No. 08-1555

IN THE

# Supreme Court of the United States

MOHAMED ALI SAMANTAR,

*Petitioner*,

—v.—

BASHE ABDI YOUSUF ET AL.,

*Respondents*.

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

## BRIEF FOR *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE, SUPPORTING NEITHER SIDE

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## INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League ("ADL"), as *amicus curiae*, submits this brief in support of neither party.[1]

ADL was organized in 1913 to combat racial, ethnic, and religious discrimination, and to fight hate, bigotry, and anti-Semitism. It is today one of the world's leading civil and human rights organizations. ADL's nearly 100-year history is marked by a commitment to protecting civil and human rights, both in the United States and abroad. In this connection, ADL has often filed briefs *amicus curiae* in cases arising under the Alien Tort Statute ("ATS") and the Torture Victims Protection Act of 1991 ("TVPA"), including in *Princz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); and *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991).

## INTRODUCTION AND SUMMARY OF ARGUMENT

As we are reminded by the mere mention of the Holocaust or such places as Serbia, Rwanda, Sudan, Argentina, Haiti, and the Congo—and, of course, by earlier tragedies and crimes as well—people, acting through governments or political movements, can

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

wreak terrible evil on their neighbors, in ways that all modern nations condemn as illegal and wholly unjustifiable. It is hardly surprising, therefore—indeed it is essential—that the United States, and other civilized nations as well, have afforded legal claims to obtain such justice as may be possible in such circumstances. Equally important, however, is that such process not be abused for political purposes.

Any decision in this case may have an impact on how the ATS and TVPA operate. On the one hand, in adjudicating the application of immunity under the Foreign Sovereign Immunities Act ("FSIA"), the Court should protect the integrity of the ATS and TVPA by ensuring that, at least, there is the possibility that the worst offenders—the perpetrators of genocide—are held to account for their violations of *jus cogens* norms. On the other hand, the Court should take care not to extend an open invitation to sue foreign officers past or present, making the courts a vehicle for political but meritless lawsuits.

While this brief suggests no specific answer to this dilemma, it does explicate several key landmarks for use in avoiding this Scylla and Charybdis. *Amicus* believes that it can best assist the Court by outlining boundary issues that will help keep the ATS and TVPA vital but cabined within appropriate limits.

There is no question that the TVPA and the ATS are important: an examination of the cases silences any doubt about the essential justice of many such claims.[2]

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[2] *See, e.g.*, *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (jury award of $1.5 million in compensatory and punitive damages to victims of torture, extrajudicial killing, and crimes

Where they properly apply, such suits provide vital deterrence and needed economic remedies. They also vindicate the most elementary claims of justice: it would be unjust, indeed monstrous, if those who profited from crimes against human rights could with impunity live the good life in America's comfortable suburbs and gated communities, often on stolen assets, while their victims may be living just miles away with maimed bodies and haunted memories.[3]

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against humanity, including acts of torture by electrocution and with acid), *cert. denied*, 130 S.Ct. 110 (2009); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (jury award of $54.6 million in compensatory and punitive damages where plaintiffs had been tortured from ten to twenty-two days); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (jury award of $4 million in compensatory and punitive damages where defendant had participated in the torture and execution of plaintiffs' son and brother); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1118 (E.D. Cal. 2004) (jury awarded $5 million in compensatory and $5 million in punitive damages for assassination of Archbishop Romero). *See also* Brief of the Center for Justice and Accountability at 6-13, filed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (discussing the facts in ATS cases in which plaintiffs prevailed arising from torture, extrajudicial murder, and genocide).

[3] *See*, *e.g.*, *Chavez*, 559 F.3d at 491 (defendant had become a naturalized citizen of the United States and lived in Memphis, Tennessee when plaintiffs commenced their action); *Cabello*, 402 F.3d at 1153 (defendant lived in Miami, Florida when plaintiffs commenced the lawsuit); *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005) (noting that defendant had won $3.2 million in the Florida State Lottery subsequent to the events in suit); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1469 (9th Cir. 1994) (former Philippine president accused of unlawful torture and execution fled to and remained in Hawaii); *Doe*, 348 F. Supp. 2d at 1118 (defendant resided in Modesto, California when lawsuit was commenced).

That the ATS and TVPA afford essential claims, however, does not mean that every claim asserted under these laws is properly brought or meritorious, even where plaintiffs have plainly suffered. *See*, *e.g.*, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (affirming dismissal of claim against oil company for providing substantial assistance to the Republic with the purpose of facilitating the human rights abuses, where plaintiffs submitted insufficient evidence to permit a finding that the company acted with the purpose of harming civilians in southern Sudan). Claims can be (and have been) brought beyond the parameters intended or permitted by Congress, and asserted for impermissible reasons, for example, as political weapons designed to harass leaders and officers of disliked governments, even where evident defenses doom the claims asserted.

As this Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), after hearing from a wide range of *amici* who presented contrary views on a range of important issues related to the ATS and TVPA, preserving the right to assert such claims within the scope in which Congress has invited them is important—as is respecting the various limits Congress has imposed.

In recent years, US courts have sought to strike a balance, protecting the ATA, TVPA and FSIA. Indeed, as the United States has noted, in many circumstances the same result would be reached *regardless* of how the Court decides the FSIA questions presented. *See generally* Brief for the United States as *Amicus Curiae*, filed in *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009). Thus, even if the FSIA does not afford immunity to individuals

who hold or have held high governmental positions in foreign states, federal common law generally affords the very same result if the executive branch advises the trial court that immunity should attach.

Notably, ADL has previously taken the position that there is a strong argument against former official immunity where the United States executive branch has advised the court that diplomatic relationships would not be harmed by the assertion of jurisdiction.[4] ADL notes here that reading the FSIA according to its plain language—which does not eliminate common law immunity for present or former officials, but leaves it largely subject to the State Department's position, should it choose to assert one—does offer significant flexibility and case-specific determination that would seem highly useful to the executive branch—and an important protection against the use of the ATS and TVPA as a political cudgel rather than for the remedial purposes Congress intended.

## ARGUMENT

### I. REGARDLESS OF HOW THE COURT DECIDES THE QUESTIONS PRESENTED, THE FSIA CAN NEVER PROVIDE IMMUNITY FOR VIOLATIONS OF PEREMPTORY NORMS OF INTERNATIONAL LAW

Since the Nuremberg Charter was drafted at the end of World War II under the leadership of the

[4] Brief of *Amicus Curiae* the Anti-Defamation League at 7-11, filed in *Siderman*, 965 F.2d 699 (focusing on the fact that the regime whose conduct was complained of was "no longer in power").

United States, heads of state, ministers, and other government officials have, in appropriate circumstances, been stripped of their right to rely upon sovereign immunity to avoid prosecution for acts that violate peremptory norms of international law. *See*, *e.g.*, Charter of the Int'l Military Tribunal, 82 U.N.T.S. 280, art. 7 (1945) (stating that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment"); *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others*, Ex Parte Pinochet Ugarte (No. 3) [2000] 1 A.C. 147 (1999). Such acts generally involve the most heinous crimes, carrying various labels including but not limited to genocide, crimes against humanity, and related acts such as torture. When individuals acting under color of law perpetrate such atrocities, they can and should be held criminally responsible regardless of rank or title. The violations giving rise to individual liability contravene *jus cogens* norms—peremptory norms of "general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

It is self-evident that, because no state can ever derogate from such a peremptory norm of international law, officials who violate such norms are acting outside their lawful capacity and cannot be said to be acting on behalf of a state. At least one court of appeals has accepted this principle and held that no head of state, sued in his individual capacity like petitioner here, can claim immunity for acts that violate *jus cogens* norms. *See Chuidian v. Philippine*

*Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472; *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992). In so holding, the Ninth Circuit correctly observed that FSIA only provides immunity for government officials who act in their official capacities, but "will not shield an official who acts beyond the scope of his authority." *Chuidian*, 912 F.2d at 1106. *See also Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J. dissenting); *Princz*, 26 F.3d at 1179 (Wald, J. dissenting). When a present or former head of state violates a peremptory norm by, for example, engaging in "acts of torture, execution, and disappearance," his or her actions violate *jus cogens* norms and fall outside the scope of the individual's authority. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1472. Therefore, by definition they cannot be "the acts of an agency or instrumentality of a foreign state within the meaning of FSIA." *Id.*

Although the Second, Seventh, and D.C. Circuits have rejected this line of reasoning, they have done so largely on the ground that "FSIA contains no unenumerated exception for violations of *jus cogens* norms." *See Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) ("there is no general *jus cogens* exception to FSIA immunity"); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 241 (2d Cir. 1996); *Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) ("FSIA did not include an implied exception to its general grant of sovereign immunity to foreign states where a foreign state was accused of violating *jus cogens* norms"). Although a superficial read of FSIA may provide a modicum of support for these decisions, both the argument above and a close tex-

tual analysis indicate that these holdings are incorrect. In particular, 28 U.S.C. § 1605(a)(1) removes immunity of a foreign state in any case "in which the foreign state has waived its immunity either explicitly or by implication."

Notwithstanding FSIA's silence on what might constitute such an implicit waiver of immunity, the legislative history of FSIA makes clear that determinations of "claims by foreign states to sovereign immunity are *best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.*" H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, 14, *reprinted* in 1976 U.S.C.C.A.N. (90 Stat. 2891) 6604, 6613 (emphasis added). As the observance of *jus cogens* is the highest recognized standard of international law, it follows that Congress likely intended to incorporate a *jus cogens* exception into 28 U.S.C. § 1605(a)(1). Stated differently, because the observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation must (by definition) waive its traditional sovereign immunity for violating such fundamental standards "[by] the very fact that it is a state." *Smith*, 101 F.3d at 242 (quoting Adam C. Belsky *et al.*, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal. L. Rev. 365, 399 (1989)). At a minimum, if the FSIA applies to individuals at all, this exception should apply to individuals, including former officials, who are sued in the United States for violating *jus cogens* norms. *Cf. In re Estate of Ferdinand Marcos*, 25 F.3d at 1471-71 (concluding that FSIA immunity does not apply when individual officials are sued for violating *jus cogens* norms whereas FSIA immunity does apply

when the state itself is sued for violating *jus cogens* norms). Such an exception, whether defined broadly or narrowly, would give effect to fundamental principles of international law and recognize equally that a "state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign." Brief of *Amici Curiae* The Anti-Defamation League *et al.*, *quoted in Princz*, 26 F.3d at 1173.

Of course, recognizing that such an exception exists does not address how broadly it reaches, and leaves open the question of whether it applies in this case. Those issues are beyond the scope of this brief. *Amicus* urges that no matter how this case is decided, the Court should not issue a ruling that undermines the possibility of a *jus cogens* exception to the FSIA.

## II. AT LEAST ELEVEN DIFFERENT DOCTRINES OR PRINCIPLES KEEP ATS AND TVPA CLAIMS WITHIN APPROPRIATE BOUNDS, REGARDLESS OF THE APPLICATION OF THE FSIA TO PRESENT OR FORMER OFFICIALS

Amicus is aware of efforts by some to draw legitimate governments and their officials into U.S. courts for political purposes. However, developments in ATS and TVPA jurisprudence over recent years appear to ensure that there is no need to summon the FSIA to constrain an otherwise ungovernable ATS and TVPA. Existing doctrine already ensures that ATS and TVPA claims beyond the narrow categories Congress has allowed will be dismissed.

Amicus urges the Court, in its ruling, to take care to ensure that the doctrines and principles summarized below continue to protect defendants from politically-motivated ATS and TVPA claims. The relevant doctrines and principles are:

1. Political Questions;
2. Common Law Immunities;
3. The Law of Nations;
4. The Element of Intent;
5. Foreign State Action;
6. Failure to Establish a Recognized Basis for Liability;
7. Standing;
8. Appropriate Defendants;
9. Exhaustion of Remedies;
10. Forum Non Conveniens; and
11. Statutes of Limitations.

We address each of these doctrines or principles succinctly in the sections that follow.

### 1. Political Questions

A key threshold issue is whether ATS and TVPA claims present an unjusticiable political question. Courts have dismissed claims brought under both statutes as barred by the political question doctrine, which " 'excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution" to Congress or the Executive Branch. *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Japan Whaling Ass'n v. Am.*

*Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). This Court indicated in *Sosa* that the doctrine may apply, on a case-by-case basis, to claims arising under the ATS and TVPA. *Sosa*, 542 U.S. at 732, 733 n.21.

Where a case presents a nonjusticiable political question, courts are without the subject matter to decide it, and the doctrine has been regularly applied to ATS claims that implicate its core concerns. *See*, *e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) (dismissing, on political question grounds, ATS claim brought by family members whose relatives were killed or injured when Israeli Defense Forces demolished homes in the Palestinian Territories using bulldozers manufactured by and ordered directly from defendant, but paid for by the United States government).[5]

### 2. Common Law Immunities

As the United States urged this Court earlier this year in its *amicus* brief in *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859, common law immunities, quite apart from those provided by the FSIA, may provide a basis for a court to dismiss a

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[5] S*ee also Joo v. Japan*, 413 F.3d 45, 46, 49 (D.C. Cir. 2005) (dismissing on political question grounds claims by Chinese and other women "seeking money damages for [allegedly] having been subjected to sexual slavery and torture before and during World War II") (citing *Sosa*); *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1261 (D.C. Cir. 2006) (dismissing ATS and TVPA claims against the United States and former National Security Advisor for alleged human rights violations that occurred in Chile as a result of U.S. foreign policy because of the political question doctrine); *Bancoult*, 445 F.3d at 436-37 (dismissing ATS claims against the United States and individual members of the Departments of State and Defense for injuries sustained as a result of plaintiffs' forced relocation to make way for a military base).

claim brought pursuant to the ATS or TVPA. For instance, under the common law, an individual official is entitled to immunity for acts performed in his official capacity. *Matar*, 563 F.3d at 14 (citations omitted) (not deciding whether the FSIA supplies immunity to individuals, but holding that in any event it did not abrogate preexisting common law immunities for former officials, which are recognized with executive branch approval). Courts defer to the other branches of government, primarily the executive branch, for a determination as to whether a particular individual should be afforded immunity. *See id.*[6]

Similarly, "[a] head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States." *Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994). This immunity is premised on the precept that a head of state and his country are the

[6] Although the Court has held that "the [FSIA was designed] to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,' " *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) (citations omitted), that is the case only for foreign states, agencies, and instrumentalities within the FSIA's reach, and says nothing about whether that reach extends to individuals. The recognition by most of the circuit courts of appeal that common law immunities remain effective, and that they are subject to the determinations of the executive (*i.e.*, the State Department), reflects the understanding that the FSIA *reduced*, but could not and should not eliminate, the State Department's role with regard to civil suits against foreign officials which may, or may not, adversely affect our nation's international relations.

same for purposes of immunity, and similarly, that states may not exercise authority over one another. *See id.* at 132. The immunity recognizes that "[h]eads of state must be able to freely perform their duties at home and abroad without the threat of civil and criminal liability in a foreign legal system." *Id.*

In *Matar*, plaintiffs had been injured or represented those who had been injured or died after an Israeli aircraft bombed an apartment building in the Gaza Strip. *See* 563 F.3d at 11. The plaintiffs brought claims under the ATS and TVPA against Avraham Dichter, who, at the time of the attack, was the director of the Israeli Security Agency, one of Israel's primary intelligence organizations, and allegedly responsible for the attack on the apartment building. *See id.* The United States, through the State Department, submitted a statement of interest, urging the court to dismiss the action based upon the common law immunity of an official of a foreign state. *See id.* In affirming the dismissal, the Second Circuit focused on this statement of interest —recognizing the executive branch's prerogative to grant immunity to foreign officials. *See id.* at 14.

In *Lafontant*, a widow had commenced an action against the president of the Republic of Haiti, Jean-Bertrand Aristide, whom she alleged was responsible for the execution of her husband in Haiti. *See* 844 F. Supp. at 130. At the time the widow commenced her lawsuit (under both the ATS and TVPA), Aristide was living in the United States, having been exiled after a military coup. *See id.* Despite his exiled status, the United States continued to recognize Aristide as Haiti's lawful head-of-state. *See id.* Indeed, the Justice Department submitted a

statement of interest effectively urging the court to dismiss the case against Aristide on the basis of head-of-state immunity. *See id.* In dismissing the case, it was irrelevant to the court's decision that Aristide did not have *de facto* control over the government (as he had been ousted). *See id.* at 131. The key, for purposes of immunity, was that the United States recognized him as the lawful head-of-state. *See id.* at 132.

In holding that the FSIA did not abrogate the common law immunities, the court stated:

> The FSIA was not designed to apply to diplomatic or other consular officials. Instead, it was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in United States courts in connection with their commercial activities. The FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched.

*Id.* at 137; *see also Ye*, 383 F.3d at 625 (FSIA does not alter common law head-of-state immunity).

### 3. Scope of ATS Claims: The Law of Nations

In *Sosa*, this Court held that the ATS is a jurisdictional grant of power enacted with the understanding that "the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. at 724. But the scope

within which the "law of nations" affords ATS claims is tightly bounded:

> [F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted . . . And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.[7]

*Id.* at 732-33 (internal citations and quotations omitted). Although *Sosa* cautioned against creating private causes under the ATS, it left the door open—"ajar"—for such claims that have the kind of "definite content and acceptance among civilized nations [as did] the historical paradigms familiar when § 1350 was enacted." *Id.*

Courts since *Sosa* have identified various inquiries that guide decision as to whether a proffered international law norm provides a cause of action under the ATS: a proffered norm must be:

> (1) [ ] a norm of international character that States universally abide by, or accede to, out of a sense of legal obligation; (2) [ ] defined with a specificity comparable to the

[7] The *Sosa* court reasoned that piracy, violation of safe conducts, and infringement of rights of ambassadors all violated the law of nations at the time the ATS was enacted in 1789. *See id.* at 724.

> 18th-century paradigms discussed in *Sosa*; and (3) [ ] of mutual concern to States.

*Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009).[8]

Based on those criteria, drawn from this Court's admonition against the judicial expansion of causes of action available under the ATS, many cases brought pursuant to the ATS have been dismissed for failure adequately to state a violation of the law of nations.[9]

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[8] Sources of international law include:

> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

*Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 116 (2d. Cir. 2008) (citations omitted), *cert. denied*, 129 S. Ct. 1524 (2009).

[9] *See, e.g.*, *Vietnam Ass'n for Victims of Agent Orange*, 517 F.3d at 115 (use of Agent Orange for defoliation purposes during Vietnam War did not violate law of nations); *Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (failure of police to inform foreign national that he could contact his consulate after his arrest did not violate law of nations), *cert. denied*, 129 S. Ct. 397 (2008); *Taveras v. Taveraz*, 477 F.3d 767, 782 (6th Cir. 2007) (cross-border parental child abduction by custodial parent did not violate the law of nations); *Cisneros v. Aragon*, 485 F.3d 1226, 1230 (10th Cir. 2007) (violations of 18 U.S.C. §§ 2243(a) (statutory-rape) and § 2242(2) (having sexual relations with someone incapable of appraising the nature of the conduct or physically incapable of refusing to participate in the conduct did not violate the law of nations); *cf. Abdullahi*, 562 F.3d at 187 (medical testing on human subjects without their knowledge or

### 4. Scope of ATS Claims: Intent

Several ATS cases have been dismissed for plaintiffs' failure to adequately allege intent of the defendants, because certain kinds of conduct are simply not actionable under the ATS absent specific intent.

For instance, the Ninth Circuit affirmed the dismissal of a complaint brought under the ATS, in part, because the plaintiffs had failed to adequately allege intent. *See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 736 (9th Cir. 2008). Specifically, plaintiffs alleged that corporate manufacturers, distributors and users of a pesticide used along Africa's Ivory Coast were liable for genocide and crimes against humanity under the ATS. *See id.* at 731. The pesticide in question had been linked to male sterility and low sperm counts of local residents. *See id.* The Ninth Circuit reasoned that, because customary international law defines genocide as a "specific intent" crime, the plaintiffs needed to allege that intent (*i.e.*, that the defendants intended to destroy a particular population by their acts), but because plaintiffs failed to do so, the court affirmed the dismissal. *Id.* at 739.

The Second Circuit recently affirmed a dismissal of ATS claims brought by Sudanese citizens who alleged that a Canadian corporation had aided and abetted or conspired with the Sudanese government in violation of international law by committing acts of genocide, war crimes and crimes against humanity. *See Presbyterian Church of Sudan*, 582 F.3d at 256. Specifically at issue in the appeal was whether a claim for aiding and abetting (and conspiracy)

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consent violates the law of nations); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) ("deliberate torture perpetrated under color of official authority" violates the law of nations).

under the ATS must allege that the defendant acted with the intent to advance the abuses alleged. *See id.* at 257. The court first reasoned that in order to answer that question, it had to look at international law rather than U.S. law for the answer, because, under *Sosa*, that is how the ATS should be interpreted. *See id.* at 259 (stating that "[w]e agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability . . . Recognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."). After examining international law, the court held that an ATS claimant seeking to impose accessorial liability "must show that the defendant provided substantial assistance with the *purpose* of facilitating the alleged offenses." *Id.* at 247 (emphasis added); *see also id.* at 259. Utilizing that standard, the court further held that the plaintiffs had failed to allege that the defendant Canadian corporation had acted with the purpose of harming the citizens of Sudan in any way.

**5. "Foreign State Action"**

Action under color of the law of a foreign state is required for claims under the TVPA, and claims failing to plead it are subject to dismissal. A cause of action under the TVPA may be brought against "an[y] individual who, under actual or apparent authority, or color of law . . . , of any foreign nation . . . subjects an individual to torture." 28 U.S.C. § 1350(a)(1).

When a private individual is named as a defendant in a TVPA case, in order to satisfy the "foreign state action" requirement, the complaint must allege "a

symbiotic relationship" between the defendant and the government that involves the alleged torture or killing. *See Romero v. Drummond Co.*, 552 F.3d 1303, 1317-18 (11th Cir. 2008) (affirming dismissal of TVPA claim where "plaintiffs failed to offer evidence either that state actors were actively involved in the assassination of the union leaders or that the paramilitary assassins enjoyed a symbiotic relationship with the military for the purpose of those assassinations"). "The determination as to whether a non-state party acts under color of state law requires an intensely fact-specific judgment unaided by rigid criteria as to whether particular conduct may be attributable to the state." *Arar v. Ashcroft*, 585 F.3d 559, 564 (2d Cir. 2009) (dismissing claim where allegation was that defendants acted under color of United States law, not foreign law).

While the ATS contains no such statutory requirement, state actors are the main targets of ATS claims, and state action is required to establish some—although not all, *e.g.*, piracy—causes of action under the ATS. *Compare*, *Saleh v. Titan Corp.*, 580 F.3d 1, 14-15 (D.C. Cir. 2009) (rejecting idea that ATS claims may be brought against private entities), *Abagninin*, 545 F.3d at 736 (affirming dismissal of ATS claim for "crimes against humanity" where corporate defendants were neither state nor state-like organizations for purposes of international law), *with Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1267 (11th Cir. 2009) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual"), *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)

("certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals").

### 6. Failure to Establish a Recognized Basis for Liability

ATS and TVPA claims may be brought so long as a claimant is able to demonstrate that an individual accused of torture or other acts otherwise subject to actionable claims is either the direct perpetrator or otherwise liable as a principal under a recognized basis, including (but not limited to) "command responsibility." The litigant bears the burden of pleading and proving the necessary basis. *See*, *e.g.*, *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002)" (suggesting, although finding it unnecessary to decide, that plaintiffs in civil suits bear burden of establishing commander's "effective control" over troops who engaged in war crimes).

### 7. Standing

Under the TVPA, claims may be brought only by the victim or by the victim's representative. *See Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46, 55 (D.D.C. 2008). At least one court has held that a plaintiff who brings a claim on behalf of another does not have standing under the TVPA if the victim was not subjected to an extrajudicial killing, *i.e.*, is still alive. *See Doe v. Qi*, 349 F. Supp. 2d 1258, 1313 (N.D. Cal. 2004). In order for a claimant to have standing to assert a TVPA claim on behalf of another, the claimant must have standing to assert a wrongful death action, which is based upon the claimant's state of domicile. *See id.*

In *Fisher*, numerous plaintiffs brought claims under the TVPA based upon a terrorist airplane bombing. *See* 541 F. Supp. 2d at 49. Some plaintiffs brought claims on behalf of themselves, *i.e.*, injuries they suffered as a result of the loss of their loved ones. *See id.* at 55. The court held these plaintiffs did not have standing under the TVPA for these types of claims. *See id.* The court further dismissed the claims brought by individuals who did not have standing to bring wrongful death actions in their state of domicile. *See id.*

The ATS does not address standing, but courts have turned to the TVPA to address standing for these claims. *See Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455761, at *11 (N.D. Cal. Aug. 22, 2006) (holding that sibling plaintiffs did not have standing under the ATS because decedents had surviving parents and children).

**8. Proper Defendants**

In *Mohamad v. Rajoub*, the district court dismissed a TVPA claim brought against, *inter alia*, the Palestinian Authority (the "PA") and the Palestine Liberation Organization (the "PLO") on the basis that neither the PA nor the PLO are "individuals" as contemplated by the TVPA. *See* No. 08-1800 (RJL), ___ F. Supp. 2d ___, 2009 WL 3127206, at *1 (D.D.C. Sept. 30, 2009).

**9. Exhaustion of Remedies**

The TVPA includes a statutory exhaustion requirement, which provides that the court "shall decline to hear a claim under [the TVPA] if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the

claim occurred." 28 U.S.C. § 1350(2)(b). Exhaustion is not a jurisdictional prerequisite, but is rather an affirmative defense for which a responding party has the burden of proof. *See Jean*, 431 F.3d at 782. Once the responding party establishes that remedies have not been exhausted, then the " 'burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.' " *Mamani v. Berzain*, 636 F. Supp. 2d 1326, 1328 (S.D. Fla. 2009) (dismissing TVPA claim because plaintiff failed to rebut evidence of available remedy in Bolivia) (quoting S. Rep. No. 102-249, at 10 (1991)).

Although the ATS does not contain an explicit exhaustion requirement, s*ee Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 484 (D. Md. 2009), after *Sosa*, courts have understood one of *Sosa*'s footnotes to suggest that a judicial examination of exhaustion may be warranted in certain ATS cases. *See*, *e.g.*, *Sarei v. Rio Tinto*, *PLC*, 550 F.3d 822, 824 (9th Cir. 2008) ("[A] prudential or judicially-imposed exhaustion requirement for ATS claims 'would certainly [be considered] in an appropriate case.' ") (quoting *Sosa*, 542 U.S. at 733, n.21) (alteration in original). The Ninth Circuit further held that "in ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.' " *Id.* at 831. For purposes of the ATS, matters of "universal concern" include those such as torture, crimes against humanity and war crimes. *Id.* at 831.

### 10. Forum Non Conveniens

At least two recent ATS/TVPA cases have been dismissed on the common law doctrine of *forum non conveniens*. When a court determines that a matter would properly be adjudicated in a foreign court, it may dismiss on the basis of *forum non conveniens*. The test for whether to invoke the doctrine is:

> (1) the degree of deference afforded to the plaintiff's choice of forum; (2) whether the alternative forum is adequate; and (3) the balance of the public and private interests implicated in the choice of forum.

*Turedi v. Coca-Cola Co.*, No. 06-5464-cv, 2009 WL 1956206, at *1 (2d Cir. July 7, 2009) (dismissing a complaint alleging, *inter alia*, ATS and TVPA claims, based upon *forum non conveniens* where neither the defendants nor the plaintiffs were U.S. citizens and the alleged injuries stemmed from conduct occurring outside of the United States); *see also Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1300 (11th Cir. 2009) (affirming dismissal of ATS and TVPA claims based upon *forum non conveniens*).

### 11. Statute of Limitations

There is a ten year statute of limitation under both the ATS and TVPA. *See Chavez*, 559 F.3d at 492 (collecting cases). Like other statutes of limitations, it can be equitably tolled. *See Jean*, 431 F.3d at 779; *Chavez*, 559 F.3d at 492-93 (quoting S. Rep. No. 102-249, at 10-11 (1991)). Statutes of limitations, however, should be strictly enforced:

> Mere ambient conflict in another country does not, by itself, justify tolling for suits

> filed in the United States. From the standpoint of the United States, many countries oppress their citizens today, and many countries have oppressed their citizens in decades and centuries past. A lenient approach to equitable tolling would revive claims dating back decades, if not centuries, when most or all of the eye witnesses would no longer be alive to provide their accounts of the events in question.

*Arce*, 434 F.3d at 1265 (circumstances of the case justified the equitable tolling of the statute of limitations).

* * *

The pre-and post-*Sosa* cases cited above reflect that case law addressing ATS and TVPA claims already contains multiple strands of doctrine that can be used to dispatch cases that lack legal merit, or to obtain, and be guided by, the views of the executive branch where foreign relations might be adversely affected. At present, existing doctrine seems ample to serve both the purposes for which Congress enacted the ATS and the TVPA, and the limits to those claims that this Court has discerned Congress surely intended. The Court's decision in *Sosa* has led to careful consideration of ATS/TVPA claims so as to serve Congress's varied intentions. *Amici* are doubtful that the FSIA needs to be wrenched past its plain wording to serve ends that at present are well-served by other doctrines applicable to these cases.

## CONCLUSION

Regardless of how the Court decides the question presented, it should maintain the effectiveness of the Alien Tort Statute and the Torture Victims Protection Act of 1991, as previously construed by this Court, in providing justice, and genuine remedies, for those harmed by torture or violations of fundamental human rights abuses while, at the same time, protect the ability of lower courts to dismiss meritless claims brought for political or other improper purposes.

Respectfully submitted,

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