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# The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts

By  
Donald J. Kochan\*

## INTRODUCTION

“US plaintiffs’ lawyers have revived a dormant 18th-century law and made it their chief weapon in a 21st-century battle over corporate responsibility in an age of globalisation,” says *Financial Times* columnist Patti Waldmeir, in a March 14, 2003 article.<sup>1</sup> These lawyers are accomplishing this development “in the best traditions of American legal creativity.”<sup>2</sup> Creativity, indeed, is a driving force here. Perhaps more importantly, the creation of “law” by a group of international organizations, which produce statements of “norms” and purport to speak for the world, has fueled this development.

The law in question is the Alien Tort Statute (“ATS”),<sup>3</sup> and its consequences are increasingly far reaching. Terry Collingsworth, one of the international labor activists who spearheaded many of these lawsuits, claimed that the ATS is a “vital tool for preventing corporations from violating fundamental human rights.”<sup>4</sup> Dissatisfied with traditional means of influence, Collingsworth (Executive Director of the International Labor Rights Fund), has no reservations

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1. Patti Waldmeir, *An abuse of power: US courts should not punish companies for human rights violations committed overseas*, FIN. TIMES, Mar. 14, 2003, at 12.

2. *Id.*

3. 28 U.S.C. § 1350 (2003).

4. Terry Collingsworth, *The Alien Tort Claims Act – A Vital Tool for Preventing Corporations from Violating Fundamental Rights*, INTERNATIONAL LABOR RIGHTS FUND, at <http://www.laborrights.org/publications> (Jan. 2003).

on stating that his interest group wants to “push the envelope” regarding the enforceability of “international law” in U.S. courts against overseas corporate conduct.<sup>5</sup> More and more, other interest groups find themselves disposed to do the same.

Seen as a vital tool for accountability by many interest groups, the ATS is also a vital catalyst for interest group investment in the *production* of “international law.” The ever-growing prospect of enforceability in U.S. courts dramatically increases the return on such investment.

ATS litigation is only recently receiving what approaches widespread attention, but it marks an important new trend in tort law that demands critical analysis. This article argues that the increasing judicial acceptance of tort claims based on “international law” creates self-interested, rather than public-interested, incentives for the *production* of “international law.” Furthermore, this article also claims that interest groups have exploitable and unbalanced means for achieving such production.

Increasingly, U.S. courts are recognizing various treaties, as well as resolutions, understandings, declarations, proclamations, conventions, programmes, protocols, and similar forms of inter- or multi-national “legislation” as evidence of a body of “customary international law” enforceable in domestic courts, particularly in the area of tort liability. These instruments, referred to herein as customary international law outputs (“CILOs”), are seen by some courts as evidence of *jus cogens* norms that bind not only nations and state actors, but also private individuals. Such enforceability has occurred in U.S. courts even where such customary international law outputs have not been codified or otherwise adopted by the U.S. Congress.

The most obvious evidence of this trend is in the proliferation of lawsuits against corporations with ties to the United States for alleged violations of customary international law during development projects abroad. Such lawsuits are most often brought under the federal Alien Tort Statute (“ATS”) (or Alien Tort Claims Act (“ATCA”)<sup>6</sup>), 28 U.S.C. § 1350, which has seen an evolution in the past twenty-three years after remaining dormant for nearly 200 years since its passage with the Judiciary Act of 1789.

Although relatively few suits have invoked it, the ATS has not escaped popular attention lately. In commenting on the ongoing ATS suit against oil giant Unocal, *The Economist* in its April 24, 1999 issue described the potential implications of this new trend in tort litigation. The article explicated, “The next big test will be whether the Alien Tort Claims Act can be used against companies as well as individuals.”<sup>7</sup> And, if companies begin losing in this emerging field of litigation, it could “provide a major headache for many American com-

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5. Terry Collingsworth, *Alien Tort Claims Lawsuits: Advancing Human Rights Or Undermining U.S. Businesses And Policy?*, Statements at Washington Legal Foundation Media Briefing (Mar. 12, 2003) (on file with author).

6. See generally, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 V.A. J. INT’L L. 587 (2002) (explaining that “Alien Tort Statute” is preferable to “Alien Tort Claims Act” if one believes that § 1350 does not create a cause of action).

7. *Human-Rights Trials: To Sue a Dictator*, THE ECONOMIST, Apr. 24, 1999, at 26.

panies operating abroad.”<sup>8</sup> When discussing an award against Serbian leader Radovan Karadzic, an August 2000 *Washington Post* editorial called the new line of ATS human rights cases “troubling” as “proceed[ing] under an ill-conceived but now well-accepted reading of a 1789 law that . . . is a modern graft on a largely moribund statute; international human rights law did not exist in the 18th century.”<sup>9</sup> Furthermore, a staff report from the *Corporate Legal Times* summed up the current situation with the following headline in October 2002: “No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts.”<sup>10</sup> In November 2002, a *Financial Times* article opined that the current ATS jurisprudential trend presents a “danger that the US judicial system will become the world’s civil court of first resort.”<sup>11</sup> Despite evidence of some attention, however, the ATS’s potential impact seems largely unappreciated in the popular press and among popular minds.

The evolution of ATS litigation began in 1980 when lawyers raised the ATS from dormancy and a federal appeals court found that suits based on customary international law for human rights abuses could be entertained under the ATS.<sup>12</sup> From here, it expanded most notably in 1995 when a federal appeals court held that quasi-public and even private actors might be bound by customary international law.<sup>13</sup> ATS litigation grew again in 1997 when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad.<sup>14</sup> Since then, dozens of lawsuits against private actors—principally corporations in extractive industries—have been filed.

The 2002 decision by the Ninth Circuit in *Doe v. Unocal Corp.*<sup>15</sup> is one of the latest expansions of the ATS, allowing customary international law tort suits against private actors. On February 14, 2003, the Ninth Circuit announced that it will rehear this case *en banc*.<sup>16</sup> Additionally, the U.S. District Court for the Southern District of New York also recently used an extremely expansive view of the ATS’s reach in their March 19, 2003 decision of *Presbyterian Church of*

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8. *Id.*

9. *Lawsuits and Foreign Policy*, WASH. POST, Aug. 12, 2000, at A20.

10. See Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, CORP. LEG. TIMES, Oct. 2002, at 35.

11. Thomas Niles, *The Very Long Arm of American Law*, FIN. TIMES, Nov. 6, 2002, at 15.

12. *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

13. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

14. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff’d in part & rev’d in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh’g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

15. *Doe*, 2002 WL 31063976 *reh’g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

16. See *Doe*, 2003 WL 359787, at \*1; see also Pui-Wing Tam, *Appeals Court to Rehear Ruling On Unocal Human-Rights Suit*, WALL ST. J., Feb. 18, 2003, at B13.

*Sudan v. Talisman Energy, Inc.*<sup>17</sup> This court rejected a motion to dismiss by a Canadian energy company. Finding that the court had subject matter jurisdiction and that the complaint sufficiently alleged that the company aided and abetted or conspired with Sudan to commit violations of customary international law, the court further held that the violations were acts of torture, enslavement, war crimes, and genocide, and that Sudan's actions could be imputed to the company.<sup>18</sup>

However, in a major development on March 11, 2003, Judge Raymond Randolph of the D.C. Circuit Court of Appeals wrote a concurring opinion in *Al Odah v. United States*, which seriously calls into doubt the expansive reach of recent ATS judicial recognition.<sup>19</sup> *Al Odah* involved habeas corpus petitions brought against the United States by detainees in Guantanamo Bay, Cuba, that the court ultimately rejected.<sup>20</sup> The detainees premised part of their claims on the ATS and international law. The majority opinion saw no need to address the ATS or its proper interpretation, but Judge Randolph's concurring opinion in *Al Odah* did address that issue. His opinion constitutes one of very few judicial opinions to question the legitimacy of modern ATS application, and will undoubtedly serve as motivation for more critical judicial examination of the ATS in forthcoming decisions.

In *Al Odah*, Judge Randolph questioned many of the premises upon which ATS jurisprudential expansion has been based for the past twenty-three years. Randolph opined, "To have federal courts discover [customary international law] among the writings of those considered experts in international law and in treaties the Senate may or may not have ratified is anti-democratic and at odds with principles of separation of powers."<sup>21</sup> It will be interesting to see how courts wrestling with ATS interpretation in the future will address Judge Randolph's reasoning.

In a similar interesting development in *United States v. Yousef*, the Second Circuit (heretofore one of the courts with the most expansive use of customary international law) on April 4, 2003, in a lengthy opinion, also called into question, and, some might say, took a newly restrictive view of the appropriate sources that courts may look to when attempting to define customary international law.<sup>22</sup> This "terrorism" decision will also undoubtedly affect the continuing debate on the ATS's expansive jurisprudence.

The development of law under these new causes of action is in its infancy, but has the potential to grow fast, and most indications show expansion of both the use and acceptance of international law claims. There are a number of driving forces, many of which aligned, attempting to push the envelope in ATS

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17. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

18. *Id.*

19. 321 F.3d 1134 (D.C. Cir. 2003).

20. *Id.*

21. *Id.* at 1148.

22. 327 F.3d 56 (2d Cir. 2003) (holding *inter alia* that the United States could exercise extra-territorial criminal jurisdiction over defendants who were charged with attempted plane bombing in Southeast Asia).

jurisprudence—both in terms of the volume and the scope of acceptable customary international law claims. These forces include: scores of law review articles, amicus briefs and other actions by international law scholars and analysts;<sup>23</sup> the plaintiffs' bar; allegedly aggrieved aliens; and, of course, the principal subject of this article, nongovernmental organizations ("NGOs"). As this article will argue, the ATS debate is largely unbalanced and, to date, few countervailing forces have surfaced to challenge these expansion efforts.

The U.S. Supreme Court has been remarkably silent on the ATS. As one judge stated, for example, the ATS "cries out for clarification" from the Supreme Court,<sup>24</sup> yet the Court has never interpreted it in any context. It is likely that this may change soon, as many significant cases (including *Al Odah*) are resolved in the courts of appeal. However, with recent Supreme Court opinions citing customary international law outputs as persuasive authority<sup>25</sup> and some Supreme Court justices speaking publicly on the importance and influence of international and comparative law,<sup>26</sup> one can only speculate as to how the justices will address these developing issues. The Supreme Court may soon provide some insight as they just recently granted certiorari in *Al Odah*.<sup>27</sup> In addition, the Court granted certiorari in *Sosa v. Alvarez-Machain*, the case of an abduction of a drug dealer in Mexico that was conducted in such a way as to breach the alleged international law against unlawful and arbitrary abduction.<sup>28</sup> Although *Al Odah* does not concentrate on ATS issues, the Court may finally tackle the ATS in *Alvarez-Machain*.

There are several problems with the trend toward enforceability of "customary international law" in U.S. courts. This litigation trend suffers infirmities related to the Constitution, foreign policy, national security, and the public policies supporting economic development and its concomitant effect on the advance of democracy and political liberty. These concerns are principally

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23. See generally, Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545 (2000); Harold Hongju Koh, *Is International Law Really State Law*, 111 HARV. L. REV. 1824 (1998).

24. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

25. See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325, 2347 (2003); *Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003).

26. See, e.g., Tony Mauro, *Court Shows Interest in International Law*, N.Y.L.J., July 14, 2003, at 1; see also Justice Sandra Day O'Connor, Keynote Address at the American Society of International Law Annual Meeting (Mar. 16, 2002), and Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the American Society of International Law Annual Meeting (Apr. 4, 2003), at <http://www.aclu.org/hrc/JudgesPlenary.pdf>; Justice Ruth Bader Ginsburg, Looking Beyond our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, Remarks for the American Constitution Society (Aug. 2, 2003), at <http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf>.

27. 124 S.Ct. 534 (2003).

28. 124 S.Ct. 807 (2003).

unaddressed in this article and left to past and future work of this author<sup>29</sup> and others.<sup>30</sup>

Part I of this article briefly provides a background of the ATS and the four principal waves of litigation that have made it a force in expanding tort liability in U.S. courts for violations of customary international law. Part II explains the increasing role NGOs play as self-interested actors in the production of customary international law outputs. Furthermore, the increase in options for enforceability of these outputs—such as under the ATS—should affect NGO behavior and strengthen their interest in shaping the production of customary international law outputs. Part II proceeds to explain that several factors give NGOs a heightened incentive to expand international tort liability a significant leg up over competitive interest groups wanting to curb such liability.

Moreover, Part II focuses on the dangers of enforceability of these customary international law outputs arising from four interrelated factors: (1) the lack of bicameralism and presentment associated with the development of the documents included in this judicially recognized body of customary international law—a process that otherwise increases the cost of legislation and thereby checks rent-seeking;<sup>31</sup> (2) the lack of formal elements of law associated with such customary international law outputs, whereas more formal, specific, and knowingly enforceable legislation is more difficult and expensive for an interest group to produce, and formality requirements to enforceability decrease production of laws while looser standards are cheaper and more easily produced; (3) unequal expectations of the parties in the bargaining process for the production of customary international law outputs; meaning that the parties have not been and are not always cognizant of both the benefits and costs of producing cus-

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29. See, e.g., 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) [hereinafter Kochan, *Constitutional Structure*]; Donald J. Kochan, *After Burma*, LEGAL TIMES, Aug. 21, 2000, at 54; Donald J. Kochan, *Foreign Policy, Freelanced: Suits Brought under Alien Tort Claims Act Undermine Federal Government's Authority*, THE RECORDER, Aug. 23, 2000, at 5; Donald J. Kochan, *Rein in the Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress*, FULTON COUNTY DAILY REPORT, Aug. 24, 2000.

30. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834-36 (1997); Bradley, *supra* note 6.

31. The primary phenomenon in the process described by the public choice theory, is that of "rent-seeking"—the process of expending resources in an effort to obtain favors from lawmaking institutions. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982). Interest groups seek to use the government to obtain legislative goods at a lower price than would be available in the market—with the difference in price constituting the "rent." Similarly, by successfully lobbying to impose regulations (and, therefore, costs) on a competitor, such as NGOs seeking to create legal liabilities for multinational corporations—the interest group can obtain a benefit at a lower cost to it than the market and impose higher costs on the competitor. Studying these behaviors is often known as examining the political economy or law & economics of the process of lawmaking. See generally TOWARDS A THEORY OF THE RENT-SEEKING SOCIETY (James Buchanan et al. eds., 1980); Daniel A. Farber & Philip Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988).

tomary international law documents because enforceability was either unexpected or unknown; and (4) the resulting incentives for NGO rent-seeking from international bodies and development of such documents due to an increased value of such documents directly proportional to increased judicial enforceability. It is interesting to note that NGOs play a key role not only in the production of customary international law outputs, but are also spearheading most of the litigation aiming to add value to those instruments through judicial enforceability.

Part III predicts that NGOs will react to new enforcement opportunities and have a competitive advantage in the production of customary international law outputs that serve their interests. Once NGOs demand more production, they will likely get it, at least in the short run. Constraints on supply simply will not act as substantial barriers to production. As a result, customary international law outputs may be even less likely to reflect true international consensus and more likely to reflect the particular interests of certain groups.

As Ronald Cass, among others, has indicated, there has been a “noteworthy” absence of law and economics analysis in the field of international law.<sup>32</sup> Moreover, there is a “striking” lack of analysis of NGOs from a public choice perspective.<sup>33</sup> Less yet has the literature focused on interest group incentives to

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32. Cass notes:

[I]t is noteworthy that only recently has there been a significant body of work utilizing economic analysis to assess the basis for agreements in international law, the interpretation of international agreements, and the effects of international law. . . . The relative paucity of economic analysis of international law issues is especially striking when compared to the proliferation of law and economics writing in other legal fields. . . . It is instructive that the listings for international law topics in the Bibliography of Law and Economics covers only one-and-a-half of the roughly 550 pages listing law and economics publications by subject.

Ronald A. Cass, *Economics and International Law*, 29 N.Y.U. J. INT'L L. & POL. 473, 474-76 (1997); see also, Charlene Denise Oliveira Cabral, *Are International Institutions Doing Their Job? International Law and Economics*, 90 AM. SOC'Y INT'L L. PROC. 109 (1996) (quoting panel comment of Alan Sykes that: “Law and economics started out in areas such as antitrust but has spread to tort, contract, property and crime, yet the international area has had a more robust immune system than the other fields.”); Jeffrey L. Dunoff and Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394 (1999); Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents and Legitimacy*, 17 Nw. J. INT'L L. & BUS. 681 (1996-1997) [hereinafter Stephan, *Accountability*]; Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 Nw. J. INT'L L. & BUS. 470 (1996-1997) (generally discussing the sparse economic analysis of the creation, application and enforcement of international economic agreements); Paul B. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 745 (1995); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 193 (1993) (“To date, public choice scholarship has focused on the contemporary viability of institutional procedures designed to inhibit rent-seeking in domestic legislation.”).

33. In discussing environmental NGOs, Zywicki offers the following:

The failure to examine the political economy of environmental interest groups is striking, especially as the influence of environmental activists have [sic] grown both domestically and globally. They have proven especially influential as the proliferation of international bureaucracies, unelected and unaccountable to any voters, have increasingly assumed control over the implementation of environmental policies. With

invest in the production of customary international law, including the effect of judicial treatment of customary international law outputs. This article aims to help fill these gaps.

Furthermore, this article seeks to examine the potential incentives to push for the expansion of, and shape the substance of, production of customary international law outputs that may be created for NGOs as these outputs gain greater value as judicially enforceable instruments. It concludes that increased judicial enforceability of customary international law outputs removes a previously existing restraint on demand for their production. Because past customary international law outputs and the forums for the production of future customary international law outputs lack true interest group competition and lie outside traditional procedural safeguards against rent-seeking, those in favor of customary international law output production are at a substantial advantage in a world where these outputs are enforceable. Moreover, although economic theory would predict that interest group competition should balance the incentive for rent-seeking in favor of customary international law output production, there are several reasons to believe that special factors exist that will preclude or at least substantially delay such a balance and, therefore, ensure a substantial advantage for NGOs interested in achieving further customary international law output production.

## I.

### BACKGROUND: THE ATS AND ITS MODERN INCARNATION

The phrase “law of nations” was the early term for expressing international law, a concept then understood to be much more limited than it is today. In most contemporary literature, however, the “law of nations” is considered coterminous with “international law.”<sup>34</sup> This “law” is unique because it purports to create universal obligations for all sovereign nation states and to somehow police the conduct of those nations. This “law” is also unique because many commentators feel that it evolves and even imposes obligations on non-state or private actors.<sup>35</sup> One of the principal means used to enforce adherence to this “international law” is the ATS. To understand the ATS, it is first important to

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respect to the activities of firms and individuals operating in the private market, the study of self-interest behavior in the private markets has comprised the core of economics at least since Adam Smith. Similarly, the public choice revolution has successfully applied the assumptions and tools of economics to explain much of the process and output of governmental activity. Little has been done, however, to apply economics to the study of the institutions that comprise civil society, “Non-Governmental Organizations” (more popularly, NGO’s) that are neither private profit-maximizing entities nor public vote-maximizing entities.

Todd J. Zywicki, *Baptists? The Political Economy of Environmental Interest Groups*, (George Mason University Law and Economics, Working Paper Series No. 02-23) at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=334341](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=334341) (citations omitted).

34. See, e.g., Bradley & Goldsmith, *supra* note 30, at 822.

35. See, e.g., William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the ‘Originalists,’* 19 HASTINGS INT’L & COMP. L. REV. 221, 241-43 (1996) (arguing that international law is an evolving body that should be applied as that law exists at the time of suit); Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal*

briefly examine the historical treatment of rules for ascertaining the “law of nations.”

A. *The Development of Judicial Rules for Ascertaining the Scope of the “Law of Nations”*

The Restatement (Third) of Foreign Relations asserts that customary international law is part of federal common law.<sup>36</sup> This assertion reflects the path most U.S. courts and judges have chosen in recent years when defining their competence to apply international legal principles to particular cases. Early cases, including *The Nereide*,<sup>37</sup> *United States v. Smith*<sup>38</sup> and *The Paquete Habana*,<sup>39</sup> established the now supposedly “unexceptionable” proposition<sup>40</sup> that the “law of nations” is included in the federal common law of the United States.<sup>41</sup>

*The Nereide* involved the issue of whether a Spanish shipper’s goods carried aboard a British merchant vessel captured by American privateers could be condemned as prize. The shipper argued that, because Spain was a neutral party in the fighting between the United States and Great Britain and because the “law of nations” protected the property of neutrals, his property could not be taken as prize.<sup>42</sup> Chief Justice Marshall, writing for the Supreme Court, argued that, absent Congressional legislation, “the Court is bound by the law of nations which is a part of the law of the land.”<sup>43</sup> Although this statement appears to conclude that international law is part of the general laws of the United States, Marshall was sitting in admiralty and thereby his statement can be read as addressing only the applicability of international law in admiralty cases.<sup>44</sup>

*Smith* entailed a prosecution for piracy involving the “plunder and robbery” of a Spanish vessel.<sup>45</sup> Thomas Smith, having participated in the piracy of the Spanish vessel, was prosecuted under an 1819 Act of Congress which stated, “That if any person or persons whatsoever, shall, upon the high seas, commit the crime of piracy, as defined by the law of nations . . . every such offender or

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*Common Law*, 66 FORDHAM L. REV. 463 (1997) (contending that evolving customary international law belongs in the courts).

36. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111, 112 (rev. ed. 1987); see also William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 480, 492, 511, nn.64-67, n.142, n.248 (1986); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952); Beth Stephens, *The Law of Our Land: Customary International Law of Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997). Cf. Bradley & Goldsmith, *supra* note 30, at 834-36 (1997) (describing the Third Restatement’s approach as without precedent and as doctrinal “bootstrapping”).

37. 13 U.S. (9 Cranch) 388 (1815).

38. 18 U.S. (5 Wheat.) 153 (1820).

39. 175 U.S. 677 (1900).

40. *Tel-Oren*, 726 F.2d at 810 (Edwards, J., concurring).

41. See *infra* Part I.B.

42. *The Nereide*, 13 U.S. (9 Cranch) at 388-90.

43. *Id.* at 423.

44. See generally Kochan, *Constitutional Structure*, *supra* note 29.

45. *Smith*, 18 U.S. (5 Wheat.) at 153-55.

offenders shall, upon conviction thereof . . . be punished with death."<sup>46</sup> The jury returned a special verdict finding that Smith was involved in the plunder and robbery, and that if these actions constituted "piracy" under the 1819 Act (a question of law) he would be in violation of the act.<sup>47</sup> Addressing this legal question, Justice Joseph Story, writing for the Supreme Court, found that Smith's acts constituted piracy "as defined by the law of nations."<sup>48</sup>

To reach this conclusion, Justice Story considered whether the 1819 Act was constitutionally infirm, for the Constitution gives Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."<sup>49</sup> The plaintiff argued "that Congress is bound to define, in terms, the offence of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation."<sup>50</sup> Story found, however, the task assigned to the judiciary by Congress in the 1819 Act (which outlawed piracy) to be no different than finding the meaning of a word in any congressional command.<sup>51</sup> He determined that ascertaining the meaning of piracy was similar to other common law means of interpreting and applying a statute and its terms.<sup>52</sup>

Finding that Congress could allow the judiciary to determine the meaning of statutory terms by reference to the "law of nations," Story set forth the now oft-quoted method for ascertaining the "law of nations." 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 recognising and enforcing that law."<sup>53</sup> From examining a variety of sources in each category, Story concluded that Smith's actions fell within those universally treated as piracy in violation of the "law of nations."<sup>54</sup>

A similar approach to ascertaining the "law of nations" was adopted in *The Paquete Habana*.<sup>55</sup> The *Paquete Habana* was a fishing vessel sailing under the Spanish flag, captured off the coast of Cuba by a U.S. gunboat.<sup>56</sup> The vessel and her cargo were condemned as prizes of war and later sold at an auction.<sup>57</sup>

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46. *Id.* at 157.

47. *Id.* at 154-55.

48. *Id.* at 163.

49. U.S. CONST. art. I, § 8, cl. 10.

50. *Smith*, 18 U.S. (5 Wheat.) at 158.

51. *Id.* at 159.

52. *Id.* at 158-59. Although subsequent cases have relied on Justice Story's search of the common law through which he defined piracy, his holding could have been based on purely domestic and statutory law, making the determination of the law of nations merely dicta. Story argues that a 1790 Act of Congress, ch. 9, § 8, declared "that robbery and murder committed on the high seas shall be deemed piracy." *Id.* at 158. Relying on this statute alone, Story could have held that the jury's finding of "plunder and robbery" fit within the congressional definition of piracy. *Id.* Nonetheless, because Story was following Congress's command to find the meaning of piracy as "defined by the law of nations," he may have felt obliged to look beyond the 1790 act and actually ascertain how the law of nations defines piracy rather than rely on the previous declaration of Congress. See *Id.* at 160.

53. *Id.* at 160-61.

54. *Id.* at 161-63.

55. 175 U.S. at 700.

56. *Id.* at 678-79.

57. *Id.* at 679.

The owner and the master, on behalf of the other crew members who were entitled to shares of the Habana's catch, brought a suit challenging the seizure as unlawful.<sup>58</sup> The Supreme Court, in order to determine whether fishing vessels were legally subject to capture during the war with Spain, looked to the "law of nations" and found that "coast fishing vessels . . . have been recognized as exempt, with their cargoes and crews, from capture as prize of war."<sup>59</sup> After tracing a significant amount of history on the international treatment of fishing vessels as prizes of war to support the holding, the Court set forth perhaps the most relied upon statement relating to the scope of the justiciability of the "law of nations":

International law is part of our law, and must be ascertained and administered by the courts of justice 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, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>60</sup>

This statement presents four key rules, at least under the circumstances of *The Paquete Habana* case.

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 a U.S. court may apply an international "law," as controlling authority, even when the "law" has not previously been recognized in a U.S. treaty, legislative act, executive act, or prior court decision. Third, the Court ratifies the *Smith* Court's method of consulting the works of jurists or commentators as a means for ascertaining an international "law." The Court cautions that only those works purporting to *report* the law rather than advocate for the acceptance of a principle should be consulted.<sup>61</sup> In support of its optimistic view that jurists can accomplish such a neutral task, the court cites Wheaton's assurance that jurists and commentators are "generally impartial in their judgment,"<sup>62</sup> a concept that is questionable if one looks at the actions and incentives of international law scholars today.

58. *Id.*

59. *Id.* at 686.

60. *Id.* at 700 (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215 (1895)). A similar approach to defining international law is adopted by the Statute of the International Court of Justice, June 26, 1945, arts. 38 & 59, 59 Stat. 1055, 1060, 1062.

61. *The Paquete Habana*, 175 U.S. at 700-01.

62. *Id.* (citing WHEATON'S INTERNATIONAL LAW § 15 (8th ed., 1836)). Cf. C. Donald Johnson, Jr., *Filartiga v. Pena-Irala: A Contribution to the Development of Customary International Law by a Domestic Court*, 11 GA. J. INT'L & COMP. L. 335, 336-37 (1981) (arguing "[t]he difficulty of the task [of defining international law] is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law," and describing the "often nebulous law represented by the usage and practice of nations"); Mark P. Jacobsen, Comment, *28 U.S.C. §1350: A Legal Remedy for Torture in Paraguay?*, 69 GEO. L.J. 833, 834 (1981) (describing the "amorphous law of nations" and arguing that the application of the ATS is "restricted . . . by difficulty in defining when an act is governed by the law of nations").

Finally, in analyzing international legal sources concerning the “legality” of certain war practices, *The Paquete Habana* Court illustrated a willingness to give international law a dynamic perspective. In other words, 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.<sup>63</sup> Nonetheless, the decision recognizes that a rule will not become a settled portion of international law unless it commands the “general assent of civilized nations.”<sup>64</sup> This allegedly “stringent”<sup>65</sup> rule is justified, at least in form, as a means for ensuring that one nation will not “feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”<sup>66</sup>

## B. *The Alien Tort Statute and the Application of the “Law of Nations”*

### 1. *Statutory Overview and the First Wave of Dormancy*

The ATS, 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.”<sup>67</sup> This grant exists separately from both federal question<sup>68</sup> and diversity<sup>69</sup> jurisdiction, as well as from jurisdiction over admiralty, maritime and prize cases.<sup>70</sup>

Little direct evidence of Congress’s intentions in enacting this provision exists to lend guidance to those searching for its meaning.<sup>71</sup> The Senate debates over the Judiciary Act were not recorded and the provision is never mentioned

63. *The Paquete Habana*, 175 U.S. at 694.

64. *Id.*

65. *Filartiga*, 630 F.2d at 881.

66. *Id.* The *Filartiga* court found that the situation would have been different had there not been a general assent of nations on the legal principle involved. *Id.* Similarly, in *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court refused to find an international law against a government’s expropriation of a foreign-owned corporation’s assets, for there was no general assent on the invalidity of such action. 376 U.S. 398 (1964); see also Josef Rohlik, *Filartiga v. Pena-Irala: International Justice in a Modern American Court?*, 11 GA. J. INT’L & COMP. L. 325, 330 (1981). But some commentators caution that the usage of a statute such as the ATS in any context may invite other, less friendly nations to assert similar jurisdiction over international law claims and impose obligations on foreign visitors that could lead to “chaotic or unjust results.” See, e.g., Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT’L & COMP. L.Q. 250, 257 (1983).

67. 28 U.S.C. § 1350 (2000). The original Act, enacted by the First Congress, read: “The district courts . . . shall also 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.” Judiciary Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76-77.

68. 28 U.S.C. § 1331 (2000).

69. 28 U.S.C. § 1332 (2000). The original statute granting diversity jurisdiction did not equate “aliens” with “citizens.” Thus, one might argue that the First Congress intended only to give aliens the same opportunity as citizens would receive under diversity jurisdiction, at least in relation to torts. *Tel-Oren*, 726 F.2d at 813-14 (Bork, J., concurring).

70. 28 U.S.C. § 1333 (2000).

71. Judge Friendly has described the Act as an “old but little used section” that is “a kind of legal Lohengrin; . . . no one seems to know whence it came.” *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (holding fraud not a violation of international law).

in the debates of the House of Representatives.<sup>72</sup> Given that the ATS's passage immediately followed the ratification of the Constitution, however, the goals of the First Congress can be inferred from those portions of ratification debates relevant to the "law of nations."<sup>73</sup>

In the ATS's more than 210-year history, neither the Supreme Court nor Congress guided the judiciary in its application.<sup>74</sup> Prior to 1980, jurisdiction under the ATS was predicated successfully only two times.<sup>75</sup> Therefore, for almost 200 years, this Act remained essentially dormant.

Though *Smith* and *The Paquete Habana* did not involve cases brought under the ATS, the standards regarding the "law of nations" set forth in those cases have been found to be particularly relevant to the interpretation and application of the ATS. Most ATS cases require that courts ascertain which torts are cognizable when "committed in violation of the law of nations."<sup>76</sup>

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72. See *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (citing 1 Annals of Cong. 782-833 (J. Gales ed. 1789)).

73. See generally Kochan, *Constitutional Structure*, *supra* note 29.

74. See E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can This Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 438 (1985). For a discussion of Supreme Court cases that have addressed issues of international law, see generally Paul B. Stephen III, *International Law in the Supreme Court*, 1990 SUP. CT. REV. 133 (1990). There is some debate whether Congress has decided this issue by enacting the Torture Victim Protection Act. Compare Collingsworth, *supra* note 4, with *Al Odah*, 321 F.3d at 1145-49 (Randolph, J., concurring).

75. See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between two aliens; wrongful withholding of custody is a tort, and defendant's falsification of child's passport to procure custody violated the law of nations); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of three slaves who were on board a Spanish ship seized as a prize of war; treaty of France superseded the law of nations; § 1350 alternative basis of jurisdiction). Because a tort must be found to be the type which violates the law of nations before jurisdiction will be granted, some cases prior to 1980 considered application of the ATS, but found the alleged tort did not meet the law of nations threshold. See *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978) (no generally accepted international rule granting custody of children to grandparents); *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978) (negligence law not part of the law of nations); cf. *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976) (wrongful confiscation of property not part of the law of nations); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (fraud not violative of international law); *Abiodun v. Martin Oil Service, Inc.* 475 F.2d 142, 145 (7th Cir. 1975) (fraud not violative of the law of nations); *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49, 51-52 (2d Cir. 1960) (illegal picketing not in violation of international law); *Valanga v. Metro. Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966) (breach of contract not in violation of the law of nations); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, Panama, 255 F. Supp. 919, 923 (S.D.N.Y. 1966) (negligence law not part of the law of nations); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (unseaworthiness doctrine not part of the law of nations).

76. See *infra* Parts I.B.2-6

## 2. *The Second Wave and Beyond: Filartiga v. Pena-Irala*

In *Filartiga v. Pena-Irala*,<sup>77</sup> decided in 1980, the Second Circuit resurrected the ATS from its fairly dormant existence.<sup>78</sup> Dolly Filartiga, a citizen of the Republic of Paraguay, sued Americo Norberto Pena-Irala, the former Inspector General of Police of Paraguay, for allegedly kidnapping, torturing, and killing her brother while in office.<sup>79</sup> Although the alleged actions took place in Paraguay,<sup>80</sup> Filartiga sued, while both Pena-Irala and she were in the United States on visitor's visas.<sup>81</sup> The district court dismissed the action for lack of subject matter jurisdiction.<sup>82</sup> 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 ATS.<sup>83</sup> This decision breathed new life into this rather ancient statute.

The *Filartiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."<sup>84</sup> For the first time, the ATS was applied in the modern human rights context. Furthermore, *Filartiga* established that "international law," used by the court as synonymous with the "law of nations," is an evolving concept to be ascertained by the courts.<sup>85</sup> The Second Circuit held that courts determining the "law of nations," must "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>86</sup>

In order to determine which principles control international "law," the court accepted the methodology prescribed in *Smith* and *The Paquete Habana*. It looked 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.<sup>87</sup> To that extent, the *Smith-*

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77. 630 F.2d 876 (2d Cir. 1980). See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981) for a general discussion of the case and its approach. See also Hassan, *supra* note 66, at 255 (1983); Jacobsen, *supra* note 62, at 834; Johnson, *supra* note 62; Rohlik, *supra* note 66; Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311 (1981); Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 Geo. L.J. 163 (1985); Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981); Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981).

78. Judge Robb of the U.S. Court of Appeals for the D.C. Circuit described the *Filartiga* approach as "judicially will[ing] that statute a new life." *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

79. *Filartiga*, 630 F.2d at 878.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 881.

86. *Id.*

87. *Id.* at 880-83.

*Paquete Habana* methodology was incorporated as precedent for the interpretation and application of the ATS.

### 3. *An Interruption: Tel-Oren v. Libyan Arab Republic*

Shortly after the Second Circuit's groundbreaking decision in *Filartiga*, the D.C. Circuit was faced with the similar task of applying the ATS in *Tel-Oren v. Libyan Arab Republic*.<sup>88</sup> Representatives of persons killed in a civilian bus in Israel, along with the injured survivors of the attack, sued the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.<sup>89</sup> The plaintiffs charged the defendants with multiple tortious acts in violation of international law.<sup>90</sup>

The three judge panel of the D.C. Circuit, deciding the case unanimously, agreed that the court did not have jurisdiction over the plaintiffs' causes of action.<sup>91</sup> Each judge, however, wrote a separate concurring opinion, all positing a different basis for denying jurisdiction. Judge Edwards, adhering to the *Filartiga* rationale, argued that violations of the "law of nations" are a narrow category reserved to "a handful of heinous actions – each of which violates definable, universal and obligatory norms,"<sup>92</sup> and that the actions in this case did not trigger such jurisdiction.<sup>93</sup> Edwards cautioned, however, that when a proper cause of action satisfies the requirements of the ATS, the judiciary should exercise jurisdiction.<sup>94</sup>

Judge Robb relied primarily on the political question doctrine in his concurrence, asserting that an exercise of jurisdiction would improperly involve the judiciary in foreign affairs, an area outside of its expertise and one wrought with the danger of interference with the political branches.<sup>95</sup> Furthermore, Judge Robb rejected the *Filartiga* formulation for ascertaining international law under

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88. 726 F.2d 774 (D.C. Cir. 1984) (per curiam). For a discussion of the case, see generally Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. MARSHALL L. REV. 341, 349-52 (1988); Kenneth Marc Schneider, Note, *Hanoeh Tel-Oren: The Retreat From Filartiga*, 4 CARDOZO L. REV. 665 (1983).

89. *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 544-45 (D.D.C. 1981). For a discussion of the district court opinion, see generally Eileen Rose Pollock, *Terrorism as a Tort in Violation of the Law of Nations*, 6 FORDHAM INT'L L.J. 236 (1982).

90. *Tel-Oren*, 517 F. Supp. at 544.

91. *Tel-Oren*, 726 F.2d at 775.

92. *Id.* at 781 (Edwards, J., concurring).

93. *Id.* at 775-98. See also *Beanel v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (accepting a broader scope of the law of nations, which included action by private individuals, but dismissing for failure to state a claim under the ATS upon which relief can be granted).

94. *Tel-Oren*, 726 F.2d at 789-91 (Edwards, J., concurring).

95. *Id.* at 823 (Robb, J., concurring).

the ATS<sup>96</sup> and, in the process, rejected the holding of *The Paquete Habana*.<sup>97</sup> Citing Chief Justice Fuller's dissent in *The Paquete Habana*,<sup>98</sup> Robb stated:

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. Yet this appears to be the clear result if we allow plaintiffs the opportunity to proceed under § 1350. . . . The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international 'law.'<sup>99</sup>

Absent congressional guidelines to clarify the ATS's application or purpose, Judge Robb saw no opportunity for judicial cognizance under the statute.<sup>100</sup>

Judge Bork, also concurring in a separate opinion, found that the ATS merely provides a forum and does not provide a separate and automatic private cause of action for violations of international law.<sup>101</sup> Alternatively stated, even though international law may be part of the federal common law, it is not of the type, such as in torts or contracts, which allows judges to fashion a remedy. Instead it merely provides rules of decision.<sup>102</sup> 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.<sup>103</sup> According to Bork, courts, in light of principles of separation of powers, should be especially adamant against finding a cause of action where none is directly conferred.<sup>104</sup> Because there exists "sufficient controversy of a politically sensitive nature about the content of any relevant international legal principles" involved in the litigation, Bork felt it would be improper to adjudicate those claims.<sup>105</sup>

Finally, Judge Bork also expressed concern, in dicta, over the appropriate scope of international law in light of rules of statutory construction.<sup>106</sup> He argued that "one might suppose" that the meaning of "law of nations" in the ATS dealt with the three kinds of offenses understood to constitute the whole of international law at the founding: violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>107</sup>

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96. *Id.* at 827 ("We ought not to cobble together for [the ATS] a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.").

97. *Id.* at 827.

98. 175 U.S. at 720 (Fuller, J., dissenting) (stating that it was "needless to review the speculations and repetitions of writers on international law. . . . Their lucubrations may be persuasive, but are not authoritative.").

99. *Tel-Oren*, 726 F.2d at 827 (Robb, J., concurring).

100. *Id.*

101. *Id.* at 799 (Bork, J., concurring).

102. *Id.* at 811.

103. *Id.* at 808-19.

104. *Id.* at 801-05.

105. *Id.* at 808. Judge Bork further stated, "Adjudication of those claims would require the analysis of international legal principles that are anything but clearly defined and that are the subject of controversy touching 'sharply on national nerves'." *Id.* at 805 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1963)).

106. *Id.* at 813.

107. *Id.* at 813-14 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*68, 72, quoted in 1 W.W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)).

#### 4. *The Third Wave: Kadic v. Karadzic*

Despite an arguably brief judicial retreat from the *Filatiga* rationale evidenced in *Tel-Oren*, the expansion of the judicial application of the ATS reached a new level in 1995 with the *Kadic v. Karadzic* decision.<sup>108</sup> The plaintiffs in *Kadic* were Croat and Muslim citizens of Bosnia-Herzegovina.<sup>109</sup> 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.<sup>110</sup> The suit was brought against Karadzic in his capacity as the President of the Bosnian-Serb faction, and he was served while at the United Nations in New York.<sup>111</sup> The district court dismissed the case for lack of subject-matter jurisdiction.<sup>112</sup> The Second Circuit reversed this ruling,<sup>113</sup> and as a consequence, greatly expanded the jurisdiction conferred by the ATS—at least within the Second Circuit.<sup>114</sup>

The Second Circuit held that the ATS applies to actions by state actors or private individuals that are in violation of customary international law.<sup>115</sup> According to the *Kadic* court, state action is not necessary for a cognizable violation of the “law of nations” to exist.<sup>116</sup> The court accepted the principles it had adopted earlier in *Filatiga*, noting that international law is constantly evolving, and consulting a similar list of authorities to ascertain the norms of contemporary international law.<sup>117</sup> As a result, the court relied upon various international conventions, declarations, and resolutions to determine that the acts alleged—including genocide, torture, and rape—constituted violations of generally accepted norms of international law.<sup>118</sup>

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108. 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996). Judge Newman highlighted the peculiar nature of the case in his opinion: “Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan.” *Id.* at 236. A number of case notes and articles have been published on the *Kadic* opinion. See, e.g., Judith Hippler Bello et al., *International Decision*, 90 AM. J. INT’L L. 658 (1996); David S. Bloch, *Dangers of Righteousness: Unintended Consequences of Kadic v. Karadzic*, 4 TULSA J. COMP. & INT’L L. 35, 47 (1996) (arguing that, while international law litigation in U.S. courts is generally good, *Kadic* itself “muddies international law, weakens American diplomacy and strengthens the very outlaws it is intended to attack”); Pamala Brondos, Note, *International Law—The Use of the Torture Victim Protection Act as an Enforcement Mechanism*, 32 LAND & WATER L. REV. 221 (1997); Amy E. Eckert, Note, *Kadic v. Karadzic: Whose International Law?*, 25 DENV. J. INT’L L. & POL’Y 173 (1996) (concluding *Kadic* went too far); Alan Frederick Enslin, Note, *Filatiga’s Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claims Act with Its Decision in Kadic v. Karadzic*, 48 ALA. L. REV. 695 (1997); Justin Lu, Note, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT’L L. 531 (1997).

109. *Kadic*, 70 F.3d at 236.

110. *Id.* at 236-37.

111. *Id.* at 237.

112. *Id.*

113. *Id.* at 251.

114. See Charles F. Marshall, *Re-framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C. J. INT’L L. & COM. REG. 591, 597 (1996).

115. *Kadic*, 70 F.3d at 239.

116. *Id.*

117. *Id.* at 238-39.

118. *Id.* at 241-44.

5. *Selected Post-Kadic Applications of the ATS*

In 1996, two circuit courts were faced with applying the ATS. In *Abebe-Jira v. Negewo*, the U.S. Court of Appeals for the Eleventh Circuit affirmed a decision awarding compensatory and punitive damages for “torture and cruel, inhumane, and degrading treatment, pursuant to the Alien Tort Claims Act.”<sup>119</sup> Negewo served as chairman of Higher Zone 9, one of twenty-five governing units created by the Dergue dictatorship, which divided Ethiopia’s capital.<sup>120</sup> The plaintiffs suffered various atrocities, including torture and beatings during interrogations, at the hands of Higher Zone 9 guards. The district court found that Negewo personally supervised or participated directly in at least some of the interrogations.<sup>121</sup>

The Eleventh Circuit determined that the ATS “establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”<sup>122</sup> Finding that the political question doctrine only prevents the courts from deciding issues “textually committed to the legislative or executive branches,”<sup>123</sup> the court determined that it could take cognizance of the tort action at bar.<sup>124</sup>

The Ninth Circuit revisited its application of the ATS<sup>125</sup> in 1996 with two separate decisions (from appeals addressing different issues) in the case of *Hilao v. Estate of Ferdinand Marcos*.<sup>126</sup> Opponents of the Marcos regime in the Philippines sued for violations of their human rights, alleging they were victims of torture. The jury found that the plaintiffs and the victims they represented were subjected to a range of tortures under the authority of Marcos, including summary execution, arbitrary detention and other atrocities during interrogations, some of which were conducted by Marcos himself.<sup>127</sup>

119. 72 F.3d 844, 845 (11th Cir. 1996).

120. *Id.*

121. *Id.* at 845-46.

122. *Id.* at 848.

123. *Id.*

124. *Id.* (citing *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding that the “political question doctrine did not bar a tort action instituted against Nicaraguan contra leaders”).

125. See *Trajano v. Marcos* (*In re Estate of Ferdinand E. Marcos Human Rights Litigation*), 978 F.2d 493, 501-03 (9th Cir. 1992) [hereinafter *Estate I*]; *Hilao v. Marcos* (*In re Estate of Ferdinand E. Marcos Human Rights Litigation*), 25 F.3d 1467, 1472-74 (9th Cir. 1994) [hereinafter *Estate II*]. For a discussion of *Trajano v. Marcos*, see Sung Teak Kim, Note, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Statute*—*Trajano v. Marcos*, 27 CORNELL INT’L L.J. 387 (1994).

126. 103 F.3d 767 (9th Cir. 1996) [hereinafter *Estate III*]; 103 F.3d 789 (9th Cir. 1996) [hereinafter *Estate IV*]; see also *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATS based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff’d in part & rev’d in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh’g en banc granted, opinion vacated by* Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

127. See *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1462-63 (D. Haw. 1995).

Applying its earlier test that “[a]ctionable violations of international law [under § 1350] must be of a norm that is specific, universal, and obligatory,”<sup>128</sup> the Ninth Circuit found that the international norm against torture and arbitrary detention was sufficiently specific to be actionable under the ATS.<sup>129</sup> Applying the *Paquete Habana* methodology<sup>130</sup> to determine the content of international law, the court drew from the following international documents: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the African Charter on Human and Peoples’ Rights.<sup>131</sup>

While the use of international law in judicial decision-making is not new, these cases illustrate the increasing presence in the jurisprudence of American courts of tort liability for customary international law violations through application of the ATS. The cases generally followed a continuously expanding wave trend: the first was disuse and dormancy; the second was the acceptance of liability under the ATS for official state acts, including its recognition of the statute as providing for both jurisdiction and a cause of action and evidencing liability by noncompliance with customary international law outputs; and the third was the movement toward an acceptance that quasi-state and private individuals could be liable for violations of customary international law. The fourth wave in ATS jurisprudence, discussed in the next subsection, involves suits against private individuals and corporations.

#### 6. *The Fourth Wave: Suits Against Private Individuals and Corporations*

Throughout the 1980s and early 1990s, several suits were brought against multinational corporations for alleged violations of customary international law. These suits were largely unsuccessful. However, a major turning point occurred in 1997 when a federal district court in California issued its decision in the case of *John Doe v. Unocal Corp.* This decision upheld subject matter jurisdiction under the ATS based on allegations that an American oil company, acting in concert with the Myanmar government, committed various civil and human rights abuses.<sup>132</sup>

As previously discussed, that case was most recently analyzed in a 2002 opinion by the Ninth Circuit, when the circuit court reversed in part a decision by the district court to grant a motion for summary judgment in favor of Unocal.

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128. *Estate IV*, 103 F.3d at 794 (citing *Estate II*, 25 F.3d at 1475).

129. *Id.*

130. *Id.* at 794-95 (citing *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 715 (9th Cir. 1992) (quoting *The Paquete Habana*, 175 U.S. at 700)).

131. *Id.*

132. 963 F.Supp. 880 (C.D. Cal. 1997), *aff'd in part & rev'd in part*, Nos. 00-56603, 00-57195, 00-57197, 00-56628, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), *reh'g en banc granted, opinion vacated* by Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

cal.<sup>133</sup> There, the circuit court held that sufficient evidence existed to support the plaintiffs—accusing Unocal of aiding and abetting forced labor, murder, rape, and torture, committed by the Myanmar government—to allow the case to proceed to trial.<sup>134</sup> The court again took a broad view of international law, citing many customary international law outputs to which the United States is not a party or for which the United States has adopted no implementing legislation.<sup>135</sup> Moreover, the court saw the application of international law as superior to state, federal, and foreign law. It reasoned that international law was a *preferable* law of first application:

Application of international law—rather than the law of Myanmar, California state law, or our federal common law—is also favored by a consideration of the factors listed in the Restatement (Second) of Conflict of Laws § 6 (1969). First, “the needs of the . . . international system” are better served by applying international rather than national law. Second, “the relevant policies of the forum” cannot be ascertained by referring—as the concurrence does—to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law. Third, regarding “the protection of justified expectations,” the “certainty, predictability and uniformity of result,” and the “ease in the determination and application of the law to be applied,” we note that the standard we adopt today from an admittedly recent case nevertheless goes back at least to the Nuremberg trials and is similar to that of the Restatement (Second) of Torts. Finally, “*the basic polic[y] underlying the particular field of law*” is to provide tort remedies for violations of international law. This goal is furthered by the application of international law, even when the international law in question is criminal law but is similar to domestic tort law . . . .<sup>136</sup>

The court’s holding seems a sweeping validation of the ATS’s reach.

Since the original 1997 *Unocal* decision, dozens of new lawsuits against private corporations have been filed.<sup>137</sup> Among these, for a wide range of alleged wrongs and in a wide range of countries, were cases brought against Nike, Shell, Texaco, Rio Tinto, The Gap, Total, Pfizer, BHP, Coca-Cola, Siemens, Drummond Coal, Del Monte, ExxonMobil, Abercrombie & Fitch, Target, J.C. Penney Co., Levi Strauss, Dole, and Chevron, to name a few.<sup>138</sup> Some of these cases involve vicarious liability theories, still others involve corporate responsibility for direct actions under customary international law. Hopes for large judgments or high settlements fuel much of this litigation, and have caused NGOs to team with the plaintiffs’ bar in an effort to fortify a new front against multinational operations. Although some of these lawsuits are ongoing, some have already resulted in substantial settlements.<sup>139</sup> A broad range of suits have

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133. See *Doe*, 2002 WL 31063976 at \*24, *opinion vacated, reh’g en banc granted* by Nos. 00-56603, 00-56628, 2003 WL 359787 (9th Cir. Feb. 14, 2003).

134. *Id.* at \*24.

135. *Id.* at \*11-13.

136. *Id.* at \*11 (emphasis added) (citations omitted).

137. See, e.g., *Vosper*, *supra* note 10.

138. *Id.*

139. *Id.*

also been filed against state actors in the past few years.<sup>140</sup> Selected cases are discussed below.

The Second Circuit in one such case, *Wiwa v. Royal Dutch Petroleum Co.*, originally filed in 1999, allowed a suit to proceed against Shell.<sup>141</sup> The complaint alleged that the plaintiffs' relatives were imprisoned, tortured, and killed by the Nigerian government, that Shell caused air and water pollution, that Shell essentially expropriated land, and that Nigeria committed various other crimes with Shell's assistance. The court explained:

According to the complaint, while these abuses were carried out by the Nigerian government and military, they were instigated, orchestrated, planned, and facilitated by Shell Nigeria under the direction of the defendants. The Royal Dutch/Shell Group allegedly provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages, procured at least some of these attacks, participated in the fabrication of murder charges against Saro-Wiwa and Kpuinen, and bribed witnesses to give false testimony against them.<sup>142</sup>

The Second Circuit rejected Shell's *forum non conveniens* argument. According to that court, Congress, through the ATS and other action, not only "permit[s] U.S. District Courts to entertain suits alleging violation of the law of nations, [but also] expresses a policy favoring receptivity by our courts to such suits."<sup>143</sup> As of this writing, this case proceeds in the discovery phase.<sup>144</sup>

Another case of interest is *Sarei v. Rio Tinto*.<sup>145</sup> There, the plaintiffs alleged environmental and other torts, including altering the climate of the Papua New Guinean island of Bougainville. Plaintiffs claimed a violation of their right to a sustainable environment, racial discrimination, and cultural genocide:

Rio Tinto needed the cooperation and assistance of [Papua New Guinea's (PNG's)] government to [construct a mine], because constructing the mine necessitated displacing villages and destroying massive portions of the rain forest. To obtain the required assistance, Rio Tinto allegedly offered the government 19.1% of the mine's profits. PNG accepted, and plaintiffs allege that thereafter, the mine became "a major source of income for PNG and provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio committed." They also assert that "[t]he financial stake of the PNG government effectively turned the copper mine into a joint venture between PNG and Rio [Tinto] and allowed Rio [Tinto] to operate under color of state law."<sup>146</sup>

The court took a broad reading of the ATS, although it ultimately dismissed the claims based on the political question doctrine.<sup>147</sup> Nonetheless, it is important that the court concluded that the plaintiffs' allegations had been sufficient to state a claim by relying on many different customary international law outputs,

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140. *Id.*

141. 226 F.3d 88 (2d Cir. 2000).

142. *Id.* at 92-93.

143. *Id.* at 105 (emphasis added).

144. See, e.g., *Shell execs face questioning in Nigeria lawsuit*, ENERGY COMPASS, Jan. 24, 2003.

145. 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

146. *Id.* at 1121.

147. *Id.* at 1208-09. See *infra* notes 94-107 and accompanying text.

including many never formally adopted by the United States and many that were highly aspirational in substance.<sup>148</sup>

Additional suits will undoubtedly be filed in this fourth wave of ATS jurisprudence. It appears that the liability trajectory will, without judicial check, undoubtedly move upward.

## II.

### THE INCREASING ROLE OF NGOs IN THE PRODUCTION OF CUSTOMARY INTERNATIONAL LAW OUTPUTS AND ITS IMPLICATIONS

As ATS jurisdiction grows and courts increasingly express a willingness to consult customary international law outputs regardless of whether they are adopted or recognized by the United States in order to enforce “customary international law,” NGOs will undoubtedly have greater incentive to invest in the production of customary international law outputs that are tailored and favorable to their interests. Similar to the proposition that the drafters of the ALI’s Restatements of Law are not indeed “restating” the existence of law but instead advancing an agenda of what law they would like to see exist,<sup>149</sup> NGOs have an incentive to gear customary international law output content not to universally accepted principles of nations, but rather to their own special interests clothed in principles so as to seem “universally accepted.”

If successful in that process, a law and economics perspective would predict that NGOs will see an increased value in such customary international law outputs, for they can be advanced as enforceable documents in court. In other words, judicial recognition of customary international law outputs substantially changes the nature of demand and supply for these outputs. This part examines this contention, through the application of public choice theory.

The incentives for NGOs to engage in rent-seeking behavior at the international level should be substantially advanced if the products/outputs of the rent-seeking gain value by recognition as legitimate evidence of “law” in liability litigation in the courts. Some recent articles have examined NGOs in an interest group perspective, explaining that we should expect NGOs to react to institutional changes.

James Sheehan posits that NGOs are a major force in the development of international law:

Welcome to the brave new world of the NGO, where full-time activists attend international treaty-making proceedings as UN-accredited representatives of the public . . . Besides participating in UN-sponsored treaty negotiations, NGOs are involved in a wide range of activities. They design and propose texts for international treaties, conventions, and other international law instruments . . . Their

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148. *Id.* See also *infra* Part II.C.

149. See, e.g., Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEG. STUD. 131 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995).

attorneys file suit in U.S. and foreign courts against public and private bodies they consider out of compliance with law . . . .<sup>150</sup>

Moreover, NGOs react just like other profit-maximizing players in the public choice process of developing customary international law outputs:

NGOs have a political ideology. Most believe that the private sector cannot solve environmental problems and that governments must control economic decision-making to protect the environment. This belief may be quite sincere, but it is also rooted in self-interest. Many NGOs depend on governments for jobs, money and power. They seek out grants and contracts from national governments and international agencies. They also bask in the recognition they receive from public agencies, which adds authority to their pronouncements and brings their leaders prestige.<sup>151</sup>

Success in litigation, or the extraction of settlements due to the threat of legal liability, is a valuable tool to further their contributions, and is, as a result, useful to an NGO's influence and power. Due to the increased funding, influence and power, even more can be invested in the production of customary international law outputs from which NGOs can reap additional benefits, including new litigation and settlements.

In fact, the United Nations accords preferential status to NGOs. For example, the UN Department of Public Information explains the following system by which over 1500 NGOs are given an identifiable "associated" role in the production of international law:

A non-governmental organization is any non-profit, voluntary citizens' group which is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs . . . provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements. Some are organized around specific issues, such as human rights, the environment or health. Their relationship with offices and agencies of the United Nations System differs depending on their goals, their venue and their mandate.<sup>152</sup>

Some scholars have documented that the system is skewed toward providing access and resources to NGOs, thus favoring an expansive view of international law and the role of customary international law outputs.<sup>153</sup>

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150. JAMES SHEEHAN, *GLOBAL GREENS* 1 (1998). See also JEREMY RABKIN AND JAMES SHEEHAN, *GLOBAL GREENS, GLOBAL GOVERNANCE* (1999); Sanford E. Gaines, *Global and Regional Perspectives on International Environmental Protection*, 19 *HOUS. J. INT'L L.* 983, 1000-03 (1997) (detailing the substantial role played by NGOs in the formation and structure of the North American Free Trade Agreement, Commission on Environmental Cooperation, and the North American Agreement on Environmental Cooperation).

151. SHEEHAN, *supra* note 150, at 2.

152. See Department of Public Information, Non-Governmental Organizations Section, at <http://www.ngo.org/dpi/ngosection/brochure.htm> (describing applications for DPI associate status) (last visited Oct. 21, 2003).

153. See generally Christopher Horner, *Modern Developments in the Treaty Process: Recent Developments Regarding Advice and Consent, Withdrawal, and the Growing Role of Nongovernmental Organizations in International Agreements With Particular Examination of the 1997 Kyoto Protocol*, The Federalist Society for Law and Public Policy Studies, at <http://www.fed-soc.org/IntlLaw&%20AmerSov/Treatypaper.pdf> (citing, among others, a report on bias in the selection process, regarding the 2002 U.N. Child Summit (UNICEF)) (last visited Oct. 21, 2003).

NGOs, like other entities, act as interest groups focused on maximizing private benefits. In seeking the production of customary international law outputs for use in future litigation, NGOs will not necessarily be seeking specific outcomes from each output; but rather, these outputs can result in the production of tools for use in other forums. Once customary international law outputs become enforceable to establish tort liability, a fundamental transformation in the nature of the output will occur. This is especially true of customary international law outputs produced prior to enforceability when all parties involved are unaware of the true consequences of the production.

Zywicki examined environmental NGOs and concluded that we should expect their behaviors to be motivated by self-interest and maximization of private benefits:

It does, in fact, seem obvious that the primary motivation for leaders and contributors to environmental interest groups is to provide *private* benefits for themselves, rather than public benefits. In this, they truly are just like any other interest group. It is the rare interest group that exists simply to provide undifferentiated public goods . . . .<sup>154</sup>

One identifiable motivation for environmental NGOs seeking “results” is to sell the outcomes of their lobbying efforts to their members and attempt to bolster budgets and self-perpetuate. In addition, environmental interest groups are in competition with development organizations.

However, the ultimate competition, in terms of production of customary international law outputs, or opposition thereto, is unbalanced. By obtaining regulation through direct governmental controls or through customary international law outputs, which could be used in litigation for greater protection of environmental values, environmental NGOs are able to escape the need to engage in market transactions with development interests for such environmental protection.

Environmentalists often claim that environmental activist groups and environmental regulation is [sic] animated by the “public interest,” i.e., an outpouring of “civic republicanism” that causes individuals to overcome their narrow self-interest and to support wide-ranging environmental regulatory policies. Moreover, it is usually added that this spirit of public interest is usually effectuated through a process of public, deliberative democracy, where all parties debate in order to reach consensus about the ideal public policy that advances the common good rather than private gain.<sup>155</sup>

Therefore, the rent created may indeed be based on the values of time, money and other market goods—using regulation to escape the need to engage in market transactions for the trading of environmental goods. Whichever way one looks at the self-interest served by NGO investment in regulation, environmental NGOs gain particular benefit from products like customary international law outputs and litigation victories or settlement extractions resulting from the enforceability of such outputs.

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154. Zywicki, *supra* note 33, at 22.

155. *Id.* at 10.

There are several reasons why NGOs may prefer to invest in customary international law outputs, *particularly* if they are enforceable laws or evidence of laws that can help establish tort liability to advance the interests of the organization. This Part examines the incentives for, and influences of, NGOs in the customary international law output production process. It concludes that, from a public choice perspective, most customary international law outputs should not serve as evidence of judicially enforceable legal obligations.

The examination focuses largely on the supply and demand for the production of customary international law outputs, arguing that enforceability of these outputs in U.S. courts will increase their production in the short run. The thesis is that non-enforceability of customary international law outputs used to be a significant demand constraint on production. However, increasingly this constraint is weakening as more and more U.S. courts recognize customary international law outputs as enforceable. At the same time, there has not been a corresponding increase in supply constraints.

To examine this thesis, I consider the following selected issues of supply and demand:

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PRODUCTION OF CUSTOMARY INTERNATIONAL LAW OUTPUTS (CILOS)

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*SUPPLY CONSTRAINTS*

- Competition/Diffuse Interests
- General Jurisdiction versus Single Purpose
- Transaction Costs Associated with Production including specificity of outputs
- Risks to Producers/Decision Makers & Their Constituents including issues of Reciprocity & Voluntary Assent

*DEMAND CONSTRAINTS*

- Cost/Price of Investment
  - Level of Competition
  - Non-Enforceability
  - Steps Requiring Additional Decisions, such as Domestic Execution/Implementation
  - Level of Benefit/Value
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I discuss several issues below to analyze these constraints on production and the effect of recent ATS trends on the constraints. The primary focus of this Part is on the demand side—that is of the motivation behind seekers of customary international law outputs. However, I will also discuss the reasons why the supply side constraints will be difficult to tighten in order to balance the increase in demand caused primarily by an increase in the enforceability of customary international law outputs.

Stephan has examined the political economy of international lawmaking—predominantly the creation of international trade and private international law, with an analysis focusing “primarily on the supply side of international law, which is to say the factors that motivate the producers of this good.”<sup>156</sup> More-

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156. Stephan, *Accountability*, *supra* note 32, at 694.

over, his limited demand analysis focuses on issues of reciprocity and cooperation,<sup>157</sup> conditions that I will later show do not hold strongly in the context of NGO use in ATS litigation. Nonetheless, he recognizes that “any analysis of the demand for international law must account for rent-seeking by interest groups.”<sup>158</sup> Moreover, his work demonstrates that different producing organs of government—the representatives of executive branches, national parliaments, private legislators, and international adjudicators—are willing to work with interest groups in varying degrees to increase the supply of a desired international rule in order to serve discrete and powerful interest groups, even when it may be to the detriment of the overall welfare of their country.<sup>159</sup>

#### A. Avoidance of Domestic Procedural Lawmaking Hurdles

Many of the documents relied on by courts to identify customary international law and used by NGOs to attempt to establish liability, have not been acknowledged as binding, let alone passed as law by Congress. As James Madison articulated, “[N]o foreign law should be a standard farther than is expressly adopted.”<sup>160</sup> If an NGO need not prove the assent of Congress in order to establish the enforceability of a customary international law output, it can, in turn, avoid the costs of adopting such legislation. For this article’s purposes, I will focus on the NGO avoidance of lawmaking in the United States, and, therefore, their circumvention of a process which requires bicameralism and presentment.

Taking the two Second Circuit decisions, *Filartiga*<sup>161</sup> and *Kadic*,<sup>162</sup> as illustrations, each court looked to various international declarations and resolutions, including the Universal Declaration on Human Rights, to interpret the scope of the “law of nations” under the ATS. Such references create two problems. First, Congress has never ratified many of the sources relied on, or at least partially relied on, to determine a controlling rule of international law. Worse yet, Congress considered these declarations and resolutions and specifically chose not to accept them as binding authority on its own (or its constituents’) actions. This poses serious questions about the legitimacy of their use as sources of law. In *Filartiga*,

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157. *Id.*

158. *Id.* at 694. Stephan states:

When discussing the demand for domestic rules, a conventional analysis incorporates the insights of public choice theory. This body of thought specifies the conditions under which cohesive minorities may obtain laws for their discrete benefit to the detriment of unorganized majorities. Similarly, any analysis of the demand for international law must account for rent-seeking by interest groups. . . . [I]n some instances interest groups may induce countries to engage in international lawmaking that disservices the populations of the nations promoting the legislation. The illumination of the conditions under which such outcomes occur is one of the central tasks of public choice theory.

*Id.* at 694-95.

159. *Id.* at 695-706.

160. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 316 (Farrand ed., 1986).

161. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

162. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

[T]he Second Circuit alluded to certain international treaties on human rights, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first two of these were among the four treaties on human rights submitted by President Carter to the Senate for its advice and consent in 1978 [and the United States was not involved in the third]. *Neither in the court's opinion nor in the amicus brief filed in the Filartiga case jointly by the Departments of Justice and State, was reference made to the reservations, declarations, understandings, and statements that President Carter recommended that the Senate include in its resolution of advice and consent.* The effect of these qualifications of the two treaties would be to render them non-self-executing for the United States, requiring implementing legislation to become effective as law in the United States.<sup>163</sup>

The *Filartiga* court did not discuss or recognize Congress's failure to ratify these documents or the affirmative and explicit concerns both voiced by Congress and the President in relation to the content of these documents. Yet it seems clear, especially in light of Congress's power to define offenses against the "law of nations," that these sentiments should restrict the courts' reliance upon such documents as an authoritative statement of the law.<sup>164</sup>

Take also the example of the Ninth Circuit in *Martinez v. City of Los Angeles*, where the court addressed a suit brought by an alien against the City of Los Angeles for actions that occurred in Mexico in alleged violation of "customary international law."<sup>165</sup> The Ninth Circuit sustained the suit, in part deriving applicable "customary international law" from the International Covenant on Civil and Political Rights.<sup>166</sup> However, as Judge Randolph recently critiqued in *Al Odah*, "the court neglected to mention that this multilateral agreement creates no judicially enforceable rights and that the Senate ratified the treaty on the basis that it 'will not create a private cause of action in U.S. courts.'"<sup>167</sup>

These examples are not isolated. ATS cases are replete with references to customary international law outputs to which no congressional assent has been made.<sup>168</sup> No laws have been passed to ratify or execute many of these outputs. Congress's actions on the International Covenant on Civil and Political

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163. Rusk, *supra* note 77, at 315 (emphasis added) (citations omitted). Hassan provides a similar conclusion:

[T]he President also inserted various reservations, declarations and understatings [sic], thereby further decreasing the efficacy of those treaties [including the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the American Convention on Human Rights] . . . when eventually those treaties are ratified by the USA.

Hassan, *supra* note 66, at 255 (1983) (also adding that the Genocide Convention, submitted to the Senate in 1948, has still not been ratified).

164. See Jacobsen, *supra* note 62, at 834, 849 (arguing that, "[t]he *Filartiga* court should have been sensitive to the Senate's deliberate inaction and refrained from creating a new rule of international law . . . . [T]he court might have effectively curtailed the Senate's ability to set policy in the area of human rights.").

165. 141 F.3d 1373 (9th Cir. 1998).

166. *Id.* at 1383-84.

167. *Al Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J., concurring) (citing S. EXEC. REP. NO. 102-23, at 9, 19, 23 (1992)).

168. *Id.*

Rights,<sup>169</sup> the American Convention on Human Rights, or on the Universal Declaration of Human Rights are not isolated situations. In fact, Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.<sup>170</sup> This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.<sup>171</sup>

Several federal courts that have faced this issue indicated a willingness to look beyond congressional action when determining whether certain customary international law outputs evidence an enforceable tort standard under customary international law.<sup>172</sup> As one court explained its position: "The United States signed the [Convention on the Rights of the Child] on February 16, 1995; it has never been sent to the Senate for ratification. . . . The CRC does not have the force of domestic law under the treaty clause of the Constitution. *Non-ratification does not, however, eliminate its impact on American law.*"<sup>173</sup> Similarly, in *Sarei v. Rio Tinto*, the court held that rights recognized in the UN Convention on

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169. The International Covenant on Civil and Political Rights awaited Senate action since 1978, eventually entering into force for the United States in late 1992 with five reservations, five understandings, four declarations, and one proviso. See generally John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

170. Jacobsen, *supra* note 62, at 847-48 ("[T]he Senate has been unwilling to extend international law to encompass the protection of human rights.").

171. See *id.* at 849. Jacobsen states:

The Senate has refrained thus far from ratifying . . . numerous . . . human rights treaties, thereby expressing an unwillingness to create any internationally recognized legal protections for human rights. The Senate's primary concern has been that the treaty provisions might intrude upon the sovereignty of nations and of the United States in particular.

*Id.*; see also Bradley & Goldsmith, *supra* note 30, at 869 (1997) (stating that, "[f]ar from authorizing the application of the new CIL [customary international law] as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status.").

172. See, e.g., *U.S. v. Schiffer*, 836 F. Supp. 1164, 1171 (E.D. Pa. 1993) (courts may consider signed but not ratified customary international law outputs as evidence of customary international law). Consider also the statement in *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002):

A treaty has been sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction. A number of these cases have been catalogued by Professor Steinhardt, who lists:

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-85 (2d Cir. 1980) (consulting the American Convention on Human Rights and the International Covenant on Civil and Political Rights, *inter alia*, to determine the customary prohibition on torture); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution), *reh'g granted in part and denied in part*, 694 F. Supp. 707 (N.D. Cal. 1988); *Lareau v. Manson*, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980) (discussing the United Nations Minimum Standard Rules Governing the Treatment of Prisoners), *modified*, 651 F. 2d 96 (2d Cir. 1981), *aff'd in part and modified in part*, 651 F. 2d 96 (2d Cir. 1981).

183 F. Supp. 2d at 593 (citing Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 *VAND. L. REV.* 1103, 1182 n. 332 (1990).)

173. *Id.* at 596 (emphasis added).

the Law of the Sea could be recognized in federal courts even though it has only been signed, not ratified, by the United States.<sup>174</sup>

By ignoring Congress's role in law creation and insisting that these documents form a foundation for ascertaining the "law of nations" component of the ATS, the U.S. courts harm Congress. As Judge Randolph stated in *Al Odah*, "Nothing in the Constitution expressly authorizes such free-wheeling judicial power."<sup>175</sup>

First of all, court acceptance of certain customary international law outputs as enforceable instruments ignores Congress's power and prerogative to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that certain principles or norms are universal and binding upon all states (or, in the case of *Kadic*, all states and some individuals), the court states that an obligation specifically not accepted by Congress will now bind the United States and its Congress. Through the production of customary international law outputs and its judicial enforceability, NGOs can not only subvert bicameralism and presentment for the creation of federal tort law, but they might also achieve something perhaps more valuable—a declaration by a United States court of a universal law binding on all nations, including the United States, without surviving the rigors of a constitutional amendment.

Inherent in Congress's power to legislate is the authority to choose not to legislate. When a court decides to look beyond Congress for controlling regulations or for controlling definitions of "law", it may be usurping Congress's power to refrain from regulating or defining.<sup>176</sup> Stated another way, the court creates a regulation or definition absent congressional intent or assent to regulate or create a controlling rule of law.<sup>177</sup>

174. 221 F. Supp. 2d 1116, 1161-62 (C.D. Cal. 2002); see also *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 175 n.3 (D.P.R. 1999) ("The Senate has yet to ratify UNCLOS III. However, pending ratification or rejection by the Senate, 'the United States is bound to uphold the purpose and principles of the agreement to which the executive branch has tentatively made the United States a party.'").

175. *Al Odah*, 321 F.3d at 1148 (Randolph, J., concurring).

176. See Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1268 (1988) [hereinafter Weisburd, *The Executive Branch*]; Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38-44 (1995). Weisburd argues:

Holding that the Executive is constrained by international law . . . would shift power from the elected President to the unelected courts. . . [and] could leave the United States bound by policy choices in which no element of the American government actively participated. This result could occur because the United States can easily be held to be bound by a rule of customary international law to which it did not object during the process of its formation, even if it did not actively participate in advancing the rule.

*Id.* (citing Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 50 (1962)).

177. Weisburd, *The Executive Branch*, *supra* note 176, at 1255-56; see also Bradley & Goldsmith, *supra* note 30, at 844-47 (arguing that declarations that the law of nations is part of the laws of the United States might create executive obligations under the "Take Care" clause in Article II of the Constitution and might also raise federalism concerns through obligations placed on the states through the Supremacy Clause in Article VI of the U.S. Constitution).

More importantly, however, for purposes of an economic analysis, the ability to cut Congress out of the equation may tip the balance in favor of investing in the production of customary international law outputs over the production of domestic legislation. The process of bicameralism and presentment ordinarily makes lawmaking expensive and thereby reduces rent-seeking.<sup>178</sup> As Turley notes, the creation of international law outside of the system of bicameralism and presentment raises particular public choice difficulties:

When analyzed as a form of legislation, international sources present a number of public choice difficulties associated with interest group activity. . . . The collective good is protected by institutional checks and balances, such as the bicameral system and the executive veto, that structure the enactment of domestic legislation. Before legislation becomes law, this delicate balance works to check both legislative opportunism and special interests. . . . International law is a system of treaties, agreements, and customs created in large part outside this representative system, untested by the pluralistic forces that drive the legislative and executive branches. The use of international sources introduces new players and new forms of "legislation" into the carefully balanced Madisonian system. . . . The judicial introduction of a source created wholly outside the Madisonian system poses a number of challenges to the delicate balance set up by the drafters of the Constitution.<sup>179</sup>

Turley, however, incorrectly concludes that "the danger of international sources is not that they are the products of rent-seeking," and that "[a] special interest group is not likely to succeed in influencing the creation of customary international law."<sup>180</sup> Turley's conclusion, of course, relies on the assumption that "customary international law" is limited to development of standards by nations and for nations, such that the political actors involved are presumed to

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178. See, e.g., JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233-48 (1965); see also John O. McGinnis, *The Original Constitution and Its Decline: A Public Choice Perspective*, 21 HARV. J.L. & PUB. POL'Y 195, 203 (1997). McGinnis explained:

Bicameralism is a second constitutional mechanism that makes it harder for majorities to effect redistribution. Intuitively, the manner in which bicameralism achieves its objective is clear: those pushing rent-seeking legislation must obtain a majority in not one but two legislative bodies. The requirement of a greater consensus should favor legislation that provides public goods that benefit a substantial majority rather than redistribution in favor of a relative few. . . . The majority not only must obtain the assent of two houses of Congress, but also that of the president. . . . Bicameralism and the veto power make rent-seeking harder for concentrated interest groups as well as for majorities, because the interest groups need to expend resources to win the support of a greater number of actors.

*Id.* at 198. McGinnis continued:

[T]he requirement that legislation receive the endorsement of the two Houses of Congress as well as the president's assent makes rent-seeking by majorities and special interests more difficult. Thus, interest groups sought to avoid these strictures by having Congress delegate large reservoirs of power to executive branch agencies. Once the power was delegated, interest groups had only to pass over one hurdle—that of the agency—to obtain rent-seeking regulation. At the same time, the United States Supreme Court discarded the non-delegation doctrine that had once policed these blank checks.

*Id.* at 207; see also John S. Baker, Jr., *Constitutional Architecture*, 16 HARV. J.L. & PUB. POL'Y 59, 68 (1993) ("In effect, the 'checks and balances' of bicameralism, serving as an internal check on the legislature, became incorporated as a countervailing force within separation of powers").

179. Turley, *supra* note 32, at 186-92.

180. *Id.* at 267.

have sufficient motive to examine the issues and the costs and benefits are internalized within the political institutions. The ATS breaks down that check, as explained in more detail below.<sup>181</sup>

Finally, because several courts recognize that the ATS provides both jurisdiction and a cause of action for “customary international law” violations, the costly steps requiring additional decision making after the production of a customary international law output (such as domestic execution or implementation) are removed. In this sense, customary international law outputs are deemed “self-executing.”<sup>182</sup> This weakens yet another demand constraint on the production of customary international law outputs. It reduces the costs of achieving results from any investment in the production at the customary international law output level.

When courts give legal enforceability to documents produced outside of the costly constitutional process, it: (1) risks enforcing legislative bargains that, due to lower production costs, may lead to inefficient outcomes; and (2) threatens to shift investment in lawmaking to a substitute forum that fails to adequately control rent-seeking behavior. For example, we can expect more investment in customary international law output production by NGOs in this situation.

### B. *Special Interest Capture and the Failure of Interest Group Competition*

In addition to escaping the procedural rigors of domestic production of international law, customary international law output production should be less costly to NGOs than traditional domestic means of producing legislation because (1) there exists a general lack of interest group competition controlling supply in most customary international law output production centers; and (2) many customary international law output production centers are specialized, single interest entities that are highly subject to capture by NGOs. Indeed, this

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181. See *infra* Part III.

182. As explained by Judge Randolph, the theory that the ATS creates a cause of action for violations of customary international law is illogical:

To hold that the Alien Tort Act creates a cause of action for treaty violations, as the *Filartiga* decisions indicate, would be to grant aliens greater rights in the nation's courts than American citizens enjoy. Treaties do not generally create rights privately enforceable in the courts. Without authorizing legislation, individuals may sue for treaty violations only if the treaty is self-executing. See, e.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.); *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107 (D.C. Cir. 2001); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994); *Holmes v. Laird*, 459 F.2d 1211, 1220 (D.C. Cir. 1972); *Tel-Oren*, 726 F.2d at 808-10 (Bork, J., concurring). To illustrate, the detainees in this case claim that the military is confining them in violation of the Geneva Convention of 1949. But the second Geneva Convention, like the first, see *Eisenstrager*, 339 U.S. at 789 n.14, is not self-executing for the reasons stated by Judge Bork in *Tel-Oren*, 726 F.2d at 808-09, and by the Fourth Circuit in *Hamdi v. Rumsfeld*, 316 F.3d 450, 468-69 (4th Cir. 2003). No American citizen, therefore, has a cause of action under this treaty. Yet on the basis of *Filartiga*, and the theory that the Alien Tort Act itself creates a cause of action, aliens could bring suit for its violation.

*Al Odah*, 321 F.3d at 1146-47 (Randolph, J., concurring).

capture has already occurred and allowed NGOs to dig in should competition emerge.

NGOs have a considerable advantage in bargaining for customary international law outputs because the development of these documents does not include interest group competition, which keeps rent-seeking in check—for example, to date, globalization and international development lobbies have a noticeably diminished presence in the production of customary international law documents, although this may be changing as awareness grows. In fact, at least at the United Nations, institutional standards and biases have favored the participation of those wishing to expand the reach of customary international law while disfavoring other groups.<sup>183</sup>

This situation, and perhaps industry's failure to appreciate the potential impact of emerging international environmental and other "laws," could explain industry and business interests' minor presence in many instances of customary international law output or treaty production. For example,

Representatives of groups directly impacted by potential commitments [of the Kyoto Protocol]—industry and labor—were fairly limited in Rio (approximately 20% of the accredited NGOs) and fairly split between those standing to lose economic activity—anti-energy-suppression interests such as the coal industry, energy users, mine workers—and those seeking 'rents' through [green house gas] restrictions with mechanisms such as credit-trading schemes.<sup>184</sup>

Yet competition lies at the heart of checks on the production of "legislation," including customary international law outputs. As Bertrand Russell explained through a "biological" examination of organizations and power, "every organization will, in the absence of any counteracting force, tend to grow both in size and density of power."<sup>185</sup>

Moreover, as the foregoing suggests, there is a much greater unity of interest among customary international law output expansionist NGOs—in lowering transaction and information costs and allowing for greater coalition building—than exists between affected industry groups. This, too, creates a competitive advantage for customary international law output expansionist NGOs. As Russell explained, "When two organizations with different but not incompatible objects coalesce, the result is something more powerful than either previous one, or even both together," and "[h]ence there is a natural tendency to combination."<sup>186</sup>

Similarly, the interests of expansionist NGOs and production entities frequently align, creating capture effects where the entity becomes beholden to particular special interests, its "clients," and an arm of those interests and their agenda. Capture theory rests on rational choice assumptions that legislative production entities can maximize their own utility by finding favor with the organized interests most likely to provide benefits both inside (such as heightened

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183. See Horner, *supra* note 153, at 10-15.

184. *Id.* at 15.

185. BERTRAND RUSSELL, *POWER: A NEW SOCIAL ANALYSIS* 160-61 (1938).

186. *Id.* at 173.

importance, authority and job stability) and outside (such as employment) service.<sup>187</sup>

These capture effects will be difficult to overcome by those seeking to limit customary international law output production. First, production entities want to produce and bureaucracies tend to exhibit self-perpetuating behavior.<sup>188</sup> Thus, the production entities have a disincentive to limit new production of customary international law outputs that might be used to increase regulatory control.

Second, specialized entities such as the U.N. Environmental Programme are far more subject to capture than general interest legislatures. Predictably, interest groups will favor the creation of a highly specialized, single-interest agency because it increases their opportunity for capture.<sup>189</sup> The cost of obtaining rent-seeking legislation is much lower when a special interest need only capture a specific agency. This is especially true because the particular agency will be more dependent on any one interest group for payments when the number of interests related to the purpose of that agency is small.<sup>190</sup> There is substantial evidence that expansionist NGOs have already captured numerous customary international law output production facilities.<sup>191</sup> Having so captured these entities and entrenched themselves, the expansionist interests have an advantage. Even if the regulated entities begin to recognize that competing to control production of customary international law outputs is in their self interest (for example due to the risk of liability from these outputs in litigation), the regulated lobby will face substantial hurdles from such entrenchment.

Finally, expansionist NGO dominance in this field of politics has allowed them to become far more entrenched and familiar with the institutions and procedures necessary to affect their interests. Counter-production interests will face high transaction costs to overcome that advantage of time. For each of these

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187. See Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 513 (1988). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

188. See generally WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (arguing that bureaucracies seek to maximize their budgets); GEORGE C. ROCHE, *AMERICA BY THE THROAT: THE STRANGLEHOLD OF FEDERAL BUREAUCRACY* (1983); LUDWIG VON MISES, *BUREAUCRACY* (1944).

189. See generally Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99-101 (1992) [hereinafter Macey, *Organizational Design*] (explaining that interest groups will be more confident in their ability to retain control over agencies, a single client, than in their ability to retain control of the legislature, composed of multiple clients).

190. For a discussion of the theory of capture, see generally Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279 (June 1984); Mathew D. McCubbins, Roger G. Noll, & Barry R. Weingast (writing as McNollGast), *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). As Macey explained in relation to the thrift industry:

[L]ong after there was any economic need for a savings and loan industry, thrift regulators took extraordinary steps to ensure the industry's survival. The regulators acted as they did, not to further the public interest, but because they understood that the survival of the industry was crucial to their own professional survival.

Macey, *Organizational Design*, *supra* note 189, at 97.

191. See generally SHEEHAN, *supra* note 150.

reasons, competition acts as a weak supply constraint on customary international law output production.

C. *Lacking Formal Elements of Law and An Expectation of Non-Enforcement by Some Bargaining Parties*

Many of the customary international law outputs herein discussed are merely aspirational commitments between nations, and not specific or formal obligations for public or private entities.<sup>192</sup> These types of documents are normally drafted with an understanding that they will not act as law, thereby making their language far less precise and much broader than any signatory might normally wish to embody in a statute. Relying on proclamations of international assemblies creates problems because the texts of these documents are drafted liberally and embody general goals or aspirations as opposed to legally binding principles.<sup>193</sup> *Filartiga*, *Kadic*, and other cases applying the ATS, however, have looked to such documents as supporting authority for their pronouncements on the existence of an international law.<sup>194</sup>

Often the parties drafting the customary international law outputs upon which the courts increasingly rely and upon which NGOs advocate in court, simply did not intend for these documents to be construed as law. For example, Rusk has stated that “[t]he simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law.”<sup>195</sup> In fact, Eleanor Roosevelt, Chairman of the Commission on Human Rights, stated when presenting the Declaration to the U.N. General Assembly, that “[i]t is not and does not purport to be . . . a statement of law or of legal obligation . . . [it is] a common standard of achievement . . . .”<sup>196</sup> Rusk further contends that this was

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192. Turley, *supra* note 32, at 191-92 (“The increasing reliance on international sources in statutory interpretation often ignores the fact that these sources are materially different in character from conventional legislation. . . . [B]efore courts use such sources . . . it is important to consider the implications of these differences for a Madisonian system”).

193. For example, in a case where plaintiffs sought jurisdiction under the ATS, one court granted a dismissal for failure to state a claim on the basis that the international principles relied upon, the Stockholm Principles on the Human Environment,

do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law.

*Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). This type of approach recognizes the limited “legal” nature of international declarations, proclamations, and the like.

194. The *Filartiga* court cited as authority a number of international treaties, “to which the United States is not a party,” to establish a universal norm against torture in “modern usage and practice.” Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT’L & COMP. L. 307, 308 (1981); see also Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT’L & COMP. L. 317, 319 (1981) (noting that *Filartiga* cited “multilateral treaties to which the U.S. [had] not adhered, such as the International Covenant on Civil and Political Rights”).

195. Rusk, *supra* note 77, at 313.

196. *Id.* (quoting XIX Bulletin, DEP’T ST. BULL., Dec. 1948, No. 494, at 751).

the understanding of Congress, the Executive, and even the United States delegates to the United Nations:

As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.<sup>197</sup>

The Universal Declaration of Human Rights is but one example. Had the drafters intended for these documents (upon which courts and plaintiffs are relying) to become legally binding in the judiciary, many of them might not have passed out of the multinational body or have been signed by the United States. Had these documents been accepted in some form, they would surely exhibit dramatically different language and scope than would those promulgated with an understanding that the document was merely aspirational. As Rusk stated, "It should be noted . . . that votes cast [on UN General Assembly Resolutions] with the knowledge that the result will not be law are very different from votes that would be cast if there were a general awareness that the result would be operationally and legally binding."<sup>198</sup>

This conclusion, that universal declarations are not meant to act as controlling law, is strengthened by an examination of the bodies creating these documents. Realizing that the United Nations is to have no sovereign authority, Rusk articulates the nature of its "power" as understood by member states. Rusk argues that "The [UN] Charter . . . did not contemplate that the General Assembly would be a legislative body in the field of international law generally . . ." <sup>199</sup> In fact, "There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter."<sup>200</sup> Thus, even if Congress could delegate its power to define offenses against the "law of nations" to the United Nations, it clearly did not intend to do so.

Indeed, when states sometimes agree to customary international law outputs, the incentives at play are not carefully based in state agreement that certain standards have truly risen to the level of enforceable international law. As Arangio-Ruiz explains:

As everybody in the United Nations is convinced that recommendations are *per se* not mandatory, States tend to embellish their image by putting forward draft resolutions. Other States tend naturally to support such drafts. And potential or natural opponents are often reluctant to face the risk of tarnishing or spoiling their own image by opposing the proposal openly or by casting a negative vote.<sup>201</sup>

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197. *Id.* at 314.

198. *Id.* at 315.

199. *Id.* at 314.

200. *Id.*

201. Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declarations of Principles of Friendly Relations*, 137 RECUEIL DES COURS 419, 457

Simply put, "General Assembly Resolutions remain too unreliable to regard as definitive sources."<sup>202</sup> Similarly, other multinational organizations to which the United States is a party and subordinate entities at the United Nations, all lack a general legislative power. They may have the ability to draft treaties, but even these do not become binding upon the United States unless two-thirds of the Senate chooses to give its consent to the ratification of that treaty.<sup>203</sup> Moreover, even when Congress ratifies a treaty, it may often require additional legislation to "execute" provisions of the treaty.<sup>204</sup>

This has several advantages for expansionist NGOs. First, the existing NGO advantage is buttressed by the fact that the decision makers in the bargaining process: (1) did not or do not now approach the bargaining process as though the resulting standards would be enforceable; and (2) among themselves do not face equal burdens (as in, not all nations or their constituents face equally risk adverse consequences from the enforcement of such international standards in domestic courts), further weakening opposition.

New doctrines that enforce previously drafted customary international law outputs allow NGOs to reap more than was intended originally. Parties in the past often drafted customary international law outputs without an understanding or expectation that it could create legally enforceable standards. Yet NGOs can now use broad aspirational commitments as a means of imposing legal duties. Second, unless and until adversely affected individuals become aware of potential liabilities, NGOs can continue to lobby for broad customary international law outputs.

Third, as long as negotiating parties feel immune to liability from broad customary international law outputs, yet can reap the benefits of selling the symbolic protection of human rights, the environment or the like to their constituents, increased enforceability against some entities may not unleash fierce opposition to customary international law output production. Many state negotiators will feel insulated by sovereign immunity, the Act of State doctrine, or minimal contacts with the United States. Thus, they may not fear continued production of customary international law outputs, particularly if they offer symbolic value to their constituencies. Therefore, they remain unconcerned for those who may become targets of customary international law output enforceability.

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(1972-III); see also Garibaldi, *The Legal Status of General Assembly Resolutions: Some Conceptual Observations*, 73 AM. SOC'Y INT'L L. PROC. 324, 326 (1979) (calling this a process of "fake agreement").

202. See Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 899 (1983). Kerwin provides an excellent critique of the use of soft customary international law outputs such as General Assembly Resolutions in courts because: (1) they are not intended to serve as binding "law" and (2) because there are many examples of contradictory statements.

203. U.S. CONST. art II, § 2, cl. 2.

204. This is the distinction between self-executing and non-self-executing treaties. Even when Congress ratifies a treaty, convention, or other international document, a non-self-executing treaty will not, through ratification alone, create any automatic, cognizable cause of action for a breach of the agreement. See *Tel-Oren*, 726 F.2d at 808-19 (Bork, J., concurring).

Although some law and economics literature has focused on the development of international law, most of this scholarship has focused on issues of reciprocity, voluntary assent and international cooperation—influences on state decision makers—that work to check the development of inefficient international law rules.<sup>205</sup> But when NGOs can enforce customary international law outputs against private actors in U.S. courts outside of the control of political/state-negotiating institutions, few of the traditional checks on inefficient production of international law apply. Only when we can assume that nation states will (and have the power to) intervene, might these traditional checks play a role. In other words, ATS suits based on customary international law outputs involve an absence of reciprocity. That is, customary international law in the context discussed herein does not, as it has evolved, deal only with relationships among nations in which both the costs and benefits of recognized standards are internalized within a state. Instead, customary international law has moved to standards applicable by and enforceable against private competitors. Absent an identification of internal impacts on themselves, individual nations have no incentive to step in and halt customary international law output production.

### III.

#### NGO REACTION AND PREDICTIONS

NGOs have taken note of, and exploited advantages of the judicial trend toward enhanced enforceability of customary international law and the role of customary international law outputs in defining the parameters of liability. This article explores two aspects of the NGO response. First, NGOs appear to recognize the benefits to their agendas, which can be gained through tort litigation based on customary international law. Certain NGOs, particularly anti-globalization, environmental, sustainable development, labor rights, and other human rights organizations, are the principal parties spearheading recent lawsuits on behalf of plaintiffs who have allegedly suffered as a result of development projects in underdeveloped and developing countries.<sup>206</sup> These NGOs have also found allies in the domestic plaintiffs' bar, including some of the most influential trial lawyers from the tobacco, asbestos, breast implant, and other high profile mass tort suits of late.<sup>207</sup>

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205. See, e.g., Jonathan Baert Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749 (1999); Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 GEO. L.J. 971 (2002); John K. Setear, *Treaties, Custom, Rational Choice, and Public Choice*, 94 AM. SOC'Y INT'L L. PROC. 187 (2000); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285 (2002); Francesco Parisi & Catherine Sevchenko, *Treaty Reservations and the Economics of Article 21(1) of the Vienna Convention*, 21 BERKELEY J. INT'L L. 1 (2003); Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law* (George Mason University Law and Economics Working Paper Series No. 02-08), at <http://www.gmu.edu/departments/law/faculty/papers/docs/02-08.pdf> ("A basic principle of customary law . . . is reciprocity. Further, the Vienna Convention imposes reciprocity on all international law created by treaty").

206. See, e.g., Vosper, *supra* note 10, at 35.

207. See *id.* For example, Steve W. Berman, the attorney who represented over a dozen states in the tobacco litigation, was lead counsel for a group of Papua New Guinea residents who sued,

The theories advanced in these suits appear not only to be attempts to take advantage of the increased recognition of customary international law, but also to further shape federal law to embrace a broad body of federally recognized international torts. Aside from developing law and resolving particular cases, NGOs are also taking advantage of such litigation and the threat thereof to influence corporations to accept and adopt industry-wide international standards for their activities. This article predicts that these industry commitments may not be revocable at some point in the future and may indeed inform (and accelerate) the further development of customary international law. This legally binds industries to such standards in future litigation.

Second, the greater the chance that international “legislative” documents will create domestically enforceable norms in United States courts, the greater incentive NGOs have to invest in the development of customary international law outputs. This article argues that NGO investment in developing customary international law outputs has increased as the documents’ values increase due to domestic court recognition of liability for conduct contrary to the standards contained therein. It also predicts that such investment will continue to increase in the future so long as such domestic recognition continues or increases. Furthermore, the likely motivation behind NGO investment in litigation that would begin and expand this trend of judicial recognition is the desire to make previously generated international legislative documents more valuable.

As these demand constraints are weakened, the supply constraints will remain stable, or at best, tighten slowly. For one thing, NGO capture of customary international law output production centers (often single purpose units with longstanding relationships with NGOs) has meant that there is limited competition in the production process. The lack of serious opposition from diffuse interests means that increasing demand from NGOs for customary international law output production will not be significantly checked—at least not in the short run. Although corporations and others subject to potential liability from enforceable customary international law outputs may recognize that they need to become engaged opposition interest groups in the supply of customary international law outputs, several barriers (including entrenched capture) will make it difficult for such groups to operate as a serious constraint on increased supply that will be motivated by increased demand.

Moreover, there are substantial public relations and psychological barriers to opposing many customary international law outputs,<sup>208</sup> especially when drafted with highly aspirational goals and in symbolic terms. Parties will be deterred from opposing production for fear of appearing to be against “good things” or for “bad things.”

Thus, although public choice would predict the emergence of equilibrium between opposing sides of the customary international law debate, substantial

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among others, Rio Tinto PLC for abuses alleged in conjunction with its mining operations in Papua New Guinea. See *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

208. See generally Peter Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD. 237 (2002).

barriers exist to effectively curb customary international law output production. One of the most valuable means for achieving the desired outcome of equilibrium would be to reinforce the demand constraint of non-enforceability. Congress could, of course, repeal the ATS or otherwise pass legislation limiting the application of customary international law in the courts.

#### CONCLUSION

It is a simple concept that the more valuable a product becomes, the more it will be demanded. We should expect nothing less when dealing with the production of customary international law outputs from international organizations. As courts accord greater weight to such outputs to establish norms enforceable in litigation, many, including NGOs, will have an incentive to push for the production of customary international law outputs embodying principles that advance their interests.