The Role of Federal Common Law in Alien Tort Statute Cases

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INTRODUCTION

The Alien Tort Statute is a procedural device that enables aliens to file suit in U.S. federal courts for torts committed in violation of international law.\(^1\) Congress originally drafted the Alien Tort Statute as part of the Judiciary Act of 1789 to provide a federal forum for tortious violations of international law, thereby avoiding potential international controversies caused by state courts hearing such cases.\(^2\)

Since 1980, the Alien Tort Statute has become the subject of considerable controversy and commentary. In 1980, the Court of Appeals for the Second Circuit decided the case of *Filartiga v. Pena-Irala* in which Paraguayan nationals sued another Paraguayan national for the wrongful death of their son.\(^3\) The plaintiffs based federal subject matter jurisdiction, *inter alia*, on the Alien Tort Statute. They alleged that the defendant, a Paraguayan police official, tortured the decedent and that torture by state officials constitutes a violation of customary international law. The court of appeals held that it was constitutional to base

\* Professor of Law, Indiana University School of Law—Indianapolis. B.A. 1962, University of Texas; J.D. 1965, University of Texas; L.L.M. 1972, London School of Economics.

\(^1\) The Judiciary Act of 1789 contained the following grant of jurisdiction: "the district courts shall have . . . cognizance, concurrent with the courts of the several states, or the circuit courts . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, 1 Stat. 73 (1789).

The present version of the Alien Tort Statute provides: "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." 28 U.S.C. § 1350 (1988).


\(^3\) 630 F.2d 876 (2d Cir. 1980).
subject matter jurisdiction on the Alien Tort Statute. The Filartiga opinion, however, has engendered considerable debate over the mechanics of applying the Alien Tort Statute.

Part I of this Article examines the constitutional foundation of Alien Tort Statute cases, and concludes that the Filartiga court did not establish a sufficient constitutional basis for subject matter jurisdiction. Part II then discusses the basis for subject matter jurisdiction, and addresses the controversy over the source of the cause of action in Alien Tort Statute cases. Finally, Part III suggests that federal common law should determine the source of the cause of action and govern the merits of these cases.

I. THE CONSTITUTIONAL FOUNDATION OF ALIEN TORT STATUTE CASES

The Alien Tort Statute is a grant of subject matter jurisdiction to federal courts based on Article III of the United States Constitution. Article III provides Congress with the power to vest federal courts with subject matter jurisdiction over maritime cases, diversity cases, and “all Cases, in Law and Equity, arising under . . . the Laws of the United States . . .” In a non-maritime case such as Filartiga, where all of the parties are aliens, the only basis for subject matter jurisdiction is the “arising under” clause of Article III. Thus, the constitutional question is whether a case in which an alien sues another alien for a tort in violation of international law is one that arises under federal law.

In Osborn v. Bank of the United States, the Supreme Court established the test for determining whether a case arises under federal law for purposes of Article III. The Court held that as long as the rights of the parties depend on a construction of the Constitution or other federal law, the case arises under federal law for purposes of Article III. The Court further stated that if there is no issue concerning the construction or interpretation of the Constitution or other federal law, the case would still meet the requirements of Article III if federal law were an “ingredient” in the case. Federal law is an ingredient in a case if the rights of the parties depend in some broad sense upon a construction of fed-

4 Id. at 885.
5 U.S. CONST. art. III, § 2 (emphasis added).
6 22 U.S. (9 Wheat.) 738 (1824) (upholding constitutionality of federal statute that accorded Bank of the United States ability to sue in federal court on causes of action based on state law).
eral law, regardless of whether that particular federal law is at issue.

For example, according to Osborn, every case in which the Bank of the United States was a party would arise under federal law because a federal statute provided the Bank with the right to sue and to be sued.\(^7\) Similarly, if the case had involved an issue of non-federal contract law, such as sufficiency of performance, the case would have arisen under federal law because a federal statute provided the Bank with the power to contract.\(^8\) Thus, a case may sometimes arise under federal law, for purposes of Article III, even if constitutional or federal law is not directly at issue.\(^9\)

It was the Filartiga case that specifically raised the issue of the constitutionality of Alien Tort Statute cases. In Filartiga, plaintiffs brought a wrongful death action based upon

"wrongful death statutes; the U.N. Charter; the Universal Declaration of Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as [the Alien Tort Statute] and the Supremacy Clause of the U.S. Constitution.\(^10\)

Subject matter jurisdiction was based, inter alia, on the Alien Tort Statute. The district court dismissed the case for lack of subject matter jurisdiction under the Alien Tort Statute because it did not find a violation of customary international law.

The court of appeals reversed, holding that the alleged torture that had resulted in death was a violation of international law, thereby satisfying the conditions of the Alien Tort Statute. The court also held that the Alien Tort Statute was a valid exercise of congressional power under the "arising under" clause of Article

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\(^7\) Id. at 823–24. The Osborn Court reasoned that Article III of the Constitution defines the extent of congressional power to provide federal subject matter jurisdiction, and "[w]hen a [U.S.] Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? . . . This depends on a law of the United States."

\(^8\) Id. at 823–26.

\(^9\) If federal law is only relevant to determine whether subject matter jurisdiction exists, however, it is likely that the case would not arise under federal law for purposes of Article III. Absent another basis upon which to ground jurisdiction, such as diversity of citizenship, it would be unconstitutional for Congress to bestow jurisdiction on federal courts. See Blum & Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 98 (1981).

\(^10\) Filartiga v. Pena-Irala, 630 F.2d 876, 879 (2d Cir. 1980).
III because customary international law is part of the law of the United States. The court stated that

A case properly "aris[es] under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.11

The court suggests that because international law is part of federal law,12 the grant of jurisdiction over cases in which aliens sue one another for torts in violation of international law is constitutionally permissible under Article III.

Nevertheless, this reasoning does not adequately substantiate the constitutionality of the Alien Tort Statute as applied to the facts of Filartiga. Rather, it is also necessary to identify some specific federal law—whether it be the Constitution, a federal statute, a U.S. treaty, federal common law, or customary international law as adopted by the federal common law—upon which the rights of the parties depend. Merely stating that international law is part of the law of the United States does not make the requisite identification. Certainly, international law is relevant in determining whether the conditions of the Alien Tort Statute have been satisfied. But if neither international law nor any other source of federal law had any further relevance, Alien Tort Statute cases would probably exceed the constitutional authority of Congress.13

11 Id. at 886 (citations omitted).
12 See The Paquette Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").
13 The only escape from this conclusion is if the courts were to adopt the theory of protective jurisdiction. See Wright, Federal Courts, 110-11 (4th ed. 1983). The theory of protective jurisdiction posits that Congress has the authority to bestow jurisdiction on federal courts as long as Congress could have constitutionally enacted laws regulating the rights and obligations of the parties in any particular case. This theory has never been endorsed by the Supreme Court. But see Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467 (1986) (in particular cases, the Alien Tort Statute can be deemed a constitutional exercise of Congress Article III powers under a theory of protective jurisdiction).
This does not suggest that it is beyond Congress's Article III powers to provide subject matter jurisdiction in cases such as *Filartiga*. The "ingredient" of federal law would have existed if the plaintiffs had had a colorable claim to relief under a U.S. treaty, the U.S. Constitution, a federal statute, or customary international law as adopted by federal common law. Similarly, where the plaintiffs in *Filartiga* based relief on non-federal law, such as the wrongful death statutes of New York and Paraguay, the *Osborn* test would have been satisfied if the issue of wrongfulness under the applicable statute could have been proven by a showing that the act violated customary international law.

By merely invoking the doctrine that international law is part of federal law, the *Filartiga* court did not sufficiently substantiate the constitutional foundation of Alien Tort Statute cases. As discussed below, even where the Constitution, international law, and federal statutory law are irrelevant to the merits of a claim brought under the Alien Tort Statute, federal common law should control.14 In this manner, these cases would always arise under federal law and the constitutionality of the Alien Tort Statute would be secure. The *Filartiga* court should have addressed this possibility because no other type of federal law was relevant to the issues in the case.

II. Judicial Interpretation of the Alien Tort Statute:
The Private Cause of Action Controversy

The *Filartiga* court interpreted the Alien Tort Statute broadly by assuming that Congress intended federal courts to have subject matter jurisdiction whenever the literal terms of the Alien Tort Statute were satisfied. As indicated in Part I, this interpretation raises the question as to what constitutes an adequate basis for subject matter jurisdiction in Alien Tort Statute cases. In *Tel-Oren v. Libyan Arab Republic*,15 Judge Green of the district court, and subsequently, Judge Bork of the court of appeals adopted the view that the Alien Tort Statute requires federal law to create a cause of action before jurisdiction attaches. Sub-part A examines this view and concludes that it is based on an erroneous interpretation of, and questionable comparison to the federal question

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14 See infra text accompanying notes 55–86.
statute, 28 U.S.C. § 1331 (section 1331). Sub-part B then addresses Judge Edwards' concurring opinion in Tel-Oren that the Alien Tort Statute itself creates a cause of action. Finally, Sub-part C considers whether international law creates a cause of action in Alien Tort Statute cases.

A. Must Federal Law Create the Cause of Action?

In Tel-Oren, alien plaintiffs sued Libya and the Palestine Liberation Organization for injuries and death attributable to alleged acts of terrorism. The plaintiffs argued that the acts were torts that violated international law and based subject matter jurisdiction in part on the Alien Tort Statute. The district court in Tel-Oren dismissed the complaint for lack of subject matter jurisdiction. In discussing subject matter jurisdiction, district court Judge Joyce Hens Green ruled that the Alien Tort Statute requires a cause of action under international law because section 1331 would impose a similar requirement. The court concluded that neither customary international law nor a treaty of the United States created a cause of action and therefore, subject matter jurisdiction failed to attach under the Alien Tort Statute.

The court of appeals affirmed the district court's decision in a memorandum opinion to which three lengthy individual concurring opinions were attached. Judge Bork wrote a concurring opinion based on the assumption that the Alien Tort Statute

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18 The plaintiffs in Tel-Oren also invoked section 1331.

19 517 F. Supp. at 549. The court held that, for purposes of section 1331, the plaintiffs had failed to state a cause of action arising under the Constitution, law, or treaties of the United States because neither the criminal statutes, the treaties, nor the law of nations cited by plaintiffs provides a cause of action through these courts to individuals to seek redress of alleged human rights violations.

20 517 F. Supp. at 548. Judge Green commented:

Somewhere in the law of nations or in the treaties of the United States, the plaintiffs must discern and plead a cause of action that, if proved, would permit the Court to grant relief. The plaintiffs cite no cause of action given to them by the law of nations or by treaties of the United States. Just as discussed under section 1331, an action predicated on a treaty or on more general norms of international law must have at its basis a specific right to a private claim.

21 Id. at 775.
requires a federally created cause of action to exist in order for jurisdiction to obtain.  

Judge Bork then concluded that neither international law nor any other species of federal law created a private right to sue for acts of terrorism.  

The interpretation of Judge Green and Judge Bork is founded on the assumption that application of the Alien Tort Statute requires the same analysis as section 1331. Both Judges apparently assumed that a case does not arise under federal law for purposes of section 1331 unless federal law creates the cause of action. Thus, a federal court would not have jurisdiction under the Alien Tort Statute unless federal law created the cause of action.

The initial assumption that there is congruity between the Alien Tort Statute and section 1331 is questionable. Commentators generally agree that section 1331 does not vest jurisdiction to the fullest extent possible under Article III. It is reasonable to conclude that Congress limited the scope of section 1331 jurisdiction because cases arising under federal law for purposes of Article III will not always involve the promotion of a substantial federal interest and do not prompt the need for a federal forum. Alien Tort Statute cases, however, will always involve an alien party and a violation of international law. The presence of these factors suggests that Congress intended to vest as much jurisdiction in federal courts as constitutionally permissible.

Furthermore, regardless of whether section 1331 and the Alien Tort Statute are co-terminous, section 1331 does not necessarily require that federal law create the cause of action. The section 1331 "cause of action" test is inclusive rather than exclusive. In other words, even if federal law does not create the cause of action, jurisdiction could still exist under section 1331. Smith v. Kansas City Title & Trust Company is the most familiar example

22 Id. at 800.
23 Id. at 819.
25 T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (noting that the test "is more useful for inclusion than for the exclusion for which it was intended.").
26 255 U.S. 180, 202 (1921). In Smith, the Court granted federal subject matter jurisdiction where plaintiffs sought an injunction to prevent the defendant from investing in certain securities issued by a federal agency. Under state law, the injunction would issue if the securities were unlawful and it was contended that such were unlawful because the statute authorizing the securities was unconstitutional.
of a case in which a federal court properly granted section 1331 jurisdiction where state law created the cause of action. Similarly, in Franchise Tax Board v. Construction Laborers Vacation Trust, the Supreme Court stated that

Even though [non-federal] law creates [the cause of action], [the] case might still arise under the laws of the United States [for purposes of 28 U.S.C. § 1331] if a well-pleaded complaint established that [the] right to relief under [non-federal] law requires resolution of a substantial question of federal law in dispute between the parties.27

For example, when an alien sues under the Alien Tort Statute for wrongful death, the cause of action might derive from a non-federal source. If the "wrongfulness" of the death turns upon whether international law was violated, the case would arguably arise under federal law because the issue of international law would implicate "some substantial, disputed question of federal law" which is a "necessary element" of a non-federal law claim.28

B. Does the Alien Tort Statute Create a Cause of Action?

1. Judge Edwards' Opinion in Tel-Oren

Judge Edwards disagreed with the theory advanced by Judge Bork. In his concurring opinion, Judge Edwards argued that the Alien Tort Statute itself provides a right to sue where there is a tort in violation of international law, but concurred in the result on the ground that there was no such violation.29 He based his conclusion that the Alien Tort Statute itself created the cause of action partly on a 1907 opinion of the U.S. Attorney General (1907 Opinion),30 and partly on an ambiguous phrase from

27 463 U.S. 1, 13 (1983).
28 But see Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 814 (1985). In Merrell Dow, the Court held that there was no jurisdiction under section 1331 where state-created causes of action for negligence and negligence per se were based upon violation of a federal statute. Therefore, assuming congruity between section 1331 and the Alien Tort Statute, it is possible that there would be no jurisdiction where a non-federal claim is based upon a violation of international law. In Merrell Dow, however, the only reason that the conduct was a proximate cause of the injury or was negligent per se was because of state law. Where there has been a violation of international law, the act is wrongful or illegal independent of non-federal law. Furthermore, because a violation of international law entails the responsibility of a nation-state, it is more substantial than liability for negligence between two private entities.
29 Id. at 779.
Filartiga. The 1907 Opinion stated that Mexican citizens had a "right of action" against an American company for diverting water in violation of international law and a forum by virtue of the Alien Tort Statute. The 1907 Opinion, however, does not provide any analysis, and does not cite any authority for the proposition asserted. The 1907 Opinion is purely conclusory.

Judge Edwards also based his conclusion on the decision in Filartiga, which is almost entirely devoted to a discussion of whether torture is a violation of international law. Contrary to Judge Edwards' interpretation, however, the Filartiga opinion did not hold that the Alien Tort Statute creates a cause of action. Rather, the court stated that "it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." This language suggests that the Alien Tort Statute is purely a jurisdictional statute.

Indeed, the Filartiga court attempted to clarify this issue in its response to the defendant's argument that international law should not be applied as "rules of decision." The court stated:

[The defendant] confuses the question of federal jurisdiction under the Alien Tort Statute with the issue of the choice-of-law . . . which will be addressed at a later stage in the proceedings. The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III.

51 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
53 See generally Filartiga, 630 F.2d at 876. In Filartiga, the plaintiffs alleged that the defendant had tortured the plaintiffs' son and had thereby caused his death. The plaintiffs claimed that torture by state officials is a violation of international law. In an opinion written by Judge Kaufman, the court sustained jurisdiction under the Alien Tort Statute and remanded.
54 Filartiga, 630 F.2d at 887. The right referred to is the right to be free from torture.
55 Id. This is followed, however, by the following statement:
Should the district court decide . . . to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred.
Id. This statement suggests that a private cause of action exists under the law of the United States and international law. Nevertheless, the basis for that conclusion is absent from the opinion. It seems that the court meant that the conduct was a violation of those laws. Earlier it had stated that torture was a "violation" of Paraguayan law. Thus, the statement would make sense if one substituted the words "a violation of" in place of "actionable under."
Thus, Filartiga does not support the theory that the Alien Tort Statute creates a cause of action. Rather, the court suggested that a choice-of-law analysis determines the cause of action and contemplated that such an analysis could lead to Paraguayan law. In describing the consequences of applying Paraguayan law, the court proposed that

such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiff's cause of action would no longer properly be "created" by a law of the United States. Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent dismissal of that claim (here, the claims under the general international prescription of torture) does not deprive the court of jurisdiction previously established.36

This language demonstrates that the Filartiga court did not hold that the Alien Tort Statute creates a cause of action. If it were otherwise, the court would not suggest conducting a choice-of-law analysis in these cases.37

2. Implying a Cause of Action Under Cort v. Ash

The question remains whether the Alien Tort Statute, as a federal statute, impliedly creates a cause of action. In several cases, the Supreme Court has held that a cause of action may be implied from a federal statute where there is no express cause of action. This phenomenon exists, inter alia, in cases where a person has been injured through a violation of a federal statute. For example, in Transamerica Mortgage Advisors, Inc. v. Lewis 38 the Supreme Court implied a private cause of action from § 215 of the Investment Advisers Act which made certain contracts in violation of the Act void. The Court, focusing on "whether the Act creates a private cause of action for damages or other relief," stated:

36 Id. at 889 n.25 (citations omitted).
In the case of § 215, we conclude that the *statutory language itself fairly implies a right to specific and limited relief in a federal court*. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. 39

In the recent case of *Thompson v. Thompson*,40 the Court stated that it would rely on the four factors established in *Cort v. Ash* to determine whether it should infer a cause of action from a federal statute.41 These factors consist of the following:

First, is the plaintiff “one of the class for whose especial benefit the statute was enacted,” . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to apply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the State, so that it would be inappropriate to infer a cause of action based solely on federal law?42

Although the present viability of the doctrine of implied causes of action is not clear, the second factor, legislative intent, is the predominant and independent factor. There is no hard evidence demonstrating legislative intent to create a private cause of action in the Alien Tort Statute. The intention of Congress apparently was to avoid international conflicts resulting from state court decisions on foreign relations and to avoid state-court biases.43 This assumption does not mean that Congress intended to create a cause of action in the Alien Tort Statute. In adopting the Alien Tort Statute, Congress probably gave little consideration to cases where an alien sued another alien for a tort in violation of international law.44

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39 *Id.* at 18 (emphasis added).
41 The court explained:
   In determining whether to infer a private cause of action from a federal statute, our focal point is Congress's intent in considering the statute. As guides to discerning that intent, we have relied on the four factors set out in *Cort v. Ash* . . . along with other tools of statutory construction.
42 *Id.* at 179.
44 Congress was probably concerned with suits by aliens against U.S. citizens. Although it might seem that the general diversity statutes would accommodate such cases, the Alien
As to the first factor of the Cort v. Ash test, the Alien Tort Statute creates a right in favor of the plaintiff to sue in federal courts. That right is completely realized, however, when the federal court determines that it has subject matter jurisdiction.

Regarding the third factor, the purpose of the Alien Tort Statute is to provide federal courts with subject matter jurisdiction. If the courts have subject matter jurisdiction, regardless of the source of the underlying cause of action, there is no need to imply one. Imposing a cause of action from a grant of subject matter jurisdiction would enable litigants to imply a cause of action every time they gain entrance to federal court. For example, if a case were properly in federal court based upon diversity of citizenship, a plaintiff’s claim that a cause of action should be inferred from the diversity statute would be fatuous.

Finally, the fourth factor of the Cort v. Ash test cannot rationally be assessed with respect to the Alien Tort Statute. Causes of action for tort are traditionally governed by state law, but state courts are rarely confronted with tortious conduct that violates international law. Furthermore, it is unlikely that Congress was concerned about a lack of uniformity. In 1789, the common law of torts was relatively uniform.

C. Does International Law Create a Cause of Action?

1. Customary International Law

There is a growing consensus that Congress intended the Alien Tort Statute to grant federal jurisdiction over cases involving safe conduct, diplomatic rights, and piracy. There is also a growing consensus that customary international law would provide a cause of action in these cases. 45

It is doubtful, however, that customary international law creates a private cause of action in Alien Tort Statute cases. 46 Customary

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46 For example, it is difficult to envision an Alien Tort Statute case involving piracy. Piracy is certain conduct of a heinous nature committed by private persons for private ends. See Ballew's Law Dictionary 950 (3d ed. 1969). It is generally recognized that a nation-state cannot be guilty of piracy. If the perpetrator is acting on behalf of a nation-state, there has been no act of piracy. On the other hand, if the perpetrator is
international law is created by the practices of nation-states. In order to become international law, the practices must be followed from a sense of legal obligation—*opinio juris sive necessitas*. The practice of states could lead to a rule that every nation-state must redress tortious violations of international law by recognizing that the alien has a cause of action against the wrongdoer. Although there is no presumption against finding that such a rule has emerged, it is doubtful that it has occurred because international law is concerned with the rights and obligations of nation-states *inter se*, rather than with the rights of private individuals. In a case such as *Filartiga*, it is possible that international law permits the United States to seek reparations from Paraguay for a violation of international human rights law. Customary international law, however, does not require the United States to assert a claim against Paraguay, and it does not require the courts of the United States to recognize a cause of action against the private actor that committed the act. As the Supreme Court has noted, "[a]lthough it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances, . . . the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders." Thus, it is unlikely that customary international law contains a rule that the United States must recognize a private cause of action for the violation, even though such a scenario might be desirable.

2. Treaty Law

Whether a treaty creates a cause of action is a matter of interpretation. The general rule is that a treaty "is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Unless the express terms of a treaty afford a

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private cause of action, it is unrealistic to suggest that the treaty provides one.

The United States position is aptly stated in The Restatement, Foreign Relations Law of the United States:

International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Whether an international agreement provides a right or requires that a remedy be made available to a private person is a matter of interpretation of the agreement.\(^{51}\)

Thus, even a self-executing treaty\(^{52}\) requires specific language to create a private cause of action. Only if a treaty is self-executing and provides for a private cause of action can it be said that the treaty has created a cause of action. If the treaty is not self-executing, no cause of action can be created without implementing legislation.

### III. The Role of Federal Common Law

The process of implying or inferring a cause of action in Alien Tort Statute cases is actually a way of describing the judicial creation of a rule. Thus, the appropriate question is whether—and if so, to what extent—the federal courts may utilize their common-law powers to create rules of decision in Alien Tort Statute cases.

#### A. The Common-Law Powers of Federal Courts

There are two situations in which federal courts exercise their common-law powers.\(^{53}\) First, federal courts fashion rules of decision based on congressional authorization.\(^{54}\) Second, the courts create and apply federal common law in cases implicating "uniquely federal interests."\(^{55}\)

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51 Restatement, supra note 47, at § 907 comment a. Section 907 suggests that international agreements may give rise to private remedies against the United States or any foreign state. Furthermore, such remedies may be sought in the U.S. courts of appropriate jurisdiction.


55 Texas Industries, 451 U.S. at 640.
In Alien Tort Statute cases, it is unlikely that federal courts could fashion common-law rules of decision based on congressional authorization. In *Textile Workers v. Lincoln Mills*, the Supreme Court held that a federal statute authorized U.S. courts to formulate federal common law in cases involving labor-management relations. The Court based its holding on express statements from the statute's legislative history. Because there is a dearth of legislative history surrounding the adoption of the Alien Tort Statute, the *Lincoln Mills* doctrine is not a sound basis for the application of federal common law in Alien Tort Statute cases.

Even in the absence of congressional authorization, however, courts may create and apply federal common law in certain cases that implicate "uniquely federal interests." The Supreme Court, in *Texas Industries, Inc. v. Radcliff Industries, Inc.*, described these areas as, "those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relation with foreign nations, and admiralty cases." Because they involve claims for relief based on a violation of international law, Alien Tort Statute cases can affect our relations with foreign nations. It is appropriate, therefore, that federal common law should govern. For example, in *Filartiga* a foreign state was accountable on the international level for tortious conduct which created issues implicating relations with foreign nations. It is thus appropriate that federal law governed.

57 But see Blum & Steinhardt, supra note 9, at 99 (concluding that, on the basis of the *Lincoln Mills* case, "the Alien Tort Statute is a mandate to fashion a federal tort law consistent with the overall body of law which Congress has deemed controlling—that is, the law of nations.").
60 In *Tel-Oren*, Judge Edwards seems to endorse, as an alternative approach to interpretation of the Alien Tort Statute, something akin to the approach discussed in Part III of this article: "Under an alternative formulation, [the Alien Tort Statute] may be read to enable an alien to bring a common law tort action in federal court . . . , as long as a violation of international law is also alleged." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (emphasis added). Although it is unclear whether the reference is to federal common law or state common law, his further discussion of this alternate approach is valuable in weighing the pros and cons of providing a federal forum to aliens who sue for torts in violation of international law. His reasoning would at least support an argument that a uniform federal choice-of-law standard should be employed in Alien Tort Statute cases.
In cases similar to Alien Tort Statute cases, the Supreme Court has recognized a strong federal interest in applying federal common law. For example, in Banco Nacional de Cuba v. Sabbatino, the Court held that federal common law determined the validity of a foreign government's act that allegedly violated international law. The fact that the case presented sensitive issues which could interfere with the executive branch's control of foreign affairs strongly influenced the Court's holding. Thus, the Court applied federal common law in order to avoid a potential violation of separation of powers. Although Alien Tort Statute cases differ from Sabbatino in that nation-states and their agencies will not be parties, the potential conflict with foreign affairs is just as real.61

In First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba,62 the Supreme Court held that federal common law would govern where an American citizen sued to recover damages from a Cuban agency for its expropriation of the plaintiff's property. The plaintiff alleged that the expropriation violated international law. In some Alien Tort Statute cases, the plaintiff seeks similar relief for a violation of international law. For example, the plaintiff might seek to recover because the tort violated international law. This situation would require the court to evaluate the interest of the United States in furthering the rule of international law and the potential for conflict with the executive branch. As a result, the court would have to evaluate the impact that its decision would have on foreign affairs.

In other situations, however, the plaintiff may seek to recover for a tort where the underlying circumstances show that the conduct was in violation of international law but recovery is not conditioned on or sought for the violation itself. For example, the plaintiff may allege the violation of international law only for purposes of gaining entry into federal court and then rely on non-federal grounds as the basis for relief. The court, if it has jurisdiction under the Alien Tort Statute, would still be confronted with a case in which the conduct violated international law. Thus, the court's decisions regarding possible relief would

61 See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 888–89 (1980). In Filartiga, the allegations established a violation of international law. This finding further established that the United States was a victim of the violation because a violation of the law of human rights allegedly occurred. Once that violation is shown, the decision regarding appropriate remedies could have an impact upon the relations between the United States and Paraguay.

entail the same federal interests that are present in cases where the plaintiff seeks recovery because the tort violated international law.

The mere invocation of federal common law, however, does not automatically grant the plaintiff a cause of action. Under federal common law, it might be appropriate to rule that an alien does not have a cause of action for a particular tort. In *Tel-Oren*, Judge Bork presented an elaborate argument against inferring a cause of action from federal law for certain violations of international law. In Judge Bork's opinion, allowing a cause of action for terrorism would be an unwise and untoward interference with the executive branch's conduct of foreign policy. Nevertheless, interference with the executive's conduct of foreign affairs will occur regardless of whether the alien files suit in federal or state court. Judge Bork decided only that federal courts lack jurisdiction in these cases. Because state courts will have concurrent jurisdiction, Judge Bork's decision would not prevent interference with the executive branch's role in foreign affairs, unless federal law governed. Only through total control of these actions can the federal interest be protected.

Additionally, federal common law should apply in Alien Tort Statute cases where the United States has violated international law. Generally, the defendant in these cases will be a person who

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64 The Alien Tort Statute does not provide for exclusive jurisdiction in federal district courts. If the plaintiff chooses to sue in a state court, the plaintiff could claim that relief is available under state law, and would not have to cite a violation of international law.
65 This analysis might appear to render the Alien Tort Statute superfluous because jurisdiction is available under section 1331. In these cases, however, jurisdiction under section 1331 may not be available. *Cf* Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900) (suit based on a federal statute did not "arise under" federal law because state law governed the rules of decision).

A student Note contains the following observation:

There would seem to be little federal interest in fashioning a federal common law of tort for violation of international law absent a showing that tort remedies under non-federal rules are in fact inadequate. State tort rules of decision hardly tend to be inadequate, especially for torts so egregious that they violate international law. No party suing under the Alien Tort Statute has, in any event, yet to make that claim. These observations undermine the basis for federal common law under the Alien Tort Statute.

Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U.L. Rev. 933, 1019-20 (1982) (footnotes omitted). Apparently, this argument is opposed to the formulation of a rule of decision that is different from a state rule, even if non-federal rules are adequate. It does not follow, however, that there is no role for federal common law. There are cases where the Supreme Court has found that state law will be the rule of decision, but a preliminary ruling has been made that federal common law governs the case.
acted on behalf of the United States, and courts have already applied federal common law where the civil liability of U.S. Government officials is at issue.\textsuperscript{66}

Moreover, in cases alleging that the United States violated international law, the courts should apply federal common law because the fact that an alien has been injured implicates a uniquely federal interest.\textsuperscript{67} Where an alien complains of a violation of international law, it is vital that he receive fair treatment. Remedying the violation of international law in federal court could satisfy the alien's nation-state, thus fostering good relations between the United States and that foreign state.\textsuperscript{68} In addition, the United States has an obligation to provide local remedies in order to satisfy the requirements of international law.\textsuperscript{69}

B. Applying Federal Common Law in Alien Tort Statute Cases

Once a court has decided that federal common law governs the merits of actions brought under the Alien Tort Statute, there are at least two options. First, the court could fashion its own common-law rules of decision. Second, the court could apply a federal common-law choice-of-law analysis.

1. Fashioning Common-Law Rules of Decision

\textit{First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba (Bancec)}\textsuperscript{70} is an example of the Court fashioning its own common-


\textsuperscript{68} See \textit{Zschernig v. Miller}, 389 U.S. 429 (1968) (nation-states may not treat aliens in a way that intrudes on foreign relations). Thus, even though state law may be invoked in some Alien Tort Statute cases, it is necessary to provide a check on its operation, which could conceivably offend foreign governments.

\textsuperscript{69} \textit{Restatement}, supra note 47 at § 902 comment k. Comment k provides: "If under international law, before a state can make a formal claim on behalf of a private person, . . . that person must ordinarily exhaust domestic remedies available in the responding state." Moreover, where a nation-state has violated international law, it is under an obligation generally to provide redress. \textit{Id.} at § 901.

law rules of decision. In *Bancec*, the plaintiff sued an agency of Cuba for damages incurred when Cuba expropriated the plaintiff's Havana properties. The issue was whether Bancec, a government entity, was liable for the debts of its principal, the Republic of Cuba. The Supreme Court formulated a common-law rule drawn from equitable principles "common to international law and federal common law . . .".

In addition to incorporating principles of international law, courts can invoke state law under the federal common-law rule formulation approach. For example, in *Clearfield Trust Co. v. United States*, the Supreme Court held that federal common law governed, and stated: "In our choice of the applicable federal rule we have occasionally selected state law." In *De Sylva v. Ballentine*, the Court noted that "[t]he scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."

In the context of Alien Tort Statute cases, federal courts have fashioned their own common-law rules of decision. For example, in *Abdul-Rahman Omar Adm v. Clift (Adm)* the court sustained jurisdiction over a case in which an alien sued for a decree requiring defendants to deliver custody of his child. The plaintiff claimed that the applicable Moslem law entitled him to custody of his daughter. He alleged that defendants violated international law when they refused to deliver her to his custody and took her from country to country under an Iraqi passport, concealing her true identity. The court held that the defendant's actions

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71 Factors based upon § 6 of the Restatement (Second) Conflict of Laws may be useful in formulating common law remedies. Section 6 states:

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(g) ease in the determination and application of the law to be applied.

72 *Id.* at 623.

73 318 U.S. 363, 367 (1943).

74 351 U.S. 570, 580 (1956).

amounted to a tort against the plaintiff. The court also held that the use of an Iraqi passport to admit the child, a Lebanese national, into the United States and to conceal her identity were violations of international law. The court concluded that because the wrongful acts caused direct and special injury, plaintiff was entitled to bring an action in tort.\textsuperscript{76} Thus, the Adra court exercised its common-law powers to create a cause of action.

2. Choice-of-Law Analysis

Federal courts can also approach the resolution of an Alien Tort Statute case as a common-law choice-of-law analysis.\textsuperscript{77} In other words, the court applies a federal common-law analysis to determine which jurisdiction's law applies to various issues in the case. For example, the district court in Filartiga, on remand, applied a common-law choice-of-law approach. The court noted that "[b]y enacting [the Alien Tort Statute] Congress entrusted [enforcement of the international law prohibition of torture] to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of international law incorporated into United States common law."\textsuperscript{78} The court noted that the parties were residents of Paraguay and that they were all nationals of Paraguay. Most of the injuries occurred there and

\textsuperscript{76} Id. at 865.

\textsuperscript{77} See Harris v. Polskie Linie Lotnicze, 820 F.2d 1000 (9th Cir. 1987). In Harris, the issue was whether Polish or California law applied to the measure of damages in a wrongful death action arising out of an airplane crash in Poland. The defendant airline was wholly owned by Poland and subject matter jurisdiction was based on the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1601-11 (1988). The court of appeals stated:

In the absence of specific statutory guidance, we prefer to resort to the federal common law for a choice-of-law rule. This avenue is not closed to us. "The use of federal common law in specialized areas where jurisdiction is not based on diversity has been sanctioned by the Supreme Court since the day Erie was decided . . . ." Corporacion Venezalana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980) (resorting to federal common law choice-of-law rules in a federal question case) . . . .

Harris, 820 F.2d at 1003.

\textsuperscript{78} Filartiga v. Pena-Irala, 577 F.Supp. 860, 863 (E.D.N.Y 1984). The court does not explain the basis for this conclusion. Rather, the court prefaces the statement by quoting from the Declaration on the Protection of All Persons from Being Subjected to Torture. Article 11 of the Declaration provides that victims of official torture "shall be afforded redress and compensation in accordance with national law." Id. at 863 (quoting 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975)). This rather clearly refers to the national law of the offending nation. In addition, from the implication of the above statement in the Filartiga case on remand, Article 11 does not impose a duty on a nation state.
the "party's relationships with each other [and the decedent] were centered in Paraguay." The court noted that torture was prohibited by the Constitution of Paraguay and was punishable under the criminal law of Paraguay. Further, the court stated that Paraguay was a signatory to a convention prohibiting torture and that under Paraguayan law damages were recoverable for wrongful death. In concluding this analysis, the court held that it was "appropriate to look first to Paraguayan law in determining the remedy for the violation of international law." Thus, the court applied the law of Paraguay to the issue of liability.

On finding that Paraguayan law did not award punitive damages, the court held that such a remedy nevertheless would be proper, citing an impressive array of cases. In awarding punitive damages, the court effectively applied federal common-law rule formulation. The court did not apply extant law, but rather, applied a rule fashioned for the particular case and its peculiar circumstances. This ruling is an example of how the common-law choice-of-law analysis can lead the court to apply the common-law rule formulation approach.

3. Considerations in Applying Federal Common Law

Several factors should be taken into account in applying federal common law—whether the approach is one of rule formulation or choice-of-law. For example, the courts should strive to avoid interference with the executive's control over and conduct of foreign affairs. In *Tel-Oren*, this factor led Judge Bork to conclude that the court should not infer a cause of action for injuries attributable to terrorist acts of a non-state party.

Another factor to consider in applying federal common law is the importance of protecting the rights of individuals under in-

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79 Filartiga, 577 F. Supp. at 864.

80 Id. at 865.

81 See Baker v. Carr, 369 U.S. 186, 211-14 (1962) (discussion of the political question doctrine as it is applied where there is a need to defer to the executive's foreign policy expertise); Manning Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3d Cir. 1979) (the focus of the act of state doctrine is the protection of the executive's conduct of foreign policy).

82 726 F.2d 774, 804 (D.C. Cir. 1984). Judge Bork based his conclusion on an interpretation of the Alien Tort Statute from which he would have concluded that there was no jurisdiction because there was no private right of action. According to this reasoning, the plaintiffs could have sued an actor capable of violating international law in state court. The state court could still find that a cause of action exists and provide a remedy.
ternational law. On remand in Filartiga, the district court exercised its common-law powers “to give effect to the manifest objective of the international prohibition against torture.” The court further observed that “the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages.”

The expectations of the parties should also be taken into account. This is particularly true where the allegedly tortious conduct is legal under the municipal law of the state where it occurred. In addition, the interests of the foreign state or states, or the United States should be considered carefully. Of particular importance is the degree of codification or consensus as to the rule of international law that has allegedly been violated.

Another factor of considerable importance in applying federal common law is the need for uniformity of decision. In Republic of Iraq v. First National City Bank, in opting for a federal common-law standard rather than a state law standard to determine whether to give effect to a foreign government’s decree of confiscation, the court stated:

> the exercise of discretion whether or not to respect a foreign act of state affecting property in the United States is closely tied to our foreign affairs, with consequent need for nationwide uniformity. It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice. It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other; any such diversity between states would needlessly complicate the handling of the foreign relations of the United States.

Surely the same reasoning applies in cases such as Filartiga and Tel-Oren which have implications on our relations with other states, particularly because the several U.S. states have little interest in applying their own laws.

**Conclusion**

Alien Tort Statute cases implicate federal interests to such an extent that federal common law should govern the rights and

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83 Filartiga, 577 F. Supp. at 865.
84 Id. at 864.
85 353 F.2d 47 (2d Cir. 1965) (citations omitted).
86 Id. at 50.
obligations of the parties. Accordingly, federal common law is the ingredient that assures the constitutionality of the Alien Tort Statute under Article III. In applying federal common law in such cases, federal courts may formulate rules of law based on a variety of federal and state law sources, or they may conduct a choice-of-law analysis to govern the merits of the cases. In this manner, federal courts will be able to protect the federal interests that arise in Alien Tort Statute cases.