HUMAN RIGHTS BOON OR TICKING TIME BOMB: THE ALIEN TORT STATUTE AND THE NEED FOR CONGRESSIONAL ACTION

MAJOR WILLIAM E. MARCANTEL, JR.*

It is nearly always the most improbable things that really come to pass.[1]

I. Introduction

In August 2014, U.S. forces, under a request for assistance from the governments of Mali and France, are heavily involved in counterinsurgency operations in northern Mali against the Movement for Oneness and Jihad in West Africa (MOJWA) and other extremist Islamist groups who have controlled the area for over two years. The local Tuareg population actively supports MOJWA and the insurgency, whose ultimate goal is to create an independent state of Azawad in northern Mali. After repeatedly failing to control Tuareg population centers, the Malian government authorizes the U.S. Joint Task Force–Mali (JTF–M) commander to relocate by force certain groups of civilians into internment centers in an attempt to separate insurgents from the

* Judge Advocate, U.S. Marine Corps. Presently assigned as the Assistant Staff Judge Advocate, U.S. Marine Corps Forces, Central Command. LL.M., 2013, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 2009, University of Missouri; B.A., 2001, Northwestern University. Previous assignments include Defense Counsel, Camp Lejeune Branch, Eastern Region, Marine Corps Defense Services Organization, Camp Lejeune, North Carolina, 2011–2012; Office of the Staff Judge Advocate, Marine Corps Base, Camp Lejeune, North Carolina, 2009–2011 (Deputy Staff Judge Advocate, 2010–2011; Civil Law Officer, 2009–2010); Student Judge Advocate, Funded Law Education Program, Columbia, Missouri, 2006–2009; Inspecting Officer / Logistics and Assistant Operations Officer, Company C, Marine Security Guard Battalion, Bangkok, Thailand (2005–2006); Platoon Commander, 1st Battalion, 1st Marine Regiment, Camp Pendleton, California (Combined Anti-Armor Team Platoon, Weapons Company, 2004–2005; Weapons Platoon, Company C, 2002–2004). Member of the bar of Missouri. Previous publications include: *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793 (2011) (with Dave Winters and Professor Christina Wells); *Protecting the Predator or the Prey? The Missouri Supreme Court's Refusal to Allow Past Sexual Misconduct as Propensity Evidence*, 74 MO. L. REV. 211 (2009); *Is it Hot in Here? The Eighth Circuit's Reduction of Fourth Amendment Protections of the Home*, 73 MO. L. REV. 881 (2008). This article was submitted in partial completion of the Master of Laws requirements of the 61st Judge Advocate Officer Graduate Course.

[1] ERNST HOFFMANN, THE SERAPION BRETHREN 48 (Alex Ewing trans., George Bell and Sons 1908).

civilians who are not directly participating in hostilities. Additionally, the JTF–M implements the practice of destroying neighborhoods from which rockets or mortars are fired at coalition forces by evicting residents and bulldozing their homes.

The daily operation of the internment centers is conducted by Malian military forces with JTF–M oversight and logistics support. Since the inception of these centers, Non-Governmental Organizations (NGOs) have criticized the U.S. and Malian governments over the poor sanitation, inadequate living conditions, and near nonexistent healthcare that contribute to hundreds of deaths from disease in the internment centers. Additionally, internees are forced to work in fields to grow crops for themselves and the Malian army. Finally, the international press reports on credible allegations detailing the rampant abuse and torture of interned civilians, including claims that U.S. counterintelligence personnel are involved in enhanced interrogations of internees suspected of affiliation with Al-Qaeda in the Islamic Maghreb (AQIM).

In the fall of 2014, Tifrat Amazigh, a Tuareg woman, escapes from an internment center where she is detained with her family after coalition forces destroy their home following a rocket attack from their neighborhood. When she flees, she leaves behind her 13-year-old son and her husband, who are interned in a "special housing unit" for suspected AQIM members where internees are allegedly tortured and abused. She subsequently enters the United States as a refugee and files suit against the JTF–M commander and the Secretary of Defense in their personal and official capacities seeking injunctive relief and damages under the Alien Tort Statute (ATS) on behalf of her husband, son, and herself. The court issues a preliminary injunction, ordering an immediate cessation of U.S. support to the internment centers and the practice of destroying neighborhoods as reprisal against insurgent attacks. As the litigation drags on and the injunction remains in effect, Malian forces are pushed back by insurgent groups after the JTF–M is limited to serving in an advisory role near the capitol, Bamako. U.S. maneuver battalions await strategic lift to redeploy to the United States due to the inability to conduct effective combat operations within the parameters of the injunction.

Within this hypothetical scenario lies the potential power of a lone sentence buried within the codification of jurisdictional statutes for federal courts: "[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 nations or a treaty of the United States."[2] Largely forgotten until 1980,[3] this single sentence has been the subject of hotly contested legal debates and litigation as to what these words mean and how they should be applied.[4] The vast majority of this debate has focused on tortious activity by non-U.S. individuals or non-state entities;[5] however, since September 11, 2001, some of this focus shifted to actions by the U.S. government and is at the intersection of international humanitarian law (IHL) and international human rights law (IHRL).[6] Despite the U.S. government's traditional view that IHL is a *lex specialis* that occupies the field during armed conflict,[7] the ATS presents the distinct possibility that IHRL could be injected into traditional IHL arenas as *lex lacunae*, complementing—if not completely replacing—IHL during military

---

[2] 28 U.S.C. § 1350 (2006).

[3] Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1127–28 (2011) (discussing the recent rise of Alien Tort Statute litigation).

[4] *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997), *and* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) *with* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002), *and* William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. FORUM 19 (2007).

[5] *See* USA*Engage, *Alien Tort Statute Case List*, http://usaengage.org/default/Documents/Litigation/ATS Case List.pdf (last visited Mar. 12, 2013).

[6] *See, e.g.*, Rasul v. Bush, 542 U.S. 483 (2004) (ATS suit against the President regarding Guantanamo detention); Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2010) (ATS suit against the Secretary of Defense regarding detention in Iraq and Afghanistan); Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2010) (ATS suit against defense contractor who participated in abusive interrogations of Iraqi citizens); El-Masri v. United States, 479 F.3d. 276 (4th Cir. 2007) (ATS suit for abusive treatment deriving from plaintiff's extraordinary rendition and subjection to enhanced interrogation); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (ATS suit to remove son's name from CIA kill list). For a brief summary of the definitions, similarities and differences of international humanitarian law (IHL) and international human rights law (IHRL) as used in this article, see The International Committee for the Red Cross (ICRC), *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. Key to the discussion herein is when and whom IHL and IHRL binds, as understood through treaty and customary international law.

[7] "*Lex specialis derogat legi generali*" means the specific law prevails over general law. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 197 (2012), *but see* U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS paras. 506–07 (30 Dec. 2011), *available at* http://www.state.gov/g/drl/rls/179781.htm (indicating shifting U.S. position to one of complementarity regarding IHL and IHRL interplay).

operations.[8]

Consequently, there is a risk that the courts could interpret the ATS to apply traditional IHL and IHRL in ways that would limit or alter the discretion and options available to battlefield commanders. In particular, the ATS could be used by the judiciary to second-guess commanders' actions and the exclusive application of firmly entrenched IHL standards if courts choose to enforce certain customary international laws that were not meant to apply to the battlefield.[9] Ultimately, the potential for judicial interference and the adverse impacts that this could have on U.S. national security requires Congress to take action and clarify the scope of

---

[8] "*Lex lacunae*" means law of the gaps. For a discussion of *lex lacunae* in a modern IHL/IHRL context, see Iain D. Pedden, Lex Lacunae*: The Merging Laws of War and Human Rights in Counterinsurgency*, 46 VAL. U. L. REV. 803 (2012). *See also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'s LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 46–47 (2012) (citing U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS para. 506 (30 Dec. 11), at http://www.state.gov/g/drl/rls/179781.htm) (expressing the emerging U.S. official view of complementarity between IHL and IHRL); Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883 (2012) (analyzing three models for understanding the relationship between IHL and IHRL: displacement, complementarity, and conflict resolution).

[9] Admittedly, this has not yet occurred in the context of ATS suits against U.S. officials; however, courts may grow weary as the Executive continues to expand its authority while conducting the War on Terror. *See, e.g.*, Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623 (discussing the likely rise in judicial intervention as the current legal framework erodes due to the withdrawal of combat forces from Afghanistan); Hedges v. Obama, 890 F. Supp. 2d 424, (S.D.N.Y. 2012) (order granting injunction against U.S. Government enforcement of § 1021(b)(2) of the National Defense Authorization Act for Fiscal Year 2012); New York Times Co. v. U.S. Dept. of Justice, 915 F. Supp. 2d 508, 515–16 (S.D.N.Y. 2013) ("The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. . . . However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusion a secret.").

the ATS.

Part II of this article discusses the history and background of the ATS. Part III applies the above hypothetical fact pattern to a potential litigation scenario involving the most common bars to these types of cases, including: a failure to state a claim that is a sufficiently recognized violation of the law of nations or an insufficient pleading under *Ashcroft v. Iqbal*;[10] a lack of standing; the political question doctrine; a claim of sovereign immunity by the U.S. government; and the state secrets privilege. Part IV briefly discusses how Amazigh's claims might still be successful in order to highlight the need for Congressional action to minimize the likelihood that such an outcome could unreasonably hamper the U.S. military's ability to fight and win the nation's wars.[11]

---

[10] Ashcroft v. Iqbal, 556 U.S. 662 (2009) (discussed in detail *infra* pp. 126–27).

[11] The debate as to how the ATS should be prospectively interpreted is beyond the scope of this article, as is much of the discussion regarding corporate liability recently addressed by the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). The decision leaves open several questions that impact how the United States fights wars due to the Justices, though concurring 9-0 in the decision upholding the Second Circuit's dismissal of Esther Kiobel's ATS claims, split 4-1-4 as to the application of the presumption against extraterritoriality. *Compare Kiobel*, 133 S. Ct. at 1669, *with id.* (Kennedy, J., concurring), *with id.* at 1671 (Breyer, J., concurring). This split regarding the application of the presumption against extraterritoriality of a statute actually cuts in favor of finding that action by a military member that violates an international norm so widely recognized as those set forth in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004), does rebut the presumption, because in such a case "(2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 133 S. Ct. at 1671 (J. Breyer concurring). There is no other recourse within the U.S. legal system currently that would allow for recovery such as through the Federal Tort Claims Act, see *infra* Part III.D or the Torture Victim Protection Act, 28 U.S.C. § 1350 note (2006) (statute limits liability only to an individual who acts "under actual or apparent authority, or color of law, of any *foreign nation*"). 28 U.S.C. § 1350 note, § 2, ¶ a (emphasis added). *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring). Additionally, the Court did not find that the ATS could not encompass violations of the law of nations committed by corporations, as would have occurred had the Court accepted the reasoning of the Second Circuit, thereby leaving open the question as to the application of the ATS to defense contractors acting on behalf of the United States. Such action would also meet the same criteria set forth by Justice Breyer and the open question left by Justice Kennedy's analysis. However, this issue is also beyond the scope of this article. In short, the concerns with the ATS raised herein and the impact that it might have on the U.S. military and foreign policy remain unanswered.

II. Background—A Legal Lohengrin[12]

As part of the necessary legislation to establish the federal judiciary's lower courts and their jurisdictional bounds, the First Congress passed the Judiciary Act of 1789.[13] This act also codified the ATS, which has remained relatively unchanged over the past 223 years.[14] Yet, despite its long history, only a handful of ATS cases arose before 1980.[15] In that year, the U.S. Court of Appeals for the Second Circuit "breathed life"[16] into the once dormant statute in *Filartiga v. Pena-Irala*,[17] giving rise to a groundswell of subsequent ATS litigation.[18]

In *Filartiga*, Paraguayan citizens filed suit under the ATS against the former Inspector General of Police in Asuncion, Paraguay for the torture and extrajudicial killing of their son and brother, Joelito Filartiga.[19] The Second Circuit held that federal jurisdiction existed over the Filartigas' claims, and that torture and extrajudicial killing under color of law was a violation of the law of nations.[20] Though the Second Circuit did not recognize a cause of action as to what specific tort applied based upon a choice of law,[21] it opened the door to foreign litigants to bring suit for IHRL violations by recognizing the right of aliens to sue within the federal courts for such violations.

---

[12] IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (1975) (Judge Friendly references the ATS and compares it to Richard Wagner's title character, Lohengrin, whose origins remain a mystery until the very end of the opera—"no one seems to know from whence it came.").

[13] Anthony Bellia, Jr. & Bradford Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 449 (2011).

[14] *Compare* Judiciary Act of 1789 § 9, 1 Stat. 73, 7 (The federal district courts "shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for tort only in violation of the law of nations or a treaty of the United States."), *with* 28 U.S.C. § 1350 (2006) ("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.").

[15] Carolyn A. D'Amore, Sosa v. Alvarez-Machain *and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?*, 39 AKRON L. REV. 593, 600 (2006).

[16] Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 111 (2005).

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

[18] D'Amore, *supra* note 15, at 603. *See also* USA*Engage, *supra* note 5.

[19] *Filartiga*, 630 F.2d at 878–79.

[20] *Id.* at 885, 889.

[21] *Id.* at 889.

After the *Filartiga* decision, ATS suits became increasingly more frequent. The U.S. Courts of Appeal added to the ATS jurisprudence. Most notably, the U.S. Court of Appeals for the District of Columbia Circuit *Tel-Oren v. Libyan Arab Republic*[22] decision and the U.S. Court of Appeals for the Ninth Circuit *In re Estate Marcos, Human Rights Litigation*[23] decision laid the groundwork for the U.S. Supreme Court's first ATS decision in 2004 with *Sosa v. Alvarez-Machain*,[24] addressing the potential hazards to commanders' and the United States' ability to act on the battlefield.

In *Tel-Oren*, survivors and representatives of persons killed in a terrorist attack on an Israeli bus filed an ATS claim against Libya and the Palestinian Liberation Organization seeking compensatory and punitive damages for tortious acts in violation of the law of nations.[25] The D.C. Circuit issued a unanimous decision to dismiss the plaintiffs' claims; however, the sitting panel issued three separate concurrences with differing conclusions as to why the suit should be dismissed.[26] Judge Edwards agreed with the Second Circuit's reasoning and construct developed in *Filartiga*, but he did not believe that terrorism in 1984 constituted a violation of the law of nations and therefore was not cognizable under the ATS.[27] Judge Bork not only agreed with Judge Edwards that terrorism was not a violation of the law of nations, but wholly rejected the *Filartiga* holding and opined that the ATS provided no right of action within federal courts. Writing that Congress must affirmatively create a cause of action in order for an alien to bring a cognizable suit under the ATS within the federal courts, Judge Bork concluded that the ATS was merely jurisdictional in nature.[28] Finally, Judge Robb rested his opinion to dismiss the plaintiffs' claims on nonjusticiability grounds based on his finding that the issue presented a political question.[29]

---

[22] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).
[23] *In re* Estate Marcos, 25 F.3d 1467 (9th Cir. 1994).
[24] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[25] *Tel-Oren*, 726 F.2d at 775.
[26] *Id.*
[27] *Id.* at 795.
[28] *Id.* at 820–23.
[29] *Id.* at 823. *See, e.g.*, *infra* Part III.3 (discussing the political question doctrine).

The *Tel-Oren* decision is significant because it laid out the three primary arguments for how the majority of courts have dealt with ATS litigation since *Filartiga*. Judge Bork's reasoning that would bar gross violations of IHRL under the ATS appears to have persuaded Congress to pass the Torture Victim Protection Act (TVPA).[30] In doing so, Congress created a federal cause of action against torture, thereby statutorily recognizing the Second Circuit's judicial determination in *Filartiga* that torture under color of law is a violation of the law of nations.[31]

In *In re Estate of Marcos, Human Rights Litigation*, Philippine citizens sued the estate of Ferdinand Marcos, the former president of the Philippines, for his ordering and supervision of human rights violations, such as torture and extrajudicial killings.[32] The Ninth Circuit explicitly joined with the Second Circuit in recognizing the ability for an alien to bring suit under the ATS, and declared that the ATS "creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer. . . . fundamental rights upon all people vis-à-vis their own governments.'"[33] Most significantly, this was the first exercise of equitable relief in an ATS decision. Specifically, the court affirmed the district court's preliminary injunction preventing the movement or transfer of funds within the estate in order to preserve the availability of funds for redress to victims.[34]

With varying opinions in the lower courts, but with a general movement toward adopting the *Filartiga* court's approach to the ATS, the U.S. Supreme Court, in *Sosa v. Alvarez-Machain*, finally weighed in on the ATS after remaining silent for 215 years.[35] In 1990, Alvarez-Machain was indicted by a grand jury in California for the torture and murder of a Drug Enforcement Agency (DEA) agent in Guadalajara, Mexico.[36] Due to the inability to obtain his official extradition from Mexico, DEA agents hired a group of Mexican nationals, including Jose Francisco Sosa, to abduct Alvarez-Machain, hold him overnight in a local hotel, and place him on a private plane that delivered him to agents

---

[30] 28 U.S.C. § 1350 note (2006).
[31] Wiwa v. Royal Dutch Petroleum, Co. (*Wiwa II*), 226 F.3d 88, 104–05 (2d Cir. 2000).
[32] *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1469 (9th Cir. 1994) (citing Filartiga v. Pena-Irala, 630 F.2d. 876, 885–87 (2d Cir. 1980).
[33] *Id.* at 1475.
[34] *Id.* at 1480.
[35] 542 U.S. 692 (2004).
[36] *Id.* at 697.

in El Paso, Texas.[37] Nevertheless, Alvarez-Machain was acquitted at trial in 1992 and returned to Mexico.[38] In 1993, he filed suit under the ATS against the Mexican nationals who had abducted and detained him, and the Ninth Circuit upheld his claim after finding that there was a "clear and universally recognized norm prohibiting arbitrary arrest and detention."[39]

However, the Supreme Court rejected Alvarez-Machain's ATS claim, holding that the arbitrary arrest and detention for a period of less than 24 hours did not rise to the level of wrongdoing that would violate the law of nations.[40] Despite this holding, the Court did not shut the door for other plaintiffs to bring suit under the ATS. Rejecting Judge Bork's interpretation of the ATS that Congress needed to affirmatively act in order to give plaintiffs a right of action under the ATS, the Court recognized a handful of international norms from 1789 that still provided recourse to the federal courts, including violations of safe conducts, infringement of the rights of ambassadors, and piracy.[41] Additionally, the Court held that the ATS was not limited to these long recognized international norms, but also included norms "of [an] international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,"[42] leaving the door to the courthouse for ATS litigants "still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms."[43] In other words, the Court explicitly recognized a right of action in tort for violations of the law of nations as recognized through federal common law.[44]

---

[37] *Id.* at 698.
[38] *Id.*
[39] *Id.* at 699 (citing Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003)).
[40] *Id.* at 738.
[41] *Id.* at 724–25.
[42] *Id.* at 725.
[43] *Id.* at 729.
[44] ERWIN CHEMERINSKY, FEDERAL JURISDICTION 391 (5th ed. 2007). Taking their cues from the *Sosa* decision, lower courts have continued to recognize causes of action under the principle that the door to the courthouse remains open for ATS litigants, which has at times resulted in victory for ATS plaintiffs. *See, e.g.*, BETH STEPHENS ET AL. INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 139–205 (2d ed. 2008) (describing different norms recognized as cognizable under the ATS by courts); Susan Simpson, *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2 (Nov. 11, 2009), http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/ (cataloging ATS cases and the underlying tort for which relief was sought).

III. Amazigh's Claim and Hurdles to ATS Litigation

Despite the holding in *Sosa* that the door to the courthouse remains open to ATS plaintiffs, there are several hurdles that an ATS plaintiff must overcome before the courts would consider a case on the merits. Some of the difficulties for ATS claimants are the same that all plaintiffs face, including jurisdiction and standing. However, in addition to the common obstacles of any civil suit, ATS litigants who sue U.S. officials in their individual and official capacities for violations of the law of nations during an armed conflict, such as the fictional Tifrat Amazigh, would face other significant hurdles.[45]

From the outset, many lower courts have struggled with *Sosa* in attempting to determine whether an alleged act would constitute a violation of a sufficiently recognized international norm to give rise to a claim under the ATS.[46] Indeed, this uncertainty concerning the sufficiency of a recognized norm is just one of the many obstacles that have stood in the way of attempts by aliens to obtain relief for what have primarily been violations of IHRL. Other obstacles faced by ATS litigants like Amazigh who file claims against U.S. officials for acts done during a time of armed conflict include: failure to state a claim based on a lack of subject-matter jurisdiction or to claim a cognizable violation under the ATS; standing; the political question doctrine; sovereign immunity; and the state secrets privilege. Although these obstacles have come together to present a near total bar to previous ATS litigants like Amazigh, they are not insurmountable. If she and others like her are able to overcome these potential pitfalls and reach the case on its merits, the ATS may well shape how and if the United States will be able to fight wars unless Congress passes affirmative legislation to limit this danger.

A. Failure to State a Claim

As with any suit, an ATS plaintiff must state a claim for which the court may grant relief.[47] Inherent within the *Sosa* formulation for stating a claim is a search through international law to define an international

---

[45] It should be noted that unlike many ATS litigants who sue other aliens or foreign corporations, ATS claims against U.S. officials are not likely to be barred by personal jurisdiction issues, because the defendants are already present within the United States.

[46] *See* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3661.1 (3d ed. 1998) (providing an overview of ATS litigation).

[47] FED. R. CIV. P. 12(b)(6) (2012).

norm that gives rise to a right of action under the ATS. Courts have looked to the standard sources of international law in attempting to determine whether a claim is as widely recognized as were those specified in *Sosa*.[48] In making this determination, courts have invoked the caution directed by the *Sosa* Court when identifying new norms of binding international law that give rise to an action under the ATS. However, this caution, depending on the court, may merely be perfunctory as courts continue to find new and emerging norms, such as aiding and abetting theories for the commission of violations of human rights by simply doing business with oppressive regimes.[49] As a result of this mixed bag of recognized norms, recent cases demonstrate that plaintiffs are apt to do best when they allege as much tortious activity as possible, and then attempt to categorize it within the language of international human rights.[50]

Yet the ability to articulate an actionable violation of the law of nations under the ATS is still a formidable task[51] because of IHRL's relative novelty and recent recognition under international law.[52] As

---

[48] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733–38; Filartiga v. Pena-Irala, 630 F.2d 876, 881–84 (2d Cir. 1980) (reviewing international treaties and respective traveaux prepatoires). *See also* Jonathan B. Lancton, *The Alien Tort Statute and Customary International Law: The Judicial Albatross Hanging Around the Executive's Neck*, 47 HOUS. L. REV. 1081 (2010).

[49] *See, e.g.*, Sarei v. Rio Tinto, PLC (*Rio Tinto IV*), 671 F.3d 736 (9th Cir. 2011); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).

[50] *See, e.g.*, Wiwa v. Royal Dutch Petroleum, Co. (*Wiwa I*), 96 CIV. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002), *cited in* 626 F. Supp. 2d 377, 384 (S.D.N.Y. 2009)) (example of how plaintiffs have successfully pleaded ATS claims).

[51] *See, e.g.*, *Sosa*, 542 U.S. at 737–38 (brief arbitrary detention not a violation of the law of nations); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795–96 (D.C. Cir. 1984) (Edwards, J., concurring) (terrorism not a law of nations violation); Kiobel v. Royal Dutch Petroleum Co., 456 Supp. 2d 457, 460, 467 (S.D.N.Y. 2006) (forced exile and violation of right of assembly not violations of the law of nations under *Sosa*); Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1299 (S.D. Fla. 2003) (violation of right of association in the context of labor unions not a violation of the law of nations); Sarei v. Rio Tinto, PLC (*Rio Tinto I*), 221 F. Supp. 2d 1116, 1158–59 (C.D. Cal. 2002), *reversed on other grounds*, 456 F.3d 1069 (9th Cir. 2006) (violation of right to life and health due to environmental degradation not a cognizable norm).

[52] *See* Samuel Moyn, *Human Rights in History*, NATION, Apr. 6, 2010, *available at* http://www.thenation.com/article/153993/human-rights-history. Additionally, international law has historically primarily dealt with only state-to-state relations. Even with the shift in the post-World War II era to recognize IHRL as a recognized body within international law, international law has focused primarily on how a state treats its own citizens, not the more novel concept of allowing civil recourse by applying human rights to relations between actual and/or juridical individuals. Much less has international law or the domestic application of

such, IHRL's constantly changing face has frustrated plaintiffs because it is difficult for a plaintiff to identify an IHRL norm that is as widely accepted as those norms of 1789 discussed in *Sosa*.[53] This task is even more arduous when alleging tortious conduct committed by U.S. state actors acting under government-sanctioned policies. This is in part due to the inherent difficulty for a domestic court to declare that a violation of the law of nations has occurred when its own government has a demonstrable state practice to the contrary, unless that court is willing to declare that the state practice is in violation of recognized international law *jus cogens* and must therefore cease.[54]

The difficulty of even identifying a cognizable wrong under the ATS increases even more following the Supreme Court's holding in *Ashcroft v. Iqbal* which places a heightened pleading requirement upon plaintiffs.[55] *Iqbal* requires a plaintiff's pleading to:

> contain a short and plain statement of the claim showing that the pleader is entitled to relief. . . . [This] does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.[56]

Although *Iqbal* dealt with a *Bivens* action[57] brought by a Pakistani-American placed in confinement in New York,[58] the case has been

---

international law dealt with bringing suit in a state with little to no contacts to the nucleus of facts giving rise to the suit, as the jurisprudence of ATS has recently allowed; ATS has become a theory teetering on a recognition of universal jurisdiction in tort. *See generally*, Bellia & Clark, *supra* note 13.

[53] *Sosa*, 542 U.S. at 732.

[54] *See generally* Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008); Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Meyers (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008); Al-Zahrani I v. Rumsfeld, 684 F. Supp. 2d 103 (D.D.C. 2010). These cases all found torture to be within the scope of employment of intelligence and military officers, thereby implicitly condoning such action.

[55] Ashcroft v. Iqbal, 556 U.S. 662, 687 (2009).

[56] *Id.* at 677–78 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 557 (2007)).

[57] Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating a federal cause of action allowing for recovery in tort for violations of an individual's constitutional rights).

[58] *Iqbal*, 556 U.S. at 666.

applied to ATS cases and has resulted, in some instances, in dismissal for a failure to plead sufficient facts that set forth a cognizable ATS violation.[59]

In the hypothetical case of Tifrat Amazigh, she has potential claims for violations of the law of nations involving her forced relocation to an internment center;[60] exposure to cruel, inhuman, and degrading treatment (CIDT) by forcing her to live in humiliating, unsanitary conditions;[61] forced / slave labor to produce food for the center;[62] and violations of the Geneva Conventions.[63] On behalf of her son and husband who are unable to bring suit themselves due to their internment, she may also raise a claim of torture[64] in addition to the aforementioned injuries that also apply to her family. Amazigh's claims would have to allege specific facts that sufficiently demonstrate the tortious actions by the defendants to "'nudg[e]' [her claims]. . . . 'across the line from conceivable to plausible.'"[65] This may prove difficult if she has not had the benefit of discovery to ascertain and plead sufficient facts, especially with regard to claims of torture on behalf of her husband and son since she has not been the actual subject of the torture and has not witnessed such behavior in the first person. In this case, she would likely rely on rumor and media reports, and such reliance on secondhand accounts may result in dismissal of some of her claims.[66]

---

[59] George D. Brown, *Accountability, Liability, and the War on Terror—Constitutional Tort Suits as Truth and Reconciliation Vehicles*, 63 FLA. L. REV. 193, 223–227 (2011); al-Kidd v. Ashcroft, 580 F.3d 949, 977–70 (9th Cir. 2009) (*rev'd on other grounds*, 131 S. Ct. 2074 (2011)); Mamani v. Berzain, 654 F.3d 1148, 1156 (11th Cir. 2011).

[60] *See, e.g.*, Wiwa v. Royal Dutch Petroleum Co., 96 CIV. 8386, 2002 WL 319887, at *8 (S.D.N.Y. Feb. 28, 2002) (recognizing forced exile as cruel, inhuman, and degrading treatment); Mujica v. Occidental Petroleum Corp. 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005) (holding forced displacement of civilians through widespread and systematic attacks on civilians is a crime against humanity and a cognizable ATS violation).

[61] *See, e.g.*, STEPHENS ET AL., *supra* note 44, at 181–87 (discussing cruel, inhuman, and degrading treatment) (CIDT) ATS claims as considered in several U.S. courts).

[62] *See, e.g.*, *In re* World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160, 1179 (N.D. Cal. 2001); Doe v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002), *vacated by, rehearing en banc granted by* 395 F.3d 978 (9th Cir. 2003); Doe v. Unocal Corp., 963 F. Supp. 880, 891–92 (C.D. Cal. 1997).

[63] *See* STEPHENS ET AL., *supra* note 44, at 222–25 (discussing a violation of the Geneva Conventions as a cognizable violation of the law of nations under the ATS).

[64] *Id.* at 140 n.44.

[65] Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009), *cited in* Mamani v. Berzain, 654 F.3d 1148, 1156 (11th Cir. 2011)).

[66] *See generally* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

Additionally, her claims may fall on deaf ears if the court hearing her case determines that the alleged violations do not rise to the level of international recognition as the norms mentioned in *Sosa*. The court will sift through sources of international law to decipher whether the norm claimed by Amazigh rises to the level required by *Sosa*. It is uncertain how a court would rule on this issue, as courts have routinely split on these determinations with no consensus, largely due to the amorphous nature and description of IHRL norms.[67] Moreover, even if Amazigh is able to overcome the hurdles of pleading, there still remain several other questions, such as whether or not she has standing to bring suit on behalf of her husband and son.

B. Standing

Standing is a jurisdictional question, ensuring that the right person is bringing the claim before a court.[68] Standing requires that the plaintiff "allege that he or she has suffered or imminently will suffer an injury . . . that the injury is fairly traceable to the defendant's conduct . . . [and] that a favorable federal court decision is likely to redress the injury."[69] A party who has not suffered the actual injury alleged may also bring suit on behalf of a third party not before the court "if there are substantial obstacles to the third party asserting his or her own rights and if there is reason to believe that the advocate will effectively represent the interests of the third party," or if the relationship between the individual and the third party is so close that the court will allow the next-friend representation.[70]

---

[67] *See* STEPHENS ET AL., *supra* note 44, at 181 n.262 (comparing opinions that recognized and did not recognize CIDT as a violation of the law of nations under the ATS). *See generally* Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* (N.Y.U. Pub. L. and Legal Theory Working Papers, Paper No. 98, 2008), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1098&context=nyu_plltwp (discussing the definition of CIDT); ICRC, CUSTOMARY IHL DATABASE, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule90#Fn_95_1 (last visited Mar. 12, 2013) (discussing the ICRC interpretation of CIDT and listing sources from which definition was derived despite differing definition between sources). Even on the issue of forced or slave labor, which has in most cases been determined to be a violation of the law of nations cognizable under the ATS, it would be uncertain if a court would find the facts Amazigh pleads rise to meet the domestic interpretation of a sufficient degree of forced labor. *See* STEPHENS ET AL., *supra* note 44, at 169–72.

[68] *Al-Aulaqi*, 727 F. Supp. 2d at 9.

[69] CHEMERINSKY, *supra* note 44, at 60. *See Al-Aulaqi*, 727 F. Supp. 2d at 14–15.

[70] CHEMERINSKY, *supra* note 44, at 85–89; *Al-Aulaqi*, 727 F. Supp. 2d at 16.

For Amazigh, the constitutional and judicially prudential standing requirements may prove fatal to some of her claims. She will likely be deemed to meet the constitutional requirements for standing to pursue her claims for damages stemming from the direct harms to her person, such as her forced relocation and labor, and CIDT claims. In order to meet these requirements Amazigh will need to adequately allege what the injury was that she suffered; that the JTF–M commander and the Secretary of Defense proximately caused her injuries; and that the court may provide a remedy in the form of compensatory and/or punitive damages. Ultimately, the *Iqbal* pleading requirement will rear its head to force her to provide sufficient facts for the court to grant standing.

Nevertheless, Amazigh's other claims and relief sought are more problematic because she is seeking relief for future injury and remedies on behalf of others. For a court to grant injunctive relief, the plaintiff will need to demonstrate that some future harm will occur.[71] More specifically, if Amazigh is to garner a preliminary injunction immediately ceasing the tortious activities, such as torture against her husband and son, she will need to demonstrate to the court that "there exists the likelihood of success on the merits; irreparable injury will result if temporary relief is not granted; the balance of hardships (or equities) lies with the plaintiff; and ordering temporary relief will serve the public interest."[72]

Of course, for Amazigh to achieve final victory in staying the hand of the U.S. Government, she would need the court to issue a permanent injunction. A court will issue a permanent injunction only when the plaintiff "has a valid claim against the defendant . . . future harm is imminent and irreparable, and . . . the hardship to defendant of compliance is not disproportionate to the benefit to plaintiff of compliance."[73] Moreover, the injunction must also be in the public interest.[74]

---

[71] JAMES M. FISCHER, UNDERSTANDING REMEDIES 260, 299 (2d. ed. 2006). *See also In re* Estate of Marcos, 25 F.3d 1467, 1479–80 (9th Cir. 1994) (providing standard for a preliminary injunction to issue even when damages are sought in an ATS case).

[72] *See* FISCHER, *supra* note 71, at 260–71 (providing an in-depth discussion of the requirements for preliminary injunction).

[73] *Id.* at 299.

[74] *Id.*

Amazigh will have difficulty demonstrating she will suffer a future harm because she already escaped the internment center and, therefore, the defendants are no longer harming her or likely to cause future harm to her. One strategy that may allow her success on the merits is if she alleges that she will return to Mali, that she believes the Malian or U.S. government will place her in an internment center upon arriving in Mali, and that she actually purchases a plane ticket to return to Mali. Though somewhat tenuous, such a strategy might work because she will have a concrete, future harm, which she can allege in the pleadings.[75] Amazigh may also have difficulty in meeting the requirement that the injunction be in the public interest, as this determination will require the court to make a judgment call as to the propriety of U.S. military and foreign affairs decisions. However, as with many of the decisions underlying the determination to grant equitable relief, the decision is largely left to the discretion of the court hearing the case as it balances the equities of the parties.

As for her claims on behalf of her husband and son, the issue of next-friend and injunctive relief in this hypothetical fact pattern are more reasonable and likely to meet the standing requirement than in other recent cases.[76] In the recent *Al-Aulaqi* case, the court found that Anwar Al-Aulaqi's father did not have standing to sue on behalf of his son to remove him from the "kill lists" managed by the national security staff because, in the court's opinion, he was free to avail himself of the U.S. court system if he merely surrendered to U.S. authorities.[77] Unlike *Al-Aulaqi* facts, Amazigh's husband and son are being held in a foreign country by a foreign power with the assistance of the U.S. government; therefore, they either are already in the hands of the U.S. government or are not at liberty to avail themselves of the U.S. courts due to actions by U.S. officials. Additionally, Amazigh's son is a minor and courts have been willing to allow third-party or next-friend standing when the

---

[75] Lujan v. Defenders of Wildlife, 504 U.S. 555, 579 (1992) (Kennedy, J., concurring) (discussing the fact that had plaintiffs simply purchased a plane ticket to once again view wildlife, then their harm would be sufficiently concrete); *but see* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138 (2013) (standing requires that the "threatened injury must be certainly impending to constitute injury in fact" and that "respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending" (internal citations omitted)).

[76] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (denying standing for Al-Aulaqi on behalf of his son on the grounds that his son could avail himself of U.S. courts if he so desired).

[77] *Id.* at 12, 17–20, 35, 40.

individual whose rights are being protected is a minor.[78] Yet even though Amazigh may have standing on behalf of her family, injunctive relief may be too extraordinary for a court to grant due to the balancing of equities, as previously discussed.[79] However, this issue will likely not arise if Amazigh is able to overcome other hurdles including the political question doctrine discussed below, because they would be based on similar constitutional concerns regarding the separation of powers.

C. Political Question Doctrine

The political question doctrine may also prevent Amazigh's claims from moving beyond the preliminary stages based on prudential grounds intertwined with separation of powers concerns.[80] The Supreme Court created the modern political question doctrine in 1962 in its decision in *Baker v. Carr*.[81] The doctrine sets forth six criteria wherein a court will not hear a case due to its nonjusticiable nature.[82] A court's determination that the question presented in a case or controversy is of a political nature such that "constitutional issues concerning the distribution of authority among the federal branches" would bar the court from resolving the issue on constitutional and prudential grounds.[83] However, the *Baker* factors are not a list that can be strictly applied, but rather a murky balancing effort that often results in disparate outcomes depending on the composition of the court. As such, the political question doctrine has

---

[78] *Id.* at 27.

[79] *Supra* p. 129–303.

[80] For an in-depth analysis and critique of the doctrine of nonjusticiability generally and its origins in separation of powers doctrine, see Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 497–510 (1996) (providing an historical understanding and critique of modern political question doctrine as a subset of nonjusticiable issues).

[81] Baker v. Carr, 369 U.S. 186 (1962).

[82] *Id.* at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question").

[83] CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 3–5 (2013) (explaining nonjusticiability and the political question doctrine generally).

been described as a "doctrine notorious for its imprecision."[84] Amazigh's claims, similar to any ATS claim against a U.S. official, are ripe for dismissal due to their nature of touching on the foreign affairs powers and exercise of military authority of the political branches.[85] As a result, the court may be more willing to punt on the issues presented in Amazigh's ATS claims rather than allow her case to go forward on the merits.[86] However, as previously stated, this is more a matter of discretion by a court rather than a strict application of certain factors; therefore, a court may just as likely find that there is no political question in Amazigh's case and let the case continue on the merits.[87]

D. Sovereign Immunity

Even if Amazigh is successful in litigating the issues of cognizable causes of action and sufficient pleadings, standing, and the political question doctrine, she will still likely face a defense of sovereign immunity, which may bar her recovery of any monetary relief for damages, but likely will not prevent injunctive relief.

---

[84] Harbury v. Hayden, 522 F.3d 413, 418 (D.C. Cir. 2008); *see also* CHEMERINSKY, *supra* note 44, at 147–50.

[85] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1 (1973) (holding nonjusticiable the question of whether there is "a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?"). *Id.* at 4. *But see* Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct 1421 (2012) (holding that the State Department's refusal to follow statute regarding listing Israel as a place of birth when born in Jerusalem was a justiciable question); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221 (1986) (holding that Executive decision to not certify Japan pursuant to international agreement and statute was justiciable).

[86] *See, e.g.*, *Harbury*, 522 F.3d at 418–21; Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006); Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir 2006); Schneider v. Kissinger, 412 F.3d 190 (D.C. Cir. 2005); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir 2010); Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007). All cases found the question presented as nonjusticiable. *See also* Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555, 614–20 (2013).

[87] *See, e.g.*, Sarei v. Rio Tinto, PLC (*Rio Tinto IV*), 671 F.3d 736 (9th Cir. 2011); Sarei v. Rio Tinto, PLC (*Rio Tinto II*), 487 F.3d 1193 (9th Cir. 2007); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); *Japan Whaling Ass'n*, 478 U.S. at 221. All found the claims to be justiciable and not barred by the political question doctrine as raised by defendants.

To sue a U.S. employee in his or her official capacity is the same as suing the United States.[88] In order for such an action to occur, the United States must affirmatively waive its sovereign immunity, which it has done in limited circumstances under the Federal Tort Claims Act (FTCA) and the Administrative Procedures Act (APA).[89] Furthermore, in order to receive monetary damages against the U.S. Government where it has waived its sovereign immunity, a plaintiff must use the FTCA claims process.[90]

A plaintiff may also sue a federal official in his or her individual capacity. By doing so, the plaintiff is still normally limited to recovery through the FTCA due to the Westfall Act, which amends the FTCA and substitutes the U.S. Government for its employee if the employee is acting within the scope of his or her employment.[91] The D.C. Circuit has heard the majority of ATS cases against U.S. officials, and its district and circuit court opinions have consistently found that monetary suits against U.S. officials must rely on the FTCA due to the Westfall Act's substitution clause.[92] Moreover, the leading ATS cases seeking damages against U.S. officials have been dismissed due to the failure by plaintiffs to exhaust the administrative remedies under the FTCA.[93] The final issue that an ATS plaintiff would encounter is that an exception to the FTCA waiver of sovereign immunity likely bars a plaintiff's claim.[94]

---

[88] CHEMERINSKY, *supra* note 44, at 633, 636.

[89] *Id.* at 634. *See* Skinner, *supra* note 86, at 581–83.

[90] CHEMERINSKY, *supra* note 44, at 635. *See generally* PAUL FIGLEY, A GUIDE TO THE FEDERAL TORT CLAIMS ACT (2012) (providing background and procedural requirements to make an Federal Tort Claims Act (FTCA) claim).

[91] CHEMERINSKY, *supra* note 44, at 636; Rasul v. Meyers (*Rasul I*), 512 F.3d 644, 654–55 (D.C. Cir. 2008).

[92] *See, e.g.*, Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011); Rasul v. Meyers (*Rasul II*), 563 F.3d 527 (D.C. Cir. 2009); *Rasul I*, 512 F.3d at 644 (all substituting the United States under the Westfall Act). *See* Karen Lin, *An Unintended Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718 (2008) (describing the absurdity of the effect of the Westfall Act on ATS claims).

[93] *Ali*, 649 F.3d at 775; *Rasul I*, 512 F.3d at 661.

[94] Brown, *supra* note 59, at 215 ("[E]ven assuming exhaustion is satisfied, the FTCA contains a number of exceptions that can bar relief . . . These include, for example, activities that took place in a foreign country and those that involve exercise of a discretionary function." (internal quotations omitted)). *See* Harbury v. Hayden, 522 F.3d 413, 423 (D.C. Cir. 2008) (barring plaintiffs ATS suit for torture by CIA). *But see Ali*, 649 F.3d at 787–93 (Edwards, J., dissenting) (explaining the application of the Westfall Act exceptions to violations of the Constitution and statute and the applicability of these exceptions to ATS suits).

Despite the mental gymnastics that allowed the courts to reach the conclusion that even acts of torture are considered within the scope of employment for certain federal employees,[95] the precedent is set within the D.C. Circuit that ATS claims for monetary relief fall within the scope of the Westfall Act, resulting in the United States being substituted for the named official even in cases of torture.[96] What this means for Amazigh's claims is that there is a strong likelihood that her claims for damages will be denied until she has exhausted her FTCA administrative remedies. Even then, a court may likely bar her suit for damages because the acts occurred in a foreign country and as a result of combat activities—two exceptions to the United States' waiver of sovereign immunity.[97] However, a court may alternatively find that such claims are not barred, as did Judge Edwards in *Ali v. Rumsfeld*, finding that the ATS claims for egregious violations of the law of nations, such as torture, do not fall within the scope of the Westfall Act and a U.S. official may not cloak himself in official immunity.[98]

Additionally, even if Tifrat Amazigh's claim for damages is denied, her suit against U.S. officials in their official capacities requesting injunctive relief may still go forward on the merits, because the APA has affirmatively waived the United States' sovereign immunity regarding injunctive relief.[99] This reality gives rise to the most dangerous course of action for a court to take, as discussed below, because the injunctive relief would either stop or force action by the U.S. Government, thereby allowing the court to direct military and foreign affairs activities of the political branches. Running afoul of limits to judicial authority as set forth in traditional conceptions of separation of powers, there would be no way to check such judicial activism beyond an appeal that stays such

---

[95] *See* Brown, *supra* note 59, at 216 (discussing the absurdity of allowing agency law intended to allow plaintiffs recovery even in what might be considered *ultra vires* acts by an employee to bar recovery when applied against the U.S. Government).

[96] *See Rasul I*, 512 F.3d at 654–55.

[97] Al-Zahrani v. Rumsfeld, 684 F. Supp. 2d 103, 116 (D.D.C. 2010). *See* William R. Casto, *The New Federal Common Law of Tort Remedies Violations of International Law*, 37 RUTGERS L.J. 635, 662–64 (2006).

[98] *Ali*, 649 F.3d at 787–93 (Edwards, J., dissenting).

[99] CHEMERINSKY, *supra* note 44, at 634 (quoting 5 U.S.C. § 702 (2006) ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.")).

an order, or, failing that, a constitutional crisis in which the Executive ignores the court order and undermines the legitimacy of both branches.

E. State Secrets

Finally, even if Amazigh is successful on the above pretrial issues, she will likely have to overcome the invocation of the state secrets privilege by the U.S. government. The state secrets privilege exists in two strains: an absolute privilege known as the *Totten* bar, and a partial privilege deriving from *United States v. Reynolds*.[100] The invocation by the U.S. Government of the *Totten* bar results in a case being dismissed in the pleadings phase of a case, because the subject-matter deals with state secrets so critical to national security that any judicial inquiry is precluded.[101] In contrast, a *Reynolds* state secrets privilege invoked by the Government carves out only that evidence that necessarily may not be revealed in order to protect state secrets, and the case may proceed unless the excised evidence is so central to the claim that the case cannot go forward.[102] The courts have not defined what constitutes a state secret that allows the government to invoke the privilege beyond "matters which, in the interest of national security, should not be divulged."[103] However, the Supreme Court has limited the privilege by stating that it should "sweep no more broadly than clearly necessary," and a court

---

[100] Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070, 1077 (9th Cir. 2010) (citing Totten v. United States, 92 U.S. 105, 107 (1875); United States v. Reynolds, 345 U.S. 1 (1953)). *See also* Jessica Slattery Karich, *Restoring Balance to Checks and Balances: Checking the Executives Power Under the State Secrets Doctrine*, Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 759 (2012) (describing the state secrets privilege).

[101] *Jeppesen Dataplan, Inc.*, 614 F.3d at 1078 (citing Tenet v. Doe, 544 U.S. 1, 7 n.4 (2005)).

[102] *Id.* at 1079–80.

> For the *Reynolds* privilege to apply: A court faced with a state secrets privilege question is obliged to resolve the matter by use of a three-part analysis. At the outset, the court must ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied. Second, the court must decide whether the information sought to be protected qualifies as privileged under the state secrets doctrine. Finally, if the subject information is determined to be privileged, the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.

El-Masri v. United States, 479 F.3d 296, 304 (4th Cir. 2007).

[103] United States v. Reynolds, 345 U.S. 1, 8 (1953).

should conduct its own *in camera* review to make the proper determination instead of blindly accepting the government's assertion.[104]

Amazigh's claims on behalf of her husband and son regarding torture by or under the supervision of U.S. government agents are likely the only claims in danger of dismissal as a result of the government invoking the state secrets privilege. Her other claims arguably revolve around open and notorious action by U.S. military officials. Even though past claims involving espionage and intelligence have been dismissed,[105] the courts may be wary of unnecessary claims of privilege by the U.S. government and may look hard at whether such claims are valid. As such, if the interrogation techniques applied in the internment centers are already public, all of Amazigh's claims may survive a summary judgment for resolution on the merits.[106]

IV. Case on the Merits and the Need for Congressional Action

Despite the potential bars to Amazigh's claims, nothing is certain in litigation. The application of each of the potential bars to an ATS suit brought against a U.S. official for actions during an armed conflict is entirely based on the discretion of the sitting court and, as demonstrated by recent litigation during the War on Terror, some courts appear to be growing more and more hostile toward questionable practices of the political branches.[107]

Tifrat Amazigh will likely plead many of her claims with sufficient facts, as she was the subject of or witnessed the tortious conduct that constituted violations of the law of nations. Additionally, because courts exercise discretion in choosing which violations rise to the level of a

---

[104] *Jeppesen Dataplan*, Inc., 614 F.3d at 1093–96 (Bea, J., concurring).

[105] *See, e.g.*, Tenet v. Doe, 544 U.S. 1 (2005) (suit based on covert espionage agreement barred by *Totten*); *El-Masri*, 479 F.3d at 296 (discovery regarding CIA rendition program privileged under *Reynolds*); Korczak v. United States, 124 F.3d 227 (Fed. Cir. 1997) (dismissing plaintiff's claim for breach of contract against the CIA for failure to pay him for services rendered during the Cold War as a secret agent).

[106] *Jeppesen Dataplan, Inc.*, 614 F.3d at 1090.

[107] *See supra* note 9. *See also* Boumediene v. Bush, 553 U.S. 723 (2008) (rejecting Congress's attempt through the Military Commissions Act of 2006 to deprive Guantanamo detainees of the constitutional right to habeas corpus for review of the legality of their detention by an Article III court).

Sosa violation of the law of nations,[108] Amazigh may find a court willing to hold that her claims are cognizable, especially those involving forced labor and torture.[109] Due to the unique circumstances of Amazigh's husband and son allegedly being in U.S. custody and the fact that her son is a minor, a court could also grant her third-party or next-friend standing to sue on their behalf.

She may also be able to proceed on her request for equitable relief, especially if she intends to return to Mali and could demonstrate as much by simply buying a plane ticket home. Such action could be sufficient to demonstrate future irreparable injury. The balancing of equities may also favor Amazigh if the court finds that torture is occurring, and that such gross misconduct is so contrary to law that it orders an immediate cessation to the practice and the circumstances allowing for such acts. A favorable court may also find that it does have jurisdiction over her case if it adopts the reasoning of the *Ali* dissent in which Judge Edwards held that the Westfall Act did not apply to ATS claims of gross misconduct such as torture.[110] Amazigh may likewise prevail over an invocation by the government of the political question doctrine, because the court may, in its discretion due to the murky nature of the *Baker* factors, determine that a political question does not exist, as claims for tortious conduct are common for courts to hear and adjudicate. Finally, the state secrets privilege is a limited privilege, especially if a court finds that legally tenuous justifications of state practice are contrary to American legal principles and if the court refuses to accept executive branch assertions of secrets so essential to national security used to justify a cover up of torture by or under the supervision of U.S. government agents.

Despite all of the maybes regarding Amazigh's hypothetical claims, almost all of the potential bars to Amazigh's ATS suit require extreme deference to the executive branch. Yet such deference may not be due when the executive branch is responsible for gross human rights

---

[108] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (finding arbitrary detention for twenty-four hours not to be a violation of the law of nations); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007) (allegations of vicarious liability of war crimes by foreign sovereign actionable under ATS); Wiwa v. Royal Dutch Petroleum, Co., 226 F.3d 88 (2d Cir. 2000) (arbitrary detention, torture, extrajudicial killing violations of the law of nations).

[109] *See* STEPHENS ET AL., *supra* note 44, at 140–52, 169–73 (discussing ATS claims of torture, slavery, and forced labor).

[110] Ali v. Rumsfeld, 649 F.3d 762, 787–93 (D.C. Cir. 2011) (Edwards, J., dissenting) (explaining the application of the Westfall Act exceptions to violations of the Constitution and statute and the applicability of these exceptions to ATS suits).

violations. Thus, depending in large part on the public and political climate, a court may take up Amazigh's suit and hear it on the merits. If the case were to go to the merits and the evidence met the moderate hurdle of a preponderance of the evidence demonstrating the tortious conduct, Amazigh would prevail and receive an award of damages and/or injunctive relief.

Some internationalist IHRL proponents may herald such a decision as a watershed moment in IHRL. They would likely proclaim that the United States was finally abiding by its international obligations by recognizing certain emerging norms as violations of the law of nations so universally recognized that they are cognizable within domestic courts. These internationalists would likely praise the integration of U.S. domestic law with what was once deemed to be mere aspirational language from IHRL treaties such as the United Nations Declaration of Human Rights. Additionally, such a decision would win praise because it would demonstrate the United States' adoption of the radical view that IHRL applies during armed conflict and cannot be displaced by IHL, which goes even beyond the emerging view of complementarity, as recently expressed by the Department of State[111] and championed by the International Committee of the Red Cross.[112] However, these internationalist IHRL proponents fail to realize the danger presented by a precedent of a victory by Tifrat Amazigh or similarly situated plaintiffs.

The ATS, as currently written and understood through case law, enables an alien plaintiff to not only receive an award of damages from a battlefield commander, but also to potentially enjoin military action, thereby checking U.S. national security strategy in mid-stride. Placing ATS liability upon commanders is also dangerous, as it may prevent some commanders from taking necessary risks for fear of the potential for personal liability and public condemnation by the courts.

---

[111] U.S. DEP'T OF STATE, U.S. FOURTH PERIODIC REP. TO THE U.N. COMM. ON HUMAN RIGHTS para. 506 (30 Dec. 11), *available at* http://www.state.gov/g/drl/rls/179781.htm. *See* Hathaway et al., *supra* note 8, at 1898–02 (describing the model of complementarity and its relative pros and cons as compared to a displacement and a conflict resolution model of understanding the relationship between IHL and IHRL).

[112] *See, e.g.*, Int'l Comm. of the Red Cross (ICRC), *Customary International Human Rights Law Database* Rules 89, 90, 105, http://www.icrc.org/customary-ihl/eng/docs/v1_rul (last visited Oct. 21, 2013) (applying IHRL in interpreting IHL rules as collected an updated by the ICRC; these rules are but a few of the many listed within the database that apply a complementary approach to IHL and IHRL).

Even though many scholars may argue that there does not appear to be much of a threat of this under the current state of the law, the threat still exists because the ATS allows the courts to determine what is and is not a violation of the law of nations and whether a plaintiff will have recourse to the courts. Additionally, the courts could significantly alter the United States' strategic posture if it began to hold military officials accountable for authorized action under current U.S. policy and understanding of the law, forcing a shift in how the United States fights and wins wars. The U.S. Government's understanding of IHL as a *lex specialis* that either wholly displaces IHRL or acts in a complementary fashion in armed conflict is moot in a scenario in which Tifrat Amazigh prevails. For the judiciary to use ATS litigation in order to adopt the majority world view that IHRL and IHL are complementary and certain practices may not be derogated creates a hierarchy in which IHRL actually trumps IHL.[113] Such action would result in several issues that do not correspond with constitutional principles of judicial restraint and the separation of powers.

For Amazigh to prevail, the courts would be judicially mandating the adoption of an emerging norm instead of allowing the political branches to make the choice to push the nation in a certain direction. This classic example of judicial activism leaves commanders in the lurch as they attempt to decipher whether their conduct on their last deployment is now barred by judicial decree based on federal common law and an arcane statute only recently revived.

Courts are poorly situated to make these determinations due to their limited resources and competencies,[114] and although judicial action may align the United States with the majority of nations in their view of the application of IHRL, such action is dangerous because of the lack of control over potentially overly progressive or zealous judges. This is not to say that the judiciary should not review the constitutionality of actions by the political branches. However, to do so through the ATS, a jurisdictional statute with limited federal common law application, is dangerous as it opens the door for freewheeling interpretations of international law, which is difficult enough to define for scholars, who

---

[113] *See* Al-Jedda v. The United Kingdom, 53 Eur. Ct. H. R. 789 (2011); Legal Consequences of the Construction a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 36; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.

[114] *See generally* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153 (2004).

concentrate solely in this area of the law.

To solve this potential danger, Congress and the President should enact legislation that would circumscribe not only the threat of judicial activism, but also the threat of lawfare as understood as the use of the U.S. legal system and respect for the rule of law to "achieve an operational objective," such as preventing the attack on military objectives through injunctive relief.[115] In doing so, the political branches will place commanders on more sure footing by clearly setting forth which norms are to be recognized as violations of the law of nations, if any, and what recourse an alien should have in the U.S. courts. Like all statutes, the ATS can be changed, and, for the reasons set forth herein, it should be.

This call for legislative action is not intended to foreclose access to U.S. courts for aliens like Amazigh who bring suit for egregious violations of international human rights. Rather, it would place the decisions regarding foreign policy and military action in the more appropriate hands of the political branches vice the unelected judiciary, still to be administered by the courts in keeping with other tort claims. An appropriate change that would still meet the goals of the United States to support and further IHRL would be to set forth an enumerated list of actionable violations and to define each of these violations.[116] Such clarification through enumeration would not only prevent extreme judicial activism that unduly impinges upon foreign policy and the authority of the executive branch and Congress, but it would set forth clear standards to guide military commanders on the battlefield. The statute should also clarify the scope of employment that has proven fatal to many a national security ATS case: by defining whether a federal employee's actions are considered *ultra vires* by statute again keeps the

---

[115] A discussion of using the ATS as lawfare, as defined by Major General Dunlap as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective," is beyond the scope of this article. Charles J. Dunlap, *Lawfare Today: A Perspective*, 3 YALE J. OF INT'L AFF. 146 (2008). A slight change to the hypothetical of Amazigh's ATS claims can illustrate how her claims could be conceptualized as lawfare and it is easy to see the potential impact that such a claim might have on U.S. military action. However, the focus of this article remains on controlling ATS litigation through legislation in order to place foreign policy and military decisions squarely in the hands of the political branches.

[116] Such an effort was made by Senator Diane Feinstein in 2005; however, her efforts were swiftly opposed and criticized by liberal IHRL proponents. *See* Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 99 (2011).

door open for alien plaintiffs alleging human rights abuses while clearly defining the expected conduct of commanders. To legislate the scope of the ATS as not only a jurisdictional, but also a substantive statute, will undo the confusing and conflicting common law built around current ATS litigation.

Finally, by reforming the ATS through legislation vice judicial action, the political branches will control the direction that the United States should head in foreign affairs and would actually push the United States toward a majority view of the IHRL/IHL nexus of complementarity. This is because such legislative action would create non-derogable international human rights within the U.S. system of laws through statutory means. Such an adoption of *jus cogens* norms affirmatively recognizes universal jurisdiction over certain wrongs that will allow any violator, U.S. or foreign, to be called before a court to answer for their actions.

V. Conclusion

The ATS has seemingly arisen out of the ether. The early history of the nation and over two hundred years of legal practice shed little more light on the subject. Scholars and the courts continue to disagree as to how the ATS should be applied. Although the modern emergence of the ATS as a tool for enforcing IHRL is positive in theory, it is potentially dangerous in execution.

As the hypothetical with Tifrat Amazigh reveals, an ATS litigant who sues a U.S. official during a time of armed conflict has enormous hurdles to clear just to get to the merits of his or her case. However, the potential fallout from a claim that goes to the merits and results in an award of damages or, even worse, an injunction is far too great to leave to the whims of the judiciary. Litigation resulting in an injunction could freeze military action or force a constitutional crisis as the judiciary and the Executive standoff over appropriate action in the realm of national security and foreign affairs. Holding commanders liable for acts that were authorized under traditional conceptions of IHL, but illegal in the eyes of a court who adopts a principle of overarching IHRL that trumps the necessities of combat, is not only unfair to commanders, but may also cause commanders greater hesitation to act when it is most essential due to the fear of additional personal liability.

An appropriate solution to this problem is for the political branches to act immediately and reform the ATS through substantive and jurisdictional amendments. This would further the United States' goal supporting IHRL while protecting its foreign policy interests. By legislating reform, the political branches will firmly direct foreign affairs and not rely on the unelected judiciary to define IHRL, and thereby set the boundaries as to how the United States and its personnel practice and engage in it. This ATS reform will give commanders greater freedom on the battlefield, as they will not have to fear being brought before a court for actions that were legal under traditional U.S. conceptions of international law. Also, ATS reform will further IHRL because the United States would affirmatively recognize, through law, certain norms as being so egregious as to constitute *jus cogens* and allow for universal jurisdiction and remedy. Most importantly from the perspective of a military practitioner, a duty is owed by our government to commanders to clearly define acceptable norms and behaviors on the battlefield, and a failure to close the gap that may be created by the courts through ATS litigation ultimately fails in this regard.