PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 30
Issue 4 *Symposium: Client Counseling and Moral Responsibility*

Article 3

5-15-2003

A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle

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TABLE OF CONTENTS

I. INTRODUCTION

The landscape of international jurisprudence is changing. How the international community applies law to individuals, companies, and countries outside the physical boundaries of the forum state is still being developed. In some respects, the United States leads the way in seeking to establish the rule of law cross-culturally and internationally. The past two decades have seen an explosion of litigation in the United States concerning activities and nationals of other countries. Much of this litigation involves the Alien Tort Statute ("ATS").[1] The ATS came into prominent modern use when the Second Circuit decided *Filartiga v. Pena-Irala* in 1980.[2] The application of the ATS has proved problematic; it does not seem to mandate a clear limit to its application nor a firm foundation for its use. For example, while the Second Circuit paved the way for the use of the Act,[3] the D.C. Circuit rejected its application in a manner that left some doubt for the ATS' future application.[4] The Supreme Court has not espoused on the Act's reach nor resolved the issues illuminated by the D.C. Circuit. A clear mandate for

1. Occasionally referred to as the Alien Tort Claims Act, its proper name is the Alien Tort Statute ("ATS"). The ATS was passed as part of the Judiciary Act of 1789 and is currently codified at 28 U.S.C. § 1350 (2003).

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

3. *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding 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").

4. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

the use of the Act in prosecuting offenders of certain crimes such as genocide or torture arises prominently from the circuits, but a vast array of complications ensue even from these. Perhaps most daunting of these complications are the implications of extraterritorial application of the ATS and how it acts within the universality principle of prescriptive jurisdiction.[5]

This Article seeks to address that issue. The ATS has become increasingly utilized in human rights litigation. Ramifications stem from its use that may exceed the individual benefits to litigants in particular cases. Part II of this Article reviews the history of the ATS and the seminal case of *Filartiga* and its progeny. Part III focuses on the doctrine of extraterritoriality and universal jurisdiction as it applies to the ATS.[6] Finally, Part IV addresses concerns raised in these prior parts and suggests some limits to the ATS' application.

II. THE ALIEN TORT STATUTE

A. Background to the ATS

Congress passed the Alien Tort Claims Act ("ATS") as part of the Judiciary Act of 1789.[7] The statute 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."[8]

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5. This Article refers to prescriptive "universal jurisdiction" and "the universality principle." They are, for all intents and purposes, the same thing.

6. Scholarship regarding the ATS is vast. Much of it focuses on the debate raised by the concurring opinion of Judge Bork in *Tel-Oren*. *See Tel-Oren*, 726 F.2d at 788-823 (Bork, J., concurring). Judge Bork posited that while the ATS provided jurisdiction for a federal court to hear claims of aliens under the law of nations, it did not provide a cause of action for claimants beyond any recognized under the law of nations. *See id.* at 803-05 (Bork, J., concurring). While this position is highly controversial and has been debated at length, for the purposes of this Article, it may be assumed that "tort" should be interpreted as broadly as possible under current American jurisprudence and "only" limits the ATS to such wrongs. For a reasoned analysis of these terms (in addition to other ATS analysis), see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489, 499-501 (1986) (providing a strong background for the passage and plain meaning of the ATS).

7. Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000).

8. 28 U.S.C. § 1350 (2003). Originally, the ATS provided that the 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 law of nations or a treaty of the United States." *See* Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1332(a) (2003)). The concurrent state jurisdiction was removed in 1878.

1. Constitutional Background and the Judiciary Act of 1789

It is well established that the Delegates' Constitutional Convention recognized the importance of a sole federal power over foreign relations.[9] Compliance with the law of nations[10] and treaty obligations were paramount concerns expressed not only at the convention, but also in the Federalist Papers.[11]

Many of these concerns arose out of defects in the Articles of Confederation.[12] The Articles allowed Congress to appoint ambassadors, make foreign relation decisions, and approve treaties.[13] However, several states routinely went outside the scope of the Articles by appointing their own ambassadors and negotiating separate treaties in conflict with federal ones.[14] These infractions caused James Madison to comment that the greatest defect of the Articles was that it permitted the states miscreant power over foreign affairs.[15] In The Federalist No. 3, John Jay commented that "it is of high importance to the peace of America, that she observe the laws of nations . . . and . . . it appears evident that this will be more perfectly and punctually done by one national Government, than it could be . . . by thirteen separate States."[16]

Thus it was that the Delegates confirmed federal authority over foreign affairs in the Constitution.[17] Not only, however, in the prevalent treaty,

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9. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 33 (1975). Professor Henkin asserts: "The Framers were strongly committed to the law of nations and assumed that the United States would share that commitment." *Id.* at 234. Professor's Henkin's assertion is unassailable in light of the literature of the time – but whether the Framers' understanding of what comprised the "law of nations" was then as it is now is questionable.

10. The "law of nations" is today commonly referred to as "Customary International Law." As some courts use one term or the other, and likewise with scholars, this Article does not differentiate between the two and uses the terms interchangeably. However, they may not be the same thing. Another interesting and perhaps important question is raised by this statement as well: did the Framers contemplate countries holding non Judeo-Christian concepts of the law of nations as being a part of the whole? Numerous references to the law of nations of only "civilized" countries combined with the Western 18th century concept of what "civilized" meant indicates they likely did not. One noted Framer, James Wilson, wrote of the law of nations that it was the "law of nature." "The law of nations, as well as the law of nature, is of obligation indispensable . . . of origin divine." James Wilson, *Of the Law of Nations*, *in* 3 THE FOUNDERS CONSTITUTION 70 (Phillip B. Kurland and Ralph Lerner eds., 1987).

11. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 12 (1985).

12. *See id.*

13. HENKIN, *supra* note 9, at 33.

14. *Id.*

15. J. MADISON, JOURNAL OF CONSTIUTIONAL CONVENTION 60 (E. H. Scott ed., 1893).

16. THE FEDERALIST NO. 3, at 14-15 (John Jay) (Jacob Cooke ed., 1961).

17. *See* Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 37 (1952).

ambassador, and war powers of the legislative and executive branches,[18] but in vesting in the federal judiciary jurisdiction over matters concerning foreign affairs, aliens, or states.[19]

The basic grant of jurisdiction over foreign affairs to the federal judiciary occurs in Article III, Section 2, Clause 1 of the Constitution, which grants judicial power over:

> [A]ll cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[20]

This power was implemented in part by the Judiciary Act of 1789.[21] This Article is primarily focused on the ATS rather than the broad subject of foreign affairs.[22]

The jurisdiction provided to the federal courts over aliens and foreign relations included so-called "alienage jurisdiction."[23] This conferred power on the federal courts to hear disputes between aliens and citizens where the amount in controversy exceeded five hundred dollars.[24] However, this jurisdiction did not provide a means for aliens to sue other aliens in federal

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18. *See, e.g.*, U.S. CONST. art. I, § 9.

19. *See* U.S. CONST. art. III, § 2; *see also* Randall, *supra* note 11, at 14 (arguing that "[t]he wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government, cannot be too much commended").

20. Randall, *supra* note 11, at 14. Several commentators and at least one prominent judge have opined that the lack of express legislation giving power to courts over cases arising out of the law of nations may require express causes of action *beyond the text of the ATS*. For one judge's support of this position, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J., concurring). *See also* Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

21. Randall, *supra* note 11, at 15.

22. *See id.* A more thorough and yet general discussion of the grant of foreign relations jurisdiction via the Judiciary Act can be found in JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 457-508 (1971). *See also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

23. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1332(a) (2003)).

24. *Id.* Alienage jurisdiction is codified at 28 U.S.C. § 1332(a) (2003). Section 11 also provided for diversity jurisdiction with the same monetary requirement.

court.[25] Thus, our inquiry must turn to that portion of the Judiciary Act that conferred specific jurisdiction over torts brought by an alien in violation of the law of nations.[26]

While the whole of the Judiciary Act served to confer broad jurisdiction over aliens upon the federal courts,[27] the ATS conferred a unique type of jurisdiction: the power of an alien to sue another alien.[28] The purposes for this unique jurisdiction are often glossed over by academics in an attempt to lump the Alien Tort Statute in with general federal question jurisdiction,[29] or to simplify the common law adoption of the law of nations so as to support its broadest use.[30] Yet, in the context of extraterritoriality, the Founders' aims in so limiting jurisdiction become manifest and dictatorial.[31]

The first publicized case prior to the adoption of the Constitution, which sealed in the Framers' minds intent to provide national remedies for offenses against the law of nations, occurred in 1784 in Philadelphia.[32] A Frenchman

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25. In *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809), the Supreme Court held that an alien may not sue another alien under "alienage jurisdiction." *See also* Dassigienis v. Cosmos Carriers & Trading Co., 442 F.2d 1016 (2d Cir. 1971). Indeed, Section 1332 does not permit an alien to sue another alien, even where citizens may be parties. *See* Lavan Petroleum Co. v. Underwriters at Lloyds, 334 F. Supp. 1069 (S.D.N.Y. 1971).

26. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1332(a) (2003)).

27. As Professor Randall characterizes it:

> Thus, together with jurisdiction over actions involving dignitaries, alienage jurisdiction, and the removal provision [allowing aliens to remove cases in diversity to federal courts much the same as citizen diversity jurisdiction removal], the Alien Tort Statute put into effect the Framers' general intention to establish federal jurisdiction over actions involving aliens.

Randall, *supra* note 11, at 17.

28. *Id.* at 16-17. Obviously, there is no prohibition against suing an American citizen either but, as distinct from the alienage jurisdiction, this is a unique aspect of the ATS.

29. *See id.* at 19. "[T]he Alien Tort Statute thus provided an additional basis for federal jurisdiction – somewhat analogous to federal question jurisdiction – over a special class of actions brought by aliens." *Id.*

30. Professor Casto suggests that because the law of nations was a part of the common law, the same breadth of jurisdiction given to common law causes of action should be granted to the Alien Tort Claims Act. For more specific support of this proposition, see Casto, *supra* note 6, at 489, 499-501.

31. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002).

> There are a number of possible reasons why the Founders would have decided not to grant the federal courts a general law of nations jurisdiction. First, they might have believed that a grant of jurisdiction over all cases arising under the law of nations would be too vague. . . . Second, the Founders may not have wanted to give the federal courts jurisdiction over certain law of nations issues [such as international mercantilism] . . . . [I]f Article III allowed the federal courts to hear all cases arising under the law of nations, it would mean that they potentially could hear all cases involving general commercial law, even in disputes between citizens of the same state. . . .
>
> Finally, it is possible that the Founders believed that their specific list of cases . . . would encompass all of the disputes likely to implicate the United States' international relations.

Id. at 599-600 (footnotes omitted).

32. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 111 (1784).

named the Chevalier De Longchamps, who was noted to be of "obscure and worthless character"[33] assaulted and battered the Secretary of the French Legation.[34] Being bereft of power to succor the enraged international community, Congress merely offered a reward for the miscreant's apprehension and encouraged state authorities to prosecute him.[35] Eventually caught and tried by state officials in Pennsylvania, De Longchamps was convicted and punished after the Court found the law of nations to be a part of Pennsylvania's state law.[36]

The case caused a national uproar and illuminated the Continental Congress' weakness when confronted with offenses against the law of nations, even where another nation's ambassador to America was threatened.[37] Thus, when the Constitutional Convention began three years later in the same city in which the De Longchamps scandal occurred, the Convention undertook to remedy the lack of national power.[38]

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33. Letter from Thomas Jefferson to James Madison (May 25, 1784), *reprinted in* 7 THE PAPERS OF THOMAS JEFFERSON 288-89 (J. Boyd ed., 1953) [hereinafter PAPERS OF THOMAS JEFFERSON].

34. *See De Longchamps*, 1 U.S. (1 Dall.) at 111. Two incidents comprised the charges as found in *De Longchamps*. One involved an assault in the house of the French ambassador and the other, an instigated fight in the streets of Philadelphia. *Id.* at 111-12. De Longchamps further threatened the ambassador and Mr. Marbois (the target of his assaults) with assassination if the prosecution was not halted. *See* PAPERS OF THOMAS JEFFERSON, *supra* note 33, at 289.

35. 27 JOURNALS OF THE CONTINENTAL CONGRESS 478-79 (1984).

36. *De Longchamps*, 1 U.S. (1 Dall.) at 114-17.

37. *See* Casto, *supra* note 6, at 493. Professor Casto suggests that the state's indecisiveness as expressed by Thomas Jefferson elicited the "real foreign affairs problem . . . that the United States might fail to provide an appropriate sanction or remedy." *Id.* at 493; *see also id.* at 493 n.146.

38. *Id.* at 493. Edmund Randolph, the governor of Virginia, opened the Convention by noting the lack of national authority over the law of nations. *See* Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 262-63 (P. Ford ed., 1888). Commenting that "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender." *Id.* Governor Randolph was joined by James Madison, who feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." Casto, *supra* note 6, at 494. The reader should note, however, that despite the woeful tidings of Randolph and Madison, Pennsylvania *did* adopt the law of nations as their own common law and successfully prosecuted and punished De Longchamps. *See supra* notes 28-32 and accompanying text.

Thus, the question is beget, whether it was an issue more of appearances and embarrassment for the fledgling country, the United States of America, than realistic need. *See, e.g.*, THE FEDERALIST NO. 42, at 279 (James Madison) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 80, at 534 (Alexander Hamilton) (Jacob Cooke ed., 1961); THE FEDERALIST NO. 3, at 15 (John Jay) (Jacob Cooke ed., 1961). While each eloquently set forth justification for federal jurisdiction, their primary support is summed up by Madison's "one nation" concept and the virtually identical Jay/Hamilton argument that "the peace of the whole ought not to be left at the disposal of a part." THE FEDERALIST NO. 3, at 14 (John Jay) (Jacob Cooke ed., 1961) (emphasis omitted). These arguments are strongly persuasive for the establishment of federal jurisdiction over foreign affairs, but they do not precisely address the

During the Constitutional Convention the second notorious scandal occurred in New York City.[39] A New York City police officer entered the house of the Dutch Ambassador and arrested one of his servants allegedly without cause.[40] The Ambassador loudly complained to John Jay, then the Secretary of Foreign Affairs.[41] Jay once again lamented the lack of federal powers to deal with such conflicts: "[T]he federal Government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases . . . ."[42] This event further galvanized the Delegates in their desire for a federal power over suits brought by aliens.[43] Thus the desire for federal jurisdiction over suits intended to protect ambassadors became one of the motivating factors behind the ATS.[44]The protection of ambassadors is one of the classic protections offered by the law of nations as restated by William Blackstone in the fourth volume of his Commentaries.[45] Blackstone characterized these laws thusly, "[t]he principle offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy."[46]

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concern of Governor Randolph because the grant of federal jurisdiction over offenses against the law of nations is no different than the adoption by the Pennsylvania state court in the De Longchamps matter. Casto, *supra* note 6, at 493-94.

Arguing that many pieces of a whole must be represented by a sole entity with uniform laws does not mean individual parts necessarily fail in their duties. For example, modern environmental laws often only apply where state laws prove inferior. The Federal Rules of Civil Procedure were not adopted because similar rules did not exist, but for consistency. *See* Erwin Chemerinsky & Barry Friedman, *Federal Judicial Independence Symposium: The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780 (1995). It seems clear from the foreign relations context and need for a strong federal government that Madison, Hamilton, and Jay were arguing for a centralized government not merely to protect individual ambassadors (for in truth Pennsylvania had done an adequate job), but to promulgate security and clear authority in the conduct of foreign relations by the federal government. This justification, while reasonable, is less a response to the miscreance of a single Frenchman (no civil claims were even ever filed either in the De Longchamps matter or the Dutch Ambassador affairs) than an affirmation of the United States as a viable single entity capable of negotiating and enforcing multinational agreements.

39. *See* Casto, *supra* note 6, at 494.

40. Letter from P.J. Van Berckel, to John Jay (Dec. 18, 1787), *reprinted in* 3 A FOUNDER'S CONSTITUTION: DIPLOMATIC CORRESPONDENCE 1783-87.

41. *Id.*

42. SECRETARY FOR FOREIGN AFF. REP. ON THE COMPLAINT OF MINSTER OF UNITED NETHERLANDS (Mar. 25, 1788), *reprinted in* 34 JOURNALS OF THE CONTINENTAL CONGRESS 109, 111 (1788).

43. *See* Casto, *supra* note 6, at 444. Once again, however, the state merely adopted the law of nations as part of its common law, and in this case, New York, convicted and sentenced the errant constable to three months in jail. *Id*; *see also* sources cited *supra* note 38.

44. *See* Casto, *supra* note 6, at 499.

45. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 56 (Morrison ed., Cavendish Publ'g Ltd. 2001) (1769).

46. *Id.* at 54.

2. Commentator Thoughts on the Background to the ATS

Scholars have suggested additional rationales for the adoption of the ATS portion of the Judiciary Act.[47] One of the most prominent viewpoints is that of Professor Anthony D'Amato.[48] Professor D'Amato suggests that "the overriding purpose [for the Alien Tort Statute] was to maintain a rigorous neutrality in the face of the warring European powers."[49] Professor D'Amato's historical analysis concluded that the climate of the fledging United States of America required a heightened sense of security for nationals of foreign countries.[50] According to Professor D'Amato, "two or three centuries ago, the plight of individual citizens in foreign countries, and not territorial ambitions, was the major excuse for war."[51] In response to suggestions made by Judge Robb in the *Tel-Oren v. Libyan Arab Republic* case,[52] Professor D'Amato pointed to the need of an impartial executive branch in conflicts between other nationals, thus supporting the goal of neutrality.[53]

Another noted commentator expanded upon the reasoning given by Professor D'Amato.[54] William Dodge posits that the ATS "provid[ed] the broad civil remedy for violations of the law of nations that the Continental Congress had sought since 1781."[55] While Professor Dodge agrees that the ATS was passed in response to the ambassadorial incidents, he cites two

47. *See, e.g.*, Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988).

48. *See id.*

49. *Id.*

50. *See id.* at 63-64.

51. *Id.* at 64.

52. Judge Robb argued that the power to adjudicate foreign national disputes is, or should have been, vested in the executive branch. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, J., concurring).

53. D'Amato, *supra* note 47, at 66. The best illustration of this derives from another historical incident. In 1794, a French assault upon British holdings in Sierra Leone, led by an American slaver and with assistance from other Americans, brought great ire to the British. *Id.* Either supporting the British by condemning the American actions and thereby angering the French, or vice-versa, would have placed the tenuous United States of America in a delicate position. *Id.* It must be noted, however, that even at this early date, the limitations suggested in this Article were not exceeded. The actions of the company that assaulted the holdings in Sierra Leone would almost certainly have been deemed acts of piracy, and since the primary actors to be sued were American, the obvious United States nexus existed. For a complete description of this event, see CHRISTOPHER FYFE, A HISTORY OF SIERRA LEONE 59-61 (Oxford Univ. 1962).

54. *See* Casto, *supra* note 6, at 63.

55. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 237 (1996).

other impetuses for passage of the ATS. He first asserts that the states did not have adequate laws to protect foreigners, but that their courts "would be hostile to alien claims."[56] Professor Dodge points to the famous quote of James Madison for support: "We well know, sir, that foreigners cannot get justice done them in these [state] courts, and this has prevented many wealthy gentlemen from trading or residing among us."[57] Secondly asserted by Professor Dodge was the difficulty foreign creditors were faced with in pursuing claims in state courts.[58] While such claims were excepted from the ATS,[59] clearly, the Founders' concern for the protection of the interests of foreign nationals encouraged adoption of the federal statute.[60]

While the reasons for the inclusion of a federal statute providing a forum for alienage jurisdiction are manifest,[61] Professor Dodge best sums up the basis for the ATS' passage: "by providing a federal remedy for [torts in violation of the law of nations], the First Congress could protect against the vagaries of state law, the hostility of state courts, and differences in their interpretations of the law of nations, sparing the new nation . . . embarrassment."[62]

B. The ATS in Case Law and the Modern Era

Perhaps strangely considering the importance placed upon its passage by the Founders, the ATS lay dormant for roughly 200 years following its passage.[63] In two cases that arose fast on the heels of its passage, courts noted the ATS' grant of jurisdiction supplemental to their maritime/admiralty jurisdiction.[64] Over 100 years later, the Supreme Court,

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56. *Id.* at 235.

57. JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (Reprint Services Corp. 1891).

58. Dodge, *supra* note 55, at 235.

59. *See id.* at 236 n.104.

60. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440-53; *see also* Dunlop v. Ball, 6 U.S. (2 Cranch) 180 (1804) ("Until the act of 1793 . . . a general opinion prevailed among the inhabitants of the state of Virginia . . . that a British debt could not be recovered."). The collection of British debt was a source of great controversy at the time, but it certainly was considered in the passage of the ATS. *See* Bradley, *supra* note 31, at 624.

61. *See, e.g.*, sources cited *supra* notes 31, 47.

62. Dodge, *supra* note 55, at 237 (emphasis omitted).

63. *Id.* at 251.

64. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D. S.C. 1795) (No. 1,607); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895). Both cases involved the capture of foreign ships in United States territorial waters. The significance of these early cases' reliance upon the maritime jurisdiction of the courts is downplayed by Professor Dodge with respect to the use of the ATS as a basis for jurisdiction over torts in general, but such reliance illustrates a respect for extraterritoriality concerns during the early uses of the ATS. Dodge, *supra* note 55, at 252-53. One distinction for the discriminating reader: *Bolchos* actually rested jurisdiction in the ATS, *Bolchos*, 3 F. Cas. at 810-11,

in the seminal case of *The Paquete Habana*, mentioned it again.[65] But it was not until 1980[66] that the ATS arose from its virtual torpor in *Filartiga v. Pena-Irala*.[67] Three cases, including *Filartiga*, have become the backbone of ATS litigation, but the Second Circuit in *Filartiga* established the ATS as a modern, viable statute.[68]

1. *Filartiga v. Pena-Irala*

The case that began the modern era of Alien Tort Statute application was *Filartiga v. Pena-Irala*.[69] The plaintiffs in *Filartiga* were a father and sister of a young man who was brutally tortured and murdered by the ruling political party in the Republic of Paraguay.[70] The plaintiffs contended that Joelito Filartiga was kidnapped and tortured to death on March 29, 1976, as retaliation for his father's well-known anti-government stance.[71] While living in Washington D.C., the plaintiffs discovered the defendant was in New York and, after securing local counsel, personally served the defendant and brought their claim under the ATS.[72]

Two important things unique to the Filartigas' tragedy bear immediate note.[73] First, Dr. Filartiga (Joelito's father) brought a criminal action in the

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while *Moxon* merely referred to it. *Moxon*, 17 F. Cas. at 947-48.

65. 175 U.S. 677, 685-86 (1899). Kathleen M. Kedian analyzes the effect of *The Paquete Habana* upon later interpretations of the ATS. *See* Kathleen Kedian, *Customary International Law and International Humans Rights Litigation in United States Courts: Revitalizing the Legacy of* The Paquete Habana, 40 WM. & MARY L. REV. 1395 (1999).

66. A rarely discussed case arose in 1961 in the district court in Maryland involving a child custody suit between aliens in which the ATS provided jurisdiction. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

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

68. These cases are *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Other cases have alternatively stretched or constricted the reach of the ATS, but these three are considered by many scholars to be the seminal modern ATS doctrinal cases.

69. 630 F.2d 876 (2d Cir. 1980).

70. *See id.* at 878.

71. *Id.* Some of these alleged facts belie objective summary:

> Later that day, the police brought Dolly Filartiga [Joelito's sister] to [Defendant] 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[ed] that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Id.

72. *Id.* at 878-79.

73. *Id.*

Paraguayan courts, which, at the time of the federal lawsuit, was still in process.[74] Second, personal jurisdiction was easily and clearly established by "tag" jurisdiction in New York.[75] These two issues, unconsciously or not, left the *Filartiga* panel with no need to address personal jurisdiction or any failure to exhaust local remedies.[76]

The Second Circuit panel first required a clear violation of "the law of nations."[77] Defining the law of nations thus became the first order of business for the panel, and it started by reviewing Supreme Court jurisprudence on this issue.[78] Relying upon the expression contained in *The Paquete Habana*,[79] the *Filartiga* panel reviewed the authorities for determination of the law of nations and then noted the unequivocal condemnation of the use of torture by "civilized nations."[80] The court found that the conduct alleged in *Filartiga* clearly violated this aspect of the law of nations.[81]

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74. *Id.* at 878. However, Dr. Filartiga's Paraguayan counsel "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." *Id.*

75. *Id.* at 879. Pena was being held on deportation charges at the Brooklyn Navy Yard when served. *Id.* The plaintiffs successfully held Pena's deportation so he could answer charges, and he brought the successful motion to dismiss which was the subject of the circuit court's review and eventual reversal. *Id.*

76. The Torture Victim Protection Act requires exhaustion of local remedies. *See* Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73. Of course, the *Filartiga* court's failure to examine extraterritoriality and universal jurisdiction is inexcusable and discussed at length in Part IV of this Article.

77. *Filartiga*, 630 F.2d at 880. While the panel in *Filartiga* chose to use the term "the law of nations," in most modern jurisprudence this term has been abandoned in favor of the term "customary international law." They mean the exact same thing, but for purposes of continuity I will continue to use the term "the law of nations."

78. *See id.* "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.'" *Id.* (quoting United States v. Smith, 18 U.S. 153, 160-61 (1820)). It is noteworthy that not only the order in which these sources are listed might be considered counterintuitive, but they furthermore recognize the importance of reviewing international law in a *manner similar to the modus of the courts in other countries. See, e.g.*, Cochran v. Taylor, 7 N.E.2d 89 (N.Y. 1937) (utilizing civil law source method by looking to scholars and commentaries first). The *Filartiga* court made a vast (if harmless) error, however, in not consulting what are clearly the most important sources of the law of nations, Congress and the Constitution. *See* U.S. CONST. art. I, § 8, cl. 10. For a discussion on the use of the Offenses Clause with respect to extraterritoriality, see Zephyr Rain Teachout, Note, *Defining and Punishing Abroad: Constitutional Limits on the Extraterritorial Reach of the Offenses Clause*, 48 DUKE L.J. 1305 (1999).

79. *See supra* note 65 and accompanying text.

80. *Filartiga*, 630 F.2d at 881-82. The court also wisely noted that a particular rule need not be adhered to by every single nation. *Id.* at 881. "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." *Id.*

81. *Id.* This is another important point because in many later cases, the greatest issue facing litigants was whether or not something violated the law of nations. Proof of a tort, and proof of alien status are both patent. Proof of violation of the law of nations is extremely fact-sensitive, and thus,

The next hurdle for the plaintiffs was the defendant's argument that personal jurisdiction should not suffice to allow the court to adjudicate between two aliens.[82] The court quickly dismissed this argument by pointing out that "[i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction."[83] The court then summed up its appraisal:

> Although the Alien Tort Statute has rarely been the basis for jurisdiction during its long history, in light of the foregoing discussion, there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations . . . .[84]

2. *Tel-Oren v. Libyan Arab Republic*

The next important case in the line of *Filartiga's* progeny,[85] *Tel-Oren v. Libyan Arab Republic*, arose just a few years after *Filartiga*.[86]

Tel-Oren involved the claims of survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the Palestine

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torture's implication as a clear violation was important insofar as the reach *Filartiga* has had, and should have. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'").

82. *Filartiga*, 630 F.2d at 885.

83. *Id.* Once again, the court failed to address the presumption against extraterritoriality or any of the five types of prescriptive jurisdiction. *See id.*

84. *Id.* at 887. In explaining the dearth of authority on the ATS, the court further surmised that "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." *Id.* at 888. The court discusses other cases that refused to recognize a particular wrong as an offense against the law of nations. *See id.* The court pointed out one amusing example:

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. . . . 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. *Id.* (alterations in original) (citation omitted).

85. The district court in *Filartiga* was reversed and the case remanded, *id.* at 889, but the eventual disposition of *Filartiga* is not important to the substance of this Article.

86. 726 F.2d 774 (D.C. Cir. 1984).

Liberation Organization ("PLO").[87] The attack took place on March 11, 1978, when thirteen terrorist-members of the PLO seized civilian buses, a car, and a taxi.[88]

In the course of the attack, the terrorists tortured and shot and killed twenty-two adults and twelve children, and seriously wounded seventy-three adults and fourteen children.[89] Most victims were Israeli, but some Americans and Dutch were also affected.[90] These plaintiffs brought their claim in the District of Columbia against a number of defendants, including the PLO.[91]

Although all three judges on the *Tel-Oren* panel agreed to affirm the decision of the district court to dismiss the action for lack of subject matter jurisdiction, their reasoning greatly diverged.[92]

Judge Edwards reasoned that while *Filartiga* had been properly decided, and torture is properly prohibited by the law of nations, such referred to "official" torture as perpetrated by a state actor.[93] In *Tel-Oren*, Judge Edwards posited that the "[p]laintiffs . . . [did] not allege facts to show that official or state-initiated torture [was] implicated."[94] Judge Edwards, therefore, backed off application of *Filartiga* because, as he put it, the court would then have to determine "whether to stretch *Filartiga's* reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law."[95]

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87. *Id.* at 776.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 775. Judge Edwards, in his concurring opinion, pointed out that he was self-limiting his analysis "to the allegations against the Palestine Liberation Organization [because] . . . the complainants' allegations against the Palestine Information Office and the National Association of Arab Americans [were] too insubstantial to satisfy the § 1350 requirement . . . [and] [j]urisdiction over Libya [was] barred by the Foreign Sovereign Immunities Act." *Id.* at 775 n.1 (Edwards, J., concurring). Commentators have disagreed as to whether this analysis is correct in light of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See* Ryan Goodman & Derek P. Jinks, Filartiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 480-97 (1997) (explaining and discussing *Sabbatino's* admonition that the Act of State Doctrine does apply to the law of nations and, therefore, the ATS); *cf.* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 743 (3d ed. 1996) (explaining that "*Sabbatino* appears to have rejected [the notion of an exception to the Act of State Doctrine for the law of nations]").

92. *Tel-Oren*, 726 F.2d at 774. The three D.C. Circuit judges were Judge Edwards, Judge Bork, and Judge Robb. Each filed a separate concurring opinion joining no part of any of the others'. *See id.*

93. *Id.* at 791 (Edwards, J., concurring).

94. *Id.*

95. *Id.* at 792 (Edwards, J., concurring). Judge Edwards further asserted that applying *Filartiga* principles would "require an assessment of the extent to which international law imposes not only rights but also obligations on individuals." *Id.* Judge Edwards conjured horrible burdens on the federal courts to determine the reach of this customary international law and agonized over whether

Judge Bork took a new, and then-to-date unique tack.[96] He also held to affirm the dismissal of the action, but on the theory that the ATS provides jurisdiction but no cause of action for violations of the law of nations.[97] Judge Bork suggested that implicating a cause of action would, in effect, make the ATS self-executing and go beyond that which Congress intended or undertook.[98] He pointed out that making such a determination would stray too far into the prerogative of the executive to conduct foreign affairs and, thus, implicated the political question doctrine.[99] Finally, Judge Bork asserted that the "law of nations" should be strictly construed, and application of the ATS to any violation of international law is be beyond the purview of the statute.[100] Judge Bork, therefore, concurred in the holding because he reasoned that the ATS did not provide a cause of action not otherwise recognized by Congress either expressly by statute,[101] or clearly recognized by the First Congress during the ATS' passage.[102]

Finally, Judge Robb concurred on the basis that the issue presented to the panel was non-justiciable based on the political question doctrine.[103] He

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they would apply to individuals. Tel Oren, 726 F.2d at 792. This attitude is somewhat confusing because the ATS was passed in the wake of a need to *expressly allow for claims against individuals*, not state actors. *See supra* notes 36-54 and accompanying text. Thus, Judge Edward's reasoning for distinguishing *Tel-Oren* from *Filartiga* is unclear at best and, at worst, would bar all claims against non-state actors under the ATS because they are not subject to the law of nations, and would bar all non-exemption claims against state actors under the ATS due to the Foreign Sovereign Immunities Act.

96. *Tel-Oren*, 726 F.2d at 798-823 (Bork, J., concurring).

97. *Id.* at 803, 823 (Bork, J., concurring). For a criticism of this point of view, see Anthony D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985).

98. *Tel-Oren*, 726 F.2d at 808-12 (Bork, J., concurring).

99. *Id.* at 803-07 (Bork, J., concurring).

100. *Id.* at 812 (Bork, J., concurring). "[A]ppellants' construction of [the ATS]... would authorize tort suits for the vindication of any international legal right." *Id.* Judge Bork then delved into the history of the law of nations, and reviewed the Founder's conception of proper offenses. *Id.* at 816 (Bork, J., concurring). This analysis has proven influential, especially in light of Judge Bork's wise admonition that "Congress' understanding of the 'law of nations' in 1789 is relevant to a consideration of whether Congress, by enacting [the ATS], intended to open the federal courts to the vindication of the violation of any right recognized by international law." *Id.* Whether Judge Bork is correct regarding the *type* of offense Congress intended to guard against, a review of the climate surrounding the adoption of the ATS is useful herein because of potential jurisdictional limits.

101. *See* Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73; discussion *infra* Part II-B(4).

102. *See supra* notes 53-54 and accompanying text.

103. *Tel-Oren*, 726 F.2d at 823-26 (Robb, J., concurring). Judge Robb based this assertion on one fundamental but unspoken difference from the other judges – that the act of terrorism committed by the defendants was a political or wartime act and not that of a private tortfeasor in the classic sense.

held that the diplomatic and foreign relations concerns inherent in such a decision implicate other branches of the government, and consequences of a judicial determination would have been potentially embarrassing or damaging to our national interests.[104] Thus, no clear precedential value flows from *Tel-Oren* for courts to follow, but it has spawned many of the current debates regarding the propriety of the Alien Tort Statute.[105]

Tel-Oren illustrated three of the primary concerns touching application of the ATS: in précis, (i) what entities are subject to the ATS; (ii) what comprises the law of nations and does it include concurrent causes of action for litigants; and (iii) where does discretion better judicial valor and the political question doctrine's rearing head step in to limit the ATS' application?[106]

3. *Kadic v. Karadzic*

While a number of other cases over the past two decades have relied upon *Filartiga* as a basis for applying the ATS,[107] arguably the most important was *Kadic v. Karadzic*.[108]

The gravamen of *Kadic* concerned allegations against citizens of the former Yugoslavic Republic (now the nation of Bosnia-Herzegovina).[109] The plaintiffs in *Kadic* alleged brutal acts of genocide,[110] as perpetrated by the Bosnian-Serb military under command of President Karadzic.[111]

See id. at 825 (Robb, J., concurring).

104. *See id.* at 823-26 (Robb, J., concurring); discussion *infra* Part IV-B.

105. *See supra* note 6 and accompanying text.

106. These questions are addressed, at least fundamentally, in each of the concurring opinions of *Tel-Oren*, respectively. Of the three questions, however, this Article focuses (if at all) only on question three.

107. *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (extending application of the ATS and TVPA to what amounted to "mental anguish" but not to environmental abuses); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (utilizing the TVPA as support for the court's finding of jurisdiction under the ATS and power to "fashion domestic common law remedies to give effect to violations of customary international law"); Jama v. INS, 22 F. Supp. 2d 353, 357, 372 (D. N.J. 1998) (holding, in action by detainees against INS for alleged mistreatment, cruel treatment is cognizable as a violation of the law of nations); White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (declining to exercise jurisdiction based upon, *inter alia*, a lack of cause of action theory); Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995) (holding that "any act by the defendant which is proscribed by the Constitution of the United States and by a cognizable principle of international law . . . is actionable before this Court under § 1350").

108. 70 F.3d 232 (2d Cir. 1995).

109. *Id.* at 236.

110. Such acts were described by the court as "various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution." *Id.* at 236-37.

111. *Id.* The court explained the complicated background and status of Karadzic:

> Karadzic, 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' . . . . In his capacity as

By the time *Kadic* was decided, the Second Circuit had the benefit of nearly twenty years of hindsight and, thus, tested plaintiffs' ATS claims in a succinct and definitive fashion.[112] The central issue considered by the court with respect to the ATS claim, however, was whether an individual actor could violate the law of nations.[113] The court conducted a review of international law crimes and concluded that the district court on remand would need to determine which crimes were genocide or war crimes (that may require state action) and which were other atrocities (that may not).[114] While *Kadic* refined the use of the ATS in modern litigation, *Filartiga* remains the seminal case on its application.[115] However, *Kadic* incorporated into its calculus the Torture Victim Protection Act.[116]

> President, Karadzic possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs was [sic] committed as part of a pattern of systematic human rights violations.

Id. at 237.

112. Although the standards for subject matter jurisdiction under the ATS were clear to the *Kadic* court, the facts underlying them were not. Inconsistent positions were taken by both the plaintiffs and defendant ascertaining the question posed by Judge Edwards in *Tel-Oren*, but not answered: Whether private actors can be liable for violations of the law of nations. *See supra* notes 87-91 and accompanying text. The *Kadic* court summed up the confusion:

> Karadzic 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, Karadzic advances the contradictory positions that he is not a state actor, even as he asserts that he is the President of the self-proclaimed Republic of Srpska. For their part, the *Kadic* appellants also take somewhat inconsistent positions in pleading defendant's role as President of Srpska, and also contending that "Karadzic is not an official of any government."

Kadic, 70 F.3d at 239 (citations omitted) (quoting Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n.25, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (No. 94-9035).

113. Kadic, 70 F.3d at 239. The court further divides this issue into how state action pertains to the separate claims of genocide, war crimes, and other offenses. *Id.* at 240. The *Kadic* panel then held effectively that plaintiffs should be allowed to prove Karadzic was a state actor "for purposes of those international law violations requiring state action." *Id.* at 245.

114. *Id.* at 244.

> 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 Karadzic to the extent he is shown to be a state actor.

Id.

115. *Id.* at 237.

116. *Id.* at 245.

4. The Torture Victim Protection Act

In 1992, Congress enacted the Torture Victim Protection Act ("TVPA").[117] This Act provided a civil remedy against a defendant who: "(1) subject[ed] an individual to torture . . . ; or (2) subject[ed] an individual to extrajudicial killing."[118] The TVPA has the effect of providing not only a clear-cut cause of action for plaintiffs (in any courts that might otherwise adopt Judge Bork's *Tel-Oren* reasoning), but also gives the right to sue to U.S. citizens who otherwise would not be able to sue under the ATS.[119] Congress apparently[120] sought in the TVPA to enhance the reach of the ATS rather than limit it.[121] Scholars disagree on whether the effect of the TVPA properly enhanced the ATS or was inconsistent with prior ATS jurisprudence. Doubt arises too, from the power of Congress to pass such a vast statute.[122] Concerns raised by the minority report illuminate this doubt: "[The TVPA] appears to over-extend Congress' constitutional authority. . . . It is a difficult and unresolved question, therefore, whether [the power to define and punish offenses against the law of nations] extends to creating a

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117. *See* 28 U.S.C. § 1350 (1992).

118. *Id.* § 2(a)(1)-(2). Note that liability only attaches to those acting "under actual or apparent authority, or color of law, of any foreign nation." *Id.*

119. *See* S. REP. NO. 102-249 (1991).

120. *See* Goodman & Jinks, *supra* note 91, at 481-97 (1997) (arguing TVPA supports ATS litigation). *But see* Bradley & Goldsmith III, *supra* note 20 (arguing in the alternative that the TVPA conflicts with current ATS litigation).

121. *See* S. REP. NO. 102-249 (1991). Congress apparently announced its support of the ATS as well as its *Filartiga* application:

> The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived, from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed "in violation of the law of nations." Section 1350 has other important uses and should not be replaced. . . . The *Filartiga* case has met with general approval. . . . At least one Federal judge, however, has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress. . . . The TVPA would provide such a grant, and would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact.

Id. (citation omitted). Curiously, the majority report notes Judge Bork's theory without disclaiming it. Clearly the TVPA establishes torture as a violation of the law of nations and gives both United States citizens and aliens a cause of action therefore; more than that is unclear, however. Furthermore, the question must be raised: if Congress so strongly supported the ATS, why did it only expressly provide for torture and extrajudicial killing as causes of action? The TVPA continues to be the source of much confusion among the federal courts. *See, e.g.*, Bradley & Goldsmith III, *supra* note 20.

122. *See* S. REP. NO. 102-249 (1991).

civil cause of action in this country for disputes that have no factual nexus with the United States or its citizens."[123] However, courts that have addressed the ATS and the TVPA have found them to be complimentary, and have refused, thus far, to view the explicit grant of a cause of action in the case of torture and extra-judicial killings as a reason to require such explicit grants in other cases not concerning torture and extra-judicial killings.[124]

C. ATS and the "Law of Nations"

"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."[125] As has already been shown, the primary inquiry confronting courts in applying the ATS is just what constitutes the law of nations.[126] Thus, before determining how far the reach of United States courts should be in light of extraterritoriality, the meaning of the phrase "law of nations" must be examined.[127]

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123. *Id.* The Minority Senate Report thus raises a similar question to that which this Article seeks to address: whether Congress can pass laws affecting interests with no United States nexus, and if so, should it? The Minority Report continues:

> The Department of Justice noted, and we agree, that "(s)uch a unilateral assertion of extraterritorial jurisdiction would be in tension with the framework of the (U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment)." According to the administration, the convention requires countries to provide remedies for acts of torture which took place only within their own territory. In fact the convention specifically declined to extend coverage to acts committed outside the country in which the lawsuit is brought. We do not wish to second-guess the experts who drafted this treaty, and believe it is unwise to do explicitly what its drafters chose not to do – extend the coverage to extraterritorial actions.

Id.

124. *See supra* notes 104, 118 and accompanying text. The intersection of queries regarding the cause of action question and the extraterritoriality question must lie for another day. While it is recognized that some scholars and Judge Bork argue the fallacy of this reasoning, as the majority of courts have done, this Article assumes the ATS does not require a separate statement from Congress granting specific causes of action. Professors Bradley and Goldsmith notwithstanding, the length to which the ATS should be applied in light of extraterritoriality principles does not depend on whether a cause of action must be expressly granted by statute separate from the ATS and, thus, is not more fully-explored in this Article. For a recent discussion of the scholarly debate on the cause of action issue, see Bradley, *supra* note 31, at 592 n.21.

125. 28 U.S.C. § 1350 (2003).

126. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

127. *See supra* note 73 and accompanying text. "Customary international law" enjoys frequent modern usage, but by no means exclusive usage, and is arguably more descriptive than historically accurate.

1. Blackstone and Vattel

Two sources contemporary to the Founders provide useful illumination to the background of the term "law of nations": William Blackstone's *Commentaries* and an important work on international law, Vattel's *The Law of Nations or the Principles of Natural Law.*[128] Blackstone summarized the principle offenses against the law of nations as violations of safe-conducts, infringements on the rights of ambassadors, and piracy.[129] This limited list of offenses conveys the narrow sense of international law as Blackstone understood it, but Vattel did not share this narrow scope.[130]

Vattel first pointed out that the law of nations is derived from "the duties which the Law of Nature imposes upon Nations."[131] He, however, asserted that international "injuries" that may be addressed by a nation as a violation of the law of nations are those that are waged on a national, state-sponsored scale.[132] These instances comprise the only times Vattel suggested that violations of the law of nations may be judged and executed upon by foreign

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128. *See* BLACKSTONE, *supra* note 45; 3 EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW 113-47 (Charles G. Fenwick trans., 1758).

129. BLACKSTONE, *supra* note 45, at 54.

130. *See supra* note 124 and accompanying text. This avoids discussion of what are "non principle offenses." Such is beyond the scope of this Article.

131. VATTEL, *supra* note 128, at 113. Further, "Since Nations are bound by the Law of Nature mutually to promote the society of the human race, they owe one another all the duties which the safety and welfare of that society require." *Id.* Lest the reader think Vattel was advocating unrestricted application of domestic law or adjudication into other nations' spheres of influence, note his admonition:

> (1) Sovereign States, or the political bodies of which society is composed, are much more self-sufficient than individual men, and mutual assistance is not so necessary among them, nor its practice so frequent. Now, in all matters which a Nation can manage for itself, no help is due it from others.
>
> (2) The duties of a Nation to itself, and especially the care of its own safety, call for much more circumspection and reserve than an individual need exercise in giving assistance to others.

Id. at 114. And later:

> Hence there is a strict obligation upon all Nations to promote justice among themselves, to observe it scrupulously in their own conduct, and to refrain carefully from any violation of it. Each should render to the others what belongs to them, respect their rights, and leave them in the peaceful enjoyment of them.

Id. at 135. Indeed, Vattel established joint appreciation for the rules of comity as well as restraint where, to coin a modern phrase of jurisprudence, "all local remedies are exhausted." *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

132. *See* VATTEL, *supra* note 128, at 130. In pertinent part:

> If, then, there should be found a restless and unprincipled Nation, ever ready to do harm to others, to thwart their purposes, and to stir up civil strife among their citizens, there is no doubt that all the others would have the right to unite together to subdue such a Nation, to discipline it, and even to disable it from doing further harm. . . . The principles involved in the three preceding propositions [the right of self-protection, the right of resistance, and the right of redress] constitute the several grounds upon which a just war may be waged . . . .

Id.

powers.[133] These two sources, while not exhaustive of the understanding of international law at the time the Judiciary Act was passed, characterize 18th century understanding of the law of nations.[134]

The only mention of the law of nations in the Constitution occurs at Article I, Section 8, Clause 10, which grants Congress the power to "define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations."[135] Of course, the question that has confronted most courts is what to do when Congress has *not* expressly defined offenses against the law of nations.[136]

2. The Paquete Habana

The leading case on determining the state of international law is *The Paquete Habana*.[137] *The Paquete Habana* involved a maritime doctrine of fishing vessel protection during times of war.[138] The question the Supreme Court grappled with was what source and precedent should guide it in the international field of law.[139] In determining the sources of international law, the Supreme Court affirmed that:

> [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; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and

133. *See id.* at 130-43.

134. *See* Bradley & Goldsmith III, *supra* note 20.

135. U.S. CONST. art. I, § 8, cl. 10. Two significant possibilities arise as a result of this language. First, Congress' power to define "Piracies and Felonies on the High Seas" is separate from offenses against the "Law of Nations." This implies that the Founders saw a division between the two, and did not intend a pure adoption of Blackstone's definition (which included piracy as one of the offenses against the law of nations). The second possibility is much simpler and comports more with other constitutional provisions: "Piracies and Felonies on the High Seas" is one aspect of law given to Congress to define, and "the Law of Nations" is the other. *Id.* This reading seems consistent with other maritime/admiralty clauses in the Constitution as opposed to other forms of law (treaties and domestic laws). Adopting this reasoning, it seems the Founders were doing no more than ensuring Congress would have power over both the law of the High Seas and other internationally-implicated law. Professor Casto touches on this issue in his paper, discussed previously. *See* Casto, *supra* note 6, at 475 n.45; *see also infra* note 229.

136. *See* The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* Jason Jarvis, *Constitutional Constraints on the International Law Making Power of the Federal Courts*, 13 J. TRANSNAT'L L. & POL'Y __ (forthcoming 2003).

137. *Id.*

138. *See id.* at 677-79.

139. *See id.*

> 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.[140]

These sources are varied and not definitive and, thus, require a court to enter into fundamental questions of what the "general principles of law recognized by civilized nations" are.[141]

3. Other Sources of International Law

Although the law of nations comes into being by either the express enumeration of Congress or judicially recognized norms of customary international law, it is both the law of the United States and supreme in its domestic application.[142]

Professor Louis Henkin, in explaining the source of international law, opined that both the courts and Congress may determine what international law is.[143] These sources must refer first to treaties, executive and legislative acts, and judicial decisions.[144]

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140. *Id.* at 700. However, the *Filartiga* court went a step further, asserting that "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. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (referencing and quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 198 (1796), which distinguished "between 'ancient' and 'modern' law of nations"). This does not necessarily follow, for while *The Paquete Habana* test mandates a review of "customs and usages of civilized nations," The Paquete Habana, 175 U.S. at 700, it is a stretch to assert that a 1796 case distinguishing between ancient and modern law of nations requires a circuit court two hundred years later to make a similar distinction. Be that as it may, it appears well settled that the law of nations is a dynamic body of law (if it can be called that) which evolves much as the *Filartiga* court asserted.

141. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. 38. The International Court of Justice has long recognized the breadth of international law:

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.

S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10.

142. *See* HENKIN, *supra* note 9, at 236-37. "International law . . . is law *for* the United States in its relations with other nations. International law is also law *of* the United States, U.S. law for domestic governance." *Id.* at 236. Professor Henkin points out, however, that while international law is considered covered by the Supremacy Clause, it is unclear how this status was achieved. *See id.* at 237-38.

143. *See id.* at 239-40. Professor Henkin quotes Justice Gray's opinion in *The Paquete Habana* to summarize the courts' role: "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." *Id.* at 239 (quoting The Paquete Habana, 175 U.S. at 700). Recognizing that Congress, too, must play a role in the determination of international law, Professor Henkin then poses the question, "Will the courts give effect to

4. Jus Cogens

In addition to those sources listed above which comprise that amorphous body of law known as customary international law, there is a doctrine of implacable natural international law known as *jus cogens*.[145] *Jus cogens* is defined by the Vienna Convention on the Law of Treaties as a "peremptory norm of general international law [that] is . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[146] Some commonly invoked precepts of *jus cogens* include genocide, slavery, extrajudicial killing, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights.[147]

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international law if the political branches determine to violate it?" HENKIN, *supra* note 9, at 239. He admits that Congress has violated international responsibilities (failure to pay United Nations dues in the 1990s), and that it is unclear the extent to which courts must defer to the executive's understanding of international law. *See id.* at 241. Professor Henkin goes so far as to assert that "[p]resumably, since [treaties and principles of customary international law] derive[] from their character and status in international law, treaties and principles of customary law have equal status in the U.S." *Id.* This conclusion is less certain than his others, however, as Congress clearly understood the difference between treaties and the law of nations, and gave one express supremacy and the other none. *See* U.S. CONST. art. VI, § 2.

144. *See* The Paquete Habana, 175 U.S. at 700. Later in the opinion it was stated that "[t]his rule of international law is one which prize courts, administering the law of nations, are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter." *Id.* at 708.

145. *Jus cogens* has been most explicitly and recently recognized in articles 53 and 64 of the Vienna Convention on the Law of Treaties. *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. For more thorough scholarly discussions of *jus cogens*, see Gros Espiell, *Self-Determination and Jus Cogens*, *in* U.N. LAW/FUNDAMENTAL RIGHTS 167 (A. Cassese ed., 1979); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967); and Marjorie M. Whiteman, *Jus Cogens in International Law, With a Projected List*, 7 GA. J. INT'L & COMP. L. 609 (1977).

146. Vienna Convention, *supra* note 145, at art. 53.

147. The Restatement also accords these seven generally prohibited conducts *jus cogens* status. They have, by and large, been adopted into ATS litigation: genocide, slavery, causing the disappearance or murder of individuals, torture or other "cruel, inhuman or degrading treatment," arbitrary detention, apartheid, or a general pattern of gross violations of international law. Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 15 (1986). Confusion may arise in the reader who astutely notes the similarities between what has thus far been addressed as "customary international law" by numerous scholars and at least the *Filartiga* and *Tel-Oren* courts and that list of *jus cogens* violations. There is certainly a layer of overlap. It is more accurate, then, perhaps to term *jus cogens* as a doctrine of nullification rather than an affirmative imposition of laws from which causes of action can be drawn (*i.e.*, the "law of nations" phraseology from the ATS.)

Thus, customary international law is established through a variety of sources, some through express pronouncements of Congress easily within their constitutional grants of power, and some adopted by individual district court judges in fact-sensitive litigation scenarios.[148]

III. EXTRATERRITORIALITY

Having established the background to the ATS, its current scope, some of the questions confronting courts and litigants seeking to apply it today, and the meaning and current use of the law of nations, we now turn to its focus: extraterritoriality and the ATS.

A. What is Extraterritoriality?

Extraterritorial application of law is nothing more than the application of a nation's domestic law in an international context.[149] When exercised by a court, such application is known as "prescriptive jurisdiction."[150]

The means of extending national power extraterritorially is not a new concept.[151] However, from its earliest use, extraterritoriality was only thought to apply in extremely narrow circumstances: those involving an affront to a nation itself and thus implicating a threat to a nation's sovereignty or security, and not to threats to individuals.[152]

B. Prescriptive Jurisdiction

There are currently five commonly accepted means of extending a nation's jurisdiction beyond the nation's borders: territoriality, nationality, the protective principle, passive personality, and universality.[153] Of these,

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This is because *jus cogens* is used to nullify contracts and treaties in conflict with its principles. *See id.* at note 148. "The principle of jus cogens, which restricts the freedom of states to contract and voids instruments that conflict with peremptory norms, has unquestionable ethical underpinnings and unimpeachable antecedents." *Id.* Thus, *jus cogens* has less importance to the ATS than customary international law, except insofar as its "peremptory norms" provide evidence of customary international law.

148. *See supra* notes 74, 103 and accompanying text.

149. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987); *see also* Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1 (1992).

150. *See* Born, *supra* note 149, at 3 n.4.

151. *See* VATTEL, *supra* note128, at 113-47.

152. *See id.* at 130.

153. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 404 (1987). Periodically hereinafter this Article will refer to the first four types as "United States nexus jurisdictions" because they involve either domestic territory, a citizen of the United States (as the tortfeasor or victim), or interests of the United States (protective or economic). The only prescriptive jurisdiction with no United States nexus is the universality principle.

territoriality is afforded the most deference and is the least controversial.[154] In lay terms, this is jurisdiction over persons or things that occur within the territory of a nation.[155] The nationality principle applies jurisdiction to citizens of the nation and has been almost universally recognized as well.[156] The protective principle is found in subsection (3) of Section 402 to the *Restatement (Third) of the Foreign Relations Law of the United States*, which agrees that United States courts have extraterritorial jurisdiction over "certain conduct outside its territory by persons not its nationals that is *directed against the security of the state*."[157] Controversial not only among the nations of the world, but also within United States application, is the "passive personality" category.[158] This principle allows a nation to punish aliens who injure their citizens outside the nation's territory.[159]

C. The Universality Principle

The fifth means of extraterritorial application of law is known as the universality principle.[160] Universal jurisdiction rests on principles of *jus cogens*, natural law, and customary international law.[161] Universality permits exercise of jurisdiction over crimes of such offensiveness as to be universally hated and feared by all civilized nations.[162]

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154. *See id.* § 402 cmt. a.

155. *See id.* This also includes actions that cause effects within a country's territory. *See* S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10.

156. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) cmt. a (1987); *see also* Blackmer v. United States, 284 U.S. 421 (1932).

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3) (1987) (emphasis added).

158. *See* Cutting's Case, 2 Moore DIGEST § 201, at 232-40.

159. *See id. Cutting's Case* saw the United States arguing against this principle when Mexico arrested a United States citizen for injuries caused to a Mexican citizen in the United States. *Id.* The United States' position has changed in recent years – arguably as a result of an increase in anti-United States terrorism. *See, e.g.*, United States v. Bin Laden, 92 F. Supp. 2d 189 (S.D. N.Y. 2000).

160. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). The universality principle is explored in depth below.

161. This phrasing is not commonly used. More common is the vague explanation that universal jurisdiction is "universally offensive" and "universally punished . . . [b]ecause such crimes threaten the very nature of humanity itself." Teachout, *supra* note 78, at 1312.

162. *See* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). Professor Randall defines universal jurisdiction as "[providing] every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended." *Id.* at 788; *see also* Teachout, *supra* note 78, at 1312. Greater depth of history of the universality principle can be gained by review of the following sources: Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177 (1945); Thomas H. Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 LOY. L. REV. 43 (1968).

This exercise of jurisdiction calls on judges to make some difficult determinations: not only what is so universally hated that it should permit universal jurisdiction, but also what is reasonable.[163] No *stare decisis* bright lines exist to assist judges in this determination, nor is there a single express treaty defining what are universal offenses.[164]

D. The "Reasonability" Requirement

Under the *Restatement (Third) of Foreign Relations Law of the United States*, extraterritorially requires reasonability in the application of laws.[165] Factors listed by the *Restatement (Third)* for a court's consideration include:

> (a) the link of the activity to the territory of the regulating state . . . ;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

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163. *See supra* note 162. The difficulty of these decisions has caused some scholars to suggest everything from strict review under standards of due process to minimum contacts and forum non conveniens. Other scholars argue that:

> No fundamental distinction needs to be drawn between the jurisdictional problems raised by litigation involving international elements arising in an American court . . . and those raised by litigation in which the nonlocal elements are connected with sister states . . . . [T]he relevant constitutional considerations seem equally applicable to the interstate and the international case.

Arthur von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1122 (1966). For a more rigorous test of extraterritorial reasonableness, see Randall, *supra* note 11, at 65-66. Professor Randall suggests that:

> [J]udicial jurisdiction would be fair and reasonable in actions involving extraterritorial torts only where one or more of the following minimum contacts exist: defendant is a citizen or resident of the United States; defendant is an alien present, not just transitorily, in the United States; defendant, if a corporation, is a U.S. corporation or foreign corporation with "continuous and systemic" contacts in this country; defendant committed an extraterritorial tort which had a direct or foreseeable effect in the United States; and (perhaps) defendant has property in the United States.

Id. at 65. Of course this list is fairly exhaustive and as broad as any domestic due process minimum contacts requirements. Are Professors Von Mehren and Trautman right? Are the standards for international and interstate jurisdiction the same? This question is explored below in greater detail, but, briefly, the answer is no. Presumptions against extraterritorial application of domestic law and the original understanding of the Framers in passing the ATS suggest a far more limited scope.

164. Judges most often appear to look to customary international law, an amalgam of treaties, principles of *jus cogens*, and the facts of the case itself. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 880-84 (2d Cir. 1980).

165. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations . . . ;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.[166]

Clearly, these factors provide a court with broad discretion with which to extend or restrict the reach of American courts.[167] This is not in and of itself a bad thing, as courts frequently do similar things with respect to domestic application of personal jurisdiction.[168] What it does, however, is force judges to make a determination, in the absence of other jurisdictional factors, of whether universal jurisdiction should apply.[169]

Commentators disagree on not only the means by which universal jurisdiction ought to be found, but also the extent to which it should be

166. *Id.* § 403(2).

167. *See id*; *supra* note 164 and accompanying text.

168. And while subject matter jurisdiction on its face appears a matter less of discretion than of bright line rules (*i.e.*, the diversity and $75,000 requirements of federal diversity jurisdiction), courts are vested with discretionary powers of whether to exercise jurisdiction in cases of political question, where justiciability matters arise (mootness, standing, etc.), and under such doctrines as forum non conveniens. These forms of discretion are rarely, if ever, questioned. *But see* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 449-51, 497-511 (1996) (arguing that the Constitution creates a "natural presumption" favoring judicial review of otherwise "political questions" that can only be rebutted by particular constitutional provisions).

169. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). Again, the types of universal jurisdiction are territoriality, nationality, the protective principle, and the passive personality principle. *See supra* note 151 and accompanying text.

extended; no surprise given its fluidity and evolution.[170] While the reach of universality jurisdiction has expanded in definition, "every state remains free to adopt principles of extraterritorial jurisdiction that it regards as best and most suitable, provided such jurisdiction does not overstep the limits of international law."[171]

IV. (HOW) SHOULD THE ATS BE LIMITED?

To this point, this Article has explored the history of the ATS,[172] the manner in which it came into modern usage,[173] and some doctrines that might have limiting implications for its use.[174] Two things of great importance are brought to light by this background: (i) the relatively narrow scope in which the Founders saw the passage of the ATS, and (ii) the enormous breadth given the ATS by United States courts who apply it liberally.[175] The question we must ask is: are these propositions in harmony?[176] If they are not, the limits of the ATS must be determined.[177]

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170. Professor Randall argues for a minimum contact standard for the means and looks to past treaties and customary international law for the extent. *See supra* note 163 and accompanying text; *see also*, Randall, *supra* note 162, at 816-17. *Contra* Meron, *supra* note 147, at 21-22 (arguing that hierarchies of moral structures are appropriate as a *lex superior* means of protecting human rights). For a discussion of interesting implications of universal jurisdiction, see Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 241, 262 (2001) (asking whether "international law [should] establish some reasonable and principled rules to resolve otherwise difficult conflicts of jurisdiction"). *Id.* at 256.

171. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 VA. J. INT'L L. 1, 3 (1992). Professor Alford notes one of the most influential international law cases, *S.S. Lotus*, 1927 P.C.I.J. (ser. A) (No. 10), as expanding the potential reach of extraterritoriality but providing individual nations with greater discretion:

> Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules.

Id. at 3.

172. *See supra* notes 2-62 and accompanying text.

173. *See supra* notes 65-148 and accompanying text.

174. *See supra* notes 149-171 and accompanying text. There are a host of other doctrines which may limit the ATS but are outside the scope of this work. The curious reader is directed to the following, admittedly not exhaustive, sources: Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring) (declining to infer a cause of action under the law of nations where not explicitly given); Bradley & Goldsmith III, *supra* note 20; Aric K. Short, *Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation*, 33 N.Y.U. J. INT'L L. & POL. 1001 (2001) (suggesting continued forum non conveniens limits for the ATS); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS. INT'L & COMP. L. REV. 445 (1995) (arguing for a more limited understanding of the phrase "tort only"); and Teachout, *supra* note 78 (questioning whether the jurisdictional rules of customary international law limit the Offenses Clause).

175. *See supra* Parts II, III.

176. For a scholar strongly in agreement with this statement, see Dodge, *supra* note 55, at 256. Professor Dodge argues that *Filartiga* and its progeny are strongly in agreement with the original

A. Presumption Against Extraterritoriality and the Alien Tort Statute

United States law has historically and routinely presumed against extraterritorial application of United States statutes.[178] Congress, of course, is vested with express constitutional authority to expand the reach of statutes beyond the borders of United States territory.[179] Much like the Charming Betsy Doctrine,[180] the presumption against extraterritorial application of United States law "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord."[181] The Supreme Court assumes that unless there is an express provision to the contrary, "Congress legislates against the backdrop of the presumption against extraterritoriality."[182] Congress is assumed to have the acumen to extend laws it passes beyond territorial borders if it so intends.[183]

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understanding of the Founders. *See id.* He asserts "overwhelming evidence that the First Congress had a broad understanding of 'torts in violation of the law of nations' and enacted the Alien Tort Clause to provide a civil remedy against any who would violate that law." *Id.* Of course, Professor Dodge argues that the law of nations is an alterable body of law (it is) and, even though it has evolved since 1781 (it has), the Founders had a far broader understanding of the law of nations than Judge Bork allowed in *Tel-Oren* (they might have). *Id.* at 241. None of this, however, alters in the least the limitations this Article suggests taking note of: extraterritoriality and the universality principle.

177. *See supra* note 174 and accompanying text.

178. *See* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (holding that federal piracy statute did not extend to a robbery committed on the high seas by foreign citizens on board a foreign ship because of presumption against extraterritoriality). The Court reasoned that "general words" covering the conduct of "any person" should not be construed to cover the actions of anyone, anywhere. *Id.* at 631; *see also* McColloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 19-22 (1963) (refusing to extend National Labor Relations Act extraterritorially).

179. *See* U.S. CONST. art. I, § 8; *see also* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (stating "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States").

180. The *Charming Betsy* Doctrine states that "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) 64, 118 (1804) (emphasis added).

181. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). Arabian (or Aramco as it is called in the case), found Title VII of the Civil Rights Act inapplicable extraterritorially. *Id.* at 249. Congress almost immediately overruled it by statute on slightly different grounds, providing, in an amendment, that it was meant to have effect over United States citizens and employees of United States companies, thus recognizing extraterritorial application of Title VII in cases where an American is involved. *See* 42 U.S.C. § 2000e-1 (2003). The rule of presumption was not overruled, and in fact was reiterated by later Supreme Court cases. *See, e.g.*, Sale v. Haitian Centers Council, 509 U.S. 155 (1993); Smith v. United States, 507 U.S. 197 (1993).

182. Arabian Am. Oil Co., 499 U.S. at 248.

183. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440 (1989).

Thus, it is clear precedent that for any statute to be applied extraterritorially, this intent must be so expressed in the statute itself.[184]

1. Why No Serious Questioning of the ATS' Extraterritorial Nature?

No commentator has seriously considered limiting the ATS only because of the presumption against extraterritoriality.[185] Thus, the *Filartiga* court incorrectly applied an English case over 200 years old while never raising the presumption against extraterritoriality.[186] In all the ATS litigation published since then, the question of whether the ATS may be applied extraterritorially has not been raised by a court.[187] This may be because the statute saw only extremely limited use until the latter part of the 20th century.[188] Its use in *Filartiga* being the penultimate modern expression of the ATS, other courts may have assumed, since Congress and the Supreme Court made no criticism of *Filartiga* apparent, that such was correct.[189]

Since *Filartiga* has been cited by so many cases as the seminal ATS case, perhaps other courts have not had occasion to question *Filartiga's* conclusions.[190] It seemed clear to the *Filartiga* court that since the statute provided for jurisdiction over a tort committed against an alien in violation of the law of nations, this must mean the violation could have occurred outside United States territory.[191]

However, this understanding of the ATS does not comply with the standards of extraterritoriality as espoused by the Supreme Court or with the history and intent of the Framers who originally passed it.[192]

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184. *See supra* notes 185-88 and accompanying text.

185. It would be impossible to list every permutation of article seeking to expand or limit the ATS, but some of its principle "limiters" are Professors Bradley and Goldsmith. *See* Bradley & Goldsmith III, *supra* note 20, at 330.

186. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). This point is discussed in detail later.

187. A complete list of all published ATS litigation may be found at Appendix A. In only two cases is the word "extraterritoriality" even used and in neither is it used in connection with the ATS. *See* Aguinda v. Texaco, Inc., 1994 WL 142006, at *5 (S.D. N.Y. Apr. 11, 1994) (touching on extraterritoriality by stating that "the local action doctrine does not lead to automatic dismissal of any of plaintiffs' claims on the current record," but declining to expressly analyze extraterritoriality of United States environmental laws); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D. N.Y. 1991) (discussing extraterritoriality of RCRA).

188. Only one case utilized the statute prior to *Filartiga* in the 20th century. *See* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (utilizing § 1350 as the basis for jurisdiction over custody suit between aliens). *Adra* claimed falsifying a passport application was a violation of the law of nations and, thus, is questionable at best as an illustration of current understanding of appropriate violations. *See id.* at 865.

189. *See Filartiga*, 630 F.2d 876 (2d Cir. 1980).

190. *See supra* note 192 and accompanying text.

191. *See Filartiga*, 630 F.2d at 887.

192. *See infra* notes 195-205 and accompanying text.

2. Background to the ATS in the Extraterritorial Context

First, the history of the ATS's passage must be reexamined.[193] Although the commentators and evidence each present a slightly different spin on the rationale for the ATS, it can be said that providing a forum for foreign plaintiffs in federal court was the primary purpose, with a concurrent intent to enshrine a fledgling country with the mantle of legitimacy that comes with protecting the international community.[194] Note once again the twin cases of *De Longchamps* and the *Dutch Ambassador* affair.[195] Both certainly involved aliens suing for a tort.[196] Both occurred on American soil.[197] Obviously it would be overly basic to suggest the entire purpose of the Alien Tort Statute was to satisfy the ire of two foreign dignitaries.[198]

But upon reexamination of other contemporaneous literature, the reasoning for passage of the ATS seems no less geocentric.[199] The primary concern of the Federalists was a sole federal authority rather than the individual (and often lacking) state interpretations of international law and issues.[200] Protection of international human rights was never mentioned in *The Federalist*.[201]

Scholars who would argue with this position might point not only to an incident,[202] but to the essential characteristics of the law of nations as defined by Blackstone.[203] First, they might point to the Sierra Leone incident,[204] in which the French assaulted British holdings in Sierra Leone, led by an American slave and with assistance from other Americans.[205] Then-Attorney General Bradford explained:

193. This summation is a simplified version of Part II(A) of this Article.

194. *See supra* notes 50-65 and accompanying text.

195. *See supra* notes 32-36, 40-44 and accompanying text.

196. *See id.* Of course, today it is unlikely these would be found as violations of the law of nations if the principles had not been ambassadors.

197. *See id.*

198. *See supra* notes 30-32 and accompanying text.

199. The reader should once again refer to THE FEDERALIST NO. 3 (John Jay), NO. 42 (James Madison), NO. 80 (Alexander Hamilton). *See also supra* notes 37-38 and accompanying text.

200. *See* THE FEDERALIST NO. 3 (John Jay), NO. 42 (James Madison), NO. 80 (Alexander Hamilton). Consider also the federalism concerns. *See supra* note 38.

201. *See id.*

202. *See supra* note 53 and accompanying text.

203. *See supra* notes 45-47.

204. *See supra* note 53 and accompanying text.

205. 1 Op. Att'y Gen. 57, 58 (1795).

> [T]here 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; . . . such a suit may be maintained by evidence taken at a distance . . . .[206]

Sierra Leone would almost certainly have been deemed an act of piracy.[207] Most compelling, however, is that while Attorney General Bradford made the above statement with respect to the *character of the offense*, he expressly refused to extend United States jurisdiction over the action *precisely because of the locus of the offense*.[208]

3. Filartiga's Extension of the ATS Conflicts with the Current Supreme Court Understanding of Transitory Actions

Second, and far more complicated, commentators might point to the existence of so-called "transitory" actions of the 18th century.[209] Such scholars might point to the example of Lord Mansfield's opinion in *Mostyn v. Fabrigas*.[210] *Mostyn* is generally held to be the foundation for extending state-jurisdiction over actions that arise in foreign states.[211] The *Filartiga* court recognized this when it asserted, "*Mostyn* came into our law as the original basis for state court jurisdiction over out-of-state torts, and it has not lost its force in suits to recover for a wrongful death occurring upon foreign soil, as long as the conduct complained of was unlawful where

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206. *Id.* at 59.

207. *See* FYFE, *supra* note 53, at 59. As an act of piracy, a civil action would have been thought advisable even with respect to an act committed outside United States territory in part because of maritime and admiralty jurisdiction, and in part due to the concurrent and prevailing thought of Blackstone that included piracy among the immutable violations of the law of nations. *See* BLACKSTONE, *supra* note 45, at 66-73.

208. 1 Op. Att'y Gen. 57, 58 (1795). Professor Casto takes issue with this characterization, claiming that "this aspect of the opinion is questionable." Casto, *supra* note 6, at 503 n.202. He so asserts this apparently because of the "'home cookin'" aspect of the case (the slaver/attacker being American). *See id.* Whether Professor Casto's assertion is correct or not, the fact remains that at no time surrounding the passage of the ATS was an actual ATS case applied extraterritorially.

209. *See* Casto, *supra* note 6, at 503.

210. 98 Eng. Rep. 1021 (K.B. 1774).

211. *See* McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843).

> [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.

Id.

performed."[212] *Filartiga* misapplied *Mostyn*, however.[213] This is clear when we turn to the Supreme Court's interpretation of the meaning of *Mostyn*:

> As was well settled at English common law before our Republic was founded, a nation's personal sovereignty over its own citizens may support the exercise of civil jurisdiction in transitory actions arising in places not subject to any sovereign. . . . [I]t is clear that the States also have ample power to exercise legislative jurisdiction over the conduct of their own citizens abroad or on the high seas.[214]

Transitory jurisdiction, as the Supreme Court has asserted throughout the history of United States jurisprudence, exists to *extend jurisdiction over citizens of the forum state.*[215]

Professor Casto also points, however, to the opinion of Judge Oliver Ellsworth's *Stoddard v. Bird.*[216] The key thing to note about *Stoddard* is that while Judge Ellsworth stated that the "[r]ight of action [for a tort arising in New York] against an administrator is transitory, and the action may be

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212. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (D.C. Cir. 1980) (citations omitted); *see also* Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120 (1904); Dennick v. R.R. Co., 103 U.S. 11 (1880); McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843). *Filartiga* translated an 18th century English court's understanding of transitory jurisdiction into a modern 20th century Second Circuit understanding, while ignoring prior Supreme Court jurisprudence directing courts how to interpret and use *Mostyn* and its principles.

213. *Filartiga*, 630 F.2d at 885. Essentially, *Filartiga's* assertion that the transitory principle "has not lost its force in suits to recover for a wrongful death occurring upon foreign soil, as long as the conduct complained of was unlawful where performed," *id.*, should have been amended to read: *was unlawful where performed and caused by a citizen of the forum country. See infra* notes 213-18 and accompanying text.

214. Smith v. United States, 507 U.S. 197, 212-13 (1993) (Stevens, J., dissenting). Justice Stevens referred not only to *Mostyn* but also to *Dutton v. Howell,* 1 Eng. Rep. 17, 21 (H.L. 1693). *Id.* at 212 (Stevens, J., dissenting). Justice Stevens continued:

> As Justice Holmes explained, "No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as adequate, such [civilized nations] may treat some relations between their citizens as governed by their own law, and keep to some extent the old notion of personal sovereignty alive."

Id. (quoting Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355-56 (1909)). This also explains why piracy (an action on the high seas) and even the Sierra Leone incident (an action involving a citizen of the United States) would fall within the 18th century understanding of transitory actions but not prove what so many commentators and the *Filartiga* court hoped they did: extraterritoriality of the ATS.

215. *Id.*

216. Casto, *supra* note 6, at 499-503. *Stoddard* involved a complicated estate and debt action, which effectively resulted in a Connecticut resident being found and held in New York to be tried. *See id.*

brought wherever he is found," all the events in question occurred within United States territorial boundaries.[217]

As the Supreme Court correctly noted in *Smith*, transitory actions have always been used only within United States territory.[218] Further support for this unassailable position may be found in Moore's *Federal Practice*.[219]

4. The Torture Victim Protection Act

The passage of the TVPA also emphasizes the lack of extraterritoriality in the ATS.[220] Reasoning for the passage of the TVPA included, first and foremost, the granting of a right to sue to United States citizens.[221] This was because, by its plain terms, the ATS did not confer such a right.[222]

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217. *See id.*

218. *Smith*, 507 U.S. at 212-15 (Stevens, J., dissenting).

219. *See* Kaiser Steel Corp. v. Fulton, 261 F. Supp. 997, 999 (D. Colo. 1966) (citing 1 MOORE, FEDERAL PRACTICE ¶ 142[2.-1], pp. 1455-56). The district court summed up Moore's position:

> The difference between a transitory and a local action is not clear. It is said that local actions are those which could have arisen in only a particular place whereas transitory actions are those which could have arisen anywhere. Sometimes it is a matter of the nature of the relief requested. Professor Moore maintains that the true distinction is in terms of the character of the remedy sought. Thus, if the effort is to proceed against property, the action is *in rem* and local; on the other hand, if it is a suit against the person, it is transitory.

Id. at 999 (citations omitted); *see also* Livingston v. Jefferson, 15 Fed. Cas. 660 (C.C.D. Va. 1811) (No. 8,411); Mostyn v. Fabrigas, 98 Eng. Rep. 1021, 1029 (K.B. 1774).

220. Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73.

221. *See* Short, *supra* note 174, at 1068. Mr. Short explains:

> U.S. interests underlying the TVPA are much clearer, largely because legislative history exists for that act. As explained in the House and Senate Judiciary Committee reports on the TVPA, Congress felt the Act was necessary, despite the existence of the ATS, for a variety of reasons: (1) to expand the class of plaintiffs that could bring suit for human rights violations to include U.S. citizens; (2) to give special attention to the international torts of official torture and summary execution; (3) to carry out the intent of the Convention Against Torture; and (4) to make clear that Congress agreed with the broad *Filartiga* interpretation of the ATS and rejected Judge Bork's narrow concurring opinion in *Tel-Oren*.

Id.

222. 28 U.S.C. § 1350 (2003). Since during the 18th century the First Congress would not have considered transitory jurisdiction possible for aliens, but certainly Congress in passing the TVPA realized providing United States citizens the right to sue might carry with it a transitory, prescriptive jurisdiction, it is clear the ATS has not been afforded extraterritoriality. It is not clear whether extraterritoriality ought to be found in the TVPA. Given the vast reference to foreign nations, to exhaustion of remedies in the country "in which the conduct giving rise to the claim occurred," and the already referenced reasons for passing the TVPA, it is likely Congress intended extraterritoriality, but it is by no means certain. Considering that the Supreme Court has been divided on the past three major extraterritoriality decisions (*Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991); and *Smith v. United States*, 360 U.S. 1 (1959)), such an intention remains in doubt.

5. The Statute and Historical Presumption

The words of the ATS are terse and have been called everything from vague to "a legal lohengrin."[223] But, they do not contain any indication the statute was intended to be used beyond United States territory.[224] It could be argued that the modern precept regarding a presumption against extraterritoriality was not, and could not, have been in the contemplation of the Framers upon passage of the ATS.[225]

Perhaps the earliest domestic case expounding upon the presumption against extraterritoriality was *State v. Carter*.[226] *Carter* refused to extend

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223. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

224. *See* § 1350.

225. But what about the blatant reference to piracy and admiralty in Blackstone's *Commentaries* and the U.S. Constitution? Don't these occur outside of United States territory? Surely Congress must have intended these to be covered by the ATS.

The history and understanding of the "high seas" and admiralty jurisdiction is unique and somewhat counterintuitive. Reduced to basic terms, jurisdiction over ships and persons on the high seas was considered domestic jurisdiction by early United States courts. *See, e.g.*, State v. Carter, 27 N.J.L. 499 (N.J. 1859). In *Carter*, the court noted:

> [C]rimes may be committed on the high seas, in lands where there are, or where there are not regular governments established. When done upon the high seas, they may be either upon our vessels or upon vessels belonging to other governments. When done upon our vessels, in whatever solitary corner of the ocean, from the necessity of the case, and by universal acceptance, the vessel and all it contains is still within our jurisdiction, and when the vessel comes to port the criminal is still tried for *an act done* within our jurisdiction. But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government.

Id. at 502.

Judge Bork noted that in the passage of the First Judiciary Act, the express grant of admiralty and maritime jurisdiction went to the district courts:

> "Sec. 9. *And be it further enacted,* That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United states, committed within their respective districts, or upon the high seas."

Tel-Oren, 726 F.2d at 785 n.15 (Bork, J., concurring) (quoting Judiciary Act of 1789, § 9, 1 Stat. 73, 76-77 (1789) (current version at 28 U.S.C. § 1350 (2003))). The First Congress granted *an express and limited* extraterritorial authority to district courts over crimes on the high seas. *See id.* Thus, insofar as prescriptive jurisdiction is concerned, the "high seas" are "defined" under the Offenses Clause (per section 8 of Article I of the Constitution) as United States territory for the purposes of district court jurisdiction, and therefore are a de facto United States nexus.

Thus, Congress could easily have contemplated actions arising out of maritime or admiralty jurisdiction that fell within a non-extraterritorial ATS – they provided expressly for this contingency by authorizing separate concurrent jurisdiction via section 9 of the Judiciary Act.

226. 27 N.J.L. 499 (N.J. 1859). The court in *Carter* did not address issues of transitory jurisdiction expressly, but implicitly rejected them. *Id.* at 499-500. Judge Vredenburgh explained that:

generalized jurisdiction over a criminal act even in just another state based on a presumption against extraterritoriality.[227] *Carter* was a state court case involving a manslaughter claim across the New Jersey-New York border, and thus it did not factually involve questions of international law.[228] The *Carter* court did, however, touch on crimes of general jurisdiction over which the court thought it could extend jurisdiction extraterritorially without express authority in the statute.[229] More importantly, the United States Supreme Court explicitly referred to *Carter* as support for its later extraterritorial jurisprudence.[230]

> If the acts charged in this indictment be criminal in New Jersey, it must be either by force of some statute or upon general principles. There is no statute, unless it be the act to be found in *Nix. Dig.* 184, § 3. But this evidently relates to murder only, and not to manslaughter.
>
> But I cannot make myself believe that the legislature, in that act, intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defendant within our own. Such an enactment, upon general principles, would necessarily be void; it would give the courts of this state jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons in all cases where personal injuries are followed by death.

Id. at 501.

227. *See id.*

228. *See id.*

229. *See id.* at 502. The court explained:

> [Some] crimes may be committed on the high seas, in lands where there are, or where there are not regular governments established. When done upon the high seas, they may be either upon our vessels or upon vessels belonging to other governments. When done upon our vessels, in whatever solitary corner of the ocean, from the necessity of the case, and by universal acceptance, the vessel and all it contains is still within our jurisdiction, and when the vessel comes to port the criminal is still tried for *an act done* within our jurisdiction. But we have never treated acts done upon the vessels of other governments as within our jurisdiction, nor has such ever been done by any civilized government.
>
> When an act *malum in se* is done in solitudes, upon land where there has not yet been formally extended any supreme human power, it may be that any regular government may feel, as it were, a divine commission to try and punish. It may, as in cases of crime committed in the solitudes of the ocean, upon and by vessels belonging to no government, *pro hac vice* arrogate to itself the prerogative of omnipotence, and hang the pirate of the land as well as of the water. Further than this it could not have been intended that our statute should apply.

See id. at 502.

230. *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

The first such case was *American Banana Co. v. United Fruit Co.*[231] In *American Banana*, the Court reviewed the complaint of a corporation with operations based in Costa Rica[232] against a domestic company for alleged violations of the Sherman Anti-Trust Act.[233] The Supreme Court espoused for the first time in plain language the presumption against extraterritoriality in federal law: "All legislation is prima facie territorial."[234] The Supreme Court refused to extend extraterritorial application over acts committed in Costa Rica, even where the actor was a United States corporation to which the Court admitted the Sherman Antitrust Act would otherwise apply.[235]

Emphasizing the accepted statute of the presumption doctrine, the Supreme Court applied a domestic statute extraterritorially in *Blackmer v. United States*.[236] *Blackmer* considered the case of an American citizen living in Paris, France, and his refusal to answer subpoenas issued him by the courts of the District of Columbia.[237] The Court found that because

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231. *Id. American Banana Co.* was later overturned on other grounds, but continued to be cited for its propositions regarding extraterritorial application of domestic law. *See* Blackmer v. United States, 284 U.S. 421, 437-38 (1932). Contemporaneous with these domestic decisions, the seminal international case of *S.S. Lotus* suggested similar precepts: "Now the first and foremost restriction imposed by international law upon a state is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State." S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10.

232. The corporation was organized in New Jersey, however. *See American Banana Co.*, 213 U.S. at 354.

233. *See id.* at 353-54.

234. *Id.* at 357. The Court continues:

> Words having universal scope, such as "every contract in restraint of trade," "every person who shall monopolize," etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue.

Id.

235. *See id.* The Court explained, however, that it felt the actions in Costa Rica would not otherwise be subject to the Sherman Antitrust Act, but this does not alter the Court's extraterritorial analysis:

> We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged but need not be discussed.
>
> For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute.

Id.

236. 284 U.S. 421 (1932).

237. *Id.* at 433. *Blackmer* is most often cited for its law concerning citizens, allegiance, and due process. *See, e.g.*, United States v. Thompson, 319 F.2d 665 (2d Cir. 1963).

Blackmer remained a citizen of the United States, discovery statutes requiring his response maintained the ability to exercise jurisdiction over him.[238] The Court recognized the presumption against extraterritoriality, however, when it stated:

> While the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States, the question of its application, so far as citizens of the United States in foreign countries are concerned, is one of construction, not of legislative power.[239]

Such ruling was one of the primary sources in *Filardo*,[240] discussed previously, and brings this Article full circle back to the modern presumption against the extraterritoriality doctrine of *Arabian American Oil* and *Smith v. United States*.[241]

6. The Background Combined with the Language and Presumption Leave No Doubt the ATS Was Not Intended to Be Extraterritorially Applied

Congress did not intend the ATS to be applied extraterritorially.[242] Although the modern concept of presumption against extraterritoriality has only been expressed in these terms during the last century,[243] the concept and reasoning behind this presumption have remained ingrained in American jurisprudence and policy since the Founders passed the ATS.[244] Given this background, it is likely that if Congress had meant to impart extraterritorial

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238. *Id.* at 434-39. No express mention of "transitory" jurisdiction is made, suggesting its use had, by this point in American jurisprudence, fallen out of common usage, although this is precisely the situation discussed by *Mostyn*.

239. *Id.* at 436-37. The Court explained why jurisdiction was proper, however:

> By virtue of the obligations of citizenship, the United States retained its authority over him, and he was bound by its laws made applicable to him in a foreign country. Thus, although resident abroad the petitioner remained subject to the taxing power of the United States. For disobedience to its laws through conduct abroad he was subject to punishment in the courts of the United States. With respect to such an exercise of authority, there is no question of international law, but solely of the purport of the municipal law which establishes the duties of the citizen in relation to his own government.

Id. (citations omitted).

240. Foley Bros. v. Filardo, 336 U.S. 281, 284-85 (1949).

241. *See supra* notes 186-87 and accompanying text.

242. *See supra* notes 186-245 and accompanying text.

243. *See, e.g.*, *Filardo*, 336 U.S. at 285.

244. *See, e.g.*, McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843) (Supreme Court's interpretation of *Mostyn*).

application of the ATS upon its passage, it would have done so.[245] Since even if the language of the statute was ambiguous in this regard (it is not), the presumption would be in favor of not applying the statute extraterritorially, and such must be the conclusion reached.[246]

Understanding the ATS in light of the manner in which transitory jurisdiction was understood in the 18th century, how it remains viewed by the Supreme Court, and Congress' most recent expression on a similar topic all demonstrate why Congress did not intend the ATS to be applied extraterritorially.[247]

B. Universal Jurisdiction: A "Case Study" in Why Extraterritoriality Is Inappropriate[248]

What is jurisdiction?[249] First, it is the power of a court to assert authority over legal interests.[250] This power is only extended in cases absent a nexus with the forum state where the acts of the defendant have been alleged to be so egregious that they fall within a universally hated sphere of wrongs.[251] This is universal jurisdiction.[252] These limits may be extended or

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245. § 1350 contains no such mention.

246. This is the nature of a presumption. *Without an express provision to the contrary, the presumption must be adopted.* What this means for the ATS is discussed in Part V.

247. *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991). The ramifications of this conclusion are discussed in Part V.

248. This Article does not address the *forum non conveniens* concern. While this issue has strong supporters arguing both for its application and against it, such is outside the scope of this Article. For a compelling discussion of this issue, compare Short, *supra* note 174, with Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 49-51 (1998).

249. *See* Randall, *supra* note 162, at 786.

250. *See id.*

251. *See id.* at 791-819, 834-37.

252. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987). The universality principle is explained briefly in notes 160 to 164. At this juncture, a careful reader will note some intersection between the prior issue (extraterritoriality) and the current (universality).

A juxtaposition of these two issues (extraterritoriality in general and universal jurisdiction) may be confusing – the first involves the power of a court to extend a domestic statute over territory not of the United States; the second involves the power of a court to extend its jurisdiction over a party with no connection to the United States. *See supra* notes 162, 171 and accompanying text. These are distinct issues. The point at which they intersect is unclear and not often addressed by courts or scholars. The confusion may be illustrated by the following hypothetical example:

Consider the case of Domestic Statute *A*, Corporation *B*, and Individual *C*. Corporation *B* is a British Corporation with operations in India. Individual *C* is an Indian citizen. Domestic Statute *A* provides stiff penalties for any corporation doing business in the United States that bribes local officials of foreign countries to better situate their business position (such as the Foreign Corrupt

constricted in accordance with a nation's domestic law.[253] These limits may be expanded or constricted by international law such as treaties.[254] They are, of course, subject to the doctrine of *jus cogens*.[255] For a United States court to seek reliance upon universal jurisdiction, the case or controversy, by definition, cannot include any United States "nexus."[256] Thus, United States courts are making determinations of their own jurisdiction over foreigners with potentially no connection to the United States other than having an United States lawyer.[257]

To determine how far the universality principle should be applied in light of the ATS and what this means for the ATS' extraterritorial application, it is helpful to survey the principle sources and users of the doctrine.[258]

1. The Restatement Approach

Earlier in this Article, it was explained that universal jurisdiction derives from offenses considered so terrible that they are an evil against all of humanity.[259] Commentators and courts all use different precise

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Practices Act). If Individual *C* sues Corporation *B* in a United States court, first the individual needs to show that the court has power to hear the dispute. The court must determine if one of the traditional five types of prescriptive jurisdiction exists. The court quickly notes that the action does not occur within U.S. territory and no U.S. nationals are involved. The passivity principle does not apply since no U.S. citizen is being harmed. United States military/protective interests are not implicated, but there may be a question of fact as to whether there are actual effects within the United States. The universality principle (discussed at length below) only applies if the alleged violation is so egregious that the actor is considered an enemy of humanity. Let us assume (for now) such does not exist here. Thus, the court must determine whether direct effects occur within the United States. *See id.* § 402. The court must also determine that the exercise of jurisdiction would be reasonable. *See id.* § 403. Then, and only then, can the court determine if Domestic Statute *A* even applies extraterritorially – but the court must bear in mind the analysis it performed in extending prescriptive jurisdiction in the first place to ensure these analyses are consistent since they likely involve some of the same arguments and facts. It is possible to find jurisdiction based on the protective principle, for example, but no extraterritoriality, since such need not come hand-in-hand; it is difficult, however, to find prescriptive jurisdiction based on the nationality principle (that the actor is a national of the forum state) without extending extraterritoriality under United States law, given the pronouncement of *Blackmer* and its progeny. (Of course, this is what happened in the *American Banana* case). Thus, the reader is cautioned for the purposes of this analysis to be wary of places where these issues intersect and treat them separately, but consistently.

253. *See* Alford, *supra* note 171, at 3.

254. *See* Randall, *supra* note 162, at 815-18.

255. *See* Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation:* Jota v. Texaco, Inc. *and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93, 108-09 (2000).

256. *See* Randall, *supra* note 162, at 785.

257. *See supra* notes 170-76 and accompanying text.

258. *See supra* notes 255-57 and accompanying text.

259. *See generally* Randall, *supra* note 162, at 785. Universal jurisdiction may comfortably be split into two inquiries: the meaning of "universal," and the meaning of "jurisdiction." It is primarily the first question with which this Article is concerned. For a discussion of the second, see Sadat,

terminology,[260] but the gist is that "[a] state has jurisdiction to define[261] and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . . ."[262] The Restatement lists seven primary offenses that fall within this list: "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps certain acts of terrorism."[263]

The reason these offenses ostensibly are given higher status within the international community is that they are crimes "of all mankind."[264] Commentators have phrased the rationale "to bring perpetrators of the most heinous international crimes to justice."[265] The primary issue with the Restatement appears to be that the violation is of "mutual" concern to the world community.[266]

2. Jus Cogens and Customary International Law

Not only the definitions, but also the character of these crimes bear striking similarities, if not a veritable mirror image, to the prohibitions found under the doctrine of *jus cogens*.[267] *Jus cogens* is a doctrine of international law that addresses unconscionability, any sanctioned genocide, slavery, extrajudicial killing, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights and will cancel all agreements or other laws of international character to the contrary.[268] The similarities between what has

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supra note 170, at 245-55.

260. And this may be part of the problem.

261. The "define" portion of section 404 of the Restatement (Third) is an enigma within the section itself, but also arguably conflicts with the United States Constitution, Article I, section 8. This must remain a discussion for another day.

262. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

263. *Id.*

264. Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U.- DCL J. INT'L L. 1, 1 (2000).

265. Johan D. van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice, and National Self-Righteousness*, 50 EMORY L.J. 775, 776 (2001).

266. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980) (interpreting the Restatement).

267. *See* Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1183 (D.C. Cir. 1994). The *Princz* court phrased this conjunction of ideas:

> Under the principle of universal jurisdiction, for certain offenses (including, but not limited to, *jus cogens* violations) a state can exercise jurisdiction over an offender in custody even if that state has neither a territorial link to the offense nor any connection to the nationality of the victim or offender.

Id. at 1182 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 cmt. a, reporter's n.1 (1987)).

268. *See* Meron, *supra* note 147, at 14.

thus far been addressed as "customary international law" by numerous scholars, the *Filartiga* and *Tel-Oren* courts, and that list of *jus cogens* violations are striking, albeit less mirror-imaged than that of *jus cogens* and the universality prohibitions.[269]

3. Filartiga's Concept of Prescriptive Jurisdiction

Are violations of customary international law alone enough to justify application of universal jurisdiction?[270] This question may seem simply answered, emphatically even, by a resounding "no," given the language of the Restatement, but the *Filartiga* court seemed to think otherwise:

> 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.[271]

According to *Filartiga*, the law of nations includes violations of "mutual" concern to the world community.[272]

According to this reasoning, the best place to go to look for a definition of these "universally offensive" acts would be customary international law.[273] Logically, then, *any offense against customary international law should be subject to universal jurisdiction.*[274] If the universality principle

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269. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987). The Restatement provides a list of violations over which universal jurisdiction may be made, but is this list exhaustive? Many scholars argue not. *See, e.g.*, Arlow, *supra* note 255, at 108-09; Susan Jenkins Vanderweert, Comment, *Seeking Justice for "Comfort" Women: Without an International Criminal Court, Suits Brought by World War II Sex Slaves of the Japanese Army May Find Their Best Hope of Success in U.S. Federal Courts*, 27 N.C. J. INT'L L. & COM. REG. 141 (2001). Conversely, should the list be expanded at all? Not without express pronouncement from Congress under its power to "define . . . the law of nations." U.S. CONST. art. I, § 8.

270. Contrary to the *Filartiga* assertion, to violate customary international law does not require a crime of great moral turpitude. The Marbois affair, *see supra* note 34 and accompanying text, illustrates this: clearly such occurrence was in the minds of the Framers upon the ATS' passage, and there is no doubt among the current scholarship that offenses against ambassadors qualified as a violation of the law of nations, yet such has never been granted the "heinous" status other crimes against humanity are given in order to provide for prescriptive universal jurisdiction.

271. *Filartiga*, 630 F.2d at 888.

272. *Id.*

273. *See id.*

274. *See id.* The *Filartiga* court seemed to suggest this when it asserted:

> 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

only applies to crimes so heinous that it is *more* restrictive than the definition of customary international law, the question arises: what are acts that violate the law of nations that are *not* covered by universal jurisdiction?[275]

4. How Courts Since Filartiga Have Used Universality

A brief survey of how other courts since *Filartiga* have applied the universality principle is in order.[276] Primary among the ATS case law is *Tel-Oren*.[277] In *Tel-Oren*, Judge Edwards concluded that universal jurisdiction would be proper for piracy or other like-considered crimes.[278] Thus, Judge Edwards would have found universal jurisdiction over the plaintiffs' claims in *Tel-Oren* but for the plaintiffs' inability to "point to a right to sue in international law."[279]

Next in importance is *Kadic v. Karadzic*.[280] In *Kadic*, the court held that

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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.

Id. at 885.

275. In fact, *Filartiga* never uses the phrase "universal jurisdiction." *See generally id.* Instead, the court in *Filartiga* based jurisdiction on a complicated state-jurisdiction analogy. *See id.* at 885-87. Given the facts of *Filartiga*, there could not have been any other kind of prescriptive jurisdiction than universal.

276. *Filartiga* was decided in 1980. Since then, over 1000 rulings have been issued in ATS-related cases in federal court. A complete list of ATS-related cases may be found at Appendix A.

277. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). Judge Edwards gives the best review of universality in *Tel-Oren*, and, thus, this portion of the Article focuses on his concurrence.

278. *Id.* Judge Edwards asserted:

> Judge Kaufman characterized the torturer in *Filartiga* as follows: "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." The reference to piracy and slave-trading is not fortuitous. Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them.

Id. (citation omitted) (quoting *Filartiga*, 630 F.2d at 890). One writer explained it this way:

> Before International Law in the modern sense of the term was in existence, a pirate was already considered an outlaw, a "*hostis humani generis*." According to the Law of Nations the act of piracy makes the pirate lose the protection of his home State, and thereby his national character. . . . Piracy is a so-called "international crime"; the pirate is considered the enemy of every State, and can be brought to justice anywhere.

Id. (alteration in original) (quoting 1 L. OPPENHEIM, INTERNATIONAL LAW § 272, 609 (8th ed. 1955)); *see also* OPPENHEIM, *supra*, § 151, 339 (each state may punish piracy, slave trade on capture of the criminal, or other similar crimes, whatever the nationality of the perpetrator).

279. *Tel-Oren*, 726 F.2d at 779 n.5 (Edwards, J., concurring)

280. 70 F.3d 232 (2d Cir. 1995).

subject matter jurisdiction did exist, and implicitly adopted the *Filartiga* rationale that as long as the offenses were against the law of nations, extraterritorial power could be exercised over the defendants.[281] Other courts have held similarly, never seeming to question the application of extraterritoriality via the universality principle once the offenses to the law of nations were either admitted or denied.[282]

5. What Does Universal Jurisdiction Exist to Do?

First, what universal jurisdiction does *not* exist to do should be noted.[283] It does not exist to duplicate other kinds of prescriptive jurisdiction.[284] The four other prescriptive jurisdictions are territoriality, nationality, the protective principle, and passive personality.[285] These types of jurisdiction each require a United States "nexus," unlike universality.[286] Universality is called for only when one of the other types of prescriptive jurisdiction is lacking.[287] Thus, it permits something no other kind of jurisdiction (either international or domestic) permits – jurisdiction over a case in which the parties and locus potentially have absolutely no connection to the forum

281. *See id.* at 241. The court explained:

> 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, 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, such as the tort actions authorized by the Alien Tort Act.

Id. at 240 (citations omitted).

282. *See, e.g.*, Alvarez-Machain v. United States, 266 F.3d 1045, 1049-50 (9th Cir. 2001) (failing to reach question of whether kidnapping violates jus cogens norm and thereby the law of nations under the ATS but never questioning universal principle); Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 552-53 (S.D. N.Y. 2001) (holding environmental suit did not sufficiently allege violation of customary international law and *forum non conveniens* would be applicable anyway); Doe v. Unocal Corp., 963 F. Supp. 880, 890 (C.D. Cal. 1997) (quoting *Trajano v. Marcos*, 978 F.2d 493, 500 (9th Cir. 1992), for the proposition that "jurisdiction may be based on a violation 'of a jus cogens norm which enjoys the highest status within international law'"). Query: is forum non conveniens merely a tool for courts to avoid extraterritorial application of the ATS? If the ATS was intended to provide a forum in federal court for aliens, and the federal court can transfer or dismiss an action based on the inconvenient forum doctrine, are the courts being true to the statute?; *See also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999) (holding that plaintiff failed to allege violations sufficient to be counted among "customary usage and clearly articulated principles of the international community").

283. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

284. *See id.* §§ 402, 404.

285. *See id.*

286. *See* Alford, *supra* note 171, at 19.

287. *See* Randall, *supra* note 162, at 788-89.

state.[288]

The universality principle exists to permit states to exercise jurisdiction over acts so egregious they dare not let such acts go unpunished[289] – acts where the forum state as a member of the international community feels as a matter of justice that such should not go unpunished – and it otherwise would.[290] Sometimes this may be used in conjunction with the ATS to grant a court jurisdiction to hear the claim of an alien with no other means of recourse.[291]

C. *The Universality Principle and the ATS*

The universality principle must be applied narrowly and with great care, if it is to be applied at all.[292] A well-meaning scholar might ask, "why?"[293] Many of the reasons have already been discussed, but one primary concern (and that raised by Judge Robb in *Tel-Oren*)[294] is the political question doctrine.[295]

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288. Thus, eliminating forum non conveniens as Professor Boyd suggests would create a vehicle for litigation where there is no more connection or reason for the parties to find themselves in an American court other than that they want to. *See* Boyd, *supra* note 248, at 49-51; *supra* note 282 and accompanying text. A more detailed and eloquent defense of forum non conveniens in human rights litigation may be found in Short, *supra* note 174.

289. *See* Randall, *supra* note 162, at 790.

290. *Id.* at 838-39.

291. *See, e.g.,* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (granting jurisdiction over one alien's claim against another with no other form of prescriptive jurisdiction than the universality principle).

292. The Restatement appears to comport with this suggestion. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987). Remember also that we are still reviewing the doctrine of extraterritoriality within the microcosm of universal jurisdiction. *The presumption still applies in cases of the universality principle*!

293. *See, e.g.*, Boyd, *supra* note 248, at 49-51 (arguing forum non conveniens should be inapplicable in human rights litigation because common law doctrine is trumped by legislative intent to provide forum).

294. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 790 (D.C. Cir. 1984) (Robb, J., concurring). Note that the executive branch has issued directives regarding the ATS. *See* Kadic v. Karadzic, 70 F.3d 232, 239-40 (2d Cir. 1995) ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law."). Such a pronouncement does not always make it easier for courts to apply statutes and doctrines, however. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71 (2d Cir. 1949) (discussing the *Bernstein* exception, which possibly permits evidence of the state department's thoughts on foreign affairs issues in federal court); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 469 (1964) (White, J., Dissenting) ("[A]n official stand is what the Department must take under the so-called *Bernstein* exception, which the Court declines to disapprove.").

295. *See* Henkin, *supra* note 9, at 144. "That there is a 'political question' doctrine is not

1. The Political Question Doctrine

The Supreme Court's jurisprudence has shaped and defined the political question doctrine starting with the seminal case of *Marbury v. Madison*.[296] Chief Justice Marshall noted in *Marbury* that while it is the province of the courts to "say what the law is," there are some acts of government not subject to "[examination] in a court of justice."[297] Since *Marbury*, the Court has used the doctrine sparingly, but consistently, in the area of foreign relations.[298] Foreign relations have routinely been subject to the use of the political question doctrine.[299]

The Supreme Court explained in *Baker v. Carr* that it is the responsibility of courts to make the determination of whether an issue has been committed to another branch of the government. "Deciding whether a matter has . . . been committed by the Constitution to another branch . . . is itself a delicate exercise in constitutional interpretation, and [the responsibility of the Supreme] Court as ultimate interpreter of the Constitution."[300]

Baker provided future courts with a list of six factors to use to determine the justiciability of a potential political question.[301] Political questions are characterized by:

> [1] a commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards

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disputed, but there is little agreement as to anything else about it . . . ." *Id.* The political question doctrine is not without controversy in and of itself, but the majority of commentators and courts have recognized its validity and need since *Baker v. Carr*. For a contrary view on the propriety of the political question doctrine, see Pushaw, Jr., *supra* note 168.

296. 5 U.S. (1 Cranch) 137, 165 (1803).

297. *Id.* at 177.

298. *See, e.g.*, Doe v. Braden, 57 U.S. (16 How.) 635 (1853) (holding that ratification by foreign government is a political question); Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829) (determining that a territorial boundary dispute is a political question); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818) (recognizing that establishing formal relations with a new foreign government is a political question).

299. Foreign affairs are a primary aspect of national power expressly delegated by the Constitution to Congress and the Executive. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2, 3 (granting the President the power to approve and make treaties with advice and consent of the Senate and to appoint and receive ambassadors); U.S. CONST. art. I, § 8, cl. 11 (congressional power to declare war). Clearly, judicial power extends over some international issues, but some scholars point out the extremely limited extent of this power. *See* Bradley & Goldsmith III, *supra* note 20, at 330 (arguing the political branches of the executive and the legislative have already, or ought to, have more control over international litigation than courts currently recognize).

300. Baker v. Carr, 369 U.S. 186, 211 (1962). The *Baker* Court explained that "resolution of [foreign relations] issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Id.*

301. *Id.* at 217.

> 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.[302]

Judge Robb explained why he thought the question presented in the ATS context in *Tel-Oren* was a political question:

> Even more problematic would be the single court's search for individual responsibility for any given terrorist outrage. International terrorism consists of a web that the courts are not positioned to unweave. To attempt to discover the reach of its network and the origins of its design may result in unintended disclosures imperiling sensitive diplomacy.[303]

And later:

> But cases which would demand close scrutiny of terrorist acts are far beyond these limited exceptions to the traditional judicial reticence displayed in the face of foreign affairs cases. That traditional deference to the other branches has stemmed, in large part, from a fear of undue interference in the affairs of state, not

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302. *Id.* The significance of the "or" language in the Court's jurisprudence indicates courts' deference to any of these characteristics. The multi-factor test of *Baker* was reduced to three primary inquiries in Justice Powell's oft-quoted concurrence in *Goldwater v. Carter*: "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" Goldwater v. Carter, 444 U.S. 996, 998 (1979) (Powell, J., concurring). Arguably, Justice Powell's second two summations of the *Baker* characteristics apply to many ATS litigations. *See* Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918) (characterizing foreign relations as a political question and noting that "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision"); Coleman v. Miller, 307 U.S. 433, 455 (1939) (finding that the conduct of foreign relations often involves "'considerations of policy . . . [that render a court] entirely incompetent to [its] examination and decision'") (quoting Ware v. Hylton, 3 U.S. (3 Dall.) 199, 260 n.31 (1796)).

303. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring).

only of this nation but of all nations.[304]

Judge Robb's cautions are paramount, and must be taken seriously, if not adopted.[305]

2. The Historical Context of the ATS and Its Current Usage Are in Contradiction

Another reason the universality principle must be applied narrowly and with great care concerns the complexity of its exercise and contradictory nature.[306] The ATS was passed to "protect against the vagaries of state law, the hostility of state courts, and differences in their interpretations of the law of nations, sparing the new nation . . . embarrassment."[307]

The Framers realized that the law of nations would be a flexible body of law, and provided for this by *granting Congress the power to define the law of nations.*[308] Additionally, under *The Paquete Habana*, Courts may seek and find the law of nations by consulting numerous sources.[309] But can the courts, absent express authority from Congress, also use universal jurisdiction?[310]

We return again to Blackstone.[311] Blackstone being one of the preeminent authorities of the time, it is almost certainly true that the Founders relied on his *Commentaries*.[312] Such suggested both that there are

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304. *Id.* at 825 (Robb, J., concurring).

305. It is recommended the reader read the entirety of Judge Robb's well-reasoned opinion. *See id.* at 823-27 (Robb, J., concurring). Note especially his assertion:

> We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*. But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorists are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, that they are entitled to their day in the courts of the United States.

Id. at 826 (Robb, J., concurring).

306. *See infra* notes 307-46.

307. Dodge, *supra* note 55, at 237.

308. *See* U.S. CONST. art. I, § 8; *see also* Jarvis, *supra* note 136.

309. *See* The Paquete Habana, 175 U.S. 677 (1900). Arguably, however, this power overreaches constitutional authority of the courts. At least two scholars have commented on this possibility. *See, e.g.*, Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998) (reexamining the modern international application of the *Charming Betsy* Doctrine in light of separation of powers concerns); Donald J. Kochan, Note, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998) (arguing that separation of powers concerns limit application of the ATCA under the Offenses Clause).

310. No.

311. *See supra* note 45 and accompanying text.

312. *See generally* Casto, *supra* note 6, at 489 n.117 ("In view of Blackstone's general influence upon eighteenth century American attorneys, it would be surprising if the drafters of the Judiciary

some particular crimes against the law of nations, and that there are other, non-"principal" offenses as well.[313] Likely, these non-principal offenses would be lesser charges, or Blackstone would have enumerated them more clearly.[314]

Following Blackstone's suggestions, the Continental Congress enumerated essentially the same three offenses in defining the law of nations: "safe-conducts . . . [,] infractions of the immunities of ambassadors . . . [,]" and "infractions of treaties."[315] Together with Blackstone's principal offenses, this language indicates the types of infractions considered by the authors of the Judiciary Act and ATS.

It must be asked: were genocide, war crimes, terrorism, and the like unknown at the time?[316] Clearly they were not.[317] Why then, were these crimes by "*hostis humani generis*"[318] not enumerated in the literature of the time?[319] The answer is deceptively simple and was alluded to previously.[320] These crimes are so great that they are an affront to nations; the means for a nation to respond to such crimes is not civil litigation but war![321]

The Founders could not have intended that the ATS give rise to litigation to cover such massive tragedies for which it is used today.[322] The Founders, in passing the ATS, provided a civil remedy for individuals who

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Act did not rely upon the *Commentaries*."); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. Rev. 731 (1976).

313. BLACKSTONE, *supra* note 45, at 67-68.

314. *See id.*

315. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (1781). Note this was the Continental Congress and not the First Congress of the United States; but the continuity of legal expression is assured.

316. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

317. *See, e.g.*, VATTEL, *supra* note 128, at 114 § 4. Vattel points to "disaster and ruin" confronting states and what amounts to genocide. *See id.* at 141 § 90 ("It is not lawful to drive a nation from the country it inhabits.").

318. This means: "An enemy of all mankind."

319. No mention of any of the universality principle prohibitions is found in any scholar's historical analysis or commentary of the time.

320. *See supra* notes 128-33 and accompanying text.

321. *See* VATTEL, *supra* note 128, at 130 § 53 ("The principles involved in the three preceding propositions [of the right of self-protection, the right of resistance, and the right of redress] constitute the several grounds upon which a just war may be waged . . . .").

322. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). *Kadic* alleged acts of brutal mass rape, torture, genocide, infanticide, war crimes, and other vast, immeasurable evils. *Id.* at 236. While this Article acknowledges the United States military acted too late to save many victims of these atrocities, it is highly improbable that either the threat, or reality, of United States litigation curbed any of these depraved acts.

had been affronted by other individuals,[323] not as an equivalent or even alternative to the use of military force.[324] The terrible tragedies confronting the 21st century international community at the Framers' time would have been seen as acts of war against a nation.[325] Matters of genocide and war crimes are matters for military tribunals.[326] Issues of systemic racial discrimination are matters for intense political pressure and sanctions.[327]

The best example of the political principle in action is the tragedy related by the *Flatow* case.[328] In *Flatow*, terrorists caused an explosion on a bus in Israel, killing several Israeli soldiers and one American citizen.[329] The American was Alisa Flatow, an undergraduate student at Brandeis University.[330] Her father brought a wrongful death action under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act ("FSIA").[331] While previously the FSIA had negated suits against state-sponsored activities, following the *Flatow* tragedy (but prior to the lawsuit), an amendment to the FSIA was enacted that abrogated immunity from suit where:

> foreign states [are] officially designated by the Department of State as terrorist states if the foreign state commits a terrorist act, or provides material support and resources to an individual or entity which commits such an act, which results in the death or personal injury of a United States citizen.[332]

The court held Iran liable[333] under the FSIA and awarded over $225 million

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323. *See supra* note 32 and accompanying text.

324. *See* 1 Op. Att'y Gen. 57, 59 (1795).

325. It should be noted that there is a commensurate doctrine applicable to actions against foreign nations: the Act of State Doctrine, which says U.S. courts will not examine the propriety of the act of a foreign nation without an exception. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

326. *The U.N. Tribunals Prosecuting War Criminals from Rwanda and the Former Yugoslavia are Making History – and Blazing a Trail*, CBC NEWS ONLINE, *at* http://cbc.ca/news/indepth/warcrimes/ (describing war crimes tribunals in general and specifically the Yugoslav War Crimes Tribunal).

327. *See, e.g.*, Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 2151, 2346(d), 5001-16 (Supp. IV 1986). So would have thought the Framers and so should we interpret the ATS today.

328. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7-10 (D. D.C. 1998).

329. *Id.* at 7.

330. *Id.*

331. *Id.* at 9-10; *see also* 28 U.S.C. §§ 1602-11 (2003). While this action was not brought under the ATS, the governmental response to the crises is a good illustration of how Congress is not only capable, but willing, to "fix" statutes that do not comport with its goal of terrorism interdiction.

332. *Flatow*, 999 F. Supp. at 12 (citing 28 U.S.C. § 1605(a)(7) (1997)). It is interesting to note that here Congress expressly reserved this cause of action for U.S. citizens – *not aliens*. What this means for terrorism as a cause of action under the ATS for aliens presents an interesting question.

333. *Id.* at 5-6. Iran never made an appearance in the suit and, thus, was subject to a default judgment. *Id.* at 6 n.1.

in punitive damages.[334] The *Flatow* case presents a perfect example of the political process picking up where the judicial process should never have been.[335]

The acts complained of by the vast majority of ATS litigants are of such great evil character that they are not affronts against a person by a person, they are affronts against a nation by a nation.[336] As Vattel wisely pointed out:

> Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen. . . . If a sovereign who has the power to see that his subjects act in a just and peaceable manner permits them to injure a foreign Nation, either the State itself or its citizens, he does no less a wrong to that Nation than if he injured it himself . . . . [I]n place of the friendly intercourse which nature intends should exist among men we shall have nothing better than a dreadful state of international anarchy.[337]

Some may say this wisdom is antiquated and of no use today.[338] Those people need only direct their thoughts to the language and character of the recent war on terrorism to see that attacks on individuals by individuals still implicate nations and war.[339]

Others would argue that the law of nations was intended as a flexible doctrine and its current understanding supercedes the Founders'; indeed, such was even their aim.[340] This may especially be true of commentators arguing for an expanded view of the law of nations to confront, for example, environmental torts.[341] Yet these arguments do not, and cannot, alter intent of the statute as it was passed,[342] nor the propriety of courts in refraining

334. *Id.* at 5, 33-34.

335. *See id.* at 12. The court discusses the efforts in particular of Congressman Jim Saxton. *Id.*

336. The Foreign Sovereign Immunities Act may apply in certain cases, but where it does not, and where appropriate, further amendments excepting appropriate conduct from immunity must be passed by Congress.

337. VATTEL, *supra* note 128, at 136 § 71-72.

338. Vattel's *The Law of Nations or the Principles of Natural Law* was originally published in 1758.

339. *See, e.g.*, *In Depth Special, War Against Terror*, CNN ONLINE, *at* http://www.cnn.com/SPECIALS/2001/trade.center/.

340. *See* Casto, *supra* note 6, at 472-73 (arguing for a "broad" and "liberal" reading of the ATS).

341. *See* Arlow, *supra* note 255, at 108-09.

342. If such was the intent, then it must be followed by the courts until Congress states to the contrary.

from exercising jurisdiction under either the Restatement's standard[343] or the political question doctrine. If the ATS is to be applied to crimes against humanity which are of global mutual concern, the global community must come together in near-unanimous agreement, and Congress must ratify any such treaty before the ATS may be, or should be, used in such a fashion.[344]

V. CONCLUSION

The ATS is not extraterritorial, as shown by this Article. Furthermore, universal jurisdiction is not appropriate for the ATS, even if the ATS were to be extraterritorially applied, because the wrongs over which universal jurisdiction is to be applied were not in the contemplation of the Framers upon the ATS' passage.[345] Universal jurisdiction, one commentator has noted, is a "weapon for all nations against international crime."[346]

It has been shown how the universality principle rests upon matters of immense concern to the world community.[347] It was also noted that modern ATS litigation focuses on massive, widespread violations of the "law of nations."[348] Courts note the violation[349] and then apply the domestic statute (the ATS) extraterritorially, even though there is no United States nexus,[350] without pausing to consider the presumption against it,[351] precisely because the alleged violation is universally hated.[352] Unfortunately, this is in complete contravention to the context in which the ATS was originally passed.[353]

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343. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987).

344. *See* 28 U.S.C. § 1605 (2003). Congress has made two important attempts at express legislation that arguably clarifies ancillary issues to the ATS. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214; Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73.

345. *See supra* Part IV(B).

346. *See, e.g.*, Jordan, *supra* note 264.

347. *Kadic* illustrates some of these concerns best. *See* Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995).

348. *See id.* at 238; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 788-89 (D.C. Cir. 1984); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

349. *See Filartiga*, 630 F.2d at 883-84.

350. Neither *Filartiga* nor *Kadic* involved a United States nexus. *Tel-Oren* arguably did since some of the plaintiffs were American, but since *Tel-Oren* dismissed the complaint, this is not as pertinent.

351. *See Filartiga*, 630 F.2d at 887-88.

352. *Id.* at 883-84.

353. Judge Robb wrote in conclusion to his concurring opinion in *Tel-Oren*, "[m]y colleagues concede that the origins and purposes of [the ATS] are obscure, but it is certainly obvious that it was never intended by its drafters to reach this kind of [political terrorism] case." *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

Thus, a new paradigm of the universality principle consistent with the intent of congress in passing the ATS must leave behind the massive, global-scale wrongs listed by the universality principle; and instead refocus on what it was intended to prevent: offenses against individuals that do *not* concern issues of concern to the global community. The proper forum for such concerns is not the United States courtroom.[354]

Judge Newman's now-famous understatement sums up a lay person's potential confusion: "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."[355] Indeed, the learned student of international law might be equally challenged, if less surprised, by this statement.[356]

The Alien Tort Statute is not without great utility and use.[357] More importantly, Congress is always free to amend the statute.[358] The best place to start would be to clarify the extraterritoriality of the ATS. It currently should not apply extraterritorially, but is this the current congressional intent? Does Congress intend it to only apply with the United States nexus? Will universal jurisdiction apply? If so, is Congress prepared to provide courts with a clear definition, under its Offenses Clause powers of the law of nations, of which violations are severe enough to warrant extraterritoriality

354. The proper forums are the United Nations General Assembly, the international press and media, or even the battlefield. The Framers passed the ATS with this consideration, and their reasoning and background is as sound today as it was then. When confronted with this issue in the future, policy makers, judges, and litigants must ask whether exercising universal jurisdiction involves questions *not too little to receive notice from the law of nations, but too large for the court to address.*

355. Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995).

356. As law students, scholars, lawyers, and judges, we carry an admittedly legal-centric view of the world. The solution to every problem is a lawsuit. The means to punish a criminal is a conviction in a criminal court. The best power for righting international wrongs is the power of the American court. Terrorism is an international problem of enormous proportion and potential for harm. It is sometimes surprising that any Americans call for a trial of the terrorists responsible for the September 11th attacks. This is especially so given the country's general support of the Bush Administration's characterization of the conflict as a "war on terrorism." Wars are meant to be ordered by the President, confirmed by the Senate, and fought by the military. They are not meant to be ordered by litigants, confirmed by judges, and fought by lawyers.

357. Briefly, as it now stands, the ATS could be used in the following situation properly: Any time an alien is harmed by a violation of customary international law either (a) within United States territory (domestically, the high seas, or U.S. territories such as Guam) or (b) under the Torture Victim Protection Act.

358. Congress is free to legislate to the contrary, and could simply amend § 1350 to read, "This law shall be applied extraterritorially in compliance with the Restatement approach to prescriptive jurisdiction."

without a United States nexus?

These questions must be addressed, but not by courts.[359] As it stands, a proper jurisprudential reading of the ATS limits its use to any violation of the law of nations within United States territory, and not beyond. The universality principle itself illustrates the impossibility of conjoining the ATS with the universality principle. The ATS can, at most, reach the United States nexus prescriptive jurisdictions, but the primary use for which it has been sought by litigants – massive crimes against humanity – are beyond the scope of the statute and certainly beyond its territorial reach.[360]

Jason Jarvis[361]

359. Turn once again to Judge Robb's *Tel-Oren* concurrence: "Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations." *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

360. I do not advocate stopping all human rights litigation if that is what the political process deems the appropriate response to human rights violations. I do advocate that courts stop exercising power they do not have under the statute as it reads and principles of extraterritoriality as they exist.

361. Pepperdine University School of Law (J.D. 2003). The author would like chiefly to thank Professor Roger P. Alford for his assistance and thoughts as well as the staff and editors of the Pepperdine Law Review.