Nos. 00-56603, 00-56628

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, ET AL.,

Plaintiffs-Appellees,

v.

UNOCAL CORPORATION, ET AL.

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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INTRODUCTION AND SUMMARY

Pursuant to Rule 29(a), Fed. R. App. P., the United States of America hereby submits this amicus curie brief.

Especially in light of the numerous cases that have recently been litigated in United States courts based on the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), the United States has a substantial interest in the ATS' proper application. The ATS was enacted in 1789, as a jurisdictional provision. It ensures that federal

courts may entertain causes of action that are otherwise properly cognizable under the "law of nations" insofar as that law is made part of U.S. law (Art. I, Sec. 8, Cl. 10), or under "a treaty of the United States." It was an obscure provision, which was almost never invoked and which became even less relevant after the enactment of general federal question jurisdiction and the elimination of the amount in controversy requirement.

In recent years, however, the ATS has been commandeered and transformed into a font of causes of action permitting aliens to bring human rights claims in United States courts, even when the disputes are wholly between foreign nationals and when the alleged injuries were incurred in a foreign country, often with no connection whatsoever with the United States.

In recent decisions, panels of this Court have made several fundamental analytical errors regarding the ATS. The Court has construed a statute that on its face merely confers subject matter jurisdiction as also affording an implied private right of action. Recent Supreme Court precedent, however, prohibits finding an implied private right of action in this jurisdictional grant. Moreover, it is clearly error to infer a right of action to enforce unratified or non-self-executing treaties, and non-binding United Nations General Assembly resolutions. Finally, contrary to the long-established presumption against extraterritorial application of a statute,

this Court has extended the causes of action recognized under the ATS to conduct occurring wholly within the boundaries of other nations, involving only foreign sovereigns or nationals, and causing no direct or substantial impact in the United States.

Under this new view of the ATS, it has become the role of the federal courts to discern, and enforce through money damage actions, norms of international law from unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements. Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation. For example, such claims have already been asserted against foreign nationals who have assisted our Government in the seizure of criminals abroad. See Alvarez-Machain v. United States, 266 F.3d 1045, 1051 (9th Cir. 2001), vacated and rhg en banc granted, 284 F.3d 1039 (9th Cir. 2002). This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war. Indeed, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism. See Al Odah v. United States, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the U.S. Naval Base at Guantanamo Bay).

Wide-ranging claims the courts have entertained regarding the acts of aliens in foreign countries necessarily call upon our courts to render judgments over matters that implicate our Nation's foreign affairs. In the view of the United States, the assumption of this role by the courts under the ATS not only has no historical basis, but, more important, raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles.

While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the U.S. Government actively is[1]) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. § 1350 note. The ATS, which is a simple grant of jurisdiction, cannot properly be construed as a broad grant of authority for the

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[1] See 67 Fed. Reg. 35423 (May 16, 2002) (order continuing sanctions against Burma); Dept. of State, CONDITIONS IN BURMA AND U.S. POLICY TOWARD BURMA FOR THE PERIOD SEPTEMBER 28, 2002 – MARCH 27, 2003 (http://www.state.gov/p/eap/rls/rpt/burma/19554.htm).

courts to decipher and enforce their own concepts of international law. Thus, respectfully, the Government asks the Court to reconsider its approach to the ATS.

STATEMENT OF THE ISSUES

In this brief, the United States will address the following issues:

1. Whether the ATS permits a court to infer a cause of action to enforce international law norms discerned by the courts from documents such as unratified and non-self-executing treaties, and non-binding UN resolutions.

2. Whether the ATS applies to claims brought by aliens relating to acts in other countries.

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 479-480 (1986) ("any suggestion that the statute creates a federal cause of action

is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he 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.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992).

This jurisdictional statute remained virtually dormant for almost 200 years, until the Second Circuit, in 1980, for the first time gave it an expansive construction. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). That court held that the ATS conferred subject-matter jurisdiction on federal courts to hear a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The court did not opine, however, on whether the ATS itself provided a cause of action.

Thereafter, in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir.), cert. denied, 470 U.S. 1003 (1984), both Judges Bork and Robb disagreed with Filartiga insofar as it allowed such a suit to proceed. Judge Bork explained that

the ATS was a jurisdictional statute only and did not provide plaintiffs a cause of action. Id. at 801-823. Judge Robb stated that the Filartiga's approach was "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." Id. at 826 n.5.[2]

In Trajano, however, this Court held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. See Trajano, 978 F.2d at 499-502. Three years later in, Hilao v. Estate of Marcos, 25 F.3d 1467, 1474-76 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), the Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Court misread Filartiga as having so held[3] and simply followed Filartiga without independently examining the question.[4]

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[2] Judge Edwards wrote a separate opinion supporting dismissal of the ATS claim. He agreed with Filartiga, but believed that a torture claim could be asserted against a state actor. Id. at 777-798.

[3] See Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATS] affords jurisdiction").

[4] The Eleventh Circuit thereafter held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

The Court should now examine the issue in this en banc proceeding and should overrule Trajano and Hilao because they erroneously read the ATS as providing, or permitting a court to infer, a private right of action.

2. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to create any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. That Act in Sections 1 through 13 establishes the federal courts and delineates the jurisdiction of those courts. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. See 1 Stat. 76 (1789). In context, the ATS is thus properly read as being solely a jurisdictional provision. See Ford, THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, Thomas Jefferson Papers Series 1. General Correspondence (Dec. 3, 1792 Jefferson letter citing the "act of 1789, chapter 20, section 9" as a statute "describing the jurisdiction of the Courts") (emphasis added) (available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html); cf. Montana-Dakota Co. v. Northwestern Pub. Serv., 341 U.S. 246, 249 (1951) ("The Judicial Code, in

vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").[5]

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile incidents of the time concerning assaults upon foreign ambassadors on domestic soil (Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784); Report of Secretary for Foreign Affairs on Complaint of Minister of United Netherlands, 34 J.Cont. Cong. 109, 111 (1788)). See, e.g., Casto, 18 Conn. L. Rev. at 488-498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. Id. at 490-494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, §350, at 230- 231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only

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[5] As we discuss below, a court's authority to adjudicate admiralty cases by reference to non-statutory law is based upon a distinct clause of the Constitution and a unique history and background, and does not authorize a court to create causes of action to enforce international law norms under the ATS. See pp. 24-25, infra.

in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 W. Blackstone, COMMENTARIES, 67-68 (1783).

Article III jurisdiction is not self-vesting. Congress did not enact a general federal question statute until much later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases -- i.e., those arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States or under "treaties of the United States." In this way, the First Judiciary Act ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such traditional law of nations protections. Then, the next year, invoking its

constitutional authority to define and punish violations of the "Law of Nations," see Article I, Sec. 8, Cl. 10, Congress made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone (piracy and violating the right of safe conduct)) offenses under the federal law. 1 Stat. 113-115, 117-118. Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), Congress must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have recognized that the elimination of the amount-in-

controversy requirement in 1980, rendered numerous jurisdictional provisions superfluous.[6]

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries. Moreover, as we discuss next, this Court has erred to the extent that it has permitted ATS actions to proceed based on asserted international norms stemming from documents such as unratified and non-self-executing treaties, and non-binding United Nations General Assembly resolutions.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. See Tel-Oren, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); id at 810 (Bork, J., concurring). See also Christenson, Federal Courts and World

[6] See, e.g., Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 520 (3rd Cir. 1998) (28 U.S.C. § 1337 superfluous); Winstead v. J.C. Penney Co., 933 F.2d 576, 580 (7th Cir. 1991) (§§ 1337, 1340, and 1343 superfluous).

Civil Society, 6 J. Transnat'l L & Policy 405, 511-512 (1997) ("U.S. courts will not incorporate a cause of action from customary international law"). This Court, however, has read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001). As the Court emphasized in Sandoval, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights. Sandoval, 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. Ibid.

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." Sandoval, 532 U.S. at 288. The ATS is demonstrably a jurisdiction-vesting statute. Although it refers to a particular type of claim (i.e., a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory rights, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under

the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by this Court to discern norms of international law were not themselves intended by that the Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Although this Court has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, Hilao, 25 F.3d at 1475, the Court has not actually applied those standards. Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, nonbinding agreements, and agreements that are not self-executing, as well as political resolutions of UN bodies and other non-binding statements. See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-716 (9th Cir. 1991); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998); Alvarez-Machain, 266 F.3d at 1051. None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. The Court has erroneously transformed these non-binding, non-self-executing documents -- none of which

remotely creates a private cause of action --into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the United States refuses to ratify a treaty, or regards a U.N. resolution as non-binding, or declares a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. See Al Odah, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate not to be), such a treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.). See also RESTATEMENT

(THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, this Court has, for example, based ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). Martinez, 141 F.3d at 1384; Alvarez-Machain, 266 F.3d at 1051-1052. That treaty is non-self-executing, see, e.g., Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.[7]

Furthermore, the labeling of an international law norm, derived from unratified agreements, etc., as "jus cogens" violations, see Siderman de Blake, 965 F.2d at 714, does not grant any greater legitimacy to judicial enforcement of such norms. Like the other types of perceived international law norms mistakenly enforced by this Court under the ATS, "the content of the jus cogens doctrine * * * emanates from academic commentary and multilateral treaties, even when

[7] Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." Foster, 27 U.S. at 314. Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. See, e.g., Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (explaining that the treaties at issue "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," but did not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

unsigned by the United States." Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. See Christenson, supra, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted jus cogens norm as the sole basis for a cause of action."). Cf. Blankenship v. McDonald, 176 F.3d 1192, 1195 (9th Cir. 1999) (a Bivens cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees").

This Court's approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a ratified treaty of the United States, receiving the advice and consent of the Senate, before it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assuming further that the treaty confers a private right of action, see pp. 15-16 n.7, supra). This Court, however, has erroneously construed the ATS to imply a cause of action to enforce such norms even where the

Executive and Congress have declined to embody the norms in a binding or domestically enforceable law or treaty.

For example, in Alvarez-Machain, supra, a panel of this Court allowed a claim for a transborder arrest authorized by the U.S. Government even though "no international human rights instruments [even] refers to transborder abduction specifically." 266 F.3d at 1051. The panel erroneously relied upon, inter alia, general provisions of the Universal Declaration of Human Rights[8] (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights[9] (which the Senate refused to ratify), and the ICCPR (a non-self-executing treaty). Id. at 1051-1052. These documents plainly do not create domestically enforceable rights. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights treaties[10]) expressly agreed that it would not be

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[8] G.A. Res. 218A, U.N. GAOR, U.N. Doc. A/810 (1948). Similarly, here, the panel relied upon the Universal Declaration of Human Rights.

[9] 9 I.L.M. 673 (July 4, 1977).

[10] In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Genocide Convention, the Torture Convention, and the

self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to infer a cause of action to enforce the terms of the agreement.

In certain areas, of course, a court, in connection with a matter already properly pending before it, may properly look to norms of international law to furnish a rule of decision, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900). That is very different from a court's inferring a cause of action as an initial matter based on international law. But even where a court may properly look to international law norms, it does so only in the absence of a "controlling executive or legislative act * * *." The Paquete Habana, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political Branches have taken the matter

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Convention on the Elimination of All Forms of Racial Discrimination would not be self-executing. See 140 Cong. Rec. S14326 (daily ed. June 24, 1994); 136 Cong. Rec. S17491, S17486-01 (daily ed., Oct. 27, 1990); 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994); 132 Cong. Rec. S1355-01, S1378 (daily ed. Feb. 19, 1986).

fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. See G. Schwarzenberger & E.D. Brown, A MANUAL OF INTERNATIONAL LAW 237 (1976). The actions or inactions of the political Branches with respect to those instruments must be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong to infer a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial inferring of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. See FDIC v. Meyer, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such

implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893). See Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936). Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. See ibid. Indeed, the Supreme Court has recognized that foreign policy are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Chicago & So. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under this Court's approach, ATS actions are not limited to rogues and outlaws. As mentioned above, such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. Indeed, that approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. See Alvarez-Machain, 266 F.3d at 1051.[11] As noted above, this Court's approach to the ATS therefore bears serious implications for our current war against terrorism, and permits ATS claims to be asserted against our allies in that war. Notably, such claims have already been brought against the

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[11] That ruling has, however, been vacated pending the en banc panel's ruling in that case.

United States itself in connection with its efforts to combat terrorism. See Al Odah v. United States, supra.

As interpreted by this Court in previous decisions, the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress wishes to permit such suits (e.g., through the TVPA), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," see Ex Parte Quirin, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. at 700. That principle does not, however, lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. See Tel Oren, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").[12]

[12] This is not to suggest that the international norms are enforceable as a part of state common law. Enforcement of such norms as a matter of state law would be inconsistent with the constitutional grant of responsibility over foreign affairs to the Federal Government, to the exclusion of the states. See Zschernig v. Miller, 389 U.S. 429 (1968); Tel Oren, 726 F.2d at 805 n.11 (Bork, J. concurring). That is especially so with respect to norms derived from ratified or unratified treaties, resolutions, and similar documents that have been relied upon in this and other suits under the ATS, for those documents are the work of the political Branches. For that reason, the absence of enforceable rights in those documents, and the refusal by the political Branches to give them enforceable domestic effect, constitute "controlling executive or legislative act[s]," The Paquete Habana, 175 U.S. at 700, that preclude reliance on those documents as a source of rights enforceable in a private suit for damages under state law.

Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 960 (4th Cir. 2000). See also The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544-545 (1828). The Framers drafted Article III with this full body of maritime law "clearly in view." R.M.S. Titanic, 171 F.3d at 960. Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." Id. at 961. See also United States v. Flores, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim.

Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is assigned to Congress under Article I. See Art. I, Sec. 8, Cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified Filartiga and its progeny when it enacted the Torture Victim Protection Act. See Goodman & Jinks, Filartiga's Firm Footing: International Human Rights and Federal Common Law, 66 Fordham L. Rev. 463, 514 (1997). The TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. See 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to hear claims by aliens for torts committed in violation of

the law of nations." S. Rep. 102-249 at 4 (1991). The report noted that the "Filartiga case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." Id. 4-5. The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." Id at 5. See also H.R. Rep. No. 102-367 at 4 (1991).

Based on these 1991 legislative statements regarding a statute enacted in 1789, some have argued that, regardless of the best reading of the ATS or of the original validity of Filartiga, the TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in 1789. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on

an interpretation of § 1350; and the statement itself is legislative dictum." Al Odah, 321 F.3d at 1146 (Randolph, J., concurring).

II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

This Court has further compounded the significance of its erroneous application of the ATS by inferring causes of actions for acts occurring within other nations. Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in United States v. Palmer, 16 U.S. 610 (1818), where the Court held that a federal piracy statute should not be read to apply to foreign nationals on a foreign ship. Id. at 630-31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts

mentioned the ATS after its recent enactment both involved domestic incidents – the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. See Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795).[13]

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors on domestic soil. See pp. 9-10, supra. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to avoid conflict with other countries.

[13] See also 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, depending upon the precise place of its commission, may only be an offence against the municipal laws") (emphasis added).

That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. See THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html); United States v. La Juene Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." Tel-Oren, 726 F.2d at 812 (Bork, J.).

CONCLUSION

For the foregoing reasons, this Court's prior ATS precedents should be overruled, and this case should be remanded for application of a more limited construction of the statute.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief is presented in Time New Roman 14 point font. The word count for the brief (as calculated by the WordPerfect 9.0 word-processing program, excluding exempt material) is 6990, and is under the 7,000 word limitation.

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