The Alien Tort Claims Act and Section 1983: The Improper Use of Domestic Laws to "Create" and "Define" International Liability for Multi-National Corporations

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I. INTRODUCTION

Amidst the rash of litigation generated by the Enron scandal, the number of corporate defendants in U.S. courts may continue increasing due to a recent interpretation of the Alien Tort Claims Act1 ("ATCA") expanding liability for corporate complicity in human rights violations committed abroad.2 On September 18, 2002, the U.S. Court of Appeals for the Ninth Circuit ruled that Unocal, a California multinational corporation ("MNC"), must stand trial for possibly "aiding and abetting" government authorities accused of subjecting their citizens to rape, murder, and forced labor in Myanmar.3 The case, one of many filed against MNCs in recent years under the ATCA, represents the first of its kind requiring a private MNC to stand trial for its connivance in human rights violations committed abroad.4

The case was brought by Burmese villagers against Unocal for its involvement in a joint venture project ("Project") between Total, S.A., a French oil company ("Total"), and the military government5 of Myanmar

2. See Pui-Wing Tam, Myanmar Human-Rights Suit Against Unocal is Reinstated, WALL ST. J., Sept. 19, 2002, at A10. "This ruling means that there’s absolutely no debate that private companies can be held liable [in U.S. courts] for overseas human-rights abuses," according to attorney Terry Collingsworth of the International Labor Rights Fund regarding the September 18, 2002 decision, Doe v. Unocal Corp., Nos. 00-56630, 00-51797, 00-56628, 00-57195, 2002 WL 31063976 (9th Cir. Sept. 18, 2002).
3. See Tam, supra note 2.
4. See id.
acting through its state-owned company, the Myanmar Oil and Gas Enterprise. The Project’s objective was to exploit the natural gas deposits discovered in 1982 in the Yadana field off the coast of Myanmar. This would be achieved through the construction of a pipeline passing through the Tenasserim region of southern Myanmar that would transport extracted gas to the border with Thailand.

Recognizing the importance of the pipeline’s construction to the Project, both Total and Unocal were concerned with the fact that the Tenasserim region was home to a rebel group opposed to Myanmar’s military junta known as the State Law and Order Restoration Council (“SLORC”). Accordingly, the SLORC—with Unocal’s knowledge and pursuant to an early agreement between Total and—increased its military presence in the region to provide security for the Project and to perform additional services to ensure the pipeline’s expeditious construction. However, while providing these services, villagers inhabiting the Tenasserim region claimed that the SLORC subjected them to multiple acts of violence in connection with the Project. Consequently, in 1996, several villagers filed multiple claims in the Central District Court of California under the ATCA against Unocal, government, naming itself the State Law and Order Restoration Council (“SLORC”), took control of Burma and renamed the country Myanmar. See id. at 1296-97. Unocal was not a party to the initial agreements between the Myanmar Oil and Gas Enterprise (“MOGE”) and Total, S.A. (“Total”) in connection with the joint venture project (“Project”). See id. at 1297. However, in 1992, Unocal and Total negotiated the assignment of a portion of Total’s interest in the Project to Unocal. See id. at 1298.

The Ninth Circuit eventually found Unocal’s knowledge of the SLORC’s involvement with the Project undisputed in light of a Unocal memorandum reflecting its understanding that four battalions of 600 men each would protect the pipeline corridor and that fifty soldiers would be assigned to guard each survey team. Doe v. Unocal Corp., Nos. 00-56630, 00-51797, 00-56628, 00-57195, 2002 WL 31063976, at *2 (9th Cir. Sept. 18, 2002). However, the court also concluded that there is a genuine issue of material fact as to whether the Project actually hired the Myanmar Military through the MOGE to provide these services and whether Unocal had any knowledge of that. See id. Among the evidence cited by the court was the Production Sharing Contract entered into between Total and the MOGE before Unocal acquired an interest in the Project providing that the MOGE would supply such services as may be requested by Total and its assigns such as Unocal. See id.

More specifically, deposition testimony indicated that SLORC, under threat of violence, forced entire villages to relocate for the benefit of the Project, forced plaintiffs and others to work on the Project and serve as porters for the military for days at a time, and perpetrated numerous acts of violence, such as torture, murder, and rape, in connection with the forced labor and relocations. Doe, 110 F. Supp. 2d at 1298.

In addition to claims alleging violations of international law pursuant to the Alien Tort Claims Act (“ATCA”), plaintiffs alleged violations of the Racketeer Influenced and
Total, and the SLORC.\textsuperscript{14} After several years of litigation, the only viable claims remaining are those against Unocal for possibly "aiding and abetting" acts of forced labor, murder, and rape in accordance with the Ninth Circuit decision of September 18, 2002, which reversed an earlier district court decision granting summary judgment in favor of Unocal.\textsuperscript{15}

For the purposes of this Note, possibly the most germane aspect of the Ninth Circuit decision arises from that court's use of an "aiding and abetting" test\textsuperscript{16} to define private liability under the ATCA vis-à-vis the "state action" test\textsuperscript{17} used by the district court, which formed the basis for that court's earlier decision granting Unocal's motion for summary judgment.\textsuperscript{18} According to the district court, in order to allege conduct in "violation of the law of nations" as required by the express terms of the ATCA and previous cases interpreting it, plaintiffs must show that Unocal engaged in "state action" as defined through reference to 28 U.S.C. section 1983 jurisprudence.\textsuperscript{19} Section 1983 is a domestic law which holds private entities liable for civil rights violations, normally only actionable against the state, when those violations take place "under the color" of government authority.\textsuperscript{20} Section 1983 jurisprudence applies four distinct tests to the facts of each case\textsuperscript{21} and imputes civil rights liability onto private individuals when they act together with state

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\textsuperscript{14} The defendants, collectively referred to as "Unocal" in the two related actions brought by the villagers from the Tenasserim region, include Unocal Corporation, its wholly owned subsidiary named the Union Oil Company of California, and two Unocal executives, John Imle and Roger Beach. See id. at 1295.

\textsuperscript{15} In 1997, the SLORC was dismissed as a defendant pursuant to the Foreign Sovereigns Immunity Act, 28 U.S.C. §§ 1602-11 (1994), on the grounds that it was immune from suit. See Doe v. Unocal Corp., 963 F. Supp. 880, 886 (C.D. Cal. 1997), aff'd, 2002 WL 31063976. In the following year, Total was dismissed for lack of personal jurisdiction under California's long arm statute. See Doe v. Unocal Corp., 27 F. Supp. 2d 1174, 1186 (C.D. Cal. 1998). In 2000, the district court granted Unocal's motion for summary judgement with respect to plaintiff's ATCA claims for forced labor, murder, rape and torture. See Doe, 110 F. Supp. 2d at 1311. However, the Ninth Circuit's decision on September 18, 2002, reversed the District Court's grant of Unocal's motion for summary judgment only with respect to plaintiff's ATCA claims for forced labor, murder, and rape, finding insufficient evidence to assert a claim for torture under the ATCA. See Doe, 2002 WL 31063976, at *24.

\textsuperscript{16} See Doe, 2002 WL 31063976, at *10.

\textsuperscript{17} The state action test used by the district court was based on 42 U.S.C. § 1983. See Doe, 110 F. Supp. 2d at 1305.

\textsuperscript{18} See id. at 1306-07.

\textsuperscript{19} See id. at 1304-06.

\textsuperscript{20} See George v. Pac.-CSC Work Furlough, 91 F.3d 1227, 1229-30 (9th Cir. 1996).

\textsuperscript{21} See id. at 1230 (noting that the four tests applied by § 1983 jurisprudence are public function, state compulsion, nexus, and joint action).
officials or with significant state aid. The district court justified its use of section 1983 standards to define individual liability imposed by the law of nations by reasoning that the effect of section 1983—which is to impute individual liability for civil rights violations normally confined to the state—is analogous to the goal of holding individuals liable for violations of the law of nations, traditionally confined to nation-states pursuant to the ATCA.

In granting Unocal’s motion for summary judgment, the district court held that the plaintiffs’ ATCA claims must fail as a matter of law for want of evidence establishing Unocal’s “control” of the SLORC’s decision to commit violent acts which necessary to establish proximate cause as required by section 1983 jurisprudence. However, according to the Ninth Circuit, the “state action” analysis borrowed from section 1983 jurisprudence by the district court to define private liability under the ATCA was unnecessary under the circumstances of the case. In its place, the Ninth Circuit required the application of an “aiding and abetting” test, borrowed from international law, to define Unocal’s liability under the ATCA.

The Ninth Circuit began its analysis with respect to the district court’s state action requirement by noting Judge Edwards’s observance in Tel-Oren v. Libyan Arab Republic, that there are a handful of crimes to which the law of nations attributes individual liability where state action is not required. Additionally, the court noted the reasoning in Kadic v. Karadzic, which extended Judge Edwards approach by holding that private individuals may be liable for acts proscribed by international law only when committed by state actors to the extent they were committed in pursuit of acts proscribed by international law regardless of state action. Accordingly, the Ninth Circuit held that Unocal may be liable, regardless of state action, to the extent that Unocal “aided and abetted” the SLORC in committing acts proscribed by the law of nations. However, the court did not directly address the issue of

22. See Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).
23. See Doe, 110 F. Supp. 2d at 1305.
24. See id. at 1307.
25. See Doe v. Unocal Corp., Nos. 00-56630, 00-51797, 00-56628, 00-57195, 2002 WL 31063976, **8-9 (9th Cir. Sept. 18, 2002).
26. See id. at *10.
29. 70 F.3d 232 (2d Cir. 1995).
31. See id. at *10.
under what circumstances, if any, section 1983 may be used to define private liability under the ATCA.

This Note examines the recent developments in U.S. courts that have led to the application of section 1983 in ATCA cases. This is accomplished generally by discussing two of the obstacles faced by the court in *Filartiga v. Pena-Irala*, which was the first circuit court to interpret the ATCA, and by comparing that court’s resolutions to other decisions addressing the same issues. Part II of this Note offers a background of ATCA litigation to illustrate the specific issues addressed in this Note as well as the arguments against using section 1983 standards to define and create private liability under the ATCA. Part III discusses the evolution of the individual’s obligations under international law. Additionally, this Part identifies how the Second Circuit’s decisions in *Filartiga* and *Kadic* led to the employment of section 1983 standards in cases involving MNCs. Part IV addresses the first obstacle faced by the court in *Filartiga* of ascertaining the appropriate sources and definition of the law of nations, and compares *Filartiga*’s extensive approach to that of other ATCA cases conducting inquiries into the definition of the law of nations. This is done primarily to emphasize the stringent requirements that must be met before a court can apply its derivation of the law of nations pursuant to the ATCA. Part V addresses the second obstacle faced by the *Filartiga* court of establishing the justiciability of ATCA cases in U.S. federal courts. Furthermore, this section discusses the differing approaches used by courts to interpret the ATCA, resulting in inconsistent decisions regarding the extent to which jurisdiction and a cause of action may be granted by the ATCA. Part VI concludes that the use of section 1983 standards are improper as a matter of law and justice, and should never be used to define or create private liability in ATCA cases.

II. BACKGROUND

For MNCs tracking the development of the *Unocal* case, the use of an “aiding and abetting” test, vis-à-vis one of “state action” to define private liability under the ATCA, is important because it potentially lowers the bar significantly for aliens to sue MNCs in U.S. courts. However, for those unfamiliar with ATCA litigation, understanding the legal mechanism empowering a U.S. court to adjudicate the international rights of non-U.S. citizens for acts committed outside U.S. borders may

32. 630 F.2d 876 (2d Cir. 1980).
33. *See Tam, supra note 2.*
be of greater importance. Therefore, brief mention of the origins of modern ATCA jurisprudence is appropriate before reaching the issue of determining the appropriate standards defining private liability vis-à-vis state actor liability under the ATCA.

The ATCA provides that "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."\(^3\) The modern interpretation of this more than two hundred year old statute was born in 1980 by way of the landmark decision *Filartiga*.\(^3\) With that decision, the pioneering judges of the United States Court of Appeals for the Second Circuit took what it called "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."\(^3\) Through its seminal interpretation of the ATCA, the *Filartiga* court achieved this great "step" by finding the ATCA to be an appropriate conduit to U.S. courts for foreign-born citizens seeking civil damages caused by conduct in violation of "the law of nations" committed anywhere in the world.\(^3\) More specifically, the court construed the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."\(^3\) Therefore, under *Filartiga*'s formulation of the ATCA, the statute serves as both a jurisdictional grant and a cause of action for aliens alleging recognized violations of the law of nations.\(^3\)

In the wake of *Filartiga*, several cases were filed under the ATCA in U.S. courts by aliens alleging violations of international human rights committed around world.\(^4\) However, because *Filartiga*'s holding seemed to leave open whether the ATCA applies only to state actors or to nonstate actors as well, courts have struggled in their application of the ATCA to private MNCs.\(^4\)

The problem exists generally in ascertaining the rights and obligations that are imposed by the law of nations on private individuals.

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35. 630 F.2d 876 (2d Cir. 1980).
36. *Id.* at 890.
37. *See id.* at 887.
38. *Id.*
39. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring). *But see id.* at 801 (Bork, J., concurring) (requiring an express grant of a cause of action from international law to maintain an action in U.S. courts pursuant to the ATCA).
THE IMPROPER USE OF DOMESTIC LAWS

...vis-à-vis obligations imposed on nations recognized as members of the international community and their official agents. Historically, the law of nations was predominantly statist, leaving individuals as mere objects of international law as opposed to its subjects. However, the genocides of the last century and the correlative development of international human rights law elevated individuals to the status of subjects of international law with both rights and duties not to violate the human rights of others. Nevertheless, the private individual’s true status in international law has remained uncertain and is hotly debated amongst legal scholars. At issue within the context of this Note is the extent of a private individual's (or more specifically, a private MNC's) liability for human rights violations of the law of nations pursuant to the ATCA.

"Confusion arises because the term 'individual liability' denotes two distinct forms of liability." The first, now well-implanted in the law of nations, refers to individuals acting under color of state law... While the second, currently less-established form of liability... addresses the responsibility of individuals acting separate from any state's authority or direction." The latter form of individual liability that exists in the absence of colorable state action is strictly limited to "offenses recognized by the community of nations as of universal concern." This unique category of internationally recognized offenses is also known as jus cogens, preemptory norms, or natural law. Due to the requirement that these offenses be of universal concern, courts and the Restatement (Third) Foreign Relations Law of the United States section 404 (2002) have strictly limited the...

43. See id. at 94.
44. See, e.g., Tel-Oren, 726 F.2d at 794 (Edwards, J., concurring) ("[F]or each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go").
45. Id. at 793.
46. Id.
47. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (2002) [hereinafter RESTATEMENT (THIRD)]. “A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.” Id.
48. This is Latin for "Compelling Law." See BLACK'S LAW DICTIONARY 864 (7th ed. 1999).
49. A more detailed explanation of these universal norms and an explanation of why they do not necessitate colorable state action is offered in Part IV of this Note.
types of offenses that can be considered *jus cogens* to such acts as piracy, slave trading, and genocide.\(^5\)

On the other hand, the former category of individual liability, existing for offenses performed under the color of state law, is well established and can therefore attribute individual liability pursuant to the ATCA for such acts as "*official* torture," as was the case in *Filartiga*.\(^5\) *Filartiga* held that pursuant to "the renunciation of torture as an instrument of *official policy* by virtually all of the nations of the world," as substantiated by the express statements made in numerous international agreements, there is sufficient agreement among civilized nations to conclude that *official* torture is prohibited by the law of nations.\(^2\) However, while the simple act of torture is egregious in and of itself, the individual liability for traditionally statist law established in *Filartiga* was predicated on the fact that the defendant performed the act in his *official* capacity as the Inspector General of Police, thereby acting, *in fact*, as an *official agent* of the state.\(^3\) Therefore, by virtue of *Filartiga*, as well as the statist nature of international law, one can easily argue that the imposition of individual liability, traditionally reserved for nation-states, is only available for an *official* state agent acting in an *official* capacity. This is because, as a practical matter, only the acts of an official agent can be can be clearly and factually attributed to the state in which the actions took place by virtue of the status and authority conferred upon her by that state.

The restriction of individual liability imposed by international law to an *official* state agent flows naturally from the international law doctrine of state action, which imputes liability onto a State for violations of international law resulting from the actions of its official agents.\(^4\) The doctrine is premised on the notion that the state and its official agents, which represent the only means by which a state can act,

\(^{50}\) See Restatement (Third), supra note 47, § 404; see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (noting that only a handful of acts, such as piracy and slave trade, have been recognized as imposing individual liability absent colorable state action).

\(^{51}\) See 630 F.2d 876, 884 (2d Cir. 1980).

\(^{52}\) Id. at 880 (emphasis added).

\(^{53}\) See id. ("[W]e find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations." ) (emphasis added).

\(^{54}\) See Restatement (Third), supra note 47, § 207(c) ("A state is responsible for any violation of its obligations under international law resulting from action or inaction by . . . any organ, agency, official, employee, or other agent of a government or of any political subdivision, acting within the scope of authority or under color of such authority.").
comprise the same entity, and hence are subject to the same laws. By virtue of this doctrine, it is logical to conclude that the agent herself may also be bound as an individual by these rules when acting in an official capacity, because the acts performed by a state’s individual agent in her official capacity are subject to the rules imposed by international law.

By that same reasoning however, one may also argue that just as the State is not responsible under international law for the actions of private individuals, neither can a private individual be bound by that law. Therefore, because individual liability for statist law proceeds from the fact that the individual is acting on behalf of the state due to the official status conferred upon her by the state, it is improper to extend this liability to private individuals absent justification from the law of nations itself. In support of this logic, it should be noted that subsequent cases interpreting the ATCA have refused to extend the holding in Filartiga to cover the same acts of torture when performed by nonstate actors who do not proceed in any official capacity whatsoever absent appropriate justification from the law of nations. Therefore, as a threshold matter in cases against individual defendants not alleging violations of jus cogens, courts must determine whether the individual is in fact acting under the color of state law before individual liability may be found pursuant to the ATCA.

As exemplified in the introduction of this Note, courts faced with claims brought against private entities (including MNCs) for international human rights violations have employed the domestic “under the color of law” jurisprudence of section 1983 to determine whether a private entity has acted under the color of state law for the purposes of attributing state reserved liability. At issue is whether section 1983 can and should be used in ATCA cases to impute state

55. See, e.g., id. at cmt. a (noting that a state may act through various agencies and instrumentalities, all actions of which being generally attributable to the state and hence subject to international law).
56. See id. § 207(c).
57. See RESTATEMENT (THIRD), supra note 47, § 207 cmt. c.
58. See, e.g., Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987) (stating with reference to the holding in Filartiga that “a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be ‘official’ simply by virtue of his position and the circumstances of the act”).
59. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (“While I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states, I decline to read [the ATCA] to cover torture by non-state actors, absent guidance from the Supreme Court on the statute’s usage of the term ‘law of nations.’”).
reserved liability on private MNCs as defendants in ATCA cases. While it is a noble goal to offer judicial relief pursuant to the ATCA to aliens suffering legitimate human rights violations supported by MNCs, this Note argues that it is improper, as a matter of law and justice, to utilize this domestic law to create and impose new individual obligations never contemplated by the law of nations.

This Note posits several arguments criticizing the use of section 1983 in ATCA cases under any circumstances. First, the employment of section 1983 to determine state action after determining that a *jus cogen* violation has been alleged flies in the face of *Filartiga*’s goal to fulfill “the ageless dream to free all people from brutal violence”62 as well as the “humanitarian and practical considerations [which] have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.”63 That is because *jus cogens*, which by its definition is a norm that is universal, specific, and obligatory,64 imposes obligations on individuals regardless of whether they proceed under the color of any state’s authority.65 Therefore, the employment of a section 1983 analysis to *jus cogens* violations creates an unnecessary obstacle for ATCA plaintiffs alleging such violations, thereby causing liability to turn on an analysis of domestic law, vis-à-vis evidence that the act alleged constitutes a violation of universal international concern.

In addition to criticizing the use of section 1983 within the context of *jus cogens* violations, this Note argues against its use to expand the obligations imposed by customary international law. That is because customary international law as well as the precedent set by *Filartiga*66 confines its reach to de facto state actors, vis-à-vis de jure state actors.67

63. Id.
64. See *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).
66. While the narrow holding in *Filartiga* is technically only binding as precedent within the Second Circuit and other jurisdictions that have accepted it as such, due to its codification by Congress within the Tortured Victims Protection Act, the express statements made by Congress acknowledging its general approval, as well as the wide approval received by this case in other circuit decisions, great deference to its specific holding should be given. See *Torture Victim Protection Act of 1991*, Pub. L. No. 102-256, 106 Stat. 73 (1992); see also S. REP. NO. 102-249, at 4 (1991) (explaining that *Filartiga* “has met with general approval”); Xuncax v. Gramajo, 886 F. Supp. 162, 179-80 (D. Mass. 1995); Frolova v. USSR, 761 F.2d 370, 374 n.6 (7th Cir. 1985).
67. Within the context of this Note, a de facto state actor refers to an individual who is a state actor in fact; that is to say, one acting in his/her official capacity on behalf of the state (for example, the defendant in *Filartiga* can be considered a de facto state actor due to his position as the Inspector General of Police of Paraguay who committed acts of torture in his official capacity) while a de jure state actor refers to an individual whose status as a state actor results from a legal
who violate that law in their official capacity. Essentially, the use of section 1983 to define obligations imposed by customary law creates a legal fiction by establishing MNCs as de jure state actors to circumvent the reach of customary law and the narrow holding in *Filartiga*, to thereby expand individual liability reserved for actual state actors onto private individuals. Moreover, the use of domestic law to portray private action as state action avoids the requirement that these obligations command the general consent of civilized nations before they become binding rules of the law of nations. Therefore, absent international recognition of private individual liability for a particular offense of customary law, MNCs established merely as de jure state actors do not satisfy the de facto state action requirement found in customary law as expressed in *Filartiga*, and cannot be held liable for violations of the law of nations. Furthermore, because the express language of the ATCA requiring a violation of the law of nations is not satisfied, the ATCA may not grant federal courts subject matter jurisdiction to hear cases brought against MNCs, which define state action by way of section 1983 in the absence of a jus cogens violation.

This Note argues further that the standards employed in section 1983 jurisprudence are, as a practical matter, inappropriate to define or expand individual liability for violations of international law. While the analogy between the application of section 1983 to individuals in civil rights cases and its application to MNCs in ATCA cases seems sound in theory, it does not lead to the conclusion that section 1983 standards, which have been calibrated to reflect American sensibilities towards the civil rights of her citizens, can also justify the expansion of individual liability for violations of international law. Accordingly, the use of section 1983 standards calibrated to effectuate U.S. sensibilities in ATCA cases would constitute a tenuous expansion of the liability available pursuant to customary law and unjustifiably threatens to expose MNC’s, as well as private individuals around the world, to an

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68. *See Filartiga*, 630 F.2d at 881 (noting the requirement that rules command the general assent of civilized nations before they become binding as customary international law).

69. This statement assumes that the alternative, which requires a claim of a violation of a United States treaty, is unavailable to the plaintiff, which is usually the case in ATCA claims.

70. *See Filartiga*, 630 F.2d at 887-89 (predicating subject matter jurisdiction upon a showing of a violation of the law of nations).
open range of liability. Moreover, this tenuous expansion of liability may serve to harm U.S. foreign relations.71

III. THE EVOLUTION OF THE INDIVIDUAL’S OBLIGATIONS UNDER INTERNATIONAL LAW AND THE IMPROPER USE OF SECTION 1983 TO EXPAND THESE OBLIGATIONS

A. The Nuremberg Trials

The fact that the individual’s status in international law has remained in flux since the end of the seventeenth century when the ATCA was drafted, explains in part, the mixed view regarding the extent of individual liability imposed by international law.72 Throughout the eighteenth and the beginning of the nineteenth century, scholars believed that international law was binding on both individuals as well as states.73 Conversely, in the nineteenth century, the view that the law of nations grants rights and confers obligations to states alone became firmly entrenched in both doctrine and practice.74 As noted in the previous section of this Note, this statist view considered nation-states subjects of international law while individuals, in contrast, were considered mere objects of this law.75

Nevertheless, the atrocities witnessed by the victorious Allies after World War II created a moral obligation upon them to punish the perpetrators of these crimes against humanity.76 To illustrate this moral obligation, the Filartiga court made the following comments regarding the international community’s current view towards ending such violence:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international

71. See Tam, supra note 2 (noting that the Bush administration has intervened in court cases on behalf of multinational corporations notifying judges that the cases threatened to harm U.S. foreign relations).
73. See id.
74. See id.
75. See supra notes 42-43 and accompanying text.
behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.\(^7\)

The dilemma created by accepting the moral obligation to punish individual perpetrators of crimes against humanity was that the private individual’s rights and obligations had never been clearly established as being imposed by the law of nations.\(^{78}\) Ultimately, however, the Nuremberg Trials concluded that the individual Nazi criminals violated preexisting international norms and therefore were subject to international individual liability for their actions.\(^{79}\) Commentators routinely trace the origins of international individual liability for acts committed under the color of state law vis-à-vis \textit{jus cogens} to this development at the Nuremberg Trials.\(^{80}\)

Post war case law dealing with individual rights and obligations imposed by the law of nations have not been a model of consistency. Most of the cases brought in federal courts have based jurisdiction and a cause of action on the express language of the ATCA, which requires a violation of the law of nations. One of the major problems in adjudicating these cases is determining whether a private individual may be held liable for violating the laws of nations. A brief analysis of the evolution of the use of section 1983 to expand the obligations imposed by the law of nations to private individuals will aid in ascertaining the functional dilemmas in holding MNCs liable for acts that do not violate recognized \textit{jus cogens} pursuant to the ATCA.

\textbf{B. Relevant Cases}

1. \textit{Filartiga v. Pena-Irala}, A New Era

Dr. Filartiga and his daughter, both citizens of Paraguay, brought suit in a U.S. federal court under the ATCA against the Inspector General of Police of Paraguay for the wrongful death of a member of

\(^{77}\) Filartiga \textit{v. Pena-Irala}, 630 F.2d 876, 890 (2d Cir. 1980).
\(^{78}\) See Klein, \textit{supra} note 76, at 340.
\(^{79}\) See id.
\(^{80}\) See id.
their family. The defendant, while in the United States under a visitor’s visa, was personally served with process for this claim. The plaintiffs claimed that the kidnapping, torture, and subsequent death of Joelito Filartiga at the hands of the defendant constituted a violation of the law of nations pursuant to the ATCA. The court held that:

[i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world... an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

In reaching its decision, the Filartiga court initially addressed the issue of whether official torture constitutes a violation of the law of nations. After identifying and analyzing the appropriate sources from which international law is derived—the usage of nations, judicial opinions, and the works of jurists—the court answered this question affirmatively. To begin its analysis, the court, relying on the statements made by the Supreme Court in The Paquete Habana, concluded that “it is clear that courts must interpret [customary] international law not as it was in 1789 [the year the ATCA was enacted,] but as it has evolved and exists among the nations of the world today.” Furthermore, the court recognized the stringent requirement that a rule command the “‘general assent of civilized nations’” to become binding upon them. Moreover, the court acknowledged that “[w]ere 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.” Accordingly, the court, making reference to several international documents, including the United Nations Charter and the Universal Declaration of Human Rights, concluded that official torture is proscribed by the law of nations.

81. See Filartiga, 630 F.2d at 878.
82. See id. at 880.
83. Id. (emphasis added).
84. See id.
85. See id.
86. 175 U.S. 677 (1900).
87. Filartiga, 630 F.2d at 881. Here the court noted that Habana was particularly instructive for its present purpose because this case held that a standard that had begun as one of comity had ripened into a settled rule of international law by the general assent of civilized nations. See id.
88. Id.
89. Id.
90. See id. at 883.
The court noted that these international agreements are neither self-execute nor binding as a treaty. Rather, they can be considered an "authoritative statement" in the international community which lends support to the conclusion that official torture has become what can be considered a violation of universally accepted international law. Upon this analysis, the court felt justified in its conclusion that the law of nations defines a specific obligation imposed upon individuals not to engage in the official torture of another held in detention, and therefore, such action constitutes a violation of the law of nations for the purposes of establishing liability pursuant to the ATCA.

The second question that was addressed was whether or not federal jurisdiction in this case may be exercised. The defendant argued that even if a tort was found to violate the law of nations, Article III of the Constitution does not permit an exercise of jurisdiction for this case. However, this argument was rejected under the reasoning that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law" and that Congress intended to confer judicial power and is authorized to do so by Article III. Furthermore, the court noted that it was not unusual for a United States court to adjudicate tort claims that have arisen outside of its territorial borders. Based on these conclusions, the court, applying a broad interpretation of the ATCA, found that jurisdiction pursuant to the Act will exist upon a showing of a violation of the law of nations.

Finally, in dicta, the court addressed in passing whether or not the suit could be barred by the act of state doctrine. The court stated that they "doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratiﬁed by that nation’s government, could properly be characterized as an act of state."

For the purposes of this Note, possibly the most germane aspect of this case arises from a section 1983 reference the Filartiga court used in an analogy discussed in detail below. The reliance by later courts

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91. See id.
92. See id.
93. See id. at 885.
94. See id.
95. Id.
96. See id.
97. See id. at 887.
98. See id. at 889.
99. Id.
100. See id. at 885 n.18.
adjudicating claims under the ATCA for guidance in determining whether “state action” by private entities exists may have resulted from and an overextension of the reference to section 1983 in that analogy. That is to say, to demonstrate the appropriateness of adjudicating a claim that occurred in Paraguay,101 Filartiga establishes consistency between United States policy and Paraguayan law by illustrating that a United States government official who committed the alleged acts could, by virtue of section 1983, be guilty of violating United States law just as the defendant would be held liable under Paraguayan law.102 That reference to section 1983 may have paved the way for later courts to recognize that a MNC found to be a de jure state actor by virtue of section 1983, vis-à-vis a de facto state actor, could still be liable for violating the law of nations.

2. Kadic Ignites a New Paradigm

After Filartiga, plaintiffs brought several cases under the ATCA in federal courts claiming violations of international human rights. Most notable perhaps was Kadic v. Karadzic,103 which can be viewed in some respects as an expansion of the holding in Filartiga. The Kadic decision was “the first to hold that there is subject matter jurisdiction under the ATCA for actions in which a nonstate defendant is said to have violated the law of nations.”104 In that case, the defendant, former president of the ruling Bosnian Serb entity, was accused of committing human rights

101. During the course of the court’s discussion regarding jurisdiction, the court addressed whether or not it is improper for United States Courts to adjudicate over a claim that arose in Paraguay. See id. at 885. They began by noting that pursuant to Anglo-American law, it is not unusual for courts to adjudicate over claims that have taken place outside of their territorial jurisdiction. See id. They continued by stating that for the purposes of comity in the course of state court practice in the United States, state courts will adjudicate claims arising in foreign states, so long as there is personal jurisdiction, the act complained of would be in violation of the foreign jurisdiction’s law, and the policies of the forum and the foreign jurisdiction are consistent. See id. They went on to note that there is personal jurisdiction in this case, and that both parties agree that the actions performed by the defendant in this case were in violation of Paraguayan law. See id. However, in an attempt to illustrate that the “policies of the forum” and the “foreign jurisdictions” are consistent, the court referred to 42 U.S.C § 1983 in footnote eighteen. See id. In this footnote, the court noted that pursuant to § 1983, it is possible to hold a private entity liable for certain violations of law, or more specifically, due process violations, when performed under the color of government authority. See id. This analogy was germane to establishing that this forum is proper as well as for justifying the court’s analogy to state court practice as a validation for adjudicating this claim in a United States court, even though it took place in Paraguay between and among Paraguayan citizens. See id.

102. See id.

103. 70 F.3d 232 (2d Cir. 1995).

violations during the course of the Bosnian Civil War pursuant to the ATCA and the Torture Victims Protection Act. The defendant argued that the ATCA, like the Torture Victims Protection Act, requires actions by a “state actor” in order to establish liability based on a violation of the law of nations. However, the court rejected this argument stating, “[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”

In support of this conclusion, the court, referring to various current and historical sources as well as the Restatement (Third), noted the availability of individual liability for “certain offenses” that receive “universal concern” such as piracy, slave trade, and genocide. The court proceeded to apply this reasoning to two of the specific acts complained of in the litigation: genocide and war crimes. Upon an analysis of the Restatement (Third) and numerous international agreements, the court determined that both of these acts are of universal concern, and therefore prohibited by the law of nations, regardless of the defendant’s status as a state actor.

The court then analyzed a third category of offenses which it called “other instances of inflicting death, torture, and degrading treatment” to determine whether or not these offences are actionable against an individual pursuant to the law of nations. The court held that these “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 that he is shown to be a state actor.” In dealing with this state action requirement, the court analyzed the plaintiff’s arguments that the Bosnian-Serb Republic referred to as “Srpska” satisfies the definition of a state for the purposes of imposing obligations

105. 28 U.S.C. § 1350 (2000). This act essentially codified the holding in Filartiga and expressly provides a cause of action for plaintiffs who claim they have been victims of official torture committed by persons acting under the color of state authority pursuant to the jurisdictional grant of the ATCA and under the general federal question jurisdiction of § 1331. See id.
106. See Kadic, 70 F.3d at 239.
107. Id.
108. See id. at 239-40.
109. See id. at 241-43.
110. See id. at 240.
111. Id. at 241, 243-44.
112. Id. at 244.
113. The defendant was the President of the self-proclaimed “Srpska.” See id. at 237.
of international law, and alternatively, that Karadzic acted in concert with the recognized state of former Yugoslavia.  

With respect to the plaintiff's first argument that Srpska fits the definition of a state, the court concluded that the nature of the republic appeared to satisfy the criteria for a state in all aspects of international law.  Regarding the plaintiff's alternative argument, the court, citing Forti v. Suarez-Mason, stated that it considered the under the color of law jurisprudence of section 1983 to be a relevant guide in determining whether or not an individual has engaged in official action for the purposes of imputing individual liability pursuant to the law of nations.

Forti involved a civil action brought against a former Argentine general pursuant to the ATCA by plaintiff's alleging human rights violations committed by military personnel under the defendant's command. However, like the Filartiga court, the court in Forti did not refer to section 1983 as a means to determine whether the law of nations imposed obligations upon individuals who do not fall into the category of a de facto state actor. Rather, the reference was made to illustrate the inapplicability of the act of state doctrine to the defendant's alleged conduct because according to that court, only acts of state—public and governmental in nature—warranted immunity under the act of state doctrine. The court in Forti analogized section 1983 to the ATCA simply to show that while the defendant's act was an act of state that might be appropriate for scrutiny under section 1983, it was not a "governmental and public action" contemplated by the act of state doctrine. Because the Kadic court concluded that certain acts alleged constituted violations of the law of nations regardless of the actor's status, and the specific use of section 1983 in Forti was not addressed, it is unclear why the court considered this domestic law necessary or appropriate for the purposes of defining state action within the context of

114. See id. at 244.
115. See id. at 245.
117. See Kadic, 70 F.3d at 245.
118. See Forti, 672 F. Supp. at 1537.
119. As noted in the previous section of this Note, the Filartiga court's use of section 1983 in its analysis was for the purposes of illustrating the appropriateness of adjudicating extraterritorial claims where the policies of the forum are similar to the policies of the jurisdiction where the claim had arose.
120. See Forti, 672 F. Supp. at 1546.
121. See id. at 1544-46.
122. See id. at 1546.
123. See Kadic v. Karadzic, 70 F.3d 232, 245-46 (2d Cir. 1995).
defining the obligations imposed by the law of nations upon private individuals.

C. An Overextension of Analogies Leads to the Misapplication of Section 1983 in ATCA Cases

As was the case in Filartiga, the reference to section 1983 by the Forti court was for the purposes of analyzing issues addressing the subject matter jurisdiction of federal courts to adjudicate ATCA cases brought against official agent’s of foreign nations. It cannot be construed as an endorsement of the use of section 1983 to define or expand the obligations imposed by the law of nations by virtue of section 1983’s characterization of private action as state action. In fact, the Forti court, referring to Filartiga, noted that, “a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be ‘official’ simply by virtue of his position and the circumstances of the act.” Therefore, because none of these cases justify the use of section 1983 for the purposes of defining or expanding the obligations imposed by the law of nations on private individuals, courts seeking to apply section 1983 must articulate some other justification for its use.

As a normative matter, even though holding private entities liable for state action in the United States is consistent with the notion of holding individuals liable for acts of state in the international arena, it is questionable, as a matter of law and justice, whether importing section 1983 standards to do so is appropriate. That is because the ATCA has not been construed “as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.” In light of the requirement that rules of international law command the general assent of civilized nations before they become binding, the use of section 1983 to define and expand the obligations imposed by the law of nations is improper as a matter of law absent evidence of general assent and justification from the law of nations.

Moreover, as a matter of justice, the use of section 1983 in furtherance of the policies underlying ATCA litigation without

124. See supra notes 120-22 and accompanying text.
125. Forti, 672 F. Supp. at 1546 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980)).
126. Filartiga, 630 F.2d at 887.
127. See id. at 880.
thoroughly considering the appropriateness of its standards, which were calibrated to ensure civil rights to American citizens, potentially effectuates the antithesis. That is because the application of a section 1983 analysis to violations of *jus cogens* creates an unnecessary obstacle for ATCA plaintiffs alleging such violations, thereby causing liability to turn on standards reflecting domestic sensibilities, vis-à-vis on appropriate evidence that the specific act constitutes a violation of universal international concern. Furthermore, within the context of customary law, MNCs are now theoretically subject to liability traditionally reserved for nation-states with neither proper legal justification nor the availability of the full extent of jurisdictional blocks that prevent nation-states from being sued in U.S. courts. For these reasons, courts should refrain from using section 1983 in ATCA cases to raise individual defendants to the necessary status that would make them amiable to suit for violations of the law of nations other than *jus cogens*.

IV. ASCERTAINING THE APPROPRIATE SOURCES, DEFINITION, AND APPLICATION OF INTERNATIONAL LAW

“The Second Circuit’s decision in Filartiga marked the beginning of a new era of reliance” on the ATCA. The court held that the ATCA constitutes a jurisdictional grant, allowing U.S. federal courts to hear extraterritorial claims brought by aliens who allege a tort in violation of customary international law. The case is most notable perhaps for its acknowledgment that the law of nations imposes certain rights and duties upon individuals vis-à-vis a nation-state. By virtue of this acknowledgment, the court held that the specific “act of torture committed by a *state official* against one held in detention violates established [rights and duties imposed by] the law of nations.” In reaching that decision, the court faced several obstacles, the first of which was to ascertain the appropriate definition of international law for the purpose of determining whether the alleged conduct violated the law.

130. See Filartiga, 630 F. 2d at 884-85.
131. *Id.* at 880 (emphasis added).
of nations thereby satisfying the first prong\(^\text{132}\) of the ATCA on which the plaintiff's based their case.\(^\text{133}\)

The Restatement (Third) identifies three sources of international law: (1) international agreements (for example, treaties); (2) customary international law; and (3) general principles of international law.\(^\text{134}\) It defines international law as those principles “that [have] been accepted as such by the international community of states” by international agreement or in the form of customary law created by consistent state practice or by derivation from general principles common to the major legal systems of the world.\(^\text{135}\) Article 38 of the Statute of the International Court of Justice codifies all three of these sources of international law and instructs courts whose function it is to hear such disputes to apply the rules of law ascertained from them accordingly.\(^\text{136}\)

In its simplest form, these international law norms can be categorized into two groups: the written and the unwritten rules of international law.\(^\text{137}\) Written rules encompass the first source of international law and consist of treaties, conventions, and other international agreements.\(^\text{138}\) Unwritten rules, which are analogous to Anglo-American common law, encompass the second and third sources of international law consisting of both the customary and general principles mentioned above.\(^\text{139}\)

Unwritten customary international law, a direct descendant of the law of nations, “results from a general and consistent practice of states followed by them from a sense of legal obligation.”\(^\text{140}\) By definition, the binding power of customary law is based on a state’s continued acquiescence of legal norms included within this source of law, which are essentially created by that state’s own general and consistent

\(^{132}\) By its express terms, the ATCA grants original jurisdiction to federal courts over civil cases brought by aliens who allege a tort committed in violation of the Acts first prong, the law of nations, or its second prong, a treaty of the United States. See 28 U.S.C. § 1350 (2000).

\(^{133}\) See Filartiga, 630 F.2d at 879.

\(^{134}\) See RESTATEMENT (THIRD), supra note 47, § 102(1).

\(^{135}\) See id.

\(^{136}\) See Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945). In this respect, the statute states:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations.

\(^{137}\) See LILICH & HANNUM, supra note 42, at 93.

\(^{138}\) See id.

\(^{139}\) See id.

\(^{140}\) RESTATEMENT (THIRD), supra note 47, § 102(2).
practices. As a result, its applicability is limited to states consenting to be governed by it.

Conversely, unwritten general principles of international law, or *jus cogens*, are those "common to the major legal systems, even if not incorporated or reflected in customary law or international agreement." By definition, *jus cogens* are binding on nations even if they do not agree to them. The binding force of *jus cogens* comes from a "rational notion of basic moral norms . . . derived from values taken to be fundamental by the international community" considered binding upon all states, regardless of a particular state's consent or rejection of specific practices included within this source of law. Furthermore, due to the nature of its justification, *jus cogens* "can only be derived from a rational inquiry into what the world community considers just, not into what is in the best interests of particular states or even of a majority of states." In summary, therefore, before an unwritten rule of international law may become binding as part of the law of nations, there must be a sufficiency of appropriate evidence to establish its recognition by the members of the international community.

A. Filartiga's Analysis, An Extensive and Systematic Approach

As noted in *Filartiga*, the U.S. Supreme Court has accepted the written and unwritten sources identified by the Restatement (Third) and the International Court of Justice Statute as appropriate for the purpose of defining and applying international law. Accordingly, because the plaintiff's claims alleged a tort in violation of the law of nations, the *Filartiga* court was forced to discern the applicable rules of international law from an unwritten source. To meet that end, the court, citing express rules offered by the Supreme Court to govern its analysis, engaged in a complex process of reasoning by which it would determine the

141. See Klein, supra note 76, at 350-52.
142. See id.
143. RESTATEMENT (THIRD), supra note 47, § 102(4).
144. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).
145. Klein, supra note 76, at 351.
146. Id. at 352-53.
147. See, e.g., Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (stating the requirement that there be sufficient criteria to establish that there is universal consensus regarding the prohibition of an act before it can be considered a norm of international law).
148. See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).
149. Judge Kaufman guided his analysis of the proper definition international law by the statements made by the Supreme Court in *The Paquete Habana*, 175 U.S. 677 (1900). See Filartiga, 630 F.2d at 880-81.
appropriate and binding international legal norms. However, it should be noted that Filartiga, by limiting it’s holding to customary law, did not clearly state whether jus cogens might also be used to establish liability in ATCA cases.

The Filartiga court began its analysis of customary law by noting that “[t]he 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.’” However, as a practical matter, the actual task of ascertaining customary law is not only complex but arduous as well. That is sufficiently demonstrated by the extensive and thorough nature of the court’s analysis, which included a lengthy discussion of numerous relevant international documents. According to the court, that analysis was necessary in ATCA cases because absent treaties, controlling executive or legislative acts, or judicial decisions, courts must resort to the often loosely defined rules of customary law as evidenced in the works of jurists and scholars whose experience have established them as experts in this field. The complexity of this process is exacerbated by the requirement that judges defining customary law in ATCA cases consult these works, “‘not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.’”

By virtue of its definition, ascertaining jus cogens norms would easily impose an even greater burden upon judges deciding ATCA claims, as it would require “rational inquiry into what the world community considers just, not into what is in the best interests of particular states or even a majority of states.” In addition to this moral element, identifying jus cogens norms is more difficult than norms of customary law due to its higher standard of justification created by its commonality among the major legal systems of the world vis-à-vis the

150. See Filartiga, 630 F.2d at 879-84.
151. See id. at 884 (“Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations.”) (emphasis added).
152. Id. at 880.
153. See id. at 880-84.
154. See id. Within this section of the opinion, the court performed an extensive analysis of numerous judicial decisions, international treaties, declarations and resolutions, works by scholars and jurists who have written extensively on the subject of international law, as well as appropriate statutes of the International Court of Justice. See id.
155. See id. at 880-81.
156. Id. at 881.
general or consistent practice followed among states required for customary law. Nevertheless, in light of Filartiga’s “stringent” requirement that customary law command the general assent of civilized nations to become binding upon them, approaches similar in complexity would seem necessary to justify a finding that a particular act is proscribed by jus cogens or customary law.

B. The Appropriate Application of Unwritten International Law to Private Individuals in ATCA Litigation

The Filartiga Court’s complex approach towards ascertaining the appropriate definition of customary law exemplifies the fact that not only is unwritten international law difficult to define, its amorphous and transient nature further complicates its application to current issues regarding the individual’s rights and obligations imposed by that law. With that in mind, it was the court’s interpretation of customary law as it exists today, in connection with its recognition that the torturer has become hostis humani generis (an enemy of mankind), which guided its analysis and facilitated its finding of individual liability for a violation of customary international law.

With respect to identifying the rights and obligations imposed by customary law, the Filartiga court stated its concern that these norms “command the ‘general assent of civilized nations’” as required by the Supreme Court before they become binding upon them. The reason for this is to avoid the imposition by one nation of idiosyncratic legal rules upon another in the name of applying international law. Consequently, the Filartiga court justified its watershed holding only after extensive analysis of evidence of customary law in the form of express assertions made in the United Nations Charter, numerous treaties and accords, judicial opinions, as well as in the works of jurists and scholars to acknowledge the specific notion that official torture committed by a de facto state actor has received sufficient global condemnation as to

158. See id. at 350-53.
159. See Filartiga, 630 F.2d at 881.
160. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that the approach of the Filartiga court “places an awesome duty on federal district courts to derive from an amorphous entity—i.e., the ‘law of nations’—standards of liability applicable in concrete situations”).
161. See Filartiga, 630 F.2d at 890.
162. See id. at 880.
163. Id. at 881 (citing The Paquete Habana, 175 U.S. 677, 694 (1900)).
164. See id. (emphasis added).
165. See id. at 880-84.
constitute a violation of customary law.\textsuperscript{166} Therefore, to protect the integrity of \textit{Filartiga}'s approach, courts must pay great deference to the requirement that a particular norm of customary law must in fact command the general assent of civilized nations before they become binding.

Within the context of \textit{jus cogens}, the statements made in \textit{Xuncax v. Gramajo},\textsuperscript{167} which held the ATCA only to apply to violations of \textit{jus cogens}, illustrates the even greater lengths by which a court must go to identify and support the existence of such norms. According to \textit{Xuncax}, before a norm of international law can be actionable under the ATCA, it must be established as "universal, definable and obligatory."\textsuperscript{168} More specifically, the court stated that these qualifications require that no state condone the act in question, that there be a universal consensus of prohibition against it, and that there be sufficient criteria to determine these qualifications.\textsuperscript{169}

To illustrate the stringent requirement that there exist evidence supporting international accord that either customary law or \textit{jus cogens} proscribe a particular act before becoming a binding norm of the law of nations, the decision in \textit{Banco Nacional de Cuba v. Sabbathino}\textsuperscript{170} is particularly instructive. In \textit{Banco Nacional de Cuba}, which involved the validity of the Cuban government's exportation of a foreign-owned corporation's assets, the Supreme Court held that U.S. courts should not decide issues of international law when those issues have not been clearly recognized to fall within the ambit of such law.\textsuperscript{171} For that reason, courts addressing questions of liability under the ATCA should not decide any issues with respect to the individual obligations imposed by international law in the absence of evidence establishing the requisite consensus among the international community that a particular act is proscribed by the law of nations when committed by a private individual.

\textit{Filartiga} comports with the warning in \textit{Banco Nacional de Cuba} because individual liability in that case was based solely on evidence

\begin{footnotesize}
\begin{enumerate}
\item[166.] \textit{See id.} at 884.
\item[168.] \textit{Id.} at 184.
\item[169.] \textit{See id.}
\item[170.] 376 U.S. 398 (1964).
\item[171.] \textit{See id.} at 428 (holding that "the Judicial Branch [of the United States] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law").
\end{enumerate}
\end{footnotesize}
that the law of nations has sufficiently defined the norms upon which it was premised. By virtue of that evidence, to hold an individual liable for violations of customary law, Filartiga concluded that the individual must be a de facto state actor engaged in the act of torture while acting in an official capacity.\footnote{See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).}

As a matter of international law, it is necessary to limit application of customary law to de facto state actors absent evidence of international accord to the contrary.\footnote{See infra notes 175-77 and accompanying text.} This limitation is needed to establish an appropriate nexus between actor and state necessary to impute state reserved liability to acts of its agent.\footnote{See supra notes 141-48 and accompanying text. This nexus is necessary because unlike \textit{jus cogens}, customary law is only binding upon those states that have accepted it as such by virtue of that state's own general and consistent practices. See \textit{id}.} As a practical matter, only the acts of an official state agent can be clearly and factually attributed to the state in which the actions took place by virtue of the status and authority conferred upon the state actor by her state.\footnote{See supra notes 51-59 and accompanying text.} Therefore, absent internationally recognized standards defining the nature of state action necessary to impute state reserved liability to an individual, imputation of statist law must be limited to de facto state actors as a matter of law.\footnote{See \textit{id}.}

Cases which seek to impose individual liability on persons other than de facto state actors are essentially required to follow the same painstaking analysis utilized by Filartiga to avoid the improper expansion of the rights and obligations imposed on individuals by the law of nations.\footnote{This statement is justified by the Supreme Court's holding in \textit{Banco Nacional de Cuba} v. Sabbatino. 376 U.S. 398 (1964), which prohibits United States courts from deciding issues that are not clearly defined within international law and as a means to avoid violation of the express warning offered by Filartiga against the imposition of idiosyncratic rules of law by one nation upon another. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring) (refusing to apply the holding in Filartiga to the defendant for failure to "allege facts to show that official or state-initiated torture [was] implicated in [that] action"); see also supra notes 35-39 and accompanying text (discussing the codification of the specific and narrow holding of Filartiga in the Tortured Victims Protection Act as well as its general approval by Congress and other jurisdictions).} Accordingly, because the imposition of individual liability for violations of customary law on individuals established as state actors merely by virtue of section 1983 does not satisfy this requirement, it is improper as a matter of law.
V. THE JUSTICIABILITY OF CASES BROUGHT PURSUANT TO THE ATCA

A. A Lack of History and Precedent Leads to Confusion

As noted supra, the ATCA provides that "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." While the language of the Act expressly states that district courts shall have jurisdiction to hear claims brought by aliens, issues regarding the justiciability of such cases presented a second obstacle for the court in Filartiga. At issue is whether the ATCA constitutes a congressional recognition of a private cause of action as well as a congressional grant of jurisdiction to hear such claims. Courts have been unable to reach a consensus as to the statute's import regarding these two issues primarily because of the lack of precedent in interpreting the ATCA as well as its insufficient legislative history.

The ATCA was enacted by Congress as part of the First Judiciary Act of 1789, and has been rarely invoked until its resurrection almost two hundred years later in Filartiga. For that reason, judges adjudicating ATCA claims have been forced to divine the appropriate application of this Act with little direct guidance from established judicial opinions. Furthermore, resort to legislative history does not solve the dilemma since there is no reference to the ATCA in the debates that led to its passage, nor is there any direct evidence of what the First Congress intended it to accomplish. Judicial opinions, therefore, have utilized varying approaches in ascertaining the intended purpose and effect of this statute.

B. A Narrow Versus a Broad Interpretation

In an article regarding the application of international human rights law in domestic courts, one commentator contends that the domestic applicability of international legal norms by private parties depends primarily on whether such norms are "self-executing." "A principle is self-executing if it is enforceable in domestic courts by its own terms, without recourse to specific implementing legislation." Under the

179. See In re Marcos, 978 F.2d 493, 498 (9th Cir. 1992).
180. See id.
181. See Klein, supra note 76, at 333.
182. Id.
Supremacy Clause, duly ratified treaties are expressly incorporated into
the supreme law of the land.\textsuperscript{183} However, while the Supremacy Clause
automatically executes treaties into [domestic] law," creating rights upon
which private parties may assert their claims, "it says nothing about
international [law] not backed by treaty."\textsuperscript{184} Therefore, to give unwritten
international law domestic effect once jurisdiction has been obtained,
plaintiffs basing their claim on a violation of this law must articulate a
theory locating its binding force and defining the substantive
prerequisites of its application.\textsuperscript{185}

Courts applying both broad and narrow interpretations of the
ATCA have disagreed as to whether it creates both a forum as well as a
cause of action for violations of international law or whether it is merely
jurisdictional by its terms.\textsuperscript{186} The broadest reading of the ATCA, as
evidence of congressional recognition of a cause of action, is that the
ATCA merely requires that a plaintiff prove that a tort was committed in
violation of the law of nations.\textsuperscript{187} Conversely, courts applying a narrow
interpretation of the ATCA have held that it does not create an
independent cause of action because the law of nations is not, by itself,
self-executing.\textsuperscript{188} As a result, these courts conclude that a plaintiff must
assert a right to sue expressly granted by the international law of which a
violation is claimed and in the absence of this grant, by federal
statute.\textsuperscript{189} The results of both approaches are illuminated by an analysis of
Filartiga and subsequent cases.

As noted in previous sections of this Note, the court in Filartiga
held that the ATCA constitutes a jurisdictional grant by Congress to
allow federal courts to hear such claims.\textsuperscript{190} The court, by virtue of a
broad interpretation, concluded that the ATCA opens the federal courts
for adjudication of the rights already recognized by the law of nations.\textsuperscript{191}
Four years later, in a \textit{per curiam} decision by the D.C. Circuit in Tel-
Oren v. Libyan Arab Republic,\textsuperscript{192} the issues of justiciability raised by

\begin{itemize}
  \item[\textsuperscript{183}] See U.S. CONST. art. VI, cl. 2.
  \item[\textsuperscript{184}] Klein, \textit{supra} note 76, at 333.
  \item[\textsuperscript{185}] See id. at 334.
  \item[\textsuperscript{186}] See, e.g., Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995) (noting that the
      answer to whether the ATCA, by its terms, creates both a cause of action and forum to assert the
      claim lies in whether or not the ATCA is to be given a broad or narrow interpretation).
  \item[\textsuperscript{187}] See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J.,
      concurring).
  \item[\textsuperscript{188}] See, e.g., id.
  \item[\textsuperscript{189}] See id. at 799 (Bork, J., concurring).
  \item[\textsuperscript{190}] See Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).
  \item[\textsuperscript{191}] See \textit{id}.
  \item[\textsuperscript{192}] 726 F.2d 774 (D.C. Cir. 1984).
\end{itemize}
Filartiga were reevaluated by the concurrences of Judges Robb, Bork and Edwards in a case involving international terrorism brought against the Palestinian Liberation Organization. The three judges employed radically different analyses to conclude that acts of terrorism are not justiciable in U.S. courts under the ATCA.  

Judge Robb concluded that by virtue of the political question doctrine, "federal courts are not in a position to determine the international status of terrorist attacks," and for that reason, denied jurisdiction under the ATCA. In his concurrence, Judge Bork affirmed the dismissal of the case on jurisdictional grounds, but for different reasons concerning the plaintiff's failure to state a cause of action sufficient to support jurisdiction under the ATCA. By employing a narrow reading of the ATCA, he held that by itself, the ATCA does not provide a cause of action and therefore, required that the plaintiff assert an express right to sue granted by the law of nations. Moreover, based on the principles of separation of powers, he refused to infer a cause of action where one was not expressly granted by the law of the nations.

While these holdings would drastically limit the kinds of cases that can be brought under the ATCA due to political questions and the requirement of an express right to sue, the reasoning by Judge Edwards is broader in scope and along with Filartiga, has been relied upon by courts finding ATCA cases to be justiciable. Judge Edwards endorsed the logic of Filartiga and concluded that jurisdiction is held proper upon a showing "that the defendant's actions violated the

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193. See Klein, supra note 76, at 343.
194. This is the principle that the judiciary should not decide issues involving the exercise of discretionary powers by the executive or legislative branches of government. See BLACK'S LAW DICTIONARY 1179 (7th ed. 1999).
195. Tel-Oren, 726 F.2d at 823 (Robb, J., concurring).
196. See id. at 799 (Bork, J., concurring).
197. See id. at 811 (Bork, J., concurring). Judge Bork supported his reasoning by arguing that since there was neither the concept of international human rights, nor any recognition of a right of private parties to recover under the traditional concept of customary law at the time the ATCA was enacted, Congress could not have intended that these concepts be included within its definition of the law of nations. See id. at 813.
198. See id. at 801 (Bork, J., concurring) (noting that the doctrine of separation of powers limits the judiciary's power to adjudicate issues dealing with foreign relations by virtue of the political question and act of state doctrine discussed in greater detail in this section).
199. See Klein, supra note 76, at 343-46.
substantive law of nations" even without an express right to sue as required by the narrow interpretation of Judge Bork. Nevertheless, he denied jurisdiction because the Palestinian Liberation Organization could not violate the law of nations since it is neither a recognized member of the community of nations, nor was it a de facto state actor. In further support of his decision, Judge Edwards stated that there is insufficient evidence of a universal condemnation of the act of terrorism for it to amount to a law of nations violation.

C. Application of Filartiga's Broad Approach to Individuals Including MNCs as Defendants in ATCA Cases

Because application of the narrow approach would essentially work to preclude the justiciability of most cases that could be brought pursuant to the ATCA, including Filartiga, the broad interpretation adopted by Filartiga and endorsed by Judge Edwards in Tel-Oren has premised the reasoning of federal judges willing to hear most ATCA cases. By virtue of Filartiga's broad approach, cases brought pursuant to the ATCA are justiciable simply upon a showing that the acts of the particular defendant violate the law of nations. For that reason, the appropriate definition of the individual obligations imposed by the law of nations is critical to the question of whether federal courts have subject matter jurisdiction to hear ATCA cases.

Within the context of individual liability under customary law, the previous section of this Note established law as only imposing obligations on de facto state actors accused of violating a norm for which there is sufficient evidence establishing a general consent among civilized nations. The application of section 1983 to MNCs to characterize private action as state action, thereby raising the MNC to a status by which the law of nations may impose obligations, acts to improperly expand the jurisdictional grant defined by cases adopting Filartiga's approach, because as a matter of law, defendants established merely as de jure vis-à-vis de facto state actors cannot violate customary law. As a result, because Filartiga's broad approach requires a violation of...
of the law of nations for jurisdiction purposes, section 1983 may not be used to establish that violation without sufficient evidence that de jure state actors have the same obligations as de facto state actors under customary law.

The use of section 1983 is also improper with respect to determining jurisdiction for *jus cogens* violations under the ATCA because application of that law improperly limits the jurisdictional grant recognized by *Filartiga*'s broad approach. Within that context, establishment of state action is unnecessary because violations of *jus cogens* violate the law of nations regardless of the defendant’s status as a private or state actor, thereby establishing jurisdiction under the ATCA. This reasoning is in harmony with the concept of universality jurisdiction found in international law, which allows any state to exercise jurisdiction over violations of *jus cogens*, even absent some other basis of jurisdiction.

VI. CONCLUSION

As many cases interpreting the ATCA illustrate, the use of section 1983 to define and create the obligations imposed upon individuals (including MNCs) by the law of nations is problematic for several reasons. With respect to defining individual obligations imposed by *jus cogens*, the employment of section 1983 creates an unnecessary obstacle for ATCA plaintiffs alleging such violations by causing liability to turn on an analysis of domestic law vis-à-vis on evidence that the alleged act constitutes a violation of universal international concern. This problem is exemplified by the recent Ninth Circuit decision in *Doe v. Unocal*, which by virtue of the obligations imposed by *jus cogens*, reversed an earlier decision that refused to find individual liability based upon its application of section 1983 standards for state action. Furthermore, section 1983 improperly limits the jurisdictional grant of the ATCA recognized for claims alleging *jus cogens* violations. Consequently, the unnecessary obstacles created through the application of section 1983 to
**jus cogens** flies in the face of the policies underlying most ATCA litigation.

Section 1983 is also inappropriate for the purposes of defining the individual obligations imposed by customary law. This is because the obligations imposed upon individuals in this context result merely from an arbitrary application of domestic standards, vis-à-vis by virtue of a justified mandate from the law of nations evidenced by a general assent among civilized nations as required by the majority of cases interpreting the ATCA.\(^{214}\)

The requirement of general consensus must not be taken lightly when dealing with individuals other than de facto state actors because unless a norm of international law is established as a **jus cogens**, it merely constitutes a custom or usage of much lesser importance that is only binding among those states that have adopted it as such by its own consistent practice.\(^{215}\) Therefore, by definition, a mere rejection of that practice would essentially relieve that state of its self-imposed obligation. Accordingly, it is improper as a matter of law to hold a private entity liable for these customs because their status serves to preclude them from being able to either endorse or reject a custom of international law. Moreover, because private entities are unable to violate customary law, the ATCA cannot grant subject matter jurisdiction to federal courts to hear such claims.\(^{216}\)

Notwithstanding the problems associated with individual liability under the law of nations, a blanket rule against the imposition of particular forms of international liability for human rights violations facilitated by MNCs is improper as a matter of justice. There may exist certain situations in which it is proper to subject MNCs to international liability other than those implicating violations of **jus cogens**. To justify this result, however, proper standards for determining individual liability such as the "aiding and abetting" test employed by the Ninth Circuit in **Doe v. Unocal** must be employed. To that end, the Supreme Court should recognize the impropriety of using section 1983 standards for the purposes of defining and creating obligations never contemplated by the

\(^{214}\) *See supra* notes 161-77 and accompanying text.

\(^{215}\) *See id.*

\(^{216}\) *See supra* notes 208-10 and accompanying text.
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law of nations pursuant to the ATCA. This would launch the pursuit of a more credible pretext to validate the just practice of holding any entity, not just nation-states, liable for committing egregious international human rights law violations.

Samuel A. Khalil

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