Multinational Corporate Liability under the Alien Tort Claims Act: Some Structural Concerns

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BY MICHAEL D. RAMSEY*

As a general proposition, courts should apply duly enacted statutes to cases brought before them, even where the facts of those cases lie far beyond the drafters' contemplations and the resolution of a case may lead the court into difficult and controversial exercises of judgment. Nonetheless, I argue below that courts should be hesitant in adopting an expansive view of multinational corporate liability under the Alien Tort Claims Act (ATCA), as they have been invited to do in recent cases. ATCA litigation in this context often amounts to U.S. courts making foreign policy on the basis of very thin statutory authorization, and pressing that role upon the courts is in substantial tension with conventional wisdom in at least three other aspects of U.S. law. This is particularly troublesome because, as I argue below, the conventional wisdom in these other areas is accepted, and indeed in some cases necessarily embraced by, advocates of an expansive ATCA. As a result, the argument for expansive application of the ATCA in this area rests upon problematic foundations.

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1. See Michael D. Ramsey, Escaping "International Comity," 83 IOWA L. REV. 893 (1998) (criticizing the doctrine of international comity on this ground) [hereinafter International Comity]; see also W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.").


I. Judicial Stretches Required to Accommodate Corporate ATCA Claims

I begin with the proposition that corporate liability under the ATCA requires a series of judicial stretches. Consider one of the leading corporate ATCA cases currently in litigation, Wiwa v. Royal Dutch Petroleum Co. That case involves a suit by Nigerian citizens against various related British and Dutch companies for injuries and deaths suffered at the hands of the Nigerian government in Nigeria; the corporations purportedly knew of and benefited from the Nigerian government's actions against the plaintiffs and the plaintiffs' decedents, although they had not participated directly. To bring this case within the purview of U.S. courts, a number of aggressive judicial moves are required. I will give a few quick examples, although others are available.

First, one must say that the relevant statute, the ATCA, encompasses such a claim. The ATCA is a brief and generally worded law, stating that "[t]he 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 . . ." There is not much agreement on the scope of the statute. Passed in 1789 in the original judiciary act, it was applied only rarely until 1980, and not applied against corporate defendants for almost another twenty years. The original point of the statute has been much debated, but in any event it seems quite

4. I do not mean to suggest that it is only corporate ATCA claims that raise troubling questions. Some non-corporate claims, especially those involving neither U.S. parties nor acts occurring in the United States, are similarly problematic. But as I illustrate below, corporate claims carry some additional difficulties.

5. Wiwa, 226 F.3d at 92-94.
6. Id.
11. See supra note 8.
clear that its drafters did not have in mind suits against foreign corporations for acts occurring outside the United States.

Second, one must say that the ATCA provides a cause of action as well as conveying jurisdiction. This is a little problematic, as the cause of action requirement did not enter U.S. jurisprudence until the mid-nineteenth century, after the ATCA was passed. It is much debated whether this series of events means that a cause of action should or should not be engrafted onto the ATCA.12

Third, one must say that the ATCA's grant of federal jurisdiction is constitutional. Article III of the Constitution does not provide jurisdiction over suits between aliens,13 so the only way alien-against-alien ATCA suits such as Wiwa could be constitutional is if a federal question is involved.14 It is argued that because international law "is part of our law," in the famous phrase of a number of court opinions, international law is incorporated into federal common law and thus the ATCA cases are in fact premised upon federal common law.15 But the international-law-as-federal-common-law proposition is itself heatedly contested16 and seems in substantial tension with several


13. U.S. CONST. art. III.


older decisions of the Supreme Court.\textsuperscript{17}

Fourth, one must find a way around the "act of state" doctrine, the long-standing common law rule that courts of one country "will not sit in judgment upon the acts of another done within its own territory."\textsuperscript{18} As a general matter, that rule applies in cases between two private litigants, where one party asserts as part of its case that a foreign government has acted wrongfully.\textsuperscript{19} Given an ordinary reading, the act of state rule would thus seem to preclude cases such as \textit{Wiwa}, for the plaintiffs' case there depends upon a showing that the Nigerian government acted wrongfully within Nigeria.

Fifth, one must establish that international law in fact provides for corporate liability for international crimes committed by a government, where the corporation may have known of and/or benefited from these crimes but did not directly participate in them. That is a debated proposition of international law for which there is relatively little precedent in the customary practices of nations.\textsuperscript{20}

I do not argue here that all, or indeed any, of these matters provide a conclusive rejection of ATCA litigation, and indeed in other contexts I have suggested that some of them have been interpreted too broadly.\textsuperscript{21} However, the sheer number of controverted points upon which corporate ATCA litigation rests may suggest that expansive application of ATCA liability is a project requiring much judicial sympathy for its success.

\section*{II. Foreign Policy and the Expansive View of ATCA Litigation}

The second part of my claim is that corporate ATCA litigation is likely to involve the courts in substantial questions of foreign policy.

\begin{itemize}
\item \textsuperscript{17} \textit{See} Ker v. Illinois, 119 U.S. 436, 444 (1886); City of San Francisco v. Scott, 111 U.S. 768, 769 (1884); N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87 (1875).
\item \textsuperscript{19} \textit{See}, e.g., Oetjen v. Central Leather Co., 246 U.S. 297 (1918). The act of state doctrine also applies in suits directly against a foreign sovereign or its agents, \textit{see} Underhill, 168 U.S. at 252, although foreign sovereign immunity makes such an application less likely, at least outside commercial contexts.
\end{itemize}
It has been easy to understate the foreign affairs challenges encompassed by ATCA litigation because to date most high-profile ATCA cases have involved either low-profile incidents in minor countries,\(^\text{22}\) or outcomes that were not seriously contested by either the world community or the political branches of the U.S. government.\(^\text{23}\) The Wiwa case, and a few others recently filed, may be the beginning of cases that edge more evidently into foreign policy conflict.\(^\text{24}\) But it is easy to imagine cases of higher profile and greater controversy. Consider three examples:

1) A claim against Israel for violation of the alleged international right of displaced Palestinian refugees to return to their homes in Israel,\(^\text{25}\) brought while the existence or non-existence of that right is a critical bargaining point in the Mideast peace talks, and while the United States is attempting to use its special relationship with Israel to achieve a delicate diplomatic resolution of those talks;

2) A claim against Britain for violation of an alleged international rule against imperialism and colonialism, premised upon Britain's occupation of Northern Ireland, brought in the context of the close United States-Britain partnership in both economic and diplomatic matters;

3) A claim against China for various alleged abuses of international human or environmental rights connected with Chinese industrial development, brought at a time when the U.S. government has settled upon a policy of encouraging China's rapid modernization and economic development through the promotion of U.S. investment in China.

Further, to the extent corporate liability may be premised upon knowledge of or benefit from the wrongful activities of foreign


\(^{23}\) E.g., In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).


governments, it is easy to see how all of these hypotheticals could become real cases of corporate ATCA liability in U.S. courts. Indeed, corporate liability greatly expands the practical sweep of ATCA litigation, as it is less likely to be limited by practical questions of personal jurisdiction: multinational corporations are more likely to be "present" in the United States for personal jurisdiction purposes than are individual perpetrators.

III. Factors Counseling Against Court-Driven Foreign Policy

As set forth above, I think it fair to describe expansive ATCA litigation, especially as applied to multinational corporations, as involving a series of judicial stretches to produce a legal regime in which courts would become deeply involved in U.S. foreign policy.\(^{26}\) That alone is not reason to reject ATCA litigation, for as I and others have argued, simply because a case raises foreign policy issues is not necessarily grounds for a court to refuse to decide it.\(^{27}\) However, at least three strands of U.S. law strongly counsel caution in this area: the policy underlying the Supreme Court's view of the act of state doctrine, as reflected in its decision in *Banco Nacional de Cuba v. Sabbatino*;\(^ {28}\) the concerns about jurisdiction over extraterritorial disputes, as reflected for example in the recent controversy over the Helms-Burton legislation;\(^ {29}\) and the concerns over foreign policy made at the state and local level, as reflected for example in the recent attempts by the state of Massachusetts, among others, to impose sanctions on companies doing business in Burma.\(^ {30}\)

Particularly problematic for an expansive view of the ATCA is the fact that many of the ATCA's leading defenders have endorsed the conventional view in each of these areas. Leading ATCA defenders do not, for example, quarrel with the *Sabbatino* case; to the contrary, they rely upon its implications to justify federal jurisdiction


Leading ATCA defenders have expressed reservations about state and local foreign policy activity; and leading ATCA defenders, together with most of the international law community, joined in expressing concerns about the extraterritorial overreaching of the Helms-Burton legislation. Yet, in each case the underlying policy is difficult to square with an expansive view of the ATCA.

A. The Problem of Sabbatino

Consider Sabbatino first. That case involved a claim that the government of Cuba had wrongfully expropriated certain property, and thus that Banco Nacional’s attempt, on behalf of Cuba, to collect money owed on account of the sale of that property, should not be permitted. The Court held this argument barred by the act of state doctrine, because the argument would entail the Court passing judgment upon Cuba’s act of expropriation. In so doing, the Court strongly rested its decision upon the view that foreign policy was best left to the political branches of government, and indeed that this attitude of judicial restraint, while not mandated by the Constitution, had “constitutional underpinnings” in the idea of separation of powers.

As discussed above, Sabbatino’s specific holding as to the act of state doctrine is problematic for ATCA litigation, because most ATCA litigation—like Sabbatino—involves a judgment as to the wrongfulness of a foreign governmental act. Accordingly,

31. Infra Part III.A.
32. Infra Part III.C.
33. Infra Part III.B.
34. Sabbatino, 376 U.S. at 421-25.
35. Id. at 423-25. The Court further stated:
   The act of state doctrine ... arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.
   Id.; see also LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 137-40 (2d ed. 1996) (discussing foreign affairs concerns in Sabbatino) [hereinafter HENKIN, FOREIGN AFFAIRS].

36. The Wiwa case, for example, turns upon holding the acts of the Nigerian
proponents of ATCA litigation have generally called for a narrow view of *Sabbatino*, arguing for a series of exceptions and qualifications that would largely confine *Sabbatino* to its facts.\(^{37}\) However, if the policy motivations of *Sabbatino* are to be taken seriously, *Sabbatino* is not so easily limited, for it should be apparent that much ATCA litigation may involve courts in the troublesome areas of foreign policy that *Sabbatino* said courts should try to avoid.\(^{38}\)

ATCA proponents might be on stronger ground here if they took the position that *Sabbatino* was a fundamentally misguided opinion.\(^{39}\) But in an ironic twist, ATCA proponents rely on *Sabbatino* to support one of the crucial elements of the ATCA. *Sabbatino* applied the act of state doctrine as a matter of federal common law, binding upon the states and presumably a sufficient basis for federal jurisdiction.\(^{40}\) It is therefore the critical case—and indeed the only Supreme Court case—endorsing the power of the federal courts to make federal common law in foreign affairs.\(^{41}\) As discussed above, the power of the federal courts to make federal common law in foreign affairs is critical to the constitutionality of the ATCA, for this is how alien-against-alien ATCA claims become a federal question.

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\(^{37}\) Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that a Paraguayan policeman's torture of a political detainee, although done under color of official authority, was not an act of state because it had not been specifically authorized by the government); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (holding that *Sabbatino* did not extend to violations of clearly established international law, based on *Sabbatino*'s statement that it was considering the scope of the act of state doctrine only "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles") (quoting *Sabbatino*, 376 U.S. at 428).

\(^{38}\) The Supreme Court has specifically said that *Sabbatino* cannot be read as authorizing judicial nondecision in cases involving foreign affairs even where an act of state is not challenged, and thus has rejected the broadest reading of *Sabbatino*. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990). But it seems peculiar to read *Sabbatino* not to apply to matters that are undoubtedly acts of state (as conventionally defined) and which plainly implicate its underlying policy.


\(^{40}\) *Sabbatino*, 376 U.S. at 378 ("[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and functions of the Judiciary and the national Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."); Henkin, *Foreign Affairs*, supra note 35, at 138-41.

\(^{41}\) See Henkin, *International Law*, supra note 15 (relying on *Sabbatino* to support federal jurisdiction over international human rights cases); Bradley & Goldsmith, *Customary International Law*, supra note 16 (discussing the importance of *Sabbatino* to international human rights litigation).
subject to federal jurisdiction under Article III of the Constitution. As a result, *Sabbatino* plays a central role in the case for an expansive ATCA.

It strikes me that this places ATCA proponents on uncomfortable ground. On one hand, they must argue for the fundamental validity of *Sabbatino*, else the jurisdictional ground for alien-against-alien ATCA cases is called seriously into question. On the other hand they must read *Sabbatino* narrowly in terms of its application, else it would bar adjudication of most ATCA cases on act of state grounds. But the narrow reading does violence to *Sabbatino*’s motivating policy—namely, to limit court involvement in foreign affairs. And indeed, ATCA proponents must reject that entire policy, not only to defend a restrictive reading of *Sabbatino*, but because that policy would call into question the entire ATCA enterprise. Yet that policy—the limitation of court involvement in foreign affairs—is what justified the *Sabbatino* Court making federal common law in the first place.

Proponents of ATCA litigation cannot have it both ways. Either *Sabbatino* is right, and concerns over judicial involvement with foreign affairs justify the creation of a federal common law of foreign affairs (in which case caution is appropriate in ATCA cases); or else *Sabbatino* is wrong, and court-driven foreign policy is unproblematic (in which case the jurisdictional basis of the ATCA is that much more doubtful). My own position is intermediate. I find it problematic for courts to refuse to decide cases properly before them, simply because they fear foreign policy implications. Therefore, to the extent *Sabbatino* purported to find a rule of law that required judicial abstention, I find it troublesome, and I would reject subsequent lower court cases that extended *Sabbatino* to allow (or require) judicial abstention wherever foreign policy concerns are raised.45 On the

42. *Supra* Part I.


other hand, I think the Sabbatino Court was correct that courts should be wary of involving themselves in foreign affairs controversies, and in cases of ambiguity they should not stretch statutes to authorize such activity.\textsuperscript{46}

**B. The Problem of Extraterritoriality and Helms-Burton**

A second difficulty for an expansive view of the ATCA is the international community's general concern over extraterritorial legislation. In many (though not all) cases, the expansive view of the ATCA would extend its reach to acts occurring entirely outside the United States, and often to claims—such as Wiwa—that involve no U.S. parties.\textsuperscript{47} In other contexts, the United States' purported assertion of legislative jurisdiction over events having no connection to it is viewed with doctrinal suspicion and political outrage. Yet in the ATCA context the doctrine is ignored and the outrage is not forthcoming, without explanation.

As to the doctrine, the first aspect of the problem arises from cases exemplified by the Supreme Court's decision in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (ARAMCO)*, which states that acts of Congress will not be read to have extraterritorial effect unless Congress manifests a contrary intent.\textsuperscript{48} The basis, the Court has said, is that Congress is ordinarily concerned with matters occurring within the United States,\textsuperscript{49} so even

\textsuperscript{46} Ramsey, *International Comity*, supra note 1 (describing the act of state doctrine, as applied to federal law, as a rule of interpretation limiting the scope of ambiguous or generally worded statutes). Thus I think it perfectly appropriate for courts to apply statutes such as the Torture Victim Protection Act, which contains a clear directive by Congress for courts to take up foreign affairs matters. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992). By contrast, I find the stretches necessary for much ATCA litigation to be problematic, for the reasons stated in *Sabbatino*.

\textsuperscript{47} Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92-94 (2d Cir. 2000). This would also include, for example, the *Filartiga, Kadic*, and *Marcos* litigations.

\textsuperscript{48} Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (ARAMCO), 499 U.S. 244 (1991); see also Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (noting "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"); Blackmer v. United States, 284 U.S. 421, 436 (1932) (same); United States v. Bowman, 260 U.S. 94, 98 (1922) (stating that if laws are to apply "outside of the strict territorial jurisdiction [of the United States], it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard").

\textsuperscript{49} Foley, 336 U.S. at 285 (noting rule "based on the assumption that Congress is primarily concerned with domestic conditions"); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 117-18 (1998)
though Congress typically legislates in general terms ("‘x’ shall be prohibited"), such general terms should not be construed to apply to the entire world (as "‘x’ shall be prohibited everywhere on the planet") but rather should be construed to apply only territorially (as "‘x’ shall be prohibited within the territory of the United States").

Applied to the ATCA, this rule would seem to present difficulties for an expansive view. The ATCA is, like the statute in ARAMCO and similar cases, generally worded, with nothing in its language suggesting an intent for it to apply to acts occurring overseas. Further, the enacting Congress plainly had concern over violations of the law of nations occurring in the United States. During the period of the Articles of Confederation immediately preceding passage of the ATCA, substantial concern was raised about the U.S. government’s inability to police against violations of the law of nations occurring in the United States (including, for example, unwarranted seizures of foreign ships and assaults on diplomatic personnel). In contrast, there is no record of concern about enforcement of the law of nations abroad in the time leading up to passage of the act. Applying the ARAMCO presumption would seem to suggest a territorial limitation to ATCA claims.

Even if one were inclined to reject the ARAMCO limitation, a


53. ARAMCO has been criticized by international scholars. See, e.g., Born, supra note 50, at 61-95. Further, it might be argued that the ATCA does not apply U.S. law abroad (the vice of ARAMCO), but merely authorizes U.S. courts to apply international law. As to the first point, the presumption is well-established in U.S. law, however unpopular it is with scholars. Dodge, Understanding the Presumption, supra note 49, at 87. The second point is subject to two objections. First, the
further doctrinal concern is the jurisdictional limit imposed by customary international law. In general, international practice recognizes the ability of nations to regulate with respect to acts occurring in or affecting their own territory, and with respect to extraterritorial acts of their own citizens. Beyond this, international practice accepts only limited exercises of a nation's jurisdiction. For example, there has long been recognized a category of "universal" crimes (such as piracy) over which all nations have jurisdiction, regardless of where they occur. But the offenses included within this category are limited to the most heinous acts that render the perpetrator an "enemy of all mankind"; they do not include all deviations from international law. Thus, it is a principle of international law that nations generally may not extend their laws to cover events in foreign countries not affecting their citizens or their territory, even where those events themselves violate international law.

Mechanics of ATCA claims essentially require one to view the ATCA as incorporating international law into U.S. law. Otherwise, it is difficult to see the constitutional basis of jurisdiction (which in most cases depends upon there being a federal question). See supra Part I. Further, depending on what one thinks of the cause of action requirement, it seems necessary to construe the Act to provide a cause of action, which is also a matter of U.S. law. Thus it is more accurate to say that ATCA courts apply U.S. law, although that law incorporates international law. Second, it is not clear why the ARAMCO presumption should be limited to U.S. law. The presumption rests upon the interpretive view that Congress is primarily concerned with acts occurring in the United States. That would be a basis for construing an act of Congress not to apply to events occurring outside the United States, even if the act in question directed courts to apply a law other than U.S. law.


55. Id. at 329-30; Rogers, supra note 52, at 50-53. See Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985).

56. Rogers, supra note 52, at 50-52. For example, an assault on a diplomat is a longstanding violation of international law. Republica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. Ct. Oyer & Terminer 1784) (punishing an assault upon a French diplomat in Philadelphia, a violation of international law). One would not contend, however, that a simple assault, such as committed by De Longchamps, was a universal crime rendering the perpetrator subject to the jurisdiction of every nation on earth.

57. Accordingly, in the De Longchamps case, a nation having no connection to the diplomatic assault would itself violate international law (the international law of jurisdiction) if it applied its law to De Longchamps, even though De Longchamps' act created a violation of international law. This objection is not circumvented by the claim that U.S. courts in ATCA litigation are applying international law rather than U.S. law. Cf. supra note 53. The point of so-called universal jurisdiction is that only the most extreme international law violations—and not others—are subject to jurisdiction in countries having no connection with the violation. Janis, supra note 54, at 329.
That limitation is doctrinally problematic for ATCA litigation because another interpretive presumption declares that acts of Congress will not be construed to violate customary international law, unless there is a manifest intent to do so. Accordingly, the ATCA should not be construed to extend the reach of U.S. law beyond international customary limits. This would not implicate all extraterritorial applications of the ATCA. It would not, for example, pose a problem for suits against U.S. corporations or suits premised upon acts subject to universal jurisdiction. But many ATCA claims would be rendered problematic. The Wiwa case, for example, does not involve U.S. defendants (or, for that matter, U.S. plaintiffs), and thus nationality could not be a basis for U.S. actions. Further, it does not seem that Wiwa involves an offense subject to universal jurisdiction. It may or may not be that the underlying offenses of the Nigerian government were universal crimes. Even if they were, the passive participation of the defendant corporation seems to fall short of making the corporation an "enemy of all mankind"—indeed, as mentioned above, there is some question as to whether it is even a violation of international law at all, much less a violation of the most heinous and universal variety.

More striking than the doctrinal issues, however, is the unrelenting hostility shown by the international academic community to U.S. assertions of extraterritorial jurisdiction in other contexts. Consider, for example, the response to the "Helms-Burton" legislation, enacted by the U.S. Congress in 1996. This law, among other things, provided a civil cause of action in U.S. courts against corporations that "trafficked" in property confiscated by the Cuban

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62. Id. at 91-93 (discussing crimes alleged).

government after the Castro revolution. Since the United States had long had an embargo on trade and investment in Cuba by U.S. companies, it was clear that the targets of this legislation were non-U.S. entities, and that liability was to be based on activities occurring entirely abroad.

Helms-Burton produced an explosion of criticism among the international community both in the United States and abroad. The principal argument deployed against it was that the United States was exercising jurisdiction upon matters that did not concern it—that is, upon acts done outside its territory by non-U.S. parties not subject to universal jurisdiction. To the contention that the U.S. was merely attempting to enforce an international norm against expropriation allegedly violated by the Cuban government, it was pointed out that not all violations of international law gave rise to extraterritorial jurisdiction—only “universal” crimes, which did not include expropriation.

This deeply-felt criticism of Helms-Burton is difficult to square with the international law community’s enthusiasm for an expansive

64. Officially, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, 110. Stat. 785, popularly called after its chief sponsors, Rep. Dan Burton and Sen. Jesse Helms [hereinafter Helms-Burton]. The civil liability portion of the act, Title III, contains a provision allowing the President to suspend the ability to bring suit based on trafficking in confiscated property, and the President has exercised this suspension, such that the liability provisions have never actually been in effect.


66. See Dodge, *Helms-Burton Act*, supra note 65, at 713 n.2 (listing sources); Cleveland, *supra* note 65, at 60-61 & nn.352, 353.


view of the ATCA. The claims presented in *Wiwa*, for example, seem to resemble closely the claims that would be permitted by Title III of Helms-Burton. In both cases the argument is that a corporation investing and operating in a foreign country knew of and benefited from violations of international law by that country.\(^7\) Indeed, it seems that the claims parallel to those authorized by Helms-Burton could, under an expansive view of the ATCA, be brought as ATCA claims.\(^7\) The only question, for an advocate of expansive ATCA claims, would be whether corporate complicity in the alleged violation by Cuba was itself an international law violation—which is precisely the international law question in *Wiwa*.

In short, it is difficult to explain the international law community’s enthusiasm for an expansive ATCA coupled with its distaste for Helms-Burton.\(^7\) Rather, the serious concerns expressed in reaction to the extraterritorial overreach of Helms-Burton should apply with equal force to an expansive reading of the ATCA.

\(^70\). Clagett, *Who Is Breaking International Law*, supra note 67, at 277 (describing Helms-Burton in this manner); *see also* Cleveland, *supra* note 65, at 64 (acknowledging the potential for this analogy but ultimately rejecting it without much explanation). The principal factual distinction would seem to be that in *Wiwa*, the corporation began operations in the country prior to the alleged violations whereas in the Helms-Burton pattern, the investor would have arrived on the scene after the alleged violation. It is not clear, however, that this makes *Wiwa* a better case for liability.

\(^71\). The principal difference is that the ATCA authorizes only claims by aliens, whereas Helms-Burton authorizes only claims by U.S. citizens. This is hardly a reason to prefer the ATCA as a basis for suit, since ATCA claims based on Cuban expropriations would have even less connection with the United States.

\(^72\). One would not wish to reach the conclusion that the difference turns on the type of injury asserted, that is, that the international law community is more sympathetic to claims by victims of crimes against persons than it is to claims of crimes against property.

Again, my own position is an intermediate one. While I think Helms-Burton did represent a jurisdictional overreach on the part of Congress, in terms of customary international law, that does not empower courts to disregard it. Yoo, *supra* note 65, at 757-58. The presumptions against extraterritoriality and violation of international law are merely presumptions, and are clearly overcome in this case. Accordingly, leaving aside potential constitutional objections, I would expect courts to apply the Helms-Burton legislation fully, if cases under it were to come before them. Ramsey, *International Comity*, *supra* note 1, at 906-31. On the other hand, I think it inappropriate for courts to go out of their way to create this sort of jurisdictional overreach, where Congress did not clearly intend it. *Cf.* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (Scalia, J., dissenting).
C. The Problem of State Foreign Policy

A third problem for advocates of an expansive ATCA is the idea that the United States must speak with "one voice" in foreign affairs. There is, for example, broad academic, political and judicial hostility to the participation of state and local jurisdictions in matters affecting U.S. foreign policy. There is, for example, broad academic, political and judicial hostility to the participation of state and local jurisdictions in matters affecting U.S. foreign policy. Recent legislation in Massachusetts, for example, imposed penalties upon companies doing business in Burma, in response to the poor human rights record of the Burmese military government. This and similar legislation are commonly thought to pose practical and perhaps constitutional problems, for permitting states and local jurisdictions to set themselves up as independent foreign policy centers could fatally undermine the authority of Congress and the President to establish the nation's foreign policy.

The debate on these matters is by no means one-sided, as a number of writers—including the present author—have argued that concerns over state and local foreign policy are overstated. Remarkably, however, leading advocates of an expanded view of the


76. See, e.g., Goldsmith, supra note 27; Michael D. Ramsey, The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism, 75 NOTRE DAME L. REV. 341 (1999) [hereinafter Power of the States in Foreign Affairs].
ATCA firmly take the position that foreign affairs are an exclusively national matter in which states cannot have a "voice."77

Yet the perceived difficulties with state foreign policy activity seem closely replicated in foreign policy activity by the federal courts under the ATCA. First, the two may often be directed toward similar ends. For example, concurrently with the Massachusetts Burma law, suits were brought under the ATCA against Burma and Unocal, a corporation with investments in Burma, for human rights violations.78 Whether Unocal and other companies with Burmese investments are deterred from operating in Burma due to Massachusetts' and other states' legislation or because of litigation costs imposed by the federal courts, the result is that investment in Burma is deterred in a way not anticipated or directed by Congress or the President.79

In addition, the practical arguments raised against state participation in foreign policy similarly apply to federal courts. The principal concerns are that states have narrow parochial interests; that they are unable to appreciate the implications of their actions on national foreign policy interests; that they lack the expertise, knowledge and geostrategic sophistication necessary to formulate foreign policy; and that their participation renders weak and inflexible the policies that may be formulated by Congress and the President.80 Yet essentially all of these points may be made with respect to federal courts. Courts, like local jurisdictions, lack the expertise, information and geostrategic experience needed to make foreign policy. Just as states are unable to look beyond local interests to see the "entire picture" of national foreign policy, courts have

77. Koh, supra note 43; Stephens, supra note 43; Neuman, supra note 43. In part, this relates again to the jurisdictional problem under the ATCA. As noted, the leading theory of federal jurisdiction in ATCA cases is that international law is incorporated into federal common law, thus creating a federal question in all ATCA cases. Henkin, International Law, supra note 15. The proposition that foreign affairs are uniquely national affairs supports the authority of federal courts to create federal common law in foreign affairs. Clark, supra note 73, at 1295-97. This in turn supports the power of the federal courts to incorporate international law into federal common law in ATCA cases. Koh, supra note 43; Stephens, supra note 43; Neuman, supra note 43.


79. Crosby, 530 U.S. 363 (emphasizing need for President to control Burma policy).

80. Spiro, supra note 75, at 123-34.
difficulty looking beyond the particular case before them to appreciate the full foreign policy context.  

Finally, court-driven foreign policy may weaken and constrain executive and congressional policy making. For example, the Supreme Court, in invalidating Massachusetts' Burma law, emphasized that foreign affairs often require a flexible, adaptable response: it may be appropriate to press sanctions at one point, and then quickly reverse course in response to perceived improvements in the disposition of the foreign government. The Court pointed out that Congress had, with respect to Burma, given the President the broad discretion needed to achieve such flexibility; but the presence of competing state regimes of foreign policy would undermine that goal, as the state policies could not change quickly and might run exactly counter to the President's position. All of this is true of courts as well: in the Unocal case, for example, the court could hardly allow or disallow the litigation on a flexible basis subject to on-going evaluation based on the attitudes of the executive branch and the Burmese government. Rather, the court's position—even more than Massachusetts's—required a single, inflexible disposition unresponsive to any evolution in the U.S.-Burma relationship.

Because I find the constitutional problems with state foreign policy to be overstated, I do not think the analogy between court-driven foreign policy and state-driven foreign policy is decisive against the ATCA. The analogy remains striking, however, for two reasons. First, as noted, many leading proponents of the ATCA and of the international law community in general are strong opponents of state foreign policy, and I think it fair to say that the weight of conventional wisdom rests with the metaphor of the "one voice" in foreign affairs. Yet those who accept this mantra when applied against the states will have great difficulty, I think, in explaining why parallel considerations do not apply against the ATCA. Second, while the role of the states in foreign policy may be debated, even the most committed defender of the states would not suggest that the states should act incautiously in pursuing foreign policy objectives. Rather, even if constitutionally authorized, states should proceed

81. Goldsmith, supra note 27, at 1643-63; Yoo, supra note 65, at 764-75.
82. Crosby, 530 U.S. 363.
83. Id.
84. Ramsey, Power of the States in Foreign Affairs, supra note 76, at 370-89; Ramsey, Myth of Extraconstitutional Foreign Affairs Power, supra note 51, at 441-42; see also Goldsmith, supra note 27, at 1663.
carefully, in full awareness of the very substantial institutional limitations upon their ability to act for good in foreign affairs. No less should be said of the federal courts.

**Conclusion**

In sum, these observations are intended as cautionary, rather than hostile, toward multinational corporate liability under the ATCA. They do not suggest outright abandonment of the enterprise. However, they do pose what I view as three difficult challenges for advocates of an expansive ATCA, namely: (1) to explain how such an enterprise is consistent with the underlying policy motivations of *Sabbatino*, that separation of powers concerns militate against court involvement in foreign affairs; (2) to explain how such an enterprise is consistent with the near-unanimous academic rejection of the Helms-Burton litigation, which appears to seek a remedy for property crimes similar to that which the expanded ATCA seeks for human rights abuses; and (3) to explain how such an enterprise is consistent with the suspicion of multicentered foreign policymaking by state and local governments, given that an expansive ATCA would devolve foreign policymaking authority upon a multiplicity of local district judges and appellate judges.85

In light of these difficult questions, it seems wise to proceed cautiously in expanding the ATCA to matters not obviously within its drafters’ contemplation.86 In particular, the foregoing concerns suggest three structural limitations on ATCA cases. First, in light of *Sabbatino*, courts should be particularly cautious in examining claims that challenge overt and official policies of foreign nations, as opposed to those involving essentially individual incidents.87 Second, in light of concerns about extraterritoriality, courts should be cautious about examining claims based on events having no connection to the

85. On the latter point, see Yoo, *supra* note 65, at 774 (noting that judicial policymaking in foreign affairs involves numerous largely independent decisions by largely autonomous individual judges).

86. Rogers, *supra* note 52, at 50-52 (arguing that the principal targets of the ATCA’s drafters were individual acts—such as assaults on diplomats—occurring in U.S. territory and for which the United States would be answerable under international law).

United States, particularly where neither the defendant nor the plaintiff are U.S. citizens. Third, in light of concerns over multifarious and conflicting foreign policies, courts should be cautious about accepting ATCA claims that implicate debatable questions of foreign policy, as opposed to those that involve matters of no great foreign policy impact. Put affirmatively, judges should be most receptive to ATCA claims that involve at their core individual rather than national transgressions, that involve persons and events with strong ties to the United States, and that involve ordinary rather than contentious theories of liability. To be sure, such caution may deprive the ATCA of much of its headline-grabbing potential, but it will also reduce much of its risk for foreign policy mischief.

88. Supra Part III.B. Compare Unocal Corp., 963 F. Supp. 880 (considering claim against U.S. corporation where some acts allegedly occurred in the United States) with Wiwa, 226 F.3d 88 (considering claim against non-U.S. corporations where all relevant acts occurred outside the United States).


90. I reiterate that the ultimate basis for judicial caution is the lack of a clear statutory mandate. In cases where the statutory mandate is clear, courts should proceed despite apparent foreign policy effects, for in such cases Congress has made the decision that the benefits of judicial involvement outweigh the disadvantages. See, e.g., Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (providing an explicit cause of action for victims of international state-sponsored torture). Under the ATCA, however, it is difficult to say that Congress has engaged in such a weighing. Thus, the problem with an expansive view of the ATCA is not that courts would transgress traditional concerns over separation of powers and extraterritoriality, but that they would do so without explicit legislative direction.