RECENT DEVELOPMENT

TVPA Holds Steady as ATS Shrinks for Redressing Torture Abroad in *Warfaa v. Ali*

I. OVERVIEW

Somali civil and political discord during the 1980s was marked by Siad Barre's oppressive military regime controlling the government and maintaining power through violence against dissenting groups.[1] In 1987, members of the Fifth Battalion of the Somali National Army kidnapped Farhan Warfaa on suspicion of supporting an opposing political party and subjected him to torture.[2] Colonel Yusuf Ali, a Barre supporter, commanded the Fifth Battalion and, at times, personally tortured Warfaa.[3] By March of 1988, Warfaa escaped the Fifth Battalion and continued to live in Somalia.[4]

Ali immigrated to Canada in December of 1990 and Barre's government collapsed less than a year later.[5] Canada deported Ali for human rights abuses, yet he arrived in the United States, under puzzling circumstances, thereafter.[6] The United States began deportation

1. Warfaa v. Ali, 811 F.3d 653, 655-56 (4th Cir. 2016).

2. *Id.* at 656. Warfaa was subjected to repeated beatings to the point of unconsciousness, sometimes while tied or chained. His torture culminated in being shot in his wrist and leg before escaping. In addition to being accused as a member of an opposition political movement, Warfaa was a member of a targeted clan. *Id.*

3. *Id.* at 656. Prior to Warfaa's kidnapping, Ali participated in the Officers' Advanced Military Course and further intensive training in Fort Benning. Ali was also invited by the Defense Intelligence Agency to train at Fort Leavenworth for a year. Two years after Warfaa's kidnapping, Ali studied with the U.S. Air Force at Fort Keesler Air Force Base. *Id.* at 664.

4. *Id.*

5. *Id.*

6. *Id.* The court is perplexed as to why or how Yusuf Ali entered the United States after being deported from Canada. *Id.* at 656 n.2.

proceedings, but Ali voluntarily left, only to return by 1996.[7] Since then, Ali continued residing in Alexandria, Virginia, as a lawful permanent resident.[8]

Warfaa filed a complaint in 2005 against Ali for kidnapping and torture, but the district court stayed proceedings pending a State Department declaration that the action would not interfere with U.S. foreign policy.[9] The district court extended the stay until after the Supreme Court resolved *Kiobel v. Royal Dutch Petroleum Co.*, a case involving similar issues to those expressed in Warfaa's complaint of torts committed abroad.[10] Warfaa's final complaint contained six counts: (1) attempted extrajudicial killing; (2) torture; (3) cruel, inhuman, or degrading treatment or punishment; (4) arbitrary detention; (5) crimes against humanity; and (6) war crimes.[11] All six counts were jurisdictionally based on the Alien Tort Statute (ATS), and the first two counts had alternative jurisdictional bases under the Torture Victim Protection Act (TVPA).[12] The court questioned the viability of the ATS claims following the decision in *Kiobel*, and Ali claimed that immunity as a foreign official barred the TVPA claims.[13] The district court dismissed the ATS claims under *Kiobel*, but denied that Ali was entitled to immunity for the TVPA claims.[14] Warfaa appealed the dismissal of the ATS claims, and Ali appealed the denial of his immunity.[15] The U.S. Court of Appeal for the Fourth Circuit *held*: (1) Warfaa's ATS claims could not overcome the presumption of extraterritoriality set forth in *Kiobel* because all conduct relevant to the tort took place in Somalia, lacking a sufficient nexus to the United States, and (2) a foreign official acting in that capacity does not have immunity for *jus cogens* violations. *Warfaa v. Ali*, 811 F.3d 653, 661-62 (4th Cir. 2016).

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7. *Id.* at 656. While the court is unaware of the details of how Ali reentered the United States after voluntarily leaving the country, one suggestion is that he returned on a spousal visa. *Id.* at 656 n.2, 664.
8. *Id.* at 656, 663.
9. *Id.* at 656.
10. *Id.* at 657.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 658.

II. BACKGROUND

A. ATS Jurisprudence from Filártiga to Kiobel

Statutorily, the ATS provides original jurisdiction to district courts for a civil action brought by an alien when a tort is committed in violation of the law of nations or of a treaty of the United States.[16] Although the ATS was part of the Judiciary Act of 1789, ATS jurisprudence did not arrive until over a century and a half later.[17] The United States Court of Appeals for the Second Circuit spawned the first substantial stream of ATS claims following its decision in *Filártiga v. Pena-Arala*.[18] *Filártiga* involved the political kidnapping, torture, and murder of seventeen-year-old Paraguayan Joelito Filártiga by a senior police official.[19] Joelito's father contended the murder was retaliatory because he had been a longstanding opponent of Paraguayan President Alfredo Stroessner.[20] The district court dismissed the complaint, holding that a state's treatment of its own citizens does not constitute a breach of the "law of nations" under the ATS so as to grant jurisdiction under the statute.[21] On appeal, the Second Circuit's inquiry revolved around whether or not the alleged conduct constituted a violation of the law of nations.[22] The court surveyed sources for the "law of nations" and gave a telling example of the evolution of international norms.[23] For instance, as a courtesy, nations historically refrain from seizing enemy fishing vessels during wartime.[24] This courtesy and practice became so widespread, it ripened into a rule of international law, uniformly binding all nations.[25] In *Filártiga*, the Second Circuit re-characterized the conduct as torture, without regard to state sponsorship, and found it violated the "norms of

16. 28 U.S.C § 1350 (1948).

17. Perry S. Bechky, *Homage to* Filártiga, 33 REV. LITIG. 333, 334-36 (2014); Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1663 (2013) (noting that the ATS "was invoked twice in the late 18th century, but then only once more over the next 167 years.").

18. Filártiga v. Pena-Arala, 630 F.2d 876, 890 (2nd Cir. 1980) (holding that torture is such a universally condemned violation of international law as to constitute an action under the ATS).

19. *Id.* at 878.

20. *Id.*

21. *Id.* at 880. The district court did recognize the gravity of the argument that torture may violate customary international law.

22. *Id.*

23. *Id.* at 880-81. Sources surveyed include: Universal Declaration of Human Rights, Declaration on the Protection of All Persons from Being Subjected to Torture, three treaties prohibiting torture, domestic laws of over fifty nations, and scholars. *Id.* at 879 n.4, 881-84.

24. *Id.* at 881.

25. *Id.*

international law of human rights, and hence the law of nations."[26] Further, *Filártiga*'s holding permitted courts to adjudicate claims between wholly foreign parties for conduct committed completely abroad.[27]

Following *Filártiga*, courts continued to refine the meaning of "conduct in violation of the law of nations."[28] The Ninth Circuit found state-sponsored torture as a violation of *jus cogens* and that it confers jurisdiction under the ATS as a breach of the law of nations.[29] The Second Circuit expanded the applicability of the law of nations to include non-state actors, permitting an ATS claim against a self-declared president of an unrecognized state during the Bosnian civil war.[30] In 2004, the ATS arrived at the doorsteps of the Supreme Court in *Sosa v. Alvarez-Machain*.[31]

Sosa stemmed from the murder of a Drug Enforcement Administration (DEA) agent by a gang in Mexico.[32] DEA officials suspected Humberto Alvarez-Machain, a Mexican doctor, assisted in extending the suffering of the agent before he died.[33] The DEA hired Mexican nationals to abduct Alvarez-Machain and bring him to the United States to stand trial.[34] After his acquittal, Alvarez-Machain brought claims under the ATS for his kidnapping and detention.[35] Addressing these claims, the Court acknowledged the statute as a jurisdictional grant, but also recognized that ATS claims would be "stillborn" without appropriate sources for a cause of action.[36] To resolve this issue, the Court set forth an extensive analytical framework to determine whether conduct violates the law of nations.[37] The first source was a breach of the law of nations as understood by the drafters at the

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26. *Id.* at 880. The court also notes the sufficiency of universally renouncing torture in principle, if not in practice. "The fact that the prohibition on torture is often honored in the breach does not diminish its binding effect as a norm of international law." *Id.* at 884 n.15.

27. Bechky, *supra* note 17, at 343.

28. Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 499 (9th Cir. 1992).

29. *In re Estate of Ferdinand E. Marcos*, 978 F.2d at 503. A *jus cogens* norm is a widespread practice so apparent as to elevate itself at the top of the hierarchy in international law from which no derogation is permitted. *Id.* at 500; Luke Ryan, comment, *The New Tate Letter: Foreign Official Immunity and the Case for a Statutory Fix*, 84 FORDHAM L. REV. 1773, 1783 n.89 (2016).

30. *Kadic*, 70 F.3d at 236-37.

31. Sosa v. Alavarez-Machain, 542 U.S. 692, 692 (2004).

32. *Id.* at 697.

33. *Id.*

34. *Id.* at 698.

35. *Id.*

36. *Id.* at 714.

37. *Id.* at 712-38.

time when the Judiciary Act was passed.[38] These included a triumvirate of violations observed by Sir William Blackstone: (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and, (3) piracy.[39] The second source was a narrow class of current international norms that rose to a level of content and acceptance as Blackstone's three violations weighed against the practical consequences of their adjudication.[40] Passing approval was given to the norms recognized in *Filártiga*, *In re Estate of Marcos Human Rights Litig.*, and *Kadic v. Karadzic*.[41] A final source came from the Court's cautious preservation of cases stemming from treaties to which the United States is a party.[42] While identifying these three sources, the Court ultimately held that Alvarez-Machain's claims did not rise to a breach of customary international law.[43]

The Supreme Court revisited the ATS in *Kiobel*, imposing an implicit element to the statute by attaching a presumption of extraterritoriality.[44] To overcome the presumption, a claimant must show: (1) that the relevant conduct took place within the United States and (2) does so with sufficient force as to displace the presumption against extraterritorial application.[45] "Mere corporate presence," when a corporation is found to be present in many countries, is insufficient to overcome this presumption.[46]

Following *Kiobel*, many courts barred *Filártiga*-type claims where the plaintiff and defendant are both aliens and the tort was committed abroad.[47] The *Kiobel* rule was also extended to American companies when the presumption was not overcome with sufficient force, despite touching the United States.[48] Corporate funding and policy decisions

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38. *Id.* at 723.

39. *Id.* at 724.

40. *Id.* at 732-33, 733 n.21. The Court notes these practical consequences may include: exhaustion of domestic remedies, the case's impact on foreign policy, and the character of the defendant as a corporation. *Id.*

41. *Id.* at 732, 748.

42. *Id.* at 734.

43. *Id.* at 738.

44. Kiobel v. Dutch Royal Petroleum Co., 133 S. Ct. 1659, 1665 (2013).

45. *Id.* at 1669. The initial issue before the Supreme Court revolved around whether the ATS permitted claims against corporate defendants. During oral arguments, the Court questioned the scope of torts occurring abroad and requested supplemental briefing before deciding to rule on the latter issue. Bechky, *supra* note 17, at 340.

46. *Kiobel*, 133 S. Ct. at 1669.

47. Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 49-50 (2d Cir. 2014).

48. Mujica v. AirScan Inc., 771 F.3d 580, 591 (9th Cir. 2014) (U.S. citizenship of corporate defendant unable to overcome presumption based on conduct occurring exclusively in Colombia); Cardona v. Chiquita Brands Int'l., Inc., 760 F.3d 1185, 1189-90 (11th Cir. 2014) (U.S. citizenship of corporate defendant unable to overcome presumption based on conduct occurring exclusively in Colombia).

made in the United States with consequences abroad were also within the harbor of insufficiency.[49] Conversely, the Fourth Circuit found the presumption overcome when an American corporation maintaining Abu Ghraib prison in Iraq engaged in torture, with regular contact from Washington, D.C.[50] While *Kiobel* appeared to have foreclosed a factually similar case to *Filártiga* under the ATS, the TVPA still affords a remedy in certain circumstances.[51]

B. TVPA and Immunity

The TVPA permits victims and heirs of torture and of extrajudicial killings to sue individuals.[52] It requires the acts be under the "actual or apparent authority or color of law, of a foreign nation."[53] In many ways, the TVPA gives express approval to *Filártiga* while supplementing the ATS.[54] The TVPA implicates questions of sovereign immunity for individuals and thus important foreign policy considerations.[55] Sovereign immunity became codified in the Foreign Sovereign Immunities Act (FSIA), which was initially interpreted to: (1) shift issues of immunity from the judiciary to the executive branch, and (2) afford immunity to sovereigns and their agents acting in an official capacity.[56] Foreign officials, however, are not protected by the FSIA and are instead analyzed according to federal common law immunity.[57] Common law immunity posits a layer of insulation from the executive branch in the judiciary's determination of immunity.[58]

In *Yousuf v. Samantar*, the Fourth Circuit evaluated the contours of common law immunity for a foreign official accused of torture in Somalia during the Barre regime.[59] Deference to the executive branch in common law immunity was not controlling, but carried "substantial weight."[60] Other considerations included domestic and international law,

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49. Doe v. Drummond Co., Inc., 782 F.3d 576, 598 (11th Cir. 2015).
50. Al Shimari v. CACI Premier Tech. Inc., 758 F.3d 516, 528 (2014).
51. Bechky, *supra* note 17, at 343.
52. Torture Victim and Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C.A. § 1350 (1991)). Claims against corporate defendants are dismissed. *Cardona*, 760 F.3d at 1189; *Mujica* 771 F.3d at 591.
53. Torture Victim Protection Act of 1991 § 1350 at § 2(a).
54. 1 H.R. Rep. No. 102-367, at 4 (1991); Bechky, *supra* note 17, at 360.
55. Yousuf v. Samantar [Samantar II], 699 F.3d 763, 766 (4th Cir. 2012).
56. *Id.* at 773; *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 497 (9th Cir. 1992).
57. Samantar v. Yousuf, 560 U.S. 305, 325–26 (2010); *Samantar II*, 699 F.3d at 774-75; Ryan, *supra* note 29, at 1773.
58. *Samantar II*, 699 F.3d at 774-75; Ryan, *supra* note 29, at 1773.
59. *Samantar II*, 699 F.3d at 766.
60. *Id.* at 773.

but the court ultimately held that a foreign official violating *jus cogens* while acting in an official capacity cannot be afforded common law immunity.[61] Despite the court's pronouncement, this case was likely bolstered by the State Department's refusal to recommend immunity for the defendant.[62]

III. THE COURT'S DECISION

In the noted case, the Fourth Circuit held Warfaa's claims did not overcome the presumption of extraterritoriality under the ATS and reaffirmed the principle expressed in *Yousuf* by refusing to grant Ali immunity for the TVPA claims.[63] The court began by tracing the lineage of ATS cases.[64] It expressed the encompassing effect of *Filártiga*, that gives litigants a forum to adjudicate claims between aliens for torts occurring abroad and violating the law of nations.[65]

Next, the court acknowledged Warfaa's claims of torture violated *jus cogens*, but still had to overcome the presumption of extraterritoriality.[66] In its analysis of the presumption, the Fourth Circuit found that *Kiobel* "significantly limited, if not rejected, the applicability of the *Filártiga* rationale."[67] The court found the presumption was not overcome here because all relevant conduct took place outside the United States.[68] The court made factual distinctions from *Al Shimari v. CACI Premier Tech, Inc.*, where the presumption had been overcome.[69] *Al Shimari* implicated an American corporation for torture at Abu Ghraib while receiving regular instruction from personnel in Washington, D.C.[70] In the noted case, the court created two categories of ATS claims: those resembling *Al Shimari* and the "heartland of cases to which the extraterritorial presumption applies."[71] The court also noted the "usual case will not present the strong and direct 'touches' we recognized in *Al Shimari*."[72] In its distinction, the opinion makes no mention of Ali's training in the United States and finds no conduct involving U.S. citizens,

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61. *Id.* at 778.
62. Ryan, *supra* note 29, at 1786-87 n.128.
63. Warfaa v. Ali, 811 F.3d 653, 661-62 (4th Cir. 2016).
64. *Id.* at 658.
65. *Id.*
66. *Id.* at 659.
67. *Id.* at 658.
68. *Id.* at 660.
69. *Id.*; Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 529 (4th Cir. 2014).
70. *Al Shimari*, 758 F.3d at 529.
71. *Warfaa*, 811 F.3d at 660.
72. *Id.*

the U.S. government, American entities, or events in the United States.[73] The court also identifies Ali's later acquired residence in the United States as the only "touch" to the United States.[74]

Relying on *Kiobel*, the court analogized happenstance residence to "mere corporate presence" and found it to be an insufficient nexus to the United States under the ATS.[75] Finally, in addressing Ali's TVPA immunity claim, the court adhered to its ruling in *Yousuf*, rejecting common law immunity on the basis of a *jus cogens* violation.[76] While the State Department issued no opinion regarding Ali's immunity, the court did not link this fact in deciding the matter.[77]

Judge Gregory dissented on the issue of ATS jurisdiction, finding Ali's military training in the United States constituted relevant conduct warranting greater analysis.[78] He also emphasized Ali's status as a permanent resident, whose conduct would otherwise be considered criminal abroad.[79] Further, he is critical of the majority's reading of *Kiobel*, noting that "[t]he fact that the alleged torts occurred outside our borders cannot be the end of the story."[80]

IV. ANALYSIS

The decision in the noted case afforded the Fourth Circuit the opportunity to shape the redress available to aliens for torts committed abroad. The court provided an illusory standard defining the sufficiency of which the extraterritorial presumption could be displaced and steered alien plaintiffs to the TVPA. The *Al Shimari* decision demonstrated the court would not apply the principles of *Kiobel* parsimoniously, but the Fourth Circuit did little to provide clarity in its extraterritorial analysis in the noted case. *Al Shimari* emphasized that *Kiobel* demands a "fact[-]based inquiry."[81] Judge Gregory was right to question the absence of key facts from the majority's opinion, which should be relevant in any

73. *Id.*
74. *Id.* at 661.
75. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013); *Warfaa*, 811 F.3d at 661.
76. Yousuf v. Samantar, 699 F.3d 763, at 766 (4th Cir. 2012); *Warfaa*, 811 F.3d at 661-662.
77. *Warfaa*, 811 F.3d at 661.
78. *Id.* at 664.
79. *Id.* at 665; *see also* U.S. v. Bollinger, 798 F.3d 201, 215 (4th Cir. 2015) (upholding constitutionality of statute against a U.S. citizen for criminal conduct abroad under the Foreign Commerce Clause).
80. *Id.* at 665.
81. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014).

assessment of extraterritoriality.[82] The majority emphasizes the nature of the claim under the ATS rather than focusing on the specific, factual conduct giving rise to the case.[83]

The majority also draws analogies from Ali's later acquired residence to a corporation's "mere" presence as insufficient to rebut the presumption of extraterritoriality.[84] This analysis, though logical, takes the view of equating limited corporate presence and actual physical residence of a natural person. Judge Gregory also uses this comparison as a basis for his criticism.[85] The majority court could have taken further steps to distinguish the noted case with other instances of ATS jurisdiction for alien resident defendants.[86]

The majority also could have reached the same conclusion with a more robust analysis. The ATS issue turns on whether the sufficiency of facts is enough to displace the presumption of extraterritoriality. Commentators have referred to this *Kiobel* language as "ambiguous."[87] Rather than assigning substance to the analysis, the court creates a categorical approach: *Al-Shimari* rebuts the presumption while the noted case does not.[88] The degree to which Ali's contact to the United States is relevant to the court's analysis is unknown and provides little guidance for future litigants.

The Fourth Circuit is at the center of three competing factors: the strength of the *Kiobel* presumption articulated by the Supreme Court, its own decisions in *Al Shimari* and *Yousuf*, and the enlargement of the TVPA at the expense of the ATS.[89] The last of these factors reflects the court's recognition that a heightened standard under the ATS will not foreclose all paths to the federal courthouse. The TVPA preserves this route, and the court makes an independent review of immunity. However, both in the noted case and in *Yousuf*, the State Department did not recommend immunity for either defendant, allowing the judiciary

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82. *Warfaa*, 811 F.3d at 664. Judge Gregory notes Ali's ties to the U.S. military "not to suggest that the U.S. government condoned or endorsed defendant's conduct, but these contacts are clearly relevant to a test that requires whether a claim 'touch[es] and concern[s] the territory of the United States.'" *Id.*

83. *Id.* at 663.

84. *Id.* at 660.

85. *Id.* at 662.

86. Yousuf v. Samantar, 699 F.3d 763, 778 (4th Cir. 2012) (finding U.S. residents "who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts"); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322 (D. Mass. 2013) (holding that *Kiobel* did not bar ATS claims against an American citizen in part because "[t]his is not a case where a foreign national is being hailed into an unfamiliar court to defend himself").

87. Bechky, *supra* note 17, at 340.

88. Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016).

89. *Id.* at 656-657.

discretion in its assessment.[90] Had the State Department recommended differently, the judiciary's level of deference to the executive branch would have been tested.[91] In this respect, the noted case, like *Yousuf*, presents little potential for conflict between the branches.

The practical consequence of this decision is to limit alien claims to *jus cogens* violations for which Congress has expressly articulated a cause of action. In doing so, the TVPA operates at a democratic peak: with congressional approval in passing the Act and an opportunity for the executive branch to relay foreign policy considerations, the judiciary does not face the problem of scope it has often confronted with the ATS. The TVPA, like the ATS, is underpinned by a universal recognition to provide litigants with a forum to adjudicate breaches of *jus cogens*.

V. CONCLUSION

The Fourth Circuit's approach recognizes the Supreme Court's reluctance to enlarge the ATS from a jurisdictional statute to one creating a cause of action without express congressional approval. In doing so, the Court maintains the *Kiobel* presumption but simultaneously steers plaintiffs to a congressionally articulated cause of action under the TVPA. In creating this exchange, the TVPA examines immunity judicially rather than under FSIA.[92] Though the Fourth Circuit and the State Department did not conflict regarding Ali's immunity, there may be reason to worry about the persistence of the executive branch's desire to make such decisions unilaterally when disagreement arises.[93]

Further, the exchange creates a gap in the statutes. In the factual circumstances existing within the presumption of extraterritoriality (thus barring ATS claims) and outside of torture or an extrajudicial killing (the ambit of the TVPA), it is unknown how broadly the Fourth Circuit would read either statute.[94] The central challenge lies in balancing the

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90. *Samantar II*, 699 F.3d at 767; *Warfaa*, 811 F.3d at 656.

91. The degree of deference afforded to a State Department declaration on immunity is disputed. Ryan, *supra* note 29, at 1783.

92. Ryan, *supra* note 29, at 1779.

93. *Samantar II*, 699 F.3d at 1773; Ryan, *supra* note 29, at 1785. The executive branch has expressed its position that immunity determinations must first be made by the State Department and the judiciary should substantially defer to that decision.

94. American courts have subsumed genocide and sexual violence into torture. Al Shimari v. CACI Premier Tech. Inc., 758 F.3d 516, 521-23 (4th Cir. 2014); Kadic v. Karadzic, 70 F.3d 232, at 242 (2d Cir. 1995). In a case where jurisdiction was based on the FSIA for claims arising during the Holocaust, one court held "the alleged takings [of property] did more than effectuate genocide . . . we see the expropriations *as themselves* genocide." Simon v. Republic of Hungary, 812 F.3d 127, 142 (D.C. Cir. 2016) (emphasis in original). Expropriation, without more, would likely present a factual scenario within the gap.

aspirational and universal principle of *jus cogens* with practical domestic considerations. The TVPA reconciles this dilemma by reifying *jus cogens* in the shades of the ATS.[95] *Warfaa* is a reminder that the courts remain an essential piece against those who, by committing heinous humans rights violations, are not only the inflictors of their victim's suffering, but are also "*hostis humani generis*, an enemy of all mankind."[96]

Hamzah Khan*

95. In *Kadic*, the court recognized genocide as a violation of *jus cogens* actionable under the ATS despite legislative and executive pronouncements that signing the Genocide Convention did not create any substantive or procedural rights. *Kadic*, 70 F.3d at 242. The Supreme Court also noted the potential conflict among the political branches, but was approving of *Kadic*. Sosa v. Alvarez-Machain, 542 U.S. 692, 748 (2004) (Scalia, J., concurring).

96. Filártiga v. Pena-Arala, 630 F.2d 876, 890 (2d Cir. 1980).

* © 2016 Hamzah Khan. J.D. candidate 2017, Tulane University Law School; B.A. 2014, University of Kentucky. This note is dedicated to the countless men, women, and children who are the unseen victims of terror each day. I would like to thank the members of the *Tulane Journal of International and Comparative Law* for their valuable feedback and assistance in editing. I would also like to extend a special debt of gratitude to Fernanda Langa, who has given me more confidence than I ever deserved.