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COURT PROPERLY LIMITS SCOPE OF ALIEN TORT CLAIMS ACT

by

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The Alien Tort Claims Act, 28 U.S.C. § 1350 ("ATCA"), is a one-sentence statute that provides federal jurisdiction for "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." After its enactment in 1789, the ATCA was rarely invoked for almost 200 years. As globalization of commerce and technology proliferated in the 1980s, however, and as the United States gained renown as a favorable forum for plaintiffs, foreign claimants began to bring suit more frequently in U.S. federal courts under the auspices of the Act. With the increasing frequency of ATCA claims in more recent years have come increasingly aggressive arguments from alien plaintiffs urging a broad reading of the Act's scope. What began largely as a movement to win redress in American courts for conduct universally acknowledged to violate basic human rights — conduct such as torture, genocide, and slavery — has threatened to devolve into a free-for-all in which foreign plaintiffs invoke the ATCA as an all-encompassing basis for jurisdiction in routine personal injury cases involving any conduct occurring abroad.

The arguments made by the plaintiffs in *Flores v. Southern Peru Copper Corporation*, 2002 WL 1587224, No. 00 CIV. 9812 (S.D.N.Y. July 16, 2002), typified the recent expansionist movement, and the court's response to those arguments was a forceful and appropriate rebuke. A group of Peruvian plaintiffs alleged that Southern Peru Copper Corporation ("SPCC"), a Delaware corporation with its principal place of business in Peru, violated international law because pollution generated by the company deprived plaintiffs of their (allegedly) internationally recognized "rights to life, health, and sustainable development." Judge Haight of the U.S. District Court for the Southern District of New York dismissed the claim, holding that ATCA jurisdiction was lacking because the plaintiffs failed to demonstrate that environmental pollution within a foreign nation's borders violates "well-established, universally recognized norms of international law," even if it causes harm to human life, health, and development. *Id.* at *11. The court further held that dismissal would have been appropriate on *forum non conveniens* grounds because Peru provided an adequate alternative forum.

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Brief History of the ATCA and the Recent Plaintiffs' Expansionist Movement. Congress enacted the ATCA in 1789. Several scholars have suggested that its primary purpose was to prevent the U.S. from becoming a safe haven for pirates seeking to evade liability for tortious acts committed at sea. *See Wiwa*, 226 F.3d at 105 n.10; Peter Waldman and Timothy Mapes, *White House Sets New Hurdles For Suits Over Rights Abuses*, WALL ST. J., Aug. 7, 2002. During its first 190 years of existence, the ATCA was successfully invoked as a basis for federal jurisdiction in only two reported cases. *See Bolchos v. Darrell*, 3 Fed. Cas. 810 (D.S.C. 1795) (dispute over title to slaves aboard ship taken at sea); *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961) (child custody suit between aliens, involving falsified passport). The Second Circuit aptly summarized the ATCA's history in 1975 when it noted that "although [the ATCA] has been with us since the first Judiciary Act … no one seems to know from whence it came." *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). The court cautioned that the Act "must be narrowly read if the section is to be kept within the confines of Article III." *Id.*

Five years later, the Second Circuit decided a landmark case styled *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). That court upheld jurisdiction pursuant to the ATCA over a claim by one Paraguayan citizen against another for causing the wrongful death of the former's son by torture, because "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." *Id.* at 878. The court based its ruling on the crucial determinations that (1) "there is at present no dissent from the view that the guaranties [of international law] include, at a bare minimum, the right to be free from torture," and (2) torture — like other universally condemned forms of conduct such as piracy — was "sufficiently determinate" and well-defined to trigger ATCA jurisdiction. *Id.* at 880, 883. *Filartiga* marked the first modern case in which a court upheld ATCA jurisdiction for a suit between non-U.S. citizens for violations of the "law of nations"; at the same time, the court deliberately mapped out clear principles to guide and restrict future exercises of jurisdiction pursuant to the ATCA.

Filartiga thus opened the door to U.S. federal courts for foreign plaintiffs claiming international human rights violations. Since *Filartiga*, foreign plaintiffs successfully have obtained jurisdiction in U.S. federal courts for a range of human rights violations occurring abroad, including torture of Ethiopian prisoners; rape, torture, genocide, and other war crimes by a Serbian military leader; torture perpetrated by the former Philippine President; and an armed attack by Libyan authorities on a bus in Israel.[1] Each of these cases, like *Filartiga*, involved conduct (such as torture and war crimes) that is both capable of precise definition and has received universal condemnation as being of mutual concern among nations. Additionally, these cases uniformly involved conduct by foreign state actors.

In contrast to those claims, which fall squarely within the ATCA's grant of jurisdiction for egregious conduct violating the "law of nations," there recently has emerged a spate of claims by plaintiffs seeking ATCA jurisdiction over more commonplace personal injury and environmental tort claims against private corporations for conduct occurring overseas. For example, in *Sequiha v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994), Ecuadorian residents sued Texaco under the ATCA for environmental contamination allegedly caused by its Ecuadorian operations. Similarly, in *Beanal v. Freeport-McMoRan*, 197 F.3d 161 (5th Cir. 1999), an Indonesian plaintiff alleged that a U.S. corporation's mining operations in Indonesia caused harm to the environment and habitat of a native tribe and that the operations violated the tribe's human rights, all in violation of the law of nations. And in *Aguinda v. Texaco, Inc.*, --- F.3d ---, 2002 WL 188105, No. 01-7756L, *et al.* (2d Cir. Aug. 16, 2002), Ecuadorian plaintiffs (again) alleged that Texaco violated international law under the ATCA because the defendant's Ecuadorian activities allegedly caused environmental harms resulting in personal injuries.

To date, plaintiffs have not succeeded in obtaining federal jurisdiction over ATCA claims relating

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[1] *See Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

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to the industrial activities abroad of private corporations. This is much to the credit of the presiding courts, which repeatedly have refused to expand the ATCA to apply to ordinary personal injury and environmental tort claims against non-state actors. Nonetheless, a potentially problematic trend has emerged: foreign plaintiffs persistently have attempted, by asserting ATCA claims for environmental pollution allegedly in violation of human rights, to erode the twin protections set forth in *Filartiga* — namely, that the ATCA confers jurisdiction only where the conduct alleged is both (1) universally condemned as being of mutual, and not merely several, concern to nations and (2) capable of some level of specific definition.[2]

Flores v. Southern Peru Copper Corporation. The arguments made by the plaintiffs in *Flores* typified the recent expansionist movement. Eight Peruvian plaintiffs claimed to have suffered asthma and lung disease as a result of environmental pollution caused by defendant SPCC's mining and smelting operations in Peru. The plaintiffs argued that federal jurisdiction was appropriate under the ATCA because SPCC violated international law by interfering with the plaintiffs' alleged "rights to life, health, and sustainable development." 2002 WL 1587224, at *2. SPCC moved to dismiss the complaint because the alleged violation of plaintiffs' asserted "rights" did not satisfy the requirement that a prohibition must achieve general international assent and must set forth definitive standards for measuring prohibited conduct in order to qualify as the "law of nations" under the ATCA.

The court agreed with SPCC. First, the plaintiffs cited no precedent to support their claim that alleged violations of their "rights to life, health and sustainable development" triggered ATCA jurisdiction. *Id*. To the contrary, in numerous cases (including *Sequiha*, *Beanal*, and *Aguinda*), courts had rejected arguments that environmental contamination triggered ATCA jurisdiction. Although the plaintiffs in *Flores* creatively cast their claims not as environmental claims or personal injury claims, but as claims for violations of the "rights to life, health, and sustainable development," the court ruled that "the labels plaintiffs affix to their claims cannot be determinative. Severe environmental pollution necessarily has an impact on human life, and the cases discussed previously all involved allegations of environmental pollution where people were injured or placed at risk of being injured." *Id.* at *6. The court concluded that the "plaintiffs have not demonstrated that high levels of environmental pollution, causing harm to human life, health, and sustainable development within a nation's borders, violate any well-established rules of customary international law" because there existed no "general consensus among nations" that environmental pollution that causes harm to human health is "universally unacceptable." *Id.*

The *Flores* court also observed that "even if conduct is universally prohibited, it is not necessarily incorporated into customary international law." *Id*. at *10. For example, "the mere fact that every nation's municipal law may prohibit theft does not incorporate 'Thou Shalt not steal' … (into) the law of nations. It is only where the nations of the world have demonstrated that the wrong is of *mutual, and not merely several*, concern … that a wrong generally recognized becomes an international violation within the meaning of the statute." *Id.* at *10 (quoting *Filartiga*) (emphasis added). Although the plaintiffs proffered numerous conventions and declarations purporting to evince that international law prohibited environmental pollution causing harm to human life and health, the court found that "[t]hese documents speak in terms of 'rights,' but they do not identify any prohibited conduct that is relevant to this case." *Id.* at *6. Thus, the plaintiffs' proffered evidence consisted of nothing more than general statements of human rights principles

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[2]Another recent trend has further whetted the appetites of opportunistic foreign plaintiffs. In *Kadic*, the Second Circuit held that state action is not necessarily required for a violation of the law of nations; the court held that some violations of international law (such as genocide and piracy) may be perpetrated by non-state actors. 70 F.3d at 239. Thus, private corporations have become targets for foreign plaintiffs suing under the ATCA. Building on *Kadic*, such plaintiffs recently convinced the Ninth Circuit to reinstate a suit against Unocal Corporation for alleged human rights abuses relating to operations in Myanmar, even though that company did not act under color of state law, but allegedly provided "assistance" or "encouragement" to the offending government actors. *See John Doe v. Unocal Corp*, 2002 WL 31063976, Nos. 00-56603, *et al.* (9th Cir. Sept. 18, 2002). *Unocal* now threatens to become the first case in which an American-based corporation will stand trial on the merits in federal court (with jurisdiction based on the ATCA) for alleged violations of international law. *See* Pui-Wing Tam, *Appeals Court Reinstates Suit Against Unocal*, WALL ST. J., Sep. 10, 2002.

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that were "insufficiently determinate, standing alone, to establish binding customary international law," and so failed to confer jurisdiction under the ATCA. *Id.* at *7. The court held that "[w]hile it is not necessary for nations to identify with specificity every factual scenario that violates a particular prohibition under international law, a rule of customary international law must nevertheless be 'sufficiently determinate' to make it clear that particular conduct is prohibited." *Id.* at *11 (quoting *Filartiga*). Thus, the "conduct" alleged by the plaintiffs — interference with the right to life, health, and sustainable development — was not sufficiently determinant to confer jurisdiction under the ATCA. This is in contrast to conduct such as slavery, genocide, and piracy, each of which is capable of some level of concrete definition.

Although the court's ruling that jurisdiction was not proper under the ATCA was sufficient to justify dismissal, the court went on to state that, had it needed to decide the issue, it would have dismissed the plaintiffs' claims on the independent ground of *forum non conveniens*. *Id.* at *11-*12. Of most relevance to this discussion, the court rejected the plaintiffs' argument that a case brought under the ATCA is immune from *forum non conveniens* dismissal. *Id.* at *14-*15. (In an even more recent decision, the Second Circuit agreed by ruling that ATCA claims may properly be dismissed on *forum non conveniens* grounds. *See Aguinda*, 2002 WL 188105, at *8.)

Flores *As a Model for a Principled and Proper Limitation on the Scope of the ATCA*. The *Flores* decision is important because it reestablished that the ATCA, while capable of conferring jurisdiction in cases of universally recognized and well-defined violations of international law such as torture and genocide, does not throw open the doors of U.S. courts to foreign plaintiffs claiming damages for run of the mill torts. This is significant on a number of levels. First, as a justice of England's Court of Appeals astutely observed, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs. Ltd. v. Bloch*, 2 All E.R. 72, 72 (Ct. App. 1983). If foreign plaintiffs ultimately succeed in eviscerating the key limiting principles set forth in *Filartiga* and reaffirmed in *Flores*, U.S. courts inevitably will endure a flood of lawsuits by aliens concerning ordinary environmental torts committed entirely within the borders of foreign nations. If, by contrast, *Filartiga* and *Flores* are properly preserved (and observed), the category of claims capable of triggering jurisdiction will be limited to those of truly international concern.

Just as it protects U.S. courts from an onrush of lawsuits by aliens, *Flores* also protects American-based corporations from the burden of a crippling wave of suits concerning alleged personal injuries (even if creatively recast as violations of human rights, as in *Flores*) sustained abroad as a result of environmental pollution. Without the vital protections established in the cases setting the limits on ATCA jurisdiction, corporations with business activities abroad could face enormous legal costs for litigation conducted in the U.S. that has no real connection to our nation, to the detriment of their investors and of the courts that must provide forums for such disputes.

On an even broader level, *Flores* is important because it preserves the ability of the Executive Branch to conduct foreign relations without interference from courts. On two occasions over the past year, the U.S. Department of State formally has stated its position against the exercise of jurisdiction over claims against corporations for their overseas activities. In the most recent case, the State Department warned that allowing jurisdiction over a case brought by Indonesian plaintiffs against ExxonMobil in U.S. court could "impair [Indonesia's] cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterorrism." *See* Waldman & Mapes, *supra*, WALL ST. J., Aug. 7, 2002. Given the current need to foster consensus regarding the fight against international terrorism, and the need of our Executive Branch to conduct foreign relations without interference from the judiciary, constant interference by U.S. courts with foreign affairs threatens to work as a powerfully counterproductive force.

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