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# 2011 Year-In-Review:
## Alien Tort Statute &
## Torture Victim Protection Act


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# I. Introduction

2011 marked a dynamic year for litigation involving claims under the Alien Tort Statute ("ATS"), also known as the Alien Tort Claims Act, and the Torture Victim Protection Act ("TVPA"). Federal courts divided on a number of important issues involving the interpretation and application of the these statutes, including whether corporations can be held liable under the ATS and TVPA, which the Supreme Court will consider during its current term in *Kiobel v. Royal Dutch Petroleum Co.* (ATS) and *Mohamad v. Palestinian Authority* (TVPA). Additional controversial issues include the requisite mental state for aiding and abetting liability and whether the ATS applies extraterritorially. The Supreme Court's grants of certiorari in *Kiobel* and *Mohamad* not only guarantee that 2012 will be a landmark year in ATS and TVPA jurisprudence, but also that these issues will receive greater public attention.

# II. Background

For thirty years, courts have struggled to interpret and apply the ATS, a statute that provides U.S. federal courts with jurisdiction over "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." 28 U.S.C. § 1350. The first Congress passed the ATS in 1789, but the statute lay dormant for nearly 200 years, providing jurisdiction in only two cases. In 1980 the Second Circuit opened the door to a new avenue of ATS litigation in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), a suit brought by two Paraguayan citizens against the former Inspector General of Police in Paraguay for the alleged torture and murder of their family member in Paraguay. The Second Circuit concluded that whenever an alleged torturer is found and served with process within the borders of the United States (where the former Inspector General then resided), the statute provides jurisdiction over an alien's human rights claims.

Since *Filartiga*, plaintiffs have extended their focus beyond foreign officials such as Pena-Irala to lawsuits against corporations, and have extended their claims to a wide variety of alleged violations of customary international law. Frequently, plaintiffs also assert claims under a more recently enacted supplemental statute to the ATS, the TVPA, 28 U.S.C. § 1350 note, which creates a private right of action for U.S. and non-U.S. citizens for torture committed by "[a]n individual" acting under color of foreign law. Lawsuits under the ATS and the TVPA have become increasingly high profile and high stakes, often involving allegations that a corporation "aided and abetted" human rights violations by doing business in a country where those violations occurred or by providing monetary or material support to that country's officials. The lawsuits sometimes involve alleged conduct that occurred decades before any complaint is filed. *See, e.g.*, *Alperin v. Franciscan Order*, 423 F. App'x 678 (9th Cir. 2011) (affirming dismissal of a complaint alleging that a religious order aided and abetted the World War II Yugoslav regime's plundering and banditry more than sixty years before the lawsuit was filed).

In 2004, the Supreme Court addressed for the first time the scope of ATS liability for alleged violations of customary international law in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004), and concluded that actionable violations under the ATS must be based on a limited category of international norms that are sufficiently "specific, universal, and obligatory." Since *Sosa*, federal courts have continued to fracture in resolving the complex issues raised by modern-day claims under this 223-year-old statute and its contemporaneous supplement, including corporate liability, the standard for aiding and abetting liability, whether the ATS applies extraterritorially, and when state action is required.

The Supreme Court heard arguments in *Kiobel* and *Mohamad* on February 28, 2012, and will issue a decision by the end of its Term in June 2012. The wider array of issues under these statutes doubtless will continue to occupy the lower courts. This Year-in-Review provides analysis of important issues arising under the ATS and the TVPA in 2011 federal court decisions, as well as summaries of these decisions.

# III. Important Issues in 2011 ATS and TVPA Decisions

The federal courts divided on a number of important issues regarding interpretation and application of the ATS and the TVPA in 2011. Foremost is the question of corporate liability, which the Supreme Court will consider during its current Term. Additional issues causing discord in 2011 included whether knowledge constitutes the requisite mental state for aiding and abetting liability, or whether purpose—a significantly more exacting standard—is required; whether the ATS applies extraterritorially in light of recent U.S. jurisprudence requiring an express statement from Congress that a statute is to apply to conduct abroad; and which international law violations that are actionable under the ATS require state action, thereby

precluding corporate liability absent a showing that the corporation acted under color of state law or aided and abetted a state violation.

## A. Corporate Liability

Whether corporations can be liable under the ATS is the most significant issue arising in ATS cases in 2011. The Supreme Court observed in 2004 that the question of corporate liability under the ATS was open. *Sosa*, 542 U.S. at 732 n.20. Following *Sosa*, a number of federal courts permitted ATS claims against corporations, *see, e.g.*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) ("[W]e have . . . recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations."), while other courts declined to decide whether corporations could be liable under the statute, *see e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009) (assuming, without deciding, "that corporations such as Talisman may be held liable for the violations of customary international law that plaintiffs allege"). The Second Circuit addressed the issue head-on in its decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), holding that corporations cannot be liable under the ATS.

In *Kiobel*, the Second Circuit first determined that international—and not domestic—law governs the question whether corporations are liable under the statute. The court then concluded that international law does not recognize a customary international law norm of corporate liability because "no international tribunal . . . has *ever* held a corporation liable for a violation of the law of nations." *Id.* at 132.

Commentators predicted that the Second Circuit's decision in *Kiobel* would mark the end of human rights litigation against multinational corporations in U.S. courts. But the Seventh, Ninth, and D.C. Circuits have since held that corporations can be liable under the ATS. In *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*), for example, the Ninth Circuit rejected the argument that the ATS itself bars corporate liability, and concluded that the appropriate inquiry is whether international law permits corporate liability for a particular violation of customary international law. According to the Ninth Circuit, international law recognizes corporate liability for genocide and war crimes, which are therefore actionable under the ATS. The D.C. and Seventh Circuits similarly upheld corporate liability under the ATS in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), and *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011). They each held that U.S. federal common law controls, noting that the Second Circuit's conclusion that international law governs corporate liability conflates a cause of action with the remedy. The D.C. and Seventh Circuits also rejected the Second Circuit's reliance on the absence of international tribunals finding corporations liable for violations of the laws of nations. The D.C. Circuit contended that the issue was "more nuanced," *Exxon*, 654 F.3d at 52, while the Seventh Circuit found the evidence unpersuasive, noting that even if no corporation has ever been prosecuted, "[t]here is always a first time for litigation to enforce a norm." *Flomo*, 643 F.3d at 1017.

Federal courts also have disagreed about whether corporations and other non-natural persons can be liable under the TVPA, which imposes civil liability on "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" engages in torture or extrajudicial killing. 28 U.S.C. § 1350 note. The Eleventh Circuit was the first federal appellate court to hold that a complaint under the TVPA stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005), in contrast to a number of federal district court decisions denying corporate liability under the statute. In 2011, district courts in the Eleventh Circuit continued to follow *Aldana*. *See, e.g.*, *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011); *In re Chiquita Brands Int'l, Inc.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011). The Fourth and D.C. Circuits held, on the other hand, that corporations and organizational entities cannot be sued under the TVPA because the statute uses the word "individual" and not "person" to identify who might be liable. *See, e.g.*, *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Exxon*, 654 F.3d 11; *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011).

On October 17, 2011, the Supreme Court granted petitions for writs of certiorari in *Kiobel* and *Mohamad* to resolve these Circuit splits. In *Kiobel*, the Court will consider (1) whether corporate civil tort liability under the ATS is a merits question or an issue of subject matter jurisdiction, and (2) whether corporations are subject to tort liability for violations of the law of nations. These questions go to the heart of corporate liability. In *Mohamad*, the Court will consider whether the TVPA permits lawsuits against defendants that are not natural persons. The broad interest in these cases is underscored by the more than thirty *amicus* briefs filed in support of petitioners and respondents. The U.S. Solicitor General filed an *amicus* brief in support of petitioners in *Kiobel*, arguing that courts "may recognize corporate liability in actions under the ATS as a matter of federal common law."

The Supreme Court's resolution of these questions in 2012 will greatly affect corporate exposure to the substantial reputational and financial risk of litigating human rights cases in U.S. courts. Oral argument is scheduled for February 28, 2012, and the Supreme Court will issue a decision by the end of its term in June.

## B. Aiding and Abetting Liability

The requisite *mens rea* for aiding and abetting claims is another important issue that continued to arise in cases in 2011. The aiding and abetting standard is significant because defendants in ATS cases often are not primary human rights violators, but rather are individuals or corporations accused of assisting primary violators by providing financing, material, or other assistance.

Determining that international law governed the question of aiding and abetting liability, the Second Circuit held in 2009 that liability for aiding and abetting human rights violations committed by others under the ATS requires (1) practical assistance having a substantial effect on the perpetration of the crime,[1] and (2) the provision of such assistance with the purpose of facilitating the crime. *See Talisman*, 582 F.3d at 257-59. In 2011, the Fourth Circuit adopted the Second Circuit's standard in *Aziz*, 658 F.3d at 396, while the D.C. Circuit held that mere knowledge is required based on decisions of international tribunals. *Exxon*, 654 F.3d at 39. The Ninth Circuit declined to address the issue in *Sarei*, 2011 WL 5041927, at *25, because it concluded that plaintiffs had met the more exacting purpose standard, but one concurring opinion advocated for a knowledge standard under customary international law. *Id.* at *33 (Pregerson, J., concurring). At the district court level, the Southern District of Florida adhered to the Second Circuit's purpose requirement. *In re Chiquita*, 792 F. Supp. 2d at 1341-44.

The applicable *mens rea* standard likely will continue to divide the courts until the Supreme Court weighs in. The Court declined to consider the question in *Talisman* in 2010. Now that a Circuit split has emerged, Supreme Court consideration appears more likely. If the Supreme Court accepts review of one of these cases and adopts *Talisman*'s purpose standard, it will be more difficult for plaintiffs to plead and prove aiding and abetting claims under the ATS.

Moreover, although the issue of the requisite *mens rea* for aiding and abetting liability is not before the Supreme Court in *Kiobel*, the Supreme Court's decision could affect how federal courts determine the standard in the future. In particular, the Supreme Court's decision could affect whether courts look to federal common law or international law. Regardless, it is likely that the standard for aiding and abetting liability will be the next big question in ATS litigation.

## C. Extraterritorial Application of the ATS

Federal courts began considering in 2011 whether the presumption against extraterritoriality articulated in *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), means that the ATS cannot apply to extraterritorial conduct. In *Morrison*, a case involving allegations by foreign plaintiffs of fraud in connection with the sale of foreign securities, the Supreme Court reaffirmed the principle that a statute without a "clear indication of an extraterritorial application" should not be presumed to have one. *Id.* at 2878.

Although courts have applied the ATS to extraterritorial conduct since *Filartiga*, they have only recently had to address *Morrison*'s standard. Based on that standard, defendants have argued that the statute's language—which only refers to conduct "committed in violation of the law of nations or a treaty of the United States"—does not clearly indicate Congress's intention that the ATS be applied to conduct occurring outside the territory of the United States, and that the statute is limited to violations of the law of nations occurring domestically (for example, assaults against ambassadors). In 2011, the D.C. Circuit in *Exxon*, the Seventh Circuit in *Flomo*, and the Ninth Circuit in *Sarei* all rejected arguments that the ATS does not apply extraterritorially. But the *Exxon* and *Sarei* decisions were each accompanied by sharp dissents. *See Exxon*, 654 F.3d at 74-81 (Kavanaugh, J., dissenting) ("[T]he ATS does not extend to conduct that occurred in foreign lands."); *Sarei*, 2011 WL 5041927, at *54-68 (Kleinfeld, J., dissenting) (concluding that "Congress has not provided for application of the Alien Tort Statute, conferring jurisdiction over 'a tort only in violation of the law of nations,' on torts committed by foreign nationals in foreign countries against foreign nationals."). At the district court level, the Southern District of Florida concluded that the ATS

[1] Although courts generally have agreed that "substantial assistance" is the standard for the *actus reus*, they likely will need to address what conduct meets that standard. *See e.g.*, *In re Chiquita*, 792 F. Supp. 2d at 1350 (drawing the line between "[m]erely supplying a violator of the law of nations with funds as part of a commercial transaction" and "engag[ing] in additional assistance beyond financing, or engag[ing] in financing that is gratuitous or unrelated to any commercial purpose").

applies extraterritorially, while the Eastern District of New York concluded to the contrary in 2010. *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1224 (S.D. Fla. 2011) (rejecting reasoning in *Velez v. Sanchez*, 754 F. Supp. 2d 488, 496 (E.D.N.Y. 2010)).

### D. ATS State Action Requirement

International law typically governs state action, not private action, except for the few international law norms applicable to private actors. The Second Circuit acknowledged such universal norms in *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), which held in a case involving genocide, war crimes, torture, and summary execution that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." Federal courts have continued to struggle to determine when non-state actors can be held directly liable for violations of international law. For those violations, a plaintiff need not allege that a defendant acted under color of state law or that the defendant aided and abetted a violation committed by a state actor.

In 2011, federal courts appear to be leaning toward holding non-state actors liable for certain widespread human rights violations such as genocide and war crimes, but not for individual violations such as torture. For example, the D.C. Circuit concluded in *Ali Shafi v. Palestinian Authority*, 642 F.3d 1088, 1095-96 (D.C. Cir. 2011), that there was insufficient international consensus that torture committed by a non-state actor would violate the law of nations, but stated that not all violations of the law of nations require state action. The Southern District of New York stated that only claims for which there is a "lack of any adequate judicial system operating on the spot where the crime takes place" require state action. *Swarna v. Al-Awadi*, No. 06 Civ. 4880(PKC), 2011 WL 1873356, at *2 (S.D.N.Y. May 12, 2011). The Southern District of Florida concluded in *In re Chiquita* that claims of war crimes and crimes against humanity did not require state action, while claims of torture and extrajudicial killing did. 792 F. Supp. 2d at 1331. In what may be an outlier, the Eastern District of Pennsylvania held in *M.C. v. Bianchi*, 782 F. Supp. 2d 127, 132 (E.D. Pa. 2011), that the plain language of the ATS does not require state action, upholding claims of sexual assault against children committed by a single individual because "[h]is crimes represent a global problem." This issue likely will continue to receive attention.

Where state action is required, federal courts have diverged on the standard for determining whether a defendant acted "under color of state law." While many federal courts have relied on case law addressing 42 U.S.C. § 1983 (providing a private right of action for individuals deprived of a federal right or immunity under the color of state law), *see, e.g.*, *Kadic*, 70 F.3d at 245, some courts since *Sosa* have rejected application of Section 1983 as reflecting domestic rather than international law and thus "dramatically expand[ing] the extraterritorial reach of the [ATS]." *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005).

### E. Other Issues

The 2011 cases reveal a number of other issues under the ATS, including a determination of the proper pleading standard, *see, e.g.*, *Mamani v. Berzain*, 654 F.3d 1148, 1153-56 (11th Cir. 2011); what constitutes an actionable customary international law norm, *see, e.g.*, *Sarei*, 2011 WL 5041927, at *27-28; *Flomo*, 643 F.3d at 1021-24; *In re Chiquita*, 792 F. Supp. 2d at 1314-20; *Orkin v. Swiss Confederation*, 770 F. Supp. 2d 612, 617-18 (S.D.N.Y. 2011); whether the statute is purely jurisdictional or also provides a cause of action for violations of the laws of nations, *compare Ali v. Rumsfeld*, 649 F.3d 762, 776 (D.C. Cir. 2011), *with In re Chiquita*, 792 F. Supp. 2d at 1312-13; what constitutes an exception to immunity for federal employees for torts committed in the scope of their employment under the Westfall Act, *see, e.g.*, *Ali*, 649 F.3d at 775-78; *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413, at *8-9 (W.D. Wash. Dec. 8, 2011); whether the United States is immune from suit under the statute, *see, e.g.*, *Tobar v. United States*, 639 F.3d 1191, 1196 (9th Cir. 2011); *Hernandez v. United States*, 802 F.Supp.2d 834, 844-45 (W.D. Tex. 2011); and whether other statutes preempt application of the ATS, *see, e.g.*, *In re Chiquita*, 792 F. Supp. 2d at 1313-14; *Magnifico*, 783 F. Supp. 2d at 1224-26. These cases are described in detail below.

## IV. Human Rights and Due Diligence

With *Kiobel* and *Mohamad* still undecided, corporations continue to face the risk of protracted and costly litigation of human rights cases in U.S. courts under the ATS and the TVPA, as well as substantial reputational damage, for allegations of association with human rights violations. With respect to legal liability, plaintiffs have obtained awards against individuals and

corporations for as much as $80 million, and other defendants have chosen to settle cases for tens of millions of dollars.[2] Moreover, the courts are not the only forum in which corporations may be confronted with allegations of supporting or failing to prevent human rights abuses. The year 2011 saw a convergence of international "soft law" standards and the introduction of new avenues of accountability in the area of business and human rights that will ensure that human rights issues are a specific focus of risk management, even apart from litigation risk.

In June 2011, the UN Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights ("Guiding Principles"), developed over six years by Professor John Ruggie, Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises.[3] The Guiding Principles recognize that states have the primary role (and legal duty) to promote and protect human rights. But the Guiding Principles also address private sector responsibilities, stating that business enterprises (of every size and nationality) have a "responsibility to respect" human rights and that this responsibility "exists over and above compliance with national laws and regulations protecting human rights."[4]

The Guiding Principles state that one aspect of meeting this responsibility is the performance of "human rights due diligence." This involves identifying and assessing the potential human rights impacts of the entity's operations and relationships, and implementing effective policies, procedures, and reporting protocols designed to avoid or mitigate negative impacts. Due diligence reviews and compliance mechanisms are familiar to most multinational corporations, and human rights due diligence may fit within existing programs, although the Guiding Principles emphasize that the due diligence required to discharge the responsibility to respect needs to go beyond identifying risks to the company itself, to include risks to rights-holders.[5] The Guiding Principles also emphasize the importance of processes allowing for the identification and resolution of human rights grievances and remediation of negative impacts the corporation may cause or contribute to, which can act as an early warning system and reduce litigation risk.

The Guiding Principles have provided a focal point for the convergence of international standards relating to the human rights impacts of business activities.[6] In May 2011, the thirty-four member states of the Organization for Economic Co-operation and Development ("OECD"), including the United States (along with several other adhering member governments from outside the OECD) agreed to revise the OECD Guidelines for Multinational Enterprises ("OECD Guidelines").[7] The revised OECD Guidelines contain a new chapter dealing with human rights that is based upon the Guiding Principles. Governments adhering to the OECD Declaration on International Investment and Multinational Enterprises are obliged to establish National Contact Points ("NCPs") to receive and resolve complaints regarding conduct of enterprises alleged to be in violation of the OECD Guidelines, which includes human rights obligations. Interested parties, including non-governmental organizations, can make complaints, and NCPS can resolve claims by mediation or a published determination, which may include recommendations for action.

The Guiding Principles and the OECD Guidelines provide a framework for best practice in the area of business and human rights and useful criteria for effective due diligence programs that can mitigate corporate exposure to allegations of complicity in human rights violations. These programs can assist in minimizing litigation exposure as well—by identifying and preventing issues before they occur, and by demonstrating an absence of wrongful intent.

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[2] *See* Michael D. Goldhaber, *A Win for Wiwa, A Win for Shell, A Win for Corporate Human Rights*, AmLaw Daily (June 10, 2009), *available at* http://amlawdaily.typepad.com/amlawdaily/2009/06/a-win-for-wiwa-a-win-for-shell-a-win-for-corporate-human-rights.html (listing a number of judicial damages awards and settlements in ATS litigation).

[3] Special Representative of the UN Secretary General, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf.

[4] Commentary to Principle 11 of the Guiding Principles.

[5] Commentary to Principle 17 of the Guiding Principles.

[6] On August 1, 2011, the International Finance Corporation ("IFC") announced the introduction of a revised Policy on Environmental and Social Sustainability, which includes an emphasis on human rights and new Performance Standards relating to Labor Rights and Community Health and Safety. The revised IFC Policy, which will become effective January 1, 2012, refers to the responsibility of businesses to respect human rights and summarizes the nature of that responsibility in the same terms as the UN Guiding Principles.

[7] OECD, OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context (2011), available at http://www.oecd.org/dataoecd/43/29/48004323.pdf.

# V. Summary of 2011 ATS and TVPA Cases

Provided below are summaries of federal court decisions issued in 2011 that address substantive ATS and TVPA issues. Summaries of decisions issued by the federal appellate courts are provided first, followed by summaries of decisions issued by the district courts. These cases are presented in reverse chronological order.

## A. Appellate Court Cases

- *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*):

  In 2000, plaintiffs, current and former residents of the island of Bougainville in Papua New Guinea, filed a class action against Rio Tinto, a mining group, alleging racially discriminatory hiring practices and harmful environmental impacts resulting from its mining operations, complicity in crimes committed by the New Guinean army during a secessionist conflict in the late 1980s, and support of a governmental food and medical blockade. Plaintiffs originally raised numerous claims under the ATS, including (1) crimes against humanity; (2) war crimes; (3) violation of the rights to life, health, and security of the person; (4) racial discrimination; (5) cruel, inhumane, and degrading treatment; (6) violation of international environmental rights; and (7) a consistent pattern of gross violations of human rights. Plaintiffs also raised various non-ATS claims, including negligence and public nuisance. In 2011, following a complex series of district and appellate court decisions, the Ninth Circuit sitting *en banc* for a second time reviewed the district court's dismissal of plaintiffs' genocide, crimes against humanity, war crimes, and racial discrimination claims under the ATS.

  In a highly fractured set of decisions—comprised of a majority opinion by Judge Schroeder, one concurring opinion, three opinions concurring in part and dissenting in part, and two dissenting opinions—the Ninth Circuit addressed many issues related to the interpretation and application of the ATS. The majority (joined in full by Judge Silverman, and joined in large part by Judges Pregerson, Rawlinson, Reinhardt, Berzon, and McKeown) first held that the ATS may be applied extraterritorially based on several "clear indications" in the text of the statute. The majority then concluded that the ATS does not bar all corporate liability. Rather, a court first must determine whether plaintiffs have alleged a norm of international law sufficiently "specific, universal, and obligatory," as required by *Sosa*, 542 U.S. at 732, and then determine whether international law permits corporate liability for that norm. In analyzing the specific international law violations at issue under this framework, the majority concluded that the allegations of genocide and war crimes (1) arose under specific, universal, and obligatory international law norms that are actionable under the ATS, (2) applied to corporations, and (3) were adequately pled. In a section of the opinion that failed to garner the support of a majority of the court, Judge Schroeder also concluded that plaintiffs' crimes against humanity claims arising from a food and medical blockade, as well as racial discrimination claims, were not cognizable under the ATS because they were not sufficiently specific, universal, and obligatory.

  The majority also addressed aiding and abetting liability, holding that international law recognizes aiding and abetting liability for war crimes. The court chose not to resolve whether the *mens rea* standard for aiding and abetting liability under the ATS is knowledge or purpose; rather, it held that the complaint adequately alleged "purposive action in furtherance of a war crime" which was sufficient regardless of whether the proper standard was "knowledge" or "purpose" (a conclusion that prompted three judges to concur as to the result but to dispute Judge Schroeder's analysis of the proper standard). The majority also held that federal question jurisdiction exists for ATS claims because they arise from federal common law. The majority also held that prudential exhaustion may be required in ATS cases, but in this instance the district court did not abuse its discretion in refusing to dismiss the case for lack of exhaustion. Finally, the court held that neither the political question doctrine, international comity, nor the act of state doctrine mandated dismissal of plaintiffs' claims.

  Several judges wrote separate opinions concurring as to most of the majority but challenging the majority's analysis of the mental state required for aiding and abetting liability, as well as whether crimes against humanity arising from a food and medical blockade and racial discrimination are cognizable under the ATS. Judge Reinhardt concurred in the majority's results, while disagreeing with a limited part of its reasoning, arguing that federal common law, not international law, prescribes the means of enforcing violations of the law of nations. For that reason, he argued, defendant must act "knowingly and substantially assist the principal violation." Similarly, although he agreed that

corporations can be held liable under the ATS, he argued that courts should look to domestic and not international law to make this determination.

Judge Pregerson, joined by Judge Rawlinson, concurred in part and dissented in part, arguing that (1) knowledge is the appropriate mental state for aiding and abetting liability under international law; (2) the alleged blockade was a crime against humanity; and (3) systematic racial discrimination is a violation of the laws of nations. Judge McKeown, joined by Judges Reinhardt and Berzon, also concurred in part and dissented in part, agreeing with the conclusion that the ATS applies extraterritorially, but dissenting from the holding that plaintiffs met the pleading standard for genocide and war crimes.

The other judges issued a variety of opinions. Judge Bea argued that exhaustion of local remedies is mandatory under international law and should be required in ATS claims. He concluded that even if prudential exhaustion applied, the majority had failed to apply the proper analysis and the court must remand to the district court for a new determination on prudential exhaustion. Judge Kleinfeld would not have applied the ATS extraterritorially under *Morrison*, 130 S. Ct. 2869, or would have limited its application to conduct similar to piracy, which occurs outside the territory of any foreign state. Judge Ikuta's dissent offers a new argument: that ATS claims do not "arise under" the laws of the United States pursuant to Article III of the Constitution, rendering adjudication of ATS claims between aliens an invalid exercise of foreign diversity jurisdiction.

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

In 2009, plaintiffs, victims and family members of victims of an attack led by Saddam Hussein on the Kurdish population in northern Iraq in the late 1980s, filed a class action alleging that Alcolac, Inc., a chemical manufacturing company, sold thiodiglycol ("TDG") to Hussein's regime, which was used to manufacture mustard gas employed in the attack, in violation of the TVPA and the ATS. Alcolac filed a motion to dismiss, which the district court granted, and plaintiffs appealed.

The Fourth Circuit addressed three issues on appeal: (1) whether a corporation can be liable under the TVPA; (2) whether the ATS imposes liability for aiding and abetting a violation of international law; and (3) whether the mens rea of any such violation requires proof of purposeful conduct. With regard to the first issue, the Fourth Circuit held that Congress's desire to exclude corporations from liability under the TVPA was clear from the text of the statute, which describe both the perpetrator and the victim of the crime as an "individual," rather than a "person," which would include corporations and other business entities. With regard to the second issue, the Fourth Circuit concluded that "aiding and abetting liability is well established under the ATS" because international human rights law recognizes such liability in the Rome Statute of the International Criminal Court, which "imposes aiding and abetting liability on one who aids and abets the commission of a crime," albeit "only if he does so '[f]or the purpose of facilitating the commission of such a crime.'" With regard to the third issue, the Fourth Circuit adopted the Second Circuit's *mens rea* standard for aiding and abetting a violation of international law, which requires that "a defendant . . . provide substantial assistance with the purpose of facilitating the alleged violation." *See Talisman*, 582 F.3d at 258. The Fourth Circuit concluded that plaintiffs' conclusory allegation that Alcolac acted with the purpose of facilitating Hussein's use of TDG against the Kurdish population in northern Iraq was insufficient to plead a claim of aiding and abetting liability and affirmed the judgment of the district court.

- *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011):

Plaintiffs, relatives of victims killed during severe civil unrest in Bolivia, sued the country's former president and former minister of defense under the ATS, asserting that defendants violated international law by committing extrajudicial killing; perpetrating crimes against humanity; and violating rights to life, liberty, security of person, freedom of assembly, and freedom of association. Plaintiffs sought compensatory and punitive damages. Defendants moved to dismiss, asserting that plaintiffs failed to state a claim under the ATS; that the suit raised political questions; that the Act of State doctrine barred resolution; and that defendants were immune under common law head-of-state immunity and the Foreign Sovereign Immunities Act ("FSIA"). On the ATS issue, the district court concluded that seven of the nine plaintiffs pleaded facts sufficient to state a claim under the ATS for extrajudicial killing and that all plaintiffs had pleaded facts sufficient to state a claim under the ATS for crimes against humanity. The district court also concluded that plaintiffs had not stated a claim for violations of the rights to life, liberty, security of persons, freedom of assembly, and

association under the ATS. The Eleventh Circuit granted defendants' petition for an interlocutory appeal as to whether plaintiffs stated a claim under the ATS for extrajudicial killing and crimes against humanity, as well as the applicability of the political question doctrine.

On appeal, the Eleventh Circuit held that the political question doctrine did not bar the ATS claims, noting that the "plaintiffs' tort claims require us to evaluate the lawfulness of the conduct of specific persons towards plaintiffs' decedents, not to decide the legitimacy of our country's executive branch's foreign policy decisions." In deciding whether plaintiffs had adequately stated a claim under the ATS, however, the Eleventh Circuit noted that it "must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens." The Eleventh Circuit concluded that plaintiffs had made only "bare assertions" and "legal conclusions" about the conduct of Bolivia's leaders, rather than setting forth the specific factual allegations required by the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). While accepting that crimes against humanity and extrajudicial killing may give rise to a cause of action under the ATS, the Eleventh Circuit held that the complaint failed to provide specific allegations that these specific defendants were responsible for international law violations.

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

Plaintiffs, Liberian children, sued Firestone Natural Rubber Company and its affiliates for allegedly using hazardous child labor in its rubber plantation in Liberia in violation of customary international law. Firestone moved for summary judgment, which the district court granted, concluding that no corporate liability exists under the ATS. Plaintiffs appealed.

The Seventh Circuit rejected the argument that corporations cannot be liable under the ATS for violations of customary international law. The Seventh Circuit based its conclusion on "the distinction between a principle of [customary international law], which is a matter of substance, and the means of enforcing it, which is a matter of procedure or remedy." The Seventh Circuit concluded that "[i]nternational law imposes substantive obligations and the individual nations decide how to enforce them." The Seventh Circuit also rejected *Kiobel*'s "factual premise" that corporations have not been punished for violating customary international law as "incorrect," noting that the Allied Powers punished German corporations that supported the Nazis under the authority of customary international law.[8] In addition, the Seventh Circuit summarily dismissed defendants' arguments that the ATS does not apply extraterritorially and that ATS plaintiffs must first exhaust local remedies. The Seventh Circuit nonetheless affirmed the district court's dismissal on other grounds, finding that customary international law does not impose liability for employing hazardous child labor.

- *Doe v. Exxon Mobil Corp.,* 654 F.3d 11 (D.C. Cir. 2011):

Plaintiffs, Indonesian villagers from the Aceh territory, sued Exxon Mobil Corporation and several of its subsidiaries, alleging that Exxon's security forces, which were comprised of members of the Indonesian military that Exxon allegedly controlled and directed, had committed human rights abuses against villagers in Aceh, including genocide, extrajudicial killing, torture, crimes against humanity, sexual violence, and prolonged arbitrary detention. The district court dismissed the statutory claims and allowed discovery to proceed on the tort claims. Those claims were subsequently dismissed, however, for lack of prudential standing. On appeal, plaintiffs challenged the dismissal of their ATS and TVPA claims based on extrajudicial killing, torture, and prolonged arbitrary detention, but did not appeal the dismissal of their claims of genocide, crimes against humanity, or sexual violence. Exxon filed a cross-appeal, arguing that corporations are not subject to suit under the ATS.

In a 112-page opinion, Judge Rogers (joined by Judge Tatel) addressed a number of issues under the ATS. First, the majority rejected defendants' argument that the ATS does not apply extraterritorially, noting Congress's interest in regulating foreign conduct at the time of enactment, as well as the application of the statute to foreign conduct in modern ATS jurisprudence. Next, the majority held that aiding and abetting liability exists under the ATS because it is a well established customary international law principle. The majority also held, in conflict with the Second and Fourth

[8] District courts within the Seventh Circuit in 2011 have applied this decision to allow claims to proceed against corporations. See Victims of Hungarian Holocaust v. Hungarian State Rys., No. 10 C 868, 2011 WL 2672400 (N.D. Ill. July 8, 2011); Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, No. 10 C 1884, 2011 WL 1900340 (N.D. Ill. May 18, 2011).

Circuits, that a corporation can be liable for aiding and abetting human rights violations committed by foreign governments if it acted with the knowledge that its actions would assist the perpetrator in the commission of the crime.

The majority then addressed corporate liability under the ATS and the TVPA. With regard to the ATS, the majority criticized the Second Circuit for "ignor[ing] the plain text, history, and purpose of the ATS," and for conflating a cause of action with a remedy. According to the majority the text of the ATS is broad and "by its terms does not distinguish among classes of defendants." Therefore, the majority turned to the "historical context" of the statute, including the federal government's interest in providing a remedy for and preventing violations of the law of nations and the accepted principle of corporate liability in U.S. domestic tort law. According to the majority, although a norm of international law must be "specific, universal, and obligatory" to be actionable under the ATS, as the Supreme Court discussed in *Sosa*, 542 U.S. at 732, "for purposes of affording a remedy . . . , the law of the United States and not the law of nations must provide the rule of decision in an ATS lawsuit." With regard to the TVPA, the majority held that corporations cannot be liable because the statute provides a civil cause of action for torture or extrajudicial killing against "individual[s]."

Judge Kavanaugh dissented, arguing that the ATS does not apply to foreign conduct under the presumption against extraterritorial application of U.S. laws. In addition, Judge Kavanaugh agreed with the Second Circuit's conclusion in *Kiobel* that corporate liability is not a recognized norm of customary international law and therefore cannot support an ATS claim.

- *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011):

Plaintiffs, four Afghan and five Iraqi citizens captured and held in Afghanistan and Iraq by the U.S. military, sued Donald Rumsfeld (former Secretary of the Department of Defense) and three high-ranking Army officers under the ATS, the Fifth and Eighth Amendments, and the Third and Fourth Geneva Conventions, seeking damages and declaratory relief for their alleged mistreatment while in U.S. custody. The district court granted defendants' motion to dismiss, concluding that the ATS does not provide a private right of action against U.S. government employees that would create an exception from application of the Westfall Act, which provides absolute immunity to federal employees for torts committed in the scope of their employment.

On appeal, plaintiffs argued that the ATS provides a private right of action that satisfies the Westfall Act exception to immunity for a claim "which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2)(B). Judge Henderson's majority opinion (joined by Judge Sentelle), relying on the Supreme Court's statement in *Sosa* that "the ATS is a jurisdictional statute creating no new causes of action," 542 U.S. at 724, held that plaintiffs' ATS claim "alleges a violation of the law of nations, not of the ATS, and therefore does not violate a statute of the United States within the meaning of [the Westfall Act]."

Judge Edwards dissented, concluding that the district court had jurisdiction over plaintiffs' claims of official torture "because the ATS is a federal statute that incorporates substantive international norms and thereby directly authorizes recovery for deliberate torture perpetrated under color of official authority."

- *Ali Shafi v. Palestinian Auth*., 642 F.3d 1088 (D.C. Cir. 2011):

Plaintiffs, Ali Mahmud Ali Shafi and his wife, Shirin Ali Shafi, sued the Palestinian Authority ("PA") and the Palestinian Liberation Organization ("PLO") for damages under the ATS for Ali Shafi's alleged torture and "physical and mental abuse," and asserted a derivative negligence claim under Israeli law on behalf of their minor son. The district court dismissed the lawsuit for failure to state a claim under the ATS, and plaintiffs appealed.

Addressing the question whether the ATS "provide[s] jurisdiction in the district court over a civil action by an alien for torture committed by nonstate actors such as the PLO," the D.C. Circuit concluded that plaintiffs had not demonstrated a sufficient international consensus that torture by private actors violates international law and that the complaint therefore did not state a claim under the jurisdictional grant of the ATS. In reaching this conclusion, the D.C. Circuit relied on Judge Edward's concurrence in *Tel–Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984), which specifically considered whether "torture today is among the handful of crimes to which the law of nations attributes individual responsibility" and concluded that it was not. The D.C. Circuit also relied on the Supreme Court's statement

in Sosa, 542 U.S. at 732 n.20, that Judge Edwards' conclusion in Tel-Oren was based on the "insufficient consensus in 1984 that torture by private actors violates international law."

- *Baloco ex rel. Tapia v. Drummond Co., Inc.,* 640 F.3d 1338 (11th Cir. 2011):

  Plaintiffs, the children of three former union leaders killed in Colombia in 2001, sued Drummond Company, Inc., Drummond Ltd., and various Drummond employees under the ATS, the TVPA, and the laws of Colombia for allegedly hiring paramilitaries from the Autodefensas Unidas de Colombia ("AUC") to assassinate their fathers, causing them damages including emotional harm, loss of companionship, and financial support. The district court dismissed the suit based on res judicata and preclusion grounds and alternatively because plaintiffs lacked standing under the ATS or the TVPA to sue for their own damages. Plaintiffs appealed.

  On appeal, the Eleventh Circuit reversed the district court's conclusion that plaintiffs lacked standing under the ATS because, accepting plaintiffs' well-pleaded allegations as true, they had adequately pled a cognizable cause of action under the ATS. Specifically, "the complaint identifie[d] each plaintiff as an alien currently residing in either Canada or Colombia" and "allege[d] an intricate and vindictive plot, orchestrated by defendants, that ultimately led to the assassinations of the Children's fathers" that, if true, "establishes a violation of international law sufficient for purposes of triggering ATS liability."

  The Eleventh Circuit also reversed the district court on plaintiffs' lack of standing under the TVPA. The court reasoned that according to the language of the statute, wrongful death claimants are eligible to obtain relief for a claim of extrajudicial killing pursuant to the TVPA. The Eleventh Circuit concluded that under applicable state law (Alabama) plaintiffs qualified as wrongful death claimants and therefore had standing to sue under the TVPA.

- *Bauman v. DaimlerChrysler Corp*., 644 F.3d 909 (9th Cir. 2011):

  Plaintiffs, Argentinean residents sued DaimlerChrysler Aktiengesellschaft (DCAG) alleging violations of the ATS and the TVPA because one of DCAG's subsidiaries, Mercedes–Benz Argentina (MBA), allegedly collaborated with state security forces to kidnap, detain, torture, and kill plaintiffs—some of whom were former employees of MBA—and their relatives during Argentina's "Dirty War." The Argentinean residents sought jurisdiction over DCAG through its wholly-owned U.S.-based subsidiary Mercedes-Benz USA (MBUSA). The district court granted DCAG's motion to dismiss, finding that it could not exercise general jurisdiction over DCAG because (1) DCAG's contacts with California were not "systematic and continuous," and (2) the assertion of general jurisdiction was not reasonable because plaintiffs had an alternative adequate forum (i.e., Argentina and Germany) to bring their claims.

  On appeal, the Ninth Circuit concluded that DCAG was subject to general jurisdiction in California through the contacts of its subsidiary, MBUSA, and held that MBUSA was DCAG's agent, at least for purposes of personal jurisdiction, and that the exercise of personal jurisdiction was reasonable under the circumstances. In discussing whether general jurisdiction was reasonable, the Ninth Circuit disregarded the district court's cursory discussion of exhaustion under the TVPA, concluding that Argentina is not an adequate alternative forum. In addition, the Ninth Circuit noted that the exhaustion requirement under the ATS is prudential (unlike the TVPA), which the district court failed to address, but did not discuss whether plaintiffs had met that requirement because DCAG did not plead ATS exhaustion as an affirmative defense or argue it on appeal. The Ninth Circuit also observed, regarding its interest in adjudicating human rights violations, that "American federal courts, be they in California or any other state, have a strong interest in adjudicating and redressing international human rights abuses." The Ninth Circuit did not address subject matter jurisdiction.

- *Liu Bo Shan v. China Const. Bank Corp*., 421 F. App'x 89 (2d Cir. 2011):[9]

  Plaintiff, Liu Bo Shan, a resident alien, sued his former employer, the China Construction Bank, for torture; cruel, inhumane, and degrading treatment; and prolonged arbitrary detention under the ATS and the TVPA, alleging that his former employer allegedly manufactured false evidence to induce his arrest knowing that the Chinese police would torture him. The complaint raised a number of issues regarding the potential liability of former state-owned corporations for actions occurring while the corporations were state-owned, which the district court did not address. The district

[9] Clifford Chance US LLP represented China Construction Bank Corporation in the trial court and on appeal.

court dismissed plaintiff's claims on the ground that he failed to state a plausible theory of direct or secondary liability, and plaintiff appealed.

The Second Circuit held that the allegations were "insufficient to support a reasonable inference of direct liability by the Bank" because the complaint alleged that the torture, cruel treatment, and prolonged arbitrary detention were committed by the Chinese police and not the Bank. The Second Circuit also held, citing *Talisman*, 582 F.3d at 247, that plaintiff failed to state a claim for aiding and abetting under international law, applying the Second Circuit's standard that a defendant must have "(1) provided 'substantial assistance' to the perpetrator; and (2) acted with the 'purpose' of facilitating the alleged offenses, rather than with mere knowledge." The Second Circuit affirmed dismissal of the complaint because, although plaintiff alleged that the Bank knew the police would torture him, plaintiff failed to allege that the Bank's purpose in having him arrested was to have him tortured. The Second Circuit also reasoned that the complaint failed because the allegation that the Bank contacted and provided police with false evidence was not enough to qualify as "substantial assistance" in the alleged torture, cruel treatment, and arbitrary detention. The Second Circuit concluded that plaintiff also failed to state a claim under the TVPA for the same reasons he failed to state a claim under the ATS, noting that the district court and neither of the parties "articulate[d] different standards for application of the two statutes."

- *Tobar v. United States*, 639 F.3d 1191 (9th Cir. 2011):

Plaintiffs, Ecuadorian crew members of a fishing boat, sued the United States for alleged damages resulting from the U.S. Coast Guard's boarding of plaintiff's boat in international waters near the Galapagos Islands for suspected involvement in drug smuggling. Tests conducted by the Ecuadorian government uncovered no contraband, and no charges were filed against plaintiffs. The district court dismissed the claims because the United States had not waived its sovereign immunity.

Reviewing a number of sources that plaintiffs claimed supported a waiver of sovereign immunity, including the ATS, the Ninth Circuit concluded that the ATS is a jurisdictional statute only and did not imply a waiver of sovereign immunity. The Ninth Circuit concluded that any party asserting jurisdiction under the ATS must establish, independent of that statute, that the United States has consented to suit, and that in this case plaintiffs did not.

- *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011):

Plaintiffs, the widow and sons of a U.S. citizen who was allegedly tortured and killed in Israel, sued three individuals, the PA, and the PLO under the ATS, the TVPA, and federal common law. The district court dismissed plaintiffs' ATS claim because the statute grants jurisdiction over civil actions filed by aliens only. The district court also dismissed plaintiffs' remaining claims, concluding that only a natural person is amenable to suit under the TVPA and that plaintiffs had no cause of action under federal common law. Plaintiffs appealed the dismissal of their TVPA and federal common law claims.

In a unanimous opinion, the D.C. Circuit held that the TVPA does not create a cause of action against an organization. The D.C. Circuit considered the text of the TVPA, which uses the word "individual" five times in the same sentence—four times to refer to the victim of the torture or extrajudicial killing, which could only be a natural person, and once to refer to the perpetrator of the torture or extrajudicial killing. According to the D.C. Circuit, there could be no reason to think that the term "individual" has a different meaning when referring to the victim and the perpetrator. In addition, the D.C. Circuit affirmed the district court's dismissal of plaintiffs' federal common law claims, rejecting plaintiffs' argument that the federal question jurisdiction provision of the U.S. Code, 28 U.S.C. § 1331, creates a cause of action.

## B. District Court Cases

- *Hamad v. Gates*, No. C10-591 MJP, 2011 WL 6130413 (W.D. Wash. Dec. 8, 2011):In 2000, plaintiffs

Plaintiff, a Sudanese citizen who was seized while working as a humanitarian worker in Pakistan and detained in a Pakistani jail; the U.S. Air Base in Bagram, Afghanistan; and Guantanamo Bay for over five years, sued U.S. Secretary of Defense Robert Gates for violations of customary international law, the Geneva Conventions, state common law, and the Fifth Amendment. Plaintiff alleged that Defendant Gates ordered, authorized, condoned, and created methods and

procedures for the abuses he suffered during his detention. Defendant Gates moved to dismiss plaintiff's Fifth Amendment claim, and the United States substituted itself as defendant under the Westfall Act and moved to dismiss plaintiff's claims for violations of customary international law, state common law, and the Geneva Conventions.

The district court held that the United States was properly substituted for Defendant Gates, rejecting plaintiff's argument that the ATS provided an exception to substitution under the Westfall Act. The district court noted that the ATS is analogous to 42 U.S.C. § 1983 because "it does not create substantive rights, but simply provides the procedural mechanism through which a plaintiff may bring suit for violations of federal rights." The district court dismissed plaintiff's Fifth Amendment claim under qualified immunity and, having substituted the United States for Defendant Gates, dismissed the remaining claims for lack of subject matter jurisdiction based on the United States' sovereign immunity.

- *Dacer v. Estrada,* No. C 10-04165 WHA, 2011 WL 6099381 (N.D. Cal. Dec. 7, 2011):

Plaintiffs, children of a prominent Philippino publicist, alleged that defendants, including Michael Aquino, the Deputy Director of the PNP-Intelligence Group (the Philippine counterintelligence agency), were responsible for the torture and death of their father. Defendant Aquino moved for summary judgment for plaintiffs' failure to exhaust local remedies.

The district court denied Defendant Aquino's motion. Noting that exhaustion is prudential under the ATS, the district court found that Defendant Aquino did not meet his burden to show that exhaustion was required because (1) the dispute had a nexus with the United States because Defendant Aquino is a U.S. resident and one plaintiff is a U.S. citizen; (2) the alleged violations are sufficiently grave; and (3) defendant did not submit evidence in support of his claim that exhaustion should apply. Next, the district court considered exhaustion under the TVPA, which is mandatory under the statute's text, and found that the mere fact that criminal proceedings were initiated against Defendant Aquino in the Philippines did not show that legal remedies in the Philippines were effective, as required to impose the requirement of exhaustion.

- *Ivanovic v. Overseas Mgmt. Co.,* No. 11-80726-Civ., 2011 WL 5508824 (S.D. Fla. Nov. 9, 2011):

Plaintiff sued a number of former associates over a failed venture to purchase a hotel in Curacao, which allegedly ended with plaintiff being forcibly removed from the hotel by armed security guards. Plaintiff alleged that his violent removal under threat of physical force amounted to torture and was actionable under the TVPA. The district court granted defendants' motion to dismiss, noting that plaintiff had failed to meet the TVPA's requirement of state action and that the complaint failed to allege how each defendant's actions constituted torture.

- *Hernandez v. United States*, 802 F. Supp. 2d 834 (W.D. Tex. 2011):

Plaintiffs, representatives of a 15-year old boy shot and killed by a U.S. Border Patrol Agent while he was playing in the cement culvert separating the United States from Mexico, sued the United States, various federal agencies, the agent involved in the shooting, and unknown federal agents, asserting claims under the ATS, the Federal Tort Claims Act, and the U.S. Constitution. The United States moved to dismiss, arguing with respect to plaintiffs' ATS claims that the United States had not waived sovereign immunity.

The district court agreed with the United States based on the absence of an unequivocal statement in the ATS or any treaties forming the basis for plaintiffs' ATS claims waiving the United States' immunity. The district court noted that because the ATS is merely a jurisdictional statute, "any party asserting jurisdiction under the [ATS to sue the United States] must establish, independent of that statute, that the United States has consented to suit."

- *Escarria-Montano v. United States*, 797 F. Supp. 2d 21 (D.D.C. 2011):

Plaintiff, a Columbian national who pled guilty to conspiracy to possess with intent to distribute cocaine while on board a Panamanian fishing vessel, sued the United States under the TVPA for injuries he suffered from an explosion set by his fellow crew members in an attempt to destroy the vessel and its contents. The United States moved to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The district court granted the motion to dismiss for lack of subject matter jurisdiction because plaintiff did not show that he had exhausted his administrative remedies, which the district court concluded was a jurisdictional requirement. In

addition, the district court noted that the suit was likely barred because the TVPA does not expressly waive the United States' right to sovereign immunity. Finally, the district court noted that dismissal was appropriate because the conduct was not torture.

- *In re Chiquita Brands Int'l, Inc.,* 792 F. Supp. 2d 1301 (S.D. Fla. 2011):

Plaintiffs, Colombian citizens and residents who are the family members of trade unionists, banana-plantation workers, political organizers, social activists, and others tortured and killed by the AUC, a paramilitary organization known for terrorizing individuals and communities suspected of guerrilla sympathies, sued Chiquita Brands International, Inc. and Chiquita Fresh North America LLC based on their payments of millions of dollars to the AUC to pacify the banana plantations and suppress union activity. Plaintiffs alleged claims under (1) the ATS for terrorism; material support to terrorist organizations; torture; extrajudicial killing; war crimes; crimes against humanity; cruel, inhumane, or degrading treatment; violation of the rights to life, liberty, and security of person and peaceful assembly and association; and a consistent pattern of gross violations of human rights; (2) the TVPA for torture and extrajudicial killing; and (3) the laws of Florida, New Jersey, Ohio, the District of Columbia, and Colombia for assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent hiring, negligence per se, and loss of consortium.

The suit followed Chiquita's March 2007 guilty plea in the D.C. District Court to one count of violating federal anti-terrorism laws by engaging in transactions with the AUC, a U.S.-designated foreign terrorist organization, and sentence of a $25 million criminal fine, the requirement to implement and maintain an effective compliance and ethics program, and five years' probation. Shortly after Chiquita's guilty plea, plaintiffs filed numerous complaints against Chiquita. On February 20, 2008, the Judicial Panel on Multidistrict Litigation transferred these actions to the district court for consolidated pretrial proceedings with the related actions already pending before that court. Chiquita moved to dismiss the complaints for lack of subject matter jurisdiction and failure to state a claim.

The district court began by noting that "the ATS is not only a jurisdictional statute; the ATS also empowers federal courts to entertain 'a very limited category' of claims." The district court then concluded that the Anti-Terrorism Act, which provides a civil cause of action for U.S. nationals harmed by international terrorism, did not preclude plaintiffs' ATS terrorism claims because there is no indication in the statute or its legislative history that Congress intended to foreclose claims by non-U.S. nationals arising under a different statute. Next, the district court concluded that terrorism and providing material support to a terrorist organization are not actionable under the ATS. The district court rejected plaintiffs' reliance on the International Convention for the Suppression of the Financing of Terrorism as evidence of an international law norm against terrorism because only 26 of the 192 nations of the world had ratified the Convention when the it came into force in 2001 and only 111 nations had ratified the Convention when Chiquita's alleged payments to the AUC terminated in 2004. The district court also rejected plaintiffs' reliance on U.S. prohibitions against terrorism, relying on *Sosa*'s emphasis on international consensus to establish an actionable international law norm under the ATS. 542 U.S. at 732.

The district court then concluded that plaintiffs' ATS claims for cruel, inhumane, or degrading treatment; violation of the rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of human-rights violations are not recognized violations of the law of nations. With regard to plaintiffs' torture and extrajudicial killing claims under the ATS, the district court noted that torture and extrajudicial killing are cognizable only when committed by state actors or under color of law. It found that plaintiffs had adequately pled such state action by alleging facts demonstrating a symbiotic relationship between the Colombian government and the AUC with respect to the AUC's campaign of torture and killing of civilians in the banana-growing regions. The district court also found that plaintiffs' war crimes and crimes against humanity claims under the ATS—which the district court concluded did not require state action—were adequately pled.

The district court next considered whether the complaints adequately pled Chiquita's secondary liability under either an aiding and abetting, conspiracy, or agency theory of liability. Citing *Sinaltrainal*, 578 F.3d at 1258 n.5, for the proposition that the ATS permits aiding and abetting and conspiracy liability, the district court next considered the appropriate standard under these theories. The district court concluded that, under *Talisman*, 582 F.3d at 259, and *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005), plaintiffs were required to allege that "Chiquita acted with the purpose or intent to assist in that violation" under either theory, and that they did so for their claims of

torture and extrajudicial killing by "including allegations of specific instances of assistance, tied to a specific purpose to further the AUC's killing, torture, and other illegal violence." Plaintiffs further adequately pled the requisite intent for war crimes by alleging facts supporting Chiquita's shared purpose with the AUC to torture and kill as a means to defeat its enemy militarily, and for crimes against humanity by alleging facts demonstrating that Chiquita intended for the AUC to torture and kill civilians. The district court rejected plaintiffs' theory of agency liability as lacking foundation in international law and as inadequately pled because plaintiffs did not allege that Chiquita exercised any direction over the AUC's decisions or conduct.

Finally, the district court concluded that plaintiffs' TVPA claims were viable because corporations can be held liable under the TVPA based on Eleventh Circuit precedent. *Sinaltrainal*, 578 F.3d at 1264 n.13; *see also Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

- *Swarna v. Al-Awadi*, No. 06 Civ. 4880(PKC), 2011 WL 1873356 (S.D.N.Y. May 12, 2011):

Plaintiff, an Indian citizen who worked as a domestic servant, brought an ATS action against her employers (a former Kuwaiti diplomat and his wife) and the State of Kuwait, alleging the former diplomat subjected her to slavery, including trafficking, involuntary servitude, forced labor, and sexual abuse. She also asserted claims under New York law for failure to pay legally required wages, fraud, unjust enrichment, and breach of contract. Defendants moved to dismiss, arguing that the court lacked subject matter jurisdiction under the ATS because plaintiff did not establish a specific norm of international law of individual liability for private enslavement.

The district court agreed with defendants, concluding that the Second Circuit's statement in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009), that "ATS claims may sometimes be brought against private actors, and not only state officials, when the tortious activities violate norms of 'universal concern' that are recognized to extend to the conduct of private parties—for example, slavery, genocide, and war crimes" was dicta, and relying instead on the dissent in *Abdullahi*, which distinguished the "slave trade" (which might support private liability in certain circumstances) from "slavery" (which does not). The district court rejected the Ninth Circuit's statement in *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002), that "forced labor, like traditional variants of slave trading, is among the handful of crimes . . . to which the law of nations attributes individual liability," because the Ninth Circuit voted to rehear the appeal *en banc* and ordered that the three-judge panel opinion shall not be cited as precedent.

- *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217 (S.D. Fla. 2011):

Plaintiffs, citizens of the Philippines, sued Star One Staffing, Inc., Star One Staffing International, Inc., and their employees under the ATS, the Trafficking Victims Protection Reauthorization Act ("TVPRA"), the Racketeer Influenced and Corrupt Organizations Act ("RICO"), and the Fair Labor Standards Act for alleged involuntary servitude and forced labor. Defendants moved to dismiss the ATS and RICO claims.

The district court first rejected defendants' argument that the ATS cannot apply to conduct occurring in the United States, despite a New York district court decision to the contrary, *Velez*, 754 F. Supp. 2d 488, because "[n]either the Supreme Court nor the text of the statute says anything of an extraterritorial requirement." The district court next analyzed whether the TVPRA preempts the ATS under the Eleventh Circuit's three-part framework in *Aldana*, 416 F.3d 124. First, the district court compared the statutory texts and concluded that the definitions of the claims at issue are drawn from different sources under the two statutes: the TVPRA provides definitions for both human trafficking and forced labor, while the definitions of these terms under the ATS must be ascertained by reference to the law of nations; the TVPRA further differs from the ATS because the TVPRA applies to U.S. citizen plaintiffs and the ATS does not; and, the TVPRA includes a statute of limitations and a requirement for staying civil claims during criminal procedures, while the ATS does not.

Second, the district court relied on Eleventh Circuit precedent holding that claims under the ATS were not preempted by Congress's passage of the TVPA to support the conclusion that Congress did not intend the TVPRA to be the exclusive remedy for victims of human trafficking and forced labor. Third, the district court concluded that principles of statutory construction favored a finding that Congress did not intend to preempt recovery for human trafficking and forced labor under the ATS when it passed the TVPRA because Congress did not expressly repeal or amend the ATS as it applies to human trafficking and forced labor claims.

- *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6 (D.D.C. 2011):

  Plaintiff, a former Cuban citizen and current U.S. citizen, sought to enforce in the District of Columbia a default judgment entered by a Florida state court and subsequently entered by the Southern District of Florida in the amount of $200 million in damages, plus $49 million in interest, against the Republic of Cuba and various Cuban state actors for the alleged torture plaintiff suffered while incarcerated in Cuba. In addressing its jurisdiction to enforce the default judgment entered by the Florida state and federal court, the district court discussed whether the other courts had jurisdiction over the dispute under the TVPA.

  The district court noted that the TVPA is limited to suits against individuals and not foreign states. The district court then noted that neither the TVPA nor the ATS (which provides subject matter jurisdiction in TVPA cases) preempts the FSIA, which provides the sole basis for obtaining jurisdiction over a foreign state in a U.S. court. According to the district court, it could not enforce the judgment because neither the Florida state or federal court had jurisdiction. None of the exceptions to the FSIA applied because the injury did not occur in the United States or while plaintiff was a U.S. national.

- *M.C. v. Bianchi*, 782 F. Supp. 2d 127 (E.D. Pa. 2011):

  Plaintiffs, four underage male Moldovan citizens, sued Anthony Mark Bianchi under the ATS for allegedly sexually assaulting them while he was traveling in Moldova. The Eastern District of Pennsylvania held the lawsuit in abeyance pending resolution of defendant's appeal of his criminal convictions for this and related conduct. Following affirmance of defendant's convictions, the court reinstated the lawsuit, and defendant moved to dismiss for lack of subject matter jurisdiction, arguing that a private citizen cannot be liable under the ATS and that rape outside the context of war or genocide is not actionable under ATS.

  The district court denied defendant's motion, holding that the ATS does not explicitly require state action. The district court noted that violations of the laws of nations, such as piracy and enslavement, were historically committed by private individuals rather than state actors. In addition, the court held that sexual assault of children through international sex tourism is a serious transgression of international law that is "specific, universal, and obligatory," *Sosa*, 542 U.S. at 732, and falls within the "very limited category" of claims cognizable under the ATS as a violation of the law of nations. The court noted that one way of identifying such international legal norms is by reference to international legal treaties, such as the Optional Protocol on the Rights of the Child, Sale of Children, Child Prostitution and Child Pornography ("Optional Protocol"), ratified by 118 countries (including Moldova and the United States), which was enacted to address the root causes of child sex tourism, such as poverty and underdevelopment.

  Plaintiffs moved for a default judgment as to defendant's liability on April 24, 2011, noting that defendant waited 473 days after being served with the complaint to challenge the district court's subject matter jurisdiction. The district court granted plaintiffs' unopposed motion for default judgment on May 18, 2011. Plaintiffs dismissed their claims against defendant with prejudice on June 14, 2011.

- *Orkin v. Swiss Confederation*, 770 F. Supp. 2d 612 (S.D.N.Y. 2011):

  Plaintiff, the great-grandson of a German Jew, sued the government of the Swiss Confederation, a museum, and a private Swiss foundation under the takings clause exception to foreign sovereign immunity under the FSIA and the ATS, seeking the return of a van Gogh drawing his great-grandmother was allegedly forced to sell to a Swiss art collector, at a fraction of its fair value, to help fund her family's escape from Nazi Germany. Following an initial dismissal for want of jurisdiction under both statutes, plaintiff amended his complaint, and defendants moved to dismiss the amended complaint for lack of subject matter jurisdiction.

  The district court again dismissed the amended complaint for lack of jurisdiction under both statutes. With regard to the FSIA, the district court concluded that the takings clause did not provide jurisdiction in a case involving acquisition by a private individual. With regard to the ATS, the district court concluded that plaintiff had alleged no cognizable cause of action. According to the district court, the act of "accept[ing] a bequest or donation of artwork from a collector who purchased it, however opportunistically, many years prior" could not rise to the level of the handful of "heinous actions" actionable under the ATS.

# VI. Conclusion

The year 2011 saw a wide variety of issues addressed under the ATS and the TVPA. In 2012, the Supreme Court's decisions in *Kiobel* and *Mohamad* will have broad implications for the potential liability of multinational corporations under these statutes. A decision rejecting corporate liability under the ATS and the TVPA would effectively eliminate lawsuits seeking to hold corporations liable for human rights violations overseas, while a decision permitting corporate liability under the statutes could lead to a wave of new lawsuits.

Even if the Supreme Court concludes that corporations can be liable under the ATS and the TVPA, numerous questions regarding the statutes' interpretation such as the required *mens rea* for aiding and abetting liability will continue to vex the lower courts in the year to come. Corporations should continue to monitor these developments, as well as consider the potential impact of the UN Guiding Principles and OECD Guidelines, and the liability-mitigating potential of devising and implementing a human rights due diligence and compliance program.

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