INTRODUCTION

Every court to address the scope of 28 U.S.C. § 1350, the Alien Tort Claims Act ("ATCA"), in this context has held that ATCA provides a basis for suits by aliens for violations of customary international human rights law norms. This Court has reached the same conclusion on numerous occasions.[1] The *amicus curiae* brief filed by the Justice Department ("DOJ Brf") asks this Court to disregard all of these precedents and adopt a position that is fundamentally inconsistent with the ATCA's plain language, intent and history, as well as the historical enforcement of international law by the federal judiciary.

---

[1] This Court has consistently held that the ATCA provides both subject matter jurisdiction and a claim for relief for violations of the law of nations. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Alvarez v. United States,* 266 F.3d 1045, 1050 (9th Cir. 2001) (*en banc* review pending); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *In re Estate of Marcos Human Rights Litig.* (Marcos II), 25 F.3d 1467, 1475 (9th Cir. 1994); *Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 711 (9th Cir. 1992); *Trajano v Marcos*, 978 F.2d 493 (9th Cir.

1992).

The Justice Department's brief marks at least the seventh time in twenty-three years that the government has offered its interpretation of the ATCA as *amicus curiae*.[2] The Justice Department's most recent analysis contradicts the view it expressed to the Second Circuit in *Filartiga v. Pena-Irala* 630 F.2d. 876 (2d Cir. 1980) ("Government's *Filartiga* Brief"). The new position is a naked attempt to strip the ATCA of all meaning and effect. DOJ Brf., 11-12. This arrogant assertion of executive power is utterly at odds with a respect for Congress and the rule of law. This Court should reject the Justice Department's proposed new construction.[3]

Even if the proper meaning of a two-hundred-year-old statute could vary from administration to administration, the government's most recent interpretation is the least persuasive and most political yet. As the

---

[2] *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876 (1980) (supporting the exercise of jurisdiction)*; Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (opposing the petition for a writ of certiorari); *Trajano v Marcos*, 878 F.2d 1439 (9th Cir. 1989); *Alvarez v. United States, supra*. In *Kadic v. Kazadzic*, 70 F.3d 232, (2d Cir 1995), the Justice Department reaffirmed the position it articulated in the *Filartiga* case. The government's *Filartiga* brief is reprinted at 19 I..L.M. 585 (1980).

[3] Unlike the *amicus* briefs in the *Filartiga* and *Kadic* cases supporting plaintiffs' claims, this brief has not been joined by the State Department.

Justice Department concedes, its newly minted interpretation renders the statute virtually meaningless; indeed, meaningless from its inception**.** DOJ Brf, 12. In advancing this position, the Justice Department betrays a deep disregard for the Framers' original understanding of the law of nations and its role in domestic litigation.

Nor does the Justice Department is brief provide any persuasive reason why adjudication of this case, or ATCA cases generally, would harm U.S. foreign policy or adversely affect the war on terrorism. The contention that the established interpretation of the ATCA would lead invariably to foreign policy "embarrassment" is unfounded. Courts have adequate tools, such as the act of state doctrine and the political question doctrine, to dismiss individual claims that would actually threaten our national interests in a particular case**.**

The State Department has long been on record that the adjudication of foreign acts of state under international law would not ordinarily embarrass or compromise the foreign policy of the United States.[4] Cases under the Foreign Sovereign Immunities Act, often filed

[4] Letter of Monroe Leigh, Legal Advisor to the Department of State, attached as Appendix I to the Supreme Court's Opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

against our allies, are far more likely to raise the kinds of concerns expressed in the Justice Department's brief, yet such cases are a common feature of our jurisprudence.

This case, in particular, demonstrates that ATCA cases do not ordinarily raise the concerns expressed in the Justice Department's brief. The State Department has already indicated that this case does not raise foreign policy concerns. The United States has repeatedly opposed the egregious human rights violations at issue in this case in Burma and Congress has passed sanctions legislation[5] prohibiting future investment in Burma because of those human rights violations. It is therefore not surprising that the Justice Department's brief fails to articulate any reason why this case would undermine United States foreign policy or why the proposed judicial repeal of the ATCA is required to avoid such hypothetical conflicts.

I.

THE GOVERNMENT'S INTERPRETATION OF THE ALIEN TORT

[5] Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997, § 570. The latest State Department report on the human rights situation in Burma confirms that the United States government continues to condemn the same pattern of human rights abuses which lies at the core of this case. *http://www.state.gov/g/drl/rls/hrrpt/2002/18237.htm*

CLAIMS ACT IS FUNDAMENTALLY FLAWED.

A. The Justice Department Offers No Special Expertise in the Interpretation of the ATCA.

"[T]he judicial department of every government. . . . is the appropriate organ for construing the legislative acts of that government." *Elmendorf v. Taylor*, 22 U.S. (10 Wheat.) 152, 158 (1825). Courts only defer to the government's construction of an organic statute, under which it exercises administrative authority pursuant to Congressional delegation, where that construction reflects some special expertise. *Chevron USA Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984). However, "when the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved. . . . by judicial application of canons of statutory construction." *Barlow v. Collins*, 397 U.S. 159, 166 (1970). *See also, Crandon v. United States*, 494 U.S. 152, 177 (1990) (No special deference to Justice Department's interpretation because law in question is administered by the courts). Nor will the courts defer when the interpretation offered by the government is inconsistent with the facial requirements of the statute or plain legislative intent, especially if the government's interpretation changes over time. *See, e.g., Immigration and Naturalization Service v. Cardoza-Fonseca,*

480 U.S. 421, 488 (1987).

The Justice Department's new interpretation should be treated no differently than its views in the *Trajano* case. In rejecting a defendant's reliance on the Justice Department's change in position from *Filartiga* to *Trajano*, this Court held that the government's conflicting positions "in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350. Rather, we are constrained by what Section 1350 shows on its face." *Trajano*, 978 F.2d at 500.

B. The Justice Department's New Position is at Odds with the Plain Language and History of the ATCA.

The Justice Department argues that ATCA does not create a cause of action for violations of the law of nations, and therefore it may not be employed to redress gross violations of human rights absent specific implementing legislation. This interpretation is contrary to the language and historical context of the statute, as well as the conclusions of the numerous federal courts that have considered the issue.

The obvious purpose of the ATCA was to permit tort suits

involving violations of the law of nations to proceed in federal courts. The statute by its terms permits the filing in federal court 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." 28 U.S.C. § 1350 (emphasis added). At the time that the ATCA was passed, in 1789, the concept of a "cause of action" had not yet even been conceived. *Davis v. Passman*, 442 U.S. 228, 237 (1978) (the phrase apparently became a legal term of art in 1848).

Moreover, the Framers considered international law to be part of the common law. *Filartiga*, 630 F.2d at 886.[6] Since common law claims are by definition not created by statute, the Justice Department's view that all claims must be created by statute manifestly conflicts with the

---

[6] *See generally,* Paust, *International Law as Law of the United States* (1996). The "law of nations" was an accepted part of English common law. *Blackstone's Commentaries on the Laws of England*, §67, 53 (Morrison, Ed. 2001). This, in turn, became an accepted part of American jurisprudence. 1 James Kent, *Commentaries on American Law*, 195 (13th ed. 1884); Dickinson, "The Law of Nations as Part of the National Law of

Framer's understanding.

---

the United States," 101 U. Penn. L. Rev. 26, 35-36 (1952).

Thus, in 1795, Attorney General Bradford concluded, in reference to a case involving private Americans who aided the acts of a foreign military in breach of the law of nations relating to neutrality, that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit" under the ATCA. 1 Op. Atty. Gen. 57, 59 (1795); *accord Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) (citing Bradford opinion).[7] Similarly, in *Bolchos v. Darrel*, the court upheld an ATCA claim based on a treaty. 3 Fed. Case 810 (D.S.Car. 1795). In neither instance was there any suggestion that Congress had passed implementing legislation or needed to. *See also Talcot v. Johnson,* 3 U.S. (3 Dall.) 131, 159 (1975) ("All piracies and trespasses committed against the general law of nations, are inquirable, and may be proceeded against."). *Bolchos* and Attorney General Bradford's opinion in 1795 are much more trustworthy indications of the Congressional intent underlying ATCA than this Justice Department's new position.

On its face, the ATCA requires only a tort in "violation" of the law

---

[7] The Justice Department devotes considerable effort to proving that no treaty gives the plaintiff a private right of action. The demonstration is irrelevant since plaintiffs make no claim under the treaty clause of Section 1350. Appellants' point has always been that treaties in consistent form, combined with U.N. resolutions and declarations and state practice , are

of nations. The violation is required for jurisdiction, but the tort supplies the basis for a claim for relief. There is no additional requirement that international law itself provide a private right of action, since by its very nature, customary international law is generally silent regarding domestic enforcement. Henkin, *Foreign Affairs and the Constitution,* 224 (1972).

---

evidence of what the "law of nations" requires. *Filartiga,* 630 F. 2d at 883.

Consistent with this analysis, the federal courts have determined that the ATCA allows a suit for torts committed in violation of the law of nations. In *Hilao v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), this Court recognized that the interpretation of the ATCA, that provides a cause of action, fits perfectly with the manner in which the law of nations functions: the law of nations itself defines obligations but does not normally define remedies, and Congress created the remedy of a tort suit for such obligations.[8] This approach comports with the historical enforcement of international customary law by the judiciary.

The starting point is *The Paquete Habana,* 175 U.S. 677 (1900). The issue in that case was whether fishing vessels were exempt from seizure as prize in times of war. A 1798 British case had suggested that the exemption of such vessels was a matter of comity, not law. The Supreme Court held that in the intervening century, what had been a matter of comity had evolved**, "**by the general assent of civilized nations,

---

[8] *See Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir.), *cert. denied*, 519 U.S. 830 (1996) (the language of Section 1350, extending federal jurisdiction to suits "committed in violation" of the law of nations, indicated that no separate enabling statute was necessary); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179-183 (D. Mass. 1995)(collecting cases).

into a settled rule of international law." *Id*. at 694. As a result, and without any Congressional enactment of the customary rule of exemption, the Supreme Court declared the seizure unlawful and awarded damages to her master.

The Court's observation that "international law is part of our law" and the Court's subsequent and repeated incorporation of customary international law into federal common law cannot be squared with the Justice Department's current fixation on Congressional codification as an index to the "law of nations" for purposes of § 1350.[9] *Filartiga*, 630 F.2d at 886 (rejecting position DOJ advocates as "extravagant."). Indeed, the case for enforcement of the "law of nations" in ATCA cases is clearer than in *The Paquete Habana* given the express Congressional authorization.

---

[9] For this reason, the Justice Department's attempt to distinguish the judicial enforcement of international law in *The Paquete Habana* from the enforcement of international law in ATCA cases, DOJ Brf., 23, fails. *See also, The Nerieide,* 13 U.S. (9 Cranch) 388 (1815).

The Justice Department's argument that the ATCA was not intended to permit suit unless a separate body of law established a cause of action for the violation of the law of nations alleged is tantamount to saying that the statute was intended to have no effect whatsoever.[10] The Justice Department proposes to erect a test that no case could pass, including those in which the Supreme Court itself has applied the law of nations. *Forti v Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988 ("It is unnecessary that plaintiffs establish the existence of an independent, express right of action, since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations.").

---

[10] The Justice Department's discussion of implied causes of action (DOJ Brf, 13, 20, 23, 25) is flawed: (i) *The Paquete Habana* case makes clear that no congressional enactment is necessary for the application of customary law; (ii) if Congress did act in the way required by the Justice Department, jurisdiction would lie under the federal question statute, 28 U.S.C. § 1331, and the ATCA would be superfluous; (iii) the truism that Congress can, by statute modify the law of nations as applied in United States courts says nothing about the law of nations to be applied when Congress speaks without such definition as in Section 1350; (iv) limitations on the United States' jurisdiction to prescribe do not translate into limitations on its jurisdiction to adjudicate claims brought within the United States by the litigants. Restatement (Third) of Foreign Relations Law of the United States, §§ 401-404, 421(1986) ("Restatement").

The Justice Department offers no coherent explanation of the function Congress intended the ATCA to perform if the Act itself did not create a right to bring an action in federal courts for violations of the law of nations. As of 1789, the statute was at the very least intended to provide a tort remedy for assaults against ambassadors and violations of safe conducts. DOJ Brf., 10. Yet, there is no evidence that Congress passed implementing legislation permitting these or any other specific claims to be brought under the jurisdiction created by the ATCA. Thus, the Justice Department's interpretation would mean that the ATCA did not even provide a remedy for these violations of the "law of nations." Any modern judicial imposition of this requirement to the ATCA is no more than a judicial repeal of the statute. *See Tel-Oren,* 726 F.2d at 778-79 (Edwards, J. concurring).

If the Act had been intended to be purely jurisdictional, it would have been meaningless when it was enacted. The Justice Department resorts to a sleight of hand to avoid this fact. It argues that, one year after passage of the ATCA, Congress made "assaults on ambassadors . . . piracy and violating the right of safe conduct offenses under the federal law." DOJ Brf., 10, *citing* 1 Stat. 113-115, 117-118. These, however, were

criminal provisions. They did not purport to create tort causes of action.

There is no support for its assertion that the Framers would naturally and without explanation collapse actionable civil torts into international offenses within the United States' criminal jurisdiction.[11] On the contrary, the fact that Congress did not expressly create such tort causes of action for claims even the government concedes Congress intended to be actionable under the ATCA simply confirms that Congress

---

[11] The Thomas Jefferson letter cited by the Justice Department makes this point. DOJ Brf, 8. In it, Jefferson states that the ATCA is not the proper remedy when an international criminal wrong is at issue. The letter states:

> "If the act in describing the jurisdiction of the Courts, had given them cognizance of proceedings by way of indictment or information against offenders under the law of nations, for the public wrong, and on the public behalf, *as well as to an individual for the specific tort*, it would have been the thing desired."

Letter of Dec. 3, 1792 of Thomas Jefferson (available at

did not believe such additional legislation was necessary.

---

http://memory.loc.gov/ammem/mtjhtml/mtjhome.html (emphasis added).

The Justice Department's reliance on Judge Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985), a case it previously described as "hav[ing] little, if any, precedential value,"[12] does not alter the analysis. Judge Bork's opinion has been consistently rejected,[13] and has not been followed in any other Circuit. Indeed, even the D.C. District Colombia has refused to follow *Tel Oren*. *See Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998).

There is a less tortured explanation of the ATCA than that offered by the Justice Department**.** The Framers understood the possibility that tort suits between aliens might well come within the individual states' general jurisdiction. Civil actions sounding in tort were (and are) considered transitory in that the tortfeasor's wrongful act creates an

---

[12]*Amicus Curiae* brief in Opposition to Petition for Writ of Certiorari, *Tel-Oren v. Libyan Arab Republic*, No. 83-2052 (January 1985) at 9.

[13] *See, e.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 442 n.20 (declining to follow Bork's "highly criticized opinion" because its "reasoning is flawed"); *Forti*, 672 F. Supp. at 1539 (declining to follow Judge Bork's opinion because *Filartiga* and Judge Edwards' opinion are "better reasoned and more consistent with principles of international law.") Judge Randolph's lone expressions of similar sentiments nineteen years later in *Al Odah v. United States*, 321 F.3d 1134, 1145-49 (D.C. Cir. 2003), did not win the support of the other members of the *Odah* panel.

obligation that may follow him across national boundaries. *McKenna v. Fisk*, 42 U.S. 241, 248 (1843).[14] The power to adjudicate these transitory torts reflects the general acceptance of the proposition that "[a] state or nation has a legitimate interest in the orderly resolution of disputes within its borders." *Filartiga,* 630 F. 2d at 885.

[14] Indeed, Oliver Ellsworth, the author of the First Judiciary Act, had himself applied the transitory tort doctrine in 1786, as a sitting judge. *Stoddard v. Bird*, 1 Kirby 65, 68 (Conn. 1786)(Ellsworth, J.).

Although the First Congress would have no reason to interfere with the states' right to hear ordinary transitory tort suits, the ATCA assured the possibility of a federal forum for that limited subset of transitory torts involving a violation of the "law of nations."[15] Section 1350 simply filled the need for a federal forum for such cases, with national implications, in accordance with the understanding of the time that claims could be made under the "law of nations." It is unimaginable that a French diplomat seeking civil damages in a Federal Court in 1790 would have had his case dismissed because Congress had not enacted implementing legislation beyond the plain language in the ATCA. *Marbury v. Madison*,

---

[15] The need for federal courts in this role was recognized in the Federalist Papers:

> Under the national government, treaties and articles of treaties, *as well as the laws of nations*, will always be expounded in one sense and executed in the same manner - whereas adjudications on the same points and questions in thirteen states...will not always be consistent; and that, as well from the variety of independent courts and judges appointed by different and independent governments as from the different local laws and interests which may affect and influence them. *The wisdom of the convention in committing such questions to the jurisdiction and judgement of courts appointed by and responsible only to one national government cannot be too much commended.*

John Jay, Federalist No. 3, in Rossiter, ed., The Federalist Papers 37-38 (Signet ed. 2003) (emphasis added).

5 U.S. (1 Cranch) 137, 162, (1803) ("where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded").

C. The ATCA Does Not Enforce Unratified and Non-Self-Executing Treaties and Non-Binding United Nations Resolutions.

The Justice Department erroneously argues that an ATCA claim cannot properly be based upon anything other than a self-executing treaty that has been signed and ratified by the United States and that explicitly creates a private right of action. DOJ Brf., 13-19. In short, the Justice Department denies that a claim can be based upon customary international law. This novel interpretation cannot be squared with the text of the ATCA, which encompasses torts "committed in violation of the law of nations *or* a treaty of the United States," (emphasis added), or with the historical enforcement of customary law by the courts.[16]

---

[16] The Justice Department's new assessment of the value of the United Nations resolutions and treaties and other state practice is at odds with its submission to the *Filartiga* court. Reviewing in great detail the same international and comparative materials, the government there stated "the conclusion that international law prohibits torture is inescapable."

Government's *Filartiga* Brief, at 601.

A customary norm does not become part of the "law of nations" unless it reflects the general consensus of states; more specifically, a norm of customary international law arises out of consistent patterns of state practice combined with states' general acknowledgment that they are legally obligated to abide by that norm. *Asylum Case (Colombia v. Peru)*, 150 I.C.J 266, 276-77; J.L. Brierly, *The Law of Nations* 61 (6th ed. 1963). The cases applying the ATCA have enforced only norms which meet this rigorous test.

Thus, properly understood, the "law of nations" contains its own limitations which assure that claims which are not truly based on customary norms will not be enforceable in U.S. courts. Those limitations, coupled with discretionary abstention doctrines, are more than adequate to protect the courts from frivolous or politically sensitive cases with which the United States has no connection.

Patently, this case is not such a case. There is nothing politically sensitive about holding a California corporation accountable for its complicity in the human rights crimes of soldiers of a pariah regime whose human rights record our government has consistently criticized and with whom we have limited relations.

The Justice Department's claim that all of the courts which have interpreted ATCA since 1980 have been mistaken and have somehow transmuted unenforceable international expressions of opinion into customary norms is itself a political statement and not a legal one. The courts applying ATCA have enforced "specific, universal and obligatory" customary norms. The Justice Department can hardly contend that the prohibitions against torture, summary execution, disappearances, crimes against humanity, war crimes, genocide and slavery-like practices like forced labor are not "specific, universal and obligatory," *Kadic*, 70 F.3d at 240, or that the United States contests these customary norms. The fact that some of these norms are codified in widely-ratified treaties does not detract from their enforceability as customary norms. The reverse is true. *See North Sea Continental Shelf,* 1969 I.C.J. 3, 42. ("a very widespread and representative participation in the convention might suffice of itself. . . ." to create a customary norm). All of the norms cited by appellants are unquestionably customary norms. Restatement, §702.[17] The Justice

[17] The courts have been able to distinguish between these fundamental norms of international law and claims of customary law violations which do not meet the rigorous test that courts applying ATCA have insisted on. *See, e.g., Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998). *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-67 (5th Cir.

Department makes much of the fact that the courts have examined a wide variety of evidence of the existence and scope of international norms in ATCA cases, and have relied on treaties, ratified and unratified, UN resolutions and declarations and other non-binding materials to determine that a particular norm is part of customary law. DOJ Brf., 14. All of these materials are evidence of widespread state practice and *opinio juris* and reliance on such materials in determining whether a customary norm exists is appropriate.[18] In examining such materials the courts have not been

---

1999) (rejecting environmental claim against corporation); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations'"); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417-18 (9th Cir. 1994) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the "law of nations").

[18] *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 789, 794-5 (9th Cir. 1996); *Hilao*, 25 F.3d at 1475; *Kadic*, 70 F.3d at 240-44; *Filartiga*, 630 F.2d at 882-84; *see also Restatement* §701, Reporters' Note 2.

enforcing non-binding, unenforceable statements of opinion; it is only when the courts have determined that there has been a "tort" committed in violation of the "law of nations" that ATCA has been enforced.

The Justice Department's contrary assertion that courts cannot rely on anything other than treaties that have been specifically implemented by further legislation betrays a serious misunderstanding of customary law and of treaties. Many of the treaties the courts have relied upon in finding evidence of customary norms are complex documents with a variety of substantive and procedural provisions, some of which may evidence customary law and some of which may not. In this context, the fact that a treaty has not been ratified cannot be read as an objection by the United States to the enforceability of each of the norms contained therein.[19]

---

[19] The government's dismissal of unratified treaties is new and contradicts its practice. The United States has not ratified the Vienna Convention on the Law of Treaties, for example, but that has never kept the government from invoking it as evidence of customary law. *See* Memorial of the Government of the United States of America in Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*) 42 n.2 (1980). In its Letter of Submittal to the President, the Department of State declared that "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc. L., 92d Cong., 1st Sess. 1 (1971).

On the contrary, a customary norm is binding on all states that do not object to it during its formation. Restatement, §102 cmt. D. Accordingly, if the United States did have objections to such norms as binding, it would have protested loudly, publicly and often, and not merely relied upon its refusal to sign a treaty as evidence of disagreement. Not surprisingly, the Justice Department cites no examples in which a court has found a norm to be actionable even though our government has persistently objected to the norm's status as custom**.**

The Justice Department's claim that this process is undemocratic is specious. The passage of the ATCA in the First Judicary Act of 1789 was the result of democratic action by the Congress and the Executive Branch. It is the Justice Department's radical new view that is undemocratic. The Justice Department is asking this Court to alter twenty-three years of consistent jurisprudence under the ATCA because this Administration disagrees with the contemporary application of the ATCA.

In 1991 when Congress passed the Torture Victim Protection Act ("TVPA"), Congress expressed its agreement with the ATCA, as interpreted by the *Filartiga* case.[20] When the Senate has consented to

---

[20] The House Report accompanying the TVPA referred to *Filartiga* with

the ratification of human rights treaties in the last decade, it has not sought to alter or amend the ATCA. Congress has offered only praise for the exercise of federal court jurisdiction under ATCA since *Filartiga*.

The Justice Department's argument that the TVPA and its legislative history cannot be used to interpret the ATCA, DOJ Brf., 25-26, also misses the point that in enacting the TVPA, Congress, joined by the Executive Branch, expressly indicated its support for the manner in which the courts had interpreted the ATCA and took a view of ATCA cases entirely different from the views of the Justice Department. DOJ Brf., 25-

---

approval and stated that it "should not be repealed." H.R. Rep. No. 367,102d Cong., 1st Sess., Pt. 1 (1991). The Senate Report contains similar language of approval and states the ATCA "has other important uses and should not be replaced." S. Rep. No. 249, 102d Cong., 1st Sess. (1991). Many courts have relied on the TVPA and its legislative history in reaffirming the uniform interpretation of ATCA. *See, e.g., Hilao v. Marcos,* 25 F.3d at 1475; *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 105 (2d Cir. 2000). These could have followed accepted principles of statutory interpretation in doing so. *See e.g., Food and Drug*

26.

This view of the ATCA, expressed by Congress in 1991, has surely been shown correct in the years since the TVPA's passage. The ATCA has become an increasingly potent weapon in the fight against impunity for the most egregious human rights violators found within our borders and there have been no significant adverse effects of ATCA legislation on the foreign relations of the United States.

D. The Justice Department Errs in Claiming That the ATCA Is Inapplicable To Human Rights Violations Committed Abroad.

Again ignoring the plain language of the ATCA, the Justice Department asks this Court to limit its scope to events occurring within the United States. DOJ Br. 27-31. The language of the ATCA imposes no geographic restriction. Indeed, when a defendant made this argument based upon the Justice Department's *amicus* brief in *Trajano*, this Court properly rejected it out of hand. The Court held: "we are constrained by what § 1350 shows on its face: no limitations as to . . . the locus of the injury." *Trajano*, 978 F.2d at 500.

Administration v. Brown & Wilkinson, 529 U.S. 120, 140-41 (2000).

Virtually all ATCA cases have involved conduct that occurred abroad. It has been understood from the law's inception that such claims are permitted. 1 Op. Atty. Gen. 57 (1795)(concluding ACTA claim existed for attacks on a settlement in Africa).[21] Not surprisingly, the Justice Department is unable to cite even a single case adopting its interpretation of Section 1350.

Instead, the Justice Department offers an incomplete and highly misleading account of the history and structure of the First Judiciary Act. The Justice Department speculates that "Congress passed the [ATCA] in part to respond to two high profile incidents concerning assaults upon foreign ambassadors *on domestic soil*." DOJ Brf., 28. (emphasis in original). Even if, however, the ATCA was passed to redress a particular kind of tort, "it does not follow that the statute should be confined to this tort. Statutes enacted with one object in the legislative mind are

---

[21] The Justice Department misstates Attorney General Bradford's opinion. DOJ Brf., 28. The Attorney General was referring to criminal prosecution when he expressed doubts about the jurisdiction of U.S. courts over offenses related to attacks on the African settlement. As to civil claims, "there can be no doubt" the victims "have a remedy" under the ATCA. 1 Op. Att'y Gen. 58. The other Attorney General's opinion noted by the Justice Department likewise refutes their own position. 1 Op. Att'y Gen. 29 (1792)(concluding Georgia should prosecute or sue persons who stole slaves in Martinique).

frequently drafted in broad terms that are properly applied to situations within both the literal terms and the spirit of the statute, though not within the immediate contemplation of the drafters." *Kadic*, 70 F.3d at 378.

While it may (or may not) be true that the law was passed "in part" to redress assault claims by ambassadors, there is no evidence this was its only purpose. As the *Kadic* court held, "[n]otably absent is any contemporaneous indication from the likely draftsman of the key language, Oliver Ellsworth, or from any other member of the 1st Congress, that their broad statutory language . . . was intended to apply to only one category of torts." *Id.*

The language, structure and history of the First Judiciary Act demonstrate the Framers also had broader concerns in mind. In 1781, three years before the first assault the Justice Department references, the Continental Congress adopted a precursor to the ATCA. It urged the states (it had no power to command them), to allow suits for torts committed against ambassadors and other listed violations of the laws of nations, *as well as* for violations "not contained in the foregoing enumeration." 21 J. Cont. Cong. 1136-37 (1781) *quoted in* Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 Am. J. Int'l. L. 461, 476-77 (1989).

The ATCA itself was part of Section 9 of the First Judiciary Act. 1 Stat. 73, 76-77(1789). [22] Section 13 of the same Act gave the Supreme Court original (but not exclusive), jurisdiction over all suits brought by ambassadors or other public ministers. 1 Stat. 73, 80 (1789). Thus, Congress knew full well how to craft a provision that applied only to suits brought by ambassadors. The expansively worded ATCA is not such a provision.

Moreover, the First Judiciary Act granted any alien a forum in the circuit courts, so long as the amount in controversy exceeded $500. Section 11. According to the Justice Department then, the ATCA's only purpose was to allow ambassadors an alternative federal forum if for some reason they chose not to sue in the Supreme Court, and could not or elected not to sue in the circuit courts. If Congress sought only to effectuate this narrow purpose, it surely would not have drafted the ATCA to apply to "any" claim by an alien for a tort committed in violation of international law.

In fact, that was not the law's only purpose. As has been noted

---

[22] *See Charles Warren***,** New Light on the History of the Federal Judiciary Act of 1789," 37 Harv. L. Rev. 49 (1923).

above, the Framers understood tort actions to be transitory. *Filartiga*, 630 F.2d at 885. The Framers would have assumed, for example, that a person who committed an assault on a foreign official abroad and who then sought haven in the United States, could be held liable under the Act.

More generally, the Framers understood the ACTA to discharge the new nation's legal and moral duty to comply with international law. Burley, *supra*, 83 Am. J.Int'l.L. 461 (1989). This duty was owed to the community of nations, not merely to a particular nation whose citizen sought to file a claim in our courts. *Id.* at 484-88, 493. Part of this duty was ensuring that "[i]ndividuals who flouted international law would find no quarter in the United States." *Id.* at 487. If the Executive believes we no longer owe that duty to the international community, even where as here, the tortfeasor is a U.S. citizen, it needs to take the issue up with Congress, not this Court.

The Justice Department's assertion that the Framers would not have contemplated that international law would encompass violations committed by a person's own government is irrelevant. DOJ Brf., 29. By incorporating the entire body of the law of nations, the ATCA contemplates that law will be applied as it evolves. *See* Dodge, "The

Constitutionality of the Alien Tort Statute: Some Observations on Text and Context," 42 Va. J. Int'l L. 681,701 (2002). Likewise, the Framers considered international law to be part of the common law, which has never been static, and they used the term "tort", which then as now refers to an evolving body of common law delicts. The Framers' concerns with providing redress for transitory torts, with upholding international law, and with ensuring that questions of international law are heard in federal rather than state courts would all be subverted if the statute were read in the limited way the Justice Department advocates. For this reason, *Filartiga* held, that the relevant "law of nations" is that existing today and every court to subsequently consider the issue has agreed.

II.

FOREIGN POLICY CONSIDERATIONS DO NOT REQUIRE A JUDICIAL REPEAL OF THE ATCA.

The Justice Department argues that the adjudication of human rights claims under the ATCA would invariably involve the courts in foreign policy conflicts. DOJ Brf., 22. However, the courts have been able to distinguish between cases which raise such conflicts and those which can be adjudicated based upon accepted principles of international law. Moreover, as the Government argued in *Filartiga,* "a refusal to recognize

a private cause of action [under ATCA] might seriously damage the credibility of our nation's commitment to the protection of human rights." Government *Filartiga* Brief, 19 I.L.M. at 604.

While some sensitive foreign relations issues can be political questions, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). This is particularly true where as here the Court is applying a duly enacted statute. Even where a case has direct foreign policy impact, "[judges] cannot shirk this responsibility [to apply congressional legislation] merely because [their] decision may have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc.,* 478 U.S. 221, 230 (1986). The fact that a norm must be universally recognized to be actionable under the ATCA further belies the Justice Department's argument. *Sabbatino* held that courts may hear claims involving international law where the norms at issue enjoy wide consensus, and that this "reflect[s] the proper distribution of functions between the judicial and political branches of the Government." 428 U.S. at 427-28.

Baker, *Japan Whaling* and *Sabbatino* demonstrate that the Government's assertion that this entire class of cases is inevitably non-

justiciable is itself entirely at odds with the basic structure of our political and legal system. Instead, "the preferable approach is to weigh carefully the relevant considerations on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in Section 1350, without compromising the primacy of the political branches in foreign affairs." *Kadic,* 70 F.3d at 249.

Courts have repeatedly rejected the claim that all ATCA claims are nonjusticiable political questions. In *Kadic,* 70 F.3d at 249, the Second Circuit found that ATCA claims against the leadership of the Bosnian Serbs were justiciable under the political question doctrine, even though the Serb leadership was participating in the Dayton Peace Accord conferences, at the time and it was a possibility that the defendant, Karadzic, might become the head of a Bosnian Serb state in the future. *See also Abebe-Jira v. Negewo*, 72 F.3d at 848 (1996)(finding that a torture claim against a former Ethiopian official was justiciable); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993). (Damages suit arising out of shooting down of civilian Iranian airline by American warship justiciable); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 347-48 (S.D.N.Y. 2003) (the political question doctrine inapplicable to a claim strikingly similar to

appellants' claims in this case).

CONCLUSION

For all of these reasons the Justice Department's brief should be rejected and this Court should reaffirm its consistent and long standing interpretation of the ATCA, an interpretation that has been accepted by all other circuits to have decided this issue.

Dated: June 2, 2003

By: _____
Paul Hoffman
Attorney for *Doe* Appellants

By: _____
Terrence C. Collingsworth
Attorney for *Roe* Appellants