one which is hotly debated, chiefly among academics."); *see, e.g.*, HUFBAUER & MITROKOSTAS, *supra* note 35 (estimating the potential economic impact of ATS litigation); Emika Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 2 (2004) (responding to Hufbauer and Mitrokostas).

[40] *See* Burley, *supra* note 36, at 464, 469, 475, 481.

[41] *Id.* at 463 ("[B]attle has been joined on this ground [the history of the Statute], giving rise to a new paper chase through the legislative history of the First Judiciary Act, the constitutional debates, the Founders' papers and the proceedings of the Continental Congress.").

[42] *See id.* at 464 ("All the existing theories about the historical origins of the statute essentially depict it as part of the protective armor designed to shield a young and vulnerable nation in a dangerous and unpredictable world.").

1. The Denial of Justice Theory

"Denial of justice" is an antiquated legal term referring to a nation's denial to non-citizens of access to – and fair process in – that nation's courts.[43] Historically (and to some degree, currently), a nation that commits a denial of justice is responsible to pay damages to the injured non-citizen's nation.[44] Proponents of the denial of justice theory note that at the time of its enactment, the drafters may have intended the ATS to provide a vent for tensions between foreign nations and the fledgling United States, then a relatively weak and disorganized nation.[45] This theory posits that the drafters were responding to concerns about the escalation of a civil wrong into international tension. That is, denial of access to the court system to an alien injured in America could set off a chain of events eventually leading to armed conflict. At the time, Alexander Hamilton saw such an escalation to war as a reasonable response to a denial of justice.[46]

The leap from an injured alien to a declaration of war may seem unlikely today, as the United States is now in a vastly different political and economic position.[47] However,

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[43] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 711 cmt. a (1987).

[44] The current Restatement of Foreign Relations still, though narrowly, recognizes denial of justice as an injury. *Id.* ("[T]he phrase 'denial of justice' is used narrowly, to refer only to injury consisting of, or resulting from, denial of access to courts, or denial of procedural fairness and due process in relation to judicial proceedings, whether criminal or civil."); *id.* at reporter's n.2 ("Before the development of the contemporary law of human rights, states were held responsible for injury to aliens consisting of, or resulting from, various acts or omissions deemed to violate an international standard of justice or other standards accepted in customary international law.").

[45] Burley, *supra* note 36, at 465.

[46] Hamilton suggests in *The Federalist No. 80* that a grant of federal jurisdiction over cases concerning aliens would diminish the possibility of such an escalation:

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

THE FEDERALIST NO. 80, at 500-01 (Alexander Hamilton) (B. Wright ed., 1961).

[47] *See* James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation Iraq in Comparative and Historical Context*, 25 U. PA. J. INT'L ECON. L. 491, 506 & n.55 (2004) ("The best statement of American hegemony

there may be relevant modern analogs of Hamilton's concern.[48] While miltary conflict with established world powers no longer poses the imminent threat to the United States that it did in the eighteenth century, a denial of justice today might lead to terrorist retribution and non-war civilian casualties.[49]

2. The Diplomatic Safety Theory

The diplomatic safety theory is a narrower variant of the denial of justice theory. The diplomatic safety theory argues that Congress enacted the ATS to provide access to courts specifically for other nations' diplomats.[50] This view is supported by Blackstone's *Commentaries* (written contemporaneously with the enactment of the ATS) which states that "[i]nfringement of the rights of embassadors" was one of three "principal offences against the law of nations[.]"[51] Thus, the ATS would help protect ambassadors' rights, which would avoid international tension caused by a violations of a principal international offense.[52]

Historical research suggests that one episode in particular, the "Marbois Affair," may have sparked political interest in the protection of ambassadors.[53] In 1784, the

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begins with the proclamation that '[t]he United States possesses unprecedented- and unequaled-strength and influence in the world.'") (quoting NAT'L SEC. COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1 (2002)).

[48] *See supra* note 44.

[49] Part IV.A.2 *infra* discusses these modern threats in greater detail.

[50] *See* Burley, *supra* note 36, at 469 (referring to the ATS as an "Ambassador Protection Plan").

[51] 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 68 (1803).

Judge Bork relies in part on the diplomatic safety theory in his concurrence in a 1984 ATS case. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring) ("The principal offences against the law of nations, animadverted on as such by the municipal laws of England, [were] of three kinds: 1. Violation of safeconducts; 2. Infringement of the rights of embassadors; and, 3. Piracy.") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 68, 72, *quoted in* W.W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)); *see also id.* at 779 (Edwards, J., concurring) (quoting same passage with trivial spelling variation from 4 WILLIAM BLACKSTONE, COMMENTARIES 67 (Welsby ed. 1854)). The *Tel-Oren* concurrences are discussed further *infra* Part II.B.2.

[52] As further evidence of the importance of diplomatic safety in the eighteenth century, the U.S. Constitution grants original Supreme Court jurisdiction over cases involving ambassadors. *See* U.S. CONST. art. III, § 2, cls. 1, 2.

[53] *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-94 (1986) (discussing the history of the events of the Marbois affair and their connection to the enactment of the ATS).

Chevalier De Longchamps insulted Francis Barbe Marbois, the French Consul-General, in Pennsylvania, which led to a public argument and assault in the streets of Philadelphia.[54] No federal courts existed at the time of the Marbois affair. Thus, the federal government, though ostensibly responsible for international diplomacy, was unable to resolve a simple assault case to protect the honor of a diplomat. This federal impotence led to international outrage, including formal protests from foreign diplomats and American politicians; it demonstrated the United States' need for a federal court system.[55] So, this theory goes, Congress enacted the ATS to prevent further incidents like the Marbois Affair and their ensuing international backlash.[56]

3. The International Duty Theory

As an alternative to the cluster of interrelated national defense theories, Professor Burley (now Dean Slaughter) posited that it was a higher sense of international duty – not self-preservation – that moved the ATS's drafters.[57] The international duty theory suggests that "the country was ready to shoulder a perceived national duty to enforce international law as it related to individual conduct."[58] Some originalists

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[54] Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111 (1784) ("[I]t appeared, that De Longchamps and Monsieur Marbois . . . entered into a long conversation, in the course of which, the latter said that he would complain to the civil authority, and the former replied, 'you are a Blackguard.'"); Casto, *supra* note 53, at 491.

[55] *See* Casto, *supra* note 53, at 491 & n.138. Eventually, a Pennsylvania state court tried and convicted the Chevalier of criminal technical assault – in violation of the law of nations. *De Longchamps*, 1 U.S. (1 Dall.) at 117.

[56] *See* Casto, *supra* note 53, at 492-95 (describing the effect of the Marbois Affair on American society, politics, and legislation). *But see* Burley, *supra* note 36, at 469-73 (criticizing the diplomatic safety theory and concluding that the Alien Tort Statute could not have been motivated by ambassadorial protection because the only suit brought to defend Marbois' honor was a criminal suit, not civil, as is a tort suit). Indeed, Blackstone noted that suits to vindicate ambassadorial rights were criminal common-law suits. *See* Casto, *supra* note 53, at 489-90 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *67, *70-71 (1783)); *see also* Triquet v. Bath, 3 Burr. 1478, 97 Eng. Rep. 936, 938 (K.B. 1764) (upholding diplomatic immunity as part of the common law of England in a case argued by Blackstone and decided by Judge Mansfield); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

[57] *See generally* Burley, *supra* note 36, at 475-88.

[58] Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV., 1359, 1364 (2002).

argue that the term "law of nations" included only rules governing relations *among nations* (and not between individuals and nations) and so the intent of the ATS's drafters could not have been to include suits to protect individual rights.[59] The international duty theory acknowledges that the prevailing view of international law in 1789 may have been limited to nations only, but asserts that the drafters, moved by a sense of duty, nevertheless intended the ATS to allow international law to be applicable by *individuals*.[60] That is, the drafters intended to allow any alien – not only ambassadors – to utilize the federal courts to redress their injuries.[61] The international duty view sees this early willingness to enforce international law as "a badge of honor" for our young nation.[62]

With these theories in mind, it remains unclear which, if any, of these views of the ATS courts have adopted. However, recent case law reflects a more expansive view of the ATS than would be suggested by the denial of justice or diplomatic safety theories.[63] Courts' willingness to interpret the ATS to include the rights of individuals is more compatible with the international duty theory than with the other theories.[64] The next section of this Note will review modern case law, legislation, and commentary on the ATS.

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[59] *See* David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 340 (1988); Beth Stephens, *Accountability Without Hypocrisy: Consistent Standards, Honest History*, 36 NEW ENG. L. REV. 919, 922 (2002) ("Most international law before World War II had governed interactions among states and their governments."). Since World War II, the international community often refers to the rules governing interactions among nations as "*public* international law."

Since international law (or the law of nations, as it was then called) at the time of the ATS's enactment had little place for individuals' rights, originalists take the position that the ATS should be narrowly interpreted to exclude suits that vindicate individual rights transnationally. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., concurring).

[60] Burley, *supra* note 36, at 475 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (G. Chase 4th ed. 1923)).

[61] This view is actually a type of originalist view in which the original facts are in dispute. Judge Bork's construction asserts that the prevailing view of international law was limited to nations and that the ATS's drafters meant the ATS to accord with that view. Professor Burley suggests that the prevailing view was not as narrow as some assert, or that even if it was so narrow, the drafters deviated from this prevailing view to go above and beyond their duty to comply with the prevailing narrow view of international law. *Id*. at 477.

[62] *Id.* at 464.

[63] *See* Willett, *supra* note 34, at 3.

[64] *Id.* ("[T]hat the new nation 'was ready to shoulder a perceived national duty to enforce international law as it related to individual conduct' . . . . resonates in the modern-day lawsuits instituted under the Alien Tort Statute.").

B. Modern Applications of the Alien Tort Statute

As previously mentioned, the ATS remained essentially unnoticed for almost two centuries.[65] After World War II, the global community's view of international law changed.[66] The scope of international law expanded to include laws governing the relationships between states and individuals and between individuals of different nations.[67] Utilizing this new conception of international law, alien plaintiffs began to sue in U.S. district courts under the ATS.[68] These plaintiffs enjoyed little success until courts and scholars took notice of the ATS's potential as a human rights enforcement tool.[69] In 1980, a Paraguayan father and daughter brought the ATS into the spotlight by suing an official of the militaristic Paraguayan government for the wrongful death of their son/brother.[70] The Second Circuit's decision in that case, *Filártiga v. Peña-Irala*, began a debate that has since greatly broadened the ATS's applicability.[71] Before *Filártiga*, courts read the ATS narrowly;

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[65] A database search on the ATS returned about ten scholarly articles published before 1980. Approximately 1300 articles are now available, over 1100 of which were published within the last ten years. A database search of cases mentioning the ATS returns over 300 cases total, with about 200 of these decided in the last ten years, but only about two dozen cases before 1980. Only two of these pre-1980 cases found jurisdiction under the ATS. *See infra* note 72.

[66] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831-32 (1997) (noting that the Nuremberg trials "shattered" the old conception of international law).

[67] *See* Burley, *supra* note 36, at 490-93. For a review of updates to the Restatement of Foreign Relations Law that reflect this change in the content of "international law," see *infra* note 77.

[68] *See, e.g.*, Damaskinos v. Societa Navigacion Interamericana, S.A, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (dismissing the case where Greek plaintiff sought damages for an injury in violation of a maritime treaty); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142, 144 (7th Cir. 1973) (affirming summary judgment for defendants because Nigerian plaintiffs alleging violations of the Thirteenth Amendment and international prohibitions against slavery failed to establish that labor was forced).

[69] *See, e.g.*, IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); Thomas P. Crotty, Note, *The Law of Nations in the District Courts: Federal Jurisdiction over Tort Claims by Aliens Under 28 U.S.C. § 1350*, 1 B.C. INT'L & COMP. L. REV. 71, 71 (1977).

[70] *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

[71] *See id.* at 887 (establishing that the ATS provides jurisdiction over extraterritorial suits); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam) (interpreting the ATS narrowly and providing three divergent rationales in concurrences); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (reinterpreting the ATS broadly and partially refuting the *Tel-Oren* reasoning), *reconsideration granted in part by* 672 F. Supp. 1531 (N.D. Cal. 1988) (mem.); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) ("In *Filártiga,* transnational public law litigants finally found their *Brown v. Board of Education.*") (citation omitted).

only two pre-*Filártiga* cases allowed jurisdiction under the ATS.[72] Since *Filártiga*, human rights plaintiffs have frequently asserted jurisdiction under the ATS.[73] Recent cases brought under the ATS tend to seek redress for violations of treaties such as the Geneva Conventions or for violation of general international norms such as those proscribing torture, slavery, and genocide.[74]

1. Early ATS Cases Used the Narrow Interpretation

Initially, almost no court held that the ATS granted jurisdiction over extraterritorial torts.[75] While the effect of the ATS was clear – that district courts have jurisdiction over cases alleging violations of the "law of nations" – its scope was not. The content of the "law of nations,"[76] now commonly referred to

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[72] *See* Adra v. Clift, 195 F. Supp. 857, 863-65 (D. Md. 1961) (regarding child custody dispute between aliens in which a falsified passport provided the violation of international law); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.C.S.C. 1795) (No. 1607) (concerning title to slaves aboard an enemy ship captured at sea); *see also* Randall, *supra* note 32 (reporting that the ATS had been invoked only twenty-one times before *Filártiga*, and jurisdiction granted only twice); Kontorovich, *supra* note 30, at 202 & n.111 (discussing *Bolchos* and noting the progression from "only faint glimmerings of universal jurisdiction" to the formal recognition of universal jurisdiction in *Filártiga*).

[73] *See infra* note 122 for examples of scholarly articles highlighting the human rights potential of the ATS.

[74] For examples of cases seeking to vindicate international human rights norms, see *infra* notes 118-20, 122-30, and accompanying text.

[75] *See supra* note 72 for a review of these cases; *see also Tel-Oren*, 726 F.2d at 792-93 & n.24 (Edwards, J., concurring) (discussing the pre-*Filártiga* narrowness of the ATS); Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 7 & n.12 (2002) (noting the rare use of ATS before *Filártiga*).

[76] 28 U.S.C. § 1350 (2005). The debate over extraterritorial jurisdiction is lively. *See, e.g.*, Carmichael v. United Techs. Corp., 835 F.2d 109, 113 (5th Cir. 1988) (noting the debate among academics regarding the ATS). *But see* Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 366 (E.D. La. 1997) ("The current view of § 1350 is that it grants a federal cause of action as well as a federal forum in which to assert the claim. . . . [S]ection 1350 is appropriately used by individuals asserting claims for violation of international law of human rights.") (citations omitted), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

Two camps have emerged with interpretations of the ATS that advance their causes. On one side, human rights advocates, scholars, and practitioners support a "cause of action" interpretation. They argue that the ATS provides both jurisdiction and a cause of action, or, alternatively, that it allows the cause of action to be found in domestic tort law, customary international law, or in the domestic tort law of a foreign nation. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (finding Congressional intent to broaden the ATS and Congressional approval of courts' interpretations to include a cause of action in the ATS); Casto, *supra* note 53, at 471-72 (advocating that the ATS "should be construed as liberally as possible").

The opposition, including international corporate interests and economists, tends toward a jurisdiction-only interpretation. That is, they read the ATS narrowly to grant jurisdiction over cases brought with an independent cause of action. *See, e.g.*,

as international law, was uncertain at best. Thus, the primary limitation on the ATS's scope was courts' narrow interpretation of the term "law of nations."

The law of nations has its origins in governing the relationships *among* national governments.[77] As a type of "international common law," its boundaries and requirements are rooted in customary protocols and the practical necessities of dealing with other nations.[78] This narrow conception of international law does not leave room for individual rights.[79] Thus, an interpretation of the ATS relying on this narrow conception would reject many modern ATS cases that have been successful. For example, courts interpreting "law of nations" narrowly would not have subject matter jurisdiction over a suit brought by a Panamanian citizen against an American corporation alleging labor abuses amounting to torture. Since the body of law that dictates relationships *among* nations does not control this hypothetical suit (because the plaintiff is not a nation, but an individual citizen), the suit would fail. The modern conception of international law is broader; it recognizes the rights of individuals as within the scope of international law.[80] This broader conception was a gradual change that crystallized after World War II.[81]

The legal fallout of the atrocities committed in Nazi Germany effectively internationalized certain broadly-

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Tel-Oren, 726 F.2d at 810 (Bork, J., concurring) ("[T]his provision . . . is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions.").

[77] *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1965) ("'International law,' as used in the Restatement of this Subject, means those rules of law applicable to a state or international organization that cannot be modified unilaterally by it."). The definition of international law changed in the Third Restatement to acknowledge the growing understanding that international law could affect the rights of individuals. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 ("International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, *as well as with some of their relations with persons, whether natural or juridical*.") (emphasis added), *id.* § 101 reporter's n.1 (explaining the change from the previous Restatement) (1987).

For purposes of this discussion, the term "international law" will be used interchangeably with the term "law of nations" used in the ATS. 28 U.S.C. § 1350.

[78] This is traditionally referred to as "customary international law." *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 cmt. c (1987).

[79] *See id.* § 101, reporter's n.1 (1987).

[80] *Id.* § 101.

[81] *See* Stephens, *supra* note 59, at 922-23 (noting changes in international law precipitated by World War II).

recognized human rights standards.[82] The short list of internationally acknowledged inderogable norms referred to as *jus cogens* encompasses the worst of these atrocities.[83] This list is informal, but some of its contents are undisputed: prohibitions against piracy, torture, and genocide, for example, are all well-accepted *jus cogens* norms.[84] One contested item that some argue to be on this list is terrorism. While most authorities agree that the international community universally prohibits terrorism, the specific activities that are included in terrorism remain undefined.[85]

Prior to 1980, courts interpreted the ATS using the narrow conception of international law as the meaning of "law of nations," which preserved the ATS's obscurity.[86] The Statute "awoke" in *Filártiga v. Peña-Irala* when the Second Circuit used the broad conception of the ATS to allow individual claims against violators of international law.[87]

2. *Filártiga* Broadened the Alien Tort Statute's Scope

Professor Harold Koh referred to *Filártiga v. Peña-Irala* as the *Brown v. Board of Education* of transnational public

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[82] *Id.*

[83] *See, e.g.*, PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 29 (2001) [hereinafter PRINCETON PRINCIPLES] ("For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture."), *available at* http://www.princeton.edu/~lapa/unive_jur.pdf; Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 413-14 (1989) ("Most areas of great human rights concern – illegal treaties, humanitarian (armed conflict) law, *apartheid*, genocide, torture, violations of the right to life and the plight of refugees – are governed by *jus cogens*.").

[84] *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1173-74 (1994) (reviewing *jus cogens* and its relationship to foreign sovereign immunity). The Restatement of Foreign Relations includes, *inter alia*, state-sponsored torture, slavery, genocide, and disappearance as violations of international law. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 702 (1987); *see also id.* cmt. c ("The customary law of human rights is part of the law of the United States to be applied as such by State as well as federal courts.").

[85] *See* PRINCETON PRINCIPLES, *supra* note 83 (noting the drafters' exclusion of terrorism). Terrorism has resisted precise definition. Though actions may be described – or, unfortunately, recounted – that are universally agreeably terroristic, there remains no standard to determine whether *any* given action is terroristic. That is, until a better definition is stated, the international community will have to know terrorism when it sees it.

[86] *See supra* note 72.

[87] Filártiga v. Peña-Irala, 630 F.2d 876, 888-89 (2d Cir. 1980).

law.[88] The *Filártiga* court combined a modern interpretation of the "law of nations" with the very old Alien Tort Statute to arrive at the conclusion that the district courts could hear extraterritorial claims. Thus, the court found that it had jurisdiction over the case, setting precedent that made the possibility of redress available to similarly situated plaintiffs everywhere.[89]

The plaintiffs in this case were Dr. Joel Filártiga and his daughter, both Paraguayan asylum seekers in the United States. They brought their wrongful death suit against defendant Americo Peña, a Paraguayan police official in the militaristic government of President Alfredo Stroessner.[90] The plaintiffs accused Peña of involvement in the death by torture of Joelito Filártiga, Dr. Filártiga's son, in political retaliation for Dr. Filártiga's opposition to the Stroessner government.[91] The district court below had dismissed the case for lack of subject matter jurisdiction by adopting the narrow meaning of "law of nations."[92] The district court reasoned that international law or the law of nations referred only to those laws governing relations among nations (this body of law is now called "*public* international law").[93] The Second Circuit found this view of "international law" to be unacceptably narrow, so it rejected the district court's narrow construction and opened the door to the expansive use of the ATS today.[94]

The *Filártiga* court went on to broadly construe the ATS's reference to international law.[95] The court recognized that modern international law governs the relationship between a government and its citizens.[96] It thus held that the plain language of the ATS granted jurisdiction over a cause of

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[88] *See* Koh, *supra* note 71, at 2366 ("In *Filártiga,* transnational public law litigants finally found their *Brown v. Board of Education.*") (citation omitted).

[89] *See Filártiga*, 630 F.2d at 879, 888-89. The *Filártiga* plaintiffs eventually won a ten-million-dollar damages judgment. *Id.*

[90] *Id.* at 878.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 880.

[94] In overturning the district court's narrow interpretation, the Second Circuit noted that the district court founded that narrow interpretation on dicta from two Second Circuit cases. *Filártiga*, 630 F.2d at 880.

[95] *Id*. at 881 ("[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."). The Supreme Court would later adopt a sympathetic view in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), discussed *infra*.

[96] *Id.* at 888-89.

action in tort in violation of international law, and that torture was such a violation.[97] Since *Filártiga*, the general trend in ATS litigation has been expansive.[98] This trend, however, has not been without interruption. A District of Columbia Circuit Court opinion posed a significant threat to *Filártiga*'s rationale.

Dismissing the plaintiffs' case in *Tel-Oren v. Libyan Arab Republic*, a D.C. Circuit three-judge panel disapproved of the *Filártiga* court's reasoning.[99] The *Tel-Oren* plaintiffs were mainly bus passengers and surviving families of passengers who were injured or killed in an armed attack against a civilian bus in Israel.[100] The district court below had dismissed the plaintiffs' case against those allegedly responsible for the murder of their relatives.[101] On appeal, the plaintiffs maintained that the ATS provided jurisdiction for their claims because the defendants' actions constituted a violation of international law, as the *Filártiga* court had defined it.[102] The D.C. Circuit upheld the dismissal in a very brief opinion, but each member of the three-judge panel wrote a substantial concurring opinion founded on largely independent grounds from the others. Judge Edwards' concurrence agreed with the principles established in *Filártiga*, but distinguished *Tel-Oren* on its facts.[103] Judge Bork's concurrence agreed with the district court's reasoning in its dismissal – because the ATS did not itself supply a private cause of action, the plaintiffs had

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[97] *Id.* at 880, 890. The Torture Victim Protection Act later explicitly established a corresponding cause of action to enforce the right. *See infra* Part II.B.3.

[98] For examples of the cases that have followed in the *Filártiga* chain, see *infra* notes 118-20, 122-30, and accompanying text.

[99] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) ("Judge Edwards contends, and the Second Circuit in *Filártiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results.").

[100] *Id.* at 776 (Edwards, J., concurring).

[101] *Id.*

[102] *Id.* at 789-91 (Edwards, J., concurring) (discussing the appropriate scope of the ATS, i.e., whether it should be read broadly to supply a cause of action or strictly to supply jurisdiction only).

[103] *Id.* at 776 (Edwards, J., concurring). Edwards agreed with the Second Circuit that the ATS conferred jurisdiction over suits alleging violations of substantive international law. *Id.* at 777-78 ("The Second Circuit did not require plaintiffs to point to a specific right to sue under the law of nations in order to establish jurisdiction under section 1350; rather, the Second Circuit required only a showing that the defendant's actions violated the substantive law of nations."). However, he reasoned that there was no firm consensus on the content of international law. He felt that without further clarification from the Supreme Court, courts should not apply the ATS to groups such as the Palestine Liberation Organization because they do not operate as state actors or under color of state law. *Id.* at 791-95 ("Against this background, I do not believe the consensus on non-official torture warrants an extension of *Filártiga*.").

failed to show a cause of action.[104] Judge Robb differed from both of his colleagues, holding briefly that he found the case to be a nonjusticiable political question.[105] Though in 1991 Congress provided some guidance regarding ATS interpretation, the broad view of the ATS (shared by the Second Circuit, Judge Edwards of the D.C. Circuit, and others) would remain at odds with Judge Bork's *Tel-Oren* opinion for years to come.[106]

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[104] *Id.* at 800-01 (Bork, J., concurring). This is the "jurisdiction-only" view of the ATS. In order for the *Tel-Oren* case to proceed, Bork thought that the plaintiffs would need to state an independent cause of action. *Id.* at 800 & n.5. By likening 28 U.S.C. § 1331 (granting federal jurisdiction to disputes arising under *inter alia* treaties of the United States) to § 1350, the district court found that the ATS granted only jurisdiction, but did not include a private cause of action. *Id*. at 800. Thus, according to Bork, plaintiffs would need a treaty granting a private cause of action for the case to proceed. Judge Bork then held that since none of the treaties cited by the plaintiffs created an express or implied cause of action, the district court had properly dismissed the case.

Judge Bork also noted that federal adjudication could interfere with American diplomatic efforts, a concern that parallels the political question rationale adopted in Judge Robb's concurrence. Bork felt that these questions were essentially diplomatic in nature and thus inappropriate for judicial scrutiny. *Id.* at 805.

[105] *Tel-Oren*, 726 F.2d at 823 (Robb, J., concurring) ("But both Judges Bork and Edwards fail to reflect on the inherent inability of federal courts to deal with cases such as this one. It seems to me that the political question doctrine controls. This case is nonjusticiable."). Judge Robb lamented that the federal courts could not help future plaintiffs "maimed or murdered at the hands of thugs clothed with power who are unfortunately present in great numbers in the international order." *Id*. He condemned the attack as "barbarity in naked and unforgivable form," but felt that the courts should not attempt to determine whether individual acts of aggression amount to violations of international law. *Id.* ("Courts ought not to engage in [the search for the least common denominators of civilized conduct] when that search takes us towards a consideration of terrorism's place in the international order."). Robb opined that drawing lines between acceptable state actions and unacceptable terrorism was not an appropriate task for the judiciary.

[106] *See, e.g.*, Flores v. Southern Peru Copper Corp., 414 F.3d 233, 242-47 (2d Cir. 2003) (reviewing *Filártiga*, *Tel-Oren*, and the Torture Victim Protection Act of 1991, and concluding that "neither Congress nor the Supreme Court has definitively resolved the complex and controversial questions regarding the meaning and scope of the [ATS]."); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538-40 (N.D. Cal. 1987) (discussing and rejecting the *Tel-Oren* concurrences of Judges Bork and Robb, and finding jurisdiction over a suit brought by Argentinean citizens living in the United States against a former Argentinean general for kidnapping and torturing their son to death as part of a national security operation in Argentina's "dirty war"), *reconsidered in part by* Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (holding that plaintiffs had shown sufficient agreement among nations to establish a cause of action in international law for the tort of "causing disappearance"). The Supreme Court eventually considered the appropriate breadth of the ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), discussed *infra* note 133 and accompanying text.

3. The Torture Victim Protection Act Supports the Expansive Interpretation

The Torture Victim Protection Act of 1991 ("TVPA") was the first substantive change to the ATS since its enactment.[107] The TVPA did not change the statutory text of the ATS, but added a note defining torture and extrajudicial killing[108] and establishing a cause of action under the ATS for aliens to remedy those offenses.[109] Congress enacted the TVPA in order to comply with the United Nations Charter and other international treaties.[110] The note added by the TVPA instructs courts that torture and extrajudicial killings constitute offenses in violation of international law.[111] Thus, the TVPA is an advisory corollary to the ATS explicitly granting jurisdiction over tort cases brought by aliens seeking to redress torture or

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[107] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2005)). The previous amendments and re-codifications were essentially administrative, not substantive. They merely changed the wording of the ATS from its original text to reflect modernized legal terms. *See* Bradley, *supra* note 7.

[108] Torture Victim Protection Act of 1991 § 3, 28 U.S.C. § 1350 note § 3.

[109] Torture Victim Protection Act of 1991 § 2(a)(1), 28 U.S.C. § 1350 note § 2(a)(1) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . ."); *see also* Kadic v. Karadžić, 70 F.3d 232, 245-46 (2d Cir. 1995) (discussing and applying the TVPA and noting that the ATS may also be applied to non-state-actor defendants).

[110] The stated purpose of the act was "[t]o 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." Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, 73. Congress' statement of the rationale underlying the TVPA evinces the international duty theory of the ATS's enactment in 1789, *see supra* notes 57-64 and accompanying text, and affirms that theory's applicability to modern times.

One of the "international agreements" to which the law refers is probably the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51/Annex (1984). *See also* U.N. CHARTER art. 55 ("[T]he United Nations shall promote: . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.").

[111] Before the TVPA, the federal district courts were fragmented on whether torture was a sufficient cause of action. *See, e.g.*, Carmichael v. United Techs. Corp., 835 F.2d 109, 113 (5th Cir. 1988) ("'Official torture' has been recognized as an actionable tort under the Alien Tort Statute in some jurisdictions and not in others."). The TVPA, perhaps in response to this fragmentation, made clear that torture gives rise to a cause of action under the ATS. 28 U.S.C. § 1350 note § 2(a)(1) ("An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . .").

extrajudicial killing. Additionally, the TVPA is a Congressional acknowledgment and approval of the ATS's use for human rights enforcement.[112] At least some courts have interpreted the enactment of the TVPA as legislative permission, if not a mandate, to continue expansion of the ATS's breadth.[113] Thus, the TVPA served as a booster shot for the ATS's growing scope. This expansive view of the ATS has continued through a string of suits against individual government officials (not the governments themselves) and against multi-national corporations.

4. Post-*Filártiga* Applications Rely on the Expansive Interpretation

The most recent applications of the ATS have involved international human rights enforcement. The plaintiffs in these cases filed ATS suits to redress human rights abuses by multinational corporations,[114] abuses by government actors,[115]

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[112] *See* 137 CONG. REC. H11244 (1991) ("[T]he Torture Victim Protection Act, H.R. 2092, puts torturers on notice that they will find no safe haven in the United States. Torturers may be sued under the bill if they seek the protection of our shores or otherwise subject themselves to the personal jurisdiction of a U.S. court.") (comments of Romano L. Mazzoli, D-Ky.). The TVPA's legislative history echoes the Second Circuit's statement in *Filártiga* that "for purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind." 630 F.2d at 890.

[113] Judge Hatchett, writing for a unanimous three-judge panel of the Eleventh Circuit, affirmed a decision by District Judge Tidwell awarding damages against a former Ethiopian government official involved in the plaintiffs' detention, torture, and disappearance:

> Lastly, we find support for our holding in the recently enacted Torture Victim Protection Act of 1991 (TVPA). In enacting the TVPA, Congress endorsed the *Filártiga* line of cases:
>
> > The TVPA would establish an unambiguous and modern basis for a cause of action *that has been successfully maintained under an existing law*, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act), *which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations*."
>
> Congress, therefore, has recognized that the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law.

Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (citation omitted) (quoting H.R. REP. NO. 102-367, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84, 86). This language is also an example of the "cause of action" interpretation of the Statute. *See supra* note 76.

[114] *See, e.g.*, Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 22 (D.D.C. 2005); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003); Doe v.

or abuses by government contractors, the topic of this Note.[116] One class of these cases involves plaintiffs subjected to human rights violations committed in connection with multinational corporations' labor practices.[117] For example, the ATS was the jurisdictional vehicle for a series of high-profile cases brought against the multinational petroleum conglomerate Unocal for its use of forced labor in the "Yadana Project" in Burma.[118] A group of Indonesian citizens filed a similar case in the District of Columbia against ExxonMobil Corporation, alleging murder, torture, rape, and genocide committed by the Indonesian

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Unocal Corp., 110 F. Supp. 2d 1294, 1295-96 (C.D. Cal. 2000), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005).

[115] *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 236-37 (2d Cir. 1995); Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 265 (S.D.N.Y. 2002) ("Plaintiffs alleged that ZANU-PF [Zimbabwe National Union-Patriotic Front], in an effort to suppress political opposition, and acting in concert with Mugabe and other high-ranking Zimbabwe government officials, carried out a campaign of violence against them that included extra-judicial killing, torture, seizure of property and terrorizing.").

Frequently, human rights groups such as the Center for Constitutional Rights ("CCR") represent the injured plaintiffs, as they did in *Filártiga*. For a list of cases in which the CCR has participated, see Center for Constitutional Rights, International Human Rights, http://www.ccr-ny.org/v2/legal/human_rights/human_rights.asp (last visited Sept. 2, 2005). The CCR has taken an active role in promoting investigations of the Abu Ghraib abuse scandals, as well. After a court-martial sentenced Specialist Charles Graner for his involvement in the abuse, the CCR "responded to the Graner verdict by calling for a special prosecutor to investigate Mr. Rumsfeld's role in creating policies that governed treatment of prisoners." Kate Zernike, *High-Ranking Officers May Face Prosecution in Iraqi Prisoner Abuse, Military Officials Say*, N.Y. TIMES, Jan. 17, 2005, at 8.

[116] *See, e.g.*, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (naming private contractor-corporations operating in the government's Abu Ghraib detention facility as defendants); Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1088 (S.D. Cal. 2004) (same); Jama v. INS, 343 F. Supp. 2d 338, 345-46 (D.N.J. 2004) (naming a private contractor-corporation operating a correctional facility as a defendant).

[117] This class of cases often includes a collaborative effort between a local government and an offending multinational corporation. *See generally* Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973 (2002). Plaintiffs have brought up to fifty such ATS suits against MNCs. *See* Willett, *supra* note 34; Kenny Bruno, *De-Globalizing Justice: The Corporate Campaign to Strip Foreign Victims of Corporate-Induced Human Rights Violations of the Right to Sue in U.S. Courts*, MULTINATIONAL MONITOR, Mar. 2003, at 13 (article written by ATS plaintiffs' co-counsel reviewing the history of the ATS and discussing its modern human rights applications).

[118] *See, e.g.*, Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1295-96 (C.D. Cal. 2000), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); Collingsworth, *supra* note 5, at 186-95. The Yadana Project involved the construction of an oil pipeline, a collaborative effort of Unocal, the militaristic Burmese government, and Total, a French oil company. *See id.* at 184 n.15.

The *Unocal* plaintiffs based their suit on an at least expansive, if not creative, interpretation of the ATS, so corporations and human rights groups greatly anticipated the *Unocal* holding. Unfortunately for the international legal community, the parties have tentatively agreed to a settlement, so the case will set no precedent after all. Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TIMES, Dec. 14, 2004, at 1.

military, then employed as the defendant's security forces.[119] In another recent example, labor unions brought actions against Coca-Cola in Columbia for paramilitary suppression of union activities.[120] Though their outcomes are mixed, these cases illustrate the trend in use of the ATS as a human rights tool against corporations.[121] Though scholars and practitioners have written a great deal on the topic,[122] this Note will not deal extensively with the effectiveness of such suits against corporate defendants or the propriety of various types of cases. For present purposes, it is sufficient to show that a growing number of plaintiffs are using the ATS to combat human rights violations committed by international corporations.[123]

Another class of cases brought under the ATS focuses on government officials. These cases often seek to vindicate tortious violations of international law arising from oppression in unstable political conditions.[124] For example, the Second

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[119] Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

[120] Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003).

[121] Some argue that cases against multinational corporations stand to cause more economic harm than good. *See* HUFBAUER & MITROKOSTAS, *supra* note 35. *Cf.* Willett, *supra* note 34. To minimize frivolous suits, however, courts have applied a more searching review before finding jurisdiction for cases under the ATS. Kadic v. Karadžić, 70 F.3d 232, 238 (2d Cir. 1995); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005). This closer inspection of the plaintiffs' claims is intended to ensure that an actual violation of international law has taken place, so ATS suits are less likely to be used as a harassment tactic. *Kadic*, 70 F.3d at 238. Further, these suits typically allege harms on the order of torture, murder, and slavery, so the rights infringed are more serious than those involved in garden-variety tort suits.

[122] *See, e.g.*, David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 941-43, 961 (2004) (discussing standards applied in evaluating ATS liability); Pagnattaro, *supra* note 18, at 262-63 (emphasizing the global responsibility to make remedies available for human rights abuses); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81, 104-114, 143-47 (1999) (analyzing past ATS cases and suggesting cautious use of the ATS to provide remedies against multinational corporations). *But see, e.g.*, Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57, 68-69 (2004) (arguing against selective use of international materials in Constitutional interpretation and noting with respect to the ATS that America "stand[s] virtually alone in the world in creating a civil cause of action for human rights violations"); Kontorovich, *supra* note 30, at 202-03, 208-09 (arguing that traditional universal jurisdiction rationales are inapplicable to support the ATS).

[123] The specific circumstances under which such cases should be allowed is highly contentious and would be ill-addressed here. This Note intends only to show the current uses of the ATS and presumes that among this class of cases are at least some instances of appropriate and beneficial litigation.

[124] For examples, see *infra* notes 125-30. The reader should note that the defendants in these suits are not the governments, but the individuals within the government responsible for the violation of international law. The Foreign Sovereign

Circuit held that Bosnian victims could sue under the ATS for alleged genocide and torture committed by officers working for Radovan Karadžić, resulting in further expansion of the Statute.[125] Similar cases against government officers have alleged human rights violations in the Philippines,[126] Ethiopia,[127] Chile,[128] Zimbabwe,[129] and Mexico.[130] Again, this Note deals with ATS cases against U.S. government contractors, so these ATS suits against foreign government actors are included to illustrate the broadening interpretation of the Statute.

The debate over the appropriate scope of the ATS continues.[131] The current U.S. government and some corporate defendants seem less supportive of a broadly-read Statute than

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Immunities Act controls federal jurisdiction over suits against governments. *See infra* note 150.

[125] *See Kadic*, 70 F.3d at 239-40. Citizens of Bosnia-Herzegovina brought a complaint against Karadžić, who was in command of Bosnian-Serb military forces, for various atrocities, including rape, forced prostitution, forced impregnation, torture, and summary execution. *Id*. at 236-37. The *Kadic* court rejected the state action requirement that had proven fatal to the plaintiffs' case in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *Kadic* held instead that plaintiffs may sue individual actors in their personal capacities for violations of international law, i.e., that state action is not a necessary element of an ATS suit. *Id*. at 239-40.

[126] Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). Philippine nationals brought a claim against Ferdinand Marcos for human rights abuses, such as torture, summary execution, and "disappearance," that occurred during his rule of the Philippines. *Id*. at 771.

[127] Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996). Former prisoners in Ethiopia filed lawsuit against Negewo, an official of "the Dergue," a military dictatorship governing Ethiopia in the mid-1970s, charging him with responsibility for their torture and other cruel acts in violation of international law. *Id*. at 845-46.

[128] Cabello Barrueto v. Fernández-Larios, 205 F. Supp. 2d 1325 (S.D. Fla. 2002). The representative of an executed former Chilean official brought an ATS suit against a member of the Chilean military group responsible for his death. In 1990, the Chilean Supreme Court granted amnesty to military officials who had committed human rights violations during the time of the execution. *Id*. at 1327.

[129] Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262 (S.D.N.Y. 2002). Plaintiffs brought a case under the ATS and Torture Victim Protection Act claiming the defendant participated with other Zimbabwean government officials in extra-judicial killing, torture, seizure of property, and terrorizing. *Id*. at 265.

[130] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004). A Mexican national abducted and brought to the United States to be prosecuted for murder was acquitted and brought a suit under the ATS and Federal Tort Claims Act against the U.S. government, the DEA, and Mexican policemen and civilians. *Id*. at 697. The Supreme Court, however, found that under the Alien Tort Statute a single illegal detention of less than one day of a Mexican national was not a violation of any provable norm of customary international law. *Id.* at 736-37 & n.27.

[131] *See, e.g.*, *id*. at 698-99; *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *see also* Bruno, *supra* note 117 (describing the debate over broad or narrow interpretation of the ATS).

the Congress that enacted the TVPA.[132] Case law, however, shows a judicial commitment to – or at least acceptance of – the expansive view of the ATS set forth in *Filártiga*.[133]

The Supreme Court's decision in *Sosa v. Alvarez-Machain* squarely confronted the issue of the ATS's scope (though it hardly resolved the issue).[134] *Sosa* clarified that the ATS not only provides jurisdiction, but also provides causes of action based on international norms if certain standards are met.[135] The Court held that "[federal] courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[136]

Courts thus remain able to enforce international law, including human rights standards.[137] This Note highlights one type of suit in which the ATS's utility is threatened: ATS suits against U.S. government contractors. A certain common law Defense protects government contractors from tort suits, undermining the ATS's human rights potential. The next part of this Note will explain this defense, its origins, the policies on

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[132] *See* Brief of Amici Curiae United States of America at 4, Doe I v. Unocal Corp., Nos. 00-56603, 00-56628 (9th Cir. May 8, 2003), *available at* http://www.hrw.org/press/2003/05/doj050803.pdf (arguing that Congress enacted the TVPA not to commend and encourage expansive interpretation, but to specify limited terms under which the suits should be allowable), *appeal dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); *cf.* Kadic v. Karadžić, 70 F.3d 232, 239-40 (2d Cir. 1995) ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.").

[133] *See supra* note 113 (illustrating the expansive view); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004) ("It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.").

[134] 542 U.S. 692, 730 (2004).

[135] *Id.* at 713-14.

[136] *Id.* at 725. The Court explained further that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.* at 732.

A footnote in *Sosa* noted, but did not address, the issue at the heart of this Note. *Id.* at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

[137] *See id.* at 729 (2004) (noting that with respect to judicially-created causes of action based on international norms, "the door is still ajar subject to vigilant doorkeeping"); Beth Stephens, Comment, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 567 (2005) (noting that the *Sosa* decision limited the purposes for which the ATS may be used, but cemented its use for the most egregious violations of international norms); *see also* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Willett, *supra* note 34, at 16-24.

which the Supreme Court founded it, and how defendants may raise it.

III. BACKGROUND OF THE GOVERNMENT CONTRACTOR DEFENSE

The Defense is a federal common-law judicial doctrine that shields a contractor-defendant from liability when the federal government controlled its actions.[138] The doctrine extends the federal government's umbrella of sovereign immunity to protect those manufacturers who essentially acted as instruments of the government.[139] The primary goal of the Defense is to protect government autonomy in procurement of goods through its contractors.[140] Principles of agency and sovereign immunity are the foundation of the Defense's rationale.[141] Courts reason that suits against contractors would increase contractor costs and that contractors would pass these additional costs on to the government, which generally enjoys sovereign immunity to such suits.[142] The Defense's reasoning is that if the government is immune and a contractor is merely executing the will of the government, the contractor should be immune.[143] Thus, the Defense holds that a manufacturer should not be held responsible for injuries caused by a defective product when the government directed the product's design and manufacture.[144]

From a policy perspective, the Defense stands to reason in certain typical situations. In order to encourage participation in government contracts and encourage competition and an ample supply of available products and

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[138] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988). There is no statutory basis for the Defense; it is essentially a part of the federal common law. *Id.* at 504 ("[W]e have held that a few areas, involving 'uniquely federal interests,' are so committed . . . to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts – so-called 'federal common law.'") (citations omitted).

[139] *Id.* at 512.

[140] *Id.* at 511-12.

[141] *Id.* at 524-25; *see id.* at 527-28 (Brennan, J., dissenting).

[142] *Id*. at 510.

[143] *See Boyle*, 487 U.S. at 511-12.

[144] *See* Charles E. Cantu & Randy W. Young, *The Government Contractor Defense: Breaking the* Boyle *Barrier*, 62 ALB. L. REV. 403, 405-08 (1998) (reviewing the origins of the Defense); *see also* Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 20-21 (1940) (disallowing suit against a contractor whose construction work gave rise to a state claim for soil erosion on the theory that contractor was executing the will of Congress).

services, the Defense minimizes the liability burden that contractors must assume.[145] This section will outline the foundations of the Defense and the reasoning in the case that established the Defense, *Boyle v. United Technologies*.[146] Since the Defense is essentially an outgrowth of sovereign immunity, a brief discussion of sovereign immunity will help illuminate the policies underlying the Defense.

A. Foreign and Domestic Sovereign Immunity

Sovereign immunity has its roots in historical deference to state actions.[147] Initially, government actors enjoyed broad immunity from judicial process.[148] But as governments began to engage in less traditionally sovereign activities, the international community responded by limiting the doctrine.[149]

There are two sides to sovereign immunity in American law, foreign and domestic. Foreign sovereign immunity deals with the liability of foreign governments in domestic courts while domestic sovereign immunity deals with the liability of the federal and U.S. state governments in domestic courts. The Foreign Sovereign Immunities Act ("FSIA") codified the American approach to foreign sovereign immunity.[150] Since

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[145] These policy implications of the Defense will be discussed more fully *infra* Part IV.A.1.

[146] 487 U.S. 500 (1988).

[147] *See* Feres v. United States, 340 U.S. 135, 139 (1950).

[148] *See, e.g.*, Ickes v. Fox, 300 U.S. 82, 96 (1937) ("[N]o rule is better settled than that the United States cannot be sued except when Congress has so provided . . . .").

[149] A letter issued by Jack B. Tate of the State Department explained the "restrictive theory" of immunity and adopted that view as the position of the U.S. government. Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *in* 26 Dep't of State Bull. 984-85 (1952), *and in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976).

[150] *See* Foreign Sovereign Immunities Act of 1976 (FSIA) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611); 28 U.S.C. § 1604 (2005) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."); *see, e.g.*, 28 U.S.C. § 1605(a)(7) (2005) (denying immunity from claims of state-sponsored terrorism). *But see* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) ("We think that Congress' decision to deal comprehensively with the subject of foreign sovereign immunity in the FSIA . . . preclude[s] a construction of the Alien Tort Statute that permits the instant suit." (citations omitted)).

The reader should note that courts have interpreted the ATS to provide jurisdiction over individual government actors in their individual capacity, *see* Kadic v. Karadžić, 70 F.3d 232, 239-40 (2d Cir. 1995), but not over the governments themselves. Courts have specifically excepted foreign governments from liability in ATS suits, noting that the FSIA controls these suits. However, legal scholars and at least one

this Note focuses on the liability of contractors working for the U.S. government, the FSIA serves mainly as a point of reference.

The Federal Tort Claims Act (FTCA) controls domestic tort immunity of the U.S. government.[151] Again, history firmly established the default rule of state immunity; American common law adopted this rule as a part of our English heritage.[152] This default remains in effect today; the U.S. government may not be sued without its permission.[153] However, Congress gave permission to sue for large classes of cases by enacting the FTCA, broadly waiving sovereign immunity subject to certain exceptions.[154] Some important exceptions to the FTCA's waiver of immunity retain immunity in situations likely to give rise to ATS suits. For example, the government remains immune to claims arising in a foreign country[155] and to claims related to military action.[156] These exceptions and others prevent an injured alien from suing the U.S. government directly for the actions of its contractors under a theory of respondeat superior.[157]

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court have thought that courts should deny immunity (otherwise permitted under the FSIA) to rogue nations in order to hold the nation itself liable for heinous human rights violations. *See* Princz v. Federal Republic of Germany, 26 F.3d 1166, 1168 (D.C. Cir. 1994) (reversing the jurisdiction asserted by the District Court of the District of Columbia in a case brought by a Holocaust survivor against the German government for slave labor reparations). The majority opinion was not entirely opposed to the reasoning of Judge Wald's dissent. *Id.* at 1174 n.1.

[151] *See* 28 U.S.C. §§ 1346, 2671-80 (2005) (granting jurisdiction over claims against the United States government and limiting jurisdiction and damages in certain cases).

[152] *See Feres*, 340 U.S. at 139.

[153] *See Fox*, 300 U.S. at 96; RESTATEMENT (SECOND) OF TORTS § 895A(1) (1979) ("Except to the extent that the United States consents both to suit and to tort liability, it and its agencies are immune to the liability.").

[154] RESTATEMENT (SECOND) OF TORTS § 895A cmt. b (1979).

[155] 28 U.S.C. § 2680(k) (2005).

[156] *Id*. § 2680(j) (2005).

[157] *See Id.* § 2680(a), (h), (j), (k) (2005) (retaining sovereign immunity for claims based on exercise of discretionary function by government employees, arising out of intentional torts, arising out of combatant activities, or arising in a foreign country, respectively); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 18-19 & n.6 (D.D.C. 2005) (noting exceptions in the FTCA that might retain sovereign immunity in an ATS case).

B. The Boyle *Rationale: Protect Government Autonomy with Private Immunity*

The Defense has no statutory foundation; it is a judicial creation.[158] The Supreme Court recognized the Defense and adopted the test currently used to apply it in *Boyle v. United Technologies*.[159] *Boyle* was a diversity action brought by family members of Boyle, a U.S. Marine helicopter copilot who drowned in a military exercise off the coast of Virginia.[160] When Boyle's helicopter crashed into the ocean, the pressure of the surrounding water trapped Boyle inside, pushing the helicopter's door hatch closed.[161] Boyle's family sued the manufacturer of the aircraft for, *inter alia*, negligence and breach of warranty in the hatch design.[162] The district court awarded a jury verdict for plaintiffs, but the Court of Appeals for the Fourth Circuit reversed, holding that the "military contractor defense" barred the suit.[163] On appeal, the Supreme Court agreed with the Fourth Circuit that military contractors should be protected, but based its opinion on a different rationale.[164]

Without a waiver of the defense of sovereign immunity, of course, a case cannot proceed against the government.[165] The Fourth Circuit reasoned in *Boyle* that since *Feres* protected the government from tort suits by military personnel, the same doctrine should also protect military contractors from liability to military personnel.[166] That is, in order to protect the

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[158] Despite the urging of government contractors to legislate a defense for them, Congress remained "conspicuously silent" on the issue. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 515 n.1 (1988) (Brennan, J., dissenting) (citing a string of legislative hearings on the topic of indemnification of civil liability for government contractors).

[159] *See id*. at 506-12.

[160] *See id.* at 502-03.

[161] *Id.* The hatch only opened outward. This was the design flaw for which Boyle's survivors sought to hold the manufacturer responsible. *Id*. at 503.

[162] *Id.*

[163] *Boyle*, 487 U.S. at 503.

[164] *Id.* at 512-13. The Fourth Circuit had relied upon the doctrine established in *Feres v. United States*, 340 U.S. 135 (1950). The *Feres* doctrine recognizes that the Federal Tort Claims Act does not waive sovereign immunity to military personnel injured in their military service. *Id.* at 146. Before *Boyle*, courts frequently used the *Feres* analysis in cases similar to *Boyle*. *Boyle*, 487 U.S. at 510 (citing Bynum v. FMC Corp., 770 F.2d 556, 565-66 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 596-97 (7th Cir. 1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 449 (9th Cir. 1983)).

[165] *See supra* note 153.

[166] *See* Tozer v. LTV Corp., 792 F.2d 403, 408 (4th Cir. 1986) (citing Stencel Aero Eng'g. v. United States, 431 U.S. 666, 673 (1977)) ("Such pass-through costs

government fully from the costs of injuries to military personnel, contractors should also be protected from these costs, lest the contractors pass them on to the government through increased contract rates.[167]

When *Boyle* reached the Supreme Court, Justice Scalia affirmed the Fourth Circuit's holding, but explicitly rejected the Fourth Circuit's *Feres* analysis and methodically explained why that rationale was unacceptable.[168] For purposes of this Note, Justice Scalia's narrowness argument is of particular interest. The Court's assertion that a *Feres* rationale would fail to bar civilian suits clearly decides that at least some cases brought by civilian plaintiffs are undesirable.[169] The *Boyle* majority supports this position with an exception to the waiver of sovereign immunity in the FTCA.[170] This exception retains

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would . . . defeat the purpose of the immunity for military accidents conferred upon the government itself."). The Fourth Circuit decided *Tozer* on the same day as *Boyle*, using the same reasoning.

[167] *Boyle*, 487 U.S. at 510.

[168] Justice Scalia wrote:

> We do not adopt [the *Feres*] analysis because [applying the *Feres* doctrine] logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever *Feres* would prevent suit against the Government, then even injuries caused to military personnel by . . . any standard equipment purchased by the Government, would be covered . . . . On the other hand, reliance on *Feres* produces . . . results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.

Id. at 510-11.

[169] Specifically, those civilian cases are undesirable that would "regulate" government design decisions. Justice Scalia uses the example of a tort suit "regulating" a government officer's selection of a jet engine. *See supra* note 168.

[170] *Boyle*, 487 U.S. at 511. The exception cited is 28 U.S.C. § 2680(a), the "discretionary function" exception to the FTCA's general waiver of sovereign immunity. This part of the FTCA retains immunity for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.

immunity in cases where a government official exercises discretion in performing an official function.[171] Thus, by the *Boyle* majority's reasoning, the Defense protects the exercise of discretion in federal procurement from "regulation" by State tort law.[172]

Since the *Boyle* decision, government contractors have had shelter under the theory that protecting the government's interests in flexible military procurement includes protecting its contractors.[173] Thus, *Boyle* extends the umbrella of sovereign immunity to shield those contractors sufficiently engaged in providing government equipment.[174] Under the current formulation of the Defense, a contractor must satisfy three prongs: specification, conformance, and disclosure.[175] Justice Scalia explained that the first two prongs were to ensure that the facts are such that liability would threaten a government officer's "discretionary function."[176] These prongs identify the product in question as embodying the will of the government (as opposed, for example, to stock catalog products designed exclusively by the contractor). The third prong, disclosure, is a safety measure to eliminate a harbor in which contractors could silently ignore known product defects that could jeopardize their contract.[177] That is, the third element creates an incentive for contractors to make relevant information known by exposing them to liability if they fail to reveal such information.[178]

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[171] *Boyle*, 487 U.S. at 511.

[172] *Id.* ("[W]e think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the Armed Services.").

[173] *See, e.g.*, Lewis v. Babcock Indus., 985 F.2d 83, 86 (2d Cir. 1993) (applying *Boyle*); Quiles v. Sikorsky Aircraft, 84 F. Supp. 2d 154, 165-70 (D. Mass. 1999) (same).

[174] *See Boyle*, 487 U.S. at 511.

[175] The Court adopted the Fourth (and Ninth) Circuit standard in *Boyle*:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.

Id. at 512.

[176] *Id.*

[177] *Id.* at 512-13.

[178] *See id.* Notably, the Court rejected a different standard for the Defense adopted by the Eleventh Circuit in a similar case, *Shaw v. Grumman Aerospace*. *Id.* at 513 (citing Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 746 (11th Cir. 1985)). The Eleventh Circuit's alternate formulation allowed the Defense in cases where a contractor either had only marginal design input or had significant design input, but

The Supreme Court cemented the judicial doctrine of the Defense by resolving a circuit split and setting the standard for raising the Defense.[179] *Boyle* established that the purpose of the Defense is to ensure government autonomy in its product procurement by extending the sovereign immunity reserved for governmental "discretionary functions" to contractors carrying out the discretion of the government.[180]

C. Hudgens *Extends the Defense to Services Contracts*

Since *Boyle*, the Defense has expanded. The Eleventh Circuit recently held that the Defense was valid for service contracts, as well.[181] The court reasoned that the same policy for making the Defense available in products liability suits against suppliers also applies when victims sue for harms caused by service contractors.[182] The extension of the Defense to service contractors is important because in practice, service contractors are more likely to violate human rights than manufacturing or design contractors.[183]

In summary, the government contractor defense extends sovereign immunity to contractors who operated as agents of

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warned the government of defects and was authorized to proceed nonetheless. *Shaw*, 778 F.2d at 746. The Supreme Court found that this approach would chill contractor participation by rewarding avoidance of design input. *Boyle*, 487 U.S. at 513. That is, by failing to immunize unconditionally contractors who had exercised significant design input, the Eleventh Circuit's formulation would discourage contractors from active engagement with product design. In rejecting this formulation, the Supreme Court found that the harms of contractor non-participation outweighed the value of a more narrowly tailored and easily applied test.

[179] *Boyle*, 487 U.S. at 512-13.

[180] *Id.* at 511-12.

[181] Hudgens v. Bell Helicopter, 328 F.3d 1329, 1334 (11th Cir. 2003) (finding a helicopter maintenance company not liable to surviving family of U.S. Army pilots who died when government officers instructed maintenance personnel not to examine the helicopter for certain wear defects).

[182] *Id.* at 1333-34. This reasoning is interesting because service contract suits are likely to rest on a negligence theory, while strict liability governs suits brought for harms caused by defective products. The different standards are important because disallowing the government contractor defense in suits against service contractors leaves them to defend a case in negligence, arguably an easier battle than a products liability case. Thus, taking the shield of the Defense away from contractors is less disadvantageous to the service contractor (the type of contractor more likely to violate human rights) than taking the same shield from a manufacturing or design contractor.

[183] Service contractors by definition require performance of a service, such as a helicopter repair technician, or more suitably for purposes of this Note, an interrogation specialist. These service contractors will have greater exposure to aliens who might bring ATS suits than would, for example, a manufacturer-contractor producing an engine part. It would be much more likely that a private military translator or interrogator would violate an alien's human rights than would an equipment provider.

the government.[184] The next part of this Note specifies issues that arise in ATS suits alleging human rights violations by U.S. government contractors[185] and then suggests that barring the Defense in ATS suits resolves many of these issues.[186]

IV. DISCUSSION

The Defense should not be allowed in ATS cases because the Defense thwarts the purposes of the ATS. Courts have recently accepted the ATS, at least to a limited degree, as a human rights enforcement mechanism.[187] The Defense is a shield of sovereign immunity, owned by the government, but used by private contractors. The government extends this shield to contractors to protect the government's discretion in procurement of goods and services.[188] The ATS and the Defense collide when alien plaintiffs use the ATS to sue government contractors over violations of international law. This impacts not only the remedy available to an injured alien, but also limits the ATS's potential as a human rights enforcement mechanism. Cases of collision are likely to occur more frequently due to increasing federal reliance on contractors, especially in military operations.[189] This part of the Note will first highlight the individual issues that arise from the conflict between the ATS and the Defense.[190] Then, it will argue that the best solution is a general ban on the Defense in ATS suits, subject to a case-by-case exception for executive orders specifically granting immunity.[191]

A. Problems with Allowing the Defense in ATS Suits

The conflicting policies behind the ATS and the Defense create a problem for courts in cases where government contractors tortiously injure aliens. The American

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[184] *See Boyle*, 487 U.S. at 512; RESTATEMENT (SECOND) OF TORTS § 895A(1) (1979) ("Except to the extent that the United States consents both to suit and to tort liability, it and its agencies are immune to the liability.").

[185] *See infra* Part IV.A.

[186] *See infra* Part IV.B.

[187] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).

[188] *See Boyle*, 487 U.S. at 511.

[189] P. W. Singer, a Senior Fellow at the Brookings Institution, estimates that more than 20,000 non-Iraqi individuals were working for private military contractors ("PMCs") in Iraq in mid-2004. *See* Dart, *supra* note 25.

[190] *See infra* Part IV.A.

[191] *See infra* Part IV.B.

government's increasing reliance on private military companies ("PMCs") in its operations abroad exacerbates this conflict.[192] With this trend toward privatization of military functions, the frequency of cases in which aliens are tortiously injured by government contractors and their employees, so-called "corporate warriors,"[193] is bound to increase.[194] Alien plaintiffs have filed several such cases in the district courts in the last decade.[195] With the American military presence in Iraq, Afghanistan, and Guantanamo Bay, military contractors will certainly be in a position to violate aliens' human rights.[196] Thus, identifying, analyzing, and resolving the conflicting policies between the ATS and the Defense will become increasingly important.[197] The following sections identify some of the particular and interrelated issues that arise in ATS suits against U.S. government contractors.

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[192] *See* Abigail Heng Wen, Note, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1562-63 (2003); Gail Gibson & Scott Shane, *Contractors Act as Interrogators; Control: The Pentagon's Hiring of Civilians to Question Prisoners Raises Accountability Issues*, BALT. SUN, May 4, 2004, at 1A.

For a list of PMCs involved in the Iraq war and the roles they play there, see Topsy N. Smalley, Military Contractors, http://www.topsy.org/contractors.html (last updated Jan. 2006).

[193] The current industry comprises several hundred companies competing for more than $100 billion in contract revenue. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 523-24 (2004), *available at* http://www.brookings.edu/dybdocroot/views/articles/fellows/singer20040122.pdf (noting that modern international law is not well-suited to regulate the sharp global trend toward military privatization).

[194] *See* P. W. Singer, *Nation Builders and Low Bidders in Iraq*, N.Y. TIMES, June 15, 2004, § A at 23 ("From the abuses at Abu Ghraib prison to the mutilation of American civilians at Falluja, many of the worst moments of the Iraqi occupation have involved private military contractors 'outsourced' by the Pentagon."). Singer has written extensively on the topic of PMCs, including the current depth of their involvement in the Iraqi occupation.

[195] *See, e.g.*, Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 12 (D.D.C. 2005) (naming private contractor-corporations operating in the government's Abu Ghraib detention facility as defendants); Saleh v. Titan Corp., 353 F. Supp. 2d 1087, 1088 (S.D. Cal. 2004) (same); Jama v. INS, 343 F. Supp. 2d 338, 345-46 (D.N.J. 2004) (naming a private contractor-corporation operating a correctional facility as a defendant).

[196] *See* Smalley, *supra* note 192 (showing the magnitude of the PMC involvement in Iraq).

[197] Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 17-19 (D.D.C. 2005) (refusing to consider whether the government contractor defense bars claims alleging torture until after discovery has taken place).

1. The Defense Facilitates Liability Laundering in Spite of Human Rights Norms

Allowing contractors to use the Defense enables a type of liability laundering scheme. Put differently, allowing the Defense creates a loophole in which the government can wash its hands of political or financial responsibility by assigning the liability to its contractors, whom the Defense will immunize.[198] If the government can depend on the Defense to protect its contractors, then it would be advantageous to assign government "dirty work" to the contractors. The contractors, in turn, will happily take on these jobs because the government's immunity will protect them from liability.[199] In court, the contractor would merely need to show a governmental exercise of discretion and that the contractor reported potential flaws in the plan to the government.[200] This liability laundering not only enables the sorts of practices the United States openly condemns – such as torture[201] or slavery[202] – but also removes the political accountability essential to keeping the government honest.[203]

This loophole means the government could use creative corporate structures as shelters from the liability of a specific military operation that could be questionable in the light of international law.[204] Military intelligence gathering provides a timely example of how such a scheme might work.[205] The government could benefit by torturing a captured soldier in order to extract information, but it might face international reproach for its actions.[206] After all, international consensus

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[198] Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

[199] *Id.*

[200] This exercise of discretion need not be highly visible, "perhaps no more than a rubber stamp from a federal procurement officer who might or might not have noticed or cared about the defects, or even had the expertise to discover them." *Id.* at 515 (Brennan, J., dissenting).

[201] *See* Torture Victim Protection Act of 1991 §§ 2, 3, 28 U.S.C. § 1350 note (2005) (creating an explicit cause of action for torture and specifying that torture is a violation of international law which triggers jurisdiction under the ATS); *see also supra* note 112 (quoting legislative comments regarding the TVPA).

[202] *See* U.S. CONST. amend. XIII.

[203] Recent American proactivity in the name of defense of human rights would seem to be at odds with such an outcome. *See* Stephens, *supra* note 59, at 922-24.

[204] *Id.*

[205] This is not to make any claims as to the facts of cases like those of the Abu Ghraib or Guantanamo Bay detainees, but rather serves as a hypothetical illustration.

[206] Some nations employ a similar method of liability laundering to diffuse responsibility for torture. This method, often called "rendition," utilizes other nations

condemns torture as a method of intelligence gathering.[207] And locally, the TVPA, a federal statute, expressly denounces torture and provides a cause of action to redress this activity.[208] To avoid reproach, among other reasons, the government would not use uniformed military personnel for this type of mission. However, an entrepreneurial privateer could fill this niche by forming a corporation to carry out a specific mission for which the government could not use uniformed military personnel. This way, if publicly exposed, the contractor would shield the government from outrage, which the public would direct primarily at the contractor. At the same time, the corporation could use the Defense to retain its profits from the illicit endeavor.[209] The net result would be a public relations victory for the government and a financial win for the contractor.

One might argue that if courts allow contractors to raise the Defense, accountability would flow from the contractor to the government. The argument is that because a contractor raising the Defense would need to prove that the government ordered the contractor to act in violation of international law, the public would know of the government's responsibility.[210] This perfect transfer of accountability from the contractor to the government, however, is unrealistic. Nevertheless, such a chain of delegation would at least *diffuse* the blame for activities in violation of international law. For example, photographs of uniformed military personnel engaged in human rights abuses, such as those seen following the incidents at Abu Ghraib, provoke criticism from the American

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instead of private contractors. A nation in possession of a prisoner "renders" (transfers) a prisoner into the custody of another nation with the diplomatic assurance that the prisoner will not be tortured. This assurance amounts to a wink and a smile between nations who fully intend that the prisoner be tortured to extract useful information. *See* Human Rights Watch, "Outsourcing" Torture, http://www.hrw.org /campaigns/torture/renditions.htm (last visited Feb. 7, 2006).

[207] Though the definition of torture may be disputed, civilized nations unquestionably agree that torture is a *jus cogens* offense. *See* PRINCETON PRINCIPLES, *supra* note 83, at 9 ("Human rights abuses widely considered to be subject to universal jurisdiction include genocide, crimes against humanity, war crimes and torture."); Parker & Neylon, *supra* note 83, at 413-14 ("Most areas of great human rights concern – illegal treaties, humanitarian (armed conflict) law, *apartheid*, genocide, torture, violations of the right to life and the plight of refugees – are governed by *jus cogens*.").

[208] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2005) (expanding the scope of the Alien Tort Statute, 28 U.S.C. § 1350, by creating an explicit cause of action for torture victims); *see also supra* note 112 (quoting legislative comments regarding the TVPA).

[209] Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988).

[210] The contractor would need to prove it was the government's agent. *See id.*

public.[211] Those pictures are powerful; they speak for themselves. In contrast, a second, similar photograph of civilian military contractors engaged in identical behavior would require a caption explaining that the subjects of the photograph were government contractors with specific orders from the government to carry out the violative actions. This second photograph would elicit less public criticism of the government because people would focus their outrage on the contractors who perpetrated the wrong instead of on the government, which ordered that the wrong be committed. Thus, as a public relations matter, the government would prefer the latter scenario. Even if the public attributes *some* responsibility for such actions to the government, the laundering tactic at least allows diffusion of blame.

If Congress and the federal courts allow defendants to raise the Defense in ATS suits, they create a loophole through which the government may diffuse or eliminate responsibility for acts in violation of international law. A nation committed to preventing torture and tyranny around the world[212] should be wary of such covert activities.

2. Allowing the Defense Threatens National Security and Credibility

If one of the initial purposes of the ATS was to prevent an alien injury or an incident such as the Marbois Affair from escalating to armed conflict,[213] one might draw modern analogs that illustrate the ATS's relevance. Of course, today, there is less concern that "denial of justice" to an alien will incite that alien's nation to declare war against the United States.[214] But today, America is more concerned that the mistreatment of aliens will lead to terrorist retaliation against American citizens abroad or at home.[215] Thus, a modern incarnation of

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[211] *See, e.g.*, Zernike, *supra* note 115.

[212] *See* David E. Sanger, *Bush Hails Vote*, N.Y. TIMES, Jan. 31, 2005, at 1 ("'The people of Iraq have spoken to the world, and the world is hearing the voice of freedom from the center of the Middle East,' Mr. Bush said . . . after the polls closed in Iraq.").

[213] *See* Burley, *supra* note 36, at 464; *see also supra* Part II.A.1-2 (discussing the denial of justice and diplomatic safety theories of the ATS's enactment).

[214] *See* Gathii, *supra* note 47 (emphasizing the United States' enormous global influence).

[215] Kenneth Roth, Letter to the Editor, *Torture, Terror and the Law*, N.Y. TIMES, May 19, 2004, at 24 (noting that the precedent set by some disputed interrogation methods approved by the Bush administration "endangers Americans

the original purpose of the ATS might be avoidance of a terrorist backlash against American citizens in Iraq or America for the treatment of prisoners at Abu Ghraib.

In addition to threatening national safety, allowing the Defense conveys impertinence to the international community. Arguably, the drafters of the ATS had the foresight to recognize the increasing importance of international cooperation.[216] By that view, the ATS is a courtesy extended, if not a duty owed, to the citizens of nations with which Americans transact business and exchange culture.[217] If international cooperation was indeed a part of what the drafters of the ATS had in mind, allowing the Defense in ATS suits would defeat their intent by barring redress and deterrence of human rights abuses. That is, hiding our contractors behind the wall of sovereign immunity would tarnish the ATS, an American "badge of honor."[218]

3. Contractor Immunity Defies the *Ubi Jus, Ibi Remedium* Principle

Alien plaintiffs injured by U.S. contractors have two potential paths to redress: they may attempt to sue the government or the contractors. Courts might not allow ATS plaintiffs to sue the government for reasons of sovereign immunity, discussed above,[219] and the Defense would bar a suit against the contractor.[220]

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and others in custody. It also encourages the excesses of Abu Ghraib, undermines international cooperation in fighting terrorism and provides a boon to terrorist recruiters.").

[216] Whether one favors the international duty theory of the origin of the ATS or the denial of justice or the diplomatic safety theory, each leaves room for the idea that the drafters of the ATS were concerned with international cooperation to minimize conflict.

[217] *See* Burley, *supra* note 36, at 481.

[218] *Id.* at 464. Even if the ATS's drafters were not acting from a sense of international duty, in today's internationalized world, such a sense of duty may be nonetheless desirable.

[219] Sovereign immunity will bar these claims. Exceptions to the FTCA's waiver of sovereign immunity are likely to apply to ATS plaintiffs, so immunity will be retained and ATS plaintiffs will not be able to sue the government. *See supra* notes 151-57 and accompanying text.

[220] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 512 (1988). *But see* Jama v. INS, 343 F. Supp. 2d 338, 361 (D.N.J. 2004) (denying summary judgment because plaintiffs' allegations of "inhumane treatment of a huge number of persons accused of no crime and held in confinement" were sufficient international law violations to establish a claim against a government-contractor defendant under the ATS).

According to the maxim *ubi jus, ibi remedium*, each right must have a remedy. Chief Justice Marshall commended this principle in the landmark case *Marbury v. Madison*:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[221]

Marshall went on to discuss the importance of the availability of remedies to the integrity of American government:

> "[E]very right, when withheld, must have a remedy, and every injury its proper redress." The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[222]

International consensus holds that certain human rights are elevated to the level of *jus cogens*.[223] If ATS plaintiffs' human rights are to be protected,[224] there must be a remedy; the ATS provides a path to that remedy. If a contractor working for the U.S. government – often an American corporation[225] – injures an alien plaintiff, it makes sense that the most effective remedy to vindicate this right would lie in an American court. But sovereign immunity prevents recovery against the government,[226] leaving the contractor as the only alternative defendant. If the government contractor defense is allowed in ATS suits, all paths to redress are blocked for ATS plaintiffs injured by government contractors.

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[221] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 23). Of interest for the purposes of this Note is that Justice Marshall used the word "individual" and not "citizen."

[222] *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 109).

[223] *See supra* notes 80-87 and accompanying text (discussing adoption of international human rights norms into American law).

[224] In *Sosa*, the Supreme Court limited the violations which give rise to ATS jurisdiction, but acknowledged that at least some *jus cogens* norms are included. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

[225] *See, e.g.*, Jama v. INS, 343 F. Supp. 2d 338 (D.N.J. 2004).

[226] *See supra* Part III.A.

One could argue that local (foreign) courts or international tribunals would vindicate their threatened rights. But local people in regions where foreign military forces are active are unlikely to have access to effective courts. Even in cases where a stable and untainted justice system is available, judgments entered against contractors by local courts are less likely to be satisfied than judgments by U.S. district courts. Similarly, international tribunals are complicated by significant jurisdictional issues, in part because they are typically convened to address the fallout of a singular crisis rather than to deal with ongoing violations.[227] These potential solutions are inadequate to provide reliable (or possibly any) remedies to alien plaintiffs.

B. Solution: Disallowing the Defense in ATS Suits

The obvious solution would be to bar the Defense entirely in suits with jurisdiction founded upon the ATS. That is, when aliens seek redress for extraterritorial torts, Congress or the courts could suspend the Defense for policy reasons. Disallowance of the Defense would change the focus of litigation from the application of the Defense (i.e., determining the degree of government oversight of the contractor-defendant)[228] to human rights enforcement (i.e., whether the action was a tort and whether it was in violation of international law).[229]

Disallowance of the Defense in ATS suits might raise contractors' costs, but this increase can be viewed as full

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[227] For example, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia was limited to certain crimes during the Yugoslav conflict of the early 1990s. Statute of the International Tribunal for the Former Yugoslavia arts. 1-5, May 25, 1993 32 I.L.M. 1159, 1170-74, *available at* http://www.un.org/icty/legaldoc-e/index.htm. The International Criminal Court, effective in 2002, is still in its infancy and the United States has not submitted to its jurisdiction. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int; Vicki C. Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 343 n.228 (2006).

[228] The *Ibrahim* case illustrates the focus on these administrative details:

> More information is needed on what exactly defendants' employees were doing in Iraq. What were their contractual responsibilities? To whom did they report? How were they supervised? What were the structures of command and control? If they were indeed soldiers in all but name, the government contractor defense will succeed, but the burden is on defendants to show that they are entitled to preemption.

Ibrahim v. Titan Corp., 391 F. Supp. 2d 10, 22-23 (D.D.C. 2005).

[229] *See Sosa*, 542 U.S. at 732 (2004).

internalization of the costs of their commercial activities. This internalization would give alien tort victims a means to redress for the contractors' wrongful actions while deterring future wrongful activities.[230] In ATS suits, the wrongful actions are violations of international law; deterring such serious violations outweighs the increased contractor costs. To further tailor the solution, Congress could mitigate the harms of mechanical disallowance of the Defense by allowing executive orders to immunize contractors in individual cases of exceptional importance.

Disallowance of the Defense would achieve consistency of purpose. The American government is willing to hold officers of foreign governments responsible for their offenses by holding them liable in their personal capacity.[231] These individuals are actors within their government – agents, in a way.[232] Cases discussing the Defense frequently reason that contractors are acting as the government's agents.[233] Since U.S. courts have been willing to try abusive officers of foreign governments as agents of those governments (whether or not they qualify as state actors), it seems courts should also be willing to try contractors engaged as agents of the U.S. government. If contractors are the private muscle of the government, why should they receive any more sovereign immunity protection than the defendant-dictators that courts have already held liable?[234] Further, the modern, restrictive conception of sovereign immunity is that state actors are only immune for those acts that are traditionally sovereign in nature.[235] Torture

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[230] *See* Willett, *supra* note 34, at 36 (noting that corporations are responding to ATS litigation by enacting new policies against human rights violations).

[231] *See* Kadic v. Karadžić, 70 F.3d 232, 239-40 (2d Cir. 1995) ("We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

[232] *Id.* at 245 ("In construing the [TVPA] terms 'actual or apparent authority' and 'color of law,' courts are instructed to look to principles of agency law. . . ."). For example, by carrying out orders to force a village into slave labor, an individual officer – military or bureaucratic – is acting on behalf of a government.

[233] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 525 (1988) (Brennan, J., dissenting) ("The action of the agent is 'the act of the government.'") (quoting Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 22 (1940)).

[234] *See supra* notes 125-30.

[235] Letter from Jack B. Tate to Philip B. Perlman, *supra* note 149; *see supra* note 231 (quoting the Second Circuit's holding in *Kadic,* 70 F.3d at 239-40, that state action is not necessary to hold a government officer personally liable).

is hardly an appropriate sovereign activity to which courts should extend immunity.

Further, the exposure of a government contractor to liability from alien plaintiffs is not a legal novelty. The risk of contractor liability to aliens is no different than the risk of liability that any run-of-the-mill business expects in the regular course of dealings with American citizens.[236]

1. How Disallowance of the Defense Might Be Implemented

The Defense could be disallowed in two ways – judicially or legislatively. First, federal courts could disallow the Defense as a matter of policy, holding that the Defense cannot nullify the ATS's purpose. Courts could rely on the latitude granted by *Sosa* to hold that orders to violate international human rights norms are not within the discretion of government officials.[237] In so holding, courts would decide that contractors are not entitled to the immunity conferred by the "official discretion" exception because there is no protectable exercise of discretion by a government actor.[238]

This judicial disallowance could stand on its own or be supplemented (or supplanted) by legislation. Congress could enact legislation, possibly amending the ATS itself, clarifying that courts are not to allow the Defense in ATS suits.[239] The legislative method could also include an exception whereby an executive order could grant immunity on a case-by-case basis.[240]

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[236] Any business expects some exposure of tort liability, including liability for the actions of its employees. Businesses are arguably on better notice when dealing with non-citizens that they should look out for the interests of those affected by their work. Government contractors could harly complain that ATS suits create unforeseeable liabilities. Nor can they claim that they will be overwhelming in number. ATS suits are harder to bring than garden-variety tort suits because the tort alleged must amount to a violation of international law. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) (limiting the causes of action available to ATS plaintiffs); Arndt v. UBS AG, 342 F. Supp. 2d 132, 138 (E.D.N.Y. 2004) (explaining the requirements for a prima facie case under the ATS).

[237] *See Sosa*, 542 U.S. at 731-33 (2004).

[238] *See* Jama v. INS, 343 F. Supp. 2d 338, 361 (D.N.J. 2004) (denying summary judgment on ATS claims against a contractor operating a detention center).

[239] This might look something like the Torture Victim Protection Act's clarification that torture and extrajudicial killing are offenses that give rise to jurisdiction under the ATS, and supply a cause of action in international law. 28 U.S.C. § 1350 note (2005).

[240] Congress could also create explicit guidelines for how and when the Executive may issue such an Order. This would help prevent the exception from swallowing the rule. For example, Congress might include a guideline requiring

Officers within the Executive Branch might recommend that the President issue an order immunizing a specific defendant or defendants as needed. Such immunization orders are not uncommon. For example, in 2003, President George W. Bush issued a broad executive order categorically immunizing from tort liability any defendant involved in the Iraqi petroleum industry.[241] Default liability would provide plaintiffs with a path to redress and deterrence in almost all cases, while the executive order exception would retain flexibility in exigent cases. Further, since the executive branch would need to act affirmatively to immunize defendants under this approach, the executive officers would assume at least some political responsibility for the results of the immunity.

This approach neatly addresses liability laundering by assigning responsibility to contractors in the general case and to the Executive Branch in exceptional cases. It also means that plaintiffs will usually have a means to recover for their injuries and deter future human rights violations.[242]

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evidence that a contractor would be unable to provide a critical service during a time of crisis if held liable in a specific suit. Such guidelines might prevent the Executive from issuing a string of boilerplate immunity orders when engaging in projects. This approach allows Congressional control over the situation in which the executive branch may issue an order.

To ameliorate rock-and-a-hard-place decisions where a contractor must choose to risk liability in tort or in breach, a defense or cause of action could be created to complement their liability. Such a defense could protect contractors from suit where they denied a government's instructions in a good faith belief that the instructions were in violation of international law – this would at least insulate the contractor from liability to the government and the injured. More proactively, a cause of action could allow contractors to recover some or all of the value of their contract when they have failed to perform the contract for international illegality. This cause, a type of indemnity or hold-harmless suit would burden the government directly with the cost of the lost performance (which the government would need to cover at its own expense) and some part of the contract (perhaps under an unjust enrichment theory). Such a cause of action would minimize a contractor's fear of being given illegal instructions, but would arguably create some amount of hesitation for government officials in issuing orders to contractors. How often and to what extent this hesitation would occur and whether it is desirable are questions outside the scope of this discussion.

[241] Exec. Order No. 13,303, 68 Fed. Reg. 31,931 (May 22, 2003).

[242] While disallowing the Defense may be the easiest path to clear for ATS plaintiffs, there are certainly other options available. For example, Congress could amend the FTCA to allow suits against the government or allow ATS suits under occupation law. *See* Scheffer, *supra* note 28, at 858-60 (suggesting a re-examination of the principles underlying occupation and trusteeship law to protect transitional societies such as modern Iraq). These solutions are somewhat more complex than disallowing the Defense, but could be implemented alternatively or to complement the solution suggested here.

2. Disallowance Protects Desirable Discretion While Deterring Human Rights Abuse

One potential argument against denying immunity to contractors is that liability to aliens for the actions of their personnel would discourage contractors from engaging with the government on foreign missions. As mentioned above, an instruction to a contractor to act in violation of international law puts the contractor into a precarious situation.[243] Compliance with the instruction risks a tort suit by the injured alien, while refusal to comply risks a breach suit by the government. Though this exposure only arises when the government issues questionable instructions, contractors may not be able to tell if and when the government might do so.

Instead of being a drawback to disallowance, this grey area might be a benefit, as it creates a desirable reluctance to carry out those orders that are in or near the realm of human rights violations. Liability would force participating contractors to monitor their personnel carefully and to refrain from engaging in questionable activities. Full liability might deter undesirable behavior, a function the tort system serves particularly well.

Though the *Boyle* majority adopted the Defense to protect the discretion of American officials, there was clear division within the Court regarding the impact of tort litigation on official discretion.[244] Justices Brennan, Marshall, and Blackmun reasoned that while it is not impossible for contractors to pass the costs of tort suits on to the government, the impact that these costs would have on a government officer's discretion would be "marginal."[245] Marginal is hardly a word that could be used to describe the countervailing human rights abuses that the Defense helps enable in ATS suits. The

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[243] One example of such an instruction might be to torture information out of a prisoner in violation of the Geneva Convention. *See supra* note 240.

[244] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 515-31 (1988) (Brennan, J., dissenting).

[245] *See id*. at 523-24 (Brennan, J., dissenting) ("On the one hand, whatever marginal effect contractor immunity might have on the effective administration of policies of government, its harm to individual citizens is more severe than in the Government-employee context." [internal quotation marks omitted]) (citing Barr v. Matteo, 360 U.S. 564, 571 (1959)).

Ninth Circuit's discussion of the effect of damages on governmental decisions echoes this rationale.[246]

Few would argue that government contracts are a risky business. The government is a stable customer well-known for providing amply for its vendors. For various reasons, competition for many contracts is limited to only a few bidders and the government compensates those who bid well for their products and services. It is unlikely that allowing tort liability would bring the American military to a grinding halt.[247]

V. CONCLUSION

The government contractor defense protects contractors on the theory that they are instruments of the government. This makes sense in certain contexts. If a soldier is injured when a government-designed rifle explodes in his face, the Defense should insulate the government and manufacturer from liability.[248] This insulation means that society is willing to deny tort damages to soldiers because the soldiers' injuries are a part of the cost of national defense. That is, the nation collectively agrees that the price of defending America includes injuries to its military personnel. If Americans disagree with this policy, they may use their political input (elective and legislative) to create a cause of action through which injured soldiers may recover damages.[249]

This rationale holds as long as the plaintiff is an American citizen. In contrast, an ATS suit has inherently different facts.[250] The victim-plaintiff in an ATS suit does not

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[246] *See* Koohi v. United States, 976 F.2d 1328, 1332 (9th Cir. 1992) (declaring the case justiciable in part because actions seeking damages are unlikely to interfere with governmental processes, especially in military actions).

[247] *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 202 (2004) ("In the authors' view, the alleged dilemma that forces the President to choose between protecting national security and upholding the rule of law is a false dichotomy, at least insofar as the Geneva Conventions are concerned.").

[248] The *Feres* doctrine embodies this rationale, but specifically immunizes the government. This hypothetical is used to illustrate a situation where the Defense legitimately immunizes a manufacturer-defendant.

[249] In the *Feres* context, for example, Congress could enact legislation overruling the *Feres* doctrine and allowing suits by injured military personnel against the government.

[250] Human rights violations are vastly different from negligent design. Courts may protect a government purchasing officer or a manufacturer who negligently designed, approved, or produced a faulty weapon, but it is hardly the same to protect decisions that result in human rights violations. ATS suits present a unique subset of the potential suits brought against government contractors. For ATS suits to survive a

benefit from American national defense. Also, an ATS plaintiff suing a government contractor must allege a violation of international law to establish federal jurisdiction, so in an ATS suit, more than a simple tort is on the line. It simply does not make sense to say that an alien victim's human rights are a cost of American national defense, especially since the victim has no political input, does not receive the benefit of the national defense, and is less likely to have an alternative mode of enforcement.

Despite the debate over the ATS's original significance, federal courts,[251] Congress,[252] and human rights groups[253] have all recognized that the Statute is an important vehicle to enforce human rights norms. The number of aliens tortiously injured by U.S. government contractors (potential ATS plaintiffs) is likely to increase proportionally with government reliance on private military companies.[254]

The government contractor defense legitimately seeks to protect U.S. government autonomy in selecting product and service contractors by immunizing contractors to prevent pass-through liability. This immunity may desirably protect autonomy in standard procurement situations, but it creates unintended consequences in ATS suits against contractors. Allowing the Defense in ATS suits allows liability laundering by the government, enabling (if not promoting) human rights abuses, like those that occurred at Abu Ghraib.[255] Allowing the Defense in ATS suits also threatens American national security and credibility by denying justice to those we purportedly seek to help.[256]

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motion to dismiss for want of subject matter jurisdiction, they must at least allege a violation of international law. Violations of international law are, on some levels, more important than standard state common-law tort suits. International law has been reasoned to include *jus cogens* offenses like torture and genocide that arise from very basic, uniform notions of justice and are only invoked in particularly egregious circumstances. Since ATS suits are likely to rely on these offenses to confer jurisdiction, ATS suits are a different animal than common-law tort suits.

[251] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[252] Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2005); *see also* Kadic v. Karadžić, 70 F.3d 232, 245-46 (2d Cir. 1995) (discussing and applying the TVPA); *supra* note 112 (discussing Congressional intent behind the TVPA).

[253] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (seminal ATS case in which plaintiffs-appellants co-counsel included attorneys from the Center for Constitutional Rights).

[254] *See supra* Part IV.A.

[255] *See supra* Part IV.A.1.

[256] *See supra* Part II.A.

Finally, the Defense denies redress to ATS plaintiffs, who are unable to recover damages from the government, leaving no existing path to redress.[257] While other *potential* legal paths to redress exist,[258] disallowing the Defense seems to be the simplest of these paths to implement.[259]

While certainly not a magic bullet, the ATS has a sufficiently narrow scope to deter human rights abuses without broadly depressing desirable economic activity or hindering government autonomy. Even if one views the ATS as an "awakening monster," the potential number of ATS suits against U.S. government contractors[260] is such a small a fraction of ATS suits against multinational corporations[261] that economic depression arguments simply do not attach.[262] The immunity conferred by the *Boyle* line of cases protects legitimate government autonomy in procurement, but should not be extended to protect the grim autonomy exercised by a government officer bent on torture, which surely does not deserve the shield of sovereign immunity.

In conclusion, courts should, as a matter of policy, refuse to allow government contractors to raise the government contractor defense in cases where jurisdiction is based upon the Alien Tort Statute. This policy would deter human rights abuses without hindering appropriate government autonomy, thus satisfying the policies underlying both the ATS and the Defense.

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[257] *See supra* notes 151-57 and accompanying text (discussing sovereign immunity) and Parts III.A, IV.A.3.

[258] *See supra* notes 240, 242.

[259] *See supra* notes 240, 242. For example, courts could initially decide to disallow the Defense in ATS suits as a matter of policy. Later, Congress could amend the FTCA to allow foreign claims or specifically allow claims under the ATS. Congress could also create or amend jurisdictional statutes, including the ATS itself, to specify which suits the courts may hear. Again, these latter options are outside the scope of this discussion, but the reader should note that none of these possible solutions are exclusive.

[260] *See* HUFBAUER & MITROKOSTAS, *supra* note 35.

[261] This is because military contractors are but a fraction of the international economy.

[262] *See* HUFBAUER & MITROKOSTAS, *supra* note 35.

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