1998

Sue and Be Recognized: Collecting § 1350 Judgments Abroad

Edward A. Amley Jr.

Follow this and additional works at: https://digitalcommons.law.yale.edu/ylj

Recommended Citation
Available at: https://digitalcommons.law.yale.edu/ylj/vol107/iss7/4

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Notes

Sue and Be Recognized:
Collecting § 1350 Judgments Abroad

Edward A. Amley, Jr.

Few domestic courts around the world possess either the competence or the desire to process individual and group human rights claims. International judicial attempts to respond to the violators of these norms are even rarer. In contrast, federal courts in the United States have provided fora allowing some of those who have suffered at the hands of foreign public officials the opportunity to make themselves whole. For almost twenty years, judges have construed the Alien Tort Claims Act (ATCA)\(^1\) to empower Article III tribunals to redress human rights abuses. As currently read, the ATCA and its modern counterpart, the Torture Victim Protection Act of 1991 (TVPA),\(^2\) permit nationals of foreign states to bring civil actions against their tormentors in federal court, even if the alleged violations took place thousands of miles from U.S. territory.

The mere existence of the provisions codified at 28 U.S.C. § 1350 does not mean that prevailing in a human rights suit is an easy task. Successfully bringing ATCA and TVPA actions is fraught with obstacles. For example, plaintiffs must prove that the federal court in which a suit is brought can properly exercise jurisdiction over the defendant and that it is the most convenient forum for the action.\(^3\) Judges must be convinced that the act-of-state doctrine\(^4\) does not render the case nonjusticiable. If the defendant is

---

1. 28 U.S.C. § 1350 (1994) (empowering federal district courts to hear “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”).
4. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 417-18 (1964) (“To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.’” (quoting
either a foreign sovereign or a recognized head of state, federal courts may not allow the suit to proceed.\textsuperscript{5} In the course of actions premised on the ATCA, parties must make a compelling case that the alleged misconduct runs afoul of the constantly evolving "law of nations."\textsuperscript{6} In addition to surmounting these hurdles, ATCA and TVPA plaintiffs must persuade a court that the alleged tort took place, that the plaintiffs were in fact the victims of the tortious conduct, and that the defendants committed that conduct.

Even if plaintiffs successfully navigate these obstacles and a court finds liability under § 1350, they are unlikely to collect a dime of the judgments they have been awarded.\textsuperscript{7} The dim prospect of recovery in this context undoubtably has a chilling effect on the willingness of human rights victims to regard § 1350 as a viable vehicle for redress. For those who do choose to proceed, they are unlikely to receive the assistance of a vigorous bar. Indeed, advocates who can afford to ignore the bottom line, including law school clinics, nongovernmental organizations (NGOs), and private practitioners willing to engage in § 1350 litigation on a pro bono basis, are usually the only legal actors willing to represent ATCA and TVPA claimants.\textsuperscript{8}

If courts could make § 1350 judgment-creditors whole via monetary relief more consistently, victims of human rights violations might place greater faith in ATCA and TVPA suits. This Note explores and evaluates one means of

---

\textsuperscript{5} See Foreign Sovereign Immunity Act (FSIA), 28 U.S.C. §§ 1602-1611; see also infra text accompanying notes 92-93.

\textsuperscript{6} See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980). In Filartiga, the court held that, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. \textit{Id.} In the context of TVPA suits, a plaintiff must analogously show that the alleged misconduct constitutes torture or extrajudicial killing. See 28 U.S.C. § 1350-2(a)(1)(2).


\textsuperscript{8} See, e.g., Filartiga, 630 F.2d at 877 (plaintiffs represented by the Center for Constitutional Rights); Xuncax v. Gramajo, 886 F. Supp. 162, 168 (D. Mass. 1995) (plaintiffs represented by the Center for Constitutional Rights, El Rescate Legal Services, and the Lowenstein International Human Rights Clinic); Paul v. Avril, 901 F. Supp. 330, 331 (S.D. Fla. 1994) (plaintiffs represented by the Center for Constitutional Rights and the International Human Rights Clinic).
accomplishing this end: seeking the recognition and enforcement\(^9\) of judgments rendered in § 1350 suits in non-U.S. domestic judicial fora.\(^{10}\) It argues that efforts to have ATCA and TVPA decisions recognized can succeed. Indeed, there is nothing about § 1350 judgments that would cause a conscientious non-U.S. court to reject them summarily. In general, however, the success of such collection efforts is likely to depend on intensely case-specific factors.

This Note discusses the dynamics likely to determine the enforceability of ATCA and TVPA judgments in foreign jurisdictions. First, it predicts that § 1350 judgment-creditors, like their counterparts who have successfully litigated other types of controversies, will be attracted to non-U.S. judiciaries that exhibit certain structural features. Part I of this Note surveys these characteristics, concluding that the availability of prejudgment relief as well as the impartiality of judges will prove important as plaintiffs screen potential jurisdictions in which to seek recognition.

When assessing collection requests, non-U.S. courts could potentially consider some of the issues that determine the validity of a purely commercial contract or tort judgment. Part II of this Note identifies those legal requirements that are likely to be difficult for ATCA and TVPA plaintiffs to meet. Concerns relating to personal jurisdiction, subject matter jurisdiction, public policy, choice of law, default judgments, and foreign sovereign immunity are likely to obstruct recognition efforts, thereby hampering § 1350 plaintiffs’ efforts to collect the judgments that U.S. federal tribunals have awarded them.

The legal factors foreign courts consider when determining whether to ratify non-ATCA and -TVPA judgments furnish only the beginnings of a thorough accounting of what will likely matter in the § 1350 collections context. Part III highlights the differences between ATCA and TVPA suits and international commercial contract and tort claims, a staple of transnational litigation. Unlike such actions, § 1350 suits allege violations of the “law of nations.” The activities that § 1350 suits address therefore cannot be separated from governmental assertions of power that offend values embraced by the

---

9. Recognition and enforcement are not the same acts. See Behrooz Moghaddam, Note, Recognition of Foreign Country Judgments—A Case for Federalization, 22 TEX. INT'L L.J. 331, 332 (1987) (noting that a “judgment cannot be enforced without first being recognized, and recognition neither compels nor guarantees enforcement”). But see Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 HARV. L. REV. 1601, 1608 (1968) (asserting that “few distinctions are drawn between recognition and enforcement of foreign judgments”). For the sake of verbal economy, this Note will refer to both acts as recognition.

10. This possibility has been raised on at least one occasion. See John H. Barton & Barry E. Carter, International Law and Institutions for a New Age, 81 GEO. L.J. 535, 548 (1993) (“Judgments by ... domestic courts [rendering § 1350 judgments] are, of course, enforceable within their own country, just like any other judgment by the domestic court. As for foreign enforcement, such judgments are usually given considerable respect in other countries, but practices differ among nations and even among the fifty states of the United States.”). Barton and Carter, however, do not engage in a sustained discussion of the viability of this course of action.
international community, even though they are committed by private actors. Thus, additional factors are likely to impact § 1350 collection efforts. Part III also distills these factors and concludes that they will be decidedly more political than the factors relevant to conventional transnational litigation.

Because these three different sets of dynamics—structural, legal, and political—play fundamentally different roles in the ratification of § 1350 judgments, assessing the precise importance of each is difficult. Initially, structural concerns, such as whether a given judiciary is able to administer justice fairly, will matter a great deal; nevertheless, these concerns will fade into the background upon the initiation of a recognition request. Similarly, the political aspects of a § 1350 suit are likely to exist only at the margins in cases in which it is legally clear that ratification should either ensue or not be forthcoming. When the law is more ambiguous, however, politics will play a central role in the validation effort. For analytic clarity, this Note assumes that non-U.S. judicial decisionmakers will determine the legality of § 1350 recognition efforts before focusing on their political dimensions. This assumption is plausible given foreign tribunals’ core institutional competencies: the processing and resolution of questions of law. Moreover, and for largely the same reason, where politics does intrude into the recognition decision, its intervention is unlikely to be explicit.

Given that some ATCA and TVPA judgment-collection efforts are likely to prevail, analysis of the desirability of this outcome is integral to understanding the full ramifications of the ATCA and TVPA statutes. This Note concludes that such attempts are not likely to interfere with other important human rights projects, such as introducing new § 1350 suits in federal court and criminalizing international human rights norms. Furthermore, collection would probably not undercut the symbolism of ATCA and TVPA judgments. Instead, their recognition may spur the healing process for victims of human rights abuses and enhance the prestige of the statutory provisions authorizing such suits.

I. AMERICAN JUDGMENTS ABROAD: STRUCTURALLY FRIENDLY FOREIGN JUDICIARIES WILL ATTRACT § 1350 JUDGMENT-CREDITORS

Section 1350 collection efforts are most likely to thrive in judiciaries with certain structural properties. First, jurisdictions authorizing prejudgment relief on demand might facilitate the recognition of U.S. judgments. Countries like Switzerland could automatically accord full faith and credit to both § 1350 and commercial judgments rendered by foreign tribunals. Nonetheless, unless

11. Swiss law entitles individuals to "the remedy of attachment." Markus H. Wirth, Attachment of Swiss Bank Accounts: A Remedy for International Debt Collection, 36 BUS. LAW. 1029, 1029 (1981). As Wirth explains, the filing of a suit in a U.S. court could sustain a attachment order sought in a Swiss court. See id. at 1038; cf. Otto Sandrock, Prejudgment Attachments: Securing Loans or Other Claims for Money,
foreign states are willing to authorize immobilizations of a given party’s property at a point early in the litigation taking place in the United States, potential judgment-creditors are not likely to regard the jurisdiction as particularly user-friendly.\textsuperscript{12}

Second, the de facto independence of the relevant judicial structures—their sensitivity to pressures from both public and private entities with explicit political agendas—will also be an important determinant of the success of ATCA and TVPA collection efforts.\textsuperscript{13} Strong courts emerge as the exception, not the rule, in many areas around the world. For example, court-made law, particularly judicial challenges to government policies, counts for very little in states like China,\textsuperscript{14} Cuba,\textsuperscript{15} Ghana,\textsuperscript{16} and Lebanon.\textsuperscript{17}

Because of their independence and willingness to accord attachment remedies to litigants, Western European judiciaries are likely to furnish particularly attractive backdrops for § 1350 collection efforts. First, plaintiffs can secure prejudgment attachment of property with relative ease from the

\begin{itemize}
  \item \textsuperscript{12} See George A. Bermann, \textit{Provisional Relief in Transnational Litigation}, 35 \textit{COLUM. J. TRANSNAT’L L.} 553, 558 (1997) (“Not surprisingly, I conclude that transnational provisional relief is both an imperative of, and a potential threat to, contemporary international litigation.”).
  \item \textsuperscript{13} Exploring this issue is crucial in the context of an initiative to have a § 1350 judgment recognized outside of the United States. One of the objectives of Part III of this Note is to differentiate ATCA and TVPA suits from other claims that arise in transnational litigation. It shows that the political dimensions of cases that courts are routinely called upon to resolve pale in comparison with those that permeate most § 1350 actions. Even parties seeking the ratification of decisions rendered in commercial suits, however, desire assurances that the judicial machinery will not kowtow to other actors that wield influence in the recognizing jurisdiction. See Carlos E. Martínez, \textit{Early Lessons of Latin American Privatizations}, 15 \textit{SUFFOLK TRANSNAT’L L. REV.}, 468, 486 (1992) (“The government should also ensure that the judiciary remains politically independent. Foreign investors are less likely to invest if they lack confidence that local courts will enforce existing laws.”).
  \item Rule-of-law concerns are likely to matter very little to the domestic judiciaries of countries where the torts that turn into § 1350 suits took place. In many ACTA cases, plaintiffs have already exhausted local remedies, both civil and criminal. \textit{See, e.g.}, Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1538 (N.D. Cal. 1987). Section 2(b) of the TVPA likewise mandates that “[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.” 28 U.S.C. § 1350-2(b) (1994). In addition, if a functioning court system existed where the alleged violation took place, the claim brought in federal court would presumably have been dismissed on forum non conveniens grounds. \textit{See, e.g.}, Koster v. (American) Lumbermens Mut. Cas. Co., 330 U.S. 518, 524 (1947). When determining whether a given suit ought to be dismissed on forum non conveniens grounds, modern courts apply a list of “private interest” factors affecting the convenience of the litigants and a list of “public interest” factors affecting the convenience of the forum. \textit{See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).}
  \item \textsuperscript{15} See Berta Esperanza Hernández Truyol, \textit{Out in Left Field: Cuba’s Post-Cold War Strikeouts}, 18 \textit{FORDHAM INT’L J.} 15, 74 (1994).
  \item \textsuperscript{16} See Roger Gocking, \textit{Ghana’s Public Tribunals: An Experiment in Revolutionary Justice}, AFR. AFF., Apr. 1, 1996, at 197.
  \item \textsuperscript{17} See Ed Blanche, \textit{Lebanese Militias Enforce a Rough and Bloody Justice}, \textit{STAR-TRIB.} (Minneapolis-St. Paul), June 1, 1986, at 18A.
\end{itemize}
other domestic political structures as their American counterparts, the national judiciaries of this area play key roles in the prevailing constitutive arrangements of most European states.\textsuperscript{19} Section 1350 export efforts are thus likely to display a decidedly Eurocentric flavor.

\section*{II. LAW AND RECOGNITION: LEGAL FACTORS AND THE AUTHORIZATION OF COLLECTION}

Evaluating the structural features of a foreign judiciary provides only a rough gauge of whether it would validate a § 1350 judgment. Once a jurisdiction that seems responsive to the needs of judgment-creditors is located, the effort to have the ATCA or TVPA verdict recognized is likely to turn on the principles that guide courts' decisions on collection efforts routinely brought by non-§ 1350 judgment-creditors.\textsuperscript{20} The literature on the ratification of foreign judgments has distilled the legal justifications that judges can employ to deny the validation of judgments issued by tribunals sitting in other

\begin{itemize}
\item \textsuperscript{19} Cf., e.g., Elaine Ganley, \textit{Lebanese Terrorist Jailed for Life}, AP, Feb. 28, 1987, available in 1987 WL 3134089 (reporting that a French “special court ignored a prosecution plea for leniency and sentenced a Lebanese terrorist to life in prison Saturday for complicity in the shooting deaths of two diplomats and the attempted killing of a third”); Jan M. Olsen, \textit{Danish Court: EU Treaty Is Constitutional, Opponents Likely To Appeal}, AP, June 27, 1997, available in 1997 WL 4872828 (reporting that “[a] trial court ruled . . . that Denmark’s participation in a treaty designed to create a closer European Union does not violate the country’s constitution”).
\item Additionally, and rarely to their credit, many European states maintain tight relationships with those who rule their former colonies, sometimes intervening in the political affairs of these countries at will. See, e.g., France’s “Mr. Africa,” \textit{Maker of Presidents, Dies at 83}, AP, Mar. 19, 1997, available in 1997 WL 4858219; \textit{Italy Committed to Consolidating Diplomatic Ties with Ethiopia}, Agence France-Presse, Nov. 24, 1997, \textit{available in 1997 WL 13441128}. The personalities with whom European states interact are often situated against human rights activists on the front lines of the struggle to ensure the respect of international human rights standards. One aspect of such special relationships is the maintenance of significant amounts of property by these persons in the ex-metropolitan power. See Stephane Barbier, “\textit{Friends of Congo}” Meet To Discuss Best Way To Aid Kinshasa, Agence France-Presse, Dec. 4, 1997, \textit{available in 1997 WL 13447383}.
\item Although there are a number of compelling arguments for the development of a single standard that would be brought to bear by domestic courts around the world when deciding whether to endorse a foreign judgment, one has yet to emerge. See Robert H. Davis, \textit{NAFTA: Resolving International Payments Conflicts}, 49 DISP. RESOL. J. 76, 81 (1994). The absence of a common approach leads to uncertainty and difficulty. See id. (stating that the “enforcement of a judgment abroad is complex, expensive and can take up to 15 years to resolve”). Without a common framework regulating the recognition of foreign judgments in force at the international level, a judgment given effect in one jurisdiction may be impeached by the courts of another. There may, of course, be overlap between the approaches utilized by jurisdictions in different states.
\end{itemize}
employ to deny the validation of judgments issued by tribunals sitting in other jurisdictions.\textsuperscript{21} The following discussion highlights and then analyzes those legal barriers that are likely to prove especially challenging for ATCA and TVPA plaintiffs.\textsuperscript{22}

A. Personal Jurisdiction

The way that the rendering federal court gained jurisdiction over the § 1350 judgment-debtor could create problems for ATCA and TVPA judgment-creditors undertaking collection efforts in non-U.S. jurisdictions.\textsuperscript{23} In many of the § 1350 suits initiated to date, plaintiffs have relied on tag service of process to establish personal jurisdiction.\textsuperscript{24} In some key European

\begin{itemize}
\item\textsuperscript{21} Deficiencies in judgments can fall under a number of rubrics, including personal jurisdiction, subject matter jurisdiction, exclusive jurisdiction, reciprocity, public policy, fraud, inconsistent judgments, final judgment, choice of law, notice and opportunity to be heard, judgment for a definite sum of money, treaty or government order, default judgment, protective legislation, review of the merits, foreign sovereign immunity, inconvenient forum, and judgment in a criminal or administrative law case. See Ronald A. Brand, Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance, 67 Notre Dame L. Rev. 253, 266 (1991) (listing exceptions to the rule favoring the recognition of judgments codified in various domestic regimes, including the Uniform Foreign Money-Judgments Recognition Act and the Restatement (Third) of Foreign Relations Law).
\item\textsuperscript{22} Although codification of a uniform approach to the recognition of foreign judgments would be a dramatic improvement, one could argue that liberalization should accompany standardization, as both would simplify collection efforts. See Eric B. Fastiff, Note, The Proposed Hague Convention on the Recognition and Enforcement of Civil and Commercial Judgments: A Solution to Butch Reynolds's Jurisdiction and Enforcement Problems, 28 Cornell Int'l L.J. 469, 485 (1995); see also Mathew H. Adler, If We Build It, Will They Come?—The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments, 26 Law & Pol'y Int'l Bus. 79, 81 (1994) (“The denial of recognition and enforcement of American judgments is particularly notable in light of the increased cooperation in other areas of international litigation.”).
\item\textsuperscript{23} Summaries of assertions of personal jurisdiction by rendering courts that foreign tribunals will ratify appear in Adler, supra note 22, at 96-98; L.l. De Winter, Excessive Jurisdiction in Private International Law, 17 Int'l & Comp. L.Q. 706, 707 (1968); Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 Am. J. Comp. L. 1, 13-16 (1988); Robert B. von Mehren & Michael E. Patterson, Recognition and Enforcement of Foreign-Country Judgments in the United States, 6 Law & Pol'y Int'l Bus. 37, 48-56 (1974); Arthur T. von Mehren & Donald T. Trautman, Jurisdiction To Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1135-36 (1966); and von Mehren & Trautman, supra note 9, at 1611-36. At least one of these articles tracks the continuing struggle between civil law and common law states over the permissibility of two bases of personal jurisdiction: the defendant's brief presence and the presence of his or her assets in the rendering jurisdiction. See De Winter, supra. Judicial decisionmakers in countries where common law traditions prevail recoil at the thought of ratifying decisions in foreign cases where the presence of the defendant's assets established jurisdiction. An “alien who leaves his slippers in a hotel in Germany can be sued there for a debt of, e.g., 100,000 DM., due to the presence of assets within the jurisdiction.” Id. at 707. On the other hand, “[i]f, for instance, a person on his way from New York to South Africa is served with a writ during a stop at London Airport, a judgment rendered against him by an English court will hardly be recognized in civil law countnes, at least if the judgment is given in default.” Id. at 712-13.
\item\textsuperscript{24} See, e.g., Kadiv v. Karadžić, 70 F.3d 232, 246-48 (2d Cir. 1995); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); cf. Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir.) (asserting personal jurisdiction over a foreign national defendant who resided in the United States), cert. denied, 117 S. Ct. 96 (1996). “Tag” service refers to the physical service of process on an individual who comes within a judicial district of the United States pursuant to Fed. R. Civ. P. 4(e)(2). See Kadiv, 70 F.3d at 347. This has been accomplished in human rights cases by serving papers on defendants when they are present in the United States. See id.
\end{itemize}
states, this basis falls outside permissible jurisdictional assertions. As a result, these tribunals are likely to impeach ATCA and TVPA verdicts relying on tag service. In contrast, judicial authorities in countries that authorize this procedure, such as the United Kingdom, are less apt to deny the recognition of § 1350 judgments on jurisdictional grounds. Thus, whether given ATCA and TVPA collection efforts prevail is likely to be linked to the validating court’s vision of personal jurisdiction and the specific contingencies that can trigger it.

Section 1350 judgment-creditors could pursue several strategies to overcome the problems they are likely to encounter as a result of having brought tag-service-based suits. Until 1994, it was conceivable that such individuals could rely on the “double execution” of judgments. For example, triumphant ATCA and TVPA plaintiffs could have tried to take advantage of language in the Brussels and Lugano Conventions that appears to authorize this course of action. Article 4 of each instrument provides that “[i]f the defendant was not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall . . . be determined by the law of that State." Article 31 of each instrument, meanwhile, provides that “[a] judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there." Thus, as long as the defendant was not domiciled in one of the countries that was a party to these instruments, the judgment-creditor could have first sought recognition of a § 1350 judgment in Britain, whose courts regard tag service as a proper ground for the exercise of their jurisdiction. If a judge in Britain had

25. See supra note 23.
29. These two instruments play a large role in managing the currency of judgments that are validated in Western Europe. See John F. Powell & Chris Burt, Brussels and Lugano Conventions: What They Are, What They Do, 61 DEF. COUNS. J. 371, 371 (1994) (“The principle purpose of the [Brussels and Lugano] conventions is to facilitate the enforcement of judgments among the contracting states [of the European Union and European Free Trade Association . . . ].”)
30. Lugano Convention, supra note 28, art. 4, 28 I.L.M. at 624; Brussels Conventions, supra note 27, art. 4, 8 I.L.M. at 232.
31. Lugano Convention, supra note 28, art. 31, 28 I.L.M. at 630; Brussels Convention, supra note 27, art. 31, 8 I.L.M. at 237.
32. No member of the European Union (EU) or European Free Trade Association (EFTA), which are where the Brussels and Lugano Conventions are in force, is currently associated with the sort of human rights abuses that often figure in suits based on the ATCA and TVPA. If a European country did commit such violations, relief could be sought at the European Commission of Human Rights or the European Court of Human Rights. See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 290-97 (1997).
33. See supra text accompanying note 26.
decided to ratify the U.S. judgment, the prevailing ATCA or TVPA plaintiff theoretically could then have sought, under Article 26 of the Brussels and Lugano Conventions, for a German, Italian, or Swiss tribunal to validate the British court's recognition of the U.S. judgment. Unfortunately, such petitions are unlikely to succeed. In 1994, in *Owens Bank Ltd. v. Bracco*, the European Court of Justice held that the Brussels Convention forbids the use of this validation strategy.  

Instead, parties that have prevailed in § 1350 suits may attempt to collect on the resulting judgments in states where the judgment-debtor is not a national. Tribunals in these localities may display more flexibility when determining whether the rendering court had jurisdiction over this party. Courts often condition the ratification of foreign judgments on the rendering judge's conformity with rather exacting standards that protect the interests of the recognizing state's nationals. Article 121 of the French Code Michaut, for example, was a graphic illustration of this concern. It provided that

---

34. See Lugano Convention, supra note 28, art. 26, 28 I.L.M. at 629; Brussels Convention, supra note 27, art. 26, 8 I.L.M. at 236.  
36. According to *Owens Bank*, double execution would allow judgment-creditors to circumvent the conditions laid down by a Contracting State for the recognition of judgments of the courts of the non-contracting State in question. If, for example, Contracting State A makes the recognition and enforcement of a judgment of the courts of a non-contracting State conditional on certain criteria, whereas judgments from the non-contracting State are declared enforceable unconditionally in Contracting State B, the judgment creditor could first obtain a declaration of enforceability in Contracting State B and then (pursuant to Article 31 of the Brussels Convention) enforce the judgment without difficulty in Contracting State A by virtue of the decision obtained in Contracting State B.  

Id. at I-127. Until the decision in this case was handed down, uncertainty prevailed over whether Article 26 applied to a contracting-state-issued decree calling for the recognition of a judicial decision rendered by a jurisdiction outside of the EU or EFTA. See Jeremy Carver & Christopher Napier, *United Kingdom, in Enforcement of Foreign Judgments Worldwide* 194, 206 (Charles Platto ed., 1989) (stating that "it appears that 'judgments' do not include: . . . 'judgments on judgments', i.e., a judgment of Country A enforcing a judgment of Country B"); Patrick E. Thieffry, *The European Integration and Transnational Disputes*, in *The European Economic Community: Products Liability Rules and Environmental Policy* 153, 200-01 (PLI Litig. & Admin. Practice Course Handbook Series No. 388, 1990) ("By making explicit reference to writs of execution, the Convention can therefore be read to grant facilitated recognition and enforcement to judgments whereby Member States’ courts ordered enforcement of non-Member State judgments. This point, however, has not been decided by the Court of Justice, and thus remains open.").  
37. For example, von Mehren and Patterson have argued that "United States courts will not recognize or enforce foreign-country judgments—at least not against U.S. citizens or residents—rendered by courts that did not acquire jurisdiction over the parties or property in question," von Mehren & Patterson, supra note 23, at 48-49, and that U.S. "[c]ourts have indicated that U.S. notions of judicial jurisdiction and other policies will not be applied vigorously to cases not involving U.S. citizens or residents," id. at 49 n.56.  
38. Only a small part of the literature on recognition of foreign judicial decisions deals with this subject. As George Delaume has noted, "At the present time, there is no definite answer as to the question of what should be the attitude of a 'disinterested' forum to issues of recognition. This is an issue which does not appear to be the object of much litigation." GEORGE R. DELAUME, Recognition and Enforcement of Foreign Judgments in the Civil Law Countries of the EEC, TRANSNATIONAL CONTRACTS: APPLICABLE LAW AND SETTLEMENT OF DISPUTES § 10.02 (1990) (describing a French decision upholding a Swiss judgment involving litigation between American and Swiss parties). For one example of a brief discussion of this issue, see Juenger, supra note 23, at 29-31.  
39. See Juenger, supra note 23, at 6 (quoting the Code Michaut and citing TRAITÉ ÉLEMENTAIRE DE DROIT INTERNATIONAL PRIVÉ §26-27 (2d ed. 1980)).
"[j]udgments rendered . . . in foreign kingdoms and sovereignties . . . shall have no lien or execution in our kingdom . . . and notwithstanding such judgments, our subjects against whom they have been rendered may contest their rights anew before our judges." 40 In contrast, courts may direct less scrutiny at judgments rendered against non-nationals. 41

Finally, ATCA and TVPA judgment-creditors can target their collection efforts at judiciaries that allow specific contingencies to trigger personal jurisdiction. German courts, for example, must uphold exercises of personal jurisdiction based on the presence of the defendant's assets in Germany. 42 Moreover, they apply the same standards when ascertaining the propriety of the non-German rendering court's exercise of jurisdiction over the parties. 43 In Germany, therefore, judges could find that an American court had jurisdiction over the parties even if its stated assertion of jurisdiction would be considered exorbitant by German standards. 44 Thus, ATCA and TVPA judgment-creditors can exploit specific features of other states' recognition regimes to establish personal jurisdiction in cases when their collection efforts otherwise would be marred because the original action relied on tag service of process.

B. Subject Matter Jurisdiction

Generally, foreign courts seem likely to defer to federal courts' exercise of subject matter jurisdiction over § 1350 claims. 45 Several considerations

40. Id.
41. This urge may be resisted by courts sitting in jurisdictions that derive significant amounts of tax revenue from activities such as banking and investment. If these states acquire reputations for being receptive to the interests of judgment-creditors, by relaxing the test for validating decisions against non-national judgment-debtors, consumers of banking services and investors might move their capital elsewhere, a feat that can be accomplished with remarkable ease. See Kenichi Ohmae, The End of the Nation State: The Rise of Regional Economies 39 (1995).

42. See Christopher B. Kuner, Personal Jurisdiction Based on the Presence of Property in German Law: Past, Present, and Future, 5 Transnat'l Law. 691, 695 (1992) (noting that a "long list" of jurisdictions adopted provisions similar to the German approach, including Austria, several Swiss cantons, Liechtenstein, Greece, Sweden, Norway, Denmark, Japan, two Canadian provinces (Ontario and Quebec), Hungary, Russia, Poland, and Turkey).

43. One approach is for the recognizing court to project the jurisdictional rules it must normally adhere to onto the litigation that produced the judgment to be ratified. See Juenger, supra note 23, at 15 ("The largest single group of reporting countries measure the foreign court's jurisdiction by reference to the bases found in their own laws.").

44. As von Mehren and Trautman note, "Relatively little consideration has been given to whether a basis that was perhaps unavailable to the rendering court but was present on the facts of the case and would satisfy the requested court's jurisdictional test should be acceptable." Von Mehren & Trautman, supra note 9, at 1621. They go on to describe a case in which a domestic court, sitting in the United Kingdom, was called upon to embrace a decision rendered by a French court that, under English jurisdictional rules, did not enjoy jurisdiction over the defendant. See id. at 1621-22. Despite this, "the English court went on to consider such possibly acceptable bases as the defendant's French nationality, French residence, and presence in France when the litigation was commenced, but it concluded that none of these bases could be made out in the actual case and refused recognition." Id. at 1622.

45. Relatively little has been written on whether, when a request for ratification has been made, an inquiry into the subject matter jurisdiction of the foreign tribunal should be conducted. For what exists on
regarding this issue could make recognizing ATCA and TVPA judgments difficult, however. In some jurisdictions, such as the United States, the Philippines, Romania, and Australia, the judgment-recognizing court must evaluate whether the rendering tribunal was competent to decide the controversy before it. Although this issue could arise in the context of some ATCA recognition efforts, it is unlikely to prove to be a significant barrier to collection. When construing the ATCA, some federal judges have held that plaintiffs seeking to invoke it must establish a private right of action under either a treaty or the law of nations before the suit being brought can proceed. In other contexts, the provision has been held to provide "a cause of action" for "violations of current customary international law." Although the exact nature of the ATCA has been hotly debated in § jurisprudence and by scholars, this latter view seems to have prevailed. A foreign judicial decisionmaker would probably not attempt to displace the conclusion that most U.S. judges have reached with regard to the competencies that the ATCA confers upon federal courts. Such individuals are unlikely to be familiar with the finer points of U.S. constitutional doctrine regarding federal jurisdiction or to conduct searching inquiries into the origins of this provision. Moreover, because the TVPA clearly "establishes a civil

this topic, see Adler, supra note 22, at 101-02; Juenger, supra note 23, at 18; von Mehren & Patterson, supra note 23, at 54-55 & n.90; and Moghaddam, supra note 9, at 338-39.

46. See Juenger, supra note 23, at 18 n.72.
47. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring).
49. See, e.g., Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995); Tel-Oren, 726 F.2d at 777-91 (Edwards, J., concurring); id. at 801-23 (Bork, J., concurring).
51. See Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir.) (reading "the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke section 1350"), cert. denied, 117 S. Ct. 96 (1996); Kadic, 70 F.3d at 246 (finding that the "Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture"); Hilao v. Estate of Marcos, 25 F.3d 1467, 1474-75 (9th Cir. 1994) (rejecting the assertion that § 1350 is a jurisdictional provision that does not grant a cause of action and concluding that the provision "creates a cause of action for violations of specific, universal and obligatory international human rights standards"). But see Trajano v. Marcos, 978 F.2d 493, 503 (9th Cir. 1992) (noting the district court's agreement with the plaintiff that § 1350 "is simply a jurisdictional statute and creates no cause of action itself").
52. According to Juenger, such rules mandating "the recognition court to wrestle with highly technical rules of foreign law on the allocation of judicial power serve[] no useful purpose." Juenger, supra note 23, at 18. This difficulty has been confronted by American courts. See, e.g., John Deere Ltd. v. Sperry Corp., 754 F.2d 132, 136 (3d Cir. 1985) (stating that federal courts should not decide technical questions of other nation's laws); In re Trinidad & Tobago, 117 F.R.D. 177, 178 (S.D. Fla. 1987) ("Foreign tribunals are far more competent to decide issues of their own making than are United States courts. If the situation were reversed, this court would certainly prefer to interpret United States law rather than have a foreign tribunal sit in judgment."). The In re Trinidad & Tobago court stated:

As a matter of law and policy, United States courts should refrain from undertaking an extensive analysis of foreign law in determining whether to honor a request for judicial assistance, and should confine its inquiry solely to whether the evidence requested complies with language of 28 U.S.C. § 1782 . . . . Our courts should not become entangled in interpreting foreign law when deciding whether to grant requests for judicial assistance.
action for damages against '[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture [or] . . . extrajudicial killing,' overseas courts are unlikely to raise subject matter questions about such claims.

Rulings by U.S. judges on the range of activities proscribed by the law of nations may be more vulnerable to scrutiny by foreign tribunals. The court in Forti v. Suarez-Mason, for example, noted that there is a "universal consensus in the international community as to [the] binding status and . . . content [of specific standards]. That is, they are universal, definable, and obligatory international norms." Nevertheless, it is often unclear how rules that meet this threshold are segregated from the mass of norms that have been characterized as forming part of the law of nations. In the course of ATCA and TVPA suits, courts have determined that customary international law forbids numerous practices, including torture, prolonged arbitrary detention, summary execution, causing disappearances, genocide, and war crimes. A non-U.S. court would probably consider the extent to which the international human rights instruments that it is obligated to enforce domestically forbid the alleged conduct. Thus, when assessing whether the rendering court had subject matter jurisdiction over the controversy, the foreign

---


57. See, e.g., Kadic v. Karadžić, 70 F.3d 232, 243-44 (2d Cir. 1995); Tranjano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1993); Forti, 672 F. Supp. at 1541.

58. See, e.g., Kadic, 70 F.3d at 242-43; Xuncax, 886 F. Supp. at 184; Forti, 672 F. Supp. at 1541.

59. See, e.g., Xuncax, 886 F. Supp. at 184; Forti, 672 F. Supp. at 1542.


61. See, e.g., Kadic, 70 F.3d at 241-42.

62. See, e.g., id. at 242-43.

tribunal might inquire into the nature of the allegations made by ATCA judgment-creditors instead of inquiring whether this statutory provision empowers federal courts to hear such cases. In those cases in which the conduct alleged is outlawed in the human rights instruments in force in the recognizing state, the § 1350 collection effort is unlikely to be thwarted on subject matter jurisdiction grounds.

C. Public Policy

Public policy concerns may interfere with collection efforts premised on successful § 1350 claims. Uncertainty regarding its exact contours may pose problems for § 1350 judgment-creditors. In some states, this exception to the general judicial posture favoring recognition encompasses only substantive outcomes that violate the recognizing jurisdiction's public policy. In others, both procedure and substance count.

Invoking public policy arguments, non-U.S. courts have opted, for example, not to recognize some American judgments that incorporate punitive damages. Such damages have formed part of many of the judgments that have been rendered in § 1350 suits. Their presence, however, does not necessarily mean that a non-U.S. court will deem the entire judgment

---

64. For a sampling of scholarly work on the public policy requirement for recognition, see, for example, Juenger, supra note 23, at 21-23; von Mehren & Patterson, supra note 23, at 61-64; and von Mehren & Trautman, supra note 9, at 1670-71. Closely linked to this requirement is that the foreign decision dovetail with the recognizing tribunal's perspective on "natural justice." British courts apply this standard. See Dennis Campbell & Dharmendra Popat, Enforcing American Money Judgments in the United Kingdom and Germany, 18 S. Ill. U. L.J. 517, 532 (1994).

65. Many observers characterize the public policy requirement as a "catch-all reason for denying recognition to a foreign judgment." R. Doak Bishop & Susan Burnette, United States Practice Concerning the Recognition of Foreign Judgments, 16 Int'l L. 425, 436 (1982). Adler asserts that "the notion of public policy defies concrete definition, and its application tends to be somewhat ad hoc." Adler, supra note 22, at 104. This ambiguity points to the need for judicial guidance regarding what methodology courts should use to ascertain the content of public policy at any given time. As Adler observes, "[I]deas about what constitutes public policy go to the heart of a country's existence as an independent and individual 'she..." Id. But see Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & Comp. 211, 221 (1994) (stating that "the public policy requirement also fails to leave much room for ambiguity").

66. See Juenger, supra note 23, at 22 & n.97 (citing to German, Polish, and Israeli examples). Many of the jurisdictions that fit into this category refuse the recognition of judgments that are deemed to be procedurally defective. These requirements simply exist independently of the prohibition on the ratification of foreign decisions that violate public policy. For example, a court's refusal to recognize a judgment could be made on notice or opportunity-to-be-heard grounds.

67. See Behr, supra note 65, at 225.

68. See id. at 228-29.

The use of discovery in § 1350 actions has also given rise to public policy concerns. The reservations Judge Bork voiced in Tel-Oren v. Libyan Arab Republic regarding the active use of discovery in ATCA litigation are similar to those that foreign judges might express in evaluating § 1350 collection requests. At least in some contexts, however, the liberal use of discovery in efforts to win § 1350 suits should not mortally wound attempts to secure the validation of these judgments. Indeed, the German Federal Supreme Court recently reached a conclusion along these lines. ATCA and TVPA plaintiffs can maximize the likelihood of recognition by adhering to the standards set out in the Hague Evidence Convention, which governs the use of extraterritorial discovery requests in transnational litigation.

D. Choice of Law

Choice-of-law issues pose a distinct challenge to the recognition efforts of § 1350 judgment-creditors. Some jurisdictions continue to "provide some form of review of the rendition court's choice-of-law determination." If federal courts followed the approach to the ATCA endorsed by Judge Edwards in Tel-Oren, choice-of-law problems might interfere with the collection of judgments authorized by this statutory provision. According to Edwards, the statute

---

70. See Behr, supra note 65, at 231 (discussing a German case in which a California judgment was enforced, except for punitive damages).
71. See id. at 228-29.
72. 726 F.2d 774 (D.C. Cir. 1984) (per curiam).
73. According to Judge Bork, the "prospect of a federal court ordering discovery on such an issue [as whether a principal-agent relationship existed between Libya and the Palestine Liberation Organization], to say nothing of actually deciding it, is, or ought to be, little short of terrifying. If anything is likely to disturb the 'PEACE of the CONFEDERACY,' this is." Id. at 821-22 (Bork, J., concurring).
75. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. Professor Brand, for example, states: As with the Service Convention, the U.S. Supreme Court has ruled that exclusive resort to the Evidence Convention is not required. While this may allow short-cuts in the discovery process, the ability to enforce any resulting judgment should be considered at all stages, and Convention procedures should be followed wherever possible. Reliance on Convention channels to obtain evidence should diminish the possibility of grounds for denial of recognition or enforcement in a foreign court. Ronald A. Brand, Enforcement of Judgments in the United States and Europe, 13 J.L. & COM. 193, 206-07 (1994) (footnote omitted).
76. For speculation on whether there is a political dimension to the public policy exception, see infra text accompanying note 157.
77. For an overview of the choice-of-law requirement, see Bishop & Burnette, supra note 65, at 437; Juenger, supra note 23, at 34; and von Mehren & Trautman, supra note 9, at 1636-55.
78. Juenger, supra note 23, at 34 n.194 (citing to the Philippines, France, and Poland as examples).
may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged. Unlike the . . . approach [taken in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980),] . . . the substantive right on which this action is based must be found in the domestic tort law of the United States.79

The methodology endorsed by Judge Edwards has yet to break into the mainstream of § 1350 jurisprudence.80 In cases relying on his approach,81 however, a recognizing court might question whether the appropriate law was chosen to decide the case.

Section 1350 judgment-creditors can avoid choice-of-law scrutiny by persuading federal courts to render decisions by applying international law. In *Filartiga v. Pena-Irala*,82 for example, the Second Circuit held that this body of rules, as opposed to local domestic law, should play a leading role in determining whether a violation of the law of nations had taken place and how any infringement ought to be remedied.83 Because all states recognize international law, its application by federal courts when resolving ATCA claims is likely to be regarded by non-U.S. tribunals as legitimate. Thus, if § 1350 plaintiffs succeed in persuading federal courts to rely on international law, choice-of-law problems would render tribunals outside of the United States unable to reject § 1350 collection requests.

---

80. In *Trajano v. Marcos*, 978 F.2d 493, 503 (9th Cir. 1992), the Ninth Circuit endorsed a variant of this approach, affirming the district court's view that the ATCA "is simply a jurisdictional statute and creates no cause of action itself. [The district court] proceeded to determine damages on default under Philippine law. From this we assume that the court did not rely on treaties or international law to provide the cause of action, only to establish federal jurisdiction." For a comment on this approach, see Clyde H. Crockett, *The Role of Federal Common Law in Alien Tort Statute Cases*, 14 B.C. INT'L & COMP. L. REV. 29, 48-49 (1991). Interestingly, Crockett argues that the district court in *Filartiga* on remand "applied a common-law choice-of-law approach." *Id.* at 48 (discussing *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984)). It seems doubtful whether this was really the case. Indeed, the district court held that, where the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international "law," the interests of the global community transcend those of any one state. That does not mean that traditional choice-of-law principles are irrelevant. Clearly the court should consider the interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States. *Filartiga*, 577 F. Supp. at 863-64. The court strove to reconcile this approach with one that was faithful to "the principles collected under the rubric of conflict of laws." *Id.* at 863.

81. In *Xuncax v. Gramajo*, 886 F. Supp. 162, 181-83 (D. Mass. 1995), the district court toyed with the idea of traveling down the path Judge Edwards recommended, implying that it would be possible to apply either Massachusetts or Guatemalan law. See *id.* at 181-83. It noted, however, that it might not matter which domestic law was chosen. For example, Judge Woodlock asserted, "I note, however, that I would reach substantially the same result here if I were to apply Massachusetts tort law, such as the Wrongful Death Act, or Guatemalan law." *Id.* at 182 n.22 (citations omitted).
82. 630 F.2d 876 (2d Cir. 1980).
83. See *id.* at 886-87.
E. Default Judgments

Courts' skepticism of default judgments may problematize requests to collect § 1350 judgments. Because exceedingly few defendants contest ATCA and TVPA claims, many matters that might arise in an adversarial context do not receive judicial attention during § 1350 litigation. As a result, a validating court may subject default judgments to greater scrutiny than other judgments. As Judge Woodlock noted in *Xuncax v. Gramajo*, "Answering [the] questions [before the court] has been made extraordinarily difficult because, while plaintiffs' contentions have been presented with exceptional skill by exceedingly competent counsel, defendant has offered no defense." The court also remarked that "extended consideration [was] necessary to explore—without adversarial assistance—the potential defenses available." As long as a § 1350 suit can be reconciled with basic due process standards, however, the resulting default judgments ought to withstand the heightened attention that recognizing courts direct at them.

F. Foreign Sovereign Immunity

Efforts to collect ATCA and TVPA judgments entered against foreign sovereigns and their agents or representatives are likely to encounter particular difficulty. Governmental authorities occupy a major role in the life of the global economy. Such entities can therefore expect increasingly to be targeted in foreign courts for the types of acts and omissions for which private

---


85. Von Mehren and Trautman therefore conclude:

The potential for unfairness is clearly greater when one party does not appear; moreover, in such cases the trial court is proceeding with no immediate prospect of appellate review. When the original judgment was not by default, it may be thought that the unsuccessful party either sought review—in which even he presumably has had an appellate testing of the fact-finding procedures—or acquiesced in the findings, in which event he should not be allowed to reopen the matter.

Von Mehren & Trautman, supra note 9, at 1627.

86. See Adler, supra note 22, at 106 ("A judgment rendered in default complicates the recognition and enforcement process because the enforcing court is compelled to conduct a more searching review to ensure that the defendant was accorded fundamental fairness.").


88. Id. at 169.

89. Id.

entities have long been sued.91 Because governments keep assets in a variety of locales, efforts to have these judgments recognized in multiple contexts might be possible.

In the United States, the Foreign Sovereign Immunity Act (FSIA)92 provides, subject to a number of exceptions, that federal courts lack jurisdiction to hear suits brought against foreign sovereigns.93 Discussion of the immunities states and their servants enjoy for § 1350 purposes figures prominently in many of the decisions involving such claims.94 Sovereign immunity is also a recurring theme in scholarly commentary on these laws.95 In Argentine Republic v. Amerada Hess Shipping Corp.,96 the Supreme Court held that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts."97 Thus, suits based on either statute, the ATCA or the TVPA, cannot target foreign governments or, by extension, the sizeable assets they hold in the United States and other states.

Much of the discussion relating to foreign sovereign immunity in the § 1350 context has focused on the FSIA's applicability to individuals.98 For the time being, the argument that the FSIA simply does not apply to individual conduct appears unassailable.99 If judicial fiat were to undermine this notion,

91. According to Rebecca Simmons, [Under the [Foreign Sovereign Immunities Act (FSIA)] "agencies or instrumentalities" of foreign governments are always granted sovereign status, and the same principles are used to determine the availability of sovereign privileges in cases involving these enterprises as in cases involving sovereign states. Because these entities are generally engaged in commercial activities, the FSIA rarely grants them immunity . . . .


93. For background material on foreign sovereign immunity and the reciprocity requirement, see Behr, supra note 65, at 222; and von Mehren & Patterson, supra note 23, at 75-76.


97. Id. at 434.

98. See, e.g., Joan Fitzpatrick, The Claim to Foreign Sovereign Immunity by Individuals Sued for International Human Rights Violations, 15 WHITTIER L. REV. 465, 466 (1994) (arguing that the "legislative history of [the FSIA] indicates that Congress never adverted to the possibility of a natural person falling within its scope").

99. The contention that individuals fall outside the scope of the FSIA is said to be in line with case law on this subject. In Amerada Hess, the Supreme Court found that "[the Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states." 488 U.S. at 438. Lininger presents a number of reasons that individuals should not be able to rely on the FSIA as a protection from suit. See Lininger, supra note 95, at 185-88. In 1990, however, the Ninth Circuit defied this conventional wisdom
ATCA and TVPA plaintiffs might claim that the FSIA immunizes only official conduct. Plaintiffs have also contended that, even if individuals fall within the scope of the FSIA, a government can waive their immunity. Thus, even before § 1350 plaintiffs confront the foreign sovereign immunity issue in collection efforts overseas, it is likely to figure in the litigation of ATCA and TVPA claims before federal courts.

The laws that a non-U.S. tribunal is obligated to enforce domestically will determine whether the tribunal will impeach a § 1350 judgment on foreign sovereign immunity grounds. If these legal rules immunize individuals who are situated in mid- and high-level positions in the security infrastructures of other states, the probability of § 1350 collection will be drastically reduced, because such persons are usually the defendants in ATCA and TVPA suits. If, instead, the state's foreign sovereign immunity laws proscribe only suits against foreign heads of state (the approach taken by the U.K. statute on foreign sovereign immunity, for example), ATCA and TVPA judgment-creditors are likely to encounter fewer recognition problems. The success of § 1350 collection efforts will thus depend on the position held by the defendant as well as the approach to foreign sovereign immunity taken by the jurisdiction in which recognition is sought.

G. Summary

Like parties seeking the validation of ordinary tort and commercial contract claims, § 1350 judgment-creditors confront a series of stark legal challenges en route to a successful recognition effort. In the case of ATCA and TVPA collection efforts, these fall under six rubrics: personal jurisdiction, subject matter jurisdiction, public policy, choice of law, default judgment, and foreign sovereign immunity. If the way in which § 1350 suits are brought is carefully modulated by their managers, it appears probable that the legality of ATCA and TVPA validation efforts will be affirmed.

by holding, in Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990), that the FSIA blocked some suits against individuals. According to Lininger, however, "[e]ven under the Ninth Circuit's standard, plaintiffs in human rights suits should encounter little difficulty. Where the defendants have exceeded the scope of their authority, the FSIA does not apply." Lininger, supra note 95, at 188.

100. See Hilao v. Estate of Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994) ("In this case, the action is against the estate of an individual official who is accused of engaging in activities outside the scope of his authority. FSIA thus does not apply to this case.").


III. POLITICAL FACTORS IN THE RECOGNITION OF § 1350 CLAIMS

This Note has thus far analyzed § 1350 collection actions as if they would proceed in the same way that ordinary tort and contract judgments would be collected abroad. Significant differences between these two species of suits, however, suggest that political considerations will also come into play upon initiation of a § 1350 collection request.

A. The Differences Between § 1350 Suits and Transnational Commercial Contract and Tort Claims

Section 1350 actions differ from the vast majority of transnational tort and commercial contractual disputes that are routinely brought in U.S. courts. To be sure, in some respects, including parties, procedures, and remedies, there are similarities. Private parties (or a governmental agency acting as a private entity) defend against both contractual and purely commercial tort claims. Roughly the same can be said of ATCA and TVPA suits. The same procedural rules apply to bringing and litigating both types of suits in U.S. federal courts. If the plaintiffs prevail, the remedy is the same in both instances: the right to a sum of money or, in extraordinary instances, some other remedy.

Significant differences emerge, however, when the extralegal significance of pursuing each type of suit is appraised. First, the context of § 1350 actions is politically supercharged. Enemies of brutal, but diplomatically powerful, regimes rely on ATCA and TVPA claims as a weapon of the politically weak. It is possible to argue that the alleged violations offend an innate moral code that transcends nationality, ethnicity, political orientation, socioeconomic status, and religious world view. Although private actors play the role of defendants in such actions, in many cases they are standing in for the governmental authorities and agencies that design and execute policies and practices irreconcilable with basic international human rights norms.

In contrast, the political symbolism and social ramifications of most commercial civil actions are negligible. Although judicial action to remedy violations of contractual provisions plays an important role in the smooth

---

104. See supra Section II.F.
105. Both types of suits are governed by the Federal Rules of Civil Procedure.
106. See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2349 (1991) (claiming that "broader strategic goals" of the human rights community "are often served by a declaratory or default judgment announcing that a transnational norm has been violated" and stating that "[e]ven a judgment that the plaintiff cannot enforce . . . empowers the plaintiff by creating a bargaining chip for use in other political fora").
107. See, e.g., Forti, 694 F. Supp. 708 (reporting that the "complaint in this action alleged numerous causes of action against defendant . . . growing out of events which allegedly occurred in the . . . Argentine military's so-called 'dirty war' against suspected subversion").
functioning of a dynamic global marketplace, finding a given defendant in breach of a contract or liable for a tort rarely advances any discernible ideological agenda. Indeed, some commentators advocate efficient breach of contract as long as the injured party receives compensation. Meanwhile, in controversies involving non-human-rights tort claims, politics is only somewhat likely to percolate to the surface.

Second, the international community appears to place a higher premium on addressing human rights violations than it does on remedying contractual breaches and the commission of traditional torts. In the human rights field, states routinely condemn practices committed by their counterparts that they regard as abhorrent. Sometimes, states even go to war over such practices. NGOs, meanwhile, take authorities to task for creating and implementing policies that cannot be squared with contemporary human rights standards. Finally, human rights concerns remain an integral component of the agendas of supranational entities such as the United Nations, the


109. An example of a commercial case with ideological implications might involve a dispute between a massive multinational entity (MNE) and a small private enterprise hailing from a developing state that is forced to declare bankruptcy because of the defendant MNE’s failure to perform a contractual obligation. Finding for the plaintiff in such a controversy might be regarded as furthering agendas favoring the Third World. Such sympathies are sometimes suspected of shaping the outcomes of particular controversies, such as the International Centre for the Settlement of Investment Disputes (ICSID) arbitration involving the Klöckner Group, a German multinational, and Cameroon. See generally Jan Paulsson, The ICSID Klöckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements, 1 J. INT’L ARB. 145 (1984).

110. See OLIVER WENDELL HOLMES, The Path of the Law, in COLLECTED LEGAL PAPERS 167, 175 (1920) (“The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.”); see also Thomas D. Morgan & Robert W. Tuttle, Legal Representation in a Pluralist Society, 63 GEO. WASH. L. REV. 984, 1021 (1995) (“[O]ver the past century, breach of contract has lost much of its normative significance.”). Even governments can stomach the breaching of contracts that result in the expropriation of property belonging to their nationals as long as the taking is accompanied by “prompt, adequate, and effective” compensation. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. c (1987).

111. For example, politics bled into the tort litigation in Indian courts spawned by the environmental disaster in Bhopal. See generally JAMIE CASSELS, THE UNCERTAIN PROMISES OF LAW: LESSONS FROM BHOPAL (1993).


Organization of American States, the European Union, the Council of Europe, and the Organization for Security and Cooperation in Europe.115

In contrast, no corresponding mobilization of resources has taken place in an effort to stamp out the breaching of contractual provisions or the commission of conventional torts. In the early 1980s, the Convention on Contracts for the International Sale of Goods (CISG),116 a U.N. instrument, came into force. This accord, however, provides only a set of default rules for firms that engage in a discrete range of transactions. In addition, by providing for damages, the CISG assumes that some agreements will be breached.117 Meanwhile, unintentional torts are regarded as an inevitable, though undesirable, price the world pays for hosting a complex, high-technology society.118 Intentional torts, on the other hand, are regarded as important concerns,119 but it can be claimed that the harms caused by delicts like defamation are not comparable with those resulting from human rights abuses such as torture and extrajudicial executions.

Because of the stark differences between § 1350 claims and suits brought to vindicate rights and enforce duties of a commercial or traditional tort nature, it is likely that nonlegal considerations will strongly influence the collection of § 1350 judgments. If ATCA and TVPA judgment-creditors begin to demand the validation of decisions rendered in these suits in non-U.S. legal contexts, political considerations are likely to buttress such efforts, especially in cases where the need to validate is compelling, but less certainty exists as to whether the legal requirements for recognition have been fulfilled.120

---

115. For example, United Nations human rights activities are carried out under the auspices of the U.N. High Commissioner for Human Rights. See, e.g., Yadira Ferrer, Colombia-Human Rights: U.N. Delegate Condemns Murders of Activists, Inter Press Serv., May 20, 1997, available in 1997 WL 7075453. The Human Rights Committee also plays a key role. See, e.g., U.N. Human Rights Committee Condemns Senegal, Sudan, Africa News Serv., Nov. 13, 1997, available in 1997 WL 15137239. The punishment and deterrence of human rights violations lies at the heart of the work of the two international criminal tribunals, one for Rwanda and the other for the former Yugoslavia, that the U.N. Security Council established. See James E. Dorsey, International Human Rights, 31 Int'l Lw. 659, 659 (1997) (“The [Yugoslav] Tribunal has four goals: (1) stopping the commission of war crimes; (2) bringing perpetrators to justice; (3) ending the cycle of crime and recrimination between the contending parties; and (4) documenting the crimes for history before the guilty can attempt to rewrite the historical record.”).


117. For treatment of the damages to which an injured party is entitled, see Delchi Carrier SpA v. Rotorex Corp., 71 F.3d 1024, 1028 (2d Cir. 1995), which held that, under the CISG, if the breach is “fundamental” the buyer may either require delivery of substitute goods or declare the contract void and seek damages.

118. Cf. Fleming James, Jr. & John J. Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769, 769-77 (1950) (arguing that industrial and vehicular accidents are simply “inevitable” tragedies caused by accident-prone individuals whose physical and psychological make-up and unconscious habits cause them to pose inordinate dangers to themselves and others).


120. For example, a recognizing court experiencing doubts about the jurisdictional pedigree of a given § 1350 judgment might, in some situations, feel compelled nonetheless to recognize it, justifying this result by stressing the need for comity.
B. Political Factors Favoring § 1350 Judgment-Creditors

Five nonlegal factors may increase the likelihood that a foreign tribunal will embrace ATCA and TVPA judgments. These dynamics could come into play even though it is unlikely that a non-U.S. court would mention them explicitly.

1. Severity of the Underlying Conduct

Overseas courts called upon to embrace § 1350 decisions will likely be more receptive to the recognition effort if ATCA and TVPA judgment-debtors have been found liable for committing heinous acts. Allegations made in the course of some § 1350 suits have been particularly ghastly. Others are fragments of larger events that have faced almost universal condemnation. The indignation that these horrid accusations have spawned cannot be discounted. In other contexts, such as criminal law, the commission of particularly heinous acts can prompt strong judicial action. In the case of human rights abuses, judges may feel similarly obligated to respond favorably to collection efforts where particularly horrific fact patterns are alleged.

121. See, e.g., Abebe-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir.) ("Shortly after her arrest, Negewo and guards interrogated and tortured her for a period of several hours. Negewo and several guards instructed Taye to remove her clothes, bound her arms and legs together, hung her from a pole, and severely beat her. They then poured water onto her wounds to increase her pain. Taye received no medical care for the wounds and, as a result of the torture, bears permanent physical scars."). cert. denied, 117 S. Ct. 96 (1996); Kadic v. Karadžić, 70 F.3d 232, 237 (2d Cir. 1995) (mentioning that "two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death"); Filarita v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) ("Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay."). Some § 1350 suits, especially those that have failed, have not involved as ghastly conduct. See, e.g., Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 215 (N.D. Ill. 1982) (holding that the expropriation of property is not prohibited by customary international law).

122. Allegations made in the Kadic case fit into this category. See Kadic, 70 F.3d at 236-37 (alleging "various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war").


124. Cf., e.g., Susan L. Pilcher, Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant, 50 ARK. L. REV. 269, 311 (1997) (noting that aliens who commit certain crimes of moral turpitude, which have been described as "conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one’s fellow man or society in general," are subject to deportation); Leslie Holdcroft, Brutality of Murder Earns Long Sentence, News Trib. (Tacoma, Wash.), Feb. 12, 1994, at B1 ("In the sentencing Friday of an Auburn man convicted of killing his wife, a King County Superior Court judge made two things clear: She had seen a lot of murders. This one was unforgettable.").
2. The Judicial Decisionmaker's Consciousness of the Violations

If foreign judges are aware of the events that prompted the filing of specific § 1350 suits, including narrations that portray victims in a sympathetic light, they may be more hesitant to block collection requests. A steadily increasing number of conflicts around the world, ranging from brutal ethnic wars to savage government crackdowns, have served as the factual predicates for § 1350 suits.125 Of course, not all are documented with equal intensity. During the adjudication of the claims that were pressed in Filarriga v. Pena-Irala,126 Paul v. Avril,127 Xuncax v. Gramajo,128 and Abebe-Jira v. Negewo,129 the political situations in Paraguay, Haiti, Guatemala, and Ethiopia, respectively, did not receive much media scrutiny.130 In other contexts, such as in Hilao v. Estate of Marcos131 and Kadic v. Karadzíć,132 the U.S. press publicized the factual backdrops more thoroughly.133 If the recognizing judiciary is similarly exposed to such extensive coverage, the efforts of § 1350 judgment-creditors may be facilitated.

This conclusion is reinforced by evidence from different contexts. Holly Fechner has drawn attention to the connections between attempts to educate judges about sexual harassment and judicial attempts to remedy sexual harassment claims.134 She argues that “recent cases demonstrate that feminist consciousness raising has influenced some judges’ descriptions of the facts in

125. See, e.g., Abebe-Jira, 72 F.3d at 845 (arising out of a brutal military dictatorship in Ethiopia in the mid-1970s); Kadic, 70 F.3d at 236 (discussing “atrocities committed in Bosnia”); Paul v. Avril, 901 F. Supp. 330, 331 (S.D. Fla. 1994) (involving “the claims of six prominent Haitian citizens, opponents of the ruling military regime, for damages suffered by torture and false imprisonment directed by Prosper Avril who was then military ruler”).
126. 630 F.2d 876 (2d Cir. 1980).
129. 72 F.3d 844 (11th Cir.), cert. denied, 117 S. Ct. 96 (1996).
130. See Christopher Hanson, As Cold War Fades, Information Flows but Not from Third World, SEATTLE POST-INTELLIGENCER, Aug. 1, 1991, at A1 (“Most information flows among the Northern Hemisphere’s developed countries—the United States, Europe, Japan—and from North to South. Very little flows from South to North, or from one Southern Hemisphere nation directly to another.”); Robert Walker, We Have Blind Spots Everywhere, Not Just in Latin America, MONTREAL GAZETTE, June 4, 1990, at B3 (discussing the lack of coverage of events in Sudan); Lawrence Weschler, Baghdad in Brazil, COLUM. JOURNALISM REV., Jan. 1, 1991, at 10 (discussing the limited coverage of former President George Bush’s trip to Latin America as illustrative of the media’s inattention to regional topics).
131. 25 F.3d 1467 (9th Cir. 1994).
132. 70 F.3d 232 (2d Cir. 1995).
sexual harassment cases.” Moreover, the power of media outlets generally has also been accorded judicial notice. The Supreme Court has observed that “[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused.” Other commentators have noted concerns about journalism’s playing a crucial role in shaping certain judicial processes. Thus, if the media in jurisdictions where § 1350 collection is sought give the judgment-creditors a sympathetic hearing, the prospects for validation may be increased.

3. Influence Wielded by Constituencies Interested in Redress

ATCA and TVPA collection attempts are more likely to prevail in jurisdictions where human rights groups are active. A variety of interests fuel § 1350 litigation, ranging from NGOs favoring resolute action on the part of domestic courts in promoting human rights to audiences angling for the invigoration of customary international law. These agendas often transcend national boundaries. For example, Human Rights Watch, which supported the Kadic suit, has taken numerous European authorities to task for implementing policies that are questionable on human rights grounds.

135. Id. at 486. Fechner argues that “[s]exual harassment law changed because judges and society at large began to look at facts differently, not because courts simply decided a new theory was more appropriate. Facts previously discounted could now be categorized under the rubric of sexual harassment.” Id. at 487.

136. Estes v. Texas, 381 U.S. 532, 544 (1965). The Court drew attention to the fact that “there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized.” Id. at 538.

137. See, e.g., Ann E. Donlan, Ex-Lover Charges Hub Cop Threatened Her with Sex Tape, BOSTON HERALD, Dec. 8, 1993, at 24 (reporting the defense attorney’s complaint “that the judge’s bail decision was influenced unfairly by media coverage”); Asher Felix Landau, Fairness for Demjanjuk, JERUSALEM POST, Nov. 22, 1989, at 5 (reporting an Israeli Supreme Court justice’s claim that “[h]e was... far from holding... that a professional judge could never be influenced by a newspaper publication”); Sandy Usul, Miura’s Daughter Pleads for Help, Information in LA, Japan Econ. Newswire, Nov. 18, 1994, available in Westlaw, All News Plus Wires (quoting a daughter’s claim that her father’s conviction was erroneous, based on her belief that the “judges must have been influenced by the Japanese mass media, which presented him as a criminal long before his trial”). But cf No Trial by the Press in Indonesia, Says Expert, JAKARTA POST, June 9, 1997, available in 1997 WL 11478750 (reporting that “[j]udges’ verdicts are often influenced by economics or pressure from authorities but not by the press, [Indonesian] legal experts said yesterday”).

138. In Kadic, Alliances (an African Women’s Network), Human Rights Watch, and the International Human Rights Law Group filed briefs as amici curiae. See Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995). On the brief for plaintiffs were practitioners affiliated with the Center for Constitutional Rights, the International Women’s Human Rights Clinic, the International League of Human Rights, the Allard K. Lowenstein International Human Rights Clinic, and the NOW Legal Defense and Education Fund. See id. at 235-36.

139. See id. at 232.

140. See, e.g., Douglass W. Cassel, Jr., Court Threatened by Post-Cold War Fallout, CHI. DAILY L. BULL., Mar. 12, 1996, at 5 (reporting that, according to Human Rights Watch, “[i]t is entirely inappropriate... for Europe’s foremost human rights body [the Council of Europe] to admit as a member a country [Russia] whose government has so repeatedly and so recently shown scorn for civilian life”); Martin Walker, Pressed Down in the Wicked Kingdom US Human Rights Monitors Are Attacking Growing Restrictions on Liberty in Britain, GUARDIAN (London), Mar. 3, 1993, at 13 (reporting that “Britain is the new Wicked Kingdom, according to a highly critical report to be published in the US this week by Human
Efforts to have § 1350 decisions recognized may receive similar support from human rights organizations. Of course, the temptation to overestimate the clout these actors wield in specific decisionmaking processes should be resisted. Those with vested interests, often profiting monetarily from their cozy relationships with the targets of ATCA and TVPA litigation, may be well positioned to exclude § 1350 judgment-creditors and their allies from key policymaking channels in the recognizing jurisdiction. Thus, the mere existence of entities that support the aims of parties seeking ATCA and TVPA collection may not ensure a successful validation attempt. Nevertheless, the power they wield in the recognizing jurisdiction could prove decisive.

4. Posture of Political Branches of the Recognizing State

The support of indigenous political personalities could bolster ATCA and TVPA collection efforts. In a number of § 1350 suits, the U.S. executive branch has entered the fray by making its views known on how the suits should be handled. Interventions by the foreign policymaking arms of the recognizing court’s state, whether solicited or not, may also take place as the tribunal decides whether to validate a § 1350 decision. Assuming that Western European jurisdictions will function as the backdrop for most attempts to enforce ATCA and TVPA judgments, such interventions are not likely to prove decisive, as the region’s courts are hardly beholden to their executive counterparts. Moreover, European leaders might be reluctant to speak out in a given case so as not to jeopardize their countries’ economic interests. On the other hand, Western European political elites may choose to intervene on behalf of § 1350 judgment-creditors because many pride themselves on

Rights Watch†).


142. See, e.g., Hilao v. Estate of Marcos, 94 F.3d 539, 541 (9th Cir. 1996); Kadie, 70 F.3d at 236; Sanchez-Espinoza v. Reagan, 770 F.2d 202, 204 (D.C. Cir. 1985); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). U.S. courts have usually followed the President's lead.

143. See Eric Rasmusen, Judicial Legitimacy as a Repeated Game, 10 J.L. ECON. & ORG. 63, 65 n.4 (1994) (observing that, “[e]ven in modern Europe, an independent judiciary does not mean the same thing as in the United States: ‘Oversight and disciplinary measures may be directed toward judicial activity outside the core (Kernbereich) decisional process protected by judicial independence’” (quoting David Clark, The Selection and Accountability of Judges in West Germany: Implementation of the Rechtsstaat, 61 S. CAL. L. REV. 1797, 1840 (1988))).

being at the vanguard of human rights developments. 145 Indeed, this cohort is likely to be quite sensitive to the further strengthening of international customary norms in the human rights area, a result that would obtain if ATCA and TVPA judgments were embraced. Although it may not be forthcoming in some situations, indigenous political support could prove to be an important aspect of § 1350 collection efforts.

5. **Stance Taken by U.S. Decisionmakers**

Should influential American political personalities register their support of a particular collection request, non-U.S. judges may experience difficulties rebuffing it. Given American preeminence in world affairs, strong, official U.S. criticism of the conduct that has given rise to these suits may reinforce efforts to have § 1350 judgments validated abroad. Indeed, Washington's views on other issues have arguably influenced the decisionmaking of foreign judges. For example, following the decision of the North Atlantic Treaty Organization (NATO) to base Pershing II and cruise missiles in Western Europe during the early 1980s, the West German Green Party sought to enjoin these deployments. 146 In reaction to such efforts, the United States launched a diplomatic and public relations counteroffensive. 147 The West German Constitutional Court subsequently affirmed the missile deployment's legality. 148 It is, of course, unclear what role the U.S. efforts played in the court's decision. The significance of remarks made by influential policymakers or the impact of comments representing the official views of Washington, however, should not be discounted, especially if the foreign court is sensitive to the diplomatic consequences of its rulings. In cases where the non-U.S. judge is of the view that a particular outcome might adversely impact the recognizing state's relations with the United States, ATCA and TVPA collection efforts are likely to be invigorated by official support from Washington. 149

---

146. See Mark D. Welton, The NATO Stationing Agreements in the Federal Republic of Germany: Old Law and New Politics, 122 MIL. L. REV. 77, 90 (1988) (noting that "the Green Party filed suit in the Federal Constitutional Court, alleging that the decision to allow the stationing of missiles on the territory of the Federal Republic violated the Basic Law (Grundgesetz)").
147. For a description of the Reagan Administration's efforts, as well as the obstacles it faced, see Strobe Talbott, Playing Nuclear Poker, TIME, Jan. 31, 1983, at 10, 14, which quotes President Reagan as saying that "[(t)he collapse of the deployments ... would leave Europe with 'no deterrent on our side.'"
Cf. Elaine Ganley, Lawyer for United States Says France May Fear New Bombings, AP, Feb. 26, 1987, available in 1987 WL 3133886 (quoting a lawyer representing the United States as saying that "[I] hope the court will be very indulgent toward someone who, in my opinion, is a big terrorist").
149. The opposite result might obtain if it was thought that the United States had overreached on a specific issue. For example, the hard-line stance taken by Washington on Cuba could derail the recognition of a hypothetical ATCA or TVPA suit brought by individuals who had suffered at the hands of the Castro
C. Political Factors Favoring § 1350 Judgment-Debtor

For ATCA and TVPA judgment-creditors, the interference of politics in efforts to have § 1350 decisions validated by foreign judges may have a downside. Indeed, there are several situations in which political dynamics in the recognition process would likely benefit defendants.

1. Invocation of the Political Question Doctrine

The political question doctrine could thwart collection of § 1350 judgments. That doctrine counsels abstention when courts face the task of grappling with issues that, because of institutional limitations, they cannot easily resolve. Many judges shy away from dealing with matters that pertain to foreign relations on this ground. Judge Robb's refusal to entertain the merits of the case in *Tel-Oren v. Libyan Arab Republic*, for example, was premised on political question grounds. Foreign courts have encountered similar dilemmas when ruling on questions linked to international affairs.
Several considerations, however, suggest that courts will only rarely use the political question doctrine to bar ATCA and TVPA collection efforts. First, if a non-U.S. court wanted to impeach a § 1350 decision, the large number of legal requirements that many jurisdictions demand before validation makes it relatively easy for the court to find the judgment legally deficient on grounds other than the political question doctrine.\textsuperscript{155} Indeed, as observers have begun to undermine the political question doctrine itself,\textsuperscript{156} this seems especially likely to occur. In particular, the public policy exception, which "properly serves to protect the interests of the state where enforcement is sought,"\textsuperscript{157} may be construed as a functional equivalent to the political question doctrine. Nonetheless, due to the hyperpoliticized environments in which ATCA and TVPA litigation unfolds, the possibility of the political question doctrine surfacing should not be discounted entirely.

2. \textit{Subsequent Developments in the Situs of the Tort}

Political elites in the jurisdiction where the underlying human rights violation took place may seek to block § 1350 collection efforts. Many of the countries that served as backdrops for the activities that have been held to violate the law of nations, including Ethiopia,\textsuperscript{158} the Philippines,\textsuperscript{159} Guatemala,\textsuperscript{160} Argentina,\textsuperscript{161} Haiti,\textsuperscript{162} and Paraguay\textsuperscript{163} have experienced

\begin{itemize}
\item \textsuperscript{155} For a list of the many legal requirements that a jurisdiction can invoke to refuse the recognition of a foreign judgment, see \textit{supra} note 21.
\item \textsuperscript{156} \textit{See}, e.g., Prosecutor v. Tadić, U.N. Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, Case No. IT-94-1-AK72 (App. Chamber 1995), \textit{reprinted} in 35 \textit{I.L.M.} 32, 41 ("The doctrines of 'political questions' and 'non-justiciable disputes' are remnants of the reservations of 'sovereignty', 'national honour', etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law.").
\item \textsuperscript{159} \textit{See}, e.g., Barry Schweid, \textit{US Assured of Two More Years' Use of Philippines Bases}, \textit{AP}, Oct. 17, 1988, \textit{available} in 1988 WL 3817380 (reporting that then-Secretary of State George Schultz was pleased with the return of democracy in the Philippines).
\item \textsuperscript{160} \textit{See}, e.g., Francis Kohn, \textit{Guatemala President Ready To Negotiate Personally with Guerrillas}, \textit{Agence France-Press}, Nov. 24, 1994, \textit{available} in 1994 WL 9640160 (referring to the election of Guatemala's human rights ombudsman as President).
\item \textsuperscript{161} \textit{See}, e.g., \textit{Editor Says Sentence of General Shows Argentine Justice Works}, \textit{AP}, Dec. 3, 1986, \textit{available} in 1986 WL 3084408 (noting that the return of Argentine democracy triggered trials of military officers).
\item \textsuperscript{162} \textit{See}, e.g., Michelle Faul, \textit{U.N. Mission Ends with Fragile Democracy in Impoverished Haiti}, \textit{AP}, Nov. 30, 1997, \textit{available} in 1997 WL 4894510 (documenting the end of the U.N. peacekeeping mission to Haiti following the restoration of a fragile democracy in that country).
\item \textsuperscript{163} \textit{See}, e.g., Hugo Ruiz Olaiz, \textit{Thousands of Cotton Farmers March on Asuncion Demanding Government Help}, \textit{Agence France-Press}, Mar. 16, 1994, \textit{available} in 1994 WL 9546592 (quoting President Juan Carlos Wasmosy as saying that "nothing would stop the success of the democratic process" in Paraguay).
\end{itemize}
some form of democratic renaissance or other political change. A number of these transitions, such as that in Argentina, even brought individuals who had been mistreated by the prior regime to power.\textsuperscript{164} Because such individuals were the victims of human rights violations, it seems likely, at least on first blush, that they would be sympathetic to the agendas of § 1350 plaintiffs.\textsuperscript{165} Some of these successor elites might even be able to bring an ATCA or TVPA claim themselves.\textsuperscript{166} Successor regimes and ATCA and TVPA plaintiffs, however, might sometimes find themselves competing for scarce resources, which the former may allege were plundered from the state’s public coffers.\textsuperscript{167} Indeed, it would be surprising if the current governments of jurisdictions that had hosted serious human rights violations always endorsed the validation efforts of parties pressing § 1350 claims. Nevertheless, a shared hatred of the old order might compel those who have gained power in the situs of the tort to aid the efforts to collect ATCA and TVPA judgments.

3. \textit{Action Taken by the International Community To Address the Alleged Torts}

Where important global actors have addressed issues at the heart of ATCA and TVPA plaintiffs’ claims, these plaintiffs may encounter difficulties in their § 1350 collection efforts. In the post-Cold War era, the great powers have interacted and collaborated to address catastrophic breakdowns in public order.\textsuperscript{168} For example, two international criminal tribunals, both set up under U.N. auspices, are working to prosecute the serious violations of humanitarian law that accompanied the disintegration of Yugoslavia during the early 1990s and the 1994 civil strife in Rwanda.\textsuperscript{169} Unfortunately for § 1350

\textsuperscript{164} See Ed McCullough, \textit{Peronists on the Move Again in Argentina}, AP, Dec. 25, 1988, available in 1988 WL 3828786 (mentioning that during military rule in Argentina, Peronist politicians, including President Carlos Menem, were jailed).

\textsuperscript{165} See US Court Orders 105 Million Dollars in Rwanda Genocide, Agence France-Presse, Apr. 9, 1996, available in 1996 WL 3835262 (reporting the Rwandan government’s waiver of any claim to immunity pressed by Jean Bosco Barayagwiza, former head of the political affairs office of the foreign ministry).

\textsuperscript{166} See Lloyd N. Cutler, \textit{The Marcos Millions: What the Law Says}, WASH. POST, Mar. 13, 1986, at A23 (arguing that newly elected Philippine President Corazon Aquino “can obtain one other personal satisfaction out of the American legal system. Under our Alien Tort statute, . . . she and her family could bring a damage action against Gen. Fabian Ver and other Marcos retainers, perhaps even the former president himself, for participating in the conspiracy to murder her husband”).

\textsuperscript{167} For a graphic example of this competition for property, see \textit{Hilao v. Estate of Marcos}, 94 F.3d 539, 542-43 (9th Cir. 1996).


judgment-creditors, it is possible to imagine instances in which the existence of such a judicial mechanism might actually interfere with ATCA and TVPA validation efforts should a supranational tribunal also be pursuing their targets. In addition to punishing individuals for criminal wrongdoing, these ad hoc bodies may be able to seize their property, a tactic commonly used by government prosecutors at the domestic level. Were it to receive contradictory requests—one ordering the transfer of property belonging to the § 1350 judgment-debtor/indictee into an account controlled by the international tribunal and another instructing that it be turned over to the judgment-creditor—the non-U.S. court would probably not favor the judgment-creditor. Doing so, after all, would be incompatible with its duty to uphold international law.

C. Summary

Numerous contingencies, including the operation of entities like a U.N. criminal tribunal and the invocation of the political question doctrine, could derail the efforts of ATCA and TVPA judgment-creditors. Overall, however, parties who have successfully brought § 1350 claims stand a good chance of being compensated when political concerns pervade the recognition of ATCA and TVPA claims.

IV. THE OVERSEAS COLLECTION OF § 1350 JUDGMENTS AND OTHER HUMAN RIGHTS PRIORITIES

This Note began by highlighting the problems that § 1350 judgment-creditors face when trying to realize what is supposedly the full

---

170. This overlap already exists for both U.N. criminal tribunals. For example, the ICTY has indicted the defendant in the Kadic suit, Radovan Karadžić. For details on the complaint against him, see 20 Indictments, 74 Indictees (visited Feb. 17, 1998) <http://www.un.org/icty/list2.htm>. See also Annan Asked To Allow Senior Official [To] Testify on War Crimes, Agence France-Presse, Nov. 20, 1997, available in 1997 WL 13438040 (reporting that the U.N. International Tribunal for Rwanda had taken Jean Bosco Barayagwiza, "former head of the political affairs office of the foreign ministry and figure on the board of the propagandist Mille Collines radio station," into custody). For details of the § 1350 suit initiated against Barayagwiza, see Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (JSM), 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (awarding plaintiffs $150 million for torts committed by the defendant).


promise of these statutory provisions. It should be clear, however, that they are not the only parties whom the validation of ATCA and TVPA judgments will affect. Indeed, there are additional reasons for being interested in efforts to have § 1350 judgments recognized.

Potential § 1350 plaintiffs and their allies might regard moves for collection as self-defeating if they cause new filings of such claims in federal court to dwindle. This outlook, of course, assumes that demand for individuals who service parties bringing ATCA and TVPA claims has outstripped the available supply of such persons and that the same practitioners who bring such claims would be heavily involved in efforts to have these judgments recognized abroad.173 It is beyond the scope of this Note to demonstrate that a shortage of counsel for § 1350 plaintiffs would not exist if the legal practitioners who currently bring such claims diversified their activities and attempted to have judgments rendered in the United States embraced in foreign contexts. It seems exceedingly unlikely, however, that many of the attorneys who bring ATCA and TVPA suits in federal courts would be in a position to pursue simultaneously complex litigation before foreign tribunals. Indeed, few of them are likely even to be licensed to practice law by the jurisdiction in which validation is sought. Instead, collection responsibility would best be entrusted to counsel who, besides harboring human rights sympathies, possess the credentials and experience to give § 1350 judgment-creditors their day in non-U.S. tribunals. These practitioners would ideally boast an extensive background in recognition practice in the jurisdiction deemed to be favorable to the parties who are seeking ratification of an ATCA or TVPA judgment.174

Nor does there seem to be much chance that extraterritorial attempts to collect § 1350 judgments will clash with the tentative steps being taken at the international level to criminalize human rights violations.175 Indeed, Beth Stephens, a prominent ATCA and TVPA practitioner, has concluded that,

173. This is a valid concern. In other highly specialized transnational litigation contexts, there have been shortages of legal practitioners. See Larry Smith, After Lockheed ... FCPA Concerns Drive New Compliance Programs, INSIDE LITIG. 1, 5 (1997) (documenting a shortage of lawyers in the context of the Foreign Corrupt Practices Act).

174. Since this Note assumes that most validation efforts will be mounted in Western European jurisdictions, it is possible that some consumers of legal services would be underrepresented if lawyers concerned with human rights began devoting increasing amounts of resources to representing § 1350 judgment-creditors. These are parties seeking relief from judicial and quasi-judicial bodies like the European Court of Human Rights and the European Commission of Human Rights. This Note offers no view as to whether this would actually be the case. It seems quite likely, however, especially if the chance of actually recovering property is relatively great, that the entire task of achieving the validation of ATCA and TVPA judgments could be outsourced to parties motivated by market incentives. This would allow practitioners who currently represent parties before the region’s human rights machinery to continue engaging in this important activity.

[e]ven where criminal prosecutions are undertaken, an international tort remedy may complement such a proceeding, much as in the domestic sphere. Civil lawsuits for international human rights violations thus serve a role similar to tort litigation in a domestic forum: to offer victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system.\(^{176}\)

Of course, there would be potential for conflicts between supranational criminal prosecutions and § 1350 plaintiffs if human rights abuses were criminalized and the international machinery deemed competent to try these offenses were to seize property aggressively. It is easy, for example, to imagine problems breaking out between the putative *Kadic v. Karadžić*\(^{177}\) judgment-creditors and the U.N. International Criminal Tribunal for the Former Yugoslavia (ICTY) were ICTY’s prosecutors to seek the seizure of property belonging to Radovan Karadžić, who stands accused of committing crimes the ICTY is empowered to try. This potential for tension, however, could be minimized if the tribunal were to decide that its central mission is the prosecution of criminal activity, not the accumulation of material possessions belonging to those it has indicted.

Until a recognition effort has been successfully executed, it is difficult to determine whether moves for collection would deflate the symbolic value of ATCA and TVPA judgments. It is, of course, unclear whether plaintiffs bring these claims only for the larger message that such actions convey. Indeed, the symbolism of working for the validation of § 1350 judgments might be eclipsed by the deterrence and compensation that are achieved as a result of securing their collection. Moving for the recognition of such judgments would seem to promote the achievement of these outcomes. For example, defendants, upon hearing that an ATCA or a TVPA suit prompted the seizure of a portion of their property, would be confronted with tangible proof that multiple national jurisdictions have refused to tolerate their behavior. This result may marginally increase the likelihood that § 1350 defendants will see the error of their ways. Or, other individuals in positions of authority may be less likely to commit future egregious human rights violations. Simultaneously, validation efforts may contribute to the financial welfare of ATCA and TVPA judgment-creditors.

Aside from providing material sustenance to § 1350 judgment-creditors, the mere act of seeking the recognition of ATCA and TVPA verdicts may function as a personally liberating or empowering experience. Such efforts could even spur the healing processes of these individuals, who have been subjected to horrendous abuses. At least one procedural justice theorist has


\(^{177}\) 70 F.3d 232 (2d Cir. 1995).
emphasized the psychological benefits that accrue to those “able to tell their story fully before a decisionmaker who is perceived as neutral, honest, and attentive.”\textsuperscript{178} The process of testifying about a dark biographic episode often increases the likelihood that the person will emerge feeling cleansed of the trauma he or she was forced to endure.\textsuperscript{179} Of course, recognition efforts would provide such individuals with additional opportunities to externalize the intense feelings they might still harbor.

Increased use of efforts to secure the recognition of § 1350 judgments might simultaneously result in transformed perceptions of the ATCA and TVPA. Currently, there is a tendency to see these provisions, especially the former, as legal oddities with obscure origins.\textsuperscript{180} This argument would be more difficult to sustain if foreign courts began to honor judgments rendered in § 1350 suits. If non-U.S. tribunals began to subject ATCA and TVPA decisions to heavy scrutiny, the litigation spawned by these laws would be gradually legitimimized and the law of nations would be further clarified and reinforced.

V. CONCLUSION

As global interdependence grows ever more entrenched, the logic of enhancing international human rights protections should be especially apparent. If, after all, the duties pertaining to the protection of rights that transcend national boundaries remain diluted, there will be limits on what can be achieved in far flung realms of human activity, from overseas trade and investment to peacekeeping and conflict-resolution ventures. At the same time, these processes—international integration and invigoration of human rights standards—appear complementary. Indeed, the prospect of successfully exporting § 1350 judgments abroad suggests that progress achieved in one area makes advances in others possible. If cooperation between jurisdictions increased—so that the recognition of judgments worldwide mirrored current practices in the European Union and European Free Trade Association—collecting ATCA and TVPA judgments would be simplified, thus facilitating the realization of an important human rights objective.

Even if the larger goal of liberalizing judgment recognition remains unattained, some efforts to validate § 1350 judgments will succeed. Determining how courts, under the current regime, will distinguish the deserving from the undeserving has been the focus of this Note. The interplay


\textsuperscript{179} See id. at 19. But see, e.g., All Things Considered (NPR radio broadcast, Sept. 10, 1997) (reporting that South Africa’s Truth and Reconciliation Commission has caused some victims’ psychological wounds to reopen).

of three types of considerations—structural, legal, and political—will determine the ultimate currency of a § 1350 judgment overseas. The idea that structural and legal factors matter in this context is hardly controversial. Indeed, other work on recognition practice, most of which has focused on the validation of judgments rendered in transnational tort and commercial contract cases, has reached similar findings.¹⁸¹ Those who seek the validation of ATCA and TVPA judgments, however, should also expect the systematic politicization of the recognition process. This intrusion, which is more likely to favor ATCA and TVPA judgment-creditors than to undermine their interests, stems from fundamental differences between these suits and claims brought to vindicate rights and enforce obligations in commercial contexts.

What sets ATCA and TVPA suits apart from the claims that are usually pressed in transnational legal settings—the fact that imperatives deemed absolutely fundamental to the functioning of the international system lie at the heart of § 1350 litigation—underscores the importance of ensuring that the judgments rendered in these cases are recognized in judicial fora overseas. Thus, it is not particularly surprising that the overseas validation of § 1350 judgments dovetails with other items on today’s human rights agenda, including criminalizing international human rights norms and ensuring that the victims of abuses committed by public officials around the world have ample opportunities to testify about the burdens they have borne.

¹⁸¹ See sources cited supra notes 11, 21, 22.