VINDICATING THE TIANANMEN SQUARE MASSACRE "THE CASE AGAINST LI PENG"

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On June 4, 1989, the world watched in horror as the Chinese Army led a violent crackdown to crush the student democracy movement that was taking place in Tiananmen Square.[1] When the last bullet was fired, hundreds of students laid murdered across the streets of Beijing and many more were injured.[2] Eleven years later, on August 28, 2000, five survivors[3] of the Tiananmen Square massacre filed a lawsuit in the Southern District of New York against Li Peng, the Chairman of the People's Republic of China (PRC), for the deaths that resulted from his military command as Premier.[4]

Specifically, the plaintiffs based their lawsuit on the Alien Tort Claim Act of 1789 (ATCA) and Torture Victim Protection Act (TVPA) of 1991 alleging that Li Peng is responsible for "crimes against humanity, including summary execution, arbitrary detention, torture and other torts."[5] This paper will: (1) briefly describe the events that led to the Tiananmen Square massacre and the subsequent lawsuit against Li Peng; (2) provide an overview of the Alien Tort Claim Act and the Torture Victim Protection Act; (3) analyze and evaluate, within the context of recent case law, the competing arguments that may arise concerning the procedural dimensions and the substantive merits of the plaintiff's case under the ACTA and TVPA; and (4) conclude with an examination of the legal and political ramifications that could emerge from the final outcome of this case.

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1 *Chinese Army Troops Crush Pro-Democracy Protests: Hundreds of Demonstrators Reported Killed; Massacre Condemned Worldwide*, WORLD NEWS DIGEST, June 9, 1989, at A1 [hereinafter *Chinese Army Troops Crush Pro-Democracy Protests*].

2 *Id.*

3 Judy Chen, *Global Justice: The Li Peng Lawsuit and Universal Jurisdiction Over Violation of Rights*, P.R.C. RTS. F. 22, 22 (Winter 2000/1) (The five plaintiffs are Liu Gang, Wang Dan, Xiong Yan Zhou Fengsuo and Zhang Liming. Gang, Dan, Yan, and Fengsuo were among the 21 students on China's Most Wanted List. The list was published in June, 1989, by the Ministry of Public Security, which is under direct authority of the State Council and was, at that time, headed by Li Peng. Following their capture by police, all four individuals were imprisoned for their role in the Tiananmen Square demonstrations and protests. The fifth plaintiff, Liming, lost his sister after she was shot and killed by the Chinese troops on the night of June 3, 1989).

4 Bruce Zagaris, *PRC Protests Service and U.S. Suit of Chinese Leader for Tiananmen Square Atrocities*, INT'L ENFORCEMENT L. REP. 10 (2000).

5 *Id.*

I. INTRODUCTION

The genesis of the Tiananmen Square movement began in late April of 1989 when a group of students gathered together to remember the passing of reformer, Hu Yaobang, who died on April 15, 1989.[6] However, what initially began as a peaceful commemoration escalated into a tense confrontation on May 4, 1989 when a student's declaration was read to the crowd in Tiananmen Square calling for the Chinese government to deliver on their promise of socioeconomic reform.[7] The student movement gained greater momentum over the next few weeks as intellectuals and thousands of Chinese citizens joined the students in a hunger strike in Tiananmen Square to force the government to respond to their demands for democracy.[8]

The Chinese government responded by imposing martial law throughout Beijing on May 20, 1989.[9] When martial law failed to restore order in Tiananmen Square, Li Peng ordered the People's Liberation Army, on June 3, 1989, to clear the square and "to use any means necessary to deal with people who interfere with the mission. Whatever happens will be the responsibility of those who do not heed warnings and persist in testing the limits of the law." [10]

Under those orders, thousands of Chinese troops, accompanied by tanks and armored personnel carriers, stormed into Tiananmen Square shortly before dawn on June 4, 1989, and fired heavily into the crowd of protestors, killing hundreds of unarmed demonstrators and wounding many more.[11] Following the massacre, the Chinese government sought the arrest of pro-democracy student leaders and issued a statement warning that "they would face severe punishment if they did not turn themselves in to authorities."[12] The Chinese authorities later executed some of the student protestors in public to demonstrate the serious nature of their warnings.[13]

On August 28, 2000, five survivors of the Tiananmen Square massacre filed a lawsuit against Li Peng in U.S. District Court in the Southern

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[6] Andrew Nathan, *The Tiananmen Papers*, FOREIGN AFF. (Jan/Feb 2001) (on file with author).
[7] *Id.*
[8] *Id.*
[9] Press Release, *Human Rights in China, Li Peng Lawsuit Pretrial Conference Set for Friday--Tiananmen Mothers Issue Statement in Support* (Oct. 21, 2000), *available at* http://www.hrichina.org/Lawsuit.htm.
[10] *See* Chen, *supra* note 3, at 22.
[11] Colin Nickerson, *Turmoil in China; Troops Kill Hundreds of Protestors in Move to Crush Rebellion in Beijing; Bloody Pandemonium as Tanks Roll Into Square*, BOSTON GLOBE, June 4, 1989, at 1.
[12] *Chinese Army Troops Crush Pre-Democracy Protest, supra* note 1.
[13] Nicholas D. Kristof, *Chinese Execute 3 in Public Display for Protest Role*, N.Y. TIMES, June 22, 1989, at A1.

District of New York. Three days later, a process server hand-delivered the summons to a U.S. State Department employee who was guarding Li Peng.[14] The plaintiffs' lawsuit is primarily based on the Alien Tort Claim Act (ATCA) of 1789 and the Torture Victim Protection Act (TVPA) of 1991.[15] Both statutes provide jurisdiction in U.S. federal court for grave violations of international law, no matter where they were committed.[16] Some of the major allegations asserted in the plaintiffs' claim against Li Peng include "summary execution, torture, and arbitrary detention."[17]

Although the Chinese government has so far made no legal response to the plaintiffs' lawsuit, they have voiced their opposition by describing the suit as a "political farce fabricated by a handful of anti-China elements in the U.S."[18] Moreover, they have blamed the U.S. government for failing to protect Li Peng from the service of a court summons while he visited New York for a United Nations conference.[19] Consequently, the U.S. State Department has challenged the legitimacy of the service of process by arguing that its Security Detail was not responsible for serving process upon those whom it protects.[20]

The final outcome of this lawsuit is important for two reasons. First, although the ATCA has been around since 1789, it has only recently been revived as a legal doctrine. Moreover, since this case involves one of the most prominent international leaders, the outcome will have a significant impact in determining the legal reach of the statute as a remedy for future victims of human rights violations. Second, the lawsuit against Li Peng represents the first legal action taken in the U.S. against a Chinese official. As a result, it has created a substantial amount of controversy and tension in the already fragile relationship between the two countries.[21] Therefore, the outcome in this case could have important legal and political ramifications for the United States as it continues to carefully balance its human rights concerns and economic interests in China.

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14 Chen, *supra* note 3, at 23

15 *Id.* at 24.

16 *Id.* at 24.

17 Press Release, *Li Peng Sued for Gross Human Rights Violations*, *available at* http://www.hrichina.org/Lawsuit.htm (The plaintiff's also charged that Li Peng was responsible for "crimes against humanity as well as for violations of the rights to peaceful assembly and association and the rights to life, liberty and security of person." However, these charges will not be discussed since they are beyond the scope of this paper.).

18 Chen, *supra* note 3, at 23.

19 Zagaris, *supra* note 4, at 2.

20 Chen, *supra* note 3, at 23.

21 Zagaris, *supra* note 4, at 1.

II. OVERVIEW OF THE ATCA & TVPA

A. THE HISTORY AND DEVELOPMENT OF THE ATCA

There are three major requirements a plaintiff must establish before it can assert a valid claim under the Alien Tort Claim Act: (1) the claim has to be made by an alien; (2) the claim must be for a tort violation; and finally, (3) the tort must be in violation of either the law of nations or a treaty of the United States.[22] Although the ATCA was originally enacted to combat piracy,[23] it has become in recent years a fertile source of civil suits against perpetrators of international crimes, ultimately leading to judgments imposing civil liability for genocide, war crimes against humanity, torture and acts of terrorism.[24]

The ATCA was first used by victims of human rights violations in the 1980 case of *Filartiga v. Pena-Irala*.[25] In that case, a Paraguayan family successfully brought an action against a Paraguayan police officer, Americo Norberto Pena-Irala, for his role in the torture and death of their seventeen-year old son, Joelito Filartiga.[26] Although Pena-Irala had fled to Brooklyn, New York when the suit was filed, the court nonetheless found him guilty for the death of Joelito Filartiga, rejecting his argument that U.S. courts lacked jurisdiction to hear the plaintiff's claims.[27] In a landmark decision, the court held, "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, §1350 provides federal jurisdiction."[28]

Following the *Filartiga* case, a series of ATCA cases emerged to further establish the ATCA as a remedy for international human rights violations. In the *Suarez Mason* cases (1990), the court expanded the ATCA to include claims of summary execution, prolonged arbitrary decision, and disappearance,[29] when it held an Argentine general liable, under the doctrine

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[22] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000).
[23] Bill Miller, *Mugabe Sued in N.Y. Over Rights Abuses*, WASH. POST, Sept. 9, 2000, at A3.
[24] John F. Murphy, *Civil Liability for Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 47 (Spring 1999).
[25] Chen, *supra* note 3, at 24.
[26] BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 9-10 (Transnat'l Publishers, Inc. 1996) (1954).
[27] Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 877-79 (2d Cir. 1980).
[28] *Id.* at 877.
[29] Chen, *supra* note 3, at 24.

of command responsibility,[30] for alleged atrocities committed within his zone of control in the late 1970s.[31] The court later ordered the defendant to pay almost $90 million in damages.[32]

A few years later, in *Paul v. Arvil* (1994), six Haitians were awarded $41 million in punitive damages for the human rights abuses they suffered at the hands of troops operating under the orders of former Haitian dictator Propser Arvil.[33] The court applied the doctrine of responsibility, holding that:

> Defendant Arvil bears personal responsibility for a systematic pattern of egregious human rights abuses in Haiti during his military rule of September 1988 until March 1990. He also bears personal responsibility for the interrogation and torture of each of the plaintiff's in this case. All of the soldiers and officers in the Haitian military responsible for the arbitrary detention and torture of plaintiffs were employees, representatives, or agents of defendant Arvil, acting under his instructions, authority, and control and acting within the scope of authority granted by him....All of the plaintiffs suffered arbitrary detention, torture, and cruel, inhuman or degrading treatment inflicted by soldiers acting under the direction and control of defendant Prosper Arvil.[34]

In *Kadic v. Kradzic* (1995), the jurisdictional reach of the ATCA was expanded to include leaders from de facto states.[35] *Kadic* involved a lawsuit brought by two groups of plaintiffs against Radovan Karadzic, the former President of the self-proclaimed Bosnian-Serb Republic of Srpska, for his role in directing the genocide campaign during the Bosnian civil war.[36]

In contrast to Judge Edward's narrow interpretation of the ATCA in *Tel Oren v. Libyan Arab* (1984),[37] the *Kadic* court ruled,

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[30] STEPHENS & RATNER, *supra* note 26, at 21-22 (the doctrine of command responsibility holds higher officials liable for human rights abuses committed pursuant to their orders).

[31] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000).

[32] Chen, *supra* note 3, at 24.

[33] STEPHENS & RATNER, *supra* note 26, at 21-22.

[34] Paul v. Avnil, 901 F. Supp. 330, 335 (S.D. Fla. 1994).

[35] Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).

[36] *Id.* at 236-37 (plaintiff asserted causes of action for genocide, rape, forced prostitution and impregnation, torture, and other cruel, inhuman and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death).

[37] Tel Oren v. Libyan Arab, 726 F.2d 774, 776 (D.C. Cir. 1984) (Edwards confined the ATCA's jurisdiction to state actors only, holding, "I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law.").

> that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.[38] Appellants' allegations that Karadzic personally planned and ordered a campaign of murder, rape, and other forms of torture clearly designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.[39]

The court cited old case law[40] to justify their liberal reading of the ATCA,[41] stating that "any government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation."[42]

The *Kadic* court further held that it would be "anomalous indeed if non-recognition by the United States had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors."[43] Moreover, the court declared that the proper inquiry in determining a leader's culpability for human rights violations should be "whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."[44]

Finally, a defendant's liability for compensation under the ATCA does not expire upon death. In *Re Estate of Ferdinand Marcos* (1994), approximately ten thousand plaintiffs brought suit against the former president of the Philippines, Ferdinand Marcos, for damages resulting from various human right violations that included torture, summary execution, and disappearance.[45] A jury awarded the plaintiffs approximately $800,000 in

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[38] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000).

[39] *Kadic*, 70 F.3d at 242.

[40] *Id.* at 240.

[41] David P. Kunstle, *Kadic v. Karadzic: Do Private Individuals Have Enforceable Rights and Obligations?* 6 DUKE J. COMP. & INT'L L. 319, 323 (1996) Specifically, the court referred to *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), and *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795). *Id.* In *Bolchos*, the plaintiff sued Darrell for illegally seizing and selling his slaves in the US after the defendant had captured the slaves upon a Spanish ship. The court, using the ATCA to provide jurisdiction, held that Darrell, a private individual, had violated rights that were guaranteed to Bolchos by a treaty of the US. *Id.*

[42] *Kadic*, 70 F.3d at 244.

[43] 28 U.S.C. § 1350.

[44] *Id.*

[45] Hilao v. Marcos, 25 F.3d 1467, 1469 (9th Cir. 1994).

compensatory damages and about $1.2 billion in exemplary damages.[46] After the Marcos estate made no effort to satisfy the judgment, the trial court issued a preliminary injunction against the estate preventing it from liquidating and transferring its assets to avoid payment.

The Ninth Circuit later affirmed this decision, holding "that the district court did not abuse its discretion in preliminary enjoining the Estate from transferring, secreting, or dissipating the Estate's assets *pendite lite.* The district court applied correct law and its factual findings support the conclusion that money damages would be an inadequate remedy due to evidence that the Estate has engaged in a pattern of secreting or dissipating assets to avoid judgment."[47]

B. THE HISTORY AND DEVELOPMENT OF THE TVPA

The Torture Victim Protection Act (TVPA) was enacted into law in 1992, providing individuals with a federal cause of action for official torture and extrajudicial killing.[48] The underlying motive behind the TVPA was to guarantee these victims access to U.S. courts.[49] The TVPA reaffirmed *Filartiga's* holding by imposing civil liability on state actors who engage in torture or extrajudicial killing.[50] Also, contrary to one commentator's belief that the TVPA conflicts with the ATCA,[51] the legislative history behind the TVPA indicates that it was designed to render support and simultaneously expand the ATCA by: (1) allowing U.S. citizens, in addition to aliens, to bring a cause of action under the ATCA; (2) providing an unambiguous and modern basis for a claim of "extrajudicial killing"[52] and "torture";[53] and (3) responding to Judge Bork's doubts and narrow interpretation of the ATCA.[54]

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[46] *In Re* Estate of Ferdinand E. Marcos, 910 F. Supp. 1470, 1470 (D. Haw. 1995).

[47] *Id. at* 1471.

[48] *See* STEPHENS & RATNER, *supra* note 26, at 25.

[49] *See id.* at 26.

[50] *See id.* at 26-27.

[51] Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?* 14 Transnat'l L. 207, 209 (Spring, 2001) (As a note, the cited article was published after this piece was accepted for publication. The assessment of the ATCA and of the case against Li Peng by Gruzen differs substantially from this author's and, in this author's opinion, does not account for all the complexities presented in this case. Because of the different conclusions reached, Gruzen's assessment is discussed throughout this article.).

[52] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000) ("For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.").

[53] *Id.*

To bring a successful claim under the TVPA, a plaintiff must establish that the defendant was acting under actual or apparent authority or under color of law of any foreign nation when the alleged act of torture or extrajudicial killing occurred.[55] However, unlike the ATCA, the TVPA imposes a ten-year statute of limitations[56] upon any claim of torture or extrajudicial killing and requires the plaintiff to exhaust all adequate and available domestic remedies before seeking relief under the statute.[57]

Mushikiwabo v. Barayagwiza (1996) was one of the first cases where the TVPA was successfully asserted.[58] In this case, the court awarded plaintiffs over $105 million in damages after they successfully proved that a Rwandan leader of a paramilitary group had played an instrumental role in the torture and massacre of thousands of Rwanda's Tutsi minority as well as moderate members of the Hutsu majority.[59]

Although the TVPA imposes a ten-year statute of limitations, courts have, in certain instances, been willing to allow a retroactive application of the statute. In *Xuncax v. Gramajo* (1995), a group of nine Guatemalans sued General Gramajo, under both the ATCA and TVPA, for summary execution, torture, disappearance and cruel treatment committed by his forces in the Guatemalan highlands.[60] Despite the fact that the alleged atrocities occurred almost ten years prior to the enactment of the TVPA, the court concluded that the TVPA could be applied retroactively to hold the defendant responsible for his egregious actions.[61] Specifically the court held:

> Torture means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id.

[54] STEPHENS & RATNER, *supra* note 26, at 83.

[55] William Aceves, *Affirming the Law of Nations in US Courts: The Karadzic Litigation and the Yugoslave Conflict*, 14 BERKELEY. J. INT'L LAW 137, 155 (1996).

[56] 28 U.S.C. §1350 ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.").

[57] *Id.* ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

[58] Mushikiwabo v. Barayagwiza, 1996 US Dist Lexis 4409, at *7 (S.D.N.Y. 1996).

[59] *Id.*

[60] Xuncax v. Gramajo, 886 F. Supp. 162, 169-71 (D. Mass. 1995).

[61] *Id.* at 177.

> that the public's interest in seeing that the TVPA is available to a plaintiff such as Ortiz who has suffered deliberately brutal abuse far outweighs any disappointment there might be of Gramajo's private expectations. There being thus neither compromise of substantive rights nor consequent manifest injustice, I conclude that retroactive application of the TVPA as the law in effect at the time of decision is entirely proper in this case.[62]

Thus, while the TVPA may impose certain restrictions upon an individual's ability to assert a claim, the limitations are not so rigid as to preclude suits that will serve the public interest.

III. ANALYSIS OF POSSIBLE COMPETING STATUTORY ARGUMENTS

A. PROCEDURAL REQUIREMENTS OF THE ATCA

As discussed earlier, to establish federal jurisdiction under the ATCA, plaintiffs must prove three elements: (1) they are an alien; (2) the suit is for a tort violation; and (3) the tort constitutes a violation of either the law of nations or the treaties of the United States.[63] In this case, the plaintiffs should have no difficulty proving their 'alien' status because they are Chinese citizens. Moreover, since their claims of torture, summary execution, and arbitrary detention have been recognized as international torts capable of triggering ATCA jurisdiction,[64] the plaintiffs should also be able to satisfy the second element.

The plaintiffs' greatest challenge will be to establish that the alleged actions of Li Peng constitute a violation of either the law of nations or a treaty of the United States. Although a majority of the plaintiffs' allegations have been recognized as triggering ATCA jurisdiction, they must still demonstrate to the court that the alleged torts lie within the reach of the ATCA.[65] This is necessary because courts do not always rely on precedence without

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[62] *Id.*

[63] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000).

[64] STEPHENS & RATNER, *supra* note 26, at 49. (As of 1990, "four international torts had been found to trigger ATCA jurisdiction: torture, summary execution, disappearance, and arbitrary detention. More recently, some courts have also recognized ATCA jurisdiction over claims of genocide, war crimes, and cruel, inhuman or degrading treatment.").

[65] *Id.* at 49-50.

questioning it.[66] Thus, one of the initial hurdles in the plaintiffs' claim against Li Peng will be to provide proof that the then Chinese Premier committed tortious acts in violation of the ATCA's "law of nations" criterion.[67]

The determination of what constitutes a violation of the "law of nations" has been a constant source of debate in ATCA cases. The *Filartiga* court set out the initial standard of analysis, which courts have subsequently adopted.[68] Specifically, the *Filartiga* court declared that not every wrong, even those outlawed by most countries throughout the world, violates the law of nations.[69] Instead, "it is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[70] Furthermore, the *Filartiga* court stated that a wrong should be viewed as violating the law of nations in situations where the law in question "had ripened over the preceding century into a settled rule of international law by the general assent of civilized nations." [71]

Since *Filartiga*, other courts have tried to provide additional guidelines to determine what constitutes a "law of nations" violation. For example, in *Forti I*, the court added the requirement of "obligatory and definable" international standards when it ruled that a law of nations violation must be one that violates customary international law "which is characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms."[72] The court further underscored *Filartiga's* "general assent of civilized nations" requirement by emphasizing "that it is consensus which evinces the willingness of nations to be bound by the particular legal principle, and so can justify the court's exercise of jurisdiction over the international tort claim."[73]

Forti II went on to clarify the "universal" criterion established in *Forti I* by first explaining that "universality" does not require unanimity among every nation; rather, a plaintiff must show a general recognition

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[66] *Id.* at 50.
[67] *Id.* at 58-59 (The focus of this paper will concentrate on violations concerning the law of nations requirement rather than the U.S. treaties element because courts have been reluctant to enforce treaties at the behest of private parties.).
[68] Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980).
[69] *Id.*
[70] *Id.* at 888.
[71] *Id.* at 881.
[72] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1988).
[73] *Id.*

among states that a specific practice is prohibited.[74] The court also held that a definable international norm cannot be vague or ambiguous.[75] A plaintiff must provide the court with a cognizable standard to determine what type of alleged treatment is actionable.[76]

The *Xuncax* court, however, declared that it is not necessary for every aspect of a cognizable standard to be fully defined before a given action meriting the "law of nations" designation is clearly proscribed under international law.[77] Instead, the court ruled that any act by the defendant that is proscribed by either the U.S. Constitution or a cognizable principle of international law would fall within the jurisdiction of the ATCA.[78]

The culmination of these cases demonstrates that there is no definitive set of rules by which courts may determine what constitutes a "law of nations" violation. The only general consensus among most commentators and judges[79] who have studied the ATCA is that the "law of nations" criterion should be interpreted according to modern definitions of international law and not limited to the doctrines at the time the statute was enacted.[80] Besides this broad generalization, there are no fixed, rigid parameters that limit the jurisdictional reach of the ATCA. Therefore, the greatest procedural barrier for the plaintiffs in the Li Peng case will be to find sources of international law which prove to the court that their claims of "summary execution, torture, arbitrary detention, and crimes against humanity" constitute a "law of nations" violation under any of the standards set forth above.

Typically, courts will refer to international treaties and other agreements such as United Nations declarations or regional treaties as starting points to examine whether an alleged act will satisfy the ATCA's "law of nations" criterion.[81] In addition, courts will look to the holdings of international judicial bodies such as the International Court of Justice, the European Court of Justice, or the Inter-American Human Rights Commission

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[74] Forti v. Suarez Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988).

[75] *Id.* at 711.

[76] *Id.*

[77] Xuncax v. Gramajo, 886 F. Supp. 162, 187 (D. Mass. 1995).

[78] *Id.*

[79] STEPHENS & RATNER, *supra* note 26, at 52 (The only judge who has explicitly advocated that ATCA jurisdiction should be restricted to international torts recognized at the time the statute was enacted was Judge Bork in *Tel Oren v. Libyan Arab*, 726 F.2d 774, 776 (D.C. Cir. 1984), who argued that ATCA jurisdiction should only be limited to acts dealing with piracy, violations of safe-conducts, and infringements on the rights of ambassadors.).

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

[81] STEPHENS & RATNER, *supra* note 26, at 54.

for guidance in gauging the level of international acceptance of certain human rights norms.[82] Finally, as mentioned above, courts will be more inclined to interpret a tort claim as violating the ATCA's "law of nations" criterion if the alleged act violates customary international law or triggers universal jurisdiction,[83] which is the principle that all nations may prosecute crimes of grave international concern, no matter where the acts were committed and regardless of the perpetrators' nationality.[84]

Among the charges filed against Li Peng, the plaintiffs' best opportunity for meeting the "law of nations" criterion under the ATCA will be to focus their attention on the allegations of summary execution, torture, and arbitrary detention. Each of these claims has previously been recognized by various international agreements and documents as violations that fall within the customary international law or the universal jurisdiction category.[85] Some of these sources include: The Restatement (Third) of the Foreign Relations Law of the United States,[86] the Universal Declaration of Human Rights,[87] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[88] The abundance of international sources defining and reinforcing the plaintiffs' claims as binding, customary international law will only strengthen their ability to satisfy the "universal, definable, and obligatory" standard under the ATCA's "law of nations" requirement.

B. POSSIBLE CHALLENGES TO ATCA JURISDICTION

Despite the fact that there is a wealth of international sources available to support the plaintiffs' claim for jurisdiction under the ATCA, their case can still be undermined by a variety of challenges raised by the defendant. These challenges include arguments based on: (i) an invalid

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[82] *Id.* at 55.

[83] *Id.*

[84] Chen, *supra* note 3, at 25.

[85] STEPHENS & RATNER, *supra* note 26, at 56-57.

[86] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights. *Id.*

[87] 1948 Universal Declaration of Human Rights, *available at* http://www.un.org/Overview/rights.html (Article 5 states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 9 states "No one shall be subjected to arbitrary arrest, detention, or exile").

[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, 213 U.N.T.S. 221, 224. (1950) ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

service of process; (ii) the Foreign Sovereign Immunities Act (FSIA); (iii) the political question doctrine; and (iv) the act of state doctrine. We will now examine each of these possible jurisdictional challenges and the potential impact it may have on the plaintiffs' argument for jurisdiction.

1. Service of Process

Service of process is probably the most difficult procedural barrier to the plaintiffs' claims under the ATCA. Typically, valid service requires delivering a copy of the summons and complaint to the defendant personally, or leaving copies at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion. Alternatively, the plaintiff can deliver a copy to an agent authorized by appointment or by law to receive service of process.[89]

The controversy in this case involves the manner in which the plaintiffs delivered the summons and complaint to Robert Eckert, a member of the U.S. State Department Security Detail who was guarding Li Peng at the Waldorf Astoria.[90] The plaintiffs contend that Eckert agreed to accept and deliver the summons to Li Peng after inspecting the details of the order.[91] In contrast, the U.S. Attorney's Office argued that its security detail was not responsible for serving process to those whom it protects.[92] The U.S. Attorney's Office also claimed that neither the State Department nor Eckert were aware of any court order requiring them to deliver the papers to Li Peng.[93] Thus, the crux of the plaintiffs' claim for jurisdiction will depend upon their ability to prove (1) that the Waldorf Astoria was a legitimate "dwelling house or usual place of abode" where service could take place and (2) that Eckert constitutes "an agent authorized by appointment or by law" to receive and deliver the service of process.

Although hotels are typically used for temporary lodging, courts have ruled that a hotel can qualify as a dwelling place for the purposes of service of process.[94] For example, in *Pickford v. Kravetz* (1952), the court declared that the hotel where a California resident was staying while visiting New York could be treated as a "dwelling place" where service of process could be performed.[95] Likewise, the plaintiffs in this case could make a

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[89] Mary P. Squiers, MOORE'S FEDERAL PRACTICE, ¶ 1(e)(2) (3d ed. 2001).
[90] Chen, *supra* note 3, at 23.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] MOORE, *supra* note 87, ¶ (b).
[95] *Id.*

similar argument that the Waldorf Astoria should be viewed as a "dwelling place" for Li Peng when he visited New York City in August 2000.

There is less clarity, however, concerning the issue of whether a State Department official has either the authority or the duty to deliver the summons to Li Peng. Questions of valid service on individuals are essentially questions of fact.[96] Consequently, the outcome of this case will ultimately be decided by the party that can best produce credible evidence in support of their factual account of how the summons was delivered to Li Peng. Therefore, the plaintiffs' success in establishing jurisdiction under the ATCA will depend upon their ability to provide evidence that Eckert had both the knowledge and the responsibility to follow the order of the court in delivering the service of process.

2. *Foreign Sovereign Immunities Act*

Another common challenge to an ATCA claim is the Foreign Sovereign Immunities Act (FSIA), which bars federal courts from hearing actions against any recognized foreign government or its political subdivisions and agencies unless the allegation falls within one of the narrow exceptions listed in the FSIA.[97] The FSIA has been used successfully to undermine several human rights cases brought against foreign governments.[98] Some examples of this include: a lawsuit against the Soviet government for unlawful detention of a diplomat, a claim against South Africa for denial of medical treatment to a black U.S. citizen, and a lawsuit against the Chilean government for the torture of student protestors.[99]

There are limitations however on the extent to which the FSIA can immunize foreign governments and states from U.S. federal jurisdiction. Besides the exceptions enumerated in the statute,[100] the FSIA typically does not protect officials acting beyond the scope of their authority[101] and as a

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[96] *Id.*

[97] Alien Tort Claim Act, 28 U.S.C. §§ 1330, 1602-11 (2000).

[98] Tom Lininger, *Recent Development: Overcoming Immunity Defenses to Human Rights Suits in U.S. Courts*, 7 HARV. HUM. RTS. J. 177, 183 (1994).

[99] *Id.*

[100] 28 U.S.C. § 1605 (a)(1)-(3) (2000). Some of the most common exceptions that do not trigger FSIA immunity include situations where: a foreign state waives immunity either explicitly or by implication; the action is based upon a foreign state's commercial activity carried out in the U.S. by the foreign state; or the action involves property taken in violation of international law; in which the property in dispute is either located in the U.S., or is owned or operated by a foreign state engaged in commercial activity within the U.S. *Id.*

[101] Hilao v. Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994).

result, gross human right violations would not be protected by the FSIA.[102]

In this case, it is unlikely that the FSIA will threaten the plaintiffs' suit for several reasons. First, the lawsuit is outside the scope of FSIA protection. Although courts have recognized that the FSIA can sometimes protect "individuals sued in their official capacity,"[103] it is hard to imagine that a court will interpret Li Peng's authorization of violence against the student demonstrators in Tiananmen Square as "official acts" deserving of FSIA protection.

In fact, the court in *Hilao v. Marcos* (1994)[104] declared that acts of torture, execution, and disappearance were clearly outside of Marcos' authority as President of the Philippines,[105] concluding that such illegal actions could not be classified as "official acts" that would trigger FSIA immunity.[106] Therefore, the plaintiffs in this case can make a similar argument to defeat any potential claim of FSIA immunity by asserting that the torture and execution of student demonstrators represented "illegal acts" that went beyond the scope of Li Peng's "official authority."

Gruzen challenges this assessment by arguing that the FSIA extends protection to heads-of-state of foreign governments. In particular, he asserts that the FSIA shields Li Peng from liability because he was acting within his official authority as Premier of China during the Tiananmen Square massacre.[107] Although the FSIA is silent on the issue of head-of-state immunity, Gruzen asserts that "courts have viewed the FSIA as including head-of-state immunity."[108]

The head-of-state immunity doctrine generally protects current heads-of-state from the jurisdiction of foreign courts.[109] However, "the scope of this immunity is in an amorphous and undeveloped state."[110] Thus, when examining the merits of a FSIA defense, it would be an overly broad generalization to proclaim that courts will view the FSIA as "including" the head-of-state immunity.

In fact, courts have been hesitant to resolve the ambiguity between the FSIA and the head-of-state immunity doctrine. The court in *Doe* (1988)

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[102] STEPHENS & RATNER, *supra* note 26, at 126.
[103] Chuidian v. Philippine National Bank, 912 F.2d 1095, 1103 (9th Cir. 1990).
[104] *Hilao*, 25 F.3d at 1472 (The *Hilao* case involved a class action lawsuit against Ferdinand Marcos for his involvement in directing military personnel to allegedly torture and execute approximately 10,000 people in the Philippines after he declared martial law in 1971.).
[105] *Id.*
[106] *Id.* at 1471.
[107] Gruzen, *supra* note 51, at 240.
[108] *Id.*
[109] *In re* Doe, 860 F.2d 40, 44 (2d Cir. 1988).
[110] *Id.*

for example, refused to expand their interpretation of the FSIA to include head-of-state immunity when it declared, "because the FSIA makes no mention of heads-of-state, their legal status remains uncertain."[111] The Tenth Circuit later relied on *Doe's* logic and narrow interpretation of the FSIA when it similarly refused, in *Southway v. Central Bank of Nigeria* (1999) to broaden the scope of FSIA protection to include "immunity from criminal indictment" of Racketeer-Influenced and Corrupt Organization (RICO) violations.[112] Given that courts have tended to apply a restrictive reading of the FSIA in recent years, it would premature to assert that the FSIA will grant Li Peng head-of-state immunity protection in this case.

Finally, even if Li Peng attempts to make an independent claim of head-of-state immunity, plaintiffs should urge the court to restrain from applying a liberal interpretation of the doctrine, as "several courts have suggested in dicta that even defendants who are current heads of state of governments....should not be given immunity for acts such as torture and summary execution."[113]

Although courts have not officially adopted this viewpoint in their decisions, the brutality and enormity of deaths witnessed in the Tiananmen Square massacre illustrates the reasons why current heads-of-state should not be given immunity for torturing its own citizens. Granting such immunity would undermine the logic behind why courts refuse to extend FSIA protection to foreign officials engaged in acts of torture[114] and other gross human right violations.[115]

3. *Political Question Doctrine*

Defendants may also challenge the plaintiffs' standing under the ATCA by using the political question doctrine to argue that the case involves an issue which should not be decided by a court.[116] The political question doctrine is frequently invoked in cases concerning foreign policy matters where defendants generally claim that such issues are better handled by the political branches of government rather than by the courts.[117] At the same time however, the United States Supreme Court has warned that not every

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[111] *Id.* at 45.
[112] Southway v. Central Bank of Nigeria, 198 F.3d 1210, 1214-15 (10th Cir. 1999) (stating that a "court of law has no business attempting to define the scope of foreign sovereign immunity in the first instance").
[113] STEPHENS & RATNER, *supra* note 26, at 131.
[114] Hilao v. Marcos, 25 F.3d 1467, 1472 (9th Cir. 1994).
[115] STEPHENS & RATNER, *supra* note 26, at 126.
[116] *Id.* at 141.
[117] *Id.* at 142.

case should be dismissed as a political question simply because it concerns foreign policy matters: "It is an error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[118]

The general rule used to determine the applicability of the political question doctrine is set forth in *Baker v. Carr* (1962), which lists six factors that could render an issue non-justiciable:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
> (2) a lack of judicially discoverable and manageable standards for resolving it; or
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
> (5) an unusual need for unquestioning adherence to a political decision already made; or
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[119]

Although one concurring opinion has mentioned the political question doctrine as a basis for dismissing a case,[120] no suit under either the ATCA or the TVPA has been defeated for this reason alone.[121]

Therefore, it does not appear that the political question doctrine would serve as a serious threat to the plaintiffs' case against Li Peng. Even if such a challenge were to be raised by the defense, plaintiffs could counter by arguing that there are universally recognized norms of international law that provide judicially discoverable and manageable standards for adjudicating suits brought under the ATCA, thereby undermining the claim

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[118] Baker v. Carr, 369 U.S. 186, 217 (1962).

[119] *Id.*

[120] Rachel Bart, *Note: Using the American Courts to Prosecute International Crimes Against Women: Jane Doe v. Radovan Karadzic and S. Kadic v. Radovan Karadzic*, 3 CARDOZO WOMEN'S L.J. 467, 475 (1996). (In *Tel Oren v. Libyan Arab*, 726 F.2d 774, 776 (D.C. Cir. 1984), Judge Robb declined jurisdiction on the grounds that the court was presented with a non-justiciable political question. He justified his findings by declaring that the case involved questions that touched upon sensitive matters of diplomacy that demands a single voiced statement of policy by the Government. Robb also thought that the possible consequences of judicial action in this area would injure the national interest).

[121] STEPHENS & RATNER, *supra* note 26, at 141.

that such suits relate to matters that are constitutionally committed to another branch.[122]

In contrast, Gruzen argues that the political question doctrine should bar the court from ruling on the merits of the plaintiffs' claim because a guilty verdict against Li Peng could jeopardize the economic and political relations between the United States and China.[123] However, the fact that this case could create significant political tensions between the governments does not automatically make it a "political question" case precluding judicial review, for as the court in *Kadic* held, "the political question doctrine is one of "political questions" not of "political cases."[124]

4. *Act of State Doctrine*

The foreign relations equivalent to the political question doctrine is the act of state doctrine,[125] which prevents courts from inquiring into the "validity of the public acts a recognized foreign sovereign power committed within its own territory in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."[126] All of these elements have to be satisfied before an official's conduct can be described as an "act of state."[127]

In this case, it is doubtful that a court will interpret the use of violence to clear Tiananmen Square of student demonstrators as a "public act" that deserves protection under the act of state doctrine. In fact, no court to date has accepted the act of state doctrine as a valid defense in cases involving torture and summary execution.[128] For example, the court in *Jimenez v. Aristeguieta* (1962)[129] rejected an act of state claim by the former president of Venezuela when it declared that acts constituting common crimes committed by the Chief of State in violation of his authority are as far from being an act of state as rape.[130] Furthermore, it could be argued that Li Peng's orders to use force and torture to punish the student protestors are "common crimes" extending beyond the scope of his authority and position as an officer of the state.

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[122] Nixon v. U.S., 506 U.S. 224, 228 (1993)
[123] Gruzen, *supra* note 51, at 239-40.
[124] Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).
[125] STEPHENS & RATNER, *supra* note 26, at 139.
[126] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 428 (1964).
[127] STEPHENS & RATNER, *supra* note 26, at 140.
[128] *Id.* at 139.
[129] Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962) (involving a case brought against the former president of Venezuela for murder and various other financial crimes).
[130] *Id.* at 558.

Gruzen offers a different viewpoint and argues that the act of state doctrine should be a valid defense in this case. He asserts that Li Peng's actions should be "characterized as official acts of state" because they were ratified and ordered by the Chinese government.[131] Allegations of official conduct, however, do not automatically implicate the act of state doctrine under §1350.[132]

In *Forti I*, the court denied defendant's argument that his actions were official acts within the Argentine government's state of siege declaration.[133] The court ruled that the Argentine general's use of prolonged arbitrary detention and summary execution violated the law of nations. The general's actions, therefore, "were not the public official acts of a head of government" that warranted protection under the act of state doctrine.[134]

Consequently, Li Peng should not receive act of state immunity simply because the Chinese government ratified his actions. Similar to *Forti I*, Li Peng's authorization of torture, prolonged arbitrary detention, and summary execution are acts that violate "fundamental human rights lying at the very heart of [an] individual's existence."[135] Moreover, given the fact that there are "controlling legal principles" declaring torture and summary execution as universal crimes,[136] it seems highly unlikely that the court will accept the act of state doctrine as a valid defense to the plaintiffs' claims in this case.

Therefore, it appears that the defense lacks a strong procedural argument to challenge jurisdiction. This paper will now briefly examine the substantive merits, as well as the probability of success, of the plaintiffs' claims against Li Peng which include: (i) arbitrary detention; (ii) torture; and (iii) summary execution.

C. MERITORIOUS ANALYSIS OF PLAINTIFF'S CLAIMS

1. Arbitrary Detention

Among the claims alleged by the plaintiffs, arbitrary detention is probably one of the most internationally recognized human rights violations. The court in *Xuncax* reaffirmed this position when it declared that there is "no

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[131] Gruzen, *supra* note 51, at 238.
[132] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1546 (N.D. Cal. 1988).
[133] *Id.* at 1544.
[134] *Id.* at 1546.
[135] *Id.*
[136] STEPHENS & RATNER, *supra* note 26, at 141.

principle of international law more fundamental than the concept that human beings should be free from arbitrary imprisonment."[137]

Specifically, arbitrary detention is defined as a situation "where a person is detained without a warrant, probable cause, articulable suspicion or notice of charges and is not brought to trial."[138] The Restatement (Third) further elaborated that detention is arbitrary if it is not pursuant to law or if it is inconsistent with the principles of justice or the dignity of a human being.[139] There is also no specific time limit that a plaintiff must be imprisoned before a detention will be considered arbitrary.[140] A detention will be arbitrary if a person is detained and is not brought to trial within a reasonable time period.[141] Moreover, there is no precise rule to determine what constitutes "reasonable time," as courts have ruled that arbitrary detention can arise in situations where the victim is confined anywhere from four years to less than a day.[142]

When we examine the circumstances surrounding the plaintiffs' arrest and imprisonment, it appears that a strong case can be made for arbitrary detention. One of the plaintiffs, Liu Gang, was tortured and detained for six years without any recourse to appeal the mistreatment he received from the prison guards. Another plaintiff, Xiong Yan, was held captive, without trial, for nineteen months for his participation in the student demonstrations.[143]

Since there is no time limit to an arbitrary detention claim, the plaintiffs' length of detention (nineteen months and six years, respectively) should qualify as "prolonged" detention under the standards set forth above. Moreover, plaintiffs could argue that their inability to receive either an adequate hearing or an appeal to China's Ministry of Justice violated the Restatement's "reasonable time requirement" for a fair trial.[144] In addition, plaintiffs could assert that using torture to punish prisoners is a practice that contravenes the "principles of justice" and undermines the "dignity of a human being."

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[137] Xuncax v. Gramajo, 886 F. Supp. 162, 169-71 (D. Mass. 1995).
[138] STEPHENS & RATNER, *supra* note 26, at 75.
[139] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 Cmt. h. (1987).
[140] STEPHENS & RATNER, *supra* note 26, at 75.
[141] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 Cmt. h. (1987).
[142] STEPHENS & RATNER, *supra* note 26, at 75-76 (In *Avril* and *Xuncax*, the detentions were brief, from less than a day to two months. In *Forti I*, the detentions were substantially longer, approximately four years, and in *Abebe-Jiri*, they ranged from three months to three years.).
[143] Chen, *supra* note 3, at 26.
[144] *Id.*

The only major challenge to the plaintiffs' claim will be to establish Li Peng's role behind their arbitrary imprisonment. If they are able to provide concrete evidence that Li Peng authorized their capture and subsequent denial of their due process rights, then the plaintiffs would most likely prevail in their arbitrary detention claim against him.

2. Torture

Although the TVPA explicitly creates a cause of action for torture and summary execution; the ATCA also provides individuals with a forum to bring such claims as long as they can establish that there is a "law of nations" violation. In *Filartiga*, for example, the court declared that an "act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and, hence, the law of nations."[145] Similarly, many other cases[146] and international agreements[147] have reached the same conclusion, recognizing torture as a violation of the "law of nations" under the ATCA.[148]

In this case, there is very little doubt that Li Peng violated the law of nations when he ordered prison guards to shackle and beat one of the student protestors with an electric baton.[149] The use of shackles and electric batons on a prisoner would certainly fit within the United Nations' definition of

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[145] Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

[146] Hilao v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 184-85 (D. Mass. 1995); Forti v. Suarez Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987); Paul v. Arvil, 901 F. Supp. 330 (S.D. Fla. 1994).

[147] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 1 defines torture as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any person based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (1987) (declaring that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones. . . torture or other cruel, inhuman or degrading treatment or punishment. . . .").

[148] STEPHENS & RATNER, *supra* note 26, at 65.

[149] *Chinese Army Troops Crush Pro-Democracy Protests*, *supra* note 1, at 26.

torture as an act that inflicts "severe pain and suffering" upon individuals.[150] Also, the fact that Li Peng ordered the torture of thousands of other prisoners makes it more difficult for him to justify his actions as a necessary public act, especially since no government to date has ever asserted the right to torture its own nationals as a defense.[151]

3. *Summary Execution*

Similar to torture, summary execution has been recognized as an international tort[152] that satisfies the ATCA's "law of nations" criterion.[153] Although there is no single definition of what constitutes summary execution, courts have agreed internationally that practices such as summary execution are inconsistent with the inherent dignity and inalienable rights of all members of the human family.[154] In addition, international norms are broken if evidence demonstrates that an execution took place without either a fair trial or due process of law.[155] For example, the court in *Forti* stated that the plaintiffs had provided a cognizable claim for summary execution when they alleged that state officials murdered their family members without due process.[156]

In this case, there is ample evidence that Li Peng executed a significant number of individuals for protesting against the Chinese government's actions in Tiananmen Square. One of the initial executions took place on June 22, 1989 when Chinese authorities staged a public execution of three men accused of taking part in a violent political protest in Shanghai.[157] Seven more people were executed later that same day in Beijing for various acts of violence that occurred during the military crackdown in Tiananmen Square.[158]

However, the fact that Chinese officials executed these students is not enough to support an argument that Li Peng is guilty of summary execution. In order to establish such a claim, plaintiffs will not only have to

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[150] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 147, art. 1.
[151] Filartiga v. Americo Norberto Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980).
[152] STEVENS & RATNER, *supra* note 26, at 49-50.
[153] Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) (declaring that summary execution is universal, obligatory, and adequately defined to encompass the instant allegations when it held, "this court clearly has jurisdiction under §1350 to hear the plaintiffs' claims for recovery in tort in connection with injuries suffered as a result of summary execution").
[154] *Id.*
[155] STEVENS & RATNER, *supra* note 26, at 68.
[156] Forti v. Suarez-Mason, 672 F. Supp. 1534, 1542 (N.D. Cal. 1987).
[157] Kristof, *supra* note 13.
[158] *Id.*

prove that Li Peng ordered the executions himself, but they will also have to provide proof that the Chinese government, under Li Peng's authority, denied those who were executed a fair and adequate hearing.

To meet the lack of due process requirement, the plaintiffs must convince the court that the Chinese government's provision for an open trial attended by ten thousand people[159] does not constitute a fair trial where due process of law is protected and guaranteed for those accused. Moreover, the court may be hesitant to inquire into the "legitimacy" of China's trial process in this particular case since it would require them to examine the validity of a foreign state's actions.[160] Thus, the likelihood of the plaintiffs' success in proving their summary execution claim will hinge upon their ability to provide concrete evidence that Li Peng denied the accused a fair hearing before he ordered their executions.

D. PROCEDURAL REQUIREMENTS OF THE TVPA

Even if the plaintiffs' lawsuit should fail under the ATCA, the TVPA may still provide them with some form of relief on their summary execution and torture claims. The plaintiff's success, however, depends upon their ability to satisfy both the procedural and substantive requirements of the statute.

1. Statute of Limitations

Procedurally, the TVPA's ten-year statute of limitations and exhaustion of remedies criteria is not likely to pose a major threat to the plaintiffs' case. Although the Tiananmen Square massacre preceded the plaintiffs' lawsuit by eleven years, courts have hesitated to strictly apply the statute of limitations requirement in cases involving human rights violations.[161] Instead, individuals may be granted an extension on their claim through the equitable tolling doctrine, which prolongs the statute of limitations period in situations where a defendant's wrongful conduct prevents a plaintiff from asserting his claims.[162]

In addition, the Senate Report of the TVPA explained that a statute should be tolled during any period in which: (i) the defendant was absent from the United States or any jurisdiction in which a suit could have been

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[159] *Id.*

[160] STEPHENS & RATNER, *supra* note 26, at 68.

[161] *Id.* at 147.

[162] Lucien J. Dhooge, *A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations*, 24 N.C.J. INT'L LAW & COM. REG. 1, 63 (Fall, 1998).

filed; (ii) the defendant had immunity; (iii) the plaintiff was either incarcerated or incapacitated; (iv) the defendant had concealed his or her whereabouts; or (v) the plaintiff was unable to discover the offender's identity.[163]

Equitable tolling should be applied in this case for several reasons. First, one could strongly assert that the plaintiffs' imprisonment, ranging from nineteen months to six years, should satisfy the Senate Report's 'incarceration' criterion for equitable tolling.[164] Second, they could argue that their imprisonment was an "extraordinary circumstance" that prevented them from filing a timely lawsuit.[165] Finally, the plaintiffs could claim that the prison guards' refusal to deliver the plaintiffs' appeal constituted a wrongful act that inhibited their ability to pursue legal relief within the TVPA's ten year time period. In short, the TVPA's statute of limitations requirement should not pose a major threat to the plaintiffs' case because there is ample evidence to demonstrate that various extraordinary circumstances beyond the plaintiffs' control prevented them from asserting their claim in a timely fashion.

2. *Exhaustion of Remedies*

The TVPA also requires individuals to exhaust all adequate and available domestic remedies before they can assert a claim under the statute.[166] The purpose behind this requirement is (1) to ensure that U.S. courts will not interfere in cases that are more appropriately handled by courts in which the alleged torture or killing occurred and (2) to encourage the development of meaningful remedies in other countries.[167]

Similar to the statute of limitations requirement, however, courts do not impose a narrow reading of the exhaustion of domestic remedies rule.[168]

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[163] STEPHENS & RATNER, *supra* note 26, at 148.

[164] *Chinese Army Troops Crush Pro-Democracy Protests*, *supra* note 1, at 26.

[165] STEPHENS & RATNER, *supra* note 26, at 63 ("Equitable tolling may also occur when 'extraordinary circumstances' outside the plaintiff's control make it impossible to timely assert the claim.").

[166] Alien Tort Claim Act, 28 U.S.C. § 1350 (2000) ("A court shall decline to hear a claim under this section if the claimant has not exhausted and available remedies in the place in which the conduct giving rise to the claim occurred.").

[167] STEPHENS & RATNER, *supra* note 26, at 145.

[168] Xuncax v. Gramajo, 886 F. Supp. 162, 169-71 (D. Mass. 1995) (The Court stated that "the legislative history of the TVPA indicates that the exhaustion requirement of §2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute. Rather the requirement must be read against the background of existing judicial doctrines under which exhaustion of remedies in a foreign forum is generally not required 'when foreign remedies are unobtainable, ineffective, inadequate or obviously futile.").