



INTERNATIONAL & NATIONAL SECURITY LAW NEWS

Aspirin for a “Major Headache?” Scaling Back Relief Under the Alien Tort Claims Act

By Donald J. Kochan *

The “Headache”: An Expanding Scope of Liability

Customary international law is increasingly permeating the jurisprudence of American courts. Early Supreme Court cases established the proposition that the “law of nations” is part of “our law.” Since those pronouncements, however, the “law of nations” has become “international law,” growing exponentially to cover human rights and non-state actors. Several new vehicles have emerged in recent years that allow federal courts to search the vast array of international law principles and adopt them as controlling legal authority. The Alien Tort Claims Act (ATCA) is one of the most significant among these laws creating private causes of action for violations of international law.

Aside from the constitutional issues raised by the ATCA and others like it, business interests may have serious liability concerns. Perhaps one of the most important cases to business interests is *John Doe I v. Unocal Corp.*¹ The suit alleges that oil giant Unocal was complicit in human rights abuses while building a gas pipeline in Myanmar. In its 1997 decision on subject matter jurisdiction,

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Domestic Regulation And International Trade: Where’s the Race?

By Ronald A. Cass* and John R. Hating**

INTRODUCTION

Critics claim that international trade undermines a nation’s ability to maintain an independent national regulatory structure that would be chosen under democratic-representative processes. The result supposedly is a “race to the bottom” in protection of public interests. Politicians and other commentators frequently conclude that public welfare is reduced by open trade without some mechanism to safeguard domestic regulation or otherwise to secure its ends.

The race-to-the-bottom metaphor builds on economic writings suggesting that, at least under certain conditions, open trade in goods leads to factor price equalization with reduced returns to factors that are relatively abundant in other nations.¹ Thus, for example, if low-skilled labor is relatively abundant outside the United States, open trade in products intensively utilizing such labor will (according to this theory) lead to lower real income for low-skilled American workers.² That conclusion has led to calls for restraining trade, for harmonizing divergent national rules, or for adopting uniform transnational regulatory accords. Economists, however, debate whether this

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a federal district court in California determined that jurisdiction existed under the ATCA for alleged violations of international law by Unocal even as a non-state actor. In commenting on the ongoing ATCA suit against Unocal, *The Economist* in its April 24, 1999, issue described the threat. "The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals." And, if companies begin losing in this emerging field of litigation, it could "provide a major headache for many American companies operating abroad."

With increasing frequency, corporations are becoming targets as the number and type of suits filed under the ATCA expands. Plaintiff claims have ranged from allegations of human rights abuses from environmental injuries caused by corporate operations to certain labor practices as violative of international law. Although these suits have met with varying success, the threat of liability to multinational operations looms. Moreover, courts are recognizing an expanding scope of liability in more "traditional" human rights cases, creating precedent that will allow ATCA jurisprudence to expand generally, thereby affecting all potential defendants within its reach.

This Article explores the growth of ATCA jurisprudence to help explain the foundation for this emerging litigation approach. It then proceeds to explain some of the constitutional infirmities of the current ATCA jurisprudence² and a possible interpretation of the law that would conform to constitutional limitations.

The Source: The ATCA and Its Modern Incarnation

The Restatement (Third) of Foreign Relations Law of the United States, Sections 111 and 112, asserts that customary international law is part of federal common law. This assertion reflects the path U.S. courts have chosen in recent years when defining their competence to apply international legal principles to particular cases.

Early cases, including *The Nereide*,³ *United*

*States v. Smith*⁴ and *The Paquete Habana*⁵, established the proposition that the "law of nations" is included in the federal common law of the United States. Courts may ascertain the law of nations "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."

Moreover, the *The Paquete Habana* Court set forth perhaps the most relied upon statement relating to the justiciability of the "law of nations." Its statement presents three critical rules. First, it reaffirms the proposition that international law is part of the law of the United States, or at least its admiralty law. Second, it holds that an international "law" can be controlling and applied by the court even when it has not previously been recognized in a treaty of the United States, a legislative act, an executive act, or a prior decision by a court. The Court supports its optimism that such a neutral task can be accomplished with the assurance of Wheaton that jurists and commentators are "generally impartial in their judgment." Finally, the Court illustrated a willingness to give international law a dynamic perspective, i.e., it indicated that the law of nations cannot be analyzed from a static perspective and that certain standards ripen over time into settled rules of international law.

The ATCA, arising from a provision in the Judiciary Act of 1789, provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁶

Little direct evidence of Congress' intentions in enacting this provision exists to lend guidance to those searching for its meaning. In the ATCA's more than 200 year history, neither the Supreme Court nor Congress has given the judiciary guidance in its application. Prior to 1980, jurisdiction under the ATCA was predicated successfully only two times. For almost 200 years, therefore, this Act essentially remained dormant.

In *Filartiga v. Pena-Irala*,⁷ decided in 1980,

the Second Circuit resurrected the ATCA from its fairly dormant existence. In *Filartiga*, Dolly Filartiga, a citizen of the Republic of Paraguay, brought suit against a former Inspector General of Police of Paraguay, for allegedly kidnaping, torturing, and killing her brother while holding that office. The alleged action took place in Paraguay. Suit was brought, however, while both Filartiga and Pena were in the United States on visitor's visas. The district court dismissed the action for lack of subject matter jurisdiction. The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law, and that alleging such torture creates jurisdiction under the ATCA.

For the first time, the ATCA was applied in the modern human rights context. Furthermore, *Filartiga* established that "international law" is an evolving concept to be ascertained by the courts. In order to determine which principles are controlling as international "law," the court accepted the methodology prescribed in *Smith* and *The Paquete Habana* of looking to general usages and customs of nations, as evidenced by the works of jurists and commentators, as well as treaties and declarations or resolutions of multinational bodies such as the United Nations. To that extent, the *Smith-Paquete Habana* methodology was incorporated as the precedent for interpreting the ATCA.

In 1985, the D.C. Circuit was faced with a similar task of applying the ATCA in *Hanoch Tel-Oren v. Libyan Arab Republic*.⁸ On behalf of persons killed on a civilian bus in Israel, the plaintiffs charged the defendants with multiple tortious acts in violation of international law. A panel of the D.C. Circuit unanimously agreed that the court did not have jurisdiction over the plaintiffs' causes of action. Each judge, however, wrote a separate concurring opinion, each positing a different basis for denying jurisdiction.

Judge Edwards, adhering to the *Filartiga* rationale, argued violations of the law of nations is a narrow category reserved to "a handful of heinous actions — each of which violates

definable, universal and obligatory norms," and that the actions in this case did not trigger such jurisdiction. Edwards cautioned, however, that when a proper cause of action satisfies the requirements of the ATCA, the judiciary should exercise jurisdiction.

Judge Robb relied primarily on the political question doctrine in his concurrence, asserting that an exercise of jurisdiction improperly involved the judiciary in foreign affairs, an area outside of its expertise and one wrought with the danger of interference with the political branches. Furthermore, Judge Robb rejected the *Filartiga* formulation for ascertaining international law arguing "statutes ought not to mutate," and "courts ought not to serve as debating clubs for professors" providing courts with "little more than a numbing sense of how varied is the world of public international 'law'." Absent Congressional guidelines to clarify the ATCA's application or purpose, Judge Robb saw no opportunity for judicial cognizance under the statute.

Judge Bork found that the ATCA merely provides a forum and did not provide a separate and automatic private cause of action for violations of international law. That is, even though international law may be part of the federal common law, it is not of the type, such as in torts or contracts, that allows judges to fashion a remedy, but merely involves rules of decision. Furthermore, Bork found no other statute or binding international law relied upon by the plaintiffs that conferred a right to a cause of action in the case.

Finally, Judge Bork also argued that "one might suppose" that the meaning of "law of nations" in the ATCA dealt with the three kinds of offences understood to constitute the whole of international law at the founding: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Furthermore, Bork noted that this list is quite consistent with specific categories enumerated in Article III.

The expansion of the judicial application of the ATCA reached new heights in 1995 with the

decision in *Kadic v. Karadzic*.⁹ The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina. They alleged that they were victims, and representatives of victims, of various atrocities including rape, torture, and summary executions by the Bosnian-Serb military forces. The district court dismissed the case for lack of subject-matter jurisdiction. The Second Circuit reversed this ruling.

The Second Circuit held that the ATCA applies to actions by state actors or private individuals that are in violation of customary international law. According to the *Kadic* court, state action is not always necessary to be a cognizable violation of the law of nations. The court accepted the principles it earlier adopted in *Filartiga* noting that international law is constantly evolving and consulting a similar list of authorities to ascertain the norms of contemporary international law.

Since *Kadic*, the Ninth¹⁰ and Eleventh¹¹ Circuits have had significant opportunities to examine and apply the ATCA and have generally followed the lead of the Second Circuit. In late November 1999, the Fifth Circuit also appeared to accept the *Filartiga/Kadic* line in dicta, although affirming a dismissal for failure to state a claim in a suit charging a corporation with violations of international law for environmental harms.¹² In addition, several district courts have been faced with a multitude of ATCA claims.

The Diagnosis: A Structural Problem with the ATCA's Application

Several challenges to the constitutionality of the ATCA as applied can be posited. This section presents one challenge based on the jurisdictional boundaries of Article III.

Article III, Section 2 of the Constitution defines the parameters of the judicial branch's authority stating, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their

Authority . . .," along with a few specific areas of additional jurisdiction. The enumeration of judicial power in Article III constitutes the entire mass of the judicial branch's authority. To that extent, authority for determining the "law of nations" must be found in Article III. Applying the concept that international law is part of the federal common law, many courts applying the ATCA, including each of the cases discussed in the previous Part, have used the "arising under . . . laws of the United States" clause to justify Article III jurisdiction over human rights claims and other portions of international law not within a separate category of Article III jurisdiction. The propriety of such a construction is called into question, however, when viewing Article III as a whole.

The law of nations plays a role in four categories of enumerated cases to which the Constitution grants jurisdictional authority — cases or controversies arising under treaties of the United States; cases affecting Ambassadors, other Public Ministers and Consuls; cases of admiralty and maritime jurisdiction; and controversies between a State, or the Citizens thereof, and foreign States, Citizens or Subjects — but no general subject-matter grant is given over this area. In fact, the enumeration of particular areas in which the law of nations is involved negates a presumption that such a general grant could exist. If the law of nations was included in the laws of the United States, the inclusion of these three additional categories of jurisdiction would be unnecessary and redundant.

For example, admiralty law is a category distinct from the "laws of the United States," yet one clearly an element of the law of nations. Because prize cases involve the application of the admiralty subcategory of international law, if a general grant over the "law of nations" is included in the "laws of the United States," the federal courts could obtain jurisdiction over these admiralty cases without a separate enumeration of admiralty and maritime jurisdiction. If one accepts that the laws of the United States generally incorporate international law, he must

accept that the admiralty jurisdictional clause is unnecessary and, to that extent, superfluous. Certainly that cannot be an appropriate outcome for the construction of a written document, especially a Constitution.

Such a construction also could explain the *Neirede/Smith/Paquete Habana* line of cases. Each of these, after all, involved admiralty jurisdiction, an area where, indeed, international law may be proper under this construction.

Furthermore, Congress, not the courts, is expressly granted a right to define the law of nations. Article I, Section 8, clause 10 of the Constitution states that "The Congress shall have the Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." The Framers recognized that effective diplomatic relations required the government to speak with one voice. Multiple voices are likely to be divergent voices, creating confusion and the possibility of embroiling the nation in international conflicts.

During the constitutional debates, it was further recognized that the law of nations is often too vague and indeterminate to act as a legal principle, and instead must be defined by Congress to act as a controlling doctrine.¹³ It was further understood by the Framers that only portions of the law of nations might be appropriate "laws" which should bind the conduct of the United States.¹⁴ The political branches, the Executive and Congress, were given the power to determine which international laws should bind the actions of the United States. Inherent in a political decision is also the ability to alter that decision. A judicial pronouncement that a law is binding upon all nations, including our own political branches, lacks such flexibility.

The Aspirin: A Two-Step Jurisdictional Test

If the construction set forth below were adopted, the subject matter of potential suits would be narrowed and the range of potential defendants would not extend beyond state actors.

Consequently, liability under the ATCA would be significantly limited, although not eliminated. More importantly, the limitations of the Constitution would be respected. Assuming all other requirements of the ATCA are met and that the plaintiff alleges a violation of the law of nations (as opposed to a treaty), jurisdiction should be granted only if a court can answer affirmatively one of the two following questions:

1) Is the plaintiff seeking a remedy for a tort only committed in violation of the law of nations *and* does the case fall under a category of Article III which I shall call "special jurisdiction" — that is does the case sound in admiralty or maritime, or does the case involve a foreign minister, counsel, or ambassador, or is the case brought against a citizen of the United States by an alien who is a citizen of a foreign state? Or,

2) If the case does not fall within any area of special jurisdiction under Article III and the plaintiff is thus relying on the jurisdictional authority of the "laws of the United States," is the plaintiff seeking a remedy for a tort only committed in violation of a law of nations as defined by Congress under its Article I, Section 8, Clause 10 authority?

If the answer to both questions is "no," jurisdiction under the ATCA cannot be triggered.

Because the ATCA must fit within the confines of Article III, this two-step analysis seeks to define the only legitimate role for the ATCA in the constitutional structure. If the ATCA is to be properly applied, the role of the judge should first be to determine whether the cases at hand is one affecting a special jurisdictional category. If the case falls within one of these categories, reference to international law will be appropriate and anticipated by the Framers in the crafting of Article III. If, however, the case or controversy does not fall within one of these categories, the judge must look to the Constitution, the laws of the United States, or a treaty of the United States, and the court must restrict itself to referencing these domestic declarations of law. This means that the judge must look to "laws of the United

States.” Under the structural view, these laws cannot include a general international common law. The judge’s duty, therefore, is to ascertain whether Congress has defined an offense against the law of nations making it actionable under the domestic laws clause. If it has not, the judge has no authority to apply international law.

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NOTE: For a more detailed presentation of the thesis presented in this Article, see Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 CORNELL INT’L L.J. 153 (1998).

¹ 963 F.Supp. 880 (C.D. Cal. 1997).

² For analyses of the various problems posed by the use of international law in domestic courts, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997).

³ 13 U.S. (9 Cranch) 388 (1815).

⁴ 18 U.S. (5 Wheat) 153 (1820).

⁵ 175 U.S. 677 (1900).

⁶ 28 U.S.C. Section 1350. The separate clause granting jurisdiction over torts committed in violation of treaties of the United States is beyond the scope of this Article.

⁷ 630 F.2d 876, 877 (2d Cir. 1980).

⁸ 726 F.2d 774 (1984).

⁹ 70 F.3d 232 (2d Cir. 1995).

¹⁰ See, e.g., *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir. 1996); 103 F.3d 789 (9th Cir. 1996).

¹¹ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (1996).

¹² See *Beanal v. Freeport-McMoran, Inc.*, 1999 U.S. App. LEXIS 31536 (5th Cir. Nov. 29, 1999).

¹³ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 637 (Bicentennial ed., Norton 1987)(reporting for September 14, 1787).

¹⁴ THE FEDERALIST No. 53, at 364 (James Madison)(Jacob E. Cooke ed., 1961).

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