No. 01 Civ. 9882

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE PRESBYTERIAN CHURCH OF SUDAN, et al.,

Plaintiffs,

vs.

TALISMAN ENERGY, INC., AND THE REPUBLIC OF THE SUDAN,

Defendants.

BRIEF AMICI CURIAE OF INTERNATIONAL LAW SCHOLARS AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS

Ralph G. Steinhardt
George Washington University Law School
2000 H Street, N.W.
Washington, D.C 20052
202.994.5739

William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
619.239.0391

Counsel for *Amici Curiae*

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LIST OF AMICI

William J. Aceves is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. He frequently works with human rights non-governmental organizations, including Amnesty International, the Center for Justice & Accountability, the Center for Constitutional Rights, Human Rights Watch, Human Rights Advocates, the International Human Rights Law Group, and the World Organization against Torture USA. Among his articles addressing the issues in this case are "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation," 41 Harv. Int'l L. J. 129 (2000) and "Using Immigration Law to Protect Human Rights: A Legislative Proposal," (with Hoffman) 20 Mich. J. Int'l L. 658 (1999).

M. Cherif Bassiouni is Professor of Law and President of the International Human Rights Law Institute of DePaul University College of Law, the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, and the International Association of Penal Law in Paris, France. The author of over 55 books and 176 law review articles, Prof. Bassiouni has received numerous honors for his international work, including a nomination for the Nobel Peace Prize in 1999.

Carolyn Patty Blum is a Clinical Professor of Law at Boalt Hall School of Law, University of California at Berkeley, where she founded and now directs the International Human Rights Law Clinic. Professor Blum also is a Tutor in the Masters of Studies in International Human Rights Law Programme at Oxford University.

Anthony D'Amato is the Leighton Professor of Law at Northwestern University School of Law, where he teaches courses in international law and human rights, analytic jurisprudence, and justice. He is the first American lawyer to argue (and win) a case before the European Court of Human Rights in Strasbourg, and he has litigated a number of human rights cases around the world. He is the author of over 20 books and over 110 articles.

William S. Dodge is Professor of Law at the University of California, Hastings College of the Law, where he teaches courses in international law and business. He has written extensively on the history of the Alien Tort Claims Act, including "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 Hastings Int'l & Comp. L. Rev. 221, 239 (1996) and "The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context," 42 Va. J. Int'l L. 687, 701 (2002).

Jon M. van Dyke has taught international law and international human rights law at the William S. Richardson School of Law, University of Hawai`i, for the past 27 years. Previously he taught at the University of California's Hastings College of the Law in San Francisco, and at Catholic University Law School in Washington, D.C. He has written numerous articles on international human rights and is co-author of the casebook International Law and Litigation in the United States (2000).

David E. Guinn is Executive Director of the International Human Rights Law Institute and Adjunct

Professor of Law at DePaul University College of Law. A moral, legal and political philosopher as well as a legal scholar, Prof. Guinn is the author/editor of 8 books and over 50 articles.

Hurst Hannum is Professor of International Law and Co-Director of the Center for Human Rights & Conflict Resolution at The Fletcher School of Law and Diplomacy. He is co-author of International Human Rights: Problems of Law, Policy, and Practice (3d ed. 1995) and editor of Guide to International Human Rights Practice (3d ed. 1999).

Harold Hong-ju Koh is the Gerard C. and Bernice Latrobe Smith Professor of International Law at Yale Law School. From 1998-2001, he served as the Assistant Secretary of State for Democracy, Human Rights and Labor. He is a member of the American Law Institute and the author of numerous books and articles, including Deliberative Democracy and Human Rights (with Slye) (1999), "Is International Law Really State Law?," 111 Harv. L. Rev. 1824 (1998), and "Why Do Nations Obey International Law?," 106 Yale L.J. 2599 (1997)

Naomi Roht-Arriaza is Professor of Law at the University of California, Hastings College of Law, where she teaches, among other things, tort law and international human rights law. She has written widely on international human rights law.

Beth Van Schaack is an assistant professor of international law at Santa Clara University School of Law. Prior to joining the Santa Clara faculty, she was in private practice and served as the acting Executive Director and Staff Attorney of The Center for Justice & Accountability. She has litigated cases under the Alien Tort Claims Act and Torture Victim Protection Act for several years and is the author of numerous works, including "In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgements Convention," 42 Harv. Int'l L. J. 141 (2001).

Beth Stephens, is Professor of Law at Rutgers-Camden Law School, and she has published a variety of articles on the relationship between international and domestic law, focusing on the enforcement of international human rights norms through domestic courts. She has written extensively on the historical origins of the Alien Tort Claims Act as well as its modern application. Recent publications include "Individuals Enforcing International Human Rights Law: The Comparative and Historical Context," 52 DePaul L. Rev. 433 (2002); "Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations, 27 Yale J. Int'l L. 1 (2002); and "Federalism and Foreign Affairs: Congress' Power to 'Define and Punish . . . Offenses Against the Law of Nations'," 42 Wm. & Mary L. Rev. 447 (2000).

Ralph Steinhardt is the Arthur Selwyn Miller Research Professor of Law at George Washington University Law School. He is also the co-founder and -director of the Oxford Programme in International Human Rights Law. He has litigated under the Alien Tort Claims Act for over twenty years and most recently as plaintiff's co-counsel in Alvarez-Machain v. Sosa. His publications in the field include The Alien Tort Claims Act (with D'Amato) (1999), "Fulfilling the Promise of *Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos," 20 Yale J. Int'l

L. 65 (1995), and "International Humanitarian Law in the Courts of the United States," __ G.W. Int'l L. Rev. __ (forthcoming, 2003).

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The Lawyers Committee for Human Rights is a nongovernmental organization based in New York City that has worked since 1978 to protect fundamental human rights and to hold governments to the standards defined by human rights and humanitarian law. The Lawyers Committee has consultative status with the United Nations

The Center for Justice and Accountability is a non-governmental organization, based in San Francisco, which works to deter torture and other serious human rights abuses around the world by helping survivors hold their perpetrators accountable, typically by bringing civil lawsuits under the Alien Tort Claims Act and the Torture Victim Protection Act. Launched in 1998 with initial support from Amnesty International USA and the United Nations Voluntary Fund for Victims of Torture, CJA has filed and litigated numerous cases in the federal courts.

ARGUMENT

The Alien Tort Claims Act of 1789 ("Act" or "ATCA") explicitly authorizes civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350. Courts construing the plain wording of the statute in its historical and doctrinal context have concluded that it provides subject matter jurisdiction and a cause of action for tortious violations of international law, including serious human rights abuses. But in an effort to induce this Court to derail this case, Defendant, Talisman Energy, has submitted a brief recently filed by the government *amicus curiae* in Doe v. Unocal (9th Cir. May 8, 2003)) ("DOJ Brief"). *Amici* file these points and authorities to identify the fundamental errors of fact and law in the government's analysis.

The DOJ's Brief is at least the seventh filing since 1980 in which the government has offered its interpretation of the ATCA *amicus curiae*.[1] Taken together, the government's *amicus* submissions offer no coherent vision of the Act; indeed, the Justice Department's most recent analysis flatly contradicts the position it expressed to the Second Circuit in Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980), and in Kadic v. Karadzic, 70 F. 3d 232 (2d Cir. 1995), both of which establish the law of this Circuit. Even if the meaning of a 214-year-old statute could vary from year-to-year and administration-to-administration, the government's most recent interpretation is

[1] The United States has also filed briefs *amicus curiae* addressing the scope of Section 1350 in Filartiga v. Pena-Irala, 630 F. 2d 876 (1980) (supporting jurisdiction); Tel-Oren v. Libyan Arab Republic, 726 F. 2d 724 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (opposing certiorari); Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421(2d Cir. 1987) (arguing that the ATCA does not provide jurisdiction over foreign sovereign); Trajano, et al. v. Marcos, et al., 878 F.2d 1439 (9th Cir. 1989) (offering restrictive interpretation of the ATCA); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (supporting jurisdiction); Alvarez-Machain v. Sosa, __ F.3d __ (9th Cir., June 3, 2003) (*en banc*) (opposing jurisdiction).

unpersuasive: it contradicts the express terms of the statute and renders the statute either meaningless or superfluous. It invites the courts to amend the statute without bothering with Congress, which not only adopted the ATCA but which expanded it in the Torture Victim Protection Act of 1992. The position adopted by the government has been rejected by every court to address the issue, including most recently this Court, Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003), and the Ninth Circuit Court of Appeals *en banc* in Alvarez-Machain v. Sosa and the United States, __ F. 3d __, 2003 WL 21264256, Nos. 99-56762, 99-56880, (9th Cir. June 3, 2003). The DOJ Brief also betrays a fundamental disregard for the Framers' original understanding of the law of nations and its role in domestic litigation. The brief erects the strawman argument that unratified or non-self-executing treaties and non-binding international resolutions are enforced in ATCA litigation, when these instruments are actually used only in conjunction with other evidence of what the law of nations is, precisely as precedent allows and as the government itself has advised the courts to do in other settings. The DOJ Brief similarly misapplies the presumption against extraterritorial application of U.S. statutes, and it offers a blanket rationale for blocking ATCA cases which is inconsistent with the political question doctrine and the act of state doctrine as articulated by the Supreme Court. Properly understood, the statute contains its own limitations which assure that frivolous cases will not survive. For each of these reasons, the Court should reject the government's analysis of this ancient statute.

I. THE ALIEN TORT CLAIMS ACT PROVIDES A CAUSE OF ACTION AND A FEDERAL FORUM FOR CERTAIN VIOLATIONS OF INTERNATIONAL LAW.

A. The Department of Justice Is Not Entitled to *Chevron* Deference in the Interpretation of the ATCA.

The Supreme Court has long recognized "that the judicial department of every government . . . is the appropriate organ for construing the legislative acts of that government." Elmendorf v. Taylor, 22 U.S. (10 Wheat.) 152, 158 (1825). When an administrative agency construes an organic statute under which it exercises authority pursuant to congressional delegation, the Court will generally defer to that interpretation to the extent that it reflects some specialized expertise. Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). But

> [when] the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by *judicial* application of canons of statutory construction.

Barlow v. Collins, 397 U.S. 159, 166 (1970) (emphasis supplied). Jurisdictional statutes are administered by the courts, not by the Justice Department, and whether a statute creates a cause of action is for the courts to determine, not the Justice Department. Nor will the courts defer when the interpretation offered by the government is inconsistent with the facial requirements of the statute or legislative intent, and this is especially true if the government's interpretation changes over time. Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 488 (1987); Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). It follows *a fortiori* that the Justice Department's interpretation of a statute like the ATCA – involving no Congressional delegation to the executive and no presumptive expertise – is entitled to no special deference, especially if that construction violates the plain meaning of the statute or reflects a basic (and recent) misunderstanding of history. As noted by the Ninth Circuit the first time it rejected the Justice Department's cramped view of the ATCA,[2] the government's inconsistent positions "in different

[2] In Trajano v. Marcos, the United States submitted an *amicus* brief arguing that the ATCA did not provide a cause of action, which in some respects anticipates the current DOJ Brief *verbatim*.

cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what § 1350 shows on its face." In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 500 (9th Cir. 1992).

B. The Justice Department's Recent Position is Inconsistent with the Language, History, and Context of the ATCA.

Enacted in 1789 as part of the First Judiciary Act, the Alien Tort Claims Act provides: "[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."[3] Since Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the ATCA has been interpreted to establish subject matter jurisdiction and a cause of action for serious violations of international law, including violations of human rights norms.[4] In its submission to the Unocal Court, the Department of Justice asserts that the ATCA is merely a jurisdictional provision and does not provide a federal cause of action. DOJ Brief, at 5.

The government's approach to the ATCA is inconsistent with the plain language of the statute. By its terms, the statute covers (i) "*any* civil action," (ii) by an "alien" plaintiff, (iii) suing

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Memorandum for the United States as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989). The Ninth Circuit rejected that approach in Trajano and Hilao. A decade later, at oral argument in the *en banc* rehearing in Alvarez-Machain, *supra*, the government resurrected its old position and later submitted its Unocal *amicus* brief, Letter to the Court dated May 9, 2003. Eight days ago, the Ninth Circuit *en banc* rejected it again. Alvarez-Machain v. United States, __ F. 3d __, 2003 WL 21264256, No. 99-56762, 99-56880 (9th Cir. June 3, 2003).

[3] 28 U.S.C. § 1350. The term "law of nations" was used until the early 20th century in reference to the customary rules and obligations that regulated interaction between states and certain aspects of state interaction with individuals. It has now been supplanted by the term "customary international law." Restatement (Third) of the Foreign Relations Law of the United States § 111 Introductory Note (1987) ("Restatement (Third)").

[4] See pp. 9-11, *infra*.

for a "tort," (iii) "in violation of" international law in either customary or treaty form. Assuming that the plaintiff is an alien, the statute is satisfied so long as the underlying wrong takes tortious form and is in violation of international law. There is no additional reference to Congressional incorporation or a case that "arises under" federal law. *Cf.* 28 U.S.C. § 1331. This was clearly understood by eighteenth-century courts, as suggested by the first reported case involving the ATCA, Bolchos v. Darrel, 3 Fed. Cas. 1810 (D. S. Car. 1795), in which the plaintiff sought restitution for the value of slaves on a captured Spanish ship. In its opinion, the court made no mention of any additional Congressional action needed to allow the plaintiff to invoke substantive rights under the law of nations. Those rights already existed in American law by virtue of the incorporation of the law of nations into the common law of the United States.[5] "[T]he First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be"[6] and that the courts of the fledgling nation should be open to aliens seeking a remedy for violations of international law.[7]

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[5] 1 James Kent, Commentaries on American Law 195 (13th ed. 2001); Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 U. Penn. L. Rev. 26, 35-36 (1952). *See also* Filartiga v. Pena-Irala, 577 F.Supp. 860, 862 (E.D.N.Y. 1984):

> There was nothing about the contemporary usage of the word [tort] in 1789, when Section 1350 was adopted, to suggest that it should be read to encompass wrongs defined as such by a national state but not by international law.

[6] William S. Dodge, "The Historical Origins of the Alien Tort Statute: A Response to the 'Originalists'," 19 Hastings Int'l & Comp. L. Rev. 221, 239 (1996). *See also* Jordan Paust, International Law as Law of the United States 206-208, 282-285 (1996); Anthony D'Amato, "Judge Bork's Concept of the Law of Nations is Seriously Mistaken," 79 Am. J. Int'l L. 92 (1985).

[7] In 1790, Chief Justice John Jay made this point in grand jury charge:

> We had become a Nation – as such 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*.

Contemporaneous statements by the Attorney General reaffirmed the status of the ATCA as the basis for an alien's suit to enforce international norms. In 1795, for example, the U.S. Attorney General was asked to consider the potential liability of U.S. citizens who had aided the French in attacking the British colony in Sierra Leone. The opinion, only six years removed from the adoption of the First Judiciary Act, reveals that the First Congress understood that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be:

> ... there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by *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.

1 Op. Att'y Gen. 57, 59 (1795) (emphasis in original). *See also* 26 Op. Att'y Gen. 250, 253 (1907) ("I repeat that the statutes thus provide a forum and a right of action.").

The Supreme Court has repeatedly established the criteria for determining the content and applicability of the law of nations in domestic litigation when Congress has not addressed the international standard. The touchstone is The Paquete Habana, 175 U.S. 677 (1900), where the Court stated:

> International law is part of our law, and must be ascertained and administered by the courts

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"John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790," *in 2 The Documentary History of the Supreme Court of the United States, 1789-1800* 25, 27 (Maeva Marcus, ed. 1988) (emphasis added). *See, generally* Anthony D'Amato, "The Alien Tort Statute and the Founding of the Constitution," 82 Am. J. Int'l L. 62 (1988); Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 Am. J. Int'l L.. 461 (1989).

> of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators . . . .

Id., at 700. In Paquete Habana and its progeny, the Supreme Court approved the application of international law in U.S. courts even in the absence of positive Congressional enactment.

By contrast, the test proffered by the Justice Department bears little resemblance to that of the Supreme Court; indeed, the most that the government can say about The Paquete Habana is that "[i]n certain areas, of course, a court, in connection with a matter already properly pending before it, may properly look to norms of international law to furnish a rule of decision." DOJ Brief at 19. But, if the courts can, even in "certain [unspecified] areas" turn to customary law for the rule of decision in the absence of Congressional direction, then surely it can take the lesser step of consulting customary law to determine whether a lawsuit is properly before it when – as in the ATCA – Congress *has* directed it to do so. Presumably, if Congress did act in the way required by the Justice Department, jurisdiction would lie under the federal question statute, 28 U.S.C. § 1331, or potentially the diversity statute, 28 U.S.C. § 1332, and the ATCA would be superfluous.

In short, the Justice Department's current insistence that the ATCA does not contain an explicit cause of action would have mystified 18th-century lawyers, who understood the law of nations to be part of American law and therefore available to claimants whose rights under that law had been abridged.[8] The Justice Department's additional requirement would necessarily defeat the application of the law of nations in domestic courts, directly contradicting the Supreme Court's

[8] See Louis Henkin, "International Law as Law in the United States," 82 Mich. L. Rev. 1555 (1985); Edwin D. Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 U. Pa. L. Rev. 26 (1952).

opinion in The Nereide, 13 U.S. (9 Cranch) 388 (1815), and its progeny, by erecting a test that no case can pass and rendering the ATCA meaningless.[9]

In addition, the Justice Department's position rests on a self-serving anachronism. The very notion of a "cause of action" entered the legal lexicon of this country almost 60 years after the adoption of the ATCA. It only "became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and suits in equity and simply required a plaintiff to include in his complaint '[a] statement of the facts constituting the cause of action.'" Davis v. Passman, 424 U.S. 228, 237 (1979). The Justice Department apparently believes that the ATCA lay dormant from the day of its passage in 1789 until sometime in the nineteenth century when it suddenly sprang into meaning with the arrival of the cause-of-action concept.

[9] As noted by the court in Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987), *reconsidered on other grounds*, 694 F.Supp. 707 (N.D.Cal. 1988), a case not cited or addressed in the DOJ Brief:

> It is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.

Relying primarily on Judge Bork's concurrence in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), a case it previously described as "hav[ing] little, if any, precedential value,"[10] and on Judge Randolph's concurrence in Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), a case in which neither of the other members of the panel considered the ATCA relevant, the Justice Department now argues that Congress must create a private cause of action before the law of nations can become the law of the United States. Judges Bork and Randolph are doubtless forceful advocates of judicial abnegation in this area, but their views reflect advocacy rather than established principles of law. See, e.g., Tel-Oren, 726 F. 2d at 777-782 (Edwards, J., concurring); Forti v Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987). To date, not a single federal court has accepted Judge Bork's interpretation of the First Judiciary Act and the status of the ATCA.

In Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), for example, the Ninth Circuit explicitly held that the ATCA provides both federal subject matter jurisdiction and a cause of action. The assertion by the Justice Department that the Ninth Circuit "simply followed Filartiga without independently examining the question", DOJ Brief, at 7, is demonstrably inaccurate. In Hilao itself, the Ninth Circuit carefully examined the ATCA and distinguished it from other jurisdictional statutes:

> [I]n contrast to section 1331, "which requires that an action 'arise under' the laws of the United States, section 1350 does not require that the action 'arise under' the law of nations, but only mandates a 'violation of the law of nations' in order to create a cause of action."

[10] Brief of the United States as Amicus Curiae Filed in Opposition to Petition for Certiorari, Tel-Oren v. Libyan Arab Republic, No. 83-2052 (January 1985), at 9.

> Tel-Oren v. Libyan Arab Republic, [726 F.2d 774, 779] (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985). It is unnecessary that international law provide a specific right to sue. International law "does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions." Id., at 777-78 (quoting L. Henkin, Foreign Affairs and the Constitution 224 (1972). "Nothing more than a violation of the law of nations is required to invoke section 1350." Id. at 779.

Id. at 1475. Rather than "simply" following Filartiga, the Ninth Circuit carefully examined the text of ATCA, relevant case law, and other statutory provisions to conclude that the ATCA "creates a cause of action for violations of specific, universal and obligatory international human rights standards . . . ." Hilao, 25 F.3d at 1475; *See also* Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992).

The consistency with which other courts have agreed with the Hilao court's analysis is remarkable, though the Justice Department neither cites nor addresses any of the pertinent precedent. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1996) (ATCA provides jurisdiction and a cause of action) (not cited in the DOJ Brief); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) ("[T]he Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation fo international law") (cited but not distinguished); Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002) (not cited); Paul v. Avril, 812 F. Supp. 207, 212 (S.D.Fla.1993) ("The plain language of the [ATCA] and the use of the words 'committed in violation' strongly implies that a well pled tort[,] if committed in violation of the law of nations, would be sufficient [to give rise to a cause of action]") (not cited); Estate of Lacarno Rodriquez v. Drummond Company, 2003 WL 1889330, 6 (N.D. Ala. 2003) ("[T]he ATCA 'creates both subject matter jurisdiction and a private right of action'") (not cited); Presbyterian Church of Sudan v. Talisman Energy, 244 F.Supp. 2d 289, 320 (S.D.N.Y. 2003) ("ATCA provides a cause of action in tort for breaches of international law") (not cited); Cabello v. Fernandez-Larios, 157 F.Supp. 2d 1345, 1365 (S.D. Fla. 2001) (ATCA

provides a cause of action to aliens for violations of international law) (not cited); Xuncax v. Gramajo, 886 F.Supp. 162, 179 (N.D. Cal. 1995) (ATCA "yields both a jurisdictional grant and a private right to sue for tortious violations of international law . . . .") (not cited); Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988) ("The Alien Tort Statute provides a cause of action for 'international torts,' . . . .") (not cited); Iwanowa v. Ford Motor Co., 67 F.Supp. 2d 424, 442 (D.N.J. 1999) (same) (not cited); Jama v. I.N.S., 22 F. Supp. 2d 353, 363 (D.N.J.,1998) (same) (not cited). The Justice Department fails to point out that district courts within the D.C. Circuit have declined to follow Judge Bork's approach to ATCA in Tel-Oren,[11] and not a single one of the eleven judges *including the five dissenters* in the recent disposition of Alvarez-Machain v. United States, __ F. 3d __, 2003 WL 21264256, No. 99-56762, 99-56880 (9th Cir. June 3, 2003) (*en banc*), adopted the Justice Department's argument, which had been placed squarely before them.

In its fruitless search for authority to establish that the ATCA does not provide a cause of action, the Justice Department badly overinterprets Tel-Oren and Al Odah. The per curiam decision in Tel-Oren affirmed the dismissal of the lawsuit, with each judge issuing separate concurring opinions providing different reasons for their rulings. Judge Robb thought that the political question doctrine should bar the case. Judge Edwards agreed with the Filartiga precedent, demonstrated the flaws in Judge Bork's historical analysis, and concluded that the ATCA "provides a right of action and a forum," but he also concluded that international law did not prohibit the underlying acts that gave rise to the litigation. Tel-Oren, 726 F.2d at 777 (Edwards, J., concurring). The internal

[11] *See, e.g.*, Doe v. Islamic Salvation Front (FIS), 993 F.Supp. 3, 9 (D.D.C. 1998) ("The ATCA provides a cause of action in federal courts . . . .") (not cited).

divisions within Tel-Oren[12] and the courts' explicit repudiation of Judge Bork's approach over the intervening twenty years make his separate concurrence entirely too slender a reed to support the Justice Department's sweeping new reinterpretation. And in Al Odah, a case resolved under *habeas* principles, no other member of the panel joined Judge Randolph's separate concurrence, with its ill-considered dicta on the ATCA.

C. The Justice Department's Recent Position is Inconsistent with the Government's Prior Interpretations of the Alien Tort Claims Act.

Although much of the DOJ Brief is recycled from a brief it filed in 1987, it generally marks a striking departure from the government's previous analysis and submissions. As noted above, contemporaneous analyses by the Attorney General established that the ATCA provided a civil remedy for aliens injured by a tortious violation of the law of nations. In our own time, in multiple public pronouncements, the U.S. Department of State has also recognized that the ATCA establishes both subject matter jurisdiction and a cause of action for serious violations of international law. In describing the ATCA in its official submission to the U.N. Committee against Torture, for example, the Government of the United States declared that

> U.S. law provides *statutory rights of action* for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act . . . represents an early effort to provide a judicial remedy to individuals whose rights have been violated under international law.

Committee against Torture, Consideration of Reports Submitted by States Parties Under Article 19

[12] Judge Bork himself admitted that the divisions within Tel-Oren made "it . . . impossible to say even what the law of this circuit is." Tel-Oren, 726 F.2d at 823 (Bork, J., concurring).

of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 60 (emphasis supplied). Similarly, in its submission to the U.N. Commission on Human Rights, the government declared that the "statute was originally enacted to provide *a remedy to individuals* who suffered a 'tort' at the hands of privateers seeking prize money under the law of admiralty. More recently, it has been applied to cases of human rights violations." Commission on Human Rights, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, U.N. Doc. E/CN.4/1996/29/Add.2 (1996), at para. 15 (emphasis supplied).

It would be bad enough if the DOJ Brief merely contradicted its own historical position or the current position of the State Department, but it even contradicts its own submissions in human rights litigation under the ATCA. In Filartiga v. Pena-Irala, the government argued that the law of nations as it had evolved obligated every state to respect the right of its own citizens to be free of torture and that this obligation bound the United States as well even in the absence of additional Congressional enactments. According to the government, the modern-day torturer had – like the pirate in the eighteenth century – become *hostis humani generis*, the enemy of all mankind, and therefore liable wherever he might be found.[13] The United States took a similar position in 1995 in Kadic v. Karadzic.[14]

This Court need not puzzle over the Justice Department's failure to acknowledge, let alone resolve, this discrepancy in its most recent brief, or why the State Department, which joined the

[13] See Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, (2d Cir. 1980), reprinted in 19 Int'l Leg. Mats. 585 (1980), at 601-606. In 1987, the Justice Department reduced Filartiga to a footnote, a choice it made again in its most recent filing. DOJ Brief, at 7, n. 3.

[14] See Statement of Interest of the United States, Kadic v. Karadzic, No. 94-9035 (2d Cir. 1995) (affirming the ATCA and the Filartiga litigation).

filings in Filartiga and Karadzic, did not join the DOJ Brief in Unocal. The Court need only recognize that the Alien Tort Claims Act establishes subject matter jurisdiction and a cause of action for serious violations of international law and that that interpretation is consistent with the text of the ATCA, the historical record, and case law.

D. The Justice Department Misinterprets the Torture Victim Protection Act of 1992.

The Justice Department's current interpretation of the ATCA cannot be squared with the enactment of the Torture Victim Protection Act of 1992 ("TVPA"), 28 U.S.C. § 1350 note. The TVPA *inter alia* codified the holding in Filartiga and extended it to citizens of the United States.[15] Kadic, 70 F.3d at 241. Congress was fully aware of the fractured opinions in Tel-Oren and, according to its principal sponsor, the TVPA was adopted to "lay it all to rest".[16] In multiple judicial decisions, not one of which is cited in the Justice Department's brief, the courts have found significance in the fact that Congress had a clear opportunity to revise or restrict the ATCA in light of Tel-Oren and did the opposite.[17] In Wiwa v. Royal Dutch Petroleum Company, 226 F.3d 88, 105

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[15] According to the House Report, "[t]he TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 . . . ." H.R. Rep. No. 367, 102d Cong., 1st Sess., pt. 1 (1991). Significantly, the House Report referred to the Filartiga decision with approval, affirmed the importance of ATCA, and indicated that it "should not be replaced." Id. The Senate Report contains almost identical language. S. Rep. No. 249, 102d Cong., 1st Sess. (1991).

[16] Torture Victim Protection Act of 1989, Hearings Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong. 36, 65 (1990) (statement of Senator Spector).

[17] Several highly respected scholars have reached similar conclusions. *See, e.g.,* Beth Stephens, "Federalism and Foreign Affairs: Congress's Power to 'Define and Punish . . . Offenses against the Law of Nations,'" 42 Wm. and Mary L. Rev. 447, 523 (2000); Harold Koh, "Is International Law Really State Law?" 111 Harv. L. Rev. 1824, 1844-1845 (1998); Ryan Goodman and Derek Jinks, "Filartiga's Firm Footing: International Human Rights and Federal Common Law,"

(2d Cir. 2000), for example, the Second Circuit said that

> [t]he TVPA ... recognizes explicitly what was perhaps implicit in the Act of 1789 – that the law of nations is incorporated into the law of the United States and that a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law.

Accord Hilao v. Marcos, 25 F.3d at 1475; Cabello v. Fernandez-Larios, 157 F.Supp. 2d 1345, 1365 (S.D. Fla. 2001); Doe v. Islamic Salvation Front (FIS), 993 F.Supp. 3, 7 (D.D.C. 1998); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (cited in DOJ Brief but not distinguished); Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1996).

The Justice Department now argues that the TVPA's legislative history from 1991 is "obviously of no value in discerning the intent of Congress in 1789." DOJ Brief, at 27 (emphasis in original).[18] No one argues that subsequent legislative history should be controlling authority in determining a prior Congress's intent, but to say that it is "obviously of no value" ignores the Supreme Court's observation that subsequent action by Congress "should not be rejected out of hand as a source that a court may consider in the search for legislative intent," Andrus v. Shell Oil Co., 446 U.S. 657, 666 (1980), especially given the similarities between the two statutes and the fact that "the earlier statute is broad but the subsequent statutes more specifically address the topic at hand." Food and Drug Administration v. Brown & Wilkinson, 529 U.S. 120, 140-141 (2000). Nor can it be said that the TVPA is useful solely for the light it sheds on the original intent behind the ATCA: its

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66 Fordham L. Rev. 463 (1997).

[18] The Justice Department's only authority for this sweeping proposition is dicta in a footnote in Vermont Agency of Natural Resources v. U.S. ex rel Stevens, 529 U.S. 765, 783 n. 12 (2000), in which the Supreme Court understandably declined to give weight (i) to a single sentence in a legislative history that (ii) did not address the statutory question before the court. That the sentence was (iii) substantively erroneous – a burden of proof the Justice Department does not begin to

significance lies in the evidence it offers that Congress approved the post-Filartiga trajectory of the Act and rejected Judge Bork's restrictive approach.[19]

E. The Justice Department Erroneously Asserts that the ATCA Enforces Unratified or Non-Self-Executing Treaties and Non-Binding Resolutions of International Organizations.

Contrary to the Justice Department's assertion, the ATCA does not and cannot enforce unratified or non-self-executing treaties. Nor does it convert non-binding resolutions of the United Nations into law. But by its terms, the ATCA does require the courts to determine the content of the law of nations, and that process is necessarily more complicated than consulting a treaty's text: customary international law arises out of a generally consistent state practice recognized out of a sense of legal obligation (*opinio juris*). The evidence of both the objective element and the subjective element can take many forms, so long as it reflects states' practice and the sense of obligation. See, e.g., Restatement (Third) U.S. Foreign Relations Law, § 102(2). *See also* The Paquete Habana, *supra*; United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

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shoulder with respect to the TVPA – suggests three ways that Vermont Agency is simply irrelevant.

[19] Given the Department's unwillingness even to consider the legislative history of the TVPA, it is surprising that the Department is perfectly willing to apply the"cause of action" doctrine, born in the nineteenth century, to restrict the ATCA retroactively. *See* p. 8, *supra*, and *generally* D'Amato, *supra*, at 95 (citation omitted); Paust, *supra*, at 208, 284-285.

In Filartiga, for example, the Second Circuit concluded that torture was a violation of the law of nations on the basis of multiple, reinforcing forms of evidence, consulted not because they were binding *per se* as a treaty might be, but because they offered evidence that states considered torture illegal. No government disagreed with that conclusion, even though it was based *inter alia* on treaties in consistent form – including some to which the United States was not a party – a draft convention prohibiting torture, laws and constitutions of states around the world, resolutions of international organizations condemning torture, the defenses offered by non-conforming states, and the writings of publicists. Filartiga, 630 F. 2d, at 882-84. Although the law of nations has no public law number, the Supreme Court has identified the sources that the courts should consult to give it content: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators ." The Paquete Habana, 175 U.S., at 700. There is no "controlling executive or legislative act" suggesting in any way that the alleged conduct in this case – including genocide – is permitted by the law of nations. Subsequent cases show a judiciary throughly familiar with this process, successfully distinguishing between norms that are "specific, universal, and obligatory," In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994), and those that are not.[20]

Ultimately, the Justice Department urges the court to limit actionable wrongs under the

[20] *Cf*., Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D.Cal.1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' ").

ATCA to self-executing treaties which have been signed and ratified by the United States and which explicitly create a right of action, DOJ Brief, at 13-19. To do so however is to delete the "law of nations" wing of the ATCA, and only Congress, not this court and certainly not the Justice Department, can rewrite the statute in so fundamental a way.

II. THE GENERAL PRESUMPTION AGAINST THE EXTRATERRITORIAL APPLICATION OF FEDERAL STATUTES DOES NOT PRECLUDE THE APPLICATION OF THE ALIEN TORT CLAIMS ACT.

The Justice Department asserts that the ATCA cannot be applied to acts occurring within other nations and urges the court to graft a territorial requirement onto the language of the act. DOJ Brief, at 29 *et seq*. In support, the Department argues that nothing in ATCA or in its contemporaneous history suggests such an intent on the part of Congress and alleges that the extraterritorial application of the ATCA "could itself lead to objections from the foreign nations where the alleged injury occurred." DOJ Brief, at 31. The argument has a distinctly hypothetical air to it, because the Department points to no example of a foreign government actually protesting the exercise of jurisdiction under the ATCA in the twenty-three years since Filartiga was announced. That is presumably because the courts adjudicating human rights cases under the ATCA are applying international standards as incorporated into federal common law and are not attempting to apply U.S. regulatory standards to foreign conduct, as in the cases cited by the Justice Department.

The Department also fails to note that the courts have explicitly rejected its invitation to amend the statute to include a locus requirement *See, e.g.*, Trajano v. Marcos, 978 F.2d 493, 500 (9th Cir. 1992) ("we are constrained by what § 1350 shows on its face: no limitations as to the citizenship of the defendant or the locus of the injury"). Instead, the Department warps the Attorney General's early interpretations of the Act, emphasizing Attorney General Bradford's view that conduct that

takes place in a foreign country is "not within the cognizance of our courts." DOJ Brief, at 30, citing 1 Op. Att'y Gen. 57, 58 (1795). A more scrupulous assessment of the opinion would acknowledge that the Attorney General was referring to the United States' doubtful criminal jurisdiction over attacks on an African settlement and that he went on to explain that "there can be no doubt" that the victims "have a remedy" under the ATCA for a civil claims despite its foreign origin.[21]

The Department also asserts that "Congress passed the [Act] to respond to two high-profile incidents concerning assaults upon foreign ambassadors *on domestic soil*." DOJ Brief, at 30 (emphasis in original). The Second Circuit has acknowledged and limited the significance of this speculation (without accepting its historical accuracy):

> Notably absent is any contemporaneous indication from the likely draftsman of the key language, Oliver Ellsworth, or from any other member of the 1st Congress, that their broad statutory language . . . was intended to apply to only one category of torts. [Even if Congress were responding to a particular type of offense], it does not follow that the statute should be confined to this tort. Statutes enacted with one object in the legislative mind are frequently drafted in broad terms that are properly applied to situations within both the literal terms and the spirit of the statute, though not within the immediate contemplation of the drafters.

Kadic, 74 F.3d, at 378. But there is reason to doubt that the ATCA was so narrowly gauged in any event: a different section of the same Judiciary Act of 1789 established that the Supreme Court's original jurisdiction extended to all suits brought by ambassadors or other public ministers. 1 Stat.

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[21] In a cryptic footnote, the Department also cites an opinion of the Attorney General that refers to the "precise place of ... commission," without acknowledging that the opinion urges prosecution or suit against the persons who stole slaves in Martinique. 1 Op. Att'y Gen. 29 (1792). *See also* Testimony of Abraham Sofaer, the State Department's Legal Advisor, with respect to the Torture Convention,

> [t]he Administration ... believes ... that, as a member of the international community, we must stand with other nations in pledging to bring to justice those who engaged in torture, *whether in U.S. territory or in the territory of other countries*.

Convention on Torture, Hearings before the Committee on Foreign Relations, U.S. Senate, 100th Cong., 2d Sess. (January 30, 1990) at 8 (emphasis supplied).

73, 80 (1789). Congress knew what language to use when it meant to restrict jurisdiction to diplomats, but in the ATCA it referred instead to "any" tort claim by an alien.

The Department's simplistic history lesson ignores the fact that the Framers understood the possibility that tort suits between aliens might well come within the individual states' general jurisdiction, even if they originated abroad. Civil actions sounding in tort were considered transitory in that the tortfeasor's wrongful act creates an obligation which may follow him across national boundaries.[22] As summarized by the Supreme Court:

> The courts in England have been open in cases of trespass other than trespass upon real property, [i.e. civil torts] to foreigners as well as to subjects, and to foreigners against foreigners when found in England, for trespass committed within the realm and out of the realm, or within or without the king's foreign dominions.

McKenna v. Fisk, 42 U.S. 241, 248 (1843). This power reflects the general acceptance of the proposition that "a state or nation has a legitimate interest in the orderly resolution of disputes within its borders." Filartiga, 630 F.2d, at 885. The First Congress might have no reason to interfere with the states' right to hear ordinary transitory tort suits, but it would wish to assure the possibility of a federal forum for that limited subset of transitory torts involving a violation of international law. Otherwise, the nation faced the prospect of multiple and inconsistent interpretations of the law of nations. The Framers' recent experience under the Articles of Confederation had confirmed that such a prospect was intolerable. L. Henkin, Foreign Affairs and the Constitution 33 (1972). From this

[22] See Cheshire's Private International Law, 257-261 (8th ed. 1970); Watts v. Thomas, 5 Ky. (2 Bibb) 458 (1811); Stout v. Wood, 1 Blackf. 70 (Ind. Circ. Ct. 1820). See Lord Mansfield's opinion in Mostyn v. Fabrigas, 1 Cowp. 161 (1774).

perspective the ATCA simply filled the need for a federal option to hear cases even if they arose abroad.

The best that can be said for the Justice Department's argument is that it confuses a sufficient condition for ATCA jurisdiction with a necessary one. If an alien were injured by a tortious violation of international law in the United States, subject matter jurisdiction under the ATCA would be established. *See, e.g.*, Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793). But it hardly follows that the territorial limitation is a precondition for all exercises of jurisdiction under the Act. Although "[t]he Framers might not have anticipated the fact that the law of nations would come to prohibit one alien from torturing another, . . . it is unrealistic to think that they would have wanted the federal courts to shrink from enforcing the law of nations 'in its modern state of purity and refinement.'"[23] Rather, as this Court properly observed, "[b]ecause of the nature of the alleged acts, the United

[23] William Dodge, "The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context," 42 Va. J. Int'l L. 687, 701 (2002). *See also* United States v. La Jeune Eugenie, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551) ("it does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations" (Story, J.)), overruled on other grounds, 23 U.S. (10 Wheat.) 66 (1825); The Paquete Habana, 175 U.S. 677 (1900) (chronicling the development of the law of nations); Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796) (distinguishing between "ancient" and "modern" law of nations). "Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Filartiga, 630 F.2d, at 881.

States has a substantial interest in affording alleged victims of atrocities a method to vindicate their rights." Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d, at 340.

III. "FOREIGN POLICY IMPLICATIONS" DO NOT JUSTIFY A PROPHYLACTIC BARRIER TO ALL ATCA LITIGATION.

The Justice Department argues that ATCA cases are inherently nonjusticiable because "the types of claims that are being asserted today under the ATS are fraught with foreign policy implications," DOJ Brief, at 22, raising the possibility that U.S. allies will be sued under the ATCA or that litigation under the Act will compromise the war on terrorism. But to suggest that the courts are powerless to protect themselves from abusive or politically dangerous cases is disingenuous: the judiciary has developed the political question doctrine and the act of state doctrine *inter alia* to ensure respect for separation of powers, and statutory immunities and the *forum non conveniens* doctrine may apply in appropriate cases.[24]

But these doctrines are too fact-dependent to create a prophylactic barrier to all ATCA litigation.

The political question doctrine for example is typically used to dismiss lawsuits that improperly involve the judiciary in matters that have been textually committed to a coordinate

[24] *See generally* Kadic v. Karadzic, 70 F.3d 232, 248-249 (2d Cir. 1995) ("We do not read Filartiga to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations"). *Accord* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (dismissed for failure to prove international standards); Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995) (same); Anderman v. Federal Republic of Austria, 2003 WL 1903455 (C.D.Cal., Apr. 15, 2003) (dismissed under political question doctrine); Abdullahi v. Pfizer, Inc., 2002 WL 31082956 (S.D.N.Y., Sept. 17, 2002) (dismissed under *forum non conveniens* doctrine); Ahmed v. Hoque, 2002 WL 1964806 (S.D.N.Y., Aug. 23, 2002) (dismissed on grounds of diplomatic immunity); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D.Cal. 2002) (act of state doctrine barred adjudication of environmental tort and racial discrimination claims).

branch of government or that require the application of standards that are not judicially manageable. Baker v. Carr, 369 U.S. 186, 217 (1962). In the context of human rights litigation however, courts have generally declined to dismiss ATCA cases under the political question doctrine. In the words of the Second Circuit, "universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion." Kadic, 70 F.3d at 249. And as noted by this Court in this case,

> the issues in this case are not political. The Court's function is to determine whether Sudan and Talisman violated international law by committing certain acts. The standards of behavior under international law are judicially-ascertainable.

Presbyterian Church of Sudan, 244 F.Supp. 2d at 347.[25]

The act of state doctrine, sometimes described as the foreign affairs equivalent of the political question doctrine,[26] precludes courts "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory . . . ." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964). *See* Restatement (Third) Foreign Relations Law of the United States §§ 443, 444. But as this Court has also noted, the act of state doctrine poses no *per se* barrier to ATCA claims based on universal and obligatory human rights norms. Presbyterian Church

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[25] *See also* Nat'l Coalition Gov't of Burma v. Unocal, Inc., 176 F.R.D. 329, 362 (C.D. Cal. 1997) ("[A]djudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government" of Myanmar), *scheduled for en bac rehearing*; Abebe-Jira v. Negewo, 72 F.3d at 848; Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 50 (2d Cir. 1991); Tel-Oren, 726 F.2d at 796 (Edwards, J., concurring).

[26] *See, e.g.*, Northrop Corp. V. McDonnell Douglas Corp., 705 F.2d 1030, 1046 (9th Cir.), *cert. denied*, 464 U.S. 849 (1983).

of Sudan, 244 F.Supp. 2d at 344 *et seq*. The Justice Department's argument to the contrary is inconsistent with the Supreme Court's refusal to adopt any "inflexible and all-encompassing rule," Sabbatino, 376 U.S., at 428, and its conclusion that deference is appropriate only when judicial resolution of the case "may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Id*., at 423. It is significant therefore that the government has previously argued that there are circumstances in which the *failure* to allow ATCA litigation to go forward could adversely affect U.S. foreign policy: "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States as Amicus Curiae, Filartiga v. Pena-Irala, (2d Cir. 1980), 19 Int'l Leg. Mats. at 604. The government fully recognized then that some ATCA cases could be highly-charged but not for that reason nonjusticiable:

> Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance.... [B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. [citation omitted] When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts.

Id., at 602-604. *Accord* Statement of Interest of the United States, Kadic v. Karadzic (2d Cir. 1995), at 3 ("Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them.")

The courts have also limited the act of state doctrine to shield only official acts, by a

government in power, in pursuit of a public purpose.[27] The fact that states are unlikely to claim human rights abuses as official policy suggests that the act of state doctrine need not automatically derail ATCA cases. Nor is the doctrine applicable when the court can apply international law norms adopted by a clear consensus among states, because "the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." Sabbatino, 376 U.S. at 428. For these reasons, the courts have generally been reluctant to dismiss an ATCA lawsuit pursuant to the act of state doctrine, but they have never ruled the doctrine inapplicable as a matter of principle. *See* comment c to § 443 of the Restatement (Third) ("A claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established . . . .")

Rather than acknowledge the power and flexibility of these doctrines, the Justice Department asserts as a constitutional matter that the Executive Branch is entirely in control of international relations, DOJ Brief, at 2. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Baker v. Carr, 369 U.S. 186, 211 (1962). "[U]nder the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and [it] cannot shirk this responsibility merely because our decision may have significant political overtones." Japan Whaling Association v. American Cetacean Society, 478 U.S. 221, 230 (1986). In the words of the Second Circuit, judges should not invoke the prudential doctrines "to avoid

[27] W.S. Kirkpatrick v. Environmental Tectonics Corp., 493 U.S. 400, 406-10 (1990); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-705 (1976); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1988) (en banc), *cert. denied*, 490 U.S. 1035 (1989); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1545-46 (N.D. Cal. 1987).

difficult and somewhat sensitive decisions in the context of human rights." Kadic, 70 F.3d at 249.

> We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Id. There can be no prophylactic barrier to ATCA cases unless the will of Congress as expressed in the statute is to be utterly ignored.

In a final demonstration that it will make any argument to gut the ATCA, the Justice Department justifies the blanket claim that ATCA cases are nonjusticiable by implying that the ATCA poses an unacceptable risk to the war against terrorism. The Department suggests that ATCA litigation could proceed "against this Nation's friends, including our allies in our fight against terrorism." DOJ Brief, at 22. But this cannot happen: foreign governments – friendly or otherwise – can only be sued under the Foreign Sovereign Immunities Act.[28] The Supreme Court has held that the ATCA does not provide subject matter jurisdiction for lawsuits against foreign governments. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 429 (1989). In support of its assertion that ATCA cases could have "serious implications for our current war against terrorism" and that such cases "have already been brought against the United States itself in connection with its efforts to combat terrorism," the Department cites Al-Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003). DOJ Brief, at 22-23. Without elaboration or substantiation, it is unclear how Al-Odah could possibly be viewed as having "serious implications for our current war on terrorism," especially when, as the Justice Department must have been at pains *not* to point out, the case was

[28] 28 U.S.C. §§ 1330, 1601 *et seq*. Even lawsuits filed under the Foreign Sovereign Immunities Act are subject to significant restrictions. *See, e.g.*, Saudi Arabia v. Nelson, 113 S.Ct. 1471 (1993) (Saudi Arabia immune from lawsuit filed by U.S. citizen alleging torture).

dismissed by the D.C. Circuit Court of Appeals. If anything, Al-Odah confirms that the federal courts are fully capable of dismissing ATCA claims when these cases do not meet the exacting standards of the statute. Al-Odah's connection to the ATCA is obscure in any event, since two members of the three-judge panel concluded that the ATCA was irrelevant to the case.

The final irony is that the Justice Department repeatedly invokes a concurring opinion of Judge Bork that interpreted the ATCA to *deprive* a plaintiff of a remedy for a terrorist attack. In the twenty years since Tel-Oren was decided, and especially in the aftermath of September 11th, the law of nations has developed to the point that the victims of terrorist attacks could use the ATCA to seek compensation from the terrorists – including those aiders and abettors of terrorism who may use the corporate form.[29] To create a blanket immunity for defendants including corporations – even those accused of genocide or slavery-like practices – and in the process to take away one weapon in the arsenal against terrorists and other violators of human rights is irrational and unnecessary given the courts' powers to identify and hear the worthy cases.

CONCLUSION

The Alien Tort Claims Act has played a critical role in upholding fundamental principles of international law, especially over the last twenty-three years. The ATCA has provided victims of human rights violations with the ability to seek redress in U.S. courts for egregious violations of human rights norms. Now the Justice Department would have this Court delete certain provisions of that ancient statute and impose new restrictions on it, despite the fact that the statute was reaffirmed jointly by Congress and the Executive Branch as recently as 1992; foreclose Filartiga-like lawsuits

[29] *Cf.* The Anti-Terrorist Act of 1990, 18 U.S.C. § 2333.

and repudiate almost a quarter century of consistent judicial treatment of the Act; ignore the history of international law as law of the United States and take all the pragmatic flexibility out of the abstention doctrines. The Justice Department should not be allowed to take a weapon out of the hands of the victims of human rights abuses, including terrorism.

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Respectfully Submitted,

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William J. Aceves
California Western School of Law
225 Cedar Street
San Diego, CA 92101
619.239.0391

Ralph G. Steinhardt
George Washington University Law School
2000 H Street, N.W.
Washington, D.C 20052
202.994.5739
Counsel for *Amici Curiae*