

# Indigenous Peoples, Culturally Specific Rights, and Domestic Courts: A Response to Professor Fodella

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## INTRODUCTION

Professor Alessandro Fodella has done a very nice job of setting out both the protection afforded indigenous peoples by current international law and the limitations of that protection as well.<sup>1</sup> As he suggests, more work needs to be done with respect to providing content to these norms.<sup>2</sup> In addition to his suggestion that a more coordinated approach focusing upon international courts, tribunals, and compliance bodies is appropriate,<sup>3</sup> I would like to suggest that another path for the development and enforcement of such rights runs through national courts. That enforcement can take the form of domestic law of the individual states protecting indigenous peoples' rights or universal jurisdiction statutes, such as exist now in several countries, which provide for criminal prosecution.<sup>4</sup> In addition, the United States has a federal statute, the Alien Tort Statute, which provides for a private civil action by an alien suing for a tortious violation of customary international law.<sup>5</sup> The U.S. Supreme Court has recently upheld the use of this statute in international human rights cases.<sup>6</sup>

In practice, the use of universal jurisdiction in criminal cases and the Alien Tort Statute in private civil actions suffer from the same problem, they protect indigenous people only to the same extent provided to all other persons under international law. So, universal jurisdiction tends to extend, under the criminal statutes, to only the most serious international crimes such as torture, genocide, war crimes, and crimes against humanity—crimes from which all persons should be free under international law. Under the Alien Tort Statute, the federal courts have similarly found private rights of

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1. Alessandro Fodella, *International Law and the Diversity of Indigenous People*, 30 VT. L. REV. 565 (2006).

2. *Id.* at 592.

3. *Id.* at 592–93.

4. For a general discussion of universal jurisdiction and the various implementing statutes, see M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001).

5. Alien Tort Statute § 9(b), 28 U.S.C. § 1350 (2000). The Alien Tort Statute states, in part: “The 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.” *Id.*

6. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004) (“Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”).

action for only the most serious violations of international human rights law: torture, genocide, war crimes, crimes against humanity, summary execution, and disappearance.<sup>7</sup> Once again, these are all international norms that protect all persons, not members of indigenous groups alone. A few cases have raised group or collective rights based upon international environmental law or an argument based on “cultural genocide.”<sup>8</sup> These have thus far been unsuccessful.<sup>9</sup> I would like to suggest that using national courts is a way of not only enforcing existing human rights law but also of enunciating and developing international human rights law, a way of creating a kind of “international common law that lies in between traditional domestic and traditional international law.”<sup>10</sup> The opinions of domestic courts will be cited in other national courts or in regional courts, which will further develop the doctrines. By way of illustrating the potential for this transnational process, I will briefly review the history and the current applicability of the Alien Tort Statute and make an argument for how the particularized rights of members of indigenous groups might be protected.

#### I. THE ALIEN TORT STATUTE

This statute was a part of the Judiciary Act of 1789, but essentially lay dormant until 1980, when the Court of Appeals for the Second Circuit applied it in a case called *Filartiga v. Pena-Irala*.<sup>11</sup> In that case, a Paraguayan father, Joel Filartiga, and his daughter, Dolly, sued a former Paraguayan Inspector General of Police for the torture and death of the

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7. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 846–48 (11th Cir. 1996) (torture); *Kadic v. Karadzic*, 70 F.3d 232, 242–44 (2d Cir. 1995) (torture and genocide); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–80, 884–85 (2d Cir. 1980) (torture and execution); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 5 (D.D.C. 1998) (torture, summary execution, and other crimes against humanity); *Xuncax v. Gramajo*, 886 F. Supp. 162, 183–84 (D. Mass. 1995) (torture, summary execution, disappearance, and arbitrary detention); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541–42 (N.D. Cal. 1987) (torture, murder, and prolonged arbitrary detention).

8. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473–74 (bringing a claim against Texaco based on acts that occurred in Ecuador); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 365 (E.D. La. 1997) (filing a claim against an Indonesian company for “cultural genocide”).

9. *Aguinda*, 303 F.3d at 477–80 (dismissing an environmental tort claim on the basis of forum non conveniens); *Beanal*, 969 F. Supp. at 382 (rejecting an environmental tort claim for failure to state a violation under the law of nations).

10. BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 20 (4th ed. 2003); see also Pamela J. Stephens, *Beyond Torture: Enforcing International Human Rights in Federal Courts*, 51 SYRACUSE L. REV. 941, 986 (2001) (suggesting a willingness of the federal courts to accept “a role in transnational legal process and a view of the U.S. courts as playing a key part in the development of international human rights law”).

11. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2000)); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

Joel's son.<sup>12</sup> The Second Circuit found that there was a cause of action under the Alien Tort Statute, holding that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights."<sup>13</sup> The court found that although the plaintiffs and the defendant were all citizens of Paraguay and the alleged torture had taken place in Paraguay, the suit could proceed in U.S. federal court.<sup>14</sup> The court noted that "whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."<sup>15</sup> In deciding whether the Alien Tort Statute applied, the court focused on whether General Pena's behavior violated customary international law because it was not alleged that a treaty applied.<sup>16</sup> The court cited early Supreme Court precedent for the proposition that customary international law is part of the law of the United States.<sup>17</sup> The Supreme Court also enumerated the appropriate sources to look to in order to determine customary international law:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.<sup>18</sup>

After a review of history and custom, including consideration of several international agreements, both binding and nonbinding, the court concluded that "[a]lthough torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced."<sup>19</sup> The Second Circuit upheld the constitutionality of such an assertion of jurisdiction, finding that because customary international law is a part of the federal common law, Congress is free to provide, as it did in the Alien Tort Statute, for federal jurisdiction over suits by aliens where principles of international law are invoked.<sup>20</sup>

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

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 880.

17. *Id.* (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 295–96 (E.D. Pa. 1963)).

18. *Id.* at 880–81 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

19. *Id.* at 880–84.

20. *Id.* at 885.

Following *Filartiga*, several federal courts found the Alien Tort Statute applicable to an expanding list of prohibited conduct.<sup>21</sup> In addition, courts found that in appropriate circumstances, nonstate actors could be found liable under the Alien Tort Statute for violations of international human rights law or the humanitarian law of war.<sup>22</sup> Corporations could also be subject to liability under the Alien Tort Statute for either direct acts in violation of international human rights law or for aiding and abetting a state or state actors in violating such law.<sup>23</sup>

After more than twenty years of decisions in the lower courts, the U.S. Supreme Court finally agreed to hear a case brought under the Alien Tort Statute. That case, *Sosa v. Alvarez-Machain*, involved the kidnapping of a Mexican doctor by Mexican citizens acting at the behest of the U.S. Drug Enforcement Agency (DEA).<sup>24</sup> The DEA had sought extradition of Dr. Alvarez-Machain (which the Mexican government refused) because it alleged that he had been complicit in the torture and murder of a DEA agent in Mexico.<sup>25</sup> Alvarez-Machain was brought to this country, tried for murder, and acquitted.<sup>26</sup> After his acquittal, Alvarez-Machain brought a civil suit against the U.S. government under the Federal Tort Claims Act<sup>27</sup> and against Sosa under the Alien Tort Statute.<sup>28</sup>

Sosa, and the United States government supporting him, argued that the Alien Tort Statute was a purely jurisdictional grant and therefore congressional action in the form of statutory creation of a private cause of action was necessary in order for such human rights cases to be brought.<sup>29</sup> The U.S. government also argued that to allow the federal courts to continue to recognize claims based upon international law was a threat to national security and the war on terrorism.<sup>30</sup> The Supreme Court agreed

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21. *See supra* note 7.

22. *See, e.g.*, *Kadic v. Karadžić*, 70 F.3d 232, 236–37, 242, 244 (2d Cir. 1995) (recognizing a claim against a Bosnian Serb military leader for war crimes).

23. *See, e.g.*, *Doe I v. Unocal Corp.*, 395 F.3d 932, 936–37, 947, 953, 962 (9th Cir. 2002) (granting a right of action against a corporation for crimes of forced labor, murder, and rape where the corporation may have aided and abetted these crimes).

24. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697–98 (2004).

25. *Id.*

26. *Id.* at 698.

27. *Id.*; *see also* Federal Tort Claims Act, 28 U.S.C. § 1346 (2000) (providing federal courts with jurisdiction over personal injury claims against the U.S. government).

28. *Sosa*, 542 U.S. at 698; *see also* 28 U.S.C. § 1350 (providing federal courts with jurisdiction over certain classes of tort claims brought by aliens).

29. *Sosa*, 542 U.S. at 712; Brief for the United States as Respondent Supporting Petitioner at 11–12, *Sosa*, 542 U.S. 692 (No. 03-339), available at <http://digbig.com/4qhah>.

30. Brief for the United States as Respondent Supporting Petitioner, *supra* note 29, at 40–43, 45 n.15.

that the first Congress intended the statute to be only a jurisdictional grant.<sup>31</sup> However, it also concluded that at the time of its enactment, Congress also intended that the statute provide jurisdiction for a small group of private actions alleging violations of the then-existing law of nations (offenses against ambassadors, violations of safe conduct, and individual actions arising out of piracy).<sup>32</sup> And, in apparent rejection of the government's argument, the Court found that in current times, jurisdiction under the Alien Tort Statute may extend to violations of international human rights norms "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>33</sup> Although the Court did indicate that exercise of such jurisdiction cautions restraint, it acknowledged discretion in the federal courts to create private rights of action under the Alien Tort Statute and cited approvingly language from several post-*Filartiga* cases that require acts "which violate[] definable, universal and obligatory norms"<sup>34</sup> or "violations . . . of a norm that is specific, universal, and obligatory."<sup>35</sup>

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31. *Sosa*, 542 U.S. at 712. The statute, as passed by the first Congress as part of the Judiciary Act of 1789, provided that the federal courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77. The Supreme Court focused on the language of the statute and its placement in section 9 of the Judiciary Act. As to the former, the Court notes that "the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law." *Sosa*, 542 U.S. at 713 (citing *The Federalist* No. 81, at 447, 451 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). As to the latter, the Court observes that "[t]he fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature." *Id.*

32. *Id.* at 720.

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. . . . There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

*Id.* at 719.

33. *Id.* at 725.

34. *Id.* at 732–33 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

35. *Id.* at 732 (alteration in original) (quoting *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

## II. THE ALIEN TORT STATUTE, CORPORATIONS, AND PROTECTION OF INDIGENOUS PEOPLES

Currently, as many commentators have suggested, the most interesting and promising area of Alien Tort Statute litigation is that against multinational corporations.<sup>36</sup> Corporations may be liable for direct human rights abuses, but more commonly claims have been brought for their complicity in the human rights abuses of the governments with which they work.<sup>37</sup> In *Sosa*, the U.S. government and amicus briefs by business groups had urged the U.S. Supreme Court to find that the Alien Tort Statute does not extend to claims against corporations.<sup>38</sup> This the Court declined to do. Though it did acknowledge that such cases counseled deference to the executive branch's opinion on the particular foreign policy impact of such a case, it held that such cases might be brought as long as the violations involved arose from norms that are "specific, universal, and obligatory" and create individual responsibility.<sup>39</sup> Many such cases have been brought and many have been dismissed for a variety of reasons, including forum non conveniens and on the basis that the cases are in essence preempted by treaty law, leaving issues of reparations in the hands of the executive branch.<sup>40</sup> No corporation has been found liable yet under the Alien Tort Statute.<sup>41</sup>

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36. See, e.g., Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2283–90 (2004) (discussing liability of corporate actors under the Alien Tort Statute for human rights abuses).

37. See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 936–37 (9th Cir. 2002) (alleging human rights abuses by a multinational oil company, directly or indirectly, against some villagers in Myanmar).

38. See Brief for the United States as Respondent Supporting Petitioner, *supra* note 29, at 44 (“[T]he prospect of costly litigation under Section 1350 and potential liability in United States courts for operating in a country whose government implements oppressive policies . . . may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on economic and political conditions.”); Brief for the National Foreign Trade Council, USA et al. as Amici Curiae in Support of Petitioner at 1, *Sosa*, 542 U.S. 692 (No. 03–339), available at 2004 WL 162760 (“Not only do these [ATS] lawsuits strain relations between the United States and the foreign governments who are the indirect targets of the litigation, they discourage foreign investment.”).

39. *Sosa*, 542 U.S. at 732–33, 733 n.21 (quoting *Hilao*, 25 F.3d at 1475).

40. See, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (2d Cir. 2003) (rejecting an ATS claim for failure to allege a violation of a U.S. treaty or customary international law); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 477–78 (2d Cir. 2002) (rejecting an ATS claim on the basis of forum non conveniens); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999) (dismissing a claim because it was preempted by an existing international trade agreement).

41. However, in the fall of 2004, the Unocal Corporation settled a case brought by a group of Burmese citizens for human rights abuses arising out of the building of a gas pipeline in Burma. *Landmark Unocal Settlement Strengthens Alien Tort Claims Act as Recourse for Human Rights and Environmental Abuses Committed Abroad*, INECE NEWSL. (Int’l Network for Env’tl. Compliance and

For our purposes, the most interesting subgroup of that corporate litigation involves cases raising claims against corporations involved in mining and oil and gas extraction. A handful of these cases have been brought unsuccessfully under the Alien Tort Statute.<sup>42</sup> I think it is fair to say that in the earliest of these cases the issues were not well-framed, nor were the international law arguments well-made.<sup>43</sup>

It seems to me that given the appropriate case, there are at least two emerging norms of international law that might be argued successfully under the Alien Tort Statute and a third, arguably more established, norm that draws upon the first two. First, I would draw upon both Professor Fodella's outline of the recent decision making of international bodies<sup>44</sup> and Professor James Anaya's characterization of modern decisions regarding indigenous peoples as defining a right to *cultural integrity*.<sup>45</sup> Such a norm "goes beyond ensuring for indigenous *individuals* either the same civil and political freedoms accorded others within an existing state" and in addition "upholds the right of indigenous *groups* to maintain and freely develop their cultural identities in coexistence with other sectors of humanity."<sup>46</sup> This norm is consistent with the shift identified by Professor Fodella and others from an assimilation model regarding minority and indigenous rights to a model that does not allow forced assimilation and perhaps does not encourage assimilation at all.<sup>47</sup> Professor Anaya would find that this right means more than not forcing assimilation—for example, it would encompass the right to exist guaranteed by the Genocide Convention.<sup>48</sup> Though there is considerable overlap between the rights of minorities in general and those of indigenous peoples, that this norm has particular significance to indigenous peoples is reflected in the many international

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Enforcement, Washington, D.C.), Dec. 2004, available at <http://digbig.com/4qhaj> [hereinafter INECE NEWSL.]. The Burmese government had provided military "protection" for the pipeline and the allegation was made that Unocal had aided and abetted the serious human rights abuses committed by the military. *Id.* After the court of appeals adopted a very broad definition of aiding and abetting, and ordered the case remanded to the district court for trial, it granted an en banc hearing. *Unocal Corp.*, 395 F.3d at 954–56, 963, *en banc granted*, 2003 WL 359787 (9th Cir. Feb. 14, 2003). After the hearing and before a decision was rendered, Unocal settled the case. INECE NEWSL., *supra*.

42. *See, e.g., Aguinda*, 303 F.3d at 473, 480 (dismissing the action based on forum non conveniens).

43. *See, e.g., Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 374 (E.D. La. 1997) (criticizing the complaint for not alleging that the defendant was "a state actor, that [defendant] was clothed with actual or apparent authority of the Republic of Indonesia, that [defendant] aided or abetted official conduct or that [defendant] acted under color of Indonesian law").

44. Fodella, *supra* note 1, at 566–91.

45. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 98–104 (1996).

46. *Id.* at 98.

47. Fodella, *supra* note 1, at 592.

48. ANAYA, *supra* note 45, at 102–03.

documents that single out indigenous peoples as a group with distinguishing concerns and characteristics that warrant treating them apart from minority populations in general.<sup>49</sup>

Professor Anaya argues, and I would concur, that:

While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability. . . . Even as . . . policies [of assimilation] have been abandoned or reversed, indigenous cultures remain threatened as a result of the lingering effects of those historical policies and because, typically, indigenous communities hold a nondominant position in the larger societies within which they live.<sup>50</sup>

The second norm that might be raised under the ATS would be one that recognizes the special relationship of indigenous peoples to their lands and the natural resources contained therein. The Inter-American Commission and the UN Human Rights Committee have acknowledged the importance of lands and resources to the survival of indigenous cultures.<sup>51</sup> “It follows from indigenous peoples’ articulated ideas of communal stewardship over land and a deeply felt spiritual and emotional connection with the earth and its fruits.”<sup>52</sup> Indigenous peoples, furthermore, “typically have looked to a secure land and natural resource base to ensure the economic viability and development of their communities.”<sup>53</sup> Under contemporary international law “modern notions of cultural integrity and self-determination join property precepts in the affirmation of sui generis indigenous land and resource rights.”<sup>54</sup>

The third norm that could be raised would draw upon the other two. An argument could be made that under the Genocide Convention, these peoples have a specific claim to make regarding the destruction of their

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49. Fodella, *supra* note 1, at 571–74.

50. ANAYA, *supra* note 45, at 102. Anaya cites as an example, *Ominayak v. Canada*, in which the Human Rights Committee of the ICCPR found that Canada had violated article 27 of the ICCPR by allowing Alberta to grant oil and gas leases within aboriginal territory. *Id.* at 100 (citing Human Rights Comm., *Comm’n No. 167/1984: Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990)).

51. ANAYA, *supra* note 45, at 104–05.

52. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 35–36 (2004).

53. James Anaya, *Indigenous Peoples’ Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT’L & COMP. L. 7, 8 (2005).

54. ANAYA, *supra* note 45, at 105.



culture. The focus of this argument in the context of litigation against mining and oil and gas extraction companies would be on their destruction of the environment. The Genocide Convention prohibits “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>55</sup> The Convention requires, in addition, that the acts constituting genocide be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>56</sup> This would not be an argument that necessarily required “specific, universal, and obligatory” norms of international environmental law,<sup>57</sup> which have been extremely difficult to prove in the cases, but rather would rest on a demonstration that the activities of these corporations involve “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,”<sup>58</sup> by destroying the natural environment and crucial resources upon which these societies depend.<sup>59</sup> My hope would be to be able to demonstrate that while other ethnic groups might make similar claims (thus raising the problem identified at the beginning of this Essay), the linkage between the environment and indigenous peoples, highlighted earlier in this Essay, would make this a claim with particular significance to those groups.

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55. Convention on the Prevention and Punishment of the Crime of Genocide arts. 1–2, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

56. *Id.* art. 2.

57. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

58. Genocide Convention, *supra* note 55, art. 2(c).

59. Framing the issue in this way would hopefully avoid the concern that what is being asserted is “cultural genocide.” When the Genocide Convention was being drafted, some national representatives argued for a separate article on cultural genocide:

In this convention, genocide also means any of the following deliberate acts committed with the intention of destroying the language or culture of a national, racial or religious group on grounds of national or racial origin or religious belief:

(1) prohibiting the use of the language of the group in daily intercourse or in schools, or prohibiting the printing and circulation of publications in the language of the group;

(2) destroying, or preventing the use of, the libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.

WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES* 182 (2000) (quoting U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 14th mtg. at 13, UN Doc. E/AC.25/SR.14 (1948)). The drafters ultimately limited the acts of genocide to essentially physical acts to achieve widespread agreement. *See id.* at 178–85 (describing the debate about whether to include cultural genocide within the definition of genocide and the final vote to exclude cultural genocide from this definition).

### III. OBSTACLES TO ASSERTING AN ALIEN TORT STATUTE CLAIM IN FEDERAL COURT

There are several common obstacles to asserting an ATS claim that may also be obstacles in a case based upon indigenous rights. One such obstacle is the doctrine of *forum non conveniens*, which counsels federal courts to dismiss a case when a more convenient, fair, alternative forum exists.<sup>60</sup> The Alien Tort Statute cases are obvious targets for such a motion since the plaintiff is a citizen of a foreign country (and, in most cases, the defendant is as well) and the acts leading to the claim have taken place in a foreign state. However, many of the cases in which the motion has been raised have a readily asserted response. Courts find that the alternative forum is not adequate and fair in light of the nature of the harm allegedly done to the plaintiff, the fact that the same government that practiced the human rights abuses is in charge, and the fact that the judiciary is not independent.<sup>61</sup>

Although great deference is usually afforded to a plaintiff's choice of forum unless the defendant can demonstrate that the alternative forum is clearly more convenient, the Supreme Court indicated in *Piper Aircraft Co. v. Reyno* that less deference is due a foreign plaintiff:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.<sup>62</sup>

However, the Second Circuit has held that a court balancing the interests in deciding whether to dismiss an Alien Tort Statute case on the basis of *forum non conveniens* should take into consideration Congress's expressed interest in having such cases heard in federal courts.<sup>63</sup> Moreover, in many of the ATS cases involving corporate misbehavior, the corporation is a U.S.

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60. See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947) (explaining and applying the doctrine of *forum non conveniens*).

61. See, e.g., *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198–99 (S.D.N.Y. 1996) (discussing how the alternative forum is not an adequate forum since the plaintiff would be putting their life in danger or the action would probably be ended).

62. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) (citing *Pain v. United Techs. Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980); Marc O. Wolinsky, Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373, 382–83 (1980)).

63. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), cert. denied, 532 U.S. 941 (2001) (quoting *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

citizen, weighing in favor of the federal courts hearing such a case.

In addition to forum non conveniens, several other potential obstacles to bringing such a claim exist. First, consistent with the Supreme Court's decision in *Sosa*, it will be necessary for the plaintiffs to be able to demonstrate that the international norm they are asserting is "specific, universal, and obligatory."<sup>64</sup> For the first two norms asserted above, this will be the principal challenge. The plaintiffs, following the lead of the Second Circuit in *Filartiga*, may look to language in binding and nonbinding international agreements and to other evidence of customary international law to establish that such norms are widely accepted by the international community as binding.<sup>65</sup>

With respect to asserting genocide as a claim, there is no difficulty in demonstrating that there is a clear, universal, and binding norm with regard to the prohibition on genocide, given the widely subscribed to Genocide Convention and the accepted view that the prohibition on genocide is also a *jus cogens* norm, binding on all states.<sup>66</sup> The difficulty with respect to demonstrating a violation of this norm will be fitting the factual circumstances of the destruction of indigenous peoples' lands into the language of the Convention. Two issues are immediately apparent. First, the Genocide Convention prohibits and punishes the commission of certain acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."<sup>67</sup> There should be no difficulty with fitting indigenous groups within the protected groups of the Convention. For example, in *Prosecutor v. Akayesu*, the International Criminal Tribunal for Rwanda stated that "[a]n ethnic group is generally defined as a group whose members share a common language or culture."<sup>68</sup> In addition, the United States in its legislation implementing the Genocide Convention defines an ethnic group as "a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage."<sup>69</sup> Clearly these definitions encompass a group of indigenous peoples.

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64. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

65. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81, 884 (2d Cir. 1980).

66. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT'L L.J. 245, 253–54 (2004) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987)).

67. Genocide Convention, *supra* note 55, art. 2.

68. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 513 (Sept. 2, 1998), available at <http://digbig.com/4rckq>.

69. Genocide Convention Implementation Act of 1987 (the Proxmire Act), 18 U.S.C. § 1093 (2000).

The difficulty will come with other aspects of the Convention. The principal feature of the Convention, one that distinguishes genocide from other international crimes such as crimes against humanity, is the intent requirement. The Convention requires that the perpetrator act with the specific intent to “destroy, in whole or in part” one of the protected groups.<sup>70</sup> The indigenous group would have to demonstrate that the corporation engaged in the destruction of its lands with this specific intent, which would be difficult, though not impossible, to establish. The Convention requires no particular motive for such acts of genocide, and therefore it would not be a defense for the corporation to assert that it acted out of economic motives rather than genocidal motives and that it bore no particular malice toward the indigenous group. In terms of establishing the requisite intent (absent a nice corporate statement or e-mail asserting an intention to wipe out the population of the area), the Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* held that the specific criminal intent of the Convention could be inferred from the physical acts and “their massive and/or systematic nature or their atrocity.”<sup>71</sup> Obviously, this will be a heavily fact-dependent determination, but where massive destruction of lands, water, and other resources has taken place, it might be resolved in the plaintiffs’ favor.

The last obstacle to overcome under the Convention would be establishing the actus reus of the crime: that the defendant–corporation engaged in “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.”<sup>72</sup> An early draft of the Genocide Convention described this form of genocide as “[d]estruction of the essential potentialities of life of a group, people or nation, or the intentional deprivation of elementary necessities for the preservation of health or existence.”<sup>73</sup> This language was clearly intended in part to address the horrendous conditions of life in concentration camps and the like. The Secretariat draft included language that addressed “the subjection to conditions of life which, by lack of proper housing, clothing, food, hygiene and medical care, or excessive work or physical exertion, are likely to result in the debilitation or death of the individuals.”<sup>74</sup> But in addition to being responsive to the horrors of World War II, the early draft also acknowledged that a second category of acts might fit within this

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70. Genocide Convention, *supra* note 55, art. 2.

71. *Akayesu*, Case No. ICTR 96-4-T, ¶ 478.

72. Genocide Convention, *supra* note 55, art. 2.

73. SCHABAS, *supra* note 59, at 165 (alteration in original) (quoting the Draft Convention on Genocide, Saudi Arabia, UN Doc. A/C.6/86 (1946)).

74. *Id.* (citing The Secretary-General, *Draft Convention on the Crime of Genocide*, arts. I, II(1)(b), U.N. Doc. E/447 (May 1947) [hereinafter *Draft Convention*]).

concept: “the deprivation of all means of livelihood, by confiscation of property, looting, curtailment of work, denial of housing and of supplies otherwise available to the other inhabitants of the territory concerned.”<sup>75</sup> In one of the few judicial interpretations of the language contained in the Genocide Convention, the Trial Chamber of the International Criminal Tribunal for Rwanda in the *Akayesu* case held that:

the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.<sup>76</sup>

Again, assuming the requisite intent to destroy the indigenous population of an area can be established, it should not be difficult to show, in a case where a population is heavily dependent on the natural resources of an area, that destruction of those natural resources may destroy them as a people. Moreover, as Professor Schabas points out:

Unlike the crimes defined in paragraphs (a) and (b), the offence of deliberately imposing conditions of life calculated to bring about the group’s destruction does not require proof of a result. The conditions of life must be calculated to bring about the destruction, but whether or not they succeed, even in part, is immaterial.<sup>77</sup>

The difficulty in overcoming the obstacle of establishing the requisite *actus reus* should not be underestimated, particularly in light of the additional intent requirement of establishing that these acts were “calculated to bring about the group’s destruction.”<sup>78</sup> However, given the devastating consequences of destruction of environment to indigenous peoples, it is an

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75. *Id.* (footnote omitted). This second category prompted the following explanation: If a state systematically denies to members of a certain group the elementary means of existence enjoyed by other sections of the population, it condemns such persons to a wretched existence maintained by illicit or clandestine activities and public charity, and in fact condemns them to death at the end of a medium period instead of to a quick death in concentration camps; there is only a difference of degree.

*Id.* (citing *Draft Convention*, at 25).

76. *Akayesu*, Case No. ICTR 96-4-T, ¶ 505.

77. SCHABAS, *supra* note 59, at 167 (footnote omitted) (citing Attorney Gen. of the Gov’t of Isr. v. Eichmann, 36 INT’L L. REP. 5, 235–36 (1961)).

78. *Id.*

obstacle that can be overcome in the appropriate case.

#### CONCLUSION

While international and regional courts may serve, as Professor Fodella indicates, as major vehicles for the development of international law with regard to indigenous peoples,<sup>79</sup> I believe that there is a role for domestic courts to play as well. The “conversation” that may occur between national courts and international and regional courts is a valuable dynamic, which I hope will accelerate the process of providing content to the collective rights of indigenous peoples.

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79. Fodella, *supra* note 1, at 592–93.