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# *Flores v. Southern Peru Copper Corporation: The Second Circuit Closes the Courthouse Door on Environmental Claims Brought Under the ATCA*

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## CASENOTE

### ***FLORES v. SOUTHERN PERU COPPER CORPORATION: THE SECOND CIRCUIT CLOSES THE COURTHOUSE DOOR ON ENVIRONMENTAL CLAIMS BROUGHT UNDER THE ATCA.***

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#### I. INTRODUCTION

The Alien Tort Claims Act (ATCA)<sup>1</sup> allows aliens to bring tort actions in the United States federal district courts to redress wrongs "committed in violation of the law of nations or a treaty of

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1. 28 U.S.C. § 1350 (2000).

the United States.”<sup>2</sup> Although the law is nearly as old as our nation, it was largely unknown and unused until the late twentieth century. The ATCA now forms the backbone of many of the human rights cases heard in the United States district courts. This note addresses a novel attempt to construe environmental degradation in foreign jurisdictions as a tort committed against aliens in violation of the law of nations. If successful, this strategy would inject a new species of tort into the scope of the ATCA - territory historically occupied by acts such as piracy, slave trading, torture, war crimes, and the wartime seizure of ships.

## II. STATEMENT OF THE CASE

Eight residents of Ilo, Peru, representing themselves and deceased Ilo residents, filed personal injury claims against the Southern Peru Copper Corporation (SPCC) in the U.S. District Court for the Southern District of New York under the ATCA.<sup>3</sup> The plaintiffs contended that SPCC’s mining and smelting activities were responsible for their (and their decedents’) acute asthma and lung disease.<sup>4</sup>

SPCC is a United States corporation headquartered in Arizona, with its principal place of operations in Peru.<sup>5</sup> It has been operating in and around Ilo since 1960.<sup>6</sup> SPCC’s mining, refining, and smelting “operations emit large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water.”<sup>7</sup> The residents claim this pollution violates the “law of nations” because it breaches their rights to life, health, and sustainable development.<sup>8</sup>

SPCC filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the plaintiffs failed to state a claim, and alternatively on the grounds of *forum non conveniens*.<sup>9</sup> The district court dismissed the complaint, hold-

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2. *Id.*

3. *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 512-13 (E.D.N.Y. 2002).

4. *See id.* at 512.

5. *See Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 143-44 (2d Cir. 2003). “[SPCC] is majority-owned by Asarco Incorporated. . . a Delaware corporation with its principal place of business in Peru. Asarco is a wholly-owned subsidiary of Grupo Mexico, S.A. de C.V., which is a Mexican corporation with its principal place of business in Mexico City.” *Id.*

6. *See id.*

7. *Id.*

8. *Id.* at 144.

9. *See Flores*, 253 F. Supp. 2d at 513.

ing that the plaintiffs failed to state a claim under the ATCA because the plaintiffs did not show that emitting harmful pollution within a nation's borders violates "well-established, universally recognized norms of international law."<sup>10</sup> Since the plaintiffs failed to plead a violation of customary international law, the court lacked subject matter jurisdiction.<sup>11</sup>

On appeal, the plaintiffs claim the district court erred by: 1) declining to recognize customary international law rights to life and health,<sup>12</sup> 2) refusing to accept the proffered sources of customary international law, and 3) concluding that Peru would serve as an adequate alternative forum.<sup>13</sup>

This note will first discuss the genesis and the evolution of the ATCA. Next, it will examine cases relied upon by the Second Circuit in *Flores*, as well as the analytical framework employed by the Second Circuit. Additionally, this note will analyze the Second Circuit's decision, applying the framework employed by that court to each of the plaintiffs' assertions. Finally, this note will discuss the correctness and significance of the decision as a limit to federal jurisdiction in this evolving area of U.S. and international law.

### III. BACKGROUND

#### A. *The Alien Tort Claims Act*

The relevant provision of the ATCA reads as follows: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>14</sup> The language of the ATCA is derived from the Judiciary Act of 1789.<sup>15</sup> Primarily because the ATCA lacks a legislative history,<sup>16</sup> divergent opinions regarding the ATCA's purpose and scope have arisen. As a result, the following two basic positions have emerged: (1) the "originalist" theory,<sup>17</sup> which restricts application of the ATCA to a narrow

10. *Id.* at 525.

11. *See id.*

12. *Flores*, 343 F.3d at 144, fn.3. On appeal, the plaintiffs dropped their claim to a "right to sustainable development".

13. *See Flores*, 343 F.3d at 147-48. On appeal, the court did not reach the *forum non conveniens* issue. *See id.* at 172.

14. 28 U.S.C. § 1350 (2000).

15. Judiciary Act, ch. 20, sec. 9, § 9, 1 Stat. 73, 76-77 (1789).

16. *See William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 222 (1996).

17. *See id.*

set of wrongs that existed at the time the law was enacted, and (2) the "evolving" theory, which states that the ATCA creates a private right of action for violations of customary international law as it has evolved through the years.

Judge Bork expressed the originalist theory in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.<sup>18</sup> Judge Bork's view is that claims under the ATCA are limited to those torts that violated the "law of nations" when Congress enacted the legislation in 1789.<sup>19</sup> At that time in history, the ATCA would have reached claims of piracy, offenses against ambassadors, and claims arising under prize (the law governing the wartime capture of vessels at sea).<sup>20</sup> Thus, the originalist theory would exclude the human rights cases that have formed the bulk of ATCA litigation.<sup>21</sup>

The evolving theory rejects the notion that, for purposes of the ATCA, international law was frozen in 1789.<sup>22</sup> Proponents of the evolving theory assert that courts should evaluate international law as it has evolved and exists today.<sup>23</sup> Under this new standard, the ATCA is construed broadly to remedy all torts in violation of continually evolving conceptions of customary international law.

The United States Supreme Court has not decided whether the ATCA encompasses claims under static or evolving interpretations of customary international law.<sup>24</sup> The Second Circuit follows the evolving theory in *Filartiga v. Pena-Irala*<sup>25</sup> and *Kadic v. Karadzic*,<sup>26</sup> the seminal cases interpreting the elements of customary international law (discussed in detail below). The evolving

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18. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

19. Dodge, *supra* note 16, at 223.

20. *See id.*

21. "It is important to remember that in 1789 there was no concept of international human rights; neither was there, under the traditional version of customary international law, any recognition of a right of private parties to recover." *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring).

22. "[E]volving standards of international law govern who is within the [Alien Tort Act's] jurisdiction." *Amereda Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987).

23. "It is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

24. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 152 (2d Cir. 2003).

25. *Filartiga*, 630 F.2d 876.

26. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

theory is also followed in the Ninth<sup>27</sup> and Eleventh Circuits.<sup>28</sup> However, the D.C. Circuit criticizes the broad, inclusive interpretation of the ATCA. In the 2003 case of *Al Odah v. United States*, Judge Randolph insisted that “[t]he meaning of §1350 has been an open question in [the D.C. Circuit].”<sup>29</sup>

Judge Randolph’s concurring opinion in *Al Odah*<sup>30</sup> and concurring opinions by Judge Bork and Judge Robb in *Tel-Oren* reject the prevailing view “that the ATCA creates a private right of action for violations of United States treaties or customary international law.”<sup>31</sup> Judge Randolph criticizes the modern ATCA interpretation as “grant[ing] aliens greater rights in the nation’s courts than American citizens enjoy,”<sup>32</sup> because absent authorizing legislation, individuals may not sue for treaty violations unless a treaty is self-executing.<sup>33</sup> Moreover, Judge Randolph believes the prevailing ATCA construction impermissibly usurps Congressional authority by granting the federal courts the power to define international law.<sup>34</sup> Thus, “[t]he rejection of *Filartiga*’s understanding of the ATCA by two of the three judges on the *Tel-Oren* panel suggests that the law of the District of Columbia Circuit stands in contrast to that of [the Second Circuit] and of the other Circuits that have followed. . . *Filartiga*.”<sup>35</sup>

### B. Modern Conception of the ATCA

The ATCA was largely unknown until 1980, when the Second Circuit Court of Appeals decided the case of *Filartiga v. Pena-Irala*,<sup>36</sup> which one commentator has referred to as the “*Brown v.*

27. See *Hilao v. Estate of Marcos* (In re Estate of Ferdinand Marcos, Human Rights Litigation), 25 F.3d 1467 (9th Cir. 1994); *John Doe I v. Unocal Corp.* 2002 U.S. App. LEXIS 19263 (9th Cir. 2002), *rehearing granted*, at 2003 U.S. App. LEXIS 2716 (9th Cir. Sept. 18, 2003).

28. See *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

29. *Al Odah v. United States*, 321 F.3d 1134, 1145-47 (D.C. Cir. 2003) (Randolph, J., concurring).

30. See *id.*

31. *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 151 (2d Cir. 2003); see *Al Odah*, 321 F.3d at 1145-47 (Randolph, J., concurring); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 811 (D.C. Cir. 1984) (Bork, J., concurring); *id.* at 826 (Robb, J., concurring).

32. *Al Odah*, 321 F.3d at 1146.

33. *Id.*; see *Tel-Oren*, 726 F.2d at 808-10 (Bork, J., concurring).

34. “Article I, section 8, clause 10 of the Constitution gives Congress the power to ‘define and punish. . . Offenses against the Law of Nations’ . . . Yet under *Filartiga*, it is the courts, not Congress who decide [what international law is and what violations of it ought to be cognizable in the courts].” *Al Odah*, 321 F.3d at 1147.

35. *Flores*, 343 F.3d at 151.

36. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980).

*Board of Education* of international human rights.<sup>37</sup> In *Filartiga*, the court held that torture perpetrated under the color of official authority violated “universally accepted norms” of international law.<sup>38</sup> As a result, an alien may bring an action against an alleged torturer in federal district court under the ATCA when the alleged torturer is served with process inside the United States.<sup>39</sup>

In *Filartiga*, Paraguayan citizens (the Filartigas) filed suit in the Eastern District of New York against a fellow Paraguayan citizen, Americo Norberto Pena-Irala (Pena).<sup>40</sup> The Filartigas alleged that Pena, the Inspector General of Police in Asuncion, Paraguay, tortured their seventeen-year-old son Joelito to death.<sup>41</sup> Joelito was kidnapped on March 29, 1976.<sup>42</sup> Later that day, Joelito’s sister, Dolly, was taken to Pena’s home where Joelito’s body was on display.<sup>43</sup> Pena chased Dolly as she fled the home, shouting, “[h]ere you have what you have been looking for so long and what you deserve. Now shut up.”<sup>44</sup> The Filartigas contended in their complaint that Joelito was tortured and killed in retaliation for his father’s opposition to the government.<sup>45</sup>

Pena subsequently entered the United States under a visitor’s visa.<sup>46</sup> Dolly Filartiga, who was living in Washington, D.C. at the time, learned of Pena’s presence and informed the Immigration and Naturalization Service.<sup>47</sup> Deportation proceedings were pending when Dolly served Pena with a complaint alleging wrongful death by torture, and seeking compensatory and punitive damages of \$10,000,000.<sup>48</sup> Pena moved to dismiss the complaint on the

37. Michael Dwayne Pettyjohn, *Bring Me Your Tired, Your Poor, Your Egregious Torts Yearning to See Green: The Alien Tort Statute*, 10 TULSA J. COMP. & INT’L L. 513, 513 (2003)(citing William Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 687 (2002)).

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

39. *See id.*

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *Id.* (internal quotation marks omitted).

45. *See id.*

46. *See id.*

47. *See id.* at 878-79.

48. *See id.* at 879. The Filartigas alleged a cause of action “arising under wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations, . . . Jurisdiction is claimed under the general federal question provision, 28 U.S.C. § 1331 and . . . under the Alien Tort Statute, 28 U.S.C. § 1350.” *Id.*

grounds of lack of subject matter jurisdiction and *forum non conveniens*.<sup>49</sup> The district court, in granting Pena's motion to dismiss for lack of subject matter jurisdiction, narrowly construed "law of nations" under § 1350 as "excluding that law which governs a state's treatment of its own citizens."<sup>50</sup>

The Second Circuit Court of Appeals reversed. The Court first reasserted that the ATCA provides a private right of action for aliens to address violations of customary international law or of a treaty of the United States.<sup>51</sup> Since the Filartigas were not U.S. citizens, and their claim involved a tort, the issue in the case was whether the Filartigas had satisfied the remaining statutory requirement of alleging a violation of "the law of nations". The Court concluded that the Filartigas had met this requirement. The "law of nations", or customary international law, "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>52</sup> For a norm to rise to the level of customary international law, it must be commonly embraced by the "general assent of civilized nations."<sup>53</sup> A principle of customary international law exists where "the nations of the world have demonstrated that the wrong is of *mutual*, and not merely *several*, concern, by means of express international accords."<sup>54</sup>

The 1995 case of *Kadic v. Karadzic* expanded the reach of the ATCA beyond wrongs committed by state actors, and held that the ATCA also encompassed claims brought against private individuals.<sup>55</sup> In *Kadic*, Muslim and Croat citizens of Bosnia-Herzegovina brought an ATCA action against Radovan Karadzic, President of a self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina.<sup>56</sup> The plaintiffs claimed that they, along with those they rep-

49. *See id.* As to the *forum non conveniens* defense, Pena submitted an affidavit of his counsel ensuring that "Paraguayan law provides a full and adequate civil remedy for the wrong alleged." *Id.*

50. *Id.* at 880.

51. *See id.* at 878.

52. *Id.* at 880 (quoting *United States v. Smith*, 18 U.S. 153, 160-61 (1820) (internal quotation marks omitted)).

53. *The Paquete Habana*, 175 U.S. 677, 694 (1900).

54. *Filartiga*, 630 F.2d at 888 (quoting *IIT v. Vencap*, 519 F.2d 1001, 1015 (1975)).

55. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995). "We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.*

56. *See id.* at 236-37.



resented, suffered various atrocities such as rape, forced prostitution, forced impregnation, torture, and summary execution at the hands of Karadzic and his forces.<sup>57</sup> Karadzic answered that as a private individual not acting under the color of a state's law, he could not violate customary international law.<sup>58</sup> Therefore, it was argued that the federal court did not have jurisdiction over the case because the plaintiffs did not state a cause of action under the ATCA.<sup>59</sup> The district court agreed with Karadzic and dismissed the case for lack of subject matter jurisdiction.<sup>60</sup> In so holding, the district court concluded that the faction that Karadzic represented in the Bosnian civil war was not a recognized state; therefore, Karadzic did not act under the color of a recognized state law.<sup>61</sup> Furthermore, the district court reasoned that since "acts committed by non-state actors do not violate the law of nations,"<sup>62</sup> the plaintiffs did not satisfy the requirements of the ATCA.<sup>63</sup>

The Second Circuit Court of Appeals reversed, citing several sources affirmatively supporting individual liability for violations of customary international law. The court noted that prohibitions against slavery and the slave trade, as well as certain war crimes, have been recognized as applicable to individuals,<sup>64</sup> and the U.S. Supreme Court has decided that the law of nations is applicable to private individuals who commit acts of piracy.<sup>65</sup> This interpretation by the U.S. Supreme Court is bolstered by a 1795 opinion of Attorney General Bradford, which approved of the application of the ATCA to individuals "aiding the French fleet to plunder British property off the coast of Sierra Leone."<sup>66</sup> The Restatement (Third) of Foreign Relations Law buttresses the positions taken by the U.S. Supreme Court and Attorney General Bradford by assert-

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57. *See id.*

58. *See id.* at 239.

59. *See id.*

60. *See id.* at 237.

61. *See id.*

62. *Id.* (quoting *Doe v. Karadzic*, 866 F. Supp. 734, 739 (S.D.N.Y. 1994) (internal quotation marks omitted).

63. The District Court also held that the absence of state action barred plaintiffs' claim under the Torture Victim Protection Act of 1991 (codified as 28 U.S.C. §1350 (1991)) which "requires that an individual defendant act 'under actual or apparent authority, or color of law, of any foreign nation'" 28 U.S.C. § 2(a)(1991); *see Karadzic*, 70 F.3d at 238.

64. *See Karadzic*, 70 F.3d at 239.

65. *See id.* (citing *United States v. Smith*, 18 U.S. 153, 161 (1820); *United States v. Furlong*, 18 U.S. 184, 196-97 (1820); *The Brig Malek Adhel*, 43 U.S. 210, 232 (1844)).

66. *Id.* (citing *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795)).

ing that “[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”<sup>67</sup>

Despite these recognitions of a broader view of the scope of the ATCA, Karadzic advanced a narrow construction of *Filartiga*, wherein only *official* torture was violative of the law of nations.<sup>68</sup> The Second Circuit responded that under the facts of *Filartiga*, it was only faced with a defendant who allegedly committed official torture.<sup>69</sup> Thus, the Second Circuit had no occasion to consider whether private acts would be covered under the ATCA, though nothing in the decision precluded this result.<sup>70</sup>

### C. Customary International Law

As developed in *Filartiga*, *Karadzic*, and their progeny, the concept of customary international law *appears* to be relatively straightforward. For a principle to become incorporated into customary international law, it must be an unambiguous, well-recognized principle, universally adhered to by the States out of a sense of legal obligation, that addresses a mutual, and not merely several, concern of the States.<sup>71</sup> However, beyond this veneer of simplicity lies a tangled thicket of complicated qualifiers and questions. The question of how a principle attains universal acceptance and accession out of legal obligation arises. Followed by that question is differentiating between a concern that is mutual among the States as opposed to one that is merely several among the States. Finally, one must ask what evidence is to be considered in making these determinations? The next section will explore the elements underlying customary international law, and will develop an analytical framework within which to examine the *Flores* case.

The first premise of customary international law centers around the notion that the principle must be well established and universally abided by. In *The Paquete Habana*,<sup>72</sup> the U.S. Supreme Court held that the customary prohibition against wartime seizure of coastal fishing vessels had attained the “general assent of civilized nations,” and thus had ripened from custom and

67. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 2 introductory note (1986).

68. See *Karadzic*, 70 F.3d at 240.

69. See *id.*

70. See *id.*

71. See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 155-56 (2d Cir. 2003); *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980).

72. *The Paquete Habana*, 175 U.S. 677 (1900).

usage among nations into a "settled rule of international law."<sup>73</sup> The requirement of universal assent is essential in preventing individual nations from "impos[ing] idiosyncratic legal rules upon others, in the name of applying international law."<sup>74</sup> However, universal acceptance does not require universal success in implementing and enforcing the rule. Nevertheless, the principle asserted must be firmly rooted and not "merely professed or aspirational".<sup>75</sup>

Although universal recognition is necessary, it does not in itself suffice to create a norm of customary international law. An additional requirement imposed is that States must universally accede to the principle out of a sense of legal obligation.<sup>76</sup> Based upon this requisite, a principle that is adopted solely for moral or political reasons does not qualify as one that is acceded to out of a legal obligation.<sup>77</sup> This rule prevents broad statements of policy, however laudable, from binding individual States under the banner of customary international law. This means that some positions may enjoy universal moral and/or political acceptance, yet fall short of being considered a norm of customary international law because they are not derived from a legal obligation. The stringent requirements for becoming a principle rooted in customary international law are also intended to prevent transitory political ideals from becoming entrenched in the law of nations. Although bare moral principles and political ideals unsupported by legal obligation may eventually ripen into customary international law, they must nevertheless legally bind States before they can achieve customary international law status.

Customary international law only applies to evils that are of *mutual*, not *several*, concern to States.<sup>78</sup> Essentially, this suggests that simply because States universally condemn an act in their domestic law does not mean that the act is a violation of custom-

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73. *Filartiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. at 694).

74. *Id. Accord*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)), wherein the U.S. Supreme Court refused to address the legitimacy of Cuba's seizure of foreign-owned private property following the communist revolution because of the absence of universal consensus on the issue of expropriation of private property by governmental entities.

75. *Flores*, 343 F.3d at 155.

76. *See id.* at 154-55 (quoting *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 307-08 (2d Cir. 2000), "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.") (internal quotation marks omitted).

77. *See id.* at 155.

78. *See id.* at 155-56.

ary international law.<sup>79</sup> In *ITT v. Vencap, Ltd.*,<sup>80</sup> Judge Friendly described customary international law as “standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.”<sup>81</sup> Accordingly, the common interest of States must be implicated. The mutual concern requirement is best explained by way of the classic example used by the court in *Flores*-murder. Every nation proscribes murder, but murder does not fall within the orbit of the ATCA because the “‘nations of the world’ have not demonstrated that this wrong is ‘of mutual, and not merely several, concern.’”<sup>82</sup> On the other hand, some forms of murder, such as extrajudicial killing and genocide, would be covered under the ATCA. These crimes against humanity are universally regarded as a mutual concern among civilized nations, “capable of impairing international peace and security.”<sup>83</sup>

#### D. Sources of Customary International Law

There must be concrete evidence of customs and practices that demonstrate universal accession to the principle out of a sense of legal obligation and mutual concern.<sup>84</sup> The hierarchy of sources of customary international law is laid out in Article 38 of the Statute of the International Court of Justice<sup>85</sup>, to which the

79. *See id.*

80. *ITT v. Vencap, Ltd.*, 519 F.2d 1001 (2d. Cir. 1975).

81. *Id.* at 1015.

82. *Flores*, 343 F.3d at 157-58 (quoting *Filartiga*, 630 F.2d at 888).

83. *Id.* at 156.

84. *See id.* at 160.

85. The Statute of the International Court of Justice, June 26, 1945, arts. 38 & 59, Stat. 1055, 1060 [hereinafter ICJ Statute].

##### Article 38.

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law. 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

##### Art. 59.

The decision of the Court has no binding force except between the parties and in respect of that particular case.

United States and all members of the United Nations are parties.<sup>86</sup> These sources, authoritatively cited by the *Filartiga* court, and followed by the *Flores* court, are as follows: (a) international conventions, (b) international custom, (c) general principles of law recognized by civilized nations, (d) judicial decisions and scholarly works as a subsidiary means of determining rules of law.<sup>87</sup> Primary consideration must be given to formal lawmaking and official State action, while the works of scholars receive only secondary consideration.<sup>88</sup> Broad, amorphous statements of principle that do not set forth clear and unambiguous rules are inadequate to establish a principle of customary international law.<sup>89</sup>

#### IV. ANALYSIS AND DISCUSSION

The analytical framework derived from ATCA jurisprudence and employed by the *Flores* court provides the background for an analysis of the the Second Circuit's decision in *Flores*.

##### A. Plaintiffs' "Egregiousness" Standard

Plaintiffs argued for an alternative to the traditional ATCA analysis announced in *Filartiga*; they proposed that courts "make a factual inquiry into whether the allegations rise to the level of egregiousness and intentionality required to state a claim under international law."<sup>90</sup> The "shockingly egregious" standard is an attempt to circumvent the "mutual rather than merely several concern" requirement by elevating some torts to the level of customary international law purely based upon the severity of the act.<sup>91</sup> The court rejected this argument as "entirely inconsistent with [its] understanding of customary international law."<sup>92</sup>

The court went on to add that the proposed "shockingly egregious" standard could not form the basis for an ATCA claim unless the behavior *also* violated an unambiguous principle of customary

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86. See *Flores*, 343 F.3d at 156.

87. See *id.* (quoting the ICJ Statute, *supra* note 84 at 24-25).

88. See *United States v. Yousef*, 327 F.3d 56, 102-03 (2d Cir. 2003). Discussing the secondary role of scholars as a source of customary international law, the Yousef court notes that no individual or group of international law scholars can authoritatively create law consistent with our democratic process and the rule of law. The Yousef court similarly discounted the use of the Restatement (Third) and other treatises as primary sources of customary international law. "Such works at most provide evidence of the practice of States". *Id.* at 99.

89. See *Flores*, 343 F.3d at 163.

90. *Flores*, 253 F.Supp. 2d at 522.

91. *Flores*, 343 F.3d at 159.

92. *Id.*

international law.<sup>93</sup> The plaintiffs' standard would substitute the district court's conception of "shocking and egregious" conduct for that of the consensus of nations that now forms the basis of customary international law.<sup>94</sup> The standard advocated by the plaintiffs would also impermissibly broaden the content of customary international law from matters of mutual concern between nations to any number of matters that a court could consider egregious, including matters of merely several concern.<sup>95</sup> Moreover, the proposed standard would dilute the "clear and unambiguous" requirement for a principle of customary international law; "egregious" behavior is an inherently subjective concept susceptible to an infinite number of interpretations.<sup>96</sup>

*B. Evaluation of Plaintiffs' Broad Claim That Rights to Life And Health Are Principles Established By Customary International Law.*

Life and health are "abstract rights and liberties devoid of discernable standards and regulations;"<sup>97</sup> they are "only nebulous notions that are infinitely malleable."<sup>98</sup> Thus, the court held that the rights to life and health are "insufficiently definite to constitute rules of customary international law."<sup>99</sup> These so-called rights are inherently vague, and fall short of being the type of clear and unambiguous rules required by *Filartiga*.<sup>100</sup> At best, these abstract "rights" constitute well-intended social or moral conceptions which are inappropriate sources of customary international law because they do not suggest an intention by the States to be legally bound to anything.<sup>101</sup>

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93. *Id.* at 159.

94. *Id.*

95. *See id.* at 159-60.

96. *Id.*

97. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

98. *Flores*, 343 F.3d at 161.

99. *Id.* at 160.

100. *See id.*

101. *Id.* at 161.

C. *Evaluation of Plaintiffs' Narrow Claim That Customary International Law Prohibits Intra-national Pollution; Analysis of Each of Plaintiffs' Proposed Sources Supporting Their Claim.*

a. Treaties, Conventions, and Covenants

Treaties, conventions, and covenants are appropriate pieces of evidence of customary international law in that they confirm a State's intent to become legally bound, thereby demonstrating assent to a principle out of a sense of legal duty.<sup>102</sup> Treaties ratified by at least two states provide some evidence of custom and practice, but to provide proof of customary international law, the treaty must be ratified and consistently adhered to by a critical mass of States.<sup>103</sup> In short, treaties provide proof of assent out of a sense of legal obligation, but do not satisfy the universal recognition prong until "an overwhelming majority of States have ratified the treaty, *and* . . . [have] uniformly and consistently act[ed] in accordance with its principles."<sup>104</sup>

The evidentiary weight given to treaties is determined not only by the number of ratifying nations, but also by consideration as to *which* nations have ratified the treaty.<sup>105</sup> The more prominent the ratifying parties, the more compelling the argument that the principles embodied in the treaty are indeed *bona fide* rules of customary international law.<sup>106</sup> Evidentiary weight given to treaties also varies according to the degree with which States take concrete action to implement and actually abide by the treaties. Treaties that give rise to tangible acts of States are accorded far more weight than treaties that have not led to discernable State acts in furtherance of the principles contained within them.

The latter treaties are less reliable markers of universally recognized principles because at the margins they begin to resemble mere statements of policy or aspirational documents, rather than legally binding treaties. By way of example, in the United

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102. *See id.* at 162.

103. *See id.* at 162-63.

104. *Id.*

105. *See id.* at 163.

106. *See United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003), ". . . it is highly unlikely that a purported principle of customary international law in direct conflict with the recognized practices and customs of the United States and/or other prominent players in the community of States could be deemed to qualify as a *bona fide* customary international law principle."

States, a treaty that is either self-executing (“those that immediately create rights and duties of private individuals which are enforceable”)<sup>107</sup> or that is executed by an Act of Congress, is a more reliable indicator of the customs and practices of the U.S. than a treaty that is merely ratified and unexecuted.<sup>108</sup> The latter is form over substance, and as such is indistinguishable from a mere aspirational statement.

The plaintiffs rely on four treaties as evidence of a consensus proscribing intra-national pollution to a degree that is cognizable in customary international law: (1) the International Covenant on Civil and Political Rights (ICCPR),<sup>109</sup> (2) the American Convention on Human Rights (American Convention),<sup>110</sup> (3) the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>111</sup> and (4) the United Nations Convention on the Rights of the Child.<sup>112</sup>

The United States has only ratified one of the cited treaties, the International Covenant on Civil and Political Rights.<sup>113</sup> The language relied upon asserts that every human has a right to life which shall be protected by law, and of which he shall not be arbitrarily deprived.<sup>114</sup> The ICCPR has been ratified by 148 nations, but the United States ratified it with numerous reservations aligning the treaty obligations with Constitutional requirements.<sup>115</sup> Moreover, the U.S. ratified the treaty with the express declaration that it is not self-executing; thus, the treaty is not a reliable indicator of actual U.S. practice because it “does not create a private cause of action in United States courts.”<sup>116</sup> Even if the treaty were self-executing, and did represent an international consensus, the ideal expressed is insufficiently definite to serve as

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107. *Flores*, 343 F.3d at 163 (quoting Stefan A. Riesenfeld, *Comment: The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 896-96 (1980)).

108. *See id.* at 163.

109. *Id.* (citing the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]).

110. *Id.* at 164 (citing the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123).

111. *Id.* (citing the International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3).

112. *Id.* at 165 (citing the United Nations Convention on the Rights of the Child, G.A. Res. 44/25, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/25 (1989), 1577 U.N.T.S. 3).

113. *See id.* at 163.

114. *See id.* at 164 (quoting ICCPR, *supra* note 108, at art. 6(1)).

115. *See id.*

116. *Id.*



a rule of customary international law.<sup>117</sup> As discussed above, the “right to life” is simply too ambiguous.

The other three treaties cited by plaintiffs suffer the same infirmity—the rights purportedly generated are simply too aspirational. The American Convention on Human Rights contains the same broad “right to life” language, and has not been ratified by the United States.<sup>118</sup> The unratified International Covenant on Economic, Social and Cultural Rights “instructs States parties to take the steps necessary for ‘the improvement of all aspects of environmental and industrial hygiene’”.<sup>119</sup> While this treaty does tangentially address the topic of pollution, it provides no concrete instruction regarding what levels of pollution are acceptable, and consequently is merely a vague statement of principle.<sup>120</sup> Similarly, the U.N. Convention on the Rights of the Child addresses environmental pollution, but also fails to establish any finite parameters or regulatory standards.<sup>121</sup> Again, the lack of any evidence of clear and unambiguous rules that States abide by out of legal obligation defeats the plaintiffs’ assertion that this treaty language is evidence of customary international law.

#### b. Non-Binding General Assembly Declarations

The plaintiffs proffer numerous United Nations General Assembly resolutions to support their claim that SPCC violated rules of customary international law. However, these documents are insufficient as sources of customary international law because they do not go beyond representing an ideal to aspire to; they are not intended to legally bind UN member states.<sup>122</sup> In the UN’s formative years, proposals to confer binding status on General Assembly declarations were specifically rejected,<sup>123</sup> leaving the

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117. *See id.* at 164.

118. *See id.*

119. *Id.*

120. *See id.*

121. *See id.* at 164-65. The unratified treaty “instructs States to ‘take appropriate measures. . . to combat disease and malnutrition. . . through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.’”

122. *See id.* at 165.

123. *See id.* The issue was extensively considered and rejected at the 1944 Dumbarton Oaks Conference in Washington, D.C., at the 1945 Yalta Conference, and at the 1945 United Nations Founding Conference in San Francisco. *See id.* (citing *The Charter of the United Nations: A Commentary* 248, 269 (Bruno Simma ed., 2d ed. 2002)).

body as “the world’s most important political discussion forum.”<sup>124</sup> The organ of the United Nations vested with the power to produce binding resolutions is the Security Council;<sup>125</sup> the output of the General Assembly is limited to “recommendations to the Members of the United Nations or to the Security Council or to both.”<sup>126</sup> Such declarations may develop into customary international law, but only if State practice follows out of a sense of legal obligation.<sup>127</sup> Here, the General Assembly’s declarations presented by the plaintiffs are advisory in nature, and do not describe actual State customs and practices motivated by legal obligation.<sup>128</sup>

### c. Other Multinational Declarations of Principle

The plaintiffs also advance numerous multinational “declarations” (made by a multinational body, or by one or more States) to support their claim of SPCC’s violation of customary international law.<sup>129</sup> These are typically statements of a political principle, espoused by a nation or group of nations, that fail to describe the type of universally recognized legal obligations required to constitute a rule of customary international law.<sup>130</sup> The two declarations relied upon by the plaintiffs (the American Declaration of the Rights and Duties of Man,<sup>131</sup> and Principle 1 of the Rio Declaration)<sup>132</sup> are both inadequate because they (1) profess mere aspirational principles, (2) create no enforceable obligations, and (3) provide no indication that the declaring States intended to be legally bound.<sup>133</sup> Therefore, the conclusion is inescapable that these declarations fail as evidence of customary international law.

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124. *Id.* (quoting *The Charter of the United Nations: A Commentary* 248, 269 (Bruno Simma ed., 2d ed. 2002)).

125. *See id.* at 167 (citing Dolivet, *The United Nations: A Handbook on the New World Organization* 35, at 45-57 (1946)).

126. *Id.* (quoting U.N. CHARTER art. 10).

127. *See id.* (quoting *Filartiga*, 630 F.2d at 883, “a [United Nations] declaration may by custom become recognized as [a] rule[ ]’ of customary international law. . . non-binding United Nations documents. . . ‘create[ ] an expectation of adherence,’ but they evidence customary international law only ‘insofar as the expectation is gradually justified by State practice.’”)

128. *See id.* at 168.

129. *Id.*

130. *See id.*

131. *See id.* at 169 (citing the American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/ I.4 Rev. (1965)).

132. *See id.* (citing Principle 1 of the Rio Declaration, 31 I.L.M. 874).

133. *See id.*

#### d. Decisions of Multinational Tribunals

The plaintiffs also rely on decisions of the International Court of Justice and the European Court of Human Rights.<sup>134</sup> However, neither of these tribunals may render decisions that create binding norms of customary international law.<sup>135</sup> Article 59 of the ICJ Statute unambiguously limits the force of its decisions to the parties involved, and to the specific matter addressed.<sup>136</sup> Similarly, the European Court of Human Rights is not empowered to create customary international law norms.<sup>137</sup> It only has jurisdiction to interpret and apply provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms; therefore, its decisions are only applicable to its regional signatories.<sup>138</sup> Moreover, the ICJ Statute lists judicial decisions as secondary, not primary sources of customary international law.<sup>139</sup> The decisions of these tribunals may be considered as subsidiary evidence of customary international law rules to the degree that the opinions are consistent with existing State practices undertaken out of legal obligation, but here the tribunals were not even addressing intranational pollution of the sort complained of.<sup>140</sup>

#### e. Expert Affidavits

The plaintiffs introduced many expert affidavits to support their contention that intranational pollution violates well-established rules of international law.<sup>141</sup> The Second Circuit agreed with the district court and "declined to afford evidentiary weight to these [writings]."<sup>142</sup> In *The Paquete Habana*, the U.S. Supreme Court stated that expert writings may be considered as a source of customary international law, but expert commentators may be relied upon solely as evidence of what the law already is, not as speculation of what a particular author thinks the law should

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134. *See id.*

135. *See id.*

136. *See id.* at 169-70 (quoting the Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, 1055. "the decisions of the Court have no binding force except between the parties and in respect of the particular case").

137. *See id.* at 169.

138. *See id.* at 170 (citing European Convention art. 32, "the Court's jurisdiction 'extends to all matters concerning the interpretation and application of the Convention'").

139. *See id.* (citing ICJ Statute, *supra* note 84, at art. 38).

140. *See id.*

141. *See id.*

142. *Id.*

be.<sup>143</sup> In accord with this decision, Article 38 of the ICJ Statute instructs courts to consult expert writings as a secondary source only,<sup>144</sup> implying that the role of scholars is to identify the law as it exists, not to create it.<sup>145</sup>

## V. CONCLUSION

A justice of England's Court of Appeals observed, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States."<sup>146</sup> Plaintiffs' lawyers have dusted off a seldom used, single sentence from the Judiciary Act of 1789 and aggressively attempted to shoehorn a case into U.S. federal court. The Second Circuit rightly limited the ATCA to those acts, such as slavery, piracy, and torture, that are well established, clearly defined, and universally recognized wrongs that States prohibit out of legal obligation. Conduct that is merely egregious cannot open the doors of U.S. courts to foreign plaintiffs. If the plaintiffs' bar were able to scour the globe in search of aliens to bring claims in the U.S. tort lottery, the cost would be astronomical both in terms of strain on the legal system, as well as in terms of economic damage to corporate and individual defendants.

There are two possible motivations behind this attempt to bring environmental claims under the ATCA. The first is the pecuniary interest already alluded to. Second, there may be a genuine attempt to use U.S. courts as a regulatory tool to effectuate a *de facto* harmonization of international environmental standards.

Disparity in environmental regulation among nations effectively demonstrates the lack of an international consensus concerning environmental standards. This disparity is a function of a myriad of complexities, but ultimately the problem comes down to a sovereign nation's priorities in balancing its resources with its desire to develop economically. Clearly, there is a benefit to doing business in the developing world because environmental regula-

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143. See *id.* at 171 (quoting *The Paquete Habana*, 175 U.S. at 700).

144. See *id.*; ICJ Statute, *supra* note 84 at art. 38.

145. See *id.*, "neither *Paquete Habana* nor Article 38 recognizes as a source of customary international law the policy-driven or theoretical work of advocates that comprises a substantial amount of contemporary international law scholarship. Nor do these authorities permit us to consider personal viewpoints expressed in the affidavits of international law scholars."

146. Washington Legal Foundation, Legal Backgrounder, *Court Properly Limits Scope of Alien Tort Claims Act*, January 17, 2003, quoting *Smith Kline & French Labs. Ltd. v. Block*, 2 All E.R. 72, 72 (Ct. App. 1983).

tion is typically not as stringent as in the United States or Europe. The generally mild regulatory climate, coupled with cheap, abundant natural resources and labor makes offshore operations highly attractive. Business interests undertake some activity in the developing world that could not occur in the United States, but that does not mean that the doors of U.S. courts should be open to grievances that are more appropriately addressed in the local jurisdiction.

In the present case, SPCC was subject to Peruvian environmental regulation,<sup>147</sup> oversight, and the jurisdiction of Peruvian courts.<sup>148</sup> Moreover, the Peruvian government had previously fined SPCC, required SPCC to pay restitution to area farmers for environmental degradation, and compelled the company to "modify its operations in order to abate pollution and other environmental damage."<sup>149</sup> The Peruvian Ministry of Energy and Mines (MEM) ordered SPCC to conduct environmental impact studies and to investigate the "economic feasibility of abating that impact."<sup>150</sup> In 1991, SPCC agreed to spend \$135 million on environmental projects under MEM's supervision as a condition precedent to the modernization and expansion of its facilities.<sup>151</sup> Finally, SPCC has been sued "in Peru for damages resulting from the environmental impact of its operations."<sup>152</sup>

Obviously, the plaintiffs consider this level of regulation and the remedies available under Peruvian law inadequate. Indeed, justice in the developing world (either in the form of regulatory containment or tort damages) may or may not be available *to the degree* we would expect in the United States. *If* that is the purpose of developing this entry into the federal courts, the proponents of expanded ATCA jurisdiction must now focus their efforts on the efficacy of local regulation and local remedies.

If, on the other hand, this theory is merely intended to mint a fresh crop of plaintiffs for the tort bar, then this decision is a victory for international business, the global economy, and local economies which would otherwise be saddled with *de facto* envi-

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147. *Flores*, 343 F.3d at 144. The Peruvian Ministry of Energy and Mines sets emissions and discharge standards which SPCC is required to meet, and the company is subject to annual or semi-annual reviews to ascertain the "impact of SPCC's activities on the ecology and agriculture of the region." *Id.*

148. *See id.*

149. *Id.*

150. *Id.*

151. *See id.* at 144.

152. *Id.*

ronmental rules not of their choosing. The United States cannot play personal injury attorney to the world. Nor can plaintiffs' attorneys and federal judges in the U.S. supplant the legislatures and regulatory agencies of developing nations by effectively imposing first world environmental standards abroad.

While the *Flores* decision does not explicitly restrict application of the ATCA to international human rights, it sets a clear boundary that, *at present*, environmental claimants need not apply. However, given the fluid nature of customary international law, it is possible that rules proscribing environmental degradation could one day emerge as an international consensus, meet the *Filartiga* requirements, and become susceptible to this sort of litigation. That day has not come, and until it does, redress for this species of harm remains with the local jurisdiction under local law.

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