

Sovereignty, Norms and the Alien Tort Claims Act: An inquiry into the sovereignty implications of the ATCA

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Abstract

This paper examines the impact of the United States Alien Tort Claims Act (ATCA) on the concept of state sovereignty. The ATCA holds that any foreign national(s) can be found liable in a United States civil court for torts committed on foreign soil. A recent increase in the use of the ATCA has raised concerns within the international community over the degree to which the ATCA infringes on individual state sovereignty. This paper argues that while the Act represents a unique category of action with respect to international human rights abuses, the traditional sovereign authority afforded to states and state leaders remains intact. Thus, established concepts of sovereignty have been left relatively unchanged.

Résumé

Cet article examine l'impact du 'United States Alien Tort Claims Act' (ATCA) sur le concept de souveraineté nationale. L'ATCA soutient que tout étranger peut être tenu responsable devant un tribunal civil pour tout délit civil commis à l'étranger. Récemment, l'appel de plus en plus fréquent à l'ATCA soulève des inquiétudes au sein de la communauté internationale vis-à-vis le degré auquel l'acte viole le principe de souveraineté nationale. Cet article maintient que, bien que l'acte représente une catégorie d'action unique en ce qui concerne les abus internationaux de droits de la personne, l'autorité souveraine traditionnelle accordée aux états et chefs d'états demeure intacte. Ainsi, les concepts de souveraineté établis demeurent relativement intacts.

The Alien Tort Claims Act, title 28 under section 1350 of the United States Code¹, is causing quite a controversy in the field of international law. The Act states that essentially any non-US citizen who causes harm in any region of the world can be found liable in any United States civil court. As such, the act gives American courts jurisdiction over any civil offense committed by anyone, anywhere, as long as the defendant may be located on American soil in order to be subpoenaed. Such jurisdiction is unique to any court system currently active in the world today, including the International Criminal Court. Recently, there has been an unprecedented increase in the citation of this act in suits against foreign nationals. Beyond suits involving an individual plaintiff and defendant, class-action suits are being filed against multi-national corporations and foreign governments in an attempt to redress alleged human rights violations.² As a result, the United States

lations.² As a result, the United States civil court system is fast becoming a legal battleground for suits involving exclusively non-US citizens. The impact of this act on international law notwithstanding, it is also of particular relevance to the concept of sovereignty.

What are the sovereignty implications of the Alien Tort Claims Act? With

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²To date, there has yet to be an instance where a multinational corporation has been found liable under the Alien tort Claims Act. Though suits have been won against military figures, such as Radovan Karadzic, efforts to collect damages have been unsuccessful. See Anne-Marie Slaughter and David L. Bosco, "Alternative Justice," *Crimes of War*, May 2001.

¹United States Code, 28 USC. Sec. 1350.

respect to this query, the purpose of this paper is twofold. The first is to establish whether or not the recent embrace of Alien Tort Claims Act (hereafter ATCA) has changed the notion of sovereignty; the second is to determine the nature of this change. In order to accomplish these tasks I will employ Thomas Biersteker and Cynthia Weber's social constructivist approach as the theoretical basis for the concept sovereignty, as well as Martha Finnemore and Kathryn Sikkink's work on norm dynamics to provide a framework to evaluate the ATCA and its ability to transform current conceptualizations of sovereignty. Ultimately I will argue that although the ATCA has the potential to transform significantly the popular meaning of sovereignty, to date the sovereignty implications of the ATCA have been minimal.

SOVEREIGNTY AND SOCIAL CONSTRUCTIVISM

Sovereignty, one of the most enduring concepts in the study of international relations, has been receiving a great deal of attention as of late. The emergences of phenomena such as globalization and humanitarian intervention that threaten to transform the notion of sovereignty have caused many to re-examine its nature. In order for sovereignty to undergo a change however, its current form must first be defined. Therein lays a highly contentious academic debate. What is the definition of sovereignty? Moreover, can such a fluid concept be restricted to the confines of a definition or is it simply too diffuse? Those who are ambitious enough to try to answer these questions find themselves embroiled in this debate.

The attempts of those who have risen to the challenge can be categorized into four separate theoretical approaches: The realist approach, interdependence and dependency theory, recent conceptual analyses, and social constructivism.³ Each of these approaches contributes to an overall understanding of the phenomenon of sov-

eignty. In addition, despite the differences in approach, the theories they yield share some significant characteristics. For instance, each theory acknowledges to some extent the external and internal aspects of sovereignty. Furthermore, in spite of the rigour with which some of these explorations are carried out, each theory maintains sovereignty's function as an organizational mechanism in international relations.

While the first three approaches - realism, interdependence and dependency theory, and recent conceptual analyses - help us to understand the complexity of sovereignty, they either fail to account for or qualify changes in it as a conceptual entity.⁴ The latter however, social constructivism, not only allows for changes in the meaning of sovereignty but also illustrates how these changes take place. Editors of the book *State Sovereignty as Social Construct*, Thomas Biersteker and Cynthia Weber see sovereignty as a socially constructed set of meanings and practices that are subject to change over time. I will use this compelling and comprehensive interpretation of sovereignty as the theoretical basis for this paper.

According to Biersteker and Weber, in order to grasp fully the concept of sovereignty, one must consider the "ways that the practices of states and non-state agents produce, reform and redefine sovereignty and its constitutive elements: population, recognition, authority, and territory."⁵ When perceived as an evolving set of meanings and practices, sovereignty becomes a living, breathing creation of a nurturing social climate that, like all creatures, changes over time. Sovereignty in this sense is socially constructed; its aggregate meaning is "negotiated out of interactions within intersubjectively identifiable communities" while practices help to "construct, reproduce, reconstruct and deconstruct" this meaning.⁶

⁴ In *State Sovereignty as Social Construct*, Thomas Biersteker and Cynthia Weber provide an in-depth analysis of each of these contributions to sovereignty theory. Their collective dissatisfaction with each of their inquiries stems either from an insufficient acknowledgement of the normative origins of sovereignty or an absence of challenges to the 'traditional' concept of sovereignty.

⁵ Biersteker, Thomas J. and Cynthia Weber, 11.

⁶ Ibid.

³ Biersteker, Thomas J. and Cynthia Weber, *State Sovereignty as Social Construct* 1996. 4-11.

While Biersteker and Weber do not investigate the different meanings that form this aggregate meaning (perhaps because they vary across time and space), they do point out that these meanings are informed by practices. In terms of these practices, they hint towards several that assist in the construction of sovereignty, chief among them being recognition. They go further by stating that certain practices are inspired by other practices. For example, the practice of recognition may owe its current form to various cultural, political, or economic practices.⁷ Some practices may be the sum of other sub-practices.

NORMS: FOUNDATIONS OF SOCIAL CONSTRUCTION

Biersteker and Weber's assertion that "as the prescriptions for sovereign recognition change, so does the meaning of sovereignty"⁸ is central to the forthcoming analysis of the Alien Tort Claims Act. In order to observe changes in the prescriptions for the practice of sovereign recognition, however, we must first explore the nature of practices in general. What are the origins of practices? What informs practices besides other practices? It can be argued that any practice has some sort of normative foundation. Be it a single norm or a set of norms, practices are the act of observing norms. The process of inquiry then leads us to examine the nature of norms if we are to further understand the nature of practices.

In their article "International Norm Dynamics and Political Change", Martha Finnemore and Kathryn Sikkink provisionally define a norm as a "standard of appropriate behaviour for actors with a given identity."⁹ Within this context, norms can be classified in three ways: as regulative, constitutive, or evaluative/prescriptive. Regulative norms govern behaviour, constitutive norms create "new actors, interests, or categories of action" and evaluative/prescriptive norms are used to evaluate the behaviour that regulative norms regu-

late.¹⁰ Norms are recognized by the reaction that their observance or non-observance generates.¹¹ The origins of norms lie either in human agency, structural circumstances, a dialectical combination of the two, or in chance occurrences.¹²

According to Finnemore and Sikkink, not all norms are equal in strength or influence. Norms, they argue, undergo a three-stage growth process that they call the norm "life cycle."¹³ Stage one in the cycle is "norm emergence", stage two is "norm cascade", and stage three is "internalization."¹⁴ The first stage, "norm emergence", is when a norm is in the initial stages of its development. At this stage, emerging norms are championed by so-called "norm-entrepreneurs" that seek to have norms accepted en masse.¹⁵ Usually aided by some kind of organizational platform such as non-governmental organizations (NGOs), these entrepreneurs are motivated in most instances by a sense of empathy, altruism and/or ideational commitments. These entrepreneurs, however, in order to make a case for the norms they promote, must also take into consideration the interests of those whom they are trying to persuade. As a result they find themselves having to compromise these motivations in order to sell their norm(s).¹⁶ An example of a norm in this stage is the legal union of homosexuals in the United States.

The second stage of the norm life cycle is the "norm cascade". Norms enter this stage after having successfully reached a "threshold or tipping point."¹⁷ At this point, norms are recognized and adopted by states and other major institutions like international organizations. In order to tip over the threshold from norm emergence to norm cascade, Finnemore and Sikkink argue that at least one third of the world's states must embrace these norms. Furthermore,

⁷ Ibid., 12.

⁸ Ibid., 13.

⁹ Finnemore, Martha and Kathryn Sikkink, 1998. 891.

¹⁰ Ibid.

¹¹ Ibid., 892.

¹² Ibid., 896.

¹³ Ibid., 895.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid., 898-899.

¹⁷ Ibid., 901.

because some states carry more influential weight than others, the population, power and international prestige of these states must be substantial or else more states will be required to allow the norms to graduate unto the next stage.¹⁸ Once having reached the second stage, norms gain legitimacy through socialization and institutionalization processes as more and more states choose to adopt them. The decision to adopt norms is linked directly to the state's identity which is itself derived from the cultural and institutional features of that state and the context within which it operates.¹⁹ Finnemore and Sikkink suggest that a state's motivations for adopting norms are usually associated with some form of peer pressure from other states. States are motivated, they argue, by the threat of losing some of their legitimation, and the need or desire to conform and be held in relatively high esteem.²⁰ An example of a norm that has cascaded can be found in the momentous though yet to be completed internationalization of democracy.

The third and final stage of the norm life cycle is internalization. At this point norms are fully indoctrinated and incorporated into international society. Internalized norms become uncontroversial and difficult to discern due to their uncontested nature. Having reached this stage of the life cycle, norms enter the sub-conscious, become features of habit and are scarcely considered by the vast majority of those who observe them.²¹ These norms only reveal themselves when they are violated, an instance that would most likely be met with an overwhelmingly negative reaction. Today, the abstention from the use of nuclear weapons in war is an example of an internalized norm. It should be mentioned here that not all norms are destined to be internalized, nor are they guaranteed to remain internalized forever.²² Different norms reach different stages; some are shot down by pre-existing norms, others are supplanted by

new ones. I will use Finnemore and Sikkink's concept of the norm life cycle to evaluate the normative nature of the Alien Tort Claims Act.

THE ALIEN TORT CLAIMS ACT

The focus of this paper now turns to Alien Tort Claims Act. Having established social constructivism as the theoretical basis of this paper and the norm life cycle as the evaluative tool of choice for investigating the normative effects of the ATCA, I will now take a more in-depth look at the act itself and its implications for sovereignty. I will begin by providing a history of the ATCA, addressing both its origin and recent history. I will then engage in a normative analysis of the ATCA, examining its nature, where it is located in the norm life cycle and its influential properties. Upon completing this analysis, I will explore the potential impact of the ATCA on the notion of sovereignty. Considering both the normative basis of practice and the role of practices in the social construction of sovereignty, I will conclude with an examination of both the real and potential effects of the ATCA on the concept of sovereignty. It should be clarified here before I proceed that the ATCA is not a norm itself, but the pattern in its use and observance is.

The Alien Tort Claims Act was written in to the United States Code in 1789. Listed as title 28 under section 1350, the act states that "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."²³ The act gives American courts jurisdiction over any tort²⁴ committed in any country by a foreign national against another foreign national(s). Under the law, the accused need only be on American soil for the amount of time it takes be served a

¹⁸ Ibid.

¹⁹ Ibid., 902.

²⁰ Ibid., 902-903.

²¹ Ibid., 904-905.

²² Ibid., 895.

²³ United States Code, 28 USC. Sec. 1350.

²⁴ A 'tort' is defined as a damage, injury, or a wrongful act done wilfully, negligently, or in circumstances involving strict liability, but not involving breach of contract, for which a civil suit can be brought. See *The American Heritage Dictionary of the English Language*, Fourth Edition Copyright. 2000 by Houghton Mifflin Company.

subpoena. The act, originally drafted to help combat piracy, was intended to have a very narrow application given that criminal courts were still used exclusively for hearing cases involving harm and negligence. However, because pirates resided in international waters, the ATCA afforded victims a venue within which to seek reparations. As pirate activity waned off the coast of the United States, so too did any memory of the act that was meant to address it. As a result, the act essentially lay dormant for almost two hundred years before it re-emerged in the 1980s with the case of *Filartiga v. Peña-Irala*.²⁵

In the precedent-setting case of *Filartiga v. Peña-Irala*²⁶ which took place in the United States District Court of Appeals in the Eastern District of New York, three separate judges ruled in 1980 that Paraguayan Americo Norberto Peña-Irala, then a resident of New York city, was liable for the 1976 murder and torture of Joelito Filartiga, a fellow in countrymen, in Paraguay. The court ordered that Peña pay the Filartiga family \$10 million in damages, an amount far beyond the means of Peña whose total assets were valued at significantly less than this amount.

Since this verdict was reached - the first of its kind in the United States that makes reference to international human rights- it has been cited as a precedent in a slew of cases involving human rights violations. The emergence of international human rights laws has broadened the jurisdictional reach of the ATCA, an act that preceded these major juridical developments. In 1991 the United States Congress passed the Torture Victim Protection Act which extended the scope of the ATCA so that it covered US citizens as well. Unlike the ATCA, the TVPA isolates anyone acting under "actual or apparent authority, or color of law"²⁷ as being subject to liability. For instance, the ATCA and TVPA have been cited in civil action suits against Serbian

leader and suspected war criminal Radovan Karadzic, former Guatemalan defence minister Hector Gramajo and Indonesian military officials.²⁸

More recently, the ATCA has been invoked in various class-action suits against multinational corporations. In the past decade, twenty-five multinational corporations have been sued for harm allegedly caused by crimes ranging from property theft to wrongful death in countries where they have invested in production operations.²⁹ The majority of these suits, which are usually facilitated by non-governmental organizations or activist law firms, are filed by plaintiffs in countries where domestic courts are deficient. The Coca-Cola Company, Exxon Mobil, Chevron, Unocal, Shell, and Texaco are some of the more high-profile companies that have been or are currently being sued under the ATCA.³⁰

To date, no multinational corporation (MNC), American or foreign, has been found liable and ordered to provide compensation for harm allegedly committed on foreign soil. In fact, eight of the twenty-five suits against MNCs have been dismissed.³¹ Furthermore, while cases have been successfully argued against Karadzic and ex-defence minister Gramajo, efforts to collect reparations have so far ended in failure. Despite these discouraging statistics, those who hope to bring irresponsible MNCs to justice are anxiously awaiting the results of cases that are currently in court.

Of particular interest to proponents of the ATCA and its capacity to bring MNCs to justice is the current suit against Talisman Energy of Canada brought on by the Presbyterian Church of Sudan. In March of 2003, Judge Allen G. Schwartz of the Southern District Court of New York ruled that the suit against the Canadian oil firm, who is listed on the New York Stock Exchange,

²⁸ Ibid.

²⁹ Ibid.

²⁵ Rosen, Mark E. 2003. See also *Filartiga v. Peña-Irala*, 630 F.2d 876 (No. 79-6090, June 30 1980).

²⁶ See *Filartiga v. Peña-Irala*, 630 F.2d 876 (No. 79-6090, June 30 1980)

²⁷ Human Rights Watch. "Defend the Alien Tort Claims Act." New York, NY: July 29, 2003.

³⁰ Business and Human Rights Resource Centre, "Alien Tort Claims Act (USA)", April 12, 2004. There does not appear to be any correlation between the fact that each of these companies process and sell an essential dark liquid and the suits that are being brought against them.

³¹ Human Rights Watch, 2003.

should proceed.³² Having successfully cleared a major legal hurdle, the ruling allows the Presbyterian Church of Sudan to pursue its claims that Talisman aided and abetted gross violations of human rights during its operation in Sudan in the late nineties and the early part of this decade. The Church alleges that Talisman was complicit in a genocidal campaign launched by the Sudanese government against occupants of land wanted for oil extraction. According to the Church, Talisman provided funds and a base for helicopters used to bomb villages and massacre their inhabitants.³³ The Church is seeking to disgorge a significant amount of the \$700 million dollars in profit that Talisman was reported to have made through its Sudanese operations.³⁴ Because of the significant evidence to support the Church's claims, in particular a memo that documents a request made by Talisman to remove villages at prospective extraction sites,³⁵ it appears as though the suit against Talisman has a good chance of being the first case to find a foreign MNC liable for damages committed in a country outside of the United States. A victory by the church would set a monumental precedent for current and future suits against MNCs and would cause many foreign businesses to reconsider their operations under increasingly liable scenarios. Because settlements involving corporations are likely to entail larger settlements than in cases involving individuals, a statute like the ATCA would not only carry more weight in terms of governing behaviour, it would also be likely to see its use increase.

Although the ATCA has been praised by human rights advocates as an invaluable resource for victims of human rights abuses the world over, the apparent increase in the trend of its use has been met with substantial protest from at least three

parties: the international business community, the US Federal Government and foreign governments. Each of these parties have publicized statements or submitted *amici curiae*³⁶ briefs to the US Supreme Court arguing one way or another for the revision of the ATCA. In a statement published in the New York Times addressing the ATCA, the National Foreign Trade Council, an international business lobby group claimed that the ATCA "interferes with foreign affairs", "discourages investment", "permits suits against bystander companies", and that the ATCA is being "misapplied," giving US courts the authority "to decide international law".³⁷

In May of 2003 Attorney General John Ashcroft issued the Supreme Court an *amicus curiae* articulating the US Justice Department's opposition to the statute.³⁸ The act, he argues, "could not be used as a basis to file civil cases and that victims should sue under other laws; that the "law of nations" covered by the ATCA did not include international human rights treaties; and that abuses committed outside of the United States would not be covered under the law."³⁹

Foreign governments have also voiced their protest over the ATCA. In January of 2004 representatives of the governments of Australia, Switzerland and the United Kingdom issued a joint *amicus curiae* briefing to the US Supreme court stating that the ATCA undermines national sovereignty.⁴⁰ While each of these governments

³⁶ *Amicus curiae*: "A party that is not involved in a particular litigation but is allowed by the court to advise it on a matter of law directly affecting the litigation." (See *The American Heritage Dictionary of the English Language*, 4th Ed. Houghton-Mifflin. 2000). Affidavits issued by *amici curiae* are considered by the judge(s) as they come to a decision on a given case.

³⁷ Earth Rights International, "Big Business Attacks ATCA in New York Times: ERI's Rebuttal." April 12, 2004.

³⁸ Since its resurfacing, the ATCA has generated minimal opposition in Washington from both Democratic and Republican governments. As the ATCA began to receive more attention, however, the current Bush administration became concerned.

³⁹ Human Rights Watch(a), "US: Ashcroft Attacks Human Rights Law: Justice Dept. Undermining Key Precedent." New York, NY: May 15th 2003.

⁴⁰ Business and Human Rights Resource Centre, 2004.

³² Hamblett, Mark. "Suit Alleging Firm Aided Genocide Proceeds." *New York Lawyer*. March 20, 2003.

³³ Ibid.; United States District Court for the Southern District of New York, Court Records of Class Action Complaint, 2001.

³⁴ Smith-Windsor, Meagan. "Lawsuit against Talisman proceeds: Judge ruling critical of Talisman's legal skills." *Alberta Independent Media Centre*. May 07, 2003.

³⁵ Business and Human Rights Resource Centre, 2004.

share with the US the recognition that all human rights abusers should be brought to justice, they "believe that any broad assertion of jurisdiction to provide civil remedies in national courts for such violations perpetrated against aliens in foreign places is inconsistent with international law and the practice of other nations."⁴¹ They stress that their respective countries are fully equipped to bring justice upon any alien individual who liable for damages committed on their soil and that they are concerned that "an expansive reading of jurisdiction by one country will undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs."⁴²

THE NORMATIVE NATURE OF THE ATCA

Is the trend that appears to be forming in the use of the ATCA as a means of addressing human rights abuses a new sovereignty norm? Recall first Finnemore and Sikkink's provisional definition of norms⁴³ and that the ATCA indicates standards of appropriate behaviour for actors with a given identity. Given that the ATCA is being championed by a relatively small group of human rights lobbyists (so-called 'norm entrepreneurs'), the observance and use of the ATCA can be classified as an emerging norm. The novel nature of this norm - the trend in the use of the ATCA - however, is problematic. While the use and subsequent recognition of the ATCA may be described as a new development, the trend in the use and observance of the law and in particular the US Code is not. Laws themselves are norms in that they inform practices. So while the trend in the use of the ATCA may be considered 'new', because its existence relies completely on an older more established norm - the law - it can also be argued that

the emerging sovereignty norm is just another example of a previously established norm.

To argue this, however, would also mean to deny the existence of a multitude of norms. Many norms are born out of pre-existing norms and rely on them for legitimacy. Human rights norms are the natural product of the co-evolution of domestic and international law, institutions built with a normative foundation. Similarly, the trend in the use of the ATCA is a natural product of the growth in human rights norms. So although the existence of this emerging norm is incumbent on pre-established norms, it exists nonetheless. For the sake of brevity, the trend that appears to be forming in the use of the ATCA will hereafter be referred to as the ATCA norm.

Having established the existence of the ATCA norm, it must now be classified. Even though the ATCA is over 200 years old, its frequent use is only a recent development. Recall that Finnemore and Sikkink classify norms that create new actors, interests or categories of action as constitutive. Because the 'discovery' of the ATCA in the 1980s has created or at least revealed a new category of action, it would seem as though the ATCA norm would fall into the constitutive category of norms.⁴⁴ As a component of the law, however, the ATCA norm may also be classified as a regulative norm in that it helps to order and constrain behaviour. In their analysis of norms, Finnemore and Sikkink do not address the possibility of norms having multiple classifications. Based on the regulative and constitutive characteristics of the ATCA norm, it would appear as though this is indeed a possibility.

Perhaps the most important feature of the ATCA norm is where it is located on the norm life cycle. The influential properties of a norm are largely determined by its stage of growth. Once again, however, the new ATCA norm defies singular categorization. There is a case to be made for placing it at both the emergence and internalization stages of the life cycle.⁴⁵ One of the domi-

⁴¹ Brief of the Governments of the Commonwealth of Australia, The Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae*, 2004. 3-5.

⁴² *Ibid.*

⁴³ Martha Finnemore and Kathryn Sikkink define a norm as "a standard of appropriate behaviour for actors with a given identity," Finnemore and Sikkink, 891.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 896.

nant mechanisms of the first stage of the norm life cycle is the persuasion of important actors to adopt a given norm.⁴⁶ Since the ATCA is already a statute of law, important actors such as states and international organizations need not be persuaded to grant legitimacy to the ATCA norm (a function of the second stage, 'norm cascade') because it has already been institutionalized in the United States. One might argue that because only one state has internalized the norm it has yet to reach the final stage internationally. Due to the enormity of the ATCA's jurisdiction (the planet) however, the ATCA norm needs only to be internalized in one state to perform its function effectively, that is, to curb human rights abuses. Because the ATCA is law, the ATCA norm has managed in some respects to forgo stage two and proceed directly to stage three, internalization.

Despite the backing of US law however, the ATCA norm still lacks a major characteristic of internalization: habit. Due to the ATCA's relatively recent discovery, its use has yet to become main-stream. Regardless of the fact that institutions and states need not be persuaded to adopt the ATCA norm in order for it to be effective (because it has already been incorporated into the American legal system); the norm has yet to undergo a period of frequent and extended use. Until such an event takes place in which the ATCA norm experiences its normative 'cascade' unto the international legal scene, it can also be argued that the ATCA norm is only in the first or 'norm emergence' stage. The norm entrepreneurs in this case are lawyers and activists and their organizational platforms are human rights organization. If one were to apply the analogy of the human life cycle to describe the ATCA norm, it might be envisioned as some sort of prepubescent wunderkind who is far more developed than his/her peers would recognize and his/her elders would admit. The ATCA norm then falls somewhere between the two extremes of the life cycle, legally internalized by the United States, but hardly recognized by those who

would subscribe to it.

The influential capacity of the ATCA norm is affected by its abnormal development with respect to the norm life cycle. While the influential power of the norm lies fully in its presence in the American legal system, the scope of its influence is limited to by its current relatively unknown status. As awareness of the ATCA spreads, it may cause some significant behavioural changes. If the ATCA norm continues to gain strength it could have a major impact on the behaviour of MNCs and governments alike. Faced with the threat of suit under the ATCA, MNCs could change their policies in troubled foreign countries or choose not to invest in them at all so as to avoid litigation. Governments, in order to protect investment, might pass legislation to help prevent the filing of suits under the ATCA or pass their own version of the ATCA to gain equal jurisdictional footing with the United States. To date, reaction to the ATCA norm is still in the protest stage. If the ATCA is somehow dismissed or revamped as a result of lobbies against the statute, then things will return to the status quo. If the ATCA norm gains momentum, it would be reasonable to expect some behavioural changes.

THE SOVEREIGNTY IMPLICATIONS OF THE ATCA

Having dissected the normative nature of the ATCA, it is now time to examine its implications for the notion of sovereignty. Taken as a set of meanings and practices, is the aggregate meaning of sovereignty affected or even altered by the emergence of the ATCA norm? I have decided to approach this query by posing two questions: *Has* the aggregate meaning of sovereignty changed and if so how; and if not, *will* the aggregate meaning of sovereignty change?

In order to respond to the first question, Biersteker and Weber's conceptualization of sovereignty must be revisited. Recall that: the "ways that the practices of states and non-state agents produce, reform and redefine sovereignty and its constitutive elements: population, recognition, authority,

⁴⁶ Finnemore, Martha and Kathryn Sikkink, 1998, 898.

and territory"⁴⁷ must be considered in order to understand the social construction of sovereignty; that its aggregate meaning is "negotiated out of interactions within intersubjectively identifiable communities" while practices help to "construct, reproduce, reconstruct and deconstruct" this meaning;⁴⁸ and that the different meanings that form this aggregate meaning are informed by practices.

In keeping with this approach, in order for the aggregate meaning of sovereignty⁴⁹ to change, it must be communally renegotiated or altered by changes in practice. While no discernable process of renegotiation has taken place, it appears as though there has been a change in practice. The discovery of the ATCA has given the United States the authority to perform a duty traditionally reserved for individual states: the prosecution of aliens found liable for harmful acts committed within these states' respective territories. Whether they desire it or not, the United States enjoy more legal authority than any other state in comparison. Because this authority (a constitutive element of sovereignty) has changed, it would follow that so too has the practice of the recognition of this authority. This change in authority would indicate that there has been a change in the prescription for sovereign recognition practices which further implies a change to the aggregate meaning of sovereignty.⁵⁰ This, however, is not entirely the case.

While it is true that the constitutive element of authority has changed, it has done so only with respect to the US. All other states still retain the same authority they had before the emergence of the ATCA norm to sue foreign perpetrators, however now they each share that authority with the United States. Because their authority has been duplicated and not usurped, the

world's states retain all aspects of the sovereignty they enjoyed prior to the introduction of the ATCA norm into the international system. Has then, the aggregate meaning of sovereignty changed? Yes; but only slightly. While the meaning of sovereignty may have been modified significantly in the US, the rest of the world is left having to amend its conception of sovereignty so as to accommodate the unique authority vested in the US by the ATCA.

Ultimately, while the aggregate meaning of sovereignty has changed (albeit minimally) in theory, in reality it has not. Regardless of the fact that suits have been allowed to proceed against citizens and MNCs, the courts have yet to exercise their authority to bypass the diplomatic immunity that states and state leaders are traditionally afforded by the US government. For instance, suits brought against the Saudi Arabian government and former Haitian President Jean-Bertrand Aristide have since been thrown out on these grounds.⁵¹ The claim made by the governments of Australia, Switzerland, and the UK that the ATCA undermines national sovereignty is therefore erroneous.⁵² Given the protection that states and their representatives enjoy from the ATCA, the ATCA's power to infringe upon state sovereignty is severely hindered, as is its ability to have a meaningful impact on the notion of sovereignty itself. Thus, while the prescriptions for sovereign recognition have technically been altered by the ATCA, the tradition of diplomatic immunity trumps any change the ATCA would bring about in practice. Nevertheless, the 'rediscovery' of the ATCA has revealed a new category of action in the field of international law and serves as a valuable means for redressing human rights abuses or any other tort. Due to the realities of diplomacy, however, it is a relatively impotent device when applied to matters involving states.

As such, the sovereignty implica-

⁴⁷ Biersteker, Thomas J. and Cynthia Weber, 1996.

⁴⁸ Ibid.

⁴⁹ Biersteker and Weber's aggregate meaning of sovereignty may be summarized as a socially constructed set of meanings and practices, including but not limited to population, recognition, authority and territory that is subject to change over time.

⁵⁰ Ibid, 13.

⁵¹ Slaughter, Anne-Marie and David L. Bosco, "Alternative Justice," *Crimes of War*, May 2001.

⁵² Brief of the Governments of the Commonwealth of Australia, The Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae*, 2004. 3-5.

tions of the ATCA are relatively minimal and should not cause a major shift in the universal understanding of sovereignty. Given the level of both protest against and support for the ATCA however, this situation is subject to change. This leads us to a modified version of the second question: will the aggregate meaning of sovereignty change *significantly*? The answer to this question depends on the likelihood of two scenarios.

The first scenario is that courts in the United States overturn the precedent set in 1989 that acknowledges the legal immunity of states and their leaders.⁵³ In normative terms this would represent the 'cascade' or second stage of the norm life cycle. This would mean a major alteration of current conceptions of state authority and, on a broader scale, state sovereignty. Such an event seems extremely unlikely, however, given the potentially disastrous diplomatic implications of such suits and the behaviour of the courts thus far in dealing with suits against foreign leader. Furthermore, members of the US government, concerned states and lobby groups who are opposed to the ATCA are directing their efforts towards the realization of the second scenario, the revision or dismissal of the ATCA. Judging by the size, momentum and influential strength of this opposition movement, this scenario may soon become a reality. If those who disapprove of the ATCA are successful in having its unique authority revoked, the aggregate meaning of sovereignty would return to its original state, awaiting another challenge to its identity.

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⁵³ See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

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