Legal Backgrounder

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JUDICIAL OPINION EXPOSES FLAWS IN SUITS UNDER ALIEN TORT STATUTE

by

Konrad L. Cailteux and Nina Nagler

The First Congress enacted the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, as part of the Judiciary Act of 1789.[1] It provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of the nations or a treaty of the United States." There is little in the way of legislative history or historical commentary regarding the purpose of the ATS, although some courts and commentators have speculated over the years that it was only meant to cover claims for acts of piracy. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 800-01 (D.C. Cir. 1984); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

After its enactment, the ATS lay virtually dormant for almost 200 years. Then, in 1980, the U.S. Court of Appeals for the Second Circuit, with little historical analysis of its origin or intended purpose, gave the ATS a very expansive construction. It concluded that the ATS conferred jurisdiction on federal courts to hear a dispute between citizens of Paraguay and, by finding that "customary international law" is part of federal common law, implied that the ATS also created a cause of action. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). In subsequent decisions, other courts, relying on *Filartiga*, explicitly found that the ATS provides aliens with a cause of action for torts committed in violation of international law or treaties.

Recently, however, Judge A. Raymond Randolph of the U.S. Court of Appeals for the D.C.

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[1] Courts and litigants haven often referred to the ATS as the "Alien Tort Claims Act" or the "ATCA." However, the correct title of the statute is the Alien Tort Statute. *See* 28 U.S.C. § 1350; *see also, e.g., Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432-37 (1989) (referring to the "Alien Tort Statute").

Konrad L. Cailteux is a partner and **Nina Nagler** is an associate in the New York office of the law firm Weil, Gotshal & Manges LLP. They have represented corporate defendants in a number of cases brought under the Alien Tort Statute.

Circuit took a critical look at the origins of the ATS and its intended purpose. Contrary to the assumptions of *Filartiga* and its progeny, Judge Randolph found that the ATS was merely a jurisdictional statute, and that the First Congress never meant to create, either implicitly or explicitly, a private right of action in U.S. courts for violations of international law. *See Al Odah v. United States*, 321 F.3d 1134, 1145-50 (D.C. Cir. 2003) (Randolph, J., concurring).

Background of the Case. The *Al Odah* case arose out of the detention of non-enemy aliens at the U.S. Naval Base in Guantanamo Bay, Cuba in the aftermath of the war on terrorism in Afghanistan. Plaintiffs, through a legal convention that allows "next friends" (such as relatives) to petition on such detainees' behalf, brought three separate suits against the United States and United States government officials in the U.S. District Court for the District of Columbia, contesting the legality and conditions of their confinement. *Id.* at 1136-37. Plaintiffs asserted claims for denial of due process under the Fifth Amendment, violation of the ATS, and arbitrary and unlawful governmental conduct. Plaintiffs in all three actions sought a preliminary and permanent injunction ordering respondents, *inter alia*, to allow the detainees contact with their counsel and families, to cease interrogations and to give them access to the courts. *Id.* The district court, relying upon the Supreme Court's decision in *Johnson v. Eisentrager,* 339 U.S. 763 (1950), dismissed the cases, holding that it lacked jurisdiction to decide claims brought by aliens detained outside the sovereign territory of the United States. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72-73 (D.D.C. 2002) (Kollar-Kotelly, J.).[2]

The Court of Appeals' Decision. The Court of Appeals affirmed the lower court's decision, also relying upon the holding in *Johnson v. Eisentrager, supra*. *See Al Odah*, 321 F.3d at 1137-1145. The Court of Appeals opined that certain basic constitutional rights and writs are simply not held by aliens where the alleged wrongs occurred outside the sovereign territory of the United States. Because it found the detainees were not entitled to the claimed constitutional rights, the majority found no reason to address the detainees' other claims, including their ATS claims. *Id.* at 1144-45.

Judge Randolph's Concurrence. In writing in a separate concurring opinion, Judge Randolph did discuss the ATS, and for the first time critically analyzed whether the ATS provides a cause of action for violations of the law of nations or international treaties. Judge Randolph began by summarizing the current state of the law. He noted that three courts of appeals had concluded that the ATS provides not only a basis for jurisdiction in federal courts, but also for a distinct cause of action.[3] He then noted that the D.C. Circuit had rejected the view that the ATS provided for a private cause of action. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 801, 926 n.5 (ATS does not create a cause of action) (Bork, J. concurring) (*Filartiga* is fundamentally at odds with a reality of the structure of

[2]The *Eisentrager* case involved a petition for writs of *habeas corpus* filed by twenty-one German nationals who were captured in China and charged with engaging in espionage against the United States after the surrender of Germany in 1945. The Supreme Court held that "the privilege of litigation" had not been extended to the German prisoners because "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." *Eisentrager*, 339 U.S. at 777-78.

[3]*I.e.*, the Second Circuit: *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); the Ninth Circuit: *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), and *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); and the Eleventh Circuit: *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

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international law and the role of U.S. in that structure) (Robb, J. concurring).[4]

Judge Randolph did his own independent analysis of the statute. He first observed that interpreting the ATS as creating a cause of action for treaty violation, as the *Filartiga* court and its progeny do, would give aliens greater rights than U.S. citizens. To illustrate this, he pointed out that the *Al Odah* appellants based their ATS claims on a violation of the Geneva Convention of 1949. Numerous U.S. courts, however, have found that the Geneva Convention is not self-executing and does not provide a U.S. citizen with a private right of action. Further illustrating such legal absurdities, Judge Randolph cited the Ninth Circuit's decision in *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998). In *Martinez*, the Ninth Circuit sustained a suit brought under the ATS by an alien against the City of Los Angeles for actions that occurred in Mexico. The Ninth Circuit found a violation of international law based partly on the International Covenant on Civil and Political Rights, a multilateral agreement that creates no judicially enforceable rights, and which the Senate ratified on the explicit basis that it *not* create a private cause of action in U.S. courts. *Al Odah*, 321 F.3d at 1147. Judge Randolph concluded that the First Congress, by enacting the ATS in 1789, could not have intended to have extended greater rights to aliens in its courts than it did to its own citizens. *Id.* at 1146-47.

Judge Randolph next rejected the *Filartiga* theory that federal common law incorporates customary international law. He argued that Article I, Section 8 of the Constitution makes it abundantly clear that Congress — not the judiciary — is to determine through legislation what international law violations will be cognizable in federal courts.[5] Thus, allowing courts to determine what constitutes the law of nations as a basis for an ATS claim would infringe on the foreign affairs power of the Executive Branch, and likely constitute a violation of the principle of separation of powers.

Moreover, Judge Randolph observed that by allowing federal courts to decide on a case-by-case basis what constitutes a violation of international law, federal courts also would be creating a body of general federal common law — something the Supreme Court specifically brought to an end in 1938. *See Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Judge Randolph concluded, then, that it was simply not within the scope of the judiciary's power to determine cognizable claims under the law of nations, opining that courts "'ought not serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations.'" 321 F.3d at 1148 (quoting Judge Robb's concurring opinion in *Tel-Oren*, 726 F.2d at 827).

Finally, Judge Randolph found that more recent historical research conducted by Professor Joseph Modeste Sweeney had shed new light on the original purpose of the ATS.[6] Professor Sweeney's historical research showed that before the adoption of the Constitution, the Articles of Confederation

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[4]Judge Randolph also noted that some courts have argued that Congress ratified *Filartiga*'s interpretation of the ATS when it passed the Torture Victim Protection Act in 1991. He rejected the argument, finding that a single statement by a Congressional committee that the ATS "would remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," was not a statement of Congress, because that committee's wish is not reflected in any language that Congress ever enacted. 321 F.3d at 1146.

[5]Judge Randolph pointed out that, as originally drafted, Article I, Section 8, merely provided that Congress would have the power to punish offenses against the law of nations. However, because there were objections that the law of nations was "'often too vague and deficient to be a rule,'" it was changed to "*define* and punish" offenses against the law of nations. 321 F.3d at 1147 (emphasis added).

[6]Professor Sweeney's research is discussed at length in Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

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gave state courts jurisdiction over "claims by alien shipowners seeking the return of their captured vessels and reparations for the damages caused by the seizure." 321 F.3d at 1148. The Constitution and the First Judiciary Act, however, gave federal courts exclusive jurisdiction over admiralty claims, and, thus, exclusive jurisdiction over suits to recover ships captured in prize. For purposes of avoiding potential confusion over whether, as a consequence of the creation of exclusive jurisdiction over admiralty claims for federal courts, state courts would still have jurisdiction over claims for damages caused by the capture of the ship, Professor Sweeney argues that the ATS was enacted to make clear that the state courts would have concurrent jurisdiction with the federal courts for claims brought by aliens for reparations only, and not the return of the ship — hence the words "for a tort only" in the ATS. Based on this legislative history, Judge Randolph found that the First Congress had intended the ATS to deal only with the creation of jurisdiction, not the creation of a cause of action.

Conclusion. Judge Randolph's opinion provides what is perhaps the first detailed analysis of the origins and purpose of the ATS ever conducted by a federal court. It persuasively argues that the First Congress could not have intended to give aliens greater rights in U.S. courts than its own citizens have. Nor did the First Congress, by enacting the ATS, intend to make U.S. courts the forum of choice to adjudicate any wrong committed against an alien outside the United States. Judge Randolph's well-reasoned opinion will hopefully provide courts in future ATS cases a strong rationale for rejecting attempts by litigants to use the ATS to convert U.S. courts into a world court of claims.

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