No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, Dr. Barinem Kiobel, *et al.*,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

ROBERT P. LOBUE
MUHAMMAD U. FARIDI
MATTHEW FUNK

WILLIAM T. ROBINSON III
Counsel of Record
President
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
(313) 988-5000
abapresident@americanbar.org

Attorneys for Amicus Curiae
American Bar Association

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States?

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INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association ("ABA") respectfully submits this brief in support of petitioners solely on the question presented for reargument.[2] Consistent with the position the ABA adopted after substantial study and debate in 1985, and consistent with its experience in promoting international protection of human rights, the ABA requests that this Court hold that the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2006), confers jurisdiction on federal courts to hear civil claims based on violations of the law of nations that have taken place in other countries, while also instructing the courts that, in appropriate cases, they should consider established legal rules, including prudential limitations, to determine whether jurisdiction should be declined.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from each of the fifty states and other jurisdictions. Membership includes attorneys in private practice, government

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

[2] This brief is limited to the question presented for reargument. The American Bar Association takes no position on the original questions presented in this case, nor does it take a position on the merits of the claims asserted by the petitioners.

service, corporate law departments, and public interest organizations, as well as legislators, judges, law professors, law students, and non-lawyer associates in related fields.[3]

The question presented on reargument raises issues relating to the international rule of law and individual access to justice that have long been core concerns of the ABA. As reflected in the ABA's Goal IV, which is entitled "Advance the Rule of Law," the ABA strives to "increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world," to "[h]old governments accountable under law," to "[w]ork for just laws, including human rights, and a fair legal process," to "[a]ssure meaningful access to justice for all persons," and to "[p]reserve the independence of the legal profession and the judiciary."[4]

The ABA has worked for decades to advance its Goal IV through a variety of international programs run by ABA entities. These include the Rule of Law Initiative and, since 2001, the Center for Human Rights. The ABA's efforts also include, among other things, letters from the ABA president to other nations concerning violations of

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[3] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[4] *See* ABA, *Association Goals*, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited June 7, 2012).

international law, as well as its participation in professional exchanges, technical assistance to foreign governments and non-governmental organizations, observation of important human rights trials, and direct assistance to human rights advocates in other countries who seek remedies for violations of fundamental rights in the local courts of their countries.

The ABA has long maintained that the ATS is an important instrument for providing access to justice to victims of internationally recognized human rights violations who, in many cases, may not otherwise have recourse to compensatory remedies. In a 1985 report presented to its House of Delegates, the ABA observed that "[t]he United States has long recognized that if international human rights are to be given legal effect, adhering nations must make available domestic remedies and sanctions to address abuses ***regardless of where they occur.***" *See* App. A at 2a, ABA, *Report No. 4 of the Section of Individual Rights and Responsibilities and the Standing Committee on World Order Under Law*, 110 Ann. Rep. A.B.A. 1122 (1985) ("ABA's 1985 Report") (emphasis added).[5] This report also noted the "practical wis-

[5] The Recommendation accompanying the ABA's 1985 Report was approved as ABA policy, with amendments not material here, by the ABA House of Delegates in July 1985. Recommendations, but not their accompanying reports, become the ABA's policy only after approval by vote of the ABA House of Delegates, which is composed of more than 550 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others. For further information, *see* http://www.americanbar.org/groups/leadership/house_of_delegates.html (last visited June 7, 2012).

dom and legal soundness" of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)—the seminal ATS case of the modern era, which upheld federal jurisdiction over torts committed abroad. App. A at 3a. However, in light of the variety of opinions expressed in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which noted a lack of clear congressional guidance on whether the ATS authorized jurisdiction over certain causes of action, and in an abundance of caution, the ABA's 1985 Report also urged Congress to enact additional legislation confirming the scope of the ATS. The report stated, "[f]ederal legislation is needed to ***clarify existing law*** by clearly establishing a federal right of action against violators of human rights and authorizing suits by both aliens and United States citizens who have been victims of gross human rights abuses ***abroad***." App. A at 3a (emphasis added).[6]

The ABA's long history and substantial experience in promoting the rule of law and access to justice gives it a unique perspective on the role that the ATS plays in providing access to justice to victims of internationally recognized violations of the law of nations.

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[6] Subsequent events, including the continued acceptance of the ATS's reach by federal courts and the enactment of Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992), alleviated the concerns that motivated the call for clarifying legislation in the ABA's 1985 Report. *See also* S. Rep. No. 102-249 (1991); H.R. Rep. No. 102-367 (1991) (noting that the TVPA is necessary, *inter alia,* to dispel any ambiguity raised by a concurring opinion in *Tel-Oren*).

SUMMARY OF ARGUMENT

For over a quarter of a century, federal courts have been hearing tort claims under the ATS brought by aliens against defendants over whom federal courts have personal jurisdiction for violations of human rights universally recognized by the law of nations, including claims based on conduct occurring, in whole or in part, overseas. The ATS has provided victims with access to justice that is often unavailable in their own lands, making it a valuable enforcement mechanism in upholding the law of nations. The plain language of the statute supports the applicability of the ATS to such claims and counsels against a categorical denial of jurisdiction based on the fact that the conduct took place in a foreign jurisdiction. Although jurisdiction should be exercised with care, the legal rules, including prudential limitations, that are regularly applied by federal courts in ATS cases—such as the requirement of personal jurisdiction, the doctrines of *forum non conveniens* and exhaustion, and the defined limitations of the scope of ATS jurisdiction to universally recognized wrongs—sufficiently ameliorate the concerns presented when federal courts are asked to entertain cases arising from events in other countries.

Restricting the ATS to violations that occur within the territory of the United States (or on the high seas) would be inconsistent with this nation's historic commitment to promoting accountability for human rights violations and encouraging all nations to develop effective remedies for violations. ATS precedents have powerfully influenced the development of human rights law and adherence to the rule of law throughout the world and

have served as a model for foreign courts hearing international human rights cases. A narrow reading of the ATS would diminish the United States' voice in fostering universal adherence to norms of international law.

ARGUMENT

I. The ATS Confers Jurisdiction Over Suits Arising From Conduct That Takes Place in Other Countries

The plain language of the ATS, which confers jurisdiction on district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations," 28 U.S.C. § 1350, allows an alien to bring a tort action in a federal district court without any restriction on where the tort occurs. This language is categorical; it contains no hint that Congress intended to place a territorial limitation on its grant of jurisdiction. *See, e.g.*, *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). When Congress has intended to create an exception for acts committed outside the United States, it has done so expressly. For example, a provision of the Federal Tort Claims Act, 28 U.S.C. § 2680(k), contains an exception to the grant of jurisdiction for "[a]ny claim arising in a foreign country." The ATS contains no such language and should be given its natural reading, that is, that an alien may bring a tort claim based on a violation of the law of nations regardless of where that violation occurs. If application of the plain language of a

statute is thought to lead to improvident results, it is the responsibility of Congress to enact language appropriate to those concerns.

Congress, in fact, has signaled its approval of enforcement of the ATS's plain language. When Congress enacted the TVPA in 1991, it considered the scope of the ATS and whether revisions to its jurisdictional grant were necessary. The legislative history of the TVPA shows that Congress specifically considered judicial interpretations permitting the ATS to be invoked for torts arising from conduct taking place in other countries and acquiesced to that interpretation. Both the House and Senate committee reports on the TVPA discussed *Filartiga*, the seminal case that underlies modern ATS litigation, and which, significantly, involved claims arising from conduct that took place in Paraguay. *See* S. Rep. No. 102-249, at 4 (1991) ("The *Filartiga* case has met with general approval."); H.R. Rep. No. 102-367, at 4 (1991) (same). Both reports referred to the ATS as a "remedy already available" to aliens for the kind of extraterritorial conduct covered by the TVPA. *See* S. Rep. No. 102-249, at 5 (noting that the TVPA "would . . . enhance the remedy already available under [the ATS]"); H.R. Rep. No. 102-367, at 3 (noting that the TVPA does not replace the causes of action "under existing an law, [ATS], which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations'"). These reports concluded that the TVPA was necessary to provide a cause of action for American citizens who are victims of torture or extrajudicial killing and to dispel any ambiguity raised by a concurring opinion in

Tel-Oren, *see* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 4 (1991), and recommended against making any alterations to the ATS. The House report explained that claims covered by the TVPA (i.e., those based on torture and summary executions) "do not exhaust the list of actions that may appropriately be covered by [the ATS] . . . or may ripen in the future into rules of customary international law." H.R. Rep. No. 102-367, at 4 (1991). The TVPA was then codified as a note to the ATS. In these circumstances, the evidence of Congress' adoption of the prevailing interpretation of the ATS as encompassing torts arising in other jurisdictions is unmistakable. *See, e.g.*, *Francis v. Southern Pacific Co.*, 333 U.S. 445, 450 (1948) (when Congress partially amends a statute while leaving intact the "established [judicial] interpretation" of another part of the statute, the latter "become[s] part of the warp and woof of the legislation").

Finally, construing the ATS to exclude claims arising from conduct taking place in other countries would create an unnecessary layer of complexity in cases where the plaintiff alleges actionable conduct that crossed national borders, that is, where conduct occurred in part in this country and in part abroad. *See, e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (United States and Mexico); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (United States and Aceh territory in Indonesia); *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007) (United States and the Dominican Republic); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995) (conduct "international in scope"). A categorical rejection of ATS

jurisdiction over torts arising in foreign jurisdictions would likely result in further litigation of intricate issues as to where various acts constituting the violation occurred, and would inevitably call upon the courts of appeals, and ultimately this Court, to craft fact-intensive rules to govern these claims. It is unnecessary to add this layer of complexity when, as discussed in the next section, courts already have at their disposal a number of well-recognized tools to limit the ATS's jurisdiction to appropriate cases.

II. Limitations Employed by Federal Courts in ATS Cases Alleviate Any Possible Concerns Related to Exercise of ATS Jurisdiction Over Torts Occurring in Other Countries

This Court has emphasized that the desire to avoid inadvertent international conflicts is paramount in determining the geographic scope of federal statutes. *See, e.g.*, *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). Courts applying the ATS to violations of established international law occurring in other countries, however, have consistently attended to this concern, and have invoked customary legal and pragmatic limitations, as necessary, when a potential for international conflict is present. A survey prepared for this brief of ATS cases that have reached federal courts of appeals since *Filartiga* (attached as Appendix B) shows that, while the great majority of ATS cases arise from conduct occurring in foreign territories, the federal courts have consistently considered and applied appropriate legal rules, including prudential doctrines, to ensure that the application of the

ATS to such tort claims does not trigger concerns about interference with United States foreign policy or the sovereignty of other law-abiding states. Many of the limitations considered and applied in these cases are consistent with those recommended in the ABA's 1985 Report (*see* App. A at 3a-4a; 16a-20a; and 23a-24a).[7] As it did in 1985, the ABA continues to believe that the proper resolution of the jurisdictional question depends not on a categorical denial of jurisdiction, but on the pragmatic and prudent application of these limiting principles, which are already part of the law, on a case-by-case basis. The principal limitations considered by courts are surveyed here:

Limitations on causes of action cognizable under the ATS. Even before *Sosa*, where this Court warned lower courts to exercise caution when identifying actionable claims under the ATS, *see Sosa*, 542 U.S. at 732, lower federal courts generally restricted the ATS's reach by limiting ATS causes of action to those norms that are specific, obligatory, and universally accepted by international law. For example, in an ATS case where the plaintiff sued his former wife for taking their children from the Dominican Republic to live in Ohio, the Sixth Circuit affirmed dismissal and ruled that the plaintiff had failed to show that parental child abduction "is a wrong so generally and universally recognized that it becomes a viola-

[7] In light of developments in ATS case law since 1985, some of the limitations noted in the ABA's 1985 Report are now less germane. Courts have also employed other limitations not referenced in the ABA's 1985 Report. The ABA does not suggest that courts are limited to the principles discussed in the ABA's 1985 Report.

tion of the law of nations within the meaning of the ATS." *Taveras*, 477 F.3d at 782. Courts have also held that free speech rights are not so universal as to be a part of the law of nations. *See, e.g.*, *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986). ATS claims of environmental harms and cultural genocide have also been dismissed because they were not characterized by the requisite universal consensus "as to their binding status and their content." *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 383-84 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *see also Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991) (holding that environmental claims arising from transportation of hazardous waste are not actionable under the ATS).

In recent years, heeding *Sosa*'s directive of "vigilant doorkeeping," *see Sosa*, 542 U.S. at 729, courts have continued to dismiss claims that do not fall within *Sosa*'s specific criteria. For example, the Ninth Circuit recently dismissed ATS claims of racial discrimination and crimes against humanity grounded in a blockade of food and medical supplies because the rights were insufficiently "specific, universal, and obligatory." *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 769 (9th Cir. 2011) (en banc). For the same reason, the Seventh Circuit held that claims of child labor are not cognizable under the ATS. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011).[8]

[8] Additional substantive limitations regularly applied by courts when considering claims brought under the ATS are the various immunities accorded by federal law, such as the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.

Existing doctrines that limit the territorial purview of federal courts. Federal courts regularly apply existing legal rules, including prudential limitations, that explicitly take into account the appropriateness of hearing a case with a foreign nexus.

As a threshold matter, personal jurisdiction over the defendant is required in each ATS case. *See Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995) (requiring personal jurisdiction in ATS case); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 112 (5th Cir. 1988) (dismissing ATS claims against corporate defendants that lacked sufficient contacts with the forum).

Courts have also invoked traditional discretionary doctrines such as *forum non conveniens* to limit ATS litigation arising from violations of the law of nations in other countries. *See, e.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir. 1987) (dismissing ATS claims on *forum non conveniens* grounds); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002) (same); *Turedi v. The Coca-Cola Co.*, 343 F. Appx. 623 (2d. Cir. 2009)

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§§ 1330 (providing that "foreign states shall be immune from the jurisdiction" of both federal and state courts except as provided in the Act) and the Diplomatic Relations Act of 1978, 22 U.S.C. § 254a-e (providing, with exceptions, immunity to diplomatic agents, members of their families, and a foreign country's administrative and technical staff and their families). *See also Ahmed v. Hoque*, No. 01-CV-7224 (DLC), 2002 U.S. Dist. Lexis 14852 (S.D.N.Y. Aug. 14, 2002) (giving deference to the State Department's views that the defendant must be afforded diplomatic immunity and dismissing ATS claims).

(same). The application of this doctrine ensures that United States courts are not open to those claimants whose claims are more properly considered in another country.

Because the availability of another competent and more convenient forum is part of the *forum non conveniens* analysis, a separate exhaustion analysis is often unnecessary. Nonetheless, some courts hearing ATS cases have separately considered whether a plaintiff has exhausted effective remedies in the country where the violation took place. Whether considered as an independent doctrine or wrapped into the *forum non conveniens* analysis, courts can decline jurisdiction over ATS suits where clear and convincing evidence shows that justice can be assured in a country with a stronger nexus to the events underlying the claim. *See Sosa*, 542 U.S. 733 n.21 (noting that exhaustion in ATS cases might be warranted when "appropriate"); *Sarei*, 671 F.3d at 755 ("The district court did not abuse its discretion when it considered whether exhaustion was required under the controlling plurality opinion of this court['s earlier decisions]."); *see also* App. A at 3a-4a and 18a-20a.[9]

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[9] Consistent with the Court's observation, the ABA's 1985 Report noted that federal courts should have the authority to decline ATS cases if they find that "justice could 'reasonably be assured' in the nation where the alleged violations took place." App. A at 4a. The report further noted that exhaustion of remedies is discussed in several international instruments, which "provide that [exhaustion] . . . is not a precondition for consideration of a claim where resorting to the domestic remedies would be 'unreasonably prolonged.'" *Id.* at 19-20a.

Even before *Sosa*, the Ninth Circuit required district courts to carefully consider exhaustion "[w]here the United States 'nexus' is weak." *Sarei*, 671 F.3d at 754. A review of federal courts handling ATS cases over the past 30 years shows that they have consistently considered a more convenient competent forum, when available, in assessing whether ATS jurisdiction has been appropriately invoked. *See* App. B.

Nonjusticiability of foreign policy determinations. Courts have declined to hear ATS cases that present nonjusticiable questions under the well-established political question doctrine. Even before this Court observed in *Sosa* that "federal courts should give serious weight to the Executive Branch's view of [an ATS] case's impact on foreign policy," *Sosa*, 542 U.S. at 733, federal courts repeatedly considered the government's views in ATS cases. For instance, the District of Columbia Circuit relied on the government's position in *Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005), in concluding that "[t]he Executive's judgment that adjudication by a domestic court would be inimical to the foreign policy interests of the United States is compelling and renders this case nonjusticiable under the political question doctrine."

The courts' careful consideration of justiciability standards has proven to be an effective bulwark against the possibility of improper adjudication of foreign policy determinations that are beyond the institutional competence of the courts.[10] That is

[10] Even in ATS cases that do not present a nonjusticiable political question, courts often request, receive, and consider the Executive Branch's views on whether allowing a case to go forward would impinge on the United States' for-

not to suggest that ATS cases inevitably or even frequently present the potential for interference with United States foreign policy. As the United States argued in its *amicus* brief to the Second Circuit in *Filartiga*, "before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts."[11]

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eign policy objectives. *See, e.g.*, *Corrie v. Caterpillar*, 503 F.3d 974, 978 n.3 (9th Cir. 2007) (taking "considerable interest" in the government's view "regarding a matter impinging upon foreign policy" and affirming dismissal of ATS claims); *Sarei*, 671 F.3d at 756-57 (observing that, as the government no longer sought dismissal of the ATS claims on foreign policy grounds, "there [was] no longer any basis for a fear of interference by the courts in the conduct of foreign affairs"); *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 264 n.14 (2d Cir. 2007) (per curiam) (considering, but declining to give dispositive weight to, the United States government's position on whether a court should exercise jurisdiction in an ATS suit), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008); *Kadic*, 70 F.3d at 250 (noting that after oral argument, the Second Circuit "wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised"); *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (noting that the district court "invited the State Department to 'state its views, if any'").

[11] Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, *Filartiga*, 630 F.2d 876, *reprinted in* 12 Hastings Int'l & Comp. L. Rev. 34, 46 (1988).

In sum, the ABA suggests, consistent with the findings in its 1985 Report, that faithful application of the ATS's unambiguous grant of federal court jurisdiction without geographic limitation over tort claims arising from violations of established norms of international law is being accomplished through discerning application by the courts of existing and well-understood legal rules, including prudential limitations. A categorical rejection of jurisdiction whenever the operative conduct occurs in whole or in part in a foreign jurisdiction is therefore not only contrary to the plain language of the ATS, but is unnecessary. Instead, courts should be instructed to continue to apply existing limitations on a case-by-case basis consistent with long-standing precedent that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

III. The Plain Language of the ATS is Consistent With This Nation's Interest in Promoting the Rule of Law and Access to Justice

Through its work in over 50 countries, the ABA plays a significant role in promoting the rule of law, an independent judiciary, access to justice, and respect for human rights.[12] As part of this

[12] *See, e.g.*, ABA, *Access to Justice Assessing Tools: A Guide to Analyzing Access to Justice for Civil Society Organizations* (2012), *available at* http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_access_to_justice_assessment_manual_2012.authcheckdam.pdf.

work, the ABA has observed the positive impact that the ATS has had in motivating other countries to enact laws providing remedies for international human rights law violations and inspiring foreign courts to provide effective processes for the resolution of human rights claims.[13] *See also* Jennifer Levine, *Alien Tort Claims Act Litigation: Adjudicating on "Foreign Territory*, 30 Suffolk Transnat'l L. Rev. 101, 117-24 (2006) (discussing Italian and British court decisions relying upon ATS precedent to allow claims arising from extraterritorial violations of universally recognized human rights); *Developments in the Law—Extraterritoriality*, 124 Harv. L. Rev. 1280, 1284 (2011) (noting that foreign courts have used ATS precedent "in decisions opening their own courts and suspending the sovereign immunity of defendants for claims arising from violations of human rights law"). As the United States argued in its *amicus* brief to the Second Circuit in *Filartiga*, "[a] refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights."[14]

The ATS also provides an important forum for victims of human rights abuses to call to account

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[13] *See also* App. A at 4a-5a (noting that allowing victims of human rights abuses in other countries to seek redress in American courts "would encourage other nations to develop and apply meaningful domestic remedies, clearly the most effective deterrent to continued human rights abuses"; "[t]his country can and should become a model for other nations, . . . by extending practical remedies to victims of human rights abuses").

[14] Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit, *supra* note 11, at 46.

perpetrators of grievous wrongs, particularly when other mechanisms for bringing the wrongdoers to justice—such as prosecution, extradition and deportation—may not be available. Further, the ATS has proved to be an important means of securing relief for such victims who have fled their home countries under the threat of persecution, and who cannot return to pursue their cases in the courts of their home countries. That, of course, is the situation alleged by the plaintiffs in this case. Limiting the ATS to exclude such claims, in many cases, would deny the possibility of justice to all such persons.

Filartiga and its progeny emerged from the reality that perpetrators of widespread torture and extrajudicial killing in Latin America had come to the United States to take up residence, with at least some attempting to avoid accountability in their home countries. Over the past 30 years, an important use of the ATS has been in cases in which individuals are seeking redress from perpetrators of alleged human rights violations who have settled in the United States. *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (suit against former Salvadoran military officer living in Tennessee); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (suit against Somali government official living in Virginia), *aff'd*, 130 S. Ct. 2278 (2010); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 205 (D.C. Cir. 1985) (suit against, among others, a Nicaraguan leader of a paramilitary group living in Florida).

From mobile courts that address the epidemic of sexual violence in the Democratic Republic of the Congo to prosecutions for genocide in Guatemala,

accountability for human rights violations is increasing throughout the world. The United States has contributed to this international trend through diplomatic exchanges, training exercises, negotiation of treaties, and the provision of significant funding for technical assistance. The ABA assists in these efforts by sending judges, prosecutors, and other lawyers to work with local advocates in developing accountability mechanisms for human rights violations that will function within each country's distinct legal system. These ABA representatives are invited to these countries because they are experienced in working with a credible, functioning legal system in which the reality exists that wrongdoers can be brought to justice, within the appropriate exercise of traditional jurisdictional requirements, when that reality is often not clearly established in the local system.

Because of the important role that the ATS plays in providing access to justice to victims of internationally recognized human rights violations, the ABA strongly urges this Court to confirm the intent of Congress to provide a forum, except where the exercise of jurisdiction would be inappropriate in a specific case, to such victims when they find their perpetrators in the United States, regardless of whether the violations took place in another country.

CONCLUSION

For the reasons set out above, *amicus curiae* the American Bar Association respectfully requests that the Court affirm that the ATS confers jurisdiction on the federal courts to hear claims of violations of international law that arise in whole or in part in other countries, while also instructing the courts that, in appropriate cases, they should consider and apply established legal rules, including prudential limitations, to determine whether jurisdiction should be declined.

Dated: June 13, 2012

Respectfully submitted,

WILLIAM T. ROBINSON III
Counsel of Record
President
American Bar Association
321 North Clark Street
Chicago, Illinois 60654
(313) 988-5000
abapresident@americanbar.org

Of Counsel:

ROBERT P. LOBUE
MUHAMMAD U. FARIDI
MATTHEW FUNK

Attorneys for Amicus Curiae
American Bar Association

APPENDIX A

REPORT NO. 4 OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES AND THE STANDING COMMITTEE ON WORLD ORDER UNDER LAW

RECOMMENDATION*

Be It Resolved, That the American Bar Association supports federal legislation which would:

(1) clearly establish a federal right of action by both aliens and United States citizens against persons who, under color of foreign law, engage in acts of torture, extrajudicial killing or prolonged arbitrary detention;

(2) authorize suits by both aliens and United States citizens who have been victims of torture, extrajudicial killing or prolonged arbitrary detention, under color of foreign law, wherever these acts occur and expressly provide federal court jurisdiction over these suits; and

(3) amend the immigration laws to allow the deportation from the United States of any alien who, in his or her official capacity, took part in the torture of another person under color of foreign law.

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* The recommendation was amended, then approved. See page 712.

REPORT

Governments throughout the world continue to violate fundamental human rights. While virtually every nation now condemns torture, extrajudicial killing, and prolonged arbitrary detention in principle, in practice more than one-third of the world's governments engage in, tolerate or condone such acts. The systematic and institutionalized violation of these fundamental human rights occurs in countries of every political persuasion and in every region of the world.

Because of its longstanding commitment to individual rights and the rule of law, the United States has assumed a special responsibility in promoting respect for human rights throughout the world. While most nations of the world have joined with the United States in universally condemning violations of fundamental human rights, each state has substantial discretion in determining how it will seek to promote these international obligations. The United States has long recognized that if international human rights are to be given legal effect, adhering nations must make available domestic remedies and sanctions to redress abuses regardless of where they occur.

During the past four years, international human rights violators visiting or residing in the United States have, in some instances, been held liable for money damages under the Alien Tort Claims Act, 28 U.S.C. § 1350. Several recent judicial decisions, however, have questioned whether this statute provides a clear basis for future suits in U.S. federal courts.

In an important case, *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), a federal court of appeals in New York interpreted the Alien Tort Claims Act (28 U.S.C. § 1350) to allow aliens to sue a foreign official acting under "color" of state authority for torture committed outside the United States. In the period since *Filartiga* was decided, its practical wisdom and legal soundness have been noted with great interest in the United States and other countries throughout the world.

However, in a recent case, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), the Court of Appeals for the District of Columbia Circuit dismissed an action brought against several defendants accused of an act of terrorism, a decision that has caused considerable confusion regarding the proper interpretation of section 1350. In three widely differing opinions, the three judge panel noted that the lack of clear congressional guidance made it difficult to ascertain the proper scope of the Alien Tort Claims Act.

Federal legislation is needed to clarify existing law by clearly establishing a federal right of action against violators of human rights and authorizing suits by both aliens and U.S. citizens who have been victims of gross human rights abuses abroad.

Such legislation should contain several important limitations. Only persons acting "under the color of" foreign state authority should be liable for damages; the courthouse door should not be open wide to suits based upon any type of violent, international crime. In addition, the courts should be allowed to decline jurisdiction over such suits if it were shown by "clear and convincing evi-

dence" that justice could "reasonably be assured" in the nation where the alleged violations took place. Thus, only a limited number of cases would likely be adjudicated under the proposed statute each year. The legislation, therefore, would have a minimal effect on the case load of U.S. federal courts.

While human rights violators seldom present themselves to their victims while in the United States, providing victims of gross human rights abuses access to the courts is both of practical and symbolic importance. Providing a right of action would add a new dimension to U.S. human rights policy by serving notice to individuals engaged in human rights violations that the United States strongly condemns such acts and will not shelter human rights violators from being held accountable in appropriate proceedings. The legislation also would encourage other nations to develop and apply meaningful domestic remedies, clearly the most effective deterrent to continued human rights abuses. Finally, legislation in this area would provide individual victims with the possibility, however remote, of obtaining some measure of justice.

Consistent with this policy of individual accountability, legislation should be considered to amend the immigration laws to allow deportation from the United States of any alien who, in his official capacity, took part under color of foreign law in the torture of any other person. Existing legislation does not adequately ensure that all aliens who took part in the torture of another person may be deported from the United States. The best evidence that current measures are inade-

quate is Congress' stated belief in 1979 that it needed to amend the Immigration and Nationality Act (INA) in order to ensure the deportation of Nazi war criminals. According to the House Report that accompanied that amendment, individuals who arrived in the United States pursuant to the INA would not be deportable "even if engagement in atrocities is proven."

Legislation in this area would reaffirm the commitment of the United States to protect human rights and would help ensure that the United States will not provide a safe haven for those who violate these rights.

The proposed legislation is based on the principle that human rights violations are not an abstract problem upon which the United States can have little effect. This country can and should become a model for other nations, both by extending practical remedies to victims of human rights abuses and by deporting torturers from our shores.

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The pages that follow provide a detailed explanation of the specific substantive, procedural and policy implications of legislation in this area. The accompanying documentation was prepared after consultations with congressional offices, legal scholars, practicing attorneys and nongovernmental human rights organizations.

Questions Pertaining to a Federal Right of Action

1. QUESTION: Who could bring suit under the proposed legislation?

ANSWER: Any person, whether an alien or a citizen of the United States, who has been a victim of torture, extra-judicial killing, or prolonged arbitrary detention abroad under color of foreign law should be able to bring suit under the proposed legislation. Under an existing statute, the Alien Torts Claims Act (28 U.S.C. § 1350), some courts have held that aliens who have been the victims of torture may bring suit. The proposed legislation confirms the existence of this right as to aliens and extends the same right to U.S. citizens.

2. QUESTION: Could persons other than the individuals injured bring suit under the proposed statute?

ANSWER: Yes. The legal representatives or heirs of victims of torture, extrajudicial killing or prolonged arbitrary detention should be able to bring suit under the proposed statute. This principle is consistent with the decision in *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980), in which the parents and sister of the victim were allowed to bring suit against the individual who tortured and murdered him. The heirs of a victim would normally be his descendents or other family members. A legal representative may be a family member, friend or attorney appointed to represent the victim's interests in the event that the victim is mentally or physically unable to do so. Obviously, in the most egregious cases of torture (and

in every case of extrajudicial killing), the victim would not survive to bring suit against his perpetrators.

3. QUESTION: What type of suit would be brought under the statute?

ANSWER: A statute would authorize civil actions for compensatory and punitive damages. Such actions may include personal injury claims for compensation for physical injury or emotional distress suffered by the victim. They also may encompass requests for punitive damages to punish the violator for his deeds and to serve as a deterrent to other, potential penetrators.

4. QUESTION: If a court renders a judgment awarding monetary relief to the victim of abuse, how would such a judgment be satisfied?

ANSWER: The victim, or his heirs or representatives, could execute a favorable judgment by seizing or attaching a lien on any of the assets of the defendant located in the United States. The rules concerning execution of judgments vary widely from state to state. In general, a judgment obtained in one jurisdiction will be recognized and may be executed in another. In some cases, it may even be possible to execute an award of compensatory damages against assets of the defendant in a foreign country.

5. QUESTION: What was the United States' position with respect to the recently passed U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment?

ANSWER: The United States strongly supports the Convention, although its signature has been

held up pending a full legal review of the Convention's ramifications. Over the past seven years, the United States has supported and actively participated in the drafting of the Convention. On December 10, 1984, the United States joined in the consensus of the United Nations General Assembly in adopting the Convention. At that time, Ambassador Richard Schifter, Alternate U.S. Representative to the United Nations, expressed the United States' "hope that the Convention just adopted will help mobilize the political will of states to end the resort to torture as an accepted practice of law enforcement agencies."

6. QUESTION: Would the proposed legislation be supported by international instruments concerning human rights?

ANSWER: Yes. The proposed legislation is consistent with the principles of a number of multilateral agreements reaffirming the signatories' commitment to the protection and maintenance of human rights. The Charter of the United Nations, the Universal Declaration of Human Rights and, more recently, the Final Act of the Conference on Security and Cooperation in Europe restate the commitments of the civilized nations of the world to recognize the right of every human being to live, work and practice his beliefs free from oppressive governmental interference, and to refrain from such oppressive conduct. Moreover, torture, extrajudicial killing and prolonged arbitrary detention have been specifically prohibited by a large number of international declarations and conventions, including the Universal Decla-

ration of Human Rights (1948); the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1975); the International Covenant on Civil and Political Rights (1966); the American Declaration on Rights and Duties of Man (1975); the American Convention on Human Rights (1960); the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Member of Armed Forces at Sea (1949); the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (1949); the Geneva Convention Relative to the Treatment of Prisoners of War (1949); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949).

7. QUESTION: How will a court determine if the acts complained of constitute "torture," "extrajudicial killing" or "prolonged arbitrary detention" in violation of the Law of Nations?

ANSWER: All nations are bound by international customary human rights law, and many are bound by international conventions and declarations concerning human rights. This body of international human rights law universally prohibits persons acting under the color of official authority from engaging in acts of torture, extrajudicial killing and prolonged arbitrary detention. The proposed statute only requires the courts to determine whether the alleged acts constitute torture, extrajudicial killing or prolonged arbitrary

detention, as defined by international law. The statute recognizes that the international community condemns these acts as violations of international law. Therefore, courts would not have to determine independently that such acts violate international law. The courts will scrutinize the facts in particular cases to determine the existence of torture, extrajudicial killing or prolonged arbitrary detention in accordance with the authorities described below.

(a) *Torture*. A court will probably look to the definitions of torture in the U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The definitions contained in these two instruments are very similar. The Declaration defines torture as follows:

> Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

(b) *Extrajudicial killing*. To determine what constitutes "extrajudicial killing" in violation of international law, a court may refer to several instruments incorporating the international consensus regarding this violation of international law: the International Covenant on Civil and Political Rights, Art. 6; the American Convention on Human Rights, Art. 4; the European Convention on Human Rights, Art. 2; and the Geneva Conventions, Art. 3. The Geneva Conventions define extrajudicial killing as follows:

> The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Under the proposed legislation, a court may be faced with claims of extrajudicial killing in cases where the victim died as a result of being tortured or was summarily executed without meaningful judicial process.

(c) *Prolonged arbitrary detention*. To determine what constitutes prolonged arbitrary detention, a court may rely on the International Covenant on Civil and Political Rights, Art. 9; the American Convention on Human Rights, Art. 7; and the European Convention on Human Rights, Art. 5. The International Covenant on Civil and Political Rights provides:

> Anyone arrested or detained on a criminal charge shall be brought promptly before a

> judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

In deciding whether "prolonged arbitrary detention" occurred in a particular case, a court might consider such factors as whether the individual was officially charged with a criminal offense, whether the individual was tried by a judge or judicial officer, whether the individual was brought to trial (or released) within a reasonable time, the length and conditions of the detention, and the availability of procedures for review.

8. QUESTION: If a suit is based upon the unlawful detention of an individual, who would be the proper defendant(s) in such a suit?

ANSWER: The individual or individuals who were directly and indirectly responsible for the unlawful detention would be the proper defendant(s) in such a suit. This would include the guards who placed and kept the individual in detention, the official or officials who ordered the detention, and any official who had the authority to prevent or halt the detention and knew or should have known about it, but failed to take action to prevent or halt it. In determining liability under the Act, a court will probably examine the scope of the official's discretion and all of the

circumstances as they reasonably appeared at the time of the alleged abuse.

9. QUESTION: Should state courts be allowed to entertain such suits under either the proposed legislation or any other principle of law?

ANSWER: As a practical matter, state courts may not be as sensitive as federal courts to human rights issues. Moreover, international human rights cases predictably raise legal issues—such as interpretations of international law and the Act of State doctrine—that are matters of federal common law and within the particular expertise of federal courts. However, the courts of appeals in the *Filartiga* decision stated that state courts could properly exercise their general subject matter jurisdiction in such cases. While the legislation should specifically provide the federal district courts with jurisdiction over these suits, it should not preclude state courts from exercising their general jurisdiction to adjudicate the same type of cases.

10. QUESTION: Who should be liable under the proposed statute?

ANSWER: Any person who committed one of the specified offenses and who acted "under the color of" foreign state authority should be liable under the proposed statute. The individual must be subject to the personal jurisdiction of the federal district court, either by being present in the jurisdiction or by means of long-arm statutes.

11. QUESTION: What constitutes acting "under the color of any statue, regulation, custom or usage of any nation"?

ANSWER: The legislation would be intended to provide federal court jurisdiction over cases arising under color of foreign law out of state-sanctioned torture, extrajudicial killing, or prolonged arbitrary detention. It is not intended to extend federal court jurisdiction over all human rights violations; for example, it would not include torture committed by ordinary criminals. At the same time, limiting jurisdiction only to acts committed pursuant to official government policy would make prosecution virtually impossible. The Foreign Sovereign Immunities Act (28 U.S.C. §§ 1606-1611) would protect a state from suit in almost every instance. The Act of State doctrine could protect both state and individual defendants by preventing inquiry into whether foreign or international law had been violated by the official government acts.

The vast majority of gross human rights violations do not occur pursuant to official government policy. Rather, they occur as a result of a government's willingness to tolerate, condone or encourage such acts. States have a strong interest in denying that violators of human rights were acting as government agents. Most states have either outlawed torture domestically or have signed international conventions prohibiting torture. Therefore, it is highly unlikely that a state would admit to knowledge or authorization of the alleged unlawful acts.

A court adjudicating a suit alleging abuse in violation of international law theoretically could be faced with a situation where the state officially authorized the conduct, thus giving rise to

sovereign immunity or the Act of State defense, or completely denies any knowledge of the conduct, in which case it would not appear to be state-sanctioned. The proposed statute incorporates the concept of "color of authority" to avoid this dilemma. This concept has been used by courts applying federal civil rights legislation to resolve the same type of problem. Action taken "under the color of authority" has been explained by the Supreme Court as the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941).

12. QUESTION: Would the statute require that the person being sued actually perform or participate in the act or acts that form the basis of the complaint?

ANSWER: No. Individuals who knowingly ordered or assisted in the act or acts that form the basis of the complaint should be held liable under the proposed statute, even if they did not actually perform the acts that form the basis of the complaint. For example, an officer who did not engage in the unlawful acts but who ordered his subordinates to perform the acts, or knew they were being performed and intentionally failed to exercise his authority to stop them, could be held liable. A high level official whose *only* connection with the offense was his position at the top of a chain of command would not be liable, however, if he had no knowledge of or involvement in the offense.

13. QUESTION: Could a government be sued under the proposed statute?

ANSWER: No. The proposed statute would establish personal liability for individual acts and would seek to avoid the political and legal problems that arise in applying sanctions against governments. It would protect internationally recognized human rights by holding individuals who violate these rights accountable for their actions. A government would be protected from suit by the Foreign Sovereign Immunities Act if the acts complained of could be shown to be official government policy.

14. QUESTION: If the defendant claims to have acted pursuant to official government policy, could the courts refuse to hear the suit on the basis of the Foreign Sovereign Immunity Act or the Act of State doctrine?

ANSWER: A defendant would have to convince the court that the abuse occurred pursuant to official government policy in order to raise successfully the defense of foreign sovereign immunity or Act of State. It is unlikely, however, that courts in the United States would conclude that a defendant accused of torture, extrajudicial killing or prolonged arbitrary detention acted pursuant to official government policy. States have a strong interest in denying that violators of human rights were acting as agents of their governments and therefore would be highly unlikely to make such admissions. If a state denied any prior knowledge or authorization of the alleged acts, a court probably would not find that the acts constituted an "Act of State." Thus, in cases where a state official

is accused only of acting under "color" of state authority, the defenses of sovereign immunity and Act of State are not likely to succeed.

(a) *Doctrine of Foreign Sovereign Immunity*: The Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1606-1611) precludes U.S. courts from exercising jurisdiction over foreign states, their agencies and instrumentalities, unless one of the exemptions to the Act applies. In the absence of an applicable exemption, the Act shields a state from liability altogether and, once successfully invoked, prevents the suit from proceeding. Because none of the exemptions would apply to suits brought under the proposed legislation, state defendants and official agencies would be absolutely immune from such actions; however, the Act would not protect individual defendants from being held personally liable for their misdeeds.

(b) *The Act of State Doctrine*: The Act of State doctrine forbids domestic courts from inquiring into the validity under international law or its own law of a foreign sovereign's acts in its own territory. In order to assert this defense successfully, the defendant would have to prove that the alleged abuse occurred pursuant to an official act or policy of his government. Most states would deny having any association with the alleged abuse, and many states have adopted domestic laws or have become signatories to international declarations or conventions banning such conduct. It is therefore unlikely that this defense would

prevail in most cases brought under the proposed legislation. Indeed, the court of appeals in the *Filartiga* case doubted whether action by a state official in violation of the laws of that state could be properly characterized as an Act of State.

15. QUESTION: May a defendant in such a suit be sheltered from liability by claiming that he was merely following higher orders?

ANSWER: Although this defense should be extremely limited, the courts might, in some instances, refrain from holding defendants liable if they had little or no power to stop or prevent the unlawful acts. For example, if the defendant can prove that he exercised no discretion in carrying out the alleged unlawful conduct, and was himself subject to duress or the threat of torture if he refused to carry out his superior's orders, a court might find that he is an improper defendant and dismiss the suit.

16. QUESTION: Are the federal courts equipped to determine whether justice can "reasonably be assured" in another country?

ANSWER: Yes. The federal courts routinely make this type of determination in a variety of other types of cases. In extradition cases, for example, a court may refuse to extradite the accused if it appears that he will not be afforded a fair trial in the foreign country. *See* Restatement of Foreign Relations Law (Tentative Draft No. 5) § 487, Comment h. U.S. courts also may decline to exercise jurisdiction under the doctrine of *former non conveniens* if the court is convinced that the

case may proceed in the foreign court more conveniently and without injustice. A dismissal under *forum non conveniens* presupposes an alternative forum. If the court has any doubt about whether the plaintiff can obtain a fair trial in the other forum, the proper procedure is either not to dismiss the case or to dismiss conditionally, reserving the power to reinstate the case if the conditions are not met.

17. QUESTION: What standards would a court apply in assessing whether the claimant had "exhausted adequate and available remedies" in the country where the violations occurred?

ANSWER: Under the civil rights laws, the federal courts have routinely applied an exhaustion requirement to determine whether the plaintiff has exhausted state administrative remedies. In such cases, a court may refuse to exercise jurisdiction if it appears that the plaintiff has failed to exhaust state administrative remedies unless the state remedies are clearly inadequate or unavailable or circumstances render resort to these remedies futile.

In the international context, the doctrine of "exhaustion of domestic remedies" originated from the doctrine of espousal by a government of its nationals' claims. The requirement that domestic remedies be exhausted is met if the claimant shows that none are available or that it would be futile to pursue them. *See* Restatement on Foreign Relations Law (Tentative Draft No. 3) § 703, Comment d. Several international instruments that require exhaustion of remedies provide that it is not a precondition for consideration of a claim

where resorting to the domestic remedies would be "unreasonably prolonged." *See, e.g.,* Optional Protocol to the International Covenant on Civil and Political Rights, Art. 5; International Convention on the Elimination of All Forms of Racial Discrimination, Art. 14(7).

An elaborate exhaustion standard is set forth in Article 46.2 of the American Convention on Human Rights. Under this Convention, exhaustion is not required when:

> (a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
>
> (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
>
> (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

18. QUESTION: Are there any barriers under international law to the exercise of federal court jurisdiction over the abuses specified in the statute?

ANSWER: No. Under a traditional common law doctrine, civil actions for personal injury torts are considered "transitory" in that the tortfeasor's wrongful acts create an obligation that follows him across national boundaries. If personal jurisdiction is obtained over the defendant, and if the policies of the forum state are consistent with

those underlying the laws allegedly violated by the defendant, then the exercise of jurisdiction is proper. The court of appeals in *Filartiga* noted that actions for battery or wrongful death by torture are transitory and that, in civil actions, "a state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders." 630 F.2d at 885.

In addition, a state arguably has "universal jurisdiction" to adjudicate and punish offenses that are universally recognized as reprehensible. Jurisdiction in such cases is grounded upon a universal obligation to punish certain acts regardless of where they occurred. Traditionally, this doctrine has been applied to pirates, slave traders, assassins and arsonists. Although the doctrine historically has been applied in civil cases, it has not in the past been extended to include the acts specified in the proposed legislation. As the court of appeals in *Filartiga* noted, however, "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generic*, an enemy of all mankind." 630 F.2d at 890.

19. QUESTION: Can Congress legally regulate the conduct of aliens who engage in abuses against other aliens?

ANSWER: Yes. Article III of the U.S. Constitution establishes federal court jurisdiction in cases "arising under" the Constitution and laws of the United States. A case properly "arises under" the laws of the United States if it is grounded upon U.S. common law, which includes the law of nations. This view is supported by the reasoning

of the court of appeals in the *Filartiga* case and the Supreme Court's recent decision in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

20. QUESTION: Do other nations, particularly those with a history of commitment to human rights and the rule of law, provide remedies or sanctions comparable to those contained in the proposed legislation?

ANSWER: Although other nations apparently have not enacted legislation providing judicial remedies comparable to those contained in the proposed legislation, most nations have endorsed the numerous international agreements mentioned above that outlaw torture, extrajudicial killing, and prolonged arbitrary detention.

21. QUESTION: Based upon the experience of federal courts adjudicating suits brought under the Alien Torts Claims Act (28 U.S.C. § 1350), what would be some hypothetical fact situations under which a court would be expected to exercise jurisdiction pursuant to the proposed statute?

ANSWER: A federal court typically would exercise jurisdiction under the proposed statute in cases where, for a multitude of reasons, the perpetrator of the acts complained of travels or relocates to the United States. The plaintiff could be an alien who was a citizen of the state in which the alleged torture, extrajudicial killing or prolonged arbitrary detention occurred. Alternatively, he could be a U.S. citizen or a citizen of a third country who was detained and subjected to the abusive acts while living in or visiting that

state. The defendant could be either the individual who actually committed the abuse or the individual who ordered it. It is also possible that an individual who knowingly allowed the abuse to take place and had the power to prevent it could be sued under the statute.

22. QUESTION: Would an individual sued under the proposed statute be able to avoid liability by asserting the defense of diplomatic immunity?

ANSWER: In some cases. Diplomatic agents and members of their family are immune from civil jurisdiction under Articles 31 and 37 of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, which the United States has extended to representatives of nonsignatory nations. *See* Diplomatic Relations Act of 1978, 22 U.S.C. § 254a-e. Members of a diplomatic mission and their families who are in or passing through the territory of a third state are also immune from civil jurisdiction (Article 40 of the Vienna Convention). Thus, official representatives of an existing government would be immune from suit as long as they were acting in their official capacities. The sending state, however, can waive immunity of diplomats and their families (Article 32 of the Vienna Convention). In addition, the receiving state can declare a diplomat *persona non grata* and expel him from the country (Article 9 of the Vienna Convention).

Members of a foreign country's administrative and technical staff and their families who are not U.S. nationals or permanent residents enjoy only immunity from civil jurisdiction with respect to

acts performed in the course of their duties. Thus, as to these individuals, the defense of consular immunity would be available only if it were shown that the alleged acts were performed within the scope of their official duties.

Questions Pertaining to Deportation

1. QUESTION: Can existing legislation be invoked to deport from the United States any alien who took part in the torture of any other person?

ANSWER: Existing legislation does not adequately ensure that all aliens who took part in the torture of another person can be deported from the United States. Individuals who were involved in Nazi atrocities during World War II may be deported under a special statute enacted by Congress in 1978. In addition, an individual may be deported upon proof that he gained entry by providing false or misleading information to the Immigration and Naturalization Service. Otherwise, as the House Report on the bill to deport Nazi war criminals pointed out, individuals who have been lawfully admitted to the United States under the Immigration and Nationality Act ("INA") may not be deported "even if engagement in atrocities is proven."

2. QUESTION: How would torture be defined in the proposed legislation?

ANSWER: The definition of torture contained in a statute could be drawn from Article I of the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975). This definition is supported by the Restatement of the Law of Foreign Relations (Tentative Draft No. 3) § 702, and the Draft Convention on the Prevention and Suppression of Torture.

3. QUESTION: Would the proposed statute require the deportation of all aliens who ordered, assisted, or otherwise participated in the torture of any person?

ANSWER: No. Only public officials or individuals acting at the instigation of a public official should be deported under the proposed statute.

4. QUESTION: Why should the legislation withdraw the discretion of the Attorney General to waive deportation?

ANSWER: As noted above, the Attorney General has discretionary authority to invoke or waive deportation provisions under the INA. Such discretion is inappropriate as applied to torturers for at least two reasons. First, torturers arguably should not be entitled to such equitable relief. Second, the existence of this discretionary power invites political interference by the Executive Branch. For precisely these reasons, Congress withdrew the Attorney General's discretion to waive exclusion or deportation under the statute dealing with Nazi war criminals.

5. QUESTION: Why should the legislation eliminate the possibility of allowing the accused to leave the United States voluntarily?

ANSWER: The opportunity to depart voluntarily from the United States is a privilege generally granted at the discretion of the immigration authorities to one who would otherwise be expelled. An individual allowed to depart the United States in such circumstances is allowed to select his own destination. Congress has restricted this privilege, however, when the Attorney General has reason to believe that the alien is deportable for specific grounds related to criminal or subversive activity or national security. Similarly, Congress withdrew this privilege in enacting the provision dealing with Nazi war criminals. Obviously, if torturers were allowed to leave the United States for a country that would protect them for political or other reasons, they would escape extradition or trial in the United States for their atrocities.

6. QUESTION: What procedural safeguards would the proposed legislation contain to protect the interests of resident aliens who may face deportation under the statute?

ANSWER: Under current U.S. immigration law, aliens present in the United States may seek judicial review of an administrative deportation decision. A judicial review proceeding encompasses the full range of procedural safeguards required by the due process clause of the Constitution.

7. QUESTION: Would the proposed legislation apply to aliens seeking entry to the United States?

ANSWER: No. The proposed legislation would merely allow the INS to deport aliens thought to have committed torture from the United States.

8. QUESTION: Would the proposed legislation apply to officials of foreign governments seeking to visit the United States in their official capacity?

ANSWER: No. Officials of a foreign government visiting the United States in their official capacity have an A-1 or A-2 visa status. *See* 22 C.F.R. § 41.20. Unless expressly provided by statute, these nonimmigrants cannot be deported from the United States. The proposed legislation therefore would not apply to visiting foreign officials. *See* 22 C.F.R. § 41.91(e).

9. QUESTION: Is the proposed legislation supported by related international agreements concerning human rights?

ANSWER: Yes. The Charter of the United Nations, the Universal Declaration of Human Rights and, more recently, the Final Act of the Conference on Security and Cooperation in Europe support the proposed legislation by restating the moral and legal obligation of nations to respect the right of every human being to live, work and practice his beliefs free from oppressive governmental interference. In addition, torture has been specifically prohibited by a host of international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the Convention for the Protection of Human Rights and Funda-

mental Freedoms, the Geneva Convention Relative to the Treatment of Prisoners of War, the Convention Relative to the Protection of Civilian Persons in Time of War, and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

10. QUESTION: If the proposed legislation establishing a federal right of action depends upon the violators' presence in the United States in order to institute suit, wouldn't the deportation provision diminish the importance of providing the federal courts with jurisdiction over such suits?

ANSWER: No. Although, the deportation provision theoretically could reduce the number of suits filed, the INS could always defer deportation pending the outcome of the suit. Further, in some instances, an individual's past atrocities might not be known at the time of admission into the United States. A private action would alert immigration authorities to possible grounds for deportation of that individual, as well as provide an opportunity for the victim or his heirs to seek damages for the illegal activities. The two proposals are thus complimentary rather than inconsistent.

J. DAVID ELLWANGER

Chairperson
Section of Individual
Rights & Responsibilities

ROBERT F. DRINAN

Chairman
Standing Committee on
World Order Under Law

APPENDIX B

Survey of Alien Tort Statute Cases*

Case	Place of Tort	Summary	Limitations Considered by the Court
Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50 (2d Cir. 2012)	Foreign country	The plaintiffs, victims and relatives of victims of a Hizbollah rocket attack in Israel, sued Lebanese Canadian Bank, SAL under the ATS, claiming that the defendant conducted wire transfers on behalf of an entity alleged to be an integral part of Hizbollah.	Claim or type of defendant not recognized by international law; Personal jurisdiction
Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert.granted*, 132 S. Ct. 472 (2011)	Foreign country	The plaintiffs sued corporations for aiding and abetting property destruction, forced exile, extrajudicial killing, the violation of various rights, torture, arbitrary arrest and detention, and crimes against humanity	Claim or type of defendant not recognized by international law
Swarna v. Al-Awadi, 622 F.3d 123 (2d Cir. 2010)	United States	The plaintiff sued under the ATS the for trafficking, involuntary servitude, forced labor, assault, and sexual abuse. The claims arose from abuse the plaintiff suffered while working as a domestic servant for a diplomat and his wife in New York.	FSIA and other immunities
Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009)	Foreign country	The plaintiffs sued Talisman Energy for aiding and abetting war crimes, genocide, and crimes against humanity committed by the Republic of Sudan.	Claim or type of defendant not recognized by international law

* This chart includes all cases since *Filartiga* (1980) found by the ABA's research for this brief that resulted in a Court of Appeals opinion designated for publication in which plaintiffs made a claim under 28 U.S.C. § 1350, and the Court of Appeals identified the claim as one raised under the "Alien Tort Statute," the "Alien Tort Claims Act," or the "Alien Tort Act." Where a Court of Appeals heard the same case multiple times, all opinions in the case that discuss the ATS appear in one row. The column titled "Limitations Considered by the Court" identifies by general category those legal principles that are discussed in Point II of this brief that were given substantive consideration by the court, whether or not found to be dispositive.

Case	Place of Tort	Summary	Limitations Considered by the Court
Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009)	Foreign country	The plaintiffs sued the former head of the Israeli Security Agency for war crimes and other violations of international law arising from the bombing of an apartment building in Gaza City, seeking damages under the ATS.	FSIA and other immunities
Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009)	Foreign country	Nigerian children and their parents sued Pfizer under the ATS for violating a customary international law norm prohibiting involuntary medical experimentation on humans.	Claim or type of defendant not recognized by international law; *Forum non conveniens*
De Los Santos Mora v. New York, 524 F.3d 183 (2d Cir. 2008)	United States	The plaintiff sued the Queens County District Attorney and the NYPD under the ATS for violating Art. 36 of the Vienna Convention on Consular Relations due to their failure to inform him that he could contact his consulate after having been arrested.	Claim or type of defendant not recognized by international law
Vietnam Association for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008)	Foreign country	Vietnamese nationals alleged that the United States military's use of Agent Orange during the Vietnam War violated international law. They sued Dow Chemical under theories of aiding and abetting and of direct liability.	Claim or type of defendant not recognized by international law
Khulumani v. Barclay National Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008)	Foreign country	South African nationals sued corporate defendants under the ATS for aiding and abetting violations of international law relating to apartheid.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question

Case	Place of Tort	Summary	Limitations Considered by the Court
Tachiona v. United States, 386 F.3d 205 (2d Cir. 2004)	Foreign country	Zimbabwean nationals sued ZANU-PF, a Zimbabwean political party, as well as President Mugabe and Foreign Minister Mudenge in their individual capacities. The plaintiffs alleged violations of international law under the ATS including torture, assault, execution, and other acts of violence.	FSIA and other immunities; Personal jurisdiction
Abrams v. Societe Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003), *vacated and remanded*, 542 U.S. 901 (U.S. 2004)	Foreign country	Holocaust victims brought claims against a French railroad for transporting French civilians to Nazi death and slave labor camps, alleging war crimes and crimes against humanity.	FSIA and other immunities
Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003)	Foreign country	Peruvian plaintiffs, representing their deceased Peruvian relatives, sued a United States corporation under the ATS for emitting high levels of environmental pollution, which they framed as violating customary international law by infringing on their "right to life" and "right to health."	Claim or type of defendant not recognized by international law
Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001)	Foreign country	Indian plaintiffs sued Union Carbide under the ATS for injuries resulting from the Bhopal gas plant disaster.	
Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000)	Foreign country	The plaintiffs, former Egyptian nationals, sued Coca-Cola under the ATS for seizure and confiscation of foreign property in violation of international law. The seizure of the plaintiffs' property resulted from the nationalization of their property by the Egyptian government.	Claim or type of defendant not recognized by international law

Case	Place of Tort	Summary	Limitations Considered by the Court
Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000)	Foreign country	Nigerian plaintiffs sued Dutch and United Kingdom corporations under the ATS for their instigation of, and direct or indirect participation in, human rights abuses by the Nigerian government, including torture, imprisonment, and extrajudicial killing.	Personal jurisdiction; *Forum non conveniens*
Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002)	Foreign country	Residents of Ecuador and Peru sued Texaco under the ATS for environmental and personal injuries resulting from the defendant's oil exploration and extraction activities in Ecuador and Peru.	*Forum non conveniens* (*Jota*, *Aguinda*)
Kadic v. Karadzic (*Kadic I*), 70 F.3d 232 (2d Cir. 1995) *reh'g denied*, 74 F.3d 377 (2d Cir. 1996) (*Kadic II*)	Foreign country	Croat and Muslim citizens of Bosnia-Herzegovina sued the leader of the self-proclaimed Bosnian-Serb republic of Srpska under the ATS for violations of international law including rape, forced impregnation, forced prostitution, torture, and other atrocities.	Claim or type of defendant not recognized by international law (*Kadic I, II*); Deference to executive branch / political question (*Kadic I*); Personal jurisdiction (*Kadic I*)
Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989)	High seas	Two corporations sued Argentina under the ATS for attacking and destroying a neutral oil tanker on the high seas in violation of international law.	Claim or type of defendant not recognized by international law; FSIA and other immunities; Personal jurisdiction
Zapata v. Quinn, 707 F.2d 691 (2d Cir. 1983)	United States	A Colombian national's "unusually frivolous" ATS claim against the New York State Lottery alleged deprivation of property without due process arising from the lottery's rule for paying out large winnings.	Claim or type of defendant not recognized by international law
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)	Foreign country	Peruvian plaintiffs sued the former Inspector General of Police in Peru under the ATS for the torture and wrongful death of their family member.	Claim or type of defendant not recognized by international law

Case	Place of Tort	Summary	Limitations Considered by the Court
Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011)	Foreign country	The plaintiffs sued a corporation that sold mustard gas to Sadaam Hussein's Iraqi regime, which used the gas to attack Kurds in northern Iraq, under the ATS on an aiding and abetting theory of liability.	
Yousuf v. Samantar, 552 F.3d 371 (4th Cir. 2009) *aff'd*, 130 S. Ct. 2278 (2010)	Foreign country	Natives of Somalia sued a former Somali government official under the ATS for directing torture and other human rights abuses.	FSIA and other immunities
Goldstar (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992)	Foreign country	A group of Panamanian businesses sued the United States government under the ATS for property damage resulting from looting and rioting following the invasion of Panama, arguing that the United State's failure to maintain order breached its obligations under the Hague Convention.	FSIA and other immunities
Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999)	Foreign country	The plaintiff sued United States mining companies under the ATS for environmental harm, human rights abuses, and cultural genocide arising out of the defendants' mining activities in the Pacific Rim.	Claim or type of defendant not recognized by international law
Carmichael v. United Techs. Corp., 835 F.2d 109 (5th Cir. 1988)	Foreign country	The plaintiff sued corporations under the ATS for false imprisonment and torture, under the theory that the defendants revoked his exit visa and conspired with the Saudi Arabian government to imprison him.	Claim or type of defendant not recognized by international law; Personal jurisdiction
Cohen v. Hartman, 634 F.2d 318 (5th Cir. 1981)	Foreign country, United States	A Canadian national sued another Canadian national under the ATS for tortious conversion.	Claim or type of defendant not recognized by international law
Chavez v. Carranza, 559 F.3d 486 (6th Cir. 2009)	Foreign country	The plaintiffs sued a former officer in the Salvadoran military under the ATS for torture, extrajudicial killing, and crimes against humanity.	
Taveras v. Taveraz, 477 F.3d 767 (6th Cir. 2007)	Foreign country, United States	The plaintiff, a citizen of the Dominican Republic, sued his former wife for parental abduction under the ATS for taking their children from the Dominican Republic to live in Ohio.	Claim or type of defendant not recognized by international law

Case	Place of Tort	Summary	Limitations Considered by the Court
Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011)	Foreign country	The plaintiffs sued a corporation on behalf of Liberian children under the ATS for child labor, alleging that the high quotas imposed by the defendant on its employees, poor agricultural workers, forced the workers to recruit their children to work as well.	Claim or type of defendant not recognized by international law
Jogi v. Voges (*Jogi I*), 425 F.3d 367 (7th Cir. 2005), *withdrawn and substituted by* 480 F.3d 822 (7th Cir. 2007) (*Jogi II*)	United States	The plaintiff, an Indian national, sued various Champaign County law enforcement officers under the ATS, alleging a violation of the Vienna Convention on Consular Relations for failing to inform him of his right to contact the Indian consulate.	Claim or type of defendant not recognized by international law (*Jogi I*)
Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005)	Foreign country	The plaintiffs, all Nigerian nationals, sued a former Nigerian general under the ATS, alleging torture and murder by the military junta under his leadership.	Claim or type of defendant not recognized by international law; Exhaustion; FSIA and other immunities
Sarei v. Rio Tinto, PLC (*Sarei I*), 487 F.3d 1193 (9th Cir. 2007), *rev'd en banc*, 550 F.3d 822 (9th Cir. 2008) (*Sarei II*); *Sarei v. Rio Tinto, PLC* (*Sarei III*), 625 F.3d 561 (9th Cir. 2010); *Sarei v. Rio Tinto, PLC* (*Sarei IV*), 671 F.3d 736 (9th Cir. 2011)	Foreign country	The plaintiffs sued the defendant mining corporation under the ATS for genocide, war crimes, racial discrimination, and crimes against humanity for actions in Papua New Guinea.	Claim or type of defendant not recognized by international law (*Sarei I, IV*); Deference to executive / political question (*Sarei I, III, IV*); Exhaustion (*Sarei I, II, IV*)

Case	Place of Tort	Summary	Limitations Considered by the Court
Bauman v. DaimlerChrysler Corp. (*Bauman I*), 579 F.3d 1088 (9th Cir. 2009), *reh'g at* 644 F.3d 909 (9th Cir. 2011) (*Bauman II*)	Foreign country	The plaintiffs, Argentinean nationals, sued a corporation under the ATS for collaborating with state security forces to kidnap, detain, torture, and kill the plaintiffs and their relatives during Argentina's "Dirty War."	Personal jurisdiction (*Bauman I, II*)
Tobar v. United States, 639 F.3d 1191 (9th Cir. 2011)	High seas	The plaintiffs, Ecuadorean crew members of a fishing boat, sued the United States for unlawful imprisonment and other claims under the ATS arising from the Coast Guard's search and seizure of the fishing vessel in international waters.	
Bowoto v. Chevron Corp., 621 F.3d 1116 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 1968 (2012)	High seas	The family of a deceased protestor sued Chevron under the ATS, bringing summary execution and survival claims. Chevron had sought the help of Nigerian Government Security Forces when Nigerian protestors, including the deceased, took over an oil platform.	
Mohamed v. Jeppesen Dataplan, Inc. (*Mohamed I*), 579 F.3d 943 (9th Cir. 2009), *rev'd en banc*, 614 F.3d 1070 (9th Cir. 2010) (*Mohamed II*), *cert. denied*, 131 S. Ct. 2442 (2011)	Foreign country	The plaintiffs, subjects of the CIA's extraordinary rendition program, sued the corporation that provided flight planning and logistical support to all flights transporting the plaintiffs from Egypt to interrogation facilities.	Deference to executive branch / political question (*Mohamed II*)
Abagninin v. AMVAC Chem. Corp., 545 F.3d 733 (9th Cir. 2008)	Foreign country	The plaintiffs, nationals of the Ivory Coast who lived and worked on banana and pineapple plantations, sued the corporations that produced, distributed, and used a pesticide that caused male sterility. The plaintiffs sued under the ATS alleging genocide and crimes against humanity.	Claim or type of defendant not recognized by international law

Case	Place of Tort	Summary	Limitations Considered by the Court
Corrie v. Caterpillar, 503 F.3d 974 (9th Cir. 2007)	Foreign country	The family members of Palestinians killed or injured when the Israeli Defense Forces demolished homes sued the corporation that manufactured the bulldozers under the ATS.	Deference to executive branch / political question
Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005)	Foreign country	Holocaust survivors sued the Vatican Bank, the Order of Friars Minor, and the Croatian Liberation Movement under the ATS, alleging that the defendants profited from genocidal acts committed by a Croatian political regime.	Deference to executive branch / political question
Alvarez-Machain v. United States (*Alvarez-Machain I*), 266 F.3d 1045 (9th Cir. 2001), *reh'g en banc at* 331 F.3d 604 (9th Cir. 2003) (*Alvarez-Machain II*), *rev'd sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2003)	Foreign country	The plaintiff sued a former Mexican policeman and Mexican civilians who aided DEA agents in kidnapping and transporting him to the United States for trial, the DEA agents, and the United States under the ATS for arbitrary arrest and detention.	Claim or type of defendant not recognized by international law (*Alvarez-Machain I, II*); Deference to executive branch / political question (*Alvarez-Machain II*)
Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003), *amended by* 324 F.3d 692 (9th Cir. 2003)	Foreign country	During World War II, Japanese and German corporations forced civilian and military prisoners to work as slave laborers. Victims and relatives of victims sued the corporations under the ATS.	
Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003)	Foreign country	Villagers from Myanmar sued oil and gas companies under the ATS for forced labor, murder, rape, and torture perpetrated by the Myanmar military during the construction of a gas pipeline.	Claim or type of defendant not recognized by international law; FSIA and other immunities

Case	Place of Tort	Summary	Limitations Considered by the Court
Papa v. United States, 281 F.3d 1004 (9th Cir. 2002)	United States	The plaintiffs, the wife and children of the victim, sued the United States, INS, and 100 John Does under the ATS for the death of the victim while he was in INS custody.	
Martinez v. Los Angeles, 141 F.3d 1373 (9th Cir. 1998)	Foreign country, United States	The plaintiff and his wife sued Los Angeles and the LAPD under the ATS for arbitrary arrest and detention. The LAPD worked with Mexican law enforcement to arrange for the arrest and detention of plaintiff for a murder he did not commit.	Claim or type of defendant not recognized by international law
Trajano v. Marcos (*In re Estate of Marcos Human Rights Litig.*) (*Estate I*), 978 F.2d 493 (9th Cir. 1992); *Hilao v. Estate of Marcos* (*In re Estate of Marcos Human Rights Litig.*) (*Estate II*), 25 F.3d 1467 (9th Cir. 1994); *Hilao v. Estate of Marcos* (*Estate III*), 103 F.3d 767 (9th Cir. 1996)	Foreign country	The plaintiffs sued former Philippine President Ferdinand Marcos, his daughter Imee Marcos-Manotoc, and the estate of Marcos under ATS for torture, summary executions, and "disappearances" committed by the Philippine military and paramilitary under his command.	Claim or type of defendant not recognized by international law (*Estate I, II*); FSIA and other immunities (*Estate I*)
Hamid v. Price Waterhouse, 51 F.3d 1411 (9th Cir. 1995)	Foreign country, United States	A class of depositors in a bank, many of whom were foreign nationals, sued the defendants under the ATS alleging that insiders caused money to be loaned to criminals, looted the bank's assets, and misrepresented its financial situation.	Claim or type of defendant not recognized by international law
Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992)	Foreign country, High seas	Heirs to passengers of an Iranian airliner shot down by the United States Navy brought suit under the ATS, among other statutes, against the United States and defense contractors.	FSIA and other immunities; Deference to executive branch / political question

Case	Place of Tort	Summary	Limitations Considered by the Court
Siderman de Blake v. Republic of Arg. 965 F.2d 699 (9th Cir. 1992)	Foreign country	The plaintiffs, husband and wife, sued Argentina under the ATS for the torture of the plaintiff-husband by the Argentine military.	FSIA and other immunities
Cisneros v. Aragon, 485 F.3d 1226 (10th Cir. 2007)	United States	The plaintiff, a Mexican national, had previously lived in the United States and been married to defendant. She sued her former husband under the ATS for sexual offenses committed against her while in the United States.	Claim or type of defendant not recognized by international law
Hoang Van Tu v. Koster, 364 F.3d 1196 (10th Cir. 2004)	Foreign country	The plaintiffs, victims of the My Lai massacre in Vietnam, sued former United States military servicemen under the ATS for committing atrocities, including murder.	
Mamani v. Berzain, 654 F.3d 1148 (11th Cir. 2011)	Foreign country	Bolivian plaintiffs sued the former president and the former defense minister of Bolivia under the ATS on behalf of their deceased relatives, alleging extrajudicial killings and crimes against humanity during a period of political upheaval.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question
Baloco v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011)	Foreign country	Colombian plaintiffs sued a corporation, its subsidiaries, and its employees under the ATS for hiring paramilitaries to assassinate their fathers, who had been union leaders.	Claim or type of defendant not recognized by international law
Estate of Amergi v. Palestinian Auth., 611 F.3d 1350 (11th Cir. 2010)	Foreign country	The estate of an Israeli woman sued the Palestinian Authority and the Palestinian Liberation Organization under the ATS for the death of the woman, who was shot and killed in the Gaza Strip.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question

Case	Place of Tort	Summary	Limitations Considered by the Court
Aldana v. Del Monte Fresh Produce N.A., Inc. (*Aldana I*), 416 F.3d 1242 (11th Cir. 2005); *Aldana v. Del Monte Fresh Produce N.A., Inc.* (*Aldana II*), 578 F.3d 1283 (11th Cir. 2009)	Foreign country	The plaintiffs, Guatemalan labor union leaders, sued Del Monte under the ATS for arbitrary detention, crimes against humanity, and cruel, inhuman and degrading treatment, alleging that Del Monte's subsidiary in Guatemala had hired security forces to detain and torture them.	Claim or type of defendant not recognized by international law (*Aldana I*); *Forum non conveniens* (*Aldana II*)
Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009)	Foreign country	Colombian plaintiffs sued Coca-Cola under the ATS, alleging kidnapping, detention, torture, and murder of trade-unionists by paramilitary forces working as agents of Coca-Cola.	Claim or type of defendant not recognized by international law
Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008)	Foreign country	Colombian plaintiffs sued a Colombian subsidiary, its executives, and its Alabama parent corporation under the ATS, alleging that executives paid paramilitaries to torture and assassinate leaders of a trade union.	
Jean v. Dorelien, 431 F.3d 776 (11th Cir. 2005)	Foreign country	Haitian plaintiffs sued a former colonel in the Haitian armed forces under the ATS for torture, arbitrary detention, extrajudicial killing, and cruel, inhuman and degrading treatment.	
Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005)	Foreign country	Relatives of a Chilean economist who was executed by Chilean military officers brought suit under the ATS against a former military officer who participated in the execution, alleging extra-judicial killing, torture, cruel, inhuman and degrading treatment, and crimes against humanity.	Claim or type of defendant not recognized by international law
Arce v. Garcia (*Arce I*), 400 F.3d 1340 (11th Cir. 2005), *vacated,* 434 F.3d 1254 (11th Cir. 2006) (*Arce II*)	Foreign country	Four Salvadoran refugees sued the former minister of defense of El Salvador and the former director-general of El Salvador's national guard under the ATS for torture perpetrated by the Salvadoran military.	

Case	Place of Tort	Summary	Limitations Considered by the Court
Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996)	Foreign country	Three Ethiopian plaintiffs sued the former chairman of one of the governing units of the Ethiopian military dictatorship, the Dergue, under the ATS, alleging that he personally supervised and participated in their torture and cruel, inhuman and degrading treatment.	Deference to executive branch / political question
Adras v. Nelson, 917 F.2d 1552 (11th Cir. 1990)	United States	Haitian refugees brought claims under the ATS and other statutes alleging unlawful detention and mistreatment at an INS detention facility.	
Talal Al-Zahrani v. Rodriguez, 669 F.3d 315 (D.C. Cir. 2012)	Guantanamo Bay	The fathers of two deceased men who had been detained at Guantanamo Bay Naval Base sued the United States and several United States officials under the ATS.	FSIA and other immunities
Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011)	Foreign country	Indonesian plaintiffs sued Exxon Mobil and several of its wholly owned subsidiaries under the ATS alleging that its security forces committed murder, torture, sexual assault, battery, and false imprisonment in Indonesia.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question
Ali v. Rumsfeld, 649 F.3d 762 (D.C. Cir. 2011)	Foreign country	Iraqis and Afghanis detained at United States military facilities in Iraq and Afghanistan sued Army officers and former Secretary of Defense Rumsfeld under the ATS for torture.	Claim or type of defendant not recognized by international law
Ali Shafi v. Palestinian Authority, 642 F.3d 1088 (D.C. Cir. 2011)	Foreign country	A Palestinian plaintiff sued the Palestinian Authority under the ATS for torture.	Claim or type of defendant not recognized by international law
El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010)	Foreign country	The plaintiffs, a Sudanese pharmaceutical company and its owner, brought ATS claims against the United States arising out of the United States military's bombing of the plaintiffs' factory in Sudan.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question

Case	Place of Tort	Summary	Limitations Considered by the Court
Saleh v. Titan Corp., 580 F.3d 1 (D.C. Cir. 2009)	Foreign country	Iraqi plaintiffs detained at Abu Ghraib prison sued contractors that provided services to the United States military for abuses committed against them during their detention.	Claim or type of defendant not recognized by international law; FSIA and other immunities
Rasul v. Myers (*Rasul I*), 512 F.3d 644 (D.C. Cir. 2008), *vacated*, 555 U.S. 1083 (2008), *remanded to* 563 F.3d 527 (D.C. Cir. 2009) (*Rasul II*)	Guantanamo Bay	Four British nationals detained at Guantanamo Bay Naval Base sued United States military officials under the ATS.	FSIA and other immunities
Belhas v. Ya'Alon, 515 F.3d 1279 (D.C. Cir. 2008)	Foreign country	Civilians who were injured, and relatives of civilians who were killed, during the shelling of a UN compound in Lebanon sued a retired general of the Israeli Defense Forces under the ATS.	FSIA and other immunities
Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006)	Foreign country	The plaintiffs sued the United States and the former Secretary of State under the ATS, alleging that the defendants supported and assisted in actions of the Chilean Pinochet regime.	Deference to executive branch / political question
Bancoult v. McNamara, 445 F.3d 427 (D.C. Cir. 2006)	Foreign country	The plaintiffs, descendants of indigenous people who had been displaced when the United States established a military base on an island in the British Indian Ocean Territory, sued the United States and government officials under the ATS.	Deference to executive branch / political question
Mwani v. Osama bin Laden, 417 F.3d 1 (D.C. Cir. 2005)	Foreign country	Kenyan nationals injured in an al Qaeda car bombing of the American Embassy in Kenya sued al Qaeda and bin Laden under the ATS.	Personal jurisdiction

Case	Place of Tort	Summary	Limitations Considered by the Court
Joo v. Japan (*Joo I*), 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 542 U.S. 901 (2004), *remanded to* 413 F.3d 45 (D.C. Cir. 2005) (*Joo II*)	Foreign country	The plaintiffs, women from China, Taiwan, South Korea, and the Philippines, sued Japan under the ATS for torture and sexual slavery before and during World War II.	FSIA and other immunities (*Joo I*); Deference to executive branch / political question (*Joo II*)
Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003) *rev'd sub nom. Rasul v. Bush*, 542 U.S. 466 2004); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008)	Guanta-namo Bay	"Next friends," representing aliens taken into custody in Afghanistan or Pakistan and detained at Guantanamo Bay Naval Base, sued the United States government and United States officials under the ATS for injunctive and declaratory relief.	
Industria Panificadora, S.A. v. United States, 957 F.2d 886 (D.C. Cir. 1992)	Foreign country	The plaintiffs, Panamanian businesses, sued the United States under the ATS for property damage resulting from looting following the United States invasion of Panama, alleging inadequate police protection.	FSIA and other immunities
Bagguley v. Bush, 953 F.2d 660 (D.C. Cir. 1991)	United States	The plaintiff, who was convicted and sentenced to imprisonment in the United States, sued the United States under the ATS, challenging the denial of his request to be transferred to England.	Claim or type of defendant not recognized by international law
Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989)	Foreign country	Libyan plaintiffs sued the United States, the United Kingdom, and officials of both countries under the ATS for injuries arising out of a United States air strike on Libya.	FSIA and other immunities

Case	Place of Tort	Summary	Limitations Considered by the Court
Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985)	Foreign country	Nicaraguan plaintiffs sued three groups of defendants (United States executive branch officials, two organizations alleged to operate paramilitary training camps in the United States, and the leader of a group running paramilitary camps in Nicaragua and elsewhere) under the ATS, alleging that defendants provided assistance to the Contras, resulting in attacks by the Contras against Nicaraguan civilians.	FSIA and other immunities
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)	Foreign country	Survivors and representatives (mostly Israeli citizens) of individuals murdered during a Palestine Liberation Organization (PLO) attack on a civilian bus in Israel sued the Libyan Arab Republic, the PLO, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America under the ATS.	Claim or type of defendant not recognized by international law; Deference to executive branch / political question
Ramirez de Arellano v. Wienberger, 724 F.2d 143 (D.C. Cir. 1983), *rev'd en banc*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985)	Foreign country	The plaintiff landowners (Honduran and Puerto Rican corporations) sued the United States and United States officials for wrongful occupation of their property under the ATS, arising out of the establishment by the United States of a military training facility on the plaintiffs' land.	Deference to executive branch / political question