Introduction to U.S. Law
and
Legal Practice

Section 3: Professor Hon. Gerald Lebovits

Just or Unjust? The Alien Tort Statute and Human Rights Violations Abroad

Table of Contents

List of Cases

1. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)
2. In re Estate of Ferdinand E. Marcos Human Right Litigation, 978 F.2d 493 (9th Cir. 1992)
3. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1996)
4. Doe v. Unocal (edited), 395 F.3d 932 (9th Cir. 2002)
5. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)
6. Adbullahi v. Pfizer (edited), 562 F.3d 163 (2d Cir. 2009)
7. Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011)
8. Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013)
9. Daimler AG v. Bauman, 134 S. Ct. 746 (2014)

Dolly M. E. FILARTIGA and Joel Filartiga, Plaintiffs-Appellants,

v.

Americo Norberto PENA-IRALA, Defendant-Appellee.

No. 191, Docket 79-6090.

United States Court of Appeals, Second Circuit.

Argued Oct. 16, 1979.

Decided June 30, 1980.

Citizens of the Republic of Paraguay, who had applied for permanent political asylum in the United States, brought action against one also a citizen of Paraguay, who was in United States on a visitor's visa, for wrongfully causing the death of their son allegedly by the use of torture. The United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., dismissed the action for want of subject matter jurisdiction and appeal was taken. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that deliberate torture perpetrated under the color of official authority violates universally accepted norms of international law of human rights regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction.

Reversed.

1. Federal Courts ⇐192

Deliberate torture perpetrated under color of official authority violates universally accepted norms of international law of human rights, regardless of the nationality of the parties, and, thus, whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction. 28 U.S.C.A. § 1350.

2. International Law ⇐2

Law of nations may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing such law.

3. International Law ⇐1

Courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. U.S.C.A.Const. Art. 2, § 2; Art. 6, cl. 2.

4. International Law ⇐1

Official torture is prohibited by the law of nations; the prohibition is clear and unambiguous and admits of no distinction between treatment of aliens and citizens.

5. Courts ⇐12(2)

Where in personam jurisdiction had been obtained over Paraguayan defendant, who was in United States on a visitor's visa, parties agreed that the acts alleged against defendant would violate Paraguayan law, and policies of the forum were consistent with the foreign law, state court jurisdiction would have been proper.

6. Federal Courts ⇐191

A case properly arises under the laws of the United States if grounded upon statutes enacted by Congress or upon the common law of the United States. U.S.C.A. Const. Art. 3, § 1 et seq.

7. Federal Courts ⇐192

Enactment of Alien Tort Statute, providing that district courts 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, was authorized by Article III, of the Constitution dealing with jurisdiction of federal courts. 28 U.S.C.A. § 1350; U.S.C.A.Const. Art. 3, § 1 et seq.

8. International Law ⇐2

Law of nations forms a part of the laws of the United States, even in absence of congressional enactment. U.S.C.A. Const. Art. 1, § 8, cl. 10.

9. Federal Courts ⇐192

Alien tort statute opens the federal courts for adjudication of rights already recognized by international law. 28 U.S. C.A. § 1350.

10. Federal Courts ⇐247

Requirement of alien tort statute of alleging a "violation of the law of nations" requires more searching review of the merits at the jurisdictional threshold than does the more flexible "arising under" formulation. 28 U.S.C.A. § 1350.

11. Federal Courts ⇐192

It is only where the nations of world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the Alien Tort Statute. 28 U.S.C.A. § 1350.

12. Federal Courts ⇐192

Where federal court had subject matter jurisdiction over action by citizens of Paraguay, who applied for permanent political asylum in the United States, against a citizen of Paraguay who was in the United States on a visitor's visa, for wrongfully causing the death of their son, allegedly by the use of torture, such jurisdiction would not be affected by the court's subsequent decision to apply foreign law as a rule of decision; its choice of law inquiry would be primarily concerned with fairness. 28 U.S. C.A. § 1350.

13. International Law ⇐1

Foreign nation's renunciation of torture as a legitimate instrument of state policy, did not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.

14. International Law ⇐10.33

Act of State Doctrine probably does not apply to acts of a foreign government official that are wholly unauthorized and expressly forbidden by the foreign sovereign.

Peter Weiss, New York City (Rhonda Copelon, John Corwin and Jose Antonio Lugo, Center for Constitutional Rights, New York City, and Michael Maggio, Goren & Maggio, Washington, D. C., of counsel), for plaintiffs-appellants.

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Irving Gornstein, Atty., Dept. of Justice, Washington, D. C. (Drew S. Days, III, Asst. Atty. Gen., John E. Huerta, Deputy Asst. Atty. Gen., Roberts B. Owen, Legal Advisor, William T. Lake, Deputy Legal Advisor, Stefan A. Riesenfeld, Charles Runyon and Linda A. Baumann, Attys., Dept. of State, Washington, D. C.), for the U. S. as amicus curiae.

Donald L. Doernberg, New York City, and David S. Weissbrodt, Minneapolis, Minn., for Amnesty International-U. S. A., Intern. League for Human Rights, and the Lawyers' Committee for Intern. Human Rights as amici curiae.

Allan Abbot Tuttle, and Steven M. Schneebaum, Washington, D. C., for The Intern. Human Rights Law Group, The Council on Hemispheric Affairs and the Washington Office on Latin America as amici curiae.

Before FEINBERG, Chief Judge, KAUFMAN and KEARSE *, Circuit Judges.

IRVING R. KAUFMAN, Circuit Judge:

Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations. Under the Articles of Confederation, the several states had interpreted and applied this body of doctrine as a

* The late Judge Smith was a member of the original panel in this case. After his unfortunate death, Judge Kearse was designated to fill his place pursuant to Local Rule § 0.14(b).

part of their common law, but with the founding of the "more perfect Union" of 1789, the law of nations became preeminently a federal concern.

Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. § 1350. Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

I

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled, horrified, from the house, Pena followed after her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up." The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

During the course of the Paraguayan criminal proceeding, which is apparently still pending after four years, another man, Hugo Duarte, confessed to the murder. Duarte, who was a member of the Pena household,[1] claimed that he had discovered his wife and Joelito *in flagrante delicto*, and that the crime was one of passion. The Filartigas have submitted a photograph of Joelito's corpse showing injuries they believe refute this claim. Dolly Filartiga, moreover, has stated that she will offer evidence of three independent autopsies demonstrating that her brother's death "was the result of professional methods of torture." Despite his confession, Duarte, we are told, has never been convicted or sentenced in connection with the crime.

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in

1. Duarte is the son of Pena's companion, Juana Bautista Fernandez Villalba, who later accompanied Pena to the United States.

Brooklyn, New York, when Dolly Filartiga, who was then living in Washington, D. C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of $10,000,000. The Filartigas also sought to enjoin Pena's deportation to ensure his availability for testimony at trial.[2] The cause of action is stated as arising under "wrongful death statutes; the U. N. Charter; the Universal Declaration on Human Rights; the U. N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350, Article II, sec. 2 and the Supremacy Clause of the U. S. Constitution. Jurisdiction is claimed under the general federal question provision, 28 U.S.C. § 1331 and, principally on this appeal, under the Alien Tort Statute, 28 U.S.C. § 1350.[3]

Judge Nickerson stayed the order of deportation, and Pena immediately moved to dismiss the complaint on the grounds that subject matter jurisdiction was absent and for *forum non conveniens*. On the jurisdictional issue, there has been no suggestion that Pena claims diplomatic immunity from suit. The Filartigas submitted the affidavits of a number of distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint.[4] Pena, in support of his motion to dismiss on the ground of *forum non conveniens*, submitted the affidavit of his Paraguayan counsel, Jose Emilio Gorostiaga, who averred that Paraguayan law provides a full and adequate civil remedy for the wrong alleged.[5] Dr. Filartiga has not

2. Several officials of the Immigration and Naturalization Service were named as defendants in connection with this portion of the action. Because Pena has now been deported, the federal defendants are no longer parties to this suit, and the claims against them are not before us on this appeal.

3. Jurisdiction was also invoked pursuant to 28 U.S.C. §§ 1651, 2201 & 2202, presumably in connection with appellants' attempt to delay Pena's return to Paraguay.

4. Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, and a former Vice President of the American Society of International Law, avers that, in his judgment, "it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Thomas Franck, professor of international law at New York University and Director of the New York University Center for International Studies offers his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Finally, Myres MacDougal, a former Sterling Professor of Law at the Yale Law School, and a past President of the American Society of International Law, states that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states."

5. The Gorostiaga affidavit states that

> a father whose son has been wrongfully killed may in addition to commencing a criminal proceeding bring a civil action for damages against the person responsible. Accordingly, Mr. Filartiga has the right to commence a civil action against Mr. Duarte and Mr. Pena-Irala since he accuses them both of responsibility for his son's death. He may commence such a civil action either simultaneously with the commencement of the criminal proceeding, during the time that the criminal proceeding lasts, or within a year after the criminal proceeding has terminated. In either event, however, the civil action may not proceed to judgment until the criminal proceeding has been disposed of. If the defendant is found not guilty because he was not the author of the case under investigation

commenced such an action, however, believing that further resort to the courts of his own country would be futile.

Judge Nickerson heard argument on the motion to dismiss on May 14, 1979, and on May 15 dismissed the complaint on jurisdictional grounds.[6] The district judge recognized the strength of appellants' argument that official torture violates an emerging norm of customary international law. Nonetheless, he felt constrained by dicta contained in two recent opinions of this Court, *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), to construe narrowly "the law of nations," as employed in § 1350, as excluding that law which governs a state's treatment of its own citizens.

The district court continued the stay of deportation for forty-eight hours while appellants applied for further stays. These applications were denied by a panel of this Court on May 22, 1979, and by the Supreme Court two days later. Shortly thereafter, Pena and his companion returned to Paraguay.

II

[1] Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, which 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." Since appellants do not contend that their action arises directly under a treaty of the United States,[7] a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

[2] The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 295 (E.D.Pa.1963). In *Smith*, a statute proscribing "the crime of piracy [on the high seas] as defined by the law of nations," 3 Stat. 510(a) (1819), was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Bochard and other commentators a genuine consensus that rendered the crime "sufficiently and constitutionally defined." *Smith, supra*, 18 U.S. (5 Wheat.) at 162, 5 L.Ed. 57.

The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), reaffirmed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they

in the criminal proceeding, no civil action for indemnity for damages based upon the same deed investigated in the criminal proceeding, can prosper or succeed.

6. The court below accordingly did not consider the motion to dismiss on *forum non conveniens* grounds, which is not before us on this appeal.

7. Appellants "associate themselves with" the argument of some of the *amici curiae* that their claim arises directly under a treaty of the United States, Brief for Appellants at 23 n.*, but nonetheless primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather then independent sources of law.

> treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 700, 20 S.Ct. at 299. Modern international sources confirm the propriety of this approach.[8]

[3] *Habana* is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." *Id.* at 694, 20 S.Ct. at 297; *accord, id.* at 686, 20 S.Ct. at 297. Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796) (distinguishing between "ancient" and "modern" law of nations).

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. Thus, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Court declined to pass on the validity of the Cuban government's expropriation of a foreign-owned corporation's assets, noting the sharply conflicting views on the issue propounded by the capital-exporting, capital-importing, socialist and capitalist nations. *Id.* at 428–30, 84 S.Ct. at 940–41.

The case at bar presents us with a situation diametrically opposed to the conflicted state of law that confronted the *Sabbatino* Court. Indeed, to paraphrase that Court's statement, *id.* at 428, 84 S.Ct. at 940, there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

The United Nations Charter (a treaty of the United States, *see* 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Id. Art. 55. And further:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Id. Art. 56.

While this broad mandate has been held not to be wholly self-executing, *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), this obser-

8. The Statute of the International Court of Justice, Arts. 38 & 59, June 26, 1945, 59 Stat. 1055, 1060 (1945) provides:

Art. 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations;
(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Art. 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

vation alone does not end our inquiry.[9] For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture." [10] The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A.Res. 2625 (XXV) (Oct. 24, 1970).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975), which is set out in full in the margin.[11] The Declaration

9. We observe that this Court has previously utilized the U.N. Charter and the Charter of the Organization of American States, another non-self-executing agreement, as evidence of binding principles of international law. *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974). In that case, our government's duty under international law to refrain from kidnapping a criminal defendant from within the borders of another nation, where formal extradition procedures existed, infringed the personal rights of the defendant, whose international law claims were thereupon remanded for a hearing in the district court.

10. Eighteen nations have incorporated the Universal Declaration into their own constitutions. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 211 (1977).

11. Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3

No state may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

Article 4

Each state shall, in accordance with the provisions of this Declaration, take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment from being practiced within its jurisdiction.

Article 5

The training of law enforcement personnel and of other public officials who may be responsible for persons deprived of their liberty shall ensure that full account is taken of the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. This prohibition shall also, where appropriate, be included in such general rules or instructions as are issued in regard to the duties and functions of anyone who may be involved in the custody or treatment of such persons.

Article 6

Each state shall keep under systematic review interrogation methods and practices as well as arrangements for the custody and treatment of persons deprived of their liberty in its territory, with a view to preventing any cases of torture or other cruel, inhuman or degrading treatment or punishment.

Article 7

Each state shall ensure that all acts of torture as defined in Article I are offenses under its criminal law. The same shall apply in regard to acts which constitute participation in, complicity in, incitement to or an attempt to commit torture.

Article 8

Any person who alleges he has been subjected to torture or other cruel, inhuman or degrading treatment or punishment by or at the instigation of a public official shall have

expressly prohibits any state from permitting the dastardly and totally inhuman act of torture. Torture, in turn, is defined as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as . . . intimidating him or other persons." The Declaration goes on to provide that "[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly. Nayar, "Human Rights: The United Nations and United States Foreign Policy," 19 *Harv.Int'l L.J.* 813, 816 n.18 (1978).

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Sohn, "A Short History of United Nations Documents on Human Rights," in *The United Nations and Human Rights, 18th Report of the Commission* (Commission to Study the Organization of Peace ed. 1968). Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." *E. Schwelb, Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, *supra*. Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law. Nayar, *supra*, at 816–17; Waldlock, "Human Rights in Contemporary International Law and the Significance of the European Convention," *Int'l & Comp. L.Q.*, Supp. Publ. No. 11 at 15 (1965).

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. *Smith, supra*, 18 U.S. (5 Wheat.) at 160–61, 5 L.Ed. 57. The international consensus surrounding torture has found expression in numerous international treaties and accords. *E. g., American Convention on Human Rights*, Art. 5, OAS

> the right to complain to, and to have his case impartially examined by, the competent authorities of the state concerned.
>
> Article 9
>
> Wherever there is reasonable ground to believe that an act of torture as defined in Article I has been committed, the competent authorities of the state concerned shall promptly proceed to an impartial investigation even if there has been no formal complaint.
>
> Article 10
>
> If an investigation under Article 8 or Article 9 establishes that an act of torture as defined in Article I appears to have been committed, criminal proceedings shall be instituted against the alleged offender or offenders in accordance with national law. If an allegation of other forms of cruel, inhuman or degrading treatment or punishment is considered to be well founded, the alleged offender or offenders shall be subject to criminal, disciplinary or other appropriate proceedings.
>
> Article 11
>
> Where it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.
>
> Article 12
>
> Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceeding.

Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N. T.S. 211 (*semble*). The substance of these international agreements is reflected in modern municipal—*i. e.* national—law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations,[12] including both the United States[13] and Paraguay.[14] Our State Department reports a general recognition of this principle:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens . . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.

Department of State, *Country Reports on Human Rights for 1979*, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1. We have been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

> In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.[15]

Memorandum of the United States as *Amicus Curiae* at 16 n.34.

[4] Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists[16]—we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in *Dreyfus v. von Finck*, *supra*, 534 F.2d at 31, to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy

12. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4 at 208 (1977).

13. U.S.Const., Amend. VIII ("cruel and unusual punishments" prohibited); *id.* Amend. XIV.

14. Constitution of Paraguay, Art. 45 (prohibiting torture and other cruel treatment).

15. The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." J. Brierly, *The Outlook for International Law* 4–5 (Oxford 1944).

16. *See* note 4, *supra*: *see also Ireland v. United Kingdom*, Judgment of Jan. 18, 1978 (European Court of Human Rights), *summarized in* [1978] Yearbook, European Convention on Human Rights 602 (Council of Europe) (holding that Britain's subjection of prisoners to sleep deprivation, hooding, exposure to hissing noise, reduced diet and standing against a wall for hours was "inhuman and degrading," but not "torture" within meaning of European Convention on Human Rights).

of our own government,[17] all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. We therefore turn to the question whether the other requirements for jurisdiction are met.

III

Appellee submits that even if the tort alleged is a violation of modern international law, federal jurisdiction may not be exercised consistent with the dictates of Article III of the Constitution. The claim is without merit. Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, § 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.

[5] It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred. Thus, Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774), *quoted in McKenna v. Fisk*, 42 U.S. (1 How.) 241, 248, 11 L.Ed. 117 (1843) said:

> [I]f A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found . . . . [A]s to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.

Mostyn came into our law as the original basis for state court jurisdiction over out-of-state torts, *McKenna v. Fisk, supra*, 42 U.S. (1 How.) 241, 11 L.Ed. 117 (personal injury suits *held* transitory); *Dennick v. Railroad Co.*, 103 U.S. 11, 26 L.Ed. 439 (1880) (wrongful death action *held* transitory), and it has not lost its force in suits to recover for a wrongful death occurring upon foreign soil, *Slater v. Mexican National Railroad Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904), as long as the conduct complained of was unlawful where performed. *Restatement (Second) of Foreign Relations Law of the United States* § 19 (1965). Here, where *in personam* jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law,[18] state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.

[6, 7] Recalling that *Mostyn* was freshly decided at the time the Constitution was ratified, we proceed to consider whether the First Congress acted constitutionally in vesting jurisdiction over "foreign suits," *Slater, supra*, 194 U.S. at 124, 24 S.Ct. at 582, alleging torts committed in violation of

17. *E. g.*, 22 U.S.C. § 2304(a)(2) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."); 22 U.S.C. § 2151(a) ("The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms").

18. Conduct of the type alleged here would be actionable under 42 U.S.C. § 1983 or, undoubtedly, the Constitution, if performed by a government official.

the law of nations. A case properly "aris[es] under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 99–100, 92 S.Ct. 1385, 1390–91, 31 L.Ed.2d 712 (1972); *Ivy Broadcasting Co., Inc. v. American Tel. & Tel. Co.*, 391 F.2d 486, 492 (2d Cir. 1968). The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law *of the United States* upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263–64 (1st Ed. 1765–69); 4 *id.* at 67.[19] Under the Articles of Confederation, the Pennsylvania Court of Oyer and Terminer at Philadelphia, *per* McKean, Chief Justice, applied the law of nations to the criminal prosecution of the Chevalier de Longchamps for his assault upon the person of the French Consul-General to the United States, noting that "[t]his law, in its full extent, is a part of the law of this state . . . ." *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 113, 119, 1 L.Ed. 59 (1784). Thus, a leading commentator has written:

> It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England. It was well understood by men of legal learning in America in the eighteenth century when the United Colonies broke away from England to unite effectively, a little later, in the United States of America.

Dickenson, "The Law of Nations as Part of the National Law of the United States," 101 *U.Pa.L.Rev.* 26, 27 (1952).

Indeed, Dickenson goes on to demonstrate, *id.* at 34–41, that one of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to "cause infractions of treaties or of the law of nations, to be punished." 1 Farrand, Records of the Federal Convention 19 (Rev. ed. 1937) (Notes of James Madison). And, in Jefferson's words, the very purpose of the proposed Union was "[t]o make us one nation as to foreign concerns, and keep us distinct in domestic ones." Dickenson, *supra*, at 36 n. 28.

[8] As ratified, the judiciary article contained no express reference to cases arising under the law of nations. Indeed, the only express reference to that body of law is contained in Article I, sec. 8, cl. 10, which grants to the Congress the power to "define and punish . . . offenses against the law of nations." Appellees seize upon this circumstance and advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. *E. g., Ware v. Hylton*, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796); *The Paquete Habana, supra*, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320; *Sabbatino, supra*, 376 U.S.

19. As Lord Stowell said in *The Maria*, 165 Eng. Rep. 955, 958 (Adm.1807): "In the first place it is to be recollected, that this is a Court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it, is the administration of the law of nations, simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known, they have at all times expressed no inconsiderable repugnance."

398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). A similar argument was offered to and rejected by the Supreme Court in *United States v. Smith, supra*, 18 U.S. (5 Wheat.) 153, 158–60, 5 L.Ed. 57 and we reject it today. As John Jay wrote in *The Federalist* No. 3, at 22 (1 Bourne ed. 1901), "Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." Federal jurisdiction over cases involving international law is clear.

Thus, it was hardly a radical initiative for Chief Justice Marshall to state in *The Nereide*, 13 U.S. (9 Cranch) 388, 422, 3 L.Ed. 769 (1815), that in the absence of a congressional enactment,[20] United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in *The Paquete Habana, supra*, 175 U.S. at 700, 20 S.Ct. at 299: "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

[9] The Filartigas urge that 28 U.S.C. § 1350 be treated as an exercise of Congress's power to define offenses against the law of nations. While such a reading is possible, *see Lincoln Mills v. Textile Workers*, 353 U.S. 488, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) (jurisdictional statute authorizes judicial explication of federal common law), we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we recognize that questions of jurisdiction "must be considered part of an organic growth—part of an evolutionary process," and that the history of the judiciary article gives meaning to its pithy phrases. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959). The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today.

[10] Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history,[21] in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court.[22] This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations. The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a "*violation* of the law of nations" (emphasis supplied) at the jurisdictional threshold. Courts have, accordingly, engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible "arising under" formula-

20. The plainest evidence that international law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction first enunciated by Chief Justice Marshall: "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . . ." *The Charming Betsy*, 6 U.S. (2 Cranch), 34, 67, 2 L.Ed. 208 (1804), *quoted in Lauritzen v. Larsen*, 345 U.S. 571, 578, 73 S.Ct. 921, 926, 97 L.Ed. 1254 (1953).

21. Section 1350 afforded the basis for jurisdiction over a child custody suit between aliens in *Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961), with a falsified passport supplying the requisite international law violation. In *Bolchos v. Darrell*, 3 Fed.Cas. 810 (D.S.C.1795), the Alien Tort Statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas.

22. We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon the Alien Tort Statute, in light of that provision's close coincidence with the jurisdictional facts presented in this case. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

tion. *Compare O'Reilly de Camara v. Brooke*, 209 U.S. 45, 52, 28 S.Ct. 439, 441, 52 L.Ed. 676 (1907) (question of Alien Tort Statute jurisdiction disposed of "on the merits") (Holmes, J.), *with Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946) (general federal question jurisdiction not defeated by the possibility that the averments in the complaint may fail to state a cause of action). Thus, the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.

[11] For example, the statute does not confer jurisdiction over an action by a Luxembourgeois international investment trust's suit for fraud, conversion and corporate waste. *IIT v. Vencap*, 519 F.2d 1001, 1015 (1975). In *IIT*, Judge Friendly astutely noted that the mere fact that every nation's municipal law may prohibit theft does not incorporate "the Eighth Commandment, 'Thou Shalt not steal' . . . [into] the law of nations." It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute. Other recent § 1350 cases are similarly distinguishable.[23]

IIT adopted a dictum from *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292 (E.D.Pa.1963) to the effect that "a violation of the law of nations arises only when there has been 'a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or in dealings *inter se.*'" *IIT, supra*, 519 F.2d at 1015, *quoting Lopes, supra*, 225 F.Supp. at 297. We have no quarrel with this formulation so long as it be understood that the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good. As one commentator has noted:

> the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their 'nature.' All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations.

23. *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835, 97 S.Ct. 102, 50 L.Ed.2d 101 (1976), concerned a forced sale of property, and thus sought to invoke international law in an area in which no consensus view existed. *See Sabbatino, supra*, 376 U.S. at 428, 84 S.Ct. at 940. Similarly, *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114, 99 S.Ct. 1016, 59 L.Ed.2d 72 (1979), held only that an air disaster, even if caused by "wilful" negligence, does not constitute a law of nations violation. *Id.* at 916. In *Khedivial Line, S. A. E. v. Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960), we found that the "right" to free access to the ports of a foreign nation was at best a rule of comity, and not a binding rule of international law.

The cases from other circuits are distinguishable in like manner. The court in *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978), was unable to discern from the traditional sources of the law of nations "a universal or generally accepted substantive rule or principle" governing child custody, *id.* at 629, and therefore held jurisdiction to be lacking. *Cf. Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) ("the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may well be a tort in violation of the 'law of nations'") (§ 1350 question not reached due to inadequate briefing). Finally, the district court in *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292 (E.D.Pa.1963) simply found that the doctrine of seaworthiness, upon which the plaintiff relied, was a uniquely American concept, and therefore not a part of the law of nations.

Preuss, "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction," Hague *Receuil* (Extract, 149) at 8, *reprinted in* H. Briggs, *The Law of Nations* 24 (1952). Here, the nations have made it their business, both through international accords and unilateral action,[24] to be concerned with domestic human rights violations of this magnitude. The case before us therefore falls within the *Lopes/IIT* rule.

Since federal jurisdiction may properly be exercised over the Filartigas' claim, the action must be remanded for further proceedings. Appellee Pena, however, advances several additional points that lie beyond the scope of our holding on jurisdiction. Both to emphasize the boundaries of our holding, and to clarify some of the issues reserved for the district court on remand, we will address these contentions briefly.

IV

[12] Pena argues that the customary law of nations, as reflected in treaties and declarations that are not self-executing, should not be applied as rules of decision in this case. In doing so, he confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings. The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness, *see Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); consequently, it looks to wholly different considerations. *See Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1954). Should the district court decide that the *Lauritzen* 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.[25]

[13, 14] Pena also argues that "[i]f the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine." This argument was not advanced below, and is therefore not before us on this appeal. We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. *See Banco Nacionale de Cuba v. Sabbatino, supra*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d

24. As President Carter stated in his address to the United Nations on March 17, 1977:

> All the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of the citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.

Reprinted in 78 Department of State Bull. 322 (1977); see note 17, *supra*.

25. In taking that broad range of factors into account, the district court may well decide that fairness requires it to apply Paraguayan law to the instant case. *See Slater v. Mexican National Railway Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904). Such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiff's cause of action would no longer properly be "created" by a law of the United States. *See American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (Holmes, J.). Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent dismissal of that claim (here, the claim under the general international proscription of torture) does not deprive the court of jurisdiction previously established. *See Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Bell v. Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946). *Cf. Huynh Thi Ahn, supra*, 586 F.2d at 633 (choice of municipal law ousts § 1350 jurisdiction when no international norms exist).

804; *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority. *See* Declaration on the Protection of All Persons from Being Subjected to Torture, *supra* note 11; *cf. Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (state official subject to suit for constitutional violations despite immunity of state).

Finally, we have already stated that we do not reach the critical question of *forum non conveniens*, since it was not considered below. In closing, however, we note that the foreign relations implications of this and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Robert MRAZEK, Rudolph F. X. Migliore, Leslie Fitzpatrick and Grace Holzmacher, Plaintiffs-Appellants,

v.

SUFFOLK COUNTY BOARD OF ELECTIONS, the Conservative Party of Suffolk County, Louis J. Lefkowitz, Attorney General of the State of New York, James J. Lack, as a candidate of the Conservative Party for Member of State Senate, 2d Senatorial District, County of Suffolk, State of New York, and Robert C. Wertz, as a candidate of the Conservative Party for Member of Assembly, Fourth Assembly District, County of Suffolk, State of New York, Defendants-Appellees.

No. 614, Docket 79-7642.

United States Court of Appeals,
Second Circuit.

Argued Jan. 10, 1980.

Decided July 25, 1980.

Action was brought challenging constitutionality of procedure used by the Conservative party in Suffolk County, New York, for designating state senate and assembly candidates who were not enrolled party members. The United States District Court for the Eastern District of New York, Jack P. Weinstein, J., 471 F.Supp. 412, dismissed complaint, and appeal was taken.

[S]uch evidence simply lacks probative value unless it is sufficiently similar to the subsequent offense. This is true because, if the prior act is not similar, it does not tell the jury anything about what the defendant intended to do in his later action—unless, of course, one argues (impermissibly) that the prior act establishes that the defendant has criminal propensities. Thus, our cases have uniformly held that the use of prior acts to prove identity of intent is only permissible if the acts are similar to the crime charged.

Id. at 1269 (citation omitted).

Without findings in the district court regarding such factors as similarity of the prior offense, we are not able to review the district court's exercise of discretion in excluding the evidence. Thus, we believe the best course is to remand the case to allow the government to develop the record, and to permit the district court the opportunity to weigh the danger of unfair prejudice against the probative force of the evidence.

V.

[12, 13] We review the dismissal of an indictment without prejudice for an abuse of discretion. *Gatto*, 763 F.2d at 1050. We conclude that, given the propriety of the interlocutory appeal under section 3731, the district court abused its discretion in dismissing the case on grounds of the delay under Federal Rule of Criminal Procedure 48(b). Since the government had the statutory right to appeal the suppression order, the delay was necessary to permit the government to exercise that right. *See id.; Loud Hawk I*, 628 F.2d at 1150.

The order dismissing the indictment is VACATED. The order excluding evidence is also VACATED, and the case is REMANDED for proceedings consistent with this opinion.

In re ESTATE OF FERDINAND E. MARCOS HUMAN RIGHTS LITIGATION.

Agapita TRAJANO; Archimedes Trajano, Plaintiffs–Appellees,

v.

Ferdinand E. MARCOS, Defendant,

and

Imee Marcos–Manotoc, Defendant–Appellant.

No. 91–15891.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 8, 1992.

Decided Oct. 21, 1992.

Philippine citizen brought action against daughter of former Philippine President, asserting wrongful death claim in connection with death of her Philippine son caused by torture. The United States District Court, District of Hawaii, Manuel L. Real, Chief Judge, entered default judgment against President's daughter, and she appealed. The Court of Appeals, Rymer, Circuit Judge, held that: (1) acts of daughter taken on her own authority, rather than authority of republic of Philippines, could not have been taken with any official mandate and, therefore, could not have been acts of "agent or instrumentality of foreign state" within meaning of Foreign Sovereign Immunities Act, and (2) suit fell within jurisdictional grant of alien tort statute.

Affirmed.

1. Federal Civil Procedure ⇐755
Federal Courts ⇐616

Defendant's claim that action against her was time barred by two-year Hawaii statute of limitations was affirmative defense which was waived by virtue of her default; as statute of limitations was not jurisdictional, Court of Appeals would not consider issue. KRS 657–7.

2. Federal Courts ⇐712

Defendant's claim that district court lacked personal jurisdiction over her because she was not properly served was waived, as it was raised for first time in her reply brief.

3. Federal Courts ⇐192.10
International Law ⇐10.34

Foreign Sovereign Immunities Act (FSIA) trumps alien tort statute when foreign state or individual acting in her official capacity is sued. 28 U.S.C.A. §§ 1330, 1350, 1602–1611.

4. International Law ⇐10.34

Acts of former Philippine President's daughter in connection with torture of Philippine citizen, taken on her own authority, rather than authority of republic of Philippines, could not have been taken with any official mandate and, therefore, could not have been acts of "agent or instrumentality of foreign state" within meaning of Foreign Sovereign Immunities Act. 28 U.S.C.A. § 1603(b).

See publication Words and Phrases for other judicial constructions and definitions.

5. Federal Courts ⇐192.10

Suit brought by Philippine citizen for tort of wrongful death committed against her Philippine son by military intelligence officials through torture prohibited by law of nations was within jurisdictional grant of alien tort statute, despite claim that constitutional limits on federal court jurisdiction would be exceeded because tort occurred outside of United States; parties' rights depended on federal substantive law for purpose of "Arising Under" clause of constitutional Article 3. 28 U.S.C.A. § 1350; U.S.C.A. Const. Art. 3, §§ 1 et seq., 2, cl. 1.

6. Federal Courts ⇐192.10

Understanding attached to United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, even if it could be read to reach transitory torts such as wrongful death, does not prohibit United States from providing forum for claims by alien for torture occurring outside of United States. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 note.

7. Federal Courts ⇐192.10
International Law ⇐10.40

Executive branch's change of position in different cases and by different administrations was not definitive statement by which Court of Appeals was bound on jurisdictional limits of alien tort statute. 28 U.S.C.A. § 1350.

8. International Law ⇐1

Prohibition against official torture carries with it force of jus cogens norm which enjoys highest status within international law. 28 U.S.C.A. § 1350.

9. Federal Courts ⇐161

Rights of parties must stand or fall on federal substantive law in order for federal courts to have jurisdiction under constitutional Article 3's "Arising Under" clause, and jurisdictional statute may not alone confer jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1.

10. Federal Courts ⇐192.10

Federal court adjudicating claim against foreign state or official must determine as threshold matter whether Foreign Sovereign Immunities Act provides subject-matter jurisdiction. 28 U.S.C.A. §§ 1330, 1602–1611.

11. International Law ⇐10.34

Only individuals who have acted under official authority or under color of such authority may violate international law, and proceeding against such individual necessarily implicates sovereign immunity.

12. International Law ⇐10.29

When questions of sovereign immunity under Foreign Sovereign Immunities Act are raised, subject-matter jurisdiction over action satisfies "Arising Under" clause of constitutional Article 3. 28 U.S.C.A. §§ 1330, 1602–1611; U.S.C.A. Const. Art. 3, § 2, cl. 1.

13. Federal Courts ⇐161

"Arising Under" clause of constitutional Article 3 is construed differently, and more broadly, than statutory "arising under" requirement for federal question juris-

diction. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1331.

14. Federal Courts ⇐192.10

In addition to resolving defendant's immunity, for court to determine whether plaintiff has claim for tort committed in violation of international law, it must decide whether there is applicable norm of international law, whether it is recognized by United States, what its status is and whether it was violated in particular case. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1350.

15. Federal Courts ⇐1

Congress had power through "Arising Under" clause of constitutional Article 3 to enact alien tort statute. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 1350.

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Appeal from the United States District Court for the District of Hawaii.

Before BROWNING, PREGERSON and RYMER, Circuit Judges.

RYMER, Circuit Judge:

[1, 2] After former Philippine President Ferdinand Marcos and his daughter, Imee Marcos-Manotoc, fled to Hawaii in 1986, they were sued in federal court by Agapita Trajano, a citizen of the Philippines who then lived in Hawaii, for the torture and wrongful death of Trajano's son, Archimedes, in the Philippines on August 31, 1977.[1] Marcos-Manotoc did not appear and a default judgment was entered against her. On appeal, she contends that the district court lacked subject-matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350, and that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, does not authorize a federal court to assert jurisdiction, over actions taken by a foreign government against its own citizens.[2] We have jurisdiction under 28 U.S.C. § 1291, and affirm.

I

In August of 1977, Ferdinand Marcos was President of the Philippines, Marcos-Manotoc was the National Chairman of the Kabataang Baranggay, and Fabian Ver was in charge of military intelligence. Archimedes Trajano was a student at the Mapua Institute of Technology. On the 31st of August, Trajano went to an open forum discussion at which Marcos-Manotoc was speaking. When Trajano asked a question about her appointment as director of an organization, he was kidnapped, inter-

1. This appeal pertains only to the action against Marcos-Manotoc. Several amici appear in support of Trajano: the Allard K. Lowenstein International Human Rights Clinic, the Center for Constitutional Rights, and Human Rights Watch. The United States filed a brief as amicus curiae in connection with an earlier appeal from an order dismissing the action against Ferdinand Marcos on act of state grounds; the brief covers the issues raised in Marcos-Manotoc's appeal and we have considered it as well.

2. Marcos-Manotoc also argues that the action is time-barred by the two-year Hawaii statute of limitations, Haw.Rev.Stat. § 657-7, but this is an affirmative defense which was waived by virtue of her default. Because the statute of limitations is not jurisdictional, we do not consider this issue. *See United States v. DeTar*, 832 F.2d 1110, 1114 (9th Cir.1987).

In her reply brief, Marcos-Manotoc claims that the district court did not have personal jurisdiction over her because she was not properly served. The district court found to the contrary. Because this issue was raised for the first time in her reply brief, Marcos-Manotoc has waived this issue as well. *See Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 1105, 113 L.Ed.2d 215 (1991).

rogated, and tortured to death by military intelligence personnel who were acting under Ver's direction, pursuant to martial law declared by Marcos, and under the authority of Ver, Marcos, and Marcos–Manotoc. He was tortured and murdered for his political beliefs and activities. Marcos–Manotoc controlled the police and military intelligence personnel who tortured and murdered Trajano, knew they were taking him to be tortured, and caused Trajano's death.

In February of 1986, Marcos, Marcos–Manotoc, General Ver and others left the Philippines and arrived at Hickam Air Force Base in Hawaii. On March 20, 1986, Agapita Trajano filed her complaint in the United States District Court for the District of Hawaii.[3] The complaint seeks damages on behalf of the estate of Archimedes Trajano for false imprisonment, kidnapping, wrongful death, and a deprivation of rights, and on behalf of Trajano's mother for emotional distress. Default was entered against Marcos–Manotoc on May 29, 1986. In 1991, she moved to set aside entry of default on the ground of insufficiency of service. The motion was denied and, after a damages hearing, judgment was entered based on the court's findings that Trajano was tortured and his death was caused by Marcos–Manotoc. The court concluded that this violation of fundamental human rights constitutes a tort in violation of the law of nations under 28 U.S.C. § 1350, and awarded damages of $4.16 million and attorneys' fees pursuant to Philippine law.[4]

II

We must first determine whether Marcos–Manotoc is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602–11. The FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989); *Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir.1989), *cert. dismissed*, 497 U.S. 1058, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990). A "foreign state" under the Act includes "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).[5] We have, in turn, held that an "agency or instrumentality of a foreign state" for purposes of the FSIA includes individuals acting in their official capacity. *Chuidian v.*

3. Marcos moved to dismiss on act of state grounds, and the district court's order granting that motion was reversed on appeal in light of our intervening decision in *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1360–61 (9th Cir.1988) (en banc) (civil RICO action brought by the Philippines against Marcos not barred by act of state doctrine), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1933, 104 L.Ed.2d 404 (1989). *See Trajano v. Marcos*, 878 F.2d 1439 (9th Cir.1989). The Judicial Panel on Multidistrict Litigation then consolidated two other actions against Marcos in the District of Hawaii and two actions in the Northern District of California, and assigned them to the Honorable Manuel L. Real, sitting pursuant to an intracircuit assignment under 28 U.S.C. § 292(b). The four actions consolidated with Trajano's are not before us at this time.

4. The district court awarded the estate of Archimedes Trajano $236,000 for lost earnings pursuant to Article 2206(1) of the Philippine Civil Code; $175,000 for moral damages including physical suffering, mental anguish, fright, bodily injury, and wrongful death pursuant to Articles 2217, 2204, and 2206 of the Philippine Civil Code; awarded Agapita Trajano $1,250,000 for mental anguish pursuant to Article 2206(3) of the Philippine Civil Code; and awarded both Mrs. Trajano and the estate $2,500,000 in punitive damages pursuant to Articles 2229 and 2231 of the Philippine Civil Code, as well as $246,966.99 in costs and attorneys' fees pursuant to Article 2208(1), (5), (9), and (11) of the Code.

5. 28 U.S.C. § 1603(b) defines an "agency or instrumentality of a foreign state" 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, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Philippine Nat'l Bank, 912 F.2d 1095, 1099–1103 (9th Cir.1990). Therefore, because Marcos–Manotoc's default concedes that she controlled the military police, the FSIA is implicated and we must be satisfied that it does not bar jurisdiction, even though the issue was not raised in the district court.

[3] Marcos–Manotoc argues that the FSIA is the sole basis for jurisdiction, preempting all other bases including § 1350. She relies on *Amerada Hess*, in which two Liberian corporations sued the Argentine Republic in a United States District Court for a tort allegedly committed by its armed forces on the high seas in violation of international law. The court of appeals had allowed the action to proceed under the Alien Tort Statute, but the Supreme Court held that it should be dismissed because the FSIA controls and does not authorize jurisdiction over a foreign state in these circumstances.[6] The Court made clear that the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in our courts." 488 U.S. at 434, 109 S.Ct. at 688; *see also Liu*, 892 F.2d at 1424. Thus, the FSIA trumps the Alien Tort Statute when a foreign state or, in this circuit, an individual acting in her official capacity, is sued.

Marcos–Manotoc argues that the Philippine Military Intelligence is an "instrumentality" of a foreign state within § 1603(b) of the FSIA, and that the tortious acts were brought about by persons acting pursuant to the authority of Marcos, Marcos–Manotoc, and Ver such that the liability of Marcos–Manotoc is expressly premised on her authority as a government agent. She further contends that, regardless of whether she acted within the scope of her employment, she is entitled to absolute immunity under § 1604[7] because a foreign state and its agents lose sovereign immunity only for tortious acts occurring in the United States. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588 (9th Cir.1983) (Congress did not intend to assert jurisdiction over foreign states for events occurring wholly within their own territory), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984). Trajano, on the other hand, argues that under *Chuidian*, the FSIA does not immunize acts of individuals which are outside the scope of their official duties,[8] and that the acts of torture and arbitrary killing (which the complaint avers occurred under Marcos–Manotoc's own authority) cannot be "official acts" within whatever authority Marcos–Manotoc was given by the Republic of the Philippines.

In *Chuidian*, we held that the FSIA covers a foreign official acting in an official capacity, but that an official is not entitled to immunity for acts which are not committed in an official capacity (such as selling personal property), and for acts beyond the scope of her authority (for example, doing something the sovereign has not empowered the official to do). 912 F.2d at 1106. In *McKeel*, in construing § 1605(a)(5) of the FSIA, which waives immunity for damages against a foreign state for injury occurring in the United States,[9] we found that Con-

6. The Court held that the most pertinent FSIA exception to sovereign immunity—that for noncommercial torts, § 1605(a)(5)—did not apply because it is limited to those cases in which the damage occurs in the United States. 488 U.S. at 439–40, 109 S.Ct. at 690.

7. 28 U.S.C. § 1604 provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

8. Amicus urges that the FSIA does not immunize individuals at all, *see Amerada Hess*, 488 U.S. at 438, 109 S.Ct. at 689 (the Alien Tort Statute "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states"), but this argument is foreclosed by *Chuidian*.

9. 28 U.S.C. § 1605(a)(5) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> . . . . . .
>
> (5) not otherwise encompassed [in the commercial activity exception], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of

gress intended the FSIA to be consistent with international law—and that the prevailing practice in international law is "that a state loses its sovereign immunity for tortious acts only where they occur in the territory of the forum state." 722 F.2d at 588.

[4] Marcos–Manotoc's default makes the application of both cases easy in this case, for she has admitted acting on her own authority, not on the authority of the Republic of the Philippines.[10] Under these circumstances, her acts cannot have been taken within any official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA. On any view, FSIA coverage under *Chuidian* is not triggered, and the statutory limitation to injury occurring in the United States recognized in *McKeel* is not relevant. As a matter of law, therefore, the district court did not err in failing to dismiss Marcos–Manotoc in her individual capacity.[11]

III

Absent jurisdiction under the Foreign Sovereign Immunities Act,[12] there is no dispute that the only possible jurisdictional basis for Trajano's action is the Alien Tort Statute, 28 U.S.C. § 1350. Section 1350 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.

It was enacted as part of the First Judiciary Act of 1789,[13] but has seldom been invoked. The debates that led to the 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. The statute has, however, been comprehensively analyzed by the Second Circuit in *Filartiga v. Pena–Irala*, 630 F.2d 876 (2d Cir.1980), which recognized a cause of action and subject-matter jurisdiction under § 1350 in an action between Paraguayan citizens for acts of torture committed in Paraguay, and by the District of Columbia Circuit in *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984) (Judges Edwards, Bork, and Robb writing separately), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985), which affirmed dismissal for lack of subject-matter jurisdiction of an action by Israeli citizens against the Palestine Liberation Orga-

> that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused....

10. This is consistent with our earlier decision that the same allegations against former President Marcos are not nonjusticiable "acts of state." *See Trajano v. Marcos*, 878 F.2d 1439 (9th Cir.1989). In so holding, we implicitly rejected the possibility that the acts set out in Trajano's complaint were public acts of the sovereign. Marcos–Manotoc presented no evidence to the contrary; indeed, her affidavit in support of the motion to lift entry of default declares that she was not a member of the government or the military at the time of Trajano's murder.

11. The parties also disagree about whether the Philippine government's statement of non-objection to the litigation against former President Marcos amounts to a waiver of sovereign immunity for Marcos–Manotoc. Given our view that Marcos–Manotoc was not an official entitled to immunity, it is unnecessary to reach this issue.

12. 28 U.S.C. § 1330(a) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

Sections 1605–1607 set out the exceptions to immunity and the extent of liability. Because Marcos–Manotoc was not acting in an official capacity, she has no claim to sovereign immunity, no exceptions are applicable, and there can be no jurisdiction under § 1330(a).

13. Judiciary Act of September 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77. The original statute read:

> [T]he district courts shall ... have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

nization for acts of terrorism in violation of international law.

We start with the face of the statute. It requires a claim by an alien, a tort, and a violation of international law. Trajano's complaint alleges that she and her son were citizens of the Philippines, and that her claims for relief arise under wrongful death statutes and various international declarations.[14]

There is no doubt, as the district court found, that causing Trajano's death was wrongful, and is a tort.[15] Nor, in view of Marcos–Manotoc's default, is there any dispute that Trajano's death was caused by torture. And, as we have recently held, "it would be unthinkable to conclude other than that acts of official torture violate customary international law." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir.1992).

[5] We believe, therefore, that Trajano's suit as an alien for the tort of wrongful death, committed by military intelligence officials through torture prohibited by the law of nations, is within the jurisdictional grant of § 1350.

Marcos–Manotoc argues, however, that the district court erred in assuming jurisdiction of a tort committed by a foreign state's agents against its nationals outside of the United States, and having no nexus to this country. If § 1350 were construed to confer jurisdiction under these circumstances, she asserts, it would exceed the constitutional limits on federal court jurisdiction under Article III of the Constitution. We disagree.

A

[6] Marcos–Manotoc argues that there is no extraterritorial jurisdiction over civil actions based on torture. She urges that *Filartiga* has been undermined by intervening acts of the legislative and executive branches which indicate that the United States is not obliged to open its courts for the redress of torture occurring in another country. First, Marcos–Manotoc points to the fact that when the Senate ratified the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), it attached an understanding to Article 14[16] that a state is required to provide a private right of action only for torture committed in territory under its jurisdiction.[17] From this she infers that it is inappropriate to rely on principles of international law to give vic-

14. These include the United Nations Charter; the Universal Declaration of Human Rights, G.A.Res. 217A(III), 3 U.N. GAOR Supp. No. 16, U.N.Doc. A/810 (1948); the American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S.T.S. 1, O.A.S. Official Records OEA/Ser. 4 v/II 23, doc 21, rev. 2 (1975); the Declaration on the Protection of All Persons From Being Subjected to Torture, G.A.Res. 3452, 30 U.N. GAOR Supp. No. 34 at 91, U.N.Doc. A/1034 (1975); and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A.Res. 39/46, 39 U.N. GAOR Supp. No. 51 at 197, U.N.Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984).

15. Marcos–Manotoc does not contend that the actions alleged do not give rise to tort liability for wrongful death both in the Philippines and in Hawaii. Because the case comes to us after entry of a default judgment, and she does not appeal the district court's award of damages pursuant to Philippine law, we have no call to decide issues pertaining to choice of law.

16. Article 14 of the 1984 Convention provides:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.
>
> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

17. The Senate's understanding under Article 14 reads:

> [I]t is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

136 Cong.Rec. S17486 (daily ed. Oct. 27, 1990).

tims of torture enforcement rights outside their own country. Nothing in the understanding, however, goes so far. Even if it could be read to reach transitory torts such as wrongful death, the understanding does not *prohibit* the United States from providing a forum for claims by aliens for torture occurring elsewhere.[18] The understanding, accordingly, sheds little light on the scope of § 1350.

[7] The same is true of the fact that the Department of Justice has changed its position on whether a plaintiff such as Trajano has a cause of action cognizable in federal court for a violation of international law condemning torture. Marcos–Manotoc notes that the government urged the court in *Filartiga* to read § 1350 expansively, while its amicus brief in this action supports a cause of action only for violations of international law rights which form a part of the law of the United States. Marcos–Manotoc suggests that the executive branch's withdrawal of support for *Filartiga* and the Senate's refusal to obligate federal courts to hear actions such as Trajano's demonstrate that the United States does not recognize a private right of action for torture having no nexus with the United States. We do not read the executive branch's flip on this issue as signifying so much; its change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant, or the locus of the injury.

[8] Nor do these acts by the Senate and the Department of Justice support Marcos–Manotoc's argument that general principles of international law may not provide a basis for federal court jurisdiction under § 1350. Regardless of the extent to which other principles may appropriately be relied upon, the prohibition against official torture "carries with it the force of a *jus cogens* norm," which " 'enjoy[s] the highest status within international law.' " *Siderman*, 965 F.2d at 715, 717 (quoting *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C.Cir. 1988)). As our survey of the scholarly and judicial opinion in *Siderman* reflects, there is widespread agreement on this; "all states believe [torture] is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens. Under international law, any state that engages in official torture violates *jus cogens.*" *Siderman* at 717 (citations omitted). We therefore conclude that the district court did not err in founding jurisdiction on a violation of the *jus cogens* norm prohibiting official torture.

Marcos–Manotoc finally argues that the district court's interpretation of § 1350 would open the floodgates to "foreign" cases in the federal courts. She also suggests that, contrary to the original purpose behind § 1350, to permit cases of this sort would invite, rather than avoid, controversy with foreign nations. We do not share these concerns in this case. As *Siderman* makes clear, the prohibition against official torture occupies a uniquely high status among norms of international law. The Philippine government has no objection to a United States District Court's entertaining Trajano's claim, so there can be no unwarranted interference with its domestic affairs. The FSIA, with its limitation on tort recovery to injuries occurring in the United States, will apply in almost all other situations. And, because of Marcos–Manotoc's default, traditional brakes on access to the federal courts by those having insufficient nexus to the United States were not considered. Such limitations as venue and the doctrine of forum non conveniens are available in § 1350 cases as in any other. Finally, it goes without saying that personal jurisdiction must first be obtained; one

18. *See, e.g.*, The Torture Victim Protection Act of 1991, Pub.L. No. 102–256, 106 Stat. 73 (1992) (providing federal cause of action for redress of torture and extrajudicial killing, irrespective of nationality of parties or locus of activities).

hopes the universe of potential defendants is not that large.

For these reasons, subject-matter jurisdiction was not inappropriately exercised under § 1350 even though the actions of Marcos–Manotoc which caused a fellow citizen to be the victim of official torture and murder occurred outside of the United States.

B

[9] Marcos–Manotoc argues that Article III of the United States Constitution does not support jurisdiction over purely foreign disputes such as Trajano's claim against her. Of the nine categories of federal judicial power defined in Article III, only two arguably authorize jurisdiction in this case: the Foreign Diversity Clause,[19] which enables the federal courts to hear cases between a state, or its citizens, and a foreign country or its citizens, and the "Arising Under" Clause,[20] which extends the judicial power to cases arising under the Constitution, laws of the United States, and treaties. It is clear that jurisdiction may not be predicated on the Foreign Diversity Clause, as a foreign plaintiff is neither "a State [n]or the Citizen[ ] thereof." Marcos–Manotoc contends that jurisdiction under the "Arising Under" Clause equally violates Article III because § 1350 is purely a jurisdictional statute and for "arising under" jurisdiction to exist, the rights of the parties must turn on the interpretation of federal substantive law. We agree that a jurisdictional statute may not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster. *Mesa v. California*, 489 U.S. 121, 136–37, 109 S.Ct. 959, 968–69, 103 L.Ed.2d 99 (1989) (naked jurisdictional statutes "cannot independently support Art. III 'arising under' jurisdiction"); *Verlinden*, 461 U.S. at 495–97, 103 S.Ct. at 1972–73. We disagree that the rights of Trajano and Marcos–Manotoc do not depend on federal substantive law.

[10] As we have already done, a federal court adjudicating a claim against a foreign state or official, *Chuidian*, 912 F.2d at 1103, must determine as a threshold matter whether the FSIA provides subject-matter jurisdiction. *Verlinden*, 461 U.S. at 493–94, 103 S.Ct. at 1971; *Siderman*, 965 F.2d at 706; *Liu*, 892 F.2d at 1424. In *Verlinden*, a foreign plaintiff sued an instrumentality of a foreign sovereign on a nonfederal cause of action; subject-matter jurisdiction was predicated on the FSIA. The Court held that Congress, in passing the FSIA, did not "exceed[ ] the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law." *Id.* 461 U.S. at 491, 103 S.Ct. at 1970. Because federal courts must first determine whether foreign sovereigns or individual officials are immune before allowing suits against them to proceed, "a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493, 103 S.Ct. at 1971. The Court also emphasized that "[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." *Id.*

[11, 12] For the same reasons, Congress did not lack power to confer subject-matter jurisdiction over this action. Only individuals who have acted under official authority or under color of such authority

19. The Foreign Diversity Clause provides that the judicial power extends "to Controversies ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1.

20. "The judicial Power shall extend to all Cases ... arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, § 2, cl. 1.

may violate international law, *Tel–Oren,* 726 F.2d at 791–95 (Edwards, J., concurring) (rejecting notion that purely private actors have responsibilities under international law), and proceeding against such individuals necessarily implicates sovereign immunity. Although Marcos–Manotoc's default concedes that she controlled the military intelligence personnel who tortured and murdered Trajano, and in turn "that" she was acting under color of the martial law declared by then-President Marcos, we have concluded that her actions were not those of the Republic of the Philippines for purposes of sovereign immunity under *Chuidian.*[21] Nevertheless, when questions of sovereign immunity under the FSIA are raised, as they have been here, *Verlinden* controls. Under *Verlinden,* subject-matter jurisdiction over this action satisfies Article III.

Marcos–Manotoc argues that the understanding attached by the Senate to Article 14 of the 1984 Convention—that the United States does not have to provide a forum for the redress of extraterritorial acts of torture—negates any constitutional underpinning for "arising under" jurisdiction because Congress has rejected application of federal court jurisdiction to such claims. This would, however, turn the point of Article III power upside down. It does not derive from the Senate, nor even the Congress; rather, the Congress derives its capacity to confer jurisdiction from the Constitution.

[13–15] The "Arising Under" Clause of Article III is construed differently, and more broadly, than the "arising under" requirement for federal question jurisdiction under 28 U.S.C. § 1331. *See Verlinden,* 461 U.S. at 495, 103 S.Ct. at 1972 ("Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331."); *id.* ("[T]he many limitations which have been placed on jurisdiction under § 1331 are not limitations on the constitutional power of Congress to confer jurisdiction on the federal courts.") (quoting *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 379 n. 51, 79 S.Ct. 468, 484 n. 51, 3 L.Ed.2d 368 (1959)); *cf. Brannon v. Babcock & Wilcox Co. (In re TMI Litigation Cases Consolidated II),* 940 F.2d 832, 861, 864–77 (3d Cir.1991) (Scirica, J., concurring) (discussing differences between constitutional and statutory grants of "arising under" jurisdiction), *cert. denied,* —— U.S. ——, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992). There is ample indication that the "Arising Under" Clause was meant to extend the judicial power of the federal courts, as James Madison put it, to "all cases which concern foreigners," Letter from James Madison to Edmund Randolph (April 8, 1787), *reprinted in* 9 The Papers of James Madison 368, 370 (R. Rutland & W. Rachal ed. 1975), and "all occasions of having disputes with foreign powers," 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 530 (J. Elliot ed. 1836) (remarks of J. Madison), and, as Alexander Hamilton wrote, to "all those [cases] in which [foreigners] are concerned...." The Federalist No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961). It is also well settled that the law of nations is part of federal common law. *See The Paquete Habana,* 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820) (same). Thus, in addition to resolving the defendant's immunity, for a court to determine whether a plaintiff has a claim for a tort committed in violation of international law, it must decide whether there is an applicable norm of international law, whether it is recognized by the United States, what its status is, and whether it was violated in the particular case. We therefore hold that Congress had power through the "Arising Under"

21. See *supra* Part II.

Clause of Article III of the Constitution to enact the Alien Tort Statute, and that exercising jurisdiction over Trajano's claims against Marcos–Manotoc comports with Article III.

IV

At most, Marcos–Manotoc argues, the district court had jurisdiction under § 1350 to determine whether Trajano had a separate, substantive cause of action; none exists, she contends, because neither the treaties set out in the complaint nor the law of nations provides a private cause of action.[22] Thus, to the extent the court's decision relies upon either treaties or international law, Marcos–Manotoc submits it is erroneous.

The district court in fact agreed with Marcos–Manotoc that § 1350 is simply a jurisdictional statute and creates no cause of action itself. It proceeded to determine damages on default under Philippine law. From this we assume that the court did not rely on treaties or international law to provide the cause of action, only to establish federal jurisdiction. Indeed, the complaint alleges that Trajano's claims arise under wrongful death statutes, as well as international law. Since Marcos–Manotoc's appeal is only to the extent the district court founded Trajano's right to sue on treaties or the law of nations, it lacks merit because the tort is admitted. That it was committed in violation of international law supplies the jurisdictional key to federal court under § 1350. We cannot say the district court erred.

The district court's approach comports with the view that the First Congress enacted the predecessor to § 1350 to provide a federal forum for transitory torts (a tort action which follows the tortfeasor wherever he goes), *see Filartiga*, 630 F.2d at 885 (tracing transitory tort doctrine to 1774 decision of Lord Mansfield), whenever such actions implicate the foreign relations of the United States. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25, 84 S.Ct. 923, 940 n. 25, 11 L.Ed.2d 804 (1964) (citing § 1350 as example of congressional intent to make claims implicating foreign affairs cognizable in federal courts); *Tel–Oren*, 726 F.2d at 790 (Edwards, J., concurring) ("As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist ... but to provide an *alternative* forum to state courts."). The district court's approach also allows the "law of nations" and "treaty" prongs of § 1350 to be treated consistently, in that the cause of action comes from municipal tort law and not from the law of nations or treaties of the United States. This avoids the anomalous result which troubled Judge Bork in *Tel–Oren*, that whereas *Filartiga* found a private right of action by implying it from principles of international law, no private cause of action can ever be implied from a non-self-executing treaty. *See Tel–Oren*, 726 F.2d at 820 (Bork, J., concurring).

For these reasons we affirm the judgment in Trajano's favor. Her suit as an alien against Marcos–Manotoc for having caused the wrongful death of her son, by official torture in violation of a *jus cogens* norm of international law, properly invokes the subject-matter jurisdiction of the federal courts under § 1350.

AFFIRMED.

22. Because Congress passed the Torture Victim Protection Act, *supra* note 18, after the district court's decision, we have no occasion to consider its applicability to the present case.

nying his motions for summary judgment, the district court relied almost exclusively on the consulting agreement between Dan–Mar Enterprises and UEL. 867 F.Supp. at 258–59. However, the employment status of an individual for the purposes of ERISA is not determined solely by the label used in the contract between the parties. *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1492 (11th Cir. 1993); see also *In re Shulman Transp. Enters., Inc.*, 744 F.2d 293, 295 (2d Cir.1984) (under agency principles, "employee does not become an independent contractor simply because a contract describes him as such"). Moreover, the corporate form under which Sharkey did business is not dispositive under the common-law agency test. Cf. *Frankel v. Bally Inc.*, 987 F.2d 86, 91 (2d Cir.1993). Employment status depends on all of the factual incidents of the relationship. *Darden*, 503 U.S. at 324, 112 S.Ct. at 1348.

Furthermore, as already indicated, Sharkey contends that the part-time arrangement provided for in the consulting agreement changed almost immediately into full-time employment in which he held the same position and performed the same duties as he had as an employee prior to his retirement. Appellees dispute exactly when this change occurred. Appellees also dispute Sharkey's assertion that he worked exclusively for UEL in 1988–91. The factual issues thus raised could not properly be determined on a motion for summary judgment—either by Sharkey or by appellees. We therefore conclude that the district court did not err in denying Sharkey's motions for summary judgment.

III. Conclusion

To summarize, we hold that the district court erred in granting appellees' motions for summary judgment and did not err in denying Sharkey's motions. We therefore reverse and remand for further proceedings.

S. KADIC, on her own behalf and on behalf of her infant sons Benjamin and Ognjen, Internationalna Iniciativa Zena Bosne I Hercegovine "Biser," and Zene Bosne I Hercegovine, Plaintiffs–Appellants,

v.

Radovan KARADŽIĆ, Defendant–Appellee.

Jane DOE I, on behalf of herself and all others similarly situated; and Jane Doe II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated, Plaintiffs–Appellants,

v.

Radovan KARADŽIĆ, Defendant–Appellee.

Nos. 1541, 1544, Dockets 94–9035, 94–9069.

United States Court of Appeals, Second Circuit.

Argued June 20, 1995.

Decided Oct. 13, 1995.

Rehearing Denied Jan. 6, 1996.

Two groups of victims from Bosnia-Herzegovina brought actions against self-proclaimed president of unrecognized Bosnian-Serb entity under, inter alia, Alien Tort Claims Act for violations of international law. The United States District Court for the Southern District of New York, Peter K. Leisure, J., 866 F.Supp. 734, dismissed actions for lack of subject matter jurisdiction, and plaintiffs appealed. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) plaintiffs sufficiently alleged violations of customary international law and law of war for purposes of Alien Tort Claims Act; (2) plaintiffs sufficiently alleged that unrecognized Bosnian-Serb entity of "Srpska" was a "state," and that defendant acted under color of law for purposes of international law violations requiring official action; (3) defendant was not immune from personal service of process while invitee of United Nations; (4) actions were not precluded by political ques-

tion doctrine; and (5) defense under act of state doctrine was waived.

Reversed and remanded.

1. Federal Courts ⇐192.10, 243

Alien Tort Claims Act confers federal subject-matter jurisdiction when alien sues for tort committed in violation of law of nations, i.e., international law; there is no federal subject-matter jurisdiction under Alien Tort Claims Act unless complaint adequately pleads violation of law of nations or treaty of United States. 28 U.S.C.A. § 1350.

2. International Law ⇐1

Federal courts ascertaining content of the law of nations, for purposes of action brought under Alien Tort Claims Act, must interpret international law not as it was when Act was enacted, but as it has evolved and exists among nations of world today. 28 U.S.C.A. § 1350.

3. International Law ⇐2

In action brought under Alien Tort Claims Act, federal courts find norms of contemporary international law by consulting works of jurists writing professedly on public law, by general usage and practice of nations, or by judicial decisions recognizing and enforcing that law. 28 U.S.C.A. § 1350.

4. Criminal Law ⇐45.50
International Law ⇐1, 10.11
Slaves ⇐2
War and National Emergency ⇐11

Law of nations, as understood in modern era for purposes of action brought under Alien Tort Claims Act, does not confine its reach to state action, in that certain forms of conduct violate law of nations whether undertaken by those acting under auspices of state or only as private individuals, such as piracy, slave trade, and war crimes. 28 U.S.C.A. § 1350; Restatement (Third) of the Foreign Relations § 404; note preceding § 201.

5. International Law ⇐1, 10.11

Acts of genocide violate law of nations, or customary international law, regardless of whether offenders acted as individuals or as members of organizations. 18 U.S.C.A. § 1091.

6. International Law ⇐10.11

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly stated violation of international law norm proscribing genocide, regardless of whether person acted under color of law, for purposes of action brought under Alien Tort Claims Act. 18 U.S.C.A. § 1091; 28 U.S.C.A. § 1350.

7. War and National Emergency ⇐11

Acts of murder, rape, torture, and arbitrary detention of civilians, committed in course of hostilities, are "war crimes" in violation of international law of war.

See publication Words and Phrases for other judicial constructions and definitions.

8. War and National Emergency ⇐11

International law of war imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for prevention of war crimes.

9. Treaties ⇐8
War and National Emergency ⇐11

Under law of war as codified in Geneva Conventions, all "parties" to conflict, including insurgent military groups, are obliged to adhere to most fundamental requirements of law of war.

10. War and National Emergency ⇐11

Claims that self-proclaimed leader of unrecognized Bosnian-Serb entity personally planned and ordered campaign of murder, rape, forced impregnation, and other forms of torture against noncombatants in Bosnian civil war clearly stated "war crimes" in violation of most fundamental norms of international law of war, for purposes of action brought under Alien Tort Claims Act. 28 U.S.C.A. § 1350.

See publication Words and Phrases for other judicial constructions and definitions.

11. International Law ⇐1

War and National Emergency ⇐11

Torture Victim Act codifies universally accepted norm of international law prohibiting official torture and extends it to cover summary execution; however, torture and summary execution, when not perpetrated in course of genocide or war crimes, are proscribed only when committed by state officials or under color of law. Torture Victim Protection Act of 1991, §§ 2(a), 3(a), 28 U.S.C.A. § 1350 note.

12. International Law ⇐3, 4

Under international law, a "state" is entity that has defined territory and permanent population, that is under control of its own government, and that engages in, or has capacity to engage in, formal relations with other such entities; recognition by other states is not required. Restatement (Third) of Foreign Relations §§ 201, 202 comment.

See publication Words and Phrases for other judicial constructions and definitions.

13. International Law ⇐8

Any government, however violent and wrongful in its origin, must be considered "de facto government" if it is in full and actual exercise of sovereignty over territory and people large enough for nation. Restatement (Third) of Foreign Relations § 201.

See publication Words and Phrases for other judicial constructions and definitions.

14. International Law ⇐1, 4

Customary international law of human rights, such as proscription of official torture, applies without distinction between recognized and unrecognized states. Restatement (Third) of Foreign Relations §§ 207, 702.

15. International Law ⇐3

Plaintiff classes of Bosnian victims, who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that entity called "Srpska" satisfied criteria to be considered a "state" for purposes of establishing international law violations requiring state action; Srpska was alleged to control defined territory, to control populations within its power, to have entered into agreements with other governments, and to have had president, legislature, and its own currency. 28 U.S.C.A. § 1350; Restatement (Third) of Foreign Relations §§ 201, 207, 702.

16. International Law ⇐10.11

Plaintiff classes of Bosnian victims who brought actions under Alien Tort Claims Act against self-proclaimed leader of unrecognized Bosnian-Serb entity, sufficiently alleged that defendant acted under color of law, for purposes of establishing international law violations which required official action, by alleging that defendant acted in concert with officials of former Yugoslavian state of Serbia. 28 U.S.C.A. § 1350.

17. Federal Courts ⇐192.10

"Color of law" jurisprudence of § 1983 is relevant guide to whether defendant has engaged in international law violations requiring "official action" for purposes of jurisdiction under Alien Tort Claims Act. 28 U.S.C.A. § 1350; 42 U.S.C.A. § 1983.

18. Civil Rights ⇐198(4)

Private individual acts under "color of law," within meaning of § 1983, when he acts together with state officials or with significant state aid. 42 U.S.C.A. § 1983.

19. International Law ⇐10.11

In construing terms "actual or apparent authority" and "color of law" under Torture Victim Protection Act, courts are to look to principles of agency law and to jurisprudence under 42 U.S.C.A. § 1983, respectively. Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note; 42 U.S.C.A. § 1983.

20. Federal Courts ⇐192.10

Though Torture Victim Protection Act creates cause of action for official torture, that statute, unlike Alien Tort Act, is not itself jurisdictional statute. 28 U.S.C.A. § 1331; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

21. Federal Courts ⇐192.10

Torture Victim Protection Act permitted plaintiff classes of Bosnian victims to pursue their claims of official torture against self-proclaimed leader of unrecognized Bosnian-Serb entity under jurisdiction conferred by Alien Tort Claims Act and also under general federal question jurisdiction statute. 28 U.S.C.A. §§ 1331, 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

22. Federal Civil Procedure ⇐415.1
Treaties ⇐8

Neither United Nations Headquarters Agreement nor federal common law provided defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," immunity from service of process while in judicial district as "invitee" of United Nations. 22 U.S.C.A. § 287 note; Restatement (Third) of Foreign Relations § 469 note.

23. Constitutional Law ⇐69

Mere possibility that defendant, the self-proclaimed leader of unrecognized Bosnian-Serb entity called "Srpska," might at some future date be recognized by United States as head of state of friendly nation and might thereby acquire head-of state immunity did not transform claims of plaintiff Bosnian victims under Alien Tort Claims Act and Torture Victim Protection Act into nonjusticiable request for advisory opinion. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

24. Constitutional Law ⇐68(1)

Not every case "touching foreign relations" is nonjusticiable as political question, and judges should not reflexively invoke doctrines to avoid difficult and somewhat sensitive decisions in context of human rights; preferable approach is to weigh carefully relevant considerations on case-by-case basis.

25. Constitutional Law ⇐68(1)

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

See publication Words and Phrases for other judicial constructions and definitions.

26. Constitutional Law ⇐68(1)

Actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act were not nonjusticiable political questions; officials of United States expressly disclaimed any concern that political question doctrine should be invoked to prevent litigation of subject lawsuits. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

27. Federal Courts ⇐616

Act of state doctrine was not asserted in district court, and was therefore not before court on appeal, in actions by plaintiff classes of Bosnian victims against self-proclaimed leader of unrecognized Bosnian-Serb for violations of international law under Alien Tort Claims Act and Torture Victim Protection Act. 28 U.S.C.A. § 1350; Torture Victim Protection Act of 1991, § 1 et seq., 28 U.S.C.A. § 1350 note.

Beth Stephens, New York City (Matthew J. Chachère, Jennifer Green, Peter Weiss, Michael Ratner, Jules Lobel, Center for Constitutional Rights, New York City; Rhonda Copelon, Celina Romany, International Women's Human Rights Clinic, Flushing, NY; Judith Levin, International League of Human Rights, New York City; Harold Hongju Koh, Ronald C. Slye, Swati Agrawal, Bruce Brown, Charlotte Burrows, Carl Goldfarb, Linda Keller, Jon Levitsky, Daniyal

Mueenuddin, Steve Parker, Maxwell S. Peltz, Amy Valley, Wendy Weiser, Allard K. Lowenstein International Human Rights Clinic, New Haven, CT, on the brief), for plaintiffs-appellants, Jane Doe I and Jane Doe II.

Catharine A. MacKinnon, Ann Arbor, MI (Martha F. Davis, Deborah A. Ellis, Yolanda S. Wu, NOW Legal Defense and Education Fund, New York City, on the brief), for plaintiffs-appellants Kadic, Internationalna Iniciativa Zena Bosne I Hercegovine, and Zena Bosne I Hercegovine.

Ramsey Clark, New York City (Lawrence W. Schilling, New York City, on the brief), for defendant-appellee.

Drew S. Days, III, Solicitor General, and Conrad K. Harper, Legal Adviser, Department of State, Washington, DC, submitted a Statement of Interest of the U.S.; Frank W. Hunger, Asst. Atty. Gen., and Douglas Letter, Appellate Litigation Counsel, on the brief.

Karen Honeycut, Vladeck, Waldman, Elias & Engelhard, New York, NY, submitted a brief for amici curiae Law Professors Frederick M. Abbott, et al.

Nancy Kelly, Women Refugee Project, Harvard Immigration and Refugee Program, Cambridge and Somerville Legal Services, Cambridge, Mass., submitted a brief for amici curiae Alliances—an African Women's Network, et al.

Juan E. Mendez, Joanne Mariner, Washington, DC; Professor Ralph G. Steinhardt, George Washington University School of Law, Washington, DC; Paul L. Hoffman, Santa Monica, CA; Professor Joan Fitzpatrick, University of Washington School of Law, Seattle, WA, submitted a brief for amicus curiae Human Rights Watch.

Stephen M. Schneebaum, Washington, DC, submitted a brief for amici curiae The International Human Rights Law Group, et al.

Before: NEWMAN, Chief Judge, FEINBERG and WALKER, Circuit Judges.

JON O. NEWMAN, Chief Judge:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian–Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña–Irala*, 630 F.2d 876 (2d Cir.1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune from service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject-matter jurisdiction, their suits against defendant-appellee Radovan Karadžić, President of the self-proclaimed Bosnian–Serb republic of "Srpska." *Doe v. Karadžić*, 866 F.Supp. 734 (S.D.N.Y. 1994) ("*Doe*"). For the reasons set forth below, we hold that subject-matter jurisdiction exists, that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background

The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia–Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, 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. Karadžić, formerly a citizen of Yugoslavia and now a citizen of Bosnia–Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian–Serb republic within Bosnia–Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia–Herzegovina. In his capacity as President, Karadžić possesses ultimate command authority over the Bosnian–Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command. The complaints allege that Karadžić acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

The two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney's fees, and, in one of the cases, injunctive relief. Plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991 ("Torture Victim Act"), Pub.L. No. 102–256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (Supp. V 1993), the general federal-question jurisdictional statute, 28 U.S.C. § 1331 (1988), and principles of supplemental jurisdiction, 28 U.S.C. § 1367 (Supp. V 1993).

In early 1993, Karadžić was admitted to the United States on three separate occasions as an invitee of the United Nations. According to affidavits submitted by the plaintiffs, Karadžić was personally served with the summons and complaint in each action during two of these visits while he was physically present in Manhattan. Karadžić admits that he received the summons and complaint in the *Kadic* action, but disputes whether the attempt to serve him personally in the *Doe* action was effective.

In the District Court, Karadžić moved for dismissal of both actions on the grounds of insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, and nonjusticiability of plaintiffs' claims. However, Karadžić submitted a memorandum of law and supporting papers only on the issues of service of process and personal jurisdiction, while reserving the issues of subject-matter jurisdiction and nonjusticiability for further briefing, if necessary. The plaintiffs submitted papers responding only to the issues raised by the defendant.

Without notice or a hearing, the District Court by-passed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. In an Opinion and Order, reported at 866 F.Supp. 734, the District Judge preliminarily noted that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadžić as the head of state of a friendly nation, *see Lafontant v. Aristide*, 844 F.Supp. 128 (E.D.N.Y.1994) (head-of-state immunity), and that this possibility could render the plaintiffs' pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dispositive but believed that it "militates against this Court exercising jurisdiction." *Doe*, 866 F.Supp. at 738.

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations," *id.* at 739. Finding that "[t]he current Bosnian–Serb warring military faction does not constitute a recognized state," *id.* at 741, and that "the members of Karadžić's faction do not act under the color of any recognized state law," *id.*, the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *id.* at 740–41. The Court did not consider the plaintiffs' alternative claim that Karadžić acted under color of law by acting in concert with the Serbian Repub-

lic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claims under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claims that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject-matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadžić urges us to affirm on any one of these three grounds. We consider each in turn.

I. Subject-Matter Jurisdiction

Appellants allege three statutory bases for the subject-matter jurisdiction of the District Court—the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants' Claims

[1] The Alien Tort Act 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.

28 U.S.C. § 1350 (1988). Our decision in *Filártiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).[1] 630 F.2d at 887; *see also Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir.1987), *rev'd on other grounds*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filártiga*, 630 F.2d at 887–88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

[2, 3] *Filártiga* established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881; *see also Amerada Hess*, 830 F.2d at 425. We find the norms of contemporary international law by " 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " *Filártiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57

1. *Filártiga* did not consider the alternative prong of the Alien Tort Act: suits by aliens for a tort committed in violation of "a treaty of the United States." *See* 630 F.2d at 880. As in *Filártiga*, plaintiffs in the instant cases "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law," *id.* at 880 n. 7.

(1820)). If this inquiry discloses that the defendant's alleged conduct violates "well-established, universally recognized norms of international law," *id.* at 888, as opposed to "idiosyncratic legal rules," *id.* at 881, then federal jurisdiction exists under the Alien Tort Act.

Karadžić contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals. In making this contention, Karadžić advances the contradictory positions that he is not a state actor, *see* Brief for Appellee at 19, even as he asserts that he is the President of the self-proclaimed Republic of Srpska, *see* statement of Radovan Karadžić, May 3, 1993, submitted with Defendant's Motion to Dismiss. For their part, the Kadic appellants also take somewhat inconsistent positions in pleading defendant's role as President of Srpska, Kadic Complaint ¶ 13, and also contending that "Karadžić is not an official of any government," Kadic Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n. 25.

Judge Leisure accepted Karadžić's contention that "acts committed by non-state actors do not violate the law of nations," *Doe*, 866 F.Supp. at 739, and considered him to be a non-state actor.[2] The Judge appears to have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture, *see, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir.1988), without consideration of the substantial body of law, discussed below, that renders private individuals liable for some international law violations.

[4] We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L.Ed. 57 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196–97, 5 L.Ed. 64 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 11 L.Ed. 239 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without ... any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765–1769, Univ. of Chi. ed., 1979). Later examples are prohibitions against the slave trade and certain war crimes. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992); Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum.Rts.J. 51 (1992).

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). The Executive Branch has emphatically restated

2. Two passages of the District Court's opinion arguably indicate that Judge Leisure found the pleading of a violation of the law of nations inadequate because Srpska, even if a state, is not a state "recognized" by other nations. "The current Bosnian–Serb warring military faction does not constitute a recognized state...." *Doe*, 866 F.Supp. at 741; "[t]he Bosnian–Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [in *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir.1984)]," *id.* However, the opinion, read as a whole, makes clear that the Judge believed that Srpska is not a state and was not relying on lack of recognition by other states. *See, e.g., id.* at 741 n. 12 ("The Second Circuit has limited the definition of 'state' to 'entities that have a defined [territory] and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other entities.' *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir.1991) (quotation, brackets and citation omitted). The current Bosnian–Serb entity fails to meet this definition."). We quote Judge Leisure's quotation from *Klinghoffer* with the word "territory," which was inadvertently omitted.

in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5–13.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) ("*Restatement (Third)*") proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." *Restatement (Third)* pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, *Restatement (Third)* § 702,[3] and a more limited category of violations of "universal concern," *id.* § 404,[4] partially overlapping with those listed in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, *cf. id.* § 402(1)(a), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of "universal concern" include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act. Indeed, the two cases invoking the Alien Tort Act prior to *Filártiga* both applied the civil remedy to private action. *See Adra v. Clift*, 195 F.Supp. 857 (D.Md.1961); *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C.1795) (No. 1,607).

Karadžić disputes the application of the law of nations to any violations committed by private individuals, relying on *Filártiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985).[5] *Filártiga* involved an allegation of torture committed by a state official. Relying on the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture, G.A.Res. 3452, U.N. GAOR, U.N. Doc. A/1034 (1975) (hereinafter "Declaration on Torture"), as a definitive statement of norms of customary international law prohibiting states from permitting torture, we ruled that "*official* torture is now prohibited by the law of nations." *Filártiga*, 630 F.2d at 884 (emphasis added). We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filártiga* purports to preclude such a result.

Nor did Judge Edwards in his scholarly opinion in *Tel-Oren* reject the application of international law to any private action. On the contrary, citing piracy and slave-trading as early examples, he observed that there exists a "handful of crimes to which the law of nations attributes individual responsibility," 726 F.2d at 795. Reviewing authorities similar to those consulted in *Filártiga*, he merely concluded that torture—the specific violation alleged in *Tel-Oren*—was not within the limited category of violations that do not require state action.

3. Section 702 provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

4. Section 404 provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

5. Judge Edwards was the only member of the *Tel-Oren* panel to confront the issue whether the law of nations applies to non-state actors. Then-Judge Bork, relying on separation of powers principles, concluded, in disagreement with *Filártiga*, that the Alien Tort Act did not apply to most violations of the law of nations. *Tel-Oren*, 726 F.2d at 798. Judge Robb concluded that the controversy was nonjusticiable. *Id.* at 823.

Karadžić also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. *See* H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (explaining that codification of *Filártiga* was necessary in light of skepticism expressed by Judge Bork's concurring opinion in *Tel-Oren*). At the same time, Congress indicated that the Alien Tort Act "has other important uses and should not be replaced," because

> Claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

Id. The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

[5] (a) *Genocide.* In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations. In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are "private individuals, public officials or statesmen." G.A.Res. 96(I), 1 U.N.GAOR, U.N. Doc. A/64/Add.1, at 188–89 (1946). The General Assembly also affirmed the principles of Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal for punishing " 'persecutions on political, racial, or religious grounds,' " regardless of whether the offenders acted " 'as individuals or as members of organizations,' " *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 n. 11 (N.D.Ohio 1985) (quoting Article 6). *See* G.A.Res. 95(I), 1 U.N.GAOR, U.N.Doc. A/64/Add.1, at 188 (1946).

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989 (hereinafter "Convention on Genocide"), provides a more specific articulation of the prohibition of genocide in international law. The Convention, which has been ratified by more than 120 nations, including the United States, *see* U.S. Dept. of State, *Treaties in Force* 345 (1994), defines "genocide" to mean

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births with the group;
>
> (e) Forcibly transferring children of the group to another group.

Convention on Genocide art. II. Especially pertinent to the pending appeal, the Convention makes clear that "[p]ersons committing genocide ... shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals.*" *Id.* art. IV (emphasis added). These authorities un-

ambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, *see id.* § 1091(a) ("[w]hoever" commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, *id.* § 1091(d). Though Congress provided that the Genocide Convention Implementation Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding," *id.* § 1092, the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act. Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide,[6] and the two statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the Alien Tort Act by implication. *See Rodriguez v. United States*, 480 U.S. 522, 524, 107 S.Ct. 1391, 1392, 94 L.Ed.2d 533 (1987) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest.") (citations and internal quotation marks omitted); *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir.) ("mutual exclusivity" of statutes is required to demonstrate Congress's "clear, affirmative intent to repeal"), *cert. denied*, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991).

[6] Appellants' allegations that Karadžić personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadžić acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

[7, 8] (b) *War crimes.* Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. *See In re Yamashita*, 327 U.S. 1, 14, 66 S.Ct. 340, 347, 90 L.Ed. 499 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities. *Id.* at 15–16, 66 S.Ct. at 347–48.

[9] After the Second World War, the law of war was codified in the four Geneva Conventions,[7] which have been ratified by more than 180 nations, including the United States, *see Treaties in Force*, *supra*, at 398–99. Common article 3, which is substantially identical in each of the four Conventions,

6. The Senate Report merely repeats the language of section 1092 and does not provide any explanation of its purpose. *See* S. Rep. 333, 100th Cong., 2d Sess., at 5 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4156, 4160. The House Report explains that section 1092 "clarifies that the bill creates no *new* federal cause of action in civil proceedings." H.R. Rep. 566, 100th Cong., 2d Sess., at 8 (1988) (emphasis added). This explanation confirms our view that the Genocide Convention Implementation Act was not intended to abrogate civil causes of action that might be available under *existing* laws, such as the Alien Tort Act.

7. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (hereinafter "Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

applies to "armed conflict[s] not of an international character" and binds "each Party to the conflict ... to apply, as a minimum, the following provisions":

> Persons taking no active part in the hostilities ... shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court....

Geneva Convention I art. 3(1). Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war.[8]

[10] The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law,* 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, *see* Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts, in* 4 The Vietnam War and International Law 447 (R.Falk ed., 1976). The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

[11] (c) *Torture and summary execution.* In *Filártiga,* we held that *official* torture is prohibited by universally accepted norms of international law, *see* 630 F.2d at 885, and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, 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. *See* Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment pt. I, art. 1, 23 I.L.M. 1027 (1984), *as modified,*

8. Appellants also maintain that the forces under Karadžić's command are bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II"), which has been signed but not ratified by the United States, *see* International Committee of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II,* 30 I.L.M. 397 (1991). Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* art. 1. In addition, plaintiffs argue that the forces under Karadžić's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, *see* Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs.

24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by United States* Oct. 21, 1994, 34 I.L.M. 590, 591 (1995) (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Torture Victim Act § 2(a) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadžić's command and with the specific intent of destroying appellants' ethnic-religious groups. Thus, many of the alleged atrocities are already encompassed within the appellants' claims of genocide and war crimes. Of course, at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes. It suffices to hold at this stage that the 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 crimes, and otherwise may be pursued against Karadžić to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian–Serb entity" headed by Karadžić does not meet the definition of a state. *Doe*, 866 F.Supp. at 741 n. 12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadžić acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

[12, 13] (a) *Definition of a state in international law.* The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) § 201; *accord Klinghoffer*, 937 F.2d at 47; *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir.1988); *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720, 19 L.Ed. 227 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620, 24 L.Ed. 1018 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with other states, it does not require recognition by other states. *See Restatement (Third)* § 202 cmt. b ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states."). Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318–20, 98 S.Ct. 584, 590–91, 54 L.Ed.2d 563 (1978) (diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408–12, 84 S.Ct. 923, 929–32, 11 L.Ed.2d 804 (1964) (access to U.S. courts); *Lafontant*, 844 F.Supp. at 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101–03, 22 L.Ed. 816 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9–12, 19 L.Ed. 361 (1868) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 91 S.Ct.

2205, 29 L.Ed.2d 680 (1971) (post-World War II East Germany).

[14] The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. *See Restatement (Third)* §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

[15] Appellants' allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

[16–18] (b) *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadžić acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. *See Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D.Cal.1987), *reconsideration granted in part on other grounds*, 694 F.Supp. 707 (N.D.Cal.1988). A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753–54, 73 L.Ed.2d 482 (1982). The appellants are entitled to prove their allegations that Karadžić acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

B. The Torture Victim Protection Act

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Act § 2(a). The statute also requires that a plaintiff exhaust adequate and available local remedies, *id.* § 2(b), imposes a ten-year statute of limitations, *id.* § 2(c), and defines the terms "extrajudicial killing" and "torture," *id.* § 3.

[19] By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that this language was intended to "make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively. *Id.*

[20, 21] Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331, *see Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D.Mass.1995), to which we now turn.

C. Section 1331

The appellants contend that section 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law. Relying on the settled proposition that federal common law incorporates international law, *see The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900); *In re Estate of Ferdinand E. Marcos Human Rights Litigation (Marcos I)*, 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 2960, 125 L.Ed.2d 661 (1993); *Filártiga*, 630 F.2d at 886, they reason that causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under section 1331. Whether that is so is an issue of some uncertainty that need not be decided in this case.

In *Tel-Oren*, Judge Edwards expressed the view that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *Tel-Oren*, 726 F.2d at 779–80 n. 4. The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations. *Id.* at 778 (Edwards, J., concurring). Some district courts, however, have upheld section 1331 jurisdiction for international law violations. *See Abebe-Jiri v. Negewo*, No. 90-2010 (N.D.Ga. Aug. 20, 1993), *appeal argued*, No. 93-9133 (11th Cir. Jan. 10, 1995); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4–5 (N.D.Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1544 (N.D.Cal. 1987).

We recognized the possibility of section 1331 jurisdiction in *Filártiga*, 630 F.2d at 887 n. 22, but rested jurisdiction solely on the applicable Alien Tort Act. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga*, 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 jurisdiction.

II. Service of Process and Personal Jurisdiction

Appellants aver that Karadžić was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action, the affidavits detail that on February 11, 1993, process servers approached Karadžić in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose, and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadžić submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the *Kadic* action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendant's State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit states that he received the complaint and handed it to Karadžić outside the Russian Embassy in Manhattan. Karadžić's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadžić stayed at

hotels outside the "headquarters district" of the United Nations and engaged in non–United Nations–related activities such as fund-raising.

Fed.R.Civ.P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court of California*, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990).

Nevertheless, Karadžić maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. Headquarters Agreement

[22] The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal process ... may take place within the headquarters district only with the consent of and under conditions approved by the Secretary–General." *Id.* § 9(a). This provision is of no benefit to Karadžić, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* § 15. This provision is also of no benefit to Karadžić, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of ... persons invited to the headquarters district by the United Nations ... on official business." *Id.* § 11. Karadžić maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden—exposure to suit—on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir.1991). We therefore reject Karadžić's proposed construction of section 11, because it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.[9]

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadžić, a responsible State Department official wrote: "Mr. Karadžić's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune from legal process while in the United States at locations outside of the Headquarters District. *See In re Galvao*, [1963] U.N.Jur.Y.B. 164 (opinion of U.N. legal coun-

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

sel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. Federal common law immunity

Karadžić nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadžić analogizes his proposed rule to the "government contacts exception" to the District of Columbia's long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C.1978); *see also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785–87 (D.C.Cir.1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2399, 81 L.Ed.2d 355 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engage in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1076 (2d ed. 1987).

Karadžić also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, *Klinghoffer* declined to extend the immunities of the Headquarters Agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y.Civ.Prac.L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations that guided *Klinghoffer* in its narrowing construction of the general terminology of New York's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

[23] Finally, we note that the mere possibility that Karadžić might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, *see Lafontant*, 844 F.Supp. at 133, would create head-of-state immunity, *but see In re Doe*, 860 F.2d 40, 45 (2d Cir.1988) (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future. *See Mexico v. Hoffman*, 324 U.S. 30, 35, 65 S.Ct. 530, 532, 89 L.Ed. 729 (1945) ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy ..., not to enlarge an immunity to an extent which the government ... has not seen fit to recognize.").

In sum, if appellants personally served Karadžić with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

III. Justiciability

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that

suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767, 92 S.Ct. 1808, 1813, 32 L.Ed.2d 466 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

[24] Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the " 'constitutional' underpinnings" of these doctrines that influenced the concurring opinions of Judge Robb and Judge Bork in *Tel–Oren*. Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is nonjusticiable, *see Baker v. Carr*, 369 U.S. 186, 211, 82 S.Ct. 691, 707, 7 L.Ed.2d 663 (1962); *Lamont v. Woods*, 948 F.2d 825, 831–32 (2d Cir.1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Karadžić maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases." ' " *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217, 82 S.Ct. at 710).

[25] A nonjusticiable political question would ordinarily involve one or more of the following factors:

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

Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir.1994). With respect to the first three factors, we have noted in a similar context involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 506 U.S. 224, 227–29, 113 S.Ct. 732, 735, 122 L.Ed.2d 1 (1993).

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests. Disputes implicating foreign policy concerns have the potential to

raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229–30, 106 S.Ct. 2860, 2865–66, 92 L.Ed.2d 166 (1986) (quoting *Baker*, 369 U.S. at 211, 82 S.Ct. at 706–07).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 84 S.Ct. 923, 940, 11 L.Ed.2d 804; *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), might be implicated in some cases arising under section 1350. However, as in *Filártiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.

[26] In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadžić, attorneys for the plaintiffs in *Doe* wrote to the Secretary of State to oppose reported attempts by Karadžić to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions, the Department responded with a letter indicating that Karadžić was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*.[10] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although 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." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reinforces our view that adjudication may properly proceed.

[27] As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of ... unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, 84 S.Ct. at 940, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, *see id.* at 428–30, 84 S.Ct. at 940–41.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome

10. The Habib Letter on behalf of the State Department added:

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.

the plaintiffs' preference for a United States forum.

Conclusion

The judgment of the District Court dismissing appellants' complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

LANDSCAPE FORMS, INC., Plaintiff–Appellee,

v.

COLUMBIA CASCADE COMPANY, Defendant–Appellant.

No. 2080, Docket 95–7343.

United States Court of Appeals, Second Circuit.

Argued June 8, 1995.

Decided Nov. 13, 1995.

Outdoor furniture manufacturer brought action against competitor, alleging trade dress infringement in violation of Lanham Act and state law. The United States District Court for the Southern District of New York, John E. Sprizzo, J., granted preliminary injunction in favor of manufacturer, and competitor appealed. The Court of Appeals, Oakes, Senior Circuit Judge, held that district court should have considered competitor's functionality defense.

Vacated and remanded.

1. Trade Regulation ⇐43

While "trade dress" initially referred to product's packaging, concept now includes design and appearance of product as well as that of container and essentially denotes product's total image and overall appearance.

See publication Words and Phrases for other judicial constructions and definitions.

2. Trade Regulation ⇐43, 478

To maintain action for trade dress infringement under Lanham Act, plaintiff must show either that its trade dress is inherently distinctive or, if trade dress is not inherently distinctive, that it has acquired secondary meaning. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

3. Trade Regulation ⇐43

Even if plaintiff in trade dress infringement action can show that its trade dress is either inherently distinctive or has acquired secondary meaning, defendant may avoid liability by demonstrating that allegedly similar trade dress feature is functional.

4. Trade Regulation ⇐43, 525

Functionality doctrine limits scope of trademark protection by forbidding use of product's feature as trademark where doing so will put competitor at significant disadvantage because feature is essential to use or purpose of article or affects its cost or quality; doctrine prevents trademark law, which seeks to promote competition by protecting firm's reputation, from instead inhibiting legitimate competition by allowing producer to control useful product feature.

5. Trade Regulation ⇐43, 525

To find product design "functional," and thus not entitled to trade dress protection, court must first find that certain features of design are essential to effective competition in particular market.

See publication Words and Phrases for other judicial constructions and definitions.

6. Trade Regulation ⇐727

District court's failure to consider functionality defense before granting preliminary injunction in outdoor furniture manufacturer's trade dress infringement action against competitor warranted remand for consideration of that issue, in light of evidence that injunction would hinder competitor's ability to compete in market.

authorities to be sentenced on December 19, 2002. After the first sentencing, the federal authorities returned Cole to the state of Arkansas where he continued to be held in pretrial detention on the pending state charges.

"A sentence to a term of [federal] imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." 18 U.S.C. § 3585(a). Because Cole returned to state custody after receiving his original federal sentence on December 19, 2002, instead of being committed to the custody of the Bureau of Prisons to commence service of the sentence, he did not begin to serve his federal sentence at that time.[2]

[9] Next, Cole contends the district court misapplied U.S.S.G. § 5G1.3(c) by failing to achieve a "reasonable incremental punishment" for Cole's total offense conduct. We disagree, because § 5G1.3(c) was not available for the district court's application. Section 5G1.3(c) permits the district court to order concurrent sentences when there is a "prior undischarged term of imprisonment" not covered by subsections (a) or (b). At the time of his original sentence on December 19, 2002, Cole was not subject to a "prior undischarged term of imprisonment" because he had not yet been sentenced in state court. At the time of his resentencing on April 19, 2004, Cole was not subject to a "prior undischarged term of imprisonment" because by then he had already discharged his state sentence. Thus, the district court did not err by failing to apply § 5G1.3(c) to Cole's situation.[3]

III

For the reasons stated, we affirm the twelve-month sentence ordered by the district court.[4]

John DOE I, individually & as Administrator of the Estate of his deceased child Baby Doe I, & on behalf of all others similarly situated; Jane Doe I, on behalf of herself, as Administratrix of the Estate of her deceased child Baby Doe I, & on behalf of all others similarly situated; John Doe II; John Doe III; John Doe IV; John Doe V; Jane Doe II; Jane Doe III; John Doe VI; John Doe VII; John Doe VIII; John Doe IX; John Doe X; John Doe

2. We note, however, Cole should receive credit against his federal sentence for the time spent in federal custody between November 2, 2001, and March 8, 2002. He should also get credit for the short time spent in federal custody after being released from state custody and prior to being released on his own recognizance on March 22, 2004.

3. In the first appeal, it was unclear whether Cole's state custody was attributable to an actual state conviction or merely pretrial detention. Thus, there was some concern about whether the length of Cole's custody on all charges exceeded the length of any federal sentence that could be imposed upon resentencing should concurrent sentencing be appropriate. *See Cole,* 357 F.3d at 786 (Bye, J., dissenting in part and concurring in part). At this time, it is clear Cole was only in state pretrial custody when he was first sentenced on the federal charge. Further, concurrent sentencing was not an option at the time of resentencing because by then Cole had already completed his state sentence.

4. Cole has not raised any claims in this appeal to implicate the Supreme Court's recent decision in *United States v. Booker,* —— U.S. ——, 125 S.Ct. 738, —— L.Ed.2d —— (2005).

XI, on behalf of themselves & all others similarly situated & Louisa Benson on behalf of herself & the general public, Plaintiffs–Appellants,

v.

UNOCAL CORPORATION, a California Corporation; Total S.A., a Foreign Corporation; John Imle, an individual; Roger C. Beach, an individual, Defendants–Appellees.

John Roe III; John Roe VII; John Roe VIII; John Roe X, Plaintiffs–Appellants,

v.

Unocal Corporation; Union Oil Company of California, Defendants–Appellees.

Nos. 00–56603, 00–57197, 00–56628, 00–57195.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 3, 2001.

Filed Sept. 18, 2002.

Background: Residents of Myanmar brought actions under Alien Tort Claims Act (ATCA) and Racketeer Influenced and Corrupt Organizations Act (RICO) against Myanmar government and government-owned oil company, French oil company, and American oil company, alleging human rights violations perpetrated by Myanmar military in furtherance of oil pipeline project. Following dismissal of actions against Myanmar government, 963 F.Supp. 880, and French oil company, 27 F.Supp.2d 1174, Richard A. Paez, J., the United States District Court for the Central District of California, 110 F.Supp.2d 1294, Ronald S.W. Lew, J., in consolidation of actions, granted American oil company's motion for summary judgment. Plaintiffs appealed.

Holdings: In consolidation of appeals, the Court of Appeals, Pregerson, Circuit Judge, held that:

(1) allegations sufficiently alleged violations of the law of nations under ATCA;

(2) application of international law, rather than California or Myanmar law, was appropriate;

(3) issue of fact existed as to whether oil company aided and abetted Myanmar military's perpetration of forced labor, murder, and rape; but

(4) evidence was insufficient to support claims for torture;

(5) alleged violations did not fall within ambit of Foreign Sovereign Immunities Act (FSIA);

(6) issues of fact existed as to whether Act of State doctrine applied; and

(7) RICO did not apply extraterritorially.

Affirmed in part, reversed in part and remanded.

Reinhardt, Circuit Judge, filed concurring opinion.

1. Federal Courts ⚿766, 776, 802

Court of Appeals reviews a grant of summary judgment de novo, and must determine whether, viewing the evidence in light most favorable to nonmoving party, there are any genuine issues of material fact and whether district court correctly applied the relevant substantive law.

2. International Law ⚿10.11

Allegations of torts committed by Myanmar military against residents of Myanmar in furtherance of pipeline construction project sufficiently alleged violations of the law of nations, as required for action against oil company, involved in pipeline project, under Alien Tort Claims Act (ATCA); allegations of murder, rape, torture, and forced labor constituted jus cogens violations. 28 U.S.C.A. § 1350.

3. International Law ⚿1

Jus cogens norms are norms of international law that are binding on nations even if they do not agree to them.

4. International Law ⚿10.11

Any violation of specific, universal, and obligatory international norms—jus cogens or not—is actionable under Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

5. International Law ⚿10.11

Crimes like rape, torture, and murder, which by themselves require state action for liability under Alien Tort Claims Act (ATCA) to attach, do not require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach. 28 U.S.C.A. § 1350.

6. International Law ⚿10.11
Slaves ⚿1

Forced labor, like traditional variants of slave trading, is among the handful of crimes to which the law of nations attributes individual liability, such that state action is not required for liability under Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

7. International Law ⚿2

The law of nations may be ascertained by consulting the works of jurists, writing professedly on public law, by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law.

8. Federal Courts ⚿374
International Law ⚿1

The law of nations is part of federal common law.

9. International Law ⚿10.11

Application of international law, rather than California law or the law of Myanmar, was appropriate in action under Alien Tort Claims Act (ATCA), alleging oil company aided and abetted Myanmar military in perpetrating forced labor on Myanmar residents to further construction of pipeline; jus cogens violations were alleged, needs of the international system were better served by applying international rather than national law, application would allow certainty, predictability and uniformity of result, and policy of providing tort remedies for violations of international law would be furthered. 28 U.S.C.A. § 1350.

10. Federal Civil Procedure ⚿2481

Genuine issues of material fact existed as to whether oil company's conduct provided knowing practical assistance or encouragement to Myanmar military that had a substantial effect on military's perpetration of forced labor imposed on area residents during construction of pipeline, precluding summary judgment for oil company in action by residents under Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

11. Federal Civil Procedure ⚿2481

Genuine issues of material fact existed as to whether oil company's conduct provided knowing practical assistance or encouragement to Myanmar military that had a substantial effect on military's perpetration, in furtherance of forced labor policy, of murder and rape on area residents during construction of pipeline, precluding summary judgment for oil company in action by residents under Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

12. International Law ⚿10.11

Evidence was insufficient to support claims, in action under Alien Tort Claims Act (ATCA) by residents of Myanmar, that oil company provided knowing practical assistance or encouragement to Myanmar military that had a substantial effect on military's perpetration of torture on area residents during construction of pipeline; allegations of extreme physical abuse all

involved victims other than plaintiffs. 28 U.S.C.A. § 1350.

13. Federal Courts ⚿776

Existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act (FSIA) is a question of law which Court of Appeals reviews de novo. 28 U.S.C.A. §§ 1330, 1602 et seq.

14. International Law ⚿10.33

Alleged violations of human rights of Myanmar residents by government of Myanmar, in connection with joint venture gas pipeline project involving American corporation, did not fall within ambit of exception to Foreign Sovereign Immunities Act (FSIA) for acts in connection with a commercial activity that caused a direct effect in the United States; alleged acts of murder, torture, rape, and forced labor were committed in Myanmar. 28 U.S.C.A. § 1605(a)(2).

15. International Law ⚿10.9

The act of state doctrine is a nonjurisdictional, prudential doctrine based on the notion that the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

16. International Law ⚿10.9

Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.

17. Federal Courts ⚿776

Court of Appeals reviews the applicability of the act of state doctrine de novo.

18. Federal Civil Procedure ⚿2481

Genuine issues of material fact existed as to whether forced labor perpetrated on residents of Myanmar by Myanmar military in connection with pipeline construction project was used to benefit the project, as opposed to the public's welfare, precluding summary judgment, on basis of Act of State doctrine, for oil company involved in project, in action by residents under Alien Tort Claims Act (ATCA). 28 U.S.C.A. § 1350.

19. Federal Courts ⚿776

Court of Appeals reviews the existence of subject matter jurisdiction under Racketeer Influenced and Corrupt Organizations Act (RICO) de novo. 18 U.S.C.A. § 1961 et seq.

20. Federal Courts ⚿207

Securities Regulation ⚿30.11, 67.11

Under the "conduct" test, a district court has jurisdiction over securities fraud suits by foreigners who have lost money through sales abroad only where conduct within the United States directly caused the loss; mere preparatory activities, and conduct far removed from the consummation of the fraud, will not suffice to establish jurisdiction.

21. Securities Regulation ⚿30.11, 67.11

Under the "effects" test, the antifraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States; test is met where the domestic effect is a direct and foreseeable result of the conduct outside of the United States.

22. Racketeer Influenced and Corrupt Organizations ⚿23

In determination of whether Racketeer Influenced and Corrupt Organizations Act (RICO) applies extraterritorially, claim must meet either "conduct" test or "effect" test; "conduct" test establishes jurisdiction for domestic conduct that directly causes foreign loss or injury, whereas "effects" test establishes jurisdiction for foreign conduct that directly causes domestic loss or injury. 18 U.S.C.A. § 1961 et seq.

23. Racketeer Influenced and Corrupt Organizations ⚿64

Oil company which participated in joint venture to extract natural gas in Myanmar was not liable under Racketeer Influenced and Corrupt Organizations Act (RICO) for Myanmar government's human rights violations in furtherance of the pipeline portion of project; company's use of domestic mail and wire to transfer significant financial and technical support for project, and allegation that company's actions gave it an unfair advantage over competitors in the United States, were insufficient to establish subject matter jurisdiction under RICO. 18 U.S.C.A. § 1961 et seq.

Paul L. Hoffman, Schonbrun, Desimome, Seplow, Harris & Hoffman LLP, Venice, CA; Dan Stormer and Anne Richardson, Hadsell & Stormer, Inc., Pasadena, CA; William Goodman, Jennifer M. Green, and Beth Stephens, Center for Constitutional Rights, New York, NY; Katharine J. Redford and Richard Herz, Earthrights International, Washington, DC; Judith Brown Chomsky, Elkins Park, PA; Julie Shapiro, Tacoma, WA; Dilan Esper, Stein & Flugge, LLP, Los Angeles, CA, for plaintiffs-appellants Doe.

Terrence P. Collingsworth and Natacha Thys, International Labor Rights Fund, Washington, DC; Christopher E. Krafchak and Kenderton S. Lynch III, Krafchak & Associates, Los Angeles, CA; Martin J. D'Urso, Hilary Cohen, and Nadia Ezzelarab, Kohn, Swift & Graf, P.C., Philadelphia, PA; Christobal Bonifaz and John C. Bonifaz, Law Offices of Christobal Bonifaz, Amherst, MA, for plaintiffs-appellants Roe.

Edwin V. Woodsome, Jr., D. Barclay Edmundson, David G. Meyer, and Keri R. Curtis, Howrey Simon Arnold & White, LLP, Los Angeles, CA; Jerrold J. Ganzfried, Howrey Simon Arnold & White, LLP, Washington, DC, for defendants-appellees Unocal Corporation, Union Oil Company of California, John Imle, and Roger C. Beach.

William J. Aceves, California Western School of Law, San Diego, California, for Amici Curiae International Human Rights Organizations and International Law and Human Rights Law Scholars.

Appeal from the United States District Court for the Central District of California; Richard A. Paez and Ronald S.W. Lew, District Judges, Presiding[1]. D.C. Nos. CV–96–06959–RSWL, CV–96–06112–RSWL.

Before PREGERSON, REINHARDT and TASHIMA, Circuit Judges.

Opinion by Judge PREGERSON; Concurrence by Judge REINHARDT

PREGERSON, Circuit Judge.

This case involves human rights violations that allegedly occurred in Myanmar, formerly known as Burma. Villagers from the Tenasserim region in Myanmar allege that the Defendants directly or indirectly subjected the villagers to forced labor, murder, rape, and torture when the Defendants constructed a gas pipeline through the Tenasserim region. The villagers base their claims on the Alien Tort Claims Act, 28 U.S.C. § 1350, and the Racketeer Influ-

1. Judge Paez initially authored the orders granting in part and denying in part Defendants' Motions to Dismiss. *See Doe I v. Unocal Corp.,* 963 F.Supp. 880 (C.D.Cal.1997); *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.,* 176 F.R.D. 329 (C.D.Cal.1997). Judge Lew later authored the order granting Defendants' consolidated Motions for Summary Judgment. *See Doe I v. Unocal Corp.,* 110 F.Supp.2d 1294 (C.D.Cal.2000).

enced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, as well as state law.

The District Court, through dismissal and summary judgment, resolved all of Plaintiffs' federal claims in favor of the Defendants. For the following reasons, we reverse in part and affirm in part the District Court's rulings.

I.

FACTUAL AND PROCEDURAL BACKGROUND

A. Unocal's Investment in a Natural Gas Project in Myanmar.

Burma has been ruled by a military government since 1958. In 1988, a new military government, Defendant–Appellee State Law and Order Restoration Council ("the Myanmar Military"), took control and renamed the country Myanmar. The Myanmar Military established a state owned company, Defendant–Appellee Myanmar Oil and Gas Enterprise ("Myanmar Oil"), to produce and sell the nation's oil and gas resources.

In 1992, Myanmar Oil licensed the French oil company Total S.A. ("Total") to produce, transport, and sell natural gas from deposits in the Yadana Field off the coast of Myanmar ("the Project"). Total set up a subsidiary, Total Myanmar Exploration and Production ("Total Myanmar"), for this purpose. The Project consisted of a Gas Production Joint Venture, which would extract the natural gas out of the Yadana Field, and a Gas Transportation Company, which would construct and operate a pipeline to transport the natural gas from the coast of Myanmar through the interior of the country to Thailand.

Also in 1992, Defendant–Appellant Unocal Corporation and its wholly owned subsidiary Defendant–Appellant Union Oil Company of California, collectively referred to below as "Unocal," acquired a 28% interest in the Project from Total. Unocal set up a wholly owned subsidiary, the Unocal Myanmar Offshore Company ("the Unocal Offshore Co."), to hold Unocal's 28% interest in the Gas Production Joint Venture half of the Project.[2] Similarly, Unocal set up another wholly owned subsidiary, the Unocal International Pipeline Corporation ("the Unocal Pipeline Corp."), to hold Unocal's 28% interest in the Gas Transportation Company half of the Project.[3] Myanmar Oil and a Thai government entity, the Petroleum Authority of Thailand Exploration and Production, also acquired interests in the Project. Total Myanmar was appointed Operator of the Gas Production Joint Venture and the Gas Transportation Company. As the Operator, Total Myanmar was responsible, *inter alia*, for "determin[ing] . . . the selection of . . . employees [and] the hours of work and the compensation to be paid to all . . . employees" in connection with the Project.

B. Unocal's Knowledge that the Myanmar Military Was Providing Security and Other Services for the Project.

It is undisputed that the Myanmar Military provided security and other services for the Project, and that Unocal knew

2. The Unocal Offshore Co. was originally owned by the Unocal International Corporation, a Delaware corporation and wholly-owned subsidiary of the Union Oil Company of California. In 1999, ownership of the Unocal Offshore Co. was transferred to Unocal Global Ventures, Ltd., a Bermuda corporation and wholly owned subsidiary of the Unocal International Corporation, "to achieve tax and cash management efficiencies."

3. The Unocal Pipeline Corp. was also originally owned by the Unocal International Corporation. In 1998, ownership of the Unocal Pipeline Corp. was transferred to Unocal Global Ventures, Ltd.

about this. The pipeline was to run through Myanmar's rural Tenasserim region. The Myanmar Military increased its presence in the pipeline region to provide security and other services for the Project.[4] A Unocal memorandum documenting Unocal's meetings with Total on March 1 and 2, 1995 reflects Unocal's understanding that "[f]our battalions of 600 men each will protect the [pipeline] corridor" and "[f]ifty soldiers will be assigned to guard each survey team." A former soldier in one of these battalions testified at his deposition that his battalion had been formed in 1996 specifically for this purpose. In addition, the Military built helipads and cleared roads along the proposed pipeline route for the benefit of the Project.

There is also evidence sufficient to raise a genuine issue of material fact whether the Project *hired* the Myanmar Military, through Myanmar Oil, to provide these services, and whether Unocal knew about this. A Production Sharing Contract, entered into by Total Myanmar and Myanmar Oil before Unocal acquired an interest in the Project, provided that "[Myanmar Oil] shall ... supply[ ] or mak[e] available ... security protection ... as may be requested by [Total Myanmar and its assigns]," such as Unocal. Unocal was aware of this agreement. Thus, a May 10, 1995 Unocal "briefing document" states that "[a]ccording to *our contract*, the government of Myanmar is responsible for protecting the pipeline." (Emphasis added.) Similarly, in May 1995, a cable from the U.S. Embassy in Rangoon, Myanmar, reported that Unocal On–Site Representative Joel Robinson ("Unocal Representative Robinson" or "Robinson") "stated forthrightly that *the companies have hired* the Burmese military to provide security for the project." (Emphasis added.)

Unocal disputes that the Project hired the Myanmar Military or, at the least, that Unocal knew about this. For example, Unocal points out that the Production Sharing Contract quoted in the previous paragraph covered only the off-shore Gas Production Joint Venture but not the Gas Transportation Company and the construction of the pipeline which gave rise to the alleged human rights violations. Moreover, Unocal President John Imle ("Unocal President Imle" or "Imle") stated at his deposition that he knew of "no ... contractual obligation" requiring the Myanmar Military to provide security for the pipeline construction. Likewise, Unocal CEO Roger Beach ("Unocal CEO Beach" or "Beach") stated at his deposition that he also did not know "whether or not Myanmar had a contractual obligation to provide ... security." Beach further stated that he was not aware of "any support whatsoever of the military[,] ... either physical or monetary." These assertions by Unocal President Imle and Unocal CEO Beach are called into question by a briefing book which Total prepared for them on the occasion of their April 1996 visit to the Project. The briefing book lists the "numbers of villagers" working as "local helpers hired by battalions," the monthly "amount paid in Kyats" (the currency of Myanmar) to "Project Helpers," and the "amount in Kyats" expended by the Project on "food rations (Army + Villages)."[5]

Furthermore, there is evidence sufficient to raise a genuine issue of material

4. Although anti-government rebels were active elsewhere in Myanmar, the record indicates that there was in fact little to no rebel activity in the region where the pipeline construction occurred, and that the center of the Myanmar civil war was 150–200 miles distant from the pipeline project.

5. Moreover, in March 1996, a cable from the U.S. Embassy in Rangoon reflects the Embassy's understanding that "the consortium building the pipeline pays the Burmese military a hard-currency fee for providing security."

fact whether the Project directed the Myanmar Military in these activities, at least to a degree, and whether Unocal was involved in this. In May 1995, a cable from the U.S. Embassy in Rangoon reported:

> [Unocal Representative] Robinson indicated ... Total/Unocal uses [aerial photos, precision surveys, and topography maps] to show the [Myanmar] military where they need helipads built and facilities secured .... Total's security officials meet with military counterparts to inform them of the next day's activities so that soldiers can ensure the area is secure and guard the work perimeter while the survey team goes about its business.

A November 8, 1995 document apparently authored by Total Myanmar stated that "[e]ach working group has a security officer ... to control the army positions." A January 1996 meeting document lists "daily security coordination with the army" as a "working procedure." Similarly, the briefing book that Total prepared for Unocal President Imle and Unocal CEO Beach on the occasion of their April 1996 visit to the Project mentions that "daily meeting[s]" were "held with the tactical commander" of the army. Moreover, on or about August 29, 1996, Unocal (Singapore) Director of Information Carol Scott ("Unocal Director of Information Scott" or "Scott") discussed with Unocal Media Contact and Spokesperson David Garcia ("Unocal Spokesperson Garcia" or "Garcia") via e-mail how Unocal should publicly address the issue of the alleged movement of villages by the Myanmar Military in connection with the pipeline. Scott cautioned Garcia that "[b]y saying *we* influenced the army not to move a village, you introduce the concept that they would do such a thing; whereas, by saying that no villages have been moved, you skirt the issue of whether it could happen or not." (Emphasis added.) This e-mail is some evidence that Unocal could influence the army not to commit human rights violations, that the army might otherwise commit such violations, and that Unocal knew this.

C. Unocal's Knowledge that the Myanmar Military Was Allegedly Committing Human Rights Violations in Connection with the Project.

Plaintiffs are villagers from Myanmar's Tenasserim region, the rural area through which the Project built the pipeline. Plaintiffs allege that the Myanmar Military forced them, under threat of violence, to work on and serve as porters for the Project. For instance, John Doe IX testified that he was forced to build a helipad near the pipeline site in 1994 that was then used by Unocal and Total officials who visited the pipeline during its planning stages. John Doe VII and John Roe X, described the construction of helipads at Eindayaza and Po Pah Pta, both of which were near the pipeline site, were used to ferry Total/Unocal executives and materials to the construction site, and were constructed using the forced labor of local villagers, including Plaintiffs. John Roes VIII and IX, as well as John Does I, VIII and IX testified that they were forced to work on building roads leading to the pipeline construction area. Finally, John Does V and IX, testified that they were required to serve as "pipeline porters"—workers who performed menial tasks such as such as hauling materials and cleaning the army camps for the soldiers guarding the pipeline construction.

Plaintiffs also allege in furtherance of the forced labor program just described, the Myanmar Military subjected them to acts of murder, rape, and torture. For instance, Jane Doe I testified that after her husband, John Doe I, attempted to escape the forced labor program, he was shot at by soldiers, and in retaliation for

his attempted escape, that she and her baby were thrown into a fire, resulting in injuries to her and the death of the child. Other witnesses described the summary execution of villagers who refused to participate in the forced labor program, or who grew too weak to work effectively. Several Plaintiffs testified that rapes occurred as part of the forced labor program. For instance, both Jane Does II and III testified that while conscripted to work on pipeline-related construction projects, they were raped at knife-point by Myanmar soldiers who were members of a battalion that was supervising the work. Plaintiffs finally allege that Unocal's conduct gives rise to liability for these abuses.

The successive military governments of first Burma and now Myanmar have a long and well-known history of imposing forced labor on their citizens. *See, e.g., Forced labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)* Parts III.8, V.14(3) (1998) (describing several inquiries into forced labor in Myanmar conducted between 1960 and 1992 by the International Labor Organization, and finding "abundant evidence ... showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military"), http:// www.ilo.org/public/english /standards/relm/gb/docs/gb273/myanmar.htm. As detailed below, even before Unocal invested in the Project, Unocal was made aware—by its own consultants and by its partners in the Project—of this record and that the Myanmar Military might also employ forced labor and commit other human rights violations in connection with the Project. And after Unocal invested in the Project, Unocal was made aware—by its own consultants and employees, its partners in the Project, and human rights organizations—of allegations that the Myanmar Military was actually committing such violations in connection with the Project.

Before Unocal acquired an interest in the Project, it hired a consulting company, Control Risk Group, to assess the risks involved in the investment. In May 1992, Control Risk Group informed Unocal that "[t]hroughout Burma the government habitually makes use of forced labour to construct roads." [6] Control Risk Group concluded that "[i]n such circumstances UNOCAL and its partners will have little freedom of manoeuvre." Unocal's awareness of the risk at that time is also reflected in the deposition testimony of Unocal Vice President of International Affairs Stephen Lipman ("Unocal Vice President Lipman"):

> [I]n our discussions between Unocal and Total[preceding Unocal's acquisition of an interest in the Project], we said that the option of having the [Myanmar] [M]ilitary provide protection[7] for the pipeline construction and operation of it would be that they might proceed in the manner that would be out of our control and not be in a manner that we would

6. In the same year, the U.S. Department of State similarly reported that "[t]he military Government [in Myanmar] routinely employs corvee labor on its myriad building projects" and that "[t]he Burmese army has for decades conscripted civilian males to serve as porters." U.S. Department of State, *Country Reports on Human Rights Practices for 1991* 796–97 (1992).

7. As noted above, the Production Sharing Contract between Total Myanmar and Myanmar Oil provided that "[Myanmar Oil] shall ... supply[ ] or mak[e] available ... security protection ... *as may be requested* by [Total Myanmar and its assigns]," such as Unocal. (Emphasis added.)

like to see them proceed, I mean, going to excess.

On January 4, 1995, approximately three years after Unocal acquired an interest in the Project, Unocal President Imle met with human rights organizations at Unocal's headquarters in Los Angeles and acknowledged to them that the Myanmar Military might be using forced labor in connection with the Project. At that meeting, Imle said that "[p]eople are threatening physical damage to the pipeline," that "if you threaten the pipeline there's gonna be more military," and that "*[i]f forced labor goes hand and glove with the military yes there will be more forced labor.*" (Emphasis added.)

Two months later, on March 16, 1995, Unocal Representative Robinson confirmed to Unocal President Imle that the Myanmar Military might be committing human rights violations in connection with the Project. Thus, Robinson wrote to Imle that he had received publications from human rights organizations "which depicted in more detail than I have seen before the increased encroachment of [the Myanmar Military's] activities into the villages of the pipeline area." Robinson concluded on the basis of these publications that "[o]ur assertion that [the Myanmar Military] has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny." [8]

Shortly thereafter, on May 10, 1995, Unocal Representative Robinson wrote to Total's Herve Madeo:

> From Unocal's standpoint, probably the most sensitive issue is "what is forced labor" and "how can you identify it." I am sure that you will be thinking about the demarcation between work done by the project and work done "on behalf of" the project. Where the responsibility of the project ends is *very important.*

This statement is some evidence that Unocal knew that the Myanmar Military might use forced labor in connection with the Project.

In June 1995, Amnesty International also alerted Unocal to the possibility that the Myanmar Military might use forced labor in connection with the Project. Amnesty International informed Unocal that comments from a Myanmar Department of Industry official "could mean that the government plans to use 'voluntary' labor in conjunction with the pipeline." Amnesty International went on to explain that "what they call 'voluntary' labor is called forced labor in other parts of the world." [9]

Later that year, on December 11, 1995, Unocal Consultant John Haseman ("Unocal Consultant Haseman" or "Haseman"), a former military attache at the U.S. Embassy in Rangoon, reported to Unocal that the Myanmar Military was, in fact, using forced labor and committing other human rights violations in connection with the Project. Haseman told Unocal that "Uno-

8. Similarly, the briefing book that Total prepared for Unocal President Imle and Unocal CEO Beach on the occasion of their April 1996 visit to the Project listed the following "area[ ] of concern": "army = additional burden on the local population."

9. Also in 1995, Human Rights Watch informed Unocal that forced labor was so pervasive in Myanmar that Human Rights Watch could not condone any investment that would enrich the country's current regime. That same year, the General Assembly of the United Nations "strongly urge[d] the Government of Myanmar ... to put an end to ... the practices of torture, abuse of women, forced labour ..., and ... disappearances and summary executions...." *Situation of Human Rights in Myanmar,* U.N. General Assembly, 50th Sess., Agenda Item 112(c), U.N. Doc. A/RES/50/194 (1995), http:www.un.org/documents/ga/res/50/ ares50–194.htm.

cal was particularly discredited when a corporate spokesman was quoted as saying that Unocal was satisfied with ... assurances [by the Myanmar Military] that no human rights abuses were occurring in the area of pipeline construction." Haseman went on to say:

> Based on my three years of service in Burma, my continuous contacts in the region since then, and my knowledge of the situation there, my conclusion is that egregious human rights violations have occurred, and are occurring now, in southern Burma. The most common are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline ...; and imprisonment and/or execution by the army of those opposing such actions.... Unocal, by seeming to have accepted [the Myanmar Military]'s version of events, appears at best naive and at worst a willing partner in the situation.[10]

Communications between Unocal and Total also reflect the companies' shared knowledge that the Myanmar Military was using forced labor in connection with the Project. On February 1, 1996, Total's Herve Chagnoux wrote to Unocal and explained his answers to questions by the press as follows:

> By stating that I could not *guarantee* that the army is not using forced labour, I certainly imply that they might, (and they might) but I am saying that we do not have to monitor army's behavior: we have our responsibilities; they have their responsibilities; and we refuse to be pushed into assuming more than what we can really guarantee. About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a grey zone.

And on September 17, 1996, Total reported to Unocal about a meeting with a European Union civil servant in charge of an investigation of forced labor in Myanmar: "We were told that even if Total is not using forced labor directly, the troops assigned to the protection of our operations use forced labour to build their camps and to carry their equipments." In reply, Total acknowledged that forced labor did indeed occur in connection with the pipeline: "We had to mention that when we had knowledge of such occurrences, the workers have been compensated." Unocal President Imle testified at his deposition that in Unocal's discussions with Total, "[s]urrounding the question of porters for the military and their payment was the issue of whether they were conscripted or volunteer workers." Imle further testified that "the consensus was that it was mixed," i.e., "some porters were conscripted, and some were volunteer." On March 4, 1997, Unocal nevertheless submitted a statement to the City Counsel of New York, in response to a proposed New York City select purchasing law imposed on firms that do business in Myanmar, in which Unocal stated that "no [human rights] violations have taken place" in the vicinity of the pipeline route.

D. Proceedings Below.

In September of 1996, four villagers from the Tenasserim region, the Federation of Trade Unions of Burma ("the Trade Unions"), and the National Coalition Government of the Union of Burma ("the Government in Exile") brought an action

10. Similarly, on May 20, 1996, a State Department cable stated: "Forced labor is currently being channeled, according to[non-governmental organization] reports, to service roads for the pipeline to Thailand.... There are plans for a helicopter pad and airstrip in the area ... in part for use by oil company executives."

against Unocal and the Project. *Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 334 (C.D.Cal. 1997) ("*Roe I*"). Plaintiffs in *Roe I* alleged violations of the law of nations under the Alien Tort Claims Act ("the ATCA"), 28 U.S.C. § 1350, and violations of state law. One of the four individual *Roe*–Plaintiffs alleged that the Myanmar Military subjected him to forced labor, without compensation and under threat of death, along the pipeline route in connection with the Project. The other three individual *Roe*–Plaintiffs alleged they owned land located along the pipeline route, and were not compensated when the land was confiscated by the Myanmar Military in connection with the Project. The Trade Unions and the Government in Exile alleged similar injuries to their members and citizens, respectively.

In October of 1996, fourteen other villagers from the Tenasserim region brought another action against Unocal, Total, Myanmar Oil, the Myanmar Military, Unocal President Imle and Unocal CEO Beach. *Doe I v. Unocal Corp.*, 963 F.Supp. 880, 883 (C.D.Cal.1997) ("*Doe I*"). Plaintiffs in *Doe I* alleged that the Defendants' conduct in connection with the Project had caused them to suffer death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property. The *Doe*–Plaintiffs sought to represent a class of all residents of the Tenasserim region who have suffered or are or will be suffering similar injuries. As in the *Roe* case, liability in the *Doe* case was based on alleged violations of the ATCA and state law. In addition, liability in the *Doe* case was also based on alleged violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*

On March 25, 1997, the District Court granted in part and denied in part Unocal's motion to dismiss the *Doe* action. *See Doe I,* 963 F.Supp. 880. The District Court dismissed the claims against the Myanmar Military and Myanmar Oil on the grounds that these defendants were entitled to immunity pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.* The District Court also determined, however, that the act of state doctrine did not require the dismissal of the claims against the other defendants, with the exception of the expropriation claims.[11] Moreover, the District Court determined that subject matter jurisdiction was available under the ATCA and that the *Doe*–Plaintiffs had pled sufficient facts to state a claim under the ATCA. The District Court later denied the *Doe*–Plaintiffs' motion for class certification and dismissed their claims against Total for lack of personal jurisdiction. *See Doe I v. Unocal Corp.,* 67 F.Supp.2d 1140 (C.D.Cal. 1999); *Doe I v. Unocal Corp.,* 27 F.Supp.2d 1174 (C.D.Cal.1998), *aff'd* 248 F.3d 915 (9th Cir.2001).

On November 5, 1997, the District Court similarly granted in part and denied in part Unocal's motion to dismiss the *Roe* action. *See Roe I,* 176 F.R.D. 329. The District Court determined that the Government in Exile (wholly) and the Trade Unions (in part) lacked standing to pursue their claims. The District Court's other determinations in the *Roe* action—regarding the act of state doctrine, subject matter jurisdiction under the ATCA, and failure to state a claim under the ATCA—were identical to its earlier determinations in the *Doe* action regarding the same issues.

On August 31, 2000, the District Court granted Unocal's consolidated motions for

11. Plaintiffs in both actions subsequently filed amended complaints that do not contain claims based on expropriation of property.

summary judgment on all of Plaintiffs' remaining federal claims in both actions. *See Doe I v. Unocal Corp.,* 110 F.Supp.2d 1294 (9th Cir.2000) ("*Doe/Roe II*"). The District Court granted Unocal's motion for summary judgment on the ATCA claims based on murder, rape, and torture because Plaintiffs could not show that Unocal engaged in state action and that Unocal controlled the Myanmar Military. The District Court granted Unocal's motion for summary judgment on the ATCA claims based on forced labor because Plaintiffs could not show that Unocal "actively participated" in the forced labor. The District Court also determined that it did not have subject matter jurisdiction over the *Doe*–Plaintiffs' RICO claim. Finally, after having granted summary judgment on all of Plaintiffs' federal claims, the District Court declined to exercise its discretion to retain Plaintiffs' state claims and dismissed those claims without prejudice.

On September 5, 2000, the District Court granted Unocal's motion to recover costs in the amount of $125,846.07. On November 29, 2000, the District Court denied Plaintiffs' joint Fed.R.Civ.P. 54(d)(1) Motion to Retax, concluding that the motion actually constituted a time-barred Fed.R.Civ.P. 59(e) Motion to Alter or Amend Judgment.

The *Doe*–Plaintiffs appeal the District Court's dismissal of their claims against the Myanmar Military and Myanmar Oil and the District Court's grant of summary judgment in favor of Unocal on their ATCA and RICO claims against Unocal (No. 00–56603). The *Roe*–Plaintiffs appeal the District Court's grant of summary judgment in favor of Unocal on their ATCA claims against Unocal (No. 00–56628). Plaintiffs also appeal the District Court's denial of their motion to retax (Nos. 00–57195 & 00–57197). The four appeals have been consolidated. We have jurisdiction under 28 U.S.C. § 1291, and we reverse in part, affirm in part, and remand to the District Court for further proceedings consistent with this opinion.

II.

ANALYSIS

A. Liability Under the Alien Tort Claims Act.

1. Introduction

The Alien Tort Claims Act confers upon the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350.[12] We have held that the ATCA also provides a cause of action, as long as "plaintiffs ... allege a violation of 'specific, universal, and obligatory' international norms as part of [their] ATCA claim." *Papa v. United States,* 281 F.3d 1004, 1013 (9th Cir.2002) (quoting *In re Estate of Ferdinand E. Marcos, Human Rights Litig.,* 25 F.3d 1467, 1475 (9th Cir.1994) ("*Marcos II*")). *See also Marcos II,* 25 F.3d at 1474–75. Plaintiffs allege that Unocal's conduct gave rise to ATCA liability for the forced labor, murder, rape, and torture inflicted on them by the Myanmar Military.[13]

[1] The District Court granted Unocal's motion for summary judgment on Plaintiffs' ATCA claims. We review a grant of summary judgment *de novo. See Lopez v. Smith,* 203 F.3d 1122, 1131 (9th Cir.2000) (en banc). We must determine

12. The "law of nations" is "the law of international relations, embracing not only nations but also ... individuals (such as those who invoke their human rights or commit war crimes)." *Black's Law Dictionary* 822 (7th ed.1999).

13. Plaintiffs' ATCA claims are timely under the ten-year statute of limitations we recently adopted for such claims. *See Papa,* 281 F.3d at 1011–13.

whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

[2–4] One threshold question in *any* ATCA case is whether the alleged tort is a violation of the law of nations. We have recognized that torture, murder, and slavery are *jus cogens* violations and, thus, violations of the law of nations.[14] *See United States v. Matta–Ballesteros,* 71 F.3d 754, 764 n. 5 (9th Cir.1995). Rape can be a form of torture. *See Farmer v. Brennan,* 511 U.S. 825, 852, 854, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (Blackmun, J., concurring) (describing brutal prison rape as "the equivalent of" and "nothing less than torture"); *Kadic v. Karadzic,* 70 F.3d 232, 242 (2d Cir.1995) (describing allegations of "murder, rape, forced impregnation, and *other forms of torture*" (emphasis added)); *In re Extradition of Suarez–Mason,* 694 F.Supp. 676, 682 (N.D.Cal.1988) (stating that "shock sessions were interspersed with rapes and *other forms of torture*" (emphasis added)); *see also generally* Evelyn Mary Aswad, *Torture by Means of Rape,* 84 Geo. L.J. 1913 (1996). Moreover, forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation. *See, e.g.,* Universal Declaration of Human Rights, G.A. Res. 217(A)III (1948) (banning forced labor); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 82 U.N.T.S. 280 (making forced labor a war crime). Accordingly, all torts alleged in the present case are *jus cogens* violations and, thereby, violations of the law of nations.[15]

[5] Another threshold question in any ATCA case *against a private party,* such as Unocal, is whether the alleged tort requires the private party to engage in state action for ATCA liability to attach, and if so, whether the private party in fact engaged in state action. In his concurrence in *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774 (D.C.Cir.1984), Judge Edwards observed that while most crimes require state action for ATCA liability to attach, there are a "handful of crimes," including slave trading, "to which the law of nations attributes *individual liability,*" such that state action is not required. *Id.* at 794–95 (Edwards, J., concurring) (emphasis added).[16] More recently, the Second Circuit adopted and extended this approach in *Kadic.* The Second Circuit first noted

14. *Jus cogens* norms are norms of international law that are binding on nations even if they do not agree to them. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 714–15 (9th Cir.1992).

15. We stress that although a *jus cogens* violation is, by definition, "a violation of 'specific, universal, and obligatory' international norms" that is actionable under the ATCA, *any* "violation of 'specific, universal, and obligatory' international norms"—*jus cogens* or not—is actionable under the ATCA. *Papa,* 281 F.3d at 1013 (quoting *Marcos II,* 25 F.3d at 1475). Thus, a *jus cogens* violation is sufficient, but not necessary, to state a claim under the ATCA.

16. Our statement in *In re Estate of Ferdinand E. Marcos Human Rights Litig.,* 978 F.2d 493, 501–02 (9th Cir.1992) ("*Marcos I*"), that "[o]nly individuals who have acted under official authority or under color of such authority may violate international law," must be read like Judge Edwards' concurrence in *Tel–Oren,* on which this statement exclusively relied. *Marcos I,* like *Tel–Oren,* involved torture, a crime for which there is no purely private liability under international law. *See Tel–Oren,* 726 F.2d at 794–95 (Edwards, J., concurring); *Kadic,* 70 F.3d at 243.

that genocide and war crimes—like slave trading—do not require state action for ATCA liability to attach. *See* 70 F.3d at 242–43. The Second Circuit went on to state that although "acts of rape, torture, and summary execution," like most crimes, "are proscribed by international law only when committed by state officials or under color of law" to the extent that they were committed *in isolation*, these crimes "are actionable under the Alien Tort [Claims] Act, without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes.*" *Id.* at 243–44 (emphasis added). Thus, under *Kadic*, even crimes like rape, torture, and summary execution, which by themselves require state action for ATCA liability to attach, do *not* require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for ATCA liability to attach. We agree with this view and apply it below to Plaintiffs' various ATCA claims.

2. Forced Labor

a. Forced labor is a modern variant of slavery to which the law of nations attributes individual liability such that state action is not required.

[6] Our case law strongly supports the conclusion that forced labor is a modern variant of slavery. Accordingly, forced labor, like traditional variants of slave trading, is among the "handful of crimes . . . to which the law of nations attributes *individual liability,*" such that state action is not required. *Id.* at 794–95 (Edwards, J., concurring). *See supra* section II.A.1.

Courts have included forced labor in the definition of the term "slavery" in the context of the Thirteenth Amendment.[17] The Supreme Court has said that "[t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of *completely free and voluntary labor* throughout the United States." *Pollock v. Williams*, 322 U.S. 4, 17, 64 S.Ct. 792, 88 L.Ed. 1095 (1944) (emphasis added).[18] Accordingly, "[i]t has been held that forced labor of certain individuals amounts to involuntary servitude and therefore is violative of the thirteenth amendment." *Weidenfeller v. Kidulis*, 380 F.Supp. 445, 450 (E.D.Wis.1974) (citing *Stone v. City of Paducah*, 120 Ky. 322, 86 S.W. 531, 533 (1905)).

The inclusion of forced labor in the definition of the term "slavery" is not confined to the Thirteenth Amendment but extends, for example, to 18 U.S.C. § 1583. 18 U.S.C. § 1583 was introduced in 1866 to prevent the kidnaping of former slaves to countries which still permitted slavery.[19] The Fourth Circuit has said that "[n]ot-

17. The Thirteenth Amendment provides in part that "[n]either slavery nor involuntary servitude . . . shall exist within the United States." U.S. CONST. amend. XIII, § 1. See also Tobias Barrington, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 Colum. L. Rev. 973 (2002), for the proposition that "the knowing use of slave labor by U.S. based entities in their foreign operations constitutes the presence of 'slavery' within the United States, as that term is used in the Thirteenth Amendment," *id.* at 978, and that "[i]f the allegations against it are true, then Unocal's participation in the Burma project makes out a strong case for a Thirteenth Amendment violation," *id.* at 1034.

18. The fact that the Thirteenth Amendment reaches private action, *see Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438–39, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), in turn supports the view that forced labor by private actors gives rise to liability under the ATCA.

19. The statute provides that anybody who kidnaps any other person, or induces such other person to go anywhere, with the intent that such other person be sold into involuntary servitude or held as a slave, shall be fined or imprisoned as specified. *See* 18 U.S.C. § 1581.

withstanding this limited purpose, the statute should be read as expressing the broad and sweeping intention of Congress during the Reconstruction period to stamp out the vestiges of the old regime of slavery and to *prevent the reappearance of forced labor in whatever new form it might take.*" *United States v. Booker,* 655 F.2d 562, 565 (4th Cir.1981) (emphasis added).

In *World War II Era Japanese Forced Labor Litig.,* 164 F.Supp.2d 1160, (N.D.Cal.2001), the District Court for the Northern District of California recently implicitly included forced labor in the definition of the term "slavery" for purposes of the ATCA. There, the district court concluded that "[g]iven the Ninth Circuit's comment in *Matta–Ballesteros,* 71 F.3d at 764 n. 5, that slavery constitutes a violation of *jus cogens,* this court is inclined to agree with the[District Court for the District of New Jersey's] conclusion [in *Iwanowa v. Ford Motor Co.,* 67 F.Supp.2d 424 (D.N.J.1999)] that forced labor violates the law of nations." *Id.* at 1179.

In light of these authorities, we conclude that forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability under the ATCA.

b. Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor.

Plaintiffs argue that Unocal aided and abetted the Myanmar Military in subjecting them to forced labor. We hold that the standard for aiding and abetting under the ATCA is, as discussed below, knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime. We further hold that a reasonable factfinder could find that Unocal's conduct met this standard.[20]

The District Court found that "[t]he evidence ... suggest[s] that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice." *Doe/Roe II,* 110 F.Supp.2d at 1310. The District Court nevertheless held that Unocal could not be liable under the ATCA for forced labor because Unocal's conduct did not rise to the level of "active participation" in the forced labor. *Id.* The District Court incorrectly borrowed the "active participation" standard for liability from war crimes cases before Nuremberg Military Tribunals involving the role of German industrialists in the Nazi forced labor program during the Second World War. The Military Tribunals applied the "active participation" standard in these cases only to overcome the defendants' "necessity defense." [21] In the pres-

20. Plaintiffs also argue that Unocal is liable for the conduct by the Myanmar Military under joint venture, agency, negligence, and recklessness theories. The District Court did not address any of Plaintiffs' alternative theories. Because we reject the District Court's general reasons for holding that Unocal could not be liable under international law, and because we hold that Unocal may be liable under at least one of Plaintiffs' theories, i.e., aiding and abetting in violation of international law, we do not need to address Plaintiffs' other theories, i.e., joint venture, agency, negligence, and recklessness. Joint venture, agency, negligence, and recklessness may, like aiding and abetting, be viable theories on the specific facts of this ATCA case. Moreover, on the facts of other ATCA cases, joint venture, agency, negligence, or recklessness may in fact be more appropriate theories than aiding and abetting.

21. The Military Tribunal in one of these case defined the necessity defense as follows: "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil." *United States v. Krupp,* 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1436 (1950) (["*Krupp*"]). (quoting 1 Wharton's Criminal Law 177 (12th ed.1932)).

ent case, Unocal did not invoke—and could not have invoked—the necessity defense. The District Court therefore erred when it applied the "active participation" standard here.[22]

[7, 8] We however agree with the District Court that in the present case, we should apply international law as developed in the decisions by international criminal tribunals such as the Nuremberg Military Tribunals for the applicable substantive law. "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; *or by judicial decisions recognizing and enforcing that law.*'" *Filartiga v. Pena–Irala,* 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820)) (emphasis added). It is "well settled that the law of nations is part of federal common law." *Marcos I,* 978 F.2d at 502.

In different ATCA cases, different courts have applied international law, the law of the state where the underlying events occurred, or the law of the forum state, respectively. *See Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 105 n. 12 (2d Cir.2000). Unocal urges us to apply not international law, but the law of the state where the underlying events occurred, i.e., Myanmar. Where, as in the present case, only *jus cogens* violations are alleged—*i.e.,* violations of norms of international law that are binding on nations even if they do not agree to them, *see supra* note 14 and accompanying text—it may, however, be preferable to apply international law rather than the law of any particular state, such as the state where the underlying events occurred or the forum state.[23] The reason is that, by definition, the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid. Moreover, "reading § 1350 as essentially a jurisdictional grant only and then looking to [foreign or] domestic tort law to provide the cause of action mutes the grave *international law* aspect of the tort, reducing it to no more (or less) than a garden-variety municipal tort," *Xuncax v. Gramajo,* 886 F.Supp. 162, 183 (D.Mass.1995), i.e., reducing it to a tort "relating to the internal

22. A reasonable factfinder could moreover conclude that Unocal's conduct met the "active participation" standard erroneously applied by the District Court. For example, Unocal Representative Robinson stated that "[o]ur assertion that [the Myanmar Military] has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny." Robinson is furthermore reported to have stated that "Total/Unocal uses [photos, maps, and surveys] to show the military where they need helipads built and facilities secured." In addition, Unocal President Imle stated that "[i]f forced labor goes hand in glove with the military yes there will be more forced labor" as the result of the Myanmar Military protecting the pipeline. Unocal thus resembles the defendants in *Krupp,* who "well knew that any expansion[of their business] would require the employment of forced labor," 9 Trials at 1442, and the defendants in *United States v. Flick,* 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1952), who sought to increase their production quota and thus their forced labor allocation, *id.* at 1198, 1202.

23. Because "the law of nations is part of federal common law," *Marcos I,* 978 F.2d at 502, the choice between international law and the law of the forum state, which in the present case is California state law or our federal common law, is less crucial than the choice between international law and the law of the state where the underlying events occurred, which in the present case is the law of Myanmar. Moreover, as discussed later in this section, the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the choice between international and domestic law even less crucial.

government of a state of nation (as contrasted with *international*)," *Black's Law Dictionary* 1037 (7th ed.1999). Significantly, we have already held that the ATCA not only confers jurisdiction but also creates a cause of action. *See Papa*, 281 F.3d at 1013; *Marcos II*, 25 F.3d at 1474–75.

[9] Application of international law—rather than the law of Myanmar, California state law, or our federal common law—is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, "the needs of the ... international system[ ]" are better served by applying international rather than national law. Second, "the relevant policies of the forum" cannot be ascertained by referring—as the concurrence does—to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law. *See Wiwa*, 226 F.3d at 105 n. 12. Third, regarding "the protection of justified expectations," the "certainty, predictability and uniformity of result," and the "ease in the determination and application of the law to be applied," we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the Nuremberg trials and is similar to that of the Restatement (Second) of Torts. *See infra* note 26 and accompanying text.[24] Finally, "the basic polic[y] underlying the particular field of law" is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law, as discussed in the next paragraph. We conclude that given the record in the present case, application of international law is appropriate.[25]

International human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings. *See* Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 Yale J. Int'l L. 1, 40 (2002). But what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law. *See id.* at 44–46. Moreover, as mentioned above in note 23 and further discussed later in this section, the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context. Accordingly, District Courts are increasingly turning to the decisions by international *criminal* tribunals for instructions regarding the standards of international human rights law under our *civil* ATCA. *See, e.g., Cabello Barrueto v. Fernandez Larios*, 205 F.Supp.2d 1325, 1333 (S.D.Fla. 2002) (concluding on the basis of, *inter alia*, the statute of and a decision by the International Criminal Tribunal for the former Yugoslavia that defendants "may be held liable under the ATCA for ... aiding and abetting the actions taken by [foreign] military officials"); *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322 (N.D.Ga. 2002) (noting that among "various contem-

24. Because "moral support" is not part of the standard we adopt today, the concurrence's discussion in this context of "the international law regarding third party 'moral support' " is beside the point. Concurrence at 967–68, *see infra* note 28.

25. We stress that our conclusion that application of international law is appropriate is based on the record in this case. In other cases with different facts, application of the law of the forum state—including federal common law—or the law of the state where the events occurred may be appropriate.

porary sources" for ascertaining the norms of international law as they pertain to the ATCA, "the statutes of the [International Criminal Tribunal for the former Yugoslavia] and the International Criminal Tribunal for Rwanda . . . and recent opinions of these tribunals are particularly relevant"). We agree with this approach. We find recent decisions by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATCA.

In *Prosecutor v. Furundzija*, IT–95–17/1 T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999), the International Tribunal for the former Yugoslavia held that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." *Id.* at ¶ 235. The Tribunal clarified that in order to qualify, "assistance need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal." *Furundzija* at ¶ 209; *see also Prosecutor v. Kunarac*, IT–96–23–T & IT–96–23/1–T, ¶ 391 (Feb. 22, 2001), *http://www.un.org/icty/foca/trialc2/judgement/index.htm* ("The act of assistance need not have caused the act of the principal."). Rather, it suffices that "the acts of the accomplice make a significant difference to the commission of the criminal act by the principal." *Furundzija* at ¶ 233. The acts of the accomplice have the required "[substantial] effect on the commission of the crime" where "the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed." *Prosecutor v. Tadic*, ICTY–94–1, ¶ 688 (May 7, 1997), *http://www.un.org/icty/tadic/trials2/judgement/index.htm.*[26]

Similarly, in *Prosecutor v. Musema*, ICTR–96–13–T (Jan. 27, 2000), *http://www.ictr.org/*, the International Criminal Tribunal for Rwanda described the *actus reus* of aiding and abetting as "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime". *Id.* at ¶ 126.

As for the *mens rea* of aiding and abetting, the International Criminal Tribunal for the former Yugoslavia held that what is required is actual or constructive (i.e., "reasonabl[e]") "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Furundzija* at ¶ 245. Thus, "it is not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime." *Id.* In fact, it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit. *See id.* Rather, if the accused "is aware that one of a number of crimes will

26. The *Furundzija* Tribunal based its *actus reus* standard for aiding and abetting on an exhaustive analysis of international case law and international instruments. *See id.* at ¶¶ 192–234. The international case law it considered consisted chiefly of decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War. *See id.* at ¶¶ 195–97. The international instruments consisted of the Draft Code of Crimes Against the Peace and Security of Mankind adopted by the United Nations International Law Commission in 1996, as well as the Rome Statute of the International Criminal Court "adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and . . . substantially endorsed by the General Assembly's Sixth Committee on 26 November 1998." *Id.* at 227. It is hard to argue with the *Furundzija* Tribunal's reliance on these sources.

probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Id.*[27]

Similarly, for the *mens rea* of aiding and abetting, the International Criminal Tribunal for Rwanda required that "the accomplice knew of the assistance he was providing in the commission of the principal offence." *Musema* at ¶ 180. The accomplice does not have to have had the intent to commit the principal offense. *See id.* at ¶ 181. It is sufficient that the accomplice "knew or had reason to know" that the principal had the intent to commit the offense. *Id.* at¶ 182.

The *Furundzija* standard for aiding and abetting liability under international criminal law can be summarized as knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. At least with respect to assistance and encouragement, this standard is similar to the standard for aiding and abetting under domestic tort law. Thus, the Restatement of Torts states: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives *substantial assistance or encouragement* to the other so to conduct himself . . . ." *Restatement (Second) of Torts* § 876 (1979) (emphasis added). Especially given the similarities between the *Furundzija* international criminal standard and the Restatement domestic tort standard, we find that application of a slightly modified *Furundzija* standard is appropriate in the present case. In particular, given that there is—as discussed below—sufficient evidence in the present case that Unocal gave assistance and encouragement to the Myanmar Military, we do not need to decide whether it would have been enough if Unocal had only given moral support to the Myanmar Military. Accordingly, we may impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support which has the required substantial effect to another day.[28]

27. The *Furundzija* Tribunal based its *mens rea* standard for aiding and abetting on an analysis of the same international case law and international instruments mentioned above in note 26. *See id.* at ¶¶ 236–49. The Tribunal's reliance on these sources again seems beyond reproach.

28. We note, however, that there may be no difference between encouragement and moral support. *See Restatement (Second) of Torts* § 876 cmt. d (stating that "encouragement to act operates as a moral support"). The concurrence claims: "Having declared . . . that the Yugoslav Tribunal's standard constitutes the controlling international law, the majority cannot then escape the full implications of being bound by the law it has selected" and "has lost whatever opportunity it had to pick and chose the aspects of international law it finds appealing." Concurrence at 970 n. 9. But nowhere in this opinion have we declared that the Yugoslav Tribunal's standard "constitutes *the* controlling international law," *id.* (emphasis added), and as a result, we are also not "bound" by every aspect of that standard, the concurrence's protestations notwithstanding. In fact, we have merely declared that "[w]e find recent decisions by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda *especially helpful* for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATCA." *Supra* at 950. That is, we have done no more than declare that the decisions by these tribunals are *one* of the sources of international law, rather than *the* source of international law. Having done so, we then concluded that *with respect to practical assistance and encouragement,* these decisions accurately reflect "the current standard for aiding and abetting under international law as it pertains to the ATCA," and have left open the question

[9] First, a reasonable factfinder could conclude that Unocal's alleged conduct met the *actus reus* requirement of aiding and abetting as we define it today, i.e., practical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor.

Unocal's weak protestations notwithstanding, there is little doubt that the record contains substantial evidence creating a material question of fact as to whether forced labor was used in connection with the construction of the pipeline. Numerous witnesses, including a number of Plaintiffs, testified that they were forced to clear the right of way for the pipeline and to build helipads for the project before construction of the pipeline began. For instance, John Doe IX testified that he was forced to build a helipad near the pipeline site in 1994 that was then used by Unocal and Total officials who visited the pipeline during its planning stages. Other Plaintiffs and witnesses, including John Doe VII and John Roe X, described the construction of helipads at Eindayaza and Po Pah Pta, both of which were near the pipeline site, were used to ferry Total/Unocal executives and materials to the construction site, and were constructed using the forced labor of local villagers, including Plaintiffs. Other Plaintiffs, such as John Roes VIII and IX, as well as John Does I, VIII and IX, testified that they were forced to work on building roads leading to the pipeline construction area. Finally, yet other Plaintiffs, such as John Does V and IX, testified that they were required to serve as "pipeline porters"—workers who performed menial tasks such as hauling materials and cleaning the army camps for the soldiers guarding the pipeline construction. These serious allegations create triable questions of fact as to whether the Myanmar Military implemented a policy of forced labor in connection with its work on the pipeline.

The evidence also supports the conclusion that Unocal gave practical assistance to the Myanmar Military in subjecting Plaintiffs to forced labor.[29] The practical assistance took the form of hiring the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food. The practical assistance also took the form of using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure.

[12] This assistance, moreover, had a "substantial effect" on the perpetration of forced labor, which "most probably would not have occurred in the same way" without someone hiring the Myanmar Military to provide security, and without someone

whether this is also true *with respect to moral support*. This procedure is not particularly noteworthy, let alone improper. And the concurrence's repeated references to "the Yugoslav Tribunal's 'moral support' standard," concurrence at 969, 970, are at best irrelevant and at worst intended to suggest that we, albeit unwittingly, adopted a standard which we, in fact, did not adopt, unwittingly or otherwise.

29. The evidence further supports the conclusion that Unocal gave "encouragement" to the Myanmar Military in subjecting Plaintiffs to forced labor. The daily meetings with the Myanmar Military to show it where to provide security and build infrastructure, despite Unocal's knowledge that the Myanmar Military would probably use forced labor to provide these services, may have encouraged the Myanmar Military to actually use forced labor for the benefit of the Project. Similarly, the payments to the Myanmar Military for providing these services, despite Unocal's knowledge that the Myanmar Military had actually used forced labor to provide them, may have encouraged the Myanmar Military to continue to use forced labor in connection with the Project.

showing them where to do it. *Tadic* at ¶ 688. This conclusion is supported by the admission of Unocal Representative Robinson that "[o]ur assertion that[the Myanmar Military] has not *expanded and amplified its usual methods* around the pipeline *on our behalf* may not withstand much scrutiny," and by the admission of Unocal President Imle that "[i]f forced labor goes hand and glove with the military yes there will be *more forced labor.*" (Emphasis added.)

Second, a reasonable factfinder could also conclude that Unocal's conduct met the *mens rea* requirement of aiding and abetting as we define it today, namely, actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime. The District Court found that "[t]he evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefitted from the practice." *Doe/Roe II*, 110 F.Supp.2d at 1310. Moreover, Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject Plaintiffs to forced labor.

[10] Viewing the evidence in the light most favorable to Plaintiffs, we conclude that there are genuine issues of material fact whether Unocal's conduct met the *actus reus* and *mens rea* requirements for liability under the ATCA for aiding and abetting forced labor. Accordingly, we reverse the District Court's grant of Unocal's motion for summary judgment on Plaintiffs' forced labor claims under the ATCA.[30]

3. Murder, Rape, and Torture

a. Because Plaintiffs testified that the alleged acts of murder, rape, and torture occurred in furtherance of forced labor, state action is not required to give rise to liability under the ATCA.

Plaintiffs further allege that the Myanmar military murdered, raped or tortured

30. Unocal argues that "Unocal is not vicariously liable for the Myanmar military's torts because the pipeline was constructed by a separate corporation," i.e., the Gas Transportation Company, and because "[t]here is no basis to pierce the corporate veils of [the Unocal Pipeline Corp.] or [the Unocal Offshore Co.]" We initially observe that there is evidence allowing a reasonable factfinder to conclude that the Unocal Pipeline Corp. and the Unocal Offshore Co. were alter egos of Unocal, and that any actions by the Unocal Pipeline Corp. or the Unocal Offshore Co. are therefore attributable to Unocal. This evidence includes the Unocal Pipeline Corp.'s and the Unocal Offshore Co.'s undercapitalization and the direct involvement in and direction of the Unocal Pipeline Corp.'s and the Unocal Offshore Co.'s business by Unocal President Imle, Unocal CEO Beach, and other Unocal officers and employees. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386(KMW), 2002 WL 319887, *13 n. 14 (S.D.N.Y. Feb.28, 2002) (holding in the ATCA context that "[b]y involving themselves directly in [their subsidiary's] activities, and by directing these activities, [parent companies] made [their subsidiary] their agent with respect to the torts alleged in the complaint"). More importantly, we do not address—and neither did the District Court—whether a reasonable factfinder could hold Unocal "*vicariously liable* for the Myanmar military's torts." (Emphasis added.) *See supra* note 20. Rather, we find that there is sufficient evidence to hold Unocal liable based on *its own actions* and those of its alter ego subsidiaries which aided and abetted the Myanmar Military in perpetrating forced labor. These actions include the employment of the Myanmar Military to provide security and build infrastructure along the pipeline route, and the use of photos, surveys, and maps to show the Myanmar Military where to do this. Unocal took these actions with the knowledge that the Myanmar army was likely to use and did in fact use forced labor "on behalf of the Project."

a number of the plaintiffs. In section II.A.1., we adopted the Second Circuit's conclusion that "acts of rape, torture, and summary execution," like most crimes, "are proscribed by international law only when committed by state officials or under color of law" to the extent that they were committed *in isolation*. *Kadic*, 70 F.3d at 243–44. We, however, also adopted the Second Circuit's conclusion that these crimes "are actionable under the Alien Tort[Claims] Act, without regard to state action, to the extent that they were committed *in pursuit of genocide or war crimes*," *id.* at 244 (emphasis added), i.e., in pursuit of crimes, such as slavery, which never require state action for ATCA liability to attach. According to Plaintiffs' deposition testimony, all of the acts of murder, rape, and torture alleged by Plaintiffs occurred in furtherance of the forced labor program.[31] As discussed above in section II.A.2.a, forced labor is a modern variant of slavery and does therefore never require state action to give rise to liability under the ATCA. Thus, under *Kadic*, state action is also not required for the acts of murder, rape, and torture which allegedly occurred in furtherance of the forced labor program.[32]

b. Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military in subjecting Plaintiffs to murder and rape, but Unocal is not similarly liable for torture.

In section II.A.2.b, we adopted "knowing practical assistance [or] encouragement ... which has a substantial effect on the perpetration of the crime," from *Furundzija* at ¶¶ 235, 245, as a standard for aiding and abetting liability under the ATCA. The same reasons that convinced us earlier that Unocal may be liable under this standard for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor also convince us now that Unocal may likewise be liable under this standard for aiding and abetting the Myanmar Military in subjecting Plaintiffs to murder and rape. We conclude, however, that as a matter of law, Unocal is not similarly liable for torture in this case.

[11, 12] Initially we observe that the evidence in the record creates a genuine question of material fact as to whether Myanmar soldiers engaged in acts of murder and rape involving Plaintiffs. For instance, Jane Doe I testified that after her husband, John Doe I, attempted to escape the forced labor program, he was shot at

31. In addition, some of the acts of murder, rape, and torture alleged by non-party witnesses apparently did *not* occur in furtherance of the forced labor program. Because this is not a class action, the context in which tortious acts alleged by non-party witnesses took place is immaterial to this discussion.

32. Because state action is not required in the present case, the District Court erred when it required a showing that Unocal "controlled" the Myanmar Military's decision to commit the alleged acts or murder, rape, and torture to establish that Unocal proximately caused these acts. *See Doe/Roe II,* 110 F.Supp.2d at 1307. We require "control" to establish proximate causation by private third parties only in cases—under, e.g., 42 U.S.C. § 1983—where we otherwise require state action. *See, e.g., Arnold,* 637 F.2d at 1356–57. In other cases—including cases such as this one—where state action is *not* otherwise required, we require no more than "forseeability" to establish proximate causation. *See id.* at 1355. This requirement is easily met in the present case, where Unocal Vice President Lipman testified that even before Unocal invested in the Project, Unocal was aware that "the option of having the [Myanmar] [M]ilitary provide protection for the pipeline construction ... would[entail] that they might proceed in the manner that would be out of our control and not be in a manner that we would like to see them proceed," i.e., "going to excess." (Emphasis added.)

by soldiers, and in retaliation for his attempted escape, that she and her baby were thrown into a fire, resulting in injuries to her and the death of the child. Other witnesses described the summary execution of villagers who refused to participate in the forced labor program, or who grew too weak to work effectively. Several Plaintiffs testified that rapes occurred as part of the forced labor program. For instance, both Jane Does II and III testified that while conscripted to work on pipeline-related construction projects, they were raped at knife-point by Myanmar soldiers who were members of a battalion that was supervising the work. The record does not, however, contain sufficient evidence to establish a claim of torture (other than by means of rape) involving Plaintiffs. Although a number of witnesses described acts of extreme physical abuse that might give rise to a claim of torture, the allegations all involved victims other than Plaintiffs. As this is not a class action, such allegations cannot serve to establish the Plaintiffs' claims of torture here.

Next, a reasonable factfinder could conclude that Unocal's alleged conduct met the *actus reus* requirement of aiding and abetting as we define it today, i.e., practical assistance or encouragement which has a substantial effect on the perpetration of the crimes of murder and rape. As just discussed, the evidence supports the conclusion that the Myanmar Military subjected Plaintiffs to acts of murder and rape while providing security and building infrastructure for the Project. The evidence also supports the conclusion that Unocal gave "practical assistance" to the Myanmar Military in subjecting Plaintiffs to these acts of murder and rape. The practical assistance took the form of hiring the Myanmar Military to provide security and build infrastructure along the pipeline route in exchange for money or food. The practical assistance also took the form of using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide these services. This assistance, moreover, had a "substantial effect" on the perpetration of murder and rape, which "most probably would not have occurred in the same way" without someone hiring the Myanmar Military to provide security, and without someone showing them where to do it. *Tadic* at ¶ 688. This conclusion is supported by the admission of Unocal Representative Robinson that "[o]ur assertions that [the Myanmar Military] has not *expanded and amplified its usual methods* around the pipeline *on our behalf* may not withstand much scrutiny." (Emphasis added.) This conclusion is further supported by Unocal Consultant Haseman's comment to Unocal that "[t]he most common [human rights violations] are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline . . .; and . . . *execution by the army of those opposing such actions.*" (Emphasis added.) [33]

Finally, a reasonable factfinder could also conclude that Unocal's conduct met

33. The evidence also supports the conclusion that Unocal gave "encouragement" to the Myanmar Military in subjecting Plaintiffs to murder, rape, and torture. The daily meetings with the Myanmar Military to show it where to provide security and build infrastructure, despite Unocal's knowledge that the Myanmar Military would probably use murder, rape, and torture in the process, may have encouraged the Myanmar Military to actually use murder, rape, and torture. Similarly, the payments to the Myanmar Military for providing these services, despite Unocal's knowledge that the Myanmar Military had actually used murder, rape, and torture in the process, may have encouraged the Myanmar Military to continue to use murder, rape, and torture.

the *mens rea* requirement of aiding and abetting as we define it today, i.e., actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime. The District Court found that "Plaintiffs present[ed] evidence demonstrating ... that the military, while forcing villagers to work ..., committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing, and would continue to commit these tortious acts." *Doe/Roe II,* 110 F.Supp.2d at 1306. Moreover, Unocal knew or should reasonably have known that its conduct—including the payments and the instructions where to provide security and build infrastructure—would assist or encourage the Myanmar Military to subject Plaintiffs to these acts of violence. Under *Furundzija,* it is not even necessary that the aider and abettor knows the precise crime that the principal intends to commit. *See id.* at ¶ 246. Rather, if the accused "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." *Id.* Thus, because Unocal knew that acts of violence would probably be committed, it became liable as an aider and abettor when such acts of violence—specifically, murder and rape—were in fact committed.

Viewing the evidence in the light most favorable to Plaintiffs, we conclude that there are genuine issues of material fact whether Unocal's conduct met the *actus reus* and *mens rea* requirements for liability under the ATCA for aiding and abetting murder and rape. Accordingly, we reverse the District Court's grant of Unocal's motion for summary judgment on Plaintiffs' murder and rape claims under the ATCA. By contrast, the record does not contain sufficient evidence to support Plaintiffs' claims of torture. We therefore affirm the District Court's grant of Unocal's motion for summary judgment on Plaintiffs' torture claims.

B. The Myanmar Military and Myanmar Oil are entitled to immunity under the Foreign Sovereign Immunities Act.

[13] Under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.,* a district court has jurisdiction over a civil action against a foreign state such as Myanmar—including its political subdivisions, agencies, or instrumentalities, such as the Myanmar Military or Myanmar Oil—only if one of several exceptions to foreign sovereign immunity applies. *See* 28 U.S.C. §§ 1330(a), 1603(a), & 1605–1607. Specifically,

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... (2) in which the action is based[1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States ....

28 U.S.C. § 1605(a). The District Court rejected the *Doe*–Plaintiffs' argument that the second and third of the above exceptions gave the District Court jurisdiction over their claims against the Myanmar Military and Myanmar Oil. The existence of subject matter jurisdiction under the Foreign Sovereign Immunities Act is a question of law which this court reviews de novo. *See Holden v. Canadian Consulate,* 92 F.3d 918, 920 (9th Cir.1996).

The *Doe*–Plaintiffs argue that their claims against the Myanmar Military and Myanmar Oil fall within the second exception to foreign sovereign immunity in § 1605(a)(2) because they are based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." We have held that under this exception, a foreign state is not immune from the jurisdiction of the courts of the United States only if an act performed in the United States is an *element* of the plaintiff's claim against the foreign state. *See Holden*, 92 F.3d at 920. In the present case, the *Doe*–Plaintiffs' claims against the Myanmar Military and Myanmar Oil are based exclusively upon acts allegedly performed by these foreign state defendants in Myanmar (forced labor, murder, rape, torture). The *Doe*–Plaintiffs do not allege that the Myanmar Military or Myanmar Oil performed any acts in the United States. Any acts allegedly performed by *Unocal* in the United States (investments decisions, money transfers) are not elements of the *Doe*–Plaintiffs' claims against *the Myanmar Military and Myanmar Oil.* The *Doe*–Plaintiffs' claims against the Myanmar Military and Myanmar Oil therefore do not fall within the second exception to foreign sovereign immunity in § 1605(a)(2).

The *Doe*–Plaintiffs also argue that their claims against the Myanmar Military and Myanmar Oil fall within the third exception to foreign sovereign immunity in § 1605(a)(2) because they are based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The Supreme Court has held that "a state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Saudi Arabia v. Nelson*, 507 U.S. 349, 360, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993) (internal quotation marks omitted). The District Court noted that "[the Myanmar Military] and [Myanmar Oil] engaged in commerce in the same manner as a private citizen might do when they allegedly entered into the . . . gas pipeline project." *Doe I*, 963 F.Supp. at 887. The District Court further noted that "[i]n addition, [the Myanmar Military and Myanmar Oil] engaged in the acts upon which the claims are based 'in connection with' that commercial activity." *Id.* at 887–88. The District Court concluded, however, that "[b]ecause[the *Doe* Plaintiffs] essentially allege that [the Myanmar Military] and [Myanmar Oil] abused their police power" when they engaged in these additional acts upon which the claims are based, these acts were exercises of powers peculiar to sovereigns and, therefore, "do not come within the commercial activity exception to the FSIA." *Id.* at 888.

The problem with this reasoning is that neither *Nelson*, nor other case law, nor the legislative history of § 1605(a)(2) suggest that a foreign state's conduct "*in connection with* a commercial activity" must itself be a commercial activity to fall within the third exception to foreign sovereign immunity. In other words, there is no support for the proposition that the foreign state's conduct "*in connection with* a commercial activity" must be an "exercise[ ][of] only those powers that can also be exercised by private citizens" to fall within the third exception in § 1605(a)(2). *Nelson*, 507 U.S. at 360, 113 S.Ct. 1471. Rather, as the Supreme Court observed in *Nelson*, "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed 'in connection with' such activity." *Id.* at 358, 113 S.Ct. 1471.

The District Court looked for support for its contrary conclusion in a different passage in *Nelson*, where the Supreme

Court held that even if a foreign government often used detention and torture to resolve commercial disputes, this would "not alter the fact that the powers allegedly abused where those of police and penal officers." *Id.* at 363, 113 S.Ct. 1471. In that passage, however, *Nelson* held *only* that the use of detention and torture to resolve commercial disputes would not qualify as a *commercial activity* and, therefore, fall within the *first* exception to foreign sovereign immunity, which is not at issue here. *See* 507 U.S. at 356, 113 S.Ct. 1471. But *Nelson* did *not* hold that such use of detention and torture also would not qualify as an *act performed in connection with a commercial activity* and, therefore, fall within the *third* exception to foreign sovereign immunity, which is at issue here.[34]

[14] The District Court's misreading of *Nelson* was, nevertheless, harmless, because the Court correctly concluded that the alleged acts of murder, torture, rape, and forced labor by the Myanmar Military and Myanmar Oil did not have the direct effect in the United States required by the third exception to foreign sovereign immunity in § 1605(a)(2). In *Siderman*, we approved of the definition of a "direct effect" as one that "occurs at the locus of the injury directly resulting from the sovereign defendant's wrongful acts." *Siderman*, 965 F.2d at 710 n. 11 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 453 Reporter's Note 5 (1987)). The injuries directly resulting from the Myanmar Military and Myanmar Oil's alleged wrongful acts were the murder, rape, torture, and forced labor of the *Doe*–Plaintiffs. The locus of these injuries was Myanmar. Therefore, any effects—such as Unocal's profits—occurring in the United States were not "direct effects" of these acts within the meaning of § 1605(a)(2). Accordingly, the District Court did not err when it concluded that the *Doe*–Plaintiffs' claims against the Myanmar Military and Myanmar Oil did not fall within the third exception to foreign sovereign immunity in § 1605(a)(2).

C. Plaintiffs' claims against Unocal are not barred by the Act of State Doctrine.

[15–17] Unocal also argues that Plaintiffs' claims against it are barred by the "act of state" doctrine. The act of state doctrine is a non-jurisdictional, prudential doctrine based on the notion that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897). "Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). As long as this requirement is met, the act of state doctrine can be invoked by private parties such as Unocal. *See, e.g., Credit Suisse v. United States Dist. Court*, 130 F.3d 1342, 1348 (9th Cir.1997). In the present case, an act of state issue arises because the court must decide that the conduct by the Myanmar Military violated international law in order to hold Unocal liable for aiding and abetting that conduct. We review the applicability of the act of state doctrine *de novo*. *See Liu v. Republic of China*, 892 F.2d 1419, 1424 (9th Cir.1989).

The Second Circuit has said that "it would be a rare case in which the act of

34. For the same reason, and contrary to the District Court's conclusion, *Nelson* also does not "undermine" our holding in *Siderman*, 965 F.2d 699, another case involving the third—rather than the first—exception in § 1605(a)(2).

state doctrine precluded suit under [the ATCA]." *Kadic,* 70 F.3d at 250. We find that the present case is not that rare case, and that the act of state doctrine does not preclude suit under the ATCA here.

In *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Supreme Court developed a three-factor balancing test to determine whether the act of state doctrine should apply:

> "[1][T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.... [2][T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. [3] The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence ...."

Id. at 428, 84 S.Ct. 923. We have added a fourth factor to this test: [4] "[W]e must [also] consider ... whether the foreign state was acting in the public interest." *Liu,* 892 F.2d at 1432. With the exception of the third factor, all of these factors weigh against application of the act of state doctrine in this case.

Regarding the first factor—international consensus—we have recognized that murder, torture, and slavery are *jus cogens* violations, i.e., violations of norms that are binding on nations even if they do not agree to them. *See Matta–Ballesteros,* 71 F.3d at 764 n. 5; *Siderman,* 965 F.2d at 714–15. As discussed *supra* in section II. A.1., rape can be a form of torture and thus also a *jus cogens* violation. Similarly, as discussed *supra* in section II.A.2.a, forced labor is a modern form of slavery and thus likewise a *jus cogens* violation. Accordingly, all torts alleged in the present case are *jus cogens* violations. Because *jus cogens* violations are, by definition, internationally denounced, there is a high degree of international consensus against them, which severely undermines Unocal's argument that the alleged acts by the Myanmar Military and Myanmar Oil should be treated as acts of state.

Regarding the second factor—implications for our foreign relations—the coordinate branches of our government have already denounced Myanmar's human rights abuses and imposed sanctions. It is also worth noting that in 1997, the State Department advised the District Court that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." *Roe I,* 176 F.R.D. at 362. This statement of interest at the dismissal stage is not conclusive at this later stage, especially in light of the fact that "[t]he Executive Branch ... cannot by simple stipulation change a political question into a cognizable claim." *First Nat'l City Bank v. Banco Nacional de Cuba,* 406 U.S. 759, 788–89, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972) (Brennan, J., dissenting). But the statement is also not irrelevant. *See Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co.,* 594 F.Supp. 1553, 1563 (S.D.N.Y.1984) (stating that courts "may, as a matter of discretion, accept the views of the State Department"). We agree with the District Court's evaluation that "[g]iven the circumstances of the instant case, and particularly the Statement of Interest of the United States, it is hard to imagine how judicial consideration of the matter will so substantially exacerbate relations with [the Myanmar Military] as to cause hostile confrontations." *Roe I,* 176 F.R.D. at 354 n. 29 (internal quotation marks omitted).

Regarding the third factor—continued existence of the accused government—the

Myanmar Military is still the government of Myanmar, although it changed its full name from State Law and Order Restoration Council to State Peace and Development Council following the events at issue here. That a condemnation of the alleged acts may offend the current government of Myanmar is the only factor that weighs in favor of applying the act of state doctrine.

[18] Finally, regarding the fourth factor that we have imposed—public interest—it would be difficult to contend that the Myanmar Military and Myanmar Oil's alleged violations of international human rights were "in the public interest." Indeed, the District Court found at the summary judgment stage that "there is an issue of fact as to whether the forced labor was used to benefit the Project as opposed to the public's welfare." *Doe/Roe II,* 110 F.Supp.2d at 1308. This genuine issue of material fact precludes summary judgment in favor of Unocal on this basis.

Because the four factor balancing test weighs against applying the act of state doctrine, we find that Plaintiffs' claims are not barred by this doctrine.

D. The District Court lacked extraterritorial subject matter jurisdiction over the Doe–Plaintiffs' RICO claim against Unocal.

The *Doe*–Plaintiffs allege that Unocal's conduct violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* RICO makes it unlawful, *inter alia,* "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," or to conspire in such conduct. 18 U.S.C. § 1962(c),(d). "Racketeering activity" is partially defined as any act which is indictable under any one of a number of listed provisions of Title 18 of the United States Code. *See* 18 U.S.C. § 1961(1)(B). The *Doe*–Plaintiffs allege that Unocal engaged and conspired in a "pattern of extortion" that is indictable under the Hobbs Act, 18 U.S.C. § 1951, one of the provisions enumerated in RICO's definition of "racketeering activity." The Hobbs Act provides in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion[,] or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section[,] shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a).

[19] The District Court granted Unocal's motion for summary judgment on the *Doe*–Plaintiffs' RICO claim for lack of subject matter jurisdiction. We review the existence of subject matter jurisdiction under RICO *de novo. See United States v. Juvenile Male,* 118 F.3d 1344, 1346 (9th Cir.1997).

The *Doe*–Plaintiffs base their underlying Hobbs Act claim on the alleged "extortion" of their labor. The Hobbs Act defines "extortion" as the "obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). We have observed that "[t]he concept of property under the Hobbs Act has not been limited to physical or tangible 'things.' " *United States v. Zemek,* 634 F.2d 1159, 1174 (9th Cir.1980). Thus we have recognized the "right ... to solicit business free from wrongful coercion," *id.,* and the "right to make personal and business decisions

about the purchase of life insurance on [one's] own life free of threats," *United States v. Hoelker,* 765 F.2d 1422, 1425 (9th Cir.1985), as property rights that are protected by the Hobbs Act. More generally, the Second Circuit has held that "[t]he concept of property under the Hobbs Act ... includes, in a broad sense, any valuable right considered as a source or element of wealth." *United States v. Tropiano,* 418 F.2d 1069, 1075 (2d Cir.1969). The right to make personal and business decisions about one's own labor also fits this definition of "property." Forced labor allegations can, therefore, form the basis of a Hobbs Act claim, and this claim can, in turn, form the basis of a RICO claim.

The District Court nevertheless correctly granted summary judgment in favor of Unocal on the *Doe*–Plaintiffs' RICO claim for lack of extraterritorial subject matter jurisdiction. We agree with the Second Circuit that for RICO to apply extraterritorially, the claim must meet either the "conduct" or the "effect" test that courts have developed to determine jurisdiction in securities fraud cases. *See North South Fin. Corp. v. Al–Turki,* 100 F.3d 1046, 1051 (2d Cir.1996); *see also Butte Mining PLC v. Smith,* 76 F.3d 287, 291 (9th Cir. 1996) (holding with respect to extraterritorial application of RICO that "[o]nce the securities fraud claim was dismissed [for lack of extraterritorial subject matter jurisdiction under the "conduct" or the "effect" test,] the wire and mail fraud and RICO claims that related to this fraud had to be dismissed as well"). The *Doe*–Plaintiffs do not challenge that they must meet one of these two test to succeed on their RICO claim. Instead, they challenge the District Court's conclusion that they cannot meet either test.

[20] Under the "conduct" test, a district court has jurisdiction over securities fraud suits by foreigners who have lost money through sales abroad "[o]nly where conduct 'within the United States *directly caused'* the loss." *Psimenos v. E.F. Hutton & Co.,* 722 F.2d 1041, 1046 (2d Cir. 1983) (emphasis added) (quoting *Bersch v. Drexel Firestone, Inc.,* 519 F.2d 974, 993 (2d Cir.1975)). "Mere preparatory activities, and conduct *far removed* from the consummation of the fraud, will not suffice to establish jurisdiction." *Id.* (emphasis added).

[21] Under the "effects" test, "[t]he anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States." *Consol. Gold Fields PLC v. Minorco, S.A.,* 871 F.2d 252, 261–62 (2d Cir.1989). This test is met where the domestic effect is "a *direct* and foreseeable *result* of the conduct outside of the United States." *Id.* at 262 (emphasis added). By contrast, "courts have been reluctant to apply our laws to transactions that have only *remote* and indirect effects in the United States." *Id.* (emphasis added).

[22] The "conduct" and the "effect" test appear to be two sides of one coin. The "conduct" test establishes jurisdiction for *domestic conduct that directly causes foreign loss or injury.* Conversely, the "effects" test establishes jurisdiction for *foreign conduct that directly causes domestic loss or injury.* The conduct involved in this case does not meet either of these two tests.

[23] The *Doe*–Plaintiffs allege that in furtherance of an unlawful conspiracy, Unocal transferred significant financial and technical support for Project activity from the United States to Myanmar. Under the "conduct" test, the question is whether this transfer from the United States "directly caused" loss or injury in Myanmar. We conclude that it did not. In *Butte Mining,* the plaintiffs alleged that

the defendants used domestic mail and wire "to further" a foreign securities fraud. 76 F.3d at 291. In that case, we found "no reason to extend the jurisdictional scope of RICO to make criminal the use of the mail and wire in the United States as part of an alleged fraud outside the United States." *Id.* Similarly, in the present case, we find no reason to extend the jurisdictional scope of RICO to create civil liability for the transfer of monies and technical support from the United States as part of an alleged "pattern of extortion" outside the United States. We therefore hold that the *Doe*–Plaintiffs' allegations do not satisfy the "conduct" test.

Nor have the *Doe*–Plaintiffs pointed to any evidence that Unocal's alleged conduct in Myanmar "directly caused" loss or injury in the United States and thus satisfied the "effects" test. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, ... the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment," but instead "must set forth ... '*specific facts* showing that there is a genuine issue for trial.' " *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987) (quoting Fed.R.Civ.P. 56(e)). The *Doe*–Plaintiffs assert in their Opening Brief that Unocal's actions in Myanmar gave Unocal an "unfair advantage over competitors" in the United States. The *Doe*–Plaintiffs, however, do not point to any "specific facts" in the record to support these conclusory allegations, as they are required to do by Fed.R.Civ.P. 56(e). These "mere allegations" are not enough to survive Unocal's motion for summary judgment on the *Doe*–Plaintiffs' RICO claim. We therefore hold that the *Doe*–Plaintiffs' allegations also do not meet the "effects" test.

III.

CONCLUSION

For the foregoing reasons, we REVERSE the District Court's grant of summary judgment in favor of Unocal on Plaintiffs' ATCA claims for forced labor, murder, and rape.[35] We however AFFIRM the District Court's grant of summary judgment in favor of Unocal on Plaintiffs' ATCA claims for torture. We further AFFIRM the District Court's dismissal of all of the *Doe*–Plaintiffs' claims against the Myanmar Military and Myan-

35. Even if we were to affirm the District Court's grant of summary judgment on Plaintiffs' ATCA claims for forced labor, murder, and rape, we would still reverse the District Court's denial of Plaintiffs' Fed.R.Civ.P. 54(d)(1) Motion to Retax. The District Court concluded that Plaintiffs' motion was, in actuality, a time-barred Fed.R.Civ.P. 59(e) Motion to Alter or Amend Judgment. The Supreme Court has observed, however, that Rule 59(e) covers only motions to reconsider "matters properly encompassed in a decision on the merits," and does not cover motions that raise "legal issues collateral to the main cause of action." *White v. New Hampshire Dep't of Employment Sec.,* 455 U.S. 445, 451, 102 S.Ct. 1162, 71 L.Ed.2d 325 (1982). *See also Whittaker v. Whittaker Corp.,* 639 F.2d 516, 520–21 (9th Cir.1981). In their motion, Plaintiffs asked the District Court "not [to] require the plaintiffs to pay any of this cost bill" because of their indigency and the chilling effect of an award of costs. Plaintiffs' indigency and the chilling effect of an award of costs are not "matters properly encompassed in a decision on the merits." Rather, they are "legal issues collateral to the main cause of action." Plaintiffs' motion, therefore, did not have to be brought as a Motion to Alter or Amend Judgment within ten days of the judgment on the merits under Rule 59(e). Instead, it could be—and in fact was—brought as a Motion to Retax within five days of the taxing of the costs under Rule 54(d)(1). Plaintiffs' motion was thus timely.

preponderance standard, based on three subsequent passages from its opinion.

First was the statement that "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." App. to Pet. for Cert. 95. In context, however, this statement is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions-for example, those relating to whether defense counsel's performance was deficient. Although it is possible to read it as referring also to the question whether the deficiency was prejudicial, thereby supplanting *Strickland*, such a reading would needlessly create internal inconsistency in the opinion.

Second was the statement that "it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified." App. to Pet. for Cert. 96. Although the Court of Appeals evidently thought that this passage intimated a preponderance standard, it is difficult to see why. The quoted language does not imply any particular standard of probability.

Last was the statement that respondent had "failed to carry his burden of proving that the outcome of the trial [655] would probably have been different but for those errors." *Id.*, at 98. We have held that such use of the unadorned word "probably" is permissible shorthand when the complete *Strickland* standard is elsewhere recited. See *Woodford v. Visciotti*, 537 U.S. 19, 23–24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) *(per curiam)*.

As we explained in *Visciotti*, § 2254(d) requires that "state-court decisions be given the benefit of the doubt." *Id.*, at 24, 123 S.Ct. 357. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Ibid.* The Sixth Circuit ignored those prescriptions.

* * *

The judgment of the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, Justice SOUTER, Justice GINSBURG, and Justice BREYER would deny the petition for a writ of certiorari.

542 U.S. 692, 159 L.Ed.2d 718

Jose Francisco SOSA, Petitioner,

v.

Humberto ALVAREZ–MACHAIN, et al.

United States, Petitioner,

v.

Humberto Alvarez–Machain, et al.

Nos. 03–339, 03–485.

Argued March 30, 2004.

Decided June 29, 2004.

Background: Plaintiff, a Mexican national acquitted of murder after being abducted and transported to the United States to face prosecution, brought action under Alien Tort Statute (ATS) and Federal Tort Claims Act (FTCA) against United States, Drug Enforcement Agency (DEA) agents, former Mexican policeman, and Mexican civilians, alleging that his abduction violated his civil rights. The United States District Court for the Central District of California partially granted defendants' motion to dismiss, and the Court of Appeals, 107

F.3d 696, reversed in part and remanded. On remand, the District Court, Stephen V. Wilson, J., entered summary judgment against former policeman, substituted United States for DEA agents, and dismissed abductee's FTCA claims. Abductee and policeman appealed. The Ninth Circuit Court of Appeals, McKeown, Circuit Judge, 331 F.3d 604, affirmed in part, reversed in part and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Souter, held that:

(1) whatever liability the United States allegedly had for alien's arrest by Mexican nationals, allegedly at instigation of the DEA, so that he could be transported across the border and lawfully arrested by federal officers, rested on events that occurred in Mexico, so as to fall within the "foreign country" exception to waiver of government's immunity under the FTCA;

(2) "foreign country" exception to waiver of government's immunity bars all claims against government based on any injury suffered in foreign country, regardless of where the tortious act or omission giving rise to that injury occurred; and

(3) single illegal detention, of less than one day, of Mexican national, custody of whom was then transferred to lawful authorities in the United States for prompt arraignment, violated no norm of customary international law so well defined as to support creation of cause of action that district court could hear under the ATS; abrogating *Sami v. United States,* 617 F.2d 755 (C.A.D.C. 1979); *Cominotto v. United States,* 802 F.2d 1127 (C.A.9 1986); *Couzado v. United States,* 105 F.3d 1389 (C.A.11 1997); *Martinez v. Lamagno,* 1994 WL 159771, judgt. order reported at 23 F.3d 402 (C.A.4 1994); *Leaf v. United States,* 588 F.2d 733 (C.A.9 1978); and *Donahue v. United States Dept. of Justice,* 751 F.Supp. 45 (S.D.N.Y.1990).

Reversed.

Justice Scalia concurred in part and concurred in judgment and filed opinion, in which Chief Justice Rehnquist and Justice Thomas joined.

Justice Ginsburg concurred in part and concurred in judgment and filed opinion, in which Justice Breyer joined.

Justice Breyer concurred in part and concurred in judgment and filed opinion.

1. United States ⇨78(1, 3)

Federal Tort Claims Act (FTCA) was designed primarily to remove sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render government liable in tort as private individual would be under like circumstances. 28 U.S.C.A. §§ 1346, 2671 et seq.

2. United States ⇨78(14)

Whatever liability the United States allegedly had for alien's arrest in Mexico by Mexican nationals, allegedly at instigation of officials in the Drug Enforcement Agency (DEA), so that he could be transported across the border and lawfully arrested by federal officers, rested on events that occurred in Mexico, so as to fall within the "foreign country" exception to waiver of government's sovereign immunity under the Federal Tort Claims Act (FTCA). 28 U.S.C.A. § 2680(k).

3. United States ⇨78(14)

"Foreign country" exception to waiver of government's sovereign immunity under the Federal Tort Claims Act (FTCA) bars all claims against federal government based on any injury suffered in foreign country, regardless of where the tortious act or omission giving rise to that injury

occurred; abrogating *Sami v. United States,* 617 F.2d 755 (C.A.D.C.1979); *Cominotto v. United States,* 802 F.2d 1127 (C.A.9 1986); *Couzado v. United States,* 105 F.3d 1389 (C.A.11 1997); *Martinez v. Lamagno,* 1994 WL 159771, judgt. order reported at 23 F.3d 402 (C.A.4 1994); *Leaf v. United States,* 588 F.2d 733 (C.A.9 1978); and *Donahue v. United States Dept. of Justice,* 751 F.Supp. 45 (S.D.N.Y.1990). 28 U.S.C.A. § 2680(k).

4. United States ⚿78(14)

"Foreign country" exception to waiver of government's sovereign immunity under the Federal Tort Claims Act (FTCA) codifies Congress' unwillingness to subject the United States to liabilities depending on laws of foreign power. 28 U.S.C.A. § 2680(k).

5. Action ⚿3

Federal Courts ⚿192.10

Alien Tort Statute (ATS), pursuant to which the district courts "have cognizance...of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," is jurisdictional statute, in sense that it only addresses power of courts to entertain certain claims and does not create statutory cause of action for aliens. 28 U.S.C.A. § 1350.

6. Federal Courts ⚿192.10

Though the Alien Tort Statute (ATS), pursuant to which the district courts "have cognizance...of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States," is jurisdictional statute, which does not create statutory cause of action for aliens, it was not intended to lie fallow until specific causes of action were authorized by further legislation, but was meant to have practical effect from moment that it became law, by providing basis for district courts to exercise jurisdiction over a modest number of causes of action recognized under the law of nations, such as for offenses against ambassadors, violations of safe conduct, and possibly for piracy. 28 U.S.C.A. § 1350.

7. Federal Courts ⚿192.10

District courts should exercise caution in deciding to hear claims allegedly based on present-day law of nations under the Alien Tort Statute (ATS), and should require any claim based on present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms, offenses against ambassadors, violations of safe conduct and piracy, that Congress had in mind when it enacted the ATS. 28 U.S.C.A. § 1350.

8. Action ⚿3

Constitutional Law ⚿70.1(11)

Decision to create private right of action is one better left to legislative judgment in great majority of cases.

9. Federal Courts ⚿192.10

Courts have no Congressional mandate to seek out and define new and debatable violations of law of nations, in deciding whether to exercise jurisdiction over suit under the Alien Tort Statute (ATS). 28 U.S.C.A. § 1350.

10. Federal Courts ⚿192.10

Determination as to whether alleged norm of international law is sufficiently definite that violation thereof will support cause of action which district may hear under the Alien Tort Statute (ATS) should, and inevitably must, involve element of judgment about practical consequences of making that cause available to litigants in federal court. 28 U.S.C.A. § 1350.

11. Federal Courts ⚿192.10
International Law ⚿10.11

When deciding whether alleged norm of international law is sufficiently definite that violation thereof will support cause of action that district may hear under the Alien Tort Statute (ATS), district court, in absence of any treaty, or of any controlling executive or legislative act or judicial decision, must resort to the customs and usages of civilized nations and, as evidence thereof, to works of jurists and commentators, not for their speculations as to what the law ought to be, but for trustworthy evidence of what the law really is. 28 U.S.C.A. § 1350.

12. Aliens ⚿53.9
Federal Courts ⚿192.10

Single illegal detention, of less than one day, of Mexican national, custody of whom was then transferred to lawful authorities in the United States for prompt arraignment, violated no norm of customary international law so well defined as to support creation of cause of action that district court could hear under the Alien Tort Statute (ATS). 28 U.S.C.A. § 1350.

Syllabus *

The Drug Enforcement Administration (DEA) approved using petitioner Sosa and other Mexican nationals to abduct respondent Alvarez–Machain (Alvarez), also a Mexican national, from Mexico to stand trial in the United States for a DEA agent's torture and murder. As relevant here, after his acquittal, Alvarez sued the United States for false arrest under the Federal Tort Claims Act (FTCA), which waives sovereign immunity in suits "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any [Government] employee while acting within the scope of his office or employment," 28 U.S.C. § 1346(b)(1); and sued Sosa for violating the law of nations under the Alien Tort Statute (ATS), a 1789 law giving district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations . . .," § 1350. The District Court dismissed the FTCA claim, but awarded Alvarez summary judgment and damages on the ATS claim. The Ninth Circuit affirmed the ATS judgment, but reversed the FTCA claim's dismissal.

Held:

1. The FTCA's exception to waiver of sovereign immunity for claims "arising in a foreign country," 28 U.S.C. § 2680(k), bars claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. Pp. 2747–2754.

(a) The exception on its face seems plainly applicable to the facts of this action. Alvarez's arrest was said to be "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico. Nonetheless, the Ninth Circuit allowed the action to proceed under what is known as the "headquarters doctrine," concluding that, because Alvarez's abduction was the direct result of wrongful planning and direction by DEA agents in California, his claim did not "aris[e] in" a foreign country. Because it will virtually always be possible to assert negligent activity occurring in the United States, such analysis must be viewed with skepticism. Two considerations confirm this Court's skepticism and lead it to reject the headquarters doctrine. Pp. 2747–2749.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

693(b) The first consideration applies to cases like this one, where harm was arguably caused both by action in the foreign country and planning in the United States. Proximate cause is necessary to connect the domestic breach of duty with the action in the foreign country, for the headquarters' behavior must be sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to that behavior. A proximate cause connection is not itself sufficient to bar the foreign country exception's application, since a given proximate cause may not be the harm's exclusive proximate cause. Here, for example, assuming the DEA officials' direction was a proximate cause of the abduction, so were the actions of Sosa and others in Mexico. Thus, at most, recognition of additional domestic causation leaves an open question whether the exception applies to Alvarez's claim. P. 2750.

(c) The second consideration is rooted in the fact that the harm occurred on foreign soil. There is good reason to think that Congress understood a claim "arising in" a foreign country to be a claim for injury or harm occurring in that country. This was the common usage of "arising under" in contemporary state borrowing statutes used to determine which State's limitations statute applied in cases with transjurisdictional facts. And such language was interpreted in tort cases in just the same way that the Court reads the FTCA today. Moreover, there is specific reason to believe that using "arising in" to refer to place of harm was central to the foreign country exception's object. When the FTCA was passed, courts generally applied the law of the place where the injury occurred in tort cases, which would have been foreign law for a plaintiff injured in a foreign country. However, application of foreign substantive law was what Congress intended to avoid by the foreign country exception. Applying the headquarters doctrine would thus have thwarted the exception's object by recasting foreign injury claims as claims not arising in a foreign country because of some domestic planning or negligence. Nor has the headquarters doctrine outgrown its tension with the exception. The traditional approach to choice of substantive tort law has lost favor, but many States still use that analysis. And, in at least some cases the Ninth Circuit's approach would treat as arising at headquarters, even the later methodologies of choice point to the application of foreign law. There is also no merit to an argument that the headquarters doctrine should be permitted when a State's choice-of-law approach would not apply the foreign law of the place of injury. Congress did not write the exception to apply when foreign law would be applied. Rather, the exception was written at a time when "arising in" meant where the harm occurred; and the 694odds are that Congress meant simply that when it used the phrase. Pp. 2750–2754.

2. Alvarez is not entitled to recover damages from Sosa under the ATS. Pp. 2754–2769.

(a) The limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 is not authority to recognize the ATS right of action Alvarez asserts here. Contrary to Alvarez's claim, the ATS is a jurisdictional statute creating no new causes of action. This does not mean, as Sosa contends, that the ATS was stillborn because any claim for relief required a further statute expressly authorizing adoption of causes of action. Rather, the reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law,

on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy. Sosa's objections to this view are unpersuasive. Pp. 2754–2761.

(b) While it is correct to assume that the First Congress understood that district courts would recognize private causes of action for certain torts in violation of the law of nations and that no development of law in the last two centuries has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering such a new cause of action. In deriving a standard for assessing Alvarez's particular claim, it suffices to look to the historical antecedents, which persuade this Court that federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when § 1350 was enacted. Pp. 2761–2769.

(i) Several reasons argue for great caution in adapting the law of nations to private rights. First, the prevailing conception of the common law has changed since 1790. When § 1350 was enacted, the accepted conception was that the common law was found or discovered, but now it is understood, in most cases where a court is asked to state or formulate a common law principle in a new context, as made or created. Hence, a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision. Second, along with, and in part driven by, this conceptual development has come an equally significant rethinking of the federal courts' role in making common law. In *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, this Court denied the existence of any federal "general" common law, which largely withdrew to havens of specialty, with the general practice being to look 695 for legislative guidance before exercising innovative authority over substantive law. Third, a decision to create a private right of action is better left to legislative judgment in most cases. *E.g., Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456. Fourth, the potential implications for the foreign relations of the United States of recognizing private causes of action for violating international law should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. Fifth, this Court has no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. Pp. 2761–2765.

(ii) The limit on judicial recognition adopted here is fatal to Alvarez's claim. Alvarez contends that prohibition of arbitrary arrest has attained the status of binding customary international law and that his arrest was arbitrary because no applicable law authorized it. He thus invokes a general prohibition of arbitrary detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government. However, he cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his rule as the predicate for a federal lawsuit, for its implications

would be breathtaking. It would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, that now provide damages for such violations. And it would create a federal action for arrests by state officers who simply exceed their authority under state law. Alvarez's failure to marshal support for his rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States, which refers to prolonged arbitrary detention, not relatively brief detention in excess of positive authority. Whatever may be said for his broad principle, it expresses an aspiration exceeding any binding customary rule with the specificity this Court requires. Pp. 2765–2769.

331 F.3d 604, reversed.

SOUTER, J., delivered the opinion of the Court, Parts I and III of which were unanimous, Part II of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., and Part IV of which was joined by STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post,* p. 2769. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post,* p. 2776. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2782.

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For U.S. Supreme Court briefs, see:

2004 WL 162761 (Pet.Brief)

2004 WL 182582 (Pet.Brief)

2004 WL 419421 (Resp.Brief)

2004 WL 425376 (Resp.Brief)

2004 WL 597235 (Reply.Brief)

2004 WL 577655 (Reply.Brief)

Justice SOUTER delivered the opinion of the Court.

[697]The two issues are whether respondent Alvarez–Machain's allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial in the United States supports a claim against the Government under the Federal Tort Claims Act (FTCA or Act), 28 U.S.C. §§ 1346(b)(1), 2671–2680, and whether he may recover under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. We hold that he is not entitled to a remedy under either statute.

I

We have considered the underlying facts before, *United States v. Alvarez–Machain*, 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena–Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2–day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez–Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture. *Id.*, at 657, 112 S.Ct. 2188.

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena–Salazar, and the United States District Court for the Central District of California issued a [698]warrant for his arrest. 331 F.3d 604, 609 (C.A.9 2003) (en banc). The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. *Ibid.*

Once in American custody, Alvarez moved to dismiss the indictment on the ground that his seizure was "outrageous governmental conduct," *Alvarez–Machain*, 504 U.S., at 658, 112 S.Ct. 2188, and violated the extradition treaty between the United States and Mexico. The District Court agreed, the Ninth Circuit affirmed, and we reversed, *id.*, at 670, 112 S.Ct. 2188, holding that the fact of Alvarez's forcible seizure did not affect the jurisdiction of a federal court. The case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.

In 1993, after returning to Mexico, Alvarez began the civil action before us here. He sued Sosa, Mexican citizen and DEA operative Antonio Garate–Bustamante, five unnamed Mexican civilians, the United States, and four DEA agents. 331 F.3d, at 610. So far as it matters here, Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS, for a violation of the law of nations. The former statute authorizes suit "for ... personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The latter provides in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation [699] of the law of nations or a treaty of the United States." § 1350.

The District Court granted the Government's motion to dismiss the FTCA claim, but awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim. A three-judge panel of the Ninth Circuit then affirmed the ATS judgment, but reversed the dismissal of the FTCA claim. 266 F.3d 1045 (2001).

A divided en banc court came to the same conclusion. 331 F.3d, at 641. As for the ATS claim, the court called on its own precedent, "that [the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.,* at 612. The Circuit then relied upon what it called the "clear and universally recognized norm prohibiting arbitrary arrest and detention," *id.,* at 620, to support the conclusion that Alvarez's arrest amounted to a tort in violation of international law. On the FTCA claim, the Ninth Circuit held that, because "the DEA had no authority to effect Alvarez's arrest and detention in Mexico," *id.,* at 608, the United States was liable to him under California law for the tort of false arrest, *id.,* at 640–641.

We granted certiorari in these companion cases to clarify the scope of both the FTCA and the ATS. 540 U.S. 1045, 124 S.Ct. 807, 157 L.Ed.2d 692 (2003). We now reverse in each.

II

The Government seeks reversal of the judgment of liability under the FTCA on two principal grounds. It argues that the arrest could not have been tortious, because it was authorized by 21 U.S.C. § 878, setting out the arrest authority of the DEA, and it says that in any event the liability asserted here falls within the FTCA exception to waiver of sovereign immunity for claims "arising in a foreign country," 28 U.S.C. § 2680(k). We think the exception applies and decide on that ground.

[700] A

[1] The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards v. United States,* 369 U.S. 1, 6, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962); see also 28 U.S.C. § 2674. The Act accordingly gives federal district courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). But the Act also limits its

waiver of sovereign immunity in a number of ways. See § 2680 (no waiver as to, *e.g.*, "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States," or "[a]ny claim arising from the activities of the Panama Canal Company").

[2] Here the significant limitation on the waiver of immunity is the Act's exception for "[a]ny claim arising in a foreign country," § 2680(k), a provision that on its face seems plainly applicable to the facts of this action. In the Ninth Circuit's view, once Alvarez was within the borders of the United States, his detention was not tortious, see 331 F.3d, at 636–637; the appellate court suggested that the Government's liability to Alvarez rested solely upon a false arrest claim. *Id.*, at 640–641. Alvarez's arrest, however, was said to be "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico.[1] The actions [701] in Mexico are thus most naturally understood as the kernel of a "claim arising in a foreign country," and barred from suit under the exception to the waiver of immunity.

[3] Notwithstanding the straightforward language of the foreign country exception, the Ninth Circuit allowed the action to proceed under what has come to be known as the "headquarters doctrine." Some Courts of Appeals, reasoning that "[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," *Sami v. United States*, 617 F.2d 755, 761 (C.A.D.C.1979), have concluded that the foreign country exception does not exempt the United States from suit "for acts or omissions occurring here which have their operative effect in another country," *id.*, at 762 (refusing to apply § 2680(k) where a communique sent from the United States by a federal law enforcement officer resulted in plaintiff's wrongful detention in Germany).[2] Headquarters claims "typically involve allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place within a foreign country." *Cominotto v. United States*, 802 F.2d 1127, 1130 (C.A.9 1986). In such instances, these courts have concluded that § 2680(k) does not bar suit.

[702] The reasoning of the Ninth Circuit here was that, since Alvarez's abduction in Mexico was the direct result of wrongful

1. In the Ninth Circuit's view, it was critical that "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles." 331 F.3d, at 640. Once Alvarez arrived in the United States, "the actions of domestic law enforcement set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process." *Id.*, at 637.

2. See also *Couzado v. United States*, 105 F.3d 1389, 1395 (C.A.11 1997) (" '[A] claim is not barred by section 2680(k) where the tortious conduct occurs in the United States, but the injury is sustained in a foreign country' " (quoting *Donahue v. United States Dept. of Justice*, 751 F.Supp. 45, 48 (S.D.N.Y.1990))); *Martinez v. Lamagno*, No. 93–1573, 1994 WL 159771, *2, judgt. order reported at 23 F.3d 402 (C.A.4 1994) *(per curiam)* (unpublished opinion) ("A headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country"), rev'd on other grounds, 515 U.S. 417, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995); *Leaf v. United States*, 588 F.2d 733, 736 (C.A.9 1978) ("A claim 'arises', as that term is used in ... 2680(k), where the acts or omissions that proximately cause the loss take place"); cf. *Eaglin v. United States, Dept. of Army*, 794 F.2d 981, 983 (C.A.5 1986) (assuming, *arguendo*, that headquarters doctrine is valid).

acts of planning and direction by DEA agents located in California, "Alvarez's abduction fits the headquarters doctrine like a glove." 331 F.3d, at 638.

> "Working out of DEA offices in Los Angeles, [DEA agents] made the decision to kidnap Alvarez and ... gave [their Mexican intermediary] precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D. C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico." *Id.,* at 638–639.

Thus, the Ninth Circuit held that Alvarez's claim did not "aris[e] in" a foreign country.

The potential effect of this sort of headquarters analysis flashes the yellow caution light. "[I]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States." *Beattie v. United States,* 756 F.2d 91, 119 (C.A.D.C. 1984) (Scalia, J., dissenting). Legal malpractice claims, *Knisley v. United States,* 817 F.Supp. 680, 691–693 (S.D.Ohio 1993), allegations of negligent medical care, *Newborn v. United States,* 238 F.Supp.2d 145, 148–149 (D.D.C.2002), and even slip-and-fall cases, *Eaglin v. United States, Dept. of Army,* 794 F.2d 981, 983–984 (C.A.5 1986), can all be repackaged as headquarters claims based on a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy. If 703 we were to approve the headquarters exception to the foreign country exception, the " 'headquarters claim' [would] become a standard part of FTCA litigation" in cases potentially implicating the foreign country exception. *Beattie, supra,* at 119 (Scalia, J., dissenting). The headquarters doctrine threatens to swallow the foreign country exception whole, certainly at the pleadings stage.

The need for skepticism is borne out by two considerations. One of them is pertinent to cases like this one, where harm was arguably caused both by individual action in a foreign country as well as by planning in the United States; the other is suggested simply because the harm occurred on foreign soil.

B

Although not every headquarters case is rested on an explicit analysis of proximate causation, this notion of cause is necessary to connect the domestic breach of duty (at headquarters) with the action in the foreign country (in a case like this) producing the foreign harm or injury. It is necessary, in other words, to conclude that the act or omission at home headquarters was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior. Only in this way could the behavior at headquarters properly be seen as the act or omission on which all FTCA liability must rest under § 2675. See, *e.g., Cominotto, supra,* at 1130 ("[A] headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country"); *Eaglin, supra,* at 983 (noting that headquarters cases require "a plausible proximate nexus or connection between acts or omissions in the United States and the resulting damage or injury in a foreign country").

Recognizing this connection of proximate cause between domestic behavior and foreign harm or injury is not, however, sufficient of itself to bar application of the foreign country exception to a claim resting on that same foreign consequence.[704] Proximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm. See, *e.g.,* 57A Am.Jur.2d § 529 (2004) (discussing proper jury instructions in cases involving multiple proximate causes); *Beattie, supra,* at 121 (Scalia, J., dissenting) ("[I]n the ordinary case there may be *several* points along the chain of causality" pertinent to the enquiry). Here, for example, assuming that the direction by DEA officials in California was a proximate cause of the abduction, the actions of Sosa and others in Mexico were just as surely proximate causes, as well. Thus, understanding that California planning was a legal cause of the harm in no way eliminates the conclusion that the claim here arose from harm proximately caused by acts in Mexico. At most, recognition of additional domestic causation under the headquarters doctrine leaves an open question whether the exception applies to the claim.

C

Not only does domestic proximate causation under the headquarters doctrine fail to eliminate application of the foreign country exception, but there is good reason to think that Congress understood a claim "arising in" a foreign country in such a way as to bar application of the headquarters doctrine. There is good reason, that is, to conclude that Congress understood a claim "arising in a foreign country" to be a claim for injury or harm occurring in a foreign country. 28 U.S.C. § 2680(k). This sense of "arising in" was the common usage in state borrowing statutes contemporary with the Act, which operated to determine which State's statute of limitations should apply in cases involving trans-jurisdictional facts. When the FTCA was passed, the general rule, as set out in various state statutes, was that "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will [also] be barred in the domestic courts." 41 A.L.R.4th 1025, 1029, § 2, 1985 WL 287457 (1985). These borrowing[705] statutes were typically restricted by express terms to situations where a cause of action was time barred in the State *"where [the] cause of action arose, or accrued, or originated."* 75 A.L.R. 203, 211 (1931) (emphasis in original). Critically for present purposes, these variations on the theme of "arising in" were interpreted in tort cases in just the same way that we read the FTCA today. A commentator noted in 1962 that, for the purposes of these borrowing statutes, "[t]he courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred"; *i.e.,* "the jurisdiction in which injury was received." Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L.Rev. 33, 47.

There is, moreover, specific reason to believe that using "arising in" as referring to place of harm was central to the object of the foreign country exception. Any tort action in a court of the United States based on the acts of a Government employee causing harm outside the State of the district court in which the action is filed requires a determination of the source of the substantive law that will govern liability. When the FTCA was passed, the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti:* courts generally applied the law of the place where the injury occurred. See *Richards v.*

United States, 369 U.S., at 11–12, 82 S.Ct. 585 ("The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties" (footnote omitted)); see also Restatement (First) of Conflict of Laws § 379 (1934) (defendant's liability determined by "the law of the place of wrong");[3] *id.,* § 377, Note 1 (place of wrong for 706 torts involving bodily harm is *"the place where the harmful force takes effect upon the body"* (emphasis in original)); *ibid.* (same principle for torts of fraud and torts involving harm to property).[4] For a plaintiff injured in a foreign country, then, the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability. See, *e.g., Day & Zimmermann, Inc. v. Challoner,* 423 U.S. 3, 96 S.Ct. 167, 46 L.Ed.2d 3 (1975) (per curiam) (noting that Texas would apply Cambodian law to wrongful-death action involving explosion in Cambodia of an artillery round manufactured in United States); *Thomas v. FMC Corp.,* 610 F.Supp. 912 (M.D.Ala. 1985) (applying German law to determine American manufacturer's liability for negligently designing and manufacturing a Howitzer that killed decedent in Germany); *Quandt v. Beech Aircraft Corp.,* 317 F.Supp. 1009 (D.Del.1970) (noting that Italian law applies to allegations of negligent manufacture in Kansas that resulted in an airplane crash in Italy); *Manos v. Trans World Airlines,* 295 F.Supp. 1170 (N.D.Ill.1969) (applying Italian law to determine American corporation's liability for negligent manufacture of a plane that crashed in Italy); see also, *e.g., Dallas v. Whitney,* 118 W.Va. 106, 188 S.E. 766 (1936) (Ohio law applied where blasting operations on a West Virginia highway caused property damage in Ohio); *Cameron* 707 *v. Vandegriff,* 53 Ark. 381, 13 S.W. 1092 (1890) (Arkansas law applied where a blasting of a rock in Indian territory inflicted injury on plaintiff in Arkansas).

[4] The application of foreign substantive law exemplified in these cases was, however, what Congress intended to avoid by the foreign country exception. In 1942, the House Committee on the Judiciary considered an early draft of the FTCA that would have exempted all claims "arising in a foreign country in behalf of an alien." H.R. 5373, 77th Cong., 2d Sess., § 303(12). The bill was then revised, at the suggestion of the Attorney General, to omit the last five words. In explaining the amendment to the House Committee on the Judiciary, Assistant Attorney General Shea said that

> "[c]laims arising in a foreign country have been exempted from this bill, H.R. 6463, whether or not the claimant is an

3. See also Restatement (Second) of Conflict of Laws 412 (1969) (hereinafter Restatement 2d) ("The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the 'place of wrong.' This was described ... as 'the state where the last event necessary to make an actor liable for an alleged tort takes place.' Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred").

4. The FTCA was passed with precisely these kinds of garden-variety torts in mind. See S.Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946) ("With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles"); see generally *Feres v. United States,* 340 U.S. 135, 139–140, 71 S.Ct. 153, 95 L.Ed. 152 (1950) (Congress was principally concerned with making the Government liable for ordinary torts that "would have been actionable if inflicted by an individual or a corporation").

alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty." Hearings on H.R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942).

The amended version, which was enacted into law and constitutes the current text of the foreign country exception, 28 U.S.C. § 2680(k), thus codified Congress's "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power." *United States v. Spelar,* 338 U.S. 217, 221, 70 S.Ct. 10, 94 L.Ed. 3 (1949). See also *Sami v. United States,* 617 F.2d, at 762 (noting *Spelar's* explanation but attempting to recast the object behind the foreign country exception); *Leaf v. United States,* 588 F.2d 733, 736, n. 3 (C.A.9 1978).

The object being to avoid application of substantive foreign law, Congress evidently used the modifier "arising in a foreign country" to refer to claims based on foreign harm or [708] injury, the fact that would trigger application of foreign law to determine liability. That object, addressed by the quoted phrase, would obviously have been thwarted, however, by applying the headquarters doctrine, for that doctrine would have displaced the exception by recasting claims of foreign injury as claims not arising in a foreign country because some planning or negligence at domestic headquarters was their cause.[5] And that, in turn, would have resulted in applying foreign law of the place of injury, in accordance with the choice-of-law rule of the headquarters jurisdiction.

Nor, as a practical matter, can it be said that the headquarters doctrine has outgrown its tension with the exception. It is true that the traditional approach to choice of substantive tort law has lost favor, Simson, The Choice–of–Law Revolution in the United States: Notes on Rereading Von Mehren, 36 Cornell Int'l L.J. 125 (2002) ("The traditional methodology of place of wrong . . . has receded in importance, and new approaches and concepts such as governmental interest analysis, most significant relationship, and better rule of law have taken over center stage" (footnotes omitted)).[6] [709] But a good many States still employ essentially the same choice-of-law analysis in tort cases that the First Restatement exemplified. Symeonides, Choice of Law in the American Courts, 51

5. The application of foreign law might nonetheless have been avoided in headquarters cases if courts had been instructed to apply the substantive tort law of the State where the federal act or omission occurred, regardless of where the ultimate harm transpired. But in *Richards v. United States,* 369 U.S. 1, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962), we held that the Act requires "the whole law (including choice-of-law rules) . . . of the State where the [allegedly tortious federal] act or omission occurred," *id.,* at 3, 11, 82 S.Ct. 585. Given the dominant American choice-of-law approach at the time the Act was passed, that would have resulted in the application of foreign law in virtually any case where the plaintiff suffered injury overseas.

6. See also Rydstrom, Modern Status of Rule that Substantive Rights of Parties to a Tort Action are Governed by the Law of the Place of the Wrong, 29 A.L.R.3d 603, 608, § 2[a], 1970 WL 22385 (1970) ("[M]any courts [are] now abandoning the orthodox rule that the substantive rights of the parties are governed by the law of the place of the wrong" (footnotes omitted)). We express no opinion on the relative merits of the various approaches to choice questions; our discussion of the subject is intended only to indicate how, as a

Am. J. Comp. L. 1, 4–5 (2003) ("Ten states continue to adhere to the traditional method in tort conflicts"); see, *e.g.*, *Raskin v. Allison*, 30 Kan.App.2d 1240, 1242, 1241, 57 P.3d 30, 32 (2002) (under "traditional choice of law principles largely reflected in the original Restatement," Mexican law applied to boating accident in Mexican waters because "the injuries were sustained in Mexican waters").

Equally to the point is that in at least some cases that the Court of Appeals's approach would treat as arising at headquarters, not the foreign country, even the later methodologies of choice point to the application of foreign law. The Second Restatement itself, encouraging the general shift toward using flexible balancing analysis to inform choice of law,[7] includes a default rule for tort cases rooted in the traditional approach: "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . . to the occurrence and the parties." Restatement 2d § 146; see also *id.*, Comment *e* ("On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort"). In practice, then, the new dispensation frequently leads to the traditional application of the [710] law of the jurisdiction of injury. See, *e.g.*, *Dorman v. Emerson Elec. Co.*, 23 F.3d 1354 (C.A.8 1994) (applying Canadian law where negligent saw design in Missouri caused injury in Canada); *Bing v. Halstead*, 495 F.Supp. 517 (S.D.N.Y.1980) (applying Costa Rican law where letter written and mailed in Arizona caused mental distress in Costa Rica); *McKinnon v. F.H. Morgan & Co.*, 170 Vt. 422, 750 A.2d 1026 (2000) (applying Canadian law where a defective bicycle sold in Vermont caused injuries in Quebec).

In sum, current flexibility in choice-of-law methodology gives no assurance against applying foreign substantive law if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign harm. Based on the experience just noted, the expectation is that application of the headquarters doctrine would in fact result in a substantial number of cases applying the very foreign law the foreign country exception was meant to avoid.[8]

positive matter, transjurisdictional cases are likely to be treated today.

7. Under the Second Restatement, tort liability is determined "by the local law of the state which . . . has the most significant relationship to the occurrence and the parties," taking into account "the place where the injury occurred," "the place where the conduct causing the injury occurred," "the domicil, residence, nationality, place of incorporation and place of business of the parties," and "the place where the relationship, if any, between the parties is centered." Restatement 2d § 145.

8. The courts that have applied the headquarters doctrine, believing it to be intimated by our emphasis, in *Richards v. United States*, *supra*, on the place of the occurrence of the negligent act, have acknowledged the possibility that foreign law may govern FTCA claims as a function of *Richards's* further holding that the whole law of the pertinent State (including its choice-of-law provisions) is to be applied. See, *e.g.*, *Leaf*, 588 F.2d, at 736, n. 3. Some courts have attempted to defuse the resulting tension with the object behind the foreign country exception. See, *e.g.*, *Sami v. United States*, 617 F.2d 755, 763 (C.A.D.C. 1979) (believing that norm against application of foreign law when contrary to forum policy is sufficient to overcome possible conflict). We think that these attempts to resolve the tension give short shrift to the clear congressional mandate embodied by the foreign country exception. Cf. Shapiro, Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited, 70 N.C.L.Rev. 641, 659–660 (1992) (noting that the *Richards* rule that the totality of a State's law is to be

Before concluding that headquarters analysis should have no part in applying the foreign country exception, however, [711]a word is needed to answer an argument for selective application of headquarters doctrine, that it ought to be permitted when a State's choice-of-law approach would not apply the foreign law of place of injury. See *In re "Agent Orange" Product Liability Litigation*, 580 F.Supp. 1242, 1254 (E.D.N.Y.1984) (noting that the purpose of the exception did not apply to the litigation at hand because foreign law was not implicated). The point would be well taken, of course, if Congress had written the exception to apply when foreign law would be applied. But that is not what Congress said. Its provision of an exception when a claim arises in a foreign country was written at a time when the phrase "arising in" was used in state statutes to express the position that a claim arises where the harm occurs; and the odds are that Congress meant simply this when it used the "arising in" language.[9] Finally, even if it were not a stretch to equate "arising in a foreign country" with "implicating foreign law," the result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any [712]such jurisdictional variety is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself. We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.

consulted may undermine the object behind the foreign country exception).

9. It is difficult to reconcile the Government's contrary reading with the fact that two of the Act's other exceptions specifically reference an "act or omission." See 28 U.S.C. § 2680(a) (exempting United States from liability for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation"); § 2680(e) ("Any claim arising out of an act or omission of any employee of the Government in administering [certain portions of the Trading with the Enemy Act of 1917]"). The Government's request that we read that phrase into the foreign country exception, when it is clear that Congress knew how to specify "act or omission" when it wanted to, runs afoul of the usual rule that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev.ed.2000).

III

Alvarez has also brought an action under the ATS against petitioner Sosa, who argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

A

[5] Judge Friendly called the ATS a "legal Lohengrin," *IIT v. Vencap, Ltd.*, 519

F.2d 1001, 1015 (C.A.2 1975); "no one seems to know whence it came," *ibid.*, and for over 170 years after its enactment it provided jurisdiction in only one case. The first Congress passed it as part of the Judiciary Act of 1789, in providing that the new federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the [713] law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.[10]

The parties and *amici* here advance radically different historical interpretations of this terse provision. Alvarez says that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law. We think that reading is implausible. As enacted in 1789, the ATS gave the district courts "cognizance" of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law. See, *e.g.*, The Federalist No. 81, pp. 447, 451 (J. Cooke ed. 1961) (A.Hamilton) (using "jurisdiction" interchangeably with "cognizance"). The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature. Nor would the distinction between jurisdiction and cause of action have been elided by the drafters of the Act or those who voted on it. As Fisher Ames put it, "there is a substantial difference between the jurisdiction of the courts and the rules of decision." 1 Annals of Cong. 807 (Gales ed. 1834). It is unsurprising, then, that an authority on the historical origins of the ATS has written that "section 1350 clearly does not create a statutory cause of action," and that the contrary suggestion is "simply frivolous." Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 479, 480 (1986) (hereinafter Casto, Law of Nations); cf. Dodge, The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 Va. J. Int'l L. 687, 689 (2002). [714] In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. Brief for Vikram Amar et al. as *Amici Curiae.* We think history and practice give the edge to this latter position.

1

[6] "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton*, 3 Dall. 199, 281, 1 L.Ed. 568 (1796) (Wilson, J.). In the years of the early

10. The statute has been slightly modified on a number of occasions since its original enactment. It now reads in its entirety: "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." 28 U.S.C. § 1350.

Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other: *"the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights,"* E. de Vattel, Law of Nations, Preliminaries § 3 (J. Chitty et al. transl. and ed. 1883) (hereinafter Vattel) (footnote omitted), or "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other," 1 J. Kent, Commentaries on American Law *1. This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial. See 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (hereinafter Commentaries) ("[O]ffences against" the law of nations are "principally incident to whole states or nations").

[715]The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry ...; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." *Id.,* at 67. The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law ...." *The Paquete Habana,* 175 U.S. 677, 686, 20 S.Ct. 290, 44 L.Ed. 320 (1900).

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. See Vattel 463–464. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

2

Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken [716]shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, ... of hostility against such as are in amity ... with the United States, ... infractions of the immunities of ambassadors and other public ministers ...

[and] infractions of treaties and conventions to which the United States are a party." 21 Journals of the Continental Congress 1136–1137 (G. Hunt ed.1912) (hereinafter Journals of the Continental Congress). The resolution recommended that the States "authorise suits ... for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137; cf. Vattel 463–464 ("Whoever offends ... a public minister ... should be punished ..., and ... the state should, at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister"). Apparently only one State acted upon the recommendation, see Public Records of the State of Connecticut, 1782, pp. 82, 83 (L. Larabee ed.1982) (1942 compilation, exact date of Act unknown), but Congress had done what it could to signal a commitment to enforce the law of nations.

Appreciation of the Continental Congress's incapacity to deal with this class of cases was intensified by the so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. See *Respublica* [717] *v. De Longchamps*, 1 Dall. 111, 1 L.Ed. 59 (O.T. Phila.1784).[11] Congress called again for state legislation addressing such matters, and concern over the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention. See 1 Records of the Federal Convention of 1787, p. 25 (M. Farrand ed.1911) (speech of J. Randolph). During the Convention itself, in fact, a New York City constable produced a reprise of the Marbois affair and Secretary Jay reported to Congress on the Dutch Ambassador's protest, with the explanation that "'the federal government does not appear ... to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.'" Casto, Law of Nations 494, and n. 152.

The Framers responded by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls." U.S. Const., Art. III, § 2, and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats, see 1 Stat. 80, ch. 20, § 13, created alienage jurisdiction, § 11, and, of course, included the ATS, § 9. See generally Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U.J. Int'l L. & Pol. 1, 15–21 (1985) (hereinafter [718] Randall) (discussing foreign affairs implications of the Judiciary Act); W. Casto, The Supreme Court in the Early Republic 27–53 (1995).

3

Although Congress modified the draft of what became the Judiciary Act, see gener-

11. The French minister plenipotentiary lodged a formal protest with the Continental Congress, 27 Journals of the Continental Congress 478, and threatened to leave Pennsylvania "unless the decision on Longchamps Case should give them full satisfaction." Letter from Samuel Hardy to Gov. Benjamin Harrison of Virginia, June 24, 1784, in 7 Letters of Members of the Continental Congress 558, 559 (E. Burnett ed.1934). De Longchamps was prosecuted for a criminal violation of the law of nations in state court.

The Congress could only pass resolutions, one approving the state-court proceedings, 27 Journals of the Continental Congress 503, another directing the Secretary of Foreign Affairs to apologize and to "explain to Mr. De Marbois the difficulties that may arise ... from the nature of a federal union," 28 *id.*, at 314, and to explain to the representative of Louis XVI that "many allowances are to be made for" the young Nation, *ibid.*

ally Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L.Rev. 49 (1923), it made hardly any changes to the provisions on aliens, including what became the ATS, see Casto, Law of Nations 498. There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section. Given the poverty of drafting history, modern commentators have necessarily concentrated on the text, remarking on the innovative use of the word "tort," see, *e.g.,* Sweeney, A Tort only in Violation of the Law of Nations, 18 Hastings Int'l & Comp. L.Rev. 445 (1995) (arguing that "tort" refers to the law of prize), and the statute's mixture of terms expansive ("all suits"), see, *e.g.,* Casto, Law of Nations 500, and restrictive ("for a tort only"), see, *e.g.,* Randall at 28–31 (limiting suits to torts, as opposed to commercial actions, especially by British plaintiffs).[12] The historical scholarship has also placed the ATS within the competition between federalist and antifederalist forces over the national role in foreign relations. *Id.,* at 22–23 (nonexclusiveness of federal jurisdiction under the ATS may reflect compromise). But despite considerable scholarly attention, it is fair to say [719] that a consensus understanding of what Congress intended has proven elusive.

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. Consider that the principal draftsman of the ATS was apparently Oliver Ellsworth,[13] previously a member of the Continental Congress that had passed the 1781 resolution and a member of the Connecticut Legislature that made good on that congressional request. See generally W. Brown, The Life of Oliver Ellsworth (1905). Consider, too, that the First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal, including the three mentioned by Blackstone. See An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat. 113–114 (murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas), and § 28, *id.,* at 118 (violation of safe conducts and assaults against ambassadors punished by imprisonment and fines described as "infract[ions of] the law of nations"). It would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress

12. The restriction may have served the different purpose of putting foreigners on notice that they would no longer be able to prosecute their own criminal cases in federal court. Compare, *e.g.,* 3 Commentaries 160 (victims could start prosecutions) with the Judiciary Act § 35 (creating the office of the district attorney). Cf. 1 Op. Atty. Gen. 41, 42 (1794) (British consul could not himself initiate criminal prosecution, but could provide evidence to the grand jury).

13. The ATS appears in Ellsworth's handwriting in the original version of the bill in the National Archives. Casto, Law of Nations 498, n. 169.

would have enacted the ATS only to leave it lying fallow indefinitely.

[720] The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, see *id.,* at 118; violations of safe conduct were probably understood to be actionable, *ibid.,* and individual actions arising out of prize captures and piracy may well have also been contemplated, *id.,* at 113–114. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court. 4 Commentaries 68.

4

The sparse contemporaneous cases and legal materials referring to the ATS tend to confirm both inferences, that some, but few, torts in violation of the law of nations were understood to be within the common law. In *Bolchos v. Darrel,* 3 F.Cas. 810 (No. 1,607) (S.C. 1795), the District Court's doubt about admiralty jurisdiction over a suit for damages brought by a French privateer against the mortgagee of a British slave ship was assuaged by assuming that the ATS was a jurisdictional basis for the court's action. Nor is *Moxon v. The Fanny,* 17 F. Cas. 942 (No. 9,895) (D.Pa. 1793), to the contrary, a case in which the owners of a British ship sought damages for its seizure in United States waters by a French privateer. The District Court said in dictum that the ATS was not the proper vehicle for suit because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.,* at 948. But the judge gave no intimation that further legislation would have been needed to give the District Court jurisdiction over a suit limited to damages.

[721] Then there was the 1795 opinion of Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone. 1 Op. Atty. Gen. 57. Bradford was uncertain, but he made it clear that a federal court was open for the prosecution of a tort action growing out of the episode:

> "But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . ." *Id.,* at 59.

Although it is conceivable that Bradford (who had prosecuted in the Marbois incident, see Casto, Law of Nations 503, n. 201) assumed that there had been a violation of a treaty, 1 Op. Atty. Gen., at 58, that is certainly not obvious, and it appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action.

B

Against these indications that the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations, Sosa raises two main objections. First, he claims that this conclusion makes no sense in view of the Continental Congress's 1781 recommendation to state legislatures to pass laws au-

thorizing such suits. Sosa thinks state legislation would have been "absurd," Reply Brief for Petitioner Sosa 5, if common law remedies had been available. Second, Sosa juxtaposes Blackstone's treatise mentioning violations of the law of nations as occasions for criminal remedies, against the statute's innovative reference to "tort," as evidence that there was no familiar [722] set of legal actions for exercise of jurisdiction under the ATS. Neither argument is convincing.

The notion that it would have been absurd for the Continental Congress to recommend that States pass positive law to duplicate remedies already available at common law rests on a misunderstanding of the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the "brooding omnipresence" [14] of the common law then thought discoverable by reason. As Blackstone clarified the relation between positive law and the law of nations, "those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." 4 Commentaries 67. Indeed, Sosa's argument is undermined by the 1781 resolution on which he principally relies. Notwithstanding the undisputed fact (per Blackstone) that the common law afforded criminal law remedies for violations of the law of nations, the Continental Congress encouraged state legislatures to pass criminal statutes to the same effect, and the first Congress did the same, *supra*, at 2758.[15]

[723] Nor are we convinced by Sosa's argument that legislation conferring a right of action is needed because Blackstone treated international law offenses under the rubric of "public wrongs," whereas the ATS uses a word, "tort," that was relatively uncommon in the legal vernacular of the day. It is true that Blackstone did refer to what he deemed the three principal

14. See *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting).

15. Being consistent with the prevailing understanding of international law, the 1781 resolution is sensibly understood as an act of international politics, for the recommendation was part of a program to assure the world that the new Republic would observe the law of nations. On the same day it made its recommendation to state legislatures, the Continental Congress received a confidential report, detailing negotiations between American representatives and Versailles. 21 Journals of the Continental Congress 1137–1140. The King was concerned about the British capture of the ship *Marquis de la Fayette* on its way to Boston, *id.*, at 1139, and he "expresse[d] a desire that the plan for the appointment of consuls should be digested and adopted, as the Court of France wished to make it the basis of some commercial arrangements between France and the United States," *id.*, at 1140. The congressional resolution would not have been all that Louis XVI wished for, but it was calculated to assure foreign powers that Congress at least intended their concerns to be addressed in the way they would have chosen. As a French legal treatise well known to early American lawyers, see Helmholz, Use of the Civil Law in Post–Revolutionary American Jurisprudence, 66 Tulane L.Rev. 1649 (1992), put it, "the laws ought to be written, to the end that the writing may fix the sense of the law, and determine the mind to conceive a just idea of that which is established by the law, and that it not [be] left free for every one to frame the law as he himself is pleased to understand it . . . ." 1 J. Domat, The Civil Law in its Natural Order 108 (W. Strahan transl. and L. Cushing ed. 1861). A congressional statement that common law was up to the task at hand might well have fallen short of impressing a continental readership.

offenses against the law of nations in the course of discussing criminal sanctions, observing that it was in the interest of sovereigns "to animadvert upon them with a becoming severity, that the peace of the world may be maintained," 4 Commentaries 68.[16] But Vattel explicitly linked [724] the criminal sanction for offenses against ambassadors with the requirement that the state, "at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister." Vattel 463–464. Cf. Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L.Rev. 433, 444 (2002) (observing that a "mixed approach to international law violations, encompassing both criminal prosecution . . . and compensation to those injured through a civil suit, would have been familiar to the founding generation"). The 1781 resolution goes a step further in showing that a private remedy was thought necessary for diplomatic offenses under the law of nations. And the Attorney General's Letter of 1795, as well as the two early federal precedents discussing the ATS, point to a prevalent assumption that Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation.

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

IV

[7] We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the [725] modern line of cases beginning with *Filartiga v. Pena–Irala*, 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of

16. Petitioner says animadversion is "an archaic reference to the imposition of *punishment.*" Reply Brief for Petitioner Sosa 4 (emphasis in original). That claim is somewhat exaggerated, however. To animadvert carried the broader implication of "turn[ing] the attention officially or judicially, tak[ing] legal cognizance of anything deserving of chastisement or censure; *hence,* to proceed by way of punishment or censure." 1 Oxford English Dictionary 474 (2d ed.1989). Blackstone in fact used the term in the context of property rights and damages. Of a man who is disturbed in his enjoyment of "qualified property" "the law will animadvert hereon as an injury." 2 Commentaries 395. See also 9 Papers of James Madison 349 (R. Rutland ed. 1975) ("As yet foreign powers have not been rigorous in animadverting on us" for violations of the law of nations).

the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

A

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. Holmes explained famously in 1881 that

> "in substance the growth of the law is legislative . . . [because t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. [726]I mean, of course, considerations of what is expedient for the community concerned." The Common Law 31–32 (Howe ed.1963).

One need not accept the Holmesian view as far as its ultimate implications to acknowledge that a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), was the watershed in which we denied the existence of any federal "general" common law, *id.,* at 78, 58 S.Ct. 817, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly, *e.g., Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) (interpretation of collective-bargaining agreements); Fed. Rule Evid. 501 (evidentiary privileges in federal-question cases). Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. *E.g., United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726–727, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).[17] And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, see *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

[8] [727]Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great

17. See generally R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System, ch. 7 (5th ed.2003); Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N.Y.U.L.Rev. 383, 405–422 (1964).

majority of cases. *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); *Alexander v. Sandoval,* 532 U.S. 275, 286–287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Cf. *Sabbatino, supra,* at 431–432, 84 S.Ct. 923. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation [728] of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. Cf. *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 813 (C.A.D.C.1984) (Bork, J., concurring) (expressing doubt that § 1350 should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens").

[9] The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing, H.R.Rep. No. 102–367, pt. 1, p. 3 (1991). But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," *id.,* at 4, Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992).

B

These reasons argue for great caution in adapting the law of nations to private rights. Justice SCALIA, *post,* p. 2769 (opinion concurring in part and concurring in judgment), concludes that caution is too hospitable, and a word is in order [729] to summarize where we have come so far and to focus our difference with him on whether some norms of today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action beyond § 1350. All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least Justice SCALIA does not dispute, *post,* at 2770, 2772–2773, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. Justice Scalia concludes, however, that two subsequent developments should be understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action. As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), that federal courts have no authority to derive "general" common law.

Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, *e.g., Sabbatino,* 376 U.S., at 423, 84 S.Ct. 923 ("[I]t is, of course, true that United States [730] courts apply international law as a part of our own in appropriate circumstances"); [18] *The Paquete Habana,* 175 U.S., at 700, 20 S.Ct. 290 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist). It would take some explaining to say now that federal courts must avert

18. *Sabbatino* itself did not directly apply international law, see 376 U.S., at 421–423, 84 S.Ct. 923, but neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts, 376 U.S., at 425, 84 S.Ct. 923 (citing Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939)).

their gaze entirely from any international norm intended to protect individuals.

We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding bearing on this issue lying at the intersection of the judicial and legislative powers. The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses [731] seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena–Irala*, 630 F.2d 876 (C.A.2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774 (C.A.D.C.1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. See *supra*, at 2763 (discussing the Torture Victim Protection Act).

While we agree with Justice SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.[19]

C

[10] We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and [732] for this action it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. See, *e.g.*, *United States v. Smith*, 5 Wheat. 153, 163–180, n. a, 5 L.Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and

19. Our position does not, as Justice SCALIA suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350), see *post*, at 2773, n. Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, see *supra*, at 2762, 2764, as a more expansive common law power related to 28 U.S.C. § 1331 might not be.

judges who faced the issue before it reached this Court. See *Filartiga*, *supra*, at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *Tel–Oren*, *supra*, at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (C.A.9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action [20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of [733] making that cause available to litigants in the federal courts.[21]

[11] Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

[734] "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized na-

20. A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karadžić*, 70 F.3d 232, 239–241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

21. This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. See Brief for European Commission as *Amicus Curiae* 24, n. 54 (citing I. Brownlie, Principles of Public International Law 472–481 (6th ed.2003)); cf. Torture Victim Protection Act of 1991, § 2(b), 106 Stat. 73 (exhaustion requirement). We would certainly consider this requirement in an appropriate case.

> Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. See *In re South African Apartheid Litigation*, 238 F.Supp.2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici Curiae* 7a, ¶ 3.2.1 (emphasis deleted). The United States has agreed. See Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in *id.*, at 2a. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy. Cf. *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (discussing the State Department's use of statements of interest in cases involving the Foreign Sover-

tions; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S., at 700, 20 S.Ct. 290.

[12] To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 16, 1966, 999 U.N.T.S. 171,[22] to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. See Humphrey, The UN Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (E. Luard ed.1967) (quoting Eleanor Roosevelt calling the Declaration " 'a statement of principles ... setting up a common standard of achievement for all peoples and all nations' " [735] and " 'not a treaty or international agreement ... impos[ing] legal obligations' ").[23] And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. See *supra*, at 2763. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.

Here, it is useful to examine Alvarez's complaint in greater detail. As he presently argues it, the claim does not rest on the cross-border feature of his abduction.[24] Although the District Court granted relief in part on finding a violation of international law in taking Alvarez across the border from Mexico to the United States, the Court of Appeals rejected that ground of liability for failure to identify a norm of requisite force prohibiting a forcible abduction across a border. Instead, it relied on the conclusion that the law of the United States did not authorize Alvarez's arrest, because the DEA lacked extraterritorial authority under 21 U.S.C. § 878, and because Federal Rule of Criminal Proce-

eign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*).

22. Article nine provides that "[n]o one shall be subjected to arbitrary arrest or detention," that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law," and that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." 999 U.N.T. S., at 175–176.

23. It has nevertheless had substantial indirect effect on international law. See Brownlie, *supra*, at 535 (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers").

24. Alvarez's brief contains one footnote seeking to incorporate by reference his arguments on cross-border abductions before the Court of Appeals. Brief for Respondent Alvarez–Machain 47, n. 46. That is not enough to raise the question fairly, and we do not consider it.

dure 4(d)(2) limited the warrant for Alvarez's arrest to "the jurisdiction of the United States." [25] It is this position that Alvarez takes now: [736] that his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.[26]

Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.[27] He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U.S.C. § 1983, and [737] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (1986), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." 2 *Id.*, § 702. Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear. Any credible invocation of a prin-

25. The Rule has since been moved and amended and now provides that a warrant may also be executed "anywhere else a federal statute authorizes an arrest." Fed. Rule Crim. Proc. 4(c)(2).

26. We have no occasion to decide whether Alvarez is right that 21 U.S.C. § 878 did not authorize the arrest.

27. Specifically, he relies on a survey of national constitutions, Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 260–261 (1993); a case from the International Court of Justice, *United States v. Iran*, 1980 I.C.J. 3, 42; and some authority drawn from the federal courts, see Brief for Respondent Alvarez–Machain 49, n. 50. None of these suffice. The Bassiouni survey does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality. The *Iran* case, in which the United States sought relief for the taking of its diplomatic and consular staff as hostages, involved a different set of international norms and mentioned the problem of arbitrary detention only in passing; the detention in that case was, moreover, far longer and harsher than Alvarez's. See 1980 I.C. J., at 42, ¶ 91 ("detention of [United States] staff by a group of armed militants" lasted "many months"). And the authority from the federal courts, to the extent it supports Alvarez's position, reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today.

ciple against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. *E.g., Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).[28]

738 Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[29] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.[30] It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

* * *

The judgment of the Court of Appeals is

Reversed.

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in part and concurring in the judgment.

739 There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. Accordingly, I join Parts I, II, and III of the Court's opinion in these consolidated cases. Although I agree with much in Part IV, I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it

28. In this action, Sosa might well have been liable under Mexican law. Alvarez asserted such a claim, but the District Court concluded that the applicable law was the law of California, and that under California law Sosa had been privileged to make a citizen's arrest in Mexico. Whether this was correct is not now before us, though we discern tension between the court's simultaneous conclusions that the detention so lacked any legal basis as to violate international law, yet was privileged by state law against ordinary tort recovery.

29. It is not that violations of a rule logically foreclose the existence of that rule as international law. Cf. *Filartiga v. Pena–Irala,* 630 F.2d 876, 884, n. 15 (C.A.2 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law"). Nevertheless, that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed.

30. Alvarez also cites, Brief for Respondent Alvarez–Machain 49–50, a finding by a United Nations working group that his detention was arbitrary under the Declaration, the Covenant, and customary international law. See Report of the United Nations Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1994/27, pp. 139–140 (Dec. 17, 1993). That finding is not addressed, however, to our demanding standard of definition, which must be met to raise even the possibility of a private cause of action. If Alvarez wishes to seek compensation on the basis of the working group's finding, he must address his request to Congress.

is neither authorized nor suited to perform.

I

The question at hand is whether the Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides respondent Alvarez–Machain (hereinafter respondent) a cause of action to sue in federal court to recover money damages for violation of what is claimed to be a customary international law norm against arbitrary arrest and detention. The ATS provides that "[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." *Ibid.* The challenge posed by this action is to ascertain (in the Court's felicitous phrase) "the interaction between the ATS at the time of its enactment and the ambient law of the era." *Ante,* at 2755. I begin by describing the general principles that must guide our analysis.

At the time of its enactment, the ATS provided a federal forum in which aliens could bring suit to recover for torts committed in "violation of the law of nations." The law of nations that would have been applied in this federal forum was at the time part of the so-called general common law. See Young, Sorting out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365, 374 (2002); Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L.Rev. 815, 824 (1997); Brief for Vikram Amar et al. as *Amici Curiae* 12–13.

General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties. U.S. Const., Art. VI, cl. 2. Federal and state courts adjudicating questions of general common law were not adjudicating questions of federal or state law, respectively—the general common law was neither. See generally Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L.Rev. 1245, 1279–1285 (1996). The nonfederal nature of the law of nations explains this Court's holding that it lacked jurisdiction in *New York Life Ins. Co. v. Hendren,* 92 U.S. 286, 23 L.Ed. 709 (1876), where it was asked to review a state-court decision regarding "the effect, under the general public law, of a state of sectional civil war upon [a] contract of life insurance." *Ibid.* Although the case involved "the general laws of war, as recognized by the law of nations applicable to this case," *ibid.,* it involved no federal question. The Court concluded: "The case, ... having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction." *Id.,* 92 U.S., at 287.

This Court's decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), signaled the end of federal-court elaboration and application of the general common law. *Erie* repudiated the holding of *Swift v. Tyson,* 16 Pet. 1, 10 L.Ed. 865 (1842), that federal courts were free to "express our own opinion" upon "the principles established in the general commercial law." *Id.,* 16 Pet., at 19, 18. After canvassing the many problems resulting from "the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment," 304 U.S., at 75, 58 S.Ct. 817, the *Erie* Court extirpated that law with its famous declaration that "[t]here is no federal general common law." *Id.,* at 78, 58 S.Ct. 817. *Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite

directly, since the question decided in *Swift* turned on the "law merchant," then a subset of the law of nations. See Clark, *supra*, at 1280–1281.

After the death of the old general common law in *Erie* came the birth of a new and different common law pronounced by federal courts. There developed a specifically federal common law (in the sense of judicially pronounced law) for a "few and restricted" areas in which "a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (internal quotation marks and citations omitted). Unlike the general common law that preceded it, however, federal common law was self-consciously "made" rather than "discovered," by judges who sought to avoid falling under the sway of (in Holmes's hyperbolic language) "[t]he fallacy and illusion" that there exists "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928) (dissenting opinion).

Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it. "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois*, 451 U.S. 304, 312, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

The general rule as formulated in *Texas Industries*, 451 U.S., at 640–641, 101 S.Ct. 2061, is that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority [742] to formulate federal common law." This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute. Indeed, *Texas Industries* itself involved the petitioner's unsuccessful request for an application of the latter sort—creation of a right of contribution to damages assessed under the antitrust laws. See *id.*, at 639–646, 101 S.Ct. 2061. See also *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 99, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) (declining to create a federal-common-law right of contribution to damages assessed under the Equal Pay Act and Title VII).

The rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction is subject to exceptions, some better established than others. The most firmly entrenched is admiralty law, derived from the grant of admiralty jurisdiction in Article III, § 2, cl. 3, of the Constitution. In the exercise of that jurisdiction federal courts develop and apply a body of general maritime law, "the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men." *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (C.A.4 1999) (Niemeyer, J.) (internal quotation marks omitted). At the other extreme is *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), which created a private damages cause of action against federal officials for violation of the Fourth Amendment. We have said that the authority to create this cause of action was derived from "our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.' " *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66, 122 S.Ct. 515, 151

L.Ed.2d 456 (2001) (quoting 28 U.S.C. § 1331). While *Bivens* stands, the ground supporting it has eroded. For the past 25 years, "we have consistently refused to extend *Bivens* liability to any new context." *Correctional Services Corp., supra,* at 68, 122 S.Ct. 515. *Bivens* is "a relic of the heady days in which this Court assumed common-law powers to create causes of action." 534 U.S., at 75, 122 S.Ct. 515 (SCALIA, J., concurring).

[743]II

With these general principles in mind, I turn to the question presented. The Court's detailed exegesis of the ATS conclusively establishes that it is "a jurisdictional statute creating no new causes of action." *Ante,* at 2761. The Court provides a persuasive explanation of why respondent's contrary interpretation, that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law," is wrong. *Ante,* at 2755. Indeed, the Court properly endorses the views of one scholar that this interpretation is " 'simply frivolous.' " *Ibid.* (quoting Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L.Rev. 467, 479, 480 (1986)).

These conclusions are alone enough to dispose of the present case in favor of petitioner Sosa. None of the exceptions to the general rule against finding substantive lawmaking power in a jurisdictional grant apply. *Bivens* provides perhaps the closest analogy. That is shaky authority at best, but at least it can be said that *Bivens* sought to enforce a command of our *own* law—the *United States* Constitution. In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena–Irala,* 630 F.2d 876 (C.A.2 1980), a federal court must first *create* the underlying federal command. But "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law." Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513, 519 (2002). In Benthamite terms, creating a federal command (federal common law) out of "international norms," and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.

[744]III

The analysis in the Court's opinion departs from my own in this respect: After concluding in Part III that "the ATS is a jurisdictional statute creating no new causes of action," *ante,* at 2761, the Court addresses at length in Part IV the "good reasons for a restrained conception of the *discretion* a federal court should exercise in considering a new cause of action" under the ATS. *Ibid.* (emphasis added). By framing the issue as one of "discretion," the Court skips over the antecedent question of authority. This neglects the "lesson of *Erie,*" that "grants of jurisdiction alone" (which the Court has acknowledged the ATS to be) "are not themselves grants of lawmaking authority." Meltzer, *supra,* at 541. On this point, the Court observes only that no development between the enactment of the ATS (in 1789) and the birth of modern international human rights litigation under that statute (in 1980) "has categorically *precluded* federal courts from recognizing a claim under the law of nations as an element of common law." *Ante,* at 2761 (emphasis added). This turns our jurisprudence regarding federal common law on its head. The question is not what case or congressional action *prevents* federal courts from applying the law

of nations as part of the general common law; it is what *authorizes* that peculiar exception from *Erie's* fundamental holding that a general common law *does not exist.*

The Court would apparently find authorization in the understanding of the Congress that enacted the ATS, that "district courts would recognize private causes of action for certain torts in violation of the law of nations." *Ante,* at 2761. But as discussed above, that understanding rested upon a notion of general common law that has been repudiated by *Erie.*

The Court recognizes that *Erie* was a "watershed" decision heralding an avulsive change, wrought by "conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it." *Ante,* at 2762. The Court's |745analysis, however, does not follow through on this insight, interchangeably using the unadorned phrase "common law" in Parts III and IV to refer to pre-*Erie* general common law and post-*Erie* federal common law. This lapse is crucial, because the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. Post-*Erie* federal common lawmaking (all that is left to the federal courts) is so far removed from that general-common-law adjudication which applied the "law of nations" that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.* Yet that is precisely what the discretion-only analysis in Part IV suggests.

|746Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us is that I would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power

* The Court conjures the illusion of common-law-making continuity between 1789 and the present by ignoring fundamental differences. The Court's approach places the law of nations on a federal-law footing unknown to the First Congress. At the time of the ATS's enactment, the law of nations, being part of general common law, was *not* supreme federal law that could displace state law. *Supra,* at 2770. By contrast, a judicially created federal rule based on international norms *would be* supreme federal law. Moreover, a federal-common-law cause of action of the sort the Court reserves discretion to create would "arise under" the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction. See *Illinois v. Milwaukee,* 406 U.S. 91, 99–100, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

The lack of genuine continuity is thus demonstrated by the fact that today's opinion renders the ATS unnecessary for federal jurisdiction over (so-called) law-of-nations claims. If the law of nations can be transformed into federal law on the basis of (1) a provision that merely grants jurisdiction, combined with (2) some residual judicial power (from whence nobody knows) to create federal causes of action in cases implicating foreign relations, then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS. This would mean that the ATS became largely superfluous as of 1875, when Congress granted general federal-question jurisdiction subject to a $500 amount-in-controversy requirement, Act of Mar. 3, 1875, § 1, 18 Stat. 470, and entirely superfluous as of 1980, when Congress eliminated the amount-in-controversy requirement, Pub.L. 96–486, 94 Stat. 2369.

"on the understanding that the door is still ajar subject to vigilant doorkeeping." *Ante,* at 2764. The general common law was the old door. We do not close that door today, for the deed was done in *Erie. Supra,* at 2770. Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it.

Although I fundamentally disagree with the discretion-based framework employed by the Court, we seem to be in accord that creating a new federal common law of international human rights is a questionable enterprise. We agree that:

- "[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law [in the area of foreign relations]. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Ante,* at 2762.
- "[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution." *Ante,* at 2763.
- "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold [747] that a foreign government or its agent has transgressed those limits." *Ibid.*
- "[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." *Ibid.*
- *"Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law."* *Ante,* at 2763.

These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, *ante,* at 2755, (2) that Congress understands that difference today, *ante,* at 2763, and (3) that the ATS itself supplies only jurisdiction, *ante,* at 2761. In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits. *Ante,* at 2765.

The Ninth Circuit brought us the judgment that the Court reverses today. Perhaps its decision in this particular case, [748] like the decisions of other lower federal courts that receive passing attention in the Court's opinion, "reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today."

Ante, at 2768, n. 27. But the verbal formula it applied is the same verbal formula that the Court explicitly endorses. Compare *ante,* at 2765 (quoting *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (C.A.9 1994), for the proposition that actionable norms must be " 'specific, universal, and obligatory' "), with 331 F.3d 604, 621 (C.A.9 2003) (en banc) (finding the norm against arbitrary arrest and detention in this action to be "universal, obligatory, and specific"); *id.,* at 619 ("[A]n actionable claim under the [ATS] requires the showing of a violation of the law of nations that is specific, universal, and obligatory" (internal quotation marks omitted)). Endorsing the very formula that led the Ninth Circuit to its result in this action hardly seems to be a recipe for restraint in the future.

The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches. *Kadic v. Karadžić,* 70 F.3d 232 (C.A.2 1995), provides a case in point. One of the norms at issue in that case was a norm against genocide set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278. The Second Circuit held that the norm was actionable under the ATS after applying Circuit case law that the Court today endorses. 70 F.3d, at 238–239, 241–242. The Court of Appeals then did something that is perfectly logical and yet truly remarkable: It dismissed the determination by Congress and the Executive that this norm should *not* give rise to a private cause of action. We *know* that Congress and the Executive made this determination, because Congress inscribed it into the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 *et seq.,* a law signed by the 749 President attaching criminal penalties to the norm against genocide. The Act, Congress said, shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." § 1092. Undeterred, the Second Circuit reasoned that this "decision not to create a *new* private remedy" could hardly be construed as *repealing* by implication the cause of action supplied by the ATS. 70 F.3d, at 242 (emphasis added). Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is "no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section," *ante,* at 2758, to override a clear indication from the political branches that a "specific, universal, and obligatory" norm against genocide is *not* to be enforced through a private damages action? Today's opinion leads the lower courts right down that perilous path.

Though it is not necessary to resolution of the present action, one further consideration deserves mention: Despite the avulsive change of *Erie,* the Framers who included reference to "the Law of Nations" in Article I, § 8, cl. 10, of the Constitution would be entirely content with the post-*Erie* system I have described, and quite terrified by the "discretion" endorsed by the Court. That portion of the general common law known as the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates). Those accepted practices have for the most part, if not in their entirety, been enacted into

United States statutory law, so that insofar as they are concerned the demise of the general common law is inconsequential. The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to
750 control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates. See generally Bradley & Goldsmith, Critique of the Modern Position, 110 Harv. L.Rev., at 831–837. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty, see, *e.g.,* Tex. Penal Code Ann. § 12.31 (West 2003), could be judicially nullified because of the disapproving views of foreigners.

* * *

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

This Court seems incapable of admitting that some matters—*any* matters—are none of its business. See, *e.g., Rasul v. Bush, ante,* 542 U.S. 446, 124 S.Ct. 2686, 159 L.Ed.2d 548, 2004 WL 1432134 (2004); *INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal
751 actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.

Justice GINSBURG, with whom Justice BREYER joins, concurring in part and concurring in the judgment.

I join in full the Court's disposition of Alvarez's claim pursuant to 28 U.S.C. § 1350. See *ante,* at 2754–2769. As to Alvarez's Federal Tort Claims Act (FTCA or Act) claim, see *ante,* at 2747–2754, although I agree with the Court's result and much of its reasoning, I take a different path and would adopt a different construction of 28 U.S.C. § 2680(k). Alvarez's case against the Government does not call for any comparison of old versus newer choice-of-law methodologies. See *ante,* at 2752–2753. See generally Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L.Rev. 521, 525–584

(1983). In particular, the Court's discussion of developments in choice of law after the FTCA's enactment hardly illuminates the meaning of that statute, and risks giving undue prominence to a jurisdiction-selecting approach the vast majority of States have long abandoned. See Symeonides, Choice of Law in the American Courts in 2002: Sixteenth Annual Survey, 51 Am. J. Comp. L. 1, 5–6 (2003) (*lex loci delicti* rule has been abandoned in 42 States).

I

The FTCA renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. The Act gives federal district courts "exclusive jurisdiction [752] of civil actions on claims against the United States, for money damages ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). Congress included in the FTCA a series of exceptions to that sovereign-immunity waiver. Relevant to this litigation, the Act expressly excepts "[a]ny claim arising in a foreign country." § 2680(k). I agree with the Court, see *ante*, at 2747–2754, that this provision, the foreign-country exception, applies here, and bars Alvarez's tort claim against the United States. But I would read the words "arising in," as they appear in § 2680(k), to signal "place where the act or omission occurred," § 1346(b)(1), not "place of injury," *ante*, at 2752, 2754, and n. 9.[1]

[753] A

On its face, the foreign-country exception appears to cover this litigation. See *ante*, at 2747. Alvarez's suit is predicated on an arrest in Mexico alleged to be "false" only because it occurred there. Sosa's conduct in Mexico, implicating questions of Mexican law, is, as the Court notes, "the kernel" of Alvarez's claim. *Ante*, at 2748. Once Alvarez was inside United States

1. In common with § 2680(k), most of the exceptions listed in § 2680 use the "claim arising" formulation. See §§ 2680(b), (c), (e), (h), (j), (*l*), (m), and (n). Only two use the "act or omission" terminology. See § 2680(a) (exception for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation ... or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty ..."); § 2680(e) (no liability for "[a]ny claim arising out of an act or omission of any employee of the Government in administering [certain provisions concerning war and national defense]"). It is hardly apparent, however, that Congress intended only §§ 2680(a) and (e) to be interpreted in accord with § 1346(b). Congress used the phrase "arising out of" for § 2680 exceptions that focus on a governmental act or omission. See § 2680(b) (exception for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"); § 2680(h) (no liability for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights"). Given that usage, and in light of the legislative history of § 2680(k), omission of a reference to an "act or omission of any employee" from that provision may reflect only Congress' attempt to use the least complex statutory language feasible. Cf. *Sami v. United States*, 617 F.2d 755, 762, n. 7 (C.A.D.C. 1979) ("We do not think the omission of a specific reference to acts or omissions in § 2680(k) was meaningful or that the focus of that exemption shifted from acts or omissions to resultant injuries.").

borders, the Ninth Circuit observed, no activity regarding his detention was tortious. See 331 F.3d 604, 636–637 (C.A.9 2003). Government liability to Alvarez, as analyzed by the Court of Appeals, rested solely upon a false-arrest claim. *Id.,* at 640–641. Just as Alvarez's arrest was "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico, so damages accrued only while the alleged wrongful conduct continued abroad. *Id.,* at 636–637.

Critical in the Ninth Circuit's view, "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles." *Id.,* at 640; see *ante,* at 2748, n. 1. See also *Fermino v. Fedco, Inc.,* 7 Cal.4th 701, 715, 30 Cal.Rptr.2d 18, 872 P.2d 559, 567 (1994) (defining as tortious "the nonconsensual, intentional confinement of a person, *without lawful privilege,* for an appreciable length of time, however short" (emphasis added and internal quotation marks omitted)); App. to Pet. for Cert. in No. 03–339, P. 184a (same). Once Alvarez arrived in El Paso, Texas, "the actions of domestic law enforcement set in motion[754] a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process." 331 F.3d, at 637; see *ante,* at 2748, n. 1.

Accepting, as the Ninth Circuit did, that no tortious act occurred once Alvarez was within United States borders, the Government's liability on Alvarez's claim for false arrest necessarily depended on the foreign location of the arrest and implicated foreign law. While the Court of Appeals focused on whether United States law furnished authority to seize Alvarez in Mexican territory, see 331 F.3d, at 626–631, Mexican law equally could have provided—or denied—authority for such an arrest. Had Sosa and the arrest team been Mexican law enforcement officers, authorized by Mexican law to arrest Alvarez and to hand him over to United States authorities, for example, no false-arrest claim would have been tenable. Similarly, there would have been no viable false-arrest claim if Mexican law authorized a citizen's arrest in the circumstances presented here. Indeed, Mexican and Honduran agents seized other suspects indicted along with Alvarez, respectively in Mexico and Honduras; "Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government." *Id.,* at 623, n. 23.

The interpretation of the FTCA adopted by the Ninth Circuit, in short, yielded liability based on acts occurring in Mexico that entangled questions of foreign law. Subjecting the United States to liability depending upon the law of a foreign sovereign, however, was the very result § 2680(k)'s foreign-country exception aimed to exclude. See *United States v. Spelar,* 338 U.S. 217, 221, 70 S.Ct. 10, 94 L.Ed. 3 (1949).

B

I would construe the foreign-country exception, § 2680(k), in harmony with the FTCA's sovereign-immunity waiver, § 1346(b), which refers to the place where the negligent or intentional act occurred. See Brief for United States in No. 03–485, p. 45 (urging that § 2680(k) should be applied by looking to "where the prohibited act is committed"); *id.,* at 46 ("the foreign country exception must be viewed together with [§]1346," which points to "the law of the place where the [allegedly wrongful] act or omission occurred" (internal quotation marks and citations omitted and emphasis deleted)).

Interpretation of § 2680(k) in the light of § 1346, as the Government maintains, is grounded in this Court's precedent. In

construing § 2680(k)'s reference to a "foreign country," this Court has "draw[n] support from the language of § 1346(b), the principal provision of the [FTCA]." *Smith v. United States*, 507 U.S. 197, 201, 113 S.Ct. 1178, 122 L.Ed.2d 548 (1993) (internal quotation marks omitted). In *Smith*, the Court held that a wrongful-death action "based exclusively on acts or omissions occurring in Antarctica" was barred by the foreign-country exception. *Id.*, at 198–199, 113 S.Ct. 1178. Were it not, the Court noted, "§ 1346(b) would instruct courts to look to the law of a place that has no law [*i.e.*, Antarctica] in order to determine the liability of the United States—surely a bizarre result." *Id.*, at 201–202, 113 S.Ct. 1178. Thus, in *Smith*, the Court presumed that the place "where the act or omission occurred" for purposes of the sovereign-immunity waiver, § 1346(b)(1), coincided with the place where the "claim ar[ose]" for purposes of the foreign-country exception, § 2680(k). See also *Beattie v. United States*, 756 F.2d 91, 122 (C.A.D.C.1984) (Scalia, J., dissenting) ("[A] claim 'arises' for purposes of § 2680(k) where there occurs the alleged [standard-of-care] violation ... (attributable to government action or inaction) nearest to the injury ...."); *Sami v. United States*, 617 F.2d 755, 761–762 (C.A.D.C.1979) (looking to where "the act or omission complained of occurred" in applying § 2680(k)).

Harmonious construction of §§ 1346(b) and 2680(k) accords with Congress' intent in enacting the foreign-country exception. Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power." 756 *Spelar*, 338 U.S., at 221, 70 S.Ct. 10. The legislative history of the FTCA suggests that Congress viewed cases in which the relevant *act or omission* occurred in a foreign country as entailing too great a risk of foreign-law application. Thus, Assistant Attorney General Francis M. Shea, in explaining the finally enacted version of the foreign-country exception to the House Committee on the Judiciary, emphasized that, when an *act or omission* occurred in a foreign country, § 1346(b) would direct a court toward the law of that country: "Since liability is to be determined by *the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country.*" Hearings on H.R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942) (emphasis added); see *ante*, at 2751–2752.[2] In the enacting Congress' view, it thus appears, §§ 1346(b) and 2680(k) were aligned so as to block the United States' waiver of sovereign immunity when the relevant act or omission took place overseas. See *supra*, at 2777, n. 1.

True, the Court has read *renvoi* into § 1346(b)(1)'s words "in accordance with the law of." See *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962) ("the [FTCA] ... requires application of the *whole* law of the State where the act or omission occurred" (emphasis added)).[3] That, however, is no

2. The foreign-country exception's focus on the location of the tortious act or omission is borne out by a further colloquy during the hearing before the House Committee on the Judiciary. A member of that Committee asked whether he understood correctly that "any representative of the United States who *committed a tort* in England or some other country could not be reached under [the FTCA]." Hearings on H.R. 5373 et al., at 35 (emphasis added). Assistant Attorney General Shea said yes to that understanding of § 2680(k). *Ibid.*

3. *Renvoi* is "[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." Black's Law Dictionary 1300 (7th ed.1999).

reason to resist defining the place where a claim arises for § 2680(k) purposes to mean the place where the liability-creating act [757] or omission occurred, with no *renvoi* elsewhere. It is one thing to apply *renvoi* to determine which State, within the United States, supplies the governing law, quite another to suppose that Congress meant United States courts to explore what choice of law a foreign court would make.[4]

In 1948, when the FTCA was enacted, it is also true, Congress reasonably might have anticipated that the then prevailing choice-of-law methodology, reflected in the Restatement (First) of Conflicts, would lead mechanically to the law of the place of injury. See Restatement (First) of Conflicts § 377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); *Richards*, 369 U.S., at 11–12, 82 S.Ct. 585 ("The general conflict-of-laws rule, followed by a vast majority of the States, [wa]s to apply the law of the place of injury to the substantive rights of the parties." (footnote omitted)); *ante*, at 2750–2751, 2752, n. 5 (same). Generally, albeit not always, the place where the negligent or intentional act or omission takes place coincides with the place of injury.[5] Looking to the whole law of the State where the wrongful "act or omission occurred" would therefore ordinarily lead to application of that State's own law. But cf. *ante*, at 2751–2752, 2754 (adopting a place-of-injury rule for § 2680(k)).

[758] II

The Ninth Circuit concluded that the foreign-country exception did not bar Alvarez's false-arrest claim because that claim "involve[d] federal employees working from offices in the United States to guide and supervise actions in other countries." 331 F.3d, at 638. In so holding, the Court of Appeals applied a " 'headquarters doctrine,' " whereby "a claim can still proceed . . . if harm occurring in a foreign country was proximately caused by acts in the United States." *Ibid.*

There is good reason to resist the headquarters doctrine described and relied upon by the Ninth Circuit. The Court of Appeals' employment of that doctrine renders the FTCA's foreign-country exception inapplicable whenever some authorization, support, or planning takes place in the United States. But "it will virtually always be possible to assert that the negligent [or intentional] activity that injured the plaintiff was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States." *Beattie*, 756 F.2d, at 119 (Scalia, J., dissenting); see *ante*, at 2749 (same). Hence the headquarters doctrine, which considers whether steps toward the com-

4. Reading *renvoi* into § 1346(b)(1), even to determine which State supplies the governing law, moreover, is questionable. See Shapiro, Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited, 70 N.C.L.Rev. 641, 679 (1992) ("It is only fair that federal liability be determined by the law where the federal employee's negligence took place, as Congress intended. The simplicity of the internal law approach is preferable to the complexity and opportunity for manipulation of *[Richards']* whole law construction.").

5. Enacting the FTCA, Congress was concerned with quotidian "wrongs which would have been actionable if inflicted by an individual or a corporation," *Feres v. United States*, 340 U.S. 135, 139–140, 71 S.Ct. 153, 95 L.Ed. 152 (1950), such as vehicular accidents, see S.Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946). See also *ante*, at 2751, n. 4. The place of injury in such torts almost inevitably would be the place the act or omission occurred as well.

mission of the tort occurred within the United States, risks swallowing up the foreign-country exception.

Furthermore, the Court of Appeals failed to address the choice-of-law question implicated by both §§ 1346(b) and 2680(k) whenever tortious acts are committed in multiple states. Both those provisions direct federal courts "in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence [or the intentional tort] took place." *Richards*, 369 U.S., at 10, 82 S.Ct. 585. In cases involving acts or omissions in several states, the question is which acts count. "Neither the text of the FTCA nor *Richards* provides any guidance . . . when the alleged acts or omissions occur in more than one state. Moreover, the legislative 759 history of the FTCA sheds no light on this problem." *Gould Electronics Inc. v. United States*, 220 F.3d 169, 181 (C.A.3 2000); see *Raflo v. United States*, 157 F.Supp.2d 1, 9 (D.D.C.2001) (same).

Courts of appeals have adopted varying approaches to this question. See *Simon v. United States*, 341 F.3d 193, 202 (C.A.3 2003) (listing five different choice-of-law methodologies for § 1346(b)(1)); *Gould Electronics*, 220 F.3d, at 181–183 (same).[6] Having canvassed those different approaches, Third Circuit Judge Becker concluded that "clarity is the most important virtue in crafting a rule by which [a federal court would] choose a jurisdiction." *Simon*, 341 F.3d, at 204. Eschewing "vague and overlapping" approaches that yielded "indeterminate" results, Judge Becker "appl[ied] [under § 1346(b)(1)] the choice-of-law regime of the jurisdiction in which the last significant act or omission occurred. This has the salutary effect of avoiding the selection of a jurisdiction based on a completely incidental 'last contact,' 760 while also avoiding the conjecture that [alternative] inquires often entail." *Ibid.* I agree.

A "last significant act or omission" rule applied under § 2680(k) would close the door to the headquarters doctrine as applied by the Ninth Circuit in this litigation. By directing attention to the place where the last significant act or omission occurred, rather than to a United States location where some authorization, support, or planning may have taken place, the clear rule advanced by Judge Becker preserves § 2680(k) as the genuine limitation Congress intended it to be.

The "last significant act or omission" rule works in this litigation to identify Mexico, not California, as the place where the instant controversy arose. I would

6. As cataloged by the Court of Appeals for the Third Circuit, these are: "(1) applying different rules to different theories of liability; (2) choosing the place of the last allegedly-wrongful act or omission; (3) determining which asserted act of wrongdoing had the most significant effect on the injury; (4) choosing the state in which the United States' physical actions could have prevented injury; and (5) determining where the 'relevant' act or omission occurred." *Simon*, 341 F.3d, at 202. For cases applying and discussing one or another of those five approaches, see *Ducey v. United States*, 713 F.2d 504, 508, n. 2 (C.A.9 1983) (considering where "physical acts" that could have prevented the harm would have occurred); *Hitchcock v. United States*, 665 F.2d 354, 359 (C.A.D.C.1981) (looking for the "relevant" act or omission); *Bowen v. United States*, 570 F.2d 1311, 1318 (C.A.7 1978) (noting "the alternatives of the place of the last act or omission having a causal effect, or the place of the act or omission having the most significant causal effect," but finding that both rules would lead to the same place); *Raflo v. United States*, 157 F.Supp.2d 1, 10 (D.D.C.2001) (applying *Hitchcock's* relevance test by looking for the place where the "most substantial portion of the acts or omissions occurred"); *Kohn v. United States*, 591 F.Supp. 568, 572 (E.D.N.Y.1984) (applying different States' choice-of-law rules on an act-by-act basis).

apply that rule here to hold that Alvarez's tort claim for false arrest under the FTCA is barred under the foreign-country exception.

Accordingly, I concur in the Court's judgment and concur in Parts I, III, and IV of its opinion.

Justice BREYER, concurring in part and concurring in the judgment.

I join Justice GINSBURG's concurrence and join the Court's opinion in respect to the Alien Tort Statute (ATS) claim. The Court says that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy. *Ante,* at 2765–2766. The norm must extend liability to the type of perpetrator (*e.g.,* a private actor) the plaintiff seeks to sue. *Ante,* at 2766, n. 20. And Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field. See *ante,* at 2765. The Court also suggests that principles of exhaustion might apply, and that courts should give "serious weight" to the Executive Branch's view of the impact on foreign[761] policy that permitting an ATS suit will likely have in a given case or type of case. *Ante,* at 2766, n. 21. I believe all of these conditions are important.

I would add one further consideration. Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that "the potentially conflicting laws of different nations" will "work together in harmony," a matter of increasing importance in an ever more interdependent world. *F. Hoffmann–La Roche Ltd. v. Empagran S. A.,* *ante,* 542 U.S., at 164, 124 S.Ct. 2359, 2366, 159 L.Ed.2d 226 (2004); cf. *Murray v. Schooner Charming Betsy,* 2 Cranch 64, 118, 2 L.Ed. 208 (1804). Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote. See *ante,* at 2756–2757.

These comity concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national—where, say, an American assaults a foreign diplomat and the diplomat brings suit in an American court. See Restatement (Third) of Foreign Relations Law of the United States §§ 402(1), (2) (1986) (hereinafter Restatement) (describing traditional bases of territorial and nationality jurisdiction). They do arise, however, when foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.

Since different courts in different nations will not necessarily apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the laws of those nations. That is to say, substantive uniformity does not *automatically* mean[762] that universal jurisdiction is appropriate. Thus, in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him. See, *e.g., United States v. Smith,* 5 Wheat. 153, 162, 5 L.Ed. 57 (1820) (referring to "the

general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity").

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement § 404, and Comment *a;* International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes torture, genocide, crimes against humanity, and war crimes. See *id.,* at 5–8; see also, *e.g., Prosecutor v. Furundzija,* Case No. IT–95–17/1–T, ¶¶ 155–156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia Since 1991, Dec. 10, 1998); *Attorney Gen. of Israel v. Eichmann,* 36 I.L.R. 277 (Sup.Ct. Israel 1962).

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement § 404, Comment *b.* That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by 763 criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Brief for European Commission as *Amicus Curiae* 21, n. 48 (citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, ¶¶ 5203–5272 (1998); EC Council Regulation Art. 5, § 4, No. 44/2001, 2001 O.J. (L 12/1) (Jan. 16, 2001)). Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in these cases. That lack of consensus provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here—where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.

542 U.S. 656, 159 L.Ed.2d 690

John D. ASHCROFT, Attorney General, Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION et al.

No. 03–218.

Argued March 2, 2004.

Decided June 29, 2004.

Background: Internet content providers and civil liberties groups sued United States Attorney General, alleging that Child Online Protection Act (COPA) violated First Amendment, and seeking preliminary injunction against enforcement there-

[3] Attempting to side step the one-year time constraint, the Trust further argues that there is "cause" to rectify an improper claim and that 11 U.S.C. § 502(j)'s grant of authority to consider motions for reconsideration for cause cannot be restricted by the Federal Rules of Bankruptcy Procedure. This argument is also unavailing. While § 502(j) provides that "[a] claim that has been allowed or disallowed may be reconsidered for cause," it does not grant a court power to reconsider a claim at any time. Absent any indication to the contrary, there is no reason that a motion to reconsider pursuant to § 502(j) should not be governed by the time limit set in Rule 9024. Here, the issue is not whether just "cause" exists to correct a substantive mistake but whether the procedural mechanism for correcting the mistake was timely invoked. It was not. The one-year limitation in Rule 9024 was triggered by the fact that the Trust's predecessor-in–interest filed an objection to the Appellant's claim. Because the Trust asked the bankruptcy court for reconsideration well over one year after the entry of the order allowing the claim, the motion to reconsider that order was untimely.[6]

In sum, it was error to conclude that Pleasant's claim was "entered without a contest" when the Debtors had objected to the claim, even though the parties had settled their dispute over the claim without additional court proceedings to decide its merits. Because Pleasant's Claim 1015 was not "entered without a contest" and because the Trust's motion for reconsideration was not filed within one year after the order allowing that claim, it was not properly subject to reconsideration under Rule 9024.

Conclusion

The judgment of the district court is REVERSED. The case is REMANDED with directions to enter judgment for Pleasant and to REMAND to the bankruptcy court for further proceedings consistent with this opinion.

Rabi ABDULLAHI, individually and as the natural guardian and personal representative of the estate of her daughter Lubabatau Abdullahi, Salisu Abullahi, individually and as the natural guardian and personal representative of the estate of his son Abulliahi [Manufi] Salisu, Alasan Abdullahi, individually and as the natural guardian and personal representative of the estate of his daughter Firdausi Abdullahi, Ali Hashimu,

6. We also observe that if we were to accept the Trust's rationale and hold that claims subject to filed objections and later settled by agreement without court intervention are "entered without a contest," we would create a significant disincentive to parties settling such disputes except through the use of court resources. Among other impacts, creditors would have reduced incentives to reach agreements with debtors regarding disputed claims when such settlements could be challenged well beyond a year later. As the United States Supreme Court has stated in the context of another time limitation on challenges in bankruptcy proceedings, "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor v. Freeland & Kronz,* 503 U.S. 638, 644, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (holding that bankruptcy trustee could not contest the validity of an exemption after the 30–day period provided by Rule 4003(b) had run, despite the fact that the debtor had no colorable basis for claiming the exemption).

individually and as the natural guardian and personal representative of the estate of his daughter Suleiman, Muhammadu Inuwa, individually and as the natural guardian and personal representative of the estate of his son Abdullahi M. Inuwa, Magaji Alh Laden, individually and as the natural guardian and personal representative of the estate of his son Kabiru Isyaku, Alhaji Mustapha, individually and as the natural guardian and personal representative of the estate of his daughter Asma'u Mustapha, Suleiman Umar, individually and as the natural guardian and personal representative of the estate of his son Buhari Suleiman, Zainab Abdu, a minor, by her mother and natural guardian, Haja Abdullahi, Haji Abdullahi, individually, Firdausi Abdullahi, a minor, by her father and natural guardian Abdullahi Madawaki, Abdullahi Madawaki, individually, Sani Abdullahi, a minor, by his father and natural guardian, Sani Abdullahi, Abdullahi Ado, a minor, by his mother and natural guardian, Aisha Ado, Aisha Ado, individually, Abdumajid Ali, a minor, by his father and natural guardian, Alhaji Yusuf Ali, Nura Muhammad Ali, a minor, by his father and natural guardian, Muhammad Ali, Muhammad Ali, individually, Umar Badamasi, a minor, by his father and natural guardian, malam Badamasi Zubairu, Malam Badamasi Zubairu, individually, Muhammadu Fatahu Danladi, a minor, by his father and natural guardian, Alhaji Danladi Ibrahim, Alhaji Danaldi Ibrahim, individually, Dalha Hamza, a minor, by his father and natural guardian malam Hamza Gwammaja, Malam Gwammaja, individually, Tasiu Haruna, a minor, by his guardian Mukhtar Saleh, Mukhtar Saleh, individually, Muhyiddeen Haasan, a minor, by his father and natural guardian, Tijjani Hassan, Tijjani Hassan, individually, Kawu Adamu Ibrahim, a minor, by his father and natural guardian, Malam Abamus Ibrahim Adamu, Alhaji Ibrahim Haruna, individually, Mallam Idris, individually, Yusuf Idris, a minor, by his father and naturall guardian, Idris Umar, Idris Umar, individually, Hafsat Isa, a minor, by her father and natural guardian, Isa Muhammed Isa, Isa Muhammed Isa, individually, Taju Isa, a minor, by her father and natural guardian, Malam Isa Usman, Malam Isa Usman, individually, Hadiza Isyaku, a minor, by her father and natural guardian, Isyaki Shuaibu, Isyaku Shuaibu, individually, Zahra'u Jafaru, a minor, by her father and antural guardian, Jafru Baba, Jafaru Baba, individually, Anas Mohammed, a minor, by his father and natural guardian, Malam Mohammed, Malam Mohammed, individually, Nafisatu Muhammed, a minor, by her mother and natural guardian, Yahawasu Muhammed, Yahawasu Muhammed, individually, Muhsinu Tijjani, a minor, by his father and natural guardian, Tijjani Hassan, Alhaji Yusuf Ali, Maryam Idris, a minor, by her father and natural guardian, Malam Idris, Ajudu Ismaila Adamu, individually and as parent and natural guardian of Yahaya Ismaica, minor, Malam Mohammed, individually and as parent and natural guardian of Bashir Mohammed, minor, Malam Yusab Ya'u Amale, individually and as parent and natural guardian of Suyudi Yusals Yu'a, minor, Malasm Haruna Adamu, individually and as parent and natural guardian of Mohammed

Tasi'u Haruna, minor, Zangon Kwajalawa, individually and as parent and natural guardian of Nuruddim Dauda, minor, Malam Dahauru Ya'y, individually and as parent and natural guardian of Rabi Dahuru, minor and as parent and natural guardian of Zainab Musa Dahuru, minor, Zangon Marikita, individually and as parent and natural guardian of Ismaila Musa, minor, Arhaji Muihammad Soja, individually and as parent and natural guardian and personal representative of Estate of Hamaza Achaji Muhammad, minor, deceased, Achaji Ibrahim Dankwalba, individually and as parent and natural guardian of Personal Representative of Est of Abdullahi Ibrahim, minor, Mallam Lawan, individually and as parent and natural guardian and personal representative of Est. of Aisha Lawan, minor, deceased, Alhaji Muhammed Tsohon Sojo, individually and as parent and natural guardian and personal representative of Est. of Unni Alhasi Muhammed, minor, Ismaila Zubairui, individually and as parent and natural guardian and personal representative of Est. of Mustapha Zubairu, minor, Deceased, Abubaker Musa, individually and as parent and natural of Sa'adatu Musa, Minor, Mohamed Abdu, individually and as parent and natural guardian of Haruna Abdu, minor, Mallam Hassan, individually and as parent and natural guardian and personal representative of Est. of Sadiya Hassan, minor, deceased, Mallam Yakubu Umar, individually and as parent and natural guardian of, Mallam Samaila, individually and as parent and natural guardian of Adamu Samalia, minor, Musa Yahaya, individually and as parent and natural guardian of Ukhasa Musa, minor, Audu Ismailia Adamu, individually and as parent and natural guardian of Yashaya Samaila, Malam Musa Dahiru, individually and as parent, Malam Musa Zango, individually and as parent and natural guardian os Samaila Musa, minor, Mallam Alhassan Maihula, individually and as a parent and natural guardian of Najib Maihula, minor, Mallam Abdullah Gama, individually and as parent and natural guardian of Dankuma Gama, Minor, Dauda Nuhu, individually and as parent and natural guardian and personal representative of Est. of Hamisu Nuhu, minor, deceased, Mallam Abdullahi, individually and as parent and natural guardian and personal representative of Est. of Najaratu Adbullahi, minor, deceased, Malam Umaru Mohammed, individually and as parent and natural guardian and personal representative of Est. of Sule Mohammed, minor, deceased, Mallam Nasiru, individually and as parent and natural guardian and personal representative of Est. of Yusif Nasiru, minor, deceased, Yusuf Musa, individually and as parent and natural guardian and personal representative of Est. of Nafisatu Musa, minor, deceased, Mallam Muritala, individually and as parent and natural guardian and personal representative of Est. of Umaru Muritala, minor, deceased, Mallam Tanko, individually and as parent and natural guardian and personal representative of Est. of madina Tankol, minor deceased, Mallam Sheu, individually and as parent and natural guardian and personal representative of Est. of Madina Tankol, minor, deceased, Malam Kabiru Mohamed, individually and as parent and natural guardian and personal representative of

Est. of Kabiru Mohamed, minor, deceased, Mallam Sule Abubakar, individually and as parent and natural guardian and personal representative of Est. of Fatima Abubaker, minor, deceased, Mallam Idris, individually and as parent and natural guardian and personal representative of Est. of Baba Idris, minor, deceased, Mallam Mohamed Bashir, individually and as parent and natural guardian and personal representative of Est. of Sani Bashir, minor, deceased, Ibrahim, individually and as parent and natural guardian and personal representative of Est. Hassan Ibrahim, minor, deceased, Alhaji Shuaibu, individually and as parent and natural guardian and personal representative of Est. of Masjbatu Shuaibu, minor, deceased, Mallam Abdullahi Sale, individually and as parent and natural guardian and personal representative of Est. of Shamisiya Sale, minor, deceased, Mallam Ibrahim Amyarawa, individually and as parent and natural guardian and personal representative of Est. of Yahaya Ibrahim, minor, deceased, Mallam Abdu Abubaker, individually and as parent and natural guardian and personal representative of Est. of Nasitu Abubaker, minor, deceased, Mallam Yusuf, individually and as parent and natural guardian and personal representative of Est. of Hodiza Yusuf, minor, deceased, Mallam Dauda Yusuf, individually and as parent and natural guardian and personal representative of Est. of Abubaker Sheu, minor, deceased, Maliam Mohammed Sheu, individually and as parent and natural guardian and personal representative of Est. of Mustapha Yakubu, minor, deceased, Alhaji Ubah, individually and as parent and natural guardian and personal representative of Est. of Maryam Ubah, minor, deceased, Mallam Mohamadu Jabbo, individually and as parent and natural guardian of Auwalu Mohamadu, Mallam Abdullah Adamu, individually and as parent and natural guardian and personal representative of Est. of Abdullah Adamu, minor, Plaintiffs–Appellants,

v.

PFIZER, INC., Defendant–Appellee.

Docket Nos. 05–4863–cv(L), 05–6768–cv(CON).

United States Court of Appeals, Second Circuit.

Argued: July 12, 2007.

Decided: Jan. 30, 2009.

Background: Nigerian children and their guardians sued drug company under the Alien Tort Statute, alleging that drug company violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including themselves, without their consent or knowledge. The United States District Court for the Southern District of New York, William H. Pauley, III, J., 2005 WL 1870811, and 399 F.Supp.2d 495, dismissed the complaints for lack of subject matter jurisdiction and on the ground of forum non conveniens, and plaintiffs appealed.

Holdings: The Court of Appeals, Barrington D. Parker, Circuit Judge, held that:

(1) prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law, and consequently an alleged violation thereof fell within jurisdiction of Alien Tort Statute, and

(2) state action element of claim against drug company under Alien Tort Statute was adequately alleged.

Reversed and remanded.

Wesley, Circuit Judge, filed dissenting opinion.

1. Aliens, Immigration, and Citizenship ⚿763

A federal court can recognize violation of customary international law under Alien Tort Statute only if a plaintiff identifies the violation of a norm of customary international law that, as defined by the sources of such law that United States courts, have long, albeit cautiously, recognized, and is sufficiently specific, universal, and obligatory to meet the standards established by *Sosa*. 28 U.S.C.A. § 1350.

2. Aliens, Immigration, and Citizenship ⚿763

Prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm of customary international law, and consequently an alleged violation thereof fell within jurisdiction of Alien Tort Statute. 28 U.S.C.A. § 1350.

3. Aliens, Immigration, and Citizenship ⚿763

While adoption of a self-executing treaty or the execution of treaty that is not self-executing may provide the best evidence of a particular country's custom or practice of recognizing a norm, the existence of a norm of customary international law, for purposes of Alien Tort Statute jurisdiction, is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community; agreements that are not self-executing or that have not been executed by federal legislation are appropriately considered evidence of the current state of customary international law. 28 U.S.C.A. § 1350.

4. Aliens, Immigration, and Citizenship ⚿763

For purposes of Alien Tort Statute jurisdiction, customary international law proscribes only transgressions that are of "mutual" concern to States, i.e., those involving States' actions performed towards or with regard to the other. 28 U.S.C.A. § 1350.

5. Aliens, Immigration, and Citizenship ⚿765

A private individual will be held liable under the Alien Tort Statute if he acted in concert with the state, i.e., under color of law; in making that determination, courts look to the standards developed for finding state action in claims brought under § 1983. 28 U.S.C.A. § 1350; 42 U.S.C.A. § 1983.

6. Aliens, Immigration, and Citizenship ⚿765

Civil Rights ⚿1326(5)

Nexus between the State and the challenged action may exist for purposes of Alien Tort Statute or § 1983 where a private actor has operated as a willful participant in joint activity with the State or its agents, or acts together with state officials or with significant state aid. 28 U.S.C.A. § 1350; 42 U.S.C.A. § 1983.

7. Aliens, Immigration, and Citizenship ⚿765

State action element of claim against drug company under Alien Tort Statute was adequately alleged by Nigerian children and their guardians who alleged that drug company's violations of customary international prohibition on nonconsensual medical experimentation on human beings occurred as the result of concerted action between company and the Nigerian government. 28 U.S.C.A. § 1350.

8. Federal Courts ⚿45

Dismissal on forum non conveniens grounds is not appropriate if an adequate and presently available alternative forum does not exist; a forum in which defendants are amendable to service of process and which permits litigation of the dispute is generally adequate, but such a forum may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.

9. Federal Courts ⚿45

Absent a showing of inadequacy by a plaintiff, considerations of comity preclude a court from adversely judging the quality of a foreign justice system for purposes of determining whether to dismiss on forum non conveniens grounds.

10. Federal Courts ⚿776

District court's choice of law is reviewed de novo.

11. Health ⚿901

Under Connecticut choice-of-law rules, Connecticut's "most significant relationship" analysis, rather than lex loci delicti doctrine, applied in determining state law applicable to tort claims brought by Nigerian children and their guardians against drug company for allegedly conducting medical experimentation on them while in Nigeria without their consent. Restatement (Second) §§ 6(2), 145(2).

Peter Safirstein (Elaine S. Kusel, Ann M. Lipton, Andrew Wilmar, and Tatiana Rodriguez, on the brief), Milberg Weiss Bershad & Schulman LLP, New York, NY, for Plaintiffs–Appellants Rabi Abdullahi, et al.

Richard Altschuler (Ali Ahmad, Cheverly, MD, on the brief), Altschuler & Altschuler, West Haven, CT, for Plaintiffs–Appellants Ajudu Ismaila Adamu, et al.

Steven Glickstein (David Klingsberg, Maris Veidemanis, James D. Herschlein, and Julie B. du Pont, on the brief), Kaye Scholer LLP, New York, NY, for Defendant–Appellee Pfizer, Inc.

Before: POOLER, B.D. PARKER, and WESLEY, Circuit Judges.

BARRINGTON D. PARKER, Circuit Judge:

This consolidated appeal is from the judgments of the United States District Court for the Southern District of New York (Pauley, *J.*) dismissing two complaints for lack of subject matter jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and in the alternative, on the ground of *forum non conveniens.* Plaintiffs–Appellants Rabi Abdullahi and other Nigerian children and their guardians sued Defendant–Appellee Pfizer, Inc. under the ATS ("the *Abdullahi* action"). They alleged that Pfizer violated a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in Nigeria, including themselves, without their consent or knowledge. Plaintiffs–Appellants Ajudu Ismaila Adamu and others, also children and their guardians who were part of Pfizer's Nigerian drug experiment, brought a similar action against Pfizer, alleging violations of the ATS, the Connecticut Unfair Trade Practices Act ("CUTPA"), and the Connecticut Products Liability Act ("CPLA") ("the *Adamu* action"). Pfizer moved to dismiss both actions for lack of subject matter jurisdiction

and on the basis of *forum non coveniens.* The district court granted the motions and both sets of plaintiffs have appealed.

As explained below, we conclude: (1) that the district court incorrectly determined that the prohibition in customary international law against nonconsensual human medical experimentation cannot be enforced through the ATS; (2) that changed circumstances in Nigeria since the filing of this appeal require re-examination of the appropriate forum, albeit on the basis of a legal analysis different from that employed by the district court; and (3) that the district court incorrectly applied Connecticut's choice of law rules in the *Adamu* action. Consequently, we reverse and remand the cases to the district court for further proceedings.

BACKGROUND

A. Pfizer's Trovan Test in Nigeria

On review of a district court's grant of a motion to dismiss, we assume as true the facts alleged in the complaints, construing them in the light most favorable to the appellants. *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.,* 517 F.3d 104, 115 (2d Cir.2008). The central events at issue in these cases took place in 1996, during an epidemic of bacterial meningitis in northern Nigeria.[1] The appellants allege that at that time, Pfizer, the world's largest pharmaceutical corporation, sought to gain the approval of the U.S. Food and Drug Administration ("FDA") for the use on children of its new antibiotic, Trovafloxacin Mesylate, marketed as "Trovan." They contend that in April 1996, Pfizer, dispatched three of its American physicians to work with four Nigerian doctors to experiment with Trovan on children who were patients in Nigeria's Infectious Disease Hospital ("IDH") in Kano, Nigeria. Working in concert with Nigerian government officials, the team allegedly recruited two hundred sick children who sought treatment at the IDH and gave half of the children Trovan and the other half Ceftriaxone, an FDA-approved antibiotic the safety and efficacy of which was well-established. Appellants contend that Pfizer knew that Trovan had never previously been tested on children in the form being used and that animal tests showed that Trovan had life-threatening side effects, including joint disease, abnormal cartilage growth, liver damage, and a degenerative bone condition. Pfizer purportedly gave the children who were in the Ceftriaxone control group a deliberately low dose in order to misrepresent the effectiveness of Trovan in relation to Ceftriaxone. After approximately two weeks, Pfizer allegedly concluded the experiment and left without administering follow-up care. According to the appellants, the tests caused the deaths of eleven children, five of whom had taken Trovan and six of whom had taken the lowered dose of Ceftriaxone, and left many others blind, deaf, paralyzed, or brain-damaged.

Appellants claim that Pfizer, working in partnership with the Nigerian government, failed to secure the informed consent of either the children or their guardians and specifically failed to disclose or explain the experimental nature of the study or the serious risks involved. Although the treatment protocol required the researchers to offer or read the subjects documents requesting and facilitating their informed consent, this was allegedly not done in

1. Bacterial meningitis is a serious and sometimes fatal infection of the fluids surrounding the spinal cord and the brain. Centers for Disease Control and Prevention, Meningococcal Disease: Frequently Asked Questions (May 28, 2008), http://www.cdc.gov/meningitis/bacterial/faqs.htm.

either English or the subjects' native language of Hausa. The appellants also contend that Pfizer deviated from its treatment protocol by not alerting the children or their guardians to the side effects of Trovan or other risks of the experiment, not providing them with the option of choosing alternative treatment, and not informing them that the non-governmental organization Médecins Sans Frontières (Doctors Without Borders) was providing a conventional and effective treatment for bacterial meningitis, free of charge, at the same site.[2]

The appellants allege that, in an effort to rapidly secure FDA approval, Pfizer hastily assembled its test protocol at its research headquarters in Groton, Connecticut, and requested and received permission to proceed from the Nigerian government in March 1996. At the time, Pfizer also claimed to have secured approval from an IDH ethics committee. Appellants allege, however, that the March 1996 approval letter was backdated by Nigerian officials working at the government hospital well after the experiments had taken place and that at the time the letter was purportedly written, the IDH had no ethics committee.[3] Appellants also contend that the experiments were condemned by doctors, including one on Pfizer's staff at the time of the Kano trial.

In 1998, the FDA approved Trovan for use on adult patients only. After reports of liver failure in patients who took Trovan, its use in America was eventually restricted to adult emergency care. In 1999, the European Union banned its use.

B. The Proceedings Below

In August 2001, the *Abdullahi* plaintiffs sued Pfizer under the ATS, alleging that the experiments violated international law. In September 2002, the district court granted Pfizer's motion to dismiss the *Abdullahi* claims on the ground of *forum non conveniens*, conditioned on Pfizer's consent to litigation in Nigeria. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118(WHP), 2002 WL 31082956, at *12 (S.D.N.Y. Sept. 17, 2002) ("*Abdullahi I*"). It found that Nigeria was an adequate alternative forum despite plaintiffs' contentions about corruption in the Nigerian court system. *Id.* at *8–10. The district court denied Pfizer's motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., concluding that the plaintiffs adequately alleged that Pfizer's collusion with the Nigerian government made it a state actor. *Id.* at *5–6.

Meanwhile, another group of children and guardians involved in the Trovan experiment sued in the Federal High Court in Kano, alleging claims under Nigerian law. That case, *Zango v. Pfizer International, Inc.*, [2001] Suit No. FHC/

2. The appellants further allege that Pfizer failed to follow its protocol in ways that might have mitigated the harm suffered by the children. They contend that Pfizer violated the protocol by administering Trovan orally even though oral absorption is difficult for sick children; conducting no testing prior to administering the drug to determine whether Nigeria's strain of meningitis might be responsive to Trovan; failing to determine that the children in the test had meningitis; and failing to either exclude from the experiment children with liver or joint problems or to test for such problems, even though Trovan was known to exacerbate them. Although Pfizer's protocol called for children receiving Trovan to be switched to Ceftriaxone if they did not respond well to Trovan, Pfizer allegedly did not conduct regular blood tests of the children or switch those who suffered from Trovan-related side effects to Ceftriaxone.

3. A Nigerian physician who was the principal investigator for the test allegedly admitted that his office created the backdated approval letter when the FDA conducted an audit of the experiment in 1997.

K/CS/204/2001 (Nigeria), was dismissed in 2003 after plaintiffs voluntarily discontinued the suit following the removal from the bench of the first judge assigned to the action and the second judge's decision to decline jurisdiction for personal reasons. *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118(WHP), 2005 WL 1870811, at *5 (S.D.N.Y. Aug. 9, 2005) ("*Abdullahi III*"). On appeal to this Court from the district court's dismissal in *Abdullahi I*, the *Abdullahi* appellants argued that the dismissal of the *Zango* litigation was a result of rampant corruption, which indicated that the Nigerian judicial system could not provide an adequate alternative forum for their action. Given an inconclusive record regarding the events leading to the dismissal of the *Zango* lawsuit, we vacated the judgment and remanded for further fact-finding on *forum non conveniens*. *See Abdullahi v. Pfizer, Inc.*, 77 Fed.Appx. 48, 53 (2d Cir.2003) (summary order) ("*Abdullahi II*").

In November 2002, following the dismissal of the *Zango* lawsuit, a number of the *Zango* plaintiffs filed the *Adamu* action. They alleged that in planning the Trovan experiment in Connecticut and in conducting the tests in Nigeria without informed consent, Pfizer violated the CUTPA, the CPLA, and the ATS. Eventually, the *Adamu* action was transferred to the Southern District of New York and consolidated with the *Abdullahi* action. Pfizer then moved to dismiss both cases for failure to state a claim under the ATS and on the basis of *forum non conveniens*. It also moved to dismiss in *Adamu* on the ground that Connecticut choice of law principles require the application of Nigerian law, which bars suit under CUTPA and the CPLA.

The district court granted the motions. *See Abdullahi III*, 2005 WL 1870811; *Adamu v. Pfizer, Inc.*, 399 F.Supp.2d 495 (S.D.N.Y.2005). In *Abdullahi III*, Judge Pauley held that while "[p]laintiffs correctly state that non-consensual medical experimentation violates the law of nations and, therefore, the laws of the United States," they failed to identify a source of international law that "provide[s] a proper predicate for jurisdiction under the ATS." 2005 WL 1870811, at *9, 14. Noting that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," he concluded that "[a] cause of action for Pfizer's failure to get any consent, informed or otherwise, before performing medical experiments on the subject children would expand customary international law far beyond that contemplated by the ATS." *Id.* at *13–14 (internal quotation marks omitted).

With regard to the *forum non conveniens* analysis, the district court declined to accept plaintiffs' submissions concerning Pfizer's alleged bribery of Nigerian officials on the ground that they were not based on personal knowledge. *Id.* at *16–17. Finding that the plaintiffs had failed to submit specific evidence that the Nigerian judiciary would be biased against its own citizens in an action against Pfizer, the district court alternatively held that Nigeria was an adequate alternate forum. *Id.* at *16, 18.

Several months later, the district court also granted Pfizer's motion to dismiss the *Adamu* case. *Adamu*, 399 F.Supp.2d 495. It relied on its *Abdullahi III* decision to hold that the plaintiffs could not establish jurisdiction under the ATS. *Id.* at 501. The district court also incorporated the *forum non conveniens* analysis from *Abdullahi III* to find that Nigeria is an adequate forum. *Id.* at 504. Applying the public and private interest factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), *superseded by statute on other grounds as*

recognized in Cowan v. Ford Motor Co., 713 F.2d 100, 103 (5th Cir.1983), the court found that while public interest factors did not support either forum, private interest factors weighed in favor of dismissal. *Adamu*, 399 F.Supp.2d. at 505–06. The district court also dismissed the *Adamu* plaintiffs' Connecticut law claims, concluding that, under Connecticut choice of law principles, the action was governed and barred by Nigerian law. *Id.* at 503.

The *Abdullahi* and *Adamu* plaintiffs appealed. Since then, a tectonic change has altered the relevant political landscape. In May 2007, the state of Kano brought criminal charges and civil claims against Pfizer, seeking over $2 billion in damages and restitution.[4] Around the same time, the federal government of Nigeria sued Pfizer and several of its employees, seeking $7 billion in damages.[5] None of these cases seek compensation for the subjects of the tests, who are the appellants before this Court. Pfizer then notified this Court that in light of these recent developments, which it believed required further consideration by the district court, it would not seek affirmance on the basis of *forum non conveniens*.

DISCUSSION

The district court dismissed both actions based on its determination that it lacked subject matter jurisdiction because plaintiffs failed to state claims under the ATS. We review dismissal on this ground *de novo*. *Rweyemamu v. Cote*, 520 F.3d 198, 201 (2d Cir.2008). "To survive dismissal, the plaintiff[s] must provide the grounds upon which [their] claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007)).[6]

I. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides that "[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." Included in the Judiciary Act of 1789, the statute provided jurisdiction in just two cases during the first 191 years after its enactment. *See Taveras v. Taveraz*, 477 F.3d 767, 771 (6th Cir.2007). In the last thirty years, however, the ATS has functioned slightly more robustly, conferring jurisdiction over a limited category of claims.

We first extensively examined the ATS in *Filartiga v. Pena–Irala*, 630 F.2d 876 (2d Cir.1980), where we held that conduct violating the law of nations is actionable under the ATS "only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords." *Id.* at 888. Following

4. Tina Akannam, *Nigeria: Pfizer—Case Adjourned Till May 27,* Vanguard, April 30, 2008, http://allafrica.com/stories/200804300470.html; Joe Stephens, *Pfizer Faces Criminal Charges in Nigeria,* The Washington Post, May 30, 2007, at A10, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/05/29/AR2007052902107.html.

5. Jonathan Clayton, *Pfizer Under Fire After Drug Trial,* TimesOnline, June 27, 2007, http://business.timesonline.co.uk/tol/business/industry_sectors/health/article 1990908.ece; *Nigeria Sues Drugs Giant Pfizer,* BBC News, June 5, 2007, http://news.bbc.co.uk/2/hi/africa/6719141.stm.

6. *Twombly* instituted a flexible "plausibility standard," not limited to antitrust cases, which requires the amplification of facts in certain contexts. *Iqbal v. Hasty*, 490 F.3d 143, 155–58 (2d Cir.2007).

Filartiga, we concluded that ATS claims may sometimes be brought against private actors, and not only state officials, *see Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir.1995), when the tortious activities violate norms of "universal concern" that are recognized to extend to the conduct of private parties—for example, slavery, genocide, and war crimes, *id.* at 240. This case involves allegations of both state and individual action. In *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003), we clarified that "the law of nations" in the ATS context "refers to the body of law known as customary international law," which "is discerned from myriad decisions made in numerous and varied international and domestic arenas" and "does not stem from any single, definitive, readily-identifiable source." *Id.* at 247–48. These principles are rejected in their entirety by our dissenting colleague. In *Flores*, we concluded that ATS jurisdiction is limited to alleged violations of "those clear and unambiguous rules by which States universally abide, or to which they accede, out of a sense of legal obligation and mutual concern." *Id.* at 252. Applying this standard, we held that the appellants' claim that pollution from mining operations caused lung disease failed to state a violation of customary international law. We reasoned that the "right to life" and the "right to health" were insufficiently definite to constitute binding customary legal norms and that there was insufficient evidence to establish the existence of a narrower norm prohibiting intranational pollution. *Id.* at 254–55.

In 2004, the Supreme Court comprehensively addressed the ATS for the first time in *Sosa v. Alvarez–Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). Justice Souter, writing for the majority, clarified that the ATS was enacted to create jurisdiction over "a relatively modest set of actions alleging violations of the law of nations" and with "the understanding that the common law would provide a cause of action." *Id.* at 720, 723. The Supreme Court confirmed that federal courts retain a limited power to "adapt[ ] the law of nations to private rights" by recognizing "a narrow class of international norms" to be judicially enforceable through our residual common law discretion to create causes of action. *Id.* at 728–29. It cautioned, however, that courts must exercise this power with restraint and "the understanding that the door [to actionable violations] is still ajar subject to vigilant doorkeeping," permitting only those claims that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized." *Id.* at 725, 729. These 18th-century paradigms consist of offenses against ambassadors, violations of the right to safe passage, and individual actions arising out of piracy. *Id.* at 724. The common theme among these offenses is that they contravened the law of nations, admitted of a judicial remedy, and simultaneously threatened serious consequences in international affairs. *Id.* at 715. Lower courts are required to gauge claims brought under the ATS against the current state of international law, but are permitted to recognize under federal common law only those private claims for violations of customary international law norms that reflect the same degree of "definite content and acceptance among civilized nations" as those reflected in the 18th-century paradigms. *Id.* at 732–33. The Supreme Court in *Sosa* also counseled that "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that

cause available to litigants" in federal courts. *Id.*

[1] In this way *Sosa* set a "high bar to new private causes of action" alleging violations of customary international law. *Id.* at 727. A federal court can recognize one only if a plaintiff identifies the violation of a norm of customary international law that, as defined by the sources of such law that United States courts "have long, albeit cautiously, recognized," *id.* at 733–34 (referencing *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900)), is sufficiently specific, universal, and obligatory to meet the standards established by *Sosa*. *See Sosa*, 542 U.S. at 732, 124 S.Ct. 2739 (citing with approval *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C.Cir.1984) (Edwards, J., concurring), and *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir.1994)). Applying these principles, the Supreme Court held that the plaintiff, a Mexican national who sued a fellow Mexican national under the ATS for allegedly aiding in his illegal abduction by agents of the U.S. Drug Enforcement Agency, had failed to allege the violation of a customary international law norm with the required precision. *Sosa*, 542 U.S. at 738, 124 S.Ct. 2739. The Supreme Court found that the practical consequences of recognizing a general and broad customary international law prohibition of arbitrary detention in a case involving "a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment" would be "breathtaking" and inappropriate. *Id.* at 736, 738, 124 S.Ct. 2739.

Since *Sosa*, this Court has reviewed three judgments dismissing claims under the ATS. In *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), we held that the ATS conferred jurisdiction over multinational corporations that purportedly collaborated with the government of South Africa in maintaining apartheid because they aided and abetted violations of customary international law. *Id.* at 260. In *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir.2008), we concluded that the ATS did not support a claim that the defendants violated international law by manufacturing and supplying Agent Orange and other herbicides used by the United States military during the Vietnam War. *Id.* at 123. We reasoned that the sources of law on which the appellants relied did not define a norm prohibiting the wartime use of Agent Orange that was both universal and sufficiently specific to satisfy the requirements of *Sosa*. *Id.* at 119–23. Similarly, in *Mora v. People of the State of New York*, 524 F.3d 183 (2d Cir.2008), we held that the norm at issue—one that prohibits the detention of a foreign national without informing him of the requirement of consular notification and access under Article 36(1)(b)(3) of the Vienna Convention on Consular Relations—was insufficiently universal to support a claim under the ATS. *Id.* at 208–09.

Turning now to this appeal, and remaining mindful of our obligation to proceed cautiously and self-consciously in this area, we determine whether the norm alleged (1) is a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) is defined with a specificity comparable to the 18th-century paradigms discussed in *Sosa*; and (3) is of mutual concern to States.

A. The Prohibition of Nonconsensual Medical Experimentation on Humans

[2] Appellants' ATS claims are premised on the existence of a norm of custom-

ary international law prohibiting medical experimentation on non-consenting human subjects. To determine whether this prohibition constitutes a universally accepted norm of customary international law, we examine the current state of international law by consulting the sources identified by Article 38 of the Statute of the International Court of Justice ("ICJ Statute"), to which the United States and all members of the United Nations are parties. *Flores,* 414 F.3d at 250; *see, e.g., United States v. Yousef,* 327 F.3d 56, 100–01 (2d Cir.2003). Article 38 identifies the authorities that provide "competent proof of the content of customary international law." *Flores,* 414 F.3d at 251. These sources consist of:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter ICJ Statute].

The appellants ground their claims in four sources of international law that categorically forbid medical experimentation on non-consenting human subjects: (1) the Nuremberg Code, which states as its first principle that "[t]he voluntary consent of the human subject is absolutely essential"; (2) the World Medical Association's Declaration of Helsinki, which sets forth ethical principles to guide physicians world-wide and provides that human subjects should be volunteers and grant their informed consent to participate in research; (3) the guidelines authored by the Council for International Organizations of Medical Services ("CIOMS"), which require "the voluntary informed consent of [a] prospective subject"; and (4) Article 7 of the International Covenant on Civil and Political Rights ("ICCPR"), which provides that "no one shall be subjected without his free consent to medical or scientific experimentation." [7]

The district court found that "non-consensual medical experimentation violates the law of nations and, therefore, the laws of the United States" and cited the Nuremberg Code for support. *Abdullahi III,* 2005 WL 1870811, at *9. It then noted that "[w]hile federal courts have the authority to imply the existence of a private right of action for violations of *jus cogens* norms of international law, federal courts must consider whether there exist special factors counseling hesitation in the absence of affirmative action by Congress." *Id.* (internal citations and quotation marks omitted). The district court then separately analyzed the four sources of international law that prohibit nonconsensual medical experimen-

7. These sources are located respectively at (1) *United States v. Brandt,* 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 181 (1949) [hereinafter Nuremberg Trials]; (2) World Med. Ass'n, *Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects,* art. 20, 22, G.A. Res. (adopted 1964, amended 1975, 1983, 1989, 1996, and 2000), http://www.wma.net/e/policy/pdf/17c.pdf [hereinafter Declaration of Helsinki]; (3) Council for International Organizations of Medical Services [CIOMS], International Ethical Guidelines for Biomedical Research Involving Human Subjects, guideline 4 (3rd ed.2002), *superseding id.* at guideline 1 (2nd ed.1993); (4) International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

tation on humans and the Universal Declaration of Human Rights. *Id.* at *11–13. It found that with the exception of the Nuremberg Code, these sources contain only aspirational or vague language lacking the specificity required for jurisdiction. *Id.* at *12–13. It also determined that because the United States did not ratify or adopt any of these authorities except the ICCPR, and because even the ICCPR is not self-executing, none of them create binding international legal obligations that are enforceable in federal court. *Id.* at *11–13. Finally, the district court concluded that the plaintiffs failed to provide a proper predicate for ATS jurisdiction because none of the sources independently authorizes a private cause of action and the inference of such a cause of action is a matter best left to Congress. *Id.* at *13–14.[8]

The district court's approach misconstrued both the nature of customary international law and the scope of the inquiry required by *Sosa.* It mistakenly assumed that the question of whether a particular customary international law norm is sufficiently specific, universal, and obligatory to permit the recognition of a cause of action under the ATS is resolved essentially by looking at two things: whether each source of law referencing the norm is binding and whether each source expressly authorizes a cause of action to enforce the norm. But *Sosa,* as we have seen, requires a more fulsome and nuanced inquiry. Courts are obligated to examine how the specificity of the norm compares with 18th-century paradigms, whether the norm is accepted in the world community, and whether States universally abide by the norm out of a sense of mutual concern. By eschewing this inquiry, the district court did not engage the fact that norms of customary international law are "discerned from myriad decisions made in numerous and varied international and domestic arenas" and "[do] not stem from any single, definitive, readily-identifiable source." *Flores,* 414 F.3d at 247–48.

[3] The district court also inappropriately narrowed its inquiry in two respects. First, it focused its consideration on whether the norm identified by the plaintiffs is set forth in conventions to which the United States is a party, and if so, whether these treaties are self-executing or executed by federal legislation. While adoption of a self-executing treaty or the execution of a treaty that is not self-executing may provide the best evidence of a particular country's custom or practice of recognizing a norm, *see Flores,* 414 F.3d at 257, the existence of a norm of customary international law is one determined, in part, by reference to the custom or practices of many States, and the broad acceptance of that norm by the international community. Agreements that are not self-executing or that have not been executed by federal legislation, including the ICCPR, are appropriately considered evidence of the current state of customary international law. *See Khulumani,* 504 F.3d at 284 (Katzmann, J., concurring) (noting that "[w]hether a treaty that embodies [a norm of customary international law] is self-executing is relevant to, but is not determinative of, [the] question" of whether the norm permits ATS jurisdiction). A formal treaty, moreover, is not the lone primary source of customary international law. The ICJ Statute permits, and *Sosa* encourages, among other things, that courts consider "international custom, as evidence of a general practice accepted

8. The district court interchangeably refers to the "lack of jurisdiction" or "lack of subject matter jurisdiction" over plaintiffs' claims, the plaintiffs' failure to state an ATS claim, and their failure to identify a norm that permits the inference of a cause of action.

as law." ICJ Statute, *supra*, at art. 38(1); *Sosa*, 542 U.S. at 734, 124 S.Ct. 2739 ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.") (quoting *The Paquete Habana*, 175 U.S. at 700, 20 S.Ct. 290).

Second, the district court's consideration of whether each source of law creates binding legal norms failed to credit the fact that even declarations of international norms that are not in and of themselves binding may, with time and in conjunction with state practice, provide evidence that a norm has developed the specificity, universality, and obligatory nature required for ATS jurisdiction. *See Filartiga*, 630 F.2d at 883 ("[A non-binding] Declaration creates an expectation of adherence, and insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.") (internal quotation marks omitted). The district court should have considered a greater range of evidence and weighed differently the probative value of the sources on which the appellants relied.

In sum, it was inappropriate for the district court to forego a more extensive examination of whether treaties, international agreements, or State practice have ripened the prohibition of nonconsensual medical experimentation on human subjects into a customary international law norm that is sufficiently (i) universal and obligatory, (ii) specific and definable, and (iii) of mutual concern, to permit courts to infer a cause of action under the ATS. *See Sosa*, 542 U.S. at 732–35, 124 S.Ct. 2739. We now proceed with such an examination.

i. Universality

The appellants must allege the violation of a norm of customary international law to which States universally subscribe. *See Sosa*, 542 U.S. at 732, 124 S.Ct. 2739; *Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d at 117. The prohibition on nonconsensual medical experimentation on human beings meets this standard because, among other reasons, it is specific, focused and accepted by nations around the world without significant exception.

The evolution of the prohibition into a norm of customary international law began with the war crimes trials at Nuremberg. The United States, the Soviet Union, the United Kingdom and France "acting in the interest of all the United Nations," established the International Military Tribunal ("IMT") through entry into the London Agreement of August 8, 1945. M. Cheriff Bassiouni et al., *An Appraisal of Human Experimentation in International Law and Practice: The Need for International Regulation of Human Experimentation*, 72 J.Crim. L. & Criminology 1597, 1640 & n. 220 (1981) (internal quotation marks omitted). Annexed to the London Agreement was the London Charter, which served as the IMT's Constitution. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, with annexed Charter of the International Military Tribunal art. 2, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. According to the Charter, the IMT had the "power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed," among other offenses, war crimes and crimes against humanity. *Id.* at art. 6.

The IMT tried 22 "major" Nazi war criminals leaving "lower-level" war criminals, including "[l]eading physicians . . . and leading German industrialists," to be tried in subsequent trials by U.S. military tribunals acting "under the aegis of the

IMT." United States Holocaust Memorial Museum, *War Crimes Trials,* Holocaust Encylopedia (2008), http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005140. The law that authorized the creation of the U.S. military tribunals, Control Council Law No. 10, was enacted in 1945 by the Allied Control Council, *see id.,* an authority through which the London Agreement signatories exerted joint-control over Germany, *see* Encyclopedia Britannica, *Germany,* Encyclopedia Britannica Online (2009), http://search.eb.com/eb/article–58214. Control Council Law No. 10 stated that its purpose was to "give effect to the terms of ... the London Agreement ... and the [London] Charter," and "to establish a uniform legal basis in Germany for the prosecution of war criminals." Allied Control Council No. 10, preamble, (Dec. 20, 1945), http://avalon.law.yale.edu/imt/imt10.asp. Law No. 10 expressly incorporated the London Agreement, identifying it as an "integral part[ ] of this Law." *Id.* at art. I. Law No. 10 also authorized military tribunals of the occupying powers to prosecute individuals for the same crimes over which the IMT had jurisdiction, including war crimes and crimes against humanity, *see id.* at arts. II–III, and made military tribunal prosecutions subject to the IMT's right of first refusal, *see id.* at art. III. Consequently, the U.S. military tribunals effectively operated as extensions of the IMT, *see* Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 107,* 107 (1949) [hereinafter *Report on Nuernberg War Crimes Trials], available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf (explaining that "the trials under Law No. 10 were to be a means of carrying out such 'declarations of criminality' ... as the International Military Tribunal might make" and that "[t]he first [IMT] trial and the 12 following [military tribunal] trials ... form a single sequence based on common principles"), and Control Council Law No. 10 served to implement the commitments undertaken in the London Agreement, *see id.* at 7 (noting that "the two documents supplemented each other" and "[m]ajor criminals not tried under the one could be tried under the other").

In August 1947, Military Tribunal 1, staffed by American judges and prosecutors and conducted under American procedural rules, *see* George J. Annas, *The Nuremberg Code in U.S. Courts: Ethics versus Expediency, in The Nazi Doctors and the Nuremberg Code* 201, 201 (George J. Annas & Michael A. Grodin eds., 1992), promulgated the Nuremberg Code as part of the tribunal's final judgment against fifteen doctors who were found guilty of war crimes and crimes against humanity for conducting medical experiments without the subjects' consent, *Brandt,* 2 Nuremberg Trials, at 181–82. Among the nonconsensual experiments that the tribunal cited as a basis for their convictions were the testing of drugs for immunization against malaria, epidemic jaundice, typhus, smallpox and cholera. *Id.* at 175–178. Seven of the convicted doctors were sentenced to death and the remaining eight were sentenced to varying terms of imprisonment. *Id.* at 298–300. The tribunal emphasized that

> [i]n every single instance appearing in the record, subjects were used who did not consent to the experiments; indeed, as to some of the experiments, it is not even contended by the defendants that the subjects occupied the status of volunteers.

Id. at 183. The judgment concluded that "[m]anifestly human experiments under such conditions are *contrary to the principles of the law of nations* as they result from usages established among civilized

peoples, from the laws of humanity, and from the dictates of public conscience." *Id.* (emphasis added and internal quotation marks omitted). The Code created as part of the tribunal's judgment therefore emphasized as its first principle that "[t]he voluntary consent of the human subject is absolutely essential." *Id.* at 181.

The American tribunal's conclusion that action that contravened the Code's first principle constituted a crime against humanity is a lucid indication of the international legal significance of the prohibition on nonconsensual medical experimentation. As Justices of the Supreme Court have recognized, "[t]he medical trials at Nuremberg in 1947 deeply impressed *upon the world* that experimentation with unknowing human subjects is morally and legally unacceptable." *United States v. Stanley,* 483 U.S. 669, 687, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987) (Brennan, J., concurring in part and dissenting in part) (emphasis added); *see also id.* at 709–10, 107 S.Ct. 3054 (O'Connor, J., concurring in part and dissenting in part).

Moreover, both the legal principles articulated in the trials' authorizing documents and their application in judgments at Nuremberg occupy a position of special importance in the development of bedrock norms of international law. United States courts examining the Nuremberg judgments have recognized that "[t]he universal and fundamental rights of human beings identified by Nuremberg—rights against genocide, enslavement, and other inhumane acts . . .—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens,*" from which no derogation is permitted, irrespective of the consent or practice of a given State. *Siderman de Blake v. Republic of Arg.,* 965 F.2d 699, 715 (9th Cir.1992) (cited in *Sampson v. F.R.G.,* 250 F.3d 1145, 1150 (7th Cir.2001)). As Telford Taylor, who first served as an assistant to Justice Robert Jackson during his time as Chief Prosecutor for the IMT and then became Chief of Counsel for War Crimes on the Nuremberg trials held under the authority of Control Council Law No. 10, explained, "Nuernberg was based on enduring [legal] principles and not on temporary political expedients, and this fundamental point is apparent from the reaffirmation of the Nuernberg principles in Control Council Law No. 10, and *their application and refinement* in the 12 judgments rendered under that law during the 3–year period, 1947 to 1949." Taylor, *Report on Nuernberg War Crimes Trials,* at 107 (emphasis added).

Consistent with this view, the Code's first principle has endured: "[S]ignificant world opinion has not come to the defense of the nature or manner in which the experiments were conducted in the Nazi concentration camps." Bassiouni et al., *supra,* at 1641. Rather, since Nuremberg, states throughout the world have shown through international accords and domestic law-making that they consider the prohibition on nonconsensual medical experimentation identified at Nuremberg as a norm of customary international law.[9]

9. The Fourth Geneva Convention, which entered into force in 1950 and provides protection to civilians in the time of war, elaborates on the application of the norm during armed conflict. Article 32 of the convention prohibits civilian or military agents of the state parties from conducting "medical or scientific experiments not necessitated by the medical treatment of the protected person." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 32, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. According to the commentary, "[p]rotected persons must not in any circumstances be used as 'guinea pigs' for medical experiments." *Commentary on the Geneva Conventions of 12 August 1949: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of*

In 1955, the draft International Covenants on Human Rights was revised to add a second sentence to its prohibition of torture and cruel, inhuman or degrading treatment or punishment. The addition provided that "[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation involving risk, where such is not required by his state of physical or mental health." Annotations on the text of the draft International Covenants on Human Rights, at 31, U.N. GAOR, 10th Sess., Annexes, agenda item 28(II), U.N. Doc. A/2929 (July 1, 1955). The clause was later revised to offer the simpler and sweeping prohibition that "no one shall be subjected without his free consent to medical or scientific experimentation." ICCPR, *supra*, at art. 7. This prohibition became part of Article 7 of the ICCPR, which entered into force in 1976, and is legally binding on the more than 160 States–Parties that have ratified the convention without reservation to the provision.[10] By its terms this prohibition is not limited to state actors; rather, it guarantees individuals the right to be free from nonconsensual medical experimentation by any entity—state actors, private actors, or state and private actors behaving in concert.

Its status as a norm that states conceive as legally binding—and therefore part of customary international law—is confirmed by Article 2 of the accord, which requires that "[e]ach State Party . . . undertake[ ] to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." ICCPR art. 2(1). The international community's recognition in the ICCPR of its obligation to protect humans against nonconsensual medical experimentation, regardless of the source of the action, is powerful evidence of the prohibition's place in customary international law.

It is clear that, as the court mentioned in *Sosa*, the Universal Declaration of Human Rights and the ICCPR themselves could not establish the relevant, applicable rule of international law in that case. *Sosa*, 542 U.S. at 754, 124 S.Ct. 2739. Nonetheless, the ICCPR, when viewed as a reaffirmation of the norm as articulated in the Nuremberg Code, is potent authority for the universal acceptance of the prohibition on nonconsensual medical experimentation. As we discuss below, *see infra* pp. 181–83, the fact that the prohibition on medical experimentation on humans without consent has been consciously embedded by Congress in our law and reaffirmed

War 224 (Oscar Uhler & Henri Coursier eds., 1958). This commentary explains that the prohibition is directly related to the first principle of the Nuremberg Code since "[i]n prohibiting medical experiments on protected persons, the Diplomatic Conference wished to abolish for ever the criminal practices from which thousands of persons suffered in the death camps of the [second] world war." The practices involved human medical experiments that were objectionable because they were nonconsensual. *See Brandt,* 2 Nuremberg Trials, at 183. The convention is legally-binding on 194 states that have ratified it without reservation to Article 32. *See* International Committee of the Red Cross, Geneva Conventions of 12 August 1949 State Parties, Signatories, Reservations and Declarations, http://www.icrc.org/ihl.nsf/WebSign?Read Form & id=375 & ps=P.

10. Although certain States–Parties to the ICCPR have made reservations or declarations with respect to Article 7's prohibition of torture and cruel, inhuman or degrading treatment or punishment, we are not aware of any similar qualification by a State–Party to the prohibition of medical or scientific experimentation without the free consent of human subjects. *See* Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, Declarations and Reservations, http://www2.ohchr.org/english/bodies/ratification/docs/Declarations ReservationsICCPR.pdf.

on numerous occasions by the FDA demonstrates that the United States government views the norm as the source of a binding legal obligation even though the United States has not ratified the ICCPR in full.[11]

In 1964, the World Medical Association adopted the Declaration of Helsinki, which enunciated standards for obtaining informed consent from human subjects. It provided that in clinical research combined with professional care, "[i]f at all possible, consistent with patient psychology, the doctor should obtain the patient's freely given consent after the patient has been given a full explanation," and that non-therapeutic clinical research on a person "cannot be undertaken without his free consent, after he has been fully informed." World Med. Ass'n, *Declaration of Helsinki: Code of Ethics of the World Medical Association*, art. III(3a), G.A. Res. (1964), http://www.pubmedcentral.nih.gov/picrender.fcgi?artid= 1816102 & blobtype=pdf. The Declaration has since been amended five times. The informed consent provision now provides that "subjects must be volunteers and informed participants in the research project." Declaration of Helsinki, *supra*, at art. 20. The Declaration also requires that "[i]n any research on human beings, each potential subject must be adequately informed of the aims, methods, . . . anticipated benefits and potential risks of the study, and the discomfort it may entail" and that researchers "obtain the subject's freely-given informed consent, preferably in writing." *Id.* at art. 22.

Although the Declaration itself is non-binding, since the 1960s, it has spurred States to regulate human experimentation, often by incorporating its informed consent requirement into domestic laws or regulations. *See* Delon Human & Sev S. Fluss, The World Medical Association's Declaration of Helsinki: Historical and Contemporary Perspectives, 8–11 (July 24, 2001) (fifth draft), http://www.wma.net/e/ethicsunit/pdf/draft_historical_ contemporary_perspectives.pdf (describing legal and regulatory developments in Australia, Belgium, Brazil, China, Israel, Japan, New Zealand, Norway, Switzerland, and the United States following the Declaration of Helsinki). Currently, the laws and regulations of at least eighty-four countries, including the United States, require the informed consent of human subjects in medical research.[12] That this conduct has been the subject of domestic legislation is not, of course, in and of itself proof of a norm. *See Flores*, 414 F.3d at 249. However, the incorporation of this norm into the laws of this country and this host of others is a powerful indication of the international acceptance of this norm as a binding legal obligation, where, as here, states have shown that the norm is of mutual concern by including it in a variety of international accords.

11. *Khulumani* makes clear that treaties that the United States has neither signed nor ratified—let alone treaties like the ICCPR that the United States has signed but not ratified—may evidence a customary international law norm for ATS purposes where the treaty has been ratified widely and it is clear that the reason for the United States's failure to subscribe to the treaty was unrelated to the particular norm in question. *See Khulumani*, 504 F.3d at 276, 276 n. 9 (Katzmann, J., concurring).

12. The Department of Health and Human Services has compiled the laws, regulations, and guidelines governing human subjects research in eighty-four countries. *See* Office of Human Research Prot., Dep't of Health & Human Servs., International Compilation of Human Subject Research Protections (2008), http://www.hhs.gov/ohrp/international/HSPCompilation.pdf. It is uncontested that all of the countries identified in this compilation require informed consent to medical experimentation.

The history of the norm in United States law demonstrates that it has been firmly embedded for more than 45 years and—except for our dissenting colleague—its validity has never been seriously questioned by any court. Congress mandated patient-subject consent in drug research in 1962. Bassiouni et al., *supra*, at 1624 (citing 21 U.S.C. § 355(i) (1976)). In response, the FDA promulgated its first regulations requiring the informed consent of human subjects. Tellingly, the sources on which our government relied in outlawing nonconsensual human medical experimentation were the Nuremberg Code and the Declaration of Helsinki, which suggests the government conceived of these sources' articulation of the norm as a binding legal obligation. Bassiouni et al., *supra*, at 1625–26 (citing 21 C.F.R. § 310.102(h) (1980)).[13] Today, FDA regulations require informed consent to U.S. investigators' research, whether conducted domestically or in a foreign country, used to support applications for the approval of new drugs. *See* 21 C.F.R. §§ 50.20, 50.23–.25, 50.27, 312.20, 312.120 (2008); 45 C.F.R. §§ 46.111, 46.116–.117 (2008).

The importance that the United States government attributes to this norm is demonstrated by its willingness to use domestic law to coerce compliance with the norm throughout the world. United States law requires that, as a predicate to FDA approval of any new drug, both American and foreign sponsors of drug research involving clinical trials, whether conducted here or abroad, procure informed consent from human subjects. 21 C.F.R. §§ 312.20, 312.120 (2008); *see also* Dep't of Health & Human Servs., Office of Inspector Gen., The Globalization of Clinical Trials 5 (2001), http://www.oig.hhs.gov/oei/reports/oei–01–00–00190.pdf. Sponsors conducting research under an Investigational New Drug Application ("IND") are obligated to adhere to FDA regulations, which require informed consent. 21 C.F.R. § 312.20 (2008); The Globalization of Clinical Trials, *supra*, at 5. Prior to April 2008, sponsors conducting research under non-IND guidelines were obligated to adhere to the ethical principles of the 1989 version of the Declaration of Helsinki or the host country's regulations, whichever offered greater protection to the human subject. 21 C.F.R. § 312.120 (2007); The Globalization of Clinical Trials, *supra*, at 5. The April 2008 revisions to the non-IND guidelines reaffirmed the informed consent requirement. Human Subject Protection: Foreign Clinical Studies Not Conducted Under an Investigational New Drug Application, 73 Fed.Reg. 22,800, 22,801, 22,803,

13. The importance of informed consent to medical experimentation was reinforced with the passage of the National Research Act in 1974, which established the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. *See* National Research Act, Pub.L. 93–348, 88 Stat. 342 (codified as amended in scattered sections of 42 U.S.C.). This body issued the *Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research* in 1979, which identifies basic ethical principles governing biomedical and behavioral research on human subjects and requires informed consent. Nat'l Comm'n for the Prot. of Human Subjects of Biomedical & Behavioral Research, The Belmont Report: Ethical Principles and Guidelines for the Protection of Human Subjects of Research, part C(1) (1979), *available at* http://ohsr.od.nih.gov/guidelines/belmont.html# goc. Soon afterwards, the Department of Health, Education and Welfare (later renamed the Department of Health and Human Services) promulgated stricter regulations for ensuring informed consent in research conducted or supported by federal departments or agencies. *See* U.S. Dep't of Health & Human Servs., Guidelines for the Conduct of Research Involving Human Subjects at the National Institutes of Health, 17–18 (5th ed.2004), http://ohsr.od.nih.gov/guidelines/GrayBooklet 82404.pdf (referencing 45 C.F.R. pt. 46, subpt. A (1981)).

22,804, 22,816 (Apr. 28, 2008) (codified at 21 C.F.R. pt. 312). Foreign clinical studies not conducted under an IND must now comply with the Good Clinical Practice guidelines ("GCP") promulgated by the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use, 62 Fed.Reg. 25,692 (May 9, 1997), which require informed consent to medical experimentation. 21 C.F.R. § 312.120 (2008).

Additional international law sources support the norm's status as customary international law. The European Union embraced the norm prohibiting nonconsensual medical experimentation through a 2001 Directive passed by the European Parliament and the Council of the European Union. The Directive accepted the informed consent principles of the 1996 version of the Declaration of Helsinki. Council Directive 2001/20/EC, preamble (2), 2001 O.J. (L 121) 37(EC) [hereinafter 2001 Clinical Trial Directive]. It also required member States to adopt rules protecting individuals incapable of giving informed consent and permitting clinical trials only where "the trial subject or, when the person is not able to give informed consent, his legal representative has given his written consent after being informed of the nature, significance, implications and risks of the clinical trial." *Id.* at art. (1), (2)(d). The Directive further required all member States to implement by 2004 domestic laws, regulations, and administrative provisions to comply with its informed consent requirements. *Id.* at art. 22(1).

Since 1997, thirty-four member States of the Council of Europe have also signed the Convention on Human Rights and Biomedicine, a binding convention and a source of customary international law. Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, art. 5, 15–16, *opened for signature* Apr. 4, 1997, E.T.S. No. 164, http://conventions.coe.int/Treaty/en/Treaties/html/164.htm [hereinafter Convention on Human Rights and Biomedicine]; Convention on Human Rights and Biomedicine, Chart of Signatures and Ratifications as of Aug. 8, 2008, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=8&DF=8/8/2008&CL=ENG. It provides that an "intervention in the health field may only be carried out after the person concerned has given free and informed consent to it" and that the informed consent of human subjects is required for their involvement in medical research. Convention on Human Rights and Biomedicine, *supra*, at art. 5.[14] In 2005, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the Universal Declaration on Bioethics and Human Rights, which requires "the prior, free, express and informed consent of the person concerned" for research-oriented treatments. Universal Declaration on Bioethics and Human Rights, UNESCO Gen. Conf. Res., at art. 6, 33rd Sess., 33 C/Resolution 36, (Oct. 19, 2005).

This history illustrates that from its origins with the trial of the Nazi doctors at Nuremburg through its evolution in international conventions, agreements, declarations, and domestic laws and regulations, the norm prohibiting nonconsensual medical experimentation on human subjects has become firmly embedded and has secured

14. States–Parties to the Convention on Human Rights and Biomedicine are also required to afford "appropriate judicial protection" to prevent or end infringements of the rights protected by the Convention, including the right to informed consent to medical experimentation. Convention on Human Rights and Biomedicine, *supra,* at art. 23.

universal acceptance in the community of nations. Unlike our dissenting colleague's customary international law analysis, which essentially rests on the mistaken assumption that ratified international treaties are the only valid sources of customary international law for ATS purposes, *see* Dissent at 200–02, we reach this conclusion as a result of our review of the multiplicity of sources—including international conventions, whether general or particular, and international custom as identified through international agreements, declarations and a consistent pattern of action by national law-making authorities—that our precedent requires us to examine for the purpose of determining the existence of a norm of customary international law. Our dissenting colleague's reasoning fails to engage the incompatibility of nonconsensual human testing with key sources of customary international law identified in Article 38 of the ICJ's statute, most importantly international custom, as evidence of a general practice accepted as law, as well as the general principles of law recognized by civilized nations. *See supra* pp. 174–75.

ii. Specificity

Sosa requires that we recognize causes of action only to enforce those customary international law norms that are no "less definite [in] content ... than the historical paradigms familiar when [the ATS] was enacted." *Sosa*, 542 U.S. at 732, 124 S.Ct. 2739. The norm prohibiting nonconsensual medical experimentation on human subjects meets this requirement. In *United States v. Smith*, 18 U.S. (5 Wheat) 153, 159–61, 5 L.Ed. 57 (1820), Justice Story found that "whatever may be the diversity of definitions, ... all writers concur, in holding, that robbery or forcible depredations upon the sea ... is piracy." *Id.* at 161. We have little trouble concluding that a norm forbidding nonconsensual human medical experimentation is every bit as concrete—indeed even more so—than the norm prohibiting piracy that Story describes, or interference with the right of safe conducts and the rights of ambassadors, which together are the paradigmatic norms identified in *Sosa*. *Id.* at 724, 124 S.Ct. 2739. The Nuremberg Code, Article 7 of the ICCPR, the Declaration of Helsinki, the Convention on Human Rights and Biomedicine, the Universal Declaration on Bioethics and Human Rights, the 2001 Clinical Trial Directive, and the domestic laws of at least eighty-four States all uniformly and unmistakably prohibit medical experiments on human beings without their consent, thereby providing concrete content for the norm.[15] The appellants allege that Pfizer knowingly and purposefully conducted such experiments on a large scale. Whatever uncertainty may exist at the margin is irrelevant here because appellants allege a complete failure on the part of Pfizer and the Nigerian government to inform appellants of the existence of the Trovan experiments. These allegations, if true, implicate Pfizer and the Nigerian government in conduct that is at the core of any reasonable iteration of the prohibition against involuntary

15. At the fringe, disagreement exists over certain aspects of informed consent including, for example, the way to best secure consent from illiterate or otherwise vulnerable populations, *see, e.g.*, Daniel W. Fitzgerald et al., *Comprehension During Informed Consent in a Less–Developed Country*, 360 The Lancet 1301, 1301–02 (2002), and whether informed consent is possible in double-blind experiments in which some subjects are given placebos, *see, e.g.*, Timothy S. Jost, *The Globalization of Health Law: The Case of Permissibility of Placebo–Based Research*, 26 Am. J.L. & Med. 175, 183–86 (2000). These debates do not disturb the specificity of the basic norm at issue or the unanimity of world opinion against medical experimentation on human subjects without their consent.

medical experimentation. While the prohibition in question applies to the testing of drugs without the consent of human subjects on the scale Pfizer allegedly conducted, we do not suggest that it would extend to instances of routine or isolated failures by medical professionals to obtain informed consent, such as those arising from simple negligence. The allegations in the complaints involve anything but a doctor's routine or erroneous failure to obtain such consent from his patient.

iii. Mutual Concern

[4] Customary international law proscribes only transgressions that are of "mutual" concern to States—"those involving States' actions performed . . . towards or with regard to the other." *Flores,* 414 F.3d at 249 (differentiating matters of "mutual" concern from those of "several" concern, in which "States are separately and independently interested"). Conduct that States have prohibited through domestic legislation is also actionable under the ATS as a violation of customary international law when nations of the world have demonstrated "by means of express international accords" that the wrong is of mutual concern. *Filartiga,* 630 F.2d at 888. An important, but not exclusive, component of this test is a showing that the conduct in question is "capable of impairing international peace and security." *Flores,* 414 F.3d at 249. Appellants have made both of these showings.

As we have seen, States throughout the world have entered into two express and binding international agreements prohibiting nonconsensual medical experimentation: the ICCPR and the Convention on Human Rights and Biomedicine. The entry of over 160 States into these agreements and the European Union's passage of the 2001 Clinical Trial Directive demonstrates that States have not only acted independently to outlaw large-scale, nonconsensual drug testing on humans, but they have also acted in concert to do so. In other words, acting out of a sense of mutual concern, "the nations [of the world] have made it their business, both through international accords and unilateral action," to demonstrate their intention to eliminate conduct of the type alleged in the complaints. *Filartiga,* 630 F.2d at 889.

The administration of drug trials without informed consent on the scale alleged in the complaints poses a real threat to international peace and security. Over the last two decades, pharmaceutical companies in industrialized countries have looked to poorer, developing countries as sites for the medical research essential to the development of new drugs. *See* James V. Lavery, *Putting International Research Ethics Guidelines to Work for the Benefit of Developing Countries,* 4 Yale J. Health Pol'y L. & Ethics 319, 320–21 (2004); The Globalization of Clinical Trials, *supra,* at 8.[16] Pharmaceutical companies recognize the potential benefits of drug trials to poor nations and have sought to promote access to medicines and health care in underserved populations through philanthropy and partnership with governments and NGOs. *See, e.g.,* PhRMA, Press Releases: Worldwide Pharmaceutical Industry Launches Global Health Progress Initiative to Expand Efforts to Improve Health in Developing Countries (April 16, 2008), http://www.phrma.org/news_room/press_releases/global_health_progress_initiative_launched_to_improve_health_in_developing_countries/ (describing initiative by worldwide pharmaceutical industry to "fur-

16. In the United States, for example, the number of foreign clinical investigators conducting drug research under an IND increased sixteen-fold in the 1990s. Globalization of Clinical Trials, *supra,* at 6.

ther access to medicines; build capacity of health workers in developing nations; advocate for global action to address health challenges; and continue R & D to develop new tools to fight diseases that plague the developing world"); PhRMA, Profile2008: Pharmaceutical Industry 42 (2008), http://www.phrma.org/files/2008% 20Profile.pdf (describing contributions by American pharmaceutical companies to the promotion of global access to medicines and health care). This trend offers the possibility of enormous health benefits for the world community. Life-saving drugs can potentially be developed more quickly and cheaply, and developing countries may be given access to cutting edge medicines and treatments to assist underresourced and understaffed public health systems, which grapple with life-threatening diseases afflicting their populations.[17]

The success of these efforts promises to play a major role in reducing the cross-border spread of contagious diseases, which is a significant threat to international peace and stability. The administration of drug trials without informed consent on the scale alleged in the complaints directly threatens these efforts because such conduct fosters distrust and resistance to international drug trials, cutting edge medical innovation, and critical international public health initiatives in which pharmaceutical companies play a key role. This case itself supplies an exceptionally good illustration of why this is so. The Associated Press reported that the Trovan trials in Kano apparently engendered such distrust in the local population that it was a factor contributing to an eleven month-long, local boycott of a polio vaccination campaign in 2004, which impeded international and national efforts to vaccinate the population against a polio outbreak with catastrophic results.[18] According to the World Health Organization, polio originating in Nigeria triggered a major international outbreak of the disease between 2003 and 2006, causing it to spread across west, central, and the Horn of Africa and

17. These benefits are well acknowledged. *See, e.g.,* Remigius N. Nwabueze, *Ethical Review of Research Involving Human Subjects in Nigeria: Legal and Policy Issues,* 14 Ind. Int'l & Comp. L.Rev. 87, 102 (2003) (recognizing that clinical trials at times provide the only access to innovative and effective health care in developing countries); David Wendler, et al., *The Standard of Care Debate: Can Research in Developing Countries Be Both Ethical and Responsive to those Countries' Health Needs?,* 94 Am. J. Pub. Health 923, 923 (2004) (noting dramatic inequalities in health care world-wide and the potential of drug research to better care for the world's poor).

Doctors Without Borders, the WHO, and other international health organizations, for example, have called for increased corporate research interest in developing countries. Sonia Shah, *Globalizing Clinical Research,* The Nation, June 13, 2002, at 3, http://www.thenation.com/doc/20020701/shah. Ruth Faden, a bioethicist at Johns Hopkins, stated, "What we need, if anything, is more health research in the developing world, not less." *Id.* An HIV researcher observed that even when companies test drugs geared for patients in the developed world through trials in developing countries, the testing "brings benefits to the patients. They get special attention and potential therapy." *Id.*

18. Salisu Rabiu, *Pfizer Asks Nigeria Court to Dismiss Case,* The Associated Press, July 4, 2007, http://origin.foxnews.com/printer_friendly_wires/2007Jul04/0,4675,Nigeria Pfizer,00.html (reporting that the boycott of the Kano polio vaccination program is believed to have "set back global eradication" of polio and to have "caus[ed] an outbreak that spread the disease across Africa and into the Middle East"). The boycott also impaired the efforts of American pharmaceutical companies to contribute to polio eradication by donating over 130 million doses of polio vaccine to sixteen African countries since 1997. PhRMA, Global Partnerships: Humanitarian Programs of the Pharmaceutical Industry in Developing Nations 4 (2004), http://www.phrma.org/files/Global_Partnerships_2004.pdf.

the Middle East, and to re-infect twenty previously polio-free countries.[19]

The administration of drug trials without informed consent also poses threats to national security by impairing our relations with other countries. Seven of the world's twelve largest pharmaceutical manufacturers—a group that includes Pfizer—are American companies. *Global 500,* Fortune, July 21, 2008, http://money.cnn.com/magazines/fortune/global500/2008/industries/21/index.html. Consequently, American companies are likely to be sponsors of medical experiments on human subjects abroad.[20] As this case illustrates, the failure to secure consent for human experimentation has the potential to generate substantial anti-American animus and hostility. Unsurprisingly, as noted above, *see supra* pp. 201–02, our government actively attempts to prevent this practice in foreign countries. For example, federal law requires that data generated from testing on human subjects abroad that is used to seek regulatory approval for a given drug must, at minimum, be the result of testing conducted consistent with the requirements of informed consent. Consequently, the U.S. government denies access to the U.S. market for any new drug unless the drug's research data is generated in a manner consistent with the customary international law norm prohibiting drug trials on human subjects without informed consent.

For these reasons, we hold that the appellants have pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent. In such an instance, ATS jurisdiction exists over plaintiffs' claims. The district court determined that the norm existed, but concluded that because no single source recognizing the norm was legally binding on the United States and created a private cause of action, it could not infer such a right under the ATS. Presumably, on this basis, it simultaneously held that there was no subject matter jurisdiction over plaintiffs' claims. Under *Sosa,* this approach was not correct. *Sosa* makes clear that the critical inquiry is whether the variety of sources that we are required to consult establishes a customary international law norm that is sufficiently specific, universally accepted, and obligatory for courts to recognize a cause of action to enforce the norm. Nothing in *Sosa* suggests that this inquiry can be halted if some of the sources of international law giving rise to the norm are found not to be binding or not to explicitly authorize a cause of action.

We believe that the issues raised by this appeal regarding customary international

19. World Health Organization, *Poliomyelitis in Nigeria and West/Central Africa,* June 18, 2008, http://www.who.int/csr/don/2008_06_18/en/.

Other examples of the link between the cross-border spread of contagious disease and international peace and stability come to mind, such as the outbreak of anti-U.S. riots in South Korea as a result of fear that imported American beef will spread mad cow disease to that country. *See* Choe Sang–Hun, *South Korea Lifts Ban on U.S. Beef,* New York Times, June 26, 2008, http://www.nytimes.com/2008/06/26/world/asia/26korea.html.

20. FDA data suggests the industry trend is to use foreign research to support applications for new drug approvals in the United States. Since 1990 there has been an explosion in the number of foreign clinical investigators conducting drug research that sponsors use for this purpose. In 1990, there were 271 foreign investigators conducting research in 28 countries in the FDA database. By 1999, the number had grown to 4,458 investigators working in 79 countries. Globalization of Clinical Trials, *supra,* at i.

law are framed by our analysis and by that of our dissenting colleague. He contends that our analysis is created from "whole cloth." Dissent at 191. We believe that his approach to customary international law is unselfconsciously reactionary and static. The approach does not accommodate itself to the normative world that, by their commitments and conduct over the past fifty years, states—including our own—have shown they believe to exist.

B. State Action

[5, 6] A private individual will be held liable under the ATS if he "acted in concert with" the state, i.e., "under color of law." *Kadic*, 70 F.3d at 245. In making this determination, courts look to the standards developed for finding state action in claims brought under 42 U.S.C. § 1983. *Id.* Under § 1983, state action may be found when "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974)). That nexus may exist "where a private actor has operated as a willful participant in joint activity with the State or its agents," *Gorman–Bakos v. Cornell Coop. Extension of Schenectady County*, 252 F.3d 545, 551–52 (2d Cir.2001) (quoting *Loce v. Time Warner Entertainment Advance/Newhouse Partnership*, 191 F.3d 256, 266 (2d Cir.1999)), or "acts together with state officials or with significant state aid," *Kadic*, 70 F.3d at 245. Pfizer meets this test.

[7] The Appellants have alleged that the Nigerian government was involved in all stages of the Kano test and participated in the conduct that violated international law. They allege that the Nigerian government provided a letter of request to the FDA to authorize the export of Trovan, arranged for Pfizer's accommodations in Kano, and facilitated the nonconsensual testing in Nigeria's IDH in Kano. Despite overcrowding due to concurrent epidemics, the Nigerian government extended the exclusive use of two hospital wards to Pfizer, providing Pfizer with control over scarce public resources and the use of the hospital's staff and facilities to conduct the Kano test, to the exclusion of MSF.

The unlawful conduct is alleged to have occurred in a Nigerian facility with the assistance of the Nigerian government and government officials and/or employees from the IDH and Aminu Kano Teaching Hospital. Pfizer's research team in Kano was comprised of three American physicians, Dr. Abdulhamid Isa Dutse (a physician in the Aminu Kano Teaching Hospital), and three other Nigerian doctors. The American and Nigerian members of Pfizer's team allegedly jointly administered the Kano test. Finally, in addition to assisting with the Kano test, Nigerian officials are alleged to have conspired to cover up the violations by silencing Nigerian physicians critical of the test and by back-dating an "approval letter" that the FDA and international protocol required to be provided prior to conducting the medical experiment. In addition to these allegations, the Adamu plaintiffs explicitly allege that the Nigerian government "was intimately involved and contributed, aided, assisted and facilitated Pfizer's efforts to conduct the Trovan test," "acted in concert with Pfizer," and, according to a Nigerian physician involved in the Trovan experimentation, appeared to "back[ ]" the testing. At the pleading stage, these contentions meet the state action test because they adequately allege that the violations occurred as the result of concerted action

between Pfizer and the Nigerian government.

II. Forum Non Conveniens

As an alternative to dismissal for failure to state a claim under the ATS, the district court dismissed the actions on the ground of *forum non conveniens.* Appellants raised this issue on appeal. Ordinarily, we review a *forum non conveniens* dismissal for abuse of discretion. *Norex Petroleum Ltd. v. Access Indus., Inc.,* 416 F.3d 146, 153 (2d Cir.2005). Since filing this appeal, however, Pfizer has notified the Court that in light of recent developments, in particular the initiation of proceedings by the federal government of Nigeria and the state of Kano against Pfizer and certain of its employees, it would not seek affirmance of the judgment on the basis of *forum non conveniens.* The appellants agreed and also requested that the issue be remanded. We accede to this request.

[8] Although we are not now called upon definitively to review the district court's application of *forum non conveniens,* in view of the frequency with which this issue has arisen and remained unsettled in this case, we offer additional guidance to assist the parties and the district court. The three-step analysis set forth in *Iragorri v. United Techs. Corp.,* 274 F.3d 65, 71–75 (2d Cir.2001) (en banc), applies. In this litigation, the second step of the analysis, which requires the district court to consider the adequacy of the alternative forum, is pivotal. Dismissal is not appropriate if an adequate and presently available alternative forum does not exist. *Norex,* 416 F.3d at 159. A forum in which defendants are amenable to service of process and which permits litigation of the dispute is generally adequate. *Id.* at 157. Such a forum may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 254–55 & n. 22, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *USHA (India), Ltd. v. Honeywell Int'l, Inc.,* 421 F.3d 129, 136 (2d Cir.2005); *Norex,* 416 F.3d at 160.

[9] The defendant bears the burden of establishing that a presently available and adequate alternative forum exists, and that the balance of private and public interest factors tilts heavily in favor of the alternative forum. *USHA (India), Ltd.,* 421 F.3d at 135; *PT United Can Co. v. Crown Cork & Seal Co., Inc.,* 138 F.3d 65, 74 (2d Cir. 1998). Absent a showing of inadequacy by a plaintiff, "considerations of comity preclude a court from adversely judging the quality of a foreign justice system." *PT United Can Co.,* 138 F.3d at 73. Accordingly, while the plaintiff bears the initial burden of producing evidence of corruption, delay or lack of due process in the foreign forum, the defendant bears the ultimate burden of persuasion as to the adequacy of the forum. *See, e.g., Norex,* 416 F.3d at 159–160.

When the district court granted Pfizer's motion, it identified the pivotal issue as whether the plaintiffs produced sufficient evidence to show that Nigeria is an inadequate alternative forum. *Abdullahi III,* 2005 WL 1870811, at *15. Having found that they had not, it concluded that Nigeria was an adequate forum. *Id.* at *16–18. In so doing, the district court omitted an analysis of whether Pfizer discharged its burden of persuading the court as to the adequacy and present availability of the Nigerian forum and improperly placed on plaintiffs the burden of proving that the alternative forum is inadequate. *Cf. DiRienzo v. Philip Servs. Corp.,* 294 F.3d 21, 30 (2d Cir.2002) (holding that it is error

not "to hold defendants to their burden of proof" of the *Gilbert* factors). On remand, the district court will have an opportunity to reassess this issue, as well as the relationship between Fed.R.Civ.P. 44.1 and the Federal Rules of Evidence.

III. Choice of Law

[10] The district court dismissed the *Adamu* plaintiffs' claims under the Connecticut Unfair Trade Practices Act and the Connecticut Products Liability Act on the ground that Connecticut choice of law principles applied and called for the application of Nigerian law. *Adamu,* 399 F.Supp.2d at 501–03. "We review the district court's choice of law *de novo.*" *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.,* 414 F.3d 325, 331 (2d Cir. 2005).

[11] The district court correctly determined that Connecticut choice-of-law rules applied because it was obligated to apply the state law that would have been applicable if the case had not been transferred from Connecticut to New York. *See Van Dusen v. Barrack,* 376 U.S. 612, 639, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Under Connecticut law, *lex loci delicti,* "the doctrine that the substantive rights and obligations arising out of a tort controversy are determined by the law of the place of injury," typically applies. *O'Connor v. O'Connor,* 201 Conn. 632, 637, 519 A.2d 13 (1986). *Lex loci delicti* would require the application of Nigerian law because the *Adamu* plaintiffs' injuries are alleged to have occurred there. Connecticut, however, has conspicuously retreated from a rigid application of the doctrine. The Connecticut Supreme Court held that *lex loci delicti* does not apply to a tort claim when doing so would undermine expectations of the parties or an important state policy, produce an arbitrary and irrational result, or where "reason and justice" counsel for the application of a different principle. *Id.* at 637, 648, 650, 519 A.2d 13. In such cases, Connecticut courts are required to apply the "most significant relationship" analysis set forth in the Restatement (Second) of Conflict of Laws §§ 6 & 145 (1971) [hereinafter Restatement (Second)]. *O'Connor,* 201 Conn. at 649–50, 519 A.2d 13.

Section 145(1) of the Restatement provides 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 under the principles stated in § 6." Restatement (Second) § 145(1). Section 6(2), in turn, provides that where a state is not guided by a statutory directive on choice of law,

> the factors relevant to the choice of the applicable rule of law include
>
> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) § 6(2). The Connecticut Supreme Court has determined that Section 145(2) provides courts with guidance regarding the evaluation of the policy choices set out in Sections 145(1) and 6(2). *O'Connor,* 201 Conn. at 652, 519 A.2d 13. Section 145(2) assists with the

tence set forth in 21 U.S.C. § 841(b)(1)(A)(iii). Santiago relies on our decision in *United States v. Edwards,* 397 F.3d 570, 577 (7th Cir.2005), in which we held that the phrase "cocaine base" in 21 U.S.C. § 841(b)(1)(A)(iii) refers only to crack cocaine. However, the Supreme Court recently disagreed, holding that the term "cocaine base," as it is used in § 841(b)(1), "means not just 'crack cocaine,' but cocaine in its chemically basic form." *DePierre v. United States,* —— U.S. ——, 131 S.Ct. 2225, 2237, 180 L.Ed.2d 114 (2011). In light of *DePierre,* Santiago's challenge fails.

III. Conclusion

For the foregoing reasons, we AFFIRM Santiago's conviction.

Boimah FLOMO, et al., Plaintiffs–Appellants,

v.

FIRESTONE NATURAL RUBBER CO., LLC, Defendant–Appellee.

No. 10–3675.

United States Court of Appeals, Seventh Circuit.

Argued June 2, 2011.

Decided July 11, 2011.

Rehearing and Rehearing En Banc Denied Aug. 30, 2011.*

Background: Liberian children filed action under Alien Tort Statute alleging that manufacturer and its officers had utilized hazardous child labor on rubber plantation in violation of customary international law. The United States District Court for the Southern District of Indiana, Jane E. Magnus–Stinson, J., 744 F.Supp.2d 810 and 2010 WL 4174583, granted summary judgment for defendants. Plaintiffs appealed.

Holdings: The Court of Appeals, Posner, Circuit Judge, held that:

(1) corporate liability was possible under Alien Tort Statute;

(2) children did not show under Alien Tort Statute that corporate manufacturer and its officers had utilized hazardous child labor on rubber plantation in Liberia in violation of customary international law;

(3) plaintiffs under the Alien Tort Statute need not exhaust their legal remedies in the nation in which the alleged violation of customary international law occurred; and

(4) Alien Tort Statute had extraterritorial application.

Affirmed on other grounds.

1. Aliens, Immigration, and Citizenship ⚿765

Corporation or any other entity that was not natural person could be liable under Alien Tort Statute. 28 U.S.C.A. § 1350.

2. International Law ⚿2

International law is part of the law of the United States; where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

3. International Law ⚿2

Customary international law is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source; it is discerned from myriad decisions made in numerous and varied international and domestic arenas and the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges.

* Circuit Judges Joel M. Flaum, John Daniel Tinder and David F. Hamilton did not participate in the consideration of this petition for rehearing.

4. Aliens, Immigration, and Citizenship ⚿760, 763

The Alien Tort Statute was enacted in 1789, when the principal violations of customary international law were piracy, mistreatment of ambassadors, and violation of safe conducts; however, in using the broad term "law of nations," Congress allowed the coverage of the statute to change with changes in customary international law. 28 U.S.C.A. § 1350.

5. Aliens, Immigration, and Citizenship ⚿763

The Alien Tort Statute is not a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators. 28 U.S.C.A. § 1350.

6. Aliens, Immigration, and Citizenship ⚿765

Corporations and Business Organizations ⚿1971, 2501

If a board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable under the Alien Tort Statute; the board members would be liable as well, but they might not have the resources to compensate the victims of the corporation's violation of international customary law, let alone pay punitive damages as well. 28 U.S.C.A. § 1350.

7. Corporations and Business Organizations ⚿2369

In the United States, the liability of a corporation for torts committed by its employees in the course of their employment is strict, on the theory that strict liability for employees' torts gives corporations incentives to police their employees that are needed because the employees themselves will usually be judgment proof and hence not responsive to tort sanctions.

8. Aliens, Immigration, and Citizenship ⚿763

Liberian children did not show under Alien Tort Statute that corporate manufacturer and its officers had utilized hazardous child labor on rubber plantation in Liberia in violation of customary international law, where, among other things, it was impossible to distill crisp rule from referenced United Nations conventions given diversity of economic conditions in the world and children did not make it known whether manufacturer had adopted effective measures for keeping children from working on plantation or situation of Liberian children who did not live on that plantation. 28 U.S.C.A. § 1350.

9. International Law ⚿2

Conventions that not all nations ratify can still be evidence of customary international law.

10. Aliens, Immigration, and Citizenship ⚿766

Plaintiffs under the Alien Tort Statute need not exhaust their legal remedies in the nation in which the alleged violation of customary international law occurred. 28 U.S.C.A. § 1350.

11. Aliens, Immigration, and Citizenship ⚿760

Alien Tort Statute had extraterritorial application. 28 U.S.C.A. § 1350.

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Before BAUER, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

This suit under the Alien Tort Statute, 28 U.S.C. § 1350, pits 23 Liberian children against the Firestone Natural Rubber Company, which operates a 118,000–acre rubber plantation in Liberia through a subsidiary; various Firestone affiliates and officers were also joined as defendants. The district court granted summary judgment in favor of all the defendants, but the plaintiffs have appealed only from the judgment in favor of Firestone Natural Rubber Company.

[1] The plaintiffs charge Firestone with utilizing hazardous child labor on the plantation in violation of customary international law. The Alien Tort Statute confers on the federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The principal issues presented by the appeal are whether a corporation or any other entity that is not a natural person (the defendant is a limited liability company rather than a conventional business corporation) can be liable under the Alien Tort Statute, and, if so, whether the evidence presented by the plaintiffs created a triable issue of whether the defendant has violated "customary international law."

[2, 3] And what is "customary international law"? "International law is part of our law, and . . . where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 44 L.Ed. 320 (1900); see also *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149–50 (7th Cir. 2001); *Restatement (Third) of Foreign Relations Law* § 102(2) (1987); Curtis A. Bradley & Mitu Gulati, "Withdrawing from International Custom," 120 *Yale L.J.* 202, 208–15 (2010). "The determination of what offenses violate customary international law . . . is no simple task. Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a 'soft, indeterminate character.' " *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 247–48 (2d Cir.2003), quoting Louis Henkin, *International Law:*

Politics and Values 29 (1995). Customary international law thus resembles common law in its original sense as law arising from custom rather than law that is formally promulgated. See 1 William Blackstone, *Commentaries on the Laws of England* 67–70 (1765).

[4] The Alien Tort Statute was enacted in 1789, when the principal violations of customary international law were piracy, mistreatment of ambassadors, and violation of safe conducts. *Sosa v. Alvarez–Machain*, 542 U.S. 692, 715, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); 4 Blackstone, *supra*, at 68 (1769). But in using the broad term "law of nations" Congress allowed the coverage of the statute to change with changes in customary international law. As cautiously stated by the Supreme Court, "the door is still ajar [for further independent judicial recognition of actionable international norms] subject to vigilant doorkeeping, and thus open to a narrow class of international norms today." *Sosa v. Alvarez–Machain*, *supra*, 542 U.S. at 729, 124 S.Ct. 2739.

[5] The concept of customary international law is disquieting in two respects. First, there is a problem of notice: a custom cannot be identified with the same confidence as a provision in a legally authoritative text, such as a statute or a treaty. (Modern common law doesn't present that problem; it is a body of judge-created doctrine, not of amorphous custom.) Second, there is a problem of legitimacy—and for democratic countries it is a problem of democratic legitimacy. Customary international legal duties are imposed by the international community (ideally, though rarely—given the diversity of the world's 194 nations—by consensus), rather than by laws promulgated by the obligee's local community. Both problems are conspicuous in the Alien Tort Statute, which contains no clarifying language, although since it's just a statute, Congress could curtail its scope; the statute therefore is not a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators.

The two problems we've just noted are serious enough to have persuaded the Supreme Court in *Sosa* to limit the statute's scope to "the customs and usages of civilized nations," 542 U.S. at 734, 124 S.Ct. 2739 (quoting *The Paquete Habana*, *supra*, 175 U.S. at 700, 20 S.Ct. 290), that are "specific, universal, and obligatory," 542 U.S. at 732, 124 S.Ct. 2739 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir.1994)), and "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" (that is, violation of safe conducts, infringement of the rights of ambassadors, and piracy). 542 U.S. at 725, 124 S.Ct. 2739. But like so many statements of legal doctrine, this one is suggestive rather than precise; taken literally it could easily be refuted. No norms are truly "universal"; "universal" is inconsistent with "accepted by the *civilized* world"; "obligatory" is the conclusion not the premise; and some of the most widely accepted international norms are vague, such as "genocide" and "torture." See, e.g., Ryan Park, "Proving Genocidal Intent: International Precedent and ECCC Case 002," 63 *Rutgers L.Rev.* 129, 133–38 (2010); Michael W. Lewis, "A Dark Descent into Reality: Making the Case for an Objective Definition of Torture," 67 *Wash. & Lee L.Rev.* 77, 82–84 (2010); Sanford Levinson, "In Quest of a 'Common Conscience': Reflections on the Current Debate about Torture," 1 *J. Nat'l Security Law & Policy* 231, 252 (2005). The Court's effort at definition illustrates rather than solves the problems of notice and legitimacy and is best understood as the statement of a mood—and the mood is one of caution.

Firestone draws on that mood for its arguments against liability. Its first argument is that conduct by a corporation or any other entity that doesn't have a heartbeat (we'll use "corporation" to cover all such entities) can never be a violation of customary international law, no matter how heinous the conduct. So, according to Firestone, a pirate can be sued under the Alien Tort Statute but not a pirate corporation (Pirates of the Indian Ocean, Inc., with its headquarters and principal place of business in Somalia; cf. U.N. Security Council, "Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008)" 99 (Feb. 26, 2010).) Firestone argues that because corporations, unlike individuals, have never been prosecuted for criminal violations of customary international law, there cannot be a norm, let alone a "universal" one, forbidding them to commit crimes against humanity and other acts that the civilized world abhors.

The issue of corporate liability under the Alien Tort Statute seems to have been left open in an enigmatic footnote in *Sosa*, 542 U.S. at 732 n. 20, 124 S.Ct. 2739 (but since it's a Supreme Court footnote, the parties haggle over its meaning, albeit to no avail). All but one of the cases at our level hold or assume (mainly the latter) that corporations can be liable. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir.2008); *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1193, 1195 (D.C.Cir.2004); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 91–92 (2d Cir.2000); *Beanal v. Freeport–McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir.1999); see also *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir.2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir.2008) (en banc). (Our court hasn't addressed the issue.) The outlier is the split decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir.2010), which indeed held that because corporations have never been prosecuted, whether criminally or civilly, for violating customary international law, there can't be said to be a principle of customary international law that binds a corporation.

The factual premise of the majority opinion in the *Kiobel* case is incorrect. At the end of the Second World War the allied powers dissolved German corporations that had assisted the Nazi war effort, along with Nazi government and party organizations—and did so on the authority of customary international law. E.g., Control Council Law No. 2, "Providing for the Termination and Liquidation of the Nazi Organizations," Oct. 10, 1945, reprinted in 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 131 (1945); Control Council Law No. 9, "Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof," Nov. 30, 1945, reprinted in 1 *id.* 225, www.loc.gov/rr/frd/Military_Law/enactments-home.html (visited June 24, 2011). The second of these Control Orders found that I.G. Farben (the German chemical cartel) had "knowingly and prominently engaged in building up and maintaining the German war potential," and it ordered the seizure of all its assets and that some of them be made "available for reparations." *Id.*

And suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created. "Prosecutorial responses to international crimes have occurred at both the national and international levels, with varying degrees of success. The first international tribunal was the Nuremberg IMT [International Military Tribunal] which sat between 1945

and 1946 to prosecute high-ranking Nazis." Robert Cryer, "International Criminal Law," in *International Law* 752, 770–71 (Malcolm D. Evans ed., 3d ed.2010); see also Jonathan A. Bush, "Nuremberg: The Modern Law of War and Its Limitations," 93 *Colum. L.Rev.* 2022, 2023 (1993). Doubts about the Tribunal's legitimacy focused on whether there were established international norms against such conduct, see, e.g., Cryer, *supra;* Jonathan A. Bush, " 'The Supreme ... Crime' and Its Origins: The Lost Legislative History of the Crime of Aggressive War," 102 *Colum. L.Rev.* 2324, 2329–30 (2002), not on whether, if there were, violators could, consistently with international law, be punished by an international tribunal—for the first time in history.

We have to consider *why* corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not; it seems rather that the paucity of cases reflects a desire to keep liability, whether personal or institutional, for such violations within tight bounds by confining it to abhorrent conduct—the kind of conduct that invites criminal sanctions. It would have seemed tepid to charge the Nazi war criminals with battery, wrongful death, false imprisonment, intentional infliction of emotional distress, fraud, conversion, trespass, medical malpractice, or other torts. And it was natural in light of the perceived effect of the Nuremberg trials on German and international opinion concerning the type of practices in which Hitler's government had engaged that a tradition would develop of punishing violations of customary international law by means of national or international criminal proceedings; it was a way of underscoring the gravity of violating customary international law.

But this has nothing to do with the issue of corporate liability. Sometimes it's in the interest of a corporation's shareholders for management to violate the law, including the criminal law, including norms of customary international law the violation of which is deemed criminal. Criminal punishment of corporations that commit crimes is not anomalous merely because a corporation cannot be imprisoned or executed. It can be fined; and so if a crime at least ostensibly in the corporation's financial interest is committed or condoned at the managerial or board of directors level of the corporation, the corporation itself is criminally liable. *New York Central & Hudson River R.R. v. United States,* 212 U.S. 481, 492–94, 29 S.Ct. 304, 53 L.Ed. 613 (1909); John C. Coffee, Jr., " 'No Soul to Damn: No Body to Kick': An Unscandalized Inquiry into the Problem of Corporate Punishment," 79 *Mich. L.Rev.* 386, 447–48 (1981). The burden of a fine on the corporation will be borne by the shareholders, who correspond to the employers of tortfeasing employees, and indirectly by the managers.

Civil liability of corporations, even when it allows the award of punitive as well as compensatory damages, is not a perfect substitute for fines because not all business activity that society wants to deter inflicts monetizable harms. A corporation might engage in fraud yet the victims be unable to prove causation. Suppose the corporation had misrepresented the efficacy of a cancer drug, but the buyers were not harmed (beyond the price of the drug, which let's assume was modest) because no substitute treatment would have been effective either. One might still want to fine the corporation, in order to increase the expected cost of fraud to it. The example illustrates that two of the fundamental techniques of criminal law are applicable to an entity that cannot be punished other than by a fine—the use of public resources to raise the probability of punishment above what might be a very low level

because of efforts taken to conceal criminal responsibility, and the punishment of preparatory activity in order to reduce the net expected gain from crime.

Corporate criminal liability is criticized, see, e.g., Albert W. Alschuler, "Two Ways of Thinking about the Punishment of Corporations," 46 *Am.Crim. L.Rev.* 1359 (2009); Daniel R. Fischel & Alan O. Sykes, "Corporate Crime," 25 *J. Legal Stud.* 319 (1996), but one of the principal criticisms is that it is superfluous given civil liability, *id.* at 330–31, and that would be a poor reason for denying both criminal and civil liability for abhorrent conduct by a corporation. Similarly, while it is true that criminal punishment of corporations is a peripheral method of social control, adopted by few countries outside the Anglo–American sphere, it would move quickly from periphery to center if corporate civil liability were unavailable; and even though civil liability is available, the resistance (outside the Anglo–American sphere) to corporate criminal liability is eroding. See V.S. Khanna, "Corporate Criminal Liability: What Purpose Does It Serve?," 109 *Harv. L.Rev.* 1477, 1488–91 (1996); Edward B. Diskant, Note, "Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine through Comparative Criminal Procedure," 118 *Yale L.J.* 126, 129–30 (2008). It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of customary international law. That doesn't mean that corporations are exempt from that law.

[6] The Alien Tort Statute, moreover, is civil, and corporate tort liability is common around the world. See, e.g., Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* 46–50 (2010). If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could be, then *a fortiori* if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable. *Kiobel v. Royal Dutch Petroleum Co., supra*, 621 F.3d at 170 (concurring opinion); see Doug Cassel, "Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts," 6 *Nw. U.J. Int'l Human Rights* 304, 322–23 (2008). The board members would be liable as well, but they might not have the resources to compensate the victims of the corporation's violation of international customary law, let alone pay punitive damages as well.

If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the Alien Tort Statute could ever be successful, even claims against individuals; only the United States, as far as we know, has a statute that provides a civil remedy for violations of customary international law.

We keep harping on criminal liability for violations of customary international law in order to underscore the distinction between a principle of that law, which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy. Suppose it's the case that the only actionable violations of customary international law—which is to say violations that all countries are deemed to have a legal obligation to take appropriate action against—are acts so maleficent that criminal punishment would be an appropriate sanction for the actors. It would not follow that civil sanctions would be improper. If a corporation has used slave labor at the direction of its board of directors, then whether the board members should be prosecuted as criminal violators of customary international law—or also or instead be forced to pay damages, compen-

satory and perhaps punitive as well, to the slave laborers—or, again also or instead, whether the corporation should be prosecuted criminally and/or subjected to tort liability—all these would be remedial questions for the tribunal, in this case our federal judiciary, to answer in light of its experience with particular remedies and its immersion in the nation's legal culture, rather than questions the answers to which could be found in customary international law. *Kadic v. Karadzić,* 70 F.3d 232, 246 (2d Cir.1995). International law imposes substantive obligations and the individual nations decide how to enforce them. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 422–23, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Kiobel v. Royal Dutch Petroleum Co., supra,* 621 F.3d at 172–74 and n. 30 (concurring opinion); *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 777–78 (D.C.Cir.1984) (concurring opinion); Eileen Denza, "The Relationship between International and National Law," in *International Law* 411 (Malcolm D. Evans ed., 3d ed.2010). Justice Breyer has opined that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Sosa v. Alvarez–Machain, supra,* 542 U.S. at 763, 124 S.Ct. 2739 (concurring opinion).

This point is supported by treaties that explicitly authorize national variation in methods of enforcing customary international law—allowing civil and administrative remedies as alternatives to criminal liability if the imposition of such liability would be inconsistent with domestic law. Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, arts. 2–3, Nov. 21, 1997 ("in the event that, under the legal system of a Party [to the convention], criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials"); United Nations International Convention for the Suppression of the Financing of Terrorism, art. 5, Dec. 9, 1999; United Nations Convention Against Transnational Organized Crime, art. 10, Nov. 15, 2000. The Alien Tort Statute is a further illustration.

[7] We grant that rights and remedies can't be divorced *so* neatly as we may seem to be suggesting. Suppose the treatment of children at Firestone's Liberian plantation does violate customary international law (our next question), and suppose Spain decreed that anyone who buys tires made from the rubber produced at the plantation can be prosecuted as an aider and abettor of a criminal violation of customary international law. That remedy would stretch customary international law too far. The case of corporate liability is less extreme. But in the United States the liability of a corporation for torts committed by its employees in the course of their employment is strict, on the theory that strict liability for employees' torts gives corporations (and other employers) incentives to police their employees that are needed because the employees themselves will usually be judgment proof and hence not responsive to tort sanctions. The theory attenuates when the employees include local residents of Third World countries, such as the Liberian rubber farmers employed on Firestone's plantation. American corporations that have branches in backward or disordered countries may be incapable of preventing abuses of workers in those countries by their employees.

But the concern we've just expressed is an objection not to corporate liability for violations of customary international law but to the scope of that liability; and the plaintiffs concede that corporate liability for such violations is limited to cases in

which the violations are directed, encouraged, or condoned at the corporate defendant's decisionmaking level. That is analogous to the liability of municipalities under the *Monell* doctrine, where as we noted recently "a person who wants to impose liability on a municipality for a constitutional tort must show that the tort was committed (that is, authorized or directed) at the policymaking level of government—by the city council, for example, rather than by the police officer who made an illegal arrest." *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir.2011). We needn't decide how far corporate vicarious liability for violations of customary international law extends; it's enough that we see no objection to corporate civil liability as circumscribed as the plaintiffs concede.

And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships. E.g., *The Malek Adhel*, 43 U.S. (2 How.) 210, 233–34, 11 L.Ed. 239 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40–41, 6 L.Ed. 405 (1825). Of course the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders.

One of the amicus curiae briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned.

[8] Having satisfied ourselves that corporate liability is possible under the Alien Tort Statute, we turn to the question whether the treatment of child labor at the Firestone plantation alleged by the plaintiffs during a period of undetermined length preceding the filing of this lawsuit violated customary international law (itself a two-part question: what is the applicable customary international law and did the working conditions at the plantation violate it?), and whether Firestone is liable under the narrow standard for corporate liability proffered by the plaintiffs. We don't understand the plaintiffs to be arguing that Firestone's violation (if it was a violation) of customary international law was of criminal gravity. But neither do we understand Firestone to be arguing that only violations that grave are actionable under the Alien Tort Statute, a question we left open earlier in this opinion.

[9] Three international conventions bear on the first question. They supply pretty much the entire ground on which the plaintiffs pitch their argument that the treatment of children on the Liberian plantation has violated customary international law. Two of these conventions—the United Nations Convention on the Rights of the Child and the International Labour Organization Minimum Age Convention—have not been ratified by the United States, though the third has been—the International Labour Organization Worst Forms of Child Labour Convention. It happens to be the one most helpful to the plaintiffs. And anyway conventions that not all nations ratify can still be evidence of customary international law. *Abdullahi v. Pfizer, Inc., supra*, 562 F.3d at 176–77; *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 283–84 (2d Cir.2007) (concurring opinion); see also *Kiobel v. Royal Dutch Petroleum Co., supra*, 621 F.3d at 137–38. Otherwise every nation (or at least every "civilized" nation) would have veto power over customary international law. (It would be as if U.S. states could

forbid the enforcement of federal law within their borders.) Moreover, a nation's legislature might refuse to ratify a convention for reasons unrelated to the convention's core principle.

The United States has enacted legislation making violations of customary international law actionable in U.S. courts: it is the Alien Tort Statute. And so the fact that Congress may not have enacted legislation implementing a particular treaty or convention (maybe because the treaty or convention hadn't been ratified) does not make a principle of customary international law evidenced by the treaty or convention unenforceable in U.S. courts.

Article 32(1) of the United Nations Convention on the Rights of the Child (1989) provides that a child has a right not to perform "any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." That's much too vague and encompassing to create an international legal norm. Millions of middle-class American children are working part-time after school at jobs that confer no intellectual or characterological benefits merely to obtain pin money for buying video games also barren of intellectual or other benefits, the jobs and the games actually functioning to diminish the children educationally, mentally, physically, and spiritually. Shall their parents, and their employers, be hauled before an international tribunal to answer charges of child abuse?

ILO Convention 138: Minimum Age Convention (1973) provides that children should not be allowed to do other than "light work" unless they're at least 14 years old. But the concept of light work is vague, and it must vary a great deal across nations because of variance in social and economic conditions.

More promising for the plaintiffs is the International Labour Organization's Convention 182: The Worst Forms of Child Labour (June 17, 1999), which as we said is the one the United States has ratified. It provides, so far as bears on this case, that the worst forms of child labor include "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children." *Id.*, art. 3(d). This is still pretty vague, in part because no threshold of actionable harm is specified, in part because of the inherent vagueness of the words "safety" and "morals." And it is weakened by the further statement that "the types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority." Art. 4(1). That sounds like forswearing the creation of an international legal norm.

The Convention's Recommendation 190 adds some stiffening detail; it explains that Article 3(d) encompasses "work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health," and "work under particularly difficult conditions such as work for long hours." But a "Recommendation" creates no enforceable obligations; according to the International Labour Organization's constitution, "apart from bringing the Recommendation before the . . . competent authority or authorities, no further obligation shall rest upon the Members, except that they shall report to the Director–General of the International Labour Office, at appropriate intervals as requested by the Governing Body, the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the

provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them." ILO Constitution, art. 19(6)(d).

Given the diversity of economic conditions in the world, it's impossible to distill a crisp rule from the three conventions. We would *like* to think that working conditions of children below the age of 13 that significantly reduce longevity or create a high risk (or actuality) of significant permanent physical or psychological impairment would be deemed to violate customary international law, but we cannot be certain even of that. The plaintiffs have furnished no "concrete evidence of the customs and practices of States" to show that states feel themselves under a legal obligation to impose liability on employers of child labor in our hypothetical case. *Flores v. Southern Peru Copper Corp.,* 414 F.3d 233, 250–52 (2d Cir.2003). Such evidence is readily available for the other types of child labor listed in ILO Convention 182, such as sexual exploitation of children and forced child labor. See, e.g., 22 U.S.C. §§ 7102(8), 7104(i); United Nations Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, arts. 3–4, May 25, 2000; *Siliadin v. France,* 73316/01, Council of Europe: European Court of Human Rights, July 26, 2005; *Hadijatou Mani Koraou v. Republic of Niger,* Judgment No. ECW/CCJ/JUD/06/08, ¶¶ 76–82, Economic Community of West African States Community Court of Justice (2008). But not for the child labor in our example; and anyway the working conditions at the Firestone plantation, while bad, are not that bad—more precisely, the plaintiffs haven't presented evidence that would create a triable issue of whether they're that bad.

Although Firestone doesn't employ children, at least directly, it sets high daily production quotas for its employees, who are poor Liberian agricultural workers. It is difficult for an employee to make his daily quota without help, and there is evidence that if he fails to make it he loses his job. These jobs are well paid by Liberian standards—in 2007 the average annual income of tappers (rubber farmers) on the Firestone plantation was $1559, though Liberia's per capita GDP was only $218 (but this figure probably excludes a fair amount of in-kind and unreported income)—so the employees have a strong incentive to fulfill their daily quota. They can assure fulfillment by hiring other poor Liberians to help them; and because Firestone's Liberian employees are paid well by local standards, they can hire helpers cheaply. But alternatively they can dragoon their wives or children into helping them, at no monetary cost; and this happens, though how frequently we don't know.

We can't tell from the record whether Firestone has adopted effective measures for keeping children from working on the plantation. The plantation covers 186 square miles, which is roughly the size of Chicago, and thousands of people live there—approximately 6500 employees of Firestone plus the members of their families. We don't know how many supervisors Firestone has deployed on the plantation, and hence whether there are enough of them to prevent employees from using their children to help them. We don't know the supervisors' routines, or how motivated they are to put a stop to any child labor they observe. Firestone claims that it now has a policy of firing employees who use their children as helpers, but it didn't have such a policy prior to 2005. The suit was filed that year (initially in California, but it was transferred to the district court in Indiana the following year, which is why the docket number in the district court has 06 in it), and though it is unclear when

Firestone's alleged violation of international law began—because it is unclear when the principle of customary international law invoked (or imagined) by the plaintiffs came into existence—it certainly began before 2005. And there is evidence that some of the supervisors had observed child labor during the period (whatever exactly it is) of alleged liability and done nothing to stop it. There is also evidence that the company's decisionmakers were aware of, and may even have condoned, some child labor on the plantation.

But does this add up to a violation of customary international law? "Agriculture is the sector with the most child labourers. It is also the sector with the most potential for decent work for rural children and young adolescents who have reached the legal minimum age of employment." International Labour Organization, "Children in Hazardous Work: What We Know, What We Need to Do" 21 (2011). But there is agricultural work and agricultural work. Harvesting rubber is hard, and to a degree hazardous, work. It involves cutting the bark of the rubber trees with machetes to expose the latex inside the tree trunk, draining the latex into buckets, carrying the buckets—which are heavy when they are full of latex—long distances, and applying fungicides and other chemicals to the trees. But not only do we not know how many children work on the plantation; we do not know, except for the 23 plaintiff children, whose ages range from six to sixteen and whose claims may differ from those of many other child workers on the plantation (which is why the district court refused to certify the suit as a class action—and the plaintiffs have not challenged that ruling), how much work the average child does, how hard that work is, and how many children work as hard as the plaintiff children attest to having worked.

Remember too that Firestone doesn't employ children; the argument rather is that by imposing tough quotas it induces its employees to enlist their children as helpers. The plaintiffs' basic objection seems therefore to be to the quotas. This implies that courts must in a case such as this determine on an employer-by-employer basis what level of production quotas violates customary international law by encouraging oppressive child labor.

We also—and this is the biggest objection to this lawsuit—don't know the situation of Liberian children who don't live on the Firestone plantation. Conceivably, because the fathers of the children on the plantation are well paid by Liberian standards, even the children who help their fathers with the work are, on balance, better off than the average Liberian child, and would be worse off if their fathers, unable to fill their daily quotas, lost their jobs or had to pay adult helpers, thus reducing the family's income. There is a tradeoff between family income and child labor; children are helped by the former and hurt by the latter; we don't know the net effect on their welfare of working on the plantation. Pranab Bardhan, "Some Up, Some Down," in *Can We Put an End to Sweatshops?* 49, 50–51 (Joshua Cohen & Joel Rogers eds.2001); Frederick B. Jonassen, "A Baby–Step to Global Labor Reform: Corporate Codes of Conduct and the Child," 17 *Minn. J. Int'l L.* 7, 25–26 (2008).

In short, we have not been given an adequate basis for inferring a violation of customary international law, bearing in mind the Supreme Court's insistence on caution in recognizing new norms of customary international law in litigation under the Alien Tort Statute.

[10] So the suit must fail, but for completeness we note two arguments by the defendant against liability that we reject.

The first is that plaintiffs must exhaust their legal remedies in the nation in which the alleged violation of customary international law occurred. The implications of the argument border on the ridiculous; imagine having been required to file suit in a court in Nazi Germany complaining about genocide, before being able to sue under the Alien Tort Statute. What is true is that a U.S. court might, as a matter of international comity, stay an Alien Tort suit that had been filed in the U.S. court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that. *Sarei v. Rio Tinto, PLC, supra*, 550 F.3d at 831–32. Liberia is not able.

[11] And second, the defendant argues that the statute has no extraterritorial application, except to violations of customary international law that are committed on the high seas. Courts have been applying the statute extraterritorially (and not just to violations at sea) since the beginning; no court to our knowledge has ever held that it doesn't apply extraterritorially; and *Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained. Deny extraterritorial application, and the statute would be superfluous, given the ample tort and criminal remedies against, for example, the use of child labor (let alone its worst forms) in this country.

To sum up, although we disagree with the district court's ruling that corporations cannot be held liable for violating the Alien Tort Statute and we reject many of the defendant's arguments, we agree with the judgment.

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Mario MESCHINO, Defendant–Appellant.

No. 10–2696.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 23, 2011.

Decided July 12, 2011.

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., to distributing and possessing child pornography and was sentenced to 360 months in prison. Defendant appealed.

Holdings: The Court of Appeals, Sykes, Circuit Judge, held that:

(1) district court did not abuse its discretion in limiting defendant's cross-examining of his niece, and

(2) sentencing enhancement for possessing material portraying sadistic or masochistic conduct was substantively reasonable.

Affirmed.

1. Sentencing and Punishment ⚿303

Generally, evidentiary standards are more relaxed at sentencing than at trial.

2. Witnesses ⚿344(5)

In sexual-abuse cases, a district court can prevent a defendant from introducing evidence that his accuser made a different, allegedly false accusation if the evidence of falsity is weak, the prior incident is unrelated to the charged conduct, and the defendant intends to use the evidence as part of an attack on the general credibility of the witness.

Kiobel v. Royal Dutch Petro. Co.

Supreme Court of the United States
February 28, 2012, Argued; October 1, 2012, Reargued; April 17, 2013, Decided
No. 10-1491.

Reporter: 133 S. Ct. 1659; 185 L. Ed. 2d 671; 2013 U.S. LEXIS 3159; 81 U.S.L.W. 4241; 43 ELR 20083; 24 Fla. L. Weekly Fed. S 142; 2013 WL 1628935

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL., PETITIONERS v. ROYAL DUTCH PETROLEUM CO. ET AL.

Prior History: **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 2010 U.S. App. LEXIS 19382 (2d Cir., 2010)

Disposition: Affirmed.

Core Terms

extraterritorial, cause of action, territory, alien, pirate, sovereign, abroad, international law, piracy, torture, foreign policy, take place, violation of law, safe, national law, harbor, federal court, common law, high seas, statute's, the, ambassadors, domestic, today's, rebut, convention, displace, genocide, offender, caution

Case Summary

Procedural Posture

Petitioner Nigerian nationals sued respondents, Dutch, British, and Nigerian corporations, under the Alien Tort Statute (ATS), alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The United States Court of Appeals for the Second Circuit dismissed the complaint, reasoning that the law of nations did not recognize corporate liability. Certiorari was granted.

Overview

After residents in Nigeria began protesting the environmental effects of the corporations' practices, Nigerian military and police forces allegedly attacked the residents, and the corporations allegedly violated the law of nations by aiding and abetting the Nigerian Government. The Supreme Court determined that the Nigerian nationals' case seeking relief for violations of the law of nations occurring outside the United States was barred because the presumption against extraterritoriality applied to claims under the ATS, *28 U.S.C.S. § 1350*, and nothing in the ATS rebutted that presumption. Nothing about the historical context suggested that Congress intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign. There was no clear indication of extraterritoriality here, and it would reach too far to say that mere corporate presence sufficed to displace the presumption against extraterritorial application.

Outcome

The Supreme Court affirmed the appellate court's judgment. 9-0 decision; 3 concurrences.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN1 See *28 U.S.C.S. § 1350*.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN2 The Alien Tort Statute, *28 U.S.C.S. § 1350*, provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. However, the First Congress did not intend the provision to be "stillborn." The grant of jurisdiction is instead best read as having been enacted on the understanding that the common law would provide a cause of action for a modest number of international law violations. Thus, federal courts may recognize private claims for such violations under federal common law.

Governments > Legislation > Interpretation
International Law > Authority to Regulate > General Overview

HN3 Regarding the presumption against extraterritorial application, that canon provides that when a statute gives no clear indication of an extraterritorial application, it has none, and reflects the presumption that United States law governs domestically but does not rule the world.

Governments > Legislation > Interpretation
International Law > Authority to Regulate > General Overview

HN4 Regarding the presumption against extraterritorial application, this presumption serves to protect against unintended clashes between the United States ' laws and those of other nations which could result in international discord. For a court to run interference in a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Authority to Regulate > General Overview
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN5 The Supreme Court typically applies the presumption against extraterritorial application to discern whether an Act of Congress regulating conduct applies abroad. The Alien Tort Statute (ATS), *28 U.S.C.S. § 1350*, on the other hand, is "strictly jurisdictional." It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But the Court thinks the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN6 The danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the Alien Tort Statute (ATS), *28 U.S.C.S. § 1350*, because the question is not what Congress has done but instead what courts may do. The Supreme Court in Sosa repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. The potential foreign policy implications of recognizing causes un-

der the ATS should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. The possible collateral consequences of making international rules privately actionable argue for judicial caution. These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction
International Law > Individuals & Sovereign States > Human Rights > Torture

HN7 The concerns implicated in any case arising under the Alien Tort Statute, *28 U.S.C.S. § 1350*, are not diminished by the fact that Sosa limited federal courts to recognizing causes of action only for alleged violations of international law norms that are specific, universal, and obligatory. As demonstrated by Congress 's enactment of the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following *28 U.S.C.S. § 1350*, identifying such a norm is only the beginning of defining a cause of action. TVPA §§ 2, 3. Each of these decisions carries with it significant foreign policy implications.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN8 The principles underlying the presumption against extraterritoriality constrain courts exercising their power under the Alien Tort Statute, *28 U.S.C.S. § 1350*.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN9 It is true that Congress , even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. But to rebut the presumption against extraterritoriality, the Alien Tort Statute, *28 U.S.C.S. § 1350*, would need to evince a clear indication of extraterritoriality. It does not.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN10 Nothing in the text of the Alien Tort Statute (ATS), *28 U.S.C.S. § 1350*, suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach — such violations affecting aliens can occur either within or outside the United States . Nor does the fact that the text reaches any civil action suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN11 Under the transitory torts doctrine, the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The question under Sosa is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress necessarily meant for those causes of action to reach con-

duct in the territory of a foreign sovereign. In the end, nothing in the text of the Alien Tort Statute, *28 U.S.C.S. § 1350*, evinces the requisite clear indication of extraterritoriality.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction
International Trade Law > International Intellectual Property Law > Sources of International Law

HN12 The historical background against which the Alien Tort Statute (ATS), *28 U.S.C.S. § 1350*, was enacted does not overcome the presumption against application to conduct in the territory of another sovereign. Assuredly context can be consulted in determining whether a cause of action applies abroad. When Congress passed the ATS, three principal offenses against the law of nations had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. The first two offenses have no necessary extraterritorial application. Indeed, Blackstone — in describing them — did so in terms of conduct occurring within the forum nation. Safe conducts grant a member of one society a right to intrude into another. The king's power to receive ambassadors at home has been recognized. On his entering the country to which he is sent, and making himself known, the ambassador is under the protection of the law of nations.

Admiralty & Maritime Law > Practice & Procedure > Jurisdiction
Governments > Legislation > Interpretation
International Law > Authority to Regulate > General Overview

HN13 The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. The U.S. Supreme Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN14 The U.S. Supreme Court does not think that the existence of a cause of action against pirates is a sufficient basis for concluding that other causes of action under the Alien Tort Statute, *28 U.S.C.S. § 1350*, reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. When a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN15 There is no indication that the Alien Tort Statute, *28 U.S.C.S. § 1350*, was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. No nation has ever yet pretended to be the custos morum of the whole world. It is implausible to suppose that the First Congress wanted their fledgling Republic — struggling to receive international recognition — to be the first.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN16 As the denial or perversion of justice is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. The Alien Tort Statute (ATS), *28 U.S.C.S. § 1350*, ensured that the United States could provide a forum for adjudicating such incidents. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Governments > Legislation > Interpretation
International Law > Authority to Regulate > General

Overview

HN17 The presumption against extraterritoriality guards against courts triggering serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN18 The presumption against extraterritoriality applies to claims under the Alien Tort Statute, *28 U.S.C.S. § 1350*, and nothing in the statute rebuts that presumption.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Statutory Sources
Governments > Legislation > Interpretation
International Law > Dispute Resolution > Conflict of Law > Jurisdiction

HN19 In the context of the Alien Tort Statute, *28 U.S.C.S. § 1350*, even where the claims touch and concern the territory of the United States , they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.

Syllabus

[*1660] **[**676]** Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents — certain Dutch, British, and Nigerian corporations — aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS provides that "[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 District Court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. This Court granted certiorari, and ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Held: The presumption against extraterritoriality applies to claims under the ATS, **[***2]** and nothing in the statute rebuts that presumption. Pp. 3-14.

[677]** (a) Passed as part of the Judiciary Act of 1789, the ATS is a jurisdictional statute that creates no causes of action. It permits federal courts to "recognize private claims [for a modest number of international law violations] under federal common law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718. In contending that a claim under the ATS does not reach conduct occurring in a foreign sovereign's territory, respondents rely on the presumption against extraterritorial application, which provides that **[*1661]** "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. ___, ___, 130 S. Ct. 2869, 2878, 177 L. Ed. 2d 535. The presumption "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, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274. It is typically applied to discern whether an Act of Congress regulating conduct applies abroad, see, *e.g.*, *id.*, at 246, 111 S. Ct. 1227, 113 L. Ed. 2d 274, but its underlying principles similarly constrain courts when considering causes of action that may be brought under the ATS. Indeed, the danger of unwarranted **[***3]** judicial interference in the conduct of foreign policy is magnified in this context, where the question is not what Congress has done but what courts may do. These foreign policy concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that

are "'specific, universal, and obligatory," *542 U.S., at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718*. Pp. 3-6.

(b) The presumption is not rebutted by the text, history, or purposes of the ATS. Nothing in the ATS's text evinces a clear indication of extraterritorial reach. Violations of the law of nations affecting aliens can occur either within or outside the United States. And generic terms, like "any" in the phrase "any civil action," do not rebut the presumption against extraterritoriality. See, *e.g.*, *Morrison, supra*, at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535. Petitioners also rely on the common-law "transitory torts" doctrine, but that doctrine is inapposite here; as the Court has explained, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well-founded belief that it was a cause of action in that place," *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 479, 32 S. Ct. 132, 56 L. Ed. 274. **[***4]** The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. That question is not answered by the mere fact that the ATS mentions torts.

The historical background against which the ATS was enacted also does not overcome the presumption. When the ATS was passed, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa, supra,* at 723, 724, 124 S. Ct. 2739, 159 L. Ed. 2d 718. Prominent contemporary examples of **[**678]** the first two offenses—immediately before and after passage of the ATS — provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad. And although the offense of piracy normally occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, applying U.S. law to pirates does not typically impose the sovereign will of the United **[***5]** States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. A 1795 opinion of Attorney General William Bradford regarding the conduct of U.S. citizens on both the high seas and a foreign shore is at best ambiguous about the ATS's extraterritorial application; it does not suffice to counter the weighty concerns underlying the presumption against extraterritoriality. Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the **[*1662]** enforcement of international norms. Pp. 6-14.

621 F.3d 111, affirmed.

Counsel: Paul Hoffman argued the cause for petitioner.

Edwin S. Kneedler argued the cause for the United States, as amicus curiae.

Kathleen M. Sullivan argued the cause for respondent.

Judges: ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined.

Opinion by: ROBERTS

Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Petitioners, a group of Nigerian nationals residing in the United States, filed suit in federal court against certain Dutch, British, and Nigerian corporations. **[***6]** Petitioners sued under the Alien Tort Statute, *28 U.S.C. §1350*, alleging that the corporations aided and abetted the Nigerian Government in committing viola-

tions of the law of nations in Nigeria. The question presented is whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

I

Petitioners were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and populated by roughly half a million people. When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company, p.l.c., were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria, and engaged in oil exploration and production in Ogoniland. According to the complaint, after concerned residents of Ogoniland began protesting the environmental effects of SPDC's practices, respondents enlisted the Nigerian Government to violently suppress the burgeoning **[***7]** demonstrations. Throughout the early 1990's, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and **[**679]** abetted these atrocities by, among other things, providing the **[*1663]** Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.

Following the alleged atrocities, petitioners moved to the United States where they have been granted political asylum and now reside as legal residents. See Supp. Brief for Petitioners 3, and n. 2. They filed suit in the United States District Court for the Southern District of New York, alleging jurisdiction under the Alien Tort Statute and requesting relief under customary international law. The ATS provides, in full, that ***HN1*** "[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*. According to petitioners, respondents violated the law of nations by **[***8]** aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. The District Court dismissed the first, fifth, sixth, and seventh claims, reasoning that the facts alleged to support those claims did not give rise to a violation of the law of nations. The court denied respondents' motion to dismiss with respect to the remaining claims, but certified its order for interlocutory appeal pursuant to *§1292(b)*.

The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. *621 F.3d 111 (2010)*. We granted certiorari to consider that question. *565 U.S. ___, 132 S. Ct. 1738, 182 L. Ed. 2d 270 (2011)*. After oral argument, we directed the parties to file supplemental briefs addressing an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *565 U.S. ___, 132 S. Ct. 1738, 182 L. Ed. 2d 270 (2012)*. **[***9]** We heard oral argument again and now affirm the judgment below, based on our answer to the second question.

II

Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years. Act of Sept. 24, 1789, §9, 1 Stat 77; see *Moxon* v. *The Fanny*, 17 F. Cas. 942, F. Cas. No. 9895 (No. 9,895) (DC Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810, F. Cas. No. 1607 (No. 1,607) (DC SC 1795); *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45, 28 S. Ct. 439, 52 L. Ed. 676 (1908); *Khedivial Line, S.A.E.* v. *Seafarers' Int'l Union*, 278 F. 2d 49, 51-52 (CA2 1960) (*per curiam*). ***HN2*** The stat-

ute provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. We held in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 714, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), however, that the First Congress did not intend the provision to be "stillborn." The grant of jurisdiction is instead "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Id.*, at 724, 124 S. Ct. 2739, 159 L. Ed. 2d 718. We thus held that federal courts **[**680]** may "recognize private claims [for such violations] under federal common law." *Id.*, at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718. The Court in *Sosa* rejected **[***10]** the plaintiff's claim in that case for "arbitrary arrest and detention," on the ground that it failed to state a violation of the law of nations with the requisite "definite content and acceptance among civilized nations." *Id.*, at 699, 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718.

[*1664] The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. ***HN3*** That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. ___, ___, 130 S. Ct. 2869, 2878, 177 L. Ed. 2d 535 (2010), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007).

HN4 This presumption "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, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991) (*Aramco*). As **[***11]** this Court has explained:

> "For us to run interference in . . . a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U.S. 138, 147, 77 S. Ct. 699, 1 L. Ed. 2d 709 (1957). The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.

HN5 We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. See, *e.g.*, *Aramco*, *supra*, at 246, 111 S. Ct. 1227, 113 L. Ed. 2d 274 ("These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad"); *Morrison*, *supra*, at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (noting that the question of extraterritorial application was a "merits question," not a question of jurisdiction). The ATS, on the other hand, is "strictly **[***12]** jurisdictional." *Sosa*, 542 U.S., at 713, 124 S. Ct. 2739, 159 L. Ed. 2d 718. It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

HN6 Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the **[**681]** question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light

of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications . . . of recognizing . . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727, 124 S. Ct. 2739, 159 L. Ed. 2d 718; see also *id.*, at 727-728, 124 S. Ct. 2739, 159 L. Ed. 2d 718 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse **[***13]** foreign policy consequences, they should be undertaken, if at all, with great caution"); *id.*, at 727, **[*1665]** 124 S. Ct. 2739, 159 L. Ed. 2d 718 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution"). These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

HN7 These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "'specific, universal, and obligatory.'" *Id.*, at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (quoting *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994)). As demonstrated by Congress's enactment of the Torture Victim Protection Act of 1991, 106 Stat. 73, note following *28 U.S.C. §1350*, identifying such a norm is only the beginning of defining a cause of action. See *id.*, *§3* (providing detailed definitions for extrajudicial killing and torture); *id.*, *§2* (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries **[***14]** with it significant foreign policy implications.

HN8 The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

III

Petitioners contend that even if the presumption applies, the text, history, and purposes of the ATS rebut it for causes of action brought under that statute. ***HN9*** It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. See, *e.g.*, *18 U.S.C. §1091(e) (2006 ed., Supp. V)* (providing jurisdiction over the offense of genocide "regardless of where the offense is committed" if the alleged offender is, among other things, "present in the United States"). But to rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality." *Morrison*, 561 U.S., at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535. It does not.

To begin, ***HN10*** nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach — such violations affecting aliens can occur either within or **[***15]** outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like **[**682]** "any" or "every" do not rebut the presumption against extraterritoriality. See, *e.g.*, *id.*, at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535; *Small* v. *United States*, 544 U.S. 385, 388, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005); *Aramco*, 499 U.S., at 248-250, 111 S. Ct. 1227, 113 L. Ed. 2d 274; *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 287, 69 S. Ct. 575, 93 L. Ed. 680 (1949).

Petitioners make much of the fact that the ATS provides jurisdiction over civil actions for "torts" in violation of the law of nations. They claim that in using that word, the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil." Supp. Brief for Petitioners 18. For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad. See *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 177, 98 Eng. Rep. 1021, 1030 (1774) (Mans-

field, L.) ("[A]ll actions of a transitory nature that arise abroad may be laid as happening in an English county"); *Dennick* v. *Railroad Co.*, 103 U.S. 11, 18, 26 L. Ed. 439 (1881) **[***16]** **[*1666]** ("Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties").

HN11 Under the transitory torts doctrine, however, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place." *Cuba R. Co.* v. *Crosby*, 222 U.S. 473, 479, 32 S. Ct. 132, 56 L. Ed. 274 (1912) (majority opinion of Holmes, J.). The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress "necessarily meant" for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.

HN12 Nor does the **[***17]** historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. See *Morrison*, *supra*, at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (noting that "[a]ssuredly context can be consulted" in determining whether a cause of action applies abroad). We explained in *Sosa* that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *542 U.S., at 723, 724, 124 S. Ct. 2739, 159 L. Ed. 2d 718*; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone — in describing them — did so in terms of conduct occurring within the forum nation. See *ibid.* (describing the right of safe conducts for those "who are here"); 1 *id.,* at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); *id.,* at 245-248 **[**683]** (recognizing the king's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. De Vattel, Law of Nations 465 **[***18]** (J. Chitty et al. transl. and ed. 1883) ("[O]n his entering the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations . . .").

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois — the Secretary of the French Legion — in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. *Respublica* v. *De Longchamps*, 1 U.S. 111, 1 Dall. 111, 1 L. Ed. 59 (O. T. Phila. 1784); *Sosa*, *supra*, at 716-717, 124 S. Ct. 2739, 159 L. Ed. 2d 718, and n. 11. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in **[***19]** turn, but cautioned that because "'neither Congress nor our [State] Legislature have **[*1667]** yet passed any act respecting a breach of the privileges of Ambassadors,'" the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641-642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which

the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See *Bolchos*, 3 F. Cas. 810, F. Cas. No. 1607 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon*, 17 F. Cas. 942, F. Cas. No. 9895 (wrongful seizure in United States territorial waters).

These prominent contemporary examples — immediately before and after passage of the ATS — provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United **[***20]** States or any other country. See 4 Blackstone, *supra,* at 72 (***HN13*** "The offence of piracy, by common law, consists of committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, *e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 173-174, 113 S. Ct. 2549, 125 L. Ed. 2d 128 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440, **[**684]** 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U.S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. **[***21]** Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, *supra,* at 71. ***HN14*** We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See *Morrison*, 561 U.S., at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms"); see also *Microsoft Corp.*, 550 U.S., at 455-456, 127 S. Ct. 1746, 167 L. Ed. 2d 737.

Petitioners also point to a 1795 opinion authored by Attorney General William Bradford. See *Breach of Neutrality, 1 Op. Atty. Gen. 57*. In 1794, in the midst of war between France and Great Britain, and notwithstanding the American official policy of neutrality, several U.S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. In response to a protest from the British Ambassador, Attorney General Bradford responded as follows:

> So far . . . as the transactions complained **[***22]** of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the **[*1668]** actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* within the jurisdiction of the . . . courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in . . . those courts . . . . But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being ex-

> pressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . .” *Id.*, at 58-59.

Petitioners read the last sentence as confirming that “the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign.” Supp. Brief for Petitioners 33. Respondents counter that when Attorney General Bradford referred to **[***23]** “these acts of hostility,” he meant the acts only insofar as they took place on the high seas, and even if his conclusion were broader, it was only because the applicable treaty had extraterritorial reach. See Supp. Brief for Respondents 28-30. The Solicitor General, having once read the opinion to stand for the proposition that an “ATS suit **[**685]** could be brought against American citizens for breaching neutrality with Britain only if acts did not take place in a foreign country,” Supp. Brief for United States as *Amicus Curiae* 8, n. 1 (internal quotation marks and brackets omitted), now suggests the opinion “could have been meant to encompass . . . conduct [occurring within the foreign territory],” *id.*, at 8.

Attorney General Bradford’s opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.

Finally, ***HN15*** there is no indication that the ATS was passed to make **[***24]** the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, “No nation has ever yet pretended to be the custos morum of the whole world . . . .” *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (CC. Mass. 1822). It is implausible to suppose that the First Congress wanted their fledgling Republic — struggling to receive international recognition — to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Bradley, *42 Va. J. Int’l L., at 641*. Such offenses against ambassadors violated the law of nations, “and if not adequately redressed could rise to an issue of war.” *Sosa*, 542 U.S., at 715, 124 S. Ct. 2739, 159 L. Ed. 2d 718; cf. The Federalist No. 80, p. 536 (J. Cooke ed. 1961) (A. Hamilton) (***HN16*** “As the denial or perversion of justice . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned”). The ATS ensured **[***25]** that the United States could provide a forum for adjudicating such incidents. See *Sosa*, *supra*, at 715-718, 124 S. Ct. 2739, 159 L. Ed. 2d 718, and n. 11. Nothing about this historical context suggests that Congress also intended federal common law under the ATS **[*1669]** to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 77-78, 397 U.S. App. D.C. 371 (CADC 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners’ view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. ***HN17*** The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

We therefore conclude **[***26]** that ***HN18*** the

presumption against extraterritoriality applies to claims under the ATS, **[**686]** and that nothing in the statute rebuts that presumption. "[T]here is no clear indication of extraterritoriality here," *Morrison*, 561 U.S., at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

IV

On these facts, all the relevant conduct took place outside the United States. ***HN19*** And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

Concur by: KENNEDY; ALITO; BREYER

Concur

JUSTICE KENNEDY, concurring.

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. **[***27]** Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following *28 U.S.C. §1350*, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

I concur in the judgment and join the opinion of the Court as far as it goes. Specifically, I agree that when Alien Tort Statute (ATS) "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Ante*, at 14. This formulation obviously leaves much unanswered, and perhaps there is wisdom in the Court's **[*1670]** preference for this narrow approach. **[***28]** I write separately to set out the broader standard that leads me to the conclusion that this case falls within the scope of the presumption.

In *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010), we explained that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.*, at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535. We also reiterated that a cause of action falls outside the scope of the presumption — and thus is not barred by the presumption — only if the event or relationship that was "the 'focus' of congressional concern" under the relevant statute takes place **[**687]** within the United States. *Ibid.* (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 255, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)). For example, because "the focus of the [Securities] Exchange Act [of 1934] is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," we held in *Morrison* that *§10(b)* of the Exchange Act applies "only" to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *561 U.S., at ___-___, 130 S. Ct. 2869, 177 L. Ed. 2d 535*.

The **[***29]** Court's decision in *Sosa v. Alvarez*

-Machain, 542 U.S. 692, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), makes clear that when the ATS was enacted, "congressional concern" was "'focus[ed],'" *Morrison, supra,* at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535, on the "three principal offenses against the law of nations" that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy, *Sosa,* 542 U.S., at 723-724, 124 S. Ct. 2739, 159 L. Ed. 2d 718. The Court therefore held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.,* at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718. In other words, only conduct that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations can be said to have been "the 'focus' of congressional concern," *Morrison, supra,* at ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535, when Congress enacted the ATS. As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality — and will therefore be barred — unless the domestic conduct is sufficient to violate an international law norm that **[***30]** satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR and JUSTICE KAGAN join, concurring in the judgment.

I agree with the Court's conclusion but not with its reasoning. The Court sets forth four key propositions of law: First, the "presumption against extraterritoriality applies to claims under" the Alien Tort Statute. *Ante,* at 13. Second, "nothing in the statute rebuts that presumption." *Ibid.* Third, there "is no clear indication of extraterritoria[l application] here," where "all the relevant conduct took place outside the United States" and "where the claims" do not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Ante,* at 13-14 (internal quotation marks omitted). Fourth, that is in part because "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Ante,* at 14.

[*1671] Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute **[***31]** where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, **[**688]** and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. See *Sosa* v. *Alvarez-Machain,* 542 U.S. 692, 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) ("'[F]or purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind.'" (quoting *Filartiga* v. *Pena-Irala,* 630 F. 2d 876, 890 (CA2 1980) (alteration in original))). See also 1 *Restatement (Third) of Foreign Relations Law of the United States §§ 402*, *403*, *404* (1986). In this case, however, the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction.

I

A

Our decision in *Sosa* frames the question. In *Sosa* the Court specified that the Alien Tort Statute (ATS), when enacted in 1789, "was intended as jurisdictional." *542 U.S., at 714, 124 S. Ct. 2739, 159 L. Ed. 2d 718*. We added that the statute gives today's courts the power to apply certain "judge-made" **[***32]** damages law to victims of certain foreign affairs-related misconduct, including "three specific offenses" to which "Blackstone referred," namely "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.,* at 715, 124 S. Ct. 2739, 159 L. Ed. 2d

718. We held that the statute provides today's federal judges with the power to fashion "a cause of action" for a "modest number" of claims, "based on the present-day law of nations," and which "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features" of those three "18th-century paradigms." *Id.*, at 724-725, 124 S. Ct. 2739, 159 L. Ed. 2d 718.

We further said that, in doing so, a requirement of "exhaust[ion]" of "remedies" might apply. *Id.*, at 733, n. 21, 124 S. Ct. 2739, 159 L. Ed. 2d 718. We noted "a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Ibid.* Adjudicating any such claim must, in my view, also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws and their enforcement. *Id.*, at 761, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (BREYER, J., concurring in part and concurring in judgment). See also *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U.S. 155, 165-169, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004).

Recognizing **[***33]** that Congress enacted the ATS to permit recovery of damages from pirates and others who violated basic international law norms as understood in 1789, *Sosa* essentially leads today's judges to ask: Who are today's pirates? See *542 U.S., at 724-725, 124 S. Ct. 2359, 159 L. Ed. 2d 226* (majority opinion). We provided a framework for answering that question by setting down principles drawn from international norms and designed to limit ATS claims to those that are similar in character and specificity to piracy. *Id.*, at 725, 124 S. Ct. 2359, 159 L. Ed. 2d 226.

In this case we must decide the extent to which this jurisdictional statute opens a federal court's doors to those harmed by activities belonging to the limited class that *Sosa* set forth *when those activities take place abroad*. To help answer this **[*1672]** question **[**689]** here, I would refer both to *Sosa* and, as in *Sosa,* to norms of international law. See Part II, *infra*.

B

In my view the majority's effort to answer the question by referring to the "presumption against extraterritoriality" does not work well. That presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. ___, ___, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). See **[***34]** *ante,* at 4. The ATS, however, was enacted with "foreign matters" in mind. The statute's text refers explicitly to "alien[s]," "treat[ies]," and "the law of nations." *28 U.S.C. §1350*. The statute's purpose was to address "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious con-sequences in international affairs." *Sosa*, 542 U.S., at 715, 124 S. Ct. 2739, 159 L. Ed. 2d 718. And at least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, *ibid.,* normally takes place abroad. See 4 W. Blackstone, Commentaries on the Law of England 72 (1769).

The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. See *ante,* at 10. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963); 2 *Restatement §502, Comment d* ("[F]lag state has jurisdiction to prescribe with respect to any activity aboard the ship"). Indeed, in the early 19th **[***35]** century Chief Justice Marshall described piracy as an "offenc[e] against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *United States* v. *Palmer*, 16 U.S. 610, 3 Wheat. 610, 632, 4 L. Ed. 471 (1818). See *United States* v. *Furlong*, 18 U.S. 184, 5 Wheat. 184, 197, 5 L. Ed. 64 (1820) (a crime committed "within the jurisdiction" of a foreign state and a crime committed "in the vessel of another nation"

are "the same thing").

The majority nonetheless tries to find a distinction between piracy at sea and similar cases on land. It writes, "Applying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the *territorial* jurisdiction of another sovereign and therefore carries less direct foreign policy consequences." *Ante,* at 10 (emphasis added). But, as I have just pointed out, "[a]pplying U.S. law to pirates" *does* typically involve applying our law to acts taking place within the jurisdiction of another sovereign. Nor can the majority's words "territorial jurisdiction" sensibly distinguish land from sea for purposes of isolating adverse foreign policy risks, as the Barbary Pirates, the War of 1812, the sinking **[***36]** of the *Lusitania,* and the Lockerbie bombing make all too clear.

The majority also writes, "Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction." *Ibid.* I very much agree that pirates were fair game "wherever found." Indeed, that is the point. That is why we asked, in *Sosa,* who are today's pirates? Certainly today's pirates **[**690]** include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." 1 *Restatement §404* **[*1673]** Reporters' Note 1, p. 256 (quoting *In re Demjanjuk,* 612 F. Supp. 544, 556 (ND Ohio 1985) (internal quotation marks omitted)). See *Sosa, supra,* at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718. And just as a nation that harbored pirates provoked the concern of other nations in past centuries, see *infra,* at 8, so harboring "common enemies of all mankind" provokes similar concerns today.

Thus the Court's reasoning, as applied to the narrow class of cases that *Sosa* described, fails to provide significant support for the use of any presumption against extraterritoriality; **[***37]** rather, it suggests the contrary. See also *ante,* at 10 (conceding and citing cases showing that this Court has "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application").

In any event, as the Court uses its "presumption against extraterritorial application," it offers only limited help in deciding the question presented, namely "'under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'" *542 U.S. ___, 132 S. Ct. 1738, 182 L. Ed. 2d 270 (2012)*. The majority echoes in this jurisdictional context *Sosa*'s warning to use "caution" in shaping federal common-law causes of action. *Ante,* at 5. But it also makes clear that a statutory claim might sometimes "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Ante,* at 14. It leaves for another day the determination of just when the presumption against extraterritoriality might be "overcome." *Ante,* at 8.

II

In applying the ATS to acts "occurring within the territory of a[nother] sovereign," I would assume **[***38]** that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp. That grasp, defined by the statute's purposes set forth in *Sosa,* includes compensation for those injured by piracy and its modern-day equivalents, at least where allowing such compensation avoids "serious" negative international "consequences" for the United States. *542 U.S., at 715, 124 S. Ct. 2739, 159 L. Ed. 2d 718*. And just as we have looked to established international substantive norms to help determine the statute's substantive reach, *id.,* at 729, 124 S. Ct. 2739, 159 L. Ed. 2d 718, so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope.

The Restatement (Third) of Foreign Relations Law is helpful. *Section 402* recognizes that, subject to *§403*'s "reasonableness" requirement, a nation may apply its law (for example, federal

common law, see *542 U.S., at 729-730, 124 S. Ct. 2739, 159 L. Ed. 2d 718* not only (1) to "conduct" that "takes place [or to persons or things] within its territory" but also (2) to the "activities, interests, status, or relations **[**691]** of its nationals outside as well as within its territory," (3) to "conduct outside its territory that has or is intended to have substantial effect within its territory," and **[***39]** (4) to certain foreign "conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests." In addition, *§404 of the Restatement* explains that a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior.

Considering these jurisdictional norms in light of both the ATS's basic purpose (to provide compensation for those injured by today's pirates) and *Sosa*'s basic caution **[*1674]** (to avoid international friction), I believe that the statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that **[***40]** Congress adopted the present statute at a time when, as Justice Story put it, "No nation ha[d] ever yet pretended to be the custos morum of the whole world." *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (CC Mass. 1822). That restriction also should help to minimize international friction. Further limiting principles such as exhaustion, *forum non conveniens*, and comity would do the same. So would a practice of courts giving weight to the views of the Executive Branch. See *Sosa*, 542 U.S., at 733, n. 21, 124 S. Ct. 2739, 159 L. Ed. 2d 718; *id.*, at 761, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (opinion of BREYER, J.).

As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes — in particular that of compensating those who have suffered harm at the hands of, *e.g.,* torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that "handful of heinous actions." *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 781, 233 U.S. App. D.C. 384 (CADC 1984) (Edwards, J., concurring). **[***41]** See generally Leval, The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court, 92 Foreign Affairs 16 (Mar. / Apr. 2013). To the contrary, the statute's language, history, and purposes suggest that the statute was to be a weapon in the "war" against those modern pirates who, by their conduct, have "declar[ed] war against all mankind." 4 Blackstone 71.

International norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent). See generally A. Bradford, Flying the Black Flag: A Brief History of Piracy 19 (2007) ("Every polis by the sea . . . which was suspected of sponsoring piracy or harboring pirates could be attacked and destroyed by the Athenians"); F. Sanborn, Origins of the Early English Maritime and Commercial Law 313 **[**692]** (1930) ("In 1490 Henry VII made a proclamation against harboring pirates or purchasing goods from them"); N. Risjord, Representative Americans: The Colonists 146 (1981) ("William Markham, Penn's lieutenant governor in the 1690s, was accused of harboring pirates in Philadelphia . . . . Governor Benjamin Fletcher of New York became the target of a royal inquiry after he issued privateering **[***42]** commissions to a band of notorious pirates"); 3 C. Yonge, A Pictorial History of the World's Great Nations 954 (1882) ("[In the early 18th century, t]he government of Connecticut was accused of harboring pirates"); S. Menefee, Piracy, Terrorism,

and the Insurgent Passenger: A Historical and Legal Perspective, in Maritime Terrorism and International Law 51 (N. Ronzitti ed. 1990) (quoting the judge who handled the seizure of the *Chesapeake* during the Civil War as stating that "'piracy *jure gentium* was justiciable by the court of New Brunswick, wherever committed'"); D. Field, Outlines of an International Code 33, Art. **[*1675]** 84 (2d ed. 1876) (citing the 1794 treaty between the United States and Great Britain ("*Harboring pirates forbidden.* No nation can receive pirates into its territory, or permit any person within the same to receive, protect, conceal or assist them in any manner; but must punish all persons guilty of such acts")).

More recently two lower American courts have, in effect, rested jurisdiction primarily upon that kind of concern. In *Filartiga*, 630 F. 2d 876, an alien plaintiff brought a lawsuit against an alien defendant for damages suffered through acts of torture that the defendant **[***43]** allegedly inflicted in a foreign nation, Paraguay. Neither plaintiff nor defendant was an American national and the actions underlying the lawsuit took place abroad. The defendant, however, "had . . . resided in the United States for more than ninth months" before being sued, having overstayed his visitor's visa. *Id.*, at 878-879. Jurisdiction was deemed proper because the defendant's alleged conduct violated a well-established international law norm, and the suit vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.

In *Marcos*, the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act, death by torture, took place abroad. *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1469, 1475 (CA9 1994); *In re Estate of Marcos Human Rights Litigation*, 978 F. 2d 493, 495-496, 500 (CA9 1992). A month before being sued, the defendant, "his family, . . . and others loyal to [him] fled to Hawaii," where the ATS case was heard. *Marcos*, 25 F.3d, at 1469. As in *Filartiga*, the court found ATS jurisdiction.

And in *Sosa* we referred to both cases with **[***44]** approval, suggesting that the ATS allowed a claim for relief in such circumstances. *542 U.S., at 732, 124 S. Ct. 2739, 159 L. Ed. 2d 718*. See also *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (CA7 2011) (Posner, J.) ("*Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained"). Not surprisingly, both before and after *Sosa*, courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application. See, *e.g.*, *643 F.3d, at 1025* ("[N]o court to our knowledge has ever held that it doesn't apply **[**693]** extraterritorially"); *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 747 (CA9 2011) (en banc) ("We therefore conclude that the ATS is not limited to conduct occurring within the United States"); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 20, 397 U.S. App. D.C. 371 (CADC 2011) ("[W]e hold that there is no extraterritoriality bar").

Application of the statute in the way I have suggested is consistent with international law and foreign practice. Nations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad. See E. de Vattel, Law of Nations, Book II, p. 163 (§76) ("pretty generally observed" **[***45]** practice in "respect to great crimes, which are equally contrary to the laws and safety of all nations," that a sovereign should not "suffer his subjects to molest the subjects of other states, or to do them an injury," but should "compel the transgressor to make reparation for the damage or injury," or be "deliver[ed] . . . up to the offended state, to be there brought to justice").

Many countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad. See, *e.g.*, Brief for Government of the Kingdom of the Netherlands et al. as *Amici Curiae* 19-23 (hereinafter Netherlands Brief) (citing *inter alia Guerrero* v. **[*1676]** *Monterrico Metals PLc* [2009] EWHC (QB) 2475 (Eng.) (attacking conduct of U. K. companies in Peru); *Lubbe and Others* v. *Cape PLc* [2000] UKHL 41 (attacking conduct of U. K. companies in

South Africa); *Rb. Gravenhage* [Court of the Hague], 30 December 2009, JOR 2010, 41 m.nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.) (attacking conduct of Dutch respondent in Nigeria)). See also Brief for European Commission as *Amicus Curiae* 11 (It is "uncontroversial" that the "United States may . . . exercise jurisdiction over **[***46]** ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law").

Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages. Certain countries, which find "universal" criminal "jurisdiction" to try perpetrators of particularly heinous crimes such as piracy and genocide, see *Restatement §404*, also permit private persons injured by that conduct to pursue "*actions civiles*," seeking civil damages in the criminal proceeding. Thompson, Ramasastry, & Taylor, Translating *Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes, 40 Geo. Wash. Int'l L. Rev. 841, 886 (2009). See, *e.g., Ely Ould Dah* v. *France*, App. No. 13113/03 (Eur. Ct. H. R.; Mar 30, 2009), 48 Int'l Legal Materials 884; Metcalf, Reparations for Displaced Torture Victims, 19 Cardozo J. Int'l & Comp. L. 451, 468-470 (2011). Moreover, the United Kingdom and the Netherlands, while not authorizing such damages actions themselves, tell us that they would have no objection to the exercise of American jurisdiction in cases **[***47]** such as *Filartiga* and *Marcos.* Netherlands Brief 15-16, and n. 23.

At the same time the Senate has consented to treaties obliging the United States to find and punish foreign perpetrators of serious crimes committed against foreign persons abroad. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, **[**694]** *28 U. S. T. 1975, T. I. A. S. No. 8532*; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, *24 U. S. T. 565, T. I. A. S. No. 7570*; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, *22 U. S. T. 1641, T. I. A. S. No. 7192*; *Restatement §404* Reporters' Note 1, at 257 ("These agreements include an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national"). See also International Convention for the Protection of All Persons from Enforced Disappearance, Art. 9(2) (2006) (state parties must take measures to establish jurisdiction "when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her"); **[***48]** http://www.unhcr.org/refworld/docid/47fdfaeb0.pdf (as visited Apr.1, 2013, and available in Clerk of Court's case file); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Dec. 10, 1984, 1465 U. N. T. S. 85, Arts. 5(2), 7(1) (similar); Geneva Convention (III) Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, [1955] *6 U. S. T. 3316, T. I. A. S. No. 3364* (signatories must "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" or "hand such persons over for trial").

And Congress has sometimes authorized civil damages in such cases. See generally note following *28 U.S.C. §1350* (Torture **[*1677]** Victim Protection Act of 1991 (TVPA) (private damages action for torture or extrajudicial killing committed under authority of a foreign nation)); S. Rep. No. 102-249, p. 4 (1991) (ATS "should not be replaced" by TVPA); H. R. Rep. No. 102-367, pt. 1, p. 4 (TVPA intended to "enhance the remedy already available under" the ATS). But cf. *Mohamad* v. *Palestinian Authority*, 566 U.S. ___, 132 S. Ct. 1702, 182 L. Ed. 2d 720 (2012) (TVPA allows suits against **[***49]** only natural persons).

Congress, while aware of the award of civil damages under the ATS — including cases such as *Filartiga* with foreign plaintiffs, defendants, and conduct — has not sought to limit the statute's jurisdictional or substantive reach. Rather,

Congress has enacted other statutes, and not only criminal statutes, that allow the United States to prosecute (or allow victims to obtain damages from) foreign persons who injure foreign victims by committing abroad torture, genocide, and other heinous acts. See, *e.g.*, *18 U.S.C. §2340A(b)(2)* (authorizing prosecution of torturers if "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender"); *§1091(e)(2)(D)* (2006 ed., Supp. V) (genocide prosecution authorized when, "regardless of where the offense is committed, the alleged offender is . . . present in the United States"); note following *28 U.S.C. §1350*, §2(a) (private right of action on behalf of individuals harmed by an act of torture or extrajudicial killing committed "under actual or apparent authority, or color of law, of any foreign nation"). See also S. Rep. No. 102-249, *supra*, at 3-4 (purpose to "mak[e] sure **[***50]** that torturers and death squads will no longer have a safe haven in the United States," by "providing a civil cause of action in U.S. courts for torture committed abroad").

[695]** Thus, the jurisdictional approach that I would use is analogous to, and consistent with, the approaches of a number of other nations. It is consistent with the approaches set forth in the Restatement. Its insistence upon the presence of some distinct American interest, its reliance upon courts also invoking other related doctrines such as comity, exhaustion, and *forum non conveniens*, along with its dependence (for its workability) upon courts obtaining, and paying particular attention to, the views of the Executive Branch, all should obviate the majority's concern that our jurisdictional example would lead "other nations, also applying the law of nations," to "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Ante,* at 13.

Most importantly, this jurisdictional view is consistent with the substantive view of the statute that we took in *Sosa*. This approach would avoid placing the statute's jurisdictional scope at odds with **[***51]** its substantive objectives, holding out "the word of promise" of compensation for victims of the torturer, while "break[ing] it to the hope."

III

Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie. The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. See Supp. Brief for Petitioners 4, n. 3 (citing *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 94 (CA2 2000)); App. 55. **[*1678]** The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, but see *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U.S. ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011), **[***52]** it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind." Thus I agree with the Court that here it would "reach too far to say" that such "mere corporate presence suffices." *Ante*, at 14.

I consequently join the Court's judgment but not its opinion.

Daimler AG v. Bauman

Supreme Court of the United States
October 15, 2013, Argued; January 14, 2014, Decided
No. 11-965

Reporter: 134 S. Ct. 746; 187 L. Ed. 2d 624; 2014 U.S. LEXIS 644; 82 U.S.L.W. 4043; 24 Fla. L. Weekly Fed. S 503; 2014 WL 113486

DAIMLER AG, Petitioner v. BARBARA BAUMAN et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at *Bauman v. Daimlerchrysler Corp., 2014 U.S. App. LEXIS 3867 (9th Cir., Feb. 28, 2014)*

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Bauman v. DaimlerChrysler Corp., 644 F.3d 909, 2011 U.S. App. LEXIS 10010 (9th Cir. Cal., 2011)

Disposition: Reversed.

Core Terms

general jurisdiction, subsidiary, shoe, personal jurisdiction, forum state, majority's, corporation's, affiliate, company's, all-purpose, systematic, defendant's, continuous, multinational, in-state, prong, headquarter, manufacture, amenable, home, tire, principal place of business, the, predictability, out-of-state, plaintiffs, court's, proportionality, distributor, long-arm

Case Summary

Procedural Posture

Respondent foreign residents brought an action against petitioner foreign corporation alleging that a foreign subsidiary of the corporation committed human rights violations in the foreign country. Upon the grant of a writ of certiorari, the corporation appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit that personal jurisdiction over the corporation was proper based on the activities of a U.S. subsidiary.

Overview

The residents contended that the substantial and continuous activities of the U.S. subsidiary of importing and distributing the corporation's products in the forum state were sufficient to establish personal jurisdiction over the corporation. The U.S. Supreme Court held that the corporation was not amenable to suit in the forum state for injuries allegedly caused by conduct of the foreign subsidiary which took place entirely outside the United States. Even assuming that the state was the home of the U.S. subsidiary and that its contacts with the state were imputable to the corporation, the corporation's slim contacts with the state were not so continuous and systematic as to render the corporation essentially at home in the state and subject to suit in the state for claims of the foreign residents for conduct which did not occur in or impact the state. Further, neither the corporation nor the U.S. subsidiary were incorporated or had a principal place of business in the state, which were paradigm bases for general jurisdiction, and the transnational context of the dispute implicated risks to

international comity from the broad assertion of general jurisdiction.

Outcome

The judgment of personal jurisdiction over the corporation was reversed. Unanimous Decision; 1 Concurrence.

LexisNexis® Headnotes

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN1 A court may assert jurisdiction over a foreign corporation to hear any and all claims against it only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN2 Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. *Fed. R. Civ. P. 4(k)(1)(A)*.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > Constitutional Limits

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Long Arm Jurisdiction

HN3 Under California 's long-arm statute, California state courts may exercise personal jurisdiction on any basis not inconsistent with the Constitution of California or of the United States . *Cal. Code Civ. Proc. § 410.10* (2004). California 's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN4 A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State.

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

HN5 One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN6 Only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN7 All-purpose jurisdiction speaks of instances in which the continuous corporate operations within a state are so substantial and of such a nature as to justify suit on causes of action arising from dealings entirely distinct from those activities. Accordingly, the inquiry is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Substantial Contacts

HN8 The general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities

in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them.

Lawyers' Edition Display

Decision

[624]** Fourteenth Amendment's due process clause held to preclude Federal District Court in California from exercising jurisdiction, solely on basis of purported subsidiary's alleged connection to California, over suit against foreign corporation.

Summary

Procedural posture: Respondent foreign residents brought an action against petitioner foreign corporation alleging that a foreign subsidiary of the corporation committed human rights violations in the foreign country. Upon the grant of a writ of certiorari, the corporation appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit that personal jurisdiction over the corporation was proper based on the activities of a U.S. subsidiary.

Overview: The residents contended that the substantial and continuous activities of the U.S. subsidiary of importing and distributing the corporation's products in the forum state were sufficient to establish personal jurisdiction over the corporation. The U.S. Supreme Court held that the corporation was not amenable to suit in the forum state for injuries allegedly caused by conduct of the foreign subsidiary which took place entirely outside the United States. Even assuming that the state was the home of the U.S. subsidiary and that its contacts with the state were imputable to the corporation, the corporation's slim contacts with the state were not so continuous and systematic as to render the corporation essentially at home in the state and subject to suit in the state for claims of the foreign residents for conduct which did not occur in or impact the state. Further, neither the corporation nor the U.S. subsidiary were incorporated or had a principal place of business in the state, which were paradigm bases for general jurisdiction, and the transnational context of the dispute implicated risks to international comity from the broad assertion of general jurisdiction.

Outcome: The judgment of personal jurisdiction over the corporation was reversed. Unanimous Decision; 1 Concurrence.

Headnotes

[625]**

COURTS §173 > STATE JURISDICTION -- FOREIGN CORPORATION

LEdHN[1] [1]

A court may assert jurisdiction over a foreign corporation to hear any and all claims against it only when the corporation's affiliations with the state in which suit is brought are so constant and pervasive as to render it essentially at home in the forum state. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

COURTS §243 > FEDERAL JURISDICTION -- STATE LAW

LEdHN[2] [2]

Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. *Fed. R. Civ. P. 4(k)(1)(A)*. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

COURTS §173 > STATE COURTS -- PERSONAL JURISDICTION

LEdHN[3] [3]

Under California's long-arm statute, California state courts may exercise personal jurisdiction on any basis not inconsistent with the Constitution of California or of the United States. *Cal. Code Civ. Proc. § 410.10* (2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U.S. Constitution.

(Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

COURTS §173 > STATE JURISDICTION -- FOREIGN CORPORATION

LEdHN[4] [4]

A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the state are so continuous and systematic as to render them essentially at home in the forum state. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

AGENCY §1.5 > WHO IS AGENT

LEdHN[5] [5]

One may be an agent for some business purposes and not others so that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

COURTS §173 > JURISDICTION -- INDIVIDUAL -- CORPORATION

LEdHN[6] [6]

Only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home. With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction. Those affiliations have the virtue of being unique--that is, each ordinarily indicates only one place--as well as easily ascertainable. These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any **[**626]** and all claims. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

CONSTITUTIONAL LAW §748.5 > JURISDICTION -- FOREIGN CORPORATION AFFILIATIONS WITH STATE

LEdHN[7] [7]

All-purpose jurisdiction speaks of instances in which the continuous corporate operations within a state are so substantial and of such a nature as to justify suit on causes of action arising from dealings entirely distinct from those activities. Accordingly, the inquiry is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's affiliations with the state are so continuous and systematic as to render it essentially at home in the forum state. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

CONSTITUTIONAL LAW §748.5 > JURISDICTION -- IN-STATE CONTACTS -- CORPORATE ACTIVITIES

LEdHN[8] [8]

The general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. (Ginsburg, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ.)

Syllabus

[627] [*748]** Plaintiffs (respondents here) are twenty-two residents of Argentina who filed suit in California Federal District Court, naming as a defendant DaimlerChrysler Aktiengesellschaft

(Daimler), a German public stock company that is the predecessor to petitioner Daimler AG. Their complaint alleges that Mercedes-Benz Argentina (MB Argentina), an Argentinian subsidiary of Daimler, collaborated with state security forces during Argentina's 1976-1983 "Dirty War" to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute and the Torture Victim Protection Act of 1991, as well as under California and Argentina law. Personal jurisdiction over Daimler was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), another Daimler subsidiary, one incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including **[***2]** California. Daimler moved to dismiss the action for want of personal jurisdiction. Opposing that motion, plaintiffs argued that jurisdiction over Daimler could be founded on the California contacts of MBUSA. The District Court granted Daimler's motion to dismiss. Reversing the District Court's judgment, the Ninth Circuit held that MBUSA, which it assumed to fall within the California courts' all-purpose jurisdiction, was Daimler's "agent" for jurisdictional purposes, so that Daimler, too, should generally be answerable to suit in that State.

Held: Daimler is not amenable to suit in California for injuries allegedly caused by conduct of MB Argentina that took place entirely outside the United States. Pp. ___ - ___, 187 L. Ed. 2d, at 632-643.

(a) California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U. S. Constitution. Thus, the inquiry here is whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See *Fed. Rule Civ. Proc. 4(k)(1)(A)*. *P. ___, 187 L. Ed. 2d, at 632*.

(b) For a time, this Court held that a tribunal's jurisdiction over persons was necessarily limited by the geographic bounds of the forum. See *Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565*. That rigidly **[***3]** territorial focus eventually yielded to a less wooden understanding, exemplified by the Court's pathmarking decision in *International Shoe Co. v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95*. *International Shoe* presaged the recognition of two personal jurisdiction categories: One category, today called "specific jurisdiction," see *Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U. S. ___, ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796*, **[*749]** encompasses cases in which the suit "arise[s] out of or relate[s] to the **[**628]** defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U. S. 408, 414, n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404*. *International Shoe* distinguished exercises of specific, case-based jurisdiction from a category today known as "general jurisdiction," exercisable when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95*.

Since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory." *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2854, 180 L. Ed. 2d 796, 807*. This Court's general jurisdiction opinions, in contrast, have been few. See *Perkins v. Benguet Consol. Mining Co., 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146* **[***4]** *Helicopteros, 466 U. S., at 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404*, and *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796*. As is evident from these post-*International Shoe* decisions, while specific jurisdiction has been cut loose from *Pennoyer*'s sway, general jurisdiction has not been stretched beyond limits traditionally recognized. *Pp. ___ - ___, 187 L. Ed. 2d, at 632-637*.

(c) Even assuming, for purposes of this decision, that MBUSA qualifies as at home in California, Daimler's affiliations with California are not sufficient to subject it to the general jurisdiction of that State's courts. *Pp. ___ - ___, 187 L. Ed. 2d, at 637-643*.

(1) Whatever role agency theory might play in the context of general jurisdiction, the Court of Appeals' analysis in this case cannot be sustained. The Ninth Circuit's agency determination rested primarily on its observation that MBUSA's services were "important" to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. But if "importan[ce]" in this sense were sufficient to justify jurisdictional attribution, foreign corporations would be amenable to suit on any or all claims wherever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" rejected **[***5]** in *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2856, 180 L. Ed. 2d 796, 809*. *Pp. ___ - ___, 187 L. Ed. 2d, at 638-639*.

(2) Even assuming that MBUSA is at home in California and that MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California. The paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business. *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2854, 180 L. Ed. 2d 796, 806*. Plaintiffs' reasoning, however, would reach well beyond these exemplar bases to approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16-17, and nn. 7-8. The words "continuous and systematic," plaintiffs and the Court of Appeals overlooked, were used in *International Shoe* to describe situations in which the exercise of *specific* jurisdiction would be appropriate. See *326 U. S., at 317, 66 S. Ct. 154, 90 L. Ed. 95*. With respect to all-purpose jurisdiction, *International Shoe* spoke **[**629]** instead of "instances **[***6]** in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities." *Id., at 318, 66 S. Ct. 154, 90 L. Ed. 95*. Accordingly, the proper inquiry, this Court has explained, is whether a foreign corporation's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796*.

[*750] Neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. No decision of this Court sanctions a view of general jurisdiction so grasping. The Ninth Circuit, therefore, had no warrant to conclude that Daimler, even with MBUSA's **[***7]** contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California. *Pp. ___ - ___, 187 L. Ed. 2d, at 639-642*.

(3) Finally, the transnational context of this dispute bears attention. This Court's recent precedents have rendered infirm plaintiffs' Alien Tort Statute and Torture Victim Protection Act claims. See *Kiobel v. Royal Dutch Petroleum Co., 569 U. S. ___, ___, 133 S. Ct. 1659, 185 L. Ed. 2d 671*, and *Mohamad v. Palestinian Authority, 566 U. S. ___, ___, 132 S. Ct. 1702, 182 L. Ed. 2d 720*. The Ninth Circuit, moreover, paid little heed to the risks to international comity posed by its expansive view of general jurisdiction. *Pp. ___ - ___, 187 L. Ed. 2d, at 642-643*.

644 F. 3d 909, reversed.

Counsel: Thomas H. Dupree, Jr. argued the case for petitioner.

Edwin S. Kneedler argued the cause for the United States, as amicus curiae, by special leave of court.

Kevin Russell argued the cause for respondents.

Judges: Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, JJ., joined. Sotomayor, J., filed an opinion concurring in the judgment.

Opinion by: GINSBURG

Opinion

Justice Ginsburg delivered the opinion of the Court.

This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States. The litigation commenced in **[***8]** 2004, when twenty-two Argentinian residents [1] filed a complaint in the United States District Court for the Northern District of California against DaimlerChrysler Aktiengesellschaft **[*751]** (Daimler), [2] a German public stock company, headquartered in Stuttgart, that manufactures Mercedes-Benz vehicles in Germany. The complaint alleged **[**630]** that during Argentina's 1976-1983 "Dirty War," Daimler's Argentinian subsidiary, Mercedes-Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs. Damages for the alleged human-rights violations were sought from Daimler under the laws of the United States, California, and Argentina. Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes-Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.

The question presented is whether the Due Process Clause of the Fourteenth Amendment precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint. Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California. See Tr. of Oral Arg. 28-29. Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory **[***10]** authority.

In *Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U. S. ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)*, we addressed the distinction between general or all-purpose jurisdiction, and specific or conduct-linked jurisdiction. As to the former, we held that ***HN1 LEdHN[1]*** [1] a court may assert jurisdiction over a foreign corporation "to hear any and all claims against [it]" only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive "as to render [it] essentially at home in the forum State." *Id., at*

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[1] One plaintiff is a resident of Argentina and a citizen of Chile; all other plaintiffs are residents and citizens **[***9]** of Argentina.

[2] Daimler was restructured in 2007 and is now known as Daimler AG. No party contends that any postsuit corporate reorganization bears on our disposition of this case. This opinion refers to members of the Daimler corporate family by the names current at the time plaintiffs filed suit.

___, *131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803*. Instructed by *Goodyear*, we conclude Daimler is not "at home" in California, and cannot be sued there for injuries plaintiffs attribute to MB Argentina's conduct in Argentina.

I

In 2004, plaintiffs (respondents here) filed suit in the United States District Court for the Northern District of California, alleging that MB Argentina collaborated with Argentinian state security forces to kidnap, detain, torture, and kill plaintiffs and their relatives during the military dictatorship in place there from 1976 through 1983, a period known as Argentina's "Dirty War." Based on those allegations, plaintiffs asserted claims under the Alien Tort Statute, *28 U. S. C. §1350*, **[***11]** and the Torture Victim Protection Act of 1991, 106 Stat. 73, note following *28 U. S. C. §1350*, as well as claims for wrongful death and intentional infliction of emotional distress under the laws of California and Argentina. The incidents recounted in the **[*752]** complaint center on MB Argentina's plant in Gonzalez Catan, Argentina; no part of MB Argentina's alleged collaboration with Argentinian authorities took place in California or anywhere else in the United States.

[631]** Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here. Plaintiffs seek to hold Daimler vicariously liable for MB Argentina's alleged malfeasance. Daimler is a German *Aktiengesellschaft* (public stock company) that manufactures Mercedes-Benz vehicles in Germany and has its headquarters in Stuttgart. At times relevant to this case, MB Argentina was a subsidiary wholly owned by Daimler's predecessor in interest.

Daimler moved to dismiss the action for want of personal jurisdiction. Opposing the motion, plaintiffs submitted declarations and exhibits purporting to demonstrate the presence of Daimler itself in California. Alternatively, plaintiffs maintained that jurisdiction over Daimler **[***12]** could be founded on the California contacts of MBUSA, a distinct corporate entity that, according to plaintiffs, should be treated as Daimler's agent for jurisdictional purposes.

MBUSA, an indirect subsidiary of Daimler, is a Delaware limited liability corporation. [3] MBUSA serves as Daimler's exclusive importer and distributor in the United States, purchasing Mercedes-Benz automobiles from Daimler in Germany, then importing those vehicles, and ultimately distributing them to independent dealerships located throughout the Nation. Although MBUSA's principal place of business is in New Jersey, MBUSA has multiple California-based facilities, including a regional office in Costa Mesa, a Vehicle Preparation Center in Carson, and a Classic Center in Irvine. According to the record developed below, MBUSA is the largest supplier of luxury vehicles to the California market. In particular, over 10% of all sales of new vehicles in the United States take place in California, and MBUSA's California sales account for 2.4% of Daimler's worldwide sales.

The relationship **[***13]** between Daimler and MBUSA is delineated in a General Distributor Agreement, which sets forth requirements for MBUSA's distribution of Mercedes-Benz vehicles in the United States. That agreement established MBUSA as an "independent contracto[r]" that "buy[s] and sell[s] [vehicles] . . . as an independent business for [its] own account." App. 179a. The agreement "does not make [MBUSA] . . . a general or special agent, partner, joint venturer or employee of DAIMLERCHRYSLER or any DaimlerChrysler Group Company"; MBUSA "ha[s] no authority to make binding obligations for or act on behalf of DAIMLERCHRYSLER or any DaimlerChrysler Group Company." *Ibid.*

[3] At times relevant to this suit, MBUSA was wholly owned by DaimlerChrysler North America Holding Corporation, a Daimler subsidiary.

After allowing jurisdictional discovery on plaintiffs' agency allegations, the District Court granted Daimler's motion to dismiss. Daimler's own affiliations with California, the court first determined, were insufficient to support the exercise of all-purpose jurisdiction over the corporation. *Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2005 U.S. Dist. LEXIS 31929 (ND Cal., Nov. 22, 2005), App. to Pet. for Cert. 111a-112a, 2005 WL 3157472, *9-*10*. Next, the court declined to attribute MBUSA's California contacts to Daimler on an agency theory, concluding that plaintiffs **[***14]** failed to demonstrate that MBUSA acted as Daimler's agent. *Id., at 117a, 133a, 2005 U.S. Dist. LEXIS 31929, [WL] at, *12, *19*; **[*753]** *Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW*, **[**632]** 2007 U.S. Dist. LEXIS 13116 (ND Cal., Feb. 12, 2007), App. to Pet. for Cert. 83a-85a, 2007 WL 486389, *2.

The Ninth Circuit at first affirmed the District Court's judgment. Addressing solely the question of agency, the Court of Appeals held that plaintiffs had not shown the existence of an agency relationship of the kind that might warrant attribution of MBUSA's contacts to Daimler. *Bauman v. DaimlerChrysler Corp., 579 F. 3d 1088, 1096-1097 (2009)*. Judge Reinhardt dissented. In his view, the agency test was satisfied and considerations of "reasonableness" did not bar the exercise of jurisdiction. *Id., at 1098-1106*. Granting plaintiffs' petition for rehearing, the panel withdrew its initial opinion and replaced it with one authored by Judge Reinhardt, which elaborated on reasoning he initially expressed in dissent. *Bauman v. DaimlerChrysler Corp., 644 F. 3d 909 (CA9 2011)*.

Daimler petitioned for rehearing and rehearing en banc, urging that the exercise of personal jurisdiction over Daimler could not be reconciled with this Court's decision in *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). **[***15]** Over the dissent of eight judges, the Ninth Circuit denied Daimler's petition. See *Bauman v. DaimlerChrysler Corp., 676 F. 3d 774 (2011)* (O'Scannlain, J., dissenting from denial of rehearing en banc).

We granted certiorari to decide whether, consistent with the Due Process Clause of the Fourteenth Amendment, Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad. *569 U. S. ___, 133 S. Ct. 1995, 185 L. Ed. 2d 865 (2013)*.

II

HN2 LEdHN[2] [2] Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons. See *Fed. Rule Civ. Proc. 4(k)(1)(A)* (service of process is effective to establish personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located"). ***HN3 LEdHN[3]*** [3] Under California's long-arm statute, California state courts may exercise personal jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." *Cal. Civ. Proc. Code Ann. §410.10* (West 2004). California's long-arm statute allows the exercise of personal jurisdiction to the full extent permissible under the U. S. Constitution. We therefore inquire **[***16]** whether the Ninth Circuit's holding comports with the limits imposed by federal due process. See, *e.g.*, *Burger King Corp. v. Rudzewicz, 471 U. S. 462, 464, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*.

III

In *Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1878)*, decided shortly after the enactment of the Fourteenth Amendment, the Court held that a tribunal's jurisdiction over persons reaches no farther than the geographic bounds of the forum. See *id., at 720, 24 L. Ed. 565* ("The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established."). See also *Shaffer v. Heitner, 433 U. S. 186, 197, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

(1977) (Under *Pennoyer*, "any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power."). In time, however, that strict territorial approach yielded to a less **[**633]** rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity." **[*754]** *Burnham v. Superior Court of Cal., County of Marin, 495 U. S. 604, 617, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (opinion of Scalia, J.).

"The canonical opinion in this area remains *International Shoe [Co. v. Washington], 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 [(1945)]*, **[***17]** in which we held that a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2853, 180 L. Ed. 2d 796, 805*) (quoting *International Shoe, 326 U. S., at 316, 66 S. Ct. 154, 90 L. Ed. 95*). Following *International Shoe*, "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." *Shaffer, 433 U. S., at 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683*.

International Shoe's conception of "fair play and substantial justice" presaged the development of two categories of personal jurisdiction. The first category is represented by *International Shoe* itself, a case in which the in-state activities of the corporate defendant "ha[d] not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on." *326 U. S., at 317, 66 S. Ct. 154, 90 L. Ed. 95*. [4]*International Shoe* recognized, as well, that "the commission of some single or occasional acts of the corporate agent in **[***18]** a state" may sometimes be enough to subject the corporation to jurisdiction in that State's tribunals with respect to suits relating to that in-state activity. *Id., at 318, 66 S. Ct. 154, 90 L. Ed. 95*. Adjudicatory authority of this order, in which the suit "aris[es] out of or relate[s] to the defendant's contacts with the forum," *Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U. S. 408, 414, n. 8, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)*, is today called "specific jurisdiction." See *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796* (citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1144-1163 (1966) (hereinafter von Mehren & Trautman)).

International Shoe distinguished between, on the one hand, exercises of specific jurisdiction, as just described, and on the other, situations where a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify **[***19]** suit against it on causes of action arising from dealings entirely distinct from those activities." *326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95*. As we have since explained, ***HN4 LEdHN[4]*** [4] "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear, 564 U. S., at ___*, **[**634]** 131 S. Ct. 2846, 180 L. Ed. 2d 796; see *id., at 317, 66 S. Ct. 154, 159, 90 L. Ed. 95, 102*; *Helicopteros, 466 U. S., at 414, n. 9, 104 S. Ct. 1868, 80 L. Ed. 2d 404*. [5]

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[4] *International Shoe* was an action by the State of Washington to collect payments to the State's unemployment fund. Liability for the payments rested on in-state activities of resident sales solicitors engaged by the corporation to promote its wares in Washington. See 326 U. S., at 313-314, 66 S. Ct. 154, 90 L. Ed. 95.

[5] Colloquy at oral argument illustrated the respective provinces of general and specific jurisdiction over persons. Two hypothetical scenarios were posed: *First*, if a California plaintiff, injured in a California accident involving a Daimler-manufactured vehicle, sued Daimler in California court alleging that the vehicle was defectively designed, that court's adjudicatory authority would be

[*755] Since *International Shoe*, "specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2854, 180 L. Ed. 2d 796, 806* (quoting Twitchell, The Myth of General Jurisdiction, *101 Harv. L. Rev. 610, 628 (1988)*). *International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum. [6] Our subsequent decisions have continued to bear out the prediction that "specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene." von Mehren & Trautman 1164. [7]

Our post-*International Shoe* opinions on general jurisdiction, by comparison, **[**635]** are few. "[The Court's] 1952 decision in *Perkins* v. *Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction **[*756]** appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Goodyear, 564 U. S., at ___, 131 S. Ct. 2846, 2856, 180 L. Ed. 2d 796, 808* (internal quotation marks and brackets omitted). The defendant in *Perkins*, Benguet, was a company incorporated under the laws of the Philippines, where it operated gold and silver mines. Benguet ceased its mining operations during the Japanese occupation of the Philippines in World War II; its president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Perkins v. Benguet Consol. Mining Co., 342 U. S. 437, 448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952)*. **[***24]** The plaintiff, an Ohio resident, sued Benguet on a claim that neither arose in Ohio nor related to the corporation's activities in that State. We held that the Ohio

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premised on specific jurisdiction. See Tr. of Oral Arg. 11 (Daimler's counsel acknowledged that specific jurisdiction "may well be . . . available" in such a case, depending on whether Daimler purposefully availed itself of the forum). *Second*, if a similar accident **[***20]** took place in Poland and injured Polish plaintiffs sued Daimler in California court, the question would be one of general jurisdiction. See *id.*, at 29 (on plaintiffs' view, Daimler would be amenable to such a suit in California).

[6] See *Shaffer* v. *Heitner*, 433 U. S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) ("The immediate effect of [*International Shoe*'s] departure from *Pennoyer*'s conceptual apparatus was to **[***21]** increase the ability of the state courts to obtain personal jurisdiction over nonresident defendants."); *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957) ("[A] trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."). For an early codification, see Uniform Interstate and International Procedure Act §1.02 (describing jurisdiction based on "[e]nduring [r]elationship" to encompass a person's domicile or a corporation's place of incorporation or principal place of business, and providing that "any . . . claim for relief" may be brought in such a place), §1.03 (describing jurisdiction "[b]ased upon [c]onduct," limited to claims arising from the enumerated acts, *e.g.*, "transacting any business in th[e] state," "contracting to supply services or things in th[e] state," or "causing tortious injury by an act or omission in th[e] state"), 9B U. L. A. 308, 310 (1966).

[7] See, *e.g.*, *Asahi Metal Industry Co.* v. *Superior Court of Cal., Solano Cty.*, 480 U. S. 102, 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (opinion of O'Connor, J.) (specific jurisdiction may lie over a foreign defendant that places a product into the "stream of commerce" **[***22]** while also "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) ("[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others."); *Calder* v. *Jones*, 465 U. S. 783, 789-790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) (California court had specific jurisdiction to hear suit brought by California plaintiff where Florida-based publisher of a newspaper having its largest circulation in California published an article allegedly defaming the complaining Californian; under those circumstances, defendants "must 'reasonably anticipate being haled into [a California] court'"); **[***23]** *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 780-781, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (New York resident may maintain suit for libel in New Hampshire state court against California-based magazine that sold 10,000 to 15,000 copies in New Hampshire each month; as long as the defendant "continuously and deliberately exploited the New Hampshire market," it could reasonably be expected to answer a libel suit there).

courts could exercise general jurisdiction over Benguet without offending due process. *Ibid.* That was so, we later noted, because "Ohio was the corporation's principal, if temporary, place of business." *Keeton v. Hustler Magazine, Inc., 465 U. S. 770, 780, n. 11, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)*. [8]

The next case on point, *Helicopteros, 466 U. S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404*, arose from a helicopter **[**636]** crash in Peru. Four U. S. citizens perished in that accident; their survivors and representatives brought suit in Texas state court against the helicopter's owner and operator, a Colombian corporation. That company's contacts with Texas were confined to "sending its chief executive officer to Houston **[***27]** for a **[*757]** contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id., at 416, 104 S. Ct. 1868, 80 L. Ed. 2d 404*. Notably, those contacts bore no apparent relationship to the accident that gave rise to the suit. We held that the company's Texas connections did not resemble the "continuous and systematic general business contacts . . . found to exist in *Perkins*." *Ibid.* "[M]ere purchases, even if occurring at regular intervals," we clarified, "are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id., at 418, 104 S. Ct. 1868, 80 L. Ed. 2d 404*.

Most recently, in *Goodyear*, we answered the question: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State? " *564 U. S., at ___, 131 S. Ct. 2846, 2850, 180 L. Ed. 2d 796, 802*. That case arose from a bus accident outside Paris that killed two boys from North Carolina. The boys' parents brought a wrongful-death **[***28]** suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. Those

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[8] Selectively referring to the trial court record in *Perkins* (as summarized in an opinion of the intermediate appellate court), Justice Sotomayor posits that Benguet may have had extensive operations in places other than Ohio. See *post*, at - . n. 8, 187 L. Ed. 2d, at 649 (opinion concurring in judgment) ("By the time the suit [in *Perkins*] was commenced, the company had resumed its considerable operations in the Philippines." "rebuilding its properties there" and "purchasing machinery, supplies and equipment." (internal quotation marks omitted)). See also *post*, at - . n. 5, 187 L. Ed. 2d, at 647 (many of the corporation's "key management decisions" were made by the out-of-state purchasing agent and chief of staff). Justice Sotomayor's account overlooks this Court's opinion in *Perkins* and the point **[***25]** on which that opinion turned: All of Benguet's activities were directed by the company's president from within Ohio. See *Perkins v. Benguet Consol. Mining Co.*, 342 U. S. 437, 447-448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952) (company's Philippine mining operations "were completely halted during the occupation . . . by the Japanese"; and the company's president, from his Ohio office, "supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and . . . dispatched funds to cover purchases of machinery for such rehabilitation"). On another day, Justice Sotomayor joined a unanimous Court in recognizing: "To the extent that the company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio . . . ." *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U. S. . . 131 S. Ct. 2846, 2856, 180 L. Ed. 2d 796, 809 (2011). Given the wartime circumstances, Ohio could be considered "a surrogate for the place of incorporation or head office." von Mehren & Trautman 1144. See also *ibid.* (*Perkins* "should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing notions of general jurisdiction" based on **[***26]** nothing more than a corporation's "doing business" in a forum).

Justice Sotomayor emphasizes *Perkins*' statement that Benguet's Ohio contacts, while "continuous and systematic," were but a "limited . . . part of its general business." 342 U. S., at 438, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146. Describing the company's "wartime activities" as "necessarily limited." *id.*, at 448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146, however, this Court had in mind the diminution in operations resulting from the Japanese occupation and the ensuing shutdown of the company's Philippine mines. No fair reader of the full opinion in *Perkins* could conclude that the Court meant to convey anything other than that Ohio was the center of the corporation's wartime activities. But cf. *post*, at . 187 L. Ed. 2d, at 647 ("If anything, [*Perkins*] intimated that the defendant's Ohio contacts were *not* substantial in comparison to its contacts elsewhere.").

foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however, and on that ground, the North Carolina Court of Appeals held the subsidiaries amenable to the general jurisdiction of North Carolina courts.

We reversed, observing that the North Carolina court's analysis "elided the essential difference between case-specific and all-purpose (general) jurisdiction." *Id., at ___, 131 S. Ct. 2846, 180 L. Ed. 2d 79*. Although the placement of a product into the stream of commerce "may bolster an affiliation germane to *specific* jurisdiction," we explained, such contacts "do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Id., at ___ - ___, 131 S. Ct. 2846, 180 L. Ed. 2d 79*. As *International Shoe* itself teaches, a corporation's **[***29]** "continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." *326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95*. Because Goodyear's foreign subsidiaries were "in no sense at home in North Carolina," we held, those subsidiaries could not be required to submit to the general jurisdiction of that State's courts. *564 U. S., at ___, 131 S. Ct. 2846, 180 L. Ed. 2d 796*. See also *J. McIntyre Machinery, Ltd. v. Nicastro, 564 U. S. ___, ___* **[**637]** 131 S. Ct. 2780, 2805, 180 L. Ed. 2d 765, 793 (2011) (Ginsburg, J., dissenting) (noting unanimous agreement that a foreign manufacturer, which engaged an independent U. S.-based distributor to sell its machines throughout the United States, could not be exposed to all-purpose jurisdiction in New Jersey courts based on those contacts).

As is evident from *Perkins*, *Helicopteros*, and *Goodyear*, general and specific jurisdiction have followed markedly different trajectories post-*International Shoe*. Specific jurisdiction has been cut loose from *Pennoyer*'s sway, but we have declined to stretch general jurisdiction beyond **[*758]** limits traditionally recognized. [9] As this Court has increasingly trained on the "relationship among the defendant, the forum, and **[***30]** the litigation," *Shaffer, 433 U. S., at 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683*, *i.e.*, specific jurisdiction, [10] general jurisdiction has come to occupy a less dominant place in the contemporary scheme. [11]

IV

With this background, we turn directly to the question whether Daimler's affiliations with California are sufficient to subject it to the general (all-purpose) personal jurisdiction of that

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[9] See generally von Mehren & Trautman 1177-1179. See also Twitchell, The Myth of General Jurisdiction, 101 Harv. L. Rev. 610, 676 (1988) ("[W]e do not need to justify broad exercises of dispute-blind jurisdiction unless our interpretation of the scope of specific jurisdiction unreasonably limits state authority over nonresident defendants."); Borchers, The Problem With General Jurisdiction, 2001 U. Chi. Legal Forum 119, 139 ("[G]eneral jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it.").

[10] Remarkably, Justice Sotomayor treats specific jurisdiction as though it were barely there. Given the many decades in which specific jurisdiction has flourished, it would be hard to conjure up an example of the "deep injustice" Justice Sotomayor predicts as a consequence of our holding that California is not an all-purpose forum for suits against Daimler. *Post*, at ___, 187 L. Ed. 2d, at 652. Justice Sotomayor identifies "the concept of reciprocal **[***31]** fairness" as the "touchstone principle of due process in this field." *Post*, at ___, 187 L. Ed. 2d, at 648 (citing *International Shoe*, 326 U. S., at 319, 66 S. Ct. 154, 90 L. Ed. 95). She overlooks, however, that in the very passage of *International Shoe* on which she relies, the Court left no doubt that it was addressing specific— not general—jurisdiction. See *id.*, at 319, 66 S. Ct. 154, 90 L. Ed. 95 ("The exercise of th[e] privilege [of conducting corporate activities within a State] may give rise to obligations, and, *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (emphasis added)).

[11] As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State." 564 U. S., at ___, 131 S. Ct. 2846, 2850, 180 L. Ed. 2d 796, 802, *i.e.*, comparable to a domestic enterprise in that State.

State's **[***32]** courts. In the proceedings below, the parties agreed on, or failed to contest, certain points we now take as given. Plaintiffs have never attempted to fit this case into the *specific* jurisdiction category. Nor did plaintiffs challenge on appeal the District Court's holding that Daimler's own contacts with California were, by themselves, too sporadic to justify the exercise of general jurisdiction. While plaintiffs ultimately persuaded the Ninth Circuit to impute MBUSA's California contacts to Daimler on an agency theory, at no point have they maintained that MBUSA is an alter ego of Daimler.

Daimler, on the other hand, failed to object below to plaintiffs' assertion that the California courts could exercise all-purpose jurisdiction over **[**638]** MBUSA. [12] But see Brief for Petitioner 23, n. 4 (suggestion that in light of *Goodyear*, MBUSA may not be amenable to general jurisdiction in California); Brief for United States as *Amicus Curiae* 16, n. 5 (hereinafter U. S. Brief) (same). We will assume then, for purposes of this decision only, that MBUSA qualifies as at home in California.

A

In sustaining the exercise of general jurisdiction over Daimler, the Ninth **[***33]** Circuit relied on an agency theory, determining that MBUSA acted as Daimler's agent for jurisdictional purposes and then **[*759]** attributing MBUSA's California contacts to Daimler. The Ninth Circuit's agency analysis derived from Circuit precedent considering principally whether the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services." *644 F. 3d, at 920* (quoting *Doe v. Unocal Corp., 248 F. 3d 915, 928 (CA9 2001)*; emphasis deleted).

This Court has not yet addressed whether a foreign corporation may be subjected to a court's general jurisdiction based on the contacts of its in-state subsidiary. Daimler argues, and several Courts of Appeals have held, that a subsidiary's jurisdictional contacts can be imputed to its parent only when the former is so dominated by the latter as to be its alter ego. The Ninth Circuit adopted a less rigorous test based on what it described as an "agency" relationship. Agencies, we note, come in many sizes and shapes: ***HN5 LEdHN[5]*** [5] "One may be an agent for some business purposes and not others so **[***34]** that the fact that one may be an agent for one purpose does not make him or her an agent for every purpose." 2A C. J. S., Agency §43, p. 367 (2013) (footnote omitted). [13] A subsidiary, for example, might be its parent's agent for claims arising in the place where the subsidiary operates, yet not its agent regarding claims arising elsewhere. The Court of Appeals did not advert to that prospect. But we need not pass judgment on invocation of an agency theory in the context of general jurisdiction, for in no event can the appeals court's analysis be sustained.

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[12] MBUSA is not a defendant in this case.

[13] Agency relationships, we have recognized, may be relevant to the existence of *specific* jurisdiction. "[T]he corporate personality," *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), observed, "is a fiction, although a fiction intended to be acted upon as though it were a fact." *Id.*, at 316, 66 S. Ct. 154, 90 L. Ed. 95. See generally 1 W. Fletcher, Cyclopedia of the Law of Corporations §30, p. 30 (Supp. 2012-2013) ("A corporation is a distinct legal entity that can act only through its agents."). As such, a corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there. See, *e.g.*, *Asahi*, 480 U. S., at 112, 107 S. Ct. 1026, 94 L. Ed. 2d 92 **[***35]** (opinion of O'Connor, J.) (defendant's act of "marketing [a] product through a distributor who has agreed to serve as the sales agent in the forum State" may amount to purposeful availment); *International Shoe*, 326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95 ("the commission of some single or occasional acts of the corporate agent in a state" may sometimes "be deemed sufficient to render the corporation liable to suit" on related claims). See also Brief for Petitioner 24 (acknowledging that "an agency relationship may be sufficient in some circumstances to give rise to *specific* jurisdiction"). It does not inevitably follow, however, that similar reasoning applies to *general* jurisdiction. Cf. *Goodyear*, 564 U. S., at , 131 S. Ct. 2846, 2855, 180 L. Ed. 2d 796, 808 (faulting analysis that "elided the essential difference between case-specific and all-purpose (general) jurisdiction").

The Ninth Circuit's agency finding rested primarily on its observation that MBUSA's services were "important" **[**639]** to Daimler, as gauged by Daimler's hypothetical readiness to perform those services itself if MBUSA did not exist. Formulated this way, the inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer: "Anything a corporation **[***36]** does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist." *676 F. 3d, at 777* (O'Scannlain, J., dissenting from denial of rehearing en banc). [14] The Ninth Circuit's agency theory **[*760]** thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the "sprawling view of general jurisdiction" we rejected in *Goodyear. 564 U. S., at ___, 131 S. Ct. 2846, 2856, 180 L. Ed. 2d 796, 809*. [15]

B

Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there. [16]

Goodyear made clear that ***HN6 LEdHN[6]*** [6] only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *564 U. S., at ___, 131 S. Ct. 2846, 2854, 180 L. Ed. 2d 796, 806* (citing Brilmayer et **[***39]** al., A General Look at General Jurisdiction, 66 Texas L. Rev. 721, 728 (1988)). With respect to a corporation, the place of **[**640]** incorporation and principal place of business are "paradig[m] . . . bases for general jurisdiction." *Id.*, at 735. See also Twitchell, *101 Harv. L. Rev., at 633*. Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable. Cf. *Hertz Corp. v. Friend, 559 U. S. 77, 94, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)* ("Simple jurisdictional rules . . . promote greater predictability."). These bases afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.

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[14] Indeed, plaintiffs do not defend this aspect of the Ninth Circuit's analysis. See Brief for Respondents 39, n. 18 ("We do not believe that this gloss is particularly helpful.").

[15] The Ninth Circuit's agency analysis also looked to whether the parent enjoys "the right to substantially control" the subsidiary's activities. *Bauman v. DaimlerChrysler Corp.*, 644 F. 3d 909, 924 (2011). The Court of Appeals found the requisite "control" demonstrated by the General Distributor Agreement between Daimler and MBUSA, which gives Daimler the right to oversee certain of MBUSA's operations, even though **[***37]** that agreement expressly disavowed the creation of any agency relationship. Thus grounded, the separate inquiry into control hardly curtails the overbreadth of the Ninth Circuit's agency holding.

[16] By addressing this point, Justice Sotomayor asserts, we have strayed from the question on which we granted certiorari to decide an issue not argued below. *Post*, at - . 187 L. Ed. 2d, at 645-646. That assertion is doubly flawed. First, the question on which we granted certiorari, as stated in Daimler's petition, is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Pet. for Cert. i. That question fairly encompasses an inquiry into whether, in light of *Goodyear*, Daimler can be considered at home in California based on MBUSA's in-state activities. **[***38]** See also this Court's Rule 14.1(a) (a party's statement of the question presented "is deemed to comprise every subsidiary question fairly included therein"). Moreover, both in the Ninth Circuit, see *e.g.*, Brief for Federation of German Industries et al. as *Amici Curiae* in No. 07-15386 (CA9), p. 3, and in this Court, see, *e.g.*, U. S. Brief 13-18; Brief for Chamber of Commerce of United States of America et al. as *Amici Curiae* 6-23; Brief for Lea Brilmayer as *Amica Curiae* 10-12, *amici* in support of Daimler homed in on the insufficiency of Daimler's California contacts for general jurisdiction purposes. In short, and in light of our pathmarking opinion in *Goodyear*, we perceive no unfairness in deciding today that California is not an all-purpose forum for claims against Daimler.

Goodyear did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums. Plaintiffs would have us look beyond the exemplar bases *Goodyear* identified, **[*761]** and approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." Brief for Respondents 16-17, and nn. 7-8. That formulation, **[***40]** we hold, is unacceptably grasping.

As noted, see *supra, at ___ - ___, 187 L. Ed. 2d, at 633*, the words "continuous and systematic" were used in *International Shoe* to describe instances in which the exercise of *specific* jurisdiction would be appropriate. See *326 U. S., at 317, 66 S. Ct. 154, 90 L. Ed. 95* (jurisdiction can be asserted where a corporation's in-state activities are not only "continuous and systematic, but also give rise to the liabilities sued on"). [17]***HN7 LEdHN[7]*** [7] Turning to all-purpose jurisdiction, in contrast, *International Shoe* speaks of "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . *on causes of action arising from dealings entirely distinct from those activities*." *Id., at 318, 66 S. Ct. 154, 90 L. Ed. 95* (emphasis added). See also Twitchell, Why We Keep Doing Business With Doing-Business Jurisdiction, 2001 U. Chi. Legal Forum 171, 184 (*International Shoe* "is clearly not saying that dispute-blind jurisdiction exists whenever 'continuous and systematic' contacts are found."). [18] Accordingly, the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense "continuous and systematic," it is whether that corporation's "affiliations **[***41]** with the State are so 'continuous and systematic' as to render **[**641]** [it] essentially at home in the forum State." *564 U. S., at ___, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803*. [19]

Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same **[***43]** global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would **[*762]** scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp., 471 U. S., at 472, 105*

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[17] *International Shoe* also recognized, as noted above, see *supra*, at - . 187 L. Ed. 2d, at 633, that "some single or occasional acts of the corporate agent in a state . . ., because of their nature and quality and the circumstances of their commission, may be deemed sufficient to render the corporation liable to suit." 326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95.

[18] Plaintiffs emphasize two decisions, *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 18 S. Ct. 526, 42 L. Ed. 964 (1898), and *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 115 N. E. 915 (1917) (Cardozo, J.), both cited in *Perkins* v. *Benguet Consol. Mining Co.*, 342 U. S. 437, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146 (1952), just after the statement that a corporation's continuous operations in-state may suffice to establish general jurisdiction. *Id.*, at 446, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146, and n. 6. See also *International Shoe*, 326 U. S., at 318, 66 S. Ct. 154, 90 L. Ed. 95 (citing *Tauza*). *Barrow* and *Tauza* indeed upheld the exercise of general jurisdiction based on the presence of a local office, which signaled that the corporation was "doing business" in the forum. *Perkins'* unadorned citations to these cases, both decided in the era dominated by *Pennoyer*'s territorial **[***42]** thinking, see *supra*, at - . 187 L. Ed. 2d, at 632-633, should not attract heavy reliance today. See generally Feder, *Goodyear*, "Home," and the Uncertain Future of Doing Business Jurisdiction, 63 S. C. L. Rev. 671 (2012) (questioning whether "doing business" should persist as a basis for general jurisdiction).

[19] We do not foreclose the possibility that in an exceptional case, see, *e.g.*, *Perkins*, described *supra*, at - . 187 L. Ed. 2d, at 634-636, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, see *infra*, at ___, 187 L. Ed. 2d, at 642, quite another to expose it to suit on claims having no connection whatever to the forum State.

S. Ct. 2174, 85 L. Ed. 2d 528 (internal quotation marks omitted).

It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California. [20]

C

Finally, the transnational context of this dispute bears attention. The **[**642]** Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS), *28 U. S. C. §1350*, and the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following *28 U. S. C. §1350*. See *644 F. 3d, at 927* ("American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses."). Recent decisions of this Court, however, have **[*763]** rendered plaintiffs' ATS and TVPA claims infirm. See *Kiobel v. Royal Dutch Petroleum Co., 569 U. S. ___, ___, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)* (presumption against extraterritorial application controls claims under the ATS); *Mohamad v. Palestinian Authority, 566 U. S. ___, ___, 132 S. Ct. 1702, 1704, 182 L. Ed. 2d 720, 725 (2012)* (only natural persons are subject to liability under the TVPA).

The Ninth Circuit, moreover, paid little heed to the **[***47]** risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case. In the European Union, for example, a corporation may generally be sued in the nation in which it is "domiciled," a term defined to refer only to the location of the corporation's "statutory seat," "central administration," or "principal place of business." European Parliament and Council Reg. 1215/2012, Arts. 4(1), and 63(1), 2012 O. J. (L. 351) 7, 18. See also *id.*, Art. 7(5), 2012 O. J. 7 (as to "a dispute *arising out of the operations*

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[20] To clarify in light of Justice Sotomayor's opinion concurring in the judgment, ***HN8 LEdHN[8]*** [8] the general jurisdiction inquiry does not "focu[s] solely on the magnitude of the defendant's in-state contacts." *Post*, at . 187 L. Ed. 2d, at 647. General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests **[***44]** framed before specific jurisdiction evolved in the United States. See von Mehren & Trautman 1142-1144. Nothing in *International Shoe* and its progeny suggests that "a particular quantum of local activity" should give a State authority over a "far larger quantum of . . . activity" having no connection to any in-state activity. Feder, *supra*, at 694.

Justice Sotomayor would reach the same result, but for a different reason. Rather than concluding that Daimler is not at home in California, Justice Sotomayor would hold that the exercise of general jurisdiction over Daimler would be unreasonable "in the unique circumstances of this case." *Post*, at . 187 L. Ed. 2d, at 643. In other words, she favors a resolution fit for this day and case only. True, a multipronged reasonableness check was articulated in *Asahi*, 480 U. S., at 113-114, 107 S. Ct. 1026, 94 L. Ed. 2d 92, but not as a free-floating test. Instead, the check was to be essayed when *specific* jurisdiction is at issue. See also *Burger King Corp. v. Rudzewicz*, 471 U. S. 462, 476-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). First, a court is to determine whether the connection between the forum and the episode-in-suit could justify the exercise of specific jurisdiction. Then, in a second step, the court is to consider several **[***45]** additional factors to assess the reasonableness of entertaining the case. When a corporation is genuinely at home in the forum State, however, any second-step inquiry would be superfluous.

Justice Sotomayor fears that our holding will "lead to greater unpredictability by radically expanding the scope of jurisdictional discovery." *Post*, at . 187 L. Ed. 2d, at 650. But it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home. Justice Sotomayor's proposal to import *Asahi*'s "reasonableness" check into the general jurisdiction determination, on the other hand, would indeed compound the jurisdictional inquiry. The reasonableness factors identified in *Asahi* include "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," "the shared interest of the several States in furthering fundamental substantive social policies," and, in the international context, "the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction." 480 U. S., at 113-115, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (some **[***46]** internal quotation marks omitted). Imposing such a checklist in cases of general jurisdiction would hardly promote the efficient disposition of an issue that should be resolved expeditiously at the outset of litigation.

of a branch, agency or other establishment," a corporation may be sued "in the courts for the place where the branch, agency or other establishment is situated" (emphasis added)). The Solicitor General informs us, in this regard, that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." U. S. Brief 2 (citing Juenger, The American Law of General Jurisdiction, 2001 U. Chi. Legal Forum 141, 161-162). **[***48]** See also U. S. Brief 2 (expressing concern that unpredictable applications of general jurisdiction based on activities of U. S.-based subsidiaries could discourage foreign investors); Brief for Respondents 35 (acknowledging that "doing business" basis for general jurisdiction has led to "international friction"). Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the "fair play and substantial justice" due process demands. *International Shoe, 326 U. S., at 316, 66 S. Ct. 154, 90 L. Ed. 95* (quoting *Milliken v. Meyer, 311 U. S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)*).

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For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Reversed.