Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos

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I. INTRODUCTION

In a recent confirmation that private liability may be imposed for public wrongs, an American jury held the estate of Ferdinand Marcos liable for human rights violations that occurred in the Philippines during the Marcos presidency. After six years of pre-trial maneuvering, multiple appeals to the Ninth Circuit, and two weeks of trial, the estate was found specifically liable to a class of ten thousand Filipinos and twenty-three named plaintiffs for...
torture, summary execution, disappearance, and prolonged arbitrary detention.\(^1\) In February 1994 the jury awarded $1.2 billion in exemplary damages.\(^2\) The Marcos verdict is the latest in a series of U.S. decisions holding former officials of foreign regimes liable for human rights violations committed abroad. Since 1980, when the Second Circuit rendered its decision in Filartiga v. Peña-Irala,\(^3\) U.S. courts have increasingly awarded judgments against foreign policemen or military officers sued after their arrival in the United States.\(^4\) Human rights practitioners argue that these cases do not represent some aberration in American civil procedure, but rather conform entirely with U.S. statutory law, the ancient doctrine of transitory torts, and the traditional role of international law in domestic litigation. At least, the Marcos cases demonstrate that the Nuremberg principles of criminal

1. Five cases were filed against Marcos soon after his departure from the Philippines and his arrival in Hawaii. Clemente v. Marcos, No. 87-1707 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438); Ortigas v. Marcos, No. 87-1706 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438); Sison v. Marcos, No. 86-2496 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438); Hilao v. Marcos, No. 86-2449 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438); Trajano v. Marcos, No. 86-2448 1989 WL 76894 (9th Cir. July 10, 1989) (reported in table at 878 F.2d 1438). In 1989, the Judicial Panel on Multidistrict Litigation consolidated the cases for trial and assigned them to Judge Manuel Real. MDL No. 840, Order of September 5, 1990.

   The Court of Appeals for the Ninth Circuit lays out the complex procedural history of these cases in its decision sustaining a preliminary injunction against transferring, secreting, or dissipating the assets in the Marcos estate pendente lite. In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994), petition for cert. filed, 63 U.S.L.W. 3371 (Oct. 26, 1994) (No. 94-775) [hereinafter Estate II]. This case had previously been before the Ninth Circuit. See In re Estate of Ferdinand E. Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S. Ct. 2960 (1993) (No. 92-1559) [hereinafter Estate I]. As this article was in press, the jury in the Marcos Human Rights Litigation returned a verdict of over 750 million dollars in compensatory damages to the more than nine thousand members of the class and a verdict of 10 million dollars in damages to twenty individual direct action plaintiffs. Inexplicably, the judge dismissed the claims of Jose Maria Sison and Ramon Veluz at the damages phase, despite the fact that the jury had previously found the Marcos Estate liable for the torture of these plaintiffs. The judge stated in open court that a person could be tortured without suffering any damages.


2. See Estate II, 25 F.3d at 1469.

3. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) [hereinafter Filartiga I]. This case was remanded to the district court. See Filartiga v. Peña-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984) [hereinafter Filartiga II].

responsibility have left a civil legacy.\(^5\)

The primary statutory authorization for the lawsuits against Marcos is the Alien Tort Claims Act ("ATCA"), which grants the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."\(^6\) Enacted as part of the First Judiciary Act of 1789,\(^7\) § 1350 seemed an inconsequential curiosity until 1980 when, with the decision in Filartiga v. Peña-Irala,\(^8\) the Act became a vehicle for the enforcement of international human rights law. In Filartiga, the United States Court of Appeals for the Second Circuit sustained federal subject matter jurisdiction under § 1350 in a suit by two Paraguayan citizens against a Paraguayan police official accused of committing torture in Paraguay.\(^9\) On remand, the district court awarded the plaintiffs a default judgment in excess of ten million dollars.\(^10\)

Although the Filartiga decision may have appeared revolutionary, the jurisdictional prerequisites stated on the face of the statute were plainly satisfied: the plaintiffs were aliens, their claims sounded in tort (assault, battery, wrongful death), and the tort alleged was committed "in violation of the law of nations," in that customary international law specifically prohibits a government from torturing its own citizens.\(^11\) The Second Circuit, operating without any meaningful legislative history, concluded that the First Congress at the least intended the Act to allow civil actions against pirates — the quintessential international criminal of the eighteenth century — and that the modern analogue to piracy, namely human rights abuse, should be equally


\(^6\) 28 U.S.C. § 1350 (1988). A handful of victims who had become citizens of the Philippines at the time of their abuse, but had become U.S. citizens thereafter, also sued Marcos in 1986 for human rights violations. Because they were not aliens at the time of the suit, they grounded federal jurisdiction on the diversity and federal question statutes.


\(^8\) Filartiga I, 630 F.2d at 876.

\(^9\) The defendant was within the personal jurisdiction of the district court by virtue of his presence in New York at the time of service. Id. at 879.

\(^10\) Filartiga II, 577 F. Supp. at 867.

Though the Marcos verdict is consistent with the plain language and legislative intent of the ATCA, it is unprecedented in many respects. The decision marks the first time a former head of state, as distinct from some lower functionary, has faced a civil action in a U.S. court for a pattern and practice of human rights violations. Marcos is also the first class action to view human rights abuses in effect as mass torts, in which the plaintiffs establish that they are victims of a single orchestrated and illegal policy. The Marcos case is in fact the first full-scale civil trial of human rights claims in the United States; all prior claims had been resolved through either criminal or default proceedings. Moreover, the Marcos estate may prove to be the first ATCA defendant that is not effectively judgment-proof in the United States.

Yet, the Marcos verdict is also significant in a more abstract sense. By both reflecting precedent and expanding it, the case offers a fresh context for recurring issues of domestic and international law in the United States. Primary among these issues is the direct enforceability of customary international law in domestic courts. In the wake of the Marcos cases, federal judges face a myriad of issues in the law of federal jurisdiction, constitutional separation of powers and due process, civil procedure, evidence, and remedies. By what statutory warrant can such cases come before the federal judiciary? From what source of law may plaintiffs derive a private right of action? What impact will forum non conveniens, the political question doctrine, or the various forms of immunity have on such litigation? How can plaintiffs prove abuses, much less attribute them to the head of state, on a class basis? Even if liability is established, how can damages for human rights violations be determined class-wide? What legal difficulties arise when judgment creditors seek enforcement of such an award in a foreign jurisdiction, as they generally must?

This Article canvasses these issues as they have arisen in the Marcos litigation under seven substantive categories: subject matter jurisdiction, the existence of a private right of action, the impact of immunities and other doctrines of diffidence, forum non conveniens, the propriety of class certification, the assessment of damages, and rules of evidence. Although the sheer complexity of these issues has prompted jurists and academics to request the Supreme Court to clarify the proper disposition of § 1350 cases, the prospects for such review are discouraging for several reasons. First, cases under the Alien Tort Claims Act are rare, and they arise in radically different procedural postures. Second, few defendants have the means to litigate beyond

12. Filartiga I, 630 F.2d at 880. The Court's analogy between eighteenth-century pirates and twentieth-century human rights abusers is assessed infra Part VII.

13. See supra note 1.

14. Defendants in prior ATCA suits have tended either to return to their homelands or to escape to some foreign jurisdiction and have thus had default judgments entered against them. Plaintiffs have rarely discovered U.S. assets from which to satisfy these judgments. By contrast, the world-wide injunction issued against the Marcos estate offers the first significant opportunity for litigants to recover a substantial portion of their award.

the circuit courts of appeals. Finally, no “cert-worthy” conflict appears likely to arise in the near future. Indeed, in the years since 1980, courts facing similar issues under § 1350 — including panels comprising judges generally hostile to any expansive treatment of the Alien Tort Claims Act — have avoided such conflict by either expressly approving Filartiga or taking pains to distinguish it from the case before them.\textsuperscript{16} Nor is Congress likely to enact a legislative manual for litigating ATCA actions that anticipates all possible procedural, evidentiary, and remedial issues.\textsuperscript{17}

Thus, courts will continue to be experimental laboratories in the synthesis of a § 1350 jurisprudence. As new cases arise, the courts will perforce address additional “torts . . . committed in violation of the law of nations,”\textsuperscript{18} including rape, gender and race discrimination, and political repression. They will also clarify the standards of liability, including the circumstances under which “command responsibility” or some form of vicarious liability will be imposed on senior government officials. Even trial management procedures and the rules of evidence applicable in human rights cases will evolve through concerted effort by domestic courts.

Marcos should be understood, however, as a case with international as well as domestic consequences. Like Filartiga, the Marcos proceedings serve a constitutive or evidentiary role in the formation of international law. In finding an unequivocal international norm against torture for the purposes of § 1350, the Filartiga court helped to clarify the norm itself. Under generally accepted principles of legal interpretation, foreign and international tribunals may appropriately invoke the Filartiga decision as evidence of how state actors conceive the status of international norms proscribing torture and, by extension, other violations of core human rights. The Marcos verdict has a similar effect on international law, especially with respect to the standard of liability, the rules of evidence, and the due process rights of defendants. Of course, these quasi-legislative effects, derived as they are from domestic judicial proceedings, must be incremental and inductive. Gaps inevitably remain. This Article thus supports the adoption of an international convention for the redress of human rights violations. Such a multilateral document might specify what gross human rights violations are actionable in the domestic courts of signatories, the choice of law approach that should govern particular issues in such actions, the calculus for determining the availability and measure of compensatory and especially punitive damages, and the obligation to enforce foreign judgments against human rights violators wherever their assets might be. Courts would continue to define the domestic consequences of the international obligation, but such a convention would go far to preserve the incremental progress marked by Filartiga and Marcos.

\textsuperscript{16} See infra notes 31-32 and accompanying text.

\textsuperscript{17} The recent Torture Victim Protection Act ("TVPA") gives congressional imprimatur to the Filartiga decision and extends federal court jurisdiction to claims made by U.S. citizens who are victims of torture and extra-judicial killing. See 28 U.S.C. § 1350 (1988). The TVPA goes beyond the Filartiga decision by imposing a statute of limitations on torture claims and requiring litigants to exhaust local remedies before invoking federal jurisdiction.

II. THE ALIEN TORT CLAIMS ACT: JURISDICTION AND THE PRIVATE RIGHT OF ACTION

A. Theories of Subject Matter Jurisdiction

Defendants under § 1350 and some academics have resisted the use of the ATCA to redress human rights violations committed abroad. Although their arguments take many forms, each is a variation on the jurisdictional theme that courts should not interpret the Act to allow civil suits between aliens whose only connection to the United States is the "accident" of the defendant's presence. For example, the Marcos estate argued that the case did not fall within the diversity clause of Article III, and that § 1350 should apply only to torts committed by the United States or by a U.S. citizen. Yet, the absence of diversity is constitutionally irrelevant; the ATCA clearly rests on the federal question clause of Article III because the law of nations has always been considered a matter of federal law.9

A separate interpretation, supported by the Justice Department in an amicus submission filed in 1987,20 would limit the class of actionable torts to those that Congress criminalized pursuant to its power to "define and punish . . . Offenses against the Law of Nations."21 The government argued that § 1350 is itself an exercise of that power and that only those offenses actually codified in the U.S. criminal code pursuant to the "Law of Nations" clause can ground claims under the ATCA. The argument is misconceived, however, because it suggests that the Framers would naturally and without explanation collapse actionable civil torts into international offenses within the United States' criminal jurisdiction.

The government's argument seems especially implausible given the less tortured explanation of the origins of § 1350, namely, that in enacting the ATCA, Congress relied not on the "Law of Nations" clause but on its power to prescribe the jurisdiction of the lower federal courts.22 The rationale for vesting such a jurisdiction in the federal courts is equally direct: the Framers understood the possibility that tort suits between aliens might well come within the general jurisdiction of the individual states. Civil actions sounding in tort were routinely considered transitory in that the tortfeasor's wrongful act created an obligation that followed him or her across national boundaries.23 The use by Congress of its power to prescribe federal

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22. Id. at art. I, § 8, cl. 9.

23. See Stout v. Wood, 1 Blackf. 70 (Ind. 1820); Watts v. Thomas, 5 Ky. (2 Bibb) 458 (1811); CHESHIRE'S PRIVATE INTERNATIONAL LAW 257-61 (8th ed. 1970); see also Mostyn v. Fabrigas, 1 Cowp. 161 (1774). In a later case, the U.S. Supreme Court summarized Lord Mansfield's opinion in Mostyn as follows:
jurisdiction reflects general acceptance of the proposition that "a state or nation has a legitimate interest in the orderly resolution of disputes . . . within its borders." Although the First Congress would have had no reason to interfere with the states' rights to hear ordinary transitory tort suits, it might well have wished to assure the possibility of a federal forum for that limited subset of transitory torts involving a violation of the law of nations or a treaty of the United States. Otherwise, the nation faced the prospect of multiple and inconsistent interpretations of international law. The Framers' recent experience under the Articles of Confederation had confirmed that such a prospect was intolerable, and § 1350 simply fulfilled the need for a federal option.

The common concern among those who resist the *Filartiga* and *Marcos* dispositions is the assertedly inadequate jurisdictional nexus among the wrong, the wrong-doer, and the United States. In this view, the United States cannot properly exercise jurisdiction unless it is responsible for either the tort or its rectification; the mere physical presence of the defendant is insufficient. But this argument asserts what no one denies. The real controversy is whether an adequate link exists through the combination of the defendant's physical presence, the traditional doctrine of transitory torts, the abiding federal interest in interpretations of international law, and the recognition that certain human rights violations are of universal concern. Defenders of the *Filartiga* and *Marcos* verdicts argue that diffidence in the face of this combination of factors is unnecessary and deprecates the courts' historical role in the application of international standards; moreover, discretionary doctrines of deference including *forum non conveniens*, sovereign immunity, and the act of state or political question doctrines constrain excessive exercises of jurisdiction under the Act. Courts have no compelling reason to depart from the plain language of the statute when existing doctrines assure a sufficient U.S. stake in cases that go to trial.

The Court of Appeals for the Ninth Circuit has addressed some of these arguments and defined the jurisdictional scope of the ATCA consistently with *Filartiga*. The court asserted correctly that § 1350, being a jurisdictional statute, could "not alone confer jurisdiction on the federal courts, and that the rights of the parties must stand or fall on federal substantive law to pass constitutional muster." Yet, the Ninth Circuit had little difficulty finding adequate substantive law to satisfy this test, given the statutory regime of the Foreign Sovereign Immunities Act and the incorporation of international

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*McKenna v. Fisk,* 42 U.S. 241, 249 (1843).

24. *Filartiga I,* 630 F.2d at 885.


26. See infra text accompanying note 51.

27. See *Estate I,* 25 F.3d at 1476; *Estate I,* 978 F.2d at 499-500; *Trujano,* 1989 WL 79894 at **2.


29. 28 U.S.C. §§ 1330, 1602-11 (1976); see also *Estate II,* 25 F.3d at 1473 ("[E]ven where FSIA was held inapplicable, there was federal subject matter jurisdiction by virtue of the required analysis of whether immunity would be granted under FSIA.").
law into federal common law. Significantly, since 1980, courts facing similar issues under § 1350 — including panels on which conservative jurists sat — have either expressly approved Filartiga or carefully distinguished it from the case before them. If plaintiffs are aliens and if their injuries take the form of torts, the only important jurisdictional issue under the Alien Tort Claims Act will be whether the defendant's conduct violated international law. This question presents an inherently difficult issue of proof, but one with which the courts of the United States are historically familiar.

B. Private Rights of Action

Quite apart from jurisdiction, the circumstances under which customary or conventional international law may provide the rule of decision in U.S. cases remain controversial. Litigants under the ATCA have often addressed the issues of domestic status and enforceability in terms of whether there is a "private right of action" to enforce international law norms. That single rubric, however, fractures into four quite separate assertions: (i) that Congress must expressly adopt a customary norm before private persons can invoke that norm in domestic litigation; (ii) that neither treaties nor the law of nations specify that torture and other violations of human rights may be adjudicated in domestic civil suits at the instance of individuals as distinct from states; (iii) that customary international law is incompetent to address a state's treatment of its own citizens; and (iv) that there can be no customary right to be free from torture and similar harms, because custom is a function of state practice and states routinely engage in human rights violations.

None of these arguments standing alone is persuasive, and their common historical premise is flawed. The assertion that no private right of action exists under § 1350, traceable to Judge Bork's concurring opinion in Tel-Oren v. Libya, betrays an ironic disregard for the original understanding of the ATCA. Although the very notion of a "cause of action" did not enter the legal

30. Estate II, 25 F.3d at 1473. The Ninth Circuit carefully limited certain precedents suggesting that "[i]nternational law principles, standing on their own, do not create substantive rights or affirmative defenses for litigants in United States courts." United States v. Davis, 905 F.2d 245, 248 n.1 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991); United States v. Thomas, 893 F.2d 1066, 1068-69 (9th Cir.), cert. denied, 498 U.S. 826 (1990). At face value, the Davis and Thomas dicta indicate a general hostility to the application of international law in U.S. courts. In Estate II, however, the Ninth Circuit rejected that broad interpretation and viewed the two cases as simple reaffirmations of the established power of Congress to extend the criminal statutes of the United States beyond U.S. territory. The incorporation of international law into federal common law, and the constitutional adequacy of that law for jurisdictional purposes under Article III, remain unaffected.

31. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 n.5 (D.C. Cir. 1985); see also, e.g., Forti, 672 F. Supp. at 1539.

32. Tel-Oren, 726 F.2d at 819-20, 826.

33. See, e.g., The Paquete Habana, 175 U.S. 677, 686 (1900) (exempting domestic coastal fishing vessels from seizure as prize under international standards and law); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (defining and applying international law of piracy); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (sustaining subject matter jurisdiction under original version of § 1350 for restitution of neutral's cargo on board Spanish vessel seized as prize of war).

34. Tel-Oren, 762 F.2d at 798 (Bork, J., concurring).
lexicon until a half century after the enactment of § 1350, the drafters of the Act were obviously familiar with civil remedies for violations of international law. As early as 1795, Attorney General Bradford concluded that § 1350 provided a civil remedy to British citizens injured in Africa by French and American citizens:

"There can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations or a treaty of the United States."

That understanding was reiterated in 1907 when Attorney General Bonaparte concluded that § 1350 "provide[s] a forum and a right of action" for torts committed in violation of the law of nations. Certainly as of 1980, the Departments of Justice and State had decided that, because torture is a "tort . . . in violation of the law of nations," it gives rise to a judicially-cognizable remedy under § 1350. In short, § 1350 enables aliens to vindicate in U.S. courts the rights they enjoy by virtue of international law. Viewed in this light, the cause of action is a creature of federal common law, compelled by the incorporation of international law standards into U.S. law.

Of course, federal common law may not be the only or even the best source for the cause of action in cases under § 1350. The ATCA itself, unlike the § 1331 "arising under" jurisdictional provision, may provide the requisite cause of action. Judges Jensen and Edwards adopted this approach, as did the Ninth Circuit in Estate II when it "conclud[ed] that the Alien Tort Act . . . creates a cause of action for violations of specific, universal, and obligatory international human rights standards which 'confer[']

39. International law is part of our law, and must be ascertained and administered by the courts 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 . . . .
40. 28 U.S.C. § 1331. See Montana-Dakota Co. v. Pub. Serv. Co., 341 U.S. 246, 249 (1951) (holding that "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 which satisfy its limiting provisions").
41. Forti, 672 F.Supp. at 1540 (holding that § 1350 provides "not merely jurisdiction but a cause of action, with the federal cause of action arising by recognition of certain 'international torts' through the vehicle of § 1350").
fundamental rights upon all people vis-a-vis their own governments." The law of the situs, i.e., that of the Philippines in Marcos or Paraguay in Filartiga, provides another possible source for the cause of action. Under this analysis § 1350 authorizes a form of "protective jurisdiction." A tort violating the law of nations might occur abroad, and, by virtue of the transitory tort doctrine, follow the tortfeasor into the United States. This view of the ATCA instructs the federal courts to assume jurisdiction over cases arising under foreign law that implicate the federal plenary interest in adjudicating issues of international law.

Emerging out of these competing approaches is a rough consensus among the courts that the ATCA itself provides a cause of action only in narrow, indeed exceptional, circumstances: the norm allegedly violated must be "specific, universal, and obligatory," in the words of the Ninth Circuit. That test conforms to the traditional standards for defining the content of customary international law in U.S. courts and assures that the courts have some efficient means of screening out frivolous suits. As shown below, the consensus also resolves the issues for which "cause of action" has been only an analytical marker.

1. The Silence of Congress

Whether the cause of action under § 1350 is a creature of federal common law or the statute itself, Congress's failure to expressly adopt the putative norm is inconsequential. The Supreme Court has specifically approved the implication of private rights in a variety of federal common law settings. As noted in Illinois v. City of Milwaukee, "the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are concerned.'" The federal judiciary routinely fashions remedies for violations of individual rights protected by the Constitution, and the Court has

43. Estate II, 25 F.3d at 1475 (quoting Filartiga I, 630 F.2d at 885-87).
44. "Protective jurisdiction" may arise whenever Congress instructs the federal courts to assume jurisdiction over a class of cases within its legislative power but as to which there is insufficient federal legislation to provide a dispositive rule of decision. As a consequence, the federal courts may assume jurisdiction but apply state law. Paul J. Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 184-85 (1953).
45. Estate II, 25 F.3d at 1475. Compare Blum & Steinhardt, supra note 7, at 87-90. In Estate II, the Ninth Circuit seems to equate such norms with the preferred, even elite set of norms designated as jus cogens.

46. See infra text accompanying notes 60-80.
specifically repudiated the idea that remedies in such cases are somehow limited by or to Congressional enactments:

The federal courts' power to grant relief not expressly authorized by Congress is firmly established. Under 28 U.S.C. §1331, the federal courts have jurisdiction to decide all cases "arising under the Constitution, laws, or treaties of the United States." This jurisdictional grant provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution, *Bell v. Hood*, 327 U.S. 678, 684 (1946), but also the authority to choose among available judicial remedies in order to vindicate constitutional rights. This Court has fashioned a wide variety of nonstatutory remedies for violations of the Constitution by federal and state officials.48

The Constitution, like the law of nations, does not necessarily define the mechanisms for enforcing the rights it guarantees. This silence has not, however, prevented courts from awarding damages to vindicate individual rights. Indeed, the absence of an express private right of action from Congress has not historically stopped federal courts from imposing civil liability on violators of international law.49 The *Marcos* verdict is consistent with this approach.

Of course, as Professor Martha Field has noted, "federal common law" may not refer to a meaningfully coherent body of law,50 and drawing conclusions about the enforceability of international law from cases on the enforceability of constitutional law may be unwise. At bottom, however, this argument is really shorthand for a deeper skepticism about international law itself, and reflects in particular the suspicion that international law is insufficiently normative or obligatory to create rights in the first place. I now turn to that constellation of arguments.

2. The Silence of International Law

One version of the skepticism asserts that treaties and international custom do not explicitly empower individuals to invoke international norms for their own benefit in domestic courts. In this view, treaties and the law of nations are contracts between states, and individuals attempting to enforce that law are in effect officious intermeddlers who lack even the attenuated standing of third-party beneficiaries. The district courts in *Filartiga* and its progeny rejected this view when they implied a private right of action and fashioned

48. Bush v. Lucas, 462 U.S. 367, 374 (1983); see also Carlson v. Green, 446 U.S. 14 (1980); *Davis*, 442 U.S. at 248. While there are circumstances under which federal courts will decline to infer a cause of action, they are arguably inapplicable to the *Marcos* case. See *Carlson*, 446 U.S. at 18-19. No "Congressional declaration" preempts the implication of a damage action, and Congress has created no "equally effective alternative remedy" to redress plaintiffs' injuries. Moreover, no "special factors counselling hesitation" are sufficient to foreclose a judicially created damage remedy, because there is nothing extraordinary or novel about the federal courts deciding cases of international law — a phenomenon running to the founding of the republic. Presumably, whatever "special factors" might exist in *Marcos* or similar cases could be addressed through other doctrines of diffidence, including the act of state doctrine or forum non conveniens. See id.


an appropriate civil remedy (including punitive damages) for violations of internationally recognized human rights. Indeed, the court in *Filartiga* recognized a heightened obligation to fashion such a remedy. Because there exists a "consensus of the community of humankind" that torturers be considered, like the pirates before them, *hostis humanis generis*, they are within every state's jurisdiction under the universality principle. From an international perspective, the private right of action is one acceptable means of taking that consensus seriously.

Yet, this view fundamentally misconceives international law by insisting that private rights of action can be legitimate if and only if they are explicitly required by treaty or custom. International law does not generally prescribe the domestic means of its own enforcement, and its silence regarding private causes of action is not surprising. The insistence that specific human rights treaties and customary law must confer a private right of action (and its demonstration that they do not do so) erects a test that no norm can pass, including those the Supreme Court has regularly enforced since the beginning of the republic.

In *Asakura v. Seattle*, for example, the Supreme Court allowed a Japanese citizen to seek the nullification of a discriminatory municipal ordinance that was in apparent violation of a Friendship, Commerce, and Navigation Treaty between the United States and Japan. The court did not discuss the requirements that the treaties be self-executing or that the plaintiff have a private right of action. Rather, the Court understood that the treaty meant what it said and merited interpretation, consistent with its terms, to allow for individual enforcement of its requirements. Numerous additional Supreme Court decisions support a private party's standing to enforce treaties in U.S. courts even where those treaties are silent as to domestic enforcement. In each of these cases, an individual's right of action was

52. See, e.g., HENKIN, supra note 25, at 224; INTERNATIONAL LAW 116 (Louis Henkin et al. eds., 1980); see also Burley, supra note 7, at 1993 n. 137 ("Under the Alien Tort Statute, the source of the right remains international law, which, after all, 'is part of our law.' But the precise scope and nature of the remedy is domestic law — specifically, judge-made federal common law."). As Judge Edwards noted:

The law of nations never has been perceived to create or define the civil actions to be made available by each member of the community of nations; by consensus, the states leave that determination to their respective municipal laws. Indeed, given the existing array of legal systems within the world, a consensus would be virtually impossible to reach — particularly on the technical accoutrements to an action — and it is hard even to imagine that harmony ever would characterize this issue.

53. See, e.g., *The Paquete Habana*, 175 U.S. at 677; *Monro*, 23 U.S. at 473; *La Jeune Eugenie*, 26 F. Cas. at 832.
54. 265 U.S. 332 (1924).
56. See, e.g., *Clark v. Allen*, 331 U.S. 503 (1947) (permitting German aliens to enforce terms of treaty protecting alien-held property against seizure by U.S. government); *Bacardi Corp. v. Domenech*, 311 U.S. 503 (1940) (finding multilateral trademark treaty enforceable by individuals despite explicit enforcement mechanism in treaty); *Cook v. United States*, 288 U.S. 102 (1933) (permitting private British subjects to challenge seizure of vessel on high seas in violation of 1924 treaty, though treaty silent on issue of individual remedies). These cases stand for the principles that treaties can and do provide rights to individuals in addition to satisfying larger diplomatic or political goals of the contracting parties, and that these rights are enforceable in U.S. courts.
necessary to assure that international norms were respected.

A more stringent private-right-of-action requirement in § 1350 cases would depart from this tradition and erect the anomaly of individual rights without individual remedies.\textsuperscript{7} That anomaly is especially unacceptable if § 1350 is conceived as a subclass of specialized tort actions, as to which a private right of action is inherent. If one focuses instead on the special law-of-nations setting of the Act, human rights law can be analogized to any public regime that relies at least partially on “private attorneys general”; members of the protected class are empowered to enforce the law because no single governmental actor or organization has the means of discovering violations, let alone prosecuting them. Even more important, insisting on a private right presupposes that jurisdiction is dependent on some permissive rule of international law, which it is not.\textsuperscript{8} To the contrary, the burden rests on those who would resist the \textit{Filartiga-Marcos} paradigm to find some prohibitive rule in international law — a prohibition unlikely to exist given the utter absence of protest in the face of these prominent cases.\textsuperscript{9}

International human rights norms may of course be “in progress,” \textit{lex ferenda}, expressions of aspiration rather than obligation. In such cases no right will exist to ground the putative remedy in the first place. Certainly nothing in \textit{Filartiga} or \textit{Marcos} requires that every conceivable or arguable norm give rise to enforceable rights. To the contrary, as demonstrated below, the traditional standards for proving custom are sufficiently stringent to assure that spurious international claims do not survive the jurisdictional test of § 1350.

3. \textit{The Incompetence of Customary International Law}

One version of the argument that individuals derive no rights from international law is that the law of nations, by definition, cannot govern a

\textsuperscript{7} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“Where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.”) (quoting 3 William Blackstone, Commentaries 23).

\textsuperscript{8} In the famous words of the Permanent Court of International Justice:

Far from laying down a general obligation to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property, and acts outside their territory, \textit{[international law]} leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable. S.S. \textit{Lotus (Fr. v. Turk.)}, 1927 P.C.I.J. (.ser. A) No. 10, at 19. Scholars dispute the contemporary significance of the PCIJ's observation. \textit{Compare} F.A. Mann, \textit{The Doctrine of Jurisdiction in International Law}, 111 Recueil Des Cours 1, 33-35 (1964) with Prosper Weil, \textit{International Law Limitations on State Jurisdiction, in EXTRA-TERRITORIAL APPLICATION OF LAWS AND RESPONSES THERETO} 32-33 (Cecil J. Olmstead ed., 1984). Still, Professor Richard Falk's judgment in 1964 — that “the prohibitive impact of international law upon the discretion of a state to delimit its legal competence is marginal” — remains valid. See \textit{Richard Falk, The Role of Domestic Courts in the International Legal Order} 39 (1964).

state's treatment of its own citizens. If that generalization was ever fair, it has by now become a striking anachronism. The proliferation of human rights treaties, the work of the human rights agencies of the United Nations, and the linking of foreign aid to a country's human rights record demonstrate the extent to which states have made human rights an issue of state-to-state concern. Indeed, twenty years ago the U.S. State Department recognized the

...general agreement within the international legal community that transgressions of human rights are not matters within a state's exclusive domestic jurisdiction and accordingly that the principle of non-intervention in internal affairs does not bar one state from taking action designed to promote respect for human rights in another.

The Filartiga decision itself recognized the recent tendency of international law to address issues traditionally considered "domestic": "We conclude that the dictum . . . to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law." However controversial the Filartiga decision may have been in other respects, the conclusion that customary international law can govern a state's treatment of its own nationals has received virtually universal approval, including from Congress.

A more common version of the argument against private rights of action has recently barred several ATCA lawsuits against nonstate actors and proto-states. Premised on the observation that international law typically cannot create obligations for private actors, these cases have been dismissed because the plaintiffs' injuries were attributable to a party insufficiently state-like to have assumed obligations under the law of nations. In the Karadzic

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60. Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976), cert. denied, 429 U.S. 835 (1976). After Filartiga, the Second Circuit Court of Appeals limited the Dreyfus holding to cases involving commercial relations. Verlinden, 647 F.2d at 325 n.16. Other courts of appeals have followed that approach, carefully distinguishing such expropriations from customary international human rights law. Chuidian v. Philippine Nat. Bank, 912 F.2d 1095, 1105 (9th Cir. 1990); De Sanchez v. Banco Central de Nicaragua, 770 F. 2d 1385, 1396-98 (5th Cir. 1985).
61. Blum & Steinhardt, supra note 7.
63. Filartiga I, 630 F.2d at 884.
64. See 28 U.S.C. §1350 (1948). The legislative history of the TVPA clearly reflects the Congressional understanding that customary international law has evolved to include certain human rights norms governing a state's treatment of its own citizens. H.R. REP. No. 102-367, 102d Cong., 1st Sess. 5, reprinted in 1992 U.S.C.C.A.N. 84. The Restatement (Third) of Foreign Relations Law establishes that this body of international standards is not limited to torture and extrajudicial killings, but rather includes genocide, slavery, prolonged arbitrary detention, systematic racial discrimination, and similar wrongs as well. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) [hereinafter RESTATMENT OF FOREIGN RELATIONS].
65. See, e.g., Sanchez-Espinoza, 770 F.2d at 206-07 (D.C. Cir. 1985) (dismissing plaintiffs' claims of torture and rape against Nicaraguan contras on ground that court was "aware of no treaty that purports to make the activities here at issue unlawful when conducted by private individuals. As for the law of nations — so-called 'customary international law,' arising from 'the customs and usages of civilized nations,' . . . we conclude that this also does not reach private, non-state conduct of this sort"); Tel-Oren, 726 F.2d at 791 (Edwards, J., concurring) (holding that Palestine Liberation Organization, not being
cases, for example, the district court dismissed a wide array of human rights claims against the leader of the Bosnian Serbs, including genocide, rape, torture, and war crimes. The court concluded that it had no subject matter jurisdiction under the Alien Tort Claims Act or the Torture Victim Protection Act because "acts committed by non-state actors do not violate the law of nations," and because "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state. . . ."

The Karadzic dismissals should not survive on appeal, however. The district court was apparently unaware that the Alien Tort Claims Act had grounded jurisdiction over torts committed by private actors in the course of violating international law. Moreover, the central and unqualified assertion that international law creates no obligations for insurgent or belligerent forces and their leaders is demonstrably false. The district court may also have erred by giving insufficient weight to the evidence of a linkage between the Bosnian Serbs and the government of Serbia at the time of the atrocities — a nexus that vitiates the defendant's status as a private actor and that as a factual allegation should have been construed favorably to the plaintiffs on a motion to dismiss. Whatever the outcome on appeal, there is little doubt that international law's competence to prescribe obligations for nonstate actors represents the next generation of issues in the continuing evolution of the statute.


One tenable argument that customary law creates no recognizable causes of action concedes the theoretical possibility of international human rights, but denies that such a body of customary law has come into existence. Proponents of this argument refuse to infer a private right of action because of their disbelief in a meaningful right to be free from torture, summary execution,
and other human rights violations. The short form of this argument is that customary law is defined as the general practice states have accepted as a matter of law, and that only consistent state practice, combined with the somewhat anthropomorphic opinio juris, gives rise to customary obligations. Putative human rights norms flunk both halves of this test. Because torture and other human rights violations are a common occurrence, these critics argue that there can be no confirmation that state practice prohibits such conduct. Even where human rights violations are rare, states give no indication that they refrain from torture out of some keenly-felt legal obligation, rather than realpolitik or even humanitarian concerns.\(^7\)

The Filartiga decision has concededly spawned some dubious claims. In Trans-Continental Investment Corp., S.A. v. Bank of the Commonwealth,\(^73\) for example, the plaintiff claimed that fraud violated the law of nations because it is a tort recognized in virtually all legal systems around the world. The court could find no treaty-based or customary condemnation of private acts of fraud and rightly denied jurisdiction under the ATCA.\(^74\) Similarly, in Guinto v. Marcos,\(^75\) the court denied § 1350 jurisdiction over claims that a government embargo on a film amounted to a violation of the plaintiffs’ internationally guaranteed rights to free expression. The court understandably declined to find any duplicate of the First Amendment to the U.S. Constitution in either customary or conventional international law.\(^76\)

Nonetheless, the problem of “quality control” does not warrant a prophylactic rule against all private causes of action under the ATCA. The rights asserted in cases that fit the Filartiga-Marcos paradigm, in contrast to the rights advanced in Trans-Continental Investment Corp. and Guinto, are universally recognized human rights norms that are limited in scope and number. According to the Restatement (Third) of Foreign Relations Law, these norms include at a minimum a prohibition of the following acts:


3. Id. at 570.


5. At the time of the Guinto decision, the United States was a signatory, but not a party, to various treaties protecting rights of free expression. See, e.g., International Covenant on Civil and Political Rights, entered into force Jan. 3, 1976, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966); American Convention on Human Rights, entered into force, July 18, 1978, OAS T.S. No. 36, OAS O.R. OEA/Ser.A/16. The European Court of Human Rights had also suggested a wide core of human rights, including the right to be free of censorship. See, e.g., The Sunday Times Case, 1979 Y.B. EUR. CONV. ON H.R. 402 (Eur. Ct. of H.R.), reprinted in 18 I.L.M. 931 (1979). The cultural variance in the interpretation of free expression may have convinced the court that the government embargo could not have violated any “specific, universal, and obligatory” standard. Cf. Estate II, 25 F.3d at 1475. The court may also have answered the wrong question by considering whether the First Amendment to the Constitution had come within the law of nations rather than giving primary weight to the international instruments themselves. See Guinto, 654 F.Supp. at 280. It might have reached the same result not by disparaging the international law of free expression, but by declaring that Marcos was not personally liable for lawful actions within the scope of his authority as president. As shown below, that disposition would have had no effect on the human rights cases since the abuses alleged there violated both international law and the law of the Philippines.
(a) genocide,
(b) slavery or slave trade,
(c) murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman, or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, and
(g) a consistent pattern of gross violations of internationally recognized human rights.77

In drafting the Restatement, the American Law Institute was careful to point out that this list is conservative and does not preclude the evolution of additional customary human rights norms. The defining characteristic of the norms in § 702 — i.e., what distinguishes these rights from other nominees like free speech — is that no state asserts the legal prerogative to violate them. A state accused of torture will generally deny the wrong or acknowledge that some junior official who exceeded his or her authority will be punished; no state will assert that torture reflects a legitimate political diversity among nations. In contrast, states have historically preserved a domain of auto-
interpretation with respect to free speech. In short, the repeated prohibitions on torture and similar wrongs in virtually every human rights instrument, combined with the unwillingness of deviant states to assert a legal right to their violations, undermine the argument that continuing occurrences of torture disprove a customary international norm in favor of such human rights.

With the rise of democracy in the last five years and the liberalization of political rights generally, the stage is set for the evolution of additional human rights norms, especially free speech and the right to be free from discrimination based on gender as well as race. Although controversy may continue in any given case about whether a norm was violated, the consensus that a norm exists should increase. As long as violations of these norms take tortious form, there should be no jurisdictional obstacle to vindicating them through ATCA litigation. The proliferation of human rights treaties in the last decade should at least give the treaty wing of § 1350 renewed significance.

One need not defend the notion of jus cogens to accept the Restatement catalogue at face value. Human rights norms are frequently subsumed in the category of jus cogens, those preemptive norms of international law from which states may not derogate.78 Yet considerable disagreement exists about which norms qualify for inclusion in this privileged class, along with some skepticism that any principle of international law is beyond alteration by treaty or consistent state practice.79 The Restatement enumeration, though it may

77. Restatement of Foreign Relations, supra note 64, § 702.
overlap with the asserted *jus cogens* norms of human rights law, need not clear that additional threshold; the traditional standards of customary law, state practice combined with *opinio juris*, fully ground the list.

Putting aside the question of whether it is possible to construct an exhaustive catalogue of human rights norms at customary law, at a minimum any violation of the rights identified in §702 of the *Restatement* — assuming the violation takes tortious form — ought to be actionable under the ATCA. The difficulty lies not in identifying the core, but in defining the margins. The *Marcos* verdict, which establishes liability for torture, summary execution, disappearance, and prolonged arbitrary detention, lies comfortably within the *Restatement* standards.

### III. IMMUNITIES AND OTHER DOCTRINES OF DIFFIDENCE

#### A. The Act of State and Political Question Doctrines

In 1986, the district court dismissed all the human rights actions against Ferdinand Marcos on the grounds that the federal act of state doctrine precluded the court from determining the validity of a foreign government's actions within its own territory. Judge Harold Fong, for example, dismissed the three cases before him, noting:

However Marcos' acts are characterized, it is clear that this case would require examination of official policies of the Marcos administration. Regardless of the semantics, these cases would still involve judicial review of the acts of the duly recognized head of a foreign sovereign committed under authority of law. Such cases have long been considered non-justiciable under the act of state doctrine.

80. See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 Am. J. Int’l L. 607 (1984); see also Blum & Steinhardt, supra note 7, at 87-97. I do not suggest that it will be easy to define torture in every case or to conclude that a particular episode amounts to torture. I do suggest, however, that this inquiry is not different analytically from the interpretive questions faced by every court in every nontrivial case.

81. Judge Harold Fong dismissed the *Trajano, Sison*, and *Hilao* cases, supra note 1, on July 18, 1986. Judge Spencer Williams dismissed the *Ortigas* and *Clemente* cases, supra note 1, on January 22, 1987. None of the dismissal orders have been published. See *Estate 11*, 25 F.3d at 1469.

On the act of state doctrine generally, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), and W.S. Kirkpatrick v. Environmental Tectonics Corp., 493 U.S. 400 (1990). In *Sabbatino*, the Court refused to adopt any “inflexible and all-encompassing rule,” 376 U.S. at 428, noting that deference is appropriate when judicial resolution of the case “may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” *Id.* at 423. As noted below, however, the Supreme Court and the lower federal courts have also limited the doctrine to shield only official acts, by a government in power, in pursuit of a public purpose. See *Kirkpatrick*, 493 U.S. at 406-10; Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695-705 (1976); Republic of the Philippines v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir. 1989) (en banc), cert. denied, 490 U.S. 1035 (1989); *Forti*, 672 F. Supp. at 1545-46. Nor is the doctrine applicable when the court can apply international law norms adopted by a clear consensus among states, because “the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.” *Sabbatino*, 376 U.S. at 428. See also *Restatement of Foreign Relations*, supra note 64, at § 443 cmt. c (“A claim arising out of an alleged violation of fundamental human rights . . . would . . . probably not be defeated by the act of states doctrine, since the accepted international law of human rights is well established . . . .”).

So deployed, the act of state doctrine erects a seemingly intractable dilemma: the state involvement necessary to establish a violation of the "law of nations" for purposes of subject matter jurisdiction under § 1350 simultaneously establishes grounds for dismissal under the act of state doctrine.

The dilemma is more apparent than real, however; indeed, on appeal the Ninth Circuit reversed after concluding inter alia that the resolution of these claims was unlikely to embarrass the United States in the area of foreign affairs—a traditional touchstone in the act of state analysis. This result is consistent with that court's disposition of the Philippine government's suit against Marcos for theft, fraud, and embezzlement under the Racketeer Influenced and Corrupt Organizations Act. Referring to its earlier rejection of Marcos's act of state defense in that context, the court noted:

> Without needing extensive analysis of whether the alleged acts constituted acts of state, we found the doctrine to be of "little or no applicability" to the situation of a deposed ruler from whom his former domain seeks an accounting. "Once deposed [a] dictator will find it difficult to deploy the [act of state doctrine] successfully."

> We see no material distinctions between these cases and Marcos. Marcos is a private citizen residing in the United States. Neither the present government of the Republic of the Philippines nor the United States government objects to judicial resolution of these claims, or sees any resulting potential embarrassment to any government. The issues raised, although extraordinarily complex, are within the capacity of the courts to resolve.

The Ninth Circuit had previously established that the act of state doctrine applies only when a state exercises its sovereignty in pursuit of the public interest. In its unpublished, per curiam disposition of the Marcos human rights cases, the court of appeals equated individuals' allegations of torture with a foreign government's allegations of financial crimes. As explained in Estate II, "Marcos' alleged illegal acts"—whether financial crimes or human rights abuses—"were not official acts pursuant to his authority as President of the Philippines," and "the illegal acts of a dictator are not 'official acts' unreviewable by federal courts." The public interest inquiry, though consistent with act of state precedents, potentially involves the courts in the very political and legal maelstrom the doctrine was designed to avoid—a symptom of the dysfunctional role the doctrine has made for itself. Apparently unconcerned with that abstraction, the court's act of state analysis turned...
explicitly on considerably more pragmatic factors, including the private status of the defendant at the time of decision\textsuperscript{91} and the apparent acquiescence of the existing Philippine government.\textsuperscript{92} From this perspective, the act of state doctrine did not apply because it would have been more embarrassing \textit{not} to adjudicate these human rights claims, thereby granting Ferdinand Marcos a form of judicially created sanctuary not offered by the executive branch. In other words, the potential for embarrassment in holding Ferdinand Marcos responsible for these specific acts was miniscule given that the Philippine and U.S. governments were both attempting similar action.

On the other hand, if one views these human rights claims somewhat more abstractly as a \textit{type} of litigation, then a U.S. court must confront the genuinely unsettling prospect of exposing former heads of state, including U.S. presidents, to money damages in foreign courts for their allegedly illegal actions or policies while in office. Although practical and doctrinal barriers render this possibility slim,\textsuperscript{93} nothing in the act of state doctrine itself guides the court in the determinative choice among abstractions. Application of the embarrassment standard alone might permit an action under \textsection{1350} that probably should be barred by the political considerations at the heart of that doctrine.\textsuperscript{94}

Of course, the act of state principle as the Supreme Court applies it is not a free-wheeling discretionary concern with embarrassment. Rather, it is subject to specific limitations and exceptions that give the principle structure and suggest its presumptive inapplicability to human rights abuses of the sort recognized as violations of customary law in the Restatement.\textsuperscript{95} Claiming act of state "immunity" also creates for Marcos and similar defendants the dilemma of adopting torture or other violations as a matter of state policy: they must claim that the mistreatment of dissidents and prisoners was an

\textsuperscript{91} See \textit{Sabbatino}, 376 U.S. at 428.
\textsuperscript{92} In an opinion made available to the court by the plaintiffs, Philippine Minister of Justice Neptali A. Gonzales stated:

\begin{quote}

\[I\text{t is believed that appropriate representations may be made with the U.S. Government to express the deep concern with which the [Philippine] Government views the violations of human rights imputed to ex-President Marcos, and to secure its assistance in seeking a just solution to the present and impending suits against ex-President Marcos.}\]


\end{quote}

\textsuperscript{93} See \textit{infra} text accompanying notes 115-122.

\textsuperscript{94} For example, the United States' actions in Nicaragua violated international law, and alien tort claims arising from those actions would probably not be justiciable under the Alien Tort Claims Act in U.S. courts. \textit{Cf.} \textit{Chaser Shipping Corp. v. United States}, 649 F. Supp. 736 (S.D.N.Y. 1986), \textit{aff'd mem.}, 819 F.2d 1129 (2d Cir. 1987), \textit{cert. denied}, 484 U.S. 1004 (1988). In \textit{Chaser}, the court held nonjusticiable a claim arising out of the mining of Nicaraguan harbors because it required the court to invade an executive prerogative. More generally, alien actions against the United States would confront the orthodoxy that the proper statutory vehicle for suing the United States for its tortious action is the Federal Tort Claims Act, which lays out very different jurisdictional standards. See \textit{Federal Tort Claims Act}, 28 U.S.C. \textsection{1346}, 2671 et seq. (1988).

\textsuperscript{95} See generally, Ralph G. Steinhardt, \textit{Human Rights Litigation and the 'One-Voice' Orthodoxy in Foreign Affairs}, in \textit{World Justice? U.S. Courts and International Human Rights} (Mark Gibney ed., 1991). As noted above, the Supreme Court has declared both that the act of state doctrine need not apply when there is consensus about the underlying norms, and that no such consensus exists with respect to expropriations. See \textit{supra} note 81; \textit{Sabbatino}, 376 U.S. at 423. The Restatement (Second) of Foreign Relations Law suggests that the contrast to basic human rights violations could not be clearer. \textit{RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW \textsection{702} (1962).}
expression of public authority ratified (at least metaphorically) by the state itself. Yet, no government or government official will generally make such a claim. As a consequence, the act of state doctrine, which cannot immunize unofficial or unacknowledged acts of government officials, must be foreclosed.96

In short, the act of state doctrine is a relevant but not necessarily preclusive consideration in cases under §1350.

This conclusion applies equally to the political question doctrine, which requires that courts abstain from hearing claims in the circumstances the Supreme Court catalogued in Baker v. Carr:97

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.98

The Court noted a variety of foreign affairs issues that would raise nonjusticiable political questions99 but established also that "it would be error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."100 The Court's subsequent treatment of the political question doctrine has at times suggested to courts and commentators alike that the doctrine is no longer viable.101 However, rumors of its demise

96. In her compelling analysis of the Marcos cases, Professor Joan Fitzpatrick demonstrates that the cleanest rationale for the Ninth Circuit's disposition would be an ultra vires exception to the act of state doctrine. Fitzpatrick, supra note 1, at 496-98. Although such a rationale imports into international adjudication a nettlesome construct of domestic discrimination law, see id. at 514-17, it also builds naturally from the Supreme Court's ratification analysis in Dunhill, 425 U.S. at 682, and the Second Circuit's disposition of the doctrine in Filartiga I:

[We] doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority. 630 F.2d at 889-90 (citations omitted). See also Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), cert. denied 373 U.S. 914 (1963). In Jimenez, a former chief of state sought refuge in the United States and was subsequently accused of having committed certain financial crimes while in office. The U.S. court rejected his act of state claim after concluding that the acts alleged "constituted common crimes committed by the Chief of State done in violation of his position and not in pursuance of it. They are as far from being an act of state as rape, which appellant concedes would not be an 'Act of State.'" Id. at 558. Of course, the act of state doctrine may be irrelevant in cases where the court finds inadequate state action to trigger the obligations of international law in the first place. See Karadzic, 1994 WL 487573 at *5. In such cases, plaintiffs must demonstrate that the "private" actor was in effect an agent of the state, clothed with the authority to commit the state internationally but without the authority to violate international standards beyond the competence of the court.

98. Id. at 217.
99. Id. at 213.
100. Id. at 211.
seem exaggerated, especially with respect to foreign affairs. In *Goldwater v. Carter*, for example, a plurality held the doctrine applicable to the president's termination of a mutual defense treaty with the Republic of China. The political question doctrine has also occasionally resurfaced in the domestic litigation of international norms, leading a court to hold either that the case is nonjusticiable altogether or that the deference owed the executive in effect "legislates" an answer to the issue.

Although actions under § 1350 that would trigger judicial diffidence are conceivable, the political question doctrine is unlikely to provide any preclusive ground for dismissing cases like *Marcos*. The assertion that human rights cases lack what the *Baker* court called "judicially discoverable and manageable standards" amounts to a radical repudiation of human rights norms as law. This position would require in turn the repudiation of decades of executive branch submissions attesting to the legal status of these and similar norms. An example is the United States' submission to the Second Circuit Court of Appeals in *Filartiga I*, which declared that when an individual has suffered a denial of his right to be free from torture, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.

This statement is entirely consistent with a prior administration's broader acquiescence in the application of international law by U.S. courts: "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy." In short, the jurisdictional finding that the "law of nations or a treaty of the United States" has been violated ought to remove an action from the typical political question model, precisely because the finding implies the existence of standards that are legal and not "political." While the political question doctrine may be relevant to actions under the ATCA, the doctrine does not provide systematic grounds for barring such cases altogether; in any event, it is unlikely to apply to a case that clears the statutory hurdles.

B. Sovereign Immunity

In the aftermath of *Filartiga*, the defendants of choice under § 1350 have

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102. Gilligan v. Morgan, 413 U.S. 1, 11 (1973) ("[That] this doctrine has been held inapplicable to certain carefully delineated situations . . . is no reason for federal courts to assume its demise.").
106. Memorandum for the United States as Amicus Curiae at 19, *Filartiga*, 630 F.2d at 876.
tended to be the persons who actually committed torture or other human rights violations. This tendency is consistent with traditional ethical notions of responsibility and common law notions of liability and proximate cause. Over the last decade, however, the class of suitable defendants has expanded markedly to include quasi-governmental organizations and government officials under whose command, or with whose tacit approval, human rights violations occurred. As explained below, this expansion in the class of defendants reflects the evolution of a new standard of liability. Nevertheless, it also invites a new set of defenses that were presumptively unavailable to defendants in *Filartiga*-like actions.

For example, the Marcos estate claimed that the former president was entitled to sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"). That act establishes a presumption of immunity for states and their agencies or instrumentalities, subject to exceptions for commercial activities, torts in the United States, and waiver, *inter alia*. Although some human rights cases have been successfully prosecuted in the United States against foreign governments, the regime of exceptions under the FSIA remains fairly strict. Accordingly, most plaintiffs under the Alien Tort Claims Act will instead name the state officers who were allegedly responsible for the abuses as individual defendants. Several courts, however, have held that in some circumstances individuals qualify as an agency or instrumentality of the state, entitled to immunity under the FSIA. The issue is therefore likely to arise routinely in litigation under § 1350.

The Marcos estate would not qualify as a state actor under current court analysis. According to the Ninth Circuit's decision in *Chuidian v. Philippine National Bank*, a government official is entitled to sovereign immunity only for acts committed in his or her official capacity and within the scope of his or her authority. The *Chuidian* rule virtually assured that immunity would be unavailable to the Marcos estate because torture, summary execution, and similar acts were illegal throughout the Marcos presidency and therefore could not have been within the president's scope of authority. As the Ninth Circuit noted in a somewhat different context:

> Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of state, bound by the laws that applied to him. Our courts have


The U.S. State Department had suggested immunity for then-President Marcos in prior litigation. See *Domingo v. Marcos*, No. C82-1055V (W.D. Wash. Sept. 14, 1982); *Psinakis v. Marcos*, No. C-75-1725 (N.D. Ca. 1975). In the human rights litigation filed after Marcos's fall from power, the State Department submitted no such suggestion.

had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law.\textsuperscript{108}

Of course, an individual defendant who is willing to argue that an alleged violation of human rights was within the scope of his or her authority might be able to exploit the \textit{Chuidian} gloss on the FSIA.\textsuperscript{111} Establishing the factual predicate for such an argument would nevertheless come at a high cost to the foreign government by requiring it in effect to acknowledge that the acts alleged were authorized by law or practice. The point is not that governments will never attempt such a ratification, only that it is sufficiently extraordinary, given the rights at issue, to prevent sovereign immunity from becoming a categorical bar to additional human rights litigation.

Sovereign immunity was an implausible defense for the Marcos estate for a separate reason. In the \textit{Marcos} cases, the Philippine government specifically requested the courts of the United States to proceed to trial on the human rights claims against the former president. Because the sovereign immunity of an individual, like that of an agency or instrumentality of a state, is derivative and can be no greater than the immunity of the state itself, the Philippine government’s request waived whatever sovereign immunity might otherwise have attached to Ferdinand Marcos.\textsuperscript{112}

Although this result is probably consistent with the FSIA, the fit is admittedly not seamless. Both halves of the sovereign immunity analysis — that Marcos was acting beyond the scope of his authority and that the immunity was waived — rely on the post-Enlightenment distinction between a head of state and the state itself. Drawing such a distinction may be defensible, even admirable judicial policy, but it cannot be considered an apolitical first principle. If one acknowledges that the FSIA was designed to take the politics \textit{out} of sovereign immunity decisions, relying upon this liberal theory of the state seems an odd way to proceed. On the other hand, if the \textit{Marcos} court’s distinction between state and state officer reflects Philippine law and not some American \textit{grundnorm}, then an autocrat who, as a matter of local law, \textit{is} equivalent to the state would presumably receive immunity for all actions under color of his or her office, whether for personal gain or not. An autocrat, in other words, would receive immunity in the United States for acts that would not have been immunized had they been committed by a leader of a liberal state.\textsuperscript{113} Quite apart from the anomaly of favoring dictatorial


\textsuperscript{111} For a cogent critique of the \textit{Chuidian} rule as applied in human rights cases, see Fitzpatrick, \textit{supra} note 1, at 505-11.

\textsuperscript{112} Section § 1605(a)(1) of the FSIA abrogates immunity “in any case . . . in which the foreign state has waived its immunity either explicitly or by implication.” 28 U.S.C. § 1605(A)(1). Diplomatic immunity can also be waived, as it was by the Philippine government. Diplomatic immunity is likewise unavailable to Marcos because the United States did not accredit him as a Philippine diplomat when he fled to Hawaii in 1986.

\textsuperscript{113} Cf. Anne-Marie Burley, \textit{Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine}, 92 COLUM. L. REV. 1907, 1909 (1992) (distinguishing between liberal and nonliberal states for purposes of applying act of state doctrine). Considerations of space prevent a full-scale critique of Professor Burley’s position from the standpoint of international human rights litigation. Yet her ground for approving the result in \textit{Guinto v. Marcos} suggests that autocrats by virtue of their constitutional position are entitled in perpetuity to preferential treatment under the act of state doctrine. See \textit{id.} at 1989
states as a matter of judicial policy, this distinction creates a new, non-statutory category of “dictatorial immunity”; it is thus a dramatic expansion of the judicial role in interpreting statutes generally, and the FSIA specifically.

In summary, the defendants of choice under § 1350 will continue to be the state actors who commit human rights violations under color of their offices but in violation of local and international law. Until Congress acts to the contrary, even violations of *jus cogens* norms will not ground jurisdiction over state defendants, unless one of the statutory exceptions is also satisfied. Yet, individual state officers, even high-ranking ones and their estates, cannot qualify for immunity as to acts committed under color of authority that are nonetheless illegal.

C. Former Head of State Immunity and the Analogy to Nixon v. Fitzgerald

The Marcos estate argued that it was entitled to “former head-of-state immunity,” a doctrine rarely, if ever, recognized by the federal courts without a suggestion of immunity from the Department of State. Hatch v. Baez, an 1876 New York state decision, suggested that the court would recognize former head of state immunity in order to protect the ongoing diplomatic relations of the United States. The demise of absolute immunity among nations and the refusal of New York courts to follow Hatch a century later in actions against the deposed Shah of Iran have undermined the persuasive authority of that decision. Given the general reluctance of the federal courts to embrace new forms of international immunity without guidance from the executive branch, Hatch is simply too slender a reed to support an immunity for former heads of foreign states.

One can construct a superficially more attractive rationale for such a doctrine by drawing on the principles of Nixon v. Fitzgerald. That case established a former U.S. president’s “absolute immunity from damages liability predicated on his official acts.” The Supreme Court expressly based its decision on the president’s “unique position in the constitutional scheme” and stressed the impossibility of performing the executive’s sensitive functions if the president were “subjected to the distraction of suits by disappointed private citizens.” By analogy, failing to recognize a former head of state’s immunity potentially compromises the nation’s foreign

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n.331. The courts cannot adopt that position without abandoning the jurisprudence developed over the last fifteen years under the Alien Tort Claims Act.

114. Siderman de Blake, 965 F.2d at 719.


119. Fitzgerald, 457 U.S. at 749.

120. Id.

121. Id. at 751 n.31.
relations with current heads of state.

The analogy, however, is highly problematic. Executive officials other than the president are not entitled to the absolute immunity recognized in Fitzgerald, and it would be anomalous if the separation of powers calculus favored former heads of foreign states over current cabinet-level executive officials. In addition, the balancing of interests that supported absolute immunity in Fitzgerald depended largely on the availability of alternative constitutional procedures — including impeachment and congressional oversight — that offered protection against the president’s illegal conduct. No analogous set of constitutional mechanisms is available for enforcing applicable U.S. law against a former head of a foreign state, even acknowledging that U.S. courts usually have an attenuated interest in such cases.

In addition, the Fitzgerald opinion recognizes that absolute immunity from damages liability applies only to acts within the "outer perimeter" of [the president’s] official responsibility." A U.S. president’s order to torture or summarily execute political opponents hardly fits within that fictive perimeter. Regardless, that part of the doctrine should not apply to former heads of foreign states residing in this country. After all, U.S presidents, unlike Ferdinand Marcos, have no immunity in the United States from impeachment or voter rejection for such acts. Thus, to extend Fitzgerald to former heads of foreign states is to create an effective and unprecedented sanctuary for lawlessness without executive, statutory, or constitutional authorization or limit.

IV. FORUM NON CONVENIENS

Forum non conveniens issues will constantly arise by the very nature of Filartiga-like suits under the Alien Tort Claims Act. Witnesses and evidence may be costly to obtain in a U.S. forum, compulsory process may not be available in all cases, and aspects of the case may depend on the law of a foreign state. Nevertheless, because application of the inconvenient forum doctrine is fact-dependent, it does not favor dismissal as a matter of course. Indeed, the forum non conveniens argument was not particularly compelling in the initial phases of the Marcos cases even though the evidence and witnesses were almost exclusively in the Philippines. No adequate alternative forum existed in the Philippines, as required by Gulf Oil Corp. v. Gilbert.123

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122. Id. at 756.
123. 330 U.S. 591, 506-07 (1947). "If dismissal of an action on forum non conveniens grounds were not conditioned on the availability of another forum, the plaintiff might find himself with a valid claim but nowhere to assert it." Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 915 (S.D.N.Y. 1977), aff’d, 588 F.2d 880 (2d Cir. 1977) (citations omitted). In Filartiga-like suits, the very existence of gross human rights violations may mean that a fair trial is impossible in the situs state, suggesting that an alternative in that country is presumptively unavailable unless an intervening change in governments has occurred. Even where the government has changed, the new government may not recognize an action for the payment of compensation to human rights victims. This lack of subject matter jurisdiction abroad would effectively compromise the adequacy of the foreign forum and preclude the application of the forum non conveniens doctrine. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254-55 n.22 (1981) (holding no adequate foreign forum exists where alternative forum does not permit litigation of subject matter of dispute).
and its progeny. No court in the Philippines could have established personal jurisdiction over the defendant because the Aquino government had revoked Marcos's passport soon after his departure from Manila and specifically prohibited his re-entry into the country. Nor was there any applicable Philippine provision establishing the long-arm jurisdiction of local courts. These circumstances led the Ninth Circuit to reject the *forum non conveniens* argument in a related case against Marcos in 1988.\(^\text{14}\)

By the time the human rights trial began in 1992, however, the government had allowed the Marcos entourage back in the Philippines, had opened estate proceedings there, and had adopted a procedure for pressing some human rights claims against the Marcos regime. As a consequence, the applicability of *forum non conveniens* became somewhat more plausible.

The federal question origins of the ATCA arguably preclude such a disposition. The Ninth Circuit, like many other jurisdictions, has held that the applicability of federal law can trump the *forum non conveniens* doctrine.\(^\text{15}\) Under the ATCA, federal law is implicated because international law became part of the federal common law when the states adopted the Constitution.\(^\text{16}\) However, because the ATCA lies figuratively between diversity jurisdiction, where *forum non conveniens* is routinely recognized, and federal question jurisdiction, where it is not, a prophylactic rule against dismissal is unlikely to emerge. Litigants will be obliged to demonstrate the balance of public and private factors behind the “ultimate inquiry” of “where [the] trial will best serve the convenience of the parties and the ends of justice.”\(^\text{17}\)

That calculus, impressionistic as it may be, cuts in favor of exercising jurisdiction in cases within the *Filartiga-Marcos* paradigm. As a general matter, the United States has a compelling interest in the interpretation and application of international legal standards. The incorporation of international law into federal common law invests the courts of this country in its construction.\(^\text{18}\) Courts should take special interest in the interpretation of international human rights norms that come within the universal principle of prescriptive jurisdiction.

The posture of the *Marcos* case reinforced this interest. Because the Philippine government agreed to cooperate during the discovery stage of the

\(^{124}\) *Republic of the Phil.*, 862 F.2d at 1361.


\(^{128}\) At the very least, international law provides a formal and authoritative restatement of governments' expectations of one another. These expectations are not enforced in the same way as domestic law, but they define what will be viewed as legitimate or acceptable and what will not. The United States has an interest in influencing the evolutionary process by which international norms emerge. By participating in the process of shaping international legal concepts, the United States can provide greater regularity and predictability in its relations with other states and avoid the development of legal norms that are contrary to U.S. foreign policy goals and democratic traditions.
trial, the concern with foreign-sited evidence was less pressing. In addition, the Judicial Panel on Multi-District Litigation consolidated the various human rights cases against Marcos, in part to streamline the proceedings for the convenience of the defense — an intermediate concession preferable to an outright dismissal on convenience grounds. Criminal proceedings initiated against Marcos in October of 1988 heightened the interest of the United States in the defendant's continued presence. The fact that part of his estate was to be administered in the United States similarly cut against dismissal.

Of course, the convenience test is intrinsically fact-dependent, and none of these characteristics standing alone is dispositive. Nevertheless, forum non conveniens clearly does not operate as an automatic bar to the litigation of human rights claims under § 1350. In applying the doctrine, courts will take into account the simultaneous presence of the plaintiffs and the defendant, the interest of the United States in the vindication of accepted human rights standards, and the existence (or absence) of an adequate foreign forum.

V. CLASS CERTIFICATION

The Marcos litigation comprises five different cases, which were consolidated for trial by the Panel on Multi-District Litigation and assigned to Judge Manuel Real.129 Four of the cases involved named plaintiffs, and the other was a class action on behalf of ten thousand human rights victims in the Philippines during martial law under Ferdinand Marcos.130 In the first phase of the trial, nine representative plaintiffs and eight expert witnesses established liability as to the class through testimony concerning the extent of human rights violations under martial law, Marcos's control of the military and police agencies, the international law of human rights, and the role of the United States in pressuring Marcos to improve his human rights record.

In form, the class action against Marcos was a mass tort action unlike any other. It was not a toxic tort or mass exposure case in which victims claimed damages from a single product, accident, or design flaw. The common question of fact was whether Marcos was responsible for a pattern or practice of torture, summary execution, and disappearances. Some of the plaintiffs who had opted out of the class were able to show circumstantially that President Marcos ordered their detention and "tactical interrogation" (a code word for torture), that he was kept fully informed of their treatment, and that he did nothing to stop the abuse. Class action litigants as a whole, in contrast, established Marcos's liability in the abstract by proving inhumane general practices of which each class member had been a victim. The class-action plaintiffs' theory of liability was that Marcos had exclusive control of the state security apparatus and that he "micro-managed" the treatment of detainees and dissidents during martial law, an issue on which the judge admitted expert testimony. Marcos could thus be held individually liable for abuses occurring under his regime. The defense did little to resist and nothing to appeal the

129. See supra note 1.
130. Almost all of the plaintiffs fell within the class definition, but several opted out of the class pursuant to the certification order.
certification of the class.

A mass human rights tort trial inevitably compromises claim autonomy and therefore raises the difficulties catalogued by Professor Roger Trangsrud and others. These difficulties include confusion of causation issues and the consequent impairment of the jury function, profound extrapolation from the experience of nine victims to that of ten thousand, distortion of the relationship between counsel and client (especially when the attorney has taken the case on a contingency fee), and overreaching by judges in pre-trial management and the coercion of settlement. Designation of the class counsel as lead attorney in the trial can also cause sharp disagreements about the fundamental trial strategy, the admission and order of evidence, and the preparation of witnesses.

In addition, the impropriety of the class mechanism has grown more pronounced in the damages phase of the trial. Class counsel has suggested an unwieldy process for distributing and collecting claim forms in the Philippines. The effect of this scheme may be to underestimate drastically the number of victims, making the next phase of litigation more manageable for counsel without reducing the prospect of a multi-billion-dollar recovery. Class counsel suggested the appointment of a special master to collect evidence in the Philippines and to recommend damage awards for each member of the class. Alternatively, trial of a dozen exemplary cases might establish parameters for the award of damages. It might also be possible to recruit the machinery of the Philippine government or nongovernmental organizations to collect and assess the evidence of damages for every class member. Yet, these procedures compromise the right to have each damage award tried by the jury that established liability. Whether any mechanism can be devised to serve the competing objectives of actually compensating victims and preserving judicial resources seems doubtful, and the law and logistics of proving damages thus undermine the propriety of the class certification.

VI. DAMAGES AND THE CHOICE OF LAW

Separate from the issue of how class members will prove their damages is the analytical question of which law governs damages under the Alien Tort Claims Act. Those few courts to face the problem have offered no unified approach to it; indeed, in Filartiga, the court computed a damage award that seems internally inconsistent. The essential difficulty is the courts' ambivalence in identifying which law defines the "tort in violation of the law of nations" for purposes of § 1350. To date, the courts have patched together an odd and shifting combination of the law of the situs, the law of the forum, and the law of nations itself.

After the Second Circuit concluded that jurisdiction was proper and remanded for further proceedings, the court in Filartiga entered a default judgment against the Paraguayan police official and referred the issue of

damages to a magistrate.\textsuperscript{132} The magistrate systematically applied \textit{lex loci delicti}\textsuperscript{133} and recommended an award of roughly $400,000 for emotional pain and suffering, loss of companionship, funeral and medical expenses, and lost income. The magistrate recommended against the plaintiffs’ claims for legal expenses and punitive damages on the grounds that these were not recognized at Paraguayan law. The district court largely adopted the magistrate’s recommendation except with respect to punitive damages, as to which the court awarded $10 million.\textsuperscript{134}

This amount may appear to be radically disproportionate to the compensatory damages. Equally troubling, however, is the court’s choice of law analysis. After consulting § 145(2) of the Restatement (Second) of Conflict of Laws and considering whether the case involved greater contacts to the United States or Paraguay, the court concluded that it should look first to the law of Paraguay to determine the appropriate remedy for international law violations.\textsuperscript{135} The court decided that the interests of the global community trump those of any one state, however, and refused to apply Paraguayan law to the extent that it “inhibit[ed] the appropriate enforcement of the applicable international law or conflict[ed] with the public policy of the United States.”\textsuperscript{136}

Specifically, the court agreed with the magistrate that the Paraguayan Civil Code did not allow the recovery of punitive damages, but held nevertheless that the objectives behind the international law “can only be vindicated by imposing punitive damages.”\textsuperscript{137} The key analytical move here was not that Paraguayan law somehow violated the public policy of the United States, and thus that the court had to apply \textit{lex fori}. Rather, the court held that it could not apply Paraguay’s law exclusively because the law was inconsistent with the needs of the international legal system.

The difficulty with this analysis is the lack of international precedent for imposing punitive damages against states, let alone individuals, for violations of international norms. While the court acknowledged that states do not generally punish one another in that way, it brushed aside the discrepancy by concluding that individual violators of the law of nations are differently situated than states:

Where the defendant is an individual, the . . . diplomatic considerations that prompt reluctance to impose punitive damages are not present. The Supreme Court in \textit{dicta} has recognized that punishment is an appropriate objective under the law of nations, saying in \textit{The Marianna Flora}, 24 U.S. (11 Wheat.) 1, 41, 6 L. Ed. 405 (1826), that “an attack from . . . gross abuse of power, and a settled purpose of mischief . . . may be punished by all the penalties which the law of nations can properly administer.”\textsuperscript{138}

It was therefore, in the court’s words, “essential and proper to grant the

\textsuperscript{132} Filartiga II, 577 F. Supp. at 861.
\textsuperscript{133} “The law of the place where the crime or wrong took place.” BLACK’S LAW DICTIONARY 911 (6th ed. 1990).
\textsuperscript{134} Filartiga II, 577 F. Supp. at 867.
\textsuperscript{135} Id. at 864.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 865.
remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture."^139

This approach has worked outside the *Filartiga* litigation. In *Martinez-Baca v. Suarez-Mason*,^140^ the court awarded over $21 million to an Argentine citizen who had been tortured repeatedly for four years. Roughly half of the award consisted of punitive damages. Here, too, the choice of law analysis on the damages issue was more pastiche than principle. After declaring initially that the "[p]laintiff's claims arise under international law and California [i.e. forum] law,"^141^ the court based the punitive damage award on international law despite the fact that such awards are virtually unheard of in the international legal system.

The *Marcos* verdict may seem similarly contrived. The jury's award of $1.2 billion in exemplary damages was "imposed by way of example or correction for the public good," according to the judge's instructions:

> Based on the evidence you have heard in the liability phase and the evidence you will hear in this phase, you are to decide what amount, if any, should be awarded to plaintiffs to make an example for the good of the public so that others will not repeat or emulate torture, summary execution or disappearance.^142^

Although the distinction between exemplary and punitive damages is obscure, the judge quite clearly thought punitive damages inappropriate against an estate.

*Ad hoc* as this analysis may seem, it is defensible. At the threshold, choice of law analysis need not yield a single body of law to govern every issue in a case. The process of dépeçage, though controversial, is common and allows composite results that might not be obtained if a court were to select a single body of law.^143^ Thus, the simultaneous application of situs law for determining the definition of tortious conduct and compensatory damages, international law for determining jurisdiction under § 1350 and punitive damages, and forum law for procedural issues such as abatement, can offer a type of coherence as long as the awards are cumulative and not mutually exclusive. Moreover, the argument that a court should award punitive damages in order to vindicate the law of nations is structurally akin to the argument that domestic courts must recognize a private right of action: if we are to take the international condemnation of torture seriously, certain domestic consequences follow. Finally, this selective approach to international law and precedent is defensible because it reflects the blended nature of international law in the law of the United States — part law of nations, part federal common law. It is consistent with modern approaches to the choice of law if different elements of a damage award reflect different though

^139. Id.


^141. Id. slip op. at 1.

^142. Jury Instructions (February 22, 1994).

reconcilable policies of the laws “in conflict.” As noted in *Martinez-Baca*:

International law principles, as incorporated in United States common law, provide the proper rules for calculating... damages. International law requires that an injured plaintiff must be compensated for all actual losses. Federal common law remedies likewise provide compensation for losses resulting from a defendant’s wrongdoing. An award of punitive damages is also proper in order to punish and deter such acts and hereby further international human rights. Humans must be deterred from inflicting such cruel punishment on fellow humans.\(^44\)

The patchwork result is more coherent from this perspective than the systematic and exclusive application of any single body of law.

**VII. The Law of Evidence**

In the course of the *Marcos* trial, Judge Real made numerous evidentiary rulings, the most prominent of which involved the use of expert testimony. As noted above, the plaintiffs established liability on the basis of a pattern and practice of human rights abuses during the Marcos presidency. To achieve this class liability, the plaintiffs had to show that Marcos bore a form of command responsibility heretofore limited to criminal proceedings. Establishing command responsibility as a matter of principle or international legitimacy is one thing, however, and proving it as a matter of fact is quite another. Plaintiffs in the *Marcos* cases relied heavily on several different witnesses to establish the factual predicates for command responsibility. One expert witness testified as to the effect of Marcos’s presidential decrees. Others described the structure, organization, and control of the Philippine military, security, and intelligence forces. Still others, including former officials of the U.S. State Department, described the efforts of the U.S. government to monitor and reduce human rights violations during the Marcos regime.

Perhaps more decisive was the expert testimony of two human rights investigators who described the pattern and practice of human rights atrocities in the Philippines, including Marcos’s personal role in the abuse. They testified on the basis of their own investigations, as well as corroborated reports from investigations by the State Department and by nongovernmental organizations. They also testified about Marcos’s responses to allegations of abuse and to the source and status of international human rights standards.

Taken cumulatively, this expert testimony convinced the jury that human rights violations in the Philippines were widespread. It allowed the jury to assess Marcos’s relationship with such institutions as the Presidential Security Command, the Armed Forces of the Philippines, and the Philippine Constabulary, among others. The testimony also enabled the jury to gauge the likelihood that Marcos had personal knowledge of human rights violations and to assess his powers to have done something about them. It gave context to the live testimony of victims and thereby enabled the jury to assess their credibility. And, at least subliminally, it conveyed the sense that human rights standards are not some form of utopian moralizing, but are in fact capable of

\(^{144}\) *Martinez-Baca*, slip op. at 4.
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definition and enforcement.

This expert testimony also affected the judge’s hearsay rulings. On the day after the first experts’ testimony about Marcos’s operational control of the military and police functions, Judge Real decided to admit all statements attributed to any member of the Philippine armed forces or security units, on the grounds, *inter alia*, that they amounted to party admissions and declarations against interest. The court also declared that such statements fell within the residual categories of reliable hearsay. As a consequence, victims could testify about the motives of their torturers, (e.g., “We [the police] are doing this because the President wants you dead”), and the agency affiliations of their tormentors (e.g., testimony admitted for the truth of the matter asserted that armed men in civilian clothes said they were from the Presidential Security Command). Though the judge allowed counsel to protect the record on this issue, he permitted virtually no argument on the propriety of the rulings.

One may well wonder whether the agency relationship that justifies the inclusion of a party admission can be proved by expert testimony or by the out-of-court declaration of the purported agent; the theory that the Marcos estate vicariously adopted these statements may strain credulity. Yet, these hearsay rulings, however broad, may not qualify as reversible error. If the court of appeals agrees that liability can be predicated on a pattern and practice of human rights abuses ordered or acquiesced in by Marcos, the cumulative effect of the scattered hearsay rulings may be negligible or fail to affect a “substantial right” of the defendant. Besides, a substantial number of plaintiffs intentionally did not rely on such testimony to establish the liability link to Marcos. Their favorable verdicts ought to be immune from whatever taint the hearsay rulings may carry.

As a general matter, although the use of expert testimony has been the subject of recent controversy, plaintiffs were clearly entitled to present expert testimony in their cases as long as the witness’s expertise would be helpful to the trier of fact. Under Rule 702 of the Federal Rules of Evidence,

> (If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.)

This concededly liberal standard appears to cover such specialized information as Marcos’s relationship with governmental agencies, the likelihood *vel non* that Marcos would take personal or vindictive action against those he perceived as opponents, and the existence of a pattern or practice of violations

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146. See *Fed. R. Evid.* 804(b)(3).

147. See *Fed. R. Evid.* 803(24) and 804(b)(5).

148. Under *Fed. R. Evid.* 103, error may not be predicated on an evidentiary ruling unless a substantial right of the defendant is thereby affected.


for which Marcos was responsible and to which the plaintiff's treatment conformed. 151

Plaintiffs also alleged various violations of international law (or the law of nations), including torture, summary execution, cruel and unusual or degrading treatment or punishment, and prolonged arbitrary detention. These terms are not self-defining but are, like all international law standards, a function of state practice and treaty interpretation. For that reason, courts have generally received the evidence of experts in determining the content of international law. 152 Although courts are understandably reluctant to allow expert testimony on matters of general knowledge, litigation under the ATCA will inevitably involve questions and issues well beyond the daily experience of most jurors. 153 Expert testimony will therefore continue to be a staple of that litigation.

VIII. INTERNATIONAL LAW AND THE CIVIL LEGACY OF NUREMBURG

The Filartiga court and others construing $1350 serve a constitutive role in the formation of the very international law the statute aims to enforce. In finding that the international norm against torture is sufficiently clear for purposes of subject matter jurisdiction, the Filartiga court effectively clarified the law it considered. Under generally accepted principles of legal interpretation, foreign and international tribunals may appropriately invoke the Filartiga decision as evidence of how other state actors conceive the status of international norms proscribing torture, and by natural extension, other violations of core human rights. 154 The Marcos verdict has a similar effect on international law.

The most significant of these is the standard of ATCA liability. After considerable disagreement among the parties as to the proper standard of liability, Judge Real instructed members of the jury that they could find the Marcos estate liable in two alternative circumstances:

You may find the defendant Estate liable to plaintiffs if you find, by a preponderance of the


152. See The Paquete Habana, 175 U.S. at 700; see also Filartiga I, 630 F.2d at 879; Forti, 694 F. Supp. at 709; Fernandez-Roque v. Smith, 622 F. Supp. 887, 902 (D.C. Ga. 1985). In Fernandez-Roque v. Smith, the U.S. Court of Appeals for the Eleventh Circuit did not challenge the propriety of relying on expert testimony to determine issues of international law as established by the district court.

153. See, e.g., Lipsett v. University of Puerto Rico, 740 F. Supp. 921, 925 (D.P.R. 1990) (asserting expert testimony not needed when subject matter "deals with common occurrences that the jurors have knowledge of through their experiences in every day life"). The meaning of international human rights practices and the patterns of abuse in Marcos's government from 1972 until 1986 are hardly "common occurrences" under the Lipsett standard. To the contrary, the testimony offered by the plaintiffs' witnesses in the case at bar is precisely the type of evidence that the Lipsett court would have allowed. Id. Even if a novel form of expertise were being offered, the testimony would be admissible as long as the "expert's specialized knowledge [is] of a kind which will enhance the jury's understanding." J. Weinstein & M. Berger, Weinstein's Evidence § 702[01], 702-09.

154. Blum and Steinhardt, supra note 7, at 113.
Category 1 liability is plainly consistent with traditional notions of responsibility in U.S. tort law and international law. Category 2 liability, on the other hand, is a still emerging international law norm suggesting that a government official has an affirmative obligation to halt human rights abuses where he has both knowledge of such abuses and the capacity to take meaningful steps to stop them. While the Nuremburg and Yugoslavian war crimes tribunals established a similar standard in the context of international criminal law, the Marcos verdict marks the first time the standard has grounded an award of civil damages.

That verdict, though hardly precedented, is a natural product of the Nuremburg experience, which established that any person, located anywhere in the abstraction of the state, who commits an international wrong bears personal responsibility for it. Even if we view the Nuremburg judgment as "victors' justice" or as law in the service of vengeance, we are obliged to acknowledge in its aftermath that international wrongs are also irreducibly personal. This idea is not as new or as radical as it may first appear. It

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2. The official position of any accused person, whether as Head of State or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Id. at 1194 (emphasis added). This provision should be compared with the consistent though less detailed standard of article 7 of the Nuremburg Charter: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Charter of the International Military Tribunal, 59 Stat. 1544, 1546.

On the legal effect of these proceedings, see generally Theodore Meron, War Crimes in Yugoslavia and the Development of International Law, 88 AM. J. INT'L L. 78 (1994), and THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

157. The district court's disposition of the Karadzic cases, supra text accompanying note 66, is not to the contrary. The Nuremburg judgments establish the personal responsibility of individuals admittedly acting on behalf of the state. Where, as in Karadzic, the underlying relationship to a state actor is denied, a different and narrower set of norms (e.g., regarding piracy, genocide, and the conduct of belligerents)
is not, for example, a form of vicarious or strict liability. Command responsibility was triggered, not because Marcos happened to be head of state at a time when unruly subordinates committed torture and other abuses, but because plaintiffs established Marcos’s extraordinary personal control over the military and security apparatus of the state. To put the point another way, Marcos actively participated in the human rights violations in ways that only a head of state can. He created a disciplinary structure within the government that actively contributed to the patterns of abuse by creating an environment of impunity, and individual plaintiffs showed that their treatment fit into that pattern.

Yet, the Marcos disposition leaves unanswered the question of whether international law should still hold liable those officials who knew of, but could do nothing about, human rights violations. Similarly, it leaves open the problem of liability for government officials who did not know of the abuses but should have known they were occurring.

Command responsibility raises the additional specter of vicarious or strict liability, but is nonetheless distinguishable from those doctrines. International human rights law has not developed to the stage where the superior is necessarily personally liable for the depredations of an unruly subordinate, and it is unlikely to do so. The notion of command responsibility recognizes that a superior may be responsible for creating an environment in which violations are more likely to occur. However, this conception differs from strict liability, which would impose responsibility on the superior even when an unruly subordinate has disobeyed direct orders to stop human rights abuses.

The principled defense for this result is grounded in the fact that every age of international law has been marked by the characteristic recognition that some wrong done by people to people fundamentally threatens the common security of states. In the eighteenth century, piracy threatened maritime commerce, and violations of diplomatic immunity threatened the already tenuous process of international communication. When Congress allowed aliens to sue in the United States for civil wrongs in violation of international law, it may have had precisely these types of wrongs in mind.

Today, those who abuse human rights pose an analogous threat. The framers of the Nuremberg Charter understood that peace among governments was intrinsically linked to respect for human rights by governments, and the front-page tragedies in Bosnia and Iraq confirm the insight that there is something deeply pragmatic about the idealism of human rights law. Of course, the Marcos jury probably did not speculate about these abstractions. Instead, they considered a range of allegations and defenses, including Marcos’s ignorance, his unruly subordinates, and the requirements of national security. They were inundated with evidence, constrained by the judge’s instructions, and swayed by the lawyers’ performances. They made their own judgments. In the end they were asked to translate a reputedly utopian ideal into language a domestic judiciary could understand, and they succeeded.

The direct effect of the Marcos verdict on pending cases is difficult to predict. Four months after the exemplary damage award in Marcos, another
court held a former head of state liable in an action alleging similar violations;\textsuperscript{158} similar suits will probably emerge from the crises in Bosnia, Rwanda, Haiti, Somalia, and Afghanistan, among others. Paramilitary groups operating under color of state authority may face similar liability in accordance with the expansion in the class of defendants of choice.\textsuperscript{159} In the end, however, the most significant contribution of the Marcos case to the developing jurisprudence under § 1350 may simply be its confirmation that plaintiffs may invoke the ATCA, without fanfare, to sanction human rights violations committed abroad.

\section*{IX. CONCLUSION: TOWARD AN INTERNATIONAL LAW OF REMEDIES}

In the first decade following the Filartiga decision, the essential debate centered on the legitimacy of recruiting U.S. courts in the fight against human rights abuses committed abroad. With a series of decisions now confirming the plain meaning of the Alien Tort Claims Act and awarding compensation, the debate has shifted to the more technical issues of how to try cases and how to resolve recurrent litigation issues. The Marcos trial offers some guidance in this regard and thus contributes to the incremental rulemaking that is the hallmark of the common law. Yet, Filartiga and its progeny continue to be subject to the criticism that fundamental issues common to any civil trial — the proper measure of damages, the appropriate standard of liability, and the problem of enforcing a judgment in-hand — are subject to constant reinterpretation. In this view, the common lawmaking powers of the courts are simply too particularized to assure the evolution of consistent and prudent remedial rules. Furthermore, because no other nation invites such cases into its courts, U.S. courts lack international law precedents to assist them in the resolution of these predictable questions. The possibility of international misunderstanding is pronounced in these circumstances. As a result, substantive norms of human rights that command a general consensus may be undermined by disagreements about their implementation through domestic litigation. Although the courts of the United States will continue to have the power to conduct human rights litigation consistently with the general standards of procedural and remedial law, the resulting judgments will not necessarily command the approval of other governments or secure foreign cooperation in assuring compensation for victims.

The existing treaties on judicial assistance solve these problems only in part. Conventions on discovery, for example, may be useful in obtaining documents and other forms of evidence, but they are too general to establish a government’s obligation to cooperate with a foreign civil proceeding involving the investigation of human rights abuses committed abroad. Nor do the treaties on enforcement and recognition of judgments assure that other

\begin{itemize}
\item \textsuperscript{158} On July 1, 1994, Judge Wilkie Ferguson awarded $41 million to six Haitians who alleged that they were tortured by the military regime of former dictator Prosper Avril. \textit{Avril}, No. 91-399-CIV (S.D. Fla. 1994).
\item \textsuperscript{159} See, e.g., Belance v. Front for the Advancement and Progress in Haiti, No. 94 Civ. 2619 (E.D.N.Y. filed June 1, 1994); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (S.D.N.Y. filed May 17, 1994); \textit{Cf. Karadzic}, 1993 WL 385757 at *1.
\end{itemize}
states will honor awards of exemplary or punitive damages in human rights cases. In contrast to the criminal setting where ad hoc international tribunals have determined the standard of liability, no international treaty defines that standard for civil actions before domestic courts.

An international treaty on the redress of human rights violations could fill this void. Building on the remedial provisions of the Universal Declaration of Human Rights, such a treaty could define the specific violations that would be actionable in the courts of all signatory states. In doing so, the treaty should draw, at least initially, on the work of the International Law Commission, the International Court of Justice’s articulation of obligations erga omnes, and the range of universal treaties defining the actionable core of rights. The treaty might also define the choice of law in such cases, articulate an international law of evidence, and define the measure of compensatory damages or impose an international obligation to recognize and enforce judgments rendered under the treaty. Such an agreement would thereby resolve once and for all whether punitive damages are appropriate for gross violations, and whether the estate of the defendant (as distinct from a

160. See, e.g., G.A. Res. 217A (III), art. VIII, U.N. GAOR, 3d. Sess., U.N. Doc. A/810 (1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).


162. As part of the I.L.C.’s continuing effort to define the conditions and consequences of state wrongdoing, it has defined “international crimes” with an oblique formality:

An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.


(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination [and]

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, and apartheid.

Id.

163. See Barcelona Traction, Light, and Power Co. Ltd. (Second Phase) (Belg. v. Spain), 1970 I.C.J. 3, 32:

[Ergra omnes] obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . , others are conferred by international instruments of a universal or quasi-universal character.

living person) ought to be vulnerable to such damages.

If past is prologue, this hypothetical treaty would be subject to a range of reservations by which state signatories would exempt themselves from certain of its obligations. The United States has an especially unenviable record of asserting reservations to human rights treaties. The legality of such reservations is suspect, however. The Vienna Convention on the Law of Treaties specifically prohibits reservations that defeat the "object and purpose" of a treaty, and a reservation that expressly exempts the United States from the domestic effect of a treaty designed to operate domestically is presumptively unlawful. It would be impossible, however, to designate in advance that certain reservations would be illegal under the proposed treaty even if it were possible to convince the international community that establishing firm obligations under the treaty is more important than obtaining the maximum number of signatories.

To propose a convention on the redress of human rights violations is not to suggest that U.S. courts must or should retreat from the Filartiga-Marcos line of authority in the absence of such a treaty. The proposal only aims to confirm that this set of issues is ripe for international determination now that the broader principle — that human rights violators who come to the United States are properly subject to suit in the United States — is well established. The courts of the United States are that much closer to honoring the promise of Filartiga as a practical vehicle for redressing human rights violations wherever they may occur.
