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THE HISTORY, NATURE, AND REACH OF THE ALIEN TORT CLAIMS ACT

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Federal statutes exist that permit civil sanctions against violators of international law and incorporate international law by reference. Domestically, it is the statute that forms the direct basis for a civil suit against the perpetrator, while international normative content and even relevant sanctions or remedies are incorporated indirectly through the statutory basis. Nonetheless, specific remedies can be tailored by the judiciary. An example is the Alien Tort Claims Act (ATCA), which states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] By enacting the ATCA as a means of determining what claims are cognizable before the courts, Congress chose to exercise its constitutional power to incorporate international law by reference, which Supreme Court cases have recognized is a congressional prerogative not to be second-guessed by the judiciary.[2]

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1. Alien Tort Statute, 28 U.S.C. § 1350 (2004). The 1789 version used the phrase "all causes where an alien sues for a tort only." An Act to Establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). It is not known whether the word "treaty" can extend to international agreements of the United States that do not rest on two-thirds consent of the U.S. Senate and were most likely unknown in 1789, such as congressional-executive or sole-presidential executive agreements. *Cf.* Weinberger v. Rossi, 456 U.S. 25 (1982).

2. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 7-8 (1946) (reiterating the recognitions in *Ex parte* Quirin regarding articles 12 and 15 of the 1916 Articles of War (what are now 10 U.S.C. §§ 818, 821), which "incorporated by reference" customary and treaty-based laws of war as offenses against the laws of the United States without listing numerous war crimes thereby implemented or their elements); *Ex parte* Quirin, 317 U.S. 1, 27-30 (1942).

The ATCA, therefore, is no ordinary statute. It has been in existence in the United States since 1789 and had achieved early and informing precedential attention with respect to violations of international law by U.S. and foreign perpetrators here and abroad,[3] but significantly increased

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> It is no objection that Congress . . . has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which the law condemns. . . . Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting . . . [by reference]. It chose the latter course.

Id.; United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-62 (1820) (regarding 18 U.S.C. § 1651, Congress has the choice to define and incorporate "by a reference" piracy "under the law of nations"); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 13-14, 64-65 n.133, 391 n.101 (2d ed. 2003); *see also* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 435 (1989) (regarding the congressional exercise of power, in part, under the U.S. Constitution, art. I, § 8, cl. 10, to "define and punish" when allowing suits under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1602, addressed in part below); 49 U.S.C. § 1472(k)(1)(d)(ii)-(iii) (Supp. V 1987) (incorporating offenses under anti-hijacking and antiaircraft sabotage treaties by reference); 28 U.S.C. § 2241(c)(3) (incorporating violations of "treaties of the United States" for habeas purposes); 28 U.S.C. § 2241(c)(4) (incorporating alien rights, exemptions, etc. "the validity and effect of which depend upon the law of nations"); 28 U.S.C. § 1330(a) (regarding nonimmunity "under any applicable international agreement"); 28 U.S.C. § 1604 (concerning suits against foreign states and foreign state entities and nonimmunity in accordance with "existing international agreements"); 28 U.S.C. § 1605(a)(3) (regarding suits and nonimmunity for takings "in violation of international law"); 28 U.S.C. § 1605(e)(2) (regarding suits under § 1605(a)(7) for "hostage taking" incorporating "the meaning given that term in" a treaty); 28 U.S.C. § 1605(e) (3) (regarding suits for "aircraft sabotage" incorporating "the meaning given that term in" another treaty); 28 U.S.C. § 1609 (concerning attachments and execution in accordance with "existing international agreements"); 21 U.S.C. § 2291(c)(6) (adopting exceptions regarding "responsibilities under applicable Status of Forces arrangements"); 18 U.S.C. § 3185(14) (concerning extradition for piracy "by the law of nations"); 18 U.S.C. § 2441 (2003) (incorporating offenses under the 1949 Geneva Conventions and Protocols by reference); *infra* text accompanying notes 22-23. In a concurring opinion in Al Odah v. United States, Judge Randolph seemed to be unaware of the Supreme Court rulings on this matter and seemed to miss the points that Congress has acted through legislation to incorporate international law by reference in the ATCA and various other statutes and that this form of time-honored incorporation is constitutionally appropriate. *Compare* Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J. concurring).

3. *See, e.g.*, Moxon v. The Fanny, 17 F. Cas. 942, 943 (D.C.D. Pa. 1793) (No. 9,895) (federal courts are "particularly by law vested with authority where an alien sues for a tort only in violation of the laws of nations, &c."); Bolchos v. Darrel, 3 F. Cas. 810, 810 (D. S.C. 1795) (No. 1,607) ("the original cause arose at sea" and the ATCA allows the court "to take cognizance of the cause" between a Spanish claimant and an agent of a British national); 1 Op. Att'y Gen. 57, 58-59 (1795).

> [T]here can be no doubt that the company or individuals who have been injured by these acts of hostility [in foreign territory on the West coast of Africa] 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 law of nations, or a treaty of the United States.

Id. (emphasis in original); United States v. Greene, 26 F. Cas. 33, 33 (C.C.D. Maine 1827) (No. 15,258) (Story, J.: Section 9 of the judiciary act "gives no right to any individual to sue in those courts, with the single exception of causes 'where an alien sues for a tort only. . . .'"); M'Grath v. Candalero, 16 F. Cas. 128 (D. S.C. 1794) (No. 6,810) ("tort" remedy, ATCA addressed by analogy: "If an alien sue here for a tort under the law of nations or a treaty . . . the suit will be sustained"); Jansen v. The Vrow Christina Magdalena, 13 F. Cas. 356, 358 (D. S.C. 1794) (No. 7,216) (dictum: "the powers of the district courts are expressed . . . as to civil causes . . . where an alien sues for a tort only"); PAUST, *supra* note 2, at 14, 63, 233, 286-87 nn.479, 481, 312 n.575, 314 n.584; Jordan J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 84-85 (1981); *infra* text accompanying note 11. The ATCA did not rest on admiralty jurisdiction. *See, e.g.*, Wilson v. Pierce, 30 F. Cas. 150, 154 (D.C.N.D. Cal. 1852) (No. 17,826). As it does today, in the 1790s the ATCA applied to conduct and/or injuries or other harm here or abroad, by U.S. or foreign violators. *See also infra* text accompanying notes 5-7. It is not unusual that the ATCA, as expected in the 1790s, is extraterritorial in its reach, since violations of customary international law contemplated and covered by the statute implicate universal jurisdiction (which provides the United States a well-known and venerable competence to enact legislation that is extraterritorial even if there are no contacts with the forum). *See, e.g.*, United States v. Furlong, 18 U.S. (5 Wheat.) 184, 197 (1820) (piracy "is against all, and punished by all . . . within this universal jurisdiction"); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 156 (1795) (Paterson, J.); *id.* at 159-61 (Iredell, J.) (Iredell, J.: "all . . . trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation"); Kadic v. Karadzic, 70 F.3d 232, 240 (2d Cir. 1995); *In re* Estate of Marcos, 978 F.2d 493, 499-500 (9th Cir. 1992); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 306 (S.D.N.Y. 2003); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 14 (D.D.C. 1998); Xuncax v. Gramajo, 886 F. Supp. 162, 183 n.25, 193 (D. Mass. 1995); PAUST, *supra* note 2, at 420-23, 432-41; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) ("whenever an alleged [violator] . . . is found and served with process . . . within our borders, [28 U.S.C.] § 1350 provides federal jurisdiction."). Moreover, extraterritoriality can be "inferred from the nature of the offenses" covered, the fact that "prohibitions are on their face all-inclusive," and "the overall purpose of the Act." United States v. Noriega, 746 F. Supp. 1506, 1515-17 (S.D. Fla. 1990) (quoting United States v. Baker, 609 F.2d 134, 136 (5th Cir. 1980) ("citing United States v. Bowman, 260 U.S. 94, 97-98 (1922)."). The nature of the ATCA clearly involves violations of customary international law and treaties which can implicate universal jurisdiction; the prohibitions are all-inclusive, reaching "any" relevant tort, and the broad language contains no geographic limits; and the overall purpose and demonstrable history have been to provide rights to a remedy and to avoid denials of justice to aliens concerning infractions here or abroad as well as to protect the United States from consequences that might follow if such rights are violated. *See, e.g.*, *infra* text accompanying notes 5-7, 11-13. The violations expressly covered, implicating universal jurisdiction, are also "not logically dependent on their locality for . . . [U.S.] jurisdiction." *See Bowman*, 260 U.S. at 98. It is also noteworthy that human rights had been of significant interest to the Founders and Framers, have identifiable constitutional bases, and have been used by federal courts since the Founding. *See, e.g.*, PAUST, *supra* note 2, at 193-223. Indeed,

use of the ATCA has occurred since the landmark decision in *Filartiga v. Pena-Irala*[4] in 1980. The ATCA requires that a plaintiff be an alien,[5] although a defendant can be a U.S or foreign perpetrator of a private[6] (individual, group or corporate)[7] or public character.[8] It provides that an

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Chief Justice Marshall recognized in 1810 that our judicial tribunals "are established . . . to decide on human rights." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 133 (1810); PAUST, *supra* note 2, at 193-202, 209. After the 1790 cases and opinion, the next major focus on the ATCA was consistent in recognizing that the statute provides a "right of action and a forum" for a violation of a treaty by a private U.S. company engaged in dredging activity along the Rio Grande that led to injuries to property interests of foreign nationals abroad. *See* 26 Op. Att'y Gen. 250, 251-54 (1907). Apparently the next case to utilize the ATCA was *Adra v. Clift.* Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (involving misuse of a passport abroad by a private foreign national defendant and issues with respect to child custody).

4. *Filartiga*, 630 F.2d at 876.

5. *See, e.g.*, Jama v. I.N.S., 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); 26 Op. Att'y Gen. 250 (1907); 1 Op. Att'y Gen. 57 (1795).

6. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996); *Kadic*, 70 F.3d at 243-45; Hilao v. Estate of Marcos (*In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467 (9th Cir. 1994); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987); *Filartiga*, 630 F.2d at 876; Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002); Barrueto v. Larios, 205 F. Supp. 2d 1325 (S.D. Fla. 2002); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. 1996); *Xuncax*, 886 F. Supp. at 162; Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); *Adra*, 195 F. Supp. at 865; *Bolchos*, 3 F. Cas. at 810 (Spanish claimant and an agent of a British national).

7. *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Kadic*, 70 F.3d at 237-43; Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1266-67 (N.D. Ala. 2003); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 308-20, 328, 333; Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443-45 n.26 (D.N.J. 1999); Burger-Fisher v. DeGussa Corp., 65 F. Supp. 2d 248, 272-73 (D.N.J. 1999); *Jama*, 22 F. Supp. 2d at 362-63; Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); *Unocal Corp.*, 963 F. Supp. at 891-92; *Mushikiwabo*, 1996 U.S. Dist. LEXIS 4409; *Adra*, 195 F. Supp. at 857, 865; *supra* text accompanying notes 3 & 5. Concerning private duties under international law, including human rights law, see also Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438 (1989) (Rehnquist, C.J.); Weisshaus v. Swiss Bankers Ass'n (*In re* Holocaust Victim Assets Litig.), 225 F.3d 191 (2d Cir. 2000); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Linder v. Portocarrero (The Contras), 963 F.2d 332, 336-37 (11th Cir. 1992); Klinghoffer v. S.N.C. Achille Lauro (The PLO), 937 F.2d 44 (2d Cir. 1991); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J., dictum); Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201-02 n.13 (9th Cir. 1975); United States v. Haun, 26 F. Cas. 227, 231 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J., in circuit) ("violations of human rights" by private "citizens of the United States"); *In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939 (N.D. Cal. 2000) (U.S. nationals' claims against Japanese corporations concerning slave labor of former prisoners of war in violation of the 1907 Hague Convention No. IV had been settled by a 1951 U.S.-Japan Treaty of Peace); Jordan J. Paust, *The Other Side of Right: Private*

alien can sue for what we term a "tort" or "wrong"[9] "in violation of the law of nations or a treaty of the United States"[10] and, as the statute manifestly requires, the substantive law to be applied is international law. With respect to the ATCA, *Filartiga* followed what is now a long line of decisions recognizing, consistently with identifiable expectations in the 1790s, that the ATCA is more than merely a jurisdictional statute since it

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Duties Under Human Rights Law, 5 HARV. HUM. RTS. J. 51 (1992); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002) [hereinafter Paust, *Human Rights Responsibilities*]; Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 149 (1977) ("terrorist activities . . . of individuals or groups . . . are in clear disregard of human rights"); Johnson v. Unisys, Ltd., 13 H.L. 37 (A.C. 2001) (Lord Hoffmann) (private corporation's responsibilities under domestic employment law are also "[s]ubject to observance of fundamental human rights. . . ."); Pushpanathan v. Canada, [1998] D.L.R. 231 (it is possible "for a non-state actor to perpetuate human rights violations on a scale amounting to persecution" within the reach of the Convention Relating to the Status of Refugees, art. 1F(c), 189 U.N.T.S. 150, which deals with denial of refugee protections to persons "guilty of acts contrary to the purposes and principles of the United Nations" which include the need to respect and observe human rights — also noting a related practice of Australia); C.A. 294/93, Kadisha v. Kestenbaum, 46(2) P.D. 464, 530 (Barak, J.) (human rights apply "also to the mutual relations between individuals themselves"); In Matter of the Republic of the Philippines, 46 BverfGE 342, 362 (2 BvM 1/76, Dec. 13, 1977) (direct duties of private individuals are created in human rights law), addressed in Memorandum for the United States as Amicus Curiae, *Filartiga*, 630 F.2d at 21, *reprinted in* 19 I.L.M. 585 (1980); JORDAN PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 106-07 (2000) (Japanese court found Japanese store liable for discrimination against foreigners in violation of the International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S 195).

8. *See, e.g., supra* text accompanying notes 6-7.

9. *See Kadic*, 70 F.3d at 238; Filartiga v. Pena-Irala, 577 F. Supp. 860, 862-63 (E.D.N.Y. 1984); *see also* The Fanny, 22 U.S. 658, 669 (1824) (libel action against "a tortious possessor of property" taken in breach of neutrality); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 320-21 (a violation of international law is the standard or substantive law to be applied); PAUST, *supra* note 2, at 14, 233-34, 312-14 nn.573-585; *supra* text accompanying note 3. The claim in *Moxon v. The Fanny* was dismissed because the foreign claimants sought restitution of the property as well as money damages, the district court stating:

> Neither does this suit for a specific return of property, appear to be included in the words of the judiciary act of the United States, giving cognizance to this court of "all causes where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." It cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.

Moxon v. The Fanny, 17 F. Cas. 942, 947-948 (D.C.D. Pa. 1793) (No. 9,895) (citations omitted).

10. 28 U.S.C. § 1350.

also creates a domestic cause of action or right to a remedy regarding various violations of international law.[11] Moreover, the need to provide

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11. *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d 604, 612 (9th Cir. 2003); Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002); Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998); *Abebe-Jira*, 72 F.3d at 847-48; *Kadic*, 70 F.3d at 236, 238; *Hilao*, 25 F.3d at 1474-75; *Amerada Hess Shipping Corp.*, 830 F.2d at 424-25; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777-80 (D.C. Cir. 1984) (Edwards, J., concurring); *Filartiga*, 630 F.2d at 880-82, 884-85, 887; *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 320; Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1359-60 (S.D. Fla. 2001); *Iwanowa*, 67 F. Supp. 2d at 441-43; *Jama*, 22 F. Supp. 2d at 362-63; *Xuncax*, 886 F. Supp. at 179; *Paul*, 812 F. Supp. at 212; *Forti*, 672 F. Supp. at 1539-40; Guinto v. Marcos, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); Handel v. Artukovic, 601 F. Supp. 1421, 1426-27 (C.D. Cal. 1985); United States v. Greene, 26 F. Cas. 33, 33 (C.C.D. Maine 1827) (No. 15,258) ("it gives . . . [a] right . . . to sue in those courts"); New England Ins. Co. v. Detroit & C. Steam Nav. Co., 18 F. Cas. 64, 65-66 (N.D. Ohio 1871) (No. 10,154) (addressing phrases in the 1789 version of section 9 of the judiciary act, including "causes when an alien sues for a tort," and concluding that "[t]he term '*civil suit*' was an apt and proper term, to describe all these *actions* and *causes of actions*." (emphasis added)); *Moxon*, 17 F. Cas. at 943 ("where an alien sues for a tort"); M'Grath v. Candalero, 16 F. 128, 128(D. S.C. 1794) (No. 6,810) ("sue here for a tort . . . the suit will be sustained"); Jansen v. The Vrow Christina Magdalena, 13 F. Cas. 356, 358 (D. S.C. 1794) (No. 7,216) ("the powers of the district courts are expressed . . . as to civil causes . . . where an alien sues for a tort only"); *Bolchos*, 3 F. Cas. at 810 ("the original cause . . . to take cognizance of the cause"); Atkins v. Fibre Disintegrating Co., 2 F. Cas. 80, 85 (C.C.E.D.N.Y. 1870) (No. 602) (similar to *New England Ins. Co.*, Woodruff, J.: "The general term 'civil suit' was apt to describe all these actions and causes of action, and it was so employed."), *rev'd on other grounds*, 85 U.S. (18 Wall.) 272, 303 (1873) ("the conclusion is inevitable that the terms 'civil suit' . . . and 'civil actions' . . . were intended to mean the same thing"); 26 Op. Att'y Gen. 250, 252-53 (1907) ("a forum and *a right of action*" (emphasis added)); 1 Op. Att'y Gen. 57, 58 (1795) ("have *a remedy by a civil suit*" (emphasis added)); *supra* note 1 (the 1789 version contained the informing phrase "all *causes* where an alien *sues* for a *tort*" (emphasis added)); PAUST, *supra* note 2, at 14-15, 229, 232-34, 286-88, 311, 314 n.584, 373-74, 391 n.101; Paust, *Human Rights Responsibilities*, *supra* note 7, at 822 nn.104 & 107; *but see Tel-Oren*, 726 F.2d at 798 (Bork, J., concurring). Judge Bork's view to the contrary in *Tel-Oren* was in error, opposed by Judge Edwards, and has not been followed. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d at 442 n.20 (in his "highly criticized opinion . . . Judge Bork's reasoning is flawed"); *Kadic*, 70 F.3d at 238; *Forti*, 672 F. Supp. at 1539. Judge Bork's opinion also contained several other errors, including (1) an ahistorical statement that "in 1789 there was no concept of international human rights." *Tel-Oren*, 726 F.2d at 813; (2) An assertion that "international law does not . . . recognize the capacity of private plaintiffs to litigate its rules in municipal courts" or provide a cause of action. *Id.* at 822; *see also id.* at 799-800, 813, 816. Concerning the first additional error, see, e.g., PAUST, *supra* note 2, at 195-202, 208-09, 236. Concerning the second additional error and treaty-based and customary human rights to an effective remedy in domestic courts, see, e.g., *id.* at 224-29, 235, 314-16, 391-92. The right of access to domestic courts and to an effective remedy concerning human rights violations also happens to be part of human rights law. *See, e.g.*, International Covenant on Civil and Political Rights, arts. 2(3)(a), 14(1), 50, 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, art. 8, at 71, U.N. Doc. A/810 (1948); General Comment No. 24, U.N. GAOR, Hum. Rts. Comm., U.N. Doc.

aliens access to our courts so that the United States does not create a "denial of justice"[12] under customary international law was most likely one of the primary reasons for adoption of the ATCA.[13]

CCPR/C/Rev.1/add.6, paras. 8-9, 11-12 (2 Nov. 1994); Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant [ICCPR] not only guarantees foreign citizens equal treatment in the signatories' courts, but also guarantees them equal access to these courts."); PAUST, *supra* note 2, at 224-29; PAUST ET AL., *supra* note 7, at 72-73, 266-68, 273, 344, 459, 726; Paust, *Human Rights Responsibilities*, *supra* note 7, at 822-23 n.108. Congress can create such causes of action or rights to a remedy by incorporating international law which does so by reference even if the statute had not itself created a cause of action. *Supra* text accompanying note 2.

12. Concerning "denial of justice," see, e.g., PAUST, *supra* note 2, at 12, 225, 287-88 n.481; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 711, cmts. a, c, e, RN 2 (3d ed. 1987).

13. *See, e.g., Tel-Oren*, 726 F.2d at 782-83 (Edwards, J.) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton)).

> The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance . . . .

Id. at 783. It also demonstrates why the first Congress was concerned with providing rights to remedies for aliens as opposed to U.S. nationals, since a "denial of justice" under customary international law only applied to aliens and a denial would set up a pretext for foreign states to engage in armed or other forms of reprisal against U.S. shipping or elsewise against the United States and its nationals. Further, this general purpose relates to the statute's extraterritoriality, given the scope of U.S. responsibility for the conduct of its nationals abroad. *See* Henfield's Case, 11 F. Cas. 1099, 1108 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J.).

> When the offending citizen escapes into his own country, his nation should oblige him to repair the damage, if reparation can be made, or should punish him according to the measure of his offence. Vatt. Law Nat. 75; Burrows, 1480; 4 Bl. Comm. 68, 69. If the nation refuse to do either, it renders itself in some measure an accomplice in the guilt, and becomes responsible for the injury. Vatt. Law Nat. 145. To what does this responsibility lead? To reprisals certainly (Vatt. Law Nat. 251); and if so, probably to war.

Id.; Comegys v. Vasse, 26 U.S. (1 Pet.) 193, 216 (1828) (Story, J.) ("right of justice" re: violation of international law); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.) (noting that the fact that the United States had a "duty to provide" that the laws of nations "be respected and obeyed" and was "responsible to foreign nations" for their observance were among the reasons for creation of the federal judiciary); *Bolchos*, 3 F. Cas. at 810 ("failure of justice"); 1 Op. Att'y Gen. 106, 107 (1802) ("ought to take every reasonable measure to cause reparation to be made by the offender"); 1 Op. Att'y Gen. 30, 32 (1793) ("The laws of nations . . . do not allow reprisals, except in case of . . . justice absolutely denied"); *Resolution of the Continental Congress* (1781), 21 J.

The ATCA, as a governing Act of Congress, contains no list or limitations of applicable customary international law or treaties of the United States and expressly applies to "any" civil action for a tort in violation of such international law.[14] For 215 years, Congress has chosen not to impose any limits on the ATCA's scope, including limits as to subject matter,[15] its extraterritorial reach,[16] or its provision of a cause of action or right to a remedy.[17] At least for a quarter century, there has been a "history of congressional acquiescence in" judicial application and the reach of the ATCA, "Congress has implicitly approved," and "Congress has not disapproved" general patterns of judicial use of the statute.[18] More recently, it appears that Congress reaffirmed the reach of the ATCA, since House and Senate Reports concerning other legislation in 1991 expressed congressional resolve that the ATCA "should remain intact."[19] One such

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CONT. CONG. 1136-37 (1781) (regarding "infractions of the laws of nations" and "infractions of treaties").

> [A]s instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent to be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Id. at 1136; THE FEDERALIST NO. 42, at 264, 265 (James Madison) (failure of the Articles of Confederation to address "the case of offenses against the law of nations . . . [will] consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."); PAUST, *supra* note 2, at 288 n.481; Anthony D'Amato, *The Alien Tort Statute and The Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63-66 (1988). Connecticut also had an early statute providing a remedy for violations of the laws of nations injuring "any foreign Power or . . . the Subjects thereof." 1784 Conn. Pub. Acts 82, 83.

14. For the judiciary to add limits that Congress has not chosen would be to rewrite the clear language of a long-standing federal statute and to violate the separation of powers. *See also supra* text accompanying note 2.

15. *See, e.g.*, *supra* text accompanying note 3; *infra* text accompanying note 20.

16. *See supra* text accompanying note 3.

17. *See supra* text accompanying note 11.

18. *See* Dames & Moore v. Regan, 453 U.S. 654, 678, 680, 686-87 (1981).

19. Both the House and Senate Reports concerning enactment of the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Supp. V 1993)) express a congressional resolve that the ATCA "should remain intact to permit suits based on . . . norms [other than torture and extrajudicial killing] that already exist or may ripen in the future into rules of customary international law." H.R. REP. NO. 367, 102d Cong., 1st Sess., pt. 1, at 4 (1991); S. REP. NO. 249, 102d Cong., 1st Sess., at 3 (1991) (re: "cause of action that has been successfully maintained under an existing law, section 1350," the ATCA "has other important uses and should not be replaced."); *see also* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) ("Congress endorsed the *Filartiga* line of cases"), *cert. denied*, 519 U.S. 830 (1996); Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996) (adding: "[t]he

pattern demonstrates that violations of international law actionable under the ATCA have not been limited to *jus cogens* norms, and judicial creation of such a limit would be contrary to the clear language of the ATCA and violate the separation of powers.[20] Moreover, at the time of formation of the ATCA the notion of a complete enumeration or short list of human rights would have been anathema to the Founders. Their generation knew that no language was so copious as to enumerate human rights with requisite latitude, a recognition that led them to adopt the Ninth Amendment as a valuable part of the Bill of Rights to assure an incorporation by reference of essential human rights for our people.[21] The same recognitions were true more generally with respect to the law of nations.[22] Still today, the general statute incorporating the laws of war by reference as offenses against the laws of the United States does not attempt to list the numerous war crimes proscribed by international law or to

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scope of the Alien Tort Act remains undiminished by enactment of the" TVPA); Hilao v. Estate of Marcos (*In re* Estate of Marcos, Human Rights Litig.), 25 F.3d 1467, 1475-76 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 7 (D.D.C. 1998).

20. For cases and executive opinions addressing non-*jus cogens* violations, see, e.g., Alvarez-Machain v. United States, 331 F.3d 604, 612-14 (9th Cir. 2003) (ATCA is not limited to *jus cogens*, courts are "guided by the language of the statute, not an imported restriction"); Alvarez-Machain v. United States, 266 F.3d 1045, 1050 (9th Cir. 2001) ("never held that a *jus cogens* violation is required"); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001) (imprisonment, among other violations); Weisshaus v. Swiss Bankers Ass'n (*In re* Holocaust Victim Assets Litig.), 225 F.3d 191 (2d Cir. 2000) (re: war crimes, among other violations); *Kadic*, 70 F.3d at 242-43 (war crimes); Nguyen da Yen v. Kissinger, 528 F.2d 1194, 1201-02 n.13 (9th Cir. 1975); *Islamic Salvation Front*, 993 F. Supp. at 5, 7-8 (claims re: war crimes, hijacking, mutilation, among others); Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961) (passport violations); Bolchos v. Darrel, 3 F. Cas. 810 (D. S.C. 1795) (No. 1,607); 26 Op. Att'y Gen. 250 (1907); 1 Op. Att'y Gen. 57 (1795); *see also* M'Grath v. Candalero, 16 F. Cas. 128 (D. S.C. 1794) (No. 6,810); *but see* Doe v. Unocal, 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000). With respect to the separation of powers, see *supra* text accompanying notes 2, 14; *infra* text accompanying note 24. Concerning various other early violations of international law, see, e.g., PAUST, *supra* note 2, at 7-8, 11-12, 59-61 nn.76-104, 193-210, 288-89, 323-24, 421-22, 434-35. Concerning lists of norms *jus cogens*, see, e.g., *id.* at 371, 376-77 (including "arbitrary" detention); RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, cmt. k, RNs 2, 6, § 702, cmts. a, n, RN 11.

21. *See, e.g.*, PAUST, *supra* note 2, at 198 (quoting Hamilton), 200-01, 219, 247-48 nn.90 & 92-93, 330-32, 350 nn.45 & 50; *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 421 (1793) (counsel: Framers "must have viewed human rights in their essence, not in their mere form."). Concerning human rights purposes of the other original amendments and the 13th, 14th, and 15th amendments, see, e.g., PAUST, *supra* note 2, at 200-01, 205, 219, 248 nn.92-93, 275-76 nn.392-93.

22. *See, e.g., id.* at 7-9, 11-12, 59-61 nn.76-104; *Resolution of the Continental Congress*, *supra* note 13, at 1136-37.

identify their elements.[23] Additionally, with respect to the separation of powers, whether the reach of the ATCA (or any federal statute implementing international law for civil or criminal sanctions) should be amended because of foreign policy considerations is not an issue for the courts.[24]

When identifying and clarifying customary human rights or other rights under customary international law, one need only identify rights and a generally shared core of normative content that are "sufficiently" determinable even if ambiguity exists outside a core of generally shared meaning.[25] Further, as recognized in *Filartiga*, courts must use

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23. *See* 10 U.S.C. §§ 818, 821; *supra* text accompanying note 2. The same congressional scheme applies regarding 18 U.S.C. § 2441.

24. *See also* The Peterhoff v. United States, 72 U.S. (5 Wall.) 28, 57 (1866) ("we administer the public law of nations, and are not at liberty to inquire what is for the particular . . . disadvantage of our own or another country"). For more than 200 years, issues concerning the interpretation and application of U.S. treaty law, customary international law as law of the United States, and U.S. statutes have been issues of law for the courts to decide and they are textually and unavoidably committed to the judiciary under the Constitution. *See generally* U.S. CONST. arts. III, § 2, VI, cl. 2; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 (1)-(3), cmts. c-e, RN 4, 113; PAUST, *supra* note 2, at 7-11, 38-59, 68-71, 317 n.598, 489-90, 493-94, 499-502, 507-10; The Paquete Habana, 175 U.S. 677, 700, 708, 714 (1900); Hilton v. Guyot, 159 U.S. 113, 116 (1895); The Nereide, 13 U.S. (9 Cranch) 388, 422-23 (1815); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272 (1796) (Iredell, J.); The Resolution, 2 U.S. (2 Dall.) 1, 13 (Fed. Ct. App. 1781); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980); Taylor v. Morton, 23 F. Cas. 784, 786 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, J., on circuit), *aff'd*, 67 U.S. (2 Black) 481 (1862); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798-99 (D. Kan. 1980). The text and structure of the U.S. Constitution also confirm judicial power and jurisdictional competence with respect to certain suits "against ambassadors," "public ministers," and "foreign States," thereby also implicitly recognizing that certain forms of nonimmunity necessarily exist, all of which can implicate foreign affairs. *See* U.S. CONST. art. III, § 2; Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73 (1789). Further, there is no "justifiable offense" to a foreign state when universal jurisdiction is exercised over violators of international law found within our territory. *See* Filartiga v. Pena-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984); PAUST, *supra* note 2, at 305-07 n.547, 421-23 n.76, 445-46.

25. *See, e.g.*, *Alvarez-Machain*, 331 F.3d at 612 ("sufficient consensus," "sufficiently . . . defined," quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820)); *Alvarez-Machain*, 266 F.3d at 1050-53 (norm need not be specific in human rights instruments); Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994) ("definable"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J.) ("definable"); *Filartiga*, 630 F.2d at 880-82 ("sufficiently determinate," "sufficiently . . . defined," quoting *Smith*); Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) ("adequately defined"); *id.* at 187 ("not necessary that every aspect . . . be fully defined"); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540-42 (N.D. Cal. 1987) ("definable," "sufficient consensus to evince"); Forti v. Suarez-Mason, 694 F. Supp. 707, 709-11 (N.D. Cal. 1988) ("general recognition," "sufficient to establish"); *see also Paquete Habana*, 175 U.S. at 700 ("must be ascertained and administered by the courts"); *Hilton*, 159 U.S. at 163; The Nereide, 13 U.S. (9 Cranch) at 422; *Kadic*, 70 F.3d

international law as it has evolved. [26] Customary international law is universal and obligatory. Yet, contrary to a mistaken mantra proffered in a few U.S. opinions that normative content should be based in "universal"

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at 238 (courts ascertain the evolving content of the law of nations); *cf. id.* at 239 ("well-established"). This approach to normative identification is consistent with judicial power, since the judiciary has the primary competence to identify and clarify the content of international law and that power is constitutionally based because customary international law is part of the "laws of the United States" within the meaning of articles III, § 2, and VI, cl. 2 of the U.S. Constitution. *See, e.g.*, PAUST, *supra* note 2, at 6-11, 38-39, 46-47, 50-64, 81-101 *passim*; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmts. d-e, RN 4; Paust, *Human Rights Responsibilities*, *supra* note 7, at 820 nn.93-94; *see also* John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, Apr. 12, 1790, *in* 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 25, 27 (Maeva Marcus ed., 1988) ("we were responsible to others for the observance of the Laws of Nations; and as our national Concerns were to be regulated by national Laws national Tribunals became necessary for the Interpretation & Execution of them both."). For these reasons, it would be error to claim that a norm should be strictly or clearly defined with detail. Moreover, Congress chose not to do so, which is its prerogative. *See supra* text accompanying note 2. Concerning the numerous types of binding and nonbinding, ratified and unratified, U.S., foreign, and international instruments and opinions (agreed to or opposed by the executive) that have been utilized since the Founding to objectively prove customary international law, especially general patterns of *opinio juris*, *see, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 30-38 (1942); *Paquete Habana*, 175 U.S. at 687-701, 707, 711; The Scotia, 81 U.S. (14 Wall.) 170, 187-88 (1871); *Peterhoff*, 72 U.S. (5 Wall.) at 50; *Smith*, 18 U.S. (5 Wheat.) at 160-81; *Nereide*, 13 U.S. (9 Cranch) at 453; *Kadic*, 70 F.3d at 238-43; *Filartiga*, 630 F.2d at 880-85; *Rodriguez-Fernandez*, 505 F. Supp. at 795-98; United States v. Altstoetter (The Justice Case), III TRIALS OF WAR CRIMINALS BEFORE THE NEURNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1946-1949, 3, 979 (1950) (the U.N. General Assembly "is the most authoritative organ in existence for the interpretation of world opinion . . . [and] is persuasive evidence" of *opinio juris*); PAUST, *supra* note 2, at 5-6, 27-36 nn.17-28 (citing numerous cases), 170-73, 175-76 (also addressing the "only 'where'" error); Jordan J. Paust, Paquete *and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981, 983-86 (1994) [hereinafter Paust, Paquete *and the President*]. It is clearly erroneous to argue that only binding instruments can be used to prove normative content. *But see* Flores v. Southern Peru Copper Corp., 343 F.3d 140, 162 (2d Cir. 2003) ("only States that have ratified a treaty are legally obligated to uphold the principles embodied in that treaty . . . [and] a treaty will only constitute sufficient proof of a norm . . . if an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance") (emphasis omitted); *id.* at 168 ("General Assembly documents are at best merely advisory, they do not . . . evidence an intent by member States to be legally bound by their principles, and thus give rise to rules of customary international law"); *id.* at 169 ("Because neither of the declarations . . . created enforceable legal obligations, they do not provide reliable evidence of customary international law"); *see also infra* text accompanying notes 27-28.

26. *See, e.g.*, *Ware*, 3 U.S. (3 Dall.) at 281 (Wilson, J.) (the U.S. is "bound to receive the law of nations, in its modern state"); *Kadic*, 70 F.3d at 238, 241; Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987); *Tel-Oren*, 726 F.2d at 777 (Edwards, J.);

consensus,[27] normative content need only be based in generally shared patterns of legal expectation or acceptance.[28]

Filartiga, 630 F.2d at 881; Estate of Rodriquez v. Drummond Co., Inc., 256 F. Supp. 2d 1250, 1263 (N.D. Ala. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003); Maria v. McElroy, 68 F. Supp. 2d 206, 233 (E.D.N.Y. 1999); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999); Jama v. I.N.S., 22 F. Supp. 2d 353, 362 (D.N.J. 1998); Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998); *Xuncax*, 886 F. Supp. at 179 n.18; *Forti*, 672 F. Supp. at 1539; H.R. REP. NO. 102-367, at 3-4 (1991), *reprinted in* 4 U.S.C.C.A.N. 86 (1992) ("norms . . . may ripen in the future into rules of customary international law"); PAUST, *supra* note 2, at 232, 311 n.562; Paust, *Human Rights Responsibilities*, *supra* note 7, at 820 n.95; *see also* United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.: "at . . . [a] subsequent period the principle can be considered as incorporated into the public code of nations."). Since the Founding, it has been understood that the meaning of customary international law and treaties can be dynamic. *See, e.g.*, PAUST, *supra* note 2, at 4-5, 61 n.103, 198 (quoting Hamilton), 311 n.562, 388 n.64; Vienna Convention on the Law of Treaties, May 23, 1969, art. 31 (1), (3)(a)-(c), 1155 U.N.T.S. 331.

27. The universal consent error is exemplified in the following four cases. [1] *Flores*, 343 F.3d at 154 ("only those rules that States universally abide by, or accede to," seriously misquoting *Filartiga*, 630 F.2d at 888 as if it was "holding that customary international law includes only 'well-established, universally recognized norms,'" but *Filartiga* actually adopted the Supreme Court's "general" assent test (630 F.2d at 881), the *Flores* panel knew that this was the test in *Filartiga* and the Supreme Court). *See Flores*, 343 F.3d at 145 (quoting *Filartiga*, 630 F.2d at 881, which had quoted *United States v. Smith*). *Filartiga* was only stating that "earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue." *Filartiga*, 630 F.2d at 888. *Flores* also proffered an erroneous view that practice has to be universal. *Flores*, 343 F.3d at 154, 158, 160. *See, e.g.*, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 184, 186; PAUST, *supra* note 2, at 5; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. b; [2] *Alvarez-Machain*, 331 F.3d at 617, 619-20 (using a "universal" consent error); *id.* at 648, 650 (O'Scannlain, J., dissenting) (arguing, completely contrary to the Supreme Court's ruling in *Paquete Habana* and missing the unanimous expectations of the Founders and the judiciary for some 200 years that the executive is bound by customary international law, that a norm "not recognized by the United States cannot be deemed a universal one, actionable in this nation's courts" and that "[i]t is not the judiciary's place to enforce such a norm contrary to" the will of the executive); *but see* PAUST, *supra* note 2, at 7-11, 169-73, 175; Paust, Paquete *and the President*, *supra* note 25; [3] *Hilao*, 25 F.3d at 1475 ("universally condemned"); [4] *Xuncax*, 886 F. Supp. at 184, 187 ("universal, definable and obligatory" and "no state condone the act in question, and there is a recognizable 'universal' consensus of prohibition against it," yet later in the opinion one finds the statement that "[i]t is not necessary that every aspect . . . be fully defined and universally agreed upon") (citing *Forti*, 672 F. Supp. at 1540). *Forti*'s phrase "universally condemned" was actually changed to the correct test a year later. *Forti*, 694 F. Supp. at 709 ("plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition"). *Forti*, 672 F. Supp. at 1540, merely cited *Filartiga*, 630 F.2d at 881 (which had actually used the "general assent" test) and *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (which had actually required merely that the *norm* be "definable, universal, and obligatory," which customary international law is (*i.e.*, a "universal" or universally obligatory norm) when it is based in general patterns of *opinio juris*; *see, e.g.*, PAUST, *supra* note 2, at 3-5, 23-27 n.14, and cases cited). Moreover, Judge Edwards did not state that the expectations must be "universal," but recognized the Supreme Court standard in *Paquete Habana* that a norm can arise from "the general assent of civilized nations." *Tel-Oren*,

726 F.2d at 789 (quoting *Paquete Habana*, 175 U.S. at 694). *See also* Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1304 (C.D. Cal. 2000) (false dictum: "states that refuse to agree . . . are not bound"); Guinto v. Marcos, 654 F. Supp. 276, 280 n.1 (S.D. Cal. 1986) (which had merely used the universal "norm" focus of Judge Edwards in *Tel-Oren*, not a universal consent error, and had used the test "standards of human rights that have been generally accepted — and hence incorporated into the law of nations," although it had also referred to "such universally recognized rights" (quoting Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985)). It is not clear why or where this error originated, perhaps in California. Also, some might have confused the fact that customary international law, once formed, creates a "universal" norm or obligation (although regional custom does not) with the standard concerning *opinio juris* for formation of a customary international legal norm, which merely requires that general patterns of supportive legal expectation exist. *See infra* text accompanying note 28. This is evident as one traces the misuse of the remarks by Judge Edwards and a shift from his focus on a "universal" *norm*, even noting that the test for *opinio juris* requires merely "general assent," to the "universal" consent error — a misrepresentation of a mantra. *Tel-Oren*, 726 F.2d at 789. Repetition of the error in dictum did not pose serious problems until its use recently in *Alvarez-Machain* to dismiss one of the plaintiff's claims. *See Alvarez-Machain*, 331 F.3d at 617, 619-20 (stating that the court's review of materials reveals no U.S. recognition of a prohibition of transborder abductions). This is strange, however, because the United States had twice voted in favor of U.N. Security Council resolutions condemning such abductions. *See* S.C. Res. 579, U.N. SCOR, U.N. Doc. S/Res/579 (1985) (emphasis omitted) (the resolution created at the request of the United States recognizes that "abductions are offences of grave concern . . . having severe adverse consequences for the rights of the victims," "[c]ondemns unequivocally all acts of . . . abduction" and "[a]ffirms the obligation of all States . . . to take all appropriate measures . . . to prevent the commission of acts of . . . abduction in the future"); S.C. Res. 138, U.N. SCOR, U.N. Doc. S/4349 (1960) (re: kidnapping of Eichmann; vote: 8-0-2, with abstentions by Poland and the Soviet Union, and Argentina not participating); *see also* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702, cmt. h (quoting a statement of the U.S. Delegation regarding arbitrary detention); 4 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW § 603, at 330 (1906) (U.S. Secretary of State recognition that it is not permissible to "arbitrarily abduct from the territory" of another state; and U.S. protest of Canadian kidnapping from New York); Paul O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. YB. INT'L L. 279, 284 (1960) (U.S. protest of British seizure in United States in 1841); Jordan J. Paust, *After* Alvarez-Machain: *Abduction, Standing, Denials of Justice, and Unaddressed Human Rights Claims*, 67 ST. JOHN'S L. REV. 551, 561 (1993) (Secretary of State Marcy protesting forcible abduction "violating . . . the rights of humanity" in 1853). Some might have feared a limitation on the right to capture bin Laden, al Odah, or others in a foreign country. *See Alvarez-Machain*, 331 F.3d at 652 (O'Scannlain, J., dissenting). But such forms of capture as measures of self-defense against those directly participating in ongoing armed attacks are permissible under Article 51 of the U.N. Charter and are not "arbitrary." *See, e.g.*, Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 538-39 (2002); *see also* Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 506-07 (2003) (whether detention of alleged terrorists is "arbitrary" has to be considered in context and with reference to various interests at stake); Paust, *After* Alvarez, *supra*, at 563, 566, 577-80 (not all captures would constitute "arbitrary" detention or denials of justice).

28. With respect to proof of customary international law, all that is required is that there be general recognition of or general consensus concerning a customary norm (i.e., general patterns of supportive legal expectation or *opinio juris* forming the core of normative content). *See, e.g.*, Nicar. v. U.S., 1986 I.C.J. 14, ¶¶ 186-88, 190, 202; North Sea Continental Shelf Cases, 1969 I.C.J.

With respect to treaties, the Supreme Court has affirmed more generally that treaty-based rights can be express or implied and that a treaty must be construed by the courts in a broad manner in favor of rights that may be claimed under a treaty.[29] By express language, the ATCA covers "any civil

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4, 41, 43-44; *id.* at 229-31 (Lachs, J., dissenting); Anglo-Norwegian Fisheries (United Kingdom v. Norway), 1951 I.C.J. 116, 148-49; *Paquete Habana*, 175 U.S. at 694 ("general assent"); *Scotia*, 81 U.S. (14 Wall.) at 187-88 ("generally accepted," "common consent of mankind"); *Ware*, 3 U.S. (3 Dall.) at 227 ("established by the general consent of mankind"); *Tel-Oren*, 726 F.2d at 789 (Edwards, J.) ("general assent"); *Filartiga*, 630 F.2d at 881 ("general assent" quoting *Paquete Habana*); *Estate of Rodriquez*, 256 F. Supp. 2d at 1263 ("accepted by a 'generality' of states"); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1359 (S.D. Fla. 2001); *Xuncax*, 886 F. Supp. at 187 ("It is not necessary that every aspect of what might comprise a standard [under customary international law] be fully defined and universally agreed upon before a given action . . . is clearly proscribed under international law. . . ."); *Forti*, 694 F. Supp. at 709 ("To meet this burden, plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited."); United States v. von Leeb (The High Command Case) (1948), XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 462, 487-88 (1950) ("common . . . general attitude of the citizens of states," "absolute unanimity among all states . . . is not required," "the general and considered opinions of the people within states — the source" of international law); J.L. BRIERLY, THE LAW OF NATIONS 62 (5th ed. 1955) ("general recognition," "not necessary, to show that every state has recognized," "test of general recognition"); ANTONIO CASSESE, INTERNATIONAL LAW 120, 123 (2001); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 344-45 (2d ed. 2000); ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 187, 189-90, 197-98 (1971); PAUST, *supra* note 2, at 3-5, 14-15; PAUST ET AL., *supra* note 7, at 25, 35-36, 83-84, 92-94, 96-98, 131; RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. c; *but see supra* text accompanying note 27.

29. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293-94 (1933); Nielsen v. Johnson, 279 U.S. 47, 51 (1929); Jordan v. Tashiro, 278 U.S. 123, 127 (1928); Asakura v. City of Seattle, 265 U.S. 332, 342 (1924) ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); United States v. Payne, 264 U.S. 446, 448-49 (1924) ("Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do. . . ."); Geofroy v. Riggs, 133 U.S. 258, 272 (1890) ("where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."); Hauenstein v. Lynham, 100 U.S. 483, 487 (1879) ("Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred."); Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"); Owings v. Norwood's Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809) (Marshall, C.J.) ("Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected."). Also, private duties pertain even though there is no express mention of individuals or individual duties in a treaty. *See, e.g.*, Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J., on circuit); Paust, *The Other Side of Right*, *supra* note 7, at 52 n.7.

action . . . for a tort only, committed in violation of . . . a treaty of the United States," and therefore can be applied consistently with Supreme Court principles of treaty construction to reach violations of express and implied rights guaranteed in a treaty of the United States.[30] Moreover, the reach of ATCA is broader. A relevant civil action is not limited to violations of treaty-based rights but expressly extends to "any civil action . . . for a tort . . . committed in violation of . . . a treaty of the United States."[31] Furthermore, there is no limitation concerning the treaties of the United States that are incorporated for such purposes by reference. Since the ATCA thus expressly incorporates all treaties of the United States by reference, it necessarily executes and implements for purposes covered by the statute any treaty of the United States that would otherwise be fully or partly non-self-executing.[32] With respect to non-self-executing treaties, this is not a remarkable result, since the ATCA performs the very role that implementing legislation generally plays by providing a cause of action or a remedy. Importantly, it is not the prerogative of courts to rewrite the ATCA to apply merely to some treaties but not to others. Additionally, it is worth emphasizing that the International Covenant on Civil and Political

30. 28 U.S.C. § 1350.

31. *Id.*; *see* PAUST, *supra* note 2, at 96-97 n.125; *supra* note 3.

32. *See, e.g., Estate of Cabello*, 157 F. Supp. 2d 1345, 1359-60 (S.D. Fla. 2001); Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000); PAUST, *supra* note 2, at 14-15, 65, 95-97, 233, 311-12 n.571, 373-74, 391 n.101; Paust, *Human Rights Responsibilities*, *supra* note 7, at 823 nn.109, 111.

Rights is at most only *partly* non-self-executing.[33] In any event, it is otherwise executed for civil sanction purposes by the ATCA.

Furthermore, when faced with a claim by the defendant in *Filartiga* that the customary "law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it,"[34] the Second Circuit opinion aptly noted: "This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. . . . A similar argument was offered to and rejected by the Supreme Court in *United States v. Smith*, . . . and we reject it today."[35]

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33. *See, e.g.*, PAUST, *supra* note 2, at 97, 361-62, 373 (noting that a U.S. declaration of non-self-execution is expressly inapplicable to Article 50, which mandates (also in self-executing language) that all of "[*t*]*he provisions* of the present Covenant *shall extend* to all parts of federal States *without any limitations or exceptions*" (emphasis added); that the Executive Explanation concerning the declaration of partial non-self-execution identifies a special meaning that the intent was that the International Covenant would not itself directly create a cause of action, thus allowing other uses of rights under the treaty, including use of rights defensively or to limit governmental power; and that the Executive Explanation concerning Article 50 was emphatic that "the Covenant will apply . . . the intent is not to modify or limit U.S. undertakings under the Covernant. . . . the U.S. will implement its obligations under the Covenant by appropriate . . . judicial means, federal or state."). Since the ATCA creates a domestic cause of action and expressly covers a violation of any treaty of the United States, it is not that important whether the treaty also creates a cause of action or whether the declaration is void as a matter of law because it is inconsistent with the object and purpose of the treaty. Concerning the issue whether the declaration is void, see, e.g., PAUST, *supra* note 2, at 363-69, 377.

One important provision reinvigorated by the express mandate of Article 50 of the International Covenant and implemented through the ATCA requires "an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity" and, thus, nonimmunity for officials who violate the treaty. ICCPR, *supra* note 11, art. 2(3)(a). More generally, U.S. and other courts use an *ultra vires* rationale to reach the same result or find the acts are "private," not "public" protectable acts. *See, e.g.*, PAUST, *supra* note 2, at 306-07, 422, 435-39.

34. Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980).

35. *Id.* at 886-87 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (a case that assured judicial competence when customary international legal norms actually exist as opposed to when significant splits obviate the existence of a pattern of *opinio juris*. *See id.* at 428, 430 n.34); The Paquete Habana, 175 U.S. 677, 677 (1900); The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 227 (1796) (customary law of nations is universal and binding); *id.* at 237 ("federal judges are bound"). For additional cases, see, e.g., Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 159-60 (1795); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); United States v. Ravara, 2 U.S. (2 Dall.) 297, 299 n.1 (C.C.D. Pa. 1793); Waite v. The Antelope, 28 F. Cas. 1341, 1341 (D.C.D. S.C. 1807) (No. 17,045); United States v. The Adriadne, 24 F. Cas. 851, 856 (D.C.D. Pa. 1812) (No. 14,465); *Henfield*, 11 F. Cas. at 1101-04 (Jay, C.J.); *id.* at 1107-08, 1120 (Wilson, J.); PAUST, *supra* note 2, at 7-12 *passim*; Paust, *Human Rights Responsibilities*, *supra* note 7, at 821 n.100; *see also Ex parte* Quirin, 317 U.S. 1, 27-28 (1942) ("From the very beginning of its history, this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy

In conclusion, the history of the ATCA is not unknown and is informing; by enacting the ATCA, Congress exercised its constitutional discretion to incorporate customary and treaty-based international law by reference and Congress chose to keep the ATCA intact in the 1990s and for more than 200 years. Since the 1790s, the ATCA has been known to be extraterritorial in its reach and to be more than a jurisdictional statute, since it provides a cause of action or right to a remedy. The ATCA is implementing legislation and incorporates by reference and executes any partly or fully non-self-executing treaty of the United States. Actionable violations of international law are potentially many and can be committed by U.S. or foreign private or public actors. It would be a violation of the separation of powers for the judiciary to place limits on the reach of the ATCA that have not been chosen by Congress, and the judiciary should use international law as it has evolved and identify normative content that is sufficiently determinable. Additionally, it would be an error to state that either customary or treaty-based norms must be strictly defined, based in universal consent, or universally practiced.

Particularly erroneous and threatening to the separation of powers and the rule of law is a recent claim that a norm not recognized by the executive or one contrary to its will cannot be customary international law or actionable in our courts.[36] The uniform expectations and decisions of the Founders, Framers, and the judiciary for some two hundred years,

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individuals."). Of course, the ATCA is congressional legislation that incorporates customary international law by reference. *See supra* text accompanying note 2.

Despite assertions of a few, customary international law has constitutional bases; is among the "laws of the United States" within judicial power and binding on the executive; and is not simplistically mere "common law" (with or without a statutory-base such as the ATCA). Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (addressing merely "common law"); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 31, 32-33 (1812) (no mere "common law" crimes), and cases addressing "maritime" law are irrelevant. *See, e.g.*, United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826) (regarding prosecution directly under customary international law (after *Hudson & Goodwin*) and alternatively under a statute); United States v. Smith, 18 U.S. (5 Wheat.) 153, 159, 161 (1820); PAUST, *supra* note 2, at 7-11, 39-43 n.50 (numerous cases demonstrate it is not mere "common law"); *id.* at 50-51 n.60, 55-56 n.67, 169-73 *passim*; Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 308-13 (1999); *but see* Al Odah v. United States, 321 F.3d 1134, 1147-48 (D.C. Cir. 2003) (Randolph, J., concurring) (using the mere "common law" error); BARRY E. CARTER ET AL., INTERNATIONAL LAW 235, 237 (4th ed. 2003). Customary international law has also been recognizably supreme vis-à-vis the states since the Founding. *See, e.g.*, PAUST, *supra* note 2, at 7-8, 10, 53-54 n.63 (and cases cited), 116, 165-67 nn.134-35 (and cases cited), 208-09 *passim*.

36. *See* Alvarez-Machain v. United States, 331 F.3d 604, 646-48, 650 (9th Cir. 2003) (O'Scannlain, J., dissenting).

including Justice O'Connor's recognition in an opinion in 1984,[37] have been emphatic that the executive is bound by international law and the judiciary has the power and responsibility to apply that law.[38] Indeed, when faced with a claim by the executive that the seizure of enemy alien vessels abroad in time of war was lawful and that its view of customary international law should apply,[39] the Supreme Court ruled that customary international law opposed by the executive was controlling and that the executive seizures were in violation of international law and void.[40] Under the Constitution, it must not be otherwise, since Article II, Section 3 demands that the executive faithfully execute the laws, including customary international law,[41] and Article III, Section 2 assures that the competence to apply international law in cases before the courts is textually committed to the judiciary.[42] To allow the executive to determine what laws it will or will not obey, and to dictate how law should be interpreted by the judiciary, would involve a radical violation of the separation of powers unacceptable in a constitutional democracy.

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37. *See* Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 261 (1984) (O'Connor, J.) (recognizing that a relevant congressional-executive "arrangement" must not be "exercised in a manner inconsistent with . . . international law.").

38. *See, e.g.*, PAUST, *supra* note 2, at 169-73, 180-87 nn.1-42, 489, 492-94.

39. The circumstance involved the height of executive powers, during a real war, involving war tactics within a battle zone against enemy aliens abroad.

40. *See, e.g.*, *Paquete Habana*, 175 U.S. at 700, 711; The Paquete Habana, 189 U.S. 453 (1903) (Holmes, J.); PAUST, *supra* note 2, at 171-72, 174-77, 183-84 n.24; Paust, Paquete *and the President*, *supra* note 25, at 983-86. The above cited materials also demonstrate that the Admiral who seized the alien vessels and crew had warned that the ships and crew could aid the enemy, the Secretary's clarification of the Admiral's warning and request for clarification quite openly assured executive permission to seize vessels and crew that the Admiral thought should be seized, the executive did not order release of the ships or crew, the executive continued to support the actions as lawful executive actions throughout the litigation and during the 1903 decision of Justice Holmes, and the executive's views concerning the content of customary international law were incorrect and certainly could not be controlling.

41. *See supra* text accompanying notes 37-38.

42. U.S. CONST. art. III, § 2.