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Richard M. Buxbaum

David D. Caron

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The Alien Tort Statute: An Overview of the Current Issues

Richard M. Buxbaum*
David D. Caron**

I. INTRODUCTION

If it may be said that in the 19th century U.S. courts were led to consider international law incidentally to considering prize and piracy, then these same courts for the last thirty years have been particularly drawn to consider international law because of the Alien Tort Statute (“ATS”).¹ Although this brief statute was adopted near the birth of the nation in 1789 as a part of the first Judiciary Act,² it remained almost unused until the 1980 Second Circuit Court of Appeals decision in *Filartiga v. Peña-Irela*.³ That judgment held that the ATS granted federal jurisdiction over a civil claim for damages by the Paraguayan sister and father of a young man who had been tortured and killed in Paraguay. The claim was brought against a particular Paraguayan citizen: the

* Jackson H. Ralston Professor of International Law, School of Law, University of California at Berkeley.

** C. William Maxeiner Distinguished Professor of Law, School of Law, University of California at Berkeley.

1. Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77 (1789), codified at 28 U.S.C. §1350. We note that sometimes the Statute is referred to as ATS (“Alien Tort Statute”) and other times as ACTA (“Alien Tort Claims Act”). For the purposes of this commentary, we have used the former acronym. M.G. Kaladharan Nayar has discussed U.S. consideration of international law prior to the last thirty years. See M.G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813 (1978).

2. *Id.* As enacted in 1789, the statute read: “the district courts shall have... cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” *Id.* at 77.

3. *Filártiga v. Peña-Irela*, 630 F.2d 876 (2d Cir. 1980).

former Inspector General of Police in Asunción and the alleged torturer. In terms of the international protection of human rights, this decision must count as one of the most significant judicial judgments ever rendered, placing the ATS at the center of human rights adjudication. This focus necessarily raised questions about the scope and limits of claims under this statute. Although the statute was increasingly utilized and debated, the United States Supreme Court did not address the ATS directly until its 2004 decision in *Sosa v. Alvarez-Machain*.⁴ Fundamentally, that decision reaffirms the basic availability of the statute. But that decision did not address all of the issues that existed regarding the ATS and itself opened up a series of new questions. For the last six years, the trial courts and Courts of Appeal have been grappling with these matters.

The faculty, students and alumni of Berkeley Law have been deeply involved over the past thirty years with the ATS. In 1980, Stefan A. Riesenfeld, both a graduate of Berkeley Law and then emeritus member of the faculty, while serving as the Counselor on Public International Law at the U.S. Department of State, was one of the principal authors of the U.S. government's *amicus* brief in *Filartiga*. Since then, faculty, students and alumni have been involved in scholarship, the submission of *amici* briefs and much of the key litigation as counsel for plaintiffs, defendants and *amici* expressing the United States's view. It is amidst this period of coalescence and confusion, and with the tradition of Berkeley Law bringing excellence to bear on the most pressing questions of the day, that these student comments are offered.

This collection of eight student articles was written in an advanced international law writing seminar focused on the ATS in the fall of 2009. These comments are intended to provide clear statements of the current situation in the various judicial circuits of the United States inasmuch as there is often a majority and minority view on the various ATS issues addressed. Where the author passes into his or her own analysis as to the preferred approach, this is made clear to the reader. This introductory essay seeks to capture the range of questions that exist concerning the ATS and place the contributions of this symposium in the context of that overview.

II. THE QUESTIONS IN ATS JURISPRUDENCE ADDRESSED BY THE CONTRIBUTIONS

There are essentially three different periods in the ATS's history: (1) the dormant Pre-*Filartiga* period from 1789 to 1980 when the statute was little utilized; (2) the *Filartiga* period from 1980 to 2004 when the statute was given a new life, and was increasingly both utilized and debated; and (3) the Post-*Sosa* period when the Supreme Court simultaneously reaffirmed the statute and

4. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

opened a set of questions to answer. These three periods, although they are helpful rough divisions, do not capture the complicated and sometimes heated debate of the last thirty years.⁵ The present Post-*Sosa* period is one in which the issues being debated concern the refinement of the guiding language set forth in *Sosa*, the adaptation of ATS jurisprudence to a fact pattern that has increasingly involved corporate defendants, and issues of the *Filartiga* period on which the various circuits continue to have different views.

The following overview of ATS jurisprudence is divided into a discussion of (A) jurisdiction and justiciability, (B) immunity and other notable preliminary issues, and (C) theories of liability for non-state actors. The eight student contributions are placed as appropriate within these three categories. We close by noting a few patterns in the line of disagreement in the Courts of Appeal on basic questions.

A. Jurisdiction and Justiciability

ATS litigation presents issues of both jurisdiction and justiciability. As in all other areas, the Federal courts must possess jurisdiction both over the defendant (personal jurisdiction) and the dispute (subject matter jurisdiction). As regards personal jurisdiction, the basic question is whether ATS litigation should be viewed any differently from litigation in other areas. The answer has been almost uniformly that the same standards apply.⁶

As regards subject matter jurisdiction, *Sosa* tells us that the provision of subject matter jurisdiction is the primary purpose of the ATS. “In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.”⁷ Broadly, *Sinaltrainal*⁸ advises, and we agree, that “Federal subject matter jurisdiction exists for an ATS claim when the following three elements are satisfied: (1) an alien⁹ (2) sues for a tort (3) committed in violation of the law of nations.”¹⁰

5. An alternate way of viewing the history of the Statute is to observe the three waves of the litigation structure following *Filartiga*: First, cases like *Filartiga* which involved a foreign government official as the defendant; second, and later, cases which involved private corporations as defendants; and third, and most recently, cases which name an official of the U.S. government as the defendant.

6. *But see* *Bauman v. DaimlerChrysler Corp.*, 578 F.3d 1088, 1098-1106 (9th Cir. 2009) (Reinhardt, J., dissenting). Other jurisdictional issues not addressed by contributions include standing and class actions in the ATS context.

7. *Sosa*, 542 U.S. at 714.

8. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009).

9. For a discussion the word “alien,” see M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 27 BERKELEY J. INT’L L. 316 (2009).

10. *Sinaltrainal*, 578 F.3d at 1261 (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1246 (11th Cir. 2005)). Despite the fact that the statute has been described as a “legal Lohengrin” and the history surrounding its adoption is unclear or unhelpful, a number of valuable articles examine its past. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort*

Sosa in particular provided guidance, albeit somewhat cryptic, as to what is encompassed by the phrase “tort committed in violation of the law of nations.”

Given the many cases at this point, the courts have slowly built up a catalog of acts widely accepted as a “tort committed in violation of the law of nations.” Torture is one example. However, in some cases, the plaintiff points to an act never before raised as such a violation of the law of nations in the ATS context. The question of how the courts were to evaluate such assertions was a central element of the debate concerning the ATS. The Supreme Court in *Sosa* sought to provide guidance particularly in this regard.

First, *Sosa* suggests that the ATS was not intended to address all violations of international law, but rather that the “jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”¹¹ The Court in *Sosa* then goes on to say that given that the First Congress

understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, . . . courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.¹²

Second, the Court notes that there are several developments in the law of the United States since 1789 that suggest some measure of caution in Federal court recognition of new torts committed in violation of the law of nations. Thus the Court concludes “the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”¹³

In the end, however, the Court’s guidance is only slightly more specific than that outlined already. We quote the key paragraph in full:

We must still, however, derive a standard or set of standards for assessing the particular claim Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under §1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted. *See, e.g., United States v. Smith*, 5 Wheat. 153, 163–180, n. a (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. *See Filartiga, supra*, at 890 (“[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind”); *Tel-Oren, supra*, at 781 (Edwards, J., concurring) (suggesting that the “limits of

Statute: A Response to the “Originalists,” 19 HASTINGS INT’L & COMP. L. REV. 221 (1996).

11. *Sosa*, 542 U.S. at 724.

12. *Id.* at 724-25.

13. *Id.* at 729.

section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); *see also* *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.¹⁴

Kathleen Jaeger's comment in this Symposium explores these statements by examining the treatment by the courts of "environmental" claims, a possible area of torts under the ATS that is on the periphery of existing international law.¹⁵

The concept of justiciability is concerned with the appropriateness of a court addressing a particular matter brought before it. It asks, for example, whether the matter before it presents a case or controversy, or instead seeks only an advisory opinion. More relevant to the ATS context, justiciability also asks whether a particular dispute presents a "political question" which the court should abstain from deciding. The possible political sensitivity of some ATS litigation has been noted and argued about for thirty years. The Supreme Court in *Sosa* writes:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, . . . Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.¹⁶

The question of the practice of, and the force to be given U.S. Government Statements of Interest in general and in the ATS context in particular is a subject requiring academic study. Amy Endicott's contribution addresses the question of the effect to be given to such statements through the application of the political question doctrine.¹⁷

14. *Sosa*, 542 U.S. at 731-33.

15. *See* Kathleen Jaeger, *Environmental Claims Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 519 (2010).

16. *Sosa*, 542 U.S. at 733 n.21.

17. *See* Amy Endicott, *The Judicial Answer? Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537 (2010).

B. Immunity and Other Notable Preliminary Issues

1. Immunity

The question of immunity to be afforded a defendant depends, of course, on the defendant's identity. The questions concerning immunity in the ATS has been uncovered progressively, with successive cases each peering deeper into the extent of identity.

At the first level, the question was whether the immunity of a State named in an ATS suit was to be analyzed under the Foreign Sovereign Immunities Act ("FSIA") or whether the ATS, in granting federal court jurisdiction, also implicitly indicated that State defendants were not entitled to immunity. The Supreme Court addressed this issue in *Amerada Hess v. Argentina*, deciding that the FSIA is the sole basis on which to determine whether a "state" as defined in that Act is entitled to immunity.¹⁸ The second level, and an issue before the Supreme Court as this Volume goes to press, inquires into the proper method of analyzing the immunity to be afforded state officials named in ATS litigation. In the *Filartiga* case, the court did not question or discuss the possible immunity of the defendant, a former police chief. There are many factual variations in such situations. Is the named official a current or former official? Is the named official a head of state, a low ranking official or someone holding a significant, for example ministerial, position? Has the individual claimed immunity or has the state of which the individual is an official sought to cloak the individual with the state's immunity? The question before the Supreme Court at present in *Mohamed Ali Samantar v. Bashe Abdi Yousuf* regards the applicable source of law for judicial analysis of such questions. The Court of Appeals for the 4th circuit held that the FSIA "does not, upon examination of its plain language and the context of its drafting, apply to individual officers of foreign states," declining therefore to extend the reasoning and effect of *Amerada Hess v. Argentina* to State officials.¹⁹ But if the FSIA is not applicable to state officials, where are the courts to look in such instances?

Although the questions regarding immunities involve a discussion internal to U.S. law, the content of that law historically has been influenced by changing state practice regarding immunity. It is that practice outside the United States that is addressed in Michele Potestà's contribution.²⁰

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

19. *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), *cert granted*.

20. See Michele Potestà, *State Immunity and Jus Cogens Violations: The Alien Tort Statute Against the Backdrop of the Latest Developments in the 'Law of Nations'*, 28 BERKELEY J. INT'L L. 571 (2010).

2. Other Notable Preliminary Issues

There are several other notable preliminary issues in ATS litigation that are coming to the fore as courts deal with a growing docket of cases. For example, how does the doctrine of *forum non conveniens* apply in the ATS context? Likewise, one may ask how the idea of a statute of limitations is to be addressed in this context. The Court in *Sosa* notes exhaustion of local remedies as a third possible area to be considered:

This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. . . .²¹

Regina Waugh's contribution addresses this third notable preliminary issue: exhaustion of local remedies, which for some is viewed as a question of ripeness.²²

C. Theories of Liability for Non-State Actors

The question of the liability of non-State actors under the ATS is probably the most pressing one in the post-*Sosa* era. Ordinarily, a tort in violation of the law of nations is committed by a state inasmuch as the obligations of the law of nations are placed on states. The state act that results in the breach is ordinarily done by one or more state officials. The issue addressed in three student contributions is how the act committed in violation of the law of nations might be done by a non-state actor. This is one of the particular questions that *Sosa* recognized, but did not address.²³

Sometimes the non-state actor may commit such a tort because the tort is of the relatively rare type where an international law obligation is directly applicable to private actors. The examples of piracy and certain war crimes are most notable.²⁴ The pressing issue is when the relationship between a private actor and a state might be said to be sufficiently close that the private actor should be held to have violated the law of nations. There is no doubt that a private actor under the law of state responsibility may be a *de facto* agent of the State.²⁵ At the time of this writing, U.S. courts have taken different approaches

21. *Sosa*, 542 U.S. at 733 n.21

22. See Regina Waugh, *Exhaustion of Remedies and the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 555 (2010).

23. *Sosa*, 542 U.S. at 732 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual . . .").

24. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995)(discussing the war crimes exception).

25. International Law Commission, *Responsibility of States for Internationally Wrongful Acts*

as to the analysis of this relationship and even as to what law should govern the issue broadly.

Charles Ainscough in his contribution addresses the fundamental question of what law should be looked to when approaching the issue.²⁶ The other two contributions examine two of the primary approaches used to examine the issue: Ryan Lincoln looks at theories of aiding and abetting and accessorial liability,²⁷ while Anna Sanders examines the theories of conspiracy and joint criminal enterprise.²⁸

D. The Relationship of the ATS to Other Statutes

As is clear from the discussion of immunity above, the ATS does not stand apart from other statutes. The Supreme Court's decision in *Amerada Hess* made clear that it is the FSIA, and not the ATS, that governs questions of state immunity. Another statute discussed in several cases, including *Sosa*, is the Federal Tort Claims Act, an act that addresses claims against the U.S. government or its officials. Ekaterina Apostolova's contribution to this Symposium addresses the relationship of the ATS to the Torture Victim Protection Act.²⁹

III. CONCLUSION

This brief overview of issues in the ATS context is by no means exhaustive. Although ATS litigation is often consumed with the issues already mentioned, we can expect that as the docket grows, more cases will reach adjudication as to the merits of the cases. As this occurs, we can expect a new set of issues: The application of the act of state doctrine in ATS context, as well as the proper choice of law relating to damages.

For all the issues mentioned, this is a time of significant clarification in the Courts of Appeal of the United States. The contributions repeatedly identify the differences in approach in U.S. courts. In our assessment, these differences for the most part still remain fluid and the next decade will likely be one of refinement and coalescence in ATS jurisprudence.

Art. 8, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10)*, chp.IV.E.1 (2001).

26. See Charles Ainscough, *Choice of Law and Accomplice Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 588 (2010).

27. See Ryan Lincoln, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604 (2010).

28. See Anna Sanders, *New Frontiers in the ATS: Conspiracy and Joint Criminal Enterprise Liability After Sosa*, *infra* 28 BERKELEY J. INT'L L. 619 (2010).

29. See Ekaterina Apostolova, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640 (2010).