

2012

## Remarks: Some Functions of Alien Tort Statute Litigation

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### Recommended Citation

Chimène Keitner, *Remarks: Some Functions of Alien Tort Statute Litigation*, 43 *Geo. J. Int'l L.* 1015 (2012).

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**Source:** Georgetown Journal of International Law

**Citation:** 43 GEO. J. INT'L L. 1015 (2012).

**Title:** *Remarks: Some Functions of Alien Tort Statute Litigation*

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## SOME FUNCTIONS OF ALIEN TORT STATUTE LITIGATION

CHIMÈNE I. KEITNER\*

The panel on “Trade, Investment, and Other Implications of ATS Litigation,” part of the *Georgetown Journal of International Law’s* 2012 Symposium on Corporate Responsibility and the Alien Tort Statute, invites us to take a broader perspective on transnational human rights litigation and to consider some of the policy implications of these cases.

I would like to suggest five functions that Alien Tort Statute (ATS)<sup>1</sup> litigation may perform, which can also be thought of as five gaps that ATS litigation can help to fill. Although the ATS is certainly not the only possible way to fill these gaps, it is worth considering the ways in which excessively restricting ATS suits against corporate defendants might impede the performance of these functions.

First, it is generally agreed that in 1789 the ATS was enacted to fill a *remedial gap*. In particular, although the new Constitution provided a federal forum for suits affecting ambassadors, there were other cases with potential foreign relations implications that could only be heard in state courts. The ATS provided a federal forum for aliens injured by violations of the law of nations. This carried both symbolic and practical value. It had symbolic value because it showed that the United States was a credible international actor not beholden to its constituent parts. It had practical value because federal courts were thought to be more hospitable to claims brought by aliens. John Bellinger and others have suggested that it would be highly ironic if a statute that was originally intended to appease other countries by providing a federal forum for injured aliens was interpreted in a way that could potentially irritate other countries. Yet it would be equally ironic if a statute that was originally intended to provide a federal forum was interpreted in a way that forced claimants to seek recourse in state court instead.

Second, the *Filártiga*<sup>2</sup> line of cases against natural persons dating from the early 1980s evolved to fill a *moral leadership gap*. The U.S. brief in *Filártiga* emphasized the condemnation of torture and the moral leadership of the United States on this issue. The brief indicated that

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1. 28 U.S.C. § 1350 (2006).

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

[B]efore entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.<sup>3</sup>

The *Filártiga* brief took the view that the United States' role as a moral leader in the international community was consistent with, and reinforced by, its provision of a federal forum for adjudicating certain human rights violations.

Third, the *Filártiga* line of cases also filled an *individual accountability gap*. The idea that the United States should not provide a safe haven for torturers and persecutors, which is also reflected in U.S. immigration laws, animated the Second Circuit's interpretation of the ATS as reaching torture and extrajudicial killings occurring in Paraguay. By filling this accountability gap, the ATS provided a tool to survivors of human rights abuses who encountered their former abusers on the streets of U.S. cities.

Fourth, starting in the mid-1990s, the *Unocal*<sup>4</sup> line of cases against corporate defendants and other legal persons and entities helped to fill a *distributive justice gap*. By asking the question "who benefits from a particular international law violation?," ATS cases against corporate defendants can serve the function of redistributing the profits of abuses from those who committed or facilitated such abuses to their victims. Basic principles of unjust enrichment also animate this line of cases.

Fifth, the *Unocal* line of cases also addresses a *governance gap* by articulating applicable standards of conduct and deterring corporations from engaging in unlawful conduct, including knowingly providing substantial assistance to human rights violators (which I have argued elsewhere is the applicable international law standard for aiding and abetting liability).<sup>5</sup> Even if a particular individual within an

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3. Memorandum for the United States as Amicus Curiae at 22-23, *Filártiga*, 630 F.2d 876 (No. 79-6090).

4. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

5. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008), available at [https://www.uchastings.edu/hlj/Archive/vol60/Keitner\\_60-HLJ-61.pdf](https://www.uchastings.edu/hlj/Archive/vol60/Keitner_60-HLJ-61.pdf).

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organization does not himself or herself know that a particular harm will result from his or her actions, the aggregate behavior of individuals through the corporate form may have a harmful effect that cannot be deterred effectively without permitting liability to attach to the corporation as a whole. Stated broadly, it might be that corporate liability is necessary in order to regulate corporate behavior.

The five gaps identified above—remedial, moral leadership, individual accountability, distributive justice, and governance—are filled only imperfectly by ATS litigation, and could be filled in other ways. Furthermore, performing these five functions may be subordinated in appropriate circumstances to other competing values. That said, it is important to consider these five functions in any overall assessment of the current liability regime. Particularly in the United States, there is a long-standing tradition of tort liability as a complement to, and even a substitute for, government regulation. Although no court exercises unlimited jurisdiction, the increasingly transborder nature of business relationships and other forms of human interaction means that a strictly territorial model of enforcement will necessarily fall short as a regulatory model.

During the *Georgetown Journal of International Law's* 2012 Symposium, there was a general call for greater clarity in the international law standards applicable to natural persons who act individually and collectively on behalf of corporations, and to corporations themselves, whose impact on human well-being can equal or even exceed the impact of states. That call should not go unheeded. However, the possibility of corporate ATS liability should not be eliminated for the sake of clarity alone. The goal should be to tailor the liability regime to achieve the most socially desirable results—a goal that will take time, careful thought, and possibly further Congressional action to achieve.<sup>6</sup>

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6. For perspectives on how to define and achieve this goal, see Alan O. Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 *GEO. L.J.* 2161 (2012), and Chimène I. Keitner, *Optimizing Liability for Extraterritorial Torts: A Response to Professor Sykes*, 100 *GEO. L.J.* 2211 (2012).

