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THE ADJUDICATION OF VIOLATIONS OF INTERNATIONAL LAW UNDER THE ALIEN TORT CLAIMS ACT: ALLOWING ALIEN PLAINTIFFS THEIR DAY IN FEDERAL COURT

I. INTRODUCTION

In 1945, Raoul Wallenberg, a Swedish diplomat who had saved more than 100,000 Jews from the Nazis, disappeared when the Soviets invaded Budapest, Hungary. Seventeen-year-old Joelito Filartiga died in 1976 after being tortured by police in Asuncion, Paraguay, in retaliation for his father's outspoken criticism of President Alfredo Stroessner. In 1978, twenty-two adults and twelve children died at the hands of the PLO on a highway outside Tel Aviv, hostages in an attempt by the PLO to force the release of members of their group from Israeli prisons.

In each of these cases the survivors of the victims brought suit in a United States federal court under the Alien Tort Claims Act, 28 U.S.C. § 1350 (the ATCA), alleging violations of international law. Two of the suits were successful. In Filartiga v. Pena-Irala, the Second Circuit held that official torture is a violation of international law. Moreover, in Von Dardel v. U.S.S.R., a suit brought on behalf of Raoul Wallenberg, the district court for the District of Columbia held that violation of diplomatic immunity is prohibited by international law.

The third suit, Tel-Oren v. Libyan Arab Republic, was dismissed for lack of subject matter jurisdiction. In upholding the dismissal, the court of appeals for the District of Columbia issued three widely disparate opinions. The opinions ranged from an approval of the Second Circuit's interpretation of international law in Filartiga to sharp criticism of the use of the ATCA as a means to redress human rights violations.

The three opinions in Tel-Oren v. Libyan Arab Republic are representative of the controversy currently raging over the adjudication of international law under the ATCA. The controversy raises two questions: 1) whether violations of international standards of human rights are proscribed by

5. Id. at 799 (Bork, J., concurring).
international law, and 2) what the appropriate role of the judiciary is in resolving issues that may impact on the foreign policies of the United States. The result has been a sharp division of judicial opinion on the proper construction of the ATCA.

This Comment proposes that a broad construction of the ATCA that recognizes a cause of action for violations of human rights is more well-reasoned and more workable than a narrow construction based on restrictive and often outdated conceptions of international law. Consequently, nine violations of international law that impact upon generally recognized human rights, in addition to torture and violation of diplomatic immunity, should be actionable under the ATCA. These violations include (1) apartheid, (2) arbitrary arrest and detention, (3) unlawful medical experimentation, (4) genocide, (5) hijacking of civilian aircraft, (6) piracy, (7) slavery, (8) summary execution, and (9) war crimes. This Comment discusses human rights under international law and the history of the ATCA. Moreover, this Comment surveys the construction of the ATCA in cases not involving human rights violations and analyzes the approaches of the courts on both sides of the controversy over the adjudication of human rights violations. Furthermore, this Comment presents a justification for the use of the ATCA to redress violations of the international law of human rights. Finally, this Comment addresses the nine violations in the context of the nature of the right under international law and the resolution of the questions raised by the courts.

II. THE INTERNATIONAL LAW OF HUMAN RIGHTS

"Human rights" refers to a broad range of rights and freedoms to which every person is entitled. Based on standards widely accepted in the inter-


"Human rights" may be analogized to legal rights, in that the term "rights" is used to include: 1) a right in the strict sense, 2) a privilege, 3) a power, and 4) an immunity. Hohfeld, Some Fundamental Legal Conceptions as Applied to Judicial Reasoning, 23 Yale L.J. 16, 29 (1913). See generally HUMAN RIGHTS (E. Pollack ed. 1971) [hereinafter HUMAN RIGHTS].
national community, these rights are inalienable, inhering in each individual by reason of their humanity. The violation of these rights are presumed to have an impact on the world community in general and are, therefore, a cause for international concern.

The international law of human rights represents a dramatic shift away from the traditional view of international law as governing only relations between states. Traditional international law included only states within its jurisdiction. Individuals were the objects of international law, inasmuch as they were the intended beneficiaries of international agreements. Rights and duties arising under international law existed only between states.

The traditional doctrine of international law firmly supported the concept of national sovereignty. As a result, a state's treatment of its own nationals


Human rights are distinguishable from legal and political rights on the basis that, while the latter require membership in a community, the former requires only the humanity of the individual. See Blackstone, The Justification of Human Rights, in Human Rights, supra note 9, at 90, 90-93. However, the term "human rights," in its broadest sense, has become a generic term that includes civil, political, economic, social and cultural rights.


15. L. Oppenheim, supra note 14, at 3; Sohn, supra note 11, at 1.


17. P. Sieghart, supra note 9, at 11-12; T. Walker, supra note 13, at 19; Kent's Commentaries, supra note 16, at 40; G. Martens, supra note 13, at 69. See 1 F. Wharton, Digest of International Law in the United States §§ 172-186 (1887) (nonintervention of United States based on sovereignty of foreign nations).
was a matter of purely domestic concern. Individuals were entitled only to those rights which their states chose to grant to them; states were entitled to derogate the rights of their nationals at their convenience. Thus, the traditional theory of international law focused on the rights of the states rather than the individual.

The modern view of the individual and human rights under international law developed largely from world outrage over the atrocities of World War Two. The United Nations has played a critical role in the definition and enumeration of human rights. The international human rights conventions and the declarations of the United Nations, along with those of the Council of Europe and the Organization of American States, have established human rights norms to which the majority of the international community has agreed.

The Charter of the United Nations expressly promotes respect for human rights and fundamental freedoms. The Charter, as a treaty, is binding upon Member States. Disagreement exists, however, over the extent of the obligation imposed by the Charter primarily because its references to the protection of human rights are phrased in broad, general language. Some

18. P. Sieghart, supra note 9, at 11; H. Lauterpacht, supra note 9, at 641; G. Martens, supra note 13, at 82.


19. Bassiouni, An Appraisal of Human Experimentation in International Law and Practice, 72 J. Crim. L. & Criminology 1597, 1607 (1981). But see P. Sieghart, supra note 9, at 6-9 (state’s power to derogate rights of its nationals limited by citizenry’s acceptance of derogation); Lauerman, Man’s Right to a Just Government and His Right to Disobey It, in Human Rights, supra note 9, at 331-34.


22. Restatement, supra note 9, at reporter’s notes.


24. P. Sieghart, supra note 9, at 51; H. Lauterpacht, supra note 9, at 147.
governments and commentators take the position that the Charter's provisions regarding human rights are too vague to be legally binding. Others, however, rely upon the enumeration of specific human rights in subsequent international instruments, such as the Universal Declaration of Human Rights, and the definition of those rights in the judgments of national and international tribunals to interpret the Charter as obligating Member States to take positive action to protect the human rights of their nationals.

The Universal Declaration is an enumeration of the rights referred to in the Charter. While the Universal Declaration has no legally binding effect, it has had a significant impact on the international law of human rights. It is generally recognized as defining international standards of human rights. There is considerable support for the view that as a result of reliance on some of the provisions of the Universal Declaration in a number of contexts, the Declaration represents customary international law and is, as such, binding upon all nations.

The principles of international human rights established by the Universal Declaration are mirrored in the general human rights instruments of other international organizations, as well as in a variety of international docu-
ments prohibiting specific conduct. As multilateral conventions, these agreements are binding only upon the signatory states. Some conventions, however, represent the customs and practices of nations; others represent general principles of law recognized by a majority of nations. Whatever their nature, these conventions are arguably international law that is binding upon all states.

III. THE ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act provides that "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 ATCA was enacted, in substantially the same form as it exists today, as part of the Judiciary Act of 1789. The legislative history of the Judiciary Act neither mentions the ATCA nor provides conclusive evidence as to Congress's intent in enacting it.


34. See infra notes 173-75 & 177-80 and accompanying text.

35. See infra notes 127 & 158 and accompanying text.

36. Humphrey, supra note 28, at 32.

37. Ch. 20, § 9, 1 Stat. 73 (1789).

The grant to the federal courts of jurisdiction over questions of international law was part of the general scheme of the Judiciary Act to bring issues of international law under the purview of the federal, rather than the state, courts. The history of the Judiciary Act demonstrates the concern in Congress that claims involving foreign nationals or states should have a federal forum because of their potential impact on foreign relations. Without the enactment of the Alien Tort Claims Act, tort actions by aliens would have been left to state courts.

The incorporation of international law into the federal common law gives the federal courts the power to adjudicate questions of international law. The doctrine of incorporation was recognized in England at the time when the American colonies were established and so was part of the legal tradition adopted by the colonial governments. The continuing adjudication of such claims by the federal courts subsequent to American independence demonstrates the doctrine's on-going vitality.

Questions of international law present problems for the courts because much of international law is neither codified in treaties nor incorporated into municipal law by legislative enactment. The sources from which international law may be derived, however, have been recognized by both international treaty and United States courts. These sources are international conventions, the customs and usages of nations, general principles of law recognized by civilized nations, the writings of the most distinguished jurists and commentators, and judicial decisions.


40. Id. See generally Dickinson, supra note 39, at 36-51.
41. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).
43. Henkin, supra note 42, at 1555-57; Dickinson, supra note 39, at 33.
44. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060-61 (customs of nations and general principles of law recognized by civilized nations among sources from which International Court derives international law). See also The Paquete Habana, 175 U.S. 677, 700 (1900) (citing Hilton v. Guyot, 159 U.S. 113 (1885), for sources of international law); Hilton v. Guyot, 159 U.S. 113, 163 (1895) (in absence of treaty or statute, courts must look to acts and usages of nations as one of the sources of international law); The Antelope, 23 U.S. (10 Wheat.) 66, 99 (1825) (court must seek international law in, inter alia, general usage and practice of nations); United States v. Smith, 18 U.S. (9 Wheat.) 153, 160 (1820) (general usages and practices of nations are one of the sources from which international law may be ascertained).
45. Id. See generally Comment, Custom and General Principles as Sources of International Law in American Courts, 82 Colum. L. Rev. 751 (1982).
IV. CONSTRUCTION OF THE ALIEN TORT CLAIMS ACT

Courts have generally construed the Alien Tort Claims Act narrowly. Several recurring questions appear in the case law: 1) Has an actual violation of international law occurred? 2) Does international law grant a private cause of action? 3) Does international law impose liability upon private actors for private conduct? 4) Is adjudication of the claim barred by one or more of the doctrines of political question, sovereign immunity, and act of state?

A violation of international law is one of two jurisdictional requirements of the ATCA. The second requirement is that the conduct be in the nature of a tort. Most courts have read the ATCA to require that the tort claim and the violation of international law claim be based upon the same conduct.

The determination that a violation of international law exists requires the court to consider whether international law or municipal law governs the


conduct alleged. If the court concludes that municipal law prohibits the conduct, the claim has not alleged a violation of international law and must be dismissed for lack of jurisdiction. Constitutional claims, international torts, and negligence claims have been denied on this basis.

The existence of a private cause of action means that international law grants an individual an enforceable right. Although international law is generally recognized as creating rights of individuals, it does not necessarily create a concurrent right of enforcement. The issue has arisen in claims brought under the ATCA in two contexts: 1) when the claim is based on an alleged violation of a treaty that is not self-executing, and 2) when the court has concluded that only nations can enforce rights under international law.

The issue of liability for private conduct focuses on the duties imposed by international law on states and individuals. Individual liability for official conduct in violation of international law in certain contexts has been well-established by international consensus. However, an individual acting in a private capacity may be liable only under municipal law. The resolution of the question of private liability depends upon the type of conduct involved. Private liability for piracy, slavery, and war crimes has long been recognized under customary international law. Furthermore, private liability for apartheid, genocide, and hijacking of civilian aircraft has been established by international conventions proscribing such conduct.

58. See infra notes 169-90 & 200-06 and accompanying text.
59. See infra notes 127-38 & 155-68 and accompanying text.
The doctrines of political question, sovereign immunity, and act of state may bar claims brought under the ATCA in certain circumstances. These doctrines developed from considerations of the appropriate role of the judiciary in the determination of claims that raise issues of foreign policy. The applicability of each of the doctrines would depend upon the factual circumstances of a particular case.

The doctrine of political question must be invoked when the court is faced with an issue beyond its constitutional powers of determination. Adjudication of such an issue would require the court to intervene in the sphere of foreign relations reserved to the political branches of the government. The doctrine has barred claims brought under the ATCA when the act alleged has been committed by the executive branch of the United States government.

Sovereign immunity prevents the courts from imposing liability on a foreign sovereign except in limited circumstances. The Foreign Sovereign Immunities Act (the F.S.I.A.) codified the restrictive common law doctrine of sovereign immunity, which was used by the courts when the F.S.I.A. was enacted in 1976. However, under the F.S.I.A., a foreign state may not assert immunity in suits based on its commercial activities. Moreover, the F.S.I.A.

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60. In Baker v. Carr, 369 U.S. 186 (1962), Justice Brennan, writing for the majority, outlined the test for a political question:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which may identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for an unquestioning adherence to a political decision already made, or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.


64. 28 U.S.C.A. § 1605 states, in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case —

(2) in which the action is based upon a commercial activity carried on by the foreign states; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an
provides for certain exceptions to immunity in suits based on noncommercial activity, such as actions for money damages for specified torts committed by the foreign state or its agent that occur within the United States. In addition, the F.S.I.A. gives to the judiciary, rather than the executive, the determination of sovereign immunity. Any claim of immunity is subject to all applicable international agreements to which the United States was a party when the F.S.I.A. was enacted.

The act of state doctrine restrains the courts from judging the validity of an act of a foreign sovereign within its own territory. It is a judicially-created doctrine based upon considerations of sovereignty and the conduct of foreign policy. The doctrine acts to bar the adjudication of the validity

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65. 28 U.S.C.A. § 1605(5).
66. Section 1602 states:

The Congress finds that the determination by United States courts of the claim of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts . . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter.

67. 28 U.S.C. § 1604. This provision would include all human rights agreements to which the United States is a party.
68. The Supreme Court first formulated the act of state doctrine in Underhill v. Hernandez, 168 U.S. 250 (1897), in which Chief Justice Fuller wrote, "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Id. at 252.

The Court extended the act of state doctrine to the acts of persons not traditionally recognized as agents of a state in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). The Court then carved out two major exceptions to the doctrine in Alfred Dunhill of London, Inc., v. Banco Nacional de Cuba, 425 U.S. 682 (1976), and First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1976). In First Nat'l City Bank, the Court held that, because of the executive's primacy in foreign affairs, the act of state doctrine should not be applied by the courts when the executive states that determination of the case on the merits will not interfere with the conduct of foreign policy. 406 U.S. at 768. In Alfred Dunhill, the Court, in a plurality opinion, held that a country's proprietary interest in the commercial activity upon which the suit was based should not be protected by the act of state doctrine. 425 U.S. at 695. For a discussion of the effects of Sabbatino, First Nat'l City Bank and Alfred Dunhill on the act of state doctrine, see Lengel, The Duty of Federal Courts to Apply International Law: A Polemical Analysis of the Act of State Doctrine, 1982 B.Y.U. L. REV. 61, 65.

Justice Harlan outlined the considerations in determining the applicability of the doctrine in Sabbatino:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of
of the act of the foreign state, but does not bar related claims. The courts have invoked this doctrine when they have concluded that the act in question is not clearly within the subject matter of international law. 69

V. HUMAN RIGHTS VIOLATION UNDER THE ALIEN TORT CLAIMS ACT

The cases in which human rights violations have been alleged have presented the courts with the four basic questions. The manner in which the questions have been answered has depended upon the court's interpretation of the ATCA. Thus, the courts usually interpret the Act broadly, as in *Filartiga v. Pena-Irala*, 70 or narrowly, as in *Tel-Oren v. Libyan Arab Republic*. 71

In *Filartiga*, a Paraguayan doctor and his daughter alleged that a Paraguayan police official had tortured and murdered the doctor's teen-age son. 72 After unsuccessfully seeking prosecution of the murder in the Paraguayan courts, the doctor and his daughter, then residing in the United States, brought suit under the ATCA after they learned of the defendant's presence in the United States. 73 The district court dismissed the action for lack of jurisdiction, concluding that the law of nations did not deal with a state's treatment of its own nationals. 74

The Second Circuit reversed, holding that official torture violated international law. 75 The court determined the existence of an international law violation by looking to international human rights agreements that prohibit

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70. 630 F.2d 876 (2d Cir. 1980).


72. *Filartiga*, 630 F.2d at 878.

73. Id. at 878-79.

74. Id. at 880.


On remand, the defendant, who had been deported to Paraguay, defaulted, and the Filartigas' were awarded more than $10,000,000 in damages. Filartiga v. Pena-Irala, 577 F. Supp. 860 (E.D.N.Y. 1984).
torture. The court concluded that the prohibitions of torture in international agreements and the renunciation of the use of torture by many nations demonstrated the universal consensus that made torture a violation of international law.

The Second Circuit analyzed the jurisdictional issue of a violation of international law in several steps. First, it reasoned that international law must be interpreted as it exists today rather than as it existed in 1789, when the ATCA was enacted. Second, the court looked to the sources of international law outlined by the Supreme Court. Third, it construed the ATCA as allowing the federal courts to adjudicate existing rights under international law rather than as granting new rights. Fourth, it considered that freedom from torture is a right clearly recognized by international law. Based on this analysis, the Second Circuit concluded that a violation of international law existed, and that jurisdiction was therefore proper.

The court's determination that international law must be interpreted as it exists today is well-founded. If the legislative history of the ATCA indicated that Congress intended to limit federal jurisdiction to violations of international law recognized in 1789, the appropriate conclusion would be contrary to that reached by the Second Circuit. However, the use of such a rule in the absence of an indication of Congress's intent would lead to the unjustified exclusion of modern violations of international law. The changing perception of the individual's position under international law since 1789 and the dramatic development of international law since the end of World War II make such an exclusion unwarranted.

The sources of international law identified by the court have been recognized by the United States Supreme Court, the municipal laws of other nations, and codified international law. The Statute of the International Court of Justice provides guidelines similar to those of the Supreme Court.

76. Filartiga, 630 F.2d at 881-84.
77. Id. at 888. In May, 1986, the "Torture Victim Protection Act of 1986" was introduced in the House of Representatives as H.R. 4756, a bill to amend the United Nations Participation Act of 1945, 22 U.S.C. § 287. The Torture Victim Protection Act would provide for the civil liability of any person who engages in torture or extrajudicial killing while acting under the actual or apparent authority of any foreign nation. The Act would prevent the application of any statute of limitations; however, it would limit liability by requiring an exhaustion of remedies in the nation in which the conduct occurred. The Act would also amend 28 U.S.C. to provide for the jurisdiction of the district courts over actions brought under the Torture Victim Protection Act.
78. Filartiga, 630 F.2d at 881.
79. Id. at 880-88.
80. Id. at 887.
81. Id. at 880.
82. The Statute of the International Court of Justice is part of the United Nations Charter and is thus a binding multilateral treaty. 59 Stat. 1055. For the cases in which the United States Supreme Court has articulated the sources from which international law should be derived, see supra note 45.
The Statute identifies sources such as: (1) international conventions; (2) the customs of nations; (3) general principles of law recognized by civilized nations; and (4) judicial decisions and the writings of the most qualified commentators (as a subsidiary means).

The Second Circuit’s construction of the ATCA, which allows the adjudication of pre-existing rights under international law, is based on its perception that the right to be free from official torture clearly exists under international law. Thus, the court did not construe the ATCA as specifically recognizing or granting a cause of action under international law. When addressing the argument that the law of nations is not self-executing, the court distinguished that issue from the question of jurisdiction. The court perceived the necessary inquiry to be “whether Congress intended to confer judicial powers, and whether it is authorized to do so by Article III.” The court left the question of the existence of a cause of action to a choice of law determination.

The final step in the Second Circuit’s analysis was the determination that freedom from torture is a right recognized by international law. In making this determination, the court looked to international agreements regarding human rights, including provisions of the United Nations Charter, the Universal Declaration of Human Rights, and, more specifically, the Declaration on the Protection of All Persons from Being Subjected to Torture. In addition, the court noted that torture is prohibited by the constitutions of a number of nations. Thus, relying on conventional international law and general principles of law recognized by civilized nations, the court concluded that international law prohibits official torture.

In Tel-Oren v. Libyan Arab Republic, the claim alleged an armed attack on civilians in Israel by the PLO that resulted in the deaths of thirty-four people. The survivors of the attack and the representatives of those killed brought suit in the district court for the District of Columbia. The district court dismissed the case for lack of jurisdiction.

The court of appeals affirmed the dismissal in three concurring opinions. Judge Bork found that the lack of a private cause of action precluded adjudication of the claim. Judge Edwards agreed with the Second Circuit’s

84. Filartiga, 630 F.2d at 889.
85. Id.
86. Id. at 881-84.
87. Id. at 882, 884.

For a discussion of private causes of action under international law and Judge Bork’s opinion in Tel-Oren, see Randall, Further Inquiries into the Alien Tort Statute and a Recommendation, 18 N.Y.U. J. Int’l L. & Pol. 473 (1986).
approach in *Filartiga*, but found no basis for extending international liability to nonstate actors. Judge Robb concluded that the political question doctrine barred the claim.

Judge Bork construed the ATCA as giving federal courts jurisdiction over claims for which either federal or international law provides a cause of action. He read the opinions of the Second Circuit and Judge Edwards as construing the ATCA to create a cause of action. He found such a construction "fundamentally wrong" where the court would be asked to enforce principles of international law that might have a significant impact on United States foreign policy.

Judge Bork found no express grant of a private cause of action under federal common law, a federal statute, the relevant international conventions, or general principles of international law. He then considered whether a cause of action ought to be implied. He found that the primary consideration in the implication of a cause of action is separation of powers, which imposes a constitutional limitation on the power of the judiciary to act in areas, such as foreign relations, that are reserved to the political branches.

Judge Bork used the act of state and political question doctrines as the limitations on judicial power over questions of international law based on concerns of separation of powers. Under both doctrines, the primary concerns are the potential interference by the courts in the functions of the political branches and the appropriateness of judicial resolution of an issue. Judge Bork concluded that, although neither the act of state nor the political question doctrine should be invoked in this case, the concerns of separation of powers required that the question of the existence of a cause of action be answered in the negative.

Judge Bork’s requirement of a cause of action under international law would have been appropriate if the claim had relied upon a violation of a treaty of the United States. Treaties have long been recognized as non-self-executing in the absence of a provision granting a private cause of action in the treaty or in municipal law. If such a provision is not included, only

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90. *Tel-Oren*, 726 F.2d at 791.
91. Id. at 823.
92. Id. at 808.
93. Id. at 801.
94. Id.
95. Id. at 808-09.
96. Id.
97. Id. at 801.
98. Id. at 801-06.

The United Nations Charter was held self-executing in *Sei Fujii v. State*, 217 P.2d 481 (Dist. Ct. App. 1950), aff’d, 38 Cal. 2d 718, 242 P.2d 617 (1952). Articles 55 and 56 of the Charter had been used by the appellate court to invalidate a state law, the Alien Land Law of
the states that are parties to the treaty, not individuals, may make claims under it. The basis of the limitation is that the state-parties to the treaty would have included such a provision had they intended to make themselves liable to individual claims. 100

However, the analysis does not work as well with customary international law or general principles of law recognized by civilized nations. International law derived from these two sources is binding upon all states. 101 Treaties and conventions may define or enumerate rights that derive from customary international law or general principles of law recognized by civilized nations, but such rights are not created by the treaty or convention. The requirement of a cause of action under customary international law or general principles of law recognized by the international community cannot be analogized to the doctrine of the self-execution of treaties.

Judge Edwards correctly considered that international law imposes liability for torture only upon states. 102 Moreover, he went on to note that individual liability under international law has not been clearly established. 103 While his conclusion regarding torture is correct, he failed to consider that international law clearly imposes individual liability for certain international crimes such as apartheid and genocide. 104

Judge Robb found the political question doctrine controlling because the determination of the liability of the PLO for an act of terrorism would require judicial interference in the conduct of foreign policy by the political branches. 105 He based his conclusion largely on the political branches' refusal to recognize the PLO and the inappropriateness of judicial recognition of the PLO in light of that decision. 106 He further considered the difficulty that adjudication of the claim would present for the court. 107 While his invocation of the political question doctrine is well-founded in a case alleging politically
motivated acts of terrorism by a group that the federal government has chosen not to acknowledge, the application would be inappropriate in cases that raise less sensitive issues.

The two interpretations of the ATCA demonstrate the confusion present in the courts regarding the proper scope of the Act. At the basis of each of the grounds for denial of jurisdiction lies the reluctance of the courts to determine substantive rights under international law. This reluctance, however, is also a policy determination that the courts should not resolve the types of issues that are commonly presented in these cases. However, that policy determination is only appropriate when the claim is clearly barred by the doctrines of political question, sovereign immunity, or act of state.

VI. THE USE OF THE ATCA TO REDRESS HUMAN RIGHTS VIOLATIONS

The evolution of international human rights law since the establishment of the United Nations has changed the concept of state sovereignty. The international community has manifested its concern with states' treatment of their own nationals in the numerous international conventions prohibiting conduct that violates human rights. In addition, many nations have claimed, based upon the international agreements or simply on humanitarian concerns, the right to protest other nations' violations of human rights and to influence the offending states, by nonmilitary means, to observe their obligations under international law. Human rights are no longer the subject of the domestic jurisdiction of states. Where international law has imposed the obligation to observe

108. Prior to the establishment of the United Nations, a state's right to treat its nationals as it chose, with the limited exception of the doctrine of humanitarian intervention, was a sovereign right. In contrast, the modern international law of human rights has created international obligations requiring states to observe human rights norms. See supra text accompanying notes 17-22. As one commentator has observed:

"The human rights revolution that began at the 1945 San Francisco Conference of the United Nations has deprived the sovereign states of the lordly privilege of being the sole possessors of rights under international law. States have had to concede to ordinary human beings the status of subjects of international law, to concede that individuals are no longer mere objects, mere pawns in the hands of states."

Sohn, supra note 11, at 1.

109. See supra notes 21, 32 and 33.

110. The international criticism of South Africa's apartheid policy is a prime example. Many countries have signed the International Convention for the Suppression and Punishment of the Crime of Apartheid, supra note 33, the preamble of which specifically mentions South Africa. Some nations have adopted economic sanctions against South Africa in an effort to influence the South African government to alter its policy. The failure of the United States to follow suit has been the subject of significant criticism.

111. Henkin, Human Rights and "Domestic Jurisdiction", in T. Buergenthal, HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 22 (1977) ("that which is governed by international law or agreement is ipso facto and by definition not a matter of domestic jurisdiction"). Henkin points out, however, that disagreement exists over the boundaries between
human rights on states, those rights are the subject matter of international jurisdiction.\textsuperscript{112} The lack of means of enforcement at the international level does not negate a state’s international obligations.\textsuperscript{113}

International law prohibits intervention in the internal affairs, or domestic jurisdiction, of a state by other states.\textsuperscript{114} Since violations of human rights are not longer solely within the domestic jurisdiction of a state, a response by another state that does not constitute the use of force or threat of force does not violate international law. Thus, the adjudication of violations of human rights in United States federal courts is consistent with international law.

The adjudication of substantive rights under international law is constitutional under Article III, which grants to the federal judiciary the authority to hear cases “arising under . . . the Laws of the United States, and Treaties made, or which shall be made . . . .”\textsuperscript{115} The Supreme Court has repeatedly affirmed that the law of nations, which includes customary international law and general principles of law recognized by civilized nations, is part of the law of the United States.\textsuperscript{116} Since treaties, customary international law and general principles of law are the sources to which a court would look in the determination of a human rights violation, adjudication of such claims is consistent with the Constitution.

The language of the ATCA clearly allows the adjudication of human rights violations as “torts committed in violation of the law of nations.”\textsuperscript{117} Such claims violate neither the Constitution nor international law. The refusal of the courts to adjudicate these claims is an evasion of judicial authority and responsibility.

The doctrines of political question, sovereign immunity, and act of state are sufficient to prevent the inappropriate exercise of judicial power.\textsuperscript{118} When properly invoked in accordance with Supreme Court and congressional guide-

\begin{itemize}
  \item \textsuperscript{112} Sohn, \textit{supra} note 11, at 7; Henkin, \textit{supra} note 111, at 23.
  \item \textsuperscript{113} Sohn, \textit{supra} note 11, at 12 (“there are no effective means of implementing these [human rights] documents . . . [but] international law as a whole suffers from the same shortcoming because methods of enforcement are still deficient”).
  \item \textsuperscript{114} Henkin, \textit{supra} note 111, at 22.
  \item \textsuperscript{115} U.S. Const. art. III.
  \item \textsuperscript{116} See \textit{supra} text accompanying notes 42-44.
  \item \textsuperscript{117} 28 U.S.C. § 1350.
  \item \textsuperscript{118} See \textit{supra} text accompanying notes 60-69.
\end{itemize}
lines, these doctrines keep the federal courts from resolving issues that will affect United States foreign relations and foreign policy. The unwarranted application of any of the doctrines, however, denies the alien victim of a human rights violation a lawful opportunity to redress an injury.

The courts' concern regarding the appropriateness of federal courts hearing claims based on extra-territorial human rights violations is unfounded. None of the cases in which a court has allowed a claim under the ATCA has resulted in repercussions in the conduct of United States foreign policy. Unless Congress changes the present law, the courts should not refuse to hear such claims.

VII. HUMAN RIGHTS VIOLATIONS

The ATCA requires a tort and a violation of international law in order for a federal court to exercise jurisdiction. By nature, violations of the rights to life, liberty and personal security sound in tort. Violations of economic or property rights may also be torts, but the federal courts have been unwilling to recognize such rights as clearly within the subject matter of international law.

Courts must make three determinations regarding international human rights violations: 1) the source of the right in international law; 2) the nature of the substantive right and the nature of the duty under international law; and 3) the standard or test to be used to determine if the right has been violated, i.e., if the duty has been breached. The source may be any of

119. Under American tort law, the violation of the right to life gives rise to a statutorily-created cause of action for wrongful death. The violation of the right to liberty gives rise to an action for false imprisonment. The violation of the right to personal security gives rise to an action for battery, and, most likely, assault.

One commentator has suggested that the appropriate analysis of a claim under the ATCA requires two steps: 1) the existence of a tort under municipal law, and 2) the existence of a violation of international law. Under this approach, the municipal tort and the violation of international law could be based upon separate conduct. Randall, Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U. J. INT'L L. & POL. 1, 32-39 (1985). See also Tel-Oren, 726 F.2d at 777-78 (Edwards, J., concurring). For an example of this approach, see Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).


121. The analysis would require the court, first, to ascertain whether a right exists under international law by looking to international agreements, customary international law, and general principles of law recognized by civilized nations. A claim based on the right to education, for example, which might exist under municipal law, would fail because international law does not recognize a right to education.

Second, the court would have to determine the content of the right under international law. For example, the beating of an arrestee by police is torture under color of official authority, which violates international law. However, the beating of an individual by a private citizen violates only municipal law. Thus, the right under international law is limited in scope to
the sources recognized by United States courts or international tribunals. The nature of the substantive right may be defined by multilateral conventions protecting certain rights or prohibiting certain conduct. The standard may be either a standard of international law or a standard of national law applied to international law.

Significant problems arise in making each of these determinations. The source of the right, in order to be binding upon the international community in general, must be either customary international law, which is limited to the actual practices of states, or general principles of law recognized by civilized nations. The nature of the substantive right and the duty imposed by international law may be delineated by looking to international agreements, but even then many of the rights lack clear definition. The identification of a standard or test, which will not be discussed in this Comment, presents the greatest problem, since international law does not currently provide many clear standards. The application of a standard recognized by United States law would result in the "internationalization" of a standard to which the international community has not agreed.

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official torture.

The nature of the duty under international law is a corollary of the nature of the right under international law; in other words, the determination of a right under international law will frequently, though not always, result in a correlative determination of when and upon whom there exists a duty not to violate that right. Summary execution is a good example. The right to be free from summary execution is the right to be free from execution at the hands of a public official, acting under color of law, absent a conviction by a competent tribunal. Thus, the right to be free from summary execution delineates the duty as well: 1) public officials must refrain from execution, 2) when there has not been a conviction by a competent court.

Third, the court must decide what standard to use in determining whether or not a right has been violated. While international law prohibits arbitrary detention, there is no clearly articulated standard as to how long an individual may be detained before the detention becomes arbitrary.

122. Conventions aimed at the prohibition of specific conduct define that conduct. For example, several slavery conventions provide definitions of what constitutes slavery, ranging from "the status of a person over whom any of the rights associated with ownership are exercised" to "debt bondage." See conventions cited infra notes 183-89. A court faced with a claim alleging slavery would look to these conventions to determine the nature of the right under international law.

123. See supra note 121 (lack of international standard for arbitrary detention).
124. Restatement, supra note 9, § 702 comment a.
125. For example, the European Convention and the American Convention, supra note 21, require, as part of their prohibition of arbitrary arrest and detention, that a detainee be "promptly" presented before a judicial officer. Neither convention, however, defines "promptness." A United States court hearing a claim alleging arbitrary detention might conclude that "promptness" requires presentment within two weeks, whereas the practice of the alien's home country may require presentment within two months. In such a case, the court would have to look to customary international law, i.e., the actual practices of nations, to determine whether detention for two months without presentment violates international law. If two months of detention is in accordance with the practice of a majority of nations, the imposition of the two-week standard would be the imposition of a national standard to which the international community has not agreed.
The following nine violations of international law that impact upon human rights should be actionable under a broad construction of the ATCA. These violations were selected because the conduct is clearly prohibited by either customary international law or general principles of law recognized by civilized nations; thus, the conduct violates international law if engaged in by any member of the international community. The consensus among nations that the conduct is prohibited is demonstrated by either the long-standing practices of nations, as is the case with customary international law, or by the existence of a number of international agreements prohibiting the conduct in question, as is the case with general principles of law.

1. Apartheid

Apartheid is the state practice of racial segregation and discrimination for the purpose of establishing and maintaining the dominance of one racial group over another. Tortious acts constituting apartheid are murder, the infliction of serious physical or mental injury, arbitrary arrest and detention, the imposition of living conditions designed to result in the complete or partial destruction of the group, and forced labor. Apartheid is distinguishable from other violations of human rights on the basis of its motive of racial discrimination. While acts constituting apartheid are similar to those constituting other human rights violations, such as arbitrary arrest and detention, apartheid is distinguishable as a state-sponsored program of racial dominance.

Apartheid is neither practiced nor recognized as a legitimate policy by a majority of nations. The practice violates both customary international law and general principles of law recognized by civilized nations. As a denial of the rights to life, liberty and personal security, apartheid violates provisions of the Universal Declaration, the International Covenant on Civil and Political Rights (the International Covenant), the European Convention for the Protection of Human Rights and Fundamental Freedoms (the

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126. The nine violations interfere with the rights to life, liberty and personal security. The discussion herein is limited to violations of personal integrity because the international community perceives these rights as deserving of immediate protection from violation; hence, the consensus among nations of the inalienability of these rights is greater than that regarding civil and social rights. See Schachter, supra note 31, at 75-76 (rights to integrity of person seen as requiring prompt fulfillment in all countries).

127. Id. art. 2, paragraphs (a), (b) and (e).

128. Id. art. 2.

129. Id.

130. Id.

131. Article 2 of the Apartheid Convention makes specific reference to the South African practice of apartheid. This reference suggests that racial discrimination as practiced by other nations is not the equivalent of apartheid.

132. Universal Declaration, supra note 21, arts. 2-7.

133. International Covenant, supra note 21, arts. 6-9.
European Convention), and the American Convention on Human Rights (the American Convention). \(134\) Apartheid is specifically prohibited by the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid Convention). \(135\) The preamble of the Apartheid Convention includes a declaration by the State Parties that apartheid is a crime under international law. \(136\)

Individual criminal liability for acts constituting apartheid is imposed by article 3 of the Apartheid Convention. \(137\) This provision demonstrates the intention of the State Parties to hold individuals responsible for both private and official acts constituting apartheid. Private liability arises when an individual does not necessarily act as an agent of the state, but instead commits the acts constituting apartheid with the encouragement or condonation of the state. Thus, international law imposes a duty on both state and individual actors to refrain from acts constituting apartheid.

2. Arbitrary Arrest and Detention

Arbitrary arrest and detention is the state practice of denial of certain procedural safeguards considered by the international community as fundamental to the principles of justice. \(138\) Arrest and detention become arbitrary when the individual is not provided with 1) the right to be informed of the charges, \(139\) 2) the right to prompt presentment before a judicial officer, \(140\) 3) the right to a speedy trial or to release before trial, \(141\) and 4) the right to access to the courts for a determination if the arrest and detention are

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134. European Convention, supra note 21, arts. 2-6 and 14.
135. American Convention, supra note 21, arts. 1 and 4-7.
137. The Apartheid Convention states:
Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law.

Observing that, in the Convention on non-applicability of statutory limitations to war crimes and crimes against humanity, "inhuman acts resulting from the policy of apartheid" are qualified as crimes against humanity. Observing that the General Assembly has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity,

Have agreed as follows:

Article I. The State parties to the present Convention declare that apartheid is a crime against humanity . . .

138. Article III states that "[i]nternational criminal liability shall apply . . . to individuals."

Id.

139. Restatement, supra note 9, § 702 comment g.
140. American Convention, supra note 21, at art. 7, para. 4; International Covenant, supra note 21, art. 9, para. 2; European Convention, supra note 132, at art. 5, para. 2.
141. American Convention, supra note 21, art. 7, para. 5; International Covenant, supra note 21, art. 9, para. 3; European Convention, supra note 21, art. 5, para. 3.
142. Id.
Arbitrary arrest and detention are practiced by many nations and are thus not prohibited by customary international law. Freedom from arbitrary arrest and detention are, however, general principles of law recognized by civilized nations and are binding international law. The Universal Declaration contains a general prohibition of arbitrary arrest and detention. The specific procedural safeguards are enumerated, with some variation, in the International Covenant, the European Convention, and the American Convention.

By its definition, arbitrary arrest and detention impose liability only on a state and its agents. Actions by an individual acting under color of official authority would create liability if the acts were committed by an agent of the state acting without official sanction. Liability for private conduct would not be imposed because of the absence of the individual’s legal authority to arrest or detain.

3. Unlawful Medical Experimentation

Unlawful medical experimentation is the subjection of an individual to medical procedures without informed consent and for a purpose other than therapy. Acts constituting unlawful medical experimentation include surgical procedures, or the injection, ingestion or inhalation of substances calculated to result in physical or psychological alteration of the subject. Unlawful medical experimentation may violate the rights to life, liberty and personal security, depending upon the specific circumstances under which the experimentation is conducted.

Unlawful medical experimentation violates general principles of law recognized by civilized nations. The practice is prohibited by the provisions of the Universal Declaration protecting the rights to life, liberty and personal security, and the right to freedom from cruel, inhuman or degrading treatment. Such experimentation would violate similar provisions of the International Covenant, the European Convention, and the American Convention. The four Geneva Conventions of August 12, 1949, prohibit experimentation during wartime on members of the armed forces, prisoners
of war and civilians. Moreover, unlawful medical experimentation falls within the definitions of war crimes and crimes against humanity of the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis. Under the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, crimes against humanity are also prohibited during peacetime. The classification of unlawful medical experimentation as a war crime or crime against humanity imposes a duty upon both state and individual actors to refrain from the prohibited conduct.

4. Genocide

Genocide is conduct calculated to cause the partial or complete destruction of a national, ethnic, racial or religious group. Acts constituting genocide include: 1) killing members of the group; 2) infliction of serious physical or mental injury; 3) imposition of living conditions intended to bring about the partial or complete physical destruction of the group; 4) imposition of measures to prevent births; and 5) forcible transfer of children of the group to another group.

Genocide is prohibited by general provisions for the rights to life, liberty and personal security in the Universal Declaration, the International Covenant, the European Convention, and the American Convention. The Convention on the Prevention and Punishment of the Crime of Genocide declares genocide to be an international crime. Furthermore, genocide is included in the prohibition of crimes against humanity by the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity. The Genocide Convention and the Convention on the Non-
applicability of Statutory Limitations expressly impose liability for both individual and state conduct. 160

5. Hijacking of Civilian Aircraft

The hijacking of civilian aircraft is the intentional use of force or threat of use of force to gain control of an aircraft, to endanger the safety of the persons on board, or to endanger the safe operation of the aircraft in flight. 161 Hijacking is not practiced by states and thus violates customary international law. Because the hijacking of civilian aircraft results in the intentional deprivation of life, liberty or personal security to persons on board the aircraft, the action constitutes a violation of human rights. 162

The hijacking of civilian aircraft is prohibited by the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Hijacking Convention), 163 the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention), 164 and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Hijacking Convention). 165 These conventions demonstrate that, in contrast to other acts of terrorism that have been legitimized by some nations as acts in furtherance of wars of national liberation, 166 the hijacking of civilian aircraft has been condemned by the international community. International law imposes a duty on individuals to refrain from the prohibited conduct. 167 States would incur liability for the assistance to, or cooperation with, individuals who have committed acts constituting hijacking. 168

6. Piracy

Piracy is any act of violence, detention or depredation for private ends by the passengers or crew of a private ship or aircraft committed on the high seas against another ship or aircraft, against persons or property on board such other ships or aircraft, or committed outside the territory of any state against any ship, aircraft, person or property. 169 Acts of piracy that include violence against, or detention of, persons would result in the dep-

160. Convention on the Prevention and Punishment of the Crime of Genocide, supra note 33, art. 4; Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, supra note 57, art. 2.
161. Bassiouni, supra note 12, at 204.
162. Id.
166. Tel-Oren, 726 F.2d at 795-96.
167. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, supra note 163, art. 1.
168. See conventions cited supra notes 163-65.
169. L. Oppenheim, supra note 13, at 608-09.
rivation of the rights to life, liberty or personal security. Piracy violates customary international law.\textsuperscript{171}

Piracy is an international crime.\textsuperscript{172} Piracy is prohibited by the Nyon Arrangement,\textsuperscript{173} the Agreement Supplemental to the Nyon Arrangement,\textsuperscript{174} and the Convention on the High Seas.\textsuperscript{175} Because piracy includes only acts committed for private ends, international law imposes a duty only on individuals to refrain from acts of piracy.\textsuperscript{176}

7. \textit{Slavery and Related Practices}

Slavery is the status of an individual over whom any or all of the rights attaching to ownership are exercised.\textsuperscript{177} Practices similar to slavery include debt bondage,\textsuperscript{178} sexual bondage,\textsuperscript{179} serfdom,\textsuperscript{180} marital bondage\textsuperscript{181} and forced or compulsory labor.\textsuperscript{182} Slavery and related practices violate the right to liberty.

Slavery violates specific provisions of the Universal Declaration,\textsuperscript{183} the International Covenant,\textsuperscript{184} the European Convention,\textsuperscript{185} and the American Convention.\textsuperscript{186} Slavery is also prohibited by a number of specific international agreements, such as the Slavery Convention (1926),\textsuperscript{187} the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,\textsuperscript{188} and the Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{170} Bassiouni, \textit{supra} note 12.
\item \textsuperscript{171} L. Oppenheim, \textit{supra} note 13, at 609.
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} 181 L.N.T.S. 135.
\item \textsuperscript{174} 181 L.N.T.S. 149.
\item \textsuperscript{175} 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 11.
\item \textsuperscript{176} L. Oppenheim, \textit{supra} note 13, at 608, 616.
\item \textsuperscript{177} Slavery Convention, \textit{supra} note 33, art. 1. 2183, T.S. No. 778, 60 L.N.T.S. 253.
\item \textsuperscript{178} Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, \textit{supra} note 33, art. 1.
\item \textsuperscript{179} Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, \textit{supra} note 33, art. 1.
\item \textsuperscript{180} Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, \textit{supra} note 33, art. 1, para. b.
\item \textsuperscript{181} \textit{Id.} art. 1, para. c.
\item \textsuperscript{182} Convention Concerning Forced or Compulsory Labour, June 28, 1930, art. 2, 39 U.N.T.S. 55.
\item \textsuperscript{183} Universal Declaration, \textit{supra} note 21, art. 4.
\item \textsuperscript{184} International Covenant, \textit{supra} note 21, art. 8.
\item \textsuperscript{185} European Convention, \textit{supra} note 21, art. 4.
\item \textsuperscript{186} American Convention, \textit{supra} note 21, art. 6.
\item \textsuperscript{187} Slavery Convention, \textit{supra} note 33.
\item \textsuperscript{188} Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, \textit{supra} note 33.
\item \textsuperscript{189} Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, \textit{supra} note 33.
\end{itemize}
International law imposes liability both for individual and state conduct that constitutes slavery.190

8. Summary Execution

Summary execution is the execution of an individual by a state that does not result from a conviction in accordance with generally accepted principles of justice.191 International law recognizes capital punishment as a legitimate criminal sanction only when it is imposed by a competent, impartial court for a serious crime for which such punishment may be imposed by laws in effect at the time of the occurrence of the crime.192 Summary execution is practiced by many nations and does not violate customary international law. Most nations, however, denounce summary execution in principle; thus, it is a violation of general principles of law recognized by civilized nations.

Summary execution violates general provisions of the Universal Declaration,193 the International Covenant,194 the European Convention,195 and the American Convention,196 as well as provisions outlining procedural safeguards in the International Covenant197 and the American Convention.198 International law imposes a duty only to states to refrain from summary execution.199 Individual conduct of the same nature would violate municipal law prohibiting murder.

9. War Crimes

War crimes are violations of the laws or customs of war.200 Acts constituting war crimes include, inter alia, the murder or ill-treatment of civilian populations, prisoners of war, or members of the armed forces on land or on the seas; the deportation of civilian populations of or in occupied territory; and the killing of hostages.201 War crimes against persons may violate the rights to life, liberty and personal security. War crimes violate customary international law and general principles of law recognized by civilized nations.202

190. Bassiouni, supra note 12, at 197.
191. Restatement, supra note 9, § 702 comment e.
192. American Convention, supra note 21, art. 4; International Covenant, supra note 21, art. 6, paras. 1-2 and 4-5.
193. Universal Declaration, supra note 21, art. 3.
194. International Covenant, supra note 21, art. 6.
195. European Convention, supra note 21, art. 2.
196. American Convention, supra note 21, art. 4.
197. International Covenant, supra note 21, art. 9.
198. American Convention, supra note 21, art. 7.
199. Restatement, supra note 9, § 702.
200. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, supra note 57, art. 6, para. b.
201. Id.
War crimes are prohibited by all of the Geneva Conventions, the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis, and the Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Moreover, international law imposes liability for state conduct and for individual conduct, whether official or private.

VIII. Conclusion

The adjudication of human rights violations under the ATCA will continue to present problems for the courts until the substantive rights under international law are more clearly delineated, and the appropriate standards are identified. However, the confusion created by the courts that construe the ATCA narrowly compounds the problem. The narrow construction is in reality a policy determination that the courts should not resolve the issues presented by violations of human rights. Despite the difficulty of resolving those issues, there exists sufficient consensus on, and definition of, substantive human rights under international law for the courts to adjudicate such claims. By employing a broad construction, the nine violations of international law that impact upon human rights proposed herein should be actionable under the ATCA.

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203. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, supra note 33; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, supra note 33; Geneva Convention Relative to the Treatment of Prisoners of War, supra note 33; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, supra note 33.

204. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, supra note 57.

205. Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, supra note 57, art. 1.

206. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, supra note 57, art. 7.