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## 1. Alien Tort Statute

The Alien Tort Statute, codified at 28 U.S.C. § 1350 (2006) and also sometimes called the “Alien Tort Claims Act,” reads in full:

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.

This U.S. law dates to the first statute establishing the federal judicial system. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789). Yet to date only six judgments of the Supreme Court mention the Alien Tort Statute, and only two of those offer any extended analysis of that statute.<sup>3</sup> The two are:

- *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)
- *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013)

This section thus is based on the guidance set forth in *Sosa* and *Kiobel*, supplemented by selected decisions from lower federal courts. *Caveat*: Many decisions in the latter group were issued before the Supreme Court’s rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as extraterritoriality.

### a. Overview of Alien Tort Statute Litigation

The following elements constitute a proper claim for civil damages under the Alien Tort Statute, 28 U.S.C. § 1350 (2006):

1. Proper plaintiff – an “alien.”

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<sup>3</sup> The other four decisions are *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1705 (2012) (affirming dismissal on Torture Victim Protection Act ground without reaching Alien Tort Statute claims); *Samantar v. Yousuf*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Rasul v. Bush*, 542 U.S. 466, 472, 484 (2004) (ruling on jurisdictional ground without reaching substance of complaint); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 432-39 (1989) (ruling on immunities issue). See also *Kiobel*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1663 (observing that “the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years”).

2. Plaintiff has pleaded “a tort” in violation of either:
  - a. a treaty of the United States; or
  - b. the law of nations.
3. Proper defendant.
4. Defendant’s alleged acts constitute an actionable mode of liability.

In moving to dismiss an Alien Tort Statute case, defendants typically have argued that one or more of the above elements have not been satisfied. Additional commonly raised defenses include the following:

- Presumption against extraterritoriality
- Immunities
- Act of state doctrine
- Political question
- *Forum non conveniens*
- Time bar
- Exhaustion of local remedies
- International comity

These aspects of Alien Tort Statute litigation are detailed below. Treated first are the elements of an Alien Tort Statute claim, as informed by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Then follows a discussion of defenses, leading with extraterritoriality, the question at bar in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013). The section concludes with a discussion of damages and other available redress.

## **b. Elements of an Alien Tort Statute Claim**

This section discusses the requisite elements of an Alien Tort Statute claim. Central to the discussion is the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see infra* § III.E.1.b.ii.2.

### **i. Alien Plaintiff**

The Alien Tort Statute by its terms confers jurisdiction over claims by aliens only. As the Supreme Court made clear in *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004), the statute does not distinguish between resident and nonresident aliens. Legal permanent residents may sue under the statute. U.S. citizens may not; rather, they must seek relief pursuant to the Torture Victim Protection Act, discussed *infra* § III.E.2, or bring other types of claims.

#### **i.1. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims**

While the Alien Tort Statute has been applied to many different international law torts, the Torture Victim Protection Act, discussed *infra* § III.E.2, permits suits only for allegations of torture or extrajudicial killing. Lower courts have split on whether alien plaintiffs alleging torture

or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006). Such courts look to a statement in the legislative history, to the effect that Congress intended the Torture Victim Protection Act to

enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

## ii. Tort

By its terms, the Alien Tort Statute provides federal jurisdiction over cases involving torts – as opposed to breaches of contract – committed in violation either of a treaty or of the law of nations. Virtually all case law deals with the latter option; accordingly, this section begins with a brief treatment of the treaty option and then proceeds to lay out in detail the treatment of cases alleging violations of the law of nations.

Allegations brought under the Alien Tort Statute are subjected to a “searching review of the merits.” *Kadić v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995). Citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), discussed *infra* § III.E.1.b.ii.2, the U.S. Court of Appeals for the Second Circuit recently explained that if a court

‘cannot find that Plaintiffs have grounded their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged, the courts are without jurisdiction under the ATS to consider them.’

*Velez v. Sanchez*, 693 F.3d 308, 318 (2d Cir. 2012) (quoting *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008)), *cert. denied*, 555 U.S. 1218 (2009)).<sup>4</sup>

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<sup>4</sup> With regard to the general federal pleading standard, see *Ashcroft v. Iqbal*, 556 U.S. 662 (2008); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2006).

## ii.1. Violation of a Treaty of the United States

The Alien Tort Statute confers federal jurisdiction over a tort committed in violation of a treaty of the United States. Few cases have involved this basis for jurisdiction, however. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court rejected plaintiff's invocation of a treaty to which the United States had become a party in 1992. The Court reasoned that although the treaty at issue, the 1966 International Covenant on Civil and Political Rights,<sup>5</sup>

does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.

*Sosa*, 542 U.S. at 734-35. For discussion of the doctrine of non-self-executing treaties, see *supra* § I.C.

## ii.2. Violation of the Law of Nations

Most Alien Tort Statute cases proceed under the law of nations prong of the statute. The reference to the law of nations is often associated with customary international law, a source of law discussed in § I.B.2. See *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003); see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 37 n.23 (2011) (writing that customary international law is but “one of the sources for the law of nations”), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

## ii.3. Supreme Court's *Sosa* Framework for Determination

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court outlined the methodology for determining whether the tort pleaded violates international law, a prerequisite to federal jurisdiction under the Alien Tort Statute. Having considered the claim at bar in light of the 1789 statute, the opinion of the Court, written by Justice David H. Souter, stated:

[C]ourts should require any claim based on the present-day law of nations to rest 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 we have recognized.

*Id.* at 725. The Court advised “judicial caution,” *id.* It pointed especially to “the practical consequences” of recognizing a cause of action. *Id.* at 732-33. The *Sosa* framework thus entails *inter alia* multiple considerations. The following are discussed in sections below:

- Acceptance of the norm by the civilized world
- Definition of the norm with specificity in international law

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<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Dec. 11, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

- Consideration of the practical consequences of enforcing the norm

It should be noted that prior to the decision in *Sosa*, lower courts typically had held that the tort in question had to be sufficiently defined, universal, and obligatory. *E.g.*, *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). In *Sosa*, Justices of the Supreme Court acknowledged that the requirements it posited were “generally consistent” with those formulations. *Sosa*, 542 U.S. at 732; *id.* at 747-48 (Scalia, J., dissenting). Thus, pre-*Sosa* opinions may remain useful in determining the cognizability of torts under the Alien Tort Statute.

### **ii.3.a. Accepted by Civilized World**

As for the acceptance of the tort alleged, the Court in *Sosa*, 542 U.S. at 733, proceeded by reference to the “current state of international law.” It did not require that the tort be contained within a federal statute. *Id.* at 714, 719, 723.

With respect to some causes of action, it may be necessary to consider whether international law extends liability to private or nonstate – as opposed to public or state – actors. This consideration is discussed *infra* § III.E.1.b.iii.3.

### **ii.3.b. Defined with Specificity**

The Court in *Sosa* drew upon its own jurisprudence respecting one of the earliest-recognized international crimes – piracy – in stating that torts alleged in Alien Tort cases should parallel “the specificity with which the law of nations defined piracy.” *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. 153, 163-80 (1820)).

### **ii.3.c. Practical Consequences**

In *Sosa*, 542 U.S. at 725-26, the Supreme Court instructed the lower courts to proceed with “caution” in exercising their “discretionary judgment” to recognize actionable torts. Lower courts should consider the “practical consequences” of making the cause of action available to litigants; to be precise, the Court wrote *id.* at 732-33:

And 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.

The Court appended a footnote, *id.* at 733 n.21, which cited a:

- Statement by the European Commission “that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals”; and

- “[P]olicy of case-specific deference to the political branches,” as indicated by “the Executive Branch’s view of the case’s impact on foreign policy.”

#### **ii.4. Supreme Court’s Application of Framework in *Sosa***

The plaintiff in *Sosa* sought to recover for the international law tort of arbitrary detention, claiming that the elements of that tort had been satisfied when he was kidnapped in Mexico and held for a short time. The Court rejected the claim.

To be specific, the Court in *Sosa* indicated that to the extent that arbitrary detention is cognizable under the Alien Tort Statute, the impugned conduct must amount to more than a “relatively brief detention in excess of positive authority,” more than “the reckless policeman who botches his warrant,” and more than “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment.” 542 U.S. at 737-38. The Court held that the plaintiff had failed to establish an actionable tort under international law, and pointed by way of comparison to the prohibition of “prolonged” arbitrary detention as set forth in the *Restatement (Third) of Foreign Relations Law of the United States* (1987).<sup>6</sup>

#### **ii.5. Post-*Sosa* Rulings in Lower Courts on Actionable Claims**

As described above, the Supreme Court held in *Sosa* that the standard it had just articulated was not satisfied by the conduct at issue, a short period of detention. Lower courts subsequently applied the *Sosa* methodology with regard to other torts. Some conduct has been found actionable, some not. A sampling of those rulings follow, with the caveat that most predate the Court’s 2013 extraterritoriality ruling in *Kiobel*, detailed *supra* § III.E.1.c.i. Courts thus must analyze the case before them according to both the extraterritoriality standard of *Kiobel* and to the actionability standard of *Sosa*.

##### **ii.5.a. Ruled Actionable**

International law torts that lower courts, post-*Sosa*, have recognized as actionable under the Alien Tort Statute include:

- Arbitrary denationalization or denaturalization, by a state actor<sup>7</sup>
- Child labor<sup>8</sup>
- Crimes against humanity<sup>9</sup>

<sup>6</sup> Designated subsequently as *Restatement*, this 1987 American Law Institute treatise compiles many of the doctrines discussed in this chapter. Its provisions must be consulted with due caution, however, particularly given that it was published decades before the Supreme Court’s most recent interpretations of the Alien Tort Statute. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, see *infra* § IV.B.1.

<sup>7</sup> In re *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 252 (S.D.N.Y. 2009).

<sup>8</sup> *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 814-16 (S.D. Ind. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1075-76 (C.D. Cal. 2010).

<sup>9</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013); *Sexual Minorities Uganda v. Lively*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4130756, at \*7-\*11 (D. Mass. Aug. 14, 2013); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112,

- Enslavement, involuntary servitude, forced labor, and sexual slavery<sup>10</sup>
- Genocide<sup>11</sup>
- Hijacking<sup>12</sup>
- Nonconsensual human medical experimentation<sup>13</sup>
- Purposeful use of poisoned weapons<sup>14</sup>
- Summary execution/extrajudicial killing<sup>15</sup>
- Torture, physical or mental, by a state actor<sup>16</sup>
- Trafficking<sup>17</sup>
- War crimes,<sup>18</sup> including deliberate targeting of civilians<sup>19</sup>

### ii.5.b. Division of Authority on Actionability

Lower court rulings post-*Sosa* have split with respect to the cognizability of international law torts such as:

- Cruel, inhumane, and degrading treatment<sup>20</sup>
- Detention without legal authority/brief arbitrary detention<sup>21</sup>
- Terrorism<sup>22</sup> and the financing of terrorism<sup>23</sup>

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1154-57 (E.D. Cal. 2004). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in judgment).

<sup>10</sup> *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074-76 (C.D. Cal. 2010); *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 521 (S.D.N.Y. 2009); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1014 (S.D. Ind. 2007); *Jane Doe I v. Reddy*, 492 F. Supp. 2d 988 (N.D. Cal. 2007).

<sup>11</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013).

<sup>12</sup> *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 480-81 (S.D.N.Y. 2010).

<sup>13</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010).

<sup>14</sup> *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008) (*dicta*).

<sup>15</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 (E.D. Va. 2009).

<sup>16</sup> *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 n.29 (2004).

<sup>17</sup> *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009).

<sup>18</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013); *Estate of Manook v. Research Triangle Inst., Int'l*, 693 F. Supp. 2d 4, 18 (D.D.C. 2010); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744-47 (D. Md. 2010).

<sup>19</sup> *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582-3 (E.D. Va. 2009).

<sup>20</sup> Compare *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (rejecting tort) with *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 253-54 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010).

<sup>21</sup> Compare *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (holding eight-hour detention not actionable) with *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging periods of detention longer than a day, an allegation not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>22</sup> Compare *Lev v. Arab Bank, PLC*, 2010 U.S. Dist. LEXIS 16887, at \*22 (E.D.N.Y. Jan. 29, 2010); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 281 (E.D.N.Y. 2007) (finding jurisdiction over terrorism) with *Saperstein v.*

### ii.5.c. Ruled Not Actionable

Since the Supreme Court decided *Sosa*, lower courts have declined to recognize a federal cause of action under the Alien Tort Statute for international law torts such as:

- Apartheid as practiced by nonstate actors<sup>24</sup>
- Unlawful killings by nonstate actors<sup>25</sup>
- Conversion<sup>26</sup>
- Detention without notice of consular rights<sup>27</sup>
- Displacement of remains<sup>28</sup>
- Failure to follow health and safety standards<sup>29</sup>
- Forced exile<sup>30</sup>
- Fraud<sup>31</sup>
- Freedom of thought, conscience, religion, and association<sup>32</sup>
- Harassment<sup>33</sup>
- Imposing production quotas that lead to child labor<sup>34</sup>
- Manufacture and supply of an herbicide used as a defoliant with collateral damage<sup>35</sup>
- Property destruction or confiscation, absent other violations<sup>36</sup>
- Property destruction by U.S. government<sup>37</sup>
- Racial discrimination<sup>38</sup>
- Deprivation of rights to life, liberty, security and association<sup>39</sup>
- Torture by a nonstate actor<sup>40</sup>

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*Palestinian Auth.*, 2006 U.S. Dist. LEXIS 92778, at \*26 (S.D. Fla. 2006). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring).

<sup>23</sup> *Krishanthi v. Rajaratnam*, 2010 U.S. Dist. LEXIS 88788, at \*37-\*43 (D.N.J. Aug. 26, 2010).

<sup>24</sup> *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 250-51 (S.D.N.Y. 2009).

<sup>25</sup> *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1358-59 (11th Cir. 2010).

<sup>26</sup> *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

<sup>27</sup> *Mora v. New York*, 524 F.3d 183, 208-09 (2d Cir. 2008); *see Jogi v. Voges*, 480 F.3d 822, 824 (7th Cir. 2007).

<sup>28</sup> *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469, 476 (S.D.N.Y. 2004).

<sup>29</sup> *Viera v. Eli Lilly & Co.*, 2010 U.S. Dist. LEXIS 103761, at \*9-\*10 (S.D. Ind. Sept. 30, 2010).

<sup>30</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>31</sup> *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004). *See also Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142, 145 (7th Cir. 1973).

<sup>32</sup> *Gang Chen v. China Cent. TV*, 2007 U.S. Dist. LEXIS 58503, at \*7-\*8 (S.D.N.Y., Aug. 9, 2007) (dicta).

<sup>33</sup> *Zapolski v. F.R.G.*, 2010 U.S. Dist. LEXIS 43863, at \*6-\*7 (E.D.N.Y., May 4, 2010).

<sup>34</sup> *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1024 (7th Cir. 2011).

<sup>35</sup> *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008).

<sup>36</sup> *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004).

<sup>37</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854-55 (D.C. Cir. 2010).

<sup>38</sup> *Sarei v. Rio Tinto, PLC*, 631 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013).

<sup>39</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>40</sup> *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 24, 30 (D.D.C. 2010).

### iii. Proper Defendant

Comparison of the text of the Alien Tort Statute, quoted in full *supra* § III.E.1, with the corollary provision of the Torture Victim Protection Act, quoted *infra* § III.E.2, reveals a significant difference: although the latter describes the potential defendant, the Alien Tort Statute contains no such express reference. That lacuna has generated considerable litigation, with respect to the persons whom plaintiffs have endeavored to sue. Defendants so named have included:

- Natural persons; that is, human beings
- Nonnatural persons – also called juridical persons or artificial persons – such as:
  - Organizations
  - States
  - Corporations

In suits naming private or nonstate actors as defendants, a court also must ask:

- Does liability for violation of the international law tort at bar extend to private or nonstate actors as well as to public or state actors?

Each of these factors is discussed in turn below.

#### iii.1. Natural Persons

Widely held to have spurred enactment of the Alien Tort Statute in 1789 was an incident that had occurred five years earlier, when “a French adventurer” physically attacked a French diplomat in Philadelphia, and France decried the absence of a clear U.S. remedy for what was termed an act contrary to the law of nations. *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1659, 1666 (2013) (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (O.T. Phila.1784)); *see also* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int’l L. 687, 692-95 (2002) (describing this so-called Marbois incident).

That paradigm has persisted for centuries: natural persons – human beings – have been treated as proper defendants from the very first reported Alien Tort Statute decision through to the 1980 appellate decision that gave rise to increased litigation and the 2004 Supreme Court opinion interpreting the statute. *See Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D.C.S.C. 1795) (ordering human defendant to pay restitution to alien plaintiff following mortgaging of slaves while docked at a U.S. port); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (permitting alien plaintiffs to pursue lawsuit against police official alleged to have committed torture); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (in a suit against a man who had helped U.S. agents detain the plaintiff, establishing the framework for determining which international law torts are cognizable under the statute).

The availability of this statute as a means to seek redress from natural persons represented an exception to the traditional role of the “law of nations,” the regulation of behavior between nation-states. When the Alien Tort Statute was passed in 1789, some “rules binding

individuals for the benefit of other individuals overlapped with the norms of state relationships,” as the Supreme Court put it in *Sosa*, 542 U.S. at 715. The Court listed “three specific offenses against the law of nations” understood in 1789 to implicate natural persons:

- Violation of safe conducts
- Infringement of the rights of ambassadors
- Piracy

*Id.* (citing 4 William Blackstone, *Commentaries on the Laws of England* ch. V, 68 (1765-69)).

Moreover, the potential for natural persons to participate in international law increased markedly in the post-World War II era. The International Military Tribunals at Nuremberg and Tokyo established that humans could be held criminally liable for violating international law. Subsequently, the proliferation of widely ratified multilateral human rights treaties entrenched the principle that each human being is protected by certain international law norms. *See generally, e.g.,* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *Ind. L.J.* 809 (2000).

In short, a natural person may be a defendant in Alien Tort Statute litigation, assuming that other components of such a suit are met. Among such components may be whether the defendant is a private or state actor, as discussed *infra* § III.E.1.b.iii.3.

### **iii.2. Nonnatural / Artificial / Juridical Persons**

The amenability to Alien Tort Statute suit of nonnatural persons – also known as artificial persons or juridical persons – has been more contested than that of natural persons. Examples of nonnatural persons that have been named as defendants include:

- Organizations
- Sovereign States
- Corporations

Each is discussed in turn below.

#### **iii.2.a. Organizations**

Given that the Alien Tort Statute makes no mention of potential defendants, as noted *supra* § III.E.1.b.iii, it contains no explicit limitation on suits against an entity like an organization. In determining that an organization was not “individual” within the express terms of the Torture Victim Protection Act, and thus was not amenable to suit under that Act, the Supreme Court distinguished the two statutes. *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1709 (2012).<sup>41</sup>

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<sup>41</sup> Justice Sonia Sotomayor wrote in her opinion for the Court that “the Alien Tort Statute ... offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute.” *Mohamad*, 132 S. Ct. at 1709. On Alien Tort Statute suits against corporations, see *infra* § III.E.1.b.iii.2.c.

Only a small handful of earlier lower court decisions had addressed whether an organization could be held liable under the Alien Tort Statute. For example, one case proceeded to a default judgment against a political party. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *rev'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004).

### **iii.2.b. Sovereign States**

A primary purpose of international law is to regulate the behavior of nation-states. The Alien Tort Statute names as potential avenues for relief two sources of international law, treaties and the law of nations. *See supra* § III.E.1.b.ii. Any prospect that a state might be held liable under the statute is quite limited, however, given doctrines of immunity that preclude such suits.

A civil action against a foreign sovereign state or its agents or instrumentalities may not go forward unless the action satisfies the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq.* (2006), detailed *supra* § II.B.1 and *infra* § III.E.1.c.ii.a. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

### **iii.2.c. Corporations**

The Supreme Court has not ruled on whether corporations may be held liable under the Alien Tort Statute. As the Court explained in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1659, 1663 (2013), it heard argument on the question in *Kiobel*, but subsequently ordered reargument. Eventually, the Court decided the case on the ground of extraterritoriality, detailed *infra* III.E.1.c.i, it did not pass judgment on the corporate liability question.

The Supreme Court had granted *certiorari* after the U.S. Court of Appeals for the Second Circuit held, by a two-to-one panel vote, that that the law of nations does not recognize corporate defendants. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). That ruling conflicted with those in other circuits, which had allowed cases to go forward against corporations. *E.g., Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

### **iii.3. Status of Defendant as State Actor or Private Actor**

In keeping with a primary purpose of international law, the regulation of behavior between nation-states, some international law rules apply only to states and to state actors, also called public or governmental actors. Others apply as well to private or nonstate actors. Thus the Supreme Court in *Sosa v. Alvarez-Machain* instructed courts to consider

whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor....

542 U.S. at 733 n.20.

Relying on lower court jurisprudence, this section discusses: first, international law torts that have been held to extend both to private and state actors; second, those torts that have been held to extend only to state actors; and third, those on which there is a division of authority respecting this question. The section concludes by discussing means by which, even with regard to state-action torts, a private actor may be held liable if the private actor's actions were sufficiently linked to state action.

### **iii.3.a. International Law Torts Applicable to State and Nonstate Actors Alike**

Courts have indicated that the following international law torts apply to private actors as well as to state actors:

- Genocide<sup>42</sup>
- War crimes<sup>43</sup>
- Forced labor<sup>44</sup>
- Hijacking of aircraft<sup>45</sup>

### **iii.3.b. International Law Torts Requiring State Action**

The following international law torts have been deemed not to extend to private actors, absent sufficient linkage to state action:

- Torture<sup>46</sup>
- Extrajudicial killing/summary execution<sup>47</sup>

### **iii.3.c. Division of Authority on Applicability to Private Actors**

Lower courts have divided on whether – absent sufficient linkage to state action – private actors may be held liable for violation of the following international law torts:

- Crimes against humanity<sup>48</sup>

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<sup>42</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004) (citing *Kadić v. Karadžić*, 70 F.3d 232, 239-41 (2d Cir. 1995)).

<sup>43</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1702 (2012); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009); *Kadić v. Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945-46 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

<sup>44</sup> *Adhikari v. Daoud & Partners*, 2010 WL 744237, at \*7 (S.D. Tex. Mar. 1, 2010); *Jane Doe I v. Reddy*, 2003 WL 23893010, at \*8 (N.D. Cal. Aug. 4, 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

<sup>45</sup> *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003).

<sup>46</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring), *discussed in Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004).

<sup>47</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at \*39 (S.D.N.Y. Feb. 22, 2002), *citing Kadić v. Karadžić*, 70 F.3d 232, 241 (2d. Cir. 1995).

- Acts of terrorism<sup>49</sup>

### iii.3.d. Potential Liability of Private Actors for Torts Requiring State Action

Even if the international law tort has been deemed to extend only to state action, a private-actor defendant may be judged liable under the Alien Tort Statute if the defendant's conduct is sufficiently linked to state action. To decide whether this is the case, some lower courts have employed an analysis akin to the "color of law" inquiry applied pursuant to:

- The general federal civil rights statute, 42 U.S.C. § 1983 (2006);<sup>50</sup>
- Agency law; and
- The Torture Victim Protection Act, described *infra* § III.E.2.

A court thus may deem a private actor amenable to suit under the Alien Tort Statute if a "close nexus" exists between a nation-state and the actions of the private defendant, such that the "seemingly private behavior may be fairly treated as that of the State itself." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation omitted)), *cert. denied*, 130 S. Ct. 3541 (2010). *See also* *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005); *Kadić v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995) (holding that self-avowed yet unrecognized state may qualify as state for this purpose).

### iv. Defendant's Acts Constitute an Actionable Mode of Liability

A defendant may be held liable under the Alien Tort Statute based not only on the defendant's acts as a principal perpetrator, but also on other modes of liability. Indeed, in a recent decision, one court observed:

Aiding and abetting liability under the ATS has been accepted by every circuit that has considered the issue.

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<sup>48</sup> Compare *Kadić v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) with *Abagnin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008).

<sup>49</sup> Compare *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007), with *Saperstein v. Palestinian Auth.*, 2006 WL 3804718, at \*5-\*8 (S.D. Fla. Dec. 22, 2006).

<sup>50</sup> The analysis derives from the precise text of that statute:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

*Sexual Minorities Uganda v. Lively*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 4130756, at \*11 (D. Mass. Aug. 14, 2013). Modes of liability that may be alleged include:

- Aiding and abetting<sup>51</sup>
- Conspiracy<sup>52</sup>
- Responsibility as a superior or commander of the primary actor<sup>53</sup>

The issue of accomplice liability generally arises at the summary judgment phase. *Presbyterian Church*, 582 F.3d at 260.

#### **iv.1. Dispute over Consultation of International or Domestic Law**

Courts have split on whether to determine accomplice liability questions by resort to international or to domestic law:

- The U.S. Courts of Appeals for the Second and the District of Columbia Circuits are among those courts that have looked to international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 32-37 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).
- A minority view has held that domestic law should govern subsidiary issues like accomplice liability; by this view, international law should be consulted only on the substantive issue of whether a tort is actionable under the Alien Tort Statute. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).

#### **c. Defenses**

In addition to challenges on the grounds just discussed, commonly raised defenses to Alien Tort Statute lawsuits include:

- Presumption against extraterritoriality
- Immunities
- Act of state
- Political question
- *Forum non conveniens*

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<sup>51</sup> *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748-49 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 29-30 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (2d Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315-16 (11th Cir. 2008); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

<sup>52</sup> *See Cabello v. Fernández-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005).

<sup>53</sup> *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. Fla. 2006); *see also Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (analyzing command responsibility under the Torture Victim Protection Act, a statute discussed *infra* § III.E.2).

- Time bar
- Exhaustion of remedies
- Comity

Each will be discussed in turn below.

### **i. Presumption against Extraterritoriality**

A court confronted with an Alien Tort Statute lawsuit must determine whether the relationship between the claims and the United States is sufficient; if it is not, the case must be dismissed. This was the unanimous conclusion of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013).

#### **i.1. Reasoning in *Kiobel***

Although the full Supreme Court agreed that the case before it in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013), must be dismissed, the reasoning by which the Justices arrived at this principle differed:

- A five-member majority held that the judicial creation of a cause of action under the Alien Tort Statute – the text of which contains no “clear indication of extraterritoriality” – must be evaluated pursuant to “a canon of statutory interpretation known as the presumption against extraterritorial application.” *Id.* at \_\_\_, 133 S. Ct. at 1664-65 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. \_\_\_, \_\_\_, 130 U.S. 2869, 2883 (2010)). Underpinning this opinion for the Court by Chief Justice John G. Roberts, Jr. was a concern that Alien Tort Statute judgments could have foreign policy consequences adverse to the interests of the political branches of the United States. *See id.* at \_\_\_, \_\_\_, \_\_\_, 133 S. Ct. at 1664-65, 1667-69.
- In contrast, Justices Stephen G. Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan concurred in the judgment, by means of an opinion that rejected application of the presumption against extraterritoriality and instead listed three situations in which the relationship between the United States and the claims should suffice to support an Alien Tort Statute suit. *Id.* at \_\_\_, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).<sup>54</sup>

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<sup>54</sup> This minority opinion advocated the finding of Alien Tort Statute jurisdiction if:

- (1) the alleged tort 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, and that includes 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.

*Id.* at \_\_\_, 133 S. Ct. at 1671 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring in the judgment).

All nine Justices agreed that the suit could not go forward on the facts at bar. To be precise, as described in *Kiobel*:

- Plaintiffs were “nationals” of a foreign state, although they were “legal residents” of the United States, where they had “been granted political asylum.”
- Defendants were corporations chartered in countries other than the United States, although each had an office in New York and the shares of each were traded on the New York Stock Exchange.
- Defendants were alleged not to have committed international law torts directly, but rather to have aided and abetted a foreign state’s commission of such violations.
- The challenged acts occurred outside of U.S. territory.

\_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1662-63 (Roberts, J., opinion for the Court); *see id.* at \_\_\_, 133 S. Ct. at 1677-78 (Breyer, J., concurring in the judgment).

Summarizing the approach that led to rejection of the suit, the opinion for the Court stated:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.

*Id.* at \_\_\_, 133 S. Ct. at 1669. Notwithstanding this passage, two of the five Justices who joined the opinion advocated a formulation that would have compelled dismissal of a broader swath of potential Alien Tort Statute claims. *See id.* at \_\_\_, 133 S. Ct. 1669-70 (Alito, J., joined by Thomas, J., concurring).<sup>55</sup> Conversely, another Justice in the five-member majority stressed that the Court’s opinion “is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute”; he anticipated future litigation of the issue. *Id.* at \_\_\_, 133 S. Ct. at 1669 (Kennedy, J., concurring).<sup>56</sup>

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<sup>55</sup> They wrote:

[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality – and will therefore be barred – unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.

*Id.* at \_\_\_, 133 S. Ct. at 1670 (Alito, J., joined by Thomas, J., concurring). On the Alien Tort Statute framework set out in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *see infra* § III.E.1.b.ii.

<sup>56</sup> He wrote:

Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of

## i.2. Lower Court Rulings Post-*Kiobel*

Courts confronted with factors different from those in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013), described *supra* § III.E.1.c.i.1, will need to evaluate whether and to what extent extraterritoriality affects the reach of the Alien Tort Statute. In the months immediately following issuance of the decision of *Kiobel*, a handful of lower courts undertook this analysis, and arrived at a range of results. In two such cases, the Alien Tort Statute litigation was permitted to go forward:

- Allegations of an international law tort of persecution based on sexual orientation survived a motion to dismiss notwithstanding the extraterritoriality ruling in *Kiobel*. *Sexual Minorities Uganda v. Lively*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 4130756, at \*13-\*15 (D. Mass. Aug. 14, 2013). Although many impugned actions occurred in Uganda and the plaintiff was a Uganda-based organization, the court ruled that extraterritoriality did not bar the suit, because the defendant was “an American citizen who has allegedly violated the law of nations in large part through actions committed within this country,” *id.* at \_\_\_, 2013 WL 4130756, at \*14.
- Allegations of international law torts arising out of the 1998 terrorist bombing of the U.S. embassy in Kenya “‘touched and concerned’ the United States with ‘sufficient force to displace the presumption against extraterritorial application of the ATS,’” another district court ruled. *Mwani v. bin Laden*, 947 F. Supp. 2d 1, 3 (D.D.C. 2013) (relying on the passage in *Kiobel*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1669, quoted *supra* § III.E.1.b.i). Characterizing the case as one of first impression, the court recommended an immediate appeal. *Id.* at 6.

The *Kiobel* standard presented an obstacle to Alien Tort Statute litigation in two other cases:

- A suit in which “non-American plaintiffs have asserted ATS claims against foreign defendants for actions that took place in Israel and Lebanon” was dismissed pursuant to *Kiobel*. *Kaplan v. Central Bank of Iran*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 4427943, at \*16 (D.D.C. Aug. 20, 2013). The court distinguished *Mwani*, described above, on the ground that in that case “the attack was planned in the United States and targeted at one of its embassies,” while in the case before it funding and deployment of the attacks all had occurred in countries other than the United States. *Id.*
- Defendants’ petition for mandamus relief in a suit concerning South Africa’s apartheid era was denied. *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). The appellate court grounded its denial of extraordinary relief in part on the reasoning that defendants would prevail if they were to move in the district court for dismissal by application of the *Kiobel* extraterritoriality standard. *See id.* at 187-94.

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today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

*Id.* at \_\_\_, 133 S. Ct. at 1669 (Kennedy, J., concurring).

## **ii. Immunities**

Both statutory and common law immunities may bar suit against a particular defendant. Each type of immunity will be discussed in turn.

### **ii.1. Foreign States and the Foreign Sovereign Immunities Act**

Civil actions against foreign sovereign states may not go forward unless they satisfy the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq.* (2006). As the Supreme Court wrote in a case brought against a foreign country pursuant to the Alien Tort Statute:

[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country....

*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *see Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (reaffirming this statement). The scope of the Foreign Sovereign Immunities Act, which governs foreign states and entities defined as their agents or instrumentalities, is detailed *supra* § II.B.1. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

### **ii.2. Foreign Officials and Common Law Immunities**

A current or former foreign official is not immune from Alien Tort Statute suits by virtue of the Foreign Sovereign Immunities Act, for the reason that such an official is a natural person and not an “agency or instrumentality of a foreign state” as required by that Act, 28 U.S.C. § 1603 (2006). After so ruling in *Samantar v. Yousuf*, 560 U.S. 305, 314-16 (2010), the Supreme Court remanded for determination of whether any common law immunities applied to the defendant at bar, who plaintiffs alleged was responsible for torture and extrajudicial killings in Somalia while he held official posts including Prime Minister. The Court mentioned in particular common law immunity doctrines respecting foreign officials’ official acts, heads of state, and diplomats. *See id.* at 312 n.6, 320-22. The consideration on remand of the first two types of immunity is described below.

#### **ii.2.a. Foreign Official’s Common Law Immunities**

Following remand of the Supreme Court decision just discussed, common law immunities were held not to bar suit against a former Somali official named as defendant in a suit brought under the Alien Tort Statute and the Torture Victim Protection Act. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014); *see Samantar v. Yousuf*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2879 (2013) (inviting the Solicitor General to file a brief expressing the United States’ views on the case). In a unanimous panel opinion written by Chief Judge William Byrd Traxler, Jr., the U.S. Court of Appeals for the Fourth Circuit held:

- *Status-based head of state immunity*: The defendant’s status as Prime Minister of Somalia during some of the relevant period did not render him immune from suit, for the reason that status-based immunity only applies to defendants who are incumbent officials at the time of suit. *See Samantar*, 699 F. 3d at 768-773.
- *Conduct-based foreign official immunity*: The defendant’s conduct as a foreign official did not render him immune from suit, either. *See id.* at 773-78. The Fourth Circuit held that any such immunity did not apply to the acts alleged – “torture, extrajudicial killings and prolonged arbitrary imprisonment of political and ethnically disfavored groups” – because such acts violated *jus cogens*, or peremptory, norms. *See supra* § I.B (discussing this source of international law). The Executive’s argument against the claimed conduct-based type of immunity, for reasons different from those on which the court focused, was treated as supplementing but not controlling the judicial decision. *See Samantar*, 699 F. 3d at 77-78.

### **ii.2.b. Waiver**

A state may waive certain immunities that otherwise would be available to a defendant. *See Mamani v. Berzaín*, 654 F.3d 1148, 1151 n.4 (11th Cir. 2011); *infra* § II.B.1.a.iii.1.

### **iii. Act of State**

The act of state doctrine holds that courts of one country may not invalidate sovereign acts done by another country within the latter country’s own borders. *See W.S. Kirkpatrick & Co. v. Evt’l Tectonics Corp.*, 493 U.S. 400, 409 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). As detailed *supra* § II.B.2, defendants may invoke this doctrine when allegations necessarily require the court to rule on the validity of the actions of a foreign government. The U.S. Court of Appeals for the Second Circuit has stated, however, that only in “a rare case” would application of the act of state doctrine preclude an Alien Tort suit. *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

To decide a motion to dismiss under this jurisprudential doctrine, the Supreme Court in *Sabbatino*, 376 U.S. at 428, advised consideration of three factors, none of which is dispositive:

- The degree of international consensus concerning the illegality of the alleged activity under international law.
- Whether, and to what extent, adjudicating the case would have foreign relations implications.
- Whether the foreign government at issue is still in existence.

Each is discussed in turn below.

### iii.1. Degree of Consensus

The greater the degree of international consensus that the alleged activity violates international law, the less appropriate it is to dismiss a complaint on the act of state ground. In the context of Alien Tort Statute litigation, the U.S. Court of Appeals for the Ninth Circuit wrote that the doctrine did not apply to allegations based on *jus cogens*, or peremptory norms. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992)), *vacated and remanded in light of Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality). *See supra* § I.B (discussing peremptory norms as a source of international law).

The list of rights that enjoy a high degree of international consensus, as listed in Section 702 of the *Restatement*, include:

- Genocide
- Slavery
- Torture and cruel, inhuman or degrading treatment
- Systematic racial discrimination
- Prolonged arbitrary detention

In contrast, actions not prohibited by international consensus – for example, the expropriation of property – are not exempt from dismissal by virtue of the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 428, 436-37 (1964).

### iii.2. Foreign Relations Implications

In determining whether its decision might have adverse foreign relations implications, a court should consult the views of the U.S. government and/or the foreign government. *Doe I v. Unocal Corp.*, 395 F.3d 932, 959 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005); *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 346 (S.D.N.Y. 2003). In particular, a court should give “respectful consideration” to the opinion of the U.S. Department of State. *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004) (quoting *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995)); *see Restatement* § 443 n.8.

### iii.3. Existence of Foreign Government

Evidence that the government at issue is no longer in existence weighs against dismissal on the ground of act of state. *Abiola v. Abubakar*, 2005 U.S. Dist. LEXIS 27831, at \*5-\*6 (N.D. Ill. Nov. 8, 2005); *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1303 (N.D. Cal. 2004). Even if the government remains in existence, however, this factor does not require dismissal. *Doe I v. Unocal Corp.*, 395 F.3d 932, 958-59 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

#### **iv. Political Question**

When a defendant seeks dismissal action under the political question doctrine, detailed *supra* § II.B.3, courts consider six factors set out in the seminal Supreme Court decision in *Baker v. Carr*, 369 U.S. 186, 217 (1962). These are:

- A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- A lack of judicially discoverable and manageable standards for resolving it; or
- The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- An unusual need for unquestioning adherence to a political decision already made; or
- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007). The six factors can be grouped into three main categories, as follows:

- Existence of a textual commitment the political branches of government
- Ability of the court to identify standards by which to rule
- Respect for the political branches

Each of these three categories is discussed in turn below. *Caveat*: Given the requirement of case-by-case analysis, courts frequently have professed to limit their rulings to the facts before them.

##### **iv.1. Textual Commitment to Political Branches**

Issues arising under the Alien Tort Statute, such as human rights violations and appropriate tort remedies, are matters that the text of the Constitution has committed to the judiciary. U.S. Const., art. III. This weighs against dismissal on the ground of political question. *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 347-48 (S.D.N.Y. 2003); *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995).

In a challenge to the acts of U.S. officials, however, the U.S. Court of Appeals for the District of Columbia Circuit applied this factor in favor of dismissal, reasoning that actions like that at bar implicate foreign policy decisionmaking, an activity that is “textually committed to the political branches of the government.” *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007). See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

#### **iv.2. Ability of Court to Identify Standards by Which to Rule**

Judicially discoverable standards are available to aid resolution of questions related to the Alien Tort Statute. In *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995), the court wrote that the existence of these standards “obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.” This reasoning counsels against dismissal on the political question ground.

#### **iv.3. Respect for the Political Branches**

If the defendant argues that resolution of the case may signal disrespect for another branch of government, courts frequently look to the views of the U.S. government. *E.g.*, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005). Consistent with this practice, the Supreme Court wrote in *Sosa* that in determining whether to apply the political question doctrine, courts “should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

To determine the Executive’s views, courts have consulted:

- Treaties. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 49-52 (D.C. Cir. 2005).
- Executive agreements. *See Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73 (2d Cir. 2005).
- Statements of Interest submitted by the Executive Branch in the course of the litigation. This is the most common source used in the making of such determinations. Courts have ruled that although views set forth in a Statement of Interest must be given deference, they do not control the decision regarding the political question doctrine. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004); *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

When the Executive has not conveyed its view, the court may interpret this silence as an indication of neutrality. *See Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005).

#### **v. Forum Non Conveniens**

The *forum non conveniens* doctrine permits dismissal when, as detailed *supra* § II.B.4, there exists a more appropriate forum for adjudication of the matter. Defendants frequently make this assertion in Alien Tort Statute cases. *See In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992). In assessing this contention, courts conduct the full *forum non conveniens* analysis to determine whether:

- An alternative forum is adequate and available; and

- The defendant has met the burden of proving that private and public interest factors substantially weigh in favor of litigating the case in the other forum.

It is difficult to derive any particular guidance from other rulings, because *forum non conveniens* analyses turn on unique facts. It nonetheless appears that, in weighing the public interest factor of the second prong, the court may deem the United States' strong interest in the vindication of violations of international human rights to weigh against dismissal. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

If the plaintiff is a U.S. citizen, the plaintiff's choice of forum is entitled to "substantial deference and should only be disturbed if the factors favoring the alternative forum are compelling." *Id.* at 101.

Also noted is the difficulty of suing a defendant in a foreign state implicated in human rights abuses. *Id.* at 106. A forum that puts plaintiff's life at risk is not an adequate alternative forum. *Aldana v. Fresh Del Monte Produce, Inc.*, 2003 U.S. Dist. LEXIS 26777, at \*6 (S.D. Fla. June 4, 2003).

#### **vi. Time Bar**

As is apparent from the full text quoted *supra* § III.E.1, the Alien Tort Statute contains no statute of limitations. On the theory that the Torture Victim Protection Act, discussed *infra* § III.E.2, is the most analogous federal statute, some courts have applied the latter statute's explicit ten-year limitations period to Alien Tort Statute cases. *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir.), *cert. denied*, 543 U.S. 874 (2004); *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir.), *cert. denied*, 540 U.S. 820, 540 U.S. 821 (2003); *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

Claims under the Alien Tort Statute are subject to federal principles of equitable tolling. *Deutsch*, 324 F.3d at 717-18. Equitable tolling may apply if extraordinary circumstances, or the defendant's wrongful conduct, are such that the plaintiff's inability to file earlier was "beyond his control and unavoidable even with diligence." *Jean v. Dorelien*, 431 F.3d 776, 779-81 (11th Cir. 2005) (internal quotation omitted). Such tolling may be appropriate for periods during which the:

- Defendant is absent from the United States;
- Violence persists in the state where the tort is alleged to have occurred; or
- Plaintiff's family members risk reprisals.

*See Jean v. Dorelien*, 431 F.3d at 779-81; *Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

#### **vii. Exhaustion of Remedies**

The terse language of the Alien Tort Statute contains no explicit requirement of exhaustion of remedies in the state where the tort is alleged to have occurred. (This stands in

contrast with an explicit provision in the Torture Victim Protection Act. *See infra* § III.E.2.) Accordingly, lower courts have held that a plaintiff's failure to exhaust remedies – a doctrine discussed *supra* § II.B.6 – posed no bar to an Alien Tort Statute suit. *See, e.g., Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

Yet as detailed *supra* § III.E.1.b.ii.3.c, the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), indicated that in some circumstances exhaustion might be considered. U.S. Courts of Appeals subsequently divided on application of this statement:

- Considering whether a prudential doctrine of exhaustion of remedies should apply to claims under the Alien Tort Statute, a divided *en banc* panel of the Ninth Circuit held that any remedy must be “available, effective, and not futile.” *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827, 832 (9th Cir. 2008) (*en banc*). Later in the same litigation, the same circuit approved of the district court's additional considerations regarding the degree of acceptance of the norm and the extent of a nexus between the claim and the United States. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality).
- The Seventh Circuit rejected this approach, stating in *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011), that the implications of the argument that plaintiffs must exhaust local remedies in the state in which the violations occurred “border on the ridiculous.”

### **viii. Comity**

Comity – which is neither “a matter of absolute obligation” nor “of mere courtesy and goodwill” – has been defined as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *see also Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.27 (1987). Defendants in Alien Tort Statute cases occasionally argue that this concept of international comity – detailed *supra* § II.B.6 – counsels against the exercise of jurisdiction. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 63-64 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

The U.S. Court of Appeals for the Seventh Circuit has suggested that the principle may justify a stay of proceedings in the United States, if the courts of the state in which the violation occurred seem willing and able to provide a remedy. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

### **d. Damages and Other Remedies**

Most cases pursued under the Alien Tort Claims Act seek money damages. Plaintiffs may also join claims seeking injunctive or other equitable relief. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d. Cir. 2002); *Doe v. Israel*, 400 F. Supp. 2d 86, 97 (D.D.C. 2005).