FROM BLACKBEARD TO BIN LADEN: THE RE-EMERGENCE OF THE ALIEN TORT CLAIMS ACT OF 1789 AND ITS POTENTIAL IMPACT ON THE GLOBAL WAR ON TERRORISM

Thomas M. Pohl[*]

Son, my turn. I've been sitting here for ten minutes now looking over this rap sheet of yours. I just can't believe it. June '93, assault. September '93, assault. Grand theft auto, February '94, where apparently you defended yourself and had the case thrown out by citing Free Property Rights of Horse and Carriage from 1798 . . . .
– Judge Malone, *Good Will Hunting*[1]

I. INTRODUCTION

Moviegoers may remember this entertaining courtroom scene from the 1997 movie "Good Will Hunting." The look on the judge's face is priceless when it becomes clear to him that Matt Damon's character has a long and successful history of defending himself in court by citing obscure, colonial era statutes and precedent. Of course, the concept of a long forgotten statute from 1798 being dug up and successfully used in court by a creative modern legal mind strikes most as pure Hollywood fantasy. Yet this happened in real life when, in 1980, creative human rights lawyers resurrected a near dormant 1789 statute originally intended to protect the victims of pirates on the high seas.[2] Since then, the Alien Tort Claims Act of 1789[3] has been cited in dozens of cases,[4] and its rapid—and often unpredictable—expansion has led to speculation regarding the impact that the Act could have when applied to situations arising out of the current global war on terrorism.[5]

The Alien Tort Claims Act, 28 U.S.C. § 1350, was passed by the nation's founders

---

* Thomas M. Pohl received his J.D. from Notre Dame Law School, *cum laude*, in 2008. He is a 2000 graduate of Princeton University. From 2000 to 2005 he served as an officer in the United States Marine Corps, deploying twice, and he is currently a captain in the United States Marine Corps Reserve.

1. GOOD WILL HUNTING (Miramax Films 1997).

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

3. 28 U.S.C. § 1350 (2000).

4. *See* Bill Baue, *Win or Lose in Court: Alien Tort Claims Act Pushes Corporate Respect for Human Rights*, BUSINESS ETHICS, Summer 2006, at 12.

5. The label attached to United States military actions since September 11, 2001 has been a topic of a great deal of political debate, but this debate is outside the scope of this Note. For purposes of this Note, the term "global war on terrorism" is used to encompass all post-9/11 United States military actions in Iraq and Afghanistan, as well as all post-9/11 United States military actions against al Qaeda and al Qaeda-affiliated organizations worldwide. The term "global war on terrorism" was selected because this is how the United States military refers to this collective body of actions.

during the First Congress in 1789.[6] (The Act is sometimes also referred to as the "Alien Tort Act" or the "Alien Tort Statute.") The Act states, in relevant part: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7]

Though somewhat debatable, it is thought that originally the Act was meant to provide a civil tort remedy in United States federal courts for alien merchants victimized by pirates while trading with the fledgling United States.[8] However, once passed the Act lay virtually dormant until 1980,[9] when it was invoked in *Filartiga v. Pena-Irala* by a Paraguayan torture victim.[10] Since 1980, the Act has been invoked dozens of times, primarily in cases involving international human rights issues.[11] Though many of these cases have met with less-than-complete success or have become bogged down in the appeals process, the sheer number of cases attempting to invoke what was long thought to be a dormant statute has caused many legal scholars to comment upon the "re-emergence" of the Act.[12]

As modern courts grapple with the Act's meaning, most of the debate has been focused upon the overseas actions of large corporations and the extent to which these corporations could be held liable in United States federal courts for torts committed overseas.[13] However, there is also some debate as to whether, and to what extent, the United States government and members of the United States military could be sued under the Act by foreign nationals for events taking place in Iraq, Afghanistan, and elsewhere abroad.[14] Such concerns also (and perhaps more promisingly) extend to various civilian contractors and other companies and individuals who work for or cooperate with the United States in overseas anti-terrorism efforts.[15]

The bottom line seems to be that, after two centuries of obscurity, the Alien Tort Claims Act has been resurrected, but no one seems to be able to predict what impact modern use of the Act will have with any degree of certainty. At one point, the Bush administration argued that the Act should be modified or abolished.[16] Various legal commentators have classified it as everything from a powerful human rights tool to a

---

6. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

7. 28 U.S.C. § 1350 (2000).

8. *See* Baue, *supra* note 4; Leon Gettler, *Liability Forges a New Morality*, THE AGE (Australia), Aug. 3, 2005, at 12, *available at* http://www.globalpolicy.org/intljustice/atca/2005/0803morality.htm.

9. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 3 (Institute for International Economics 2003).

10. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). The Court in *Filartiga* identified only two cases in the preceding 191 years which addressed the Act. *See id.* at 887–88.

11. *See* Baue, *supra* note 4.

12. *See* Rachel Chambers, *The Unocal Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 No. 1 HUM. RTS. BRIEF 14 (2005); Anne-Marie Slaughter & David L. Bosco, Alternative Justice, Global Policy Forum, http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm (last visited Mar. 25, 2007); *see generally* HUFBAUER & MITROKOSTAS, *supra* note 9.

13. *See* Baue, *supra* note 4.

14. *See* Charlie Savage, *Four Ex-Detainees Sue Rumsfeld, Ten Others: Plaintiffs Allege Officials to Blame for Abuse at Base*, BOSTON GLOBE, Oct. 28, 2004, at A2; *see also* Warren Richey, *When Can Foreigners Sue In US Courts?*, CHRISTIAN SCIENCE MONITOR, Mar. 30, 2004, at 2.

15. *See* Savage, *supra* note 14; *see also* Saleh v. Titan Corp., 436 F. Supp. 2d 55, 56 (D.D.C. 2006).

16. Richard Hermer & Martyn Day, *Helping Bush Bushwhack Justice*, THE GUARDIAN (London), Apr. 27, 2004, at 16.

meaningless jurisdictional provision.[17] The Supreme Court issued a 2004 holding involving the Act which provided less clarification than many would have liked regarding the overall application of the Act.[18] The goal of this Note is to explore how the Act has been employed and interpreted to date, to examine the various predictions regarding the Act's future use and, in particular, its potential impact on the global war on terrorism.

II. HISTORY

A. Origin of the Act and Subsequent Dormancy

The Alien Tort Claims Act was passed in 1789 by the United States' First Congress.[19] The Act states, in relevant part: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[20]

Scholars know surprisingly little about the origins of the Act.[21] This is quite understandable when one considers that the First Congress had the monumental task of drafting and passing the infant nation's first legislation, most of which was far more important than an act addressing civil tort liability.

The leading theory surrounding the origins of the Act is that it was drafted as a response to two specific concerns, and that—together—these two concerns spawned a perceived need for a broader expression of the United States' desire to be a "nation of laws."[22]

The first concern addressed by the Act is piracy, as suggested by the title of this article.[23] After gaining independence from Britain, the founding fathers knew that maintaining and encouraging trade of American goods with European merchants would be a major factor in the creation of a strong economy.[24] With this in mind, the Act was part of a larger effort to extend the protections of United States courts to foreign merchants and sea captains willing to trade with the United States. While criminal prosecution for acts of piracy was addressed elsewhere, the Alien Tort Claims Act was intended to ensure that foreign traders victimized by pirates had access to federal courts

17. Anthony J. Sebok, *Is the Alien Tort Claims Act a Powerful Human Rights Tool?*, CNN.COM, Jul. 12, 2004, http://www.cnn.com/2004/LAW/07/12/sebok.alien.tort.claims/index.html.

18. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004); *see also* Sebok, *supra* note 17 ("[T]he court, in deciding Sosa, avoided many of the hard questions that have made the ATCA so controversial . . . It thus left often the question of whether the ATCA will be as powerful a weapon as human rights activists hope – or as weak a weapon as multinationals hope.").

19. *Sosa*, 542 U.S. at 712.

20. 28 U.S.C. § 1350 (2000).

21. *See* Warren Richey, *Ruling Makes It Harder for Foreigners to Sue in U.S. Courts*, CHRISTIAN SCIENCE MONITOR, Jun. 30, 2004, at 3.

22. *See Sosa*, 542 U.S. at 715.

23. Admittedly, some artistic license has been taken with the title, as the buccaneer known as "Blackbeard" had been dead for nearly ninety years at the time of the Act's creation. However, the type of piracy that Blackbeard's name invokes in modern minds is essentially the sort of activity that the drafters of the Act meant to address. Baue, *supra* note 4; Gettler, *supra* note 8.

24. HUFBAUER & MITROKOSTAS, *supra* note 9.

so that they could pursue a civil tort remedy against their aggressors.[25] Of course, the impracticality of the Act is obvious with respect to such situations—the Act may give federal courts subject matter jurisdiction over alien tort claims,[26] but there is still the problem of gaining personal jurisdiction over the pirate-defendants,[27] not to mention the potential problems of enforcing judgments against these less-than-law-abiding individuals.[28]

The second concern addressed by the Act stemmed from the high-profile assault of a French foreign ambassador on American soil.[29] By expressly making the federal courts open to foreign tort victims (or to their estates), the founding fathers sought to send a message to visiting merchants, diplomats, and visitors and the new United States would be a nation of laws—essentially the same message that the founding fathers sought to send to merchants and sea captains with respect to piracy.[30]

This broad expression that the United States is a "nation of laws" is, perhaps, the real purpose of the Act. As the impracticality of actually applying the Act to instances of piracy suggests, the Act may have originally been intended to be more of a political message than a functioning, commonly used statute.[31] The terms of the Act, rooted in "the law of nations" and in treaties of the United States, signaled that United States courts would be amenable to actions and grievances of the sort recognized by the "civilized" European community of which they sought to be a part.[32]

There is one notable case from the Act's early history[33] that serves to illustrate the United States' early desire to create and maintain a law-abiding reputation: the early Alien Tort Claims Act case of *Bolchos v. Darrel*,[34] decided by the Honorable Thomas Bee of the District Court of South Carolina in 1795. Though the facts of the case are somewhat odd and disturbing by modern standards, the true significance of this case is the district court's willingness to hear this tort action via the Alien Tort Claims Act in order to demonstrate to the foreign nationals involved that the United States is respectful of treaties and of the laws of nations.

Captain Bolchos was a French sea captain who captured a Spanish merchant ship on the high seas, sailing it into a South Carolina port.[35] The seizure of the ship itself was not an issue in the case—a state of war existed between France and Spain at the time, and so Captain Bolchos' action was presumed to have been a legal seizure of an

---

25. *Sosa*, 542 U.S. at 715–16.

26. *Id.* at 729.

27. *See* Slaughter & Bosco, *supra* note 12 ("[T]he Supreme Court rejected the notion that a plaintiff could bypass the protection of sovereign immunity and sue a foreign government or a sitting foreign leader directly under the Alien Tort statue" and that "(t)he courts have also ruled that plaintiff can only sue defendants who venture onto U.S. soil.").

28. *See id.* ("Most of the judgments that have been entered remain unpaid.").

29. *Sosa*, 542 U.S. at 716-17 (describing "the so-called Marbois incident of May 1784").

30. *Id.* at 717.

31. *See* HUFBAUER & MITROKOSTAS, *supra* note 9, at 3 ("[T]he ATS was apparently intended to show European powers that the new nation would not tolerate flagrant violations of the 'law of nations'").

32. *Id.*

33. *See Sosa*, 542 U.S. at 720 (referencing Bolchos v. Darrel, 3 F.Cas. 810 (D.S.C. 1795) (No. 1607)).

34. *Bolchos*, 3 F.Cas. at 810.

35. *Id.*

enemy ship.[36] The case arose because Bolchos sought to keep possession of the captured Spanish cargo, while a citizen of Great Britain (a man named Savage, acting through his agent, Darrel) claimed a right to some of the cargo because it had been mortgaged to him.[37] The disturbing aspect was that the "cargo" in question was an unspecified number of "negroes."[38] In other words, to put it bluntly: a Spanish slave owner mortgaged his slaves to a British citizen in exchange for cash, the slaves were on the ship when it was captured, and this South Carolina case was the French captain's attempt to retain possession of the mortgaged "property."

The district court began by noting that this case had already been dismissed by a South Carolina state court for lack of jurisdiction.[39] The district court held that, unlike the state court, the federal court had jurisdiction over the matter via the Alien Tort Claims Act.[40] After making this jurisdictional note, the district court went on to hold that the federal courts were obliged to give full recognition to "the treaty" between the United States and France, the terms of which appeared to govern the mortgage issue before the court.[41] While the mortgage decision that the court proceeded to explain is inconsequential to a discussion of the Alien Tort Claims Act,[42] the larger issue is significant—a federal district court afforded a French citizen and a British citizen their day in court and based judgment upon a good faith interpretation of a controlling French treaty.

It is possible that there were other early decisions similar to this one,[43] but *Bolchos* is the only one commonly referenced. The *Bolchos* case appears to have served the early political purpose of the Act i.e. furthering the United States' reputation as a modern, law-abiding nation by providing an available forum to alien litigants and by affording due respect to governing treaties and laws of the day.[44] However, after this case, the Act lay virtually dormant.[45] It was barely referenced in any other materials until the latter half of the twentieth century.[46]

B. Filartiga v. Pena-Irala "Re-Awakens" the Act

In 1980, the case of *Filartiga v. Pena-Irala* provided the big "Good Will Hunting" moment where the Alien Tort Claims Act of 1789 was pulled from the stacks, dusted off, and used (on appeal to the Second Circuit) to successfully bring a Paraguayan tort case before the Eastern District of New York.[47] Though the Act had actually been

36. *See generally Bolchos*, 3 F.Cas. at 810.

37. *Id.*

38. *Id.*

39. *Bolchos*, 3 F.Cas. at 810.

40. *Id.* (referring to the Act as "the 9th section of the judiciary act of congress" and noting that the Act grants the district court jurisdiction "where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States . . .").

41. *Id.* (citing the "14th article of the treaty" as support for this proposition).

42. *Id.* at 811.

43. *See, e.g., Sosa*, 542 U.S. at 712 (citing Moxon v. The Fanny, 17 F.Cas. 942 (D. Pa. 1793)).

44. *See supra* notes 31–32 and accompanying text.

45. HUFBAUER & MITROKOSTAS, *supra* note 9.

46. Sebok, *supra* note 17.

47. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). *See also* Sebok, *supra* note 17.

invoked in an earlier (1961) child custody case,[48] and mentioned in a few others,[49] *Filartiga* is now generally recognized as the 'starting point' for the modern re-emergence of the Alien Tort Claims Act.[50]

Filartiga was a case in which all parties were citizens of Paraguay, and in which all tortious events took place solely in Paraguay.[51] The plaintiffs were Dr. Joel Filartiga, a Paraguayan physician, and his adult daughter Dolly Filartiga.[52] Dr. Filartiga, while living in his native Paraguay, was an outspoken critic of Paraguayan President Alfredo Stroessner's government.[53] Dr. Filartiga alleged that, on March 29, 1976, his seventeen-year-old son, Joelito Filartiga, was kidnapped and tortured to death in Asuncion, Paraguay by the government's Inspector General of Police, Americo Norberto Pena-Irala (Pena).[54] At the time, Dr. Filartiga attempted to initiate an action in Paraguayan courts, but the Paraguayan government responded by arresting Dr. Filartiga's attorney and "shackling him to a wall" at police headquarters.[55] Shortly thereafter—and quite understandably—Dr. Filartiga and his daughter fled to the United States and filed for political asylum.[56]

In July of 1978, pressured by political rivals and enemies, Inspector General Pena himself left Paraguay and entered the United States under a visitor's visa.[57] Pena overstayed his visa, intending to permanently reside in Brooklyn, New York.[58] However, in 1979 Dolly Filartiga learned that Pena was in the United States.[59] She informed the Immigration and Naturalization Service, who arrested Pena and subsequently ordered his deportation.[60] While Pena was incarcerated at the Brooklyn Navy Yard, awaiting deportation, the Filartigas caused him to be personally served with a summons and a civil complaint.[61] The civil tort action alleged that Pena had wrongfully caused Joelito Filartiga's death by torture.[62]

When the case came before the federal district court, jurisdiction proved to be a hot threshold issue.[63] The court clearly had personal jurisdiction over Pena, since he was personally served with process while physically within the state of New York.[64] However, the district court doubted that it had subject matter jurisdiction of the case.[65] Seemingly grasping at straws, the Filartigas' original cause of action stated that the

48. Adra v. Clift, 195 F. Supp. 857, 859 (D. Md. 1961).
49. *See id.* at 863.
50. *See* Slaughter & Bosco, *supra* note 12.
51. *Filartiga*, 630 F.2d at 878.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Filartiga*, 630 F.2d at 878.
57. *Id.*
58. *Id.* at 878–79.
59. *Id.* at 879.
60. *Id.*
61. *Filartiga*, 630 F.2d at 879.
62. *Id.*
63. *Id.* at 879–80.
64. *Id.*
65. *Id.*

case:

> [Arose] under "wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. s 1350, Article II, sec. 2 and the Supremacy Clause of the U.S. Constitution, . . . 28 U.S.C. s 1331 and . . . under the Alien Tort Statute, 28 U.S.C. s 1350.[66]

The district court considered and summarily rejected all bases for subject matter jurisdiction and subsequently dismissed the action because of lack of subject matter jurisdiction.[67]

The Filartigas appealed to the United States Court of Appeals, Second Circuit.[68] Re-examining the Filartigas' laundry list of proposed bases for subject matter jurisdiction,[69] the court seized upon the Alien Tort Claims Act and held that the Act provided a legitimate basis for subject matter jurisdiction in the case.[70] In the opening paragraphs of his opinion, Circuit Judge Irving R. Kaufman wrote:

> Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, wherever an alleged torturer is found and served with process by an alien within our borders, [the Alien Tort Claims Act][71] provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.[72]

The Filartigas' case was reversed and remanded to the district court for trial on the merits.[73] The Alien Tort Claims Act had successfully kept this improbable Paraguayan tort case alive in United States courts.[74]

Filartiga is seen as the beginning of the Act's modern re-emergence because of the "Wow, it actually worked!" factor. Yet, it is also a landmark case with respect to the re-emergence of the Act because it provides the first clues as to how modern courts are likely to interpret and apply the Act.

One notable aspect of the decision is that the Second Circuit appeared to limit

---

66. *Filartiga*, 630 F.2d at 879.

67. *Id.* at 880.

68. *Id.* at 878.

69. *Id.* at 879.

70. *Id.* at 878.

71. The act is referred to in the Second Circuit's opinion by its alternate name, the "Alien Tort Statute."

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

73. *Id.*

74. The Filartigas were eventually awarded a $10 million judgment, but they were never able to collect it; Pena lacked any significant assets, and he was deported immediately after the conclusion of the case. *See* Slaughter & Bosco, *supra* note 12.

application of the Act to instances where the defendant is served with process within the borders of the court's jurisdiction.[75] In *Filartiga* itself, this did not present a problem since Pena was physically present within the state of New York.[76] However, the opinion's use of the phrase "is found and served with process by an alien within our borders" appears limiting in nature,[77] making it unclear regarding whether the Act somehow precludes the application of other bases for personal jurisdiction, such as in cases where personal jurisdiction would be based upon satisfaction of "minimum contacts."[78]

A second notable aspect of the *Filartiga* decision was that the Second Circuit rejected another motion that Pena made to dismiss based upon *forum non conveniens.*[79] Pena argued that Paraguayan courts provided a more appropriate forum, and Pena's Paraguayan counsel submitted an affidavit in support of this motion, "averr[ing] that Paraguayan law provides a full and adequate civil remedy for the wrong alleged."[80] The Second Circuit found it irrelevant that Paraguayan courts were available to hear this action—that fact had no bearing on the United States federal court system's ability or willingness to hear the *Filartiga* case.[81]

The most notable aspect of the *Filartiga* decision, however, was the exhaustive analysis that the Second Circuit performed regarding what constituted a "law of nations." The court began by noting that the Act, by its very terms, was limited only to torts committed "in violation of the law of nations or a treaty of the United States."[82] Classifying this as "a threshold question,"[83] the court determined that there was no applicable treaty between the United States and Paraguay covering the Filartigas' case, so it began a detailed analysis of the phrase "law of nations."[84] In doing so, the court examined numerous writings on international law from the United Nations and from various legal scholars in an effort to determine whether the torts alleged in the Filartigas' case could be classified as violations of "the law of nations."[85] The court ultimately concluded:

> In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates

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

76. *Id.* at 879.

77. *Id.* at 878.

78. Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

79. *Filartiga*, 630 F.2d at 879–80.

80. *Id.* at 879.

81. *See id.* at 879–80.

82. *Id.* at 880 (quoting 28 U.S.C. § 1350 (2000)).

83. *Filartiga*, 630 F.2d at 880.

84. *Id.* at 880.

85. *Id.* at 880–85. For example, the court examined: The Statute of the International Court of Justice, Arts. 38 & 59, June 26, 1945, 59 Stat. 1055, 160 (1945); The Universal Declaration of Human Rights, United Nations General Assembly Resolution 217(III)(A) (Dec. 10, 1948); The Declaration on the Protection of All Persons from Being Subjected to Torture, United Nations General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975).

> established norms of the international law of human rights, and hence the law of nations.[86]

In holding that torture by a state official was a violation of the law of nations, the court's extensive analysis and labeling of this as a "threshold issue" sent a clear signal that the Act would not be liberally interpreted to apply to all torts, but only those torts falling within the smaller sub-set of universally condemned violations of human rights.[87]

C. Expansion of the Act Since 1980

Since *Filartiga*, dozens of other cases have been filed which rely upon the Alien Tort Claims Act for jurisdiction.[88] To date, the majority of these suits have been initiated with the assistance of various human rights activists and non-profit organizations.[89] For example, in recent years:

> Philippine nationals sued the family of ex-dictator Ferdinand Marcos for acts of torture carried out during his rule. An Ethiopian victim sued his torturer and won a large judgment. A group of Guatemalan peasants successfully sued the country's former defense minister, whom they accused of complicity in torture and extrajudicial killings. Unable to get a hearing in Japan, a group of Chinese men forced into labor during the Second World War recently filed suit in the U.S.[90]

Many of these suits are at least moderately similar in character to *Filartiga*, involving victims of torture, extrajudicial killing, and other clear human rights violations.[91] This broad category of suits is also similar to *Filartiga* with respect to two critical items. First, even though the Alien Tort Claims Act provides subject matter jurisdiction, it can still be quite difficult for courts to get personal jurisdiction over the defendants.[92] Second, as the Filartigas found out, it can be nearly impossible to actually collect on any judgment rendered against the defendants in these cases.[93]

However, a second broad category of suits under the Act has emerged in recent years—one that has caused worry for some U.S. corporations and investors.[94] Alien victims of foreign human rights abuses have begun to sue U.S. corporations for

---

86. *Filartiga*, 630 F.2d at 880.

87. *Id.*

88. *See* Baue, *supra* note 4.

89. *See* Sebok, *supra* note 17.

90. Slaughter & Bosco, *supra* note 12.

91. *Id.*

92. *Id.* ("The courts have . . . ruled that plaintiffs can only sue defendants who venture onto U.S. soil. This requirement effectively immunizes many perpetrators, who know better than to tempt fate by visiting the U.S.").

93. Slaughter & Bosco, *supra* note 12 ("[P]laintiffs who win judgments [are not likely to] see the money. Most of the judgments that have been entered remain unpaid.").

94. John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. Chamber of Commerce, Oct. 2002, http://www.uschamber.com/press/opeds/0210howardlitigation.htm.

complicity in the alleged abuses.[95] Unlike the *Filartiga* line of cases, personal jurisdiction and availability of funds, which are necessary to satisfy judgments, are rarely a problem in cases where parties bring suit against U.S. corporations.[96] According to the U.S. Chamber of Commerce web page, by late 2002 there were more than twenty pending Alien Tort Claims Act suits specifically targeting United States corporations, "alleging that U.S. firms doing business in . . . Colombia, Ecuador, Egypt, Guatemala, India, Indonesia, Myanmar (Burma), Nigeria, Peru, Saudi Arabia, South Africa, and the Sudan are liable for actions in those countries . . . whether or not they had any direct connection other than being present in those countries."[97]

A 2002 Ninth Circuit case, *Doe I v. Unocal Corp.*, and the events surrounding that case, provide a good illustration of the model used in the Alien Tort Claims Act cases which seek to hold corporations liable for allegedly being complicit in human rights violations.[98] In *Unocal*, Unocal Corporation was an energy company that was constructing a gas pipeline stretching through rural Burma.[99] Unocal allegedly contracted with the local government's military, seeking soldiers to protect the pipeline while it was under construction.[100] In the lawsuit under the Alien Tort Claims Act, Plaintiff "Doe" was actually a collection of Burmese villagers who lived in a rural jungle settlement near the site of the pipeline construction.[101] The villagers' claims included allegations that military guards forced them to work as slave laborers in furtherance of the Unocal pipeline project, as well as allegations that they endured rapes, torture, and other abuses at the hands of the Burmese soldiers.[102] The villagers did not allege that Unocal Corporation directly participated in any of the abuses, but instead alleged that Unocal should be held liable as an accomplice of the Burmese soldiers.[103]

Though Unocal prevailed before the district court, the court of appeals reversed the lower court's entry of summary judgment and dismissal of the case.[104] Unocal subsequently settled the lawsuit for an unspecified sum (rumored to be quite a sizeable amount).[105] While the Unocal case was likely first initiated because Unocal was available (a U.S. corporation) and because Unocal possessed deeper pockets than any Burmese soldier could have,[106] the case also ended up illustrating another factor which has led to the suit of so many corporations: the public relations factor.[107] Whether

---

95. *Id.*

96. *Id. See also* Thomas Niles, *The Very Long Arm of American Law*, USA ENGAGE, Nov. 5, 2002, http://www.usaengage.org/news/2002/20021105_atcaniles.html.

97. Howard, *supra* note 94.

98. Doe I v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002).

99. *Id.* at 936.

100. *Id.* at 937–38.

101. *Id.* at 936.

102. *Id.* at 939.

103. *Unocal*, 395 F.3d at 942–43.

104. *Id.* at 962.

105. Lisa Girion, *Unocal to Settle Rights Claims*, LOS ANGELES TIMES, Dec. 14, 2004. *See also* Chambers, *supra* note 12, at 16.

106. Chambers, *supra* note 12, at 16.

107. Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, LOS ANGELES TIMES, Mar. 22, 2005.

Unocal Corporation was truly liable or not for the actions of the Burmese soldiers (and it might have been), it is clear that—from a public relations standpoint—Unocal Corporation wanted to avoid any protracted litigation in a United States federal court involving such concepts as forced slave labor and the rape of villagers during the construction of an oil pipeline.[108] Having the media pick up on sound bites from such a protracted trial would have caused Unocal's stock to plummet and would have seriously damaged the company's public image.[109]

There have been a slew of similar cases in the wake of Unocal, in which victims of human rights abuses (often assisted by various human rights agencies) have organized and brought suits under the Alien Tort Claims Act against corporations for their complicity in foreign abuses.[110] For example, DaimlerChrysler was sued in early 2004 "over its alleged role in the disappearance and torture of workers and union leaders" based upon actions that the Argentine military took outside of its Buenos Aires plant during the Argentine "Dirty War" of 1976-1977.[111] The Coca-Cola Company was sued under the Act by Colombian citizens claiming that the company influenced Colombian military units which intimidated local unions.[112] ExxonMobil faced a similar suit because of crimes committed by Indonesian army units assigned to protect the company's facilities in Aceh, Indonesia.[113]

Just as *Filartiga* set the modern standard for use of the Act with respect to individualized wrongs,[114] *Unocal* has set the modern standard for use of the Act to go after corporate deep pockets via various accomplice theories.[115]

III. CURRENT INTERPRETATION OF THE ACT: THE SUPREME COURT'S RULING IN *SOSA* AND THE AFTERMATH

Given the explosion of cases which attempted to rely on the Alien Tort Claims Act during the 1980s and '90s, it was probably only a matter of time before the Supreme Court would find itself called upon to interpret the Act. And although the Supreme Court's holdings always, by definition, provide the definitive interpretation of a federal statute, the "re-emergence" of the Act from dormancy had set the stage in such a way that any holding related to the Act would be afforded greater weight than normal.[116] This is because the Act is such a legal anomaly, having lain virtually un-cited for two

108. *See* Baue, *supra* note 4 ("The truth or falsity of the claims against Unocal was never established, because the case never went to trial, but in the court of public opinion, Unocal suffered mightily by the steady drumbeat of stories about the pending litigation.").

109. Even though Unocal avoided litigation, the corporation's stock fell $1.09 to $61.80 on the New York Stock Exchange when the settlement was announced in March 2005. *See* Lifsher, *supra* note 107.

110. *See generally* HUMAN RIGHTS WATCH, DEFEND THE ALIEN AND TORTS ACT (2003), http://www.hrw.org/campaigns/atca/.

111. Pablo Bachelet, *DaimlerChrysler Sued Over Alleged Argentine Abuses*, REUTERS, Jan. 14, 2004, *available at* http://www.globalpolicy.org/intljustice/atca/2004/0114daimler.htm.

112. *Id.*

113. Gettler, *supra* note 8.

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

115. *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

116. *See* Sebok, *supra* note 17 ("[H]uman rights groups and multinational corporations eagerly awaited the decision."); Richey, *supra* note 21 ("[A]nalysts say any legal precedent established in the case could be a watershed in the development and enforcement of international law.").

centuries before exploding into widespread usage.[117] Even by the year 2000, there were simply so few published opinions dealing with the Act that any interpretation or clarification of the Act by our nation's high court would have a profound effect upon any future usage of the Act.

The Supreme Court finally got to weigh in on the Alien Tort Claims Act in 2004. In *Sosa v. Alvarez-Machain*, the Court addressed two issues: one dealing with an exception to the Federal Tort Claims Act, and the other dealing with the Alien Tort Claims Act.[118] In a seventy-one-page opinion, the Court devoted roughly forty pages to an in-depth discussion of the Alien Tort Claims Act.[119]

In *Sosa*, the plaintiff-respondent was a Mexican national named Humberto Alvarez-Machain (hereinafter "Alvarez") who was attempting to use the Alien Tort Claims Act to pursue civil damages in response to an allegedly improper arrest and detainment.[120] However, unlike the Paraguayan torture-murder victim in *Filartiga*[121] or the Burmese villagers in *Unocal*,[122] Alvarez was not a particularly sympathetic figure.[123] By way of explanation, the Court provided the following background information:

> In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture.[124]

Alvarez was indicted by a federal grand jury in 1990, but the Mexican Government refused all requests to extradite him.[125] Unwilling to give up, the DEA instead "approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial."[126] Defendant-petitioner Jose Francisco Sosa and several other Mexican nationals abducted Alvarez from his house, held him overnight in a motel, and then brought him by private plane to El Paso, Texas, where he was arrested by United States federal officers.[127]

Unfortunately for the DEA, Alvarez was acquitted in 1992.[128] He returned to

---

117. *See Supreme Court Asked To Stop Abuse of Alien Tort Statute*, INT'L CHAMBER OF COMMERCE, Jan. 26, 2004, *available at* http://www.globalpolicy.org/intljustice/atca/2004/0126abuse.htm (requesting that the United States Supreme Court clarify a "controversial 200 year-old US statute").

118. Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004).

119. *Id.* at 712–51 (referring to the Alien Tort Claims Act by it alternate name, the "Alien Tort Statute," throughout the opinion).

120. *Sosa*, 542 U.S. at 697–98.

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

122. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

123. *Sosa*, 542 U.S. at 697.

124. *Id.*

125. *Id.* at 697–98.

126. *Id.* at 698.

127. *Id.*

128. *Sosa*, 542 U.S. at 698.

Mexico, and, in 1993, he filed the civil lawsuit which eventually led to this Supreme Court case.[129] Alvarez sued Sosa and several other Mexican nationals, as well as the DEA agents involved, seeking damages "from the United States under the [Federal Tort Claims Act], alleging false arrest, and from Sosa under the [Alien Tort Claims Act], for a violation of the law of nations."[130] With respect to the claim based upon the Alien Tort Claims Act, the district court awarded summary judgment and $25,000 in damages to Alvarez, and the Ninth Circuit then affirmed this judgment.[131]

The Supreme Court granted certiorari and heard oral arguments on March 30, 2004—fourteen years after Alvarez's abduction.[132] Then, on June 29, 2004, the Court issued its decision: The Supreme Court reversed the lower courts, *unanimously* holding that the Alien Tort Claims Act should *not* have applied to this case.[133]

The media initially reacted as though this decision marked a defeat for champions of human rights. *The Christian Science Monitor* wrote that "[t]he justices stopped short of rolling back 24 years of legal decisions . . . [but t]he decision marks somewhat of a setback for international human rights activists."[134] Even before the decision was announced, some in the media had imparted a rather sensationalist slant upon this case. One article in *The Guardian*, bearing the fair and balanced title "Helping Bush Bushwhack Justice," proclaimed:

> The [Alien Tort Claims Act] has been a truly remarkable tool for seeking justice for victims of human rights abuses, empowering torture victims and the families of those who have been killed to seek redress for crimes that would otherwise have gone unpunished. It is astonishing and profoundly saddening that our own government would spend its time and our money on seeking to support Bush and Ashcroft's attempts to stifle justice for victims of gross human rights violations.[135]

Of course, the *Sosa* decision was not a fatal blow to human rights everywhere. The entire United States Supreme Court was in agreement that the Act should not have been applied in *Sosa*.[136]

What the Supreme Court *did* do in *Sosa* was set forth an opinion that provides some moderately useful clarifications as to how the Act should be interpreted in the twenty-first century. To begin with, the Supreme Court reaffirmed that the Act is still a valid, useable law.[137] The Court did not take the view that lower court cases expanding the application of the statute had overstepped their bounds.[138] However, the Court

129. *Id.*

130. *Id.*

131. *Id.* at 699.

132. *Id.* at 692.

133. *Sosa*, 542 U.S. at 699 (Justice Souter wrote the majority opinion, with Justice Scalia (joined by the Chief Justice and Justice Thomas), Justice Ginsburg, and Justice Breyer separately concurring in the judgment.).

134. Richey, *supra* note 21.

135. Hermer & Day, *supra* note 16.

136. For example, it's a pretty safe bet that Justice Ruth Bader Ginsburg did not see her concurring decision as gleefully helping President Bush and Mr. Ashcroft "bushwhack justice."

137. *Sosa*, 542 U.S. at 712.

138. *Id.* at 724–25.

appeared to take the view that the Act should not be stretched any further than it already has been.[139]

Most important to the ruling was the observation that the Act is purely jurisdictional in nature.[140] It provides a means of creating subject matter jurisdiction, but the Act does not itself create a cause of action.[141] There is no such thing as an "Alien Tort." In other words, causes of action must still be based upon existing treaties or upon the existing "law of nations."[142] This, in fact, was the dispositive point in *Sosa*. The court held that Alvarez's improper arrest, though inappropriate and offensive, did not rise to the serious level of a violation of the "law of nations."[143] Instead, there is now a general consensus among legal analysts that acceptable causes of action under the Act may be limited to government-sponsored torture, genocide, and other "human rights" issues. These issues are seen to exist in a realm of global concern that extends these offenses beyond basic criminal actions (such as ordinary murder or rape) which, while still serious, are perhaps best dealt with by courts in the jurisdictions where the offenses occurred.[144]

Other limitations on usage of the Act have been solidified as well, both through the *Sosa* decision and in the cases that have followed. Courts have generally continued to abide by the rule followed in *Filartiga*, where plaintiffs can only sue defendants who are physically present in the court's jurisdiction when process is served upon them.[145] As one commentator noted, "[t]his requirement effectively immunizes many perpetrators, who know better than to tempt fate by visiting the U.S."[146] Commentators have also noted that many suits may be deterred by the practical consideration that, even if a judgment is achieved, collecting that judgment from the defendant often proves impossible.[147]

Another very significant limitation on usage of the Act is that "courts have not allowed Alien Tort claims to trump the legal immunity that is traditionally granted to foreign states and their leaders."[148] This item is particularly significant when analyzing possible suits that may stem from the global war on terrorism. Government lawyers have taken the position that well-established immunity defenses would defeat any attempts to sue the United States and those, such as government officials, who are acting on behalf of the government.[149] Specifically addressing the detainees at

---

139. *Id.*

140. *Id.* at 729.

141. *Id.* at 724.

142. *Sosa*, 542 U.S. at 724. *See also* 28 U.S.C. § 1350 (2000) (The plain text of the Act reads, in relevant part, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

143. *Sosa*, 542 U.S. at 738 ("It is enough to hold that a single illegal detention of less that a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.").

144. *See* Richey, *supra* note 21 (quoting Harold Koh, Dean of Yale Law School: "It looks like you can still bring an action for torture, genocide, for slavery, for apartheid . . . .").

145. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

146. Slaughter & Bosco, *supra* note 12.

147. *Id.*

148. *Id.*

149. *See* Savage, *supra* note 14.

Guantanamo Bay, a Pentagon spokesman states that, "[t]here is no basis in U.S. law to pay claims to those captured and detained as a result of combat activity."[150] Lawyers working on behalf of the detainees, on the other hand, say that they will attempt to defeat immunity defenses by asserting that "because it is illegal for any official to authorize torture," immunity defenses should not apply if it can be shown that the activities in question constituted torture and overstepped the authority of the government official who authorized or condoned those activities.[151]

At this point in time, the total number of cases providing guidance about how to interpret the Act is still underwhelming. However, thanks in no small part to *Sosa*,[152] the general principles discussed above provide a better understanding of how the Act will be interpreted by modern courts.[153] What is still not fully clear, however, is how the Act will come into play in cases stemming from the global war on terrorism.

IV. POTENTIAL APPLICATION TO GLOBAL WAR ON TERRORISM CASES

Since the Alien Tort Claims Act re-emerged in the 1980s, human rights organizations have continued to rely upon it in actions attempting to address "traditional" human rights abuses in foreign nations, such as the ones addressed in *Filartiga*[154] and *Unocal*.[155] However, since September 11, 2001, the global war on terrorism has created other situations where persons have attempted to sue in United States federal courts by invoking the Act. These global war on terrorism cases, both present and future, can be grouped into two general categories. The first category involves cases where the victims of terrorist activity attempt to use the Act in order to sue the terrorists. In many ways, these types of cases are closely analogous to some of the earlier human rights cases brought under the Act. The second category of global war on terrorism cases is a bit different. This category involves cases where individuals, including "enemy combatant" detainees, attempt to use the Act in order to sue United States government officials, military contractors, and other similarly situated parties.[156] While the first category of cases seems to be in keeping with the Act's original aims of combating piracy,[157] one wonders if the founding fathers would approve of the "stretching" of the Act to cover the second category of cases.

A. Potential Use of the Act by Victims of Terrorist Activity

The Alien Tort Claims Act has the potential to be a useful tool when invoked by the victims of terrorist activity. To begin with, the use of the Act against modern-day terrorists seems to be strongly analogous to the Act's origins as an anti-piracy device.

150. *Id.*

151. *Id.*

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

153. *See supra* notes 137–151 and accompanying text.

154. *See supra* notes 88–93 and accompanying text.

155. *See supra* notes 99–110 and accompanying text.

156. If the first category of cases represents the "Blackbeard to Bin Laden" line of cases, then those critical of our current president might think of the second category as the "Blackbeard to Bush" line of cases.

157. *See supra* notes 23–28 and accompanying text.

Looking back to the time period when the Act was first passed, it is important to note *why* such an act was necessary in order to address piracy. The answer is found by looking at the nature of the pirate himself. Pirates generally did not consider themselves to be citizens of a particular nation—they were rogue nomads, whose crimes were likely to be committed on the high seas and in other far-flung locales.[158] Our founding fathers felt compelled to craft an act which would allow the victims of piracy to have their day in court, regardless of the rogue nature of the would-be defendant or the unpredictable place of injury.[159]

There are strong parallels when one considers modern-day terrorists. Consider Osama bin Laden, for example: he is a rogue nomad who no longer considers himself to be the citizen of a particular nation—he has roamed from Saudi Arabia to the Sudan to Afghanistan and elsewhere—and his crimes have, likewise, been committed globally.[160] Given the similarities between pirates of yesteryear and modern terrorists,[161] the Act seems like the appropriate vehicle with which to seek civil damages for injuries suffered at the hands of terrorists.[162]

In addition, policy experts since September 11, 2001 have generally encouraged civil lawsuits against terrorists because these suits supplement any criminal proceedings with respect to redressing harm.[163] Though civil lawsuits using the Act are fraught with the same problems witnessed in earlier human rights cases using the Act, such as inability to collect most judgments,[164] they are valuable nonetheless as a means of giving the victims of terrorism their day in court. Such actions provide the world with yet another way to "go after" terrorists, even though a civil proceeding is admittedly a far weaker tool than a criminal prosecution.

To date, there have not been many post-9/11 attempts by victims to sue terrorists under the Act. However, there is at least one case tangentially related to the Global War on Terror which is worth mentioning, as it serves as an important reminder of what the Act can—and cannot—do.

Mwani v. Bin Laden came about in response to the August 7, 1998 bombing of the United States embassy in Nairobi, Kenya.[165] A truck bomb killed more than 200 people, including twelve Americans, and wounded more than 4,000 others.[166] Osama bin Laden and al Qaeda subsequently claimed responsibility for the bombing.[167] The plaintiffs in *Mwani* were all Kenyans, and consisted of victims of the bombing, relatives

158. *Expert Sinks Pirate Myths, Stereotypes With Real History*, PURDUE NEWS SERVICE, Jun. 28, 2006, http://news.uns.purdue.edu/html4ever/2006/060628.T-Lambert.pirates.html.

159. *See supra* note 25 and accompanying text.

160. *A Biography of Osama Bin Laden*, Frontline: Hunting Bin Laden: Who Is Bin Laden?, http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/bio.html (last visited Mar. 25, 2007).

161. *Expert Sinks Pirate Myths*, *supra* note 158.

162. At least, the appropriate vehicle for *foreign* plaintiffs—recall that the act can only be invoked by foreign plaintiffs, and not by United States citizens.

163. *See, e.g.*, Hermer & Day, *supra* note 16 ("[L]lawsuits by victims of terrorist acts can be extremely helpful to the government in its effort to track down terrorists and their sources of funding.").

164. *See supra* notes 74 and 93 and accompanying text.

165. Mwani v. Bin Laden, 417 F.3d 1, 4–5 (D.C. Cir. 2005).

166. *Id.* at 4.

167. *Id.* at 12–13.

of victims, and businesses harmed in the attack.[168] As the D.C. Circuit Court of Appeals explained, "They sued defendants Osama bin Laden and al Qaeda for orchestrating the bombing, and defendant Afghanistan for providing logistical support to bin Laden and al Qaeda."[169]

The lower court had dismissed the suit for want of jurisdiction,[170] but the court of appeals reversed (in part).[171] The first point illustrated by *Mwani* stems from the portion of the case where the lower court's action was upheld: the dismissal of all claims against the nation of Afghanistan.[172] The court of appeals held that "[t]he Foreign Sovereign Immunities Act 'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.' Under the FSIA, a foreign state is immune from the jurisdiction of American courts unless the case falls within a statutory exception."[173] This serves as a practical reminder that the Alien Tort Claims Act is purely jurisdictional in nature,[174] and that it does not trump any applicable immunities, including immunity granted to foreign nations.[175] For this reason, it may be rare that action could be taken against a foreign nation for terrorism by using the Act.[176]

The second point illustrated by *Mwani* stems from the portion of the case where the appellate court dismissed all claims against Osama bin Laden and al Qaeda.[177] The court of appeals held that:

> [T]he plaintiffs have sued under the Alien Tort Claims Act, which the Supreme Court has held to supply both subject matter jurisdiction and a cause of action for a narrow set of claims brought by aliens and involving violation of the law of nations. The Mwani plaintiffs certainly have more than a colorable argument that their claims fall within that narrow set.[178]

This is an important reminder that the Act does not support causes of action for all torts, but only for those that fall within the narrower sub-set considered to be violations of "the law of nations." The holding in this particular case provides some evidence that acts of terrorism are likely to be accepted by United States courts as falling within this

---

168. *Id.* at 4.

169. *Id.*

170. *Mwani*, 417 F.3d at 5–6.

171. *Id.* at 17.

172. *Id.*

173. *Id.* at 14–15 (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993)).

174. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

175. Slaughter & Bosco, *supra* note 12.

176. *But see* Vine v. Iraq, 459 F. Supp. 2d 10 (D.D.C. 2006) (illustrating that immunity statutes typically have certain exceptions). In that case, former "human shields" that were forced by Saddam Hussein to protect Iraqi military installations during the 1990 Gulf War were able to sue the Republic of Iraq. The plaintiffs were found to have been "hostages," which meant that they satisfied one of the established exceptions to the Foreign Sovereign Immunities Act's general prohibition against suing foreign nations in United States courts.

177. *Mwani*, 417 F.3d at 17.

178. *Id.* at 14 (referencing *Sosa*, 542 U.S. 692). A key point in these cases, with respect to the Act, is the courts' recognition that the Act only applies to violations of "the law of nations," and not to all torts in general. One other aspect unique to *Mwani*, however, is that the court permitted personal jurisdiction over bin Laden to be achieved via long-arm jurisdiction. It is not clear that all courts would have allowed this—many seem to take the view that physical presence in the forum state is required.

particularized sub-set of torts, thus allowing the Act to be invoked in terror cases.[179]

The *Mwani* court provided their rationale by citing *Sosa*, noting that:

> In *Sosa*, the Court determined that the First Congress understood the ATCA to "recognize private causes of action for certain torts in violation of the law of nations," including "violation of safe conducts, infringement on the rights of ambassadors, and piracy." It concluded that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [those] 18th-century paradigms." The plaintiffs' [claims against bin Laden] would appear to fall well within those paradigms.[180]

Thus, bin Laden and al Qaeda were sued via the Alien Tort Claims Act because their terrorist embassy bombing was seen to be sufficiently heinous so as to qualify as a violation of the "law of nations."[181]

Examining *Mwani* and earlier Alien Tort Claims Act cases, it is clear that the Act has the potential to be a useful tool when invoked by the victims of terrorist activity. But it is only a moderately useful one. The Act does allow foreign plaintiffs to sue terrorists in the United States under certain circumstances,[182] and—in that respect—it promotes justice and ensures that victims are able to get their day in court.[183] It further appears that terrorist activities may be sufficiently heinous so as to fall within the small sub-set of tort actions covered by the Act.[184] However, though the Act provides subject matter jurisdiction for a federal court to hear the case,[185] there is still the problem of gaining personal jurisdiction over the terrorist defendants,[186] as well as the practical unlikelihood of being able to collect on any judgments.[187] These are practical problems that have somewhat plagued the Act since its inception.[188]

B. Potential Use of the Act Against United States Interests

Cases such as *Mwani* have indicated that the Alien Tort Claims Act may be an available tool for victims of terrorism to use against those who committed the acts of terror.[189] But what about the people in this world who view the United States as a terrorist aggressor of sorts? Will the Act allow them to pursue their claims in the courts of the very nation that they seek to hold accountable? The answer, like so many legal questions, is a resounding: "Maybe?"

---

179. *Mwani*, 417 F.3d at 14.
180. *Id.* at 14 n.14.
181. *Id.*
182. *Id.* at 4.
183. *See* Hermer & Day, *supra* note 16.
184. *Mwani*, 417 F.3d at 14 n.14. *See also* Richey, *supra* note 21.
185. Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).
186. *See supra* notes 145–146 and accompanying text.
187. *See supra* note 147 and accompanying text.
188. *See supra* notes 25–28 and accompanying text.
189. *Mwani*, 417 F.3d at 14.

There are two general situations related to the global war on terrorism where the Act is most likely to be invoked against United States interests. The first is by those detained at Guantanamo Bay, challenging the legality of their detention and their treatment while detained.[190] The second is by persons in areas affected by U.S. military actions, seeking to hold anyone working in cooperation with the U.S. military accountable.[191]

With respect to the first situation, many of the detainees at Guantanamo Bay have filed habeas petitions and other actions challenging the legality of their detention.[192] Often, these actions include a laundry list of alleged violations based upon the Fifth Amendment's due process protections, the Eighth Amendment's cruel and unusual punishment prohibitions, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, and the Geneva Conventions.[193] Typically, the Alien Tort Claims Act is added to these complaints as well.[194] One of the more prominent Guantanamo cases, *Rasul v. Bush*, provides a good insight into how the Act is invoked in these cases.[195]

In *Rasul*, two Australian citizens and twelve Kuwaiti citizens challenged their detention at Guantanamo Bay.[196] All of the plaintiffs were captured by the U.S. military in early 2002 while they were in Afghanistan, allegedly fighting for the Taliban.[197] In conjunction with their habeas petition,[198] they also invoked the Alien Tort Claims Act, alleging that their detention "without being charged with any wrongdoing" is a tort actionable under the Act.[199] When the case came before the Supreme Court, the Court held that:

> [N]othing . . . in any of our [] cases categorically excludes aliens detained in military custody outside the United States from the "privilege of litigation" in U.S. courts. The courts of the United States have traditionally been open to nonresident aliens . . . [The Alien Tort Claims Act] explicitly confers the privilege of suing for an actionable "tort . . . [sic] committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.[200]

Notably, the Court declined to decide whether or not the plaintiffs' detention was "an actionable tort" under the Act. It merely held that there was nothing to prevent

190. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 484–85 (2004).
191. *See, e.g.*, Saleh v. Titan Corp., 436 F. Supp. 2d 55, 57–58 (D.D.C. 2006).
192. Savage, *supra* note 14.
193. *Id.*
194. *Id. See also Rasul*, 542 U.S. at 484–85.
195. *Rasul*, 542 U.S. at 484–85.
196. *Id.* at 466.
197. *Id.* at 470–71.
198. *Id.* at 472.
199. *Id.* at 484.
200. *Rasul*, 542 U.S. at 484–85.

detainees from invoking the Act in order to satisfy federal subject matter jurisdiction.[201]

When the Court's holding in *Rasul* is coupled with other recent legal developments in the global war on terrorism, the stage is set for an interesting challenge which will likely involve the Alien Tort Claims Act. In a 2006 Supreme Court case, *Hamdan v. Rumsfeld*, the Court made the somewhat surprising decision that the Geneva Conventions apply to members of al Qaeda, even though they are non-state actors who are not (and cannot) become "high contracting parties" to the conventions.[202] The Court's reasoning is important: the Court held that the Geneva Conventions apply because over the years the conventions have risen to become part of the common law of nations.[203] Elevating the conventions (or, at least, portions of the conventions) to the status of "law of nations" suggests that, in future cases, the Court might view violations of the Geneva Conventions as "an actionable tort" under the Alien Tort Claims Act.

Further complicating the matter is that, in the wake of *Hamdan*, Congress passed the Military Commissions Act of 2006.[204] Congress took this action expressly for the purpose of remedying items mentioned by the Court in *Hamdan*. This act purports to establish acceptable detainee processing procedures at Guantanamo Bay, fully in compliance with United States law and the law of nations.[205] The Supreme Court will undoubtedly address further challenges to the Military Commissions Act of 2006, and it is likely that these challenges will require the Court to more fully examine the issue of what constitutes a violation of the "law of nations." Given the Supreme Court's holding regarding the Alien Tort Claims Act in *Rasul*,[206] a future challenge to the Military Commissions Act of 2006 (and any Guantanamo cases in the meantime) will likely involve the Alien Tort Claims Act.

As noted earlier, the second situation where the Alien Tort Claims Act might be invoked against United States interests is the use of the Act by persons in areas affected by U.S. military actions, seeking to hold anyone working in cooperation with the U.S. military accountable.[207] Because of immunity issues, such suits are most likely to take the form of suits against corporations cooperating with the U.S. military—somewhat along the lines of a *Unocal* suit.[208]

A 2006 case, *Saleh v. Titan Corporation*, provides a good illustration of the form that such cases might take.[209] In *Saleh*, the plaintiffs were Iraqi nationals[210] who alleged that they endured "acts of torture and other mistreatment" while imprisoned in Iraq at Abu Ghraib prison in Baghdad.[211] Because suits against the military itself raise barriers based upon various immunities and also upon political question and separation

201. *Id.* at 485.

202. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794–95 (2006).

203. *Id.*

204. Military Commissions Act of 2006, 10 U.S.C. § 948 (2006).

205. *Id.*

206. *Rasul*, 542 U.S. at 484–85.

207. *See supra* note 191 and accompanying text.

208. *See supra* notes 98–115 and accompanying text.

209. Saleh v. Titan Corp., 436 F. Supp.2d 55 (D.D.C. 2006).

210. Plaintiff Saleh himself was actually described as "an individual residing in Sweden and Dearborn, Michigan." However, all other plaintiffs were residents of Iraq. *Id.* at 56.

211. *Saleh*, 436 F. Supp.2d at 56.

of powers principles,[212] the plaintiffs in *Saleh* instead targeted a private corporation. Defendant Titan Corporation is a private company, operating in Iraq as a government contractor.[213] Titan Corporation provides interpreters to U.S. military personnel, including—relevant to this suit—to the military intelligence interrogators at Abu Ghraib.[214]

The court in *Saleh* determined that the alleged acts of torture were not actionable under the Alien Tort Claims Act. In a disappointingly brief memorandum order, the court reasoned that the type of "torture" that constitutes a violation of the law of nations is government torture.[215] Any "torture" carried out by a private corporation is really just assault and battery,[216] and such torts of this nature do not fall under the coverage of the Act.

The court in *Saleh* correctly notes that the Act does not cover all torts—it only covers those heinous enough to rise to the level of a violation of the law of nations (or in violation of a treaty).[217] However, the holding seems to be at odds with the accomplice liability theories that succeeded (or, at least, forced settlement) in *Unocal* and earlier cases involving corporations.[218] Given this apparent inconsistency, it will be interesting to see how the district courts apply the Act in future suits against corporations operating in support of the global war on terrorism.

V. CONCLUSION

A scant thirty years ago, if a legal scholar had been asked about the Alien Tort Claims Act of 1789 it's likely that the response would have dismissed the Act as a long forgotten statute—one of those "technically still on the books," like a law against driving one's buggy on Sundays. In the 1980s, *Filartiga* made the Act relevant again.[219] Later, *Unocal* and *Sosa* further piqued curiosity as to how the Act might be applied by creative lawyers in the future.[220] The jury is still out, so to speak, on how the Act will influence global war on terrorism cases. However, as cases such as *Rasul* and *Saleh* illustrate,[221] an understanding of what the Act can—and cannot—do will be

212. *Id.* at 57. *See generally* Slaughter & Bosco, *supra* note 12.

213. *Saleh*, 436 F. Supp.2d at 56–57.

214. *Id.*

215. *Id.*

216. *Id.* at 57.

217. *Id.* at 56–57; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004).

218. *See supra* notes 110–113 and accompanying text.

219. *Filartiga*, 630 F.2d 876.

220. *Doe I*, 395 F.3d 932; *Sosa*, 542 U.S. 692.

221. *Rasul* 542 U.S. 466; *Saleh* , 436 F. Supp. 2d 55.

critical as courts address cases stemming from a conflict that has defined the early years of the twenty-first century.

Whatever else can be said about this intriguing piece of legislation, it is clear that its relevance did not die with Blackbeard.