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Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts

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INTRODUCTION

The issue of pluralistic deficit in decisionmaking processes and in the judicial process covers a wide range of questions, relating pluralism to contexts both within and outside the state level. Legal pluralism, in fact, is a general phenomenon linked to the coexistence of different systems of rules, concepts, and values,[1] which has always existed, but whose relevance has surely increased in recent decades, when multifold relationships and interactions increasingly challenge the possibility of isolating law as a merely national element.

The analysis of the judicial application of the Alien Tort Claims Act (ATCA)[2] by U.S. federal courts is a specific instance where several important issues concerning the relevance and scope of legal pluralism in the international context arise. The decision by the Supreme Court in *Sosa v. Alvarez-Machain*[3] in June 2004 is an important step in a field that has been rapidly expanding in the last twenty years, after the groundbreaking decision of the Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*,[4] and can be usefully taken as a starting point for the discussion of the relevance of legal pluralism in U.S. and international law. Although the central feature of *Sosa*, and the line of cases decided by federal courts prior to it,

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1. *See* Marco Guadagni, *Legal Pluralism*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 542 (Peter Newman ed., 1998).

2. 28 U.S.C. § 1350 (2004).

3. 124 S. Ct. 2739 (2004). *See also* François Larocque, *Alien Tort Statute Survives the Supreme Court*, 63 CAMBRIDGE L.J. 532 (2004); Anthony J. Sebok, *The Alien Tort Claims Act: How Powerful a Human Rights Weapon is It? The Supreme Court Gives Some Guidance, But Not Much* (July 12, 2004), *available at* http://writ.news.findlaw.com/sebok/20040712.html (last visited Feb. 10, 2005).

4. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

is the use of the ATCA as a means to protect international human rights, its potential scope is wider because the interplay of international law with U.S. domestic law envisaged by the ATCA is not confined to a specific subject matter.

I. THE ALIEN TORT CLAIMS ACT: MEANING AND CONTEXT

In order to understand the debate, it is useful to analyze briefly the characteristics of the Act.[5] The ATCA was passed by the first Congress in 1879, and its short and laconic text has been a source of wide discussion and disagreement. The Act reads: "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." The difficulty in defining the scope of application of the Act is that for over 170 years it remained virtually dead letter.[6]

The historical context in which the Act was enacted is important in understanding its significance. During the period of confederation, the Continental Congress was unable to punish infractions of treaties and the law of nations, and concerns about this issue were raised during the Constitutional Convention. Consequently, the Framers vested the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls,"[7] and the first Congress followed with the Judiciary Act, of which the ATCA was a part. Although there is disagreement about what the original intent of Congress was, most lawyers agree that at that time, the law of nations was composed of general norms governing the behavior of national states among themselves, and judge-made rules relating to the conduct of individuals outside domestic boundaries, as well as some rules where aspects related to individuals and state relationships overlapped. Blackstone, for instance, mentions three in his *Commentaries*: "Violation of safe-conducts," "Infringement of the rights of ambassadors," and "Piracy."[8] It is therefore likely that the first Congress, when enacting the ATCA, intended to give jurisdiction to federal courts for a limited number of important violations of the law of nations.

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5. For an anthology of articles concerning the ATCA, see THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

6. *See Sosa*, 124 S. Ct. at 2755 (stating that "for over 170 years after its enactment it provided jurisdiction in only one case").

7. U.S. CONST. art. III, § 2, cl. 1.

8. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 54 (Wayne Morrison ed., 2001).

The peculiarity of the ATCA is further evident if one compares it with other foreign statutes that grant universal jurisdiction over violations of international law.[9] These statutes, which are more recent than the ATCA, refer to gross violations of human rights that clearly belong to *jus cogens*, and provide for criminal sanctions. In contrast, the ATCA is very general in the formulation of the violations that can determine liability, and limits sanctions to money damages.[10]

II. *Filártiga* AND THE USE OF THE ATCA IN FEDERAL CASE LAW FOR THE VINDICATION OF HUMAN RIGHTS

In 1980, the U.S. Court of Appeals for the Second Circuit breathed new life into the Act in the *Filártiga* case, which involved the kidnapping, torturing, and killing of a Paraguayan national by a Paraguayan police inspector in Paraguay. The court held that the Act created federal jurisdiction for tort actions brought by aliens, regardless of where in the world the tort occurred.[11]

After *Filártiga*, in cases that are not numerous, but have nevertheless had a significant impact, the ATCA has been used as an instrument for the protection of human rights that are guaranteed by international law.[12] These cases have heterogeneous characteristics, but can be grouped into three categories.[13] The first group concerns cases where both plaintiff and defendant are foreigners, as in *Filártiga*, and the parties are linked to the U.S. legal system through personal jurisdiction—that is, it is possible to serve process on the defendants because they are physically on U.S. territory. This first group of cases, which includes

9. An example is the Belgian statute enacted in 1993, but later repealed in 2003.

10. *See* Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act*, 12 IND. J. GLOBAL LEGAL STUD. 631 (2005). *See generally* Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

11. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). On remand, the district court applied Paraguayan law to determine liability, but decided to award punitive damages, even though punitive damages were not allowed according to Paraguayan law, because the court deemed such damages necessary in order to deter torture. *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 864 (E.D.N.Y. 1984).

12. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 20–23 (1996). There has been significant consistency in the judicial application of the ATCA because courts have generally endorsed the *Filártiga* approach.

13. *See* Ochoa, *supra* note 10, at 633–37.

Kadic v. Karadzic,[14] concerns blatant violations of international standards of human rights, such as torture, murder, kidnapping, and genocide, and refers to defendants who were either acting for the state, or whose actions could be linked to state action through the doctrine of action under color of law—that is, actions committed under state auspices or with a substantial degree of cooperation with a state.[15]

Other cases have enlarged the scope of application of the ATCA by blurring the requirement that only state action or action under color of law can be a source of liability. This second category of cases concerns foreign plaintiffs taking action against private multinational corporations for violations of international human rights law.[16] These decisions have been more controversial because they establish a link between what traditionally has been considered private action, and human rights as guaranteed by international law. The original rationale of these decisions can be found in the doctrine according to which the most

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14. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995). The Court of Appeals for the Second Circuit decided that, although Karadzic was not officially acting for the state, he was the leader of an unrecognized government during the war in the former Yugoslavia and received significant backing from the Yugoslav government. Consequently, he was not to be considered as a private party, but rather as acting under color of law. Moreover, some violations were, according to international law, so serious that they caused liability even if they were not related to state action.

15. *See also In re* Estate of Ferdinando Marcos, 25 F.3d 1467 (9th Cir. 1994).

16. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d. Cir. 2000) (action against a multinational oil company for complicity in human rights violations and killings in Nigeria during the construction of a pipeline), *cert. denied*, 532 U.S. 941 (2001); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (action against a multinational oil company for human rights violations against indigenous people); Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999) (action against a corporation for human rights violations against indigenous people committed by Burmese (now Myanmar) military who were supervising security during the construction of a pipeline).

Similar human rights suits were filed against several multinational corporations that did business in South Africa and were linked to the apartheid regime. Some commentators have argued that these suits could impair the working of the Truth and Reconciliation Commission established by the post-apartheid South African government. One of these suits was recently dismissed by a federal district court in New York.

Previously, action was taken by holocaust survivors against corporations that had profited from property and labor stolen during the holocaust. Most of these suits were settled out of court. Compensation was also paid through a large fund established in 2000 by the German government and German corporations, but this was not related to court settlements. These developments are discussed in several comments by A.J. Sebok on the Findlaw website. *See, e.g.*, Anthony J. Sebok, *Un-Settling the Holocaust (Part I), at* http://writ.news.findlaw.com/sebok/20000828.html (Aug. 28, 2000); Anthony J. Sebok, *Un-Settling the Holocaust (Part II), at* http://writ.news.findlaw.com/sebok/20000829.html (Aug. 29, 2000).

outrageous and blatant violations of human rights foreseen by international law can be sanctioned, even if they are committed by private individuals or entities acting with no link to states. Nevertheless, some of these cases do establish a link between the tortious conduct of the defendants and states, but use different standards than the ones traditionally employed in the analysis of whether an action is under color of law.

Finally, some recent cases have employed the ATCA in order to establish the liability of individuals affiliated with U.S. activities for violations of international human rights.[17] The United States has immunity under the ATCA, but states that back U.S. action can be held liable.[18] *Sosa v. Alvarez-Machain* falls under this category. The case concerned a Mexican citizen, Alvarez-Machain, who was abducted from Mexico in order to stand trial in the United States for the torture and murder in Mexico of an agent of the Drug Enforcement Administration (DEA); Alvarez-Machain brought suit against another Mexican citizen, Sosa, who helped the DEA in the kidnapping.[19]

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17. *See* Papa v. United States, 281 F.3d 1004 (9th Cir. 1999) (reversing the District Court's dismissal of the ATCA claim and remanding to determine whether the U.S. Immigration and Naturalization Service was liable under the ATCA for the killing of a Brazilian citizen during INS captivity).

18. *See* Al Odah v. United States, 321 F.3d 1134, 1149 (D.C. Cir. 2003) (Randolph, J., concurring) (concerning violations of human rights of foreign prisoners under military detention on the U.S. base at Guantánamo Bay in Cuba), *rev'd and remanded by* Rasul v. Bush, 124 S.Ct. 2686 (2004). This development implied the abandonment of the act-of-state doctrine, the discretionary doctrine of abstention according to which actions of a foreign government within its territory should not be subject to U.S. judicial scrutiny. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 415–37 (1964) (applying the act-of-state doctrine).

19. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746–47 (2004). Alvarez-Machain stood trial in the United States, and in 1993, after being acquitted, he sued both Sosa, claiming liability under the ATCA, and the United States, for false arrest under the Federal Tort Claims Act (FTCA), which waives sovereign immunity in suits for personal injury caused by the negligent or wrongful act or omission of any government employee acting within the scope of his office or employment. *See* Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2005). The District Court dismissed the FTCA claim and affirmed liability under the ATCA. The Court of Appeals for the 9th Circuit affirmed the ATCA judgment and reversed the FTCA claim's dismissal. *See* Alvarez-Machain v. United States, 331 F.3d 604, 641 (9th Cir. 2003). The Supreme Court granted certiorari in order to clarify the scope of FTCA and ATCA, see Sosa v. Alvarez-Machain, 540 U.S. 1045 (2003), and finally decided that there was no governmental liability on the basis of the FTCA because the act contains an exception to waiver of sovereign immunity for claims arising in a foreign country. *See* 28 U.S.C. § 2680(k). It thereby rejected the Court of Appeals' decision based on the so-called "headquarter doctrine," according to which, because Alvarez-Machain's abduction was planned

III. THE DECISION OF THE SUPREME COURT IN *Sosa v. Alvarez-Machain* AND ITS IMPACT ON THE APPLICATION OF THE ATCA

Prior to *Sosa*, no decision concerning the application of the ATCA had reached the highest federal court, so the decision by the Supreme Court in June 2004 was an important step in clarifying the content and scope of the Act. In fact, expectations about how the Court would rule ran very high and were extremely divided. Some hoped that the Court would declare that, by being merely jurisdictional in nature, the ATCA did not confer jurisdiction outside the torts recognized by Congress, strictly limiting the application of common-law rules to this field. Others hoped for a decision that would keep the doors open for victims of human rights violations worldwide. As in many other crucial decisions, the Supreme Court struck a middle ground between these opposite positions. It recognized that courts can apply actionable international norms independently from statutory recognition, but at the same time it established very strict criteria for the exercise of this power.

The Court's reasoning begins with a historical and textual analysis of the meaning of the ATCA, concluding that

> although the [ATCA] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law . . . . [T]he common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[20]

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and directed by DEA agents in California, the claim did not arise in a foreign country, and consequently the exception did not apply.

Previously there was another series of decisions that reached the Supreme Court, concerning whether Alvarez-Machain's arrest violated the United States-Mexico extradition treaty. The Supreme Court decided that the arrest was lawful because a court can try a person for a crime even though that person has been brought within the court's jurisdiction by forcible abduction because the treaty contains no explicit prohibition of alternatives to formal extradition procedures. *See* United States v. Alvarez-Machain, 504 U.S. 655, 663–66 (1992). However, the Court did not rule out the possibility that Alvarez-Machain's abduction violated general international law principles and that he could therefore be protected by a civil remedy. *Id.* at 669–70.

20. *Sosa*, 124 S. Ct. at 2761. These violations included offenses against ambassadors, violations of safe conduct, prize captures, and piracy. *See* William R. Casto, *The Federal Courts' Protective*

The Court goes on to say that "no development in the last two centuries has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[21] Nevertheless,

> there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. . . . [C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms.[22]

The great caution in adapting the law of nations to private rights requires that the elements for the judicial establishment of torts actionable under the ATCA must be strictly defined, so as to keep the door open, but "subject to vigilant door keeping."[23] According to the Supreme Court, the international norms violated must be specific, universal, and obligatory,[24] and the application of this strict standard to the *Sosa* case implies that Alvarez-Machain does not have a claim under the ATCA, because under current international law, unlawful and arbitrary detention have not attained the status of binding customary international law.

The decision of the Supreme Court is also based on the analysis of the scope of federal common law—that is, the extension of the power of federal courts to shape judge-made rules. The Court starts from the premise that the declaratory theory of the common law, according to which law is discovered by the court from a body of preexisting rules rather than created by judges themselves, must

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Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 CONN. L. REV. 467, 486 (1986); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2001–2002); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 444–48 (2002).

21. *Sosa*, 124 S. Ct. at 2744. Justice Scalia disagrees with the power of courts to recognize claims based on international law as an element of federal common law. *See Sosa*, 124 S. Ct. at 2769–82 (Scalia, J., concurring).

22. *Id.* at 2761–62.

23. *Id.* at 2764.

24. *See* Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); *In re* Estate of Ferdinando Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

be considered obsolete.[25] The awareness of the discretionary element in judicial decisionmaking, and the need to use it carefully, is considered crucial in the area of private rights deriving from international law: "It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[26] The Court remarks that the decision to create a private right of action is generally better left to the legislative power, and consequently "judicial caution" is required in this area. Finally, the Court emphasizes that the extension of private causes of action for violations of international law could impinge on the discretion of the legislative and executive branches, and could have adverse foreign policy consequences.[27] Again, this requires great caution,[28] which leads to the conclusion that, as a rule, judicial creativity with regard to violations of international law is confined to areas where there is a congressional mandate.[29]

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25. Having recognized that courts do make law when they shape common-law rules, the Court recalls that the current doctrine denies the existence of a federal general common law, but limits the power to interstitial areas of particular federal interest. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

It is interesting to note that while the Supreme Court blurs the distinction between lawmaking and interpretation in the area of the common law, it still rigidly adheres to the distinction between making and finding the law when it comes to the issue of treaty-making and treaty interpretation, which determines the division of tasks between the judicial and the political branches.

26. *Sosa*, 124 S. Ct. at 2762.

27. The relevance of political issues related to the discretionary power of the legislative and executive branches is underlined in the decision of the U.S. Court of Appeals for the 9th Circuit in the *Alvarez-Machain* case, where the dissenting opinion by O'Scannlain stated "[w]e are now in the midst of a global war on terrorism, a mission that our political branches have deemed necessary to conduct throughout the world. . . . [T]he implications for our national security are so ominous that I must dissent." Alvarez-Machain v. United States, 331 F.3d 604, 645–46 (9th Cir. 2003) (O'Scannlain, J., dissenting). On the contrary, the majority opinion by Judge McKeowen states that "[w]hatever the contours of the powers of the political branches during wartime or in matters of national security, the exercise of those powers in the combat against terrorism are not implicated in our analysis." *Id.* at 608.

28. *See Tel-Oren*, 726 F.2d at 775, in which the court dismissed the ATCA claims of Israeli survivors of a terrorist attack in Israel.

29. This is the case, for example, in the Torture Victim Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73, which establishes a cause of action for torture and extra-judicial killing, subject to exhaustion of remedies and a 10-year statute of limitations. The Act was passed as an amendment to ATCA.

IV. THE CHANGING RELATIONSHIP OF INTERNATIONAL LAW AND U.S. DOMESTIC LAW

International law in the U.S. legal system has a fairly low status.[30] According to the Supremacy Clause of the U.S. Constitution, all treaties shall be the supreme law of the land,[31] and the Supreme Court has said that this applies to customary international law as well.[32] Nevertheless, case law does not consider that this establishes a monist system with respect to international law—that is, a system where international law is part of the domestic legal system and superior to all domestic sources—but rather treats international law as a form of federal law, subject to the Constitution, and essentially coequal with federal statutes. Moreover, even though it is generally recognized that customary international law ("law of nations" in the terminology of the Constitution) can be part of federal common law, it does not enjoy a particularly high status, because according to the standard conception, common law is ranked below all statutory law—not only the Constitution, treaties, and federal statutes, but according to some case law and authors, regulations as well.[33]

Finally, the rule that Congress cannot interfere with rights under treaties, except in purely political cases, is limited only to property and other tangible rights capable of sale and transfer,[34] which means that there is a significant possibility that the legislative power can encroach on rights defined by international law.

This situation leads to a paradoxical result because international obligations are steadily expanding in number, characteristics, and scope, and because these obligations are increasingly encroaching on domestic law, "the United States is an increasingly unreliable treaty partner as a direct consequence of its approach

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30. On the role of international law in the U.S. legal system, see generally JOHN M. ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW (1999); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES (1996).

31. U.S. CONST. art VI, cl. 2. Treaties properly made and ratified in the U.S. legal system are enforceable in U.S. courts only if they are self-executing, i.e., if they do not require domestic legislation in order to give legal effect to their provisions. Sei Fujii v. State, 242 P.2d 617, 620 (Cal. 1952) (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

32. *See* The Paquete Habana, 175 U.S. 677, 700 (1900).

33. *See id.* (implying that customary international law applies only if there is no treaty and no controlling executive or legislative act or judicial decision).

34. *See* Holden v. Joy, 84 U.S. (17 Wall.) 211, 247 (1872); Chae Chan Ping v. United States, 130 U.S. 581 (1889).

to those obligations under domestic law." The U.S. approach is characterized by a "visceral unwillingness to take international law seriously."[35]

The sources of international law are treaties and other international agreements, customary law, and general principles of law. While it is relatively easy to define the content of legal rules belonging to the first source, it is more problematic to define customary rules, which stem from general and consistent state practice observed and undertaken from a sense of legal obligation.[36] Even more problematic is isolating rules that are a part of general principles of law, which are a supplementary source used to fill existing gaps.[37]

In terms of the hierarchy of sources, treaties and customary international law are of equal force. Therefore, in cases where the two clash, the more recent rule prevails. It must be noted that there is a special category of rules of international law, so-called *jus cogens* (peremptory norms)[38] that are so fundamental that no state can derogate from them. Again, although their existence is generally acknowledged, there is disagreement about which rules fit the category: usually they prohibit attacks on diplomats, acts of genocide, slave trading and slavery, apartheid, torture, and other gross violations of human rights. Traditionally, treaties and custom governed relationships between states and did not create enforceable private rights, although there were limited exceptions, such as those referred to by the ATCA.

Recently, the application of the ATCA has become an important element in the gradual internationalization of U.S. law; its effects must be evaluated in light

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35. Ralph G. Steinhardt, *The Internationalization of Domestic Law*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY, *supra* note 5, at 3, 42–43, 45.

36. "The positions or outlooks of particular states, including the United States, should not be confused with what a consensus of states would accept or support." . . . [T]his Restatement represents the opinion of The American Law Institute as to the rules that an impartial tribunal would apply if charged with deciding a controversy in accordance with international law.

Introduction to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 3 (1987) (quoting the previous edition of the Restatement).

37. *Cf.* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, § (1)(c) (stating that when deciding international disputes, courts must apply, among other things, "general principles of law recognized by civilized nations"). The United States accepted compulsory jurisdiction of the International Court of Justice in 1946 (although it exempted disputes concerning matters essentially within domestic jurisdiction), but in 1985, after its decision in a case brought by Nicaragua concerning the United States' funding of the contra guerillas, the United States decided to terminate its acceptance.

38. *See* Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 344, 347.

of the dramatic changes in the international legal context.[39] In the twentieth century, international law has transformed from a body of negative rules of abstention to a much larger and more complex body of positive rules of cooperation.[40] This transformation has affected the boundaries between international law and domestic law. The scope of international law is constantly changing and enlarging, taking over issues that were previously considered purely domestic. The expansion of the scope of international law has also modified the sources of international law, which range from uniform legislation to principles, modern contracts, and various forms of soft law. The proliferation of the number of lawmakers and lawmaking processes has influenced enforcement methods, which now allow states, individuals, organizations, and other entities to invoke international law in a variety of settings—all on a national, international, and transnational level.[41] This evolution has blurred the traditional distinction between public and private international law, extending public interests into the spheres of traditionally private matters.

The case law on ATCA that has followed the landmark case of *Filártiga* has better defined the instances when international law will be applied to domestic litigation,[42] and the margin of discretion U.S. courts may exercise in determining the content of customary international law.[43] In general, the analysis of this case law shows that courts tend to treat international law primarily as a matter of domestic law. This has important consequences.[44]

As has been previously discussed, in *Filártiga* and some subsequent decisions, liability on the basis of the ATCA was established only for violations committed by state officials, or by individuals acting under color of law, later decisions expanded liability to nonstate actors as well, either because the torts were related to violations where no state action was required, such as genocide,[45] or because they

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39. *See generally* Steinhardt, *supra* note 35 (using the neologism "intermestic law" to define the creeping of international law in virtually every field of domestic law).

40. *See generally* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

41. *See* Donald J. Kochan, *The Political Economy of the Production of Customary International Law: The Role of Non-governmental Organizations in U.S. Courts*, 22 BERKELEY J. INT'L L. 240, 241 (2004).

42. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 37 (3d ed. 1996); JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 287 (2000).

43. *See* Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J.L. & PUB. POL'Y 431, 433 (2004).

44. *See* discussion *infra* Part V.

45. The U.S. military tribunal in Nuremberg found private parties guilty of international crimes.

were linked to different kinds of state action. This trend conforms to emerging international standards, which are gradually expanding the liability of nonstate actors. However, U.S. courts have reached this result by applying the domestic doctrine of action under color of law, developed previously in the field of antidiscrimination. The most recent developments extend liability to private, transnational corporations, and generate a very relevant area of potential litigation dealing with violations of international law, particularly human rights law, but also environmental protection, and others. This means that private parties can now use U.S. courts to enforce international rules in a variety of areas.[46] In this way, the expanded number of parties that can be held liable, combined with the expansion of individual rights that are conferred and defined by international law, opens up an enormous field where national and international law overlap, leading to greater decentralization in the elaboration and application of international legal standards—a context in which U.S. courts act as "agents" of the international order.[47]

Although the analysis of the case law applying the ATCA shows that "lawsuits in the United States are not some ideal or cost-free approach to the problem," many commentators believe that:

> [i]n the face of the difficulties that inevitably attend such cases, we must remember that there are few if any real-world alternatives. There is no global international tribunal to resolve these cases, and . . . victims generally cannot get a fair hearing in their home countries. Given that reality, the [ATCA] offers a decent option. It is consistent with the early judgments of the founding generation, it is consistent with the nation's stated commitment to human rights, and it is consistent with the obligation of the courts to resolve disputes that are brought within the borders of this country.[48]

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46. *See* Steinhardt, *supra* note 35, at 12 (stating that "non-state actors have come to play a quasi-legislative role in the development of international standards").

47. *See generally* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004) (arguing that "the Constitution vests in the Supreme Court original and exclusive jurisdiction over suits brought by foreign states against States alleging violations of treaties of the United States"). *See also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1117–19 (2000).

48. Steinhardt, *supra* note 35, at 45; *see also* Ochoa, *supra* note 10.

But from the point of view of legal pluralism, how does this reading of ATCA-related case law fit into the global picture?

V. THE ROLE OF LEGAL PLURALISM IN THE NEW TRANSNATIONAL CONTEXT

The expansion of international law related to new lawmaking bodies and lawmaking processes has led to the creation of a new set of rules, characterized by the use of vague legal concepts[49] that influence national laws in various ways.[50] Examples of such concepts include *rule of law*, *governance*, and *due process*. These concepts are so general that they can lead to a variety of different results, depending on the context; yet they command universal acceptance because of the importance, and often also the prestige, of the lawmakers who stimulate or impose the "transplant" (e.g., the World Bank and the International Monetary Fund).[51] The isolation of legal concepts from the contexts where they were originally formed and the corresponding loss of a detailed technical meaning are two of the main reasons for their success worldwide, because legal concepts can easily be employed in radically different legal contexts.

Comparative law has extensively studied the reasons and ways in which legal concepts and legal models circulate,[52] as well as the results that transplants produce in different legal settings.[53] Starting from a neutral point of view in relation to the issue of legal pluralism versus legal harmonization, comparative law has shown that there is no direct link between "black letter" rules and the law in action: different legal rules in different legal systems can lead to the same operational results; and conversely, identical rules in different legal systems can produce

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49. On the notion of vagueness, see TIMOTHY A.O. ENDICOTT, VAGUENESS IN LAW (2000); TIMOTHY WILLIAMSON, VAGUENESS (1994).

50. *See generally* Gianmaria Ajani, *Navigatori e giuristi. A proposito del trapianto di nozioni vaghe*, *in* IO COMPARO, TU COMPARI, EGLI COMPARA: CHE COSA, COME, PERCHÉ? 3 (Valentina Bertorello ed., 2003). On the relationship between international and comparative law, see David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 1997 UTAH L. REV. 545 (1997); Gianmaria Ajani, *Diritto comparato e diritto internazionale*, 2001 DIRITTO PUBBLICO COMPARATO ED EUROPEO 1589 (2001).

51. On the use of "buzz words" (such as "rule of law") outside their own legal context, see UGO MATTEI & LAURA NADER, PLUNDER—IMPERIAL USES OF THE RULE OF LAW, ch. 1 (forthcoming 2005).

52. *See generally* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (2d ed. 1993); ALAN WATSON, SOCIETY AND LEGAL CHANGE (2d ed. 2001).

53. *See generally* RODOLFO SACCO, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J. Comp. L. 1 (1991); Rodolfo Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171 (2001); RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO (5th ed. 1992).

different outcomes, depending on a variety of factors that influence the law in action.[54]

The development of globalization[55] puts tremendous pressure on institutions and actors to create legal concepts, rules, and models that can be transplanted, mainly to achieve harmonization of different areas of law, both at a regional (such as the European Union) and worldwide level (such as the World Trade Organization).[56] The circulation of legal models is most intense in the economic field (trade, financial instruments, market governance), but other areas are affected as well, such as human rights and environmental protection. The impetus that has characterized this new wave of legal transplants, coupled with the activism of new lawmakers in the international arena, has led to the creation of a whole set of vague concepts that are employed in radically different contexts. Yet, it is often forgotten that when these vague concepts, obtained by a process of abstraction, are transplanted into an international or transnational setting, they interact with a preexisting legal framework, and they can work together smoothly or create friction between the components of that framework. Because these transplants are often linked to goals of harmonization or uniformity, little room is left for the appreciation of legal pluralism.

The judicial application of the ATCA by U.S. courts can be read in this light: international human rights are admitted as actionable rights within the domestic legal system, but at the same time they are applied by reference to U.S. law and standards. Although there is much to be said for the opinion that the chance of obtaining judicial redress is well worth the risk of partial distortion of legal rules, it is still necessary to emphasize that this can be an instrument for the imposition of U.S. standards and concepts outside domestic boundaries.[57]

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54. In Sacco's terminology, these factors are called legal formants.

55. On the impact of globalization on law, see WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); William Twining, *Globalization and Comparative Law*, 6 MAASTRICHT J. EUR. COMP. L. 271 (1999); MARIA ROSARIA FERRARESE, IL DIRITTO AL PRESENTE: GLOBALIZZAZIONE E TEMPO DELLE ISTITUZIONI (2002). For a wider evaluation of globalization, see JÜERGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001).

56. In fact, comparative law is also facing difficulties in analyzing the new legal phenomena linked to globalization because its traditional analysis refers to national—that is, state—law as the primary level of analysis while the new dynamics mainly span across national borders. For a critique of this situation, see Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002).

57. For a critical analysis of the transplant of the U.S. legal model and the elements that have led to its success, see Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, IND. J. GLOBAL LEGAL STUD., Winter 2003, at 383; MATTEI & NADER, *supra* note 51, at chs. 4–7.

CONCLUSION

Comparative law teaches that the quest for universal concepts and rules can be misleading, because it starts from the premise that concepts and rules can be defined in a "legal vacuum," and consequently all that is needed is to carefully define concepts and rules in order to make them suitable for circulation. Yet, this method conceals the fact that the use of concepts and rules implies the imposition of a specific legal model (in this case, the U.S. legal model) to different contexts. In fact, rules and concepts are context-bound, and legal pluralism is not only to be considered a desirable goal, but also as a starting point for analysis.

In cases such as *Filártiga*, where both plaintiff and defendant were foreign, and the violation took place abroad, the only reason U.S. courts had jurisdiction was because the defendant could be served with process on U.S. territory. Although most would agree with the results reached by U.S. courts, it still remains that this leads to the application of U.S. legal standards to wholly foreign legal situations, justified by the interpretation given by U.S. courts to international law. It is not impossible to imagine cases where the situation might be less clear-cut, and imposition of U.S. standards might be perceived as an arbitrary decision because of the importance and power of the transplanting system.

But why is the U.S. legal system, more than any other legal system in the world, the target of these kinds of actions? There are a number of features that make U.S. law unusually pro-plaintiff, and therefore make U.S. courts an attractive forum for litigation.[58] First, the U.S. judicial process contains mechanisms that are particularly favorable to claims frequently at issue in ATCA litigation, such as class actions[59] and the possibility of obtaining punitive damages. Moreover, the existence of a large and aggressive plaintiffs' bar, coupled with the contingent-fee system and a liberal discovery process, makes it possible (and easier) for a foreign plaintiff to bring a case before U.S. courts—a task that would be much more difficult in other countries.

The overall success of the intervention of U.S. courts in the field of human rights litigation should not overshadow the awareness that when U.S. courts are used as a forum for international litigation, they are interacting with a wider and

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58. *See* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (3d ed. 2002); UGO MATTEI, IL MODELLO DI COMMON LAW (2d ed. 2004).

59. *See generally* Kevin R. Johnson, *International Human Rights Class Actions: The New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 (2004).

more complex legal setting. This awareness should encourage greater caution in applying domestic concepts and rules, and should be backed by efforts of lawyers (judges, practitioners, and scholars alike) to develop concepts, rules, and taxonomies that reflect the international and transnational setting, taking legal pluralism, rather than universalism, as a starting point.[60]

60. *See generally* Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43 (1998).