## KIOBEL THREE YEARS ON: ALIEN TORT STATUTE SCOPE AND LITIGATION TRENDS

#### TRANSNATIONAL LITIGATION GROUP WEBCAST

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#### **ATS Lawsuits On the Rise**

- According to the U.S. Chamber of Commerce: Plaintiffs have filed over 150 ATS lawsuits against corporations.
- The lawsuits cover over 20 industry sectors, including agriculture, financial services, manufacturing and communications.
- Dozens of major U.S. corporations have been targeted, particularly with respect to their activities in developing and post-conflict countries.
- More than 50% of the companies listed on the Dow Jones have been named as defendants in ATS cases.

### Roadmap

- Supreme Court jurisprudence
- Issues Resolved by the Supreme Court
- Open Issues / Circuit Splits Following *Kiobel* 
  - Corporate Liability
  - Extraterritoriality
  - Actionable Conduct
  - Aiding & Abetting Liability
- Alternatives to the ATS Under Federal and State Law

### 28 U.S.C. § 1350 Alien Tort Statute or Alien Tort Act

- Enacted by the First Congress as part of the Judiciary Act of 1789:
  - ✓ "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
  - ✓ Has been addressed by the Supreme Court on two occasions, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (U.S. 2013).

### Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)

- ATS is jurisdictional only. 542 U.S. at 712.
- The Supreme Court rejected the notion that only those violations of the law of nations recognized at the time the ATS was enacted in 1789 were actionable.
- Holding: "Federal 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 [the ATS] was enacted." *Id.* at 733.
- The Court declined to recognize a claim for "arbitrary arrest and detention," on the ground that it failed to state a violation of the law of nations with the requisite "definite content and acceptance among civilized nations." *Id*.

#### Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (U.S. 2013)

- Second Circuit held that corporations cannot be held liable for violations of customary international law, but did not foreclose using the ATS against a corporation's employees and directors.
- The Supreme Court affirmed on extraterritoriality grounds.
- The Supreme Court declined to decide whether corporations may be held liable.

#### Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (U.S. 2013)

- Five justices—Justices Roberts, Scalia, Kennedy, Thomas, and Alito—concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption.
- The Court held that "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. *See Morrison*, 561 U.S. 247, 120 S. Ct., at 2883-2888."
  - ✓ Note that the concurrence by Justice Alito (joined by Justice Thomas) emphasizes that the conduct constituting the violation of international law that forms the basis for an ATS claim must occur in the U.S.

### Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (U.S. 2013)

- Four justices—Justices Breyer, Ginsburg, Sotomayor, and Kagan—concurred in the result but held that the presumption against extraterritorial application did not apply.
- However, not all extraterritorial applications are permissible. In reliance on the Restatement (Third) of Foreign Relations Law, Section 402, the plurality concluded that the ATS provides jurisdiction when:
  - the tort occurs on American soil, or
  - the defendant is an American national, or
  - the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

#### Issues Resolved by Sosa and Kiobel

- The ATS is jurisdictional only.
- Actionable offenses will not be limited to those existing at the time the ATS was enacted.
- An extraterritorial component to the claim will not automatically bar it.

#### Unresolved Issues / Circuit Splits After Sosa and Kiobel

## **Corporate Liability**

Extraterritoriality
Actionable Conduct
Aiding & Abetting Liability

#### Can Corporations Be Held Liable Under the ATS?

- The text of the statute is not informative on this point:
  - "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
- In the caselaw, application of international law to corporations remains uncertain and may depend on the violation alleged:
  - In footnote 20 of *Sosa*, the Court noted that "a related consideration is whether *international law* extends the scope of liability for a violation of *a given norm* to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual." *Sosa*, 542 at 732 n. 20, 124 S.Ct. 2739 (emphasis added).
    - Justice Breyer's concurrence also noted that "[t]he norm [of international law] must extend liability to the *type of perpetrator* (*e.g.*, a private actor) the plaintiff seeks to sue." *See id.* at 760, 124 S.Ct. 2739.

#### The Supreme Court Declines to Address the Issue in *Kiobel*

- The Supreme Court initially agreed to hear *Kiobel* to resolve a split among lower courts on whether corporations can be sued under ATS but declined to reach the issue, deciding the case based on the extraterritorial reach of the ATS instead.
- The plurality opinion in *Kiobel* mentions corporations but doesn't address whether they can be liable under the ATS: "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." 133 S.Ct. 1659, 1669.

## Second Circuit Finds No Liability for Corporations Under the ATS

- The Second Circuit held in *Kiobel I* that the ATS does *not* apply to corporations. *See* 621 F.3d 111, 145 (2d Cir. 2011) (*Kiobel I*).
- The court relied on footnote 20 in *Sosa* to apply international law.
  - "Customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for violation of the law of nations." *Id.* at 120.
  - "[N]o corporation has ever been subject to *any* form of liability under the customary international law of human rights, and thus the ATS, the remedy Congress has chosen, *simply does not confer jurisdiction over suits against corporations.*" *Id.* at 121.
- Liability still possible against corporate officers, employees, agents, "or any other person who commits, or purposefully aids and abets, violations of international law." *Id.* at 122.

#### Kiobel I, Judge Leval Concurrence

• Judge Leval criticized the majority's reasoning:

"The new rule offers to unscrupulous businesses advantages of incorporation never before dreamed of. So long as they incorporate (or act in the form of a trust), businesses will now be free to trade in or exploit slaves, employ mercenary armies to do dirty work for despots, perform genocides or operate torture prisons for a despot's political opponents, or engage in piracy—all without civil liability to victims. By adopting the corporate form, such an enterprise could have hired itself out to operate Nazi extermination camps or the torture chambers of Argentina's dirty war, immune from civil liability to its victims." *Kiobel*, 621 F.3d at 150.

• He concurred with the ruling, finding that plaintiffs did not state a cause of action under federal pleading standards.

### Second Circuit Maintains Its Position on Corporate Liability

- Numerous panels of the Second Circuit have followed *Kiobel* on this point, rejecting the notion that the Supreme Court implicitly overruled this holding by deciding *Kiobel* on other grounds.
  - *Balintulo v. Daimler AG*, 727 F.3d 174,191 n.26 (2d Cir. 2013) ("The law of this Circuit already provides answers to some of those questions, including the principle that corporations are not proper defendants under the ATS in light of prevailing customary international law")
  - *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 49 n.6 (2d Cir. 2014) ("*Kiobel* did not disturb the precedent of this Circuit that corporate liability is not presently recognized under customary international law and thus is not currently actionable under the ATS")
  - *Mastafa v. Chevron Corp.*, 770 F.3d 170, 177 (2d Cir. 2014) (*Kiobel* "did not address, much less question or modify, the holding on corporate liability under the ATS...in the Second Circuit's *Kiobel* opinion")

# Seventh, Ninth, Eleventh (and likely DC) Circuits – Corporations May Be Liable Under the ATS

- Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1019 (7th Cir. 2011) ("If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, ...then a fortiori if the board of directors of a corporation directs the corporation's managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable.")
- *Doe v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014) (affirming the *en banc* reasoning in *Sarei v. Rio Tinto*, 671 F.3d 736, 748 (9th Cir. 2011), that "corporate liability ultimately turns on an analysis of the norm underlying the ATS claim")
- Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008) ("the text of the [ATS] provides no express exception for corporations, and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants")
- In a decision that was later vacated in light of *Kiobel*, the D.C. Circuit also held that corporations could be liable under the ATS, with Judge Kavanaugh dissenting. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011). Because *Kiobel* did not address that issue, and the district court later followed this aspect of the opinion, it may be considered good law on that issue.

## Flomo v. Firestone Nat'l Rubber Co. – Seventh Circuit Holds Corporations Can Be Liable

- Judge Posner did not find the lack of precedent for finding corporations liable for violations of international law persuasive: "We have to consider *why* corporations have rarely been prosecuted criminally or civilly for violating customary international law; maybe there's a compelling reason. But it seems not; it seems rather that the paucity of cases reflects a desire to keep liability, whether personal or institutional, for such violations within tight bounds by confining it to abhorrent conduct—the kind of conduct that invites criminal sanctions." 643 F.3d 1013, 1018 (7th Cir. 2011).
- "It is neither surprising nor significant that corporate liability hasn't figured in prosecutions of war criminals and other violators of customary international law. That doesn't mean that corporations are exempt from that law." *Id.* at 1019.

## Sarei v. Rio Tinto PLC – Ninth Circuit Conducts a Norm-by-Norm Analysis

- The Ninth Circuit adopted the D.C. Circuit's reasoning in *Doe v. Exxon Mobil*, looking at both congressional intent and international law, holding that the text and legislative history of the ATS did not suggest that corporate liability was intended to be excluded. 671 F.3d 736, 748 (9th Cir. 2011).
- Courts should undertake a norm-by-norm analysis to see whether corporations are subject to the norms underlying a claim under international law: "Sosa expressly frames the relevant international-law inquiry to be the scope of liability of private actors for a violation of the 'given norm,' i.e. an international-law inquiry specific to each cause of action asserted." *Id*.
- The Supreme Court vacated this ruling and remanded in light of *Kiobel*. The Ninth Circuit *en banc* affirmed the district court's ruling, which dismissed the ATS claims.

#### Doe v. Nestle USA, Inc. - Ninth Circuit Follows Sarei

- The Ninth Circuit continues to follow *Sarei* after the Supreme Court's decision in *Kiobel*:
  - 1. Norm-by-norm analysis— "there is no categorical rule of corporate immunity or liability."
  - 2. "Corporate liability under the ATS does not depend on the existence of international precedent enforcing legal norms against corporations."
  - 3. "Norms that are 'universal and absolute,' or 'applicable to all actors' can provide the basis for a claim against a corporation." 766 F.3d 1013, 1021-22 (9th Cir. 2014).

## Doe v. Exxon Mobil Corp. – DC Circuit Applies Common Law, Holds Corporations Can be Liable – Opinion Vacated

- "Sosa neither addressed the question presented by Exxon's claim of corporate immunity, nor provided guidance on which body of law a court must draw to answer questions ancillary to the cause of action itself, such as corporate liability." 654 F.3d 11, 50 (D.C. Cir. 2011), vacated in part by 527 Fed. App'x 7 (2013).
- "The majority in *Kiobel* not only ignores the plain text, history, and purpose of the ATS, it rests its conclusion of corporate immunity on a misreading of footnote 20 in *Sosa* while ignoring *Sosa*'s conclusion that *federal common law would supply the rules regarding remedies*, inasmuch as all claims under the ATS are federal common law claims." *Id.* at 54-55.
- "The law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents." *Id*.
- "[C]orporate liability is a universal feature of the world's legal systems and [] no domestic jurisdiction exempts legal persons from liability." *Id.* at 53.

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#### Conclusion: Corporate Liability Under the ATS

- A circuit split exists on whether corporations can be held liable under the ATS.
- Courts also disagree on the appropriate source of law to determine corporate liability federal common law or international law.
- Courts disagree on whether *Sosa* requires a norm-by-norm analysis.
- Corporate defendants should preserve this issue for Supreme Court review.

#### Unresolved Issues / Circuit Splits After Sosa and Kiobel

**Corporate Liability** 

Extraterritoriality

**Actionable Conduct** 

Aiding & Abetting Liability

#### Refresher on Morrison v. National Australia Bank Ltd.

- Holding: Presumption against extraterritorial reach of federal laws applied to Section 10(b) of the Securities Exchange Act of 1934. Presumption was not overcome by any clearly expressed intent of Congress. 561 U.S. 247 (2010).
- Whether an application of a statute is impermissibly extraterritorial depends on what conduct was the "focus" of Congressional concern in enacting the statute.
  - The "focus" of the Exchange Act was the purchase and sale of securities taking place in the U.S., or of securities listed on domestic exchanges.
  - Applied to "foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges," the case called for an impermissible extraterritorial application of the law.
- The reach of the statute is a merits question (subject to a motion to dismiss under FRCP 12(b)(6)), not a question of jurisdiction (subject to a motion to dismiss under FRCP 12(b)(1)).

#### Kiobel: The Presumption Applies to the ATS Also

- In the Supreme Court's ruling in *Kiobel*, 5 justices—Justice Roberts, Scalia, Kennedy, Thomas, and Alito—concluded that the presumption against extraterritoriality applied to claims ATS. The Court noted that "We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad," but held that "the principles underlying the canon of interpretation similarly constrains courts considering causes of action that may be brought under the ATS."
- The Court held that "In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality." 133 S. Ct. at 1666.

# Actionable Claims May Still Have a Foreign Component

- With a "see" cite to *Morrison*, the Court held that "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. at 1669.
- Justice Kennedy noted in a one-paragraph concurrence that "the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," and that "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation" in future cases. *Id.* Justice Kennedy did not cite to *Morrison*.

#### Kiobel Justice Alito Concurrence: Focus on U.S. Conduct

- Justice Alito, joined by Justice Thomas, concurred to provide further guidance on application of the "focus" test used in *Morrison* to claims under the ATS. According to the concurrence, *it is the domestic conduct itself that must be sufficient to violate an international law norm* that satisfies *Sosa*'s requirements.
- "[O]nly conduct that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations can be said to have been the focus of congressional concern when Congress enacted the ATS. As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—*unless the domestic conduct is sufficient to violate an international law norm* that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."

## Kiobel Justice Breyer Concurrence: Presumption Does Not Apply

- A plurality of four justices supported Justice Breyer's concurrence that the presumption against extraterritoriality does <u>not</u> apply to the ATS and that a court can exercise jurisdiction when:
  - (1) the alleged tort occurs on American soil,
  - (2) the defendant is an American national, or
  - (3) the defendant's conduct substantially and adversely affects an important American national interest, including an interest in preventing the United States from becoming a safe harbor for a torturer or other common enemy of mankind.

#### Questions Post-Kiobel Questions Regarding Extraterritoriality

- Is "touch and concern" a new test or a reference to *Morrison's* "focus" test?
  - ✓ "Touch and concern" has not previously appeared in previous ATS cases.
- Even if the extraterritorial reach of a statute is a merits question where that statute regulates conduct (as in *Morrison*), is it a question of subject matter jurisdiction where the statute regulates jurisdiction, as does the ATS?

# Baloco v. Drummond – Eleventh Circuit Applies Morrison Plus

- The Eleventh Circuit affirmed the district court's dismissal, finding that plaintiffs' claims were barred by *Kiobel*. 767 F.3d 1229 (11th Cir. 2014).
- "[A]lthough the two [defendants] are United States nationals, the majority in *Kiobel* did not place significant weight on the defendants' nationality; certainly none sufficient to warrant the extraterritorial application of the ATS to situations in which the alleged relevant conduct occurred abroad." *Id.* at 1236.
- "Assuming, without deciding, that the 'relevant conduct' inquiry extends to the place of decision-making—as opposed to the site of the actual 'extrajudicial killing'—the allegations in the First Amended Complaint still fall short of the minimum factual predicate warranting the extraterritorial application of the ATS." *Id*.
- Court cited *Morrison* and concluded that the claims were barred by *Kiobel* because plaintiffs did not allege "conduct focused in the U.S." *Id.* at 1239.

## Mastafa v. Chevron – Second Circuit Applies Morrison Plus

- The Second Circuit affirmed the district court's dismissal based on *Kiobel*, applying *Morrison*'s focus test as part of its analysis, holding that "in determining whether the ATS confers on a federal court jurisdiction over a particular case, a district court must isolate the 'relevant conduct' in a complaint." 770 F.3d 170, 185 (2d Cir. 2014).
- "The phrase 'relevant conduct' in *Kiobel* referred, at all times and '[i]n all cases,' to the conduct constituting the alleged offenses under the law of nations." *Id.* at 184.
- "[I]n order to displace the presumption against extraterritoriality and establish federal subject matter jurisdiction over an ATS claim, the complaint must plead: (1) conduct of the defendant that 'touch[ed] and concern[ed]' the United States with sufficient force to displace the presumption against extraterritoriality, *and* (2) that the *same conduct*, upon preliminary examination, states a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations." *Id.* at 187. The second part of this test has been called a "peek at the merits."
- "[N]either the U.S. citizenship of defendants, nor their presence in the United States, is of relevance for jurisdictional purposes." *Id.* at 188 & n.14.

# Al Shimari v. CACI Premier Technology – Fourth Circuit Treats "Touch and Concern" as a New Test

- The Fourth Circuit reversed district court's dismissal on the basis of *Kiobel*. The court stated it was "applying the fact-based inquiry articulated by the Supreme Court in *Kiobel*," requiring the court to "consider all the facts that give rise to the ATS claims, including the parties' identities and their relationship to the causes of action." 758 F.3d 516, 520 (2014).
- The court described the analysis in Justice Alito's concurrence as "far more circumscribed than the majority opinion's requirement that 'the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 527.
- "[T]he clear implication of the Court's 'touch and concern' language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory." *Id.* at 528.

# Doe v. Nestle USA, Inc. – Ninth Circuit Treats "Touch and Concern" as a New Test

- "Morrison may be informative precedent for discerning the content of the touch and concern standard, but the opinion in Kiobel II did not incorporate Morrison's focus test. Kiobel II did not explicitly adopt Morrison's focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt." Doe v. Nestle USA, Inc., 766 F.3d 1013, 1028 (9th Cir. 2014).
- The Ninth Circuit did not decide whether plaintiffs' claims were impermissibly extraterritorial, rather it remanded to permit plaintiffs to amend their complaint in light of the Supreme Court's ruling in *Kiobel*. *Id*. at 1029.
- In dissent, Judge Rawlinson noted that she "d[id] not agree with the majority that the Supreme Court 'did not incorporate *Morrison*'s focus test.' Why else would the Supreme Court direct us to *Morrison* precisely when it was discussing claims that allegedly 'touch and concern' the United States?" *Id.* at 1035.

# Is the Extraterritorial Reach of the ATS a Question of Subject Matter Jurisdiction?

- The Court held in *Morrison* that §10(b)'s extraterritorial reach was a question of the merits, not subject-matter jurisdiction, noting that: "to ask what conduct §10(b) reaches is to ask what conduct §10(b) prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, refers to a tribunals' power to hear a case." 561 U.S. 247, 254 (2010).
- The ATS is a jurisdictional statute. In *Kiobel*, the Supreme Court framed the ATS's extraterritorial reach as one of whether a court has "power" to hear a case: "The principles underlying the presumption against extraterritoriality [] constrain courts exercising their power under the ATS." 133 S. Ct. 1659, 1665 (2013).
- "[J]ust as we have looked to established international substantive norms to help determine the statute's substantive reach, so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope." Kiobel, 133 S. Ct. 1659, 1673 (2013) (Breyer, J., concurring).

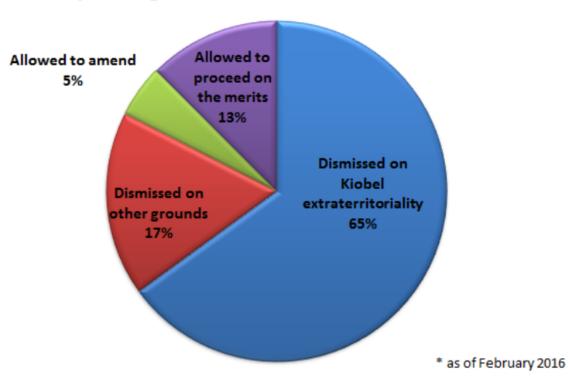
# Several Courts Have Treated Extraterritoriality as a Question of Subject Matter Jurisdiction

- "[T]he presumption against extraterritorial application bars the exercise of subject matter jurisdiction over the plaintiffs' ATS claims unless the 'relevant conduct' alleged in the claims 'touch[es] and concern[s] the territory of the United States with sufficient force to displace the presumption." *Al Shimari*, 758 F.3d at 528.
- "[W]e begin by assessing whether the ATS grants us jurisdiction over plaintiffs' action. In light of the singular character of the ATS as a jurisdictional statute that derives its substantive meaning from customary international law, there are numerous jurisdictional predicates, all of which must be met before a court may properly assume jurisdiction over an ATS claim. For a district court, these jurisdictional inquiries include . . . the presumption against the extraterritorial application of the ATS, announced by the Supreme Court in *Kiobel*." *Mastafa*, 770 F.3d at 179.

### Extraterritoriality and the ATS

- Many ATS lawsuits are dismissed on this ground.
- A U.S. Chamber of Commerce analysis from 2015 found that of the 40 ATS lawsuits that were pending when *Kiobel* was decided, about 65% have been dismissed on extraterritoriality grounds. 17% were dismissed on other grounds.

# Disposition of the 40 ATS cases that were pending at the time of *Kiobel* decision\*



# Some Claims Involving Foreign Conduct May Get Traction

- 1. Krishanti v. Rajartnam, 2014 WL 1669873 (D.N.J. Apr. 28, 2014) (actions in the U.S. included hosting of meetings and fundraisers for foreign terrorist organization and forming corporations to facilitate further donations).
- 2. Sexual Minorities Uganda v. Lively, 960 F.Supp.2d 304, 321 (D. Mass. 2013) (claim against U.S. citizen who assisted, managed, and advised Ugandan government in drafting bill to impose the death penalty for homosexuality).
- 3. Mwani v. Bin Laden, 947 F.Supp.2d 1, 5 (D.D.C. 2013) (claims brought by foreign nationals injured in a foreign terrorist attack against a U.S. embassy in a foreign state).
- 4. Al Shimari v. CACI Premier Tech., 758 F.3d 516 (4th Cir. 2014) (claims against U.S. corporation that provided interrogators who worked at Abu Ghraib prison during U.S. military operations in Iraq and allegedly engaged in torture and aided torture of captives).
- 5. Ahmed v. Magan, 2013 WL 4479077 (S.D. Ohio Aug. 20, 2013) (claim against U.S. legal resident for arbitrary detention in Somalia and subject to cruel, inhuman, or degrading treatment).

### Extraterritoriality: Recap

- Circuit Split on what the appropriate test is for extraterritoriality for claims brought under the ATS *Morrison*'s focus test or a new "touch and concern" test that the Supreme Court did not describe?
  - The Second and Eleventh Circuits have applied *Morrison* as well as other aspects of the Court's opinion in *Kiobel*.
  - The Ninth and Sixth Circuits have held that "touch and concern" means something besides *Morrison*.
- Regardless of the test, many ATS cases are dismissed on extraterritoriality grounds.

# Unresolved Issues / Circuit Splits After Sosa and Kiobel

Corporate Liability Extraterritoriality

**Actionable Conduct** 

Aiding & Abetting Liability

### What Violations of International Law Will Be Actionable?

• "The district courts shall have original jurisdiction of any civil action . . . for a **tort only, committed in violation of the law of nations or a treaty** of the United States."

### What Violations of International Law Will Be Recognized?

- The Supreme Court addressed this issue in *Sosa*:
  - The "law of nations" as of the enactment of the ATS encompassed (1) the violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy. *Sosa*, 542 U.S. at 715.
  - "Federal 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 [the ATS] was enacted." Id. at 733.
  - "[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.
- In his concurrence, Justice Breyer recognized four additional offenses as sufficiently definite and accepted to be recognized: (4) torture; (5) genocide; (6) crimes against humanity; (7) war crimes. *Id.* at 762.

### Sources of International Law

- Treaties, Conventions, sources of law followed by international tribunals, decisions of international tribunals
- Article 38 of the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 99, recognizes the following sources of international law:
  - a. international conventions;
  - b. international custom;
  - 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.
- "Agreements or declarations that are merely aspirational, and that do not impose obligations as a matter of international law, are of "little utility" in discerning norms of customary international law." *Kiobel I*, 621 F.3d 111, 131 (2d Cir. 2010) (citing *Sosa*, 542 U.S. at 734).

### Customs and Usages

• "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the *customs* and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." Sosa, 542 U.S. at 733–34.

# Courts Have Recognized the Following as Actionable Violations of International Law Under the ATS

- Genocide
- War crimes
- **Summary execution** (*Mwai v. Laden*, 947 F.Supp.2d 1 (D.D.C. 2013) (an attack on the U.S. embassy in Nairobi "touches and concerns" the U.S. with sufficient force to displace the presumption against extraterritoriality)).
- **Terrorism** (*Krishanti v. Rajartnam*, 2014 WL 1669873 (D.N.J. Apr. 28, 2014) (ATS claim brought against U.S. citizens and U.S. organization that organized and funded terrorist bombings in Sri Lanka)).
- Cruel, inhuman, or degrading treatment
- **Slavery** (*Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1022 (9th Cir. 2014) ("the prohibition against slavery is universal and may be asserted against the corporate defendants in this case")).
- **Persecution on the basis of sexual orientation** (*Sexual Minorities Uganda v. Lively*, 960 F.Supp.2d 304 (D. Mass. 2013) ("Widespread, systematic persecution of LGBTI people constitutes a crime against humanity that unquestionably violates international norms.")).

# **Unresolved Issues / Circuit Splits After Sosa and Kiobel**

Corporate Liability
Extraterritoriality
Actionable Conduct

Aiding & Abetting Liability

# The Standard for Aiding and Abetting Liability Under the ATS.

- Plaintiffs often rely on aiding and abetting liability against corporate defendants.
- Courts are split as to the scienter or "mens rea" required for aiding and abetting liability, with some courts holding that aiding and abetting liability requires that the defendant have acted with the purpose of facilitating the alleged offense, while other courts have held that acting with knowledge of the offense suffices.
- Courts also differ on whether federal common law or international law is the appropriate source of law on this issue.

# Khulumani v. Barclay Nat. Bank Ltd. – Defendant Must Act "with Purpose" to Facilitate the Offense

- In *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam), Judge Katzmann analyzed the standard for aiding & abetting liability (unanimous as to this portion of the analysis).
  - Looked to international law for the appropriate standard.
  - Noted that Sosa requires that a norm obtain universal acceptance before forming the basis for liability under the ATS. 542 U.S. at 732.
  - Relied on the Rome Statute of the International Criminal Court to hold that purpose is required: "[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."

# Khulumani v. Barclay Nat. Bank Ltd. – Defendant Must Act "with Purpose" to Facilitate the Offense

- The Rome Statute is a treaty "signed by 139 countries and ratified by 105, including most of the mature democracies of the world." As such, it could be taken "as constituting an authoritative expression of the legal views of a great number of States." 504 F.3d 254, 276 (2d Cir. 2007).
  - The U.S. has not ratified the Rome Statute.
- The court noted that the "with purpose" requirement was also consistent with international criminal tribunal rulings, while former Yugoslavia and Rwanda tribunal decisions supporting a knowledge standard were not sufficiently well-established or universal. *Id*.

# Presbyterian Church of Sudan v. Talisman Energy, Inc. - Second Circuit Follows Khulumani

- The Second Circuit followed *Khulumani* in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), and several times thereafter.
- "There is evidence that southern Sudanese were subjected to attacks by the Government, that those attacks facilitated the oil enterprise, and that the Government's stream of oil revenue enhanced the military capabilities used to persecute its enemies. But if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts. Such measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations."

# Aziz v. Alcolac, Inc. – Fourth Circuit Also Requires Purpose, Equating It to "Specific Intent"

- In *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 400-01 (4th Cir. 2011), the Fourth Circuit held that purpose was required: "[W]e hold that for liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation." *Id.* at 401.
- "[A]dopting the specific intent *mens rea* standard for accessorial liability explicitly embodied in the Rome Statute hews as closely as possible to the *Sosa* limits of 'requir[ing] any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized."

# Doe v. Nestle USA, Inc. – Ninth Circuit Declines to Decide Whether Standard Is Knowledge or Purpose

- The "knowledge standard dates back to the Nuremberg tribunals" and "has also been embraced by contemporary international criminal tribunals." 766 F.3d 1013 (9th Cir. 2014).
- The court declined to decide what standard applied, holding plaintiffs' allegations satisfied the more stringent purpose standard. *Id.* at 1024.
- "[D]efendants allegedly intended to support the use of child slavery as a means of reducing their production costs. In doing so, the defendants sought a legitimate goal, profit, through illegitimate means, purposefully supporting child slavery. . . . a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery. These allegations are sufficient to satisfy the *mens rea* required of an aiding and abetting claim under either a knowledge or purpose standard." *Id.* at 1025-26.

# Doe v. Nestle USA, Inc. - Judge Rawlinson Dissents

- Drawing on the Supreme Court's decision in *Sosa*, which cautioned courts to take a "narrow" and "modest" approach to recognizing violations of international law under the ATS, the Second Circuit's decision in *Talisman*, and the Fourth Circuit's decision in *Aziz*, Judge Rawlinson concluded aiding and abetting requires the defendant have acted with purpose. 766 F.3d 1013 (9th Cir. 2014).
- Judge Rawlinson noted that Plaintiffs admitted they could not satisfy a "purpose" standard. *Id.* at 1029.
- "Piling inference upon inference, the majority contends that the allegations that the defendants placed increased revenues before human welfare and acted with the intent to reduce the cost of purchasing cocoa, 'support the inference that the defendants acted with the purpose to facilitate child slavery." *Id.* at 1031 (quoting Majority Opinion at 1024).
- Such inferences were implausible under *Iqbal*. *Id*. at 1032.

# Doe v. Exxon – DC Circuit Holds "Knowledge" Is Sufficient But Decision Is Vacated

- The DC Circuit also looked to international law as a source for the relevant standard, the D.C. Circuit held the Rome Statute must be viewed as a treaty and not as customary international law, and because the U.S. had not ratified it, it was not binding on the U.S. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 35 (D.C. Cir. 2011).
- Moreover, the court noted that even the Rome Statute art. 25(3)(d) imposes liability on anyone who "contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" where such contribution is "intentional" and "made in the *knowledge* of the intention of the group to commit the crime." *Id.* at 37.
- The International Criminal Tribunals for Yugoslavia and Rwanda have applied a knowledge standard, which constitute customary international law. *Id.* at 38.
- This decision was vacated and remanded in light of *Kiobel*, but the district court subsequently followed it as to this point.

# Doe v. Exxon – Applying Knowledge Standard, District Court Permits Aiding and Abetting Claims to Proceed

• The district court denied Exxon's motion to dismiss, holding plaintiffs had alleged the *mens rea* and *actus reus* for aiding and abetting based on allegations that 1) Exxon executives had made decisions about providing resources to Exxon security personnel; 2) executives approved plans that put security personnel in close proximity to villagers; and 3) security personnel used Exxon facilities and supplies in committing human rights abuses. *Doe v. Exxon Mobil Corp.*, 2015 WL 5042118, at \*15 (D.D.C. July 6, 2015).

### Aiding and Abetting: Recap

- Plaintiffs often rely on aiding and abetting liability in ATS claims against corporations.
- Courts are split on whether "purpose" or only "knowledge" is required, and what exactly purpose means is it specific intent or something less?
- The Second and Fourth Circuits have held that aiding and abetting liability requires showing that the defendant substantially assisted a violation of international law with the purpose of facilitating the commission of the offense.
- The Ninth Circuit has declined to decide whether knowledge or purpose applies. The DC Circuit applied knowledge in a vacated opinion, subsequently followed by the district court.

# Alternatives to the ATS Under Federal & State Law

### Alternatives to the ATS

- Federal law:
  - Torture Victim Protection Act of 1991, 18 U.S.C. § 1350 note
  - Trafficking Victims Protection Act, 18 U.S.C. § 1589 et seq.
  - Anti-Terrorism Act, 18 U.S.C. § 2331 et seq.
- State law claims:
  - Wrongful death, assault, battery, intentional infliction of emotional distress, etc.
  - Violation of California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.
  - Violation of state constitution

### Torture Victim Protection Act of 1991

- Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102–256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note).
- Creates a civil damages remedy against "[a]n *individual*, who, under actual or apparent authority, or color of law, of any foreign nation ... subjects *an individual* to torture ... or ... extrajudicial killing." *Id.* § 2(a)(1)-(2) (emphases added).
- In *Sosa*, the Supreme Court characterized the TVPA as "supplementing" the ATS, not replacing it. 542 U.S. at 731, 124 S.Ct. 2739.
- Does not apply to corporations. *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702, 1705 (2012) ("We hold that the term 'individual' as used in the Act encompasses only natural persons. Consequently, the Act does not impose liability against organizations.")
- Exhaustion requirement. TVPA §§ 2(b), 2(c), 28 U.S.C. § 1350 (note).

# Torture Victim Protection Act: Indirect Liability Available

- TVPA plaintiffs may invoke a range of theories of liability: "since domestic law sets the standards for the TVPA, secondary or indirect theories of liability recognized by U.S. law are available for claims brought under the TVPA." *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 607 (11th Cir. 2015).
- The TVPA contemplates liability against those who did not "personally execute the torture or extrajudicial killing." *Mohamad*, 132 S.Ct. at 1709; *Aldana*, 416 F.3d 1242, 1248 (11th Cir. 2005)("[T]he [TVPA] reaches those who ordered, abetted, or assisted in the wrongful act."); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, 52 (2d Cir. 2014) (noting that agency law "can provide a theory of tort liability if a defendant did not personally torture the victim"); *Drummond*, 782 F.3d at 610 ("we do not foreclose the possibility that, under different circumstances, the doctrine of command responsibility may afford a basis for liability of a private corporate officer in a TVPA claim.").

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# Trafficking Victims Protection Act

Amended in 2003 to create a private right of civil for victims of trafficking: "An individual who is a victim of a violation may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees." 18 U.S.C. § 1595(a). Section 1595 became effective on December 19, 2003. *See* Pub.L. 108–193, 117 Stat. 2878 (2003) (codified as amended at 18 U.S.C. § 1589 et seq.).

### Trafficking Victims Protection Act

- Prohibits trafficking in persons for forced or slave labor and applies to "Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter." 18 U.S.C. § 1590(a).
- Makes it a federal crime to knowingly: "recruit[], entice[], harbor[], transport[], provide[], obtain[] or maintain[] by any means a person ... knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion ... or any combination of such means will be used to cause the person to engage in a commercial sex act." 18 U.S.C. § 1591(a).
- In *Ditullio v. Boehm*, the Ninth Circuit held that punitive damages are available under the TVPA, but that the law does not apply retroactively. 662 F.3d 1091 (9th Cir. 2011).

### Anti-Terrorism Act

- "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." 18 U.S.C. § 2333(a).
- The ATA encompasses situations in which a plaintiff has been injured by acts of terrorism and (i) the defendant has "provided material support," including the provision of financial services, to (ii) an organization or individual designated by the U.S. government as a terrorist or terrorist organization.

# State Law Claims – California Extends Statute of Limitations for Certain Human Rights Claims

- ATS plaintiffs frequently allege state law claims based on the same facts.
- California Assembly Bill 15, enacted in October 2015, extended to 10 years the statute of limitations for torts (assault, battery, and wrongful death) where the conduct would also constitute torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity (defined to include murder, extermination, enslavement, forcible transfer of population, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, persecution on political, race, national, ethnic, cultural, religious, or gender grounds, and enforced disappearance of persons). Cal. Code. Civ. P. § 354.8.
- Authorizes prevailing plaintiffs in such actions to recover attorneys' fees and litigation costs. *Id*.

# State Law Claims – *Unocal* and Direct Liability

- Plaintiffs brought five intentional tort claims: battery, assault, false imprisonment, intentional infliction of emotional distress, and conversion.
- Plaintiffs brought also claims for negligence, and for violations of the California Unfair Competition Law ("UCL"), Cal. Bus. & Profs. Code § 17200 et seq, and California Constitution.
- The court granted Unocal's motion for summary judgment as to the intentional tort claims insofar as they were based on theories of direct liability. *Doe v. Unocal*, 2002 WL 33944506 (Cal. Sup. Ct. June 11, 2002).
- The court denied the motion as to the UCL and California Constitution claims, rejecting Unocal's extraterritoriality argument: "A Business and Professions Code section 17200 claim may be brought in California for injuries occurring outside of California as long as some of the wrongful conduct occurred within California." *Id.* The court found plaintiffs alleged some California conduct, including funding decisions. *Id.*

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### State Law Claims – *Unocal* and Vicarious Liability

- The court held the defendant could be vicariously liable based on its involvement in a joint venture that hired the military personnel who allegedly committed the human rights violations.
- "Because Plaintiffs' evidence would allow a reasonable trier of fact to find that the military was contractually responsible for security, or that the military was an agent or independent contractor hired by the joint venture, sufficient evidence exists to allow plaintiffs to proceed on their independent contractor and agency theories." *Doe v. Unocal*, 2002 WL 33944505 (Cal. Sup. Ct. June 11, 2002).

# Perez v. Dole Food Co. – Foreign Acts Brought as State Law Claims

- 50+ Colombian plaintiffs brought suit in 2009 in California Superior Court against Dole Food for allegedly support the AUC, a paramilitary organization that sprang up to combat the "guerilla" group known as the FARC during Colombia's bloody civil conflict in the late 1990s and early 2000s.
- State claims included wrongful death, assault, battery, negligent hiring and supervision, intentional infliction of emotional distress, negligent infliction of emotional distress, civil conspiracy, and negligence.
- Similar claims were brought against Chiquita, Drummond, and others as ATS claims.

# Hupan v. Alliance One Int'l, Inc., 2015 WL 7776659 (Del. Sup. Ct. Nov. 30, 2015): Using FNC to Defeat State Law Claims

- Hundreds of Argentine citizens filed suit against Philip Morris USA, Philip Morris Global, Monsanto, and other corporate defendants alleging exposure to pesticides used on Argentina tobacco farms.
- State law claims included negligence, strict liability, breach of warranty, abnormally dangerous activity, aiding and abetting, willful and wanton misconduct. There were also violations under Argentine Civil Code as well.
- The Delaware Superior Court granted the motion to dismiss on FNC grounds for both Philip Morris entities. Monsanto did not file a motion for FNC.
- The court found that there would be an overwhelming hardship to subject Philip Morris USA to suit in Delaware, given the foreign nature of the claims, specific Argentine entities missing from the lawsuit, and the lack of access to key documents and witnesses necessary to mount a meaningful defense.

### Alternatives to the ATS: Recap

- Plaintiffs may bring other federal or state law claims in addition to, or instead of, ATS claims.
- Plaintiffs often supplement ATS claims with Torture Victim Protection Act ("TVPA") claims. But the TVPA has important limitations, including 1) it does not apply to corporations (though it may apply to individual corporate officers); and 2) it requires that plaintiffs exhaust local remedies.
- Plaintiffs may bring state law claims, with the most common being wrongful death, assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of consumer protection laws (such as the California Unfair Competition Law ("UCL")).
- In legislation some have called a mini-ATS statute, CA extended the statute of limitations to 10 years for certain human rights violations.
- Extraterritoriality, international comity, choice of law, *forum non conveniens*, and due process arguments are all potential hurdles to claims.

# KIOBEL THREE YEARS ON: ALIEN TORT STATUTE SCOPE AND LITIGATION TRENDS

### TRANSNATIONAL LITIGATION GROUP WEBCAST

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May 24, 2016

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