CALIFORNIA WESTERN INTERNATIONAL

LAW JOURNAL

VOLUME 47 FALL 2016 NUMBER 1

DRONES, PRIVATE MILITARY COMPANIES AND THE ALIEN TORT STATUTE: THE LOOMING FRONTIER OF INTERNATIONAL TORT LIABILITY

DAVID SHEA BETTWY*

"There is always a first time for litigation to enforce a norm; there has to be." — Judge Richard A. Posner[1]

I. INTRODUCTION

The Alien Tort Statute (ATS)[2] poses a litigation risk to corporations whose domestic operations connected to conduct abroad that violates international law. The most likely target of future ATS litigation is U.S. private military companies (PMCs), especially those involved in the manufacture and deployment of drones. This is a result of recent case law clarifying the extraterritorial application of the Alien Tort Statute and the current U.S. national military strategy to rely on the use of

* J.D., University of California, Berkeley; LL.M., International Human Rights Law, National University of Ireland, Galway; B.A., University of Notre Dame.

1. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).
2. 28 U.S.C. § 1350 (West 2012).

"remotely operated vehicles and technologies."[3] Judge-made international tort law has exposed corporations to the risk of ATS litigation, beginning with the 1980 *Filártiga v. Peña-Irala*[4] decision and leading up, most recently, to the 2013 *Kiobel v. Royal Dutch Petroleum Co.*[5] decision.

So far, corporations have escaped serious exposure to civil liability under the ATS. But the risk of civil international tort liability has recently increased due to the evolution of case law on aiding-and-abetting liability. Given the state of case law, including the *Kiobel* decision regarding the presumption against extraterritoriality, PMCs are especially vulnerable to civil liability.

Section II of this article examines the evolution of judge-made international tort law through the ATS, from the 1980 *Filártiga* decision to the 2013 *Kiobel* decision. Section III examines the history of ATS litigation against corporations. Further, Section IV is a discussion of how the Supreme Court's recent decision in *Kiobel* regarding the presumption against extraterritoriality has opened the door to ATS litigation against corporations with sufficient contacts in the United States. Finally, Section V discusses ATS litigation against PMCs, particularity those involved in the production and use of drones, and why *Kiobel* makes PMCs prime targets of future ATS litigation.

II. EVOLUTION OF JUDGE-MADE CAUSES OF ACTION UNDER INTERNATIONAL LAW THROUGH THE ATS

In 2004, just as ATS litigation was waning after a promising start in 1980, the Supreme Court seemed to strike the final blow in *Sosa v. Alvarez-Machain*,[6] stating that the ATS does not create a cause of action.[7] That statement was illusory and ironic, however, because the Court also ruled that the ATS is a conduit through which U.S. courts may "recognize" private rights of action for violations of customary international law.

---

3. JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA, 1, 16 (2015), http://www.jcs.mil/Portals/36/Documents/Publications/2015_National_Military_Strategy.pdf.

4. 630 F.2d 876 (2d Cir. 1980).

5. 133 S. Ct. 1659 (2013).

6. 542 U.S. 692 (2004).

7. *Id.* at 742.

But for the ATS, violations of international law are not actionable for monetary damages in U.S. courts. *Sosa* is therefore to international tort liability as *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[8] is to constitutional tort liability. In *Bivens*, the Court used 42 U.S.C. § 1983 as a conduit (or excuse) to create an analogous federal cause of action.[9] The *Sosa* Court used the ATS to create a new body of federal tort law that derives from customary international law. The rule in *Sosa*, combined with settled law that corporations can be held criminally liable for violations of international law[10] and circuit court rulings that that there can be civil liability under the ATS for aiding and abetting,[11] has opened the door to lawsuits against corporations for violations of certain norms of international law.

The Supreme Court's 2013 decision in *Kiobel*[12] is the latest phase of the assembly line of decisions that have resulted in judge-made international tort law. The Court held that the presumption against extraterritoriality applies to the ATS.[13] Despite stating a rule that seems to foreclose ATS litigation, the Court also defined when the presumption against extraterritoriality can be overcome, namely when the tortfeasor's conduct occurs within the United States and causes injuries abroad. The ATS therefore poses a litigation risk to corporations that make decisions in the United States related to conduct abroad that potentially violates international law.

A. Filartiga *and the Rise of the ATS*

The ATS is a federal U.S. statute that provides subject-matter jurisdiction to national courts 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."[14] The statute was dormant for nearly two centuries after it was enacted as part of the Judiciary Act of 1789.[15] But, in 1980, the

8. 403 U.S. 388 (1971).
9. *Id.* at 399.
10. *See infra* text accompanying notes 123-31.
11. *See infra* text accompanying notes 132-42.
12. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
13. *Id.* at 1665.
14. 28 U.S.C. § 1350 (West 2012).
15. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77; Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115-16 (2d Cir. 2010).

U.S. Court of Appeals for the Second Circuit upheld federal jurisdiction under the ATS against a former Paraguayan law enforcement officer who tortured and killed the plaintiff's son outside the United States.[16]

Before the Second Circuit brought life to the ATS in *Filártiga* in 1980, it had rejected ATS claims in 1976, finding that neither "the law of nations" nor U.S. treaties provided any private rights of action.[17] In *Dreyfus v. Von Finck*, a Second Circuit panel held that "[i]t is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."[18] And as with treaties, "the law of nations has been held not to be self-executing so as to vest a plaintiff with individual legal rights."[19]

Four years later in *Filártiga*, however, the Second Circuit recognized a cause of action under international law for a plaintiff whose son was tortured and killed.[20] The panel held that the plaintiff had stated a cause of action arising under various international human rights documents as well as the ATS.[21] The panel did not question whether the plaintiff had a private right of action as it did in 1976 in *Dreyfus*, but focused instead on whether the alleged torture violated customary international law.[22] It distinguished previous ATS cases, including *Dreyfus*, by pointing out that the claims in those cases did not involve well-established and universally recognized norms of international law such as the prohibition against torture.[23] Under *Filártiga*, therefore, plaintiffs do not need to establish a private right of action to state a claim under the ATS; they need only allege conduct that violates the law of nations.[24]

---

16. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
17. Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir. 1976).
18. *Id.* at 30.
19. *Id.*
20. *Filártiga*, 630 F.2d at 885.
21. *Id.*
22. *Id.* at 881-82.
23. *Id.* at 884-85.
24. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring).

B. Tel-Oren, Bivens, *and the Decline of the ATS*

In his 1984 concurring opinion in *Tel-Oren v. Libyan Arab Republic*,[25] however, Judge Bork argued that *Filártiga* should be limited, echoing *Dreyfus*'s holding that ATS claims must rest on an express or implied cause of action.[26] The plaintiffs alleged in *Tel-Oren* that the Palestine Liberation Organization had committed violations of international law, including genocide and torture, and conceded that they "ha[d] not been granted a cause of action by federal statute or by international law itself."[27] First, Judge Bork pointed out that none of the U.S. treaties cited by the plaintiffs granted them an express or implied cause of action.[28] Second, he rejected the view that international law automatically provides a cause of action by being part of federal common law. As Bork explained, neither the federal question statute[29] nor the ATS creates a cause of action,[30] and there is no norm of customary international law that creates an exception to the general rule that international law does not provide private rights of action.[31]

Judge Bork entertained the possibility that, at the time of enacting the ATS, legislators intended the statute to grant jurisdiction to federal courts to "recognize" existing private rights of action for certain torts, namely "[v]iolation of safe-conducts," "[i]nfringement of the rights of ambassadors," and "[p]iracy."[32] But he maintained that customary international law has never provided for "any recognition of a right of private parties to recover."[33] He noted that while "substantive rules of international law may evolve . . . that does not solve the problem of the existence of a cause of action."[34] In sum, while the *Filártiga* court silently presumed that a violation of international law gave rise to a

25. 726 F.2d 774 (D.C. Cir. 1984).

26. *Id.* at 812 (Bork, J., concurring).

27. *Id.* at 801.

28. *Id.* at 808 ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action.").

29. 28 U.S.C. § 1331 (West 2012).

30. *Tel-Oren*, 726 F.2d at 811 (Bork, J., concurring).

31. *Id.* at 816-17.

32. *Id.* at 811-13.

33. *Id.*

34. *Id.* at 816.

private right of action, Judge Bork reasoned that the ATS permits courts to recognize a cause of action for international tort only when Congress or a norm of customary international law expressly provides a private right of action.

Judge Bork's concurring opinion propagated the jurisdiction-only interpretation of the ATS[35] and influenced Congress' passage of the Torture Victim Protection Act (TVPA) in 1992.[36] His pushback against *Filártiga*, which had provided torture victims civil damages under the ATS, created uncertainty that Congress sought to clarify.[37] While Congress believed the ATS "should remain intact to permit suits based on other norms . . . of customary international law,"[38] it passed the TVPA to ensure that torture victims had an unambiguous cause of action, given Judge Bork's prerequisite of an "explicit grant . . . by a state, by Congress, by a treaty, or by international law."[39]

Congress' torture legislation, despite the view that the ATS was still operational, may have also reflected recognition that courts were increasingly restrained from inferring or creating causes of action—a trend that would continue through the 2004 *Sosa* decision. The Supreme Court established a judge-made cause of action in 1971 for Fourth Amendment violations of the U.S. Constitution in *Bivens*,[40] which was subsequently extended to Fifth and Eighth Amendment violations.[41] However, as the late Justice Scalia noted in his concurrence in *Sosa*,

---

35. *See generally* Bradford Clark, *Tel-Oren, Filártiga, and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177, 177 (2013) (arguing that Bork's opinion "more accurately anticipated how the Supreme Court would ultimately interpret the statute" than *Filártiga*); Kedar Bhatia, *Reconsidering the Purely Jurisdictional View of the Alien Tort Statute*, 27 EMORY INT'L L. REV. 447, 465-69, 472-73 (2013) (describing the impact of Judge Bork's purely jurisdictional view on subsequent ATS case law).

36. TORTURE VICTIM PROTECTION ACT OF 1991, H.R. Res. 2092, 102d Cong., 106 Stat. 73 (1992).

37. H.R. REP. NO. 102-367, at 3-4 (1991); *see also* Ekaterina Apostolova, Comment, *The Relationship between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 642 (2010).

38. H.R. REP. NO. 102-367, at 4.

39. *Tel-Oren*, 726 F.2d at 801, 804 (Bork, J., concurring).

40. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971).

41. *See* Davis v. Passman, 442 U.S. 228, 248-49 (1979); Carlson v. Green, 446 U.S. 14, 18-23 (1980).

"the ground supporting [*Bivens*] has eroded" since.[42] Courts could not extend *Bivens* causes of action to new contexts if "Congress ha[d] provided an alternative remedy" to substitute recovery directly under the Constitution, or if there were "special factors counseling hesitation in the absence of affirmative action by Congress."[43] In 1983 the Supreme Court declined to extend *Bivens* in a First Amendment case, deferring to Congress to "create a new substantive legal liability" for a First Amendment violation.[44]

As for the ATS, the separation-of-powers problems and risks of adverse foreign policy consequences that concerned Judge Bork in *Tel-Oren*[45] certainly could have constituted "special factors counseling hesitation" to establish a new cause of action. The Supreme Court has since declined to extend *Bivens* causes of action to new contexts.[46] In reflection, Scalia wrote in 2001 that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."[47]

Courts were also restrained from inferring or finding "implied" statutory causes of action at the time of TVPA's passage. The Supreme Court had effectively ended the "*Borak* era,"[48] during which courts could infer a cause of action if it would further the legislative purpose of the statute.[49] In its 1975 decision in *Cort v. Ash*,[50] the Court provided

---

42. Sosa v. Alvarez-Machain, 542 U.S. 692, 742 (2004) (Scalia, J., concurring).

43. *Carlson*, 446 U.S. at 18-19 (citing *Bivens*, 403 U.S. at 396) (internal quotation marks omitted).

44. Bush v. Lucas, 462 U.S. 367, 390 (1983).

45. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 799 (D.C. Cir. 1984) (Bork, J., concurring).

46. Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) ("The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades, forecloses such an extension here."). *See also* Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 473 (1994) (holding that a *Bivens* action cannot be brought against a federal agency).

47. *Corr. Servs. Corp.*, 534 U.S. at 75 (Scalia, J., concurring).

48. *See* Tom Gardner, Note, *The New Face of Implied Right to Sue Jurisprudence and the SEC's Best-Price Rule*, 83 ST. JOHN'S L. REV. 495, 502 (2009). *See also* Lumen N. Mulligan, *Federal Courts Not Federal Tribunals*, 104 NW. U. L. REV. 175, 182-83 (2010).

49. J. I. Case Co. v. Borak, 377 U.S. 426, 433 (1964).

50. Cort v. Ash, 422 U.S. 66, 78 (1975).

a four-factor test for finding implied, statutory causes of action, but emphasized strict application[51] and raised separation-of-powers concerns.[52] The Court further limited the *Cort* test in 1979, stating that "[t]he ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."[53] Professor Lumen Mulligan wrote that, "[a]lthough the Court . . . continued to infer causes of action on occasion [after *Touche Ross & Co.*], it has generally disapproved of the practice."[54] Finally, in 2001, the Court declined to infer a private right of action from Title VI of the Civil Rights Act of 1964.[55] Writing for the Court, Justice Scalia ruled that "the text and structure" of the statute did not contain "rights-creating language" nor revealed "congressional intent to create a private right of action."[56] He propagated a strictly textualist approach to finding causes of action, writing that "'contemporary legal context' . . . matters only to the extent it clarifies text."[57] In sum, Bork's refusal to read causes of action into the ATS in 1984, as well as the passage of the TVPA in 1992, reflect an increasing hesitation to find implied causes of action, such as in *Borak*, or create new causes of action, such as in *Filartiga*.

---

51. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("[I]t suffices to say that in a series of cases since *Borak* we have adhered to a stricter standard for the implication of private causes of action.").

52. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 730-31 (1979) (Powell, J., dissenting).

53. *Touche Ross & Co.*, 442 U.S. at 578; *see also* Thompson v. Thompson, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co.*, . . . converting one of its four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.").

54. Mulligan, *supra* note 48, at 183; *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 396 (5th ed. 2007) (noting that the Court generally refused to create new causes of action under the *Cort* test); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Rights of Action*, 71 NOTRE DAME L. REV. 861, 870-71 (1996) ("[R]ecent cases suggest that a private plaintiff has no cause of action unless the statute grants one or there is clear congressional intent to grant one.").

55. Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

56. *Id.* at 288-89.

57. *Id.* at 288.

C. Resurrection of the ATS

Despite the Supreme Court's efforts, led by Justice Scalia, to end the practice of creating new causes of action or finding implied causes of action, its 2004 *Sosa* decision established a new body of international tort law based on judge-made causes of action. The Court held that federal courts are permitted to "recognize private causes of action" for "torts in violation of the law of nations," as long as claims based on present-day international law rest on a norm of international law as definite and specific as the eighteenth-century norms that constituted the law of nations at the time the ATS was enacted.[58] Writing for the majority, Justice Souter reasoned that the ATS was enacted "on the understanding that common law would provide a cause of action for . . . international law violations thought to carry personal liability at the time,"[59] which according to William Blackstone, included "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[60] After all, the reasonable inference from history and practice is that the ATS was "intended to have practical effect the moment it became law."[61]

Given that "the ATS is a jurisdictional statute creating no new causes of action,"[62] it would have made sense to conclude that the ATS's scope was limited to allowing courts to recognize existing common law causes of action, namely Blackstone's three international torts. But, as Justice Scalia pointed out in his concurrence, Justice Souter assumed that the common law at present was able to create new causes of action,[63] despite overwhelming precedent disfavoring judge-made causes of action. Justice Souter shrugged off *Malesko*[64] and *Sandoval*,[65] two cases that cautioned against extending *Bivens* to create

58. Sosa v. Alvarez-Machain, 542 U.S. at 692, 724-25 (2004).

59. *Id.* at 724.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 745 (Scalia, J., concurring) ("Post-*Erie* federal common lawmaking . . . is so far removed from that general-common-law adjudication which applied the 'law of nations' that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.").

64. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001).

65. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

causes of action in new contexts. Souter advised caution in "making international rules privately actionable," but opined that "the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute."[66] Moreover, in upholding the creation of new causes of action upon "the reasonable inference . . . that the ATS was intended to have practical effect the moment it became law,"[67] Justice Souter effectively reverted to the *Borak* era by inferring a cause of action where it would further the legislative purpose of the statute.

Justice Souter's lose-the-battle-but-win-the-war approach is reminiscent of *Marbury v. Madison*, where the Court established its power of judicial review by striking down a law that gave the Court power to issue a writ of mandamus.[68] The *Sosa* Court explicitly refused to recognize a cause of action through the ATS for arbitrary arrest, but effectively authorized future judge-made private rights causes of action for international torts. Justice Scalia exposed this approach in his concurrence, writing that "[t]he Court masks the novelty of its approach when it suggests . . . the door is still ajar" to "recognition of actionable international norms."[69] The door was shut, Justice Scalia argued, when the Court terminated general common law in *Erie R. Co. v. Thompkins*.[70] Despite Scalia's contentions, courts after *Sosa* may create causes of action for violations of international norms as definite and specific as those contemplated at the ATS's inception.

Since *Sosa*, the creation of new causes of action has been a foregone conclusion, although courts have recognized that *Sosa*'s universal-and-specific standard offers limited flexibility in declaring norms of customary international law. For example, one district court determined that a defendant's conduct constituted cruel, inhuman, or degrading treatment, but ultimately decided that the conduct did not survive "the rigorous *Sosa* requirements."[71] Environmental claims have failed under

66. *Sosa*, 542 U.S. at 727.
67. *Id.* at 724.
68. *See* Marbury v. Madison, 5 U.S. 137 (1803).
69. *Sosa*, 542 U.S. at 746 (Scalia, J., concurring).
70. *Id.*; 304 U.S. 64 (1938).
71. Jama v. INS, 343 F. Supp. 2d 338, 360-61 (D.N.J. 2004).

the *Sosa* standard.[72] Human rights claims as a proxy for environmental torts have also failed, such as in a Second Circuit case against chemical companies that produced Agent Orange, a highly toxic defoliant deployed by the United States during the Vietnam War.[73] Nevertheless, since *Sosa*, courts have employed the ATS to identify several actionable norms of customary international law, including: crimes against humanity;[74] genocide;[75] war crimes;[76] torture;[77] cruel, inhuman or degrading treatment;[78] prolonged arbitrary detention;[79] forced labor;[80]

---

72. *See* Viera v. Eli Lilly & Co., No. 09-495, 2010 WL 3893791, at *3 (S.D. Ind. Sept. 30, 2010).

73. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 119 (2d Cir. 2008). *See also* Sarei v. Rio Tinto, PLC, 650 F. Supp. 2d 1004, 1024-25 (C.D. Cal. 2009) (rejecting environmental tort claims that invoke the rights to life and health).

74. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 743 (9th Cir. 2011); *In re* Chiquita Brands Int'l, 792 F. Supp. 2d 1301, 1334 (S.D. Fla. 2011); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 316 (D. Mass. 2013) (finding that "[w]idespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms").

75. *See, e.g.*, Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116-117 (2d Cir. 2008).

76. *See, e.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 743-44 (9th Cir. 2011); *In re* Chiquita Brands Intern., 792 F. Supp. 2d at 1331.

77. *See, e.g.*, Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1076 (C.D. Cal. 2010), *rev'd on other grounds*, 766 F.3d 1013 (9th Cir. 2014); Aldana v. Del Monte Fresh Produce, 416 F.3d 1242, 1247 (11th Cir. 2005).

78. *See, e.g.*, Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1093 (N.D. Cal. 2008), *aff'd on other grounds*, 621 F.3d 1116 (9th Cir. 2010) (severe beatings and confinement); Doe v. Qi, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004) (sexual abuse); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 756 (D. Md. 2010) (beatings, electric shocks, threats of rape, mock executions). *But see, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (holding that an eight-hour forced detention did not constitute cruel, inhuman or degrading treatment or punishment).

79. *See, e.g.*, Wiwa v. Royal Dutch Petroleum, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (stating that arbitrary detention can violate a norm of international law when it is prolonged).

80. *See, e.g.*, Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355, 1358 (S.D. Fla. 2008).

human trafficking;[81] extrajudicial killing;[82] aircraft hijacking;[83] arbitrary denationalization;[84] nonconsensual medical experimentation;[85] child labor;[86] and child sexual abuse.[87] The majority of these lawsuits were brought against multinational corporations (MNCs).

III. ATS LITIGATION AGAINST MNCS

Filártiga established the ATS as a way for human rights plaintiffs to obtain civil damages for violations of international law.[88] Practically, it gave U.S. federal courts universal jurisdiction over international law claims, particularly those arising in countries where justice systems are inadequate.[89] It also demonstrated the potential for substantial damages under the ATS.[90]

Courts were initially slow to appreciate the novelty of holding corporations liable for violations of international law. But ATS plaintiffs relentlessly targeted corporations, and courts began adopting theories of corporate liability. A corporation can be held liable for violations of international law under any of the following circumstances: (1) acting "under color of official authority"; (2) acting

81. *See, e.g.*, *id.* at 1358.

82. *See, e.g.*, Chavez v. Carranza, 413 F. Supp. 2d 891, 898-99 (W.D. Tenn. 2005); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1178-79 (C.D. Cal. 2005).

83. *See In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005).

84. *See In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 252 (S.D.N.Y. 2009).

85. *See* Abdullahi v. Pfizer, 562 F.3d 163, 180-81 (2d Cir. 2009).

86. *See* Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1075 (C.D. Cal. 2010), *rev'd on other grounds*, 766 F.3d 1013 (9th Cir. 2014).

87. *See* M.C. v. Bianchi, 782 F. Supp. 2d 127, 132-33 (E.D. Pa. 2011). *But see* Cisneros v. Aragon, 485 F.3d 1226, 1230 (10th Cir. 2007) (holding that the alleged sexual abuse of a minor did not violate a norm of customary international law).

88. *See* Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT'L L. 927, 937 (1998) ("The [ATS] provides one possible solution to the present-day inability to hold an MNC accountable for human rights violations.").

89. *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (acknowledging that "further resort to [Paraguayan courts] would be futile").

90. *Id.* at 867 (entering judgment for over $10 million).

where an applicable norm of international law extends to private actors, regardless of whether acting with color of authority; or (3) aiding and abetting violations of international law by a foreign government.

A. Impact of Corporate Liability

Awakening Monster: The Alien Tort Statute of 1789 predicted in 2003 that the ATS would spawn a new body of mass tort litigation comparable in impact to asbestos tort litigation: "This one-sentence law . . . could plausibly culminate in a nightmare, more than 200 years after it was enacted."[91] The authors suggested that, theoretically, 100,000 class action plaintiffs in China could sue American companies for aiding and abetting China's human rights violations for $6 billion in actual damages and $20 billion in punitive damages.[92] They also compared the potential costs of ATS litigation to those of asbestos litigation, noting that ATS litigation could "clog the courts and run up massive costs because [ATS trials] involve numerous prediscovery motions, overseas discovery, expert witnesses in foreign and international law, and near certainty of appeal."[93]

The business community embraced *Awakening Monster* as part of a movement to reform the ATS.[94] But its conclusions are largely speculative,[95] especially regarding massive damages awards, which are usually difficult to enforce. John Bellinger, former Legal Adviser to the U.S. Secretary of State, commented that "ATS litigation has not

---

91. GARY HUFBAUER & NICHOLAS MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 1, 1 (2003).

92. *Id.*

93. *Id.* at 14. *See also* Konrad L. Cailteux & B. Keith Gibson, *"Alien Tort Statute" Shakedown: Court Must Arrest New Attempt to Expand Mischievous U.S. Law*, 20 LEGAL BACKGROUNDER 1, 1 (Jan. 14, 2005), www.wlf.org/upload/011405LBCailteux.pdf (noting the "influx of cases has cost [U.S.] corporations significant, unnecessary costs in legal fees, discovery costs, and lost employee time").

94. Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN. J. GLOBAL TRADE 1, 4 (2004). *See* Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, 21 WORLD POL'Y J. 60, 64 (2004).

95. *Id.* at 39.

produced large judgments that can realistically be executed," and "it does not provide any effective relief in the vast majority of cases."[96]

But damages awards are not the only cost to ATS defendants. Even when plaintiffs lose, "they will have succeeded in making the companies expend substantial resources to fight the lawsuits and burnish their public image," which could in turn affect stock value.[97] Regarding ATS litigation, the U.S. Chamber of Commerce remarked, "U.S. companies lose even if they win!"[98] Human rights plaintiffs may be more motivated by the "vindication and psychological redress" resulting from a favorable judgment than by damages awards anyway.[99] And in cases where the host state's judicial resources are inadequate, the ATS may be the only realistic means available of suing a corporation for human rights violations. Indeed, one commentator counted a total of 173 opinions by U.S. courts in cases brought under the ATS from 1980 to 2011.[100] While one might have expected ATS lawsuits to decrease after the Supreme Court's 2004 *Sosa* decision, which imposed a high standard for bringing ATS claims, ATS litigation "continues largely unabated."[101] That may be a result of *Sosa*'s lack of specificity with regard to which claims are actionable, or even a product of sheer abuse of the statute.[102]

ATS litigation against corporations has also resulted in large settlements in some cases. For example, although the settlement terms were confidential, reports suggested that Unocal Corporation settled for about $30 million with U.S. human rights groups that represented Burmese villagers who were allegedly enslaved by the Burmese

96. John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 8 (2008); *see also* MICHAEL KOEBELE, CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE 90 n.10 (2009) (listing compensatory and punitive damage amounts for numerous ATS plaintiffs, noting, however, that "actual recovery of damages was rare").

97. Duruigbo, *supra* note 94, at 39.

98. John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. CHAMBER OF COMMERCE (Oct. 8, 2002), https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation.

99. Duruigbo, *supra* note 94, at 37.

100. Julian Ku, *The Curious Case of Corporate Liability under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011).

101. Bellinger, *supra* note 96, at 2.

102. *See* Cailteux & Gibson, *supra* note 93.

military to clear jungle to construct a natural gas pipeline in the 1990s.[103] In 2003, retailers and manufacturers including The Gap, J. Crew, Tommy Hilfiger and Target settled for about $20 million with class action plaintiffs alleging sweatshop abuse in Saipan.[104] And in 2009, the Center of Constitutional Rights agreed to settle with Shell Oil Company for $15.5 million after bringing suit against the company for complicity in human rights violations against the Ogoni people in Nigeria.[105]

Until recently, courts struggled with the issue of whether domestic or international law determines corporate liability under the ATS. In a footnote in *Sosa*, the Supreme Court suggested that international law—in which corporate liability is less certain—is the appropriate source of law.[106] But after years of confusion, courts have come to a consensus that corporations can be held liable under the ATS, no matter the source of law.

C. Rise of Corporate Liability Under the ATS

For decades, courts presumed without further inquiry that corporations could be held liable for violations of international law under the ATS.[107] While it is well-settled in the United States that a corporation is a legal person, the legal personality of corporations under

---

103. WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA-IRALA 107 (2007).

104. The court, however, found that "there was minimal success in the outcome of this litigation as originally contemplated by the plaintiffs," noting that plaintiffs received only 2% of what they originally sought. Does I v. The Gap, Inc., No. CV-01-0031, 2003 WL 22997250 at *1 (D.N. Mar. I. Sept. 11, 2003).

105. Statement of Plaintiffs, Center for Constitutional Rights (Jun 8, 2009), *available at* http://ccrjustice.org/Wiwa (last visited Feb. 21, 2016). *See* Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd., 335 Fed. Appx. 81 (2d Cir. 2009).

106. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) (The Supreme Court did not directly address corporate liability, but noted with respect to whether a norm of international law is sufficiently definite to support a cause of action that "[a] related consideration is 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 such as a corporation or individual.").

107. *See* Ku, *supra* note 100, at 354 n.1 (listing ATS cases since 1999 holding private corporations subject to customary international law); Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985) (first reported case against a corporate defendant).

international law is unsettled.[108] The prosecution of Nazi officers in the Nuremberg trials after World War II is noted for extending international law to cover individuals, not just states.[109] However, the implications for corporate liability under international law are debated.[110] No corporations were tried, and "the record contains no suggestion that corporations could themselves incur criminal liability."[111] The Nuremberg tribunal even declared that international crimes "are committed by men, *not by abstract entities*, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[112] Proponents of corporate liability under international law contend that the Allies dissolved German corporations to make assets available for reparations to victims of the corporations' activities during the war.[113]

The Nuremberg trials nevertheless provided a foundation for a line of ATS cases against corporations. In 1995, the *Kadic* court held that an ATS action could be brought against both state actors and private individuals, noting that the Nuremberg trials had established that individuals could be held liable for certain crimes under international law.[114] In *Doe v.. Unocal Corp.*, the first ATS case to address corporate liability, the district court noted that, under *Kadic*, certain crimes do not require state action and may be perpetrated by a "private party" for ATS

---

108. *See* Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753 (D. Md. 2010) ("There is no basis for differentiating between private individuals and corporations in this respect since '[a] private corporation is a juridical person and has no per se immunity under U.S. domestic or international law.'"); Peter Muchlinski, *Corporations in International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 52 (2014) (concluding that "[t]here is no general international corporate law as such and the recognition of international legal personality for corporations remains elusive").

109. *See generally* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008).

110. *Id.*

111. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 57 (E.D.N.Y. 2005).

112. Judgement: The Law of the Charter, NUREMBERG TRIAL PROCEEDINGS, http://avalon.law.yale.edu/imt/judlawch.asp (last visited Feb. 21, 2016) (emphasis added).

113. Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1017 (7th Cir. 2011).

114. Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995).

liability to attach.[115] The court adopted this view and applied it to claims against Unocal Corporation, presuming that *Kadic* had encompassed both individuals and corporations within the meaning of "private party."[116] After *Doe v. Unocal Corp.*, other courts have similarly presumed corporate liability under the ATS, producing a "cascade of missed issues,"[117] to uphold corporate liability under the ATS.[118]

It was not until 2005 that courts began to legitimately question the presumption of corporate liability under the ATS. Judge Weinstein, in *In re Agent Orange Product Liability Litigation,* noticed that "none of [the ATS decisions preceding it] had addressed the liability of corporations under the ATS" and that the decisions were "inconsistent with the assertion that no claim under the ATS can be brought against corporations."[119] In 2007, the Second Circuit finally acknowledged that previous courts had drawn "no distinction between a corporation and an individual," and that the question of corporate liability under the ATS had merely "lurk[ed] in the record."[120] The panel, addressed the implications of the Nuremberg trials and whether customary international law extended liability to corporations, in addition to individuals and states.[121] It concluded that the question was unsettled under customary international law and held that claims against apartheid-era corporations in South Africa were therefore subject to dismissal.[122]

---

115. Doe v. Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997).

116. *Id.* at 890-891.

117. Ku, *supra* note 100, at 390.

118. *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009) (citing *Romero* as authority for corporate liability under the ATS); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) (citing *Aldana* as authority for corporate liability under the ATS); Aldana v. Del Monte Fresh Produce, 416 F.3d 1242 (11th Cir. 2005) (not directly addressing corporate liability).

119. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d at 58-59. Even after this 2005 realization, in 2009 the district court in *In re South African Apartheid Litigation* presumed corporate liability and declined to "reopen a long-settled question." 617 F. Supp. 2d at 254-55.

120. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 321 (2d Cir. 2007) (citations omitted).

121. *Id.* at 321-26.

122. *Id.* at 326.

In 2013, the Second Circuit determined in *Kiobel v. Royal Dutch Petroleum* that *Sosa*[123] had directed courts to look to international law – not domestic law – to determine whether corporations could be held liable for international torts.[124] The panel accordingly applied *Sosa*'s standard to corporate liability under international law, as it would to a substantive norm of international law.[125] In doing so, it found that corporate liability under international law did not rest on a specific, universal, and obligatory norm.[126] Judge Cabranes declared that "for the foreseeable future, the [ATS] does not provide subject-matter jurisdiction over claims against corporations."[127]

Judge Cabranes' view, however, has proven to be the minority view. Courts in the Third, Fourth, Seventh, Ninth, Eleventh, and D.C. Circuits have since held that corporations are subject to liability under the ATS.[128] The D.C. Circuit rejected Judge Cabranes' reasoning that corporate liability under international law must rest on a norm of customary international law, holding instead that "domestic law, i.e. federal common law, supplies the source of law on the question of corporate liability."[129] Judge Posner from the Seventh Circuit reasoned that, even supposing that corporate liability did not exist under customary international law, "[t]here is always a first time for litigation to enforce a norm; there has to be."[130] Moreover, a district court within the Second Circuit declined to follow *Kiobel*, deciding that corporations can be held liable under the ATS via domestic law.[131] Corporate

123. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004) ("A related consideration is 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 such as a corporation or individual.").

124. Kiobel v. Royal Dutch Petroleum Co, 621 F.3d 111, 126 (2d Cir. 2010).

125. *Id.* at 131.

126. *Id.*

127. *Id.* at 149.

128. Krishanthi v. Rajaratnam, No. 09-CV-5395, 2011 WL 2607108 (D.N.J. 2011); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Romero v. Drummond, 552 F.3d 1303 (11th Cir. 2008); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011).

129. Doe v. Exxon Mobil Corp., 654 F.3d at 57.

130. *Flomo*, 643 F.3d at 1017.

131. *In re* S. Afr. Apartheid Litig., 15 F. Supp. 3d 454, 463-65 (2014).

liability under the ATS for violations of international law has therefore been acknowledged by a strong consensus.

D. State Action and Indirect Liability

Whether the defendant is a corporation or an individual, state action is required to litigate a successful ATS claim. The general rule is that a private actor can be held liable under the ATS if the violation of international law was committed under color of law.[132] Some forms of conduct are considered so egregious that they violate international law whether committed by a private or state actor.[133] So far, courts have determined that nonstate actors can be liable for war crimes, slave trading, genocide, and the three Blackstone torts.[134]

If the conduct at issue does not meet the state action requirement or one of the exceptions, plaintiffs may also sue corporations for a violation of international law under a theory of indirect liability, such as aiding and abetting. But in a 2004 ATS suit against apartheid-era South African corporations, a New York district court ruled that aiding and abetting international law violations was not a universally recognized theory of civil liability.[135] The court noted that, while aiding and abetting was a theory of criminal liability, it was "uncertain in application" in the civil context.[136] Similarly, in a 2009 ATS suit against a bank for providing services that facilitated terrorist organizations, the *Litle* district court held that there was "no basis for the judicial creation of a federal law of contribution under the ATS."[137] The court stated that, indisputably, "no international law norm provides those who violate international law with a right to seek contribution against a third party"

---

132. *See* Kadic v. Karadzic, 70 F.3d 232, 238-39, 245 (2d Cir. 1995) ("A private individual acts under color of law . . . when he acts together with state officials or with significant state aid.").

133. *Id.* at 239.

134. *See, e.g.*, *In re* Chiquita Brands Int'l, 792 F. Supp. 2d 1301, 1331 (S.D. Fla. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 73 n.2, *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013). (Blackstone torts); Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (slave trading, genocide and war crimes).

135. *In re* S. Afr. Apartheid Litig., 346 F. Supp. 2d 538, 549-50 (S.D.N.Y. 2004).

136. *Id.* at 550 (quoting Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181-82 (1994)).

137. Litle v. Arab Bank, 611 F. Supp. 2d 233, 249 (E.D.N.Y. 2009).

and that such a right is not universally recognized even within the United States.[138]

Nevertheless, courts have freely imported theories of indirect criminal liability into the civil context for ATS cases. In its 2007 *Khulumuni* decision, the Second Circuit reversed a district court holding that aiding and abetting international law violations could not provide a basis for ATS jurisdiction against apartheid-era South African corporations.[139] Judge Katzmann, in his concurrence, surveyed international law extensively and found that aiding and abetting liability was a norm of customary international law.[140] Although he concluded that the district court erred in reaching the opposite conclusion, Judge Katzmann never discussed aiding and abetting liability in international law in the *civil* context, which was the very root of the district court's uncertainty. He concluded that aiding and abetting liability is found when a defendant "(1) provides practical assistance to the principal which has a substantial effect on the perpetration of the *crime*, and (2) does so with the purpose of facilitating the commission of that *crime*."[141] Since then, aiding and abetting civil liability under the ATS has gained wide acceptance among U.S. federal courts.[142]

IV. *KIOBEL*: OVERCOMING THE PRESUMPTION AGAINST EXTRATERRITORIALITY

The Supreme Court finally revisited the ATS in 2013, originally to review the Second Circuit's decision that corporations could not be held liable for violations of international law under the ATS. Ultimately, the Supreme Court determined that the presumption against extraterritoriality precludes ATS claims regarding torts committed in

138. *Id.*

139. Khulumani v. Barclay Nat. Bank, 504 F.3d 254, 260 (2d Cir. 2007) (Katzmann, J., concurring).

140. *Id.* at 270-76.

141. *Id.* at 277 (emphasis added).

142. Aiding and abetting claims against corporations may turn on whether the court applies a "purpose" or "knowledge" standard. *See, e.g.*, Mastafa v. Chevron Corp., 770 F.3d 170, 192-93 (2d Cir. 2014) (finding that plaintiffs' assertions that defendants acted "knowingly" were insufficient for aiding and abetting liability); *but see* Doe v. Exxon Mobil Corp., 654 F.3d 11, 34 (D.C. Cir. 2011) (holding that knowledge satisfies the mens rea requirement of aiding and abetting).

foreign territory.[143] Nigerian nationals sued Shell Oil Company's Nigerian subsidiary under the ATS, claiming it was complicit in human rights violations.[144] Regarding whether "a claim may reach conduct occurring in the territory of a foreign sovereign," the Court held that a claim under the ATS must "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial application."[145] The Court noted that foreign policy concerns are "all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign."[146] Since "all the relevant conduct took place outside the United States," the claims did not touch and concern the United States with sufficient force to rebut the presumption.[147] While the Court did not directly address corporate liability under the ATS, it tacitly accepted it by alluding to the fact that corporations with sufficient contacts in the United States could be held liable under the ATS.[148]

As Justice Alito noted in his concurrence, the Court leaves open the question of the statute's extraterritorial reach.[149] *Kiobel*'s holding is limited, because both the plaintiffs (Nigerians) and defendants (Dutch, British and Nigerian corporations) were foreign, and *all* relevant conduct took place abroad.[150] The Court did not address what might constitute "relevant conduct" sufficient to overcome the presumption, and whether the nationality of the parties was a meaningful factor.[151] The Court did mention that "mere corporate presence" in the United States would not suffice, given the ubiquity of MNCs, but that was the extent of its guidance.[152] In his concurrence, Justice Breyer argued that jurisdiction under the ATS should be found if the defendant is a U.S.

143. Kiobel, 133 S. Ct. at 1663.

144. *Id.* at 1662.

145. *Id.* at 1164, 1669.

146. *Id.* at 1665.

147. *Id.* at 1669.

148. *Id.* (holding that "mere corporate presence" in the United States would not suffice to overcome the presumption against extraterritoriality).

149. *Id.* at 1669-70 (Alito, J., concurring).

150. Nigerian plaintiffs had sued Dutch, British and Nigerian corporations alleging that they aided and abetted the Nigerian government in committing human rights abuses against the Ogoni people in Nigeria. *Id.* at 1662-63.

151. *See id.* at 1669.

152. *Id.*

national, but disagreed that the presumption against extraterritoriality applies in the first place.[153] Ultimately, "the *Kiobel* majority answered the question before the Court in the negative, providing only 'under what circumstances' a court may *not* recognize a cause of action under the ATS."[154]

Contrary to Justice Breyer's concurrence, courts tend to agree that a U.S. defendant alone is not sufficient to provide ATS subject-matter jurisdiction. The Ninth Circuit in *Mujica v. AirScan, Inc.* held that the mere fact that the defendants were both U.S. corporations "is not enough to establish that the ATS claims here touch and concern the United States with sufficient force."[155] The panel noted that in all post-*Kiobel* cases in which the presumption against extraterritoriality was overcome, "the plaintiffs . . . alleged that at least some of the conduct relevant to their claims occurred in the United States."[156] The panel, however, acknowledged that "U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and [the United States] to satisfy *Kiobel*."[157]

By contrast, the Second Circuit held that the nationality of the defendant is immaterial, and that the location of the alleged violations of international law is the only consideration in the *Kiobel* analysis.[158] The Eleventh Circuit in *Doe v. Drummond* disagreed, reasoning that *Kiobel* specifically "did not exclude the significance of U.S citizenship," by noting that mere corporate presence would not suffice.[159] The *Drummond* panel ruled that its defendants—two U.S.

153. *Id.* at 1671 (Breyer, J., concurring).

154. Doe v. Drummond, 782 F.3d 576, 585 (11th Cir. 2015).

155. Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014) (internal quotations omitted). *See also* Cardona v. Chiquita Brands Int'l, 760 F.3d 1185, 1189 (11th Cir. 2014) (rejecting plaintiffs' "attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations").

156. *Mujica*, 771 F.3d at 595.

157. *Id.*

158. Balintulo v. Daimler, 727 F.3d 174, 190 (2nd Cir. 2013) ("Nothing in the Court's reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant's citizenship."); Mastafa v. Chevron Corp., 770 F.3d 170, 185 (2nd Cir. 2014) (looking "solely to the site of the alleged violations of customary international law" accordingly with *Balintulo*).

159. Doe v. Drummond, 782 F.3d 576, 594 (11th Cir. 2015).

corporations – maintained more than mere corporate presence by being incorporated in a state and having their principal places of business in the United States.[160] While this did not "firmly secure" ATS jurisdiction, the panel stated that their corporate status "can guide us in our navigation of the touch and concern inquiry."[161] With the exception of the Second Circuit, courts have found that the nationality of a defendant in an ATS suit is relevant to overcoming the presumption against extraterritoriality, especially if the defendant corporation maintains more than mere presence in the United States.

The "relevant conduct" analysis is fact-intensive, but post-*Kiobel* case law generally demonstrates that the presumption against extraterritoriality can be overcome by specific allegations of decisions and transactions in the United States that contribute to injuries abroad. In *Mastafa v. Chevron Corp.*, the plaintiffs overcame the presumption by showing several specific instances of conduct by Chevron and BNP in the United States that had an indirect impact on human rights violations in Iraq.[162] They alleged that Chevron and BNP had contributed to human rights abuses by the Hussein regime by purchasing and financing Iraqi oil, "facilitating" a surcharge payment to the regime, recouping profits, and allowing payments through a U.S. escrow account that included kickbacks to the Hussein regime – all in the United States.[163] The Second Circuit panel concluded that the alleged conduct was sufficiently "specific and domestic" to overcome the presumption against extraterritoriality.[164] A New Jersey district court recently refused to overturn subject-matter jurisdiction under the ATS in light of *Kiobel*, even though all the alleged injuries occurred abroad.[165] The defendants had allegedly hosted members of the perpetrator terrorist organization in the United States, contributed money to the U.S. branch of an organization that funneled money to the organization, and provided funds to bribe U.S. officials in attempts to remove the organization from the list of Foreign Terrorist

160. *Id.*

161. *Id.* at 595.

162. Mastafa, 770 F.3d at 190-91.

163. *Id.*

164. *Id.* at 191.

165. Krishanthi v. Rajaratnam, No. 09-CV-5395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014).

Organizations.[166] Furthermore, a Maryland district court suggested that ATS claims could be brought against defendants whose products are used primarily for committing violations of international law.[167] In sum, ATS plaintiffs have failed to overcome the presumption when their claims were not specific, too conclusory, or alleged only irrelevant U.S. contacts.[168] These claims did not fail merely because all of the injuries occurred abroad.[169]

V. POST-*KIOBEL*: ALIEN TORT STATUTE AND PRIVATE MILITARY COMPANIES

Post-*Kiobel* courts consider whether an ATS defendant had contacts in the United States and whether the defendant's conduct in the United States contributed to international law violations committed abroad. The presumption against extraterritoriality tends to narrow the focus of potential litigation to U.S. corporations whose decision-makers operate in the United States, especially PMCs.[170]

Scholars recognize that MNCs in general[171] play an increasingly greater role in the United Nations system.[172] While states agonize over

166. *Id.*

167. Du Daobin v. Cisco Systems, 2 F. Supp. 3d 717, 728 (D. Md. 2014).

168. *See, e.g.*, Doe v. Drummond, 782 F.3d at 591 (holding that an employee's obtaining consent in the United States to provide support to a perpetrator of war crimes, as well as frequent travel to the United States, was not sufficient to overcome the presumption against extraterritoriality in an ATS suit against a multinational coal mining company).

169. *See* Al Shimari v. CACI Premier Tech., 758 F.3d 516, 528 (4th Cir. 2014) ("[I]t is not sufficient merely to say that because the actual injuries were inflicted abroad, the claims do not touch and concern United States territory.").

170. *See generally* Jenny S. Lam, Comment, *Accountability for Private Military Contractors under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1460 (2009) (reporting that the United States and Britain together account for more than 70% of annual spending on PMCs).

171. Christopher C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 704 (2007) ("Intergovernmental organizations, nongovernmental organizations, multinational corporations, and even the individual person have all acquired recognized status under international law.").

172. B. S. Chimini, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 1 (2004) (the author attributes the increased influence of MNCs to the "abandonment of attempts to adopt a code of conduct for

international law principles of sovereignty and non-intervention,[173] MNCs thrive as their influence moves across borders unhindered by such restrictive notions.[174] State control has declined due to privatization, globalization, and the expansion of MNCs.[175] One writer goes so far as to say that MNCs "appear to be on the brink of superseding the state as the basis of international affairs."[176]

Data from 2004 estimated a total of 500,000 MNCs and foreign affiliates,[177] and the extent of foreign direct investment (FDI) is not entirely known. The U.N. Conference on Trade and Development reported in 2010 that FDI increasingly "has significant social, and often political, ramifications" and that there is a great demand for new statistical information to measure FDI activities.[178]

---

transnational corporations" and the "marginalization of development issues in the UN system.").

173. *See generally* Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 Q.L.R. 23 (2004).

174. *See* Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1779 n. 163 (2003) ("These dynamics help explain current anxieties over forces that evade territorial control such as multinational corporations, immigration, and the internet."). *See generally* Anthony Smith, *States and Homelands: The Social and Geopolitical Implications of National Territory*, 10 MILLENNIUM 187 (1981).

175. Andrew Barry, *Ethical Capitalism*, in GLOBAL GOVERNMENTALITY: GOVERNING INTERNATIONAL SPACES 195, 202 (Wendy Larner & William Walters eds., 2004).

176. Laura Cruz et al., *Policy Point-Counterpoint: Is Westphalia History?*, 80 INT'L SOC. SCI. REV. 151, 153 (2005). *See also* Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty,* 25 B. C. INT'L. COMP. L. REV. 235, 236 (2002) ("[S]tates no longer dominate the international landscape, as international organizations and private actors (e.g., multinational corporations, non-governmental organizations (NGOs), and even individuals) exercise increasing influence in the creation, implementation, and enforcement of international norms.").

177. CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 24-27 (2005) (estimating the existence of at least 6,400 intergovernmental organizations (IGOs), 44,000 international NGOs, 500,000 MNCs and foreign affiliates, and 6.3 billion persons).

178. U.N. Conference on Trade and Development, 2 UNCTAD Training Manual on Statistics for FDI and the Operations of TNCs: Statistics on the Operations of Transnational Corporations, 35 (2009).

MNCs are generally perceived as the enemies of human rights because they allegedly exploit and abuse labor,[179] damage the environment,[180] introduce unsafe products and technologies,[181] displace local businesses,[182] displace indigenous peoples,[183] and support regimes that violate the human rights of their peoples.[184] In Sudan, for example, Standard Oil has been accused of being complicit with the Sudanese government in the genocide of civilians to clear the way for oil production and transportation.[185]

---

179. *See, e.g.*, Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUM. J. GENDER & L. 510, 519 (2003) ("Transnational corporations exploit the low-wage status of women.").

180. Pauline Abadie, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U. L. REV. 745, 745 (2004); Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT'L L.J. 53, 56 (2004); Francis O. Adeola, *Environmental Injustice and Human Rights Abuse: The States, MNCs, and Repression of Minority Groups in the World System*, 8 HUM. ECOLOGY REV. 39, 43-44 (2001); Int'l Comm'n of Jurists, Access to Justice: Human Rights Abuses Involving Corporations in Philippines, www.icj.org/access-to-justice-human-rights-abuses-involving-corporations-in-philippines/ (last visited Feb. 21, 2016).

181. Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 8-10 (1995). *See generally* Dinah Shelton, *Challenges to the Future of Civil and Political Rights*, 55 WASH. & LEE L. REV. 669, 674-81 (1998).

182. ERIC REGRAFF & MICHAEL W. HANSEN, MULTINATIONAL CORPORATIONS AND LOCAL FIRMS IN EMERGING ECONOMIES 19 (2011).

183. Upendra Baxi, *What Happens Next Is up to You: Human Rights at Risk in Dams and Development*, 16 AM. U. INT'L L. REV. 1507, 1509-10 (2001); Erin K. MacDonald, *Playing by the Rules: The World Bank's Failure to Adhere to Policy in the Funding of Large-Scale Hydropower Projects*, 31 ENVTL. L. 1011, 1030-39 (2001).

184. Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights?*, 39 DENV. J. INT'L L. & POL'Y 483, 483-84 (2011) ("BITs empower MNCs and encumber a State's regulatory power to promote and protect human rights.").

185. Hannibal Travis, *Genocide in Sudan: The Role of Oil Exploration and the Entitlement of the Victims to Reparations*, 25 ARIZ. J. INT'L & COMP. L. 1, 4 (2008) ("Multinational corporations therefore play a role in arming a genocidal regime and perpetuating an apathetic international response."). *See also* Larry Cata Backer, *Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

In particular, PMCs hired by the U.S. military inherently touch and concern the United States. In *Al Shimari*, the Fourth Circuit found that the conduct of private civilian interrogators contracted by the U.S. military in Iraq sufficiently touched and concerned the United States because: (1) the interrogators were employed by CACI, a U.S. corporation; (2) the interrogators were U.S. citizens; (3) CACI's contract was issued in the United States by the U.S. Department of the Interior and required CACI interrogators to obtain security clearances in the United States; and (4) CACI managers in the United States approved and encouraged acts abroad that violated international law.[186] In other words, the "relevant conduct" analysis coincides with the very nature of U.S. PMCs, in that they form contracts with the U.S. government in the United States and make decisions in the United States to direct conduct abroad.[187] One pre-*Kiobel* commentator has highlighted the potential for ATS litigation against PMCs, arguing that human rights abuses committed by PMCs abroad should overcome the various legal obstacles that ATS plaintiffs usually face.[188] Given the fast-growing use of PMCs[189] and the prospect that *Kiobel* poses a relatively negligible threat to ATS suits against PMC defendants, *Kiobel* may have funneled ATS litigation toward PMCs.

A. U.S. Drone Strikes

The United States' use of drones to combat terrorists abroad could open the door to ATS liability against civilian contractors involved with their operation. Civilian contractors are needed behind the scenes of

186. *Id.* at 530-31.

187. *See* P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 9-18 (Robert J. Art et al. eds., 2007).

188. Lam, *supra* note 170, at 1465.

189. Adam Ebrahim, *Going to War with the Army You Can Afford: The United States, International Law, and the Private Military Industry*, 28 B.U. INT'L L.J. 181 (2000) (discussing the possibility of a "private humanitarian intervention regime," noting the "increasing numbers of multinational corporations, nongovernmental organizations, and regional organizations" employing private military companies (PMCs); P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 9-18, 80 (Robert J. Art et al. eds., 2007) (discussing the expanded use of PMCs by corporations, international organizations, and non-governmental organizations and noting that PMC customers include "legitimate sovereign states, respected multinational corporations, and humanitarian NGOs").

drone operations to analyze surveillance videos and gather intelligence used to identify and target enemies.[190] Although civilian contractors do not make the final decision to strike, their intelligence-gathering functions are regarded as those of a "targeteer" because they are "very closely associated" with the decision to strike.[191] Thus, the actions of civilian contractors sometimes play a key role in drone strikes that violate international law. Indeed, a mistaken U.S. drone strike that killed fifteen Afghan civilians and zero combatants in 2010 "was largely based upon intelligence analysis conducted and reported by a civilian contractor."[192]

Susceptibility to civilian-guided drone mis-strikes is likely to increase as the United States expands its drone operations and demands more civilian contractors to conduct them.[193] One drone mission alone requires hundreds of personnel; the Predator drone requires 160 to 180 personnel per mission, and the larger Global Hawk drone requires 300 to 500 per mission.[194] Moreover, the drone has become the United States' "weapon of choice";[195] the Obama administration has launched 500 drone strikes and operates around-the-clock surveillance

190. David S. Cloud, *Civilian contractors playing key roles in U.S. drone operations*, L.A. TIMES, Dec. 19, 2011, http://articles.latimes.com/2011/dec/29/world/la-fg-drones-civilians-20111230 ("America's growing operations rely on hundreds of civilian contractors, including some . . . who work in the so-called kill chain before Hellfire missiles are launched.") [hereinafter Cloud]. *See also* Pratap Chatterjee, *Meet 11 of the Private Defense Contractors That Are Raking It in from the Drone War,* CORPWATCH, (Aug. 5, 2015) http://www.alternet.org/news-amp-politics/meet-11-private-defense-contractors-are-raking-it-drone-war (listing contractors providing "Imagery Analyst" services to the U.S. government).

191. Duane Thompson, *Civilians in the Air Force Distributed Common Ground System* (DCGS), X JOINT CENTER FOR OPERATIONAL ANALYSIS J., 18, 23-24 (2008) (describing individuals performing "targeteer" functions as "[p]ersons who relay target identification for an imminent real-world mission to persons causing actual harm to enemy personnel or equipment").

192. Cloud, *supra* note 190.

193. *See* Joint Chiefs of Staff, *supra* note 3.

194. ANN HAGEDORN, THE INVISIBLE SOLDIERS: HOW AMERICA OUTSOURCED OUR SECURITY 243 (2014).

195. Daniel Byman, *Why Drones Work*, 92 FOREIGN AFFAIRS 32 (July 2013) ("Obama has signed off on over 400 [drone strikes] in the last four years, making the program the centerpiece of U.S. counterterrorism strategy.").

missions.[196] The United States has made plans to increase its active worldwide drone missions from about 65 to 90 in 2019.[197] One drone expert noted the United States' "desperation" to keep up with demand, and predicts that a shortage of drone pilots will force the United States to use civilian contractors to conduct deadly strikes.[198] President Trump's continuation of Obama's drone program as part of his effort to "eradicate radical Islamic terrorism" could accelerate the use of civilian contractors in drone strikes, depending on how the United States plans to incorporate drones in its anti-terrorism strategy going forward.[199]

This article does not propose that drone strikes by the United States to combat terrorism violate international law, but rather that challenges to their legality might create an area of opportunity for ATS litigants when civilian contractors are involved. Drone strikes could be found to violate provisions of *jus ad bellum* (law governing the resort to military force), international humanitarian law (law of armed conflict), and international human rights law,[200] for which courts are likely to recognize—or have already recognized—causes of action under *Sosa*.

B. Jus Ad Bellum

U.S. drone strikes could violate the *jus ad bellum* protection of territorial integrity established in the U.N. Charter, which provides only

---

196. Jack Serle & Abigail Fielding-Smith, *Monthly drone report: Total drone strikes under Obama in Pakistan, Somalia and Yemen now 491 after September attacks*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 5, 2015), https://www.thebureauinvestigates.com/2015/10/05/monthly-drone-report-total-drone-strikes-under-obama-in-pakistan-somalia-and-yemen-now-491-after-september-attacks/ [hereinafter *Drone Report*]; Michael Flynn, *Employing ISR SOF Best Practices*, 50 Joint Force Quarterly 56, 57 (2008).

197. Paul Shinkman, *A Slippery Slope for Drone Warfare?*, U.S. NEWS (Aug. 21, 2015) http://www.usnews.com/news/articles/2015/08/21/pentagon-opening-drone-missions-to-private-contractors.

198. Another commentator, a law professor at the University of Notre Dame, also predicts that the United States "may be tempted in the future to move contractors from assisting with drone maintenance and the like to killing with them." *Id.*

199. Micah Zenko, VOICE *Trump Could Take Obama's Drone War Further Into the Shadows*, FOREIGN POLICY GROUP (Feb. 2, 2017) http://foreignpolicy.com/2017/02/02/the-buck-doesnt-stop-with-trump-on-counterterrorism/.

200. *See generally* Mary O'Connell, *Remarks: The Resort to Drones under International Law*, 39 DENV. J. INT'L L. & POL'Y 585 (2011).

a narrow exception in the case of self-defense.[201] Generally, the United States can use force against terrorists in a foreign country without violating its territorial integrity if (1) the strikes are necessary and proportionate[202] acts of self-defense and the country itself has failed to deal with the terrorists to the point of effectively acquiescing in their hostilities; or (2) the country has given the United States permission to conduct the strikes, regardless of whether they constitute self-defense.[203] Commentators disagree as to whether the United States has permission to conduct drone strikes in places such as Pakistan and Somalia.[204] Apart from the question of permission, the U.S. State Department Legal Advisor and other advocates argue that the strikes are acts of self-defense against threatened terrorist attacks, while opponents contend that international law does not permit anticipatory (or "preemptive") self-defense.[205]

The force of the legal principles of territorial integrity and self-defense in an ATS lawsuit is uncertain but promising for plaintiffs. U.S. courts have been hesitant to recognize a cause of action under the ATS for provisions found in non-self-executing treaties, but ATS litigants could make an argument that the protection of territorial integrity and

---

201. U.N. Charter art. 2, ¶ 4; art. 51.

202. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 94, ¶ 176 (June 27).

203. S.C. Res. 748, ¶ 508 (Mar. 31, 1992) ("[E]very state has the duty to refrain from . . . acquiescing in activities within its territory directed towards the commission of [hostile acts against other states], when such acts involve a threat or use of force."); Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings, ¶ 29, Human Rights Council, U.N. Doc. A/HRC/14/24/Add.6 at 11-12 (May 28, 2010).

204. *Compare* O'Connell, *supra* note 200, at 592, *with* Andrew C. Orr, Note, *Unmanned, Unprecedented, and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law*, 44 CORNELL INT'L L.J. 729, 737 (2011). *See also* David Ignatius, *A Quiet Deal with Pakistan*, WASH. POST (Nov. 4, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/03/AR2008110302638.html (last visited Feb. 21, 2016).

205. *See* Harold Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), www.state.gov/s/l/releases/remarks/139119.htm (last visited Feb. 21, 2016); Orr, *supra* note 204, at 740-41. *But see* O'Connell, *supra* note 200, at 593; Sikander Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of the U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOBAL STUD. L. REV. 77, 100 (2010).

self-defense requirements are norms of customary international law[206] that are sufficiently universal, specific, and obligatory under *Sosa* to support a cause of action.

C. International Humanitarian Law

ATS litigants could bring ATS causes of action alleging violations of international humanitarian law if U.S. drone strikes are deemed not to be acts of self-defense but rather part of an ongoing armed conflict.[207] For example, they could allege that a U.S. drone strike that kills civilians violated the *jus in bello* principles of distinction and proportionality arising from Common Article III of the Geneva Conventions, which limits the use of force to military objectives and prohibits the excessive killing of civilians.[208] This could be the most viable claim under the ATS, given the controversial number of civilian deaths resulting from U.S. drone strikes. The Bureau of Investigative Journalism reported that U.S. drone strikes in Pakistan have killed between 423 and 965 civilians since 2004.[209] That represents between 10% and 39% of the estimated 2,476 to 3,989 combatants killed in Pakistan.[210] Defenders contend that drones are better at delivering precision strikes and kill fewer civilians.[211]

Aside from whether the killing of civilians in a U.S. drone strike would lead to a successful ATS claim, it could at least provide the basis for a cognizable cause of action under the ATS. The Geneva Conventions as well as the principles of distinction and proportionality

---

206. Nicaragua, 1986 I.C.J., at 174; Shah, *supra* note 205, at 90-92.

207. *See* Koh, *supra* note 205 (describing the United States' use of force against al-Qaeda as part of an "ongoing armed conflict").

208. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 287; Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, 90 Int'l Rev. Red Cross 991, 995 (2008); I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 29 (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005).

209. *Drone Report*, *supra* note 196.

210. *Id.*

211. Byman, *supra* note 195; Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), ¶¶ 37-39, U.N. Doc. A/68/382 (Sep. 13, 2013) [hereinafter UN Report 2013].

are widely considered part of customary international law,[212] and courts have already recognized a cause of action under ATS for violations of Common Article III. In 2011, the Ninth Circuit recognized a cause of action based on Common Article III against a mining corporation that used military force against civilians to suppress a revolt.[213] The panel stated that Common Article III provided a definition of war crimes "sufficiently specific, obligatory, and universal to give rise to an ATS claim."[214] A Florida district court also recognized a cause of action, based on Common Article III, against a corporation that allegedly supported the killing of noncombatants in the course of an armed conflict.[215]

D. International Human Rights Law

International human rights law could also support a cause of action for extrajudicial killing or summary execution,[216] which applies both during and outside armed conflicts.[217] For example, in 2003 the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions determined that a U.S. drone strike against suspected terrorists in Yemen constituted "a clear case of extrajudicial killing."[218] A 2013 UN report affirmed that drone strikes are subject to international human rights law and stated that a particular drone strike could violate the right

---

212. Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶¶ 78-79 (July 8, 1996); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. Exec. Rep. 101-30, at 15 (1990) ("the Geneva Conventions, to which the United States and virtually all other countries are Parties . . . generally reflect customary international law.").

213. Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011).

214. *Id.* at 764.

215. *In re* Chiquita Brands Int'l, Inc., Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1331 (S.D. Fla. 2011).

216. The killing of civilians is only permissible under international human rights law when it is necessary to combat an imminent threat to life. UN Report 2013, *supra* note 211, ¶ 35.

217. Legality of the Threat or Use of Nuclear Weapons, ¶¶ 24-25.

218. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Comm'n on Human Rights, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions, ¶¶ 37-39, U.N. Doc. E/CN.4/2003/3 (Jan. 13, 2003).

to life if not carried out accordingly.[219] And as with war crimes involving civilian deaths, U.S. courts have recognized causes of action under the ATS for extrajudicial killing and summary execution, even after *Sosa*.[220] The TVPA's explicit recognition of the prohibition against extrajudicial killing is particularly strong evidence that it is part of binding customary international law.[221]

VI. CONCLUSION

The rise, fall and resurrection of the ATS has resulted in a new body of international tort law. After many years of uncertainty regarding the applicability of the statute, in 2004, the Supreme Court established a judge-made cause of action for violations of customary international law. Courts then reached a consensus that corporations, as well as individuals, could be held civilly liable for violations of international law under the ATS, despite the novelty of corporate civil liability under international law. Finally, in 2013, the Supreme Court held in *Kiobel* that the ATS is limited by the presumption against extraterritoriality. As a result, ATS litigation has become focused on defendants that make decisions and execute transactions in the United States that contribute to violations of international law abroad. *Kiobel* is likely to narrow the focus of ATS litigation to transnational torts committed by U.S. MNCs, especially U.S. PMCs that participate in the production and deployment of drones.

---

219. UN Report 2013, *supra* note 211, ¶ 24, 47.

220. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d at 1164, 1178-79 (C.D. Cal. 2005); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution . . . [is] universal, definable, and obligatory.").

221. *See* Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d at 1179.