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ESTABLISHING INCREDIBLE EVENTS BY CREDIBLE EVIDENCE: CIVIL SUITS FOR ATROCITIES THAT VIOLATE INTERNATIONAL LAW*

Russell J. Weintraub[†]

INTRODUCTION

Through the millennia, religious, racial, national, tribal, and ethnic differences have set us at one another's throats. When the manifestations of this hate descend to genocide, murder, and torture, they may violate international law.¹ Two international criminal tribunals are indicting and trying persons accused of "serious violations of international humanitarian law" committed in Rwanda and neighboring states and in the former Yugoslavia.² One of the persons indicted by the

* ©1996 Russell J. Weintraub. All Rights Reserved. The first portion of the title is taken from ROBERT H. JACKSON, *THE NÜRNBERG CASE 10* (1947) (stating "[w]e must establish incredible events by credible evidence," in a report to the President of the United States by Chief Counsel for the United States in the prosecution of the principal Axis war criminals).

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¹ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986) [hereinafter RESTATEMENT] (listing "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism" as "offenses recognized by the community of nations as of universal concern"); *id.* § 702 (stating that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones" listed practices, including "genocide," "murder or causing the disappearance of individuals," and "torture or other cruel, inhuman, or degrading treatment or punishment"). One of the issues that this Article addresses is whether these actions violate international law when practiced by persons who do not operate under color of state authority. See *infra* notes 14-16, 38-39, 116 and accompanying text.

² See James Podgers, *The World Cries for Justice*, A.B.A. J., Apr. 1996 at 52, 55. The tribunals were created by resolutions of the United Nations Security Council. The Tribunal for the Former Yugoslavia is sitting in The Hague, Netherlands, and the Tribunal for Rwanda convenes in three cities in Rwanda-Arusha, Tanzania and Kigali. *Id.* The competence of the International Tribunal for the

International Criminal Tribunal for the former Yugoslavia, Radovan Karadzic,³ is also a defendant in suits in the Second Circuit brought by victims of atrocities for which he is alleged to be responsible.⁴ These suits, seeking a civil remedy in damages, are the focus of this Article.

The plaintiffs in these suits "allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war."⁵ The scene for these events is the former Yugoslavia. In 1992, the Croats and Muslims of Bosnia-Herzegovina voted to form an independent nation.⁶ Serbs living in this area boycotted the referendum and claimed two-thirds of the territory as their country. Karadzic is the self-proclaimed president of this entity, called "Srpska." Srpska is not recognized by other nations or by the United Nations. Karadzic is alleged to have ordered and directed a campaign of "ethnic cleansing" designed to eliminate Croat and Muslim residents from Srpska by killing them and driving them into exile. Tactics included massacres, murders, torture, and, as an integral part of the scheme, rape. Approximately 20,000 Muslim and Croat women were raped by Serb soldiers. Many of these women were subjected to repeated gang rapes and forced to give birth to children thus conceived.

Former Yugoslavia is limited to "the power to prosecute persons responsible for serious violations of international humanitarian law" and does not include civil compensation. Statute of the Yugoslavian Tribunal art. 1, contained in the Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159, 1170.

³ See Podgers, *supra* note 2, at 55, 58.

⁴ See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996). For a suit against a Rwandan political leader accused of atrocities there, see *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (awarding compensatory and punitive damages).

⁵ *Kadic*, 70 F.3d at 236-37.

⁶ For short accounts of these background events, see *Doe v. Karadzic*, 866 F. Supp. 734, 736-37 (S.D.N.Y. 1994), *rev'd sub nom. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996); Michele Brandt, Comment, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1416-20 (1995); Podgers, *supra* note 2, at 54-55.

Two actions were brought against Karadzic in the United States District Court for the Southern District of New York to recover compensatory and punitive damages. One action was brought by "Jane Doe" plaintiffs on behalf of themselves and members of their class. The other action was brought by "S.K." "on her own behalf and on behalf of her infant sons."⁷ Jurisdiction was founded primarily on the Alien Tort Claims Act ("ATCA")⁸ and the Torture Victim Protection Act ("TVPA").⁹ The ATCA, which was part of the first Judiciary Act, in 1789,¹⁰ provides: "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."¹¹ The TVPA was enacted in 1992¹² and provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture . . . or . . . to extrajudicial killing shall, in a civil action be liable for damages"¹³ The district court dismissed the actions under the ATCA on the ground that acts of private individuals do not violate "the law of nations" and dismissed the TVPA claims because Karadzic did not act under color of law.¹⁴ The Second Circuit reversed and remanded for further

⁷ Doe, 866 F. Supp. at 734-36.

⁸ 28 U.S.C. § 1350 (1994) [hereinafter ATCA]. This statute is sometimes referred to as the "Alien Tort Act," *Kadic*, 70 F.3d at 236, or as the "Alien Tort Claim Act." Doe, 866 F. Supp. at 735. "Alien Tort Claims Act" is the form in which the statute is listed in the Popular Name Table of U.S.C. Annotated. U.S.C.A. GENERAL INDEX, U to Z, at 848 (West 1996).

Other bases asserted for jurisdiction were federal question jurisdiction under 28 U.S.C. § 1331 (1994) and "the principles of supplemental jurisdiction, 28 U.S.C. § 1367." Doe, 866 F. Supp. at 735.

⁹ Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 (Supp. V 1993) [hereinafter TVPA].

¹⁰ The Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

¹¹ The original enactment provided that this jurisdiction was "concurrent with the courts of the several States." *Id.* This language was deleted in subsequent codifications, but because the statute does not provide for exclusive federal court jurisdiction, state courts retain concurrent jurisdiction. See *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.4 (1986).

¹² See *supra* note 9.

¹³ TVPA § 2(a).

¹⁴ Doe v. Karadzic, 866 F. Supp. 734, 739 (ATCA), 741 (TVPA), 743 (rejecting federal question jurisdiction under 28 U.S.C. § 1331) (S.D.N.Y. 1994), *rev'd sub*

proceedings,¹⁵ holding that private individuals who commit war crimes violate international law and can be held civilly liable for this violation.¹⁶ Moreover, plaintiffs' allegations were sufficient to entitle them either "to prove that Karadzic's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action,"¹⁷ or "that Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid."¹⁸

This Article first summarizes in more detail the district court and Second Circuit opinions in the suits against Karadzic. Part Two discusses whether the cryptic ATCA should be construed broadly to create a civil cause of action for all violations of international law, or narrowly to provide a remedy in only one or a few instances. Part Three addresses whether, if Congress has provided aliens with a remedy for harm inflicted abroad, it has conferred jurisdiction on federal courts in violation of the limits on "judicial Power" in Article III, section 2, of the Constitution.¹⁹ Part Four analyzes the question of judicial abstention—if federal courts have jurisdiction over such cases, should the courts nevertheless decline to exercise it under doctrines such as act of state, sovereign immunity, political question, and forum non conveniens? Part Five discusses choice-of-law issues—if jurisdiction is exercised, what law applies to determine the elements of harm that are compensable and how damages should be measured? The Article concludes that the ATCA and TVPA validly confer judicial power, but that the exercise of this power is likely to interfere with executive and legislative functions in the conduct of foreign policy. Nevertheless, in the absence of an international tribunal to adjudicate the tort claims of victims, the ATCA and TVPA are flawed but viable means of providing compensation and documenting atrocities.

nom. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

¹⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

¹⁶ *Id.* at 242-43.

¹⁷ *Id.* at 245.

¹⁸ *Id.*

¹⁹ U.S. CONST. art. III, § 2.

I. THE SECOND CIRCUIT SUITS AGAINST RADOVAN KARADZIC

Two actions were filed against Karadzic in the Southern District of New York. The class action by the Doe plaintiffs sought damages on behalf of all persons who were victims of "torts inflicted by Bosnian-Serb military forces under the command of defendant."²⁰ The wrongs alleged included "genocide, war crimes, summary execution, wrongful death, torture, cruel, inhuman or degrading treatment, assault and battery, rape and intentional infliction of emotional harm."²¹ In a second action, S.K. sued alleging "that she had witnessed the murder of her son, the burning of her home, and that she was repeatedly raped" under defendant's "order and direction."²²

Karadzic was served with process while in New York at the invitation of the United Nations to explore the possibility of ending the civil war in Bosnia.²³ Without reaching the issue of whether this service was sufficient to confer personal jurisdiction, Judge Leisure dismissed both suits for lack of subject matter jurisdiction.²⁴ He noted that if the United States recognized the Bosnian-Serb entity, Karadzic would be entitled to immunity from suit and that this future possibility, "while not dispositive at this point in the litigation, militates against this Court exercising jurisdiction"²⁵ He then held that the court did not have jurisdiction under the ATCA²⁶ because the actions by Karadzic were not under color of the law of any recognized state and thus not "in violation of the law of nations" as required by that Act.²⁷ The TVPA²⁸ therefore certainly did not provide jurisdiction because it expressly "only ex-

²⁰ Doe v. Karadzic, 866 F. Supp. 734, 736 (S.D.N.Y. 1994), *rev'd. sub nom* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

²¹ *Id.*

²² *Id.* at 736-37.

²³ *Kadic*, 70 F.3d at 247.

²⁴ See Brief of Plaintiffs-Appellants at 1, *Kadic*, 70 F.3d at 232 [hereinafter Plaintiffs' Brief] (stating that the judge dismissed when the only issue briefed was personal jurisdiction and without providing the parties an opportunity to be heard on subject matter jurisdiction). I thank Professor Catharine A. MacKinnon, counsel for Kadic, who provided me with a copy of the brief.

²⁵ Doe, 866 F. Supp. at 738. Karadzic would be immune from suit because he would be a head of state. See *infra* note 143 and accompanying text.

²⁶ See *supra* notes 8, 10-11 and accompanying text.

²⁷ Doe, 866 F. Supp. at 738-41.

²⁸ See *supra* notes 9, 12-13 and accompanying text.

tends to actions carried out under the authority or color of law of an entity recognized by the United States as a foreign nation."²⁹ Judge Leisure also declined jurisdiction under 28 U.S.C. § 1331,³⁰ which confers jurisdiction over actions "arising under" the "laws" of the United States. Although "substantive international law is incorporated into the law of the United States,"³¹ he did not find "an implied right" of a civil action for violation of the law of nations.³² Moreover, as he had previously held, acts not under color of state law did not violate international law.³³ Finally, because all federal claims had been dismissed, Judge Leisure dismissed plaintiffs' pendent non-federal claims.³⁴

The Second Circuit reversed and remanded for further proceedings.³⁵ The court held that *Filartiga v. Pena-Irala*³⁶ had established as the law of the circuit that the ATCA provided a civil cause of action; that "the law of nations" is to be applied as it has evolved to the present, not as it existed in 1789 when the Act was first adopted; and that international law now applies to a country's treatment of its own citizens.³⁷ The court made new law for the circuit when it held that "the

²⁹ *Doe*, 866 F. Supp. at 741.

³⁰ 28 U.S.C. § 1331 (1994).

³¹ *Doe*, 866 F. Supp. at 742.

³² *Id.* at 743.

³³ *Id.*

³⁴ *Id.* at 744.

³⁵ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

³⁶ 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, two citizens of Paraguay brought suit under the ATCA against another citizen of Paraguay. The plaintiffs alleged that the defendant, while a Paraguayan police official, caused the death by torture of Joelito Filartiga, who was the son of one plaintiff and the brother of the other. The Second Circuit held that official torture, even of a country's own citizens, violates international law, *id.* at 884-85, and that the ATCA provided plaintiffs with a civil cause of action to recover for this violation. *Id.* at 887. The court also held that as so construed, the ATCA did not violate Article III of the Constitution. *Id.* at 885-89. In *Doe v. Karadzic*, the district court held that *Filartiga* should not be extended to permit suit for "acts committed by non-state actors." 866 F. Supp. at 739.

³⁷ *Kadic*, 70 F.3d at 238-39. For the holding that international law includes a country's treatment of its own citizens, see *Filartiga*, 630 F.2d at 884; see also 2 RESTATEMENT, *supra* note 1, pt. VII, Introductory Note at 144-45 (noting "general acceptance . . . that how a state treats . . . its own citizens, in respect of their human rights, is not the state's own business alone . . . but is a matter of international concern and a proper subject for regulation by international law").

alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes³⁸

The court did conclude that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."³⁹ For torture and execution claims, plaintiffs' allegations were sufficient to entitle them "to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia."⁴⁰ In order for an entity to be a "state" for these purposes, it is not necessary that it be recognized by other states.⁴¹ "Moreover, it is likely that the state action concept, where applicable to some violations like 'official' torture, requires merely the semblance of official authority."⁴²

As for service of process on Karadzic, the court held that if he was served in the Southern District, he was not immune from service even though he had been invited to negotiations at the United Nations. Under the terms of the United Nations Headquarters Agreement, Karadzic was properly served because he was not served in the United Nations "headquarters district," was not a representative of any United Nations member, and service did not impede his "transit to or from the headquarters district" as an invitee on official business.⁴³

³⁸ *Kadic*, 70 F.3d at 244; see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794-95 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Edwards, J., concurring) (stating that international law proscribes some acts by individuals, such as piracy).

³⁹ *Kadic*, 70 F.3d at 243.

⁴⁰ *Id.* at 244; see *Mushikiwabo v. Barayagwiza*, No. CIV.A.94-3627, 1996 WL 164496, at *1 (S.D.N.Y. Apr. 9, 1996) (finding that a political leader who was not a government official acted as "part of a coordinated, genocidal effort with officials of the Rwandan government and thus . . . under color of law"); Claire Finkelstein, *Changing Notions of State Agency in International Law: The Case of Paul Touvier*, 30 TEX. INT'L L.J. 261 (1995) (stating that although "piracy has been considered *jus cogens*, and more recently, the Genocide Convention and various terrorism treaties authorize international prosecutions against individuals without regard to their relation to a state . . . the state agency requirement remains the central vehicle for distinguishing domestic from international offenses").

⁴¹ *Kadic*, 70 F.3d at 245.

⁴² *Id.*

⁴³ *Id.* at 247. The Secretary General of the United Nations, Boutros Boutros-

The court then held that there was no reason to abstain from exercising jurisdiction over plaintiffs' claims. First, the decision was not barred by the "political question" doctrine, under which a court will decline to decide issues more properly determined by the executive or legislative branches.

The court enumerated the factors listed by the Supreme Court in *Baker v. Carr*⁴⁴ as signaling a non-justiciable political question and held that none of them applied. The issue was constitutionally committed to the courts, not "to a coordinate political department."⁴⁵ International law provided "judicially discoverable and manageable standards" for adjudication, so that there was no need for "an initial policy determination of a kind clearly for nonjudicial discretion."⁴⁶ There was no likelihood that assuming jurisdiction would conflict with policy decisions or statements of the Executive. The court had asked the Attorney General to express her views, and the response, a "Statement of Interest" signed by the Solicitor General and the State Department's Legal Adviser, stated that this case was not an occasion for invoking the "political question" doctrine.⁴⁷

Nor was the matter non-justiciable under the "act of state doctrine."⁴⁸ Under that doctrine, United States courts refrain from examining the validity of the acts of a foreign sovereign within its own territory. *Banco Nacional de Cuba v. Sabbatino*⁴⁹ is the source of modern understanding of the act of state doctrine. In that case, Cuba had expropriated without compensation Cuban sugar factories owned by United States citizens. When proceeds of the sale of sugar from these factories were located in the United States, the former owners claimed that the expropriation violated international law and that they, not Cuba, were entitled to the money.

In older cases, the act of state doctrine had been explained on the basis of international comity and tranquillity.⁵⁰ In

Ghali, did request diplomatic immunity from service for Karadzic. See Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1, 32 n.183 (1993).

⁴⁴ 369 U.S. 186, 217 (1962).

⁴⁵ *Kadic*, 70 F.3d at 249.

⁴⁶ *Id.*

⁴⁷ *Id.* at 250.

⁴⁸ *Id.*

⁴⁹ 376 U.S. 398 (1964).

⁵⁰ See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918).

Sabbatino, Justice Harlan emphasized the pragmatic aspects of the doctrine. If a foreign country misbehaved and caused financial or physical injury to United States citizens, the Executive and Congress had many methods of dealing with the problem, including diplomatic negotiations, "submission to the United Nations," and the "employment of economic and political sanctions."⁵¹ If such measures did not work, there was little likelihood that the courts could correct the matter by adjudicating a handful of cases involving the foreign sovereign's conduct.⁵² Worse, the judiciary might embarrass and impede the diplomatic efforts of the political branches of government.⁵³ Harlan therefore held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles"⁵⁴ Application of the act of state doctrine depends on "the degree of codification or consensus concerning a particular area of international law, . . . the implications of the issue for our foreign relations, [and whether] the government which perpetrated the challenged act of state is no longer in existence"⁵⁵ Under these standards, Justice Harlan thought *Sabbatino* a clear case for judicial abstention. There was not even an international consensus on the propriety of expropriation without compensation.⁵⁶

The act of state doctrine did not preclude adjudication in *Kadic* because the defendant "has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state."⁵⁷ Even if he did, the doctrine would not preclude suit because unlike the expropriation in *Sabbatino*, the acts alleged here clearly would violate international law.⁵⁸

⁵¹ *Sabbatino*, 376 U.S. at 431.

⁵² *Id.*

⁵³ *Id.* at 432.

⁵⁴ *Id.* at 428.

⁵⁵ *Id.*

⁵⁶ *Sabbatino*, 376 U.S. at 429-30.

⁵⁷ *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

⁵⁸ *Id.*

Finally, there was no basis for a *forum non conveniens* dismissal because "at this stage of the litigation no party has identified a more suitable forum. . . . [T]he courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims" ⁵⁹

On remand, District Judge Leisure ruled that the *Doe* plaintiffs validly served process despite the fact that special agents protecting Karadzic prevented actual handing of the papers to the defendant.⁶⁰ The judge also held that answer and discovery in both the *Doe* and *Kadic* actions should not await the decision by the Supreme Court of the United States on defendant's petition for certiorari.⁶¹

II. CONSTRUCTION OF THE ALIEN TORT CLAIMS ACT

Was *Filartiga*⁶² correct in construing the ATCA to provide a civil cause of action in federal court to any alien who was tortiously injured abroad by any act that violated international law, as that law has evolved to the present? The legislative history of the first Judiciary Act casts no light on the Act's purposes. Judge Friendly has famously said of the Act: "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."⁶³

Before *Filartiga* opened the floodgates, only twice in almost 200 years had jurisdiction under the Act been upheld.⁶⁴

⁵⁹ *Id.*

⁶⁰ *Doe v. Karadzic*, Nos. CIV.A.93-0878 & CIV.A.93-1163, 1996 WL 194298, at *1-*2 (S.D.N.Y. Apr. 22, 1996).

⁶¹ *Id.* at *2. Certiorari has been denied. 116 S. Ct. 2524 (1996).

⁶² 630 F.2d 876 (2d Cir. 1980). For discussion of *Filartiga*, see *supra* notes 36-37 and accompanying text.

⁶³ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (holding that fraud, although universally condemned, does not violate international law). Lohengrin is the eponymous hero of an opera by Richard Wagner, which was first performed in 1850. When a duke's daughter is accused of murder, a mysterious stranger appears to defend her in trial by combat. Comparison to Lohengrin should not be welcome to advocates of broad use of the Act. When Lohengrin's identity and origin are eventually revealed, he sails away, never to be seen again. See Thomas Grey, *Classics World, Opera Stories and Background, Lohengrin*, www.classicalmus.com/bmgclassics/opera/lohengrin-e.html. For the Lohengrin legend on which Wagner based his opera, see 7 *ENCYCLOPEDIA BRITANNICA* 450 (15th ed. 1985).

⁶⁴ *Adra v. Clift*, 195 F. Supp. 857, 863 (D. Md. 1961) (upholding jurisdiction in

Since then, the Act's jurisdiction has been invoked successfully in a large and growing number of suits.⁶⁵ Some judges, however, have limited the Act to a narrow compass. In his concurring opinion in *Tel-Oren v. Libyan Arab Republic*,⁶⁶ Judge Bork would allow suits under the Act only for violations of international law that might have been in the mind of Congress in 1789—violations of safeconducts, infringements of the rights of ambassadors, and piracy.⁶⁷ Before becoming a Justice of the Supreme Court, Judge Scalia wrote that the Act "may conceivably have been meant to cover only private, non-governmental acts that are contrary to treaty or the law of nations—the most prominent examples being piracy and assaults upon ambassadors."⁶⁸ Some law review articles have also

suit over custody of child on ground that the mother's movement of the child under an improper passport violated international law and noting that "[d]espite its age, only six cases and one opinion of Attorney General Bonaparte are cited in the annotations [to the Act]"; *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (using the Act, along with admiralty, as a basis for jurisdiction in a suit for restitution of cargo on board a Spanish ship seized as a prize of war); Jeffrey M. Blum & Ralph G. Steinhardt, 22 HARV. INT'L L.J. 53, 55 (1981) (citing these cases as the only ones before *Filartiga* that sustained jurisdiction under the Act).

⁶⁵ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (affirming award of compensatory and punitive damages against former Ethiopian official); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 115 S. Ct. 934 (1995) (affirming an order enjoining the estate of the former Philippine President from transferring or otherwise disposing of assets during litigation); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992), cert. denied, 508 U.S. 972 (1993) (affirming a default judgment against the former Philippine President's daughter for death by torture); *Mushilswabo v. Barayagwiza*, No. CIV.A.94-3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (awarding compensatory and punitive damages against Rwandan political leader); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (awarding compensatory and punitive damages against former Haitian military ruler); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (awarding compensatory and punitive damages against former Guatemalan Minister of Defense); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), modified, 694 F. Supp. 707 (N.D. Cal. 1988) (denying in part former Argentine general's motion to dismiss).

⁶⁶ 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (dismissing, in a per curiam opinion, a suit brought against the Libyan Arab Republic, the Palestine Liberation Organization and several other Arab organizations to recover for an attack on civilians in Israel).

⁶⁷ *Id.* at 813 (citing 4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68, 72 (Garland Publishing 1978)).

⁶⁸ *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (dismissing a suit by members of Congress, citizens of Nicaragua and two Florida residents against President Reagan and others for claims arising out of United States support of anti-government guerrillas in Nicaragua).

urged restricting jurisdiction under the Act,⁶⁹ while other articles and comments have applauded *Filartiga's* broad interpretation.⁷⁰

Professor Sweeney has advocated the narrowest construction of the Act. In time of war, under the law of prize, United States warships and authorized private vessels could stop apparently neutral vessels to determine whether an intercepted ship was in fact neutral, or was attempting to aid the enemy. Professor Sweeney contends that "tort" applies only to wrongs done to person or property on neutral vessels stopped under the law of prize.⁷¹ After Professor Sweeney's article was published, Karadzic moved for a rehearing seeking to give the Act Sweeney's restrictive interpretation. The motion was denied on the ground that "Professor Sweeney's argument is

⁶⁹ See Simon, *supra* note 43, at 34 (stating that "Congress intended the statute to give foreigners the ability to sue U.S. citizens, not fellow aliens, for law of nations violations"); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 447, 453-67 (1995) (stating that the Act was intended to cover only torts committed in violation of the law of prize when United States war vessels search neutral merchant vessels).

⁷⁰ See Blum & Steinhardt, *supra* note 64, at 112-13; Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 488 (1989) (stating that "understanding the Statute as fulfilling a more general duty under the law of nations evokes a positive spirit supporting an expansive reading of its letter"); Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 360 (1991) (stating that international law should be interpreted as it has evolved); David Cole et al., *Interpreting the Alien Tort Statute: Amicus Curiae Memorandum of International Law Scholars and Practitioners in Trajano v. Marcos*, 12 HASTINGS INT'L & COMP. L. REV. 1, 16 (1988) (stating that the Act was "designed to direct cases involving issues of foreign relations and international law into the federal judiciary"); Tom Lininger, *Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 178 (1994) (stating that civil litigation in U.S. courts "can achieve several significant results"); Helen C. Lucas, Comment, *The Adjudication of Violations of International Law under the Alien Tort Claims Act: Allowing Alien Plaintiffs Their Day in Federal Court*, 36 DEPAUL L. REV. 231, 232 (1987) (proposing "a broad construction" of the Act); Andrew M. Scoble, Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127, 128 (1986) (stating that the Act "must be construed to encompass those customary rules that have evolved since passage of the statute and that may evolve in the future"); cf. Casto, *supra* note 11, at 525 (stating that the Act should be construed broadly to enable federal courts to shape a "uniform national approach" to the "appropriate limits" of litigation under it).

⁷¹ See Sweeney, *supra* note 69, at 447.

interesting but far from conclusive.⁷² Moreover, *Filartiga*⁷³ had established that the Act "has a broad scope" and Congress codified this understanding of the ATCA when it enacted the TVPA.⁷⁴

One reason advanced for giving the Act a narrow interpretation is that judgments rendered under it are probably uncollectible. The defendant is likely to be impecunious or to have fled the United States leaving no assets here.⁷⁵ Even the judgment against the large Marcos estate⁷⁶ will present difficulties in collection. The Philippine Government "has taken the position it is entitled to the entire estate because the money was looted from the people of the Philippines."⁷⁷ There are, however, reasons other than compensation of the victims for suits under the ATCA. Suits under the Act deprive a perpetrator of atrocities of safe haven in the United States.⁷⁸ It is also important, as the title of this Article suggests, to establish the facts and vindicate the claims of the victims.⁷⁹ In addition, as

⁷² *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996).

⁷³ See *supra* notes 36-37 and accompanying text.

⁷⁴ *Kadic*, 74 F.3d at 378. For discussion of the effect of the TVPA on construction of the ATCA, see *infra* notes 81-87, 91-93 and accompanying text.

⁷⁵ See Mark Curriden, *U.S. Justice for Abuses Abroad*, A.B.A. J., Dec. 1993, at 20 (stating that the defendant in *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), characterized the \$1.5 million judgment against him as a "joke" because he has no money"); Simon, *supra* note 43, at 28 (stating "while most cases so far have resulted in default judgments for the plaintiffs, none of the damages awarded . . . has never [sic] been collected").

⁷⁶ *In re Estate of Ferdinand Marcos*, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (affirming an award of \$1.2 billion in exemplary damages); *In re Estate of Marcos*, No. 94-840, 1994 WL 874222, at *105 (D. Haw. Jan. 3, 1995, addendum Jan. 4, 1996) (recommending \$767,491,493 in compensatory damages).

⁷⁷ Arleen Jacobius, *Collection Next Step for Marcos Victims*, A.B.A. J., Apr. 1995, at 24, 25. For the Philippine Government's suit against Marcos, see *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989).

⁷⁸ See Blum & Steinhardt, *supra* note 64, at 113; Curriden, *supra* note 75, at 20; Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491, 501 (1993); Jacobius, *supra* note 77, at 25; Lininger, *supra* note 70, at 178.

⁷⁹ See Hope Viner Samborn, *Ruling Could Lead to More Human Rights Torts Cases*, A.B.A. J., Dec. 1995, at 30 (quoting Beth Stephens, counsel for the Doe plaintiffs in *Kadic*, that the plaintiffs "feel it is important to receive a judgment that vindicates them in the public eye").

Kadic itself demonstrates, suits under the Act assist in the development of international law.⁸⁰

Moreover, although the TVPA⁸¹ did not codify *Filartiga's* "broad reading" of the ATCA, as the Second Circuit asserted in *Kadic*,⁸² the TVPA and its legislative history do undermine arguments that suits by aliens for atrocities committed abroad should be kept from our courts by construing the ATCA as narrowly as possible. The TVPA expressly establishes a civil cause of action for victims of torture and for legal representatives of victims of extrajudicial killing.⁸³ The Report of the Committee on the Judiciary of the House of Representatives states that the purpose of the bill is "to provide a Federal cause of action against any individual who [commits the proscribed wrongs] under actual or apparent authority, or color of law, of any foreign nation"⁸⁴ The Report refers to Judge Bork's opinion in *Tel-Oren*⁸⁵ and states that the TVPA is intended explicitly to provide the civil cause of action he denied, and that suits for violations of international law not covered by the TVPA should be permitted under the ATCA.⁸⁶ The Report of the Senate Committee on the Judiciary contains a similar statement concerning the effect of the TVPA and the continued viability of the ATCA.⁸⁷

⁸⁰ See Fitzpatrick, *supra* note 78, at 501.

⁸¹ See *supra* notes 9, 12-13 and accompanying text.

⁸² *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996). The TVPA left the ATCA intact and provided a new cause of action for official torture. If anything, this would undermine the argument that the ATCA was sufficient for this purpose. The legislative history of the TVPA reveals agreement with *Filartiga's* construction of the ATCA and a desire to enact new legislation that places beyond doubt that there is a civil cause of action for harm inflicted by official torture. See *infra* notes 84-87.

⁸³ TVPA, *supra* note 9, § 2. But cf. 18 U.S.C. §§ 1091(d) (punishment for crime of genocide, created by the section, applies only if the offense is committed in the United States or the alleged offender is a United States national), 1092 (1994) (creation of criminal penalties for genocide shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding").

⁸⁴ H.R. REP. NO. 367, 102d Cong., 1st Sess., pt. 1, at 2 (1991) [hereinafter House Report].

⁸⁵ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). For discussion of Judge Bork's opinion, see *supra* notes 66-67 and accompanying text.

⁸⁶ House Report, *supra* note 84, at 4.

⁸⁷ S. REP. NO. 249, 102d Cong., 1st Sess. 4 (1991) [hereinafter Senate Report].

The TVPA is both broader and narrower than the ATCA. The TVPA extends a cause of action to United States citizens, whereas the ATCA is limited to alien plaintiffs.⁸³ The ATCA permits suit for any tort in violation of the law of nations or a treaty of the United States, whereas the TVPA is limited to torture and extrajudicial killing.⁸⁹

Although both the House and Senate reports make it clear that the ATCA is not superseded by the TVPA,⁹⁰ it would have been preferable to amend the ATCA instead of enacting a separate TVPA. Nevertheless, Congress has made it clear that it approves of *Filartiga's* broad reading of the ATCA.⁹¹ The only viable jurisdictional questions that remain are whether, as so construed, the ATCA confers power on federal courts in violation of the limits imposed in Article III, section 2, of the Constitution,⁹² and whether the Act violates what Judge Bork has termed "the constitutional core of the political question doctrine."⁹³ The same questions apply to the express grant of jurisdiction in the TVPA.

III. DO THE ALIEN TORT CLAIMS ACT AND THE TORTURE VICTIM PROTECTION ACT EXCEED ARTICLE III LIMITS ON FEDERAL JURISDICTION?

Article III of the Constitution sets out the limits of the subject matter jurisdiction of federal courts. The validity of the ATCA and the TVPA turns on the scope of the "arising under" provision: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"⁹⁴ *Filartiga*⁹⁵ dismissed an Article III attack on the ATCA, stating "[t]he constitutional basis for

⁸³ See *supra* notes 8-13 and accompanying text.

⁸⁹ See *supra* notes 8-13 and accompanying text.

⁹⁰ See *supra* notes 86-87 and accompanying text.

⁹¹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). For discussion of *Filartiga*, see *supra* notes 36-37 and accompanying text.

⁹² U.S. CONST. art. III, § 2 (stating the extent of the "judicial Power" of federal courts).

⁹³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 822 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1995).

⁹⁴ U.S. CONST. art. III, § 2.

⁹⁵ See *supra* notes 36-37 and accompanying text.

the Alien Tort Statute is the law of nations, which has always been part of the federal common law.⁹⁶ This is the same basis on which numerous federal courts,⁹⁷ commentators⁹⁸ and the Senate Committee on the Judiciary⁹⁹ have rejected Article III objections to the ATCA or the TVPA.

Ironically, *Filartiga* raised an issue of subject matter jurisdiction that was not a problem. The court addressed the question of whether "arising under" jurisdiction would be lost if on remand it were decided that Paraguayan tort law applied to determine compensation for death by torture in that country, stating:

Such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiffs cause of action would no longer properly be "created" by a law of the United States. Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent

⁹⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

⁹⁷ See *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1474 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); *Mushikiwabo v. Barayagwiza*, No. CIV.A.94-3627, 1996 WL 164496, at *2 n.1 (S.D.N.Y. Apr. 9, 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995); *cf. Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (stating that "we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 [28 U.S.C. § 1331 (1994)] jurisdiction"); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (stating that "[t]he reference to the law of nations must be narrowly read if the [ATCA] is to be kept within the confines of Article III" and rejecting a contention that securities fraud violates international law). *But see Tel-Oren*, 726 F.2d at 822 (Bork, J., concurring) (stating that "[s]hould such an improbable statute [such as the TVPA expressly conferring a civil cause of action] come into existence, it will be time to ask whether the constitutional core of the political question doctrine precludes jurisdiction" and indicating that if he could rule unrestrained by precedent, he would hold that the doctrine "bars this or any similar action").

⁹⁸ See *Blum & Steinhardt*, *supra* note 64, at 99-100; *Casto*, *supra* note 11, at 511; *Lucas*, *supra* note 70, at 248; *Ralph G. Steinhardt, Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 70 (1995).

⁹⁹ See Senate Report, *supra* note 87, at 5. The Report finds an alternative basis for congressional power to enact the TVPA in U.S. CONST. art. I, § 8, which empowers Congress to "define and punish . . . offenses against the Law of Nations." Senate Report, *supra* note 87, at 5-6. *But see* Senate Report, *supra* note 87, at 13-14 (minority views of Senators Simpson & Grassley) (arguing that the power to define crimes in Article I, section 8 may not extend to creating a civil cause of action, and that "arising under" jurisdiction may not extend to violations of international law that have no nexus with the United States).

dismissal of that claim (here, the claim under the general international proscription of torture) does not deprive the court of jurisdiction previously established.¹⁰⁰

There was no need to invoke the "colorable claim" doctrine, which is applicable to pendent jurisdiction over non-federal claims after a court has dismissed all federal claims.¹⁰¹ "Arising under" jurisdiction permits Congress to channel to federal courts an issue in which there is a compelling federal interest, even though state or foreign law determines rights and remedies.¹⁰² It is this interest in conferring on federal courts jurisdiction over cases that affect United States foreign relations that ultimately must rebut Article III objections to ATCA and TVPA in cases lacking any nexus with the United States.¹⁰³

The Supreme Court has held the presence of federal interests sufficient to confer Article III jurisdiction. In *Verlinden B.V. v. Central Bank of Nigeria*,¹⁰⁴ the Court rejected an Article III attack on permitting a suit between two foreign parties under the Foreign Sovereign Immunities Act ("FSIA").¹⁰⁵ The Court adverted to the danger of opening federal courts to claims by anyone in the world against a foreign sovereign and noted that "Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial

¹⁰⁰ *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 n.25 (2d Cir. 1980) (citation omitted). For discussion of choice of law under ATCA and TVPA, see *infra* Part V.

¹⁰¹ See 13B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3567.1, at 114-66 (1984).

¹⁰² See HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 744-45 (1953) (discussing "protective jurisdiction"); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 192 (1953) (stating that "[w]here there is an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law").

¹⁰³ See *Cole et al.*, *supra* note 70, at 16 (discussing the interest in directing "cases involving issues of foreign relations and international law into the federal judiciary"); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 411 (1988) (stating that "[c]ourts may invoke protective jurisdiction legitimately over human rights claims because the cases implicate clear and unique foreign policy interests").

¹⁰⁴ 461 U.S. 480 (1983).

¹⁰⁵ 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-11 (1994). For discussion of the Foreign Sovereign Immunities Act, see *infra* Part IV.D.

contact with the United States."¹⁰⁶ There was, however, one exception. The Act provided jurisdiction over a foreign sovereign that had waived its immunity.¹⁰⁷ The Court carefully left open the question of "whether, by waiving its immunity, a foreign state could consent to suit based on activities wholly unrelated to the United States."¹⁰⁸ In this part of its opinion, however, the Court was addressing the issue of construction of the FSIA, not its constitutionality. When the Court turned to Article III, it found that Congress had properly exercised its power to confer jurisdiction on federal courts because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident."¹⁰⁹

Moreover, international law recognizes "universal jurisdiction" to define and punish certain offenses such as "piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes" which are "recognized by the community of nations as of universal concern."¹¹⁰ "Universal jurisdiction" can be exercised "although the state has no links of territory with the offense, or of nationality with the offender (or even the victim)."¹¹¹ International law also permits a state to provide a civil remedy for the offenses that justify universal criminal jurisdiction.¹¹² Article III should not deny federal courts jurisdiction to do what international law regards as permissible. Otherwise the foreign relations of the United States might be adversely affected if this country could not comply with its obligation to the community of nations to seize and prosecute enemies of mankind.

IV. DOCTRINES OF JUDICIAL ABSTENTION

Federal courts are not required to exercise their jurisdiction over civil actions brought to redress a growing list of violations of international law. Under self-imposed doctrines of

¹⁰⁶ *Verlinden*, 461 U.S. at 490.

¹⁰⁷ *Id.* at 490 n.15 (citing 28 U.S.C. § 1605(a)(1) (1994)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 493.

¹¹⁰ RESTATEMENT, *supra* note 1, § 404.

¹¹¹ RESTATEMENT, *supra* note 1, § 404, at cmt. a.

¹¹² RESTATEMENT, *supra* note 1, § 404, at cmt. b.

abstention, such as act of state, political question, and forum non conveniens, federal courts can decline to decide cases over which they have jurisdiction. Courts are also barred from entertaining suits against foreign sovereigns except as permitted under the FSIA.¹¹³

A. Act of State

The act of state doctrine poses a minor dilemma¹¹⁴ for suits under the ATCA and TVPA. If the acts are officially approved, the doctrine applies.¹¹⁵ If the acts are not officially approved, the wrong may not violate international law when that law requires that the defendant act in an official rather than private capacity. *Kadic* diminished the problem by ruling that a person acting in an individual capacity violates international law when committing genocide or war crimes, but held that "torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law."¹¹⁶ A state official, however, can act contrary to law but "under color of law." As the court said in *Filartiga*,¹¹⁷ "Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort [fatal use of torture by a high police official] of its character as an international law violation, if it in fact occurred under color of government authority."¹¹⁸

It is unlikely that a state will declare that acts such as torture and extrajudicial killing are officially approved and thus throw the state-action cloak around its official.¹¹⁹ Even

¹¹³ 28 U.S.C. §§ 1604-1607 (1994).

¹¹⁴ See Blum & Steinhardt, *supra* note 64, at 108 (stating that "[s]uperficially, the act of state doctrine poses a dilemma to plaintiffs seeking to enforce human rights under § 1350").

¹¹⁵ For discussion of the act of state doctrine, see *supra* notes 48-58 and accompanying text.

¹¹⁶ *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

¹¹⁷ See *supra* notes 36-37 and accompanying text.

¹¹⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

¹¹⁹ See Senate Report, *supra* note 87, at 8 (stating that "[s]ince [the act of state doctrine] applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation"); cf. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (holding that the act of state doc-

if a state did give its imprimatur to the atrocities, the act of state doctrine should not prevent suit. One of the factors determining application of the doctrine is "the degree of codification or consensus concerning a particular area of international law."¹²⁰ There is a consensus that torture and extrajudicial killing violate international law,¹²¹ and a state that embraces them is an outlaw.

B. *Political Question*

The heart of the political question doctrine is the notion of separation of powers.¹²² The concept is that courts should not deal with issues that, like the conduct of foreign policy, are constitutionally committed to other branches of government.¹²³ Yet *Baker v. Carr*,¹²⁴ the fountainhead of modern understanding of the political question doctrine, itself suggests a nuanced approach to cases that might affect foreign policy:

[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.¹²⁵

Nevertheless, even under an approach to the political question doctrine that is sensitive to the circumstances of each case, "[t]here is no more complex and sensitive issue between countries than human rights."¹²⁶ Judge Bork believed that except for a small category of offenses—such as violation of safeconducts, infringement of the rights of ambassadors, and

trine does not apply when a state sues its deposed leader).

¹²⁰ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

¹²¹ See *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

¹²² See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring) (stating that "adjudication of appellants' claims would present great separation of powers problems"), *cert. denied*, 470 U.S. 1003 (1985).

¹²³ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹²⁴ 369 U.S. 186 (1962). The case rejected the contention that allegations of a denial of equal protection by failure to reapportion the Tennessee General Assembly presented a political question and therefore were not justiciable.

¹²⁵ *Id.* at 211-12.

¹²⁶ Senate Report, *supra* note 87, at 15 (minority views of Senators Simpson and Grassley).

piracy—which posed no threat to foreign relations, suits under the ATCA should be precluded by “the constitutional core of the political question doctrine.”¹²⁷ Judge Robb wrote that the doctrine precluded entry “into so sensitive an area of foreign policy.”¹²⁸

In *Kadic*, the Court invited the Executive branch to express its views. In response, a “Statement of Interest,” submitted by the Solicitor General and the Legal Adviser to the Department of State, concluded that “dismissal of these cases at this stage under the ‘political question’ doctrine is not warranted” and that “[a]lthough there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.”¹²⁹ The words “at this stage” suggest that the Executive’s views might change in light of future events. Moreover, as Professor Simon noted, “[f]ollowing service, Karadzic left the United States immediately and refused to return, complicating the U.N. negotiations and certainly raising a question of court interference in foreign policy, indeed matters of war and peace.”¹³⁰

Perhaps in ATCA and TVPA cases the shoals of the political question can be avoided if, as in *Kadic*, the court requests and receives assurances from the Executive that dismissal is not warranted. There is an analogous exception to the act of state doctrine, the “*Bernstein* exception.”¹³¹ The Supreme Court has left open the question of whether the *Bernstein* exception is valid.¹³² Moreover, the exception was applied to a despised regime that had been expunged by the armed forces of the United States and its allies. There was no possibility

¹²⁷ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 822 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

¹²⁸ *Id.* at 827 (Robb, J., concurring).

¹²⁹ Statement of Interest of the United States at 1, 3, *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) [hereinafter Statement of Interest]. I thank Drew S. Days, III, Solicitor General of the United States, for providing me with a copy of the Statement of Interest.

¹³⁰ Simon, *supra* note 43, at 76.

¹³¹ From *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), in which, after the Department of State published a letter to plaintiff’s attorney from the Department’s Acting Legal Adviser indicating that the Executive had no objection, the court permitted evidence of the invalidity of seizure of property from a Jew by officials in Nazi Germany.

¹³² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964).

that passing on the validity of acts of the Nazis could affect our foreign relations. Nevertheless, obtaining executive approval before exercising jurisdiction over human rights suits does lessen the political question problem, particularly when, as is often the case, the defendant is no longer in power.

C. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens*, a court may decline to exercise its jurisdiction if the court finds that it is a seriously inconvenient forum and that the interests of the parties, the public or both will be served best by remitting the plaintiff to another available and more convenient forum.¹³³ The plaintiff's choice of forum is ordinarily entitled to great deference and the defendant has a difficult burden to meet convincing the trial court to exercise its discretion to order a *forum non conveniens* dismissal or stay.¹³⁴ The United States Supreme Court has declared, however, that "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."¹³⁵

In suits under the ATCA and TVPA, because of the possible unfairness of requiring defendants to present evidence far from the scene of the alleged offenses,¹³⁶ *forum non conveniens* dismissals should be granted whenever there is a more convenient forum available, particularly if that forum is near the site of the alleged atrocities. Whether such an alternative forum is available will depend on the circumstances of each case. In *Kadic*, the court declared that "the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims"¹³⁷ In its

¹³³ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

¹³⁴ *Id.* at 508.

¹³⁵ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981).

¹³⁶ See Simon, *supra* note 43, at 4 (raising "questions of fairness . . . as to the propriety of forcing foreign defendants to litigate uniquely testimonial and witness-based issues in U.S. courts").

¹³⁷ *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995); see Plaintiffs' Brief, *supra* note 24, at 5 (stating that "[d]ue to war, occupation, and the likelihood of reprisals, it is impossible to adjudicate these torts . . . where they were committed"). In *Filartiga*, the trial court on remand stated that defendant "submitted nothing to cast doubt on plaintiffs' evidence showing that further resort to Para-

Statement of Interest, the Executive declared that "on remand the district court should examine whether [forum non conveniens] might apply here."¹³⁸ There may be some areas of Bosnia-Herzegovina where suit might be brought. In Banja Luka, the largest city in the Serb territories of Bosnia, a newspaper article reports that a court "has issued 90 orders reinstating minorities to their homes, and 200 more lawsuits are pending."¹³⁹ The same article, however, goes on to report that police have refused to enforce the court orders and that "a Muslim was beaten in the courthouse itself [by Serb police officers] moments after he obtained a court order giving him back his apartment."¹⁴⁰

The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."¹⁴¹ The Report of the Senate Committee on the Judiciary states:

The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.¹⁴²

guayan courts would be futile." *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984).

¹³⁸ Statement of Interest, *supra* note 129, at 18.

¹³⁹ Barbara Demick, *Bosnia Court Functions, but Police Still Lacking*, AUSTIN AMERICAN-STATESMAN, June 9, 1996, at A21 (also available on ALLNEWS, 1996 WL 3432317).

¹⁴⁰ *Id.*

¹⁴¹ TVPA, *supra* note 9, § 2(b).

¹⁴² Senate Report, *supra* note 87, at 10.

D. Foreign Sovereign Immunity

Under international law, foreign heads of state¹⁴³ and, to a lesser extent, diplomatic¹⁴⁴ and consular¹⁴⁵ agents of foreign governments are immune from civil suit. Are other officials of foreign governments entitled to cloak themselves with the sovereign immunity of their states to avoid suit under ATCA and TVPA? The FSIA defines a "foreign state" to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."¹⁴⁶ "Agency or instrumentality" is defined as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."¹⁴⁷ This language does not appear to be applicable to an individual.¹⁴⁸ In *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁴⁹ which held that the FSIA barred suit against Argentina, the Court remarked that *Filartiga*, which permitted suit under the ATCA, was a suit "against a Paraguayan police official for torture; the Paraguayan Government was not joined as a defendant."¹⁵⁰ This observation suggests that the Court does not consider the FSIA applicable to individuals.¹⁵¹

¹⁴³ See *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (holding President of Haiti immune from suit under ATCA or TVPA).

¹⁴⁴ See RESTATEMENT, *supra* note 1, § 464 (stating immunity of foreign diplomatic agents).

¹⁴⁵ See RESTATEMENT, *supra* note 1, § 465 (stating immunity of foreign consular personnel).

¹⁴⁶ 28 U.S.C. § 1603(a) (1994).

¹⁴⁷ *Id.* § 1603(b).

¹⁴⁸ See House Report, *supra* note 84, at 5 (stating that "[w]hile sovereign immunity would not generally be an available defense, nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity"); Blum & Steinhardt, *supra* note 64, at 107 (stating that "[t]here is no indication in the legislative history of the FSIA that individuals would be entitled to sovereign immunity"); Lininger, *supra* note 70, at 186 (stating that the language of the FSIA "does not contemplate the inclusion of human beings under the rubric of 'foreign state'").

¹⁴⁹ 488 U.S. 428 (1989).

¹⁵⁰ *Id.* at 436 n.4.

¹⁵¹ Cf. Fitzpatrick, *supra* note 78, at 510 (stating that this passage indicates that the FSIA does not apply to former officials).

In *Chuidian v. Philippine National Bank*,¹⁵² however, the Ninth Circuit affirmed dismissal of a suit against a member of a Philippine presidential commission. The court held that the defendant was entitled to sovereign immunity for acts in his capacity as a member of the commission, finding that the FSIA is "ambiguous as to its extension to individual foreign officials."¹⁵³ The opinion stated that the FSIA should cover individuals operating in their official capacity, because otherwise it would omit the common law immunity of officials that existed before the Act took effect.¹⁵⁴

The court misunderstood the pre-FSIA law concerning immunity of foreign officials. The Second Restatement of Foreign Relations states that

[t]he immunity of a foreign state . . . extends to . . . (b) its head of state and any person designated by him as a member of his official party . . . [and] (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state.¹⁵⁵

The Restatement emphasizes that

[p]ublic ministers, officials, or agents of a state . . . do not have immunity from personal liability even for acts carried out in their official capacity, unless the effect of exercising jurisdiction would be to enforce a rule against the foreign state or unless they have one of the specialized immunities referred to above [diplomatic and consular officials, and representatives to international organizations].¹⁵⁶

As an illustration of when permitting suit against a foreign official "would be to enforce a rule against the foreign state," the Restatement provides the following:

X, an official of the defense ministry of state A, enters into a contract in state B with Y for the purchase of supplies for the armed forces of A. A disagreement arises under the contract and Y brings

¹⁵² 912 F.2d 1095 (9th Cir. 1990).

¹⁵³ *Id.* at 1101.

¹⁵⁴ *Id.* at 1102; see Senate Report, *supra* note 87, at 8 (stating that "[t]o avoid liability by invoking the FSIA, a former official would have to prove an agency relationship to a state").

¹⁵⁵ RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 66 (1962).

¹⁵⁶ *Id.* at cmt. b.

suit in B against X as an individual, seeking to compel him to apply certain funds of A in his possession to satisfy obligations of A under the contract. X is entitled to the immunity of A.¹⁵⁷

Thus, before the FSIA, foreign officials could cloak themselves in the immunity of their state only if the suit would have the effect of enforcing liability against the state itself.

If the FSIA did apply to individuals, it would all but foreclose suit against foreign officials under the ATCA or the TVPA if the officials' acts were authorized.¹⁵⁸ *Argentine Republic v. Amerada Hess Shipping Corp.*¹⁵⁹ held that suit could be brought under the ATCA against a foreign government only if one of the FSIA exceptions to sovereign immunity applied.¹⁶⁰ The Senate Report states that the TVPA is also subject to the FSIA.¹⁶¹ The FSIA permits suits for torts only if the harm occurs "in the United States."¹⁶² Moreover, abuse of police power, if authorized, would likely be considered performance of "a discretionary function" and thus result in immunity from tort liability under the FSIA.¹⁶³ Furthermore, the

¹⁵⁷ *Id.* at illus. 2.

¹⁵⁸ If the acts were not authorized, the immunity would be lost. *See In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995) (holding that former President Marcos is not entitled to immunity because his acts of torture and execution were not authorized); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 498 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (holding that Marcos' daughter is not entitled to immunity because her act of killing by torture was not performed in her official capacity); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175 (D. Mass. 1995) (stating that it is not necessary to decide whether the First Circuit would follow the Ninth in holding the FSIA applicable to individuals because the defendant's acts were beyond the scope of his authority); Senate Report, *supra* note 87, at 8; Steinhardt, *supra* note 98, at 87.

¹⁵⁹ 488 U.S. 428 (1989).

¹⁶⁰ *Id.* at 434; *cf. Goldstar (Panama) S.A. v. United States*, 967 F.2d 965 (4th Cir. 1992) (holding that the United States can be sued under the ATCA only as permitted in the Federal Tort Claims Act), *cert. denied*, 506 U.S. 955 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985) (holding that the ATCA does not waive the sovereign immunity of the president).

¹⁶¹ Senate Report, *supra* note 87, at 7.

¹⁶² 28 U.S.C. § 1605(a)(5) (1994).

¹⁶³ 28 U.S.C. § 1605(a)(5)(A) (1994); (stating that suit may not be brought for "any claim based upon . . . a discretionary function"); *cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993) (holding that suit for injuries to an employee of a government hospital suffered as a result of arrest and alleged mistreatment in prison was not "based on a commercial activity" within the meaning of section 1605(a)(2) because the conduct was "peculiarly sovereign in nature").

Ninth Circuit has rejected a claim that a violation of human rights effects a waiver of sovereign immunity within the meaning of section 1605(a)(1)¹⁶⁴ of the FSIA.¹⁶⁵

If the Ninth Circuit is correct that the FSIA applies to individuals¹⁶⁶ and therefore there is ATCA or TVPA liability only if the acts are not authorized,¹⁶⁷ an outlaw state could cloak its officials with immunity. Rather than risking this result or playing the game of declaring acts of a high official not within the scope of his or her authority, it would be preferable to amend the FSIA and provide an express exception for violations of human rights.¹⁶⁸ It is better still to hold that the FSIA does not apply to individuals. Thus, if persons like Karadzic are not entitled to head of state immunity, their conduct is not immune from civil redress even though authorized by a recognized government.

V. CHOICE OF LAW

When a defendant has committed a tort in violation of the law of nations, how does the court select the law to determine which elements of harm are compensable and whether punitive damages are recoverable? There are four major possibilities: (1) use a choice-of-law rule to select the tort law of some state or country; (2) use choice-of-law analysis to select the proper law, but reject that law when incompatible with international law; (3) fashion new tort law from standards of international law; (4) fashion new tort law as a matter of federal common law.

With a minor exception,¹⁶⁹ the preferable approach is to select the appropriate law¹⁷⁰ by a federal choice-of-law rule based on the "most significant relationship" approach of the

¹⁶⁴ 28 U.S.C. § 1605(a)(1) (1994).

¹⁶⁵ *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718-19 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

¹⁶⁶ *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990). For discussion, see *supra* notes 152-154 and accompanying text.

¹⁶⁷ See *supra* note 158 and accompanying text.

¹⁶⁸ See Finkelstein, *supra* note 40, at 275-76 (stating that "[a] more coherent solution . . . would be to extend the exceptions to immunity under the FSIA").

¹⁶⁹ See *infra* note 177 and accompanying text.

¹⁷⁰ See Casto, *supra* note 11, at 487 (stating that "[a] few courts have indicated that foreign domestic law may control cases under section 1350, and this construction is consistent with the statute's plain meaning").

Second Restatement of Conflict of Laws.¹⁷¹ The law selected to determine what elements of harm, such as pain and suffering, are compensable, and whether punitive damages are available, would ordinarily be that of the foreign country where the plaintiff resided when abused by an official of that country. In the suits against Ferdinand Marcos and his daughter under the ATCA, Philippine law was applied to determine the elements of recovery,¹⁷² which included exemplary damages.¹⁷³ There is authority for a federal most-significant-relationship conflicts rule to choose appropriate domestic law under both the FSIA¹⁷⁴ and the Warsaw Convention.¹⁷⁵ Applying foreign local law to the measure of recovery does not affect the jurisdictional argument that the action arises under federal law, which includes the law of nations.¹⁷⁶

¹⁷¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1969) (stating that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.").

¹⁷² *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993) (approving application of Philippine law in suit against Marcos' daughter); *In re Estate of Marcos*, No. 94-840, 1994 WL 874222, at *3-4 (D. Haw. Jan. 3, 1995, addendum Jan. 4, 1996) (applying the Philippine Civil Code to permit recovery of "moral damages" and lost earnings from the former president's estate).

¹⁷³ See Jacobius, *supra* note 77, at 25 (stating that "the jury awarded \$1.2 billion in exemplary damages against the Marcos estate . . . under Philippine law.").

¹⁷⁴ 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602-1611 (1994); see *Liu v. Republic of China*, 892 F.2d 1419, 1426 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990) (applying a federal "more significant relationship" conflicts rule to select the law applicable in a suit under the FSIA). But see *Barkan v. General Admin. of Civil Aviation of People's Republic of China*, 923 F.2d 957, 960 (2d Cir. 1991) (applying the choice-of-law rules of the forum state).

¹⁷⁵ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* note following 49 U.S.C. § 1502 (1988); see *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 635 (1996) (stating that, under the Warsaw Convention, who may recover and the measure of compensatory damages are determined by domestic law selected by a choice-of-law rule); *Bickel v. Korean Air Lines Co.*, 83 F.3d 127, 130 (6th Cir. 1996) (applying a federal choice-of-law rule to select law under the Warsaw Convention and stating that "[i]n the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflict of Laws").

¹⁷⁶ See *supra* notes 101-103 and accompanying text discussing "protective jurisdiction"; see also Steinhardt, *supra* note 98, at 74 (same); Michael Danaher, Comment, *Torture as a Tort in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353, 357-60 (1981) (discussing "protective jurisdiction" in the context of the ATCA).

Does reference to foreign local law mean that an outlaw country can cloak its officials with immunity by embracing torture and nonjudicial executions as state policy and therefore not a "tort"? If ever this occurred, international law should be used to override the foreign law on the threshold issue of whether the conduct was tortious, but the court should apply foreign law to determine remedies for a tort.¹⁷⁷

In *Filartiga*, the Second Circuit left open the question of what it would do if foreign law purported to legalize violations of international law.¹⁷⁸ On remand, the district court claimed to find in international law a basis for rejecting a different aspect of the foreign law—the failure to provide for punitive damages.¹⁷⁹ It is not likely that recovery of punitive damages can be justified under the aegis of international law because such damages are rejected by the great majority of legal systems.¹⁸⁰

Instead of choosing the tort law of the appropriate state, another possibility is to use international law as the basis for the remedies available, as well as for the threshold determination that a tort has been committed.¹⁸¹ Judge Edwards, in his

¹⁷⁷ Danaher, *supra* note 176, at 362, suggests that a foreign rule approving of human rights violations should be rejected as conflicting "with the public policy of the forum state." It is preferable to find the basis for this rejection in international law to avoid the appearance of imposing local forum law on parties and transactions that have no contact with the forum. See *infra* note 187 and accompanying text.

¹⁷⁸ *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). The court stated that because torture was illegal under the law of Paraguay, [s]hould the district court decide that [choice-of-law] analysis requires it to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred.

¹⁷⁹ *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 864 (E.D.N.Y. 1984); see *Paul v. Avril*, 901 F. Supp. 330, 335-36 (S.D. Fla. 1994) (citing favorably this *Filartiga* opinion and awarding compensatory and punitive damages, but not referring to the law of Haiti, where the offenses occurred).

¹⁸⁰ See Casto, *supra* note 11, at 478 (referring to the opinion after remand in *Filartiga* and asking "[w]ho but an English-speaking judge would have imagined that the international community would embrace as binding international law a common-law doctrine rejected by most of the world's nations"). But see Steinhardt, *supra* note 98, at 95 (stating that the use of international law to impose punitive damages "is defensible").

¹⁸¹ See *Xuncax v. Gramajo*, 886 F. Supp. 162, 182 (D. Mass. 1995) (awarding compensatory and punitive damages fashioned "from the 'amorphous body' of inter-

concurring opinion in *Tel-Oren*, rejected this option because "the formidable research task involved gives pause"¹⁸² Perhaps someday there will emerge a complete international law for compensating victims of atrocities. For now, because any court purporting to apply international law for this purpose would be inventing more than it is finding, it is preferable to use choice-of-law rules to select the proper law.¹⁸³

The final possibility is to develop federal common-law tort remedies for recoveries under the ATCA and TVPA.¹⁸⁴ The Senate Report on the TVPA goes a step further and alternates between domestic and foreign law, whichever is more favorable to the claimant. The Report states that "[t]he term 'beneficiary [sic] in a wrongful death action' is generally intended to be limited to those persons recognized as legal claimants in a wrongful death action under Anglo-American law."¹⁸⁵ The Report then opines that "[w]here application of Anglo-American law would result in no remedy whatsoever for an extrajudicial killing . . . application of foreign law recognizing a claim by a more distant relation in a wrongful death action is appropriate."¹⁸⁶

The suggestion that in ATCA or TVPA cases, courts apply United States federal tort law, the law of a state that has no contact with the parties or the occurrence, is bizarre. Even monsters are entitled to due process, and due process requires that the state of the applicable law "have a significant contact or significant aggregation of contacts [with the parties and the occurrence], creating state interests, such that choice of its law

national law").

¹⁸² *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

¹⁸³ *But see* Cicero, *supra* note 70, at 380 (stating that international law already provides "reasonable standards of liability and adjudication").

¹⁸⁴ *See Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996) (stating that "the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law"); *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring) (stating that "the substantive right on which this [ATCA] action is based must be found in the domestic tort law of the United States").

¹⁸⁵ Senate Report, *supra* note 87, at 7 (quoting TVPA § 2) (as enacted, the term "claimant" is used rather than "beneficiary"); *cf.* House Report, *supra* note 84, at 4 (stating that "[c]ourts may look to state law for guidance as to which parties would be proper wrongful death claimants").

¹⁸⁶ Senate Report, *supra* note 87, at 7 n.10.

is neither arbitrary nor fundamentally unfair.¹⁸⁷ In *Kadic*, it may be difficult to determine the tort law in effect at the scene of the atrocities, but it is an effort that must be made.

CONCLUSION

The enactment of the TVPA, which expressly creates a civil cause of action for victims of official torture and extrajudicial killing, undercuts arguments that the ATCA should be narrowly construed to keep from our courts cases with strong potential for embarrassing our foreign policy. The only viable jurisdictional issues under either the ATCA or TVPA are whether the statutes confer "judicial Power" beyond that permitted by Article III of the United States Constitution, and whether the statutes are invalid under what Judge Bork has called "the constitutional core of the political question doctrine."¹⁸⁸ Reasonable people may differ on this issue, but the consensus, with which I agree, is that the enactments pass constitutional muster.

Nevertheless, what is constitutional is not necessarily prudent. Our Executive must often negotiate with foreign barbarians. Hauling these persons before our courts in ATCA and TVPA actions is likely to make those negotiations even more difficult. A statement from the Executive, such as that obtained by the Second Circuit in *Filartiga*, that there is no objection to the case proceeding, will minimize this difficulty. A change of administrations may, however, produce a change in the Executive's position. Is the case then to be aborted? It is preferable that an international tribunal, close to the scenes of the atrocities when feasible, adjudicate tort claims against those who violate basic human rights standards.¹⁸⁹ Until there is an international civil tribunal, the ATCA and TVPA are flawed but viable methods of establishing "incredible events by credible evidence."¹⁹⁰

¹⁸⁷ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

¹⁸⁸ *Tel-Oren*, 726 F.2d at 822 (Bork, J., concurring).

¹⁸⁹ Cf. Steinhardt, *supra* note 98, at 102 (advocating "[a]n international treaty on the redress of human rights violations").

¹⁹⁰ JACKSON, *supra* note *.

