UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE I, et al.,	
Plaintiffs,	
v.	**1-01-CV-1357-LFO**
EXXON MOBIL CORP., et al.,	
Defendant.	

SUPPLEMENTAL STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

Pursuant to 28 U.S.C. § 517, the United States respectfully submits this supplemental statement of interest concerning plaintiffs' claims under the Alien Tort Statute.

PRELIMINARY STATEMENT

In this action, plaintiffs seek to assert claims under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), for alleged human rights abuses by security forces in Indonesia. On May 10, 2002, this Court inquired whether "the Department of State has an opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on interests of the United States, and, if so, the nature and significance of that impact." On August 1, 2002, the United States responded by submitting a letter from the State Department. See Dkt. 38, Exhibit A. The State Department letter explained that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." See Dkt. 38, Exhibit A, at 1. Because the Court had requested only policy input from the State

Department, the State Department's letter specifically did not address the legal issues before the Court. Ibid.

The United States is cognizant of the limited scope of the Court's prior request. The lay of the land, however, recently has changed. On May 8, 2003, the United States filed an amicus curiae brief in a Ninth Circuit en banc case, Doe I v. Unocal Corp., Nos. 00-56603, 00-56628. In that brief, the United States asked the Court of Appeals to overrule its prior precedent reading the ATS as providing a cause of action. The brief explained that the ATS is solely a grant of jurisdiction, and that it does not provide a cause of action.

There is no controlling D.C. Circuit precedent on this threshold issue. Recent Supreme Court precedent, however, and a recent decision by the D.C. Circuit on a closely related issue, militate strongly against finding an implied private right of action in the mere jurisdictional grant provided by the ATS. Moreover, it would be contrary to the long-established presumption against extraterritorial application of a statute for the Court to construe the ATS as applying to conduct occurring wholly within the boundaries of other nations.

It remains the United States' position that adjudication of this case would raise foreign policy and national security concerns for the reasons articulated in the State Department's letter. Those concerns can be avoided by holding, as the United States contends, that the ATS does not create an independent right of action. Given the substantial interest of the United States in the proper construction and application of the ATS, the United States respectfully submits this Supplemental Statement of Interest explaining why plaintiffs' claims under the ATS should be rejected as a matter of law.

ARGUMENT

I. THE ATS DOES NOT PROVIDE A CAUSE OF ACTION AND DOES NOT PERMIT A COURT TO INFER A CAUSE OF ACTION TO ENFORCE INTERNATIONAL LAW NORMS DISCERNED BY THE COURTS FROM DOCUMENTS SUCH AS UNRATIFIED AND NON-SELF-EXECUTING TREATIES, AND NON-BINDING RESOLUTIONS.

A. The ATS Is Merely A Jurisdictional Provision.

1. a. It is a fundamental mistake to read the ATS as anything but a jurisdictional provision. See Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 479-480 (1986) ("any suggestion that the statute creates a federal cause of action is simply frivolous"). Congress passed this statute as part of the Judiciary Act of 1789. As slightly revised today, the ATS provides:

> [T]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350. "The debates that led to the [Judiciary] Act's passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish." Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992).

This jurisdictional statute remained virtually dormant for almost 200 years, until the Second Circuit, in 1980, for the first time gave it an expansive construction. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). That court held that the ATS conferred subject-matter jurisdiction on federal courts to hear a dispute between citizens of Paraguay regarding torture allegedly committed in Paraguay. The court did not opine, however, on whether the ATS itself provided a cause of action.

b. Thereafter, in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir.), cert. denied, 470 U.S. 1003 (1984), in separate opinions, both Judges Bork and Robb disagreed with Filartiga insofar as it allowed such a suit to proceed.[1] Tel-Oren involved the claims of survivors and relatives of persons murdered and injured by a terrorist attack in Israel by the PLO. The victims brought their claim in the District of Columbia, relying on the ATS. In affirming the dismissal of the ATS claims, Judge Bork explained that § 1350 was only a jurisdictional statute and did not provide the plaintiffs a cause of action or a substantive right to sue. Id. at 801-811 (Bork, J.). Judge Bork further explained that neither the treaties cited by plaintiffs in that case, nor international law by itself, provided the plaintiffs a cause of action. Id. at 816. Judge Bork observed, "[w]hat little relevant historical background is now available to us indicates that those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." Id. at 812. See also id at 816 ("[a]djudication of international disputes of this sort in federal courts, disputes over international violence occurring abroad, would be far more likely to exacerbate tensions with other nations than to promote peaceful relations").

Judge Robb did not reach the question of whether the ATS provided a cause of action. Rather, he rejected the claims as nonjusticiable, stating that the Second Circuit's approach was "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure." Id. at 826 n.5 (Robb, J.).

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[1] Judge Edwards wrote a separate opinion supporting dismissal of the ATS claim. He agreed with Filartiga, but believed that a torture claim could only be asserted against a state actor. Id. at 777-798.

c. In Trajano, however, the Ninth Circuit held that a court in an ATS action could define and enforce the law of nations as part of its common law powers. See Trajano, 978 F.2d at 499-502. Three years later in, Hilao v. Estate of Marcos, 25 F.3d 1467, 1474-76 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995), that Court expressly held for the first time that the ATS itself created a cause of action to enforce the "law of nations." The Ninth Circuit misread Filartiga as having so held,[2] and simply followed Filartiga without independently examining the question.[3]

d. Recently, the D.C. Circuit rejected ATS claims asserted against the United States on behalf of aliens detained at the U.S. Naval Base at Guantanamo Bay. See Al Odah v. United States, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003). The Court held that, under Johnson v. Eisentrager, 399 U.S. 763 (1950), aliens outside the United States had no right to sue in U.S. Courts regarding their detention. In a separate concurring opinion, Judge Randolph explained that the ATS provides the courts with jurisdiction, but does not confer a cause of action.[4] Judge Randolph explained that, under the U.S. Constitution, "Congress – not the Judiciary – is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." Al Odah, 321 F.3d at 1147 (Randolph, J., concurring). Moreover, Judge Randolph observed that, "[t]o hold that the [ATS] creates a cause of action for treaty

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[2] See Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984) ("We must now face the issue left open by the Court of Appeals, namely, the nature of the 'action' over which [the ATS] affords jurisdiction").

[3] The Eleventh Circuit thereafter held that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law." Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

[4] Although Judges Garland and Williams did not join Judge Randolph's concurring opinion, "they d[id] not intend thereby to express any view about its reasoning. They believe[d] the issues addressed need not be reached." Al Odah, 321 F.3d at 1145 n*.

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." Id. at 1146.

2. Judges Bork and Randolph were correct. By its terms, the ATS vests federal courts with "original jurisdiction" over a particular type of action; it does not purport to create any private cause of action. An examination of the Judiciary Act of 1789 strongly supports that view. That Act in Sections 1 through 13 establishes the federal courts and delineates the jurisdiction of those courts. The ATS is set out in Section 9, adjacent to provisions establishing jurisdiction over crimes on the high seas, admiralty issues, and suits against consuls. See 1 Stat. 76 (1789). In context, the ATS is thus properly read as being solely a jurisdictional provision. See Ford, THE WORKS OF THOMAS JEFFERSON IN TWELVE VOLUMES, Thomas Jefferson Papers Series 1. General Correspondence (Dec. 3, 1792 Jefferson letter citing the "act of 1789, chapter 20, section 9" as a statute "describing the jurisdiction of the Courts") (emphasis added) (available at http://memory.loc.gov/ammem/mtjhtml/mtjhome.html); cf. Montana-Dakota Co. v. Northwestern Pub. Serv., 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources").

Although there is no direct legislative history regarding the ATS, many scholars agree that Congress passed this jurisdictional provision, in part, in response to two high profile incidents of the time concerning assaults upon foreign ambassadors on domestic soil (Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784); Report of Secretary for Foreign

Affairs on Complaint of Minister of United Netherlands, 34 J.Cont. Cong. 109, 111 (1788)). See, e.g., Casto, 18 Conn. L. Rev. at 488-498. These two cases raised serious questions of whether the then-new federal institutions would be adequate to avoid international incidents that could arise if such matters were left to the state courts. Id. at 490-494.

At the time, "denial of justice" to one's own citizens abroad was a justification for a country to launch a war of reprisal. E. De Vattel, THE LAW OF NATIONS, bk. II, ch. XVIII, §350, at 230- 231 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). For example, Edmund Randolph commented that, without an adequate federal forum, "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender." Letter from Edmund Randolph, Governor, Virginia, to the Honorable Speaker of the House of Delegates (Oct. 10, 1787). James Madison also feared the country's inability to "prevent those violations of the law of nations & of treaties which if not prevented must involve us in the calamities of foreign wars." 1 M. Farrand, RECORDS OF THE FEDERAL CONVENTION, 316 (1911). Notably, the protection of ambassadors is one of the three classic protections afforded by the law of nations, as given effect in domestic law. William Blackstone explained that "[t]he principal offences against the law of nations as animadverted upon by the municipal laws of England are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy." 4 W. Blackstone, COMMENTARIES, 67-68 (1783).

Article III jurisdiction is not self-vesting. Congress did not enact a general federal question statute until much later. The ATS, however, permitted the federal courts to hear one subset of "arising under" cases -- i.e., those arising under Acts of Congress incorporating principles of the "law of nations" into the laws of the United States or under "treaties of the

United States." In this way, the First Judiciary Act ensured that the federal courts would have jurisdiction over any claim brought by an ambassador, or other alien, seeking redress for a violation of such traditional law of nations protections. Then, the next year, invoking its constitutional authority to define and punish violations of the "Law of Nations," see Article I, Sec. 8, Cl. 10, Congress made assaults on ambassadors (as well as the two other traditional violations of the "law of nations" identified by Blackstone (piracy and violating the right of safe conduct)) offenses under the federal law. 1 Stat. 113-115, 117-118. Thus, the origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the "law of nations" insofar as that law has been affirmatively incorporated into the laws of the United States. The action of the First Congress, in adopting three traditional concepts from the Law of Nations into the positive law of the United States, demonstrates that Congress knows how to do so when it wishes, and that type of direct Congressional action is absent in the present case.

Under this understanding of the ATS (and Supreme Court jurisprudence regarding the recognition of causes of actions under federal law), Congress must enact a cause of action (or provide a basis for inferring a cause of action). Such causes of action would also fall within the present-day federal question jurisdiction (28 U.S.C. § 1331). While this interpretation may appear to render the ATS superfluous today, it would not have been so in 1789. General federal question jurisdiction was not enacted until nearly 100 years later, in 1875, and until 1980, that jurisdictional grant contained a minimum amount-in-controversy requirement. The courts have

recognized that the elimination of the amount-in-controversy requirement in 1980, rendered numerous jurisdictional provisions superfluous.[5]

Accordingly, although the ATS is somewhat of a historical relic today, that is no basis for transforming it, as plaintiffs suggest, into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries.

B. Neither The ATS Itself, Nor International Law Norms, Based On Documents Such As Unratified And Non-Self-Executing Treaties, And Non-Binding UN Resolutions, Provide Any Basis For Inferring A Cause Of Action.

1. International law does not generally provide causes of action enforceable in federal court. See Tel-Oren, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); id at 810 (Bork, J., concurring). See also Christenson, Federal Courts and World Civil Society, 6 J. Transnat'l L & Policy 405, 511-512 (1997) ("U.S. courts will not incorporate a cause of action from customary international law"). Plaintiffs, however, ask this Court to read the ATS statute as itself providing an implied cause of action to enforce international law norms. Reading the ATS' grant of jurisdiction as a broad implied right of action cannot today be reconciled with the Supreme Court's repeated refusal in recent decisions to recognize implied private causes of action. See, e.g., Alexander v. Sandoval, 532 U.S. 275 (2001). As the Court emphasized in Sandoval, it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing implied private rights.

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[5]See, e.g., Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 520 (3rd Cir. 1998) (28 U.S.C. § 1337 superfluous); Winstead v. J.C. Penney Co., 933 F.2d 576, 580 (7th Cir. 1991) (§§ 1337, 1340, and 1343 superfluous).

Sandoval, 532 U.S. at 287. And the renunciation of that "habit" of inferring private causes of action applies equally to older statutes, such as the ATS. Ibid.

Under controlling Supreme Court precedent, a court must focus on whether the statute at issue has "'rights-creating' language." Sandoval, 532 U.S. at 288. The ATS is demonstrably a jurisdiction-vesting statute. Although it refers to a particular type of claim (i.e., a "civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"), it does not purport to create any particular statutory rights, much less rights that in turn could be interpreted to confer a private right of action for money damages. Thus, under the governing analysis established by the Supreme Court, it is plainly erroneous to construe the ATS itself as conferring a private cause of action.

2. Moreover, it is clearly improper to infer a cause of action when the documents relied upon by plaintiffs to discern norms of international law are not themselves intended by the Executive or Congress to create rights capable of domestic enforcement through legal actions by private parties.

Plaintiffs cite to the ruling of the Ninth Circuit to support the claimed violations of international law in this case of "unlawful detention, violence against women, and crimes against humanity." See Pl. Opp. to Motion to Dismiss 9-10. Although the Ninth Circuit has said that violations of international law "must be of a norm that is specific, universal, and obligatory" to be actionable under the ATS, Hilao, 25 F.3d at 1475, that Court has not actually applied those standards. Instead, it has found an implied right of action to enforce rights based upon international agreements that the United States has refused to join, nonbinding agreements, and

agreements that are not self-executing,[6] as well as political resolutions of UN bodies and other non-binding statements. See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714-716 (9th Cir. 1991); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1998); Alvarez-Machain v. United States, 331 F.3d 604, 620-623 (9th Cir. 2003) (en banc). None of these documents is "obligatory" in the sense that is critical for present purposes, because none in itself creates duties or rights enforceable by private parties in court. This Court should reject the Ninth Circuit's approach of transforming these non-binding, non-self-executing documents -- none of which remotely creates a private cause of action --into sources of binding obligatory rights actionable in private suits for damages in federal court.

If the political Branches of the United States Government refuse to ratify a treaty, or regard a U.N. resolution as non-binding, or declare a treaty not to be self-executing, there obviously is no basis for a court to infer a cause of action to enforce the norms embodied in those materials. See Al Odah, 321 F.3d at 1148 (Randolph, J., concurring) (to enforce such agreements "is anti-democratic and at odds with principles of separation of powers"). As to treaties or conventions not ratified by the United States, it is clearly inappropriate for the courts to adopt and enforce principles contained in instruments that the President and/or the Senate have declined to embrace as binding on the United States, or enforceable as a matter of U.S. law through judicially-created causes of action. And, where a treaty is ratified but is not self-executing (as modern human rights treaties have been declared by the President and the Senate

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[6] A self-executing treaty is one that does not require implementing legislation for its provisions to have effect in domestic law. Provisions in treaties and other international agreements are given effect as law in domestic courts of the United States only if they are "self-executing" or if they have been implemented by an act (such as an act of Congress) having the effect of federal law. See Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

not to be), such a treaty neither creates a cause of action nor provides rules that a court may properly enforce in a legal action brought by a private party. As the Supreme Court has held, a non-self-executing treaty "addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court." Foster v. Neilson, 27 U.S. (2 Pet.) at 314 (Marshall, C.J.). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 cmt. h (1987) (emphasis added). Despite this established principle, the cases relied upon by plaintiffs base ATS claims on the International Covenant on Civil and Political Rights ("ICCPR"). Martinez, 141 F.3d at 1384; Alvarez-Machain,, 331 F.3d at 620-623. That treaty is non-self-executing, see, e.g., Buell v. Mitchell, 274 F.3d 337, 372 (6th Cir. 2001), and therefore clearly does not itself provide a private cause of action and cannot furnish a basis for a court to infer one.

Even where a treaty is self-executing, that fact does not necessarily mean that it provides a cause of action. Rather, it means only that the treaty is "regarded in courts of justice as equivalent to an act of the legislature." Foster, 27 U.S. at 314. Like an Act of Congress, a treaty may establish legal standards or rules of decision in litigation without itself creating a private right of action. See, e.g., Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 442 (1989) (explaining that the treaties at issue "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs," but did not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts").

Furthermore, the labeling of an international law norm, derived from unratified agreements, etc., as "jus cogens" violations, see Siderman de Blake, 965 F.2d at 714, does not

grant any greater legitimacy to judicial enforcement of such norms. Just last month, the D.C. Circuit reiterated that "a sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a jus cogens norm outside the United States." Joo v. Japan, __ F.3d ___, 2003 WL 21473010 (D.C. Cir. June 27, 2003), citing Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994). The D.C. Circuit specifically declined to revisit the holding of Princz that "a court cannot create a new exception to the general rule of immunity under the guise of an 'implied waiver. . . .'" The Court further observed, in concluding that it need not reach the question whether the ATS creates a cause of action for alleged violations of international law, that "whatever else the [ATS] might do, it does not provide the courts with jurisdiction over a foreign sovereign." 2003 WL 21473010.n

As the Seventh Circuit recently observed, "the content of the jus cogens doctrine * * * emanates from academic commentary and multilateral treaties, even when unsigned by the United States." Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1155 (7th Cir. 2001). Such sources do not authorize a court to infer a federal cause of action when the political Branches have elected not to use their powers to create one. See Christenson, supra, 6 J. Transnat'l L & Policy at 485 ("courts in the United States have uniformly rejected application of an asserted jus cogens norm as the sole basis for a cause of action."). Cf. Blankenship v. McDonald, 176 F.3d 1192, 1195 (9th Cir. 1999) (a Bivens cause of action should not be recognized where "congressional action has not been inadvertent in providing certain remedies and denying others to judicial employees"); Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988)(en banc)(same).

Moreover, the approach of looking to unratified agreements to discern the "law of nations" under the ATS cannot be squared with the text of the ATS, which refers to both "treaties of the United States" and the "law of nations." The obvious import of the reference to treaties is that an international agreement must be a ratified treaty of the United States, receiving the advice and consent of the Senate, before it could be subject to enforcement in a private suit resting on the jurisdiction of the ATS (assuming further that the treaty confers a private right of action). This Court should, therefore, reject the invitation to erroneously construe the ATS to imply a cause of action to enforce such norms even where the Executive and Congress have declined to embody those norms in a binding or domestically enforceable law or treaty.

For example, in one of the cases cited by plaintiffs, Alvarez-Machain, the Ninth Circuit allowed a claim for arbitrary arrest, even though the suspect's seizure was authorized by the U.S. Government. In so holding, the Court erroneously relied upon, inter alia, general provisions of the Universal Declaration of Human Rights[7] (a non-binding resolution of the General Assembly of the United Nations), the American Convention on Human Rights[8] (which the Senate refused to ratify), and the ICCPR (a non-self-executing treaty). Alvarez-Machain, 331 F.3d at 620-622. These documents plainly do not create domestically enforceable rights. A court cannot properly find enforceable rights in the American Convention on Human Rights, where the Senate has refused to ratify that convention. And even as to the ICCPR, which is a treaty, when ratified by the United States, the Senate and the Executive Branch (as it has with other modern human rights

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[7]G.A. Res. 218A, U.N. GAOR, U.N. Doc. A/810 (1948). Similarly, here, the panel relied upon the Universal Declaration of Human Rights.

[8]9 I.L.M. 673 (July 4, 1977).

treaties[9]) expressly agreed that it would not be self-executing and may not be relied upon by individuals in domestic court proceedings. See S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070-71 (Apr. 2, 1992). It is flatly inconsistent with that decision of the political Branches for a court to nevertheless infer a cause of action to enforce the terms of the agreement.

In certain areas, a court, in connection with a matter already validly pending before it, properly looks to norms of international law to furnish a rule of decision, e.g., The Paquete Habana, 175 U.S. 677, 700 (1900). That required practice is very different from a court inferring a cause of action as an initial matter based on international law. As the D.C. Circuit has recognized, international law does not generally provide causes of action enforceable in federal court. See Tel-Oren, 726 F.2d at 779 ("the law of nations consciously leaves the provision of rights of action up to the states") (Edwards, J., concurring); id at 810 (Bork, J., concurring). But even where a court may properly look to international law norms, it does so only in the absence of a "controlling executive or legislative act * * *." The Paquete Habana, 175 U.S. at 700. A ratified treaty accompanied by an express declaration that it is not self-executing is plainly such a controlling act. Similarly, the existence of a treaty or convention that has been ratified by some nations and even signed by the United States (but not yet ratified) falls in the same category, because the political Branches have taken the matter fully in hand, but not yet taken the necessary steps to make the treaty binding on the United States; the treaty therefore cannot properly be

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[9]In addition to the ICCPR, the Senate either expressly conditioned its consent or clearly understood that the Genocide Convention, the Torture Convention, and the Convention on the Elimination of All Forms of Racial Discrimination would not be self-executing. See 140 Cong. Rec. S14326 (daily ed. June 24, 1994); 136 Cong. Rec. S17491, S17486-01 (daily ed., Oct. 27, 1990); 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994); 132 Cong. Rec. S1355-01, S1378 (daily ed. Feb. 19, 1986).

relied upon in our courts as a source of the law of nations. And United Nations General Assembly resolutions are (with narrow exceptions) not binding on the member nations, and require further action by the member states before they can create any enforceable rights. See G. Schwarzenberger & E.D. Brown, A MANUAL OF INTERNATIONAL LAW 237 (1976). The actions or inactions of the political Branches with respect to those instruments must be deemed dispositive with respect to what effect they have on the law of nations to be applied within the United States. Thus, it is plainly wrong for a court to create a cause of action to enforce such documents in a suit for damages when the political Branches have elected not to do so.

3. Even beyond the general prohibition against judicial creation of a cause of action, there are additional compelling reasons against inferring a cause of action (or creating common law causes of action to enforce international law norms) when the political Branches have not done so. In other contexts, courts refuse to infer causes of action where they implicate matters that by their nature should be left to the political Branches. See FDIC v. Meyer, 510 U.S. 471, 486 (1994). Matters that implicate international affairs are the quintessential example of a context where a court may not infer a cause of action. Permitting such implied causes of action under the ATS infringes upon the right of the political Branches to exercise their judgment in setting appropriate limits upon the enforceability or scope of treaties and other documents.

The Supreme Court has long recognized that the Constitution commits "the entire control of international relations" to the political Branches. Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893). See Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."). It is the "plenary and exclusive power of the

President as the sole organ of the federal government in the field of international relations" to decide the "important complicated, delicate and manifold problems" of foreign relations. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319, 320 (1936). See also American Ins. Ass'n v. Garamendi, __ S.Ct. __, 2003 WL 21433477, 71 USLW 4524, Slip op. at 15 (June 23, 2003) ("Nor is there any question generally that there is executive authority to decide what [foreign] policy should be").

Because the Constitution has so committed the power over foreign affairs, the Supreme Court has strongly cautioned the courts against intruding upon the President's exercise of that authority. See ibid. Indeed, the Supreme Court has recognized that foreign policy is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility." Chicago & So. Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948).

Despite this instruction from the Supreme Court, the types of claims that are being asserted today under the ATS are fraught with foreign policy implications. They often involve our courts in deciding suits between foreigners regarding events that occurred within the borders of other nations, and in the exercise of foreign governmental authority. The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral, and legal judgment on these foreign acts. And, under plaintiffs' approach, ATS actions are not limited to suits against rogues and outlaws. Such claims can easily be asserted against this Nation's friends, including our allies in our fight against terrorism. A plaintiff merely needs to accuse a defendant of, for example, arbitrary detention to support such a claim. That approach has already permitted an alien to sue foreign nationals who assisted the United States in its conduct of international law enforcement efforts. See Alvarez-Machain, supra. Such claims have also been brought against

the United States itself in connection with its efforts to combat terrorism. See Al Odah v. United States, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted of behalf of aliens detained at the U.S. Naval Base at Guantanamo Bay).

Plaintiffs' approach to the ATS thus places the courts in the wholly inappropriate role of arbiters of foreign conduct, including international law enforcement. Where Congress wishes to permit such suits (e.g., through the Torture Victim Protection Act, 28 U.S.C. § 1350 note), it has done so with carefully prescribed rules and procedures. The ATS contains no such limits and cannot reasonably be read as granting the courts such unbridled authority.

4. Moreover, while Congress can and has created specific offenses, such as piracy, in reference to the "Law of Nations," see Ex Parte Quirin, 317 U.S. 1, 30 (1942), it is error to read the ATS' reference to the "law of nations" as granting the judiciary the wholesale power, without direction from the legislature, to define and enforce customary international law through civil damage actions. There is no basis for holding that, by referencing the "law of nations" in the ATS, Congress must have intended to permit the Judicial Branch to engage in a free-wheeling exercise to develop its own views of "customary international law," based on sources that are neither law nor customary, such as unratified treaties and other non-binding documents.

In some instances a court can, as we have noted, look to international law where "questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. at 700. That principle does not, however, lead to the conclusion that international law provides a private cause of action to be pursued under the ATS. Even where international law norms are considered part of federal common law (e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)), they do not supply a private right of action. See

Tel Oren, 726 F.2d at 811 (Bork, J. concurring) ("[t]o say that international law is part of federal common law * * * is not to say that, like the common law of contract and tort, for example, by itself it affords individuals the right to ask for judicial relief").

Those supporting an expansive view of the ATS might nevertheless argue that a federal court can enforce international law under the ATS just as it enforces admiralty law under its common law powers. It has been long understood, however, that "the body of admiralty law referred to in Article III did not depend on any express or implied legislative action. Its existence, rather, preceded the adoption of the Constitution." R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 960 (4th Cir. 2000). See also The American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 544-545 (1828). The Framers drafted Article III with this full body of maritime law "clearly in view." R.M.S. Titanic, 171 F.3d at 960. Thus, the reference in Article III to "all Cases of admiralty and maritime Jurisdiction" has been read as authorizing "the federal courts to draw upon and to continue the development of the substantive, common law of admiralty when exercising admiralty jurisdiction." Id. at 961. See also United States v. Flores, 289 U.S. 137, 148 (1933) (Section 2 of Article III "has been consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies").

Admiralty law is thus manifestly unique and does not support reading the ATS as granting the courts common law authority to create implied causes of action enforcing vague concepts of international law through an ATS claim. Notably, there is no similar express grant in Article III for the general enforcement of the Law of Nations, as there is for admiralty law. Rather, the power to define and legislate causes of actions regarding Law of Nations offenses is

assigned to Congress under Article I. See Art. I, Sec. 8, Cl. 10. Nor, unlike the admiralty law situation, was there a pre-constitutional history of more than 1,000 years of specialized courts enforcing international law norms relating to human rights.

C. The TVPA Also Does Not Support Inferring A Cause Of Action Under The ATS.

In embracing an expansive view of the ATS, some courts have asserted that Congress ratified Filartiga and its progeny when it enacted the Torture Victim Protection Act. See Goodman & Jinks, Filartiga's Firm Footing: International Human Rights and Federal Common Law, 66 Fordham L. Rev. 463, 514 (1997). In stark contrast to the ATS, the TVPA expressly provides a cause of action for damages to persons who suffered torture at the hands of any individual acting under the law of any foreign nation. See 28 U.S.C. § 1350 note.

In reporting on the TVPA, the Senate Committee did observe that the TVPA would provide "an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 * * * which permits Federal district courts to hear claims by aliens for torts committed in violation of the law of nations." S. Rep. 102-249 at 4 (1991). The report noted that the "Filartiga case has met with general approval," but also recognized that at "least one Federal judge, however, has questioned whether section 1350 can be used * * * absent an explicit grant of a cause of action by Congress." Id. 4-5 (referring to Judge Bork's opinion in Tel-Oren). The report stated that the TVPA was not intended to displace Section 1350, and concluded that the latter "should remain intact." Id at 5. See also H.R. Rep. No. 102-367 at 4 (1991).

Based on these 1991 legislative statements regarding a statute enacted in 1789, some have argued that, regardless of the best reading of the ATS or of the original validity of Filartiga, the

TVPA evidences Congressional approval of reading the ATS to provide a cause of action. A Congressional committee statement in 1991 about the meaning of the ATS, however, is obviously of no value in discerning the intent of Congress in 1789. In a similar context, the Supreme Court recently refused to look to legislative history from 1986 setting forth "a Senate Committee's (erroneous) understanding of the meaning of the statutory term enacted some 123 years earlier." Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, 529 U.S. 765, 783 n.12 (2000). As Judge Randolph recently explained, "the wish expressed in the committee's statement [about the TVPA] is reflected in no language Congress enacted; it does not purport to rest on an interpretation of § 1350; and the statement itself is legislative dictum." Al Odah, 321 F.3d at 1146 (Randolph, J., concurring).

II. NO CAUSE OF ACTION MAY BE IMPLIED BY THE ATS FOR CONDUCT OCCURRING IN OTHER NATIONS.

Even if the ATS could be read to imply (or permit the implication) of a cause of action, it cannot be construed to have that effect in the territory of other nations. Unless expression to the contrary is found within a federal statute, that statute is presumed to apply only within the territory of the United States, or, in limited circumstances, on the high seas. See Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-285 (1949). This presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). It dates back to the time the ATS was enacted. Its earliest express application by the Supreme Court is found in United States v. Palmer, 16 U.S. 610 (1818), where the Court held that a

federal piracy statute should not be read to apply to foreign nationals on a foreign ship. Id. at 630-31.

Nothing in the ATS or in its contemporaneous history suggests an intent on the part of Congress that it would furnish a foundation for suits based on conduct occurring within other nations. Notably, the only reported cases where courts mentioned the ATS after its recent enactment both involved domestic incidents – the capture of a foreign ship in U.S. territorial waters and seizure of slaves on a ship at a U.S. port. See Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795). Moreover, Attorney General Bradford, while noting the availability of ATS jurisdiction for offenses on the high seas in 1795, also explained that insofar "as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts." See 1 Op. Att'y Gen. 57, 58 (1795).[10]

As discussed above, many commentators believe that Congress passed the ATS in part to respond to two high profile incidents concerning assaults upon foreign ambassadors on domestic soil. See pp.5-6, supra. Congress enacted the ATS because it wanted to ensure a federal forum so that traditional international law offenses (assaults against ambassadors and interference with the right of safe conduct) committed in this country were subject to proper redress. The point of the ATS was to avoid conflict with other countries.

That logic does not support expanding the ATS to encompass claims arising in other nations. Other nations did not in 1789 (and certainly do not today) expect our courts to provide

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[10]See also 1 Op. Att'y Gen. 29, 29 (1792) ("[t]he bringing away of slaves from Martinique, the property of residents there, may be piracy, and, depending upon the precise place of its commission, may only be an offence against the municipal laws") (emphasis added).

civil remedies for disputes between their own citizens (or involving third-country nationals) that occur on their own soil. See THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, Fitzpatrick, ed., Letter of George Washington to James Monroe, August 25, 1796 ("no Nation had a right to intermeddle in the internal concerns of another") (available at http://memory.loc.gov/ammem/gwhtml/gwhome.html); United States v. La Juene Eugenie, 26 F. Cas. 832, 847 (D. Mass. 1822) (Story, J.) ("No one [nation] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns"). To the contrary, litigating such disputes in this country can itself lead to objections from the foreign nations where the alleged injury occurred. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations * * *. A broad reading of section 1350 runs directly contrary to that desire." Tel-Oren, 726 F.2d at 812 (Bork, J.).

CONCLUSION

For the foregoing reasons, this Court should grant the motion to dismiss the ATS claims.

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