The Alien Tort Statute:
An Emerging Threat to National Security

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I. Summary

The American judicial system has been remarkably well insulated from the pressures of international law. Consequently, when federal judges try to apply international principles in domestic cases there are mistakes and collateral damage. This is a story of how some federal courts have taken the relatively obscure Alien Tort Statute (ATS), a 200-year-old law, and applied it in such a bizarre fashion that it threatens the overseas activities of most US companies. It also threatens US security operations, since the Department of Defense (DOD) relies heavily on contractors for essential combat support services in foreign theaters of operations. DOD also relies on foreign governments to wage coalition warfare or apprehend terrorists. Recent ATS decisions have the potential to interfere with the manufacture and use of new weapons systems and operational concepts, disrupt foreign training programs, and undermine good order and discipline if individual servicepersons become the objects of suit. This paper will focus on the foreign policy and national security implications of recent ATS rulings and how this weapon of judicial activism can be used to ambush DOD planners and contractors when the order is given to engage a foreign enemy.

II. The Alien Tort Statute

International Law and US Domestic Courts

After World War II, courts began to tie provisions of the US Constitution to international legal principles and to domestic law – within limits. Article VI of the Constitution states that treaties, like statutes and court decisions, are part of the law of the land. However, there is a strong countervailing principle that treaties are not "self-executing" and for that reason there are specific statutes in the US Code implementing the Chemical Weapons Convention, the Missile Technology Control Regime, the WTO and bilateral trade agreements like NAFTA, and various treaties regulating transport including the Chicago Convention (establishes the ICAO) and Safety of Life at Sea Convention (SOLAS). Treaties almost never create rights that are privately enforceable in court unless Congress passes legislation authorizing such use of the courts. Thus "when no right is explicitly stated, courts look to the treaty as a whole to determine whether it evidences an intent to provide a private right of action.[1]" In general, private causes of action are disfavored.

As to the elusive principle of "customary international law," the Constitution is silent -- except that Article I, §8, cl. 10, authorizes Congress to ''define and punish . . . Offences against the Law of Nations.'' Consequently, in the few early cases in which courts sought to apply principles of customary international law in domestic cases, the results were inconsistent. Against this backdrop of almost no specificity or precedent, federal district courts have further confused the intersection between US domestic law and customary international law in recent decisions under the ATS.

[1] Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (Concurring opinion of Judge Bork).

The ATS: Early History

Enacted as part of the First Judiciary Act in 1789, the Alien Tort Statute (ATS), 28 U.S.C. §1350, provides that:

> the district courts shall have original jurisdiction over any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of United States.

In the context of the Judiciary Act, the ATS did nothing more than to give jurisdiction to the new federal courts for tort actions by aliens for violations of international law.[2] Plaintiffs argue that the ATS has no jurisdictional or geographic limits because it complements the provision in Section 8, Article 1 that vests federal courts with "admiralty" jurisdiction to try felonies on the high seas. Given that activities on the high seas aboard US flag vessels are legally considered to occur on US territory, it is inappropriate to assume that the ATS was ever intended to capture conduct occurring outside of the United States. Nevertheless, most analysts of the ATS are of the view that the Statute was enacted as a relief valve to enable aliens present in the United States to avail themselves of the US courts to address "injustices" that might befall them in the US. At that time, denying justice to aliens residing abroad often led to wars of reprisals, and the Founding Fathers preferred to move disputes from the battlefield into the Federal courts.[3]

The statute lay dormant for nearly 200 years until 1981 when the Second Circuit Court of Appeals gave it new life in *Filartiga v. Pena-Irala.* A Paraguayan man (Filartiga) learned that the former Paraguayan official who had tortured his son to death in Paraguay was in the United States and he sought relief. Labeling torturers "enemies of all mankind" the Second Circuit held that the ATS allowed US courts to adjudicate suits concerning violations of human rights standards. Other jurisdictions have since questioned whether the forum was appropriate, or convenient (the torture occurred in Paraguay, involved only Paraguayan citizens, and had no other real US connection). In ruling, the court cited several "soft laws[4]" (UN General Assembly Resolutions including the Universal Declaration on Human Rights and the UN Declaration Against Torture) as the basis for its decision.

Filartiga was a watershed. It established a precedent in the US for activities abroad that may or may not have been expressly forbidden in a treaty to which the United States is party. Other courts have built on *Filartiga*, finding that the ATS creates a private right of action if[5] 1) an alien brings the suit to the US; 2) the claim alleges tortious injury and 3) the tort alleged violates the "law of nations" or a "treaty of the United States[6]."

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[2] D'Amato, A. *The Alien Tort Statute and the Founding of the Constitution*, 82 American Journal of International Law 62 (1988).
[3] *Ibid*.
[4] The Statute of the International Court of Justice, Article 38(I) (c) cites two "hard law" sources: decision by competent international tribunals and international conventions; "soft" sources are international custom and general principles of law recognized by civilized nations. UN General Assembly (UNGA) Resolutions adopted by a majority are not binding but can, depending on their degree of recognition, be strong evidence of customary practice. See, Brownlie, Ian, *Principles of Public International Law* 14, Oxford Press (1998).
[5] See, e.g., In re Estate of Ferdinand Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994), cert. denied, 513 US1126 (1995). Hereinafter Marcos. Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995) Hereinafter Karadzic.
[6] Karadzic, *supra* note 5 at 238, citing Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2nd Cir. 1987), *rev'd* on other grounds, 488 US428 (1989), Hereinafter Hess.

Expansion of Filartiga into Novel Areas

Many from the human rights community heralded *Filartiga* because it commits US courts to international human rights "standards" passed by the UN General Assembly and other bodies[7] and enforced by international tribunals like the European Court of Justice[8], the International Court of Justice, and the Inter-American Commission of Human Rights. Traditional US jurists argue that customary international law (CIL) is not a historic component of US jurisprudence. Others argue that CIL should not bind U.S courts because it is vague, evolving and may be in conflict with the U.S. Constitution or the rule-making powers of the Legislative and Executive Branches[9].

No matter; since *Filartiga,* suits in US courts have challenged political oppression in Ethiopia and the Philippines[10], genocide and war crimes in Bosnia,[11] violence by the Guatemalan military, and environmental crimes.[12] The ATS is indeed undergoing "significant expansion.[13]"

Filartiga and other factors led Congress to pass the Torture Victims Protection Act (TVPA) in 1992[14] to guide the courts and litigants. The TVPA creates a cause of action for US citizens and foreigners who were victims of torture or extra-judicial killings by state actors in foreign jurisdictions acting under the color of foreign law. Then in *Marcos*, the Ninth Circuit held that civil relief for human rights violations under the ATS must be based on international norms that are "specific, universal and obligatory.[15]" These principles were reaffirmed by the Second Circuit's 1995 *Karadzic* decision which said that, <u>except</u> for offenses such as genocide and war crimes, customary international law can be violated only by governments.

Congress amended the Foreign Sovereign Immunities Act (FSIA) in 1996[16] removing sovereign immunity from civil suits for state sponsors of terrorism, torture, extrajudicial killings, and certain acts of terrorism[17]. Thus Congress in two statutes, established rights of civil action to remedy particularly heinous human rights abuses by state actors so that perpetrators -- especially if they had financial assets in the United States -- could not escape civil justice in the United States.

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[7] The UNGA's 1948 Universal Declaration of Human Rights is the embodiment of human rights principles and the basis for the UN Charter, the 1975 UNGA "Torture Declaration", the 1950 European Convention on Human Rights, the Charter of the International Labor Organization, and in other instruments.

[8] Decisions of the European Court of Human Rights are binding on European states that are party to the Convention. Human rights litigation has been used by private litigants in Europe to protest conditions of employment, civil liberties, rights of travel and immigration, and other "social evils."

[9] In Fernandez v. Wilkinson, 505 F. Supp. 787, 195, 198 (D. Kan. 1980), the district court ordered the Immigration and Naturalization Service to release from a federal penitentiary a Cuban citizen awaiting deportation -- the court found that the detention was consistent with ''the United States Constitution [and] our statutory laws,'' -- yet ruled that it violated customary international law.

[10] Marcos, *supra* note 5 at 1474-75.

[11] Karadzic, *supra* note 5 at 232.

[12] http://www.earthrights.org/litigation/recentATScases.shtml

[13] Bradley, C. *The Costs of International Human Rights Litigation*, Chicago J of Intl Law 458 (Fall 2001). Hereinafter, Bradley.

[14] Torture Victim Protection Act of 1991, S. Rep. 102-249, 102d Cong. (Nov. 19, 1991).

[15] *Supra* note 5 at 1475-76. The plaintiffs were a large number of Philippine citizens claiming to have been arrested and tortured by the Marcos regime.

[16] 28 U.S.C. §1330, 1332, 1602-1611(1994 & Supp 1998)

[17] This is linked to a presidential finding. *See*, 22 C.F.R. §126.1(d).

Filartiga and later *Marcos* established a new legal trajectory, and launched cases against US companies for doing business in countries whose policies and actions on human rights or on labor and environmental standards fall short of our own[18]. ATS suits have been filed against US firms operating in: Colombia, Ecuador, Egypt, Guatemala, India, Indonesia, Myanmar (Burma), Nigeria, Peru, Saudi Arabia, South Africa, and Sudan. There will be others, probably relying on "vicarious" or "joint venture" liability theories to claim company responsibility for alleged sins of the host governments.

Unlike *Filartiga,* in which there was an actual connection between the litigants, NGOs and law firms are underwriting the current spate of suits on behalf of individuals who live abroad. Examples include *Wiwa v. Royal Dutch Petroleum Co*[19], (Nigerians vs a non-US corporation for alleged human rights abuses in Nigeria); *Flores v. Southern Peru Copper Corp*[20](Peruvians vs a US corporation, concerning pollution from mining and refinery operations in Peru); *Aguinda v. Texaco, Inc*[21] (Ecuadorians and Peruvians vs a US company for alleged violations of "customary international environmental law" in South America). Other groups are targeting more than 100 western multinational companies, including IBM, General Motors, Ford, and Westinghouse, that operated in South Africa during apartheid.

In September 2002 a Ninth Circuit Court of Appeals panel in *Doe v. Unocal*[22] held that Unocal (a third-generation subsidiary which is a minority investor in a pipeline in Myanmar) could stand trial for alleged forced labor and other human rights abuses by the Burmese military. The court opined that *Unocal's* investment facilitated the abuses and that Unocal "had reason to know" that human rights abuses would occur. A Ninth Circuit en banc hearing has been held and has accepted a Department of Justice *amicus* brief for dismissal.

In *Doe v. ExxonMobil*[23] the Federal District Court in the DC Circuit is considering whether (despite a State Department letter urging that the pending suit would interfere U.S.- Indonesian relations) to allow the suit to progress in the face of a number of procedural issues. The ultimate question at issue (assuming the court doesn't dismiss the action) is whether ExxonMobil can be held vicariously liable for human rights abuses by Indonesian Armed Forces (ABRI) in the breakaway Province of Aceh since ABRI personnel, under orders from their government, provided physical security for the operation of one of ExxonMobil subsidiary's facilities. Both cases are under review. Both cases are under review. The fact that they have not yet been dismissed raises concerns that courts will depart from prior rulings and find liability for tortious conduct which did not come close to the genocide standard in *Karadzic*.[24]

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[18] Thus far, litigants have had minimal success in suing US corporations for environmental "colonialism." In Beanal v. Freeport-McMoran, Inc, 969 F. Supp. 362, 383 (E.D. La. 1997, the Fifth Circuit Court refused to hold an American mining company liable for ecological damage in Irian Jaya, Indonesia because "ecological genocide" is not recognized as a violation of the "law of nations." The court refused to grant jurisdiction, but did find standing for the suit to be brought. With a different set of facts and a more liberal circuit, one can easily envision a different result.

[19] 2002 WL 319887 (S.D.N.Y Feb. 28, 2002)

[20] 2002 US Dist. LEXIS 13013 (S.D.N.Y. July 16, 2002)

[21] 142 F. Supp. 2d 534 (S.D.N.Y. 2001)

[22] On February 14, 2003 the Ninth Circuit granted rehearing *en banc*. *See*, John Doe I, et al. v. Unocal Corp., et al, Nos. 00-56603, 00-57197 (9th Cir. Feb 14, 2003).

[23] (D.D.C.) No. 01CV01357

[24] Karadzic, *supra*, note 5.

Business Concerns with ATS

The decision trend and the high probability that some pending case could further expand the ATS are raising concerns because overseas investment is an essential business strategy in a global economy. Businesses are vulnerable to these decisions because the courts applied standards which are: 1) vague and in a constant state of flux and 2) do not apply to foreign competitors that do not have a presence in the United State. Additionally, these suits are very difficult and costly to defend because all of the witnesses (and physical evidence) are in foreign countries, they undermine the ability of US companies to engage in constructive engagement, and have an unjustified negative impact on corporate reputations.

Even though ATS litigants have yet to use the statute to attack DOD operations abroad, the same issues which concern the international business community apply with equal force to DOD operations. DOD has almost no indigenous industrial production capacity and a shrinking logistics base. Today, DOD relies heavily on contractors to provide it the equipment, training, repair services, and technical assistance that it needs to deter or wage war.

DOD and other national security agencies should be equally concerned as multinational corporations because their primary operating environment is overseas -- the domain of the ATS. Like it or not, DOD is involved in many types of high-risk activities which may provide the factual predicate for suit to recover damages or for harassment purposes. DOD should also be concerned because it is more dependent than ever on the contractors that accompany them overseas and because the ATS can almost certainly be used as a jurisdictional tool to harass or injure contractor personnel and operations. Defense telecommunications are today almost totally reliant on commercial technology and also non-DOD networks.[25] The President has challenged all federal agencies to increase outsourcing and privatization to make government more "citizen based," and lower costs.[26] DOD civilian and military positions eliminated by outsourcing number in the hundreds of thousands – with more to come.[27] According to P.W. Singer of the Brookings Institution, "several hundred companies will send . . . contractors to war with Iraq -- about one civilian for every 10 military personnel." Contractors in Operation Iraqi Freedom numbered 10 times more than during the 1991 Persian Gulf War[28]." Since defense contractors are vulnerable to the same kinds of lawsuits as other companies, DOD, and its mission, could be severely impaired.

Activist lawyers outside the courtroom compare the Nuremburg Industrial Cases[29] to pending ATS cases, but they are vastly different. The Nuremberg Tribunals involved criminal prosecutions of individuals accused of war crimes and associated human rights violations. With

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[25] http://www.nytimes.com/2003/03/10/technology/10GEAR.html. "The military quit trying to develop anything significant in communications 20 years ago because it took too long and wasn't cheap" says Alan D. Campen, "a retired Air Force colonel who has written widely on the use of information technologies in armed conflicts."

[26] http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf . One study performed by the Center for Naval Analyses estimated that if the 13,000 separate functions within DOD competed with the private sector, savings on the order of $5.74 Billion would be realized.

[27] Air Force depot level maintenance by private sector companies has jumped from 36 to 50 per cent. Long-term contracts held by industry swelled from a total of $600 million five years ago to $1.1 billion last year. They are expected to hit $1.5 billion by 2004. http://www.afa.org/magazine/Jan2001/0101depot.html

[28] Bredemeir, K. *Support of USForces in Persian Gulf*, Washington Post, E1, March 3, 2003. See also, http://www.airpower.maxwell.af.mil/airchronicles/apj/apj00/fal00/castillo.htm

[29] 6 Trials of War Criminals Before the Nuremberg Military Tribunal under Control Council Law No. 10 (1952).

regard to the Nazi Regime's slave labor program, each of the individual's convicted was found to have willingly participated in that slave labor program, and most personally prospered from that participation. By contrast, many recent ATS cases attempt to hold corporations civilly liable for human rights violations, not because the corporations actively and willingly participated in human rights violations but because they engaged in business with foreign governments that are alleged to have committed such violations. There are multiple bases for criticizing *Unocal* and cases like it. Some of the recurrent themes include:

"Aiding and Abetting" and "Vicarious Liability" Theories: Too Wide a Net

Unocal's subsidiary was a minority investor in a pipeline project in Myanmar led by the French Company Total. While acknowledging that Total was beyond ATS jurisdiction, the Ninth Circuit panel said that Unocal "should have known" that the Burmese army security detail that was hired by Total would use improper labor practices vis-à-vis the local populace. Totally disregarding the different corporations involved, the Ninth Circuit panel held that the US parent could be held liable because its subsidiary's investment "aided and abetted" human rights abuses by the Burmese military. There was no evidence that the US parent company had direct knowledge either that the security detail had been hired, or of its activities. However, the precedent forced many multinational corporations to reassess their foreign direct investment because US corporations were now facing liability in federal court for the remote actions by host government officials. As a result of *Unocal,* senior management are now being advised that they need to consider:

- Reduced overseas investment. This would please activists, cede projects and markets to foreign companies beyond ATS reach; and damage US companies, developing nations' economies and US policies and interests); and

- Not invest in a foreign country until after a thorough investigation of its officials, customs, laws and institutions. Assuming that such investigations could be reliably conducted, most foreign officials and the Department of State would probably consider such a process to be offensive to sovereignty and potentially damaging to US foreign policy. These due diligence steps would not deter activists from continuing to harass corporations that do business with any regime(s) that they dislike.

ATS Threatens National Sovereignty – At Home and Abroad

ATS suits challenge the basic tenet of international law that sovereign governments are equal and that no nation will stand in judgment in a "municipal court setting" over another. Congress created a limited exception to this principle of sovereign equality in the FSIA[30] in 1976, allowing suits against nations engaged in a commercial activity that had effects in the United States[31] or if the state were responsible for a non-commercial tort in the United States.[32] Congress expanded the FSIA in 1996 to allow suits against select renegade states for extra-judicial killings and torture.[33] Complementing the FSIA is the judicially created Act of State Doctrine that in general

[30] 28 U.S.C. §1330 *et seq*.
[31] The best example, of course, is a state-run cruise or airline.
[32] Hess*, supra* note 6. Other exceptions to FSIA are not germane here (disputes over property or a claim to property expropriated). The intent of "torts occurring in the United States" was to preclude foreign states from claiming immunity for traffic accidents and other torts committed in the U.S.[32].
[33] *See* note 16 and accompanying text

requires courts to give due deference to the authorized act by a foreign sovereign within its own territory.[34]

Some US courts hold that the Act of State Doctrine is no defense in ATS suits alleging torture and summary execution because such abuses cannot be legitimate acts of a state, *Karadzic*[35] *a*nd senior state officials may be held personally accountable. Other courts rely on the Supreme Court decision in *Sabbatino* that the Act of State Doctrine will only apply if the foreign "legislation" conforms to international standards and was passed in the public interest. Needless to say, some nations regard this aspect of *Sabbatino* to be judicial imperialism because it allows US courts to sit in judgment of foreign legislation.

Lack of "containment" of ATS litigation – as in *Unocal* – places the Act of State doctrine in constant jeopardy.[36] Lowering the bar judicially will allow US courts to retry foreign disputes or legislation; applying US standards to new definitions of a company's role or responsibility (or power). At minimum, this course may create political turmoil as activists seek out a US company in a nation as an excuse to decide the "legitimacy" of that nation's laws[37]. More likely than not, it will invite retaliation from many other nations against US business.

A recent Justice Department *amicus* brief summarized those concerns*;*

> … although the ATS is somewhat of a historical relic today, that is no basis for transforming it into an untethered grant of authority to the courts to establish and enforce (through money damage actions) precepts of international law regarding disputes arising in foreign countries*[38]*.

Can US Courts be the World's Courts?

When President Bush signed the TVPA in 1992, he expressed concern about the danger:

> … that US courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill founded or politically motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery. Such potential abuse of this statute undoubtedly would give rise to serious frictions in international relations and would also be a waste of our own limited and already overburdened judicial resources.*[39]*

He was right. The ATS naturally challenges the traditional doctrine of *forum non conveniens* that allows a court to refuse to exercise jurisdiction over a controversy because another forum is better suited to decide the case. In *Wiwa v. Royal Dutch Petroleum Co[40],* for example, the Second Circuit held that a group of Nigerian citizens could sue a Dutch company in the US for human

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[34] The leading case is Banco Nacionale de Cuba v. Sabbatino, 376 U.S.C. 398 (1964)(hereinafter Sabbatino). In an ATS setting, the Act of State Doctrine could be asserted as a defense if it could be shown that the conduct, in question, was privileged under the laws in the jurisdiction where cause of action arose.
[35] Karadicz, *supra* note 5.
[36] Bradley, *supra,* note 13.
[37] This should be a special concern for those states that have judicial systems that incorporate Islamic Law (Syariah) into their everyday jurisprudence.
[38] Amicus Curiae Brief of the United States in Doe et. al. v. Unocal, Civil Action No. Nos. 00-56603, 00-56628. p.11. Hereinafter DOJ *Amicus.*
[39] 28 Weekly Comp. Pres. Doc. 465, March 16, 1992
[40] *Supra* note 19 at 88.

rights abuses -- without showing that courts in the Netherlands would not give the plaintiffs a fair hearing. US judges seem be following a principle that human rights cases "must be heard" no matter how remote the interest to the United States or the difficulties of trial.

This trend of finding jurisdiction over cases with remote connections to the United States draws into questions the issue of whether US courts are giving proper deference to foreign legal systems. Foreign plaintiffs claim that they will be subject to retaliation for pursuing legal avenues in their host country (as have hundreds of thousands of asylum claimants in the US) and US courts are tending to accept that assertion. There is already evidence that US court dockets are seeing an increased number of these cases, and almost every one presents enormous logistical and evidentiary reliability risks.

Rapid expansion of ATS litigation is also an insult to foreign legislatures, courts, and judges. In fact, US judicial intrusion into areas perceived by other governments as infringing on sovereignty can -- and has -- provoked strong negative reaction, including that of South African President Thabo Mbeki, who said of current US litigation: "We consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country and the observance of the perspective contained in our constitution of the promotion of national reconciliation."[41]

Moreover, developing countries may perceive these actions as unnecessarily raising the cost of foreign direct investment, a concern most recently raised in a July 15, 2003 letter from South African Minister of Justice and Constitutional Development Dr. Penuell M. Maduna to US District Court Judge John E. Sprizzo, urging the dismissal of US ATS litigation. Among other concerns, the letter stated: "Permitting this litigation to go forward will, in the government's view, discourage much-needed direct foreign investment in South Africa and thus delay the achievement of our central goals."[42]

Routinely Applying "Customary International Principles" in ATS Will Lead to Chaotic Outcomes

Customary international law (CIL) is technically "part" of US domestic law,[43] but most US judges and courts decide cases on the basis of statutes, The English common law, and modern case law. They view CIL as changeable and at times inconsistent with US laws and policies. For example, many international lawyers would argue that the death penalty and the use of nuclear weapons violate CIL but US laws/policies accept them. Moreover, the First Amendment to the US Constitution allows misguided individuals to make bigoted statements towards racial or ethnic groups. Such slurs would probably be regarded as illegal under CIL since most societies are much less tolerant of dissenting speech than the United States. These disparities will seriously complicate the choice of law duties facing judges that have to hear ATS cases and create fertile opportunities for error and disparate outcomes. The choice of law concern will be a tremendous burden on corporate compliance activities since there will inevitably be cases where the proper standard is not being applied. Finally, if US laws are applied in derogation of foreign law in a case involving foreign nationals, this creates a real risk (if the case is sufficiently publicized) that

[41] South African President Thabo Mbeki address to the South African Parliament, April 15, 2003.
[42] "Declaration" to Judge John E. Sprizzo, U.S. District Court for the Southern District of New York from South African Minister of Justice and Constitutional Development Dr. Penuell M. Maduna, July 15, 2003.
[43] The linchpin in this statement is Article 28 of the Statute of the International Court of Justice (ICJ) that recognizes the binding effect of customary international law. The ICJ Statute came into force for the United States at the same time as the UN Charter. 59 Stat. 1055; TS 993.

the government which was the site of the tortious activity will take offense at the notion that US federal judges cannot be bothered to apply their laws in suits involving their citizens. If US courts are perceived of not according "comity" to foreign courts and legislatures, one can image that foreign governments may become much less protective of rights of foreign investors.

As of yet, international law does not typically authorize individuals to bring actions in international or municipal tribunals. According to the US Supreme Court, the "usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.[44] Recent ATS cases turn this principle around. Further expansion of the *Unocal* decision raises constitutional issues for US companies whose private property is placed at risk for conduct not prohibited by US law subject only to changing interpretations in court.

The position of Department of Justice in *Unocal* reinforces this concern:

> While the United States unequivocally deplores and strongly condemns the anti-democratic policies and blatant human rights abuses of the Burmese (Myanmar) military government, it is the function of the political Branches, not the courts, to respond (as the US Government actively is) to bring about change in such situations. Although it may be tempting to open our courts to right every wrong all over the world, that function has not been assigned to the federal courts. When Congress wants the courts to play such a role, it enacts specific and carefully crafted rules, such as in the Torture Victim Protection Act of 1991 (TVPA) *citations omitted.*[45]

III. The Post 911 Security Environment

To understand the implications of the ATS on defense operations, consider the transformation of military operations from largely set-piece operations involving state actors and standing armies. Today, defense operations are complex undertakings conducted under the authority of the UN Security Council, or regional security organizations, involving non-state actors and unconventional forces. Recurrent themes in modern warfare involving US forces include:

Defense is a Collective Endeavor

For years, military readiness meant the capability to fight two simultaneous regional wars. Military planners had to demonstrate that US forces were properly positioned, with sufficient personnel, equipment, sea and airlift, and readiness to wage war on two separate fronts against conventional armies. September 11 changed all that; today's "National Security Strategy" declares that:

> New deadly challenges have emerged from rogue states and terrorists. None of these contemporary threats rival the sheer destructive power that was arrayed against us by the Soviet Union. However, the nature and motivations of these new adversaries, their determination to obtain destructive powers… and the greater likelihood that they will use

[44] Sabbatino, *supra* note 34 at 422-23.
[45] DOJ *Amicus supra* note 38 at 4.

> weapons of mass destruction against us, make today's security environment more complex and dangerous.[46]

To combat non-traditional threats by terrorists and non-state actors, military planners must ferret out an enemy that operates in the shadows and is able to blend into the civilian community. The National Security Strategy addresses the challenges that security specialists now face:

> The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time… Our priority will be first to disrupt and destroy terrorist organizations of global reach and attack their leadership; command, control, and communications; material support; and finances… While our focus is protecting America, we know that in order to defeat terrorism in today's globalized world we need support from our allies and friends.

A global approach involving cooperation between law enforcement and intelligence agencies, rather than military forces massed at borders, is being used to interdict terrorists who have committed past atrocities or are planning new ones. The capture of many al-Qaeda operatives, including World Trade Center mastermind Khalid Shaikh Mohammed, was due to cooperation between US and foreign intelligence and law enforcement personnel.[47] There are other successes:

- Over US$116MM in suspected terrorists assets were frozen in over 165 countries;[48]
- The Philippine Government[49] authorized US military forces to operate on its territory (Southern Philippines) to pursue the Abu Sayyaf terrorist group;
- Scores of arrests in Germany, Italy, Great Britain and Spain of Al Quaeda operatives;
- The US received permission from foreign governments under the Container Security Initiative (CSI) for US customs officials to be posted in over 20 foreign ports to oversee the documentation and loading of shipping containers destined for US ports.

Collective security is the cornerstone of the post WWII security architecture established in the UN Charter. While consensus could not be achieved for *Operation Iraqi Freedom,* UN and regional security organizations (NATO), have engaged with the US to meet international security challenges in numerous other expeditionary operations: Afghanistan, the Middle East (Iraq I), Africa, and the Balkans. Moreover, US diplomats have standing instructions to: "reject any suggestion that the United States is not committed to multilateral means of achieving policy

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[46] This document was formerly known as the "National Military Strategy" http://www.whitehouse.gov/nsc/nss.html. While the unclassified strategy document does not contain specific budgetary information, it is the "Capstone" document that is the basis for the Defense Planning Guidance and the "posture" positions of the Military Departments and the Joint Forces.

[47] The Pakistani government, for example, says it has handed over more than 420 al-Qaida and Taliban suspects to the US http://www.msnbc.com/news/879289.asp; http://www.nytimes.com/2003/03/02/international/asia/02STAN.html?th

[48] www.dos.gov.

[49] This authorization has been in effect since October 2001. An average of 650 military personnel has been involved in this operation. The actual number of participants has varied.

goals. To the contrary . . . our policies are profoundly multilateralist.[50]" Finally, public opinion polling since September 11th confirms that most Americans recognize there is a clear nexus between their personal safety/way of life and events abroad. Americans also believe that multilateral policies must be pursued -- including multilateral security policies.[51.]

Foreign Cooperation is an Essential Component in Peace and Coalition Warfare

The United States cannot successfully engage every military or terrorist force unilaterally. Military effectiveness depends on a number of important factors:

- Access to foreign territory for port visits, logistics and combat forces staging;
- Information from foreign intelligence or law enforcement agencies;
- International support to sustain (during a conflict) normal flows of trade, commerce, capital, and telecommunications, upon which DOD relies to sustain its operations;
- Political support/acquiescence to proposed actions domestically or internationally.

Military strength alone is not sufficient to successfully prosecute a war. The Viet Nam War is a classic example of where the collapse of political support for the war caused the military mission to fail. During the 1980s and 1990s Greenpeace's nuclear free seas campaign[52]involving direct action and litigation, was highly successful in disrupting US Navy operations and fomenting foreign political concerns about the safety and legitimacy of US Navy nuclear powered ships. This contributed to the loss of port access in New Zealand and new restrictions in other countries. In countries that continued to host US Navy ships, local officials often had to forcibly intervene and provide security for visiting Navy units because those units had become magnets for protest activities and now terrorist actions. Greenpeace also disrupted the security and safety of routine ship movements and Trident missile tests, and hopes now to prevent testing and deployment of a new sonar (SURTASS LFA) that has unique capabilities to detect quiet submarines of potential US adversaries. The result of these actions is vilification of US policies by the press in many communities around the world.

Groups like Greenpeace present one kind of "threat" to DOD and businesses around the world;[53] ATS litigation is another. A central criticism of the modern trend in ATS decisions is that courts are increasingly intrusive in areas involving sensitive foreign policy concerns. The Constitution assigns powers over foreign relations to the political branches (Congress and the President), not the judiciary. Indeed, it is up to Congress, not the courts to "define and punish…Offenses against the Law of Nations." US Const. Art II, sec 8, para. 10. When federal judges undertake to define

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[50] Statement of Stephen G. Rademaker, US Assistant Secretary of State for Arms Control to the Conference of Disarmament, Geneva, February 13, 2003

[51] Long-standing American support for multilateral approaches to deal with international problems has been reaffirmed and in some cases strengthened in the aftermath of 9-11. 61% of Americans said that the United States should work more closely with other countries, while 34% said it should act on its own more. In addition, large majorities favor participation in treaties and other agreements. Polling immediately prior to the 2003 War in Iraq also found that most Americans favored collective US action in Iraq. Only a small minority supported invading Iraq without some type of multilateral support. Center on Policy Attitudes and the Center for International and Security Studies at the Maryland School of Public Affairs. http://www.pipa.org

[52] Personal knowledge of author.

[53] See generally: http://www.greenpeace.org/homepage and links therein.

the scope of liability of international law violations in ATS cases, they are interfering with the power of Congress.

Joseph Nye, an Assistant Secretary of Defense in the Clinton Administration, argues[54] that anti-Americanism thrives on the perception that America doesn't care how the rest of the world feels about anything. Many European analysts say that "arrogance" was the reason two US embassies, the USS Cole, and the World Trade Center/Pentagon were attacked by al-Qaeda terrorists who are jealous of American wealth and might.[55]

US security policies and attitudes towards multinational treaty obligations are another major source of friction today between the US and its traditional allies. International lawyers, scholars, and diplomats openly criticize President Bush's new national security strategy of "preemptive action" as outlined at West Point on June 1, 2002.[56] US policies towards Israel are viewed as one-sided by an increasing number of western countries that have growing Muslim populations. Finally, there has been a significant diplomatic backlash from America's rejection of a number of treaties that had broad international support.[57]

The failure of the United States to assemble a politically significant coalition for *Operation Iraqi Freedom* is evidence that the US no longer enjoys the same level of pluralistic political support it once had.[58] Given this, will the new risks of ATS litigation make it more difficult for the US to get help from foreign officials if there is a concern that the individuals, or perhaps their government, will become defendants in ATS litigation in US courts? So long as federal judges are perceived to be free to dabble in the sensitive internal affairs of other nations and substitute their judgment for that of a foreign court or legislature, international cooperation will be jeopardized at some level.

IV. National Security Impacts of Case Law

Civil litigation trends do not normally concern national security officials because civil suits do not normally restrict US freedom of action in the defense arena. But US military forces today rely more than ever on: (a) private sector equipment and personnel; (b) a credible public image and support; and (c) political support from allies and foreign access. Here are five ATS litigation scenarios that undermine US security policies and the tactical execution of defense policies:

Litigation Scenarios

Case 1: **Negligent Injury Caused by Defective Weapons System.** It is reasonable to conjure civil suits against weapon's manufacturers for tortious deaths or injuries of foreign persons associated with US military operations overseas. The case would be based on injuries to, or deaths of foreign non-combatant persons from a combat system that malfunctions during combat,

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[54] Nye, Joseph. *The Paradox of American Power: Why the World's Only Superpower Can't Go It Alone*, Oxford University Press (2002).
[55] http://www.terrorismanswers.com/causes/power.html#Q6
[56] http://www.foreignpolicy.com/
[57] Europeans see US arrogance in recent US decisions to: (a) terminate the ABM Treaty over strong Russian objections; (b) reject the Kyoto Greenhouse Gas Protocol; (c) reject the Treaty of Rome establishing an International Criminal Court; (d) vote down the Comprehensive Test Ban Treaty; and (e) reject the Ottawa Landmines Treaty.
[58] Chicago Council on Foreign Relations, http://www.worldviews.org/key_findings/us_911_report.htm. (Survey of over 2800 US citizens conducted in late 2002).

or negligent design of the system. There are numerous situations in which this might occur ranging from the crash of aircraft due to equipment malfunction, bombing the wrong site because the coordinates were improperly programmed or because a fire control system failed to properly discriminate between a "hostile" that was hiding among a group of civilians.

Direct suits against the United States for such actions are barred by sovereign immunity because the US has only consented to suit[59] under the Federal Tort Claims Act (FTCA) [60] for torts arising in the US and for non-combatant/governmental activities. However, US consent to suit under the FTCA does not extend to independent contractors[61] unless the tort arises in the United States and the contractors were supervised to the extent that they became "statutory employees." Then, the US is substituted as the defendant.[62] No such body of case law exists under the ATS. Contractors can be considered "employees" of the US government under some status of forces agreements,[63] and perhaps under some foreign legal systems (so that they would be eligible for limited immunity), but the rules are not uniform.

Case 2: Human Rights Violation – Illegal Weapons. The manufacturer or foreign officials that use a weapon considered "illegal" under CIL are viable litigation targets. Foreign combatants are also potential plaintiffs for injuries or deaths at the hands of US service persons using illegal weapons. As noted above, other states consider weapons like cluster munitions, landmines, and other items in the US arsenal illegal under their interpretation of CIL. Plaintiffs would assert that any US decision to use such "illegal" weapons must be measured by general "international standards" established by such bodies as the International Committee of the Red Cross, Amnesty International, and the ICC and individuals associated with the use of such weapons would be subject to personal liability. Contractors involved in fielding these weapons could also be subject to the same risks of violating the customary laws of war and would probably not be able to utilize the immunities that ordinarily apply to the US government contractors.

Case 3: Human Rights Violation – Waging Illegal War. Business entities, US military or civilian employee or foreign government officials might be sued under ATS for violating international law for waging an illegal "offensive war" under the new International Criminal Code[64] (ICC). Waging illegal war might include the strategic decision to initiate hostilities or could cover "tactical" decisions to target certain areas(s) that result in collateral damage to civilians or their property. Waging illegal war could extend to the treatment of prisoners of war, detainees, or incidents arising during an occupation. Litigation might also be predicated on "negligently supervising" the prosecution of a war effort in which troops commit war crimes against civilians.

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[59] The US can entertain foreign claims under a variety of statutory procedures including the Military Claims Act, 10 U.S.C. §2733, the Foreign Claims Act, 10 U.S.C. §2734 and claims procedures established in Status of Forces Agreements. No right of suit exists under these statutes.

[60] Title 28, United States Code, §'s 2671-80.

[61] United States of America v. Broussard, 989 F.2d 171 (5th Cir. 1993).

[62] United States v. Orleans, 425 US807, 814 (1976)

[63] Contractors are not considered employees of the US Government under the NATO Status of Forces Agreement although there are special provisions in effect in the German Supplementary Agreement that entitle "technical representatives" supporting the U.S. military to be statutory employees.

[64] See generally: http://www.un.org/law/icc/. While the treaty entered into force on 1 July 2002, it is not likely that the Court will begin to hear cases for at least twelve months. President Bill Clinton unexpectedly authorized a US representative to sign the 1998 Rome Statute on December 31, 2000 although on May 6, 2002 the US "unsigned" the document. As of March 1, 2003, there are 139 signatories and 89 State Parties.

Direct suits against the US Government for the activities of its employees are probably barred by sovereign immunity;[65] however, there is no blanket immunity for individual servicepersons for conduct that causes tortious injury to foreign persons.[66] A direct suit against a foreign government would also be probably barred by the 1989 Supreme Court's decision in *Argentine Republic v. Hess,*[67] except for those limited waivers of foreign government immunity in the FSIA.[68] However, the recent judgment against the former Serbian leader Radovan Karadizic[69] indicates that while governments per se cannot be sued, heads of states can be held liable under the ATS for serious violations of international law. One might surmise that if a judgment were taken against a sitting foreign leader, or a high-ranking civilian or military official, then the foreign government might intervene in the suit and assert "Act of State" and other defenses. However, if such an appearance were made, it is quite possible that a presiding judge would disregard the traditional immunities that are accorded to foreign heads of state if the judge felt that the foreign leader had seriously departed from the expected norms of behavior.

If military personnel or support contractors were acting pursuant to a military mission authorized under international law[70] and by the US Congress, most courts would probably hold that the individuals are protected by "combatant privilege.[71]" But it is not difficult to envision a scenario in which a US government employee (or military person) is found tortiously liable for military or para-military activities[72] that are not explicitly sanctioned under international law or conducted outside of the War Powers Resolution.[73] The absence of a specific UNSC Resolution authorizing US combat operations in *Operation Iraqi Freedom* could still be exploited by enterprising

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[65] A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, see, *e.g.,* United States v. Nordic Village, Inc.*,* 503 U.S. 30, 33-34, 37 (1992), and will not be implied, Irwin v. Department of Veterans Affairs*,* 498 U.S. 89, 95 (1990).

[66] Government drivers and doctors have statutory immunities for conduct that causes injuries to persons in the US. See e.g., 10 U.S.C §1089 (immunities for military doctors). However, the judicially created immunity for individual US Government actors does not explicitly apply to the ATS. See generally, Barr v. Mateo, 360 U.S.C. 564 (1959). The seminal case in this area is Bivens v. Six Unknown Named Agents, 403 US 388 (1971). In that case, the US Supreme Court recognized that citizens have the right to bring suit against federal employees who deprive them of their constitutionally guaranteed rights. This case was seen by many as providing a potential way around the "sovereign immunity" enjoyed by federal agencies in some cases.

[67] Hess, *supra* note 6 at 428. In that case the Supreme Court held that the ATS did not vitiate state immunities under FSIA.

[68] See notes 16 and 17 *supra.*

[69] Karadzic, *supra* note 5.

[70] A clear case of "authority" would be combat operations pursuant to a UN Security Council Resolution. Another would be use(s) of force in self-defense in response to an armed attack. *See generally,* Art. 51, Charter of the United Nations.

[71] This is the law of war principle that allows uniformed military personnel to use deadly force to accomplish a military objective.

[72] The pending case Venancio A. Arias, et al. v. DynCorp et al, Civil Action No. 01-1908 (D.D.C 2002) is an excellent example of this litigation scenario. In DynCorp, Ecuadorian citizens sued DynCorp for its role in providing flight crews (presumably under contract to DOD or the DEA) that were responsible for spraying drug eradication herbicides that caused damage to crops and livestock. There is no explicit statutory shield for US government employees (civilian and military) except for government doctors and drivers who are sued in their personal capacity. This issue of personal liability of military commanders came to a head in the early 1990s when US commanders were advised to buy liability insurance because of a couple of suits holding US Army officials liable under the civil liability provisions under certain environmental statutes (CERCLA). See: http://milcom.jag.af.mil/ch14/liability.htm

[73] Public Law 93-148; 50 USC §1541-1548 (1973). The War Powers Resolution requires Congressional reporting if US forces are likely to come under hostile fire. Simply put, the President can commit US forces for up to 60 days. After that, Congress must pass a concurrent resolution authorizing military action.

plaintiffs in an ATS suit for injuries arising from an illegal war. The fact that Congress authorized the military action does not mean that war was necessarily legal under the "law of nations" or that the methods and means chosen by U.S. and British forces were universally accepted.

Case 4: Human Rights Violation – Liability for Providing Equipment or Other Assistance to a Foreign Government to Wage Illegal War or Otherwise Oppress Foreign Citizens.

The liability of a US corporation or US government officials for "aiding and abetting" a foreign government to violate the human rights of its citizens can be generally envisioned under the "joint venture" principles in *Unocal.*

A direct suit against the US Government for "illegal" foreign military sales to an irresponsible regime would likely be prohibited because there has been no waiver of sovereign immunity. Suits against a contractor for participating in sales of "defense articles and services" would also likely be barred by the FSIA or the Act of State Doctrine since the sales of defense articles and services on the US Munitions List is extensively regulated by the Arms Export Control Act,[74] the Foreign Assistance Act, and other regulations (ITAR[75]). Those regulations also establish that foreign military sales transactions are "government to government." The situation is much less clear in the export of "munitions list" defense articles to overseas foreign governments under a commercial export license. US Government approval is required before a US defense contractor can export a munitions list items but, the transaction is still "business to foreign government"[76] in which ordinary commercial terms apply. Because "customary" commercial terms apply to those transactions, courts may be willing to attach ATS liability.

A fertile area of potential "joint venture" liability in a defense setting would involve suits against US supplies of non-lethal military equipment, technical support, or information/ intelligence to a country that then uses the military assistance in a context in which alleged human rights violations occur involving foreign nationals. US firms involved in selling civil aircraft, heavy equipment, pharmaceuticals, computers, communications supplies or services, or other commodities to the government of Israel are all potentially at risk because these sales of non-military materials could be somehow linked to the "illegal occupation" of territory and/or oppression of the Palestinian people. Potential US contractor liability is also easy to envision for those involved in the construction or operation of a detention facility – such as those in Guantanamo Bay, Iraq, or Afghanistan to house persons being detained for war crimes or on suspicion of terrorist activity.

A number of federal agencies fund and deliver military and civil assistance programs overseas to promote economic development, democratic principles, and respect for the rule of law. Training of foreign students abroad or in the United States is the major component of these assistance programs. This training is provided by federal employees and contract personnel and has, as its goal, enabling the recipient nation to be self-sufficient militarily and economically. But, the vast majority of U.S. training dollars is earmarked for countries that have a history of economic or political instability. All too often, however, the goals of these programs are not shared by fundamentalists or radicals who believe that these activities violate the principle of national self-determination. Or, as is currently being witnessed in the rebuilding of Iraq, these training programs are a direct threat to elites from regimes that have been deposed. Regardless, there is legal risk for those directly involved in providing military and development assistance to states at

[74] *See*, Ch. 39 of Title 22, US Code.
[75] International Trafficking in Arms Regulations, 22 C.F.R. Parts 120-130.
[76] http://disam.osd.mil/pubs/dr/22GBook/28-04%20Appendix.pdf

risk. A most plausible scenario would be an ATS suit based on extensive participation of US military personnel and US defense contractors in the retraining of the armed forces and police forces in the Balkans, Afghanistan, and Iraq. Other theories would focus on the downstream effects of training. If, for example, a foreign trainee is found to have abused a local inhabitant, one could envision direct suits against US government or corporate trainers under the ATS.

Case 5: **Human Rights Violation – Colluding with a Foreign Government in Illegal Police Actions.** Liability for human rights abuses of foreigners overseas in connection with a police action is a growing area where suit is possible.[77] In prosecuting the "Wars" on terrorism and drugs, US officials (and contractors) must cooperate directly with foreign officials -- to monitor and interdict terrorists and drug traffickers. In this two-front campaign against heavily-armed and determined adversaries, it is often necessary to adopt unconventional tactics including coercive interrogation, bribery of criminal informants, paramilitary actions, and intrusive surveillance. The interrogation and capture of multiple Al Quaeda suspects in Pakistan, the seizure Al Quaeda funds in the custody of Islamic charities, and the extra-judicial execution of Al Quaeda officials in Yemen in November 2002 are all incidents which could end in civil litigation in US courts.

A mounting number of filed cases in the law enforcement area that suggest that expansion of lawsuits is likely. In *Alvarez-Machain v. U.S*[78] the Ninth Circuit held that a Mexican national could sue Mexican policemen in a US court for abducting him and returning him to US authorities to stand trial for a USDEA agent's murder. In the pending *DynCorp* case (note 70) Ecuadorian farmers are suing the US contractors that are assisting DEA in drug eradication operations. Finally, in *Turkman et. al. v. Ashcroft*[79], an action was recently initiated against federal officers under the ATS on behalf of Middle Eastern males who were incarcerated post – 9/11 in Guantanamo Cuba under "color of law."

In the *amicus* brief filed by the Justice Department in the Ninth Circuit in *Unocal*, these concerns were underscored:

> . . . claims have already been asserted against foreign nationals who have assisted our Government in the seizure of criminals abroad. See Alvarez-Machain v. United States, citations omitted. This Court's approach to the ATS bears serious implications for our current war against terrorism, and permits ATS claims to be easily asserted against our allies in that war. Indeed, such claims have already been brought against the United States itself in connection with its efforts to combat terrorism.[80]

Vulnerability Analysis and Summary

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[77] One decision that stands out is Jama v. INS, 22 F. Supp. 2d 353 (D.N.J. 1998). The plaintiffs in *Jama* were alien asylum seekers who sued the INS and its officials for violating customary international law for subjecting them to mental and physical abuses in a US prison. The district court held that the ATS applied because the alleged torts were committed in violation of the law of nations although direct claims against the US government were not admissible because the United States had not waived immunity. The court also held that the US prison officials could be sued in their individual capacities.

[78] 266 F. 3d 1045 (9th Cir. 2001).

[79] Civil Action No. 02CV – 2307 (E.D. NY 2003). *See also*, http://www.talkleft.com/archives/003735.html

[80] DOJ Amicus, supra note 38 at p. 2 *citing* Al Odah v. United States, 321 F.3d 1134, 1144-1145 (D.C. Cir. 2003) (ATS claims asserted by aliens detained at the US Naval Base in Guantanamo Bay).

It is impossible to predict all the effects of the ATS on combat and related national security activities given the unsettled nature of the law. However, assuming the continued expansion of the ATS, Table 1 attempts to assess the national security vulnerabilities if the current case trends continue:

Table 1 – National Security Operations Vulnerability

	USG Liability?	**USG Employee Liability?**	**Contractor Liability?**	**High Ranking Foreign Official Liability[81]**	**Lesser Foreign Government Official Liability**
Case 1: Defective weapon causes collateral damage	No	Probably no – court would probably accord combatant privilege under the Laws of War	Maybe – supplying negligent product	No	Generally no – unless a "rouge" was involved in the use of illegal weapons.
Case 2: Injury from weapons considered illegal under customary international law	No- but with "egregious" use of illegal weapons, court may "find a way" to impose liability	Potentially yes – under ICC principles for use of "illegal weapons." US court would have to disregard US government decisions to field the system.	Conceptually no but harassment suits possible. If the weapon was not legally certified by the DOD weapons review group, builder at risk	Yes, Act of State defense may not hold for claims of serious human rights abuses if a foreign gov't was the weapon's user.	Yes – same conditions of liability as the foreign government itself.
Case 3- Direct US Participation in Waging an "Illegal War"	No	Possible if the combatants acted in derogation of International Laws of War and the War Powers Resolution.	Yes. If contractors war materials or services to a US or foreign regime involved in an illegal war	Yes – if the conduct amounts to a serious human rights abuse	Yes
Case 4- "Aiding and Abetting" a regime wage illegal war or oppress its citizens. Focus: military and intelligence assistance.	No.	Possible if assistance was to a regime acting outside of the bounds international law.	Yes – *Unocal* decision.	Yes – if conduct amounts to serious human rights abuse	Yes. Foreign employees of the US who provide perimeter security for US bases overseas especially at risk if they harm a local national protecting a US activity.
Case 5 – Direct participation or "Aiding and Abetting" in illegal police action against foreigners.	Yes - if the tortious conduct occurs in the US	Yes. "Immunities" under 42 USC §1983 for police officers do not directly apply to ATS litigation.	Yes	Yes - if conduct amounts to a serious human rights abuse	Yes. Foreign law enforcement who provide assistance to US agencies involved in hunting down terrorists.

National Security Impacts

1. ATS Hampers Good Order and Mission Success

Scenarios 2 through 5 show that, while the U.S. Government cannot be sued directly under the ATS, federal officials or contractors could be held liable in tort for combatant actions that kill or harm foreigners. A USG employee or contractor working in a high-risk law enforcement, intelligence, or military operation could be sued for his or her direct participation. Liability might

[81] Direct suit against the foreign government is probably barred by the *Hess* decision. See, note 6 and accompanying text.

also attach to more passive activities such as providing intelligence, technical support, or arms to a foreign government which results in death or injury to a foreign person. Providing construction services and maintenance work on facilities might also give rise to ATS liability if it could be linked to a tortious outcome e.g., construction of a prison. Since the US government has not waived sovereign immunity for these types of actions, substitution of the United States for suits against individual government employees (the procedure in claims under the Federal Tort Claims Act) the individual military and civilian employees would have to initially bear responsibility for their defense.[82] They would also ultimately be liable for the payment of any judgment in these suits.

Liability for US government contractors in most of these scenarios is troublesome because there is no established "government contractor defense."[83] Contractors are especially attractive magnets for suits mounted by anti-war activists or entrepreneurial attorneys, because contractors are a convenient punching bag for the press or Congress who attack them to indirectly challenge U.S. security policies. Contactors have far fewer protections under the network of Status of Forces (SOFA) agreements and contractors today are more closely aligned with the operating forces – including combat forces. Contractor risk also extends beyond that in a traditional DOD setting since they have been widely used by federal agencies like the CIA or DEA to provide logistical support, pilot aircraft, and provide security in conjunction with hazardous counter-drug operations because of lack of critical skills in the federal workforce or manpower shortages.

There are severe Constitutional issues imbedded in suits of these sorts because the cases pit a single federal judge against the competence of the President to be the Commander-in-Chief and lesser officials conduct the foreign affairs of the United States.[84] If private litigants can legally challenge the outcomes of U.S. military assistance, intelligence or counter-drug assistance programs, it will seriously undermine US power and prestige. Depending on the invasiveness and notoriety of the lawsuits, foreign friends and allies might prefer not to cooperate with the US for fear of suit or the public exposure of their cooperation. This risk is inflated in the especially high-risk special operations, intelligence, and counter-narcotics areas in which foreign government assistance is essential to mission accomplishment.

The suits could severely curtail the ability of military and civilian personnel to perform their ordinary duties. The specter of civil liability over national security operations overseas will have an obvious impact on recruitment and retention of military personnel. Warfighters will have to add risk of civil suit to the litany of other issues involved in planning combat operations.[85] Mission accomplishment could suffer. People in national security operations are accustomed to

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[82] In the past, the Justice Department has provided USG employees the assistance of counsel, but the employees were responsible for payment of any judgment.

[83] In broad terms, if the government supplied the specifications and the contractor followed them, federal common law "government contractor defense" prevents liability from attaching against the contractor in product liability cases. Boyle v. United Technologies, 487 US500 (1987). See generally, Beh, H. *The Government Contractor Defense,* 28 Seton Hall L. Rev 430 (1997). There cases are unsettled as to the outer limits of the defense: The defense usually lies in cases of product liability if the government either supplied the explicit specifications for a particular item that later caused injury or if the government approved the specs after being warned by the contractor of the dangers involved. The availability of the defense in a service contract setting is very unsettled although the 11th Circuit recently the defense to a helicopter maintenance contract. See, v. 79 BNA Gov't Contacts Reports, No. 18 (May 6, 2003).

[84] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S.579 (1952),

[85] Past military operations plans concerned force movements, tactics, weapons selection and logistics. Operations plans today have whole sections on to public affairs management, legal, and environmental protection. Under the ATS, one could envision a new annex to operational plans, "risk management."

ultra-hazardous activities and risk-taking to defeat a military threat or a drug warlord. Those risks can't be eliminated, and undue caution or timidity in mission execution is harmful to its success and ultimately national interest. Moreover, even if government employees could purchase liability insurance, adoption of a "risk management" approach to preserve insurability is unacceptable. Mission accomplishment, not minimizing risk of an ATS action, must be the primary goal.

2. ATS Jeopardizes Military Assistance Programs

To further national security and foreign policy objectives, many federal agencies provide foreign assistance. DOD is the largest federal actor in the sphere. Over $13.3 billion[86] in foreign military assistance programs were delivered in 2001in the following areas: information and intelligence sharing, foreign training, defense services, and defense equipment sales. The purposes of these programs are simple: (a) help other nations defend themselves and resist tyranny; (b) create a bond between US and foreign security officials; and (c) promote interoperability between US and foreign armed forces. If foreign forces are trained and equipped by the US, chances are that they will be able to operate with US forces in a coalition setting.

Military assistance and sales programs (direct commercial sales and government-to-government transactions) are carefully regulated by DOD and the Department of State. There is also Congressional oversight of sales of major defense equipment and transactions that exceed certain dollar thresholds.[87] Despite this oversight by two branches of government, ATS litigation scenarios 4 and 5 in Table 1 could jeopardize the continued viability of US assistance programs. The scenarios of immediate concern are:

- ***Suits against foreign military trainees in the US*** -- A considerable number of foreign military personnel receive training in the US each year. These individuals would be attractive targets for suits filed by putative victims from their home countries. Military trainees do not have diplomatic immunity or any special status while present in the United States and would seem to be ripe targets for suit.[88]

- ***Suits against US military personnel, civilian employees, or contractors involved in military assistance programs*** for "aiding and abetting" in human rights abuses -- providing assistance to foreign military forces that somehow harm the foreign plaintiffs. The classic ATS scenario would be a suit mounted against the US government or contractors involved in the training of individuals or members of a foreign armed or police force who were, in some way, connected to later human rights abuses.[89]

Suits against trainees are particularly vexing because DOD and the State Department aggressively promote training on the systems DOD sells as part of a "total package" approach it takes to defense sales. An integral part of US military assistance programs is the International Military

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[86] http://www.dsca.osd.mil/programs/Comptroller/2001_FACTS/default.htm
[87] http://disam.osd.mil/pubs/dr/22GBook/03%20chapter3.pdf
[88] The lack of "reciprocal status" for foreign military trainees in the US is a continuing problem for DOD officials. The US network of status of forces agreements with foreign countries grants US authorities jurisdiction over many types of cases involving US service persons in a foreign country; but not the contrary.
[89] Given the loose evidentiary standards in *Unocal,* potential plaintiffs might not need to prove causation between the U.S. military assistance (training) and the later abuses.

Education Training Program (IMET) that provides grant training assistance to many military students from lesser developed countries. In FY 2002, IMET trained over 11,000 foreign military students (most in the US) at approximately 150 military schools and installations. DOD and the State Department call the program:

> . . . an investment in ideas and people. … it presents democratic alternatives to key foreign militaries and civilian leaders. Military cooperation is strengthened as foreign militaries improve their knowledge of US military doctrine and operational procedures. This cooperation leads to opportunities for military-to-military interaction, information sharing, joint planning, and combined force exercises that facilitate interoperability with US forces. Additionally, access to foreign military bases and facilities is notably expanded, the utility of which is readily evident in the war on terrorism.[90]

A subset of the IMET program is the Expanded International Military Education and Training Program (EIMET). EIMET authorizes non-lethal training in subjects such as military management, military law enforcement, and oceanography for students from less-developed countries that the US is helping to transition to democratic rule. A large part of the training deals with respect for human rights, the rule of law, and military justice. This type of training has been provided in "high risk" situations in Rwanda, immediately prior to civil war in that country, Indonesia, and is now being provided to military officers from various Balkan countries.

Many other federal agencies also run training programs -- in law enforcement, international development, financial management, and business. During FY 2001 over 350,000 foreign participants had US funded or sponsored training. Most of that training was provided in the United States.[91] Any of those trainees could be targeted by a suit designed to harass or embarrass the trainee's nation.

Arms exports which are linked to US foreign military "assistance" programs could become litigation targets for activists seeking to curtail worldwide arms transfers or covertly attack US security policies abroad. Those arms transfers which are accomplished though government-to-government foreign military sales (FMS) transaction are probably immune because of traditional principles of sovereign immunity and/or the Act of State Doctrine. But, as noted above, sales of defense equipment under a commercial export license [92] or contractor's follow-on support to an earlier government-to-government agreement is risky. It is also easy to envision suits predicated on the sale of non-munitions list defense articles or services legally sold with or without a State Department commercial export license.

A proliferation of lawsuits that results in US military training activities shutting their doors to military trainees would cause significant turbulence in US military training commands. Most foreign training is provided on a fully reimbursable basis from the foreign government. Loss of foreign students would cost DOD millions of dollars and likely cause DOD to curtail some of the training for US military personnel. Unlike lost sales of defense equipment in which the US

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[90] Dep't of State, FY 2003 Congressional Presentation Document, p. 131.
http://www.state.gov/documents/organization/9468.pdf

[91] http://www.iawg.gov/info/reports/2002annualreport.pdf

[92] About $1 Billion in defense articles was sold in FY 2001 pursuant to a commercial export license. This is about 6% of the current volume of munitions list exports. The ratio of commercial export licenses to FMS transactions has varied from year to year. In 1994, for example, about 21% of all munitions list exports were accomplished via export license.
http://www.dsca.mil/programs/Comptroller/2001_FACTS/default.htm

government is a contracting conduit, a far greater percentage of revenues for training activities are paid directly into DOD training accounts.

Interoperability and US military readiness are major costs if DOD has to step out of the training business because teachers and students are fearful of ATS litigation. To wage coalition warfare effectively and avoid incidents of friendly fire, it is essential that the armed forces of all participants have a common operational frame of reference. Common equipment and training is essential to preserve interoperability and also creates a motivation for US and foreign forces to work together. One need only recall the number of "friendly fire" incidents during past Gulf conflicts involving allied forces to gain an appreciation of the critical need for there to be commonality of tactics, training, and equipment.

There are added political costs of not being able to "set the standard" and to develop personal relationships with foreign military officials. In many lesser-developed countries, the military is the only source of stability and professionalism. If US assistance programs are terminated, or vastly curtailed, the US government will lose valuable contacts with the military and political elites in a number of foreign countries. Important diplomatic opportunities will be lost or wasted if this occurs.

Unwanted arms proliferation is another risk. US arms sales come with strict end-use monitoring requirements to ensure that the receiving state does not retransfer the arms to another country without US government permission. End-use rules also specify that arms shall only be used for legitimate self-defense. End-use monitoring is not foolproof; but it provides the US important political leverage if improper use of arms is being contemplated by a foreign buyer. Most foreign buyers prefer US arms and training because of the high standards of quality and reliability. If ATS litigation created a liability minefield for foreign states, this could undercut US influence.

The ATS would not stop the customers from buying arms; only from buying them from the US Government or from American companies. There are plenty of private arms dealers and unscrupulous states that will be only too happy to fill any armaments gaps in the market. Once a state turns to unscrupulous or suppliers hostile to the United States, valuable leverage will be lost. Equally important, many foreign arms suppliers who fill that gap will be out of reach of ATS suits. So long as the supplies do not have a presence in the US, they would avoid liability under the ATS and the expanse of export control restrictions.

There are other costs to increased ATS liability for US manufacturers, DOD personnel, or contractors associated with the provision of defense articles and services to foreign armed forces. In 2001, the total value of US FMS transactions and export sales was about $14 billion,[93] or about 21.5 % of total US expenditure that year for military procurement. FMS sales help DOD recoup the costs of non-recurring Research, Development, Test and Evaluation (RDT& E) in particular systems, and help reduce unit costs of systems for US forces. Loss of the overseas component of the defense industrial economy would increase the prices that DOD pays for its systems and would deprive the defense economy of much needed capital for company investment, new equipment, and R&D.

3. ATS Jeopardizes Operations That Need Foreign Access

The US Navy and Marine Corps are "expeditionary forces" that do not need a "permission slip" to operate in a particular area. But, even expeditionary forces need proximate foreign access for

[93] http://www.dsca.mil/programs/Comptroller/2001_FACTS/default.htm

logistics, mail, personnel, and to make repairs. The US Army and Air Force have even greater needs for foreign access, to stage forces, preposition equipment and logistics, and for bases of operations. Deputy Secretary of Defense Wolfowitz appeared before the House Armed Services Committee on April 9, 2002 and declared that a component of the US military strategy is to counter "anti-access" forces because "today, US power projection depends heavily on access to large overseas bases, airfields, and ports.[94]" Even Secretary of Defense Rumsfeld, who has been a vigorous proponent for transformational policies which stress insertion of "light" forces, has listed among his six transformational objectives protecting the "US homeland and our bases overseas.[95] Rumsfeld knows that even "light" special operation forces need logistics and air support from land bases or from the sea. Also, as most recently witnessed in *Operation Iraqi Freedom,* the brilliant successes of special operations forces would probably not have been possible without heavy US armor forces on the ground to engage the Republican Guard units.

Rumsfeld is right, and his statements reflect frustration that the current network of bases is under pressure because of changes in the international political landscape. There are new opportunities for bases in Eastern Europe and the Caucasus, but sea access to the southern portions of the region is highly restricted because of rules governing the Turkish Straits. Similarly, DOD gains in Eastern Europe are more than offset by adverse development in Saudi Arabia, which has asked the US to vacate the massive Prince Sultan airfield and combined operations center[96] by the end of 2003. There is also widespread press reporting that the United States is considering dismantling many post-WWII Army and Air Force bases in Germany and shifting its focus to Eastern Europe and the littoral countries around the Black Sea.[97] Finally, the March 2003 election victory in Turkey of a more Islamist government and its refusal to allow US use of its bases to open a northern front during the war in Iraq, raise concerns that the operating restrictions on US forces may become too onerous to justify the continued cost of the Turkish bases in Incirlik, Izmir and Ankara.

The DOD base network in Asia is also under stress. South Korea and the US have been engaged in a tiff over foreign criminal jurisdiction over US service persons and, recently, South Korea's criticism of US reconnaissance flights off the North Korean coastline.[98] As with Germany, the current president of South Korea, Roh Moo Hyun, ran a campaign that had anti-American elements. There has also been a rise in violence against US servicepersons in South Korea,[99] prompting Secretary Rumsfeld to state that the US would reevaluate its continued presence in South Korea. Longstanding issues over US bases in Okinawa continue because of some terrible criminal incidents involving US Marines and local citizens, and commercial real estate encroachment around the base. Local calls for a reduction in the footprint of the III Marine Expeditionary Force in Okinawa are likely to continue despite the strong support that the Japanese government provided to the US in *Operations Enduring Freedom* and *Iraqi Freedom.*

Virtually every case against a US entity for what it does or sells overseas, or against a foreign government for supporting US actions overseas, will entail significant financial costs in legal fees and investigation to the all of the defendants. For foreign governments and corporate defendants, there is added cost in hyperbolic adverse publicity. Because of the relative ease of using the ATS

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[94] http://www.defenselink.mil/speeches/2002/s20020409-depsecdef2.html
[95] Speech at National Defense University, January 31, 2002. Reported in: http://www.jfcom.mil/newslink/storyarchive/2002/no020102a.htm
[96] http://www.washingtonpost.com/wp-dyn/articles/A56859-2003Apr29.html
[97] Personal knowledge of author.
[98] http://www.iht.com/articles/88877.html
[99] http://www.korea.army.mil/index1.htm ; http://www.korea.army.mil/sofa/2001sofa_english%20text.pdf

to harass US actors, or their foreign allies, it could become a form of harassment used by hostile foreign governments, or their intelligence services, peer competitors (France), or NGOs. Depending on how effectively the ATS is able to disrupt foreign operations of US military activities abroad, it could undermine the support that US forces are now receiving from many foreign governments either overtly or covertly.

That last point bears repeating because many foreign governments, especially in the Middle East, follow a "don't ask, don't tell" approach with respect to US military activities from their territory. The US relationship in Saudi Arabia is a perfect example where the US and Saudi leaders had to walk a political tightrope for many years because of the political repercussions of appearing to be too supportive the United States. Critics of that longstanding relationship will assert that the impending loss of base access in Saudi Arabia is no real "loss" because the United States should not align itself with undemocratic regimes and because of the number of 9-11 terrorists that were Saudi citizens. But, for military planners and logistics planners, the loss of access to Prince Sultan airbase is a major blow because those facilities provided a unique military advantage and because of the huge cost of replicating the infrastructure. Litigation would obviously bring other discreet foreign assistance programs into the sunshine.

There is a false perception in some policy circles that America can simply promise a protective defense umbrella and an infusion of cash to buy overseas access. In fact, history shows that the US hold on foreign bases is precarious and that anti-US movements can tip the balance.[100] In the 1990s the United States sought to extend its rights to base troops in the Philippines and Panama; in both cases public opinion (despite the economic benefits the US bases conferred in those lesser developed countries) overwhelmingly favored disestablishing US bases. On May Day 1990, 25,000 Hondurans, with united labor support, demonstrated on the streets of the capital city of Tegucigalpa demanding that US troops and bases get out of their country. The US Navy recently stopped using Vieques Island in Puerto Rico as a live-fire range because of continuing protests. Puerto Rico's Governor Sila María Calderón ran on an anti-Vieques platform knowing that evicting the US Navy would cost the local economies between $200 million and $1 billion per annum if DOD went forward with plans to sharply cut back its footprint in Puerto Rico[101] if Vieques was lost.

Another potential source of disruption could be suits by NGOs or local interest groups against the foreign nationals that are either employees of the US government, its contractors, or the host nation and are involved in providing security for a US installation. Almost all agreements governing US access abroad[102] specify that it is a host nation's responsibility to provide perimeter security of US bases and installations. There are two basic reasons for this arrangement: first, under most foreign laws, only local nationals can be credentialed by the host nation to use force or arrest persons trying to breach the perimeter of a US base or facility. Second, most host nations, for reasons of sovereignty, make the rights of the US forces subordinate to the rights of the host nation to control activities around the base perimeter. Legal action against these foreign nationals involved in protecting US bases might be predicated an "excessive use of force" theory involving dissidents or protestors. Action may also be predicated on some vague theory that the perimeter guards are "aiding and abetting" the US military to use the foreign base as a staging area for an illegal police or military action abroad.

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[100] Schirmer, B., *US Bases in Central America and the Opposition to Them*, FFP Bulletin (Spring/Summer 1990).

[101] Oliver-Mendez, K. *Economic Bombshell…US Base Closures,* The Puerto Rico Herald, Oct 3, 2002. See, http://www.puertorico-herald.org/issues/2002/vol6n40/CBEconBombMilitary-en.shtml

[102] Formal agreements are known as Status of Forces Agreements (SOFAs)

ATS suits against foreign officials protecting US personnel and facilities abroad would create major problems because there is no legal authority for the United States to intervene, have those suits dismissed, and substitute itself as the defendant. Nor is there authority under existing principles of federal appropriations law for the United States to pay any judgments that might get rendered against foreign security workers. If judgments against foreign security officials or hyperbolic press coverage resulted, intervention by US military forces to provide permanent perimeter security is not an option because it would offend host nation sovereignty and invite foreign suits/criminal charges against US forces. The only recourse is withdrawal.

The obvious conclusions from this discussion: The US military needs foreign access for wartime and peacetime operations. Access is difficult to secure and maintain. Threatened loss of revenues from base employment and spending by US forces in the economy has not won the day in past disputes over US basing rights. ATS suits against foreign workers or officials for providing "illegal" assistance to US forces could cause enough political, legal, and economic turbulence that some states might further restrict or deny the US continued access.

4. ATS Could Harm The DOD Business And Industrial Base.

The "tooth to tail" ratio of contractors to active military forces continues to increase and, as depicted in Table 1 above, contractors are at risk in all the litigation scenarios in the national security and law enforcement realm. This increased "privatization" of government is a trend that is likely to continue. Current estimates are that the Administration will seek to outsource 850,000 jobs government-wide with 20 percent of those actions completed by 2004. The DOD will also continue to outsource positions that are not "inherently governmental" or directly related to combat, through public-private competitions and other methods.

In *Waging War with Civilians* Lieutenant Colonel Castillo, USAF[103] documents that contractors are no longer restricted to acquisition and logistics. They are on the battlefield, involved in operational planning, intelligence analysis, and maintenance on an unprecedented scale. Contractors carry out much of post-conflict rebuilding and restoration of central governments in Afghanistan and Iraq. DOD has no choice but to rely on contractors because "since the end of the cold war, DOD has shrunk by over seven hundred thousand active duty military personnel, yet has deployed nearly five times more frequently...and ...has cut over three hundred thousand of its civilians since 1989."[104] Projected revenues from the global international security market "will increase from $55.6 billion in 1990 to $202 billion in 2010. The Department of Defense has now 700,000 full-time and part-time contractors on its payroll."[105]

This paper is principally focused on the effects of the recent spate of ATS litigation on national security; although this focus should not obscure the compelling need for broad congressional action to sharply curtail future frivolous ATS actions against US companies arising from their normal business operations and investment abroad. Hampering the ability of US companies to be full participants in global trade and business is equally threatening to US national interests as the other defense issues discussed herein. Nevertheless, Congress should ensure that any remedial legislation that it passes should firmly establish a "government contractor" defense against ATS for those corporations that support DOD activities abroad. At a minimum, the ATS will increase the cost of business operations for defense contractors because of the necessity to purchase

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[103] Air, Space and Power Jrl., (v. 26, No. 2) 26-31. (Fall 200)
[104] *Ibid*.
[105] Kuyrlantzick, J. *Warfare Inc*. Military Officer, 50, 54 (May 2003). Citation is to a report by Equitable Services, Inc, - - a firm that analyzes the security industry.

additional insurance[106] which, given the novel and uncontrollable nature of ATS cases, could be very expensive. Judgments exceeding or outside of insurance coverage will have obvious impacts on profitability and corporate survival. Whether most defense contractors are capable of sustaining these types of blows is far from certain since over 80% of the recent DOD increases in defense spending is for necessary "fact of life adjustments" and replenishment of consumables rather major new spending or capital acquisition programs which can have high profit margins.[107.] Certainly, any increased costs of defending against ATS litigation will divert precious dollars away from the private sector R&D that is essential to the development of the next generation weapons systems that DOD can only develop and procure in partnership with industry.

A more pernicious impact of increased ATS litigation is the departure of smaller, and less well capitalized companies, from defense contracting because they cannot afford the risks associated with foreign operations under the ATS. Some companies have already concluded that the risks of producing for the new Department of Homeland (DHS) without judicially tested "government contractor" defense are too high until their legal position is improved.[108] The White House is now reportedly considering an Executive Order to limit the liability exposure of contractors whose product or service has been certified as "high-risk" by the Homeland Security Secretary to supplement provisions in the 2002 Homeland Security Act.[109] But this initiative would not ameliorate most ATS liability concerns since ATS can be used as a litigation vehicle for an almost infinite number of different types of causes of action.

The problems that mining, oil, drug and construction companies have encountered from activists using the ATS could easily hit the defense sector; the same activists who oppose oil and mining companies are likely hostile to the "military industrial complex." ATS suits could be very destabilizing in the short term because defense contractors have fewer customers than other businesses, and their size and their attempts to diversify their portfolios have been described as "spotty at best."[110] Defense industry consolidations have left only five major contractors: Boeing, Raytheon, Lockheed Martin, Northrop-Grumman, and General Dynamics. Most major defense contractors are operating at less than 50% capacity utilization, and some segments such as shipbuilding are operating as low as 20%.[111] Unquestionably, a rash of ATS suits against defense contractors would hamper their ability to tackle their excess capacity issues and make capital investments for innovative changes and diversification to remain viable. Even if they prevailed in all the suits, the very high costs of defending them would probably be entirely borne by the individual businesses since current cost accounting rules would very likely preclude this expense from being charged to "cost plus" contract with the government.

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[106] In a cost reimbursement contract, then under current cost accounting standards the costs of insuring against special risks associated with performing a government contract can be recouped in a cost reimbursement contract. See Part 28.3 of the DOD Cost Accounting Standards http://www.acqnet.gov/far/current/html/FARTOCP28.html

[107] http://www.ndia.org/advocacy/policy/topissues.cfm

[108] http://www.govexec.com/dailyfed/0902/091102td1.htm .

[109] Sections 861-865 of the Homeland Security Act of 2002, P.L. 107-296, establish a limited government contractor defense for those supplying "qualified" anti-terrorism technologies. Industry remains concerned with the restrictive nature of the defense.http://www.govexec.com/dailyfed/0103/010203td2.htm. Industry wants judgments limited to a "reasonable" level, essentially the insurance a company can buy commercially and still remain profitable. To date, the White House and Congress have been unable to agree on legislation to find this balance or fully extend the government contractor defense to contractors for the Department of Homeland Security

[110] http://www.aviationnow.com/content/publication/awst/20021111/avi_mkt.htm

[111] Heimbaugh, et. al. *Industries Study, 2001*, Industrial War College of the United States, http://www.ndu.edu/icaf/IS2001/finance.htm.

V. Remediation

Many of the above concerns could be eliminated by a Supreme Court ruling making clear that the ATS is strictly jurisdictional, and that cases along the lines currently pending cannot be pursued. The *Unocal* case could be a vehicle for judicial intervention but the history of the Supreme Court does not favor such bold action and, regardless, a decision in those cases would be at least two years away. What happens in the meantime?

The bizarre twists and turns that the ATS has taken since the mid-1990s are the results of creative advocacy by special interest groups and judicial adventurism by federal judges. The litigation scenarios outlined above reflect "worst case" analyses -- especially in the areas of joint venture liability as seen in the 9th Circuit's *Unocal* decision. Cases have thus far not burrowed into the treasuries of United States or foreign entities. But as the costs of defending against groundless suits continue to mount, or if isolated adverse decisions appear in the district courts, then market forces will begin to affect the costs of insurance and other costs of doing business internationally on behalf of DOD. Congress and the Department of Justice should now enter the fray and establish some administrative and legal boundaries on future ATS litigation.

Remedial legislation extending the government contractor defense to the ATS is an immediate priority to assure continuity of contractor support of current military operations. US defense contractors are highly vulnerable defendants in future ATS litigation, along with those companies already targeted. Defense contractors are perceived to have the resources to pay adverse ATS judgments, and they are attractive from the perspective of activists who seek to conjure up "David vs. Goliath" images in suits against the "military industrial complex." Of course, the reality is that many US defense contractors are in a poor position to weather the costs of this type of litigation, and none should have to. There are valid US laws that apply to crimes; we need not create laws and remedies from a statute that was never intended for that purpose.

Pursuit of such statutory protection will elicit screams from the trial bar and its advocates (as was the case when vaccine manufacturers received some limited immunities in the Homeland Security Agency Act[112]). They will say that the United States is coddling defense contractors that support dictators and human rights violators. That perception is, of course, flawed and would have to be countered strongly and immediately. Nevertheless, remedial legislation to protect US Government contractors should include the following components:

- Explicit extension of the Government Contractor Defense activities overseas by a US contractor on behalf of any federal agency of the United States Government. The defense should apply to all types of contracts including service contracts. It should also apply to claims derived from an approved export license or a foreign military sales case.

- Classification of contractors who work for federal agencies (Defense, State, DEA, DHS, Intelligence Community) as "Statutory Federal Employees" for the purposes of any privileges or immunities that might exist under an applicable Status of Forces and Access Agreements.[113] That action might also bolster the claim of contractors to non-combatant

[112] http://www.researchprotection.org/infomail/1102/15.html

[113] Such a unilateral declaration will not necessarily be binding on foreign governments. However, to maximize their protections under the network of agreements that the United States has negotiated, they should be reclassified internationally as "federal employees" rather than as "contractors."

> status under applicable international law of war conventions[114] if they were ever charged with aiding and abetting in the prosecution of an illegal war under the new International Criminal Court (ICC). Such action is not that far fetched in light of the recent filing of a lawsuit in Belgium against Gen. Tommy Franks for atrocities against Iraqi civilians.[115]

To prevent foreign military trainees and official guests in the US from becoming convenient targets for suits by activists seeking to embarrass their governments, the US should accord such personnel some limited protections from ATS litigation. This could be accomplished by making those persons part of their Embassy's "Administrative and Technical (A&T) Staff" as is now often done with US military and civilian personnel performing official duties in countries in which there is no formal status of forces agreement. The 1961 Vienna Convention on Diplomatic Relations[116] grants foreign embassy administrative and technical persons limited immunity from criminal and civil liability for acts performed within the scope of their official duties in the United States and, at times, abroad. Since criminal jurisdiction is typically exercised by the states under the federal system, specific federal legislation preempting state laws and extending A&T status to foreign military trainees is necessary. The text of such legislation, which is designed to reach the result in *Karadizic,* might read:

> Notwithstanding any other provision of law, the military or civilian employees of a foreign government who are present in the United States pursuant to an approved course of instruction authorized by a federal agency of the United States shall be entitled to the same status as that accorded to the Administrative and Technical Staff of that person's embassy pursuant to the 1961 Vienna Convention on Diplomatic Relations. Such status shall specifically extend to official acts that were alleged to have taken place outside the United States and are subject to a suit brought under the Alien Tort Claims Statute, 28 U.S.C. §1350.

Individual US government military and civilian personnel and contractor personnel are less well equipped to defend against ATS litigation than the organizations for which they work. For this reason, they become likely targets for ATS suits so that activities can make a political point or to draw the government into the legal fray. Accordingly, legislation that mirrors the federal system of removal (if a case is brought in state court) and substitution of the US government as the defendant should be pursued if the federal employee is acting in the scope of his/her employment.[117] Substitution and removal actions are now used in for government doctors, drivers, and others although the difficulty is that removal to federal court limits the plaintiffs to recovery under the Federal Tort Claims Act (FTCA). The FTCA, unfortunately, could not be used to deal with ATS liability because it does not apply overseas since the US government has a variety of administrative claims systems in place to entertain foreign claims e.g., Military Claims

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[114] Article 4(4) of The Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW) and Article 51(3) of Protocol I Additional to the Geneva Conventions, 1977.

[115] http://www.washtimes.com/national/20030428-12027619.htm

[116] 22 UST 3227; TIAS 7502; 500 UNTS 95. Entered into force for the United States in 1972. The FSIA (discussed above) is the U.S. statutory implementation many of the major principles in the '61 Vienna Convention.

[117] United States Attorneys make a certification under 10 U.S.C. § 1089(c), 22 U.S.C. § 817(c), 28 U.S.C. § 2679(d), 38 U.S.C. § 4116(c), and 42 U.S.C. §§ 233(c) and 2458a(c) that the employee was acting in the scope of their employment in order to substitute the United States as defendant in place of federal employees.

Act, Foreign Claims Act, and the International Agreements Claims Act.[118] These claims provisions do not cover losses due to combatant activities. Nor do these statutes cover claims based on a contractor's actions.

Substitution and removal of actions against US government employees or contractors would be an effective way to blunt ATS litigation provided that a viable judicial or administrative system of adjudicating the complaints existed. One model to consider is formation of a claims tribunal as was established to deal with large contract cancellation claims between the US and Iran after the fall of the Shah. Award caps and joint funding by the US and defense contractors (on behalf of their employees) should be studied.

The preceding steps require permanent legislation and cooperation by the Executive Branch. That cooperation is likely. But, to get the process moving the Secretaries of Defense and State should write the Chairmen of the Senate and House foreign relations committees and the judiciary committees to hold a joint hearing which fully explores the issues raised in this paper and puts draft legislation on the table. As cases continue to mount, the potential for disruptive verdicts increases. Now is the time to act before the ATS starts to disrupt DOD's overseas activities.

[118] 10 U.S.C. §2734a. This statute is not an independent basis for claims. Instead, it provides legal authority for US officials to settle claims pursuant to treaties or international agreements (e.g., the NATO SOFA Agreement) that establish claims procedures.

About the Author

Captain Mark E. Rosen, JAGC, USN (Ret) is a widely published defense and homeland security analyst who has prepared analytic studies and commentary for Intellibridge's Homeland Security Monitor, Sea Power magazine, and CNA Corporation's Center for Naval Analyses. Captain Rosen also served as General Counsel and Senior Director of Communications of the Navy League and as Director for Strategic Alliances at the Office of International Trade, SBA. Prior to his retirement, Captain Rosen served as an International Law Advisor to the Deputy Chief of Naval Operations for Policy, Plans, and Operations. He also served as an arms control and an international transaction specialist for the Joint Staff's Directorate for Strategic Plans and Policy (J-5) and the Communications Directorate (J-6).