

*Federal Judicial Center  
International Litigation Guide*

International Human Rights Litigation:  
A Guide for Judges

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International Litigation Guide*

International Human Rights Litigation:  
A Guide for Judges

David Nersessian, J.D., Ph.D.  
*Assistant Professor, Accounting and Law Division,  
Babson College*

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## I. Overview and Scope

The purpose of this guide is to help federal judges adjudicate civil cases alleging human rights violations under domestic and international law. In the common vernacular, the phrase “human rights” often is construed broadly<sup>1</sup> to encompass many forms of civil rights and constitutional claims.<sup>2</sup> The focus here is narrower. This guide addresses cases with an international dimension brought in federal court pursuant to specific U.S. statutes that provide jurisdiction over such claims. These cases include rights-based legal disputes involving foreign plaintiffs or defendants, cases involving violations occurring abroad, and cases relying on international human rights law.<sup>3</sup>

Human rights litigation can be lengthy and complex. *Bowoto v. Chevron Corp.*, for example, which was one of a small number of such cases to progress through trial, took ten years from filing through jury verdict.<sup>4</sup> The underlying allegations of killings, torture, and other human rights violations against Nigerian protestors by government security agents,

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1. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 701 cmt. a (1987) (defining human rights as those “freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives”) [hereinafter Restatement (Third) of Foreign Relations Law]. The Restatement is an authoritative resource for federal courts at all levels on issues of international human rights law and other questions of international law. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 506 n.3 (2008) (citing with approval Restatement § 907); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (citing with approval Restatement § 702) and *id.* at 761–62 (Breyer, J., concurring) (citing with approval Restatement §§ 402, 404); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 806 (D.C. Cir. 1984) (citing with approval Restatement §§ 701–722). The American Law Institute’s Restatement (Fourth) of Foreign Relations Law of the United States remains unfinished at the time of this writing. Therefore, this guide references the third draft adopted by the ALI in 1987.

2. See, e.g., Rhode Island Comm’n for Human Rights, <http://www.richr.state.ri.us/> (last visited Aug. 10, 2016) (state antidiscrimination agency).

3. Major international human rights treaties to which the United States is a party are listed in Appendix A.

4. *Bowoto v. Chevron Corp.*, No. C-99-02506-SI, 2009 WL 1081096 (N.D. Cal. 2009).

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allegedly with Chevron's support, ultimately led to more than 2,319 entries in the trial docket, plus an appeal decided in September 2010.<sup>5</sup>

Human rights cases often involve the broader challenges inherent in any type of transnational litigation, in which documents, physical evidence, and witnesses often are located outside of the jurisdictional reach of the court. The parties' need to access evidence abroad may require that the court draw upon various mechanisms for taking testimony and procuring documents overseas. Evidence obtained may be in one or more foreign languages, necessitating the use of translation services in pretrial and trial proceedings. There also are the challenges inherent in adjudicating any piece of complex litigation, such as large numbers of parties, large-scale discovery, class action certification, and heightened media interest in the case.

This guide addresses the practicalities of adjudicating human rights cases. It provides a general overview of the major legislation in this field, as well as procedural matters that arise. It also addresses circuit splits and relevant trends in case law. Provisions of the Federal Judicial Center's *Manual for Complex Litigation*,<sup>6</sup> *Elements of Case Management Pocket Guide*,<sup>7</sup> and *Foreign Sovereign Immunities Act Guide*<sup>8</sup> are incorporated by reference.

This guide focuses on civil claims under the following federal statutes, which are involved in the vast majority of human rights cases in U.S. courts:

- Alien Tort Claims Act, 28 U.S.C. § 1350 (ATS);
- Torture Victim Protection Act, 28 U.S.C. § 1350 (note) (TVPA);
- Anti-Terrorism Act, 18 U.S.C. §§ 2331, 2333 (ATA);
- Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595 (TVPRA);
- State Sponsors of Terrorism Exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (FSIA);

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5. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (affirming jury verdict).

6. *Manual for Complex Litigation*, Fourth (2004) [hereinafter MCL].

7. William W. Schwarzer & Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges* (Federal Judicial Center, 2d ed. 2006).

8. David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (Federal Judicial Center 2013).

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- Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (RFRA); and
- Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962 (RICO).

Conduct giving rise to claims under the foregoing statutes also may implicate constitutional rights and other federal laws or constitute a general tort under state law (wrongful death, wrongful imprisonment, assault and battery, etc.). Such claims may be raised in tandem with a statutory human rights case, either as an independent federal case<sup>9</sup> or through the court's supplemental jurisdiction over state claims.<sup>10</sup>

Not all claims linked to human rights are discussed here. Cases involving the status of enemy combatants and the use of military tribunals to adjudicate violations of the laws of war are not covered. These cases raise separate questions on the boundaries of executive and congressional constitutional authority, separation of powers, and many other issues.<sup>11</sup> Immigration and asylum cases also are not covered,<sup>12</sup> except insofar as they involve separate human rights violations (e.g., ATS claims for deportations that violate *non refouler* (non-return) obligations under the Convention Against Torture or customary international law).<sup>13</sup> Domestic

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9. See, e.g., 28 U.S.C. § 1332 (2012) (diversity jurisdiction); *Linder v. Calero Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (declining to consider claims under international law for killings by Nicaraguan Contras but allowing case to proceed on state law tort claims).

10. See, e.g., 28 U.S.C. § 1367 (2012) (supplemental jurisdiction); *Xuncax v. Gramajo*, 886 F. Supp. 162, 194–95 (D. Mass. 1995) (allowing supplemental jurisdiction over additional claims under domestic law).

11. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (invalidating jurisdiction-stripping provisions of the Military Commission Act of 2006 as an unconstitutional suspension of the writ of habeas corpus).

12. The Federal Judicial Center has a separate publication that addresses these topics. See Michael A. Scaperlanda, *Immigration Law: A Primer* (Federal Judicial Center 2009).

13. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 art. 3 (“No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”) [hereinafter *Convention Against Torture*].

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or international criminal proceedings stemming from human rights violations also are not addressed.<sup>14</sup>

This guide seeks to provide practical guidance for federal judges who hear human rights cases. Where matters of controversy exist, it aims to define the contours of those debates without advocating for a particular resolution. Cases are cited to illustrate applicable principles and judicial positions taken on them.

This guide addresses substantive legal issues of federal human rights law as well as the procedural issues that arise in federal human rights cases. It commences with an overview of the Alien Tort Statute (ATS)<sup>15</sup> and the ways in which treaties and customary international law apply through the ATS's unique jurisdictional grant. It also discusses important territorial limitations on the statute's application.

After explaining the general requirements of the ATS, the guide provides a detailed analysis of several important issues on which the federal circuit courts are divided at the time of this writing (such as the proper standard for "aiding and abetting" liability and whether the ATS applies to corporate entities). The analysis of substantive law concludes with a discussion of other federal human rights statutes, such as the Torture Victim Protection Act.

Important procedural issues (e.g., service of process, personal jurisdiction, and standing) are then discussed in the order that judges are likely to encounter them. Because many human rights cases either involve governmental parties or otherwise touch upon foreign relations, the guide then addresses the role that principles of sovereign immunity and judicial abstention play in human rights cases. It then briefly addresses the enforcement of remedies in human rights cases before concluding with a discussion of active case management principles.

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14. *See, e.g.,* United States v. Belfast, 611 F.3d 783, 806 (11th Cir. 2010) (federal criminal prosecution and conviction of the son of former Liberian President Charles Taylor for acts of torture).

15. Alien Tort Claims Act, 28 U.S.C. § 1350 (2012) [hereinafter ATS].

## II. Federal Law—Civil Remedies for International Human Rights Violations

The application and interpretation of international law fall within the judicial authority of the federal courts.<sup>16</sup> This authority encompasses both treaties of the United States<sup>17</sup> and rules of customary international law (defined as conduct undertaken by nation-states on the international plane with *opinio juris*—the belief that the conduct is required under international law).<sup>18</sup>

Congress plays a critical role in making international law actionable within the United States. It does so through legislation incorporating rules of international law, providing for jurisdiction over disputes, and creating causes of action relating to international rules. Congress also has authority to incorporate rules of customary international law<sup>19</sup> and treaties<sup>20</sup> into federal law by reference.

Although the U.S. Constitution prevails over all other sources of law,<sup>21</sup> international law and federal statutes rest on equal footing.<sup>22</sup> Where there is a conflict, courts use the “*Charming Betsy*” doctrine to interpret

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16. See Restatement (Third) of Foreign Relations Law § 112(2) (1987) (“The determination and interpretation of international law present federal questions.”).

17. See U.S. Const. art. VI, cl. 2.

18. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of [c]ivilized nations . . .”).

19. See U.S. Const. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”); *United States v. Smith*, 18 U.S. 153, 157 (1820) (upholding the constitutionality of Congress’s incorporation of international law by reference and its creation of a criminal offense punishing “the crime of piracy, as defined by the law of nations”).

20. War crimes under federal law, for example, are defined through an express reference to the Geneva Conventions. See War Crimes Act of 1996, 18 U.S.C. § 2441 (1996) (defining war crime “as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party”).

21. See *Reid v. Covert*, 354 U.S. 1, 16–18 (1957).

22. See *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 878 (D.C. Cir. 2006) (“The Constitution establishes that statutes enacted by Congress with the concurrence of the President (or over his veto) have no less weight than treaties made by the President with the advice and consent of two-thirds of the Senate.”).

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rules of federal law in harmony with international law unless no such interpretation is reasonably possible.<sup>23</sup> Where irreconcilable conflicts exist, the “last in time” rule controls.<sup>24</sup> These rules of construction apply equally to treaties<sup>25</sup> and rules of customary international law.<sup>26</sup> Courts also may refer to treaties and other international instruments to resolve questions about the interpretation of domestic legislation intended to implement international obligations.<sup>27</sup>

Remedies in federal court for violations of international law require a specific grant of federal jurisdiction. Much of this guide is devoted to claims brought under the Alien Tort Statute<sup>28</sup> and the Torture Victim Protection Act,<sup>29</sup> which are the primary avenues of recovery in most human rights cases. Other federal human rights statutes are discussed briefly following the more comprehensive analysis of the ATS and the TVPA.

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23. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993). This canon of construction is named after the Supreme Court case in which the principle was first announced. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

24. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“[If federal legislation and a treaty] are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.”).

25. See *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (applying *Charming Betsy* doctrine); *Whitney*, 124 U.S. at 194 (applying last in time rule).

26. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–22 (1963) (applying *Charming Betsy* doctrine and last in time rule).

27. See, e.g., *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1315 (N.D. Cal. 2004) (“Because the [TVPA] definition of torture borrows extensively from [the Convention Against Torture] and thus the two statutes may be read in *pari materia*, the courts’ interpretation and application of torture under CAT informs the interpretation of torture under the TVPA.”).

28. Alien Tort Claims Act, 28 U.S.C. § 1350 (2012).

29. Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 (note) (2012) [hereinafter TVPA].



## II. Federal Law—Civil Remedies for International Human Rights Violations

### A. Alien Tort Statute

The jurisdictional basis for most civil claims by foreign human rights plaintiffs in the United States is the Alien Tort Statute (ATS). The ATS was enacted by the first federal Congress in 1789 as part of the first Judiciary Act and provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>30</sup>

The ATS confers federal subject-matter jurisdiction when (1) an alien files suit; (2) for a tort; (3) committed in violation of the “law of nations” or a treaty of the United States.<sup>31</sup> The statute is jurisdictional; by itself, the ATS provides no cause of action.<sup>32</sup>

Substantive claims under the ATS must be grounded in a tortious violation of either a treaty of the United States or customary international law.<sup>33</sup> (Most ATS cases involve violations of the latter.) The ATS provides jurisdiction whether such violations are committed by foreign government officials<sup>34</sup> or private citizens.<sup>35</sup> As discussed later, however,

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30. ATS, 28 U.S.C. § 1350.

31. *See, e.g.*, *Beanal v. Freeport McMoran*, 197 F.3d 161, 164–65 (5th Cir. 1997).

32. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

33. The “law of nations” includes customary international law. *See Beanal*, 197 F.3d at 165. There is some debate among the circuits over whether the “law of nations” refers solely to what is now known as customary international law or if instead it is a broader concept that includes customary law and other international sources. *Compare id.* at 165 (“law of nations” now is known as customary international law), *with Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 37 (D.C. Cir. 2011) (rejecting view “that the definition of customary international law is synonymous with the law of nations” and holding instead that “customary international law is one of the sources for the law of nations”), *and Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399 (4th Cir. 2011) (agreeing with the majority decision in *Doe VIII* on this point).

34. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (holding that “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, [the ATS] . . . provides federal jurisdiction.”). *See also Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 104 (2d Cir. 2000) (noting that the ATS addresses the “increasing international concern with human rights issues” and collecting various types of ATS cases brought since *Filartiga* was decided).

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only a small category of conduct by private actors qualifies as a violation of international law.<sup>36</sup>

The U.S. Supreme Court interpreted the scope and requirements of the ATS in the 2004 decision *Sosa v. Alvarez-Machain*.<sup>37</sup> *Sosa* involved ATS claims brought by a Mexican national against the United States and individual government officials following his arrest and incarceration at the behest of U.S. drug enforcement authorities. The Court confirmed that the ATS was jurisdictional only, such that it did not establish new federal causes of action. It also determined that the first Congress intended the ATS to provide a remedy for certain international violations recognized under the common law as it existed in 1789 (acts of piracy, injury to ambassadors, and violations of obligations of safe conduct).<sup>38</sup> This original congressional intent remained effective because “Congress has not in any relevant way amended [the ATS] or limited civil common law power by another statute.”<sup>39</sup>

*Sosa* affirmed the understanding of ATS subject-matter jurisdiction articulated nearly a quarter century earlier in *Filartiga v. Pena-Irala*.<sup>40</sup> The Supreme Court also set out standards for federal courts to apply in

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35. See, e.g., *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (holding that international violations such as genocide, crimes against humanity, and war crimes did not require the underlying predicate of official state conduct).

36. See *infra* Part II.B.1.

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

38. *Id.* at 724–25 (“The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

39. *Id.* at 725. There is disagreement in the courts over whether customary international law is part of federal common law after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Compare *Al-Bihani v. Obama*, 619 F.3d 1, 18 (D.C. Cir. 2010) (“Some respected scholars have asserted that even though *Erie* did away with the idea of federal general common law, principles of customary international law may still be recognized as federal common law by federal courts. But that notion is very difficult to square with *Erie* . . . .”) (internal citations omitted), with *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992) (“It is . . . well settled that the law of nations is part of federal common law.”).

40. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”).

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evaluating new substantive ATS claims under international law. In determining whether to recognize a cause of action, courts must look to international law and determine whether the alleged violation “rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms.”<sup>41</sup>

The *Sosa* Court denied recovery against the United States because the federal government’s waiver of sovereign immunity under the Federal Tort Claims Act excluded claims “arising in a foreign country.” Claims like Alvarez-Machain’s, which were based on injuries suffered abroad (abduction and detention), thus were barred even though acts and omissions allegedly causing the foreign injury (DEA agents planning and directing the plaintiff’s arrest) took place within the United States. The Court also held that the ATS claims against other individual defendants for arbitrary detention failed because the limited detention at issue in the plaintiff’s arrest failed to qualify under the liability standard outlined in *Sosa*.<sup>42</sup>

Litigation in ATS cases often concentrates on the application of *Sosa* and whether plaintiffs can establish that the defendant’s acts constituted a tort under the law of nations. Courts make this determination with reference to one of two principal sources. Treaties are the first source—international agreements entered into by the United States.<sup>43</sup> The second source is customary international law.<sup>44</sup> Each of these is addressed below, followed by a discussion of territorial limitations on ATS claims under

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41. *Sosa*, 542 U.S. at 715, 725.

42. *Id.* at 701–12 (immunity) and 712–38 (customary international law).

43. See U.S. Const. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”).

44. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . .”).

the Supreme Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum Company*.<sup>45</sup>

### **1. ATS Claims Under Treaties**

The ATS allows private claims for violations of a treaty of the United States when that treaty is otherwise enforceable in U.S. courts.<sup>46</sup> Apart from ratification by the Senate, domestic enforceability usually also requires legislation that (1) incorporates the treaty's provisions into U.S. federal law and (2) specifies whether the treaty can be enforced by private litigants (as opposed to the federal government alone).<sup>47</sup>

Without more, Senate advice and consent to a treaty only creates enforceable obligations when the treaty itself is self-executing.<sup>48</sup> Whether a treaty is self-executing is a question of law for the court.<sup>49</sup> In *Medellín v. Texas*, the Supreme Court held that

[w]hat we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress.<sup>50</sup>

The intentions of governmental parties to the treaty are the primary consideration that federal courts examine to determine whether a treaty is self-executing. Senate declarations upon ratification are a particularly strong demonstration of such intent and have been held by many courts to be dispositive on this issue.<sup>51</sup> If the Senate has made no ratifying declarations, the court should consider not only the terms of the instrument

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45. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

46. *See* ATS, 28 U.S.C. § 1350.

47. *See, e.g.*, *Jama v. INS*, 22 F. Supp. 2d 353, 365 (D.N.J. 1998).

48. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (International Covenant on Civil and Political Rights (ICCPR) did not provide grounds for the plaintiff's ATS claims because it was ratified by the United States “on the express understanding that it was not self-executing”). *See also* *Beazley v. Johnson*, 242 F.3d 248, 267–68 (5th Cir. 2001) (collecting cases and affirming prior determinations that the ICCPR was not self-executing and thus could not support private claims for relief under the ATS).

49. *See, e.g.*, *Akhtar v. Reno*, 123 F. Supp. 2d 191, 196 (S.D.N.Y. 2000).

50. *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008).

51. *See, e.g.*, *Pierre v. Att’y Gen. of U.S.*, 528 F.3d 180, 185–86 (3d Cir. 2008) (ratification of the Convention Against Torture).

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itself, but also “the history of the treaty, the negotiations, and the practical construction adopted by the parties.”<sup>52</sup> The drafters’ intent also can be evidenced by the treaty’s text, *travaux préparatoires* (formal historical records) reflecting its drafting and negotiation history, the views of the executive branch, and the declarations and understandings of other signatory states upon ratification, as well as their post-ratification conduct.<sup>53</sup>

These requirements apply even to treaties that are nearly universally recognized on a global basis, such as the U.N. Charter<sup>54</sup> and the Genocide Convention.<sup>55</sup> They are particularly important in the context of multilateral human rights conventions, which often are ratified on the express understanding that some or all of their provisions are not self-executing. (A list of major human rights instruments ratified by the United States is provided in Appendix A.) For example, when the U.S. Senate ratified the International Covenant on Civil and Political Rights (ICCPR) in 1992, it specified “that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”<sup>56</sup> This declaration has been interpreted as prohibiting ATS claims for ICCPR violations,<sup>57</sup> even though the United States is a party to the ICCPR itself.<sup>58</sup>

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52. *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431–32 (1943).

53. *See, e.g., Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010).

54. *See Medellín v. Texas*, 552 U.S. at 505–06 (noting that when treaty provisions “are not self-executing they can only be enforced pursuant to legislation to carry them into effect,” such that the U.N. Charter is not self-executing) (internal quotations and citations omitted). *See also Hitai v. INS*, 343 F.2d 466, 468 (2d Cir. 1965) (U.N. Charter provision mandating “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” was not self-executing and thus would not invalidate the immigration law of charter signatories, including the United States).

55. *See* Genocide Convention art. V (providing that domestic legislation is required to implement the convention’s obligations) and Proxmire Act, 18 U.S.C. § 1092 (1988) (“Nothing . . . in this chapter shall be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.”). *See also Vaughn v. Hvass*, No. C4-99-2184, 2000 WL 73067 (unpublished opinion) (Minn. Ct. App. June 6, 2000) (holding that the Proxmire Act provides no private right of action).

56. *See* United States Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, Declaration No. 1, 138 Cong. Rec. S4781–01 (daily ed., Apr. 2, 1992).

57. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (ICCPR was ratified by the United States “on the express understanding that it was not self-executing”);

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The foregoing principles apply even to major instruments that uphold fundamental human rights. The United States is a party, for example, to the Convention Against Torture (CAT),<sup>59</sup> which is the major international treaty that defines torture and creates international obligations to prohibit and punish it. But the CAT itself is not directly enforceable in U.S. courts.<sup>60</sup> Judicially enforceable rights under the Torture Convention exist only to the extent that Congress creates them,<sup>61</sup> which Congress has done through different laws focused on criminal prosecution,<sup>62</sup> civil liability,<sup>63</sup> and asylum claims.<sup>64</sup>

It is important to note that even when they address the same subject matter, federal legislation and the international obligations implemented by that legislation are not necessarily identical. Although the overlap is

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Beazley v. Johnson, 242 F.3d 248, 267–68 (5th Cir. 2001) (ICCPR was not self-executing and thus did not support private claims under the ATS).

58. See 138 Cong. Rec. 8071 (1992) (Senate ratification of ICCPR); ICCPR art. 50 (“The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”).

59. See Convention Against Torture arts. 1–4, Dec. 10, 1984, 1465 U.N.T.S. 85.

60. See 136 Cong. Rec. S17486 (daily ed., Oct. 27, 1990). For additional views of the U.S. Senate on the Convention, see *id.* at S17486–92.

61. See *Auguste v. Ridge*, 395 F.3d 123, 132–33 n.7 (3d Cir. 2005) (“Treaties that are not self-executing do not create judicially-enforceable rights unless they are first given effect by implementing legislation.”).

62. See Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 § 506, 18 U.S.C. § 2340A (2001) (criminalizing torture, attempted torture, and conspiracy to commit torture outside the United States by U.S. nationals and other persons found within the United States), and 18 U.S.C. § 2340 (2004) (defining torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”).

63. See Torture Victim Protection Act of 1991 § 2(a), 28 U.S.C. § 1350 (2012) (note) (providing private right of action for torture or extrajudicial killing).

64. See United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Foreign Affairs Reform and Restructuring (FARR) Act of 1998, Pub. L. No. 105-277, div. G, tit. XXII, § 2242, 112 Stat. 2681-822 (codified at 8 U.S.C. § 1231) (2012) § 2242(a) (non-refouler policy of United States) and § 2242(f)(1)–(f)(2) (adopting Convention Against Torture, subject to U.S. Senate’s reservations and other ratification conditions). See also Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a) (2008) (defining torture by reference to Convention Against Torture and Senate’s ratification conditions for purpose of asylum and withholding from removal claims).

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substantial, there remain differences between federal law and international law in their definitions of international crimes and related human rights matters. Federal law clearly controls in federal courts, such that otherwise-applicable international rules are superseded where Congress has prescribed different standards for application in the United States.<sup>65</sup> That said, it is important for courts hearing human rights cases to ensure that the operative terminology is precise in terms of both the source and the substance of the legal rule at issue.

The prohibition on torture provides a good example of the potential divergence of federal law from international law.<sup>66</sup> Everyone agrees there is such a prohibition. U.S. courts recognize that “the prohibition on torture is categorical” and that “torture is illegal under the law of virtually every country in the world and under the international law of human rights.”<sup>67</sup> So do international tribunals.<sup>68</sup> “Torture” is prohibited simultaneously as a matter of:

1. federal statutory law, both directly<sup>69</sup> and through other laws incorporating the prohibition on torture by reference;<sup>70</sup>

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65. See, e.g., *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 678 (7th Cir. 2012) (federal courts must apply domestic rules where controlling federal statutes prescribe different standards from customary international rules); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938–39 (D.C. Cir. 1988) (holding that in federal courts, applicable treaties, statutes, or constitutional provisions overrode inconsistent provisions of customary international law).

66. An earlier writing by the author discusses torture and customary international law in the context of the ethical obligations of corporate lawyers dealing with human rights issues. See David L. Nersessian, *Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice*, 28 *Geo. J. Legal Ethics* 1135, 1156–58 (2015). Certain aspects of that discussion are repeated here to facilitate the analysis of ATS claims in federal court.

67. See, e.g., *Nuru v. Gonzales*, 404 F.3d 1207, 1222 (9th Cir. 2005) (“Unlike customary international law which, ‘like international law defined by treaties and other international agreements, rests on the consent of states,’ jus cogens norms apply universally to states and individuals . . . . Therefore, the proscription against torture ‘transcend[s] such consent’ of states and individuals.”) (internal quotations and citations omitted). For more information on torture, see Michael J. Garcia, CRS Report for Congress RL32438: U.N. Convention Against Torture (CAT): Overview and Application to Interrogation Techniques, Jan. 25, 2008, available at <https://www.fas.org/sgp/crs/intel/RL32438.pdf>.

68. See *Prosecutor v. Furundzija*, Case No. ICTY-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998) (criminal prohibition against torture is a jus cogens obligation).

69. See Torture Victim Protection Act, 28 U.S.C. § 1350 (note) (2012).

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2. international treaties, namely, the Convention Against Torture<sup>71</sup> and the Statute of the International Criminal Court (where torture is addressed as a method of committing genocide, crimes against humanity, and war crimes);<sup>72</sup> and
3. customary international law, as applied in civil<sup>73</sup> and international criminal<sup>74</sup> proceedings.

Despite such universal condemnation and prohibition, “[t]he word ‘torture’ lacks a stable definition.”<sup>75</sup> Federal judges hearing torture cases must determine the operative definition based upon the legal source or sources alleged to provide relief. The required degree of official involvement in, or toleration of, the conduct varies, for example,<sup>76</sup> as does the minimum threshold for injury.<sup>77</sup> U.S. torture law is narrower than the

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70. See War Crimes Act of 1996, 18 U.S.C. § 2441 (2012) (defining war crime “as a grave breach in any of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party”) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 32, and 147, Aug. 12, 1949, 75 U.N.T.S. 287 (1949) (Geneva Convention IV) (prohibiting torture).

71. Convention Against Torture arts. 1, 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

72. Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) art. 6(b) (acts “[c]ausing serious bodily or mental harm to members of the group” as a method of genocide), arts. 7(1)(f) and 7(2)(e) (torture as a crime against humanity), and arts. 8(1), 8(2)(a)(ii), and 8(2)(c)(i) (torture as a war crime) [hereinafter ICC Statute]. Note that, as of the time of this writing, the United States is not a party to the ICC Statute.

73. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). See also *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006) (confirming that Common Article III of the Geneva Conventions applied as federal law and requiring unlawful enemy combatants to be tried by a regularly constituted court).

74. See, e.g., *Prosecutor v. Furundzija*, Int’l Crim. Trib. for the Former Yugo., Case No. ICTY-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998) (prohibition against torture is mandatory under customary international law as a jus cogens obligation).

75. Richard A. Posner, *Torture, Terrorism, and Interrogation*, in *Torture: A Collection* 291 (Sanford Levinson ed., 2004).

76. Compare ICC Statute art. 7(2)(e) (defining torture as the “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”) with Convention Against Torture art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (further requiring “the consent or acquiescence of a public official or other person acting in an official capacity”).

77. Compare Convention Against Torture art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 (“any act by which severe pain or suffering, whether physical or mental, is intentionally



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prohibition applied in international settings in both *actus reus* (because “severe mental pain or suffering” is defined more restrictively in the statute itself) and *mens rea* (because the federal law’s “specific intent” requirement limits it to cases in which causing such harm is the offender’s actual purpose).<sup>78</sup> While these differences do not render federal law ineffective,<sup>79</sup> they do mean that federal law has a narrower scope than the international prohibition.<sup>80</sup>

In some instances, federal law and international law do not overlap at all. Crimes against humanity, for example, are not addressed legislatively

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inflicted on a person for such purposes as obtaining from 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 reason 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*”), with Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S. Doc. OEA/Ser. P, A.G./Doc. 2023/85 Rev. 1 art. 2 (“any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of *criminal investigation*, as a means of intimidation, as personal punishment, *as a preventive measure*, as a penalty, or *for any other purpose*. Torture shall also be understood to be *the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish*”), and with ICC Statute art. 7(2)(e) (“the intentional infliction of severe pain or suffering, whether physical or mental, upon a person *in the custody or under the control of the accused*”) and with 18 U.S.C. § 2340(1) (2012) (U.S. torture law defining torture as “an act committed by a person acting under the color of law *specifically intended* to inflict severe physical or mental pain or suffering”) and with 18 U.S.C. § 2340(2) (2012) (limiting “severe mental pain or suffering” to four categories of specified conduct) and with United States Manual for Military Commissions, 2010 Edition, Apr. 27, 2010, part IV(11) (definition of torture identical to that in the federal criminal statute) (same) (emphasis added to all).

78. See *United States v. Bailey*, 444 U.S. 394, 405 (1980) (“purpose” corresponds to specific intent, whereas “knowledge” corresponds to general intent).

79. See *United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) (holding that “slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; . . . the Torture Act is a valid exercise of congressional power . . . because the Torture Act tracks the provisions of the CAT in all material respects”).

80. As discussed later, in the civil context, most torture cases are addressed through the TVPA rather than the ATS. See *infra* Part II.C.

as federal offenses in and of themselves.<sup>81</sup> Yet U.S. recognition of such conduct as criminal dates back to the Nuremberg Trials (where crimes against humanity were prosecuted by American officials, among others).<sup>82</sup> And although war crimes are addressed in federal law, the federal codification omits a number of specific types of war crimes that violate customary international law.<sup>83</sup>

These differences become more relevant when claims are asserted under the second basis for ATS liability—customary international law. As discussed below, even if a treaty is not directly enforceable within the United States, it may be relevant to an ATS case as evidence of the content of customary international law (when the treaty codifies independently recognized customary international rules).

## **2. ATS Claims Under Customary International Law**

As noted previously, rules of customary international law also must be considered by federal courts that are assessing the viability of ATS claims.<sup>84</sup> The Restatement (Third) of Foreign Relations Law, whose definition has been widely adopted in the federal system,<sup>85</sup> defines customary international law as the “general and consistent practice of states followed by them from a sense of legal obligation.”<sup>86</sup>

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81. *See, e.g.*, Crimes Against Humanity Act of 2009, S. 1346, 111th Cong., 1st Sess. (June 24, 2009) (legislative proposal that would amend the federal criminal code and make certain crimes against humanity, as defined in the statute, federal crimes).

82. *See* Charter of the International Military Tribunal art. 6(c), Aug. 8, 1945, 82 U.N.T.S. 279, 1 Trial of the Major War Criminals Before the International Military Tribunal, November 14, 1945–October 1, 1946 10–16 (William S. Hein & Co. ed., 1995).

83. *See, e.g.*, David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 Nw. U. J. Int'l Rts. 30, 47 (2009) (“Despite what may appear to be an impressive compilation of war crimes that can be prosecuted under the War Crimes Act of 1996 . . . there remain a significant number of war crimes under customary international law . . . that have not been codified in U.S. law.”).

84. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–38 (2004) (finding that ATS claims based on arbitrary detention must fail because the nature and extent of the petitioner’s underlying arrest violated no clear norm of customary international law).

85. *See, e.g.*, *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1251–52 (11th Cir. 2012) (collecting numerous cases adopting the Restatement’s definition of customary international law).

86. *See* Restatement (Third) of Foreign Relations Law § 102(2) (1987). *See also* Statute of the International Court of Justice art. 38(1)(b), 59 Stat. 1055 (1945) (sources of

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When identifying relevant rules of customary international law, courts often turn to materials outside the usual realm of federal statutes, case law, and legislative and administrative materials. The Supreme Court has recognized that

where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>87</sup>

The inquiry is far-reaching. “Customary international law does not stem from any single, definitive, readily identifiable source but is discerned from myriad decisions made in numerous and varied international and domestic arenas.”<sup>88</sup> Evidence of the rules of international law can be found in the decisions of international courts and tribunals, domestic decisions addressing international law, scholarly writings, and diplomatically significant state pronouncements reflecting a particular rule of law.<sup>89</sup>

As the Second Circuit has noted, “in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.”<sup>90</sup> Multiple sources of law might apply to different aspects of an ATS claim. Each potential source should be identified clearly, because the court may need to address these issues in considering the sufficiency of a complaint under *Ashcroft v. Iqbal*.<sup>91</sup> Under this standard, plaintiffs must plead plausible facts to enable the court to identify the

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international law include “international custom, as evidence of a general practice accepted as law”) [hereinafter ICJ Statute].

87. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

88. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 685 (7th Cir. 2012) (citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 247–48 (2d Cir. 2003)).

89. Restatement (Third) of Foreign Relations Law § 103 (1987).

90. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (denying claim that international pollution infringed upon a general right to good physical and mental health under the Universal Declaration of Human Rights and the ICCPR because the principles in question were “virtuous goals” that were not clear enough to constitute enforceable norms of customary international law).

91. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (holding that plaintiffs “must plead sufficient factual matter” to establish their claims in initial pleadings).

source or sources of legal rights claimed and the manner in which those rights allegedly were violated.<sup>92</sup> Although an *Iqbal* challenge may lead to dismissal,<sup>93</sup> the court also should consider whether to grant the plaintiff leave to amend.<sup>94</sup>

The 1995 case *Kadic v. Karadžić*,<sup>95</sup> while predating *Sosa*, nevertheless provides a useful illustration of the complex relationship between U.S. federal law and international human rights law. Genocide is proscribed as a federal crime under the Proxmire Act, which was the ratifying legislation that Congress passed to implement the 1948 Genocide Convention.<sup>96</sup> At the time, Congress concluded that the Genocide Convention conferred no private right of action and limited the reach of the Proxmire Act to offenses committed on U.S. territory or perpetrated by U.S. nationals.<sup>97</sup> It was not until 2007 that federal jurisdiction was expanded to include acts of genocide committed abroad.<sup>98</sup>

The ATS claims approved in 1995 by the Second Circuit in *Kadic v. Karadžić* thus were based on genocide as a violation of customary inter-

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92. See, e.g., *Kaplan v. al Jazeera*, No. 10-CV-5298, 2011 WL 2314783 (S.D.N.Y. 2011) (dismissing ATS and ATA claims against television network for aiding and abetting terrorism based on factual insufficiency where “[p]laintiffs . . . offered no facts suggesting that Defendant even knew that it was providing anything to Hezbollah. This is a far cry from donating money to a terrorist organization.”).

93. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1265 (11th Cir. 2009) (applying *Iqbal* to human rights case and holding that the “[f]ailure to plead any of the elements of a TVPA claim results in a failure to state a claim upon which relief can be granted”), *overruled on other grounds by* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (holding that only natural persons could be held liable under the TVPA).

94. See *Iqbal*, 556 U.S. at 686–87 (remanding for lower court to determine whether plaintiff should be given leave to amend).

95. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

96. See Proxmire Act, 18 U.S.C. § 1091 (2012).

97. See *id.* § 1091(d) (limiting jurisdiction) and § 1092 (no private right of action). See also *Vaughn v. Hvass*, No. C4-99-2184, 2000 WL 73067 (unpublished opinion) (Minn. Ct. App. June 6, 2000) (holding that the Proxmire Act provides no private right of action).

98. The Genocide Accountability Act of 2007 expanded the categories of perpetrators to include aliens and stateless persons residing in the United States, as well as other offenders who are brought into or otherwise found in the United States, even if their genocidal conduct took place abroad. See Genocide Accountability Act of 2007, Pub. L. No. 110-151 § 2 (Dec. 21, 2007).

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national law.<sup>99</sup> The court’s decision was based neither on federal statutory law on genocide (because the Proxmire Act provided no private right of action<sup>100</sup>) nor on the ATS claims being grounded in a federal treaty (because the Genocide Convention was not self-executing).<sup>101</sup> Rather, the court focused on the *separate* international prohibition on genocide that exists independently under customary international law. The Second Circuit allowed the plaintiff’s genocide claims because the ATS specifically provides relief for violations of the “law of nations.” Put another way, the ATS “does not by its own terms regulate conduct; rather, it applies universal norms that forbid conduct regardless of territorial demarcations or sovereign prerogatives.”<sup>102</sup>

One other consideration raised in *Sosa* bears mentioning. Judges must bear in mind that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”<sup>103</sup>

In sum, federal courts considering ATS claims under customary international law must determine whether the evidence offered proves the existence of a legal norm that is sufficiently universal, obligatory, and specific<sup>104</sup> to constitute a compensable violation of international law under the ATS. To assist the court in making this assessment, Appendix B sets forth a selection of federal decisions on whether certain types of human rights violations did or did not support a cause of action under the ATS. Courts may reach different conclusions about the viability of cer-

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99. *Kadic*, 70 F.3d at 241–42.

100. See Proxmire Act, 18 U.S.C. § 1092 (“Nothing . . . in this chapter [shall] be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.”).

101. Convention on the Prevention and Punishment of the Crime of Genocide art. V, 78 U.N.T.S. 277 (1948) (addressing domestic legislation to implement the Convention’s obligations).

102. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 246–47 (S.D.N.Y. 2009). Note that the district court’s reference to legal norms that transcend international boundaries is conceptually distinct from territorial limitations on ATS claims under the Supreme Court’s decision in *Kiobel*. See *infra* Part II.A.3.

103. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004).

104. *Id.* at 715, 725.

tain types of ATS claims, however—just as they may differ on any complex question of federal law.<sup>105</sup>

The mere pleading of international violations that suffice under *Sosa* does not automatically mean that an ATS claim can proceed, however. As discussed below, the Supreme Court has determined that such claims also must “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application [of the ATS].”<sup>106</sup>

### 3. Territorial Limitations on ATS Claims

In 2013, the U.S. Supreme Court announced a significant limitation on the application of the ATS to cases in which the underlying claims arise overseas. *Kiobel v. Royal Dutch Petroleum Co.*<sup>107</sup> involved ATS claims by Nigerian plaintiffs who alleged that foreign oil companies orchestrated torture, extrajudicial killings, and crimes against humanity in Nigeria. In 2010, the Second Circuit dismissed the case on the grounds that international law did not provide for recovery in tort against corporations.<sup>108</sup> The Supreme Court agreed to hear the case during its October 2011 term in order to address the liability of artificial entities under the ATS.<sup>109</sup>

The extraterritorial application of the ATS itself was not among the questions initially presented to the Court in *Kiobel*. (This issue had been noted but not resolved by the Second Circuit.<sup>110</sup>) It also had been addressed by the Ninth Circuit in *Sarei v. Rio Tinto* (which was pending before the Supreme Court at the time *Kiobel* was heard).<sup>111</sup> In response to

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105. Compare, e.g., *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (finding “no basis in law to recognize Plaintiffs’ claim for cruel, inhuman, degrading treatment or punishment”), with *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 253–54 (S.D.N.Y. 2009) (declining to follow *Aldana* and recognizing ATS claim for cruel, inhuman, or degrading treatment or punishment).

106. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

107. *Id.*

108. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010), *reh’g denied*, 642 F.3d 379 (2d Cir. 2011) (en banc). The liability of artificial entities under the ATS is discussed in more detail below. See *infra* Part II.B.3.

109. *Kiobel v. Royal Dutch Petroleum*, 132 S. Ct. 472 (2011) (mem.).

110. The Second Circuit had noted that extraterritoriality was “lurking” in the background. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 n.10 (2d Cir. 2010).

111. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744–47 (9th Cir. 2011) (holding that *Morrison v. National Australia Bank Ltd.* did not preclude ATS claims for conduct occur-

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several justices raising the issue during oral arguments, the Court carried *Kiobel* over to the following term, directing the parties to provide supplemental briefing on “[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>112</sup>

The primary question framed for decision in *Kiobel* thus became whether the ATS applied outside the territory of the United States.

### a. The *Kiobel* Majority Opinion

All nine Justices in *Kiobel* agreed that the ATS claims in that case should be dismissed, although they disagreed on the underlying rationales for that decision. The Court had previously considered the extraterritorial application of a federal statute in *Morrison v. National Australia Bank Ltd.*<sup>113</sup> In that case, the Court determined that section 10(b) of the 1934 Securities Exchange Act provided no right of action to foreign plaintiffs suing foreign defendants for conduct that did not involve the sale of securities on U.S. territory or trading on U.S. exchanges.

The *Kiobel* majority opinion, authored by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito, followed *Morrison* even though the ATS (in contrast to the Securities Exchange Act) was a jurisdictional statute.<sup>114</sup> The majority cited *Morrison*’s broad presumption against the extraterritorial application of federal laws as a canon of statutory interpretation. As a general matter, federal courts must dismiss statutory claims arising from overseas conduct absent clear evidence that Congress intended such foreign claims to be heard.<sup>115</sup>

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ring outside the United States), *cert. granted, judgment vacated by* 133 S. Ct. 1995, Apr. 22, 2013. The Supreme Court did not act on the cert. petition in *Sarei* until after it decided *Kiobel*. See *Rio Tinto, PLC v. Sarei*, 133 S. Ct. 1995 (2013) (granting cert., vacating judgment, and remanding to Ninth Circuit for reconsideration in light of *Kiobel*). On remand, the Ninth Circuit applied the *Kiobel* standard and dismissed the case with prejudice. See *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109 (9th Cir. 2013) (en banc).

112. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013).

113. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010).

114. See *Kiobel*, 133 S. Ct. at 1664 (noting that the ATS was “strictly jurisdictional”) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004)).

115. See *Morrison*, 561 U.S. at 255 (holding that “[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to

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The Supreme Court's decisions in *Morrison* and *Kiobel* note the importance of federal judges' avoiding the "diplomatic strife"<sup>116</sup> that can arise when they adjudicate the legal consequences of conduct that occurs in the territory of foreign sovereigns:

[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do . . . . These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign."<sup>117</sup>

In *Kiobel*, the Chief Justice noted that the Court had voiced similar concerns nine years earlier in *Sosa*.<sup>118</sup> He also pointed out that such foreign policy considerations applied in reverse, noting that the absence of territorial limits "would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."<sup>119</sup>

After examining the text and historical background of the ATS,<sup>120</sup> Chief Justice Roberts determined that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."<sup>121</sup> The burden of rebutting the presumption against extraterritorial application fell to the petitioners, who were Nigerian nationals asserting claims against foreign defendants for

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apply only within the territorial jurisdiction of the United States . . . . Thus, unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.") (internal quotations and citations omitted).

116. See *Kiobel*, 133 S. Ct. at 1669–70.

117. *Id.* at 1664–65.

118. *Id.* at 1664 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (noting that "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"))).

119. *Id.* at 1669.

120. See *Kiobel*, 133 S. Ct. at 1665–68.

121. *Id.* at 1669.



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violations of international law that occurred in Nigeria.<sup>122</sup> The Court found that nothing in the facts of the case rebutted the presumption and therefore held that the ATS claims were barred.<sup>123</sup>

The Chief Justice left an opening for future claims to proceed but noted that subsequent ATS claims that “touch and concern the territory of the United States . . . must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>124</sup> While the specific parameters were left for determination in subsequent cases, the Chief Justice was careful to note that corporate presence alone would not rebut the presumption. “Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.”<sup>125</sup> Thus, even though the corporate defendants in *Kiobel* were foreign entities affiliated with U.S. corporations, that limited presence alone was insufficient to confer ATS jurisdiction over the petitioners’ claims.<sup>126</sup>

### b. The *Kiobel* Concurring Opinions

In addition to its majority opinion, *Kiobel* included three concurring opinions, one of which was authored by Justice Kennedy. His concurring opinion included a reference to the Torture Victim Protection Act, which was not at issue in *Kiobel*. He stated that *Kiobel*’s presumption against extraterritorial application might be rebutted (or at least would “require some further elaboration and explanation”) in cases involving “serious violations of international law principles protecting persons” that were “covered neither by the TVPA nor by the reasoning and holding of [*Kiobel*].”<sup>127</sup>

Justice Alito’s concurring opinion, which was joined by Justice Thomas, articulated his view that “a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will

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122. *Id.* at 1662 (foreign defendant corporations), 1663 (foreign claimants), and 1662–63 (claims arising out of foreign conduct).

123. *Id.* at 1669.

124. *Id.*

125. *Id.*

126. *Id.* See also *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010) (noting that “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case”).

127. *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

therefore be barred—unless the *domestic conduct* is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance."<sup>128</sup>

Justice Breyer's concurring opinion, which was joined by Justices Ginsburg, Kagan, and Sotomayor, offered a fundamentally different approach to ATS jurisdiction. Justice Breyer opined that the ATS provided subject-matter jurisdiction whenever (1) the tortious conduct "occurs on American soil"; (2) "the defendant is an American national"; or (3) "the defendant's conduct substantially and adversely affects an important American national interest . . . includ[ing] a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."<sup>129</sup>

Because none of these three considerations was present under the facts of *Kiobel*, Justice Breyer agreed that the case should be dismissed.<sup>130</sup> Justice Breyer also agreed that mere corporate presence by a non-U.S. national defendant by itself was insufficient to rebut the presumption against extraterritorial application of the ATS.<sup>131</sup> Neither Justice Kennedy nor Justice Alito voiced any disagreement with this proposition in their concurring opinions.<sup>132</sup>

*c. The Future Implications of Kiobel*

The Supreme Court left room for the future interpretation and application of the *Kiobel* standard. Two concurring opinions pointed out that the majority opinion was narrow and left important questions unresolved.<sup>133</sup> And as noted above, the majority opinion provided that ATS

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128. *Id.* at 1670 (Alito, J., concurring) (emphasis added).

129. *Id.* at 1670 (Breyer, J., concurring). In contrast, the majority opinion expressly disclaimed the notion that the ATS "was passed to make the United States a uniquely hospitable forum for the enforcement of international norms" and suggested that it was highly unlikely that the early Congress of a "fledgling republic" would seek to directly involve the nation in the affairs of foreign states by creating a cause of action for conduct in a foreign sovereign's territory. *Id.* at 1668.

130. *Id.* at 1669 (Breyer, J., concurring).

131. *Id.* at 1677 (Breyer, J., concurring).

132. *Id.* at 1669–70 (Kennedy, J., concurring) and *id.* at 1670 (Alito, J., concurring).

133. *See id.* at 1669 (Kennedy, J., concurring) (recognizing that "a number of significant questions regarding the reach and interpretation of the [ATS remained]") and *id.* at

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claims that “touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application” might be allowed to proceed.

Post-*Kiobel* questions left for resolution by the lower federal courts include the following:

- the criteria used to determine whether overseas conduct “touches and concerns” the United States;
- when conduct does “touch and concern” the United States, the standard for ascertaining whether it does so with “sufficient force” to rebut the presumption against extraterritoriality;
- whether defendants who are U.S. nationals can be held liable for violations of international law committed abroad;
- whether the ATS should be limited solely to violations that occur on U.S. territory; and
- the nature and extent of domestic conduct required to make a foreign corporation more than “merely present” in the United States.

There is great room for debate over these (and other) questions that cannot be addressed comprehensively in this writing.<sup>134</sup> Case law is evolving rapidly, often presenting issues of first impression to the district and circuit courts hearing ATS claims. A selection of post-*Kiobel* developments in federal case law follows to provide guidance on how at least some federal courts have implemented the *Kiobel* standard.

### d. Developments and Emerging Trends

One immediate implication of *Kiobel* is that fewer ATS cases are likely to proceed to resolution on the merits. As one district court noted, “[w]hile the full extent of the impact that the *Kiobel* decision will have on future ATS claims remains unclear, the majority in *Kiobel* (and for that matter the court unanimously overall) clearly sought to restrain, to a significant degree, the ability of individuals to bring ATS claims for tortious conduct

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1669–70 (Alito, J., concurring) (noting the majority opinion’s “narrow approach,” which “obviously leaves much unanswered”).

134. The *American Journal of International Law* devoted a full issue—containing seventeen separate articles—to the meaning and implications of *Kiobel*. See 107 Am. J. Int’l Law 601 (2013).

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occurring entirely outside of the United States.”<sup>135</sup> This undoubtedly will be the practical effect in many cases, at least for foreign claims that do not forcefully “touch and concern” the territory of the United States.<sup>136</sup>

*Kiobel* has been interpreted as setting “a very high bar for plaintiffs asserting jurisdiction under the ATS for claims arising out of conduct occurring entirely abroad.”<sup>137</sup> This limitation is entirely independent of the substantive factual merits of the claim and its viability under *Sosa*. The district court that heard *Mohammedi v. Islamic Republic of Iran*, while noting that the underlying claims (torture and extrajudicial killing of an Iranian citizen by Iranian government officials) were “undoubtedly egregious,” nevertheless found that they failed to clear the jurisdictional threshold established in *Kiobel*.<sup>138</sup> Because the ATS case turned on “conduct that occurred entirely within the sovereign territory of Iran,” the claims were barred.<sup>139</sup> There was a similar result in *Sarei v. Rio Tinto*,<sup>140</sup> in which the Ninth Circuit determined that *Kiobel* required dismissal of the thirteen-year-old case with prejudice.<sup>141</sup>

*Kiobel* and *Sarei v. Rio Tinto* both involved a particular type of ATS dispute that has fared poorly post-*Kiobel*—so-called “foreign cubed” cases, in which foreign defendants are sued by foreign plaintiffs for alleged violations on foreign soil. Since *Kiobel* was decided, federal courts have dismissed a variety of “foreign cubed” cases, including ATS claims involving

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135. *Ahmed-Al-Khalifa v. Salvation Army*, No. 3:13-CV-289-WS, 2013 WL 2432947, at \*2 n.1 (N.D. Fla. June 3, 2013).

136. The Supreme Court more recently limited federal claims in other contexts in which the domestic conduct in the case is limited. See *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395–97 (2015) (online purchase of a Eurail pass from a Massachusetts-based travel agency was insufficient to constitute commercial activity within the United States for purposes of the commercial activity exception to the FSIA; all negligent conduct allegedly giving rise to the plaintiff’s claims occurred abroad, such that the “gravamen” of the lawsuit involved conduct occurring outside of the United States).

137. See *Mohammedi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 71 (D.D.C. 2013).

138. *Id.*

139. *Id.*

140. *Sarei v. Rio Tinto*, 671 F.3d 736, 744–47 (9th Cir. 2011), cert. granted and judgment vacated, *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013).

141. *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (2013) (en banc) (dismissing case on remand from the Supreme Court).

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- the false arrest and torture of a Bangladeshi plaintiff procured by a Bangladeshi corporation in Bangladesh (vacating a jury award previously rendered in the case);<sup>142</sup>
- a Chinese media executive who developed propaganda and media campaigns that led to the torture and abuse of Chinese Falun Gong practitioners in Chinese “re-education” camps);<sup>143</sup>
- political persecution and the arbitrary arrest, detention, and prosecution of a Ukrainian politician by Ukrainian political opponents in Ukraine;<sup>144</sup>
- a Nigerian plaintiff denied humanitarian relief by a Nigerian aid organization in Nigeria;<sup>145</sup>
- the political murder of a Honduran politician in Honduras, allegedly at the hands of Honduran military officials;<sup>146</sup>
- claims by Israeli fathers against high-ranking Israeli officials and Israeli nonprofits arising out of alleged discrimination against fathers in Israel’s family law judicial system;<sup>147</sup> and
- ATS claims of torture, genocide, unlawful killings, and other serious human rights violations brought by members of the Chinese Falun Gong movement now residing in the United States in which the “[p]laintiffs’ alleged detention, torture, and abuse took place entirely abroad” at the hands of the Chinese government.<sup>148</sup>

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142. *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 746 F.3d 42, 49 (2d Cir. 2014) (vacating a jury award on appeal and dismissing ATS claims where “all the relevant conduct set forth in plaintiff’s complaint occurred in Bangladesh”).

143. *Chen Gang v. Zhao Zhizhen*, No. 3:04-CV-1146, 2013 WL 5313411 (D. Conn. Sept. 20, 2013).

144. *Tymoshenko v. Firtash*, 57 F. Supp. 3d 311 (S.D.N.Y. 2014).

145. *Ahmed-Al-Khalifa v. Salvation Army*, No. 3:13-CV-289-WS, 2013 WL 2432947 (N.D. Fla. June 3, 2013). Given the nature of the allegations in question, this case most likely would have failed on *Sosa* grounds as well, although the court did not reach the merits of the ATS claim. *Id.*

146. *Murillo v. Bain*, No. H-11-2373, 2013 WL 1718915, at \*3 (S.D. Tex. Apr. 19, 2013) (noting that “American laws like the Alien Tort Statute . . . are presumed not to apply beyond the borders of the United States”).

147. *Ben-Haim v. Neeman*, 543 F. App’x 152, 155 (3d Cir. 2013) (dismissing because “the conduct that formed the basis of the ATS claims took place in Israel, and thus subject matter jurisdiction . . . is lacking in the federal courts”).

148. *Hua Chen v. Honghui Shi*, No. 09-8920-RJS, 2013 WL 3963735, at \*7 (S.D.N.Y. Aug. 1, 2013).

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Many other “foreign cubed” cases have yielded similar results. Cases in which less than all three factors are “foreign” have been more successful, however.

Multiple factors have been considered by courts analyzing whether the presumption against extraterritorial application of the ATS has been rebutted. In *Al Shimari v. CACI Premier Technology, Inc.*,<sup>149</sup> a unanimous Fourth Circuit panel reversed the dismissal of claims against a U.S. civilian military contractor arising out of alleged torture and war crimes committed at the Abu Ghraib prison in Iraq. The alleged violations took place on foreign territory that was under the actual control of the United States. Holding that the application of *Kiobel* presented a question of fact,<sup>150</sup> the court concluded that the plaintiffs’ ATS claims sufficiently “touched and concerned” the territory of the United States to rebut the presumption against extraterritorial application.

Factors considered by the Fourth Circuit included the defendant’s status as a U.S. corporation, the U.S. citizenship of the corporate employees who allegedly committed torture, the involvement of the U.S. government in retaining the defendants’ services and in allegedly encouraging the conduct and concealing it after the fact, and the intent of Congress to prohibit torture and allow victims a remedy.<sup>151</sup> The court also addressed the “‘foreign policy concerns’ arising from potential ‘unintended clashes between our laws and those of other nations which could result in international discord, and from ‘the danger of unwarranted judicial interference in the conduct of foreign policy.’”<sup>152</sup> It held that the case presented no foreign policy problems because the defendants were U.S. citizens.<sup>153</sup>

The precise weight (if any) to be afforded an ATS defendant’s citizenship is a matter of dispute in the federal courts. Some courts have sug-

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149. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014).

150. *Id.* at 527 (4th Cir. 2014) (“The ‘touch and concern’ language set forth in the majority opinion contemplates that courts will apply a fact-based analysis to determine whether particular ATS claims displace the presumption against extraterritorial application.”).

151. *Id.* at 530–31.

152. *Id.* at 526 (citing *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)).

153. *Id.* at 520, 526. The court remanded so that the district court could ascertain whether the case presented a nonjusticiable political question.

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gested that U.S. citizenship (or even residence) is sufficient in and of itself to rebut the presumption.<sup>154</sup> Others have held that residence is irrelevant.<sup>155</sup> In *Mastafa v. Chevron Corp.*,<sup>156</sup> the Second Circuit considered the citizenship of corporate ATS defendants and made the following holding:

We disagree with the contention that a defendant’s U.S. citizenship has any relevance to the jurisdictional analysis. The Supreme Court made clear in *Kiobel* that the full “focus” of the ATS was on conduct . . . . Whether a complaint passes jurisdictional muster accordingly depends upon alleged conduct by anyone—U.S. citizen or not—that took place in the United States and aided and abetted a violation of the law of nations. A complaint cannot be “saved” for jurisdictional purposes simply because a U.S. citizen happened to commit the alleged violation; similarly, our jurisdiction over actions taken within the United States is

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154. See, e.g., *Ahmed v. Magan*, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013) (unpublished opinion) (following a grant of summary judgment on liability and a trial on damages, holding that “as a permanent resident of the United States, the presumption against extraterritoriality has been overcome”). See also *Mujica v. AirScan, Inc.*, 771 F.3d 580, 615–16 (9th Cir. 2014) (Zilly, J., concurring in part and dissenting in part) (arguing that treating “U.S. citizenship as just ‘one factor’ among other unspecified factors simply begs the question of what act is sufficient or how many acts are enough to establish jurisdiction. I would instead hold that the ATS confers jurisdiction when an ATS claim is brought against a domestic corporation or other U.S. national, without any allegation of underlying conduct within the United States.”) (internal citations omitted).

155. See, e.g., *Warfaa v. Ali*, 33 F. Supp. 3d 653, 659 (E.D. Va. 2014) (dismissing case against former Somali military officer for alleged torture perpetrated in Somalia, holding that “[b]ecause the extraterritoriality analysis set forth in *Kiobel* appears to turn on the location of the relevant conduct, not the present location of the [lawful resident alien] defendant, a straightforward application to the instant action leads the Court to conclude that plaintiff’s ATS claims are ‘barred’ and must be dismissed.”), *aff’d*, *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016) (“Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context.”); *Mamani v. Berzain*, 21 F. Supp. 3d 1353 (S.D. Fla. 2014) (because claims by Bolivian citizens against former government officials were based on conduct in Bolivia, ATS case arising out of massacres during periods of civil unrest must be dismissed, notwithstanding defendants’ current residence in the United States and Bolivian government’s support for the case).

156. *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014).

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not less clear where they are actions of a foreign national rather than a U.S. citizen.<sup>157</sup>

At the time of this writing, many federal courts (including the Fourth, Ninth, and Eleventh Circuit Courts of Appeals) treat a defendant's citizenship as simply one factor in determining whether the case sufficiently "touches and concerns" the territory of the United States.<sup>158</sup> As one district court put it, under this line of reasoning, "a defendant's citizenship can only operate to push across the finish line, so to speak, an ATS claim that alleges enough relevant conduct in the United States."<sup>159</sup>

Another important factor is the nature and degree of tortious conduct within the United States that will rebut the presumption against extraterritorial application. (Because all of the relevant conduct in *Kiobel* occurred overseas, the Supreme Court did not need to consider the role of domestic conduct in order to resolve that case.<sup>160</sup>) It has been left to the lower federal courts to sort this out, although "*Kiobel* has not given courts a road map for answering this question."<sup>161</sup>

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157. *Id.* at 189 (internal citations omitted). *See also* Balintulo v. Daimler AG, 727 F.3d 174, 190 n.24 (2d Cir. 2013) (holding that "nothing in the Court's reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant's citizenship").

158. *See, e.g.,* Doe v. Drummond Co., 782 F.3d 576, 600 (11th Cir. 2015) (considering as relevant factors "the U.S. citizenship and corporate status of Defendants, the U.S. interests implicated by Plaintiffs' claims, and the U.S. conduct alleged"); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530-31 (4th Cir. 2014) (holding that ATS claims against a U.S. corporation touched and concerned the United States where the contract giving rise to the alleged violations was made in the United States and company managers also approved the tortious conduct and attempted to cover it up there); Mujica v. AirScan Inc., 771 F.3d 580, 591-92, 594 (9th Cir. 2014) (holding that citizenship alone was insufficient to rebut the presumption against extraterritorial application of the ATS); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 322 (D. Mass. 2013) (holding that "an exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described by *Kiobel*").

159. Doe v. Exxon Mobil Corp., No. 01-1357, 2015 WL 5042118, at \*7 (D.D.C. July 6, 2015).

160. *See* Balintulo v. Daimler AG, 727 F.3d 174, 191 (2d Cir. 2013).

161. Giraldo v. Drummond Co., No. 2:09-CV-1041, 2013 WL 3873960, at \*5 (N.D. Ala. July 25, 2013) (noting that courts must determine "[w]hat then is 'enough' such that the conduct [overseas] touches and concerns the United States with sufficient force?").



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When the defendants were U.S. citizens and all relevant conduct occurred in the United States, district courts found the presumption rebutted in a case relating to financial support for terrorists<sup>162</sup> and another involving technology that allowed the Chinese government to “detect, monitor, detain, suppress, and torture dissidents.”<sup>163</sup> Citizenship and domestic conduct also were considered by the district court in determining that the presumption was rebutted in *Sexual Minorities Uganda v. Lively*,<sup>164</sup> which involved claims that the defendant deliberately helped a foreign nation create “an atmosphere of harsh and frightening repression against LGBTI people in Uganda.”<sup>165</sup>

Considering the impact of *Kiobel*, the *Lively* court noted first that the defendant was a U.S. citizen residing in Massachusetts. Second, while some conduct occurred in Uganda and the impact of the violations was felt there, there also was significant conduct within the United States over a period of years. The court held that the ATS claims could proceed, noting that

[t]he fact that the impact of Defendant’s conduct was felt in Uganda cannot deprive Plaintiff of a claim. Defendant’s alleged actions in planning and managing a campaign of repression in Uganda from the United States are analogous to a terrorist designing and manufacturing a bomb in this country, which he then mails to Uganda with the intent that it explode there. The Supreme Court has made clear that the presumption against the extraterritorial application of a statute comes into play only where a defendant’s conduct lacks sufficient connection to the United States.<sup>166</sup>

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162. See *Krishanti v. Rajaratnam*, No. 2:09–CV–05395, 2014 WL 1669873 (D.N.J. Apr. 28, 2014) (allowing plaintiffs to proceed on ATS claims against U.S. citizen defendants because all conduct relating to alleged financial support for overseas terrorist groups occurred within the United States).

163. See *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717, 720, 728 (D. Md. 2014) (assuming, without deciding, that the presumption against extraterritoriality was overcome because the defendants were a U.S. citizen and U.S. corporation with offices nationwide and the alleged conduct “took place predominantly, if not entirely, within the United States”).

164. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 309 (D. Mass. 2013).

165. *Id.*

166. *Id.* at 321–22.

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Several other cases also considered the extent to which conduct in the United States can give rise to ATS claims for injuries that manifest abroad. In *Ates v. Gülen*,<sup>167</sup> the district court considered claims by Turkish nationals against an exiled cleric who had a substantial online following. The plaintiffs alleged that statements by the cleric in two online videos and a television interview encouraged the cleric's followers to arbitrarily arrest and persecute the plaintiffs. The court found the allegations insufficient to rebut the presumption against extraterritorial application of the ATS because the plaintiffs "offer[ed] only circumstantial and tenuous allegations of a connection between [the cleric's] domestic conduct and the violations of Plaintiffs' rights in Turkey."<sup>168</sup>

On the other hand, the domestic violations alleged in *Salim v. Mitchell* were far more detailed.<sup>169</sup> *Salim* involved claims by foreign nationals against the two psychologists who allegedly designed and helped to operate the CIA's secret enhanced interrogation program in the years after the 9/11 attacks. The plaintiffs alleged torture and other specific injuries by CIA operatives using the methods prescribed by the interrogation program.<sup>170</sup> The court considered the defendants' U.S. citizenship and domicile as factors but also noted that the interrogation plan was designed in the United States (pursuant to contracts with the U.S. government entered into within the United States) and implemented by the CIA (with advice from the defendants) at detention facilities operated by the U.S. government.<sup>171</sup> The *Salim* court determined that these allegations were sufficient to overcome the presumption against extraterritorial application of the ATS.<sup>172</sup> The Second Circuit also found the presumption

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167. *Ates v. Gülen*, No. 3:15-CV-2354, 2016 WL 3568190 (M.D. Pa. June 29, 2016).

168. *Id.* at \*13.

169. *Salim v. Mitchell*, No. CV-15-0286, 2016 WL 1717185 (E.D. Wash. Apr. 28, 2016).

170. *Id.* at \*2 (noting that "[t]he allegations of ongoing torture are . . . pled with great specificity").

171. *Id.* at \*8.

172. *Id.* The court also noted the similarity between the claims in the case before it and those at issue in *Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014) (claims against a U.S. civilian military contractor arising out of alleged torture and war crimes committed at the Abu Ghraib prison in Iraq). *Id.*

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displaced in a case involving terrorists who made extensive use of the U.S. banking system in New York to fund terrorist groups overseas.<sup>173</sup>

Eschewing any consideration of an ATS defendant's citizenship, the Second Circuit has focused solely on the defendant's conduct, holding the presumption rebutted where a complaint identifies specific domestic acts that also constitute a viable ATS claim:

[P]laintiffs have alleged specific, domestic conduct in the complaint—namely, Chevron's oil purchases, financing of oil purchases, and delivery of oil to another U.S. company, all within the United States; and BNP's use of a New York escrow account and New York-based "financing arrangements" to systematically enable illicit payments to the Saddam Hussein regime that allegedly facilitated that regime's violations of the law of nations, namely war crimes, genocide, and other crimes against humanity. This U.S.-based conduct "touches and concerns" the United States to satisfy the first prong of our extraterritoriality analysis.<sup>174</sup>

Claims have failed when such U.S.-based conduct is lacking, however. The absence of any conduct that would constitute aiding and abetting, for example, was fatal to ATS claims against U.S. corporate defendants who allegedly participated in South Africa's apartheid regime for profit.<sup>175</sup> Similarly, in *Adhikari v. Daoud & Partners*,<sup>176</sup> the district court held that the absence of "cover up" activities by U.S.-based employees (as opposed to concealment by foreign employees of a U.S. company) con-

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173. See *Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 215–17 (2d Cir. 2016) (finding that the plaintiffs' claims against a foreign bank sufficiently touched and concerned the United States to displace the presumption against extraterritorial application of the ATS but nevertheless dismissing on the grounds that the defendant bank was a corporation).

174. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 195 (2d Cir. 2014). The court dismissed the ATS claims, however, because the conduct alleged in the complaint failed to meet the Second Circuit's "purpose" standard for aiding and abetting liability. *Id.* at 192–94.

175. See *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 170 (2015) (holding that "because plaintiffs fail plausibly to plead that any U.S.-based conduct on the part of either Ford or IBM aided and abetted South Africa's asserted violations of the law of nations, their claims cannot form the basis of our jurisdiction under the ATS"), *cert. denied*, 136 S. Ct. 2485 (2016) (mem.).

176. 95 F. Supp. 3d 1013, 1020–21 (S.D. Tex. 2015). [Appeal Filed by Ramchandra Adhikari et al. v. Daoud & Partners et al., 5th Cir., Apr. 21, 2015.]

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firmed that the human trafficking that “occurred in Nepal; Jordan; Iraq; and points in transit between and among these foreign locations” failed to touch and concern the territory of the United States.

Courts thus must decide whether the allegations against an ATS defendant “tie[] the relevant human rights violations to actions taken within the United States,”<sup>177</sup> with the burden of proof resting on the plaintiff.<sup>178</sup> While the threshold remains unclear at the time of this writing, it seems that courts are focusing on the degree of *tortious* conduct (as opposed to ordinary business activity) committed by actors within the United States. As one district court put it:

While this standard is fairly opaque, it appears to require that there be specific, substantial allegations of conduct occurring in the United States that supports an ATS cause of action. Although the U.S.-based conduct need not allege a completed tort under the ATS, the domestic conduct must indicate a U.S. focus to the claims and must be relevant to the claims, i.e. must support the claims.<sup>179</sup>

The inquiry thus appears to turn on the extent and nature of the defendant’s conduct within the United States and the impact of that conduct on the injuries caused. ATS claims grounded in theories of vicarious liability, in which a U.S. company merely exercises the control necessary to conduct business in a foreign location, have proved difficult to sustain.<sup>180</sup> *Williams v. AES Corp.*, for example, involved personal injury al-

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177. See *Balintulo v. Daimler AG*, 727 F.3d 174, 192 (2d Cir. 2013) (dismissing ATS claims that South African subsidiary corporations aided and abetted the South African government’s violations of international law).

178. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027–29 (9th Cir. 2014), *reh’g denied*, 788 F.3d 946 (9th Cir. 2015) (remanding to allow plaintiffs to amend their complaint to describe how defendants’ conduct “touched and concerned” the United States); *Adhikari v. Daoud & Partners*, No. 09–CV–1237, 2013 WL 4511354, at \*7 (S.D. Tex. Aug. 23, 2013) (burden rests on plaintiff to displace presumption against extraterritorial application), *rev’d on other grounds*, 994 F. Supp. 2d 831 (S.D. Tex. 2014) (dismissing TVPRA claims).

179. *Doe v. Exxon Mobil Corp.*, No. 01–1357, 2015 WL 5042118, at \*6 (D.D.C. July 6, 2015).

180. See, e.g., *Balintulo*, 727 F.3d at 192 (2d Cir. 2013) (“Because the defendants’ putative agents did not commit any relevant conduct within the United States giving rise to a violation of customary international law—that is, because the asserted violation[s] of the law of nations occur[ed] outside the United States—the defendants cannot be *vicariously liable* for that conduct under the ATS.”) (internal quotations and citations omitted).

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legedly arising out of substandard electricity provided by a Cameroonian power company and its Virginia parent corporation.<sup>181</sup> Although the power was generated in Cameroon and the alleged injuries occurred there, the plaintiffs argued that the presumption against extraterritorial application should be rebutted “where the [U.S.] corporation profits from and is actively involved in the decision-making of its foreign subsidiaries.”<sup>182</sup> The *Williams* court disagreed, holding that this was exactly the type of “mere corporate presence” held insufficient in *Kiobel*.<sup>183</sup>

Other federal cases suggest that even more overt conduct in the United States—such as consenting to murders,<sup>184</sup> tacitly approving tortious violations overseas,<sup>185</sup> or even approving and concealing violations<sup>186</sup>—may not be enough to rebut the presumption against extra-

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*See also* *Adhikari v. Daoud & Partners*, No. 09–CV–1237, 2013 WL 4511354, at \*7 (S.D. Tex. Aug. 23, 2013) (holding that “mere corporate presence” was insufficient and dismissing ATS claims against U.S. military contractor when plaintiffs failed to establish “sufficient domestic conduct by [the U.S. corporate defendant] to ‘displace the presumption’” against extraterritorial application), *rev’d on other grounds*, 994 F. Supp. 2d 831 (S.D. Tex. 2014) (where legislative amendment allowing extraterritorial jurisdiction of the TVPRA was not retroactive, TVPRA claims predating the amendment must be dismissed).

181. *Williams v. AES Corp.*, 28 F. Supp. 3d 553 (E.D. Va. 2014).

182. *Id.* at 568.

183. *Id.* (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013)). The ATS claim also failed under *Sosa* because the complaint alleged no violation of a specific, universal, and obligatory norm of international law. *Id.*

184. *See, e.g., Doe v. Drummond Co.*, 782 F.3d 576, 599 (11th Cir. 2015) (dismissing ATS claims against U.S. corporate parent where “there are no distinguishable allegations or evidence of conduct in the United States ‘directed at’ the extrajudicial killings and war crimes, and ‘mere consent’ is not enough”).

185. *See, e.g., Baloco v. Drummond Co.*, 767 F.3d 1229, 1236–38 (11th Cir. 2014) (in a case alleging corporate support for the murder of union leaders in Colombia, holding that even if “the ‘relevant conduct’ inquiry extends to the place of decision-making—as opposed to the site of the actual ‘extrajudicial killing’—the allegations in the First Amended Complaint still fall short of the minimum factual predicate warranting the extraterritorial application of the ATS”).

186. *See, e.g., Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014) (allegations that corporate officials in the United States reviewed, approved, and concealed payments and weapons shipments to Colombian terrorist and paramilitary organizations by corporate subsidiaries, which led to torture, murder, and other human rights violations in Colombia), *cert. denied*, 135 S. Ct. 1842 (2015) (mem.).

territorial application of the ATS. *Jovic v. L-3 Services, Inc.*,<sup>187</sup> for example, involved a U.S. private military company that negotiated a contract with foreign military personnel, who allegedly committed war crimes and related offenses in the course of fulfilling the contract. The district court dismissed the ATS claims, finding that the U.S.-based conduct was insufficient to displace the presumption against extraterritorial application of the ATS. Although the contract was negotiated with foreign military leaders in Virginia and some planning and development activities were conducted there, because “the substantial part of [the defendant’s] challenged conduct occurred extraterritorially,” the claims failed to touch and concern the territory of the United States.<sup>188</sup>

Another district court similarly held that awareness of foreign violations was insufficient, even when combined with some involvement in planning. *Doe I v. Cisco Systems, Inc.*<sup>189</sup> involved the creation of a customized electronic monitoring system allegedly used by the Chinese government to identify, persecute, and torture members of the minority Falun Gong religious sect. The court held that the

[d]efendants’ creation of the Golden Shield [monitoring] system, even as specifically customized for Chinese authorities and even if directed and planned from San Jose, does not show that human rights abuses perpetrated in China against Plaintiffs touch and concern the United States with sufficient force to overcome the ATS’s presumption against extraterritorial application.<sup>190</sup>

The cases discussed above may reflect an emerging division among the circuits over the nature and degree of domestic conduct that will rebut the presumption against extraterritorial application of the ATS. Other federal courts have held the presumption rebutted in similar types of cases alleging domestic approval and concealment of overseas violations<sup>191</sup> or other indicia of domestic corporate control over the perpetrators.<sup>192</sup>

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187. *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750 (N.D. Ill. 2014).

188. *Id.* at 758–60.

189. *Doe I v. Cisco Sys., Inc.*, 66 F. Supp. 3d 1239 (N.D. Cal. 2014), *appeal filed*, *Doe v. Cisco Sys., Inc.*, No. 15-16909 (9th Cir. Sept. 24, 2015).

190. *Id.* at 1246–47.

191. *See, e.g.*, *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530–31 (4th Cir. 2014) (ATS claims against U.S. corporation touched and concerned the United States

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Even when there is no alleged involvement by U.S. corporations or citizens or the federal government, there appear to be cases in which “an act occurring outside the United States could so obviously touch and concern the territory of the United States that the presumption against extraterritorial application of the ATS is displaced.”<sup>193</sup> In *Mwani v. Bin Laden*, the district court considered ATS claims arising out of terrorist attacks on the U.S. embassy in Nairobi. The court analyzed the national interests of the United States in two respects—the intentional nature of the acts in question and the places that they occurred.

The *Mwani* court found that the terrorist acts were specifically intended to injure the United States and its citizens, such that the United States had a greater national interest in redressing them through the federal courts.<sup>194</sup> The court also considered the locus of the underlying conduct, determining that at least some of the planning activity of the terrorist conspirators occurred in the United States.<sup>195</sup>

Based on these two considerations, the *Mwani* court held that the presumption against extraterritorial application of the ATS was rebutted, such that the plaintiffs could proceed on their ATS claims. While recog-

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because they related to a U.S. contract and because corporate managers approved the tortious conduct and attempted to conceal it in the United States). *See also Cardona*, 760 F.3d at 1192, 1194 (Martin, J., dissenting) (arguing that the court had jurisdiction over the ATS claims “because they allege violations of international law by an American national”—“that Chiquita’s corporate officers reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations from their offices in the United States with the purpose that the terrorists would use them to commit extrajudicial killings and other war crimes”).

192. *See Doe v. Exxon Mobil Corp.*, No. 01-1357, 2015 WL 5042118, at \*14 (D.D.C. July 6, 2015) (holding that allegations of (a) actual knowledge by U.S. corporate officials that foreign security forces were committing human rights violations on the corporate defendant’s property using its own equipment; (b) control, planning, and deployment of such foreign forces by U.S.-based officials; and (c) the corporate defendant’s U.S. citizenship and principal place of business in the United States together were sufficient to rebut the presumption against extraterritorial application of the ATS).

193. *Mwani v. Bin Laden*, 947 F. Supp. 2d 1, 4 (D.D.C. 2013).

194. *Id.* at 5 (noting that it was “obvious that a case involving an attack on the United States Embassy in Nairobi is tied much more closely to our national interests than a case whose only tie to our nation is a corporate presence here”).

195. *Id.* (discussing “evidence that the attackers were involved in an ongoing conspiracy to attack the United States, and overt acts in furtherance of that conspiracy took place within the United States”).

nizing the limitations set forth in *Kiobel*, the district court opined that “[s]urely, if any circumstances were to fit the Court’s framework of ‘touching and concerning the United States with sufficient force,’ it would be a terrorist attack that 1) was plotted in part within the United States, and 2) was directed at a United States Embassy and its employees.”<sup>196</sup> In *You v. Japan*,<sup>197</sup> the district court reached similar conclusions. It found a sufficient nexus between the plaintiffs’ ATS claims and the territory of the United States in a case involving Japanese war crimes in occupied U.S. territories during World War II.

In contrast, cases with weaker links between violations and the territory of the United States may not survive, even if they involve injury to U.S. citizens as well as the alien plaintiffs. In *Kaplan v. Central Bank of Islamic Republic of Iran*, the court dismissed the Israeli plaintiffs’ ATS claims under *Kiobel* even though U.S. citizens were among the victims (along with Israeli and Canadian nationals).<sup>198</sup> Federal courts have also dismissed ATS cases relating to apartheid in South Africa<sup>199</sup> and genocide during World War II.<sup>200</sup> Thus, the mere demonstration of compelling U.S. national or foreign policy interests, by itself, is unlikely to rebut the presumption against extraterritorial application of the ATS.<sup>201</sup> Courts do

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196. *Id.*

197. *You v. Japan*, No. C-5-03257, 2015 WL 6689398, at \*1–2 (N.D. Cal. Nov. 3, 2015). The case was dismissed, however, because it presented a nonjusticiable political question and because the claims in question were time barred. *Id.* at \*2–5.

198. *Kaplan v. Cent. Bank of Islamic Republic of Iran*, 961 F. Supp. 2d 185 (D.D.C. 2013) (dismissing case involving rocket attacks launched from Lebanon into Israel that allegedly were funded by Iran).

199. *See Balintulo v. Daimler AG*, 727 F.3d 174, 194 (2d Cir. 2013) (rejecting claim that presumption against extraterritorial application did not apply if defendants were American citizens or when the case itself involved “compelling American interests in supporting the struggle against apartheid in South Africa”).

200. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381, 444 (D.D.C. 2014) (dismissing ATS claims and holding that although “[n]o one disputes that the ‘United States not only has an important interest in preventing and stopping acts of genocide, but also in bringing some measure of justice to the victims and survivors of these acts’ . . . [t]he majority of the Supreme Court concluded that adjudication in federal court was not the appropriate mechanism to address such atrocities as genocide committed overseas by foreign actors . . . and instead defer[red] such decisions, quite appropriately, to the political branches.”) (internal citations and quotations omitted).

201. The relevant question is not the clarity or importance of the policy in question, but rather the proper role of the judiciary in furthering it. *See Balintulo*, 727 F.3d at 191–



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have the discretion to grant plaintiffs leave to amend their complaints in order to allege conduct that may rebut the presumption against extraterritoriality, unless such amendment clearly would be futile (e.g., “foreign cubed” cases with no U.S. connections at all).<sup>202</sup>

### **B. Rules of Decision in ATS Cases**

In *Sosa*, the Supreme Court determined that the existence of a cause of action under the ATS should be decided with reference to international law.<sup>203</sup> The Court has not yet decided whether international law should also determine a number of other important issues that arise in ATS cases. In the years since *Sosa* was decided, there have been wide divisions among the federal courts (at times, even among judges in the same case) on this question.

Questions such as whether state action requirements (where applicable) are fulfilled,<sup>204</sup> the applicable standard for aiding and abetting liabil-

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92 (holding that “the presumption against extraterritoriality applies to the statute” itself, such that “a common-law cause of action brought under the ATS cannot have extraterritorial reach simply because some judges, in some cases, conclude that it should”).

202. *See, e.g.*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1027–29 (9th Cir. 2014) (remanding to allow plaintiffs to amend their complaint to describe how defendants’ conduct “touched and concerned” the United States); *Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 96–97 (D.D.C. 2014) (granting leave to amend ATS complaint); *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014) (granting leave to move for permission to file an amended ATS complaint). *See also* *Ashcroft v. Iqbal*, 556 U.S. 662, 686–87 (2009) (remanding for lower court to determine whether plaintiff should be given leave to amend).

203. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 (2004).

204. *Compare, e.g.*, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) (drawing on 42 U.S.C. § 1983 for guidance on making this determination for non-governmental actors), *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (same), *and* *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (state actor question is governed by federal law), *with* *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25–26 (D.D.C. 2005) (holding that claims of torture and extrajudicial killing did not apply because state action/color-of-law jurisprudence from § 1983 case law did not apply under the Supreme Court’s decision in *Sosa*). On appeal, the D.C. Circuit declined to consider the issue. *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 39 n.27 (D.C. Cir. 2011) (“Because Exxon is subject to ATS liability on an aiding and abetting theory, the court need not address appellants’ alternative contention, which Exxon challenges, that Exxon is subject to ATS liability as a state actor acting under color of Indonesian law.”).

ity,<sup>205</sup> and whether corporations can be held liable for human rights violations<sup>206</sup> are all impacted greatly by whether courts look to federal common law or to international law for the answers. Each of these questions is discussed below.

### **1. State Action Requirements Under the ATS**

As discussed above, a key question in ATS claims is whether a human rights plaintiff has alleged a violation of customary international law that is sufficiently definite to support a cause of action under the *Sosa* test. This analysis requires the court to consider the identity of the alleged perpetrator as well as the nature of the conduct itself.<sup>207</sup> Both factors can impact whether a cognizable violation of human rights exists.

Some conduct constitutes a violation of international law only when it is perpetrated by a state actor or under color of law. Torture and extrajudicial killing certainly violate the law of nations when perpetrated by state authorities, for example.<sup>208</sup> So does a governmental policy of systematic racial discrimination.<sup>209</sup> The absence of such state involvement can be fatal to an ATS claim. It often is the auspices of state authority used to violate individual rights that transforms ordinary domestic crimes into violations of the law of nations. In *Estate of Amergi v. Palestinian Au-*

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205. Compare, e.g., *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 130 (2d Cir. 2010), *reh'g denied*, 642 F.3d 379 (2d Cir. 2011) (en banc), *cert. granted*, 132 S. Ct. 472 (2011) (mem.) (international law determined question of aiding and abetting), and *Khumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007) (Katzmann, J.) (holding that aiding and abetting liability was determined by reference to international law), *with id.* (Hall, J., concurring) (aiding and abetting applied but only based on federal common law) and *id.* (Korman, J., dissenting) (international law governed the question but did not apply in this case).

206. Compare, e.g., *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 130 (2d Cir. 2010), *reh'g denied*, 642 F.3d 379 (2d Cir. 2011) (en banc), *cert. granted*, 132 S. Ct. 472 (2011) (mem.) (international law determined question of corporate liability), *with Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1019–20 (7th Cir. 2011) (declining to follow the Second Circuit and noting that corporate liability did not turn on international law alone because “[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them”).

207. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

208. See *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) (summary execution and forced disappearances).

209. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1209–10 (9th Cir. 2007).

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*thority*, for example, the Eleventh Circuit dismissed the plaintiff's ATS claims on the grounds that a single killing by a non-state actor did not violate the law of nations.<sup>210</sup> However, in *Doe v. Exxon Mobil Corp.*, the state action requirement was deemed satisfied for ATS claims alleging injuries by foreign military personnel who were working for a corporate defendant as overseas security forces.<sup>211</sup>

Even when state involvement is conceded or otherwise is clear, the underlying conduct must violate international law in order to support a claim under the ATS. For example, the mere threat of extrajudicial killings does not qualify as a violation of the law of nations.<sup>212</sup> Nor does a single murder perpetrated by a drunk government security officer,<sup>213</sup> false arrest,<sup>214</sup> government abuse leading to “constructive” expulsion from a homeland,<sup>215</sup> a government taking its own citizens' property,<sup>216</sup> or the intentional infliction of emotional distress by state actors.<sup>217</sup>

That said, certain conduct violates the “law of nations” regardless of whether the perpetrator acts on behalf of a state or under color of foreign law. It is the heinousness of the underlying conduct itself, rather than the identity of the actor engaged in it, that transforms it into a violation of

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210. *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1365 (11th Cir. 2010).

211. *Doe v. Exxon Mobil Corp.*, No. 01-1357, 2015 WL 5042118, at \*3 (D.D.C. July 6, 2015) (holding that conduct “may be state action when it results from the State's exercise of ‘coercive power’”) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)).

212. *See Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 37 (D.D.C. 2010) (holding that “there is no basis for the assertion that the threat of a future state-sponsored extrajudicial killing—as opposed to the commission of a past state-sponsored extrajudicial killing—constitutes a tort in violation of the ‘law of nations’”).

213. *See In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 590 (E.D. Va. 2009).

214. *See Mora v. New York*, 524 F.3d 183, 209 (2d Cir. 2008) (noting that a “reckless policeman” was hardly an enemy of humankind).

215. *See Xuncax v. Gramajo*, 886 F. Supp. 162, 189 (D. Mass. 1995).

216. *See Guinto v. Marcos*, 654 F. Supp. 276, 280 n.1 (S.D. Cal. 1986) (“A taking or expropriation of a foreign national's property by his government is not cognizable under [the ATS].”). *But see Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 674–77 (7th Cir. 2012) (in a non-ATS case involving the expropriation exception to the FSIA, the court affirmed the general rule on “domestic takings” but held that where expropriations were combined with other serious human rights violations and helped to further them, the plaintiffs nevertheless stated a viable claim for the expropriation).

217. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1183 (C.D. Cal. 2005).

international law. Such torts almost always involve either international crimes or similar egregious violations of fundamental human rights. Examples include genocide,<sup>218</sup> slavery and slave trading,<sup>219</sup> war crimes,<sup>220</sup> and crimes against humanity.<sup>221</sup>

## **2. Aiding and Abetting, and Secondary Liability Under the ATS**

While many ATS cases are brought against the direct perpetrators of human rights abuses,<sup>222</sup> a growing number have been asserted against defendants who are alleged to be accountable for authorizing or facilitating such violations by others. *Cabello v. Fernández-Larios*, for example, involved claims that a former Chilean military officer should be held liable for assisting in violations committed by other Chilean officials.<sup>223</sup> The Eleventh Circuit allowed the case to proceed. Although the defendant did not personally engage in the alleged murders, the court found that principles of accomplice liability were well established in customary international law.<sup>224</sup>

At the time of this writing, the federal courts of appeals are divided over the precise circumstances under which private actors (individuals or corporate entities<sup>225</sup>) can be held liable for assisting either state actors or other private parties in violating international law. Although human rights claims have been allowed to proceed on the basis of theories of

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218. See, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995).

219. See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 206 (2d Cir. 2009).

220. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266–67 (11th Cir. 2009) (torture and murder committed in the course of war crimes), *overruled on other grounds by* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (holding that only natural persons could be held liable under the TVPA).

221. See, e.g., *Abdullahi*, 562 F.3d at 187 (holding that “appellants have pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent”).

222. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

223. *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005).

224. *Id.* at 1157–58.

225. The special liability issues for corporate entities are discussed in Part II.B.3 *infra*.

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“command” responsibility for conduct by subordinates<sup>226</sup> and tortious conspiracy,<sup>227</sup> the most common theory of indirect liability is aiding and abetting.<sup>228</sup> In *Bowoto v. Chevron Corp.*,<sup>229</sup> for example, a group of Nigerian villagers sued an oil company for aiding and abetting Nigerian military personnel in crimes against humanity, torture, and other attacks. The district court surveyed prior case law and determined that “the vast majority of courts to have considered the issue have found that aiding and abetting liability is available under the ATS,”<sup>230</sup> although a small minority have reached the opposite conclusion.<sup>231</sup>

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226. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) (noting that “[t]he United States has moved toward recognizing similar ‘command responsibility’ for torture that occurs in peacetime”).

227. See, e.g., *Cabello*, 402 F.3d at 1157–58. But see *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 260 (2d Cir. 2009) (rejecting conspiracy claims on the grounds that the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006), foreclosed conspiratorial liability under international law for crimes other than genocide and a common plan to wage aggressive war).

228. See, e.g., *Romero v. Drummond Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008) (allowing aiding and abetting liability under the ATS); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260–61 (2d Cir. 2007) (secondary liability in connection with apartheid-era conduct of South Africa).

229. *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006).

230. *Id.* at \*3–4, \*7–8 (internal citations omitted) (citing *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 321–24 (S.D.N.Y. 2003); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); and *Cabello*, 402 F.3d 1148). See also *Romero v. Drummond Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008) (allowing aiding and abetting liability under the ATS); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005) (affirming that “courts . . . have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy”).

231. See, e.g., *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005) (holding that although “international law may recognize accomplice liability in some instances,” merely selling a product, without more, did not give rise to an ATS claim for aiding and abetting under *Sosa*); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (holding that liability for “aiding and abetting” violations of international law was not actionable under the ATS). Note, however, that the district court in *Doe* relied squarely on the court’s reasoning in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 549–51 (S.D.N.Y. 2004), whose holding that “aiding and abetting” violations of international law were not actionable under the ATS was subsequently over-

The conduct element of aiding and abetting (about which there is consensus among the circuits) is that the defendant must provide practical assistance that has a substantial effect on the perpetration of the violation in question.<sup>232</sup> Courts differ widely, however, on what mental state must accompany such conduct. The Fourth and Second Circuits, for example, have adopted a “purpose”<sup>233</sup> standard that limits liability to deliberate conduct,<sup>234</sup> whereas the D.C. and Eleventh Circuits allow secondary liability based on a broader “knowledge”<sup>235</sup> standard.<sup>236</sup> (The Ninth Circuit recently declined to reach a final resolution on the question.<sup>237</sup>) Simi-

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ruled by the Second Circuit in *Khulumani v. Barclay National Bank*, 504 F.3d 254, 260 (2d Cir. 2007).

232. See, e.g., *Khulumani*, 504 F.3d at 277 (liability under international law for aiding and abetting the violations exists “when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime”).

233. “Purpose” is the subjective positive desire to engage in wrongful conduct or to have a wrongful result occur. See Model Penal Code § 2.02(a) (1985).

234. See, e.g., *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011) (plaintiffs must show that defendants aided and abetted violations with the purpose of facilitating them); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009) (same). See also *Mastafa v. Chevron Corp.*, 770 F.3d 170, 193–96 (2d Cir. 2014) (reaffirming the “purpose” standard adopted in *Presbyterian Church of Sudan*).

235. “Knowledge” is a subjective, practical certainty that a particular result will occur in the ordinary course of events, but without any positive desire to bring it about. See Model Penal Code § 2.02(b) (1985).

236. See, e.g., *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (knowledge standard); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005) (same). See also Restatement (Second) of Torts § 876(b) (tortfeasor “is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself”).

237. See *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1024 (9th Cir. 2014) (“Here, we need not decide whether a purpose or knowledge standard applies to aiding and abetting ATS claims. We conclude that the plaintiffs’ allegations satisfy the more stringent purpose standard, and therefore state a claim for aiding and abetting slavery.”). See also *Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015) (declining en banc review), and *id.* (Bea, J, dissenting) (arguing that en banc review should have been granted and that a purpose standard was required for aiding and abetting claims), *cert. denied*, *Nestle U.S.A., Inc. v. John Doe I*, 136 S. Ct. 798 (2016).

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lar considerations arise when plaintiffs allege conspiracy to violate human rights.<sup>238</sup>

To ascertain whether accessorial liability exists, the court must consider both (1) the source of the liability standard (e.g., whether liability is determined with reference to federal law or international law) and (2) what that body of law (federal or international) requires as the liability standard for aiding and abetting (e.g., whether the law in question requires purposeful or knowing conduct). The circuit split over aiding and abetting thus reflects the larger debate over whether international law supplies the mode of liability (e.g., method of breach) as well as the norm (duty) itself, or whether the mode of liability must instead be determined by reference to federal law.<sup>239</sup>

The question of accessorial liability is distinct from the vicarious liability principles reflected in the traditional tort doctrines of *respondeat superior* and agency. In *Doe v. Exxon Mobil*,<sup>240</sup> for example, the court allowed the case to proceed upon a showing that the corporate defendant exercised control over the activities of local Indonesian security forces that allegedly committed human rights violations. But a parent company cannot be held liable on such grounds when the culpable acts of employees cannot be imputed to its subsidiary companies.<sup>241</sup>

### 3. Corporate Liability Under the ATS

Corporations have been accused of a wide variety of egregious human rights violations in U.S. courts. Examples include

- a pharmaceutical company conducting nonconsensual medical experiments in the form of overseas drug trials;<sup>242</sup>
- a chemical distributor selling to late Iraqi dictator Saddam Hussein chemical weapon components used to manufacture mustard gas used against Kurdish enclaves in northern Iraq;<sup>243</sup>

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238. See, e.g., *Presbyterian Church of Sudan*, 582 F.3d at 260 (recognizing theory of conspiracy but holding that it requires “a criminal intention to participate in a common criminal design”).

239. See *supra* Part II.B.

240. *Doe v. Exxon Mobil*, 573 F. Supp. 2d 16 (D.D.C. 2008).

241. See *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494, 521–22 (S.D.N.Y. 2010).

242. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

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- bankers assisting in Nazi plunder of private property that prevented French Jews from financing their escape from the country, leading to their deaths in the Holocaust;<sup>244</sup>
- human trafficking by a U.S. military contractor;<sup>245</sup>
- forced labor and false imprisonment by a shipping firm;<sup>246</sup>
- an oil company's participation in slave trading, forced labor, and other atrocities by Burmese security agents providing security during the construction of an oil pipeline;<sup>247</sup>
- Arab banks administering the provision of financial benefits to the heirs of suicide bombers killed in attacks on civilians in Israel;<sup>248</sup>
- a tire manufacturer allowing rubber plantations to force children as young as six to perform heavy, hazardous labor;<sup>249</sup>
- a mining company aiding paramilitary groups in their murder of union leaders for attempting to organize mine workers;<sup>250</sup>
- the support and facilitation of apartheid in South Africa by more than fifty corporations that conducted business operations there for decades;<sup>251</sup>
- an energy company aiding the Sudanese government in war crimes, crimes against humanity, and genocide;<sup>252</sup>
- an oil company's corporate support for killings, torture, and other human rights violations against Nigerian protestors by government security agents;<sup>253</sup>
- an oil company's corporate control over Indonesian security forces who committed atrocities against Achenese villagers;<sup>254</sup> and

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243. *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011).

244. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

245. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009).

246. *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

247. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

248. *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

249. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).

250. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

251. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007).

252. *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009).

253. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010).

254. *Doe v. Exxon Mobil*, 573 F. Supp. 2d 16 (D.D.C. 2008).



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- a private military contracting company providing interpreter services to facilitate the “enhanced interrogation” of detainees by CIA operatives.<sup>255</sup>

Despite this wave of cases, the federal courts are split over whether corporations may be held directly responsible (as distinct legal entities) for serious human rights violations. The Supreme Court set the stage for the debate in 2004 by suggesting in *Sosa* that lower courts should consider the extent to which corporations operating as private actors could be held liable under the ATS.<sup>256</sup> The federal circuits are now divided on this question, putting the Second Circuit’s ruling against corporate liability at odds with decisions from the Seventh, Ninth, Eleventh, and D.C. Circuits upholding it.

In 2010, the Second Circuit rejected corporate liability in *Kiobel v. Royal Dutch Petroleum Co.*, holding that the ATS did not provide for corporate liability because “the relatively few international treaties that impose particular obligations on corporations do not establish corporate liability as a ‘specific, universal, and obligatory’ norm of customary international law.”<sup>257</sup> The Eleventh Circuit had reached the opposite conclusion two years earlier, holding in *Romero v. Drummond Co.* that the “text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction for complaints of torture against corporate defendants.”<sup>258</sup>

In subsequent cases, the Seventh,<sup>259</sup> Ninth,<sup>260</sup> and D.C.<sup>261</sup> Circuits all declined to follow the Second Circuit’s reasoning, holding that the ATS

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255. *Saleh v. Titan Corp.*, 580 F.3d 1, 115 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011) (mem.).

256. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 and nn.20–21 (2004).

257. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

258. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (internal citations omitted).

259. *See Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011) (corporations are subject to ATS liability for torts committed in violation of international law).

260. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (finding “no legitimate basis for Rio Tinto’s position that the [ATS] itself is a complete bar to corporate liability”). *See also Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014), *reh’g denied*, 788 F.3d 946 (9th Cir. 2015) (holding, in post-*Kiobel* decision affirming *Sarei* and

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allowed liability against corporations and other artificial entities.<sup>262</sup> The U.S. Supreme Court initially sought to resolve the division in *Kiobel v. Royal Dutch Petroleum Co.*, granting certiorari on the following questions:

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, is a merits question, as it has been treated by all courts prior to the decision below, or an issue of subject-matter jurisdiction, as the court of appeals held for the first time.
2. Whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions or genocide, as the court of appeals decisions provides, or if corporations may be sued in the same manner as any other private party defendant under the ATS for such egregious violations, as the Eleventh Circuit has explicitly held.<sup>263</sup>

These questions ultimately were not resolved by the Court, which dismissed the claims in *Kiobel* based solely on the application of the rebuttable presumption against extraterritorial application of the ATS.<sup>264</sup> The dual questions on corporate liability were not answered directly by the Supreme Court, and the circuit courts thus remain divided. It is unlikely that the circuit split will resolve itself, however, even though the

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the viability of corporate liability under the ATS, that “it would be contrary to both the categorical nature of the prohibition on slavery and the moral imperative underlying that prohibition to conclude that incorporation leads to legal absolution for acts of enslavement”).

261. See *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

262. The Fourth Circuit declined to reach the question of corporate liability under the ATS in *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011). It subsequently allowed ATS claims to proceed, however, against a corporate defendant based at least in part on the defendant’s “status as a United States corporation[.]” See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014). A Virginia district court also has held that corporations can be liable under the ATS. See *In re Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569, 588 (E.D. Va. 2009) (“Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations.”).

263. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 136 (2d Cir. 2010), *aff’d*, 133 S. Ct. 1659 (2013).

264. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (affirming Second Circuit decision “based on our answer to the second question [on extraterritoriality]”).

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Second Circuit at present is internally divided on whether the Supreme Court *impliedly* authorized ATS cases against corporations.

In his majority opinion in *Kiobel*, Chief Justice Roberts noted that because “[c]orporations are often present in many countries . . . mere corporate presence” was insufficient to overcome the presumption against extraterritorial application.<sup>265</sup> In *Daimler AG v. Bauman*,<sup>266</sup> the Supreme Court addressed whether general personal jurisdiction over a foreign corporate defendant in an ATS case was proper. Courts within the Second Circuit have reached different conclusions about the implications of these two decisions for corporate ATS defendants.

Some have found that the Supreme Court did not alter the status quo by implication. For example, the panel decision in *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*<sup>267</sup> focused primarily on extraterritorial application of the ATS, affirming dismissal of ATS claims where all violations took place overseas. But the decision included a footnote stating that claims against the corporate entity would have failed in any event because “the Supreme Court’s decision in *Kiobel* did not disturb the precedent of this Circuit . . . that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS.”<sup>268</sup> A concurring opinion in *Chowdhury* characterized this position as *dicta*, however, pointing out that other circuit courts had taken a different view.<sup>269</sup> And in another Second Circuit case, the panel hearing *Licci ex rel. Licci* held that corporate liability post-*Kiobel* was an open question to be resolved in the first instance by the district court.<sup>270</sup>

District courts within the Second Circuit also have come to different conclusions. Some have determined that pre-*Kiobel* law within the Second Circuit remains in effect because the Supreme Court did not rule

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265. *Id.* at 1669.

266. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Bauman* is discussed in more detail in Part III.B, *infra*.

267. *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

268. *Id.* at 49 n.6.

269. *Id.* at 55 n.2 (Pooler, J., concurring).

270. *See Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013). Following reconsideration of the issue by the district court, the Second Circuit subsequently dismissed the case on the grounds of non-applicability of the ATS to corporate entities. *See Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016).

directly on corporate liability.<sup>271</sup> Others have held that the Supreme Court implicitly recognized corporate liability for ATS claims, thereby overruling the Second Circuit's prohibition on them. In *In re South African Apartheid Litigation*, the district court found that it would make little sense for the Supreme Court to address legal issues involving corporate ATS defendants if ATS claims could not be asserted against them in the first place:

The Supreme Court's opinions in *Kiobel II* and *Daimler* directly undermine the central holding of *Kiobel I*—that corporations cannot be held liable for claims brought under the ATS. The opinions explicitly recognize that corporate presence alone is insufficient to overcome the presumption against extraterritoriality or to permit a court to exercise personal jurisdiction over a defendant in an ATS case, respectively. By necessity, that recognition implies that corporate presence plus additional factors can suffice under either holding.<sup>272</sup>

Considering the question de novo, the district court subsequently determined that corporate liability was permissible under the ATS in the Second Circuit.<sup>273</sup> The district court hearing *Sikhs for Justice Inc. v. Indian National Congress Party* reached the same conclusion on similar grounds.<sup>274</sup>

In late December 2015, a Second Circuit panel squarely considered the impact of the Supreme Court's decision in *Kiobel* on the circuit's prior rulings denying corporate liability under the ATS in *In re Arab Bank, PLC Alien Tort Statute Litigation*.<sup>275</sup> The court concluded that *Ki-*

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271. See, e.g., *Tymoshenko v. Firtash*, No. 11-CV-2794, 2013 WL 4564646, at \*3 (S.D.N.Y. Aug. 28, 2013). See also *Sikhs for Justice, Inc. v. Nath*, 596 F. App'x 7, 10 (2d Cir. 2014) (because the dismissal was warranted based on the presumption against extraterritorial application, there was "no need to address . . . whether, under current law, corporate defendants are subject to suit under the ATS").

272. *In re S. African Apartheid Litig.*, 15 F. Supp. 3d 454, 460 (S.D.N.Y. 2014).

273. *Id.* at 460–64. The case ultimately was dismissed based on extraterritoriality. See *In re S. African Apartheid Litig.*, 56 F. Supp. 3d 331 (S.D.N.Y. Aug. 28, 2015) (dismissing under *Kiobel* because all relevant conduct took place overseas).

274. *Sikhs for Justice Inc. v. Indian Nat'l Cong. Party*, 17 F. Supp. 3d 334, 339–43 (S.D.N.Y. 2014), *aff'd sub nom.* *Sikhs for Justice, Inc. v. Nath*, 596 F. App'x 7 (2d Cir. 2014). This case also was dismissed based on the prohibition on extraterritorial claims. *Id.* at 343–45.

275. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015).

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*obel* did not unequivocally approve ATS liability for corporations, but it recognized that this certainly was a plausible reading of the Supreme Court’s decision.<sup>276</sup> The court further noted that all other circuits had approved such liability, such that “on the issue of corporate liability under the ATS, [the Second Circuit] now appears to swim alone against the tide.”<sup>277</sup> Although it affirmed the dismissal of ATS claims against the corporate defendant on the sole basis that the ATS precluded corporate liability, the panel expressly invited further review of the question by the full Second Circuit or the Supreme Court itself.<sup>278</sup>

In a divided opinion, the Second Circuit declined to reconsider the case en banc.<sup>279</sup> Its judges offered a variety of justifications for why the question of corporate liability should or should not be considered by the full court in light of the divide with other federal circuits on this issue.<sup>280</sup> Thus, absent a contrary determination by the Supreme Court, the Second Circuit is likely to continue to dismiss otherwise meritorious cases on the grounds that ATS does not apply to corporations.<sup>281</sup>

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276. *Id.* at 151 (“We conclude that *Kiobel I* is and remains the law of this Circuit, notwithstanding the Supreme Court’s decision in *Kiobel II* affirming this Court’s judgment on other grounds. We affirm the decision of the district court on that basis . . . despite our view that *Kiobel II* suggests that the ATS may allow for corporate liability and our observation that there is a growing consensus among our sister circuits to that effect.”).

277. *Id.*

278. *Id.* at 151 (“We will leave it to either an en banc sitting of this Court or an eventual Supreme Court review to overrule *Kiobel I* if, indeed, it is no longer viable.”).

279. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 822 F.3d 34 (2d Cir. 2016).

280. *Compare, e.g., id.* at 37–38 (Jacobs, J., concurring) (claiming that “the panel’s angst in having to follow *Kiobel I* was self-inflicted. The appeal could have been resolved under *Kiobel II*; if the problem was lack of briefing, briefing could have been ordered; if finding the right answer under *Kiobel II* was a strain on the panel, it could have remanded; if the easiest course was to follow a precedent that the panel dislikes, it could have done what appellate judges must frequently do: swallow hard.”) *with id.* at 40–41 (Pooler, J., dissenting) (arguing that “this circuit yet again misses an opportunity to correct the panel’s majority opinion in [*Kiobel I*], an opinion which is almost certainly incorrect but continues to maintain a needless circuit split with every other circuit to address the question of whether corporations may be held civilly liable under the [ATS]”) *and id.* at 38 (Cabranes, J., concurring) (disputing the dissent’s “suggestion that ‘*Kiobel II* strongly suggests that corporate liability *does* exist under the ATS”).

281. *See, e.g., Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 217–19 (2d Cir. 2016) (finding that the plaintiffs’ claims against a foreign bank sufficiently touched and

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One final issue of corporate liability in human rights cases involves whether a parent company that is directly subject to U.S. jurisdiction is responsible, either directly or through various forms of indirect liability, for the actions of an overseas subsidiary that actually committed or facilitated the human rights violations. As noted above, this issue raises questions of superior responsibility and agency.<sup>282</sup> Important questions are whether the parent can be held liable for some or all of the subsidiary's conduct and the theory (or theories) on which such liability is predicated. These inquiries are highly fact-specific and can involve the corporate law doctrines of alter-ego liability/piercing the corporate veil, single enterprise liability, agency, the parent aiding and abetting the conduct of the subsidiary, and ratification.<sup>283</sup>

The traditional tort doctrines of *respondeat superior* and agency allow claims based on the theory that a parent company should have exercised greater control over the subsidiary's conduct.<sup>284</sup> Whether a subsidiary will be deemed the agent of a parent turns on corporate law principles that determine whether the entities are truly independent. In *Sinaltrainal v. Coca-Cola Co.*, for example, the Eleventh Circuit held that a parent company could be held responsible under the ATS for conduct by a wholly owned foreign subsidiary that was "an alter ego or agent" of the parent.<sup>285</sup> Because the subsidiary acted "under the management, con-

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concerned the United States to displace the presumption against extraterritorial application of the ATS, but dismissing because the defendant bank was a corporation).

282. See *infra* Part II.B.2.

283. See *Bowoto v. Chevron*, 312 F. Supp. 2d 1229, 1235–40 (N.D. Cal. 2004) (collecting cases and discussing application of various corporate law theories in human rights context).

284. See, e.g., *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (parent can be held liable for subsidiary's conduct under either agency or alter-ego theory); *Doe v. Exxon Mobil*, 573 F. Supp. 2d 16 (D.D.C. 2008) (sufficient evidence of defendant controlling the activities of Indonesian security forces that allegedly committed human rights violations); *Chowdhury v. WorldTel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008) (agency and subsequent ratification of tortious conduct in case involving arrest and torture of plaintiff), *rev'd on other grounds*, 746 F.3d 42 (2d Cir. 2014) (vacating jury verdict on ATS claims because all violations occurred overseas and thus failed to satisfy the Supreme Court's territorial requirements under *Kiobel*).

285. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), *abrogated by* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (holding that TVPA was limited to defendants who were natural persons).

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trol, and direction of [the parent] . . . its separateness [was] illusory.”<sup>286</sup> It is incumbent upon the plaintiff, however, to identify the nature of the relationship between domestic and overseas organizations and to sufficiently explain how one allegedly controlled the tortious conduct of the other.<sup>287</sup>

Mere ownership of a subsidiary’s stock is insufficient to establish such control. The court will pierce the corporate veil only when doing so is necessary “to prevent fraud or other wrong, or where a parent dominates and controls a subsidiary.”<sup>288</sup> This is a fact-specific inquiry that focuses on the conduct of both the parent and the subsidiary.<sup>289</sup> Generally speaking, a “parent corporation and its subsidiary lose their distinct corporate identities when their conduct demonstrates a virtual abandonment of separateness.”<sup>290</sup> In an ATS case brought against a multitude of corporations that had business operations in South Africa and dealings with the South African government during the apartheid era, one district court noted that considerations relevant to this determination include

- whether corporate formalities are respected, including whether the entities are treated as independent profit centers;
- whether the subsidiary is sufficiently capitalized, including whether the parent guarantees or forgives the subsidiary’s debts;

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286. *Id.* at 1259.

287. See *Sikhs for Justice Inc. v. Indian Nat’l Cong. Party*, 17 F. Supp. 3d 334, 345–48 (S.D.N.Y. 2014), *aff’d sub nom. Sikhs for Justice, Inc. v. Nath*, 596 F. App’x 7 (2d Cir. 2014) (dismissing, inter alia, based on the absence of any demonstrated linkage between the U.S. entity and the overseas conduct, but noting that the presumption against extra-territorial application of the ATS would not have been rebutted even if an agency relationship had been established).

288. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 271 (S.D.N.Y. 2009) (internal quotations and citations omitted).

289. *Doe v. Exxon Mobil Corp.*, 573 F. Supp. 2d 16, 31 (D.D.C. 2008) (issue is fact-specific and “defies resolution by mechanical formulae” but requires at least that “the parent has manifested its desire for the subsidiary to act upon the parent’s behalf, the subsidiary has consented so to act, the parent has the right to exercise control over the subsidiary with respect to matters entrusted to the subsidiary, and the parent exercises its control in a manner more direct than by voting a majority of stock in the subsidiary or making appointments to the subsidiary’s Board of Directors” (internal quotations and citations omitted)).

290. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 271–72 (internal quotations and citations omitted).

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- any intermingling of funds;
- overlapping personnel, including owners, officers, directors, and other employees, as well as shared resources (e.g., office space) between the entities; and
- the amount of discretion provided to the subsidiary, as reflected in arms-length dealings between the entities.<sup>291</sup>

Similar principles govern questions of parent–subsidiary liability in other types of human rights cases, such as those brought under the ATA<sup>292</sup> and the TVPRA.<sup>293</sup> (Claims under these statutes are discussed below.<sup>294</sup>)

#### ***C. Torture Victim Protection Act***

Congress enacted the Torture Victim Protection Act (TVPA) in 1992.<sup>295</sup> The TVPA provides a cause of action for torture or extrajudicial killing perpetrated under the “actual or apparent authority, or color of law, of any foreign nation.”<sup>296</sup> The TVPA expanded the scope of civil human rights remedies available to U.S. citizens, since only aliens may file suit under the ATS.<sup>297</sup> Justice Kennedy’s concurring opinion in *Kiobel* stated that the TVPA applied extraterritorially as Congress’s direct response to

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291. *Id.*

292. *See, e.g., In re Terrorist Attack on Sept. 11, 2001*, 740 F. Supp. 2d 494, 521–22 (S.D.N.Y. 2010) (“Mere allegations that defendant provided routine banking services, and of wrongful conduct committed by independent subsidiaries, are insufficient . . .” absent a further basis for imputing culpable conduct by employees to corporate entities); *In re Chiquita Brands Int’l, Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 690 F. Supp. 2d 1296 (S.D. Fla. 2010) (U.S. corporation may be held liable under ATA where its Colombian subsidiary was wholly owned and controlled by the parent entity).

293. *See, e.g., Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009) (denying motion to dismiss where allegations sufficiently alleged that parent contractor “actively participated in and knowingly benefited from [a subsidiary’s] venture that involved forced labor and trafficking”).

294. *See infra* Part II.D.

295. *See* 28 U.S.C. § 1350(3)(b)(1) (note) (2012).

296. *Id.*

297. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104–05 (2d Cir. 2000) (discussing expansion of jurisdiction).



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“serious concerns with respect to human rights abuses committed abroad.”<sup>298</sup>

The TVPA defines torture as

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 . . . .<sup>299</sup>

The TVPA’s direct reference to foreign law precludes it from serving as a basis for claims against U.S. officials (or former officials) acting on the basis of U.S. law or implementing federal foreign policy decisions.<sup>300</sup> In *Arar v. Ashcroft*, the Second Circuit noted that “[a]ny allegation arising under the TVPA requires a demonstration that the defendants acted under color of foreign law, or under its authority.”<sup>301</sup> The court dismissed TVPA claims in which the plaintiffs alleged “at most” that the defendants “encouraged or solicited certain conduct by foreign officials” and therefore could not establish that the defendants acted on behalf of the Syrian government or under Syrian law.<sup>302</sup> According to the Second Circuit, “an individual ‘acts under color of law [under the TVPA] . . . when he acts together with state officials or with significant state aid.’”<sup>303</sup>

Given these limitations under the TVPA, some federal courts have seen torture claims raised as *Bivens* actions against former U.S. govern-

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298. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring).

299. TVPA, 28 U.S.C. § 1350(3)(b)(1) (note).

300. *See Schneider v. Kissinger*, 310 F. Supp. 2d 251, 267 (D.D.C. 2004) (because former Secretary of State was acting under U.S. law in carrying out American foreign policy, not foreign law, the TVPA could not apply to his conduct).

301. *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009).

302. *Id.*

303. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (quoting *Kadic v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995)).

ment officials. These cases are subject to the limitations that otherwise apply to *Bivens* cases and have been largely unsuccessful to date.<sup>304</sup>

Federal case law is presently divided on a number of TVPA issues:

- aiding and abetting liability;
- exclusivity of remedy;
- exhaustion of remedies;
- corporate liability; and
- relation to immigration law.

Each of these will be discussed in turn.

### **1. Aiding and Abetting Liability**

There is an ongoing dispute over whether accessorial liability for aiding and abetting is cognizable under the TVPA. While the TVPA does not explicitly address modes of liability, some courts have found accessorial liability to be appropriate under the statute.<sup>305</sup> Others have not.<sup>306</sup>

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304. *See, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (former Attorney General was entitled to qualified immunity against *Bivens* claims arising out of the use of federal material witness warrants to facilitate preventative detention and interrogation of terrorism suspects); *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015) (denying *Bivens* claims against the FBI arising out of the alleged torture of a U.S. citizen during a counterterrorism investigation in Africa based on the extraterritoriality of the conduct in question and because the investigation itself implicated national security); *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (dismissing, based on qualified immunity, *Bivens* action brought by former “enemy combatant” detainee against former lawyer in White House Office of the Legal Counsel who allegedly authorized and furthered policies leading to alleged abuse). *See also* *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012) (dismissing case in which special factors (separation of powers in matters involving the U.S. military) weighed against providing a *Bivens* remedy and habeas corpus was available as an alternative ground for the relief that plaintiff sought).

305. *See, e.g.*, *Romero v. Drummond Co.*, 552 F.3d 1303, 1315–16 (11th Cir. 2008) (recognizing aiding and abetting liability under the TVPA); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777, 779 (9th Cir. 1994) (allowing aiding and abetting liability and command responsibility for conduct of public officials under the TVPA).

306. *See, e.g.*, *Weisskopf v. United Jewish Appeal-Fed’n of Jewish Philanthropies of N.Y., Inc.*, 889 F. Supp. 2d 912, 924–25 (S.D. Tex. 2012) (finding that the “statute does not permit liability for aiding and abetting a primary violator”); *Mastafa v. Chevron Corp.*, 759 F. Supp. 2d 297, 300 (S.D.N.Y. 2010) (dismissing TVPA claims because, among other things, the “plain language” of the statute “does not permit aiding-and-abetting liability . . . [and] does not extend liability to parties who provide aid to individuals who commit acts of torture”).

## 2. Exclusivity of Remedy

It is an open question whether alien plaintiffs can plead both ATS and TVPA violations in the same case or whether the TVPA precludes other avenues of relief for torture and extrajudicial killings.<sup>307</sup> The Seventh Circuit has ruled that alien plaintiffs alleging torture and extrajudicial killing can only raise claims that could be brought by American citizens under the TVPA. In *Enaharo v. Abubakar*, it held that the TVPA “occupied the field” as an expression of congressional intent for the TVPA to provide the exclusive remedy for claims involving torture and extrajudicial killing.<sup>308</sup>

Most other courts have taken the opposite view. In *Kadic v. Karadžić*, the Second Circuit had previously ruled that plaintiffs could bring torture and extrajudicial killing claims under either the ATS or the TVPA.<sup>309</sup> The Eleventh Circuit also has held that the TVPA did not displace the ATS.<sup>310</sup> A number of district courts have followed suit.<sup>311</sup>

## 3. Exhaustion of Remedies

The TVPA requires claimants to exhaust local remedies—in the place where the violations in question occurred—unless such efforts would be

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307. Only certain subsets of claims brought by foreign plaintiffs could be supplanted under this theory, in that the ATS (subject to *Sosa* and *Kiobel*) (a) only applies to aliens, (b) is not limited to violations by individuals acting under the color of foreign law, and (c) covers a broader set of international wrongs, whereas the TVPA is limited solely to torture and extrajudicial killings.

308. *Enahoro v. Abubakar*, 408 F.3d 877, 884–85 (7th Cir. 2005) (subsequently vacated on other grounds).

309. *Kadic v. Karadžić*, 70 F.3d 232, 241 (2d Cir. 1995) (noting that one benefit of proceeding under the ATS was avoidance of the TVPA’s requirement of exhausting local remedies). *See also* *Wiwa v. Royal Dutch Petroleum*, No. 96-CV-8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (“This Court reads *Kadic I* to hold that the TVPA did not preempt torture and summary execution claims under the ATCA.”); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1145 (E.D. Cal. 2004) (citing *Kadic*, 70 F.3d at 241) (“The scope of the Alien Tort Act remains undiminished by the enactment of the Torture Victim Act.”).

310. *Aldana v. Del Monte Fresh Produce, NA, Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (holding that plaintiffs may bring distinct claims under each statute).

311. *See, e.g.*, *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1085–86 (N.D. Cal. 2008), *aff’d*, 621 F.3d 1116 (9th Cir. 2010) (TVPA and ATS claims mutually coexist for torture and related offenses); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178 n.13 (C.D. Cal. 2005) (same).

patently futile or ineffective.<sup>312</sup> Plaintiffs who would suffer retaliation for bringing local claims are exempt from the exhaustion requirement. A genuine threat of violence, for example, “easily meets the futility standard.”<sup>313</sup> Also exempt are plaintiffs who can demonstrate the patent insufficiency of local remedies. The Seventh Circuit held this requirement fulfilled upon proof that “the legal remedies offered by the Nigerian courts were indeed ineffective, unobtainable, unduly prolonged, inadequate or obviously futile under any applicable exhaustion provisions.”<sup>314</sup>

The mere receipt of some compensation for human rights injuries does not appear to automatically preclude additional remedies under the TVPA. The Eleventh Circuit recently considered this issue as a case of first impression in *Mamani v. Berzain*.<sup>315</sup> In *Mamani*, the court held that plaintiffs who received payments from a Bolivian government compensation fund following the ouster of a predecessor regime that committed torture and related violations had satisfied the TVPA’s requirement to exhaust local remedies before bringing suit. In denying a motion to dismiss, the court held that such “successful exhaustion of foreign remedies” did not preclude subsequent TVPA claims in the United States based upon the statute’s exhaustion requirements.<sup>316</sup>

Exhaustion is a question of law for the court,<sup>317</sup> but there is disagreement over which party bears the burden of establishing it. Some courts have held that proof of exhaustion (or futility) is part of the plaintiff’s case in chief and must be pleaded alongside other elements of a TVPA claim.<sup>318</sup> Others have held exhaustion to be an affirmative defense upon

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312. See 28 U.S.C. § 1350 (2012) (note).

313. See *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005).

314. *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005).

315. *Mamani v. Berzain*, 825 F.3d 1304 (11th Cir. 2016).

316. *Id.* at 1311 (holding, based on a plain reading of the statute, that the TVPA’s “exhaustion requirement does not bar a TVPA suit by a claimant who has successfully exhausted her remedies in the foreign state.” The court did not consider questions of issue or claim preclusion or res judicata because those issues were not raised on appeal. *Id.*

317. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1994) (holding that jury instructions on exhaustion were not required).

318. See, e.g., *Enahoro*, 408 F.3d at 884–86 (subsequently vacated on other grounds) (remanding for determinations as to whether torture victims should be allowed to amend pleadings to assert exhaustion under the TVPA and if so, whether they had in fact exhausted available remedies).

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which defendants bear a “substantial” burden of proof.<sup>319</sup> Courts considering the issue have relied upon such materials as motion papers and briefs, statements of interest from the State Department, affidavits, and NGO Reports.<sup>320</sup>

There also is a lack of agreement among federal courts over whether the TVPA’s exhaustion requirement extends to the ATS as well. The Supreme Court recognized in *Sosa* that exhaustion might apply in an “appropriate case” under the ATS, but did not elaborate on the applicable standards and procedures.<sup>321</sup>

Courts have taken different positions on the proper influence of the TVPA in ATS cases. In *Kadic v. Karadžić*, the Second Circuit declined to require exhaustion on ATS claims of torture and summary execution, even while simultaneously finding TVPA claims subject to exhaustion based on the identical underlying conduct.<sup>322</sup> The Seventh Circuit<sup>323</sup> and

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319. *See, e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005). *See also In re Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569, 594 n.32 (E.D. Va. 2009) (defendants could not establish affirmative defense when no remedy was available in Iraq, such that question of exhaustion was “essentially moot and need not be answered”); *Doe v. Constant*, 354 F. App’x 543 (2d Cir. 2009) (exhaustion under TVPA is affirmative defense); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1096 (N.D. Cal. 2008) (where defendants failed to establish the availability of remedies in Nigeria, exhaustion was not required); *Collett v. Socialist People’s Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230, 242–43 (D.D.C. 2005) (plaintiff was not obligated to plead exhaustion or futility until defendant established that effective remedies existed in the local forum).

320. *See, e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 782–83 (11th Cir. 2005) (considering party briefs, affidavits, and a report from Amnesty International); *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20, 25 (D.D.C. 2005) (assessing motion papers and briefs, as well as statement of interest from the State Department and an affidavit from an Indonesian Supreme Court Justice).

321. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01-CV-9882, 2005 WL 2082846, at \*7 n.10 (S.D.N.Y. 2005) (describing *Sosa*’s “discussion [of exhaustion as] . . . too truncated to provide guidance here”).

322. *Kadic v. Karadžić*, 70 F.3d 232, 241–44 (2d Cir. 1995).

323. *Enahoro v. Abubakar*, 408 F.3d 877, 889 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006) (mem.). *But see Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 674–77 (7th Cir. 2012) (holding, in a case involving claims under customary international law brought pursuant to an exception to the FSIA statute, that as a matter of both federal and international law, plaintiffs were required to either pursue claims in foreign courts first or provide a compelling reason for their failure to do so).

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Eleventh Circuit<sup>324</sup> also have determined that the TVPA's exhaustion requirement does not apply to ATS claims, as have a number of district courts.<sup>325</sup>

Because *Sosa* does not mandate exhaustion,<sup>326</sup> several courts have suggested that exhaustion is better understood as a *discretionary* consideration for courts hearing ATS claims. The Seventh Circuit has suggested that exhaustion may constitute a principle of international law incorporated into the ATS under *Sosa*.<sup>327</sup> The most extensive analysis of the issue to date appears in a series of opinions in *Sarei v. Rio Tinto*, although that case subsequently was dismissed on jurisdictional grounds following the Supreme Court's decision in *Kiobel*.<sup>328</sup>

In *Sarei*, the Ninth Circuit interpreted *Sosa*'s reference to exhaustion to mean that the Supreme Court considered exhaustion to be a "prudential 'principle' among others that courts should consider beyond the initial task of determining whether the alleged violations of the ATS satisfy the 'requirement of a clear definition.'"<sup>329</sup> The court held that unlike statutory exhaustion, "prudential exhaustion is not a prerequisite to the exercise of jurisdiction, but rather is 'one among related doctrines—

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324. *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (citing *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995)).

325. See, e.g., *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); *Jama v. INS*, 22 F. Supp. 2d 353, 364 (D.N.J. 1998) ("There is nothing in the ATCA which limits its application to situations where there is no relief available under domestic law.").

326. See *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1178 n.13 (C.D. Cal. 2005) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004)) (ATS claims need not "be modeled after the TVPA to include an administrative exhaustion requirement."), *remanded*, 564 F.3d 1190 (9th Cir. 2009) (remanding so that district court could consider prudential exhaustion issues in light of the Ninth Circuit's opinion in *Sarei v. Rio Tinto*, 550 F.3d 822 (9th Cir. 2008) (en banc)).

327. See, e.g., *Enahoro*, 408 F.3d at 886 ("It may be that a requirement for exhaustion is itself a basic principle of international law.").

328. *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013) (dismissing on remand from the Supreme Court).

329. *Sarei v. Rio Tinto*, 550 F.3d 822, 827 (9th Cir. 2008) (en banc) (citing *Sosa*, 542 U.S. at 733 n.21). See also *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 281 n.320 (S.D.N.Y. 2009) (noting that "*Sosa* . . . raised exhaustion as a possible prudential limitation") (citations omitted).

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including abstention, finality, and ripeness—that govern the timing of federal-court decision making.”<sup>330</sup>

Prudential exhaustion may apply to some claims in the case and not others. In *Sarei*, for example, the district court applied prudential exhaustion to claims with a weak nexus to the United States (e.g., cruel, inhuman, and degrading treatment and international environmental violations) but not claims involving matters of “universal concern” (war crimes, crimes against humanity, and racial discrimination).<sup>331</sup> Its decision on prudential exhaustion was upheld by the Ninth Circuit.<sup>332</sup>

These issues—and others—relating to exhaustion remain open questions for federal courts to resolve in future cases.

### 4. Corporate Liability

At one time the question of liability for artificial entities also had divided the federal courts in cases involving the TVPA. In contrast to the question of corporate liability under the ATS, this dispute did not center on whether international law recognized tort liability for corporations. Rather, the question turned on whether the direct reference to an “individual” perpetrator in the TVPA itself<sup>333</sup> precluded its application to foreign states<sup>334</sup> or corporations.<sup>335</sup>

The Supreme Court resolved this question in *Mohamad v. Palestinian Authority*, when it determined that the plain meaning of the term “individual” precluded application of the TVPA to artificial entities.<sup>336</sup> The Court limited its holding to the TVPA alone, noting that the question of entity liability under the ATS “offers no comparative value here

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330. *Sarei*, 550 F.3d at 828 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)).

331. *Sarei v. Rio Tinto, PLC*, 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).

332. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 754–55 (9th Cir. 2011), *cert. granted and judgment vacated*, *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013).

333. TVPA, 28 U.S.C. § 1350(2)(a) (note) (2012).

334. *See, e.g., Hurst v. Socialist People’s Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 30 n.14 (D.D.C. 2007) (holding that the statute’s use of the term “individual” meant that the TVPA did not apply to states).

335. *Compare Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (holding that both TVPA and ATS applied to corporate defendants), *with Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) (holding that corporations could be neither victims nor perpetrators under the TVPA).

336. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710–11 (2012).

regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute.”<sup>337</sup>

## **5. Relation to Immigration Law**

One final TVPA issue is its relation to appellate review of immigration cases. Although this guide does not cover immigration and asylum cases,<sup>338</sup> federal judges inevitably must contend with allegations of torture, cruel and inhumane treatment, and persecution in immigration cases in which the court is asked to review the denial of asylum, withholding of removal, and relief under the Convention Against Torture (CAT).

These claims may arise from similar underlying facts, but the grounds for relief and the available remedies are different. While an asylum recipient may stay in the United States and apply for permanent resident status after one year, withholding of removal merely prohibits the United States from returning an individual to the country of persecution and does not provide a path to regularized status in the United States.<sup>339</sup> Furthermore, under the CAT, the United States may not return an individual to a country where he or she is likely to be tortured.<sup>340</sup>

Claims for denial of asylum, withholding of removal, and CAT relief may all be present in an immigration appeal.<sup>341</sup> Although the issues raised

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337. *Id.* at 1709.

338. For guidance on this topic, see Michael A. Scaperlanda, *Immigration Law: A Primer* (Federal Judicial Center 2009).

339. *Id.* at 110.

340. *Id.* at 111.

341. See, e.g., *Mushayahama v. Holder*, 469 F. App'x 443 (6th Cir. 2012) (unpublished opinion) (finding asylum claim time barred and denying withholding of removal because petitioner failed to establish past persecution based on political opinion or likely future persecution based on social group membership, but remanding CAT claims based on the BIA's failure to consider all evidence of potential future torture in Zimbabwe). See also *Madrigal v. Holder*, 716 F.3d 499 (9th Cir. 2012) (mistreatment by members of drug cartel beyond Mexican government's control could establish past persecution, and acquiescence of local officials in torture established required parameters of relief under the CAT); *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2011) (denying persecution claim on the grounds that petitioners who refused to join Honduran youth gangs were not a particular social group, but remanding the case for determination of whether police refusal to help aliens constituted acquiescence of a public official in torture for purposes of CAT claim).



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in immigration cases are analytically distinct, the underlying facts upon which asylum and related claims are based also may support claims under one or more of the statutory grounds discussed in this guide.<sup>342</sup>

### D. Additional Statutory Remedies

There are other federal statutes that potentially relate to human rights claims. These include the following:

- Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595 (TVPRA);
- Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (RFRA);
- Anti-Terrorism Act, 18 U.S.C. §§ 2331, 2333 (ATA);
- State Sponsors of Terrorism Exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7) (FSIA); and
- Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1962 (RICO).

Claims under these provisions may be raised in tandem with claims under the ATS or the TVPA. But RICO, RFRA, the TVPRA, and anti-terrorism laws have a much broader application that extends far beyond the human rights focus of this guide. Although federal courts should be aware that human rights claims may arise under these provisions, those claims form a much smaller part of the overall picture of federal human rights litigation. Consequently, they are discussed in less detail here.

#### 1. Trafficking Victims Protection Reauthorization Act

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) prohibits involuntary servitude, forced labor, and trafficking individuals to facilitate these crimes or sexual offenses against the person.<sup>343</sup> It also provides victims with the right to recover damages and attorneys' fees through a civil action in federal court.<sup>344</sup> Claims may be asserted against perpetrators and anyone who “knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act

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342. Parallel proceedings are addressed in Part III.F, *infra*.

343. See 18 U.S.C. §§ 1589–1591 (criminal offenses).

344. See 18 U.S.C. § 1595(a) (civil action).

in violation of [the TVPRA].”<sup>345</sup> TVPRA claims for human trafficking are often paired with other federal causes of action, such as RICO and ATS cases.<sup>346</sup>

A federal court may take jurisdiction over any domestic violation of the TVPRA and over conduct occurring abroad if the alleged offender is a U.S. national or resident or otherwise is found in the United States.<sup>347</sup> Extraterritorial application of the TVPRA was explicitly authorized by Congress in the statute’s December 2008 reauthorization. The reauthorization legislatively supersedes cases such as *Roe v. Bridgestone Corp.*, which had held that the prior version of the TVPRA provided no remedy for violations outside the United States.<sup>348</sup> A more recent decision, *Adhikari v. Daoud & Partners*, confirmed the TVPRA’s retroactive application to a case involving overseas human trafficking brought by Nepalese laborers against a U.S.-based contracting company.<sup>349</sup>

## **2. Religious Freedom Restoration Act**

The Religious Freedom Restoration Act (RFRA)<sup>350</sup> has been raised in human rights cases involving religious practices. RFRA provides that the “[g]overnment shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” except to further a compelling governmental interest and only by using the least restrictive means available to accomplish that goal. RFRA applies to the U.S. federal government only, not to state or local governments.<sup>351</sup> It pro-

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345. 18 U.S.C. § 1595(a).

346. *See, e.g., Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 688–90 (S.D. Tex. 2009) (declining to dismiss claims that human trafficking and other mistreatment by the Jordanian affiliate of a military contractor and its subsidiaries violated the TVPRA as well as the ATS and civil RICO statutes).

347. 18 U.S.C. § 1596(a).

348. *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 999–1003 (S.D. Ind. 2007).

349. *Adhikari*, 697 F. Supp. 2d at 683–84 (confirming that extraterritorial application of the TVPRA, provided for in the 2008 amendments to prior version of federal trafficking statute, applied retroactively, such that federal civil jurisdiction over such conduct existed even if it took place before the amendments were enacted).

350. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) (2012) [hereinafter RFRA].

351. *See* RFRA, 42 U.S.C. § 2000bb-2(1) (defining “government” as the United States), and § 2000bb-3(a) (applying RFRA to “[f]ederal law”).

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vides a civil remedy for violations and allows federal courts to enter “appropriate relief” against infringing governmental entities.<sup>352</sup>

Although RFRA is not limited to foreign plaintiffs or the international human rights context, RFRA violations have been raised in tandem with other human rights claims. In *Jama v. INS*,<sup>353</sup> alien plaintiffs brought ATS claims against federal border guards for torture, beatings, and harassment that occurred while they were detained on immigration charges. The plaintiffs also alleged that detention facility personnel impermissibly burdened their free exercise of religion. The court allowed the ATS claims based on the abysmal living conditions at the facility to proceed, together with RFRA claims grounded in detention policies and other conduct that interfered with the plaintiffs’ religious observances.<sup>354</sup>

Other factors may limit RFRA’s application, however. One such factor is the plaintiff’s nationality. In *Rasul v. Myers*, detainees at Guantanamo Bay, Cuba, alleged, inter alia, that the federal government substantially burdened the exercise of Muslim religious beliefs and engaged in systematic efforts to disrupt religious observances.<sup>355</sup> In the second *Rasul* opinion issued by the D.C. Circuit (*Rasul II*), the majority noted that “Congress legislated [RFRA] against the background of precedent establishing that nonresident aliens were not among the ‘person[s]’ protected by the Fifth Amendment . . . and were not among ‘the people’ protected by the Fourth Amendment[.]”<sup>356</sup> It then held that “the term ‘person’ as used in RFRA should be read consistently with similar language in constitutional provisions.”<sup>357</sup>

On this basis, the *Rasul II* majority concluded that the Guantanamo detainees were not “persons” entitled to invoke RFRA’s protections

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352. RFRA legislatively overrules *Employment Division v. Smith*, 494 U.S. 872 (1990) (neutral, generally applicable laws that incidentally restrict religious freedom must satisfy only rational basis review), and restores the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

353. *Jama v. INS*, 343 F. Supp. 2d 338 (D.N.J. 2004).

354. *Id.* at 366.

355. *Rasul v. Myers*, 563 F.3d 527, 533 (D.C. Cir. 2009) [hereinafter *Rasul II*].

356. *Id.* at 533 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950) (Fifth Amendment), and *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (Fourth Amendment)).

357. *Id.* at 532–33 (internal quotations and citations omitted).

against the federal government and dismissed the claims.<sup>358</sup> In a separate concurring opinion, Judge Brown agreed with the dismissal of RFRA claims on the grounds of qualified immunity but disputed the majority's reasoning on whether the detainees were "persons" entitled to assert claims under RFRA.<sup>359</sup>

Plaintiffs also face immunity obstacles to RFRA claims, at least when the conduct in question occurs outside of the United States and is connected to military activities. In early 2012, RFRA claims against government and military officials alleging detention abuses overseas were dismissed by the Fourth and Ninth Circuits on qualified immunity grounds.<sup>360</sup> Qualified immunity also was a separate ground for dismissing the plaintiff Guantanamo Bay detainees' RFRA claims in *Rasul II*.<sup>361</sup>

### **3. Anti-Terrorism Act**

There are specific federal statutes addressing acts of terrorism. The Anti-Terrorism Act (ATA) allows a U.S. national to seek treble damages for injuries to "his or her person, property or business by reason of an act of international terrorism."<sup>362</sup> ATA cases have been brought against non-state entities,<sup>363</sup> individuals,<sup>364</sup> and even commercial banks<sup>365</sup> in connec-

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358. *Id.* at 533. In *Rasul II*, the D.C. Circuit reinstated a prior judgment, *Rasul v. Myers*, 512 F.3d 644, 671–72 (2008) (*Rasul I*), that had been vacated by the Supreme Court for reconsideration in light of *Boumediene v. Bush*, 553 U.S. 723 (2008). See *Rasul v. Myers*, 555 U.S. 1083 (2008) (vacating prior decision), and *Rasul II*, 563 F.3d at 533 (reinstating prior decision).

359. See generally *Rasul II*, 563 F.3d at 533 (Brown, J., concurring) ("Unlike the majority, I believe Congress 'did not specifically intend to vest the term "persons" with a definition . . . at odds with its plain meaning.' The majority does not point to a single statute defining 'person' so narrowly as to exclude nonresident aliens from its ambit, and nothing in RFRA's history suggests Congress focused on the term's scope here.") (internal citations and quotations omitted).

360. See *Lebron v. Rumsfeld*, 670 F.3d 540, 560 (4th Cir. 2012) (dismissing claims on the grounds that RFRA's application "to the military detention setting" was not clearly established at the time of the alleged violations). See also *Padilla v. Yoo*, 678 F.3d 748 (9th Cir. 2012) (same).

361. See *Rasul II*, 563 F.3d at 533, 536 n.6.

362. Anti-Terrorism Act, 18 U.S.C. § 2333 (2012) [hereinafter ATA].

363. See, e.g., *Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153 (D.D.C. 2006).

364. See, e.g., *Morris v. Khadr*, 415 F. Supp. 2d 1323 (D. Utah 2006).

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tion with acts of terrorism overseas. ATA claims are often asserted with claims under other human rights statutes, including the ATS, the TVPA, and RICO.<sup>366</sup>

Standing under the ATA is limited to individuals injured in terrorist attacks or their estates, survivors, or heirs.<sup>367</sup> Some courts have held that available damages include compensation for related emotional injuries as well. In *Biton v. Palestinian Interim Self-Government Authority*, the court held that allegations of “emotional distress, a loss of consortium, and a loss of solatium” qualified as injuries to the plaintiff’s “person, property, or business” and that the bombing in question was properly alleged to have caused those injuries.<sup>368</sup>

In any case, the burden rests with the plaintiffs to establish a causal link between the defendant’s conduct (such as transferring funds or providing material support) and the terrorist acts in question.<sup>369</sup> For their ATA claims to succeed, plaintiffs must prove both proximate cause and material contribution to the terrorist acts with awareness of or indifference to the terrorist’s aims.<sup>370</sup>

The ATA specifically excludes claims against the U.S. government and government officials, however, as well as conduct involving acts of

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365. See, e.g., *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006) (declining to dismiss ATA claims against British bank for allegedly transmitting and collecting funds used in terrorist activities).

366. See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 740 F. Supp. 2d 494 (S.D.N.Y. 2010) (multidistrict litigation arising out of 9/11 terrorist attacks involving claims under ATA, ATS, TVPA, and RICO); *Abecassis v. Wyatt*, 704 F. Supp. 2d 623 (S.D. Tex. 2010) (claims under ATS, ATA, and TVPA for allegedly financing terrorist activities).

367. See *Litle v. Arab Bank, PLC*, 507 F. Supp. 2d 267 (E.D.N.Y. 2007) (denying standing to plaintiffs who claimed emotional injuries as friends of the victim).

368. *Biton v. Palestinian Interim Self-Gov’t Auth.*, 310 F. Supp. 2d 172, 182 (D.D.C. 2004) (finding it “unlikely that Congress would have considered damage to a car to constitute an ‘injury’ for purposes of the ATA but not emotional trauma and a loss of companionship from the death of a spouse occurring in the same attack. Which would you rather lose, a car or a spouse?”).

369. See generally *Rothstein v. UBS AG*, 647 F. Supp. 2d 292 (S.D.N.Y. 2009) (claims against banks for aiding and abetting terrorism).

370. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 637 (S.D. Tex. 2010) (dismissing ATS, ATA, and TVPA claims against oil companies for allegedly financing terrorism by illegally purchasing oil from Iraq in violation of UN Oil-for-Food Program).

war.<sup>371</sup> Its four-year limitations period also is much shorter than the ten-year limitations found in other human rights statutes, although this period is tolled during a defendant's absence from the United States.<sup>372</sup>

#### **4. FSIA State Sponsors of Terrorism Exception**

The “state sponsors of terrorism” exception to the Foreign Sovereign Immunities Act (FSIA)<sup>373</sup> allows direct claims against designated foreign “state sponsors of terrorism”<sup>374</sup> for acts of torture, extrajudicial killing, hostage taking, or aircraft sabotage, or the provision of material support in connection with such acts. At the time of this writing, only three countries are designated under this provision: Iran, Sudan, and Syria.<sup>375</sup> The previously designated states of Iraq, North Korea, Libya, and Cuba have all been removed from the list,<sup>376</sup> thereby eliminating subject-matter jurisdiction over claims against these countries.<sup>377</sup>

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371. ATA, 18 U.S.C. §§ 2336–2337 (2012).

372. *Id.* § 2335. Limitations periods for all human rights causes of action are detailed in Part III.G, *infra*.

373. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605A (2012) [hereinafter FSIA].

374. The U.S. State Department makes this designation pursuant to three laws: article 6(j) of the Export Administration Act of 1979, 50 U.S.C. app. 2405(j) (2012); section 40 of the Arms Export Control Act, 22 U.S.C. § 2780 (2012); and section 620A of the Foreign Assistance Act of 1961, 22 U.S.C. § 2371(a) (2012). *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 18–19 (D.D.C. 2005).

375. *See* U.S. State Department—State Sponsors of Terrorism Designations, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Aug. 10, 2016).

376. *See* Office of Foreign Assets Control, Dep't of the Treasury, Prohibited Financial Transactions, 31 C.F.R. § 596.201 (1997) (prior designation including Iraq, North Korea, Libya, and Cuba).

377. *See, e.g.*, Libyan Claims Resolution Act (LCRA), Pub. L. No. 110–301, Aug. 4, 2008, 122 Stat. 2999, 28 U.S.C.A. § 1605A (note), and Executive Order No. 13477, Oct. 31, 2008, Settlement of Claims Against Libya, 73 Fed. Reg. 65965 (terminating all pending cases and precluding all future claims in United States or Libyan courts based on terrorist acts that occurred prior to June 30, 2006); *Certain Underwriters at Lloyds London v. Great Socialist People's Libyan Arab Jamahiriya*, 677 F. Supp. 2d 270, 275 (D.D.C. 2010) (holding that the LCRA and executive settlement agreement eliminated the FSIA terrorism exception for Libya, thereby depriving the federal courts of subject-matter jurisdiction over reimbursement action by insurance companies for claims paid in connection with a terrorist airline hijacking).

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Prior versions of the FSIA exception did not give rise to a federal cause of action.<sup>378</sup> They simply removed an obstacle to suit and allowed substantive causes of action that existed elsewhere in federal, state, or international law to be asserted against the designated states to the same extent as private individuals.<sup>379</sup> In contrast, the current statute creates a cause of action against both the foreign state and governmental agents. It allows victims to assert wrongful death and other tort claims directly against foreign states—causes of action from which they normally would be immune under U.S. law.<sup>380</sup> The statute also includes provisions designed to make judgments easier to collect.<sup>381</sup>

Unlike the ATS, which allows suits only by non-citizens, under the FSIA state sponsors of terrorism exception, the claimant must be a U.S. national at the time of the injury.<sup>382</sup> A ten-year statute of limitations applies, which is tolled during any period of time in which the defendant was immune from suit.<sup>383</sup>

### 5. Racketeer Influenced and Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act (RICO), which was enacted to counter organized criminal enterprises, has been asserted as a means of recovery in some human rights cases. RICO prohibits racketeering activity in interstate commerce as well as conspiracy and the use

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378. See 28 U.S.C. § 1606. This general rule was subject to some exceptions, such as the so-called Flatow Amendment, Pub. L. No. 104-208, div. A, tit. I § 101(c), 28 U.S.C. § 1605 (note) (2012). *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 25 (D.D.C. 1997) (cause of action for American student killed by suicide bomber in Israel).

379. See, e.g., *Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 68 (D.D.C. 2006) (legislatively superseded, see *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 17–18 (D.D.C. 2011)). See also *Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261 (D.D.C. 2005) (recognizing causes of action for battery, intentional infliction of emotional distress, and wrongful death in connection with more than 80 victims and families of victims of the 1983 bombing of the United States Embassy in Beirut, Lebanon).

380. For additional details, see David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (Addendum) (Federal Judicial Center 2013) (discussing state-sponsored terrorism exception).

381. FSIA, 28 U.S.C. § 1605A.

382. *Id.*

383. *Id.*

of income derived from such conduct.<sup>384</sup> It provides both criminal penalties and civil remedies, including treble damages and attorneys' fees,<sup>385</sup> subject to a four-year limitations period.<sup>386</sup>

Civil recovery under RICO is limited to damages from injury to business interests or property. Damages from personal injuries, such as murder, kidnapping, or emotional distress, are not compensable.<sup>387</sup> RICO claims in human rights cases have been dismissed on this basis. In *Ibrahim v. Titan Corp.*,<sup>388</sup> for example, the court held that detainees in an Iraqi prison lacked standing under RICO because the only allegations against Titan's contractors were personal injuries (alleged acts of torture), rather than injuries to business or property.

In contrast, the Nigerian plaintiffs in *Wiwa v. Royal Dutch Petroleum Co.*<sup>389</sup> were allowed to proceed on RICO claims on the grounds that summary executions, crimes against humanity, torture, and other serious human rights violations also caused property damage and business harm. One *Wiwa* plaintiff alleged that he "was forced to flee Nigeria and leave his medical practice because he feared arbitrary arrest, torture and death as a consequence of defendants' racketeering activities."<sup>390</sup> Another claimed a loss of crops and future farming income as a result of being beaten and shot by the defendants, which caused physical injuries that prevented her from operating her farm. The court found that both plaintiffs had pled sufficient pecuniary injury from alleged racketeering activities to survive the defendants' motion to dismiss these claims.<sup>391</sup>

Human rights plaintiffs must establish a sufficient connection between the alleged RICO activity and the human rights violations in ques-

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384. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2012) [hereinafter RICO].

385. See RICO, 18 U.S.C. § 1964(c) ("Any person injured in his business or property by reason of a violation of . . . [18 U.S.C. § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . .").

386. See *Agency Holding v. Malley-Duff Assocs., Inc.*, 483 U.S. 143 (1987).

387. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

388. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005).

389. *Wiwa v. Royal Dutch Petroleum Co.*, No. 96-CV-8386, 2002 WL 319887, at \*26 (S.D.N.Y. Feb. 28, 2002).

390. *Id.*

391. *Id.*



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tion. Such RICO claims are subject, however, to limitations on extraterritorial application under the broader principles delineated by the Supreme Court in *Morrison* and *Kiobel*. In *RJR Nabisco v. European Community*, the Supreme Court held unanimously that RICO was an example of “the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”<sup>392</sup> Not all extraterritorial conduct is covered, however—the question turns on whether the underlying RICO predicates themselves have extraterritorial effect.<sup>393</sup>

There was less agreement among the justices, however, about the extraterritorial application of RICO’s private right of action. In a ruling that may have a significant impact on human rights plaintiffs, the Court split 4–3 on whether RICO’s private right of action applied to injuries that occurred overseas. Focusing primarily on concerns about “international friction” caused by redressing foreign injuries in U.S. courts, the majority determined that there was insufficient evidence of congressional intent to create a remedy for overseas conduct,<sup>394</sup> such that only domestic injuries were covered.<sup>395</sup> The dissent disputed this conclusion, arguing that RICO’s private remedy derived directly from the statutory provision that the Court already had determined could apply extraterritorially.<sup>396</sup> In the dissent’s view, prior RICO precedent required “linking, not separating, prohibited activities and authorized remedies” under RICO, including its private right of action.<sup>397</sup>

Thus, under *RJR Nabisco*, federal courts must determine whether civil RICO is even available to human rights plaintiffs as a remedy based on where the injuries occurred. When RICO does apply, it requires proof of racketeering (as defined in the statute) that proximately caused harm

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392. *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2103 (2016).

393. *Id.* at 2102.

394. *Id.* at 2106–11.

395. *Id.* at 2111. (holding that “[s]ection 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries”).

396. *Id.* at 2113. (“How can § 1964(c) exclude [such overseas claims] when, by its express terms, § 1964(c) is triggered by ‘a violation of section 1962?’”) (Ginsburg, J., dissenting) (internal citations omitted).

397. *Id.*

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to the plaintiff's business interests or property,<sup>398</sup> operating as a "but-for" cause of the injury.<sup>399</sup> For example, a pre-*RJR Nabisco* case, *Corrie v. Caterpillar, Inc.*,<sup>400</sup> involved deaths and the destruction of homes in the Gaza Strip by Israeli Defense Forces using bulldozers manufactured by Caterpillar. The court dismissed the Palestinian plaintiffs' civil RICO claims on multiple grounds:

1. The relationship between Caterpillar and the State of Israel was too attenuated to constitute an "enterprise."
2. Caterpillar did not engage in "racketeering activities" because the sale of bulldozers was not alleged to be punishable under state law.
3. Caterpillar's actions were not the proximate cause of the plaintiffs' injury.
4. The plaintiffs failed to allege "some factual basis for the finding of a conscious agreement among defendants" sufficient to state a claim for conspiracy.<sup>401</sup>

RICO allegations are independent of other human rights claims but may arise in tandem with litigation under the ATS. One ATS/RICO case, *Licea v. Curacao Drydock Co.*,<sup>402</sup> involved claims that a dry-dock company conspired with the Cuban government to force Cuban nationals into labor camps in violation of international law prohibiting forced labor and human trafficking. The court awarded the plaintiffs \$80 million in compensatory and punitive damages under the ATS but also held that RICO was a separate ground of recovery that supported both jurisdiction and damages.<sup>403</sup>

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398. Civil RICO plaintiffs must establish "(1) that the defendant (2) through the commission of two or more acts (3) constituting a 'pattern' (4) of 'racketeering activity' (5) directly or indirectly invests in, maintains an interest in, or participates in (6) an 'enterprise' (7) the activities of which affect interstate or foreign commerce." *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983).

399. *See, e.g., Lopez v. Council on American-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104 (D.D.C. 2009).

400. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005).

401. *Id.* at 1027-30.

402. *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

403. *Id.* at 1359.

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RICO claims for human trafficking have also been paired with claims under the TVPRA. In *Adhikari v. Daoud & Partners*, for example, the court found that allegations of human trafficking and mistreatment by the Jordanian affiliate of a military contractor and its subsidiaries potentially violated RICO, the ATS, and the TVPRA.<sup>404</sup>

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404. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 688–90 (S.D. Tex. 2009) (allowing the plaintiffs to proceed on RICO, ATS, and TVPRA claims).



### III. Procedural Issues

The ordinary procedural requirements of civil litigation in federal court also apply to human rights cases. Plaintiffs in human rights cases must demonstrate that each defendant has been properly served with legal process. They also must establish that the alleged perpetrators are subject to personal jurisdiction and that venue is proper. Defendants may seek dismissal under the doctrine of *forum non conveniens* and also may challenge standing and whether the plaintiffs have actual rights to assert the claims in question. Further disputes may arise over the scope and timing of overseas discovery and whether claims have been brought in a timely manner.

While these procedural issues are of course separate legal questions, in practice they may be raised in tandem and often are predicated upon similar underlying facts. They and other related issues are discussed below.

#### A. Service of Process

The service of process requirements in human rights cases follow Rule 4 of the Federal Rules of Civil Procedure. It is incumbent upon the plaintiff to properly serve the summons and complaint upon all defendants, whether they are present in the United States or located abroad.<sup>405</sup>

Service is most easily accomplished when a defendant is physically served while present within the United States. In many human rights cases, however, the defendant will not be available within the United States. This requires service of process in a foreign state—often the place in which the alleged human rights violations occurred. Service overseas must be made pursuant to a treaty agreement between the United States and the foreign nation, if one exists.<sup>406</sup> One such agreement is the multi-lateral Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the “Hague Service Convention”), which sets forth detailed means for the transnational

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405. See Fed. R. Civ. P. 4 and 4.1 (service of summons and complaint).

406. See Fed. R. Civ. P. 4(f)(1) (service abroad by “internationally agreed means”).

service of legal process.<sup>407</sup> The Hague Service Convention provides the exclusive means of service in countries that are parties to this treaty.<sup>408</sup>

Under the Hague Service Convention, plaintiffs generally present service requests to a designated central authority in the foreign state, including the documents to be served, required translations, and a special transmittal document that comports with the model forms annexed to the convention. The application of the Hague Service Convention varies by country, however, such that otherwise-valid means of service may not be available for a particular overseas defendant. This can occur, for example, when the country in question objected to a particular mode of service by making a reservation when it ratified the Hague Service Convention itself.<sup>409</sup>

Where the Hague Service Convention applies, “the party seeking to apply the Convention bears the burden to show that the ‘particular facts, sovereign interests, and likelihood [that resorting to Hague procedures] will prove effective.’”<sup>410</sup> That said, minor technical errors in transnational service will not invalidate service when a defendant receives actual notice. Even in human rights cases, the service rules are “to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the party has received actual notice.”<sup>411</sup>

Questions of sovereign immunity, which are discussed in more detail below,<sup>412</sup> may impact service of process as well. For example, when a dis-

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407. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 art. 1 (1969) (“The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”).

408. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988).

409. *See, e.g., Mones v. Commercial Bank of Kuwait*, 502 F. Supp. 2d 363, 369–71 (S.D.N.Y. 2007) (service by mail under the Hague Convention was ineffective where the Kuwaiti government repeatedly objected to its use).

410. *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 529 (D.N.J. 2009) (quoting *In re Automotive Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 300 (3d Cir. 2004)).

411. *See Doe v. Constant*, 354 F. App’x 543, 546 (2d Cir. 2009) (because former Haitian military leader whose name was misspelled in the summons received actual notice of ATS and TVPA claims, and because any defects in the summons were purely clerical, default judgment would not be vacated) (internal quotations omitted).

412. *See infra* Part IV.

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pute involves a foreign government, agency, or instrumentality, the FSIA specifies the exclusive methods by which process may be served.<sup>413</sup> Immunity also can invalidate otherwise permissible modes of service. Diplomats, for example, have long been granted special protections and exemptions under international law.<sup>414</sup> Diplomatic immunity protects diplomats and their family members “from arrest, detention and, in general, civil process.”<sup>415</sup> These diplomatic protections can invalidate service based upon immunity attaching to a person (e.g., ambassadors and government officials),<sup>416</sup> to the participants in a “mission” or visiting delegation,<sup>417</sup> or to a geographic location (e.g., the six-block area surrounding the United Nations headquarters building).<sup>418</sup>

The Second Circuit considered all three types of immunity in *Kadic v. Karadžić*. It determined that the Bosnian Serb leader attending meetings at the United Nations was not entitled to immunity from service of process as a head of state or as a U.N. mission delegate, even though he was in New York to discuss the armed conflict in the former Yugoslavia in the early 1990s. The court held that immunity did apply to the geographic area constituting the U.N. headquarters district, such that personal service upon the defendant within this zone was invalid. It determined, however, that service a second time outside of the immunity zone was valid, such that the defendant was required to defend claims of genocide and other human rights violations in federal court in New York.<sup>419</sup>

Where no international agreement applies, service may be made pursuant to the foreign country’s laws or through other means authorized by

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413. FSIA, 28 U.S.C. § 1608(a)(1)–(a)(4) (2012).

414. *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 721–25 (2004) (discussing historic protections for diplomats); *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. 1784) (affirming criminal conviction under law of nations for assault on French ambassador).

415. Restatement (Third) of Foreign Relations Law § 464 (1987).

416. *See, e.g., Tachiona v. United States*, 386 F.3d 205, 221–24 (2d Cir. 2004) (service on foreign president and foreign minister violated diplomatic immunity and therefore was ineffective).

417. Restatement (Third) of Foreign Relations Law § 464 cmt. i (1987).

418. *See, e.g., Kadic v. Karadžić*, 70 F.3d 232, 247 (2d Cir. 1995).

419. *Id.* at 247–48.

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the court.<sup>420</sup> This includes service under state long-arm statutes. In *Estate of Manook v. Research Triangle Institute*,<sup>421</sup> for example, the defendant, a Singaporean corporation with a principal base of business in Dubai, sought to dismiss ATS and TVPA claims based on insufficient service of process. The defendant argued that service was defective because overnight packages containing the plaintiff's Notice of Service were sent to the wrong address, were delivered by a non-neutral party, and did not constitute "mail" under the applicable rules.<sup>422</sup> The court declined to even consider these issues because the defendant also had been properly served pursuant to Washington, D.C.'s long-arm statute.<sup>423</sup>

If the circumstances require it, the court may authorize service in some other manner or modify otherwise-applicable service procedures. In *Kadic v. Karadžić*, for example, the court modified in-hand service requirements to allow service by providing a copy of the summons and complaint to a member of the defendant's State Department security detail, together with a court order directing the recipient to provide the summons to the defendant.<sup>424</sup> In litigation stemming from the bombing of the American embassy in Kenya, the court authorized service on Osama bin Laden and al-Qaeda by publication, because the addresses of bin Laden and his organization were neither known nor easily ascertainable.<sup>425</sup>

### ***B. Personal Jurisdiction***

Human rights plaintiffs must demonstrate that alleged perpetrators are subject to personal jurisdiction in the court before which their claims are pending.<sup>426</sup> An American court may not adjudicate a defendant's rights if

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420. See Fed. R. Civ. P. 4(f)(3) (allowing transnational service "by other means not prohibited by international agreement, as the court orders").

421. *Estate of Manook v. Research Triangle Inst.*, 693 F. Supp. 2d 4 (D.D.C. 2010).

422. See Fed. R. Civ. P. 4(f)(2)(C)(ii) (allowing service by use of "any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt").

423. *Estate of Manook*, 693 F. Supp. 2d at 11.

424. See *Kadic*, 70 F.3d at 246-47.

425. *Mwani v. Bin Laden*, 417 F.3d 1, 8 (D.C. Cir. 2005).

426. *Kulko v. Superior Court*, 436 U.S. 84, 91 (1978). See also *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 6 (1st Cir. 2000) (plaintiff's burden to establish personal jurisdiction in transnational litigation).



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the court's assertion of personal jurisdiction over that defendant would violate "traditional notions of fair play and substantial justice."<sup>427</sup> This requirement reflects the constitutional principle that due process under the Fourteenth Amendment requires a minimum baseline of volitional contact by the defendant with the forum in question.<sup>428</sup> In the early stages of litigation, a human rights plaintiff need only establish a prima facie showing of such contacts in order to overcome a motion to dismiss.<sup>429</sup> Discovery also may be phased to focus solely on these potentially dispositive issues at the outset of the case,<sup>430</sup> although considerations of cost, delay, and fairness also come into play, especially when overseas discovery is required.<sup>431</sup>

Personal jurisdiction turns principally on the nature and extent of the defendant's contacts with the U.S. forum. In-hand service establishes valid personal jurisdiction over human rights defendants even when they have no other contacts with the United States and the injuries alleged in the case occurred overseas.<sup>432</sup> When personal service is made on a defendant's local agent, however, the plaintiff must establish that the agent was authorized to accept service of process on the defendant's behalf.<sup>433</sup>

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427. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring sufficient "minimum contacts" with the forum "that the maintenance of the suit does not offend traditional notions of fair play and substantial justice" in violation of the U.S. Constitution). See also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (reaffirming *International Shoe*).

428. See *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011).

429. See *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 99 (2d Cir. 2000).

430. See, e.g., *Jet Wine & Spirits, Inc. v. Bacardi & Co.*, 298 F.3d 1, 6 (1st Cir. 2000) (early discovery on personal jurisdiction); *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (holding that discovery on personal jurisdiction "should ordinarily be granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary") (internal quotations omitted).

431. Case and docket management are discussed in Part VII, *infra*.

432. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 609–16 (1990); *Kadic v. Karadžić*, 70 F.3d 232, 246–48 (2d Cir. 1995). See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980) (service on defendant living in New York at the time the lawsuit was filed).

433. See *Estate of Klieman v. Palestinian Auth.*, 467 F. Supp. 2d 107, 114 (D.D.C. 2006) (service of process on a researcher in the Palestine Liberation Organization's Washington, D.C., offices was insufficient to establish personal jurisdiction over defendant).

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When personal service within the United States is not available, service may be made pursuant to state long-arm statutes. As in other types of cases, the burden rests with the plaintiff to establish that the defendant has continuous and systematic contacts with the United States<sup>434</sup> such that the defendant would reasonably anticipate being required to respond to claims in an American court.<sup>435</sup>

In 2011, the Supreme Court considered personal jurisdiction in the products liability case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*.<sup>436</sup> *Goodyear* involved a bus accident in France in which tires manufactured by the defendant (the Turkish subsidiary of an American company) allegedly failed, causing the deaths of several American citizens. The North Carolina Court of Appeals determined that personal jurisdiction existed in North Carolina and allowed the case to proceed.<sup>437</sup> The Supreme Court reversed.

The Court noted that personal jurisdiction consists of two types: general and specific. General jurisdiction—which provides personal jurisdiction over a defendant in any legal matter—arises when a defendant’s contacts “with the State are so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State.”<sup>438</sup> Specific jurisdiction, on the other hand, applies to connections “‘between the forum and the underlying controversy,’ principally, an activity or occurrence that takes place in the forum State and is therefore subject to the State’s regulation.”<sup>439</sup>

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PLO members in an ATA case arising out of a terrorist bombing in Israel, absent proof that the researcher was authorized to accept service as their agent).

434. See *In re Terrorist Attacks* on Sept. 11, 2001, 740 F. Supp. 2d 494 (S.D.N.Y. 2010) (granting in part and denying in part motions to dismiss claims brought pursuant to the ATS, ATA, TVPA, and RICO in multidistrict litigation arising out of 9/11 terrorist attacks in the United States on personal jurisdiction grounds).

435. *Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 422 F. Supp. 2d 96, 105 (D.D.C. 2006) (dismissing ATA claims in which individual defendants had no contact whatsoever with the United States).

436. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011).

437. *Brown v. Meter*, 681 S.E.2d 382 (N.C. 2009).

438. *Goodyear*, 131 S. Ct. at 2851 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

439. *Id.* (internal citations omitted).

### III. Procedural Issues

The Court’s rejection of the “stream of commerce” argument that had persuaded the North Carolina court is particularly relevant to human rights defendants who have little or no direct contact with the United States but whose products ultimately may be distributed in one or more American states. In *Goodyear*, the fact that a small number of the defendant’s products (tens of thousands of tires out of tens of millions—and none of the type of tire involved in the accident) were distributed in North Carolina from 2004 to 2007 was held insufficient to establish general jurisdiction in the state. And because the accident in question occurred overseas, the lack of connection between the underlying claims and the defendant’s conduct in the state prohibited specific jurisdiction as well.<sup>440</sup>

Human rights cases against corporate defendants raise similar questions of (1) whether parent companies are responsible for acts of their overseas subsidiaries and, if so, (2) whether personal jurisdiction exists over related entities. These questions came before the Supreme Court in a human rights case involving the Alien Tort Statute.

*Daimler AG v. Bauman* involved ATS claims that a German automobile manufacturer’s Argentinian subsidiary collaborated with state security forces in kidnappings, detentions, torture, and murders during Argentina’s “Dirty War” from 1976 to 1983.<sup>441</sup> The plaintiffs sued Daimler using California’s long-arm statute, which authorizes personal jurisdiction to the full extent permitted under the United States Constitution. The district court subsequently granted Daimler’s motion to dismiss, finding that the court lacked personal jurisdiction over this foreign corporation. The Ninth Circuit reversed, holding that the exercise of personal jurisdiction over Daimler was consistent with due process.<sup>442</sup> Relying on an agency theory, the court of appeals determined that personal jurisdiction existed because Daimler’s local subsidiary in California pro-

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440. *Id.* at 2855. See also *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 886 (2011) (New Jersey courts could not assert personal jurisdiction over British manufacturer of a product purchased by a New Jersey business that allegedly injured an employee, because the manufacturer had not “purposefully directed” its products toward New Jersey, even though it had encouraged its local distributors to market the product throughout the United States).

441. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

442. See *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 931 (9th Cir. 2011).

vided “important” services to Daimler in the state that were attributable to it.<sup>443</sup>

The Supreme Court reversed (9–0), holding the exercise of personal jurisdiction improper.<sup>444</sup> The Court rejected the Ninth Circuit’s agency theory as vastly overbroad, noting that its “inquiry into importance stacks the deck, for it will always yield a pro-jurisdiction answer.”<sup>445</sup> Even if the subsidiary’s conduct was imputable to Daimler, due process still prohibited the exercise of personal jurisdiction over it.

Because the underlying conduct occurred in Argentina and was unrelated to the defendant’s activities in California, *Bauman* addressed only general (“all-purpose”) personal jurisdiction.<sup>446</sup> The Court noted that the “paradigm all-purpose forums” for corporations are their place of incorporation and their principal place of business.<sup>447</sup> The majority expressly declined to adopt a broad standard that would allow personal jurisdiction whenever a corporation “engages in a substantial, continuous, and systematic course of business” in a particular state.<sup>448</sup> It held that the proper question under *Goodyear* was whether the “foreign corporation’s ‘affiliations with the State’ are so ‘continuous and systematic’ as to render [the corporation] essentially at home in the forum State.”<sup>449</sup> Because the in-state contacts were insufficient to render Daimler “at home” in California, the due process clause prohibited the exercise of personal jurisdiction over it.<sup>450</sup>

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443. *Id.* at 920.

444. *See Bauman*, 134 S. Ct. 746 (Justice Sotomayor concurred only in the result).

445. *Id.* at 759–60 (holding that the Ninth Circuit’s test would cover acts by distributors, subsidiaries, and independent contractors, and “thus appears to subject foreign corporations to general jurisdiction whenever they have an in-state subsidiary or affiliate, an outcome that would sweep beyond even the ‘sprawling view of general jurisdiction’ we rejected in *Goodyear*”) (internal quotations and citations omitted).

446. *Id.* at 758. The plaintiffs never asserted any grounds for specific jurisdiction in the case. *Id.*

447. *Id.* at 760–61.

448. *Id.*

449. *Id.* at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011)).

450. *Id.* at 761–62. Justice Sotomayor disagreed with the majority’s reasoning but concurred in the result. *Id.* at 763–74 (Sotomayor, J., concurring). Apart from the jurisdictional issues, the majority also noted that the underlying ATS and TVPA claims at issue had been rendered “infirm” by the Court’s other jurisprudence. *Id.* at 762–63 (citing

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The plaintiffs in *Bauman* did not allege that Daimler’s local subsidiary was an alter-ego of the parent company,<sup>451</sup> and the conduct within the forum jurisdiction was insufficient in any event to allow personal jurisdiction.<sup>452</sup> Things may work out differently in other cases involving overseas parent corporations (e.g., cases involving specific jurisdiction or cases in which there is sufficient conduct to render the parent corporations generally “at home” in the forum). As discussed above,<sup>453</sup> although separation of entities is respected where corporate formalities are observed, the corporate veil may be pierced where conduct rises to the level of dominance and control over the subsidiary, making the subsidiary an alter-ego of the parent company. In such cases, an overseas parent company may be held to have engaged in sufficient conduct within the state to justify an assertion of personal jurisdiction over it.<sup>454</sup>

#### C. *Venue and Forum Non Conveniens*

Once a defendant has been served and personal jurisdiction is established, the court may be called upon to resolve issues relating to venue and the doctrine of *forum non conveniens*. To date, venue has played a much smaller role in human rights cases than has *forum non conveniens*. The ordinary venue rules generally apply in human rights cases: individual and corporate aliens may be sued in any district.<sup>455</sup> Where Congress so specifies, special venue rules may apply to all claims (including human rights violations) arising out of certain events (e.g., the 9/11 terrorist at-

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Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (presumption against extraterritorial application of the ATS), and Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012) (limiting TVPA claims to defendants who were natural persons)).

451. *Id.* at 758.

452. *Id.* at 760–62.

453. *See supra* Part II.C.

454. *See, e.g.,* Meier v. Sun Int’l Hotels, Ltd., 288 F.3d 1264, 1272–74 (11th Cir. 2002) (overseas corporation engaged in substantial activity in jurisdiction through subsidiary that could not be characterized as isolated). In such cases, state long-arm statutes also may provide valid means of service on non-U.S. corporate defendants through their domestic subsidiaries. *See Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988) (despite the transnational dimension of the case, “[w]here service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the [Hague] Convention has no further implications”).

455. 28 U.S.C. § 1391(d).

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tacks<sup>456</sup>) or involving certain types of defendants (e.g., foreign governments sued pursuant to a FSIA exception<sup>457</sup>).

The doctrine of *forum non conveniens* (inconvenient forum) involves more complicated legal issues. This doctrine provides a discretionary basis for requiring a particular case to be heard in another forum, even when all other considerations—such as jurisdiction and venue—are proper. Typically, it is raised by human rights defendants seeking to have the claims against them adjudicated either in their foreign home jurisdiction or in the overseas jurisdiction where the alleged injuries occurred. Although it is often raised simultaneously with motions to dismiss on other grounds, federal courts may dismiss cases on the basis of *forum non conveniens* without first resolving challenges to subject-matter or personal jurisdiction.<sup>458</sup>

The basic framework for *forum non conveniens* is reflected in two Supreme Court decisions from 1947—*Gulf Oil Corp. v. Gilbert*<sup>459</sup> and *Koster v. American Lumbermens Mutual Casualty Co.*<sup>460</sup> The analysis consists of two steps: (1) determining whether an adequate alternative forum exists that can hear the claim; and (2) considering whether the balance of public interests and private interests weighs in favor of trial in that forum instead of the court in which the case was filed.<sup>461</sup> Defendants

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456. See, e.g., Pub. L. No. 107-42, 115 Stat. 230 (2001) § 408(b)(3) (exclusive jurisdiction and venue in Southern District of New York for claims arising out of September 11, 2001, terrorist attacks).

457. See, e.g., 28 U.S.C. § 1391(f)(1)–(4) (2012) (venue in FSIA cases is always proper in District of Columbia, in addition to jurisdictions where the underlying events occurred or where disputed property is located).

458. See *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 432 (2007) (unanimous decision holding that “[a] district court . . . may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant”).

459. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

460. *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947).

461. See *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 100 (2d Cir. 2000) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. Am. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947)).

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bear the “burden of showing that the *Gilbert* factors tilt strongly in favor of trial in the foreign forum.”<sup>462</sup>

The plaintiff’s choice of forum is a significant factor in this analysis.<sup>463</sup> This consideration may be particularly important in human rights cases. The ATS case of *Wiwa v. Royal Dutch Petroleum*, for example, involved allegations that employees of the Nigerian subsidiary of a foreign oil company had engaged in summary executions, crimes against humanity, and torture. The Second Circuit noted that “[d]ismissal on grounds of *forum non conveniens* can represent a huge setback in a plaintiff’s efforts to seek reparations for acts of torture.”<sup>464</sup> It found three factors particularly important: (1) the U.S.-resident plaintiff’s choice of the American forum; (2) the interests of the United States in providing a forum to redress international human rights violations; and (3) whether the factors weighing in favor of a foreign forum are “particularly compelling.”<sup>465</sup>

While not an issue in *Wiwa*,<sup>466</sup> the adequacy of the alternate forum is a critical issue in some human rights cases. A proposed alternative may be deemed inadequate if “[the forum] does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all.”<sup>467</sup> Political unrest also can render a foreign forum unsuitable.<sup>468</sup>

The assessment of the adequacy of the foreign forum is an ongoing process that may change during the course of litigation. In a pair of cases before the Southern District of New York, *Adamu v. Pfizer, Inc.*<sup>469</sup> and

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462. *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 106 (2d Cir. 2000) (internal quotations and citations omitted).

463. See *Gilbert*, 330 U.S. at 508 (“unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed”).

464. *Wiwa*, 226 F.3d at 105.

465. *Id.* at 101.

466. *Id.* (noting that the Second Circuit regarded “the British courts as exemplary in their fairness and commitment to the rule of law”).

467. *Abdullahi v. Pfizer, Inc.*, 562 F.3d at 189 (2d Cir. 2009) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254–55 & n.22 (1981)).

468. See, e.g., *Hatzlach Supply, Inc. v. Tradewind Airways, Ltd.*, 659 F. Supp. 115 (S.D.N.Y. 1987) (finding Nigeria to be an inadequate forum).

469. *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005).

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*Abdullahi v. Pfizer, Inc.*,<sup>470</sup> groups of Nigerian plaintiffs asserted ATS claims for unlawful medical experimentation in connection with the administration of experimental antibiotics. The trial court rejected both complaints for failure to state a claim under the ATS, dismissing in the alternative on *forum non conveniens* grounds. But while the plaintiffs' appeal was pending, "a tectonic change . . . altered the relevant political landscape" in Nigeria.<sup>471</sup> In unrelated cases, Pfizer had become the target of a \$2 billion criminal and civil investigation and a \$7 billion federal government lawsuit in Nigeria.<sup>472</sup> The Second Circuit ruled that non-consensual medical experimentation was compensable under the ATS, reversed the dismissal on these grounds, and remanded the case for reconsideration of the *forum non conveniens* dismissal in light of the changed circumstances in Nigeria.<sup>473</sup>

The public interest of the United States in providing a remedy for international human rights violations is another significant factor.<sup>474</sup> This interest may be overridden by other federal policy considerations, however. In *Mastafa v. Australian Wheat Board*,<sup>475</sup> for example, Iraqi victims of torture, imprisonment, and killing by Saddam Hussein's regime sued an Australian company under the ATS for providing kickbacks in violation of the United Nations Oil-for-Food Program. The court found that Australia provided the most convenient alternative forum and dismissed the case under the *forum non conveniens* doctrine, reasoning that

[a]djudication of foreign claims under ATCA is certainly appropriate where an adequate foreign forum is unavailable or there is reason to

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470. *Abdullahi v. Pfizer, Inc.*, No. 01-CV-8118, 2005 WL 1870811 (S.D.N.Y. Aug. 9, 2005), *rev'd and remanded by* 562 F.3d 163 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010) (mem.).

471. *Abdullahi v. Pfizer, Inc.*, 562 F.3d at 189.

472. *Id.* at 172.

473. *Id.* at 189–90.

474. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000) (reversing dismissal on *forum non conveniens* grounds and noting as significant the "United States resident plaintiff's choice of forum . . . [and] the interests of the United States in furnishing a forum to litigate claims of violations of the international standards of the law of human rights"); *Licea v. Curacao Drydock Co.*, 537 F. Supp. 2d 1270, 1276–77 (S.D. Fla. 2008) (alleged human trafficking of Cuban nationals by dry-dock company).

475. *Mastafa v. Australian Wheat Bd.*, No. 07-CV-7955, 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008).



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think that the foreign forum lacks an interest in pursuing such an adjudication or that litigation in the United States would be more convenient for the parties. But where, as here, there is an adequate foreign forum with a profound interest in adjudicating the dispute and litigation here would be significantly less convenient, the abstract interest of the United States in enforcing international law does not compel an assertion of jurisdiction.<sup>476</sup>

Considerations of judicial comity also factor into the analysis. In *Aldana v. Del Monte Fresh Produce*,<sup>477</sup> the Eleventh Circuit upheld a district court's dismissal of ATS claims alleging torture in retaliation for labor union activities in Guatemala. The court acknowledged the strong public interest in addressing torture claims, but it held that preventing forum shopping and maintaining comity with Guatemala were more important considerations in this case.<sup>478</sup> The Second Circuit affirmed dismissal on similar grounds in another case, *Türedi v. Coca-Cola Co.*, citing concerns about forum shopping and acknowledging substantial evidence that Turkey provided an adequate alternative forum to hear the plaintiffs' claims against Turkish officials and companies for alleged assaults and wrongful arrests.<sup>479</sup>

#### D. Parties and Standing

As in all cases, before human rights litigation can proceed, the plaintiffs must establish that they have standing to assert the legal claims in question.<sup>480</sup> Plaintiffs establish standing by demonstrating “[1] that [they have] suffered ‘injury in fact,’ [2] that the injury is ‘fairly traceable’ to actions of the opposing party, and [3] that a favorable decision [by the court] will likely redress the harm.”<sup>481</sup> Standing must be established for

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476. *Id.* at \*9. The court noted, however, that it would resume jurisdiction over the case if the Australian courts found jurisdiction to be lacking. *Id.*

477. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009).

478. *Id.* at 1299.

479. *Türedi v. Coca-Cola Co.*, 343 F. App'x 623 (2d Cir. 2009).

480. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 351–52 (2006). *See also* *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 44 (1st Cir. 2005) (“It is axiomatic that Article III standing is a constitutional precondition to a federal court’s power to adjudicate a case.”).

481. *Nike, Inc. v. Kasky*, 539 U.S. 654, 667 (2003) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

each human rights claim or violation asserted. The applicable standards may vary depending upon the statute under which the claim is advanced. For example, U.S. citizens may not bring federal claims under the ATS because it is a jurisdictional statute that confers standing only to aliens.<sup>482</sup>

Under the TVPA, legal representatives of deceased American torture victims have standing to recover on behalf of the victim's estate,<sup>483</sup> but only the victims themselves may assert claims for torture that did not result in death.<sup>484</sup> Standing has been upheld on a similar basis for ATS plaintiffs. In *Baloco v. Drummond Co.*, the Eleventh Circuit reversed the district court's dismissal on standing grounds, holding that where the alien plaintiffs' "complaint alleges an intricate and vindictive plot, orchestrated by the defendants, that ultimately led to the assassinations of [their] fathers . . . such conduct establishes a violation of international law sufficient for purposes of triggering ATS liability."<sup>485</sup>

In cases in which foreign law applies, standing may turn on choice-of-law issues. Legal rules in other countries, for example, may allow broader categories of representation than would be permitted in many U.S. jurisdictions.<sup>486</sup> Organizations also may have standing to assert human rights claims on behalf of their members. The test is whether

1. the organization's members would have standing to bring suit as individuals;
2. the interests the organization seeks to protect by suit are germane to the organization's ordinary purpose; and

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482. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005).

483. *See* TVPA, 28 U.S.C. § 1350 (note) § 2 (2012); *Cabello v. Fernández-Larios*, 205 F. Supp. 2d 1325, 1334–35 (S.D. Fla. 2002).

484. *Cabello*, 205 F. Supp. 2d at 1334–45.

485. *Baloco v. Drummond Co.*, 640 F. 3d 1338, 1347 (11th Cir. 2011). (Addressing separate TVPA claims, the *Baloco* court also noted that "the TVPA expressly creates a *separate* cause of action for the wrongful death claimant through which 'any person' fitting that description can sue for TVPA damages.")

486. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (allowing representation claim by siblings under Guatemalan law even though parents were not deceased).

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3. the participation of an individual member is not required by the nature of either the claim asserted or the relief requested.<sup>487</sup>

In *Presbyterian Church of Sudan v. Talisman Energy*, for example, the court held that the Presbyterian Church of Sudan and an American non-profit refugee organization, each of which sued in a representative capacity on behalf of its members, had standing to assert ATS claims that a Canadian energy company conspired with Sudanese government officials to “ethnically cleanse” civilian populations in order to facilitate oil exploration and extraction.<sup>488</sup> However, organizations have been denied standing to represent members in human rights cases in which individualized proof is required to adjudicate the scope of damages for each victim.<sup>489</sup> Even in such cases, however, organizations may be entitled to sue in their personal capacities.<sup>490</sup>

Other issues relating to parties also can arise in human rights cases. For example, in cases that otherwise meet the requirements established for class actions,<sup>491</sup> claims for human rights violations may be addressed through these mechanisms.<sup>492</sup> The same holds true for the consolidation

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487. See, e.g., *United Food and Commercial Workers v. Brown Group*, 517 U.S. 544, 553 (1996) (citing *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333 (1977)).

488. *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 331–33 (S.D.N.Y. 2003).

489. See *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119–20 (D.D.C. 2003) (requirement of individualized proof leading to dismissal of organization); *Nat’l Coal. Gov’t of Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329, 360 (C.D. Cal. 1997) (denying labor union associational standing to bring tort claims).

490. See *Nat’l Coal. Gov’t of Union of Burma*, 176 F.R.D. at 360 (labor union had standing to assert its own claims based on the increased cost of providing benefits to members as a result of defendant’s alleged conduct).

491. See Fed. R. Civ. P. 23(a) and 23(b).

492. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 774 (9th Cir. 1994) (affirming certification of class of 10,000 ATS claimants for acts of torture, summary execution, and enforced disappearances perpetrated by Marcos regime). It may prove difficult to properly certify human rights plaintiffs as a class, however. See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (distinguishing *Hilao* in light of the ATS context and suggesting that the court “did not operate under the constraints of the Rules of Decision Act or *Erie*”), and *Doe v. Karadzic*, 176 F.R.D. 458, 463 (S.D.N.Y. 1997) (certifying class of Bosnian genocide victims with ATS claims under the limited funds provision of Fed. R. Civ. P. 23(b)(1) but expressing “grave doubts” that plaintiffs could establish “that common questions of law and fact will predominate and that the proposed class

of related claims in multidistrict litigation.<sup>493</sup> The issue of joinder also may arise,<sup>494</sup> particularly when necessary parties are entitled to immunity or are otherwise beyond the jurisdictional reach of the court.<sup>495</sup>

Lastly, where necessary, the court may adopt special procedures to accommodate unique circumstances. For example, although the federal rules normally require a complaint to include the names of all parties,<sup>496</sup> courts have allowed plaintiffs to proceed anonymously in appropriate human rights cases.<sup>497</sup>

### ***E. Discovery***

No special discovery concerns arise in human rights cases for parties and non-parties located within the United States. As long as litigants and

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action will be manageable”). *See also* Kpadeh v. Emmanuel, 261 F.R.D. 687 (S.D. Fla. 2009) (critiquing *Hilao* and *Karadzic* and stating that “even those who advocate the relaxation of the Rule 23 requirements in cases of international human rights abuses . . . nonetheless agree that the courts in those cases did not engage in intellectually rigorous analyses of the class certification requirements).

493. *See, e.g., In re* Chiquita Brands Int’l, Inc. Alien Tort Statute and Shareholders Derivative Litig., 536 F. Supp. 2d 1371, 1372 (2008) (transfer order on centralization). *See also In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009) (MDL transfer court addressing class action issues in human rights claims).

494. *See* Fed. R. Civ. P. 19(b).

495. *See, e.g., Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) (holding that under Rule 19(b), dismissal of a suit against a sovereign Indian tribe was “mandated by the policy of tribal immunity”). *See also* Kickapoo Tribe of the Indians of the Kickapoo Res. in Kan. v. Babbitt, 43 F.3d 1491, 1496 (D.C. Cir. 1995) (noting that “there is very little room for balancing of other factors’ set out in Rule 19(b) . . . because immunity may be viewed as one of those interests ‘compelling by themselves’” that circumscribed the court’s usual discretion) (quoting *Wichita and Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)). *See also* Provident Tradesmen’s Bank & Trust Co. v. Patterson, 390 U.S. 102, 118–19 (1968) (noting that some factors were “substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests”).

496. Fed. R. Civ. P. 10(a).

497. *See, e.g., Doe I v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (political activists and intellectuals alleging human rights violations by members of a radical Islamic opposition group during an ongoing civil war in Algeria); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (anonymity for minor plaintiff); *Doe I v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (underlying claims involving “rape, forced prostitution, forced pregnancy, and forced childbirth”).

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third parties fall within the court's jurisdiction, they can be required to provide documentary and testimonial evidence pursuant to the ordinary rules of civil procedure.<sup>498</sup> But other human rights cases require courts to determine whether evidence and witnesses located abroad can be made available during discovery and for trial, despite falling outside the jurisdictional reach of the court.

Overseas discovery may be facilitated through procedures outlined in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention").<sup>499</sup> The Hague Evidence Convention applies to evidence located outside of the United States and provides specific means of international judicial cooperation to enable the parties to obtain it.<sup>500</sup> If evidence is located in a jurisdiction that is not party to the Hague Evidence Convention, the court may seek assistance from governmental authorities in that jurisdiction through a letter rogatory. Unless some kind of bilateral cooperation arrangement

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498. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 539–40 (1987) (the "Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation"). See also *In re Aircrash Disaster Near Roselawn, Ind.*, 172 F.R.D. 295, 310 (N.D. Ind. 1997) (compelling discovery without resort to the Hague Convention on the basis that defendants "who, as a means of advancing their profit-making businesses in the United States, incorporated under the laws of the United States and then placed their [products] in this country's stream of commerce, have little to complain about when served with enforceable discovery requests under the Federal Rules of Civil Procedure").

499. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (allowing parties to request that the court forward an evidentiary request to reciprocal authorities in the receiving state, which in turn processes the request for implementation according to that jurisdiction's usual procedures). The party advocating use of the Hague Evidence Convention bears the burden of establishing its applicability and effectiveness. See, e.g., *Schindler Elevator Corp. v. Otis Elevator Co.*, 657 F. Supp. 2d 525, 528–29 (D.N.J. 2009).

500. See *Société Nationale*, 482 U.S. at 534 ("The text of the Evidence Convention itself does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures.").

exists with the other country, however, the foreign government's compliance with the court's request will be purely voluntary.<sup>501</sup>

Even when legal measures of cooperation with a foreign state exist, overseas discovery often is both procedurally complicated and time-consuming. Although discovery might normally be phased for other purposes (e.g., jurisdictional decisions, liability, damages), it may prove more efficient to allow overseas discovery on all issues simultaneously. The court may also consider the resources and capacity of each party to conduct lengthy discovery abroad.<sup>502</sup> Considerations of efficiency and fairness may be offset by other factors, however (e.g., sovereign immunity, which is meant to protect foreign states from the burden even of pretrial litigation proceedings).<sup>503</sup>

### ***F. Parallel Criminal and Civil Proceedings***

The existence of related criminal proceedings can also become an issue in human rights cases.<sup>504</sup> As noted previously, Congress may make international law applicable within the United States, including international criminal prohibitions. Congressional authorization is required to make

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501. See Restatement (Third) of Foreign Relations Law § 473 reporter's note 1 (1987). This may create particular difficulties for plaintiffs claiming human rights abuses at the hands of government officials.

502. See, e.g., *Bowoto v. Chevron Corp.*, No. C-99-02506-SI, Order Denying Bill of Costs, Apr. 22, 2009, at 3 (N.D. Cal. 2009) (denying post-trial costs, inter alia, on the basis that it was "beyond dispute that there is an extreme economic disparity between plaintiffs [Nigerian villagers in low-wage jobs] and defendants [oil companies with a net income of \$23.93 billion in 2008]"), *aff'd*, 621 F.3d 1116 (9th Cir. 2010).

503. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation" that extends beyond a mere defense to liability). Assertions of immunity should be resolved as early as practicable. See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (stressing "the importance of resolving immunity questions at the earliest possible stage in litigation"). For a detailed discussion, see David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, Part IV (Federal Judicial Center 2013) (discussing persons and entities entitled to immunity).

504. The Model Order in Appendix C requires the parties to disclose this information and to supplement it when new details become available.

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international crimes prosecutable in American courts because the Supreme Court abolished federal common-law crimes in 1812.<sup>505</sup>

One method used by Congress is to incorporate treaties or customary international law directly into federal law by reference.<sup>506</sup> The other is to enact specific legislation that provides a basis for criminal prosecution in the United States. Congress has used both methods to domesticate many international crimes, including genocide,<sup>507</sup> war crimes,<sup>508</sup> and torture.<sup>509</sup> Slavery, too, has long been criminalized as a matter of both international law<sup>510</sup> and federal law,<sup>511</sup> and it continues to be addressed in both settings today.<sup>512</sup>

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505. *See* *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812) (rejecting federal common-law crimes); Restatement (Third) of Foreign Relations Law § 111 cmt. I (1987) (international law creating criminal offenses “could not itself become part of the criminal law of the United States, but would require Congress to enact an appropriate statute before an individual could be tried or punished for the offense”).

506. *See* U.S. Const. art. I, § 8, cl. 10 (“The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”); *United States v. Smith*, 18 U.S. 153, 157 (1820) (upholding the constitutionality of Congress incorporating international law by reference and creating a criminal offense to punish “the crime of piracy, as defined by the law of nations”).

507. *See* Proxmire Act, 18 U.S.C. § 1091(a) (2012) (implementing legislation for the Genocide Convention).

508. *See* War Crimes Act of 1996, 18 U.S.C. § 2241 (1996) (prohibiting war crimes, defined relative to the four Geneva Conventions of 1949); Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261 (2000) (criminal offenses by U.S. armed forces and persons employed by or accompanying them outside the United States).

509. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, § 506, 18 U.S.C. § 2340A (2001) (implementing legislation for the Convention Against Torture).

510. *See, e.g.*, International Convention for the Suppression of the White Slave Traffic, May 4, 1910, art. 2–3, Gr. Brit. T.S. No. 20 (1912) (Cd. 6326); International Convention for the Suppression of the Traffic in Women and Children, 9 L.N.T.S. 415 (Sept. 30, 1921); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (Mar. 21, 1950).

511. *See, e.g.*, U.S. Const. amend. XIII (abolishing slavery); White Slave Traffic Act of 1910 (Mann Act), 18 U.S.C. §§ 2421–2424 (2000) (as amended) (federal legislation on slavery).

512. *See, e.g.*, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25/Annex II (Nov. 15, 2000) (international convention); Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1589–1591 (2012) (criminal prohibition on involuntary

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Breaches of the criminal prohibitions on serious human rights violations may create civil liability as well. Conduct leading to criminal prosecution for war crimes,<sup>513</sup> for example, also may constitute a compensable breach under the ATS or the TVPA.<sup>514</sup> In such instances, the court may wish (or may even be required) to stay proceedings in the civil case pending the outcome of the criminal trial.

In some cases, federal statutes provide specific guidance or procedures with respect to related criminal proceedings. The TVPRA, for example, automatically stays civil proceedings while criminal investigations and prosecution “arising out of the same occurrence in which the claimant is the victim” are pending.<sup>515</sup> The ATA and the FSIA state sponsors of terrorism exception do not automatically stay proceedings but instead provide mechanisms that allow courts to stay civil proceedings following a special request by the U.S. Attorney General.<sup>516</sup> When specific mechanisms are not provided, the court’s range of options is the same as in other types of cases.

Similar issues may arise when other civil cases dealing with the same subject matter are pending. If parallel litigation is proceeding in another forum, the court can determine whether it should stay or dismiss the case before it,<sup>517</sup> enjoin the parties from proceeding with the other case,<sup>518</sup> or

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servitude, forced labor, and the trafficking of individuals to facilitate these crimes or sexual offenses against the person); Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. §§ 7101–7112 (2011) (as amended) (U.S. legislation providing for interdiction efforts and civil cause of action for victims of human trafficking).

513. War Crimes Act of 1996, 18 U.S.C. § 2441 (2012) (civilian jurisdiction over war crimes through the federal criminal processes). *See also* Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261–3267 (federal criminal jurisdiction for felonies committed by civilians who are employees, contractors, or family members of the U.S. military overseas).

514. *See, e.g.,* Estate of Atban v. Blackwater Lodge Training Center, 611 F. Supp. 2d 1, 10 n.6 (D.D.C. 2009) (noting criminal indictments relating to civil claims that defendant was liable for war crimes when civilian private military contractors opened fire during the Nisur Square incident in Iraq in 2007).

515. 18 U.S.C. § 1595(b)(1) (2012); Antonio-Morales v. Bimbo’s Best Produce, Inc., No. Civ. A.8:5105, 2009 WL 1591172, at \*1 (E.D. La. Apr. 20, 2009).

516. *See* FSIA, 28 U.S.C. § 1605(g) (2012) (special procedures involving certifications by U.S. Attorney General); ATA, 18 U.S.C.A. § 2336(c) (2012) (same).

517. Dismissal is an exceptional remedy, however. *See, e.g.,* Royal & Sun Alliance Ins. Co. of Can. v. Century Int’l Arms, Inc., 466 F.3d 88, 95 (2d Cir. 2006) (noting that “cir-



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enter other relief to reduce or eliminate the potential for inconsistent results. Multiple related cases also may be consolidated through Multi-District Litigation (MDL) transfer procedures or handled through class action mechanisms.<sup>519</sup>

#### **G. Limitations Periods and Tolling**

Some human rights cases are brought many years after the events in question occurred. The claims asserted must be considered in light of the relevant limitations periods, which will vary depending on the statutory basis for the cause of action at issue.

The Torture Victim Protection Act provides expressly for a ten-year statute of limitations,<sup>520</sup> which has been judicially extended to ATS claims as well. Although the ATS does not include a statute of limitations,<sup>521</sup> several federal courts have determined that the TVPA's ten-year limitations period applies as the most closely analogous federal statute.<sup>522</sup> This limitations period applies to all ATS claims—even international torts unrelated to actual torture.<sup>523</sup> The claims of trafficking victims under the

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circumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances, and therefore the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention”).

518. Generally, the party seeking an antisuit injunction must establish that the parties in both cases are the same and that resolution of the case before the enjoining court would be dispositive of the issues in the other jurisdiction. *See, e.g., China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987) (enjoining judgment debtor from instituting overseas proceedings to collect on arbitral award subject to enforcement by federal courts in New York).

519. *See, e.g., In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 296 (S.D.N.Y. 2009) (MDL transfer court addressing class action issues in human rights claims); *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holders Derivative Litig.*, 536 F. Supp. 2d 1371 (2008) (transfer order on centralization).

520. TVPA, 28 U.S.C. § 1350(2)(c) (note) (1992).

521. *See, e.g., Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 462 (D.N.J. 1999).

522. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1011–13 (9th Cir. 2002) (collecting cases and holding the TVPA to be the closest federal analogue to the ATS for purposes of imputing a statute of limitations).

523. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004). *See also* *Caballo v. Fernández-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005); *Papa*, 281 F.3d, at 1012; *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996).

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TVPPRA must be brought within ten years,<sup>524</sup> as must claims against designated state sponsors of terrorism under the FSIA<sup>525</sup> and terrorism claims under the ATA.<sup>526</sup> Claims under both RICO<sup>527</sup> and RFRA<sup>528</sup> are subject to four-year limitations periods.

In some cases, principles of equitable tolling may allow claims to be brought outside the ordinarily prescribed period.<sup>529</sup> Some limitations periods may be tolled because the human rights violation constitutes a continuing offense. In *Bodner v. Banque Paribas*,<sup>530</sup> the court found that because the defendant's ongoing concealment of stolen property and refusal to return it were continuing offenses, "the statute of limitation has been tolled from running."<sup>531</sup>

The calculation of a statute of limitations also may depend on how difficult it was for the plaintiffs to gather proof about the human rights violations in question. In *Cabello v. Fernández-Larios*, for example, the court held that the statute of limitations did not begin to run until the bodies of the alleged victims had been located and exhumed.<sup>532</sup>

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524. TVPPRA, 18 U.S.C. § 1595(c) (2012) ("No action may be maintained under this section unless it is commenced not later than . . . 10 years after the cause of action arose . . ."). See also *Hernandez v. Attisha*, 2010 WL 816160, at \*4-5 (S.D. Cal. Mar. 4, 2010) (discussing TVPPRA's limitations period).

525. FSIA, 28 U.S.C. § 1605(f) (2012).

526. ATA, 18 U.S.C. § 2335(a) (2012) (claims must be commenced "within 10 years after the date the cause of action accrued"). The 2013 National Defense Authorization Act, Pub. L. No. 112-239, 126 Stat. 1632 (2013), enlarged the ATA's statute of limitations from four years to ten, which was intended to "be applied retroactively to pending claims." See *Linde v. Arab Bank, PLC*, 950 F. Supp. 2d 459, 460 (E.D.N.Y. 2013) (restoring claims previously deemed time-barred).

527. See *Agency Holding v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 156-57 (1987).

528. See, e.g., *Jama v. INS*, 343 F. Supp. 2d 338, 365 (D.N.J. 2004).

529. See, e.g., *Arce v. Garcia*, 434 F.3d 1254, 1261-65 (11th Cir. 2006) (discretion of district court to apply equitable tolling principles in human rights cases).

530. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

531. *Id.* at 135. The court also noted that "systematic and historical denial and misrepresentation concerning the custody of the looted assets to plaintiffs and the public at large" also would have entitled the plaintiff "to the benefit of equitable tolling" had the limitations period begun to run. *Id.* at 135-36.

532. *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (holding that the Chilean political climate at the time and concealment of the murder by Chilean officials made it "nearly impossible for the Cabello survivors to discover the wrongs perpetrated" and bring suit).

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Tolling also may depend on conditions abroad, such as the pendency of a civil war or a brutal government remaining in power. In *Chavez v. Carranza*, the court held that equitable tolling should apply “where extraordinary circumstances outside plaintiff’s control make it impossible for plaintiff to timely assert his claim.”<sup>533</sup> The *Chavez* court applied equitable tolling to ATS and TVPA claims of torture committed during El Salvador’s civil war, holding that the ongoing violence made it impossible for the plaintiffs to assert their claims beforehand.<sup>534</sup>

The Ninth Circuit made a similar determination in *Hilao v. Estate of Marcos*, a case in which ongoing intimidation and justifiable fears of retaliation warranted equitable tolling of the limitations period for ATS and TVPA claims while Ferdinand Marcos remained president.<sup>535</sup> The Eleventh Circuit made a similar determination in *Jean v. Dorelien* with respect to claims against former Haitian military leaders and government officials during the years in which their regime held power.<sup>536</sup> Tolling also may depend on decisions by the United States government, such as executive branch determinations that immunity does or does not apply to certain defendants.<sup>537</sup>

Other aspects of a human rights defendant’s conduct also may be relevant. The ATA provides that “the absence of the defendant from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, or of any concealment of the defendant’s whereabouts, shall not be included in the 10-year period.”<sup>538</sup> “Whereabouts” refers to physical location, such that a defendant who makes no effort to hide and is present in the juris-

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533. *Chavez v. Carranza*, 407 F. Supp. 2d 925, 928 (W.D. Tenn. 2004). *See also* *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006) (equitable tolling applied to nearly identical facts).

534. *Chavez*, 407 F. Supp. 2d at 927–30.

535. *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1994) (noting that Marcos officials were protected from suit and that individual claimants were subjected to intimidation and legitimately feared retaliation).

536. *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005).

537. *Collett v. Socialist People’s Libyan Arab Jamahiriya*, 362 F. Supp. 2d 230 (D.D.C. 2005) (holding that the TVPA’s ten-year statute of limitations was tolled while defendants had immunity, because claims would have been barred beforehand).

538. 18 U.S.C. § 2335(b) (2012).

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diction is not subject to the exception.<sup>539</sup> “Concealment” requires improper hiding of information or other forms of deception.<sup>540</sup> In *Litle v. Arab Bank, PLC*,<sup>541</sup> the court declined to apply statutory tolling because the defendant bank merely kept banking client information secret in accordance with applicable law.<sup>542</sup> But when a plaintiff demonstrates active concealment of the very conduct upon which claims are based, the court may deny requests to dismiss on limitations grounds.<sup>543</sup>

In all instances, the burden rests on the plaintiff to establish that equitable tolling applies.<sup>544</sup> Lack of diligence in pursuing a claim undermines the request. A plaintiff’s ignorance of available legal remedies does not warrant equitable tolling,<sup>545</sup> even if this ignorance results from changes in laws that otherwise would have alerted the plaintiff of the right to sue.<sup>546</sup>

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539. See, e.g., *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702, 2007 WL 2296832, at \*3–4 (E.D.N.Y. Aug. 6, 2007).

540. *Id.* at \*4–5.

541. *Litle v. Arab Bank, PLC*, 507 F. Supp. 2d 267 (E.D.N.Y. 2007).

542. *Id.* at 272–73. The *Litle* decision was vacated in light of subsequent congressional action that retroactively enlarged the ATA’s limitations period to ten years. See *Linde v. Arab Bank, PLC*, 950 F. Supp. 2d 459, 461 (E.D.N.Y. 2013).

543. *In re Chiquita Brands Int’l, Inc.*, 690 F. Supp. 2d 1296, 1306–07 (S.D. Fla. 2010) (credible allegations of concealment and misrepresentations in connection with secret payments to terrorist organizations).

544. *Id.* at 1306.

545. See *Arraz-Saenz v. Colorado*, No. 07–CV–02046, 2009 WL 3162258, at \*5–6 (D. Colo. Sept. 29, 2009).

546. See, e.g., *Fayoade v. Spratte*, 284 F. App’x 345, 347 (7th Cir. 2008).

## IV. Immunity

Immunity questions usually arise early on in human rights cases.<sup>547</sup> The Supreme Court itself has noted “the importance of resolving immunity questions at the earliest possible stage in litigation.”<sup>548</sup> These questions should be resolved early because, apart from being a substantive defense to liability, immunity includes the grant of “an entitlement not to stand trial or face the other burdens of litigation.”<sup>549</sup>

### *A. Foreign Sovereign Immunities Act*

Human rights statutes do not operate to waive the sovereign immunity that foreign states normally enjoy in the United States.<sup>550</sup> The Foreign Sovereign Immunities Act (FSIA) provides the sole basis for bringing claims against foreign states and their agencies and instrumentalities in U.S. courts.<sup>551</sup> Immunity is the default position; human rights plaintiffs suing foreign governments must establish that a FSIA exception exists before the court may hear the case.<sup>552</sup> “[U]nless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state.”<sup>553</sup>

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547. The discussion of immunity here is necessarily brief. For additional details, *see generally* David P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (Federal Judicial Center 2013) (discussing immunity issues under FSIA and other federal law).

548. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

549. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

550. *See, e.g.*, *Rosner v. United States*, 231 F. Supp. 2d 1202, 1210 (S.D. Fla. 2002) (no immunity waiver in the ATS); *Lafontant v. Aristide*, 844 F. Supp. 128, 138–39 (E.D.N.Y. 1994) (no immunity waiver in the TVPA).

551. *See, e.g.*, *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 434 (1989) (holding “that the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts”).

552. *Id.* at 434–35.

553. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Note that the FSIA only exempts sovereign property located *within* the United States. *See Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250 (2014) (holding that the FSIA neither forbade nor limited federal proceedings in aid of execution against assets held outside the United States by a foreign sovereign judgment debtor).

The FSIA codifies the “restrictive” theory of sovereign immunity, which the Supreme Court has applied retroactively to cover conduct that occurred prior to its enactment in 1976.<sup>554</sup> Apart from the terrorism exceptions discussed above, for a claim against a foreign sovereign to proceed, the FSIA generally requires that the sovereign either waive immunity or have engaged in commercial activities connected to the United States.<sup>555</sup> Entities not recognized as foreign states by the United States are not entitled to FSIA immunity, however, even if they exercise some functions normally allocated to sovereigns.<sup>556</sup>

### ***B. Individual Foreign Government Officials***

Federal courts recognize a distinction between immunity based on position and immunity based on conduct. Position-based immunity protects high-level government officials (e.g., heads of state, diplomats) from judicial process on the basis of the position they presently hold, such that it ceases to apply once they leave office. It applies whether the conduct in question is public or private in nature. Conduct-based immunity, in contrast, protects all governmental officials acting on behalf of the state from judicial proceedings based on their official conduct. It is more durable temporally, because it applies even after they leave office, but it also

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554. *Republic of Austria v. Altmann*, 541 U.S. 677, 697–700 (2004).

555. 28 U.S.C. § 1605(a)(3) (2012) (covering cases “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by a foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States”); *Altmann*, 541 U.S. at 691 (applying FSIA to property dispute arising out of claims that the Austrian government violated international law by unlawfully retaining works of art stolen from Jewish owners during the Nazi era).

556. *See, e.g., Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 422 F. Supp. 2d 96, 101 (D.D.C. 2006) (Palestinian Interim Self-Government Authority was not a sovereign state entitled to immunity in ATA case); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 438–39 (S.D.N.Y. 2004) (neither the PLO nor the Palestinian Authority constituted a “state” under FSIA and thus could not claim immunity with respect to ATA claims arising out of the murder of an American citizen during a terrorist attack in Israel).

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is narrower because it only applies to official conduct and provides no protection for private conduct.<sup>557</sup>

Although the FSIA does not reference individual foreign government officials, sovereign immunity extends to individuals when they are heads of state or other high-level government actors who essentially are indistinguishable from the state itself.<sup>558</sup> This position-based immunity arises from policy considerations:

[F]ar greater likelihood exists for stirring embarrassment and offense to national pride and provoking acts of retaliation in connection with an exercise of jurisdiction extended individually to a nation's ruler by denial of sovereign immunity than by such action asserted against state commercial entities or even lesser foreign government officials. The potential for harm to diplomatic relations between the affected sovereign states is especially strong in cases . . . that essentially entail branding a foreign ruler with the ignominy of answering personal accusations of heinous crimes.<sup>559</sup>

In 2010, the Supreme Court held in *Samantar v. Yousuf* that common law—not the FSIA—determines whether individual foreign officials enjoy immunity for actions taken during their time in office.<sup>560</sup> The Court held further that the common law also determines whether *former* officials may claim such immunity.<sup>561</sup>

The federal courts of appeals are divided over whether immunity principles apply to a particular type of human rights claim—the alleged violation of international jus cogens norms by government officials. Jus cogens obligations (also called peremptory norms) are a small set of in-

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557. See generally *Altmann*, 541 U.S. at 708–11, 715 (Breyer, J., concurring).

558. See, e.g., *Lafontant v. Aristide*, 844 F. Supp. 128, 132, 138–39 (E.D.N.Y. 1994) (“Head of state immunity, like foreign sovereign immunity, is premised on the concept that a state and its ruler are one for purposes of immunity.”).

559. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 291 (S.D.N.Y. 2001), *aff'd sub nom. in part, rev'd in part, and remanded by* *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004) (disposing of the case on other grounds and declining to reach the question of head-of-state immunity).

560. *Samantar v. Yousuf*, 560 U.S. 305, 308, 325 (2010) (remanding for a determination on “[w]hether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him”).

561. See *id.* at 310 n.5 (“Because . . . individual officials are not covered by the FSIA, petitioner’s status as a former official is irrelevant to our analysis.”) and *id.* at 322 n.17 (noting that the FSIA does not address whether it covers former government officials).

ternational legal rules that are binding on all states regardless of consent. They are defined as “norm[s] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>562</sup> Genocide and other serious human rights violations are considered violations of jus cogens.<sup>563</sup> Because breaches of jus cogens norms are per se *ultra vires* to legitimate governmental authority, some courts have held that immunity cannot apply, while others have taken the opposite view.<sup>564</sup>

The Fourth Circuit’s remand decision in *Samantar v. Yousuf* rested on the previously discussed distinction between “position-based” or “head-of-state” immunity and “official conduct” immunity. The court noted a trend in U.S. case law to treat “position-based” immunity as absolute and applicable even to jus cogens claims, but not to treat “official conduct” immunity in the same way, since by definition such violations could never be deemed legitimate official acts. The Fourth Circuit ultimately concluded that Samantar himself was not entitled to “official conduct” immunity under the common law because his case involved jus cogens violations.<sup>565</sup>

Whether a government official’s decisions involve nonjusticiable political questions and whether they constitute acts of state are separate matters (discussed below<sup>566</sup>), even though these issues are often raised in connection with assertions of immunity on other grounds.<sup>567</sup>

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562. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. *See also* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992) (noting that “[w]hereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting jus cogens transcend such consent, as exemplified by the theories underlying the judgments of the Nuremberg tribunals following World War II”).

563. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 102 cmt. k, n.6 (1987).

564. *Compare* *Ye v. Jiang Zemin*, 383 F.3d 620, 625–27 (7th Cir. 2004) (upholding executive branch’s request to recognize such immunity), *with* *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1996) (denying immunity on the basis that “Marcos’ acts of torture, execution, and disappearance were clearly acts outside of his authority as President”).

565. *Yousuf v. Samantar*, 699 F.3d 763, 777 (4th Cir. 2012).

566. *See infra* Parts V.A and V.B.

567. *See, e.g.*, *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (dismissing case on political question grounds but noting that Attorney General had certified that gov-



#### IV. Immunity

##### **C. Individual U.S. Government Officials**

Nothing in the ATS precludes its application to U.S. state or federal government officials,<sup>568</sup> although claims against such officials are governed by domestic law on governmental immunity. Claims against federal officials, for example, are allowed only insofar as governmental immunity is waived under the Federal Tort Claims Act (FTCA).<sup>569</sup> The FTCA operates in conjunction with the Westfall Act,<sup>570</sup> which substitutes the U.S. government as the defendant in claims against individual federal employees who are certified by the Attorney General to have been acting within the scope of their employment when the events allegedly causing the injury occurred.<sup>571</sup>

The FTCA imposes significant limitations on the ability of human rights plaintiffs to recover against U.S. government officials, however. The exception to immunity applies only to conduct occurring in the United States.<sup>572</sup> The Supreme Court interpreted this restriction broadly in *Sosa*, holding that the FTCA's exception for claims "arising in a foreign country" barred claims for injuries suffered abroad, even when acts and omissions that allegedly caused the foreign injury took place in the United States.<sup>573</sup>

Intentional torts (which comprise most human rights claims) are actionable under the FTCA only with respect to law enforcement officers.<sup>574</sup> In practice, this provision effectively eliminates many cases against cur-

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ernment officials acted within the scope of their employment in a case alleging that officials had supported the kidnapping, torture, and assassination of a Chilean military officer during a coup d'état).

568. *See, e.g.,* *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1379, 1384 (9th Cir. 1998) (holding that the ATS applied to the Los Angeles Police Department but determining that the detention at issue was not "arbitrary" under international law).

569. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2675, & 2680 [hereinafter FTCA].

570. Westfall Act, 28 U.S.C. § 2679(d)(1) (2012).

571. The U.S. government substituted itself for the original defendants in the *Sosa* litigation, for example. *See Alvarez v. United States*, 331 F.3d 604, 631–32 (9th Cir. 2003) (en banc) (holding that the ATS provided no exception to substitution provisions of the Westfall Act), *rev'd on other grounds*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

572. FTCA, 28 U.S.C. § 2680(k).

573. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

574. FTCA, 28 U.S.C. § 2680(h).

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rent or former U.S. governmental officials. Even when an official is sued individually, once the official is removed via substitution, the government can move to dismiss on the basis of the intentional tort exception (except when substituting for law enforcement officers).<sup>575</sup> The FTCA also excludes combat activities by U.S. military forces during wartime.<sup>576</sup> Some courts have held that this immunity extends to federal military contractors as well.<sup>577</sup>

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575. *See, e.g.,* *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005).

576. FTCA, 28 U.S.C. § 2680(j) (2012); *Koohi v. United States*, 976 F.2d 1328, 1337 (9th Cir. 1992) (holding that “one purpose of the combatant activities exception [to the FTCA] is to recognize that during wartime encounters no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action”).

577. *See, e.g.,* *Saleh v. Titan Corp.*, 580 F.3d 1, 9 (D.C. Cir. 2009) (addressing claims against private contractors providing interrogation and interpretation services at Abu Ghraib prison in Iraq and holding that “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted”); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123–24 (2d Cir. 2008) (holding that “government contractor defense operates as a complete bar” to claims).

## V. Judicial Abstention

Human rights cases have the potential to intersect with complex and sensitive issues of foreign relations, which, in turn, give rise to separation of powers concerns. Federal courts have invoked three interrelated bases for judicial abstention in order to manage the potential conflicts in such cases: (1) the political question doctrine, (2) the act of state doctrine, and (3) principles of judicial comity. A fourth issue—the state secrets doctrine—protects national security by allowing the political branches to designate certain materials and information as off-limits in judicial proceedings.

While each judicial abstention basis reflects its own legal principles and policy choices, all three generally aim at a similar question. As the Ninth Circuit put it, they “all in effect provide different ways of asking one central question: are United States courts the appropriate forum for resolving the plaintiffs’ claims?”<sup>578</sup> Abstention is an exception to the general rule that federal courts will hear all cases legitimately brought before them.<sup>579</sup> Consequently, courts should apply these principles only when important countervailing factors weigh against judicial resolution of a human rights case.<sup>580</sup> The state secrets doctrine, while of a different character, also is a limited rule of application predicated on necessity.

Each of these issues is discussed below.

### A. *The Political Question Doctrine*

Cases that present so-called “political” questions—those involving the exercise of political judgment and policy-making discretion—are regarded as nonjusticiable because federal courts are prohibited from adjudicating “policy choices and value determinations constitutionally committed to the halls of Congress or the confines of the Executive Branch.”<sup>581</sup> Federal courts decline to hear such cases in order to avoid interfering in matters

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578. *Sarei v. Rio Tinto*, 487 F.3d 1193, 1197 (9th Cir. 2007).

579. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction, if it should.”).

580. *See generally* Howard Fink et al., *Federal Courts in the 21st Century* 763–71 (3d ed. 2007) (discussing various abstention doctrines as applied in federal jurisprudence).

581. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986).

that the U.S. Constitution allocates to the expertise and authority of another branch of federal government.<sup>582</sup>

The political question doctrine “is primarily a function of the separation of powers”<sup>583</sup> among the three branches of federal government in the United States. In *Baker v. Carr*, the Supreme Court identified six factors that often are “[p]rominent on the surface of any case held to involve a political question.”<sup>584</sup> The presence of *any* of the following six “*Baker* factors” weighs in favor of dismissal, provided that the factor “is inextricable from the case”:

- (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.<sup>585</sup>

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582. There is a division of authority over whether the political question doctrine is jurisdictional or prudential. *Compare, e.g., Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (holding that political question doctrine is jurisdictional, rather than prudential), *with Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2005) (“Judicial deference to the Executive Branch on questions of foreign policy has long been established under the prudential justiciability doctrine known as the ‘political question.’”).

583. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

584. *Id.* at 217.

585. *Id.* (“Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question’s presence.”).

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The first factor does not apply when a question involves statutory construction and analysis of federal law,<sup>586</sup> however, including judicial interpretation of the ATS.<sup>587</sup>

The political question doctrine includes matters affecting U.S. foreign relations, which are allocated by the U.S. Constitution to the discretion of the executive branch.<sup>588</sup> It may prohibit a court from resolving a case involving human rights violations that are linked to policy decisions by the U.S. government, because such cases involve “questions, in their nature political, or which are, by the constitution and laws, submitted to the executive.”<sup>589</sup>

The doctrine seeks to avoid situations in which the outcome of private civil litigation might be inconsistent with or otherwise inhibit the President’s foreign policy decisions. Human rights cases have been dismissed, for example, with respect to

- the U.S. government’s removal of indigenous peoples from islands in the Chagos Archipelago in order to build a military base;<sup>590</sup>
- executive resolution of intergovernmental claims for involuntary sexual servitude by Japan during World War II;<sup>591</sup> and

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586. *See* *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430–31 (2012) (holding that the interpretation of a federal statute, even one that the State Department refuses to enforce on the grounds of interference with its exclusive province in foreign affairs, presents a question for the judicial branch, whose resolution is not prohibited by the political question doctrine).

587. *See, e.g., Sarei v. Rio Tinto*, 487 F.3d 1193, 1204 (9th Cir. 2007) (noting that “[w]hen the Supreme Court reversed our en banc decision in *Sosa*, it did not question our conclusion that ATCA suits are constitutionally entrusted to the judiciary”); *Kadic v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995) (holding that “the existence of judicially discoverable and manageable standards further undermines the claim that such suits relate to matters that are constitutionally committed to another branch”).

588. *See* U.S. Const. art. II, § 2.

589. *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803)).

590. *See* *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006).

591. *See* *Joo v. Japan*, 413 F.3d 45, 52–53 (D.C. Cir. 2005). *See also* *You v. Japan*, No. C-5-03257, 2015 WL 6689398, at \*2–3 (N.D. Cal. Nov. 3, 2015) (dismissing, inter alia, because the case presented a nonjusticiable political question) (citing *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005)).

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- allegations of U.S. support of kidnapping, torture, and assassination in Chile during a coup d'état in the early 1970s.<sup>592</sup>

When a pending case implicates either the conduct of a foreign government or some other aspect of foreign policy, the U.S. State Department often makes its views known by filing a statement of interest with the court. (It may do so of its own volition or at the request of the court or a party.) Although not dispositive, such statements are highly persuasive as to whether the court should dismiss a case on political question grounds.<sup>593</sup> While preserving judicial discretion, the Supreme Court has noted that “[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”<sup>594</sup>

The political question doctrine applies even in cases involving only private parties, including corporate defendants.<sup>595</sup> In *Mujica v. Occidental Petroleum Corp.*, for example, a district court dismissed on political question grounds ATS and TVPA claims grounded in the bombing of a village by the Colombian military.<sup>596</sup> The court relied heavily on the State Department’s opinion that the case would interfere with the Chief Executive’s approach to encouraging protection of human rights in Colombia. It found that both the fourth *Baker* factor (respect due coordinate branches of government) and fifth *Baker* factor (adherence to a prior political decision) warranted dismissal.<sup>597</sup> Direct input from the executive branch is not required, however. Courts have dismissed cases on political

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592. See *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

593. See, e.g., *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1188 n.18 (C.D. Cal. 2005) (noting that federal courts must accept such statements at “face value” and may not inquire into whether the executive’s position was wise or well-founded), *remanded by* 564 F.3d 1190 (9th Cir. 2009).

594. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (citing *Republic of Austria v. Altmann*, 541 U.S. 677 (2004)).

595. See, e.g., *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (applying *Baker* factors and declining to dismiss on political question grounds claims of victims of crimes in Europe during World War II against foreign banks).

596. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

597. See *id.* at 1195.

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question grounds even when the State Department has not provided details on its position in the case.<sup>598</sup>

The principles involved in the political question doctrine apply even when the violations in question took place decades ago. For example, the D.C. Circuit Court of Appeals dismissed the claims of former “comfort women” forced into sexual slavery during Japanese occupation of their home nations in World War II.<sup>599</sup> It noted that “the Executive has persuasively demonstrated that adjudication by a foreign court not only would ‘un-do’ a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan’s ‘delicate’ relations with China and Korea, thereby creating ‘serious implications for stability in the region.’”<sup>600</sup> Because the case involved “a nonjusticiable political question,” the court deferred to the executive branch’s discretion and dismissed the claims.<sup>601</sup>

This does not mean, however, that courts must automatically abstain whenever a case involves some aspect of foreign relations. In *Baker v. Carr*, the Supreme Court noted that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”<sup>602</sup> Rather, each application requires “a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.”<sup>603</sup> Thus, if a human rights case “does not require an evaluation of any executive or congressional policy decision or value judgment,” dismissal on political question grounds is unnecessary.<sup>604</sup> Because the political question doctrine presupposes an actual sov-

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598. See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (noting that “it remains our responsibility to determine whether a political question is present, rather than to dismiss on that ground simply because the Executive Branch expresses some hesitancy about a case proceeding”) (internal quotations omitted).

599. See *Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005).

600. *Id.* at 52 (quoting U.S. Statement of Interest at 34–35).

601. *Id.* (holding that “[t]he Executive’s judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine”).

602. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

603. *Id.* at 211–12.

604. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 19–20 (D.D.C. 2006) (political question doctrine would not bar the court from hearing a case that did not require the

ereign with whom the executive branch conducts foreign relations, it has limited application to cases involving non-state entities.<sup>605</sup>

### ***B. The Act of State Doctrine***

The act of state doctrine, while not a form of position-based immunity, also may preclude litigation arising out of the conduct of foreign officials. The doctrine prohibits federal courts from deciding cases that require them to adjudicate the validity of official acts or decisions by foreign governments within their own territory.<sup>606</sup> “Courts must dismiss under the act of state doctrine when resolution of a suit would require the court to declare invalid and ineffective as ‘a rule of decision for the courts of this country’ the official act of a foreign sovereign.”<sup>607</sup> It thus operates “as a substantive defense on the merits.”<sup>608</sup>

The act of state doctrine applies simultaneously with the related legal principles governing immunity. While both issues may be raised in the same case on the basis of similar facts, they remain separate grounds for dismissal. As noted above, individuals may claim sovereign immunity based upon their official acts as heads of state or other high-level gov-

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adjudication of executive or congressional value judgments or policy choices). This case subsequently was dismissed on other grounds by the Supreme Court in *Republic of Iraq v. Beatty*, 556 U.S. 848 (2009), in which the Court held that the FSIA exception for state sponsors of terrorism, pursuant to which the case was brought, ceased to operate against Iraq when the President removed Iraq from the designated list of state sponsors of terrorism. *Id.* at 2195.

605. See *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 448–49 (S.D.N.Y. 2004) (political question doctrine would not bar ATA action against Palestinian Liberation Organization and the Palestinian Authority for deaths of American citizens during a terrorist attack in Israel).

606. See *Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 773 n.4 (1972) (Douglas, J., concurring) (“The history of the [Act of State] doctrine indicates that its function is not to effect unquestioning judicial deference to the Executive, but to achieve a result under which diplomatic rather than judicial channels are used in the disposition of controversies between sovereigns.” (internal citations omitted)).

607. *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 391–92 (3d Cir. 2006) (quoting *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 405 (1990) (“In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.”)).

608. *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004).



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ernment officials.<sup>609</sup> The act of state doctrine focuses on whether a federal court is being asked to potentially delegitimize the decision or conduct of a foreign government on its own soil.

The application of the act of state doctrine to human rights cases depends principally on the grounds underlying the plaintiff's claims for relief. The doctrine applies in litigation between private parties, given the underlying goal of ensuring that U.S. adjudication will not "interfere with the executive's conduct of American foreign policy."<sup>610</sup> That said, neither acts clearly beyond the scope of a government official's authority<sup>611</sup> nor conduct performed in a personal capacity<sup>612</sup> falls within the doctrine's application.

The Second Circuit has noted that "it would be a rare case in which the act of state doctrine precluded suit under [the ATS,]"<sup>613</sup> although the doctrine has been applied even in cases in which the claims, if proved, would constitute violations of jus cogens human rights norms.<sup>614</sup> That said, alleged violations of widely accepted and clearly defined rules of international law generally do not fall under the act of state doctrine because the disputed conduct involves the breach of an international rule, rather than a judicial assessment of the validity of the internal conduct of a foreign state.<sup>615</sup> The Supreme Court has provided three factors for courts to consider in such cases:

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609. *See, e.g.*, *Lafontant v. Aristide*, 844 F. Supp. 128, 138–39 (E.D.N.Y. 1994).

610. *Sarei v. Rio Tinto*, 487 F.3d 1193, 1208 (9th Cir. 2007) (vacated on other grounds, *Sarei v. Rio Tinto*, 550 F.3d 822, 844 (9th Cir. 2008) (en banc)). *See also* *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1113 (5th Cir. 1985) ("In the act of state context, even if the defendant is a private party, not an instrumentality of a foreign state, and even if the suit is not based specifically on a sovereign act, we nevertheless decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory.").

611. *Sarei*, 487 F.3d at 1209–10.

612. *See, e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1471 (9th Cir. 1996).

613. *Kadic v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

614. *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1032–33 (W.D. Wash. 2005) (holding, inter alia, that the act of state doctrine precluded adjudication of case in federal courts); *Doe v. State of Israel*, 400 F. Supp. 2d 86, 113–15 (D.D.C. 2005) (same).

615. *See* Restatement (Third) of Foreign Relations Law § 443 cmts. b & c (1987).

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1. “the degree of codification or consensus concerning a particular area of international law” (the greater the consensus, the more appropriate judicial resolution of that issue);
2. the importance of the matter for U.S. foreign relations (the less important, “the weaker the justification for exclusivity in the political branches”); and
3. whether the foreign government that engaged in the act in question still exists (if not, the doctrine’s application “may, as a result, be measurably altered”).<sup>616</sup>

### **C. Judicial Comity**

The doctrine of judicial comity (distinct from the prescriptive comity at issue in *Kiobel*<sup>617</sup>) shares many characteristics with the act of state doctrine, such that they often are raised together.<sup>618</sup> Comity encompasses “the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”<sup>619</sup>

In *Ungaro-Benages v. Dresdner Bank AG*, the Eleventh Circuit analyzed comity in an ATS case against German banks involving claims of Nazi-era property expropriation.<sup>620</sup> Considerations relevant to the court’s analysis included “the strength of the United States’ interest in using a foreign forum, the strength of the foreign governments’ interests, and the adequacy of the alternative forum.”<sup>621</sup> Because the German government had established a claims mechanism to provide compensation to victims, the Eleventh Circuit determined that comity principles justified its abstention from hearing the claims under federal law and the ATS.

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616. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

617. *See supra* Part II.A.1.

618. *See, e.g., Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260–61 (2d Cir. 2007).

619. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522, 543 n.27 (1987).

620. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004).

621. *Id.* at 1238. Note that comity applies retrospectively as well, in terms of respect granted to adjudicative results in foreign tribunals. *Id.* at 1238–39 (providing additional factors to assess foreign judgments).

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When the issue of judicial comity is raised in litigation, federal courts have discretion<sup>622</sup> to balance the nature and extent of the potential conflict with a foreign state's interests against the rights of the domestic litigants and the interests of the United States.<sup>623</sup> "Absent true conflicts, a judgment from a foreign court, or parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds."<sup>624</sup> Some courts have required defendants to demonstrate a "specific legislative or judicial statement of policy of a foreign state or court" that would be frustrated by the federal court's retaining jurisdiction over the matter.<sup>625</sup> An example would be a case in which the non-international claims at issue require the federal court to interpret and apply foreign law.<sup>626</sup>

Considerations of judicial comity do not apply to non-sovereigns, even when the entity in question exercises some similar functions. For example, even though the Palestine Liberation Organization exercised many functions normally handled by a foreign government, the principles of judicial comity did not preclude claims against it because it was not actually a foreign sovereign.<sup>627</sup>

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622. See *Cunard S.S. Co. v. Salen Reefer Services AB*, 773 F.2d 452, 457 (2d Cir. 1985).

623. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993); *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (explaining that comity rests somewhere between obligatory conduct and simple goodwill and is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws").

624. *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006).

625. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 129 (E.D.N.Y. 2000).

626. See, e.g., *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 871 (7th Cir. 2015) (considering comity issues as part of the public factor analysis in *forum non conveniens* dismissal and holding that "[t]he application of foreign law—particularly that of a civil law system—favors dismissal in favor of a [foreign] forum . . . [because the foreign] court would be far better able to apply its own law than any United States court would be").

627. See *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 439 (S.D.N.Y. 2004) (noting that "comity developed as a principle generally applicable to certain interactions between sovereign states and governments that maintain some relations" and would be inapplicable to an entity not recognized by the executive branch).

#### ***D. The State Secrets Doctrine***

U.S. national security has emerged as an issue in some human rights cases in which the federal government has sought dismissal on the basis of the state secrets doctrine. This doctrine allows a court to exclude evidence from discovery or even to dismiss a case if the proceedings would reveal military or government secrets and threaten national security.<sup>628</sup> The doctrine is a common law evidentiary rule, first recognized by the Supreme Court in 1953 in *United States v. Reynolds*, which provided a three-part test.<sup>629</sup>

First, the governmental department or agency in control of the evidence must formally claim the state secrets privilege. In evaluating whether the claim is proper, the court may take note of special executive branch procedures governing the invocation of the doctrine.<sup>630</sup>

Second, considering “all the circumstances of the case . . . [the court must determine whether] there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged.”<sup>631</sup>

Third, the court must evaluate both the necessity of the privileged evidence and the availability of alternatives.<sup>632</sup> Where “there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if . . . military secrets are at stake.”<sup>633</sup> Evidence covered by the privilege must be excluded from discovery and all other proceed-

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628. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1076 (9th Cir. 2010).

629. *United States v. Reynolds*, 345 U.S. 1, 7–9 (1953).

630. See *Jeppesen Dataplan*, 614 F.3d at 1077, 1090 (citing Memorandum from the Attorney General to the Heads of Executive Departments and Agencies on Policies and Procedures Governing Invocation of the State Secrets Privilege (Sept. 23, 2009), available at <http://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf>).

631. *Reynolds*, 345 U.S. at 7–9. For more guidance on this topic, see Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide to the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

632. *Reynolds*, 345 U.S. at 11. The availability of alternative forms of evidence diminishes the necessity for accessing restricted materials. *Id.*

633. *Id.* at 11.

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ings in the case.<sup>634</sup> Dismissal may be necessary if the secret evidence is indispensable to the plaintiff's case or to an asserted defense<sup>635</sup> or if "the subject matter of a case is so sensitive that there is no way it can be litigated without risking national secrets."<sup>636</sup>

The federal government, for example, asserted the state secrets privilege in three cases arising out of the CIA's "extraordinary rendition" program. The first case, *Arar v. Ashcroft*, was filed in 2004 on behalf of a dual Canadian and Syrian citizen against former U.S. Attorney General John Ashcroft and sixteen other government and law enforcement officials.<sup>637</sup> Arar alleged TVPA violations after he was mistakenly identified as part of al-Qaeda, detained and interrogated in New York City, and transferred to Jordan and later Syria.<sup>638</sup>

The government and individual defendants moved to dismiss the case on multiple grounds, including the state secrets privilege.<sup>639</sup> Although the district court dismissed because the plaintiff failed to assert a proper claim under the TVPA, it specifically noted the "serious national-security and foreign policy issues at stake"<sup>640</sup> and stated that "the need for much secrecy can hardly be doubted."<sup>641</sup> The Second Circuit affirmed,<sup>642</sup> also noting that state secrets were a "further special factor"<sup>643</sup> in the case that served as "a reminder of the undisputed fact that the claims under consideration involve significant national security decisions made in consultation with several foreign powers."<sup>644</sup> The panel decision was vacated following a decision en banc in 2009, in which the court affirmed

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634. *Id.* at 10–11.

635. *See, e.g., Kasza v. Browner*, 133 F.3d 1159, 1166 (9th Cir. 1998).

636. *In re Sealed Case*, 494 F.3d 139, 153 (D.C. Cir. 2007). The doctrine applies more narrowly in criminal proceedings than in civil human rights cases. *See El-Masri v. United States*, 479 F.3d 296, 313 n.7 (4th Cir. 2007) ("[T]he Executive's authority to protect [state secrets] is much broader in civil matters than in criminal prosecutions.").

637. *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y. 2006), *vacated on other grounds*, 585 F.3d 559 (2d Cir. 2009) (en banc).

638. *Id.* at 253–55.

639. *Id.* at 287.

640. *Id.* at 286–87.

641. *Id.* at 281.

642. *Arar v. Ashcroft*, 532 F.3d 157, 181 (2d Cir. 2008), *vacated on other grounds*, 585 F.3d 559 (2d Cir. 2009) (en banc).

643. *Id.* at 183.

644. *Id.*

dismissal based on pleading defects.<sup>645</sup> The Second Circuit declined to reach the state secrets question but recognized in dictum that lawsuits like Arar's "unavoidably . . . probe[] government secrets."<sup>646</sup>

A subsequent ATS case with state secret implications involved both public and private parties. In *El-Masri v. Tenet*, a German citizen of Lebanese origin brought suit against former CIA Director George Tenet, three corporations that either owned or operated airplanes allegedly used in a CIA rendition program, and twenty other CIA and corporate officials.<sup>647</sup> El-Masri alleged that he was mistakenly identified as part of al-Qaeda after his arrest in Europe and that he was subsequently rendered to Afghanistan, where he was arbitrarily detained for an extended period and subjected to torture and cruel, inhuman, and degrading treatment.<sup>648</sup>

Following the government's motion to dismiss based on state secrets, El-Masri argued that the facts of his case had become public and that he could prove his case without classified materials.<sup>649</sup> The district court dismissed the case, resting its decision squarely on the state secrets doctrine.<sup>650</sup> Although the court found that "special procedures, such as clearing defense counsel for access to classified information . . . have been used effectively . . . in other cases, . . . [s]uch procedures are plainly ineffective where, as here, the entire aim of the suit is to prove the existence of state secrets."<sup>651</sup> The Fourth Circuit affirmed, rejecting El-Masri's argument that the case should proceed with the court reviewing state secrets evidence in camera, requiring counsel to obtain security clearances and execute nondisclosure agreements, and conducting a closed trial.<sup>652</sup>

A third state secrets case emerging from the CIA rendition program involved only private parties. In *Mohamed v. Jeppesen Dataplan, Inc.*,

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645. Arar v. Ashcroft, 585 F.3d 559, 574 (2d Cir. 2009) (en banc).

646. *Id.*

647. *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (E.D. Va. 2006).

648. *Id.* at 535.

649. *Id.*

650. *Id.* at 541.

651. *Id.* at 539.

652. *El-Masri v. Tenet*, 479 F.3d 296, 311 (4th Cir. 2007). *See also* United States v. Reynolds, 345 U.S. 1, 9–11 (1953) (although the judge's control over proceedings "cannot be abdicated to the caprice of executive officers [, the court] should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers").

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ATS claims were brought against a Boeing subsidiary by five men allegedly transported on “torture flights” arranged by Jeppesen to Egypt, Morocco, and Afghanistan.<sup>653</sup> The claimants alleged that they were harshly interrogated, subjected to enforced disappearances, and tortured while in foreign custody.<sup>654</sup> Although no U.S. officials or agencies were sued, the district court granted the government’s motion to intervene.

The Ninth Circuit ultimately dismissed the case on the basis of the state secrets doctrine, even though the case involved only claims asserted against private parties (rather than government officials). The court determined that there was “no feasible way to litigate Jeppesen’s alleged liability without creating an unjustifiable risk of divulging state secrets.”<sup>655</sup> Even if “plaintiffs could [theoretically] establish their entire case *solely* through non-privileged evidence . . . any effort by Jeppesen to defend would unjustifiably risk disclosure of state secrets.”<sup>656</sup> The sensitive nature of the case was such that the protective mechanisms normally available to the court would not be sufficient.<sup>657</sup>

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653. *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073–75 (9th Cir. 2010). Plaintiffs submitted affidavits from a former employee alleging that a senior Jeppesen official referenced the program as the “torture flights” or “spook flights.” *Id.* at 1095–96.

654. *Id.* at 1073–76.

655. *Id.* at 1087.

656. *Id.* at 1090.

657. *Id.* at 1089 (holding that “the risk of disclosure that further proceedings would create could not be averted [even] through the use of devices such as protective orders or restrictions on testimony”).





## VI. Enforcement of Remedies

For successful individual human rights plaintiffs, courts have allowed damage awards to compensate for both physical and emotional suffering, as well as punitive damages.<sup>658</sup> When the human rights plaintiff is an organization, it is sufficient to establish that the injuries to the entity “are quantifiable and may be remedied by an award of monetary damages”<sup>659</sup>

Final judgments rendered in human rights cases may prove difficult to enforce, however. Human rights defendants often lack significant attachable assets located within the United States.<sup>660</sup> Even when assets exist, they may be unreachable for other reasons. As noted previously, foreign states generally are immune from lawsuits in U.S. courts,<sup>661</sup> and cases against them are often dismissed in the early stages. But even when a foreign state has defaulted or failed to defend the case, certain types of foreign government property are immune from attachment.<sup>662</sup> This FSIA-granted immunity is subject to exceptions, however, as is the immunity of property belonging to designated state sponsors of terror.<sup>663</sup> It also does not apply to property of a foreign government located outside of the United States.<sup>664</sup>

Valid judgments rendered against non-immune foreign defendants may ultimately prove uncollectible overseas as well. Some foreign courts

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658. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1994) (awarding \$1.2 billion in exemplary damages and \$766 million in compensatory damages to 10,000 claimants in class action case arising out of torture, summary executions, and enforced disappearances); *Xuncax v. Gramajo*, 886 F. Supp. 162, 198–202 (D. Mass. 1995) (awarding compensatory and punitive damages for summary executions; enforced disappearances; torture; and cruel, inhuman, and degrading punishment); *Paul v. Arvil*, 901 F. Supp. 330, 335–36 (S.D. Fla. 1994) (awarding compensatory and punitive damages for torture).

659. *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 325 (D. Mass. 2013).

660. A good example is the \$4.5 billion damage award entered against former Bosnian Serb leader Radovan Karadžić. *Jane Doe I v. Karadzic*, No. 93-CIV-0878, Order of Aug. 28, 2001, 2001 WL 986545, at \*1 (S.D.N.Y. 2001).

661. FSIA, 28 U.S.C. § 1604 (2012) (providing absolute immunity to foreign states when no FSIA exception applies).

662. *Id.* § 1609 (property of foreign states is immune from attachment and seizure unless a FSIA exception applies).

663. *Id.* § 1605A.

664. *See Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250, 2257–58 (2014).

provide little, if any, assistance with the enforcement of final judgments. At present, the United States is not a party to any bilateral or multilateral treaty addressing the enforcement of foreign judgments.<sup>665</sup> Some foreign courts review judgments rendered by U.S. courts with caution, especially if the case involves legal procedures that are unfamiliar in the local regime, such as punitive damages or jury verdicts, or if the litigation is based on conduct outside of U.S. borders.<sup>666</sup> Final judgments in human rights cases rendered by U.S. courts thus may not result in tangible remuneration to plaintiffs for injuries sustained.

It also is worth noting that the executive branch has the authority to eliminate private causes of action for human rights violations entirely by settling the claims of U.S. citizens through a treaty or an executive agreement.<sup>667</sup> In *American Insurance Association v. Garamendi*, for example, the Supreme Court addressed whether U.S. foreign policy interests preempted the enforcement of a California law that required insurance companies to disclose certain Holocaust-era information to state

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665. *See, e.g., Gabbanelli Accordions & Imps., L.L.C. v. Ditta Gabbanelli Ubaldo Di Elio Gabbanelli*, 575 F.3d 693, 696–97 (9th Cir. 2009) (“[B]ecause the United States is not a signatory to any treaty governing recognition of foreign judgments, the significance of the foreign judgment will depend on a variety of other considerations . . . having to do with the reliability of the foreign proceeding for determining the parties’ rights.”) (internal citations omitted). At the time of this writing, the United States has signed but not ratified the Hague Choice of Court Convention, which does contain provisions on the recognition of foreign judgments. *See* Hague Convention on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.

666. *See, e.g., Ansari v. New York Univ.*, 179 F.R.D. 112, 116–17 (S.D.N.Y. 1998) (noting that foreign courts may not recognize the preclusive effect of “opt-out” class action resolutions). U.S. courts apply similar scrutiny to foreign judgments. *See, e.g., Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (issuing permanent injunction against the enforcement of an Ecuadorian court’s \$18 billion damage award against U.S. energy companies for allegedly contaminating the Amazon rainforest on the grounds that the judgment was obtained by fraud on the Ecuadorian court by the plaintiffs and their lawyers).

667. *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981) (discussing treaty negotiations with Iran as part of the Algiers Accords of 1980 and holding that “where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President’s action, we are not prepared to say that the President lacks the power to settle such claims”).

## VI. Enforcement of Remedies

officials as a condition of selling insurance in California.<sup>668</sup> A group of insurers challenged the measure, arguing that it interfered with matters resolved previously through a Holocaust insurance claims commission sanctioned by the executive branch.

California's insurance disclosure statute was deemed preempted because it interfered with the President's authority and discretion in the foreign policy arena.<sup>669</sup> In its ruling, the Supreme Court discussed the extensive powers granted to the President in matters of foreign affairs, including the authority to reach executive agreements with other nations. The Court determined that the President had the power to settle private claims in order to remove "sources of friction" that might remain after the cessation of hostilities or war.<sup>670</sup>

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668. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–17 (2003).

669. *Id.* at 420.

670. *Id.* (citing *United States v. Pink*, 315 U.S. 203, 225 (1942)).



## VII. Active Case Management and Human Rights Cases

Given the transnational elements, the complexity of substantive claims, and potentially sensitive questions of immunity and other foreign relations matters, it often will prove useful for courts hearing human rights cases to employ active case-management strategies.<sup>671</sup>

Apart from facilitating the integration of human rights cases into already crowded dockets, active case management of discovery and motion practice helps to ensure that considerations unique to human rights cases can be addressed from the outset. It also facilitates the resolution of potentially dispositive issues early in the litigation, thereby narrowing the matters in dispute prior to trial.

Issues that might be resolved by active case management include

1. territorial limitations on ATS claims under *Kiobel*,<sup>672</sup>
2. personal jurisdiction over necessary parties;
3. the viability of substantive ATS claims under *Sosa*,<sup>673</sup>
4. factual pleading sufficiency under *Iqbal*,<sup>674</sup>
5. immunity under FSIA<sup>675</sup> or common law; and
6. questions of judicial abstention.

Addressing these issues early on may lead to the dismissal of parties, the narrowing of disputed claims, or both, thereby simplifying merits proceedings down the line. In appropriate cases, the court may want to consider conducting separate trials on certain claims or disputed matters, provided that the efficiencies of resolving predicate issues first outweigh the added time and expense of multiple rounds of discovery and trial proceedings.

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671. See William W Schwarzer & Alan Hirsch, *The Elements of Case Management: A Pocket Guide for Judges 1* (Federal Judicial Center, 2d ed. 2006) (“A small amount of a judge’s time devoted to case management early on in a case can save vast amounts of time later on.”).

672. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

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

674. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

675. FSIA, 28 U.S.C. § 1605 (2012).

### *International Human Rights Litigation*

Active case management also serves the purpose of ensuring that the parties and counsel are familiar with the major issues that are likely to arise in human rights cases. Despite the primary obligations of the parties to educate the court on the factual details and applicable law of their case, it remains entirely possible that counsel (who may include plaintiff's personal injury attorneys, corporate litigators, in-house lawyers, and other non-specialists) may not be familiar with the full range of issues involved in human rights litigation, many of which are *sui generis*. The court therefore may find it helpful to provide a structure to address the major issues that are likely to arise.

The model order set out in Appendix C may prove useful for this purpose. It sets forth a template for structuring early proceedings and includes an optional special form for the mandatory joint statement of the parties contemplated by the order. The model order is structured to enable the court to take early control over the proceedings and to require the parties to focus on the unique issues that tend to arise in human rights cases. It also offers a timeline for discovery and other pretrial events.

As with other federal cases, the model order requires counsel to confer prior to the initial scheduling conference and—to the extent possible—reach consensus on a statement setting forth a joint litigation plan that addresses all relevant issues. In addition to the matters normally required under Rules 16(b), 16(c), and 26(f), the model joint statement encompasses special issues that arise in human rights cases. Note that the order setting the initial pretrial conference requires attendance by senior counsel with genuine authority to plan the conduct of the case—not a junior lawyer or colleague asked to “cover” the meeting. It also requires parties to state their positions on whether the appointment of a federal magistrate judge or special master may be useful for purposes of discovery, fact-finding, or other aspects of the case.

An important issue for the court to learn about early on is the existence of any related proceedings arising out of the same transaction, event, or occurrence that gave rise to the case before the court. The model order requires the parties to disclose this information and to supplement it when new details of related civil or criminal proceedings become available.

Finally, the court may find it useful to require the parties to supplement their joint statement as new parties are joined or existing parties are

*VII. Active Case Management and Human Rights Cases*

dismissed, as well as at other stages of the litigation. To ensure clarity, the template form accompanying the model order in Appendix C suggests dating each joint statement prominently in the caption.<sup>676</sup>

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<sup>676</sup> If the case warrants such treatment, the court also may want to include in its initial case-management order some or all of the additional considerations encompassed by the model scheduling order set forth in the *Manual for Complex Litigation, Fourth* (2004). See MCL Form 40.21.





## VIII. Resources—Table of Appendices

As discussed above, human rights cases often raise many complex substantive and procedural questions. This guide, while intended to cover all major issues, is by no means a substitute for additional research and consideration of specific matters arising in a particular case. To assist judges in that process, the following research references and other additional resources are provided in the appendices to this guide.

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## Appendix A. Major International Human Rights Instruments

### *Human Rights Treaties Ratified by the United States*

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 (CAT) (ratified).

**Notes:** Treaty is not self-executing; implementing legislation was adopted with respect to the obligations imposed by article 5 concerning jurisdiction over extraterritorial acts of torture by United States citizens and by others “found” in the United States whom it does not extradite. In addition, the obligations of article 3 (“non-refoulement”) have been effectively implemented through federal administrative process and procedure and regulations. *See* 22 C.F.R. Parts 3, 103, 208, 235, 238, 240, 241, and 253, reprinted in 64 Fed. Reg. 33 at 8478–96 (Feb. 19, 1999) (INS regulations); 22 C.F.R. Part 95, reprinted in 64 Fed. Reg. 38 at 9435–37 (Feb. 26, 1999).

Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1948), entered into force Jan. 12, 1951 (Genocide Convention) (ratified).

**Notes:** Treaty is not self-executing; implemented through Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 (1949), entered into force Oct. 21, 1950 (Geneva Convention I) (ratified).

**Notes:** Treaty is not self-executing; certain grave breaches criminalized in War Crimes Act of 1996, 18 U.S.C. § 2441.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (1949), entered into force Oct. 21, 1950 (Geneva Convention II) (ratified).

**Notes:** Treaty is not self-executing; certain grave breaches criminalized in War Crimes Act of 1996, 18 U.S.C. § 2441.

*International Human Rights Litigation*

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (1949), entered into force Oct. 21, 1950 (Geneva Convention IV) (ratified).

**Notes:** Treaty is not self-executing; certain grave breaches criminalized in War Crimes Act of 1996, 18 U.S.C. § 2441.

Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (1949), entered into force Oct. 21, 1950 (Geneva Convention III) (ratified).

**Notes:** Treaty is not self-executing; certain grave breaches criminalized in War Crimes Act of 1996, 18 U.S.C. § 2441.

International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969 (CERD) (ratified).

**Notes:** Treaty is not self-executing; no implementing legislation.

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 (ICCPR) (ratified).

**Notes:** Treaty is not self-executing; no implementing legislation. *See* 138 Cong. Rec. 8068 (1992), S. Exec. Rep. No. 102–23, 102d Cong., 2d Sess. (1992). *See also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.” (citing 138 Cong. Rec. 8068, 8071 (1992))).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. Res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49, Vol. III (2000), entered into force Feb. 12, 2002 (ratified).

**Notes:** Protocol is not self-executing; no implementing legislation.

*Appendix A. Major International Human Rights Instruments*

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49, Vol. III (2000), entered into force Jan. 18, 2002 (ratified).

**Notes:** Protocol is not self-executing; no implementing legislation.

Protocol III Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 2404 U.N.T.S. 261 (2005), entered into force Sept. 8, 2007 (ratified).

**Notes:** Protocol is not self-executing; no implementing legislation. *See* U.S. Senate Treaty Document No. 109-10, 109th Congress, 2d Sess. (Secretary of State's transmittal letter of June 12, 2006 noting that implementing legislation would be required for Protocol III).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc A/RES/55/25/Annex II (Nov. 15, 2000), entered into force Dec. 25, 2003 (ratified).

**Notes:** Treaty is not self-executing; no implementing legislation. (*See* U.S. Reservation No. 1: "The United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b) . . . with respect to the offenses established in the Trafficking Protocol. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws . . . . Accordingly, the United States will implement paragraph 1(b) of the Convention to the extent provided for under its federal law."). The Protocol was referenced with support in a Congressional Resolution. *See* H. Res. 508, Dec. 20, 2011 ("Supporting the goals and ideals of International Day for the Abolition of Slavery, recognizing the tenth anniversary of the adoption by the United Nations of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, and commending the efforts of modern day abolitionists following in the tradition of Frederick Douglass.").

### *International Human Rights Litigation*

Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267 (1966), entered into force Oct. 4, 1967 (ratified).

**Notes:** Protocol is not self-executing; implemented through the Refugee Act of 1980. See *Al-Fara v. Gonzales*, 404 F.3d 733, 742–43 (3d Cir. 2005) (“The United States is a signatory to the 1967 United Nations Protocol Relating to the Status of Refugees (‘1967 Protocol’), which incorporated the 1951 Convention. The Attorney General implemented regulations to comply with its terms. In 1980, Congress amended the INA through passing the Refugee Act, which brought the domestic laws of the United States into conformity with its treaty obligations under the 1967 Protocol. The 1967 Protocol is not self-executing, nor does it confer any rights beyond those granted by implementing domestic legislation.”).

#### ***Human Rights Treaties Signed But Not Yet Ratified by the United States***

Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) (CEDAW) (signed, not ratified).

Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2, 1990) (CRC) (signed, not ratified).

Inter-American Convention on Human Rights, 1144 U.N.T.S. 123 (1969) (entered into force July 18, 1978) (IACHR) (signed, not ratified).

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) (ICESCR) (signed, not ratified).

International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006) (entered into force May 3, 2008) (signed, not ratified).

*Appendix A. Major International Human Rights Instruments*

Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977) (entered into force Dec. 7, 1978) (signed, not ratified).

Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609 (1977) (entered into force Dec. 7, 1978) (signed, not ratified).

Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (1998) (entered into force July 1, 2002) (ICC) (signed, not ratified; subsequent to signature the United States announced that it “does not intend to become a party to the treaty,” and that “accordingly, the United States has no legal obligations arising from its signature”).





## Appendix B. Selected Cases—Actionable Conduct Under the Alien Tort Statute (ATS)

### *Cases Finding a Right of Action Under the ATS*

Aircraft hijacking. *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005).

Conspiracy with attorney and judge to jail plaintiff in miserable and life-threatening conditions until favorable settlement could be extorted. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (pre-*Sosa* case).

Extrajudicial killing; crimes against humanity; and cruel, inhuman, or degrading treatment or punishment. *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005).

Forced labor and human trafficking. *Rodriguez Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008).

Forcing children as young as six to perform heavy, hazardous labor. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

Harmful physical effects and medical problems caused by the aerial fumigation of drug farms. *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007).

Human trafficking. *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674 (S.D. Tex. 2009).

Murder, rape, forced impregnation, and torture. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (pre-*Sosa* case).

Murder of union leaders as an extrajudicial killing and violation of rights to associate and organize. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (pre-*Sosa* case).

Nonconsensual medical experimentation. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

Participation in slave trading and benefiting from forced labor. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (pre-*Sosa* case).

### *International Human Rights Litigation*

Plunder of private property that deprived members of the Jewish community in France of the means of financing their escape, thereby facilitating Nazi genocide. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (pre-*Sosa* case).

Torture, prolonged arbitrary detention, and summary execution. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (pre-*Sosa* case) (superseded on other grounds, 281 F.3d 1004 (9th Cir. 2002)).

Violation of rights of safe navigation and acts of piracy on the high seas. *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, No. C11-2043-JLR, 2015 WL 9308296, at \*9 (W.D. Wash. Dec. 21, 2015) (citing *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940 (9th Cir. 2013) (reinstating ATS claims for acts of piracy committed on the high seas)).

War crimes and other violations of international humanitarian law. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995) (approving ATS jurisdiction over war crimes).

#### ***Cases Finding No Right of Action Under the ATS***

False imprisonment, arbitrary detention for five months, and handcuffing such that plaintiff was required to stand for hours. *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2008), *rev'd on other grounds by Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014) (post-*Kiobel* case reversing jury verdict on surviving ATS claims based on extraterritoriality).

Arbitrary detention and cruel, inhuman, and degrading treatment or punishment of minor arising from altercation with city police officer outside club. *Lopez v. Richardson*, 647 F. Supp. 2d 1356 (N.D. Ga. 2009).

Arrest and detention by Mexican authorities under apparently valid U.S. warrant. *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998) (pre-*Sosa* case).

Brief unlawful detention prior to transfer to lawful authorities. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

*Appendix B. Selected Cases—Actionable Conduct Under the Alien Tort Statute*

Conspiracy to commit torture unsupported by factual basis for claims. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (abrogated by *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012)); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

“Constructive” expulsion from homeland arising out of government and military abuse. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (pre-*Sosa* case).

Cross-border parental child abduction by an individual with full guardianship or custody. *Taveras v. Taveras*, 477 F.3d 767 (6th Cir. 2007).

Denial of free speech. *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613 (S.D.N.Y. 1983) (pre-*Sosa* case).

Denying child custody to grandparents in favor of foster parents. *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978) (pre-*Sosa* case).

Environmental pollution from mining operations leading to health problems. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

Exportation of harmful pollutants. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (pre-*Sosa* case).

False arrest. *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008).

Fraud, unjust enrichment, misrepresentation, conversion, and other commercial claims. *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004).

General violations of environmental treaties and agreements. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (pre-*Sosa* case).

Governmental takings of its own citizens’ property. *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986) (pre-*Sosa* case).

Intentional infliction of emotional distress. *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

*International Human Rights Litigation*

Keeping workers on Liberian rubber plantation through fear, ignorance, and poverty, absent allegations that workers were unpaid or physically forced to work. *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988 (S.D. Ind. 2007).

Murder perpetrated by a drunk government security officer. *In re Xe Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009).

Negligence causing death or personal injury. *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Tex. 1989); *B.T. Shanker Hedge v. British Airways*, No. 82 C 1410, 1982 U.S. Dist. LEXIS 16469 (N.D. Ill. Dec. 27, 1982); *Benjamins v. British European Airways*, 572 F.2d 913 (2d Cir. 1978); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292 (E.D. Pa. 1963) (pre-*Sosa* cases).

Prisoner mistreatment, not rising to the level of torture. *Diaz v. United States*, 373 F. App'x 947 (11th Cir. 2010) (case not selected for publication in the *Federal Reporter*).

Reputational damage and defamation. *Akbar v. New York Magazine Co.*, 490 F. Supp. 60 (D.D.C. 1980); *De Wit v. KLM Royal Dutch Airlines, N.V.*, 570 F. Supp. 613 (S.D.N.Y. 1983) (pre-*Sosa* cases).

Single murder committed by private actors, in the course of an ongoing armed conflict, without demonstrating a serious breach of Geneva Conventions or other serious violation of international law. *Estate of Amergi v. Palestinian Authority*, 611 F.3d 1350 (11th Cir. 2010).

Statutory rape of a 15-year-old girl by the man she was forced to marry. *Cisneros v. Aragon*, 485 F.3d 1226 (10th Cir. 2007).

Threat of future state-sponsored extrajudicial killing. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010).

Use of chemicals as defoliants during the Vietnam War. *Vietnam Association for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008).

Violations of United Nations General Assembly resolutions. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (pre-*Sosa* case).

## **Appendix C: Model Order on Scheduling and Procedure in Human Rights Cases (with Joint Statement Form)**

As they do in all cases, federal judges hearing human rights claims must use their best discretion in docket management and in crafting the initial case management order that governs the case. On one hand, it can be useful to develop a comprehensive sketch of key factual and legal issues and to address their resolution from the outset in the case management order. On the other hand, a request for information about *potential* issues should not be taken as a jurisdictional road map for the defense or an unwarranted invitation to create hurdles for the opposing party.

The following is a model case management order for human rights cases.<sup>677</sup> Judges must balance the various interests involved—including the need to bring the case to a final resolution as expeditiously as possible—in light of the claims at issue, the location of evidence and witnesses, the parties and their resources, and other factors described in the federal rules and in case law. The mere fact that particular issues appear in the model order that follows (see, e.g., paragraph 6) does not mean that the parties are entitled to extensive motion practice or discovery on those issues in any given case.

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<sup>677</sup> Some of the content of the model order and the attached joint statement form was adapted from MCL Form 40.1 and Local Rules 16.1, 16.3, and 16.4 of the District of Massachusetts, as well as that district's special rules for patent litigation (General Order 08-3).

## MODEL ORDER

### Order of the Honorable \_\_\_\_\_ on Scheduling and Pretrial Procedures in Human Rights Cases

Pursuant to Fed. R. Civ. P. 16, the court hereby adopts the following scheduling requirements and procedures for cases involving allegations of human rights violations. This Order has been developed to help provide certainty and efficiency in such cases and is intended to be neutral as between plaintiffs and defendants. The requirements herein are supplemental to the parties' obligations under Fed. R. Civ. P. 11, 16, and 26 [*and Local Rule \_\_\_\_*].

1. **General Applicability.** In light of one or more claims for relief pleaded pursuant to the following [strike out as appropriate]:
  - a. The Alien Tort Claims Act, 28 U.S.C. § 1350;
  - b. The Torture Victim Protection Act, 28 U.S.C. § 1350 (note);
  - c. The Anti-Terrorism Act, 18 U.S.C. §§ 2331, 2333;
  - d. The Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595; and
  - e. The State Sponsors of Terrorism Exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7),the procedures specified in this Order shall apply to this case.
2. **Applicability in Other Cases.** In its discretion, either upon the request of a party or on its own initiative, the court may apply some or all of the requirements of this Order to other cases before it that involve similar types of claims and issues to the statutory causes of action set forth above.
3. **Scheduling Conference.** Pursuant to Fed. R. Civ. P. 16 [*and Local Rule \_\_\_\_*], an initial scheduling conference shall be conducted by the court in each case to which this Order applies. This conference shall be attended either by lead trial counsel for each party or by another senior lawyer with direct and ongoing responsibility for the conduct of the case.

4. **Obligation to Confer.** Unless otherwise ordered by the court, counsel for all parties shall confer and reach agreement to the extent possible on the topics set forth in this Order and the matters contemplated by Fed. R. Civ. P. 16(b), 16(c), and 26(f) [*and Local Rule \_\_\_\_*]. Counsel are jointly responsible for arranging and conducting this meeting. The court strongly encourages counsel to confer in person, but should that prove impossible or impractical, counsel shall meet by telephone or videoconference. Communicating by writing, including fax, instant message, text, or e-mail, will not be sufficient without an actual meeting. This conference shall take place at least [*twenty-eight (28)*] days prior to the initial scheduling conference in the case for the purpose of discussing and preparing:
  - a. An agenda of matters to be discussed at the scheduling conference; and
  - b. A proposed pretrial schedule that includes a plan for discovery and that addresses the other pretrial matters set forth below.
5. **Joint Statement of the Parties—Required Content.** Unless otherwise ordered by the court, the parties shall file a joint statement not later than [*ten (10)*] days before the initial scheduling conference. The joint statement shall be based upon the best knowledge, information, and belief of the parties and their counsel following reasonable inquiry and due diligence appropriate to that stage of the litigation. The joint statement shall include the following:
  - a. A joint discovery plan scheduling the time and length for all discovery events. To the extent possible, this plan should account for the desirability of conducting phased discovery, with the first phase limited to developing information needed either for a realistic assessment of the case or for the court to decide potentially dispositive pretrial motions, and with the second phase directed at information needed to prepare for trial if the case does not terminate;
  - b. A proposed schedule for the filing of motions and other pretrial events;
  - c. The parties' positions on other considerations deemed by the court to be potentially relevant to human rights cases, as set forth in paragraph 6 below;

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- d. The parties' positions on whether the case may be appropriate for early settlement negotiations, possible means of facilitating those negotiations, and what assistance may be appropriate for the court to provide (including reference of the case to another judicial officer or to a special master for settlement discussions);
  - e. The parties' positions on whether the case may be appropriate for reference to alternative dispute resolution programs designated for use in the district court or that the court otherwise may make available, including, without limitation, mediation, minitrial or summary jury trial; and
  - f. The parties' positions on whether the case may be appropriate for reference to a U.S. magistrate judge or a special master for purposes of discovery, fact-finding, or other aspects of the case.
6. **Joint Statement of the Parties—Additional Content.** In addition to the requirements of paragraph [5] above, the parties shall set forth their respective positions on each of the following considerations:
- a. **Related Proceedings.** Whether any civil or criminal proceeding relating to the same course of conduct, transaction, or occurrence at issue in the case is (i) currently pending; or (ii) likely to be brought in any federal or state court in the United States, in the courts of any foreign jurisdiction, or in any international judicial or arbitral forum. For each such action, the joint statement shall specify: the nature of the case (civil or criminal), the court or tribunal in question, the date of initial filing, the identity of the parties thereto, and the current status of the case. The parties shall timely supplement this statement when and as new information becomes available to them in the exercise of reasonable diligence.
  - b. **Overseas Discovery.** The extent to which evidence and witnesses are located outside the jurisdictional reach of the court, and whether discovery will be sought under The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, through letters rogatory, or through other similar procedures. The parties also shall state whether they reasonably anticipate any difficulty in securing the cooperation of any foreign jurisdiction with respect



*Appendix C. Model Order on Scheduling and Procedure in Human Rights Cases*

to obtaining information, testimony, or documentary evidence in that state.

- c. **Choice of Law; Foreign and International Law.** The jurisdiction(s) providing the sources of law applicable to the present dispute. If any party claims that the law of any foreign jurisdiction other than federal or state law of the United States governs any legal question in the case, the party shall state (i) the identity of the jurisdiction in question; (ii) the issue(s) on which such foreign or international law is alleged to be applicable; and (iii) the means by which the party intends to establish the content of that foreign or international law at or before trial.
- d. **Limitations Period.** Whether any party claims that some or all of the causes of action in the case are subject to any statute of limitations that has expired, and whether the expiration of such limitations period has or should be tolled on equitable or other grounds.
- e. **Confidentiality.** Whether any party will request that the court enter an order (i) protecting the confidentiality of information, testimony, or documents (including identifying information about parties and/or witnesses in the case); (ii) restricting public statements or commentary to the media by the parties or their counsel (“gag” order); or (iii) restricting public or media access to pleadings or case materials and/or limiting access to the courtroom when some or all proceedings are underway. If so, the parties shall reach agreement on confidentiality-related issues to the extent possible and shall submit a draft order to the court with their joint statement.
- f. **Rule 12(b)(6) Motions.** Whether any party intends to file a motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6), and if so, the specific grounds for the motion and why the defect alleged cannot be cured by amendment.

**g. Potential Grounds for Dismissal.**

**OPTION A**

Whether any party reasonably claims that it is or may be entitled to dismissal based upon any of the following considerations:

- i. Territorial limitations on the application of any federal statute under which claims for relief are asserted;
- ii. Immunity of foreign governments, agencies, and instrumentalities under the Foreign Sovereign Immunities Act;
- iii. Other forms of statutory or common law immunity, such as head of state immunity, immunity of government officials, and diplomatic immunity;
- iv. Lack of personal jurisdiction;
- v. Defects in service of process that cannot be cured;
- vi. Fed. R. Civ. P. 19(b) and claims that the court is unable to properly adjudicate the dispute in the absence of other parties that cannot be joined;
- vii. *Forum non conveniens*; or
- viii. Lack of standing to assert some or all of the grounds for relief claimed.

**OPTION B**

Whether any party reasonably claims that it is or may be entitled to dismissal, setting forth the basis of such claim for each ground the party asserts may be applicable.

- h. **Abstention.** Whether any party will request the court to abstain from hearing the case on the grounds that the case presents a nonjusticiable political question, or based upon the act of state doctrine, considerations of international judicial comity, or other similar grounds.
- i. **Governmental Statements of Interest.** Whether any party has requested or intends to request a statement of interest from the government of the United States or any foreign state with respect to the matters at issue in the case, as well whether any party will ask the court to make such requests in that regard.

**OPTIONAL**

- j. **Resolution of Claims as a Matter of Law; Separate Statements on Preliminary Legal Issues.** The parties shall use their best efforts to reach agreement as to (i) the critical factual and legal issues that are in dispute; and (ii) whether those contested issues are (or are not) amenable to summary judgment or other resolution by the court prior to trial. The parties will submit separately to the court brief written statements setting forth their current understanding of the facts involved in the litigation and the critical factual and legal issues in dispute. These statements will not be filed with the clerk, will not be binding, will not waive claims or defenses, [will be treated as confidential by all parties and may not be released to the public or the media], and may not be offered into evidence against a party in later proceedings in the case [or in any other judicial, arbitral, or administrative proceeding, unless otherwise ordered by the court].
7. **Form of Joint Statement.** To the extent that the parties agree that certain pretrial matters are (or are not) genuinely in dispute and/or on a proposed pretrial schedule, they shall so indicate in their joint statement. Where the parties disagree, they shall set forth separately the items on which they differ and indicate the nature of that difference. The purpose of the parties' proposals shall be to advise the court of their best understanding of matters genuinely in dispute and the time required to accomplish specified pretrial steps. The parties' proposed agenda for the scheduling conference and their proposed pretrial schedule shall be considered by the court as advisory only. [*To assist the parties and their counsel, a template for the joint statement is attached to this Order.*]
8. **Supplemental Joint Statements.** Unless otherwise ordered by the court, within [*thirty (30)*] days of the dismissal of any party or the joinder of any new party to the case, and at such other times as directed by the court, all parties shall meet and confer as specified in this Order and shall file a revised joint statement. The revised joint statement shall be based upon the best knowledge, information, and belief of the parties and their counsel following reasonable inquiry and due diligence appropriate to that stage of the case.

**[Joint Statement Form follows]**

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**Model Order  
Joint Statement Form<sup>678</sup>**

United States District Court  
for the

< \_\_\_\_\_ > DISTRICT OF < \_\_\_\_\_ >

<Name(s) of plaintiff(s)>,                    )  
  )  
  ) Plaintiff(s)                                    )  
  )  
  ) v.    )  
  ) Civil Action No. <Number>  
<Name(s) of defendant(s)>,                )  
  )  
  ) Defendant(s)                                )  
  )

Joint Statement Dated \_\_\_\_\_ Pursuant to the  
Standing Order of the Honorable \_\_\_\_\_ on  
Scheduling and Pretrial Procedures in Human Rights Cases

I. **Participating Counsel.** The following persons participated in a conference pursuant to Fed. R. Civ. P. 26(f) and the Standing Order of the Honorable \_\_\_\_\_ on Scheduling and Pretrial Procedures in Human Rights Cases on <Date> by <State the method of conferring>:

<Name(s)>, representing the <plaintiff(s)>

<Name(s)>, representing the <defendant(s)>

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678. Adapted from Form 52: Report of the Parties Planning Meeting, Federal Rules of Civil Procedure and Form 2: Order for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference, Civil Litigation Management Manual (Judicial Conference of the U.S. 2001).

*Appendix C. Model Order on Scheduling and Procedure in Human Rights Cases*

II. **Initial Disclosures.** The parties [have completed] [will complete by <Date>] the initial disclosures required by Rule 26(a)(1) [*and Local Rule \_\_\_\_*].

III. **Discovery Plan.** The parties propose the following discovery plan:

[Use separate paragraphs or subparagraphs if the parties disagree.]

- a. Discovery will be needed on these subjects: [Describe].
- b. Dates for commencing and completing discovery, including discovery to be commenced or completed before other discovery.
- c. Need for and proposed means of obtaining discovery from non-parties outside the jurisdictional reach of the court.
- d. Maximum number of interrogatories by each party to another party, along with the dates the answers are due.
- e. Maximum number of requests for admission, along with the dates responses are due.
- f. Maximum number of depositions by each party.
- g. For foreign witnesses who are to be deposed in the United States, the proposed means of ensuring that the witness will have the necessary permission to travel to and enter the United States for purposes of providing deposition testimony.
- h. Limits on the length of depositions, in hours.
- i. Anticipated testimony of expert witnesses, dates for exchanging reports of expert witnesses, and whether depositions of experts will be needed.
- j. Dates for supplementation under Rule 26(e).

IV. **Required Considerations in Human Rights Cases**

[Use separate paragraphs or subparagraphs if the parties disagree.]

- a. Related civil and criminal proceedings
  - i. Case(s) currently pending
  - ii. Anticipated filings

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- b. Overseas discovery
  - i. Hague Convention
  - ii. Letters rogatory or other procedures
- c. Choice of Law
  - i. U.S. state or federal
  - ii. Foreign
  - iii. International
- d. Statute of limitations; tolling
- e. Confidentiality
  - i. Information, testimony, or documents
  - ii. Gag order—parties
  - iii. Restrictions on public/media access
    - 1. Pleadings/case materials
    - 2. Courtroom access
- f. Rule 12(b)(6) (failure to state a claim)
- g. Potential grounds upon which any party may seek dismissal
  - OPTIONAL**
  - i. Territorial limitations on statutory causes of action
  - ii. Immunity
    - 1. FSIA/Foreign states, agencies, and instrumentalities
    - 2. Head of foreign state
    - 3. U.S. government as party
    - 4. U.S.—Current or former government officials
    - 5. Foreign state—Current or former government officials
    - 6. Diplomatic
  - iii. Personal jurisdiction
  - iv. Service of process
  - v. Rule 19 (indispensable parties)

*Appendix C. Model Order on Scheduling and Procedure in Human Rights Cases*

- vi. *Forum non conveniens*
- vii. Standing
- h. Abstention and Related Doctrines
  - OPTIONAL**
  - i. Nonjusticiable political question
  - ii. Act of state
  - iii. International comity
  - iv. Other prudential grounds
- i. Requests for statements of interest from governments
  - i. U.S. government
    - 1. Request(s) pending
    - 2. Request(s) anticipated
  - ii. Foreign government
    - 1. Request(s) pending
    - 2. Request(s) anticipated
  - iii. Request(s) for involvement by the court in requesting statements of interest
- j. Resolution of claims as a matter of law

**V. Additional Items**

[Use separate paragraphs or subparagraphs if the parties disagree.]

- a. Requested dates for pretrial conferences.
- b. Final dates for the plaintiff to amend pleadings or to join parties.
- c. Final dates for the defendant to amend pleadings or to join parties.
- d. Final dates to file dispositive motions.
- e. State the prospects for settlement.
- f. Identify any alternative dispute resolution procedures that may enhance settlement prospects.

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- g. Final dates for submitting Rule 26(a)(3) witness lists, designations of witnesses whose testimony will be presented by deposition, and exhibit lists.
- h. Final dates to file objections under Rule 26(a)(3).
- i. Suggested trial date and estimate of trial length.
- j. For trial witnesses who are not present in the United States, the proposed means of ensuring that the witness will have the necessary permission to travel to and enter the United States for purposes of providing trial testimony.
- k. Potential involvement of U.S. magistrate and/or special master in the case.
- l. Other matters.

Date: [Date]

[Signature of each attorney or unrepresented party]

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[Printed name]  
[Address]  
[E-mail address]  
[Telephone number]  
[State Bar or License #]



## Appendix D. Federal Statutes (Excerpts)

### *Alien Tort Claims Act, 28 U.S.C. § 1350*

Alien's action for tort

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.

(June 25, 1948, ch. 646, 62 Stat. 934)

### *Torture Victim Protection Act, 28 U.S.C. § 1350 (note)*

Section 1. Short Title

This Act may be cited as the "Torture Victim Protection Act of 1991."

Section 2. Establishment of Civil Action.

- (a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation—
  - (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
  - (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.
- (b) Exhaustion of Remedies. 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.
- (c) Statute of Limitations. No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 3. Definitions.

- (a) Extrajudicial Killing. For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a pre-

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vious 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.

- (b) Torture. For the purposes of this Act—
- (1) the term “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; and
  - (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
    - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
    - (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
    - (C) the threat of imminent death; or
    - (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

***Anti-Terrorism Act, 18 U.S.C. §§ 2331, 2333***

**18 U.S.C. § 2331 (Definitions)**

As used in this chapter—

- (1) the term “international terrorism” means activities that—
  - (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
  - (B) appear to be intended—
    - (i) to intimidate or coerce a civilian population;
    - (ii) to influence the policy of a government by intimidation or coercion; or
    - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;and
  - (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;
- (2) the term “national of the United States” has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;
- (3) the term “person” means any individual or entity capable of holding a legal or beneficial interest in property;
- (4) the term “act of war” means any act occurring in the course of—
  - (A) declared war;
  - (B) armed conflict, whether or not war has been declared, between two or more nations;or
  - (C) armed conflict between military forces of any origin; and

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- (5) the term “domestic terrorism” means activities that—
- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
  - (B) appear to be intended—
    - (i) to intimidate or coerce a civilian population;
    - (ii) to influence the policy of a government by intimidation or coercion; or
    - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping;
- and
- (C) occur primarily within the territorial jurisdiction of the United States.

Anti-Terrorism Act of 1990, Pub. L. No. 102-572, 106 Stat. 4521 (as amended by the Act of Oct. 26, 2001, Pub. L. No. 107-56, 115 Stat. 376).

**18 U.S.C. § 2333 (Civil Remedies)**

- (a) Action and Jurisdiction. Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.
- (b) Estoppel Under United States Law. A final judgment or decree rendered in favor of the United States in any criminal proceeding under section 1116, 1201, 1203, or 2332 of this title or section 46314, 46502, 46505, or 46506 of title 49 shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.
- (c) Estoppel Under Foreign Law. A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from

*Appendix D. Federal Statutes (Excerpts)*

denying the essential allegations of the criminal offense in any subsequent civil proceeding under this section.

Anti-Terrorism Act of 1990, Pub. L. No. 102-572, 106 Stat. 4522 (as amended by the Act of Oct. 31, 1994, Pub. L. No. 103-429, 108 Stat. 4377)

***William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. § 1595***

**18 U.S.C. § 1595 (Civil Remedy)**

- (a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorney's fees.
- (b)(1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.
- (b)(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified with prior versions in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., and 42 U.S.C.) (amending Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (amending Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (amending Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464))), as amended by Pub. L. No. 114-22, tit. I, § 120, May 29, 2015, 129 Stat. 247.

***Terrorism Exception to the Jurisdictional Immunity of a Foreign State, 28 U.S.C. § 1605A***

(a) **In General.**

(1) **No immunity.** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) **Claim heard.** The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(A)(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

*Appendix D. Federal Statutes (Excerpts)*

- (III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and
  - (A)(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or
  - (B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.
- (b) **Limitations.** An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605 (a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—
- (1) 10 years after April 24, 1996; or
  - (2) 10 years after the date on which the cause of action arose.
- (c) **Private Right of Action.** A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—
- (1) a national of the United States,
  - (2) a member of the armed forces,
  - (3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or
  - (4) the legal representative of a person described in paragraph (1), (2), or (3), for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United

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States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

- (d) **Additional Damages.** After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

Act of Jan. 28, 2008, Pub. L. No. 110-181, div. A, tit. X, § 1083(a)(1), 122 Stat. 338.



## Appendix E: Research References

### *Online Resources*

- American Society of International Law, Electronic Information System for International Law, <http://www.eisil.org/> (last visited Aug. 10, 2016).
- American Society of International Law, Human Rights Research Guide, [http://www.asil.org/sites/default/files/ERG\\_HUMRTS.pdf](http://www.asil.org/sites/default/files/ERG_HUMRTS.pdf) (last visited Aug. 10, 2016).
- University of Minnesota Human Rights Library, <http://www1.umn.edu/humanrts> (last visited Aug. 10, 2016).

### *Restatement (Third) of Foreign Relations Law*

- Restatement (Third) of the Foreign Relations Law of the United States § 101 (1987) (International Law Defined).
- Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987) (Sources of International Law).
- Restatement (Third) of the Foreign Relations Law of the United States § 111 (1987) (International Law and Agreements as Law of the United States).
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## About the Author

Dr. David Nersessian is an Assistant Professor in the Accounting and Law Division of Babson College, where he teaches Business Law and Public International Law. He earned his D. Phil. (Ph.D.) in Law from Oxford University (St. Catherine's College), where his research concentrated in public international law and human rights. He earned his J.D. *magna cum laude* from Boston University School of Law.

Before joining Babson, Dr. Nersessian held administrative and teaching appointments at Boston University Questrom School of Business, Boston University School of Law, and Harvard Law School. He was a Supreme Court Fellow at the U.S. Supreme Court from 2005 to 2006. Prior to completing his doctoral work, Dr. Nersessian practiced for six years with several large law firms, representing clients in complex commercial litigation in state and federal courts, administrative proceedings, and private arbitrations throughout the United States.

Dr. Nersessian's book *Genocide and Political Groups* was published by Oxford University Press in 2010. His research concentrates on public international law, human rights, legal ethics, and the management of legal and ethical risk in the corporate setting. He has a particular focus on the role of corporate lawyers in human rights issues, the intersection of business and human rights, and the impact of globalization on the ethical regulation of the legal profession. In addition to his work in globalization and ethics, he continues to write, speak, and consult in public international law and human rights.

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