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The Alien Tort Claims Act

Remarks of
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It is a great honor to have been invited to address this audience on a topic so timely, and so important, not only to lawyers but to all Americans, and indeed to people around the planet. I thank you for this opportunity. It is no exaggeration to say that what is at stake in this discussion of an obscure 215-year-old statute is nothing less than the role of international law in our country, and the role of our country in defending and promoting the rule of law in the world.

The statute itself is straightforward. It establishes federal jurisdiction over a particular category of civil actions, which satisfy three prerequisites: they must sound in tort only, and the plaintiffs must be aliens who allege that the defendant violated the law of nations or a treaty of the United States. The common wisdom is that, at least until immediately following World War Two, international law exclusively governed relations between states, and had little to say about the conduct of individuals. Exceptions were few, and easily identified. Piracy and (eventually) the slave trade were rare instances in which international law traditionally imposed obligations directly on individuals, and presumably, therefore conferred rights on individuals to be free from conduct that violated those rules.

Scholars have invested substantial labor in inconclusive attempts to determine just what the Framers had in mind when they enacted the law now codified at 28 U.S.C. § 1350. One may suppose that they wanted to concentrate in the federal courts of the new Republic litigation that might require a determination of the content of the law of nations, to accomplish two purposes that we know inspired others of their statutory enactments: avoiding the embarrassment that might

befall the new country from inconsistent decisions involving international law, and promoting the image of the United States as acting through all of its departments, as Thomas Jefferson famously wrote in the Declaration of our Independence, with "a decent respect for the opinions of mankind."

International law was seen as too important to leave to the scattered and haphazard mercy of the States. Indeed, one of the failures of the Confederation was precisely its inability to speak with one voice, as one sovereign, taking its place in the pantheon of sovereign nations in the world community. It was very important to the fledgling Republic to be taken seriously, as a worthy coequal to the great empires and the princely powers. The limitation of the statute to tort cases was an effort to exclude from this special category reserved for federal jurisdiction issues essentially contractual and hence commercial in character. The State courts could competently handle those, and even if they on occasion did their job poorly, that was no reflection on the character of the country. The requirement that the plaintiff be an alien too may have been meant to reassure the world that the United States considered its international obligations to be so important that it would reserve the application of international law to its independent national judiciary, appointed for life and, by constitutional design at least, above the local political fray. If your citizens come here, the first Congress was saying to other nations, they may be assured of effective and fair treatment, at least where their rights protected by international law are concerned.

We need not, however, resolve the historical debate that offers so little hard evidence, and therefore so much room for speculation and surmise. More than 200 years of national experience with our extraordinary Constitution have taught us, if they have taught us anything, that the genius of that document and the early laws it inspired is precisely their ability to accommodate to changing times, while remaining true to the words and principles our Founders inscribed for us. It hardly bears repeating that many of the framers of the instrument that the world reveres as the model for individual liberty were themselves owners of slaves. Yet in the language of Constitution our

generation found the basis for a prohibition of discrimination based on race. It is beyond any doubt that not a single one of the men who wrote the Constitution could have imagined that their reservation of the commerce power to the national government would someday permit Congress to mandate that places of public accommodation could not deny access to Americans because they are black.

So those of us who see in the Alien Tort Claims Act something of fundamental importance are not deterred by the thought that, in 1789, there existed but few torts that could be said to implicate the law of nations. The drafters used the broad language that is still on the books; they did not enumerate certain acts or exclude others.

Today, international law legitimately concerns itself with the conduct of individuals in many areas. And the United States has been a consistent and vocal supporter of this development in the post-War international legal regime. Americans were the drafters of the blueprints for the trials at Nuremberg and Tokyo. Americans were in the forefront in the emergence of the United Nations, and were the principal authors of the Universal Declaration of Human Rights. Americans, both in government and out, have led in promoting the rule of law around the world, and our statute books are filled with examples of our efforts to have human rights occupy a central station in our national foreign policy.

This is not a matter of ivory-tower idealism. The United States has, until recently, been the champion of the concept that international human rights law is law, and not, to use the evocative words of Judge Eugene Nickerson in the *Filartiga* case on remand, "a mere set of benevolent yearnings, never to be given effect."

So when our national Founders gave the federal courts jurisdiction over tort suits, brought by aliens, alleging violations of international law, they provided a federal forum for victims of human rights abuses two centuries later. They may not have known that, but so were those same people

equally unaware of so many consequences of their words that we now take for granted. That the language our forbears used over 200 years ago now provides a basis for obtaining judicial remedies against the human rights violator, the enemy of all mankind, is something of which we should be proud. It is entirely in keeping with the fundamental commitments of this country, again dating back to the earliest times. We stand with the oppressed, with the abused, and with the dispossessed. We stand against the tyrant, against the torturer, against the violator of the basic rights that inhere in all of us simply because we are human.

International law has been part of our law since the beginning, and there has always been a shared understanding that international law is subject to change. The drafters of the Judiciary Act knew that. And not only that: they were also aware that the factors and forces that produce change in the law of nations are not the same as those that influence statutory law.

So what is the problem, and why are we having this discussion today? I may be missing subtleties that more sophisticated minds can perceive, but in my reading of it, there is no ambiguity in this statute. It confers jurisdiction on the federal courts over a certain class of tort cases, which have certain characteristics that it is the burden of plaintiffs to establish.

I simply do not understand the arguments of those who proclaim that since the Alien Tort Claims Act does not create a private cause of action, there is some flaw in the reasoning of judges who have awarded substantial damages to victims of torture, extrajudicial killings, disappearances, and other deprivations of human rights. Of course the Act does not create a private right of action. To come within the Act, the cause of action must already exist: it must be in tort, the plaintiff must be an alien, and the challenged act by the defendant must allegedly violate the law of nations. Some torts qualify, and others do not. Some plaintiffs qualify to bring cases under the statute, and others do not. And some defendants may fairly be characterized to have violated international law, and some may not.

The real issue is not whether the Act creates a private right of action. It is that the Act's detractors do not concede that **international law** can create a private right of action. And yet it does; and yet it must. If human rights are legal rights, then there must be some correlative obligation, and there must be some forum in which a holder of those rights may be heard to make her claim that they have been violated. This is reflected in a number of sources of international law. The International Covenant on Civil and Political Rights, for example, speaks in the vocabulary of real, enforceable rights: I have a right not to be tortured, and you, as someone acting under color of state authority, have a duty not to torture me. The prohibition of state-sanctioned torture is now accepted as a norm of customary law, even a norm of the level of *jus cogens*, permitting no derogation in any circumstances.

But other international instruments, such as the Covenant on Economic, Social and Cultural Rights, do not set forth agreed, fixed principles that generate rights. They are aspirational, not legal, *inter alia* because there is no correlative obligation, and therefore no enforceability, to the "right" to a job, or to education. Moreover, there is no international consensus that these rights exist. They have not become established in customary law, according to the standard tests that our courts and international tribunals have used to determine whether such law has been made.

In the United States, international law, including customary international law, has always been part of our national legal system. Even at the time of Mr. Justice Gray's famous articulation of this principle in *The Paquete Habana* in 1900, it was not new. It stems from historical first principles, and it is of great importance in defining the American *corpus juris*.

We all learned in law school another fundamental tenet of our system of constitutionalism and separation of powers that is relevant here. In the words of Chief Justice Marshall in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is." "The law" – here, the body of law – includes principles of the law of nations. So it is hardly

surprising that, in some cases, judges must define the contents of international law. They often do this without controversy, whether interpreting treaties, outlining the law of prize, or determining who is the owner of the wreck of a Spanish galleon found centuries later off the coast of Florida. It is maddeningly difficult, in some cases, to determine the precise contents of international law. There is no legislature, and no Congressional Record. Finding the law may involve some hard intellectual work, and lawyers, and even judges, may sometimes get it wrong. But we already have in place a mechanism, including the courts of appeals, designed to minimize the instances of judicial error. By and large, that system works. So why are those who profess an originalist orientation to the legal system so reluctant to trust the tools finely honed by our experience over centuries?

The Alien Tort Claims Act requires that judges do exactly what judges are paid to do. They must say what the law is, and they must determine whether this plaintiff has a right which this defendant violated. In *Filartiga* and other cases, judges found that there is a legal right to be free from torture, concluding that the torturer, properly before a court with personal jurisdiction over him, is liable to his victim, just like any other tortfeasor. No floodgates have been opened by this holding. *Filartiga* does not stand for the proposition that all a plaintiff must do is allege a violation of the international law of human rights. A plaintiff must do much more: she must prove not only that she is the holder of a legal right, but that this defendant, personally within the jurisdiction of the court, has violated it, causing compensable injury. In international cases, where pitfalls for a plaintiff lie in the Foreign Sovereign Immunities Act, the act of state doctrine, the political question doctrine as articulated in *Baker v. Carr* and its progeny, comity, equitable abstention, *forum non conveniens* . . . there is simply no basis to think that the doors of the courthouse have been thrown open to anyone with any perceived grievance. The Alien Tort Claims Act is not the "awakening monster" that its detractors fear.

Has the statute been abused by the leading villain of our time, the tassel-loafered Antichrist, the Trial Lawyer? In all likelihood it has been, and no doubt it will be again. But the fine principles of the Civil Rights Act of 1964 have been abused too, by people of all races, sexes, and religions, who have sought to justify their own shortcomings by claiming that their bad fortune was attributable to actionable discrimination. The fact that those abusive cases are virtually always stopped somewhere far short of judgment should give us assurance that, in fact, the sky is not falling. Indeed, only a handful of § 1350 cases have resulted in judgments, and to this day not a single one has been against a company. More: no ATCA case against a corporation has yet gone to trial, and the one that looks most promising, *Doe v. UNOCAL*, at least in Federal court raises questions of joint venture liability that are more important than those of international human rights law. The issue in *UNOCAL* is whether that company can be proved to have worked hand-in-hand with the government of Burma, as the plaintiffs allege, with actual or constructive knowledge of its torture and abuse of innocent people. If it did, then I can think of no legal principle that should shield UNOCAL from the legitimate claims of its joint-venture partner's victims. Of course, the company denies that it did so, and the charges may well not be true, or even if true, provable. But these are questions whose resolution must await the results of the adversary process of a trial.

The presence or absence of private rights of action is not the answer to the ATCA conundrum. Yet no less than Justice Scalia reflected this error last month, in oral argument in *Sosa v. Alvarez-Machain.* He told the lawyers representing Dr. Alvarez, and I quote from the transcript, "The problem I have with your proposal is that it leaves it up to the courts to decide what the law of nations is." But that is what judges are meant to do: they say what the law is. It may be that the kidnapping of Dr. Alvarez in Mexico and his detention there were not violations of international law. If so, then he should and will lose his case, for the simple reason that he has not borne the

burden of establishing the bases for the subject matter jurisdiction of the federal courts under § 1350.

Justice Scalia is surely entitled to his view that international law has nothing to say to American judges, but that is a profoundly radical proposition, which one can hardly imagine any of the drafters of the Constitution entertaining for a moment. He is right, however, in reminding us that the terms of our debate over the Alien Tort Claims Act at bottom reflect something more important than a single statute, however venerable. We are talking about whether this country is to live up to its Founders' vision: that it would take its place as a sovereign among other sovereigns, governed by the same law, subject to the same requirements, as other members of the greater community of nations.

My view is closer to that of another great American judge who, testifying before the Senate in favor of ratification of the Convention Against Torture in 1990, said that our government "as a member of the international community . . . must stand with other nations in pledging to bring justice to those who engage in torture, whether in U.S. territory or in the territory of other countries." That vision of the role of international law in our courts, and of our country in the international legal regime, is the one truly embedded in the history and tradition of our Constitution. And that is the inspiration behind the Alien Tort Claims Act.

The Judge whose words I just read to you is Abraham Sofaer, the esteemed moderator of our panel.

Thank you again for inviting me, and for listening to my presentation. As someone warned me last night, "You will not be preaching to the choir tomorrow." But I hope I have provoked some of you to consider the magnitude of what is at stake in this discussion. I look forward taking your questions.