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## E. Human Rights

Alleged violations of individual rights recognized at international law are increasingly part of the federal docket, as a result of statutes that confer jurisdiction over such violations and/or implement U.S. treaty obligations into domestic law. With regard to some violations, such as the transnational trafficking of humans, suits for civil remedies form one component of a comprehensive legislative and regulatory framework. Certain human rights claims arise not as allegations in lawsuits, moreover, but rather as defenses to governmental actions against individuals. Examples may be found in the:

- Alien Tort Statute
- Torture Victim Protection Act
- Trafficking Victims Protection Act
- Doctrine of *Non-refoulement*, or Nonreturn

This chapter discusses each of these in turn below.<sup>2</sup>

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<sup>1</sup> For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

<sup>2</sup> The Alien Tort Statute, codified at 28 U.S.C. § 1350 (2006), is described in detail in the sections immediately following. The second-named statute, the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73, codified at note following 28 U.S.C. § 1350 (2006), is discussed *infra* § III.E.2, and the third-named statute, the Trafficking Victims Protection Act of 2000, codified as amended at 22 U.S.C. §§ 7101 *et seq.* (2006), is described *infra* § III.E.3. Among practitioners, both of the latter two statutes frequently are referred to as the TVPA. With the exception of direct quotations, in order to avoid confusion this *Benchbook* uses the full name of each statute rather than that acronym.

Yet another statute that allows the assertion of international law claims in U.S. courts is the Anti-Terrorism Act of 1990, Pub. L. No. 101-519, 18 U.S.C. § 2333 (2006); its terms are not detailed in this edition of the *Benchbook*.

## 1. Alien Tort Statute

The Alien Tort Statute, codified at 28 U.S.C. § 1350 (2006) and also sometimes called the “Alien Tort Claims Act,” reads in full:

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.

This U.S. law dates to the first statute establishing the federal judicial system. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789). Yet to date only six judgments of the Supreme Court mention the Alien Tort Statute, and only two of those offer any extended analysis of that statute.<sup>3</sup> The two are:

- *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)
- *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013)

This section thus is based on the guidance set forth in *Sosa* and *Kiobel*, supplemented by selected decisions from lower federal courts. *Caveat*: Many decisions in the latter group were issued before the Supreme Court’s rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as extraterritoriality.

### a. Overview of Alien Tort Statute Litigation

The following elements constitute a proper claim for civil damages under the Alien Tort Statute, 28 U.S.C. § 1350 (2006):

1. Proper plaintiff – an “alien.”

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<sup>3</sup> The other four decisions are *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1705 (2012) (affirming dismissal on Torture Victim Protection Act ground without reaching Alien Tort Statute claims); *Samantar v. Yousef*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Rasul v. Bush*, 542 U.S. 466, 472, 484 (2004) (ruling on jurisdictional ground without reaching substance of complaint); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 432-39 (1989) (ruling on immunities issue). *See also Kiobel*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1663 (observing that “the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years”).

2. Plaintiff has pleaded “a tort” in violation of either:
  - a. a treaty of the United States; or
  - b. the law of nations.
3. Proper defendant.
4. Defendant’s alleged acts constitute an actionable mode of liability.

In moving to dismiss an Alien Tort Statute case, defendants typically have argued that one or more of the above elements have not been satisfied. Additional commonly raised defenses include the following:

- Presumption against extraterritoriality
- Immunities
- Act of state doctrine
- Political question
- *Forum non conveniens*
- Time bar
- Exhaustion of local remedies
- International comity

These aspects of Alien Tort Statute litigation are detailed below. Treated first are the elements of an Alien Tort Statute claim, as informed by *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Then follows a discussion of defenses, leading with extraterritoriality, the question at bar in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013). The section concludes with a discussion of damages and other available redress.

## **b. Elements of an Alien Tort Statute Claim**

This section discusses the requisite elements of an Alien Tort Statute claim. Central to the discussion is the decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *see infra* § III.E.1.b.ii.2.

### **i. Alien Plaintiff**

The Alien Tort Statute by its terms confers jurisdiction over claims by aliens only. As the Supreme Court made clear in *Rasul v. Bush*, 542 U.S. 466, 484-85 (2004), the statute does not distinguish between resident and nonresident aliens. Legal permanent residents may sue under the statute. U.S. citizens may not; rather, they must seek relief pursuant to the Torture Victim Protection Act, discussed *infra* § III.E.2, or bring other types of claims.

#### **i.1. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims**

While the Alien Tort Statute has been applied to many different international law torts, the Torture Victim Protection Act, discussed *infra* § III.E.2, permits suits only for allegations of torture or extrajudicial killing. Lower courts have split on whether alien plaintiffs alleging torture

or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005), *cert. denied*, 549 U.S. 1032 (2006). Such courts look to a statement in the legislative history, to the effect that Congress intended the Torture Victim Protection Act to

enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

## ii. Tort

By its terms, the Alien Tort Statute provides federal jurisdiction over cases involving torts – as opposed to breaches of contract – committed in violation either of a treaty or of the law of nations. Virtually all case law deals with the latter option; accordingly, this section begins with a brief treatment of the treaty option and then proceeds to lay out in detail the treatment of cases alleging violations of the law of nations.

Allegations brought under the Alien Tort Statute are subjected to a “searching review of the merits.” *Kadić v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995). Citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), discussed *infra* § III.E.1.b.ii.2, the U.S. Court of Appeals for the Second Circuit recently explained that if a court

‘cannot find that Plaintiffs have grounded their claims arising under international law in a norm that was universally accepted at the time of the events giving rise to the injuries alleged, the courts are without jurisdiction under the ATS to consider them.’

*Velez v. Sanchez*, 693 F.3d 308, 318 (2d Cir. 2012) (quoting *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008)), *cert. denied*, 555 U.S. 1218 (2009)).<sup>4</sup>

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<sup>4</sup> With regard to the general federal pleading standard, see *Ashcroft v. Iqbal*, 556 U.S. 662 (2008); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2006).

## ii.1. Violation of a Treaty of the United States

The Alien Tort Statute confers federal jurisdiction over a tort committed in violation of a treaty of the United States. Few cases have involved this basis for jurisdiction, however. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court rejected plaintiff's invocation of a treaty to which the United States had become a party in 1992. The Court reasoned that although the treaty at issue, the 1966 International Covenant on Civil and Political Rights,<sup>5</sup>

does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.

*Sosa*, 542 U.S. at 734-35. For discussion of the doctrine of non-self-executing treaties, see *supra* § I.C.

## ii.2. Violation of the Law of Nations

Most Alien Tort Statute cases proceed under the law of nations prong of the statute. The reference to the law of nations is often associated with customary international law, a source of law discussed in § I.B.2. See *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 247 (2d Cir. 2003); see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 37 n.23 (2011) (writing that customary international law is but “one of the sources for the law of nations”), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

## ii.3. Supreme Court's *Sosa* Framework for Determination

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Supreme Court outlined the methodology for determining whether the tort pleaded violates international law, a prerequisite to federal jurisdiction under the Alien Tort Statute. Having considered the claim at bar in light of the 1789 statute, the opinion of the Court, written by Justice David H. Souter, stated:

[C]ourts should require 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 we have recognized.

*Id.* at 725. The Court advised “judicial caution,” *id.* It pointed especially to “the practical consequences” of recognizing a cause of action. *Id.* at 732-33. The *Sosa* framework thus entails *inter alia* multiple considerations. The following are discussed in sections below:

- Acceptance of the norm by the civilized world
- Definition of the norm with specificity in international law

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<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Dec. 11, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

- Consideration of the practical consequences of enforcing the norm

It should be noted that prior to the decision in *Sosa*, lower courts typically had held that the tort in question had to be sufficiently defined, universal, and obligatory. *E.g.*, *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring). In *Sosa*, Justices of the Supreme Court acknowledged that the requirements it posited were “generally consistent” with those formulations. *Sosa*, 542 U.S. at 732; *id.* at 747-48 (Scalia, J., dissenting). Thus, pre-*Sosa* opinions may remain useful in determining the cognizability of torts under the Alien Tort Statute.

### **ii.3.a. Accepted by Civilized World**

As for the acceptance of the tort alleged, the Court in *Sosa*, 542 U.S. at 733, proceeded by reference to the “current state of international law.” It did not require that the tort be contained within a federal statute. *Id.* at 714, 719, 723.

With respect to some causes of action, it may be necessary to consider whether international law extends liability to private or nonstate – as opposed to public or state – actors. This consideration is discussed *infra* § III.E.1.b.iii.3.

### **ii.3.b. Defined with Specificity**

The Court in *Sosa* drew upon its own jurisprudence respecting one of the earliest-recognized international crimes – piracy – in stating that torts alleged in Alien Tort cases should parallel “the specificity with which the law of nations defined piracy.” *Sosa*, 542 U.S. at 732 (citing *United States v. Smith*, 18 U.S. 153, 163-80 (1820)).

### **ii.3.c. Practical Consequences**

In *Sosa*, 542 U.S. at 725-26, the Supreme Court instructed the lower courts to proceed with “caution” in exercising their “discretionary judgment” to recognize actionable torts. Lower courts should consider the “practical consequences” of making the cause of action available to litigants; to be precise, the Court wrote *id.* at 732-33:

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.

The Court appended a footnote, *id.* at 733 n.21, which cited a:

- Statement by the European Commission “that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals”; and

- “[P]olicy of case-specific deference to the political branches,” as indicated by “the Executive Branch’s view of the case’s impact on foreign policy.”

#### **ii.4. Supreme Court’s Application of Framework in *Sosa***

The plaintiff in *Sosa* sought to recover for the international law tort of arbitrary detention, claiming that the elements of that tort had been satisfied when he was kidnapped in Mexico and held for a short time. The Court rejected the claim.

To be specific, the Court in *Sosa* indicated that to the extent that arbitrary detention is cognizable under the Alien Tort Statute, the impugned conduct must amount to more than a “relatively brief detention in excess of positive authority,” more than “the reckless policeman who botches his warrant,” and more than “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment.” 542 U.S. at 737-38. The Court held that the plaintiff had failed to establish an actionable tort under international law, and pointed by way of comparison to the prohibition of “prolonged” arbitrary detention as set forth in the *Restatement (Third) of Foreign Relations Law of the United States* (1987).<sup>6</sup>

#### **ii.5. Post-*Sosa* Rulings in Lower Courts on Actionable Claims**

As described above, the Supreme Court held in *Sosa* that the standard it had just articulated was not satisfied by the conduct at issue, a short period of detention. Lower courts subsequently applied the *Sosa* methodology with regard to other torts. Some conduct has been found actionable, some not. A sampling of those rulings follow, with the caveat that most predate the Court’s 2013 extraterritoriality ruling in *Kiobel*, detailed *supra* § III.E.1.c.i. Courts thus must analyze the case before them according to both the extraterritoriality standard of *Kiobel* and to the actionability standard of *Sosa*.

##### **ii.5.a. Ruled Actionable**

International law torts that lower courts, post-*Sosa*, have recognized as actionable under the Alien Tort Statute include:

- Arbitrary denationalization or denaturalization, by a state actor<sup>7</sup>
- Child labor<sup>8</sup>
- Crimes against humanity<sup>9</sup>

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<sup>6</sup> Designated subsequently as *Restatement*, this 1987 American Law Institute treatise compiles many of the doctrines discussed in this chapter. Its provisions must be consulted with due caution, however, particularly given that it was published decades before the Supreme Court’s most recent interpretations of the Alien Tort Statute. On use of this *Restatement* and the 2012 launch of a project to draft a fourth *Restatement* in this field, see *infra* § IV.B.1.

<sup>7</sup> In re *S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 252 (S.D.N.Y. 2009).

<sup>8</sup> *Flomo v. Firestone Natural Rubber Co.*, 744 F. Supp. 2d 810, 814-16 (S.D. Ind. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1075-76 (C.D. Cal. 2010).

<sup>9</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), vacated and remanded in light of *Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013); *Sexual Minorities Uganda v. Lively*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 4130756, at \*7-\*11 (D. Mass. Aug. 14, 2013); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112,

- Enslavement, involuntary servitude, forced labor, and sexual slavery<sup>10</sup>
- Genocide<sup>11</sup>
- Hijacking<sup>12</sup>
- Nonconsensual human medical experimentation<sup>13</sup>
- Purposeful use of poisoned weapons<sup>14</sup>
- Summary execution/extrajudicial killing<sup>15</sup>
- Torture, physical or mental, by a state actor<sup>16</sup>
- Trafficking<sup>17</sup>
- War crimes,<sup>18</sup> including deliberate targeting of civilians<sup>19</sup>

### ii.5.b. Division of Authority on Actionability

Lower court rulings post-*Sosa* have split with respect to the cognizability of international law torts such as:

- Cruel, inhumane, and degrading treatment<sup>20</sup>
- Detention without legal authority/brief arbitrary detention<sup>21</sup>
- Terrorism<sup>22</sup> and the financing of terrorism<sup>23</sup>

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1154-57 (E.D. Cal. 2004). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring in part and concurring in judgment).

<sup>10</sup> *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1074-76 (C.D. Cal. 2010); *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 521 (S.D.N.Y. 2009); *John Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1014 (S.D. Ind. 2007); *Jane Doe I v. Reddy*, 492 F. Supp. 2d 988 (N.D. Cal. 2007).

<sup>11</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), vacated and remanded in light of *Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013).

<sup>12</sup> *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 480-81 (S.D.N.Y. 2010).

<sup>13</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009), cert. denied, 130 S. Ct. 3541 (2010).

<sup>14</sup> *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008) (*dicta*).

<sup>15</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 383 n.4 (S.D.N.Y. 2009); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 593 (E.D. Va. 2009).

<sup>16</sup> *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 738 n.29 (2004).

<sup>17</sup> *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009).

<sup>18</sup> *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 256 (2d Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011), vacated and remanded in light of *Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013); *Estate of Manook v. Research Triangle Inst., Int'l*, 693 F. Supp. 2d 4, 18 (D.D.C. 2010); *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 744-47 (D. Md. 2010).

<sup>19</sup> *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 582-3 (E.D. Va. 2009).

<sup>20</sup> Compare *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (rejecting tort) with *Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377, 382 n.4 (S.D.N.Y. 2009); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1322 (N.D. Cal. 2004); *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 253-54 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1077 (C.D. Cal. 2010).

<sup>21</sup> Compare *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (holding eight-hour detention not actionable) with *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging periods of detention longer than a day, an allegation not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>22</sup> Compare *Lev v. Arab Bank, PLC*, 2010 U.S. Dist. LEXIS 16887, at \*22 (E.D.N.Y. Jan. 29, 2010); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 281 (E.D.N.Y. 2007) (finding jurisdiction over terrorism) with *Saperstein v.*

### ii.5.c. Ruled Not Actionable

Since the Supreme Court decided *Sosa*, lower courts have declined to recognize a federal cause of action under the Alien Tort Statute for international law torts such as:

- Apartheid as practiced by nonstate actors<sup>24</sup>
- Unlawful killings by nonstate actors<sup>25</sup>
- Conversion<sup>26</sup>
- Detention without notice of consular rights<sup>27</sup>
- Displacement of remains<sup>28</sup>
- Failure to follow health and safety standards<sup>29</sup>
- Forced exile<sup>30</sup>
- Fraud<sup>31</sup>
- Freedom of thought, conscience, religion, and association<sup>32</sup>
- Harassment<sup>33</sup>
- Imposing production quotas that lead to child labor<sup>34</sup>
- Manufacture and supply of an herbicide used as a defoliant with collateral damage<sup>35</sup>
- Property destruction or confiscation, absent other violations<sup>36</sup>
- Property destruction by U.S. government<sup>37</sup>
- Racial discrimination<sup>38</sup>
- Deprivation of rights to life, liberty, security and association<sup>39</sup>
- Torture by a nonstate actor<sup>40</sup>

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*Palestinian Auth.*, 2006 U.S. Dist. LEXIS 92778, at \*26 (S.D. Fla. 2006). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J. concurring).

<sup>23</sup> *Krishanthi v. Rajaratnam*, 2010 U.S. Dist. LEXIS 88788, at \*37-\*43 (D.N.J. Aug. 26, 2010).

<sup>24</sup> *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 250-51 (S.D.N.Y. 2009).

<sup>25</sup> *Estate of Amergi v. Palestinian Auth.*, 611 F.3d 1350, 1358-59 (11th Cir. 2010).

<sup>26</sup> *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004).

<sup>27</sup> *Mora v. New York*, 524 F.3d 183, 208-09 (2d Cir. 2008); *see Jogi v. Voges*, 480 F.3d 822, 824 (7th Cir. 2007).

<sup>28</sup> *Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469, 476 (S.D.N.Y. 2004).

<sup>29</sup> *Viera v. Eli Lilly & Co.*, 2010 U.S. Dist. LEXIS 103761, at \*9-\*10 (S.D. Ind. Sept. 30, 2010).

<sup>30</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>31</sup> *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004). *See also Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1995); *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d 142, 145 (7th Cir. 1973).

<sup>32</sup> *Gang Chen v. China Cent. TV*, 2007 U.S. Dist. LEXIS 58503, at \*7-\*8 (S.D.N.Y., Aug. 9, 2007) (dicta).

<sup>33</sup> *Zapolski v. F.R.G.*, 2010 U.S. Dist. LEXIS 43863, at \*6-\*7 (E.D.N.Y., May 4, 2010).

<sup>34</sup> *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1024 (7th Cir. 2011).

<sup>35</sup> *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104, 119-20 (2d Cir. 2008).

<sup>36</sup> *Mohammad v. Bin Tarraf*, 114 Fed. Appx. 417, 419 (2d Cir. 2004).

<sup>37</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 854-55 (D.C. Cir. 2010).

<sup>38</sup> *Sarei v. Rio Tinto, PLC*, 631 F.3d 736, 744 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013).

<sup>39</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006) (alleging this tort, not ruled on in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality)).

<sup>40</sup> *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 24, 30 (D.D.C. 2010).

### iii. Proper Defendant

Comparison of the text of the Alien Tort Statute, quoted in full *supra* § III.E.1, with the corollary provision of the Torture Victim Protection Act, quoted *infra* § III.E.2, reveals a significant difference: although the latter describes the potential defendant, the Alien Tort Statute contains no such express reference. That lacuna has generated considerable litigation, with respect to the persons whom plaintiffs have endeavored to sue. Defendants so named have included:

- Natural persons; that is, human beings
- Nonnatural persons – also called juridical persons or artificial persons – such as:
  - Organizations
  - States
  - Corporations

In suits naming private or nonstate actors as defendants, a court also must ask:

- Does liability for violation of the international law tort at bar extend to private or nonstate actors as well as to public or state actors?

Each of these factors is discussed in turn below.

#### iii.1. Natural Persons

Widely held to have spurred enactment of the Alien Tort Statute in 1789 was an incident that had occurred five years earlier, when “a French adventurer” physically attacked a French diplomat in Philadelphia, and France decried the absence of a clear U.S. remedy for what was termed an act contrary to the law of nations. *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1659, 1666 (2013) (citing *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (O.T. Phila.1784)); *see also* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int’l L. 687, 692-95 (2002) (describing this so-called Marbois incident).

That paradigm has persisted for centuries: natural persons – human beings – have been treated as proper defendants from the very first reported Alien Tort Statute decision through to the 1980 appellate decision that gave rise to increased litigation and the 2004 Supreme Court opinion interpreting the statute. *See Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1,607) (D.C.S.C. 1795) (ordering human defendant to pay restitution to alien plaintiff following mortgaging of slaves while docked at a U.S. port); *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (permitting alien plaintiffs to pursue lawsuit against police official alleged to have committed torture); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (in a suit against a man who had helped U.S. agents detain the plaintiff, establishing the framework for determining which international law torts are cognizable under the statute).

The availability of this statute as a means to seek redress from natural persons represented an exception to the traditional role of the “law of nations,” the regulation of behavior between nation-states. When the Alien Tort Statute was passed in 1789, some “rules binding

individuals for the benefit of other individuals overlapped with the norms of state relationships,” as the Supreme Court put it in *Sosa*, 542 U.S. at 715. The Court listed “three specific offenses against the law of nations” understood in 1789 to implicate natural persons:

- Violation of safe conducts
- Infringement of the rights of ambassadors
- Piracy

*Id.* (citing 4 William Blackstone, *Commentaries on the Laws of England* ch. V, 68 (1765-69)).

Moreover, the potential for natural persons to participate in international law increased markedly in the post-World War II era. The International Military Tribunals at Nuremberg and Tokyo established that humans could be held criminally liable for violating international law. Subsequently, the proliferation of widely ratified multilateral human rights treaties entrenched the principle that each human being is protected by certain international law norms. *See generally, e.g.,* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *Ind. L.J.* 809 (2000).

In short, a natural person may be a defendant in Alien Tort Statute litigation, assuming that other components of such a suit are met. Among such components may be whether the defendant is a private or state actor, as discussed *infra* § III.E.1.b.iii.3.

### **iii.2. Nonnatural / Artificial / Juridical Persons**

The amenability to Alien Tort Statute suit of nonnatural persons – also known as artificial persons or juridical persons – has been more contested than that of natural persons. Examples of nonnatural persons that have been named as defendants include:

- Organizations
- Sovereign States
- Corporations

Each is discussed in turn below.

#### **iii.2.a. Organizations**

Given that the Alien Tort Statute makes no mention of potential defendants, as noted *supra* § III.E.1.b.iii, it contains no explicit limitation on suits against an entity like an organization. In determining that an organization was not “individual” within the express terms of the Torture Victim Protection Act, and thus was not amenable to suit under that Act, the Supreme Court distinguished the two statutes. *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1709 (2012).<sup>41</sup>

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<sup>41</sup> Justice Sonia Sotomayor wrote in her opinion for the Court that “the Alien Tort Statute ... offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute.” *Mohamad*, 132 S. Ct. at 1709. On Alien Tort Statute suits against corporations, see *infra* § III.E.1.b.iii.2.c.

Only a small handful of earlier lower court decisions had addressed whether an organization could be held liable under the Alien Tort Statute. For example, one case proceeded to a default judgment against a political party. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *rev'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004).

### **iii.2.b. Sovereign States**

A primary purpose of international law is to regulate the behavior of nation-states. The Alien Tort Statute names as potential avenues for relief two sources of international law, treaties and the law of nations. *See supra* § III.E.1.b.ii. Any prospect that a state might be held liable under the statute is quite limited, however, given doctrines of immunity that preclude such suits.

A civil action against a foreign sovereign state or its agents or instrumentalities may not go forward unless the action satisfies the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq.* (2006), detailed *supra* § II.B.1 and *infra* § III.E.1.c.ii.a. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

### **iii.2.c. Corporations**

The Supreme Court has not ruled on whether corporations may be held liable under the Alien Tort Statute. As the Court explained in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1659, 1663 (2013), it heard argument on the question in *Kiobel*, but subsequently ordered reargument. Eventually, the Court decided the case on the ground of extraterritoriality, detailed *infra* III.E.1.c.i, it did not pass judgment on the corporate liability question.

The Supreme Court had granted *certiorari* after the U.S. Court of Appeals for the Second Circuit held, by a two-to-one panel vote, that that the law of nations does not recognize corporate defendants. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). That ruling conflicted with those in other circuits, which had allowed cases to go forward against corporations. *E.g., Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013, 1017-21 (7th Cir. 2011); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

### **iii.3. Status of Defendant as State Actor or Private Actor**

In keeping with a primary purpose of international law, the regulation of behavior between nation-states, some international law rules apply only to states and to state actors, also called public or governmental actors. Others apply as well to private or nonstate actors. Thus the Supreme Court in *Sosa v. Alvarez-Machain* instructed courts to consider

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....

542 U.S. at 733 n.20.

Relying on lower court jurisprudence, this section discusses: first, international law torts that have been held to extend both to private and state actors; second, those torts that have been held to extend only to state actors; and third, those on which there is a division of authority respecting this question. The section concludes by discussing means by which, even with regard to state-action torts, a private actor may be held liable if the private actor's actions were sufficiently linked to state action.

### **iii.3.a. International Law Torts Applicable to State and Nonstate Actors Alike**

Courts have indicated that the following international law torts apply to private actors as well as to state actors:

- Genocide<sup>42</sup>
- War crimes<sup>43</sup>
- Forced labor<sup>44</sup>
- Hijacking of aircraft<sup>45</sup>

### **iii.3.b. International Law Torts Requiring State Action**

The following international law torts have been deemed not to extend to private actors, absent sufficient linkage to state action:

- Torture<sup>46</sup>
- Extrajudicial killing/summary execution<sup>47</sup>

### **iii.3.c. Division of Authority on Applicability to Private Actors**

Lower courts have divided on whether – absent sufficient linkage to state action – private actors may be held liable for violation of the following international law torts:

- Crimes against humanity<sup>48</sup>

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<sup>42</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004) (citing *Kadić v. Karadžić*, 70 F.3d 232, 239-41 (2d Cir. 1995)).

<sup>43</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1702 (2012); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 173 (2d Cir. 2009); *Kadić v. Karadžić*, 70 F.3d 232, 243 (2d Cir. 1995); *Doe I v. Unocal Corp.*, 395 F.3d 932, 945-46 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

<sup>44</sup> *Adhikari v. Daoud & Partners*, 2010 WL 744237, at \*7 (S.D. Tex. Mar. 1, 2010); *Jane Doe I v. Reddy*, 2003 WL 23893010, at \*8 (N.D. Cal. Aug. 4, 2003); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

<sup>45</sup> *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 (D.D.C. 2003).

<sup>46</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring), *discussed in Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004).

<sup>47</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. LEXIS 3293, at \*39 (S.D.N.Y. Feb. 22, 2002), *citing Kadić v. Karadžić*, 70 F.3d 232, 241 (2d. Cir. 1995).

- Acts of terrorism<sup>49</sup>

### iii.3.d. Potential Liability of Private Actors for Torts Requiring State Action

Even if the international law tort has been deemed to extend only to state action, a private-actor defendant may be judged liable under the Alien Tort Statute if the defendant's conduct is sufficiently linked to state action. To decide whether this is the case, some lower courts have employed an analysis akin to the "color of law" inquiry applied pursuant to:

- The general federal civil rights statute, 42 U.S.C. § 1983 (2006),<sup>50</sup>
- Agency law; and
- The Torture Victim Protection Act, described *infra* § III.E.2.

A court thus may deem a private actor amenable to suit under the Alien Tort Statute if a "close nexus" exists between a nation-state and the actions of the private defendant, such that the "seemingly private behavior may be fairly treated as that of the State itself." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) (quoting *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (internal quotation omitted)), *cert. denied*, 130 S. Ct. 3541 (2010). *See also Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005); *Kadić v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995) (holding that self-avowed yet unrecognized state may qualify as state for this purpose).

### iv. Defendant's Acts Constitute an Actionable Mode of Liability

A defendant may be held liable under the Alien Tort Statute based not only on the defendant's acts as a principal perpetrator, but also on other modes of liability. Indeed, in a recent decision, one court observed:

Aiding and abetting liability under the ATS has been accepted by every circuit that has considered the issue.

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<sup>48</sup> Compare *Kadić v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995) with *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 741 (9th Cir. 2008).

<sup>49</sup> Compare *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007), with *Saperstein v. Palestinian Auth.*, 2006 WL 3804718, at \*5-\*8 (S.D. Fla. Dec. 22, 2006).

<sup>50</sup> The analysis derives from the precise text of that statute:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

*Sexual Minorities Uganda v. Lively*, \_\_ F. Supp. 2d \_\_, \_\_, 2013 WL 4130756, at \*11 (D. Mass. Aug. 14, 2013). Modes of liability that may be alleged include:

- Aiding and abetting<sup>51</sup>
- Conspiracy<sup>52</sup>
- Responsibility as a superior or commander of the primary actor<sup>53</sup>

The issue of accomplice liability generally arises at the summary judgment phase. *Presbyterian Church*, 582 F.3d at 260.

#### **iv.1. Dispute over Consultation of International or Domestic Law**

Courts have split on whether to determine accomplice liability questions by resort to international or to domestic law:

- The U.S. Courts of Appeals for the Second and the District of Columbia Circuits are among those courts that have looked to international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 32-37 (D.C. Cir. 2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).
- A minority view has held that domestic law should govern subsidiary issues like accomplice liability; by this view, international law should be consulted only on the substantive issue of whether a tort is actionable under the Alien Tort Statute. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 286 (2d Cir. 2007) (Hall, J., concurring).

#### **c. Defenses**

In addition to challenges on the grounds just discussed, commonly raised defenses to Alien Tort Statute lawsuits include:

- Presumption against extraterritoriality
- Immunities
- Act of state
- Political question
- *Forum non conveniens*

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<sup>51</sup> *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 748-49 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_ U.S. \_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 29-30 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (2d Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315-16 (11th Cir. 2008); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

<sup>52</sup> *See Cabello v. Fernández-Larios*, 402 F.3d 1148, 1161 (11th Cir. 2005).

<sup>53</sup> *See Arce v. Garcia*, 434 F.3d 1254 (11th Cir. Fla. 2006); *see also Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002) (analyzing command responsibility under the Torture Victim Protection Act, a statute discussed *infra* § III.E.2).

- Time bar
- Exhaustion of remedies
- Comity

Each will be discussed in turn below.

### **i. Presumption against Extraterritoriality**

A court confronted with an Alien Tort Statute lawsuit must determine whether the relationship between the claims and the United States is sufficient; if it is not, the case must be dismissed. This was the unanimous conclusion of the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013).

#### **i.1. Reasoning in *Kiobel***

Although the full Supreme Court agreed that the case before it in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013), must be dismissed, the reasoning by which the Justices arrived at this principle differed:

- A five-member majority held that the judicial creation of a cause of action under the Alien Tort Statute – the text of which contains no “clear indication of extraterritoriality” – must be evaluated pursuant to “a canon of statutory interpretation known as the presumption against extraterritorial application.” *Id.* at \_\_\_, 133 S. Ct. at 1664-65 (quoting *Morrison v. National Australia Bank Ltd.*, 561 U.S. \_\_\_, \_\_\_, 130 U.S. 2869, 2883 (2010)). Underpinning this opinion for the Court by Chief Justice John G. Roberts, Jr. was a concern that Alien Tort Statute judgments could have foreign policy consequences adverse to the interests of the political branches of the United States. *See id.* at \_\_\_, \_\_\_, \_\_\_, 133 S. Ct. at 1664-65, 1667-69.
- In contrast, Justices Stephen G. Breyer, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan concurred in the judgment, by means of an opinion that rejected application of the presumption against extraterritoriality and instead listed three situations in which the relationship between the United States and the claims should suffice to support an Alien Tort Statute suit. *Id.* at \_\_\_, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).<sup>54</sup>

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<sup>54</sup> This minority opinion advocated the finding of Alien Tort Statute jurisdiction if:

- (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, 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.

*Id.* at \_\_\_, 133 S. Ct. at 1671 (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, JJ., concurring in the judgment).

All nine Justices agreed that the suit could not go forward on the facts at bar. To be precise, as described in *Kiobel*:

- Plaintiffs were “nationals” of a foreign state, although they were “legal residents” of the United States, where they had “been granted political asylum.”
- Defendants were corporations chartered in countries other than the United States, although each had an office in New York and the shares of each were traded on the New York Stock Exchange.
- Defendants were alleged not to have committed international law torts directly, but rather to have aided and abetted a foreign state’s commission of such violations.
- The challenged acts occurred outside of U.S. territory.

\_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1662-63 (Roberts, J., opinion for the Court); *see id.* at \_\_\_, 133 S. Ct. at 1677-78 (Breyer, J., concurring in the judgment).

Summarizing the approach that led to rejection of the suit, the opinion for the Court stated:

On these facts, all the relevant conduct took place outside the United States. And even 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. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.

*Id.* at \_\_\_, 133 S. Ct. at 1669. Notwithstanding this passage, two of the five Justices who joined the opinion advocated a formulation that would have compelled dismissal of a broader swath of potential Alien Tort Statute claims. *See id.* at \_\_\_, 133 S. Ct. 1669-70 (Alito, J., joined by Thomas, J., concurring).<sup>55</sup> Conversely, another Justice in the five-member majority stressed that the Court’s opinion “is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute”; he anticipated future litigation of the issue. *Id.* at \_\_\_, 133 S. Ct. at 1669 (Kennedy, J., concurring).<sup>56</sup>

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<sup>55</sup> They wrote:

[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.

*Id.* at \_\_\_, 133 S. Ct. at 1670 (Alito, J., joined by Thomas, J., concurring). On the Alien Tort Statute framework set out in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *see infra* § III.E.1.b.ii.

<sup>56</sup> He wrote:

Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of

## i.2. Lower Court Rulings Post-*Kiobel*

Courts confronted with factors different from those in *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1659 (2013), described *supra* § III.E.1.c.i.1, will need to evaluate whether and to what extent extraterritoriality affects the reach of the Alien Tort Statute. In the months immediately following issuance of the decision of *Kiobel*, a handful of lower courts undertook this analysis, and arrived at a range of results. In two such cases, the Alien Tort Statute litigation was permitted to go forward:

- Allegations of an international law tort of persecution based on sexual orientation survived a motion to dismiss notwithstanding the extraterritoriality ruling in *Kiobel*. *Sexual Minorities Uganda v. Lively*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 4130756, at \*13-\*15 (D. Mass. Aug. 14, 2013). Although many impugned actions occurred in Uganda and the plaintiff was a Uganda-based organization, the court ruled that extraterritoriality did not bar the suit, because the defendant was “an American citizen who has allegedly violated the law of nations in large part through actions committed within this country,” *id.* at \_\_\_, 2013 WL 4130756, at \*14.
- Allegations of international law torts arising out of the 1998 terrorist bombing of the U.S. embassy in Kenya “‘touched and concerned’ the United States with ‘sufficient force to displace the presumption against extraterritorial application of the ATS,’” another district court ruled. *Mwani v. bin Laden*, 947 F. Supp. 2d 1, 3 (D.D.C. 2013) (relying on the passage in *Kiobel*, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1669, quoted *supra* § III.E.1.b.i). Characterizing the case as one of first impression, the court recommended an immediate appeal. *Id.* at 6.

The *Kiobel* standard presented an obstacle to Alien Tort Statute litigation in two other cases:

- A suit in which “non-American plaintiffs have asserted ATS claims against foreign defendants for actions that took place in Israel and Lebanon” was dismissed pursuant to *Kiobel*. *Kaplan v. Central Bank of Iran*, \_\_\_ F. Supp. 2d \_\_\_, \_\_\_, 2013 WL 4427943, at \*16 (D.D.C. Aug. 20, 2013). The court distinguished *Mwani*, described above, on the ground that in that case “the attack was planned in the United States and targeted at one of its embassies,” while in the case before it funding and deployment of the attacks all had occurred in countries other than the United States. *Id.*
- Defendants’ petition for mandamus relief in a suit concerning South Africa’s apartheid era was denied. *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013). The appellate court grounded its denial of extraordinary relief in part on the reasoning that defendants would prevail if they were to move in the district court for dismissal by application of the *Kiobel* extraterritoriality standard. *See id.* at 187-94.

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today’s case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

*Id.* at \_\_\_, 133 S. Ct. at 1669 (Kennedy, J., concurring).

## **ii. Immunities**

Both statutory and common law immunities may bar suit against a particular defendant. Each type of immunity will be discussed in turn.

### **ii.1. Foreign States and the Foreign Sovereign Immunities Act**

Civil actions against foreign sovereign states may not go forward unless they satisfy the narrow exceptions set forth in the Foreign Sovereign Immunities Act of 1976 (FSIA), codified at 28 U.S.C. § 1602 *et seq.* (2006). As the Supreme Court wrote in a case brought against a foreign country pursuant to the Alien Tort Statute:

[T]he FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country....

*Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *see Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (reaffirming this statement). The scope of the Foreign Sovereign Immunities Act, which governs foreign states and entities defined as their agents or instrumentalities, is detailed *supra* § II.B.1. On common law immunities, see *supra* § II.B.1.b and *infra* § III.E.1.c.ii.b.

### **ii.2. Foreign Officials and Common Law Immunities**

A current or former foreign official is not immune from Alien Tort Statute suits by virtue of the Foreign Sovereign Immunities Act, for the reason that such an official is a natural person and not an “agency or instrumentality of a foreign state” as required by that Act, 28 U.S.C. § 1603 (2006). After so ruling in *Samantar v. Yousuf*, 560 U.S. 305, 314-16 (2010), the Supreme Court remanded for determination of whether any common law immunities applied to the defendant at bar, who plaintiffs alleged was responsible for torture and extrajudicial killings in Somalia while he held official posts including Prime Minister. The Court mentioned in particular common law immunity doctrines respecting foreign officials’ official acts, heads of state, and diplomats. *See id.* at 312 n.6, 320-22. The consideration on remand of the first two types of immunity is described below.

#### **ii.2.a. Foreign Official’s Common Law Immunities**

Following remand of the Supreme Court decision just discussed, common law immunities were held not to bar suit against a former Somali official named as defendant in a suit brought under the Alien Tort Statute and the Torture Victim Protection Act. *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 2014 WL 102984 (Jan. 13, 2014); *see Samantar v. Yousuf*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2879 (2013) (inviting the Solicitor General to file a brief expressing the United States’ views on the case). In a unanimous panel opinion written by Chief Judge William Byrd Traxler, Jr., the U.S. Court of Appeals for the Fourth Circuit held:

- *Status-based head of state immunity*: The defendant’s status as Prime Minister of Somalia during some of the relevant period did not render him immune from suit, for the reason that status-based immunity only applies to defendants who are incumbent officials at the time of suit. *See Samantar*, 699 F. 3d at 768-773.
- *Conduct-based foreign official immunity*: The defendant’s conduct as a foreign official did not render him immune from suit, either. *See id.* at 773-78. The Fourth Circuit held that any such immunity did not apply to the acts alleged – “torture, extrajudicial killings and prolonged arbitrary imprisonment of political and ethnically disfavored groups” – because such acts violated *jus cogens*, or peremptory, norms. *See supra* § I.B (discussing this source of international law). The Executive’s argument against the claimed conduct-based type of immunity, for reasons different from those on which the court focused, was treated as supplementing but not controlling the judicial decision. *See Samantar*, 699 F. 3d at 77-78.

### **ii.2.b. Waiver**

A state may waive certain immunities that otherwise would be available to a defendant. *See Mamani v. Berzain*, 654 F.3d 1148, 1151 n.4 (11th Cir. 2011); *infra* § II.B.1.a.iii.1.

### **iii. Act of State**

The act of state doctrine holds that courts of one country may not invalidate sovereign acts done by another country within the latter country’s own borders. *See W.S. Kirkpatrick & Co. v. Env’tl Tectonics Corp.*, 493 U.S. 400, 409 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). As detailed *supra* § II.B.2, defendants may invoke this doctrine when allegations necessarily require the court to rule on the validity of the actions of a foreign government. The U.S. Court of Appeals for the Second Circuit has stated, however, that only in “a rare case” would application of the act of state doctrine preclude an Alien Tort suit. *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

To decide a motion to dismiss under this jurisprudential doctrine, the Supreme Court in *Sabbatino*, 376 U.S. at 428, advised consideration of three factors, none of which is dispositive:

- The degree of international consensus concerning the illegality of the alleged activity under international law.
- Whether, and to what extent, adjudicating the case would have foreign relations implications.
- Whether the foreign government at issue is still in existence.

Each is discussed in turn below.

### iii.1. Degree of Consensus

The greater the degree of international consensus that the alleged activity violates international law, the less appropriate it is to dismiss a complaint on the act of state ground. In the context of Alien Tort Statute litigation, the U.S. Court of Appeals for the Ninth Circuit wrote that the doctrine did not apply to allegations based on *jus cogens*, or peremptory norms. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992)), *vacated and remanded in light of Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality). *See supra* § I.B (discussing peremptory norms as a source of international law).

The list of rights that enjoy a high degree of international consensus, as listed in Section 702 of the *Restatement*, include:

- Genocide
- Slavery
- Torture and cruel, inhuman or degrading treatment
- Systematic racial discrimination
- Prolonged arbitrary detention

In contrast, actions not prohibited by international consensus – for example, the expropriation of property – are not exempt from dismissal by virtue of the act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 428, 436-37 (1964).

### iii.2. Foreign Relations Implications

In determining whether its decision might have adverse foreign relations implications, a court should consult the views of the U.S. government and/or the foreign government. *Doe I v. Unocal Corp.*, 395 F.3d 932, 959 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005); *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 346 (S.D.N.Y. 2003). In particular, a court should give “respectful consideration” to the opinion of the U.S. Department of State. *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1296 (N.D. Cal. 2004) (quoting *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995)); *see Restatement* § 443 n.8.

### iii.3. Existence of Foreign Government

Evidence that the government at issue is no longer in existence weighs against dismissal on the ground of act of state. *Abiola v. Abubakar*, 2005 U.S. Dist. LEXIS 27831, at \*5-\*6 (N.D. Ill. Nov. 8, 2005); *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1303 (N.D. Cal. 2004). Even if the government remains in existence, however, this factor does not require dismissal. *Doe I v. Unocal Corp.*, 395 F.3d 932, 958-59 (2002), *reh'g en banc granted*, 395 F.3d 978 (2003), *vacated based on consent motion*, 403 F.3d 708 (9th Cir. 2005).

#### **iv. Political Question**

When a defendant seeks dismissal action under the political question doctrine, detailed *supra* § II.B.3, courts consider six factors set out in the seminal Supreme Court decision in *Baker v. Carr*, 369 U.S. 186, 217 (1962). These are:

- A textually demonstrable constitutional commitment of the issue to a coordinate political department; or
- A lack of judicially discoverable and manageable standards for resolving it; or
- The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
- The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
- An unusual need for unquestioning adherence to a political decision already made; or
- The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See *Corrie v. Caterpillar*, 503 F.3d 974, 981 (9th Cir. 2007). The six factors can be grouped into three main categories, as follows:

- Existence of a textual commitment the political branches of government
- Ability of the court to identify standards by which to rule
- Respect for the political branches

Each of these three categories is discussed in turn below. *Caveat*: Given the requirement of case-by-case analysis, courts frequently have professed to limit their rulings to the facts before them.

##### **iv.1. Textual Commitment to Political Branches**

Issues arising under the Alien Tort Statute, such as human rights violations and appropriate tort remedies, are matters that the text of the Constitution has committed to the judiciary. U.S. Const., art. III. This weighs against dismissal on the ground of political question. *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289, 347-48 (S.D.N.Y. 2003); *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995).

In a challenge to the acts of U.S. officials, however, the U.S. Court of Appeals for the District of Columbia Circuit applied this factor in favor of dismissal, reasoning that actions like that at bar implicate foreign policy decisionmaking, an activity that is “textually committed to the political branches of the government.” *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1069 (2006); *Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007). See *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007).

#### **iv.2. Ability of Court to Identify Standards by Which to Rule**

Judicially discoverable standards are available to aid resolution of questions related to the Alien Tort Statute. In *Kadić v. Karadžić*, 70 F.3d 232, 249 (2d Cir. 1995), the court wrote that the existence of these standards “obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion.” This reasoning counsels against dismissal on the political question ground.

#### **iv.3. Respect for the Political Branches**

If the defendant argues that resolution of the case may signal disrespect for another branch of government, courts frequently look to the views of the U.S. government. *E.g.*, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 72 (2d Cir. 2005). Consistent with this practice, the Supreme Court wrote in *Sosa* that in determining whether to apply the political question doctrine, courts “should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

To determine the Executive’s views, courts have consulted:

- Treaties. *See Hwang Geum Joo v. Japan*, 413 F.3d 45, 49-52 (D.C. Cir. 2005).
- Executive agreements. *See Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73 (2d Cir. 2005).
- Statements of Interest submitted by the Executive Branch in the course of the litigation. This is the most common source used in the making of such determinations. Courts have ruled that although views set forth in a Statement of Interest must be given deference, they do not control the decision regarding the political question doctrine. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004); *Kadić v. Karadžić*, 70 F.3d 232, 250 (2d Cir. 1995).

When the Executive has not conveyed its view, the court may interpret this silence as an indication of neutrality. *See Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005).

#### **v. Forum Non Conveniens**

The *forum non conveniens* doctrine permits dismissal when, as detailed *supra* § II.B.4, there exists a more appropriate forum for adjudication of the matter. Defendants frequently make this assertion in Alien Tort Statute cases. *See In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 500 (9th Cir. 1992). In assessing this contention, courts conduct the full *forum non conveniens* analysis to determine whether:

- An alternative forum is adequate and available; and

- The defendant has met the burden of proving that private and public interest factors substantially weigh in favor of litigating the case in the other forum.

It is difficult to derive any particular guidance from other rulings, because *forum non conveniens* analyses turn on unique facts. It nonetheless appears that, in weighing the public interest factor of the second prong, the court may deem the United States' strong interest in the vindication of violations of international human rights to weigh against dismissal. See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), *cert. denied*, 532 U.S. 941 (2001).

If the plaintiff is a U.S. citizen, the plaintiff's choice of forum is entitled to "substantial deference and should only be disturbed if the factors favoring the alternative forum are compelling." *Id.* at 101.

Also noted is the difficulty of suing a defendant in a foreign state implicated in human rights abuses. *Id.* at 106. A forum that puts plaintiff's life at risk is not an adequate alternative forum. *Aldana v. Fresh Del Monte Produce, Inc.*, 2003 U.S. Dist. LEXIS 26777, at \*6 (S.D. Fla. June 4, 2003).

#### **vi. Time Bar**

As is apparent from the full text quoted *supra* § III.E.1, the Alien Tort Statute contains no statute of limitations. On the theory that the Torture Victim Protection Act, discussed *infra* § III.E.2, is the most analogous federal statute, some courts have applied the latter statute's explicit ten-year limitations period to Alien Tort Statute cases. *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir.), *cert. denied*, 543 U.S. 874 (2004); *Deutsch v. Turner Corp.*, 324 F.3d 692, 717 (9th Cir.), *cert. denied*, 540 U.S. 820, 540 U.S. 821 (2003); *Papa v. United States*, 281 F.3d 1004, 1012 (9th Cir. 2002).

Claims under the Alien Tort Statute are subject to federal principles of equitable tolling. *Deutsch*, 324 F.3d at 717-18. Equitable tolling may apply if extraordinary circumstances, or the defendant's wrongful conduct, are such that the plaintiff's inability to file earlier was "beyond his control and unavoidable even with diligence." *Jean v. Dorelien*, 431 F.3d 776, 779-81 (11th Cir. 2005) (internal quotation omitted). Such tolling may be appropriate for periods during which the:

- Defendant is absent from the United States;
- Violence persists in the state where the tort is alleged to have occurred; or
- Plaintiff's family members risk reprisals.

See *Jean v. Dorelien*, 431 F.3d at 779-81; *Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005).

#### **vii. Exhaustion of Remedies**

The terse language of the Alien Tort Statute contains no explicit requirement of exhaustion of remedies in the state where the tort is alleged to have occurred. (This stands in

contrast with an explicit provision in the Torture Victim Protection Act. *See infra* § III.E.2.) Accordingly, lower courts have held that a plaintiff's failure to exhaust remedies – a doctrine discussed *supra* § II.B.6 – posed no bar to an Alien Tort Statute suit. *See, e.g., Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

Yet as detailed *supra* § III.E.1.b.ii.3.c, the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), indicated that in some circumstances exhaustion might be considered. U.S. Courts of Appeals subsequently divided on application of this statement:

- Considering whether a prudential doctrine of exhaustion of remedies should apply to claims under the Alien Tort Statute, a divided *en banc* panel of the Ninth Circuit held that any remedy must be “available, effective, and not futile.” *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 827, 832 (9th Cir. 2008) (*en banc*). Later in the same litigation, the same circuit approved of the district court's additional considerations regarding the degree of acceptance of the norm and the extent of a nexus between the claim and the United States. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 757 (9th Cir. 2011), *vacated and remanded in light of Kiobel*, \_\_ U.S. \_\_, 133 S. Ct. 1995 (2013) (holding, as described *supra* § III.E.1.c.i, that suit was barred by application of presumption of extraterritoriality).
- The Seventh Circuit rejected this approach, stating in *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011), that the implications of the argument that plaintiffs must exhaust local remedies in the state in which the violations occurred “border on the ridiculous.”

### **viii. Comity**

Comity – which is neither “a matter of absolute obligation” nor “of mere courtesy and goodwill” – has been defined as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *see also Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 544 n.27 (1987). Defendants in Alien Tort Statute cases occasionally argue that this concept of international comity – detailed *supra* § II.B.6 – counsels against the exercise of jurisdiction. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 63-64 (2011), *vacated on other grounds*, 527 Fed. Appx. 7 (D.C. Cir. 2013).

The U.S. Court of Appeals for the Seventh Circuit has suggested that the principle may justify a stay of proceedings in the United States, if the courts of the state in which the violation occurred seem willing and able to provide a remedy. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

### **d. Damages and Other Remedies**

Most cases pursued under the Alien Tort Claims Act seek money damages. Plaintiffs may also join claims seeking injunctive or other equitable relief. *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 473 (2d. Cir. 2002); *Doe v. Israel*, 400 F. Supp. 2d 86, 97 (D.D.C. 2005).

## 2. Torture Victim Protection Act

Enacted in 1992, the Torture Victim Protection Act of 1991,<sup>57</sup> Pub. L. No. 102-256, 106 Stat. 73, is codified at note following 28 U.S.C. § 1350 (2006); that is, in a note immediately following the codification of the Alien Tort Statute. In contrast with that latter statute – which, as discussed *supra* § III.E.1, refers broadly to “a tort ... committed in violation of the law of nations or a treaty of the United States” – the Torture Victim Protection Act provides a civil remedy for just two international law torts. Those two torts, which are defined below, are:

- Torture
- Extrajudicial killing

A congressional report described the Torture Victim Protection Act as a means to “enhance the remedy already available under” the Alien Tort Statute, in that the Act extends a civil remedy to U.S. citizens who have suffered either torture or extrajudicial killing under the color of law of a foreign state. S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). In its judgment in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004), the Supreme Court characterized the Torture Victim Protection Act as “supplementing,” but not replacing, the Alien Tort Statute.

In establishing the civil action, the Torture Victim Protection Act states as follows:

Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
- (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350.

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<sup>57</sup> Among practitioners in the field, the Torture Victim Protection Act of 1991 typically is referred to as the TVPA. With the exception of direct quotations, this *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusing this statute with a subsequently enacted statute to which practitioners in another field often give the self-same acronym; that is, the Trafficking Victims Protection Act of 2000, codified as amended at 22 U.S.C. §§ 7101 *et seq.* (2006), and described *infra* § III.E.3.

To date, only four judgments of the Supreme Court mention the Torture Victim Protection Act, and only one offers any extended analysis.<sup>58</sup> That judgment is:

- *Mohamad v. Palestinian Auth.* \_\_\_ U.S. \_\_\_, 132 S. Ct. 1702 (2012)

This section discusses that decision, which interpreted the statutory term “individual,” and further treats other aspects of Torture Victim Protection Act litigation by reference to select lower court opinions. *Caveat*: Many decisions in the latter group were issued before the Supreme Court’s rulings. Such lower court decisions are cited on precise points of law not yet addressed by Supreme Court; it should be recognized, however, that some of them might not have gone forward for some other reason later explored by the Supreme Court, such as the meaning of “individual.”

#### **a. Overview of Torture Victim Protection Act Litigation**

The following elements constitute a proper claim for civil damages under the Torture Victim Protection Act:

1. Proper plaintiff; that is, in the case of:
  - a. torture, an individual victim
  - b. extrajudicial killing, a legal representative or person entitled to sue for the wrongful death of a victim.
2. The victim suffered “torture” or “extrajudicial killing” within the meaning of the Act.
3. Proper defendant; that is, defendant is “[a]n individual” who acted “under actual or apparent authority, or under color of law,” of a “foreign nation.”
4. Defendant subjected the victim to torture or extrajudicial killing.

#### **i. Overview of Defenses**

In seeking to dismiss a Torture Victim Protection Act suit, defendants regularly argue that the court lacks subject-matter jurisdiction on the ground that the plaintiff has failed sufficiently to allege that one or more of the above elements is present. Decisions analyzing such claims are discussed below.

Additional defenses commonly raised in Torture Victim Protection Act cases include many of those detailed *supra* § III.E.1.c. with regard to the Alien Tort Statute. Discussions of overlapping defenses – immunities, political question, *forum non conveniens*, and comity – will not be repeated here. Rather, this section examines only those defenses that have merited distinct treatment in litigation brought pursuant to this Act. The section also adds consideration of a

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<sup>58</sup> The other three decisions are *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, 133 S. Ct. 1659, 1665 (2013) (referring to the Act as point of comparison in discussion of scope of Alien Tort Statute); *Samantar v. Yousuf*, 560 U.S. 305, 308, 324-26 (2010) (remanding on question of immunity without reaching merits); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-38 (2004) (ruling against plaintiff based on interpretation of the Alien Tort Statute).

defense unique to this two-decades-old Act, that of nonretroactivity. Thus treated below, within the specific context of the Torture Victim Protection Act, are:

- Nonretroactivity
- Act of state
- Exhaustion of local remedies
- Time bar

### **i.1. Extraterritoriality Not a Defense**

As detailed *supra* § III.E.1.c.i, in 2013 a majority of the Supreme Court held that “a canon of statutory interpretation known as the presumption against extraterritorial application” pertained to the Alien Tort Statute, the text of which contains no “clear indication of extraterritoriality.” *Kiobel v. Royal Dutch Petroleum Co.*, \_\_\_ U.S. \_\_\_, \_\_\_, \_\_\_, 133 S. Ct. 1659, 1664, 1665 (2013) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, \_\_\_, 130 U.S. 2869, 2883 (2010)).

The presumption does not hold with regard to the Torture Victim Protection Act. By its terms the Act authorizes civil suits for torture or extrajudicial killings in an extraterritorial context; that is, only when the defendant is someone who acted “under actual or apparent authority, or color of any *foreign nation* ....” Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (emphasis added). Justice Anthony M. Kennedy recognized this when he wrote in his separate opinion in *Kiobel*:

Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act ....

\_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1669 (Kennedy, J., concurring).

### **b. Elements of a Torture Victim Protection Act Claim**

Discussed below are challenges respecting the requisite elements of a Torture Victim Protection Act claim – elements listed *supra* § III.E.2.a.

#### **i. Proper Plaintiff**

Plaintiffs in a lawsuit pursuant to this Act must be the human victim or the legal representative of that victim, as detailed below.

##### **i.1. Human Victim**

The Torture Victim Protection Act, § 2, note following 28 U.S.C. § 1350, authorizes a civil suit when an “individual” is subjected to torture or extrajudicial killing. In *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1707-08 (2012), the Court held that an “individual” is a natural person – a human being. Although the precise holding pertained to the

status of the defendant “individual,” Justice Sonia Sotomayor wrote in her opinion for a unanimous Court.<sup>59</sup>

Only a natural person can be a victim of torture or extrajudicial killing.

*Id.* Clearly, a natural person is a proper plaintiff under the Act.

### **i.2. Victim’s Legal Representative / Wrongful-Death Claimant**

If the individual victim is deceased, the Act further authorizes a suit by “the individual’s legal representative, or” by “any person who may be a claimant in an action for wrongful death.” Torture Victim Protection Act, § 2(a)(2), note following 28 U.S.C. § 1350.

In *Mohamad*, the Court wrote that the term “person” has “a broader meaning in the law than ‘individual,’ and frequently includes nonnatural persons.” \_\_ U.S. at \_\_, 132 S. Ct. at 1708 (citations omitted). It concluded that “Congress’ use of the broader term evidences an intent to accommodate that possibility”; that is, the possibility that “estates, or other nonnatural persons, in fact may be claimants in a wrongful-death action.” *Id.* at \_\_ n.3, 132 S. Ct. at 1708 n.3.

A year before the Supreme Court issued its decision in *Mohamad*, the U.S. Court of Appeals for the Eleventh Circuit looked to the law of the forum state to determine whether plaintiffs at bar – children who alleged their fathers had been subjected to extrajudicial killings – were proper wrongful-death claimants. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347-50 (11th Cir. 2011). It did so based on a finding of Congress’s intent that it made after consulting legislative history. *Id.* at 1348-49 (quoting H.R. Rep. No. 102-367 (I), at 4, 1992 U.S.C.C.A.N at 87 (1991); S. Rep. No. 249, 102d Cong., 1st Sess., at 7 (1991)).

### **i.3. Any Nationality**

The Torture Victim Protection Act contains no limitation on the nationality of the plaintiff. Therefore – in contrast with the Alien Tort Statute, 28 U.S.C. § 1350 (2006), which is confined by its terms to noncitizens – the Torture Victim Protection Act permits suits by all natural persons, U.S. citizens and noncitizens alike.

### **i.4. Maintenance of Alien Tort Statute and Torture Victim Protection Act Claims**

If other requirements are met, torture or extrajudicial killing – the two actionable Torture Victim Protection Act torts – may be alleged in an Alien Tort Statute suit. Lower courts have split on whether alien plaintiffs alleging torture or extrajudicial killing may rely on both the Alien Tort Statute and the Torture Victim Protection Act in the same suit:

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<sup>59</sup> Justice Antonin Scalia joined all of Sotomayor’s opinion for the Court, save for a different section, which discussed legislative history. *See id.* at 1702. Justice Stephen G. Breyer concurred, writing, after his own discussion of legislative history: “I join the Court’s judgment and opinion.” *Id.* at 1711 (Breyer, J., concurring).

- The U.S. Court of Appeals for the Eleventh Circuit is among the lower courts that have held that both statutes may be invoked. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005). Such courts look to a statement in the legislative history, to the effect that Congress intended the *Torture Victim Protection Act* to

enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

S. Rep. No. 249, 102d Cong., 1st Sess., at § II (1991). *See, e.g., Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1179 n.13 (C.D. Cal. 2005).

- In contrast, the Seventh Circuit held that for aliens and citizens alike, the Torture Victim Protection Act is the sole avenue for relief based on claims of torture or extrajudicial killing. *Enahoro v. Abubakar*, 408 F.3d 877, 884-85 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

## **ii. Conduct Alleged**

In contrast with the Alien Tort Statute, which provides the basis for an array of international law torts, so long as they satisfy the standards detailed *supra* § III.E.1, the Torture Victim Protection Act authorizes recovery for two torts only:

- Torture
- Extrajudicial killing

The elements of each are set forth below.

### **ii.1. Torture**

After establishing “torture” as one of two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(b)(1), note following 28 U.S.C. § 1350, states:

[T]he term ‘torture’ means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind

....

This definition “borrows extensively from” that in Article 1 of the 1984 Convention Against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment, a treaty to which the United States is a party.<sup>60</sup> See *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002); see also S. Rep. No. 249, 102d Cong., 1st Sess., at 3 (1991). Indeed, the Torture Victim Protection Act operates as U.S. implementing legislation with respect to certain aspects of the Convention. See *United States v. Belfast*, 611 F.3d 783, 807-09 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011).

## ii.2. Extrajudicial Killing

After establishing “extrajudicial killing” as the other of the two actionable torts, as set forth in the statutory text quoted *supra* § III.E.2, the Torture Victim Protection Act, § 3(a), note following 28 U.S.C. § 1350, defines extrajudicial killing as a:

[D]eliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

The same section proceeds to exclude from the definition “any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.” *Id.*

According to the legislative history, Congress adopted this definition in accordance with the ban on extrajudicial killing contained in the 1949 Geneva Conventions on the laws of customs of war, treaties to which the United States and all member states of the United Nations belong. See S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(A) & n.7 (1991).<sup>61</sup>

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<sup>60</sup> Article 1 of that treaty defines torture as follows:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Dec. 17, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.*

<sup>61</sup> This section of the Senate Report cites the Geneva Convention (No. 1) for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.N.T.S. 3114, 75 U.N.T.S. 31, available at <http://www.icrc.org/ihl.nsf/INTRO/365?OpenDocument> (last visited Dec. 17, 2013). In pertinent part, subsection (d) of Article 3 of that treaty forbids

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

### **iii. Proper Defendant**

As quoted in full *supra* § III.E.2, the Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant be “[a]n individual” who acted “under actual or apparent authority, or color of law, of any foreign nation.” Each aspect of this definition is discussed in turn below.

#### **iii.1. “Individual”: Natural Person Only**

The defendant must be a natural person; that is, a human being. This was made clear in *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, \_\_\_, 132 S. Ct. 1702, 1705 (2012), in which the Supreme Court unanimously held “that the term ‘individual’ as used in the Act encompasses only natural persons.”

The Court in *Mohamad* thus rejected the Torture Victim Protection Act suit at bar, which had been brought against an organization. It extended its reasoning to all “nonnatural” persons – sometimes also referred to as “artificial” or “juridical” persons – naming as examples corporations, partnerships, associations, firms, societies, and related entities. *See id.* at 1707.

##### **iii.1.a. Foreign States**

As an artificial person, a foreign state cannot be a defendant: it falls outside the statutory term “individual” as construed by the Supreme Court in *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1702 (2012). Even if this were not the case, the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (2006), discussed *supra* §§ II.B, III.E.1.c.ii.a., typically would preclude such a suit. *See Mohamad*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. at 1706; S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

#### **iii.2. Actual or Apparent Authority or Color of Law**

The Supreme Court recently wrote:

[T]he Act does not impose liability on perpetrators who act without authority or color of law of a foreign state.

*Mohamad v. Palestinian Auth.*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1702, 1710 (2012) (citing H.R. Rep. No. 102-367 (I), at 5, and S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991), each of which specified that the legislation was not intended to cover “purely private” acts). This statement

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This provision is known as Common Article 3 because it is repeated verbatim in the other three 1949 Geneva Conventions on the laws and customs of war, which concern: in No. 2, the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; in No. 3, the Treatment of Prisoners of War; and No. 4, the Protection of Civilian Persons in Time of War. Each of these four treaties is universally accepted; that is, all 195 U.N. member states have joined the treaty regime. *See generally* Int’l Comm. Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols*, <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (last visited Dec. 17, 2013) (presenting links to each treaty that report 195 states parties).

tracks the explicit statutory requirement that the defendant acted “under actual or apparent authority, or color of law,” of a “foreign nation.” Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006).

To interpret this provision, courts employ analysis similar to that in Alien Tort Statute suits involving torts that require state action. By this analysis, described *supra* § III.E.1.b.iii.3.b, courts draw from general principles of agency law and from the jurisprudence interpreting a federal civil rights statute, 42 U.S.C. § 1983 (2006). *See, e.g., Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

If the defendant is not an agent of a foreign nation-state, courts may require a showing that the defendant was in a symbiotic relationship with a state actor. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009). Proof of state action does not require proof of widespread government misconduct; the actions of a single official are sufficient. *Romero*, 552 F.3d at 1317.

#### **iv. Defendant Subjected Victim to Torture or Extrajudicial Killing**

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350, requires that the defendant “subject[ed]” the victim to torture or extrajudicial killing.

The legislative history provides that the Torture Victim Protection Act allows suits “against persons who ordered, abetted, or assisted in the torture.” S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(E) (1991). The Senate Report states in the same section that “anyone with higher authority who authorized, tolerated or knowingly ignored” the commission of actionable torts “is liable for them.”

Referring to such provisions, courts have concluded that Congress intended the Torture Victim Protection Act to extend to forms of responsibility such as ordering, aiding and abetting, command responsibility, and conspiracy. *See Chavez v. Carranza*, 559 F.3d 486, 498-99 (6th Cir.), *cert. denied*, 558 U.S. 822 (2009); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.2d 1283, 1286 (11th Cir. 2002); With explicit reference to the Sixth Circuit’s decision in *Chavez*, the Supreme Court wrote in *Mohamad v. Palestinian Auth.*, \_\_\_ U.S. at \_\_\_, 132 S. Ct. 1702, 1709 (2012):

[T]he TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing.

#### **c. Defenses**

In general, many of the same defenses commonly raised in Alien Tort Statute litigation, and detailed *supra* § III.E.1.b.iii.3., are applicable to cases brought under the Torture Victim Protection Act. This section examines only those defenses that have merited distinct treatment within the specific context of the Torture Victim Protection Act:

- Nonretroactivity

- Act of state
- Exhaustion of local remedies
- Time bar

Each of these defenses is discussed in turn below.

### **i. Nonretroactivity**

The Torture Victim Protection Act took effect on March 12, 1992. Occasionally, plaintiffs have filed suit under the Act for conduct occurring before that date. Courts have ruled that the Act does not have impermissible retroactive effect, for the reason that it neither creates new liabilities nor impairs rights. *E.g.*, *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1153-54 (11th Cir. 2005) (applying general nonretroactivity analysis established in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

### **ii. Act of State**

On the act of state doctrine in general, see *supra* § II.B.2; on the application of the doctrine to Alien Tort Statute litigation, see *supra* § III.E.1.c.iii.

With particular respect to the Torture Victim Protection Act, the legislative history suggests that the act of state doctrine cannot prevent liability with respect to allegations of torture committed by former government officials. The legislative report generated in connection with this statute provides:

[T]he committee does not intend the ‘act of state’ doctrine to provide a shield from lawsuit for former officials. ... Since the doctrine applies only to ‘public’ acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 249, 102d Cong., 1st Sess., at § IV(D) (1991).

### **iii. Exhaustion of Local Remedies**

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly requires that plaintiffs exhaust local remedies before pursuing suit in U.S. courts. The Act thus provides:

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

Torture Victim Protection Act, § 2(b), note following 28 U.S.C. § 1350 (2006). See *Enahoro v. Abubakar*, 408 F.3d 877, 886 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006).

A challenge under this portion of the statute constitutes an affirmative defense. Therefore, the defendant bears the “substantial” burden of proof that plaintiff has not exhausted available local remedies. Doubts are to be resolved in the favor of the plaintiff; moreover, the plaintiff

need not pursue a local remedy if such pursuit would be futile or would subject the plaintiff to a risk of reprisal. *See Jean v. Dorelien*, 431 F.3d 776, 781-83 (11th Cir. 2005).

#### **iv. Explicit Time Bar**

Unlike the Alien Tort Statute, the Torture Victim Protection Act explicitly sets forth a limitations period:

No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Torture Victim Protection Act, § 2(c), note following 28 U.S.C. § 1350 (2006).

This limitations period is subject to equitable tolling. *See Hilao v Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing S. Rep. No. 249, 102d Cong., 1st Sess., at 11 (1991)); *see also Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005).

#### **d. Damages and Other Remedies**

The Torture Victim Protection Act, § 2(a), note following 28 U.S.C. § 1350 (2006), makes clear that an individual found to have committed torture or extrajudicial killing “shall, in a civil action, be liable for damages.” This has been held to include both compensatory and punitive damages. *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1151 (11th Cir. 2005).

Many judgments have been entered under this statute, but damages have been collected in few cases. In its 2012 judgment in *Mohamad v. Palestinian Authority*, the Supreme Court wrote:

[W]e are told that only two TVPA plaintiffs have been able to recover successfully against a natural person – one only after the defendant won the state lottery.

\_\_ U.S. \_\_, \_\_, 132 S. Ct. 1702, 1710 (citing *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005)).

### 3. Human Trafficking

Recent, unprecedented efforts to combat human trafficking include U.S. legislative developments, anti-trafficking policy implementation, and innovations in international law. U.S. domestic law slightly predates the key international treaty on human trafficking. Nevertheless, domestic and international law are largely consistent. With regard to enforcement, the numbers of criminal and civil cases against human traffickers have surged in the United States. On a parallel track, the European Court of Human Rights and the International Criminal Tribunal for the Former Yugoslavia have issued several important human trafficking rulings. This section focuses on the U.S. government's efforts to comply with the principal statute at issue, the 2000 Trafficking Victims Protection Act, and its subsequent reauthorizations.

#### a. Overview of Statutory Law

Congress passed the Victims of Trafficking and Violence Prevention Act in 2000. Pub. L. No. 106–386, 114 Stat. 1466 (2000) (codified as amended in Title 22, Chapter 78, and Title 18, Chapter 77, of the U.S. Code). Typically referred to as the TVPA,<sup>62</sup> this statute:

- Enumerated new federal criminal prohibitions;
- Afforded victims access to refugee resettlement benefits and new immigration protections; and
- Established a governmental office to conduct international monitoring and reporting on human trafficking. Information about and reports by this unit, the State Department's Office to Monitor and Combat Trafficking in Persons, may be found at <http://www.state.gov/j/tip/index.htm> (last visited Dec. 9, 2013).

Subsequent reauthorizations of the Trafficking Victims Protection Act, in 2003, 2005, 2008, and 2013:

- Extended the extraterritorial reach of the law;

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<sup>62</sup> Among practitioners in this field, the statute typically referred to as the TVPA. This *Benchbook* uses the full name rather than the acronym, however, in order to avoid confusion of this 2000 statute with an earlier statute to which practitioners in another field often give the self-same acronym; that is, the Torture Victim Protection Act of 1991, Pub.L. 102-256, H.R. 2092, 106 Stat. 73. Enacted on Mar. 12, 1992, and codified in the note following 28 U.S.C. § 1350 (2006), the Torture Victim Protection Act is described *supra* § III.E.2.

- Enumerated additional criminal prohibitions; and
- Added a civil remedy that permits victims to sue traffickers in federal court.

The reauthorized law is sometimes referred to as the TVPRA.

### **i. Developments Leading to Adoption of the Trafficking Victims Protection Act**

Section 1 of the Thirteenth Amendment to the U.S. Constitution states:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 of the amendment authorizes Congress “to enforce this article by appropriate legislation.”

Initially, the Thirteenth Amendment’s prohibition on chattel slavery could only be implemented through criminal statutory provisions.<sup>63</sup> Those statutes did not adequately address the modern manifestations of human trafficking in the United States, as a Congressional finding set forth in the Trafficking Victims Protection Act pointed out. *See* 22 U.S.C. § 7101(b)(13) (2006). For example, in *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court narrowly interpreted 18 U.S.C. § 1584 to criminalize only servitude brought about through use or threatened use of physical or legal coercion. With passage of the Trafficking Victims Protection Act, Congress sought to broaden the definition to encompass other, more subtle forms of coercion and conduct “that can have the same purpose and effect.” 22 U.S.C. § 7101(b)(13).

### **ii. Relation between the Trafficking Victims Protection Act and International Legal Instruments**

The Trafficking Victims Protection Act is largely consistent with multilateral treaties that proscribe human trafficking. Among these is an issue-specific treaty adopted in 2000 to supplement an omnibus treaty on transnational organized crime. This issue-specific 2000 Trafficking Protocol – formally titled the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>64</sup> – is discussed more fully *infra* § III.E.3.b.

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<sup>63</sup> Courts are divided over whether the Thirteenth Amendment to the U.S. Constitution carries with it a private right of action. *Compare Manliguez v. Joseph*, 226 F. Supp. 2d 377, 383-85 (E.D.N.Y. 2002), with *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1357 (6th Cir. 1996).

<sup>64</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Dec. 25, 2003, has 159 states parties, among them the United States, which ratified the treaty on November 3, 2005. U.N. Treaty Collection, Status, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en), (last visited Dec. 16, 2013).

It would not be correct to characterize the Trafficking Victims Protection Act as a federal statute that “implements” the 2000 Trafficking Protocol, for two reasons:

- *Timing*: The Trafficking Victims Protection Act became law weeks before the Trafficking Protocol was finalized and opened for signature in 2000, and well before that protocol entered into force in 2003 or was ratified by the United States in 2005; and
- *Omission*: Although the Trafficking Victims Protection Act itself lists an extensive catalogue of treaties and conventions that condemn slavery and servitude, the 2000 Trafficking Protocol is not included.<sup>65</sup>

Nonetheless, there is considerable consistency between the Trafficking Victims Protection Act and the 2000 Trafficking Protocol. The U.S. government has coined the term the “Three P’s” – prevention, protection, prosecution – to describe the scope both of the legislation and of the Trafficking Protocol.

Considerations related to adjudication of trafficking cases include:

- Treaty framework
- The United States’ ratification of the Trafficking Protocol
- Elements of the U.S. statutory scheme addressing human trafficking
- Common defenses

Each is discussed in turn below.

For an excellent overview of relevant international law, see Anne T. Gallagher, *The International Law of Human Trafficking* (2010).

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<sup>65</sup> Among the findings set forth in the Trafficking Victims Protection Act is the following:

The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports, including the Universal Declaration of Human Rights; the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the 1948 American Declaration on the Rights and Duties of Man; the 1957 Abolition of Forced Labor Convention; the International Covenant on Civil and Political Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; United Nations General Assembly Resolutions 50/167, 51/66, and 52/98; the Final Report of the World Congress against Sexual Exploitation of Children (Stockholm, 1996); the Fourth World Conference on Women (Beijing, 1995); and the 1991 Moscow Document of the Organization for Security and Cooperation in Europe.

22 U.S.C. § 7101(b)(23). Three additional international conventions specifically address trafficking in persons: the Convention on the Elimination of All Forms of Discrimination against Women, art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981; the Rome Statute of the International Criminal Court, art. 7, July 17, 1998, 2187 U.N.T.S. 3, entered into force Jul. 1, 2002; and the Convention on the Rights of the Child, art. 35, Nov. 20, 1989, 1577 U.N.T.S. 3, entered into force Sept. 2, 1990. Because the United States has not ratified any of these treaties, they are not addressed in this chapter.

## b. The 2000 Trafficking Protocol

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children<sup>66</sup> is typically called the Trafficking Protocol. At times it is also designated “the Palermo Protocol,” in recognition of the fact that it is one of three protocols, or side treaties, supplementing the 2000 U.N. Convention against Transnational Organized Crime.<sup>67</sup> That comprehensive treaty is known as the Palermo Convention, for the reason that, along with the Trafficking Protocol and one other side treaty, it was opened for signature in December 2000 at a diplomatic conference in Palermo, Italy.<sup>68</sup> States must ratify the Convention against Transnational Organized Crime in order to ratify the Trafficking Protocol.

The U.N. Office of Drugs and Crime, which is based in Vienna, Austria, serves as the secretariat for the Conference of Parties to the Palermo Convention; the website for that agency is <http://www.unodc.org> (last visited Dec. 9, 2013).

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<sup>66</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319, Annex II, available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Dec. 25, 2003, has 158 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the U.N. Convention against Transnational Organized Crime*, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=XVIII-12-a&chapter=18&lang=en) (last visited Dec. 9, 2013).

<sup>67</sup> U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Vol. 1, U.N. Doc. A/55/49 (2001), available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>. This treaty, which entered into force on Sept. 29, 2003, has 179 states parties, among them the United States, which ratified on Nov. 3, 2005. U.N. Treaty Collection, *United Nations Convention Against Transnational Organized Crime*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en) (last visited Dec. 9, 2013).

<sup>68</sup> See U.N. Office on Drugs and Organized Crime, *United Nations Conference and the Protocols Thereto*, <http://www.unodc.org/unodc/treaties/CTOC/index.html#Fulltext> (visited Dec. 9, 2013). As stated *id.*, the other protocol opened for signature at this time was the Protocol against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 480. This treaty, which entered into force on Jan. 28, 2004, has 138 states parties, including the United States, which ratified on Nov. 5, 2005. U.N. Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the U.N. Convention against Transnational Organized Crime*, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-b&chapter=18&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en) (last visited Dec. 9, 2013). The third side treaty is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Nov. 15, 2000, 2326 U.N.T.S. 208. This treaty, which entered into force on July 3, 2005, has 105 states parties; the United States is not among them. U.N. Treaty Collection, *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-c&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en) (last visited Dec. 9, 2013). Both protocols are available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

### **c. Trafficking Defined**

Article 3(a) of the 2000 Trafficking Protocol defines trafficking as follows:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

One phrase in the passage above, “exploitation of the prostitution of others,” is purposefully left undefined in the Protocol. The official record of the negotiations, known as the *travaux préparatoires*, or preparatory works states:

The protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” or “other forms of sexual exploitation” are not defined in the protocol, which is therefore without prejudice to how States parties address prostitution in their respective domestic laws.<sup>69</sup>

As the official notes clarify, states may criminalize prostitution, but this is not required. States parties to the Trafficking Protocol exercise complete discretion on this aspect of their domestic criminal law.

In contrast, pursuant to Article 5 of the Trafficking Protocol, states must criminalize all forms of human trafficking, including forced labor and forced prostitution, “when committed intentionally.”<sup>70</sup> Similarly, states must criminalize the trafficking of children, defined in Article 3(d) of the Trafficking Protocol as any persons under 18 years of age. Article 3(c) confirms that the “recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation” is trafficking, even if no force, fraud, or coercion is present.

### **d. Reservations Accompanying U.S. Ratification of the Trafficking Protocol**

When it ratified the 2000 Trafficking Protocol on November 3, 2005, the United States attached a number of reservations and one understanding; these may be found at U.N. Treaty Collection, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women*

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<sup>69</sup> The *travaux préparatoires* for the 2000 U.N. Convention Against Transnational Organized Crime and its Protocols are available at [http://www.unodc.org/pdf/ctoccop\\_2006/04-60074\\_ebook-e.pdf](http://www.unodc.org/pdf/ctoccop_2006/04-60074_ebook-e.pdf) (last visited Dec. 9, 2013), at page 347.

<sup>70</sup> Notably, the Trafficking Victims Protection Act does not criminalize organ trafficking. The National Organ Transplant Act of 1984 prohibits the buying and selling of organs in the United States. Pub. L. 98-507, 98 Stat. 2339 (codified as amended in scattered sections of 42 U.S.C.).

*and Children, supplementing the United Nations Convention against Transnational Organized Crime*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en) (last visited Dec. 9, 2013). Issues addressed included:

- Jurisdiction
- Federalism

Each is discussed in turn below.

### **i. Jurisdiction**

With regard to jurisdiction, the first U.S. reservation to its ratification of the 2000 Trafficking Protocol provided in part:

The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law.

This reservation thus proceeded to state that the United States would “implement paragraph 1(b) of the” U.N. Convention against Transnational Organized Crime, described *supra* § III.E.3.b, “to the extent provided for under its federal law.”

### **ii. Federalism**

A second reservation concerned the relationship of federal law and constituent states in the United States. It stated that

U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteenth Amendment’s prohibition of “slavery” and “involuntary servitude,” serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol ....

This reservation then stated that federal criminal law “does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment.” It concluded, however, that federalism concerns would not preclude the mutual legal assistance and international cooperation required by the Convention against Transnational Organized Crime and the Trafficking Protocol.

### **e. Elements of the Treaty Implemented by U.S. Law and Policy**

The 2000 Trafficking Protocol is best analyzed under the “Three P’s” paradigm of prevention, protection, and prosecution. Protection of victims typically arises out of provisions of the Trafficking Victims Protection Act, and prosecution of traffickers most frequently occurs in

federal courtrooms. This is changing, however, given that all fifty states in the United States have adopted human trafficking statutes.

### **i. General Protection of Victims**

Article 6 of the 2000 Trafficking Protocol addresses “assistance to and protection of victims of trafficking in persons.” The Protocol requires that states consider implementing measures to:

- Protect the privacy and identity of victims of trafficking;
- Provide victims with information about court and administrative proceedings, permitting victims to present their views in criminal proceedings;
- Provide measures “for the physical, psychological, and social recovery” of victims. This includes appropriate housing, counseling, and information on legal rights, medical and material assistance, and employment opportunities;
- Consider the special needs of children;
- “[P]rovide for the physical safety of victims of trafficking”; and
- Ensure that the domestic legal system permits trafficking victims to obtain compensation for damage suffered.

With regard to privacy measures, victims of trafficking are routinely referred to only by their initials or first names in written opinions in criminal cases. *See, e.g., United States v. Marcus*, 628 F.3d 36, 45 n.12 (2d Cir. 2010).<sup>71</sup>

With regard to victim presentations, U.S. law permits witnesses to make victim-impact statements in criminal cases. *See* 18 U.S.C. § 3771.

With regard to victims’ recovery, the Trafficking Victims Protection Act established funding for nongovernmental agencies, which provide many recovery-related services.

Finally, with regard to compensation, 18 U.S.C. § 1593 (2006) requires courts to award restitution to victims of trafficking. This statute specifically addresses the difficulty of calculating restitution for victims of trafficking, requiring that victims receive compensation for the full value of their losses.

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<sup>71</sup> A federal grand jury had indicted the defendant in *Marcus* for unlawful forced labor and sex trafficking between January 1999 and October 2001. His conviction was reversed on appeal, for the reason that the Trafficking Victims Protection Act took effect on Oct. 28, 2000. *United States v. Marcus*, 538 F.3d 97 (2d Cir. 2008). The Supreme Court reversed and remanded. 560 U.S. 258 (2010). The U.S. Court of Appeals for the Second Circuit upheld the forced labor conviction and remanded to the trial court for retrial on the sex trafficking conviction. 628 F.3d 36, 44 (2d Cir. 2010). At this juncture, prosecutors dropped the sex trafficking charge, and the defendant was sentenced to eight years in prison on the remaining charges. 517 Fed. Appx. 8 (2d Cir.), *cert. denied*, 134 S. Ct. 135 (2013).

Section 1593(b)(3) defines “full amount of the victim’s losses” as “the greater of the gross income or value to the defendant of the victim’s services or labor or the value of the victim’s labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. § 201 et seq. (2012)).” This formulation permits a victim of sex trafficking to recover the amount earned by the trafficker for commercial sexual services. Restitution orders issued under other statutes, such as 18 U.S.C. § 3663 (2006), limit restitution in sex trafficking cases to back wages, which may be a less appropriate measure of loss. In 2012, the Treasury Department issued a notice on Restitution Payment under the Trafficking Victims Protection Act. I.R.S. Notice 2012-12, 2012-6 I.R.B. 365, *available at* <http://www.irs.gov/pub/irs-drop/n-12-12.pdf> (last visited Dec. 9, 2013).

Mandatory restitution payments awarded under 18 U.S.C. § 1593 are excluded from gross income for federal income tax purposes. Because of this tax treatment and the more accurate damages calculation in sex trafficking cases, restitution orders made to trafficking victims should be made under 18 U.S.C. § 1593 only.

## **ii. Immigration Measures**

Article 7 of the 2000 Trafficking Protocol requires states to consider measures to “permit victims of trafficking in persons to remain” in the state’s territory, either temporarily or permanently. As in other instances, provisions of the federal statute, the Trafficking Victims Protection Act, correspond to this international obligation.

This Act initially established two forms of immigration relief for trafficking victims, by:

- Creating a new nonimmigrant category – T – for aliens who qualified as victims of a “severe form of trafficking in persons” set out in § 101(a)(15)(T) of the Immigration and Nationality Act, codified at 8 U.S.C. § 1101(a)(15)(T). The Department of Homeland Security may award up to 5,000 of these T-visas annually. Recipients may eventually adjust their immigration status to legal permanent residency.
- Establishing “continued presence,” a temporary immigration status that permits potential witnesses to stay in the United States through the investigation and criminal prosecution stages. 22 U.S.C. § 7105(C)(3), 7105(E).

The 2008 reauthorization of the Trafficking Victims Protection Act, known as the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, established another avenue for relief for victims of labor exploitation and trafficking in the United States. Pub. L. No. 110-457, 122 Stat. 5072 (codified in scattered sections of 6, 8, 18, 22, and 42 U.S.C. (Supp. II 2009)). Holders of special visas reserved for domestic workers and servants of diplomats and international organization employees – that is, holders of A-3 and G-5 visas – may remain in the United States to pursue civil claims against their employers. Section 203(c) of this 2008 reauthorization statute, codified at 8 U.S.C. § 1375c (2006), permits A-3/G-5 visa holders to request deferred action as they pursue their civil claims.

Section 205(a)(3)(A)(iii), codified at 22 U.S.C. § 7105, also requires that a victim's previously granted continued presence remain in effect for the duration of a civil action filed under 18 U.S.C. § 1595, even if continued presence otherwise would have been terminated.

### **iii. Prosecution of Traffickers: Criminal Prohibitions and Definitions**

The Trafficking Victims Protection Act of 2000 and subsequent reauthorizations created a number of additional crimes and remedies, and it further recodified several preexisting crimes.<sup>72</sup> These criminal statutes are generally referred to as the chapter 77 crimes, as they appear in chapter 77 of Title 18 of the U.S. Code. These include:

- 18 U.S.C. § 1581, Peonage.
- 18 U.S.C. § 1584, Sale into involuntary servitude.
- 18 U.S.C. § 1589, Forced labor.
- 18 U.S.C. § 1590, Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1591, Sex trafficking of children or by force, fraud, or coercion.
- 18 U.S.C. § 1592, Unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor.
- 18 U.S.C. § 1593, Mandatory restitution.
- 18 U.S.C. § 1593A, Benefitting financially from peonage, slavery, and trafficking in Persons.
- 18 U.S.C. § 1594, General provisions, including those on attempt and forfeiture.
- 18 U.S.C. § 1595, Civil remedy, providing a private right of action.
- 18 U.S.C. § 1596, Additional jurisdiction in certain trafficking offenses, extraterritorial jurisdiction.

Other crimes, codified in chapters other than chapter 77, are often charged along with trafficking offenses. These include:

- 18 U.S.C. § 2423, Transportation of minors into prostitution.
- 18 U.S.C. § 1546, Fraud and misuse of visas, permits, and other documents.

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<sup>72</sup> Several of the chapter 77 crimes predated the Trafficking Victims Protection Act and remained essentially untouched or only slightly modified. These include sections 1981 and 1984, which were untouched, and section 1583, which only added an additional obstruction prohibition.

- 18 U.S.C. § 1351, Fraud in foreign labor contracting

The 2008 amendments to the Trafficking Victims Protection Act added a number of provisions to the existing criminal statutes prohibiting obstruction of justice.

The definition of “severe forms of trafficking” underpins these criminal statutes. The Trafficking Victims Protection Act defines the term “severe forms of trafficking in persons” as follows:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

22 U.S.C. § 7102(9). It further defines “sex trafficking” as “the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.” *Id.* § 7102(10).

#### **iv. Monetary Remedies**

Trafficking victims in the United States may obtain financial damages in criminal cases through mandatory restitution, as discussed *supra* § III.E.3.e.1. In addition, trafficking victims may bring federal or state civil cases seeking money damages. Most commonly, these civil cases include state law claims for tort damages, contract breach, labor law violations under state law or the federal Fair Labor Standards Act, and negligence. Cases brought during a federal criminal action are subject to a mandatory stay. 18 U.S.C. § 1595.

#### **v. Civil Remedies and Restitution**

In the civil context, in cases brought under 18 U.S.C. § 1595, courts have awarded a full range of damages. The U.S. Court of Appeals for the Ninth Circuit has held that punitive damages are available to plaintiffs filing federal civil actions for trafficking. *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011). Trial courts routinely award back wages, tort damages, and contract damages, as well as punitive damages. *See, e.g., Mazengo v. Mzengi*, 542 F. Supp. 2d 96 (D.D.C. 2008).

In the criminal context, 18 U.S.C. § 1593, described *supra* § III.E.3.e.iii, defines the scope of mandatory criminal restitution.

## **vi. Federal Civil Actions under Chapter 77**

Section 1595 of Title 18 of the U.S. Code creates a federal right of action for victims of trafficking. Any crime that a federal prosecutor may charge under 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii, may be included in a federal civil complaint brought under 18 U.S.C. § 1595 for conduct that occurred after the enactment date of December 19, 2003. The original civil remedy, created by the 2003 reauthorization, permitted suits only under 18 U.S.C. §§ 1589, 1590, or 1591. Section 221 of the William Wilberforce Trafficking Victims Reauthorization Act of 2008, codified at 18 U.S.C. §§ 1593(b), 1595, extended the civil remedy to all offenses listed in chapter 77. Pub. L. No. 110-457, 122 Stat. 5072 (2008).

## **vii. Extraterritorial Jurisdiction**

Federal law, codified at 18 U.S.C. §§ 1596, 3271, provides extraterritorial jurisdiction for criminal and civil prosecutions of trafficking crimes listed in chapter 77 of Title 18 of the U.S. Code, discussed *supra* § III.E.3.e.iii.

## **f. Common Affirmative Defenses**

A host of defenses has been advanced in trafficking cases. The most frequent, in both criminal and civil cases, pertain to: limitations periods; constitutional provisions; timing of conduct; the diplomatic status of the defendant; the asserted absence of force, fraud, or coercion; the asserted family status of the alleged victim; asserted cultural differences; the immigration status of the alleged victim; the defense of consent; an asserted belief that the alleged victim was an adult; the relationship of trafficking to slavery; and the status of the defendant in relation to subcontractors. Each of these defenses is treated below.

### **i. Limitations Period Defense**

Defendants routinely challenge the statute of limitations for each count of the complaint or indictment. The statute of limitations for a civil trafficking case under 18 U.S.C. § 1595(c) is ten years. *Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011).

### **ii. Constitutional Overbreadth Defense**

Defendants have attacked the forced labor statute as overbroad, in violation of constitutional guarantees. By this claim, defendants argue that they did not threaten the alleged victim, but merely warned, honestly and innocently, that the authorities would deport that person. At least one U.S. court of appeal has rejected this defense. *United States v. Calimlim*, 538 F.3d 706, 710-13 (7th Cir. 2008), *cert. denied*, 555 U.S. 1102 (2009).

In sex trafficking cases, defendants have unsuccessfully challenged the term “sex act” as unconstitutionally vague. *E.g.*, *United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

### **iii. Timing of Conduct: Pre-Enactment Activity Defense**

Under the pre-enactment activity claim, the defense challenges whether the conduct charged in the indictment predated the enactment of the relevant portion of the statute. *See United States v. Marcus*, 560 U.S. 258, 260 (2010) (criminal context); *Ditullio v. Boehm*, 662 F.3d 1091, 1102 (9th Cir. 2011) (civil context). Prosecutors generally counter that conduct that straddles the pre-enactment and post-enactment dates qualifies as a continuing violation. *Ditullio*, 662 F.3d at 1096.

### **iv. Status of the Accused: Diplomatic Immunity Defense**

A defendant may raise diplomatic immunity, arguing that service must be quashed and the complaint dismissed. *See Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996). Only diplomats credentialed under the 1961 Vienna Convention on Diplomatic Relations<sup>73</sup> enjoy this total immunity. Consular officers and individuals working for international organizations have only functional immunity. *See Park v. Shin*, 313 F.3d 1138, 1143 (9th Cir. 2002).

Furthermore, even diplomats with full immunity may not enjoy residual immunity once they depart the United States or abandon their post. *Swarna v. Al-Awadi*, 622 F.3d 123, 137-38 (2d Cir. 2010) (analyzing residual immunity provided for under Article 39(2) of the 1961 Vienna Convention on Diplomatic Relations).

### **v. “No Force, Fraud, or Coercion” Defense**

The “no force, fraud or coercion” defense arises when a defendant contends that the alleged victim was a happy and fulfilled worker, a claim advanced *inter alia* by submission of photographs of the alleged victim enjoying life at, for example, parties or Disneyland. *See, e.g., Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011), a case in which defendants filed an answer with dozens of photographs not considered by the court. Defendants also have introduced as evidence letters sent to family members in the country of origin, describing satisfaction with life in the United States. *E.g., United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

### **vi. Status of Alleged Victim: Family Member Defense**

Under the “family member” defense, a defendant submits that the alleged trafficking victim was a member of the family performing chores, rather than an employee forced to work. *See, e.g., Velez v. Sanchez*, 693 F.3d 308, 328 (2d Cir. 2012).

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<sup>73</sup> Vienna Convention on Diplomatic Relations, art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, available at [http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch\\_III\\_3p.pdf](http://treaties.un.org/doc/Treaties/1964/06/19640624%2002-10%20AM/Ch_III_3p.pdf). This treaty, which entered into force on Apr. 24, 1964, has 189 states parties; among them is the United States, which ratified on Nov. 13, 1972. *See* U.N. Treaty Collection, *Vienna Convention on Diplomatic Relations*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=III-3&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&lang=en) (last visited Dec. 9, 2013). The Convention has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006). This treaty, which has been implemented in the United States by means of the Diplomatic Relations Act of 1978, 22 U.S.C. §§ 254a-254e (2006), is discussed *supra* § II.B.

## **vii. Cultural Defense**

The cultural defense is premised on the claim that the defendants' treatment of the alleged victim is appropriate and customary in the defendants' country of origin. *See, e.g., United States v. Afolabi*, Crim. No. 2:07-cr-00785-002 (D.N.J. 2007). The cultural defense in this case was discussed in Assoc. Press, *Lawyer Says N.J. Trafficking Case Involves Culture Norms Not Understood in America*, Dec. 8, 2010, available at [http://www.nj.com/news/index.ssf/2010/12/nj\\_immigrants\\_lawyer\\_says\\_smug.html](http://www.nj.com/news/index.ssf/2010/12/nj_immigrants_lawyer_says_smug.html). The conviction and sentence were affirmed on appeal in an unpublished opinion. *United States v. Afolabi*, Case No. 10-3287 (3d Cir. 2011).

Defendants frequently engage expert witnesses to support this defense, which can be related to the family member defense just described. In an Eritrean context, for example, experts dubbed a domestic worker's position in the family as "fictive kinship." *Mesfun v. Hagos*, No. CV 03-02182 MMM (RNBx), 2005 WL 5956612 (C.D. Cal. Feb. 16, 2005).

## **viii. Immigration Status of Alleged Victim: Lack of Standing**

In what is known as the "illegal alien" or *Hoffman Plastics* defense, defendants argue that the alleged victim has no standing to bring a civil action because the victim is in the United States illegally. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 151 (2002). Most courts that have considered this decision have construed it narrowly, to apply only to certain claims for back wages brought under the National Labor Relations Act. *See Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 247 (2d Cir. 2006).

## **ix. Immigration Status of Alleged Victim: Immigration "Fraud"**

Under the "immigration fraud" defense, defendants contend that the alleged victim made false accusations in order to obtain a T-visa or other immigration status to remain in the United States.

## **x. Defense of Consent**

In raising a consent defense, a defendant may argue that although the plaintiffs or complaining witnesses had contracts promising them minimum wage and benefits, these workers voluntarily (and orally) agreed to accept a far lower wage. In the sex trafficking context, defendants often argue that the alleged victims voluntarily engaged in prostitution and did not suffer force, fraud, or coercion with any nexus to prostitution. *See, e.g., United States v. Paris*, No. 3:06-cr-64, 2007 U.S. Dist. LEXIS 78418, at 29-30 (D. Conn. Oct. 23, 2007). On appeal, on appeal, no arguments raised on this point were considered. *See United States v. Martinez*, 621 F.3d 101 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1622 (2011).

## **xi. Defense Based on Perceived Age of Alleged Victim**

In a case concerning a severe form of trafficking involving a child under 18 years of age, the defense may argue that the defendant believed that the child was an adult; that is, a person

older than 18. *United States v. Daniels*, 653 F.3d 399, 409-10 (6th Cir. 2011) (upholding jury instructions stating that the government was “not required to prove knowledge of the minor’s age to sustain a conviction”), *cert. denied*, 132 S. Ct. 1069 (2012).

### **xii. “Not Slavery” Defense**

In the Alien Tort Statute context, defendants argue that trafficking does not rise to the level of slavery, and therefore does not violate customary international law. *See, e.g., Swarna v. Al-Awadi*, 622 F.3d 123 (2d Cir. 2010).

Similarly, defendants in TVPRA cases, described *supra* § III.E.3.a, frequently point to the lack of physical violence, the absence of chains and other restraints, in an effort to compare the victims’ treatment favorably with that of slaves held in the United States during the early nineteenth century. In such a case, a federal appellate court declined “to construct a minimum level of threats or coercion required to support a conviction” for involuntary servitude, thus leaving the question for the finder of fact. *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002), *cert. denied*, 538 U.S. 981 (2003).

### **xiii. Independent Contractor/Lack of Agency Defense**

In several civil lawsuits against larger employers, in which subcontractors or recruiters were most directly responsible for the forced labor, the larger employers typically have claimed that the subcontractors or recruiters were independent contractors, and that they acted outside the scope of their agency to the larger employer.

### **xiv. Payment of Legal Wages Defense**

Several civil cases have been brought on behalf of trafficking victims who were paid wages that were the equivalent of, or surpassed, the required minimum wage. In these cases, employers have attempted to conflate compliance with wage and hour laws with their defense against human trafficking allegations.

It is possible for a victim of human trafficking to be paid wages, but still to qualify as being trafficked. This is particularly true when traffickers illegally deduct enormous sums for food, housing, purported debts, and transportation. *See United States v. Farrell*, 563 F.3d 364 (8th Cir. 2009).

### **xv. Conclusion**

All of these defense are frequently rejected by the court of first instance, and so do not appear in appellate decisions.

#### **4. *Non-refoulement*, or Nonreturn**

A person in the United States may invoke the legal principle of *non-refoulement*, or nonreturn, in an effort to block transfer or return to another country. This most commonly occurs in asylum and extradition cases. On occasion it arises in other detention contexts. Following a general discussion of the history and scope of the principle, each context will be addressed in turn.

##### **a. History and Scope of *Non-refoulement* Principle**

According to the legal principle of *non-refoulement* (from the French *refouler*, “to force back”), a state may not return a person to a place where the person is sufficiently likely to suffer violations of certain rights. The principle developed as a reaction to World War II incidents in which refugees from Nazism were returned to face death and other persecution. The principle first appeared in the 1951 Convention relating to the Status of Refugees,<sup>74</sup> as follows:

##### Article 33 – Prohibition of expulsion or return (*refoulement*)

1. No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

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<sup>74</sup> Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176 (entered into force Apr. 22, 1954), available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter *Refugee Convention*]. As of Apr. 1, 2011, 145 states were parties to the Convention; the United States is not among them. See U.N. Treaty Collection, *Convention relating to the Status of Refugees*, [http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTS&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&lang=en](http://treaties.un.org/pages/ViewDetailsII.aspx?&src=UNTS&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&lang=en) (last visited Dec. 9, 2013). The United States is, however, a party to the 1967 Refugee Protocol, a treaty that incorporates operative provisions of the 1951 Refugee Convention.

## **b. Pertinent Treaty Provisions Binding the United States**

Though not a party to the 1951 Refugee Convention, quoted in the section immediately above, the United States is party to three subsequent treaties pertinent to *non-refoulement* or nonreturn:

- 1967 Protocol Relating to the Status of Refugees<sup>75</sup>
- 1984 Convention Against Torture<sup>76</sup>
- 1966 International Covenant on Civil and Political Rights<sup>77</sup>

Relevant aspects of each treaty are discussed below.

### **i. Protocol Relating to the Status of Refugees**

In 1967, states adopted a protocol, or supplementary treaty, to the 1951 Refugee Convention; the United States acceded to this 1967 Protocol Relating to the Status of Refugees on November 1, 1968.<sup>78</sup>

In Articles 1(1) and 7(1) of the 1967 Refugee Protocol, states “undertake to apply articles 2 to 34 inclusive of the Convention to refugees,” without reservation. The Supreme Court noted in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999), that the Refugee Protocol thus “incorporates by reference” Articles 2 through 34 of the Refugee Convention. Included within these enumerated articles is the nonreturn provision of Article 33, which is quoted in full *supra* § III.E.4.a.

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<sup>75</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 146 states parties; among them is the United States, which acceded to the treaty entered into force on Nov. 1, 1968. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en) (last visited Dec. 9, 2013).

<sup>76</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Dec. 9, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.* None of these statements concerns the principle of *non-refoulement*.

<sup>77</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Dec. 9, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

<sup>78</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 145 states parties besides the United States. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en) (last visited Dec. 9, 2013).

Congress implemented the tenets of the 1967 Refugee Protocol when it enacted the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107 (codified as amended in scattered sections of Title 8 of the U.S. Code). “If one thing is clear from the . . . the entire 1980 Act,” the Supreme Court has written, “it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

The Refugee Act of 1980 contains a nonreturn provision:

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in that country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1231(b)(3)(A).

## ii. Convention Against Torture

Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>79</sup> provides:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

The Convention Against Torture was implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Subdiv. B, Title XXII, Ch. 3, Subch. B, § 2242, 112 Stat. 2681, 822-823 (codified as 8 U.S.C. § 1231 note (2012)). This legislation, known as FARRA or, on occasion, the FARR Act, makes explicit the prohibition against *refoulement*:

It shall be the policy of the United States not to expel, extradite, or otherwise

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<sup>79</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. This treaty, which entered into force on June 26, 1987, has 154 states parties. U.N. Treaty Collection, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) (last visited Dec. 9, 2013). The United States ratified on Oct. 21, 1994, subject to declarations and reservations set out *id.* None of these statements concerns the principle of *non-refoulement*.

effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

FARRA required other government agencies – such as the Department of Justice and the Department of State – to issue regulations implementing Article 3 of the Convention Against Torture. The primary implementing regulations may be found at 8 C.F.R. § 208.18 (2012).

### **iii. International Covenant on Civil and Political Rights**

The 1966 International Covenant on Civil and Political Rights<sup>80</sup> addresses expulsion in language somewhat different from that of the refugee and anti-torture treaties because it arises in the context of regular immigration proceedings. Article 13 states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The United States signed this treaty in 1977 and ratified it in 1992. Attached to the instrument of ratification, however, was this proviso: “That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.” 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). To date there has been no legislation passed to implement Article 13.

### **c. Customary International Law and *Non-refoulement***

Although rare, a litigant may seek application of *non-refoulement* as customary international law. See *Yuen Jin v. Mukasey*, 538 F.3d 143, 159 (2d Cir. 2008). As a general matter, such a claim requires consideration of the discussion *supra* § I.B with regard to the use of customary international law in U.S. courts. As a specific matter, it is to be noted that the question of whether the *non-refoulement* norm has attained the status of customary international law is itself contested.<sup>81</sup> A judge who wishes to entertain such a claim may need to require full briefing

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<sup>80</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. This treaty, which entered into force on Mar. 23, 1967, has 167 states parties. U.N. Treaty Collection, *International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Dec. 9, 2013). The United States ratified on June 8, 1992, subject to declarations and reservations set out *id.*

<sup>80</sup> Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, available at <http://www.unhcr.org/3b66c2aa10.html> [hereinafter Refugee Protocol]. This treaty, which entered into force on Oct. 4, 1967, has 145 states parties besides the United States. U.N. Treaty Collection, *Protocol relating to the Status of Refugees*, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en) (last visited Dec. 9, 2013).

<sup>81</sup> Compare, e.g., Elihu Lauterpacht & Daniel Bethlehem, “The Scope and Content of the Principle of Non-

of both the general and specific issues.

#### **d. *Non-refoulement* in U.S. Litigation**

*Non-refoulement* typically arises in asylum and extradition cases, although invocation in other detention contexts is possible.

#### **i. *Non-Refoulement* in Processes of Deportation and Removal**

Individuals who are found present in the United States unlawfully, for example when they enter illegally or overstay a visa, are subject to removal pursuant to 8 U.S.C. § 1227 (2006). People fleeing persecution who have been ordered removed from the United States may raise *non-refoulement* claims under two statutes: the Refugee Act of 1980 and FARRA.

##### **i.1. Withholding of Removal Under The Refugee Act of 1980**

Judicial review of a final order of removal is authorized by 8 U.S.C. § 1252(a)(1) (2006). Individuals denied withholding of removal by the Board of Immigration Appeals must file a petition for review with a federal appeals court no later than 30 days after the date of the final order of removal. 8 U.S.C. § 1252 (b)(1)-(2). Absent an order from the court, a petition for review does not stay the alien's removal pending the court's decision; therefore, an applicant may concurrently file for a stay. 8 U.S.C. § 1252(b)(3)(B).

A court reviewing a final order of removal is limited to reviewing the administrative record on which the order is based. 8 U.S.C. § 1252(b)(4)(A). The Supreme Court held in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987), that the Refugee Act of 1980 “removed the Attorney General’s discretion” in withholding of removal proceedings, so that decisions regarding withholding of removal are reviewable. This ruling rendered 8 U.S.C. § 1252(b)(4)(D) – which states that “the Attorney General’s discretionary judgment whether to grant relief under Section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion” – inapplicable in review of withholding of removal cases. “[T]he administrative findings of fact are conclusive,” however, “unless any reasonable adjudicator would be compelled to conclude to the contrary.” 8 U.S.C. § 1252(b)(4)(B).

The process of *non-refoulement* begins at the administrative level, at the moment that an individual subject to removal invokes the nonreturn right provided for in the Refugee Act of 1980 by seeking withholding of removal. This claim for nonreturn is typically, though not necessarily, advanced in tandem with a request for a grant of asylum at a deportation or exclusion hearing. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 159 (1993). While both the Refugee Act and FARRA are only available to aliens who reside in or have arrived at the border of the United States, as detailed in *INS v. Aguirre-Aguirre*, 526 U.S. 415, 419 (1999),

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Refoulement: Opinion,” in *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* 141, ¶¶ 196-253 (Erika Feller, Volker Türk & Frances Nicholson eds. 2003) (discussing principle as customary international law), with James C. Hathaway, *Leveraging Asylum*, 45 *Texas Int’l L.J.* 503 (2010) (challenging contentions that *non-refoulement* is even a norm of customary international law, let alone a nonderogable *jus cogens* norm).

withholding of removal and asylum are distinct forms of relief:

- Withholding bars the deportation of an alien only to a particular country or countries. If the requirements are met, a grant of withholding is mandatory unless one of the exceptions discussed *infra* § III.E.4.d.i.1. applies.
- Asylum permits an alien to remain in the United States and to apply for permanent residency after one year and citizenship after five years. Asylum also enables successful applicants to provide derivative asylum status to their spouse and minor children. The decision to grant asylum is not mandatory; rather, it falls within the discretion of the Attorney General.

An applicant for withholding of removal, the mandatory *non-refoulement* remedy, must establish that:

- The applicant's life or freedom would be threatened because of race, religion, nationality, membership in a particular social group, or political opinion, pursuant to 8 U.S.C. § 1231(b)(3) (2006); and

The burden of showing that life or freedom is “more likely than not” to be threatened if the applicant is removed to a third country rests with the applicant. 8 U.S.C § 1231(b)(3)(C) (2006), *explained in INS v. Stevic*, 467 U.S. 407, 422, 429-30 (1984). This standard may be met by the applicant's own, uncorroborated, credible testimony. 8 U.S.C. § 1158(b)(1)(B)(ii). Credibility is to be judged based on the totality of the circumstances, taking into account the “demeanor, candor, or responsiveness of the applicant,” the plausibility of the applicant's account, and the consistency of all written and oral statements. *Id.* § 1158(b)(1)(B)(iii). Although there is no presumption of credibility, a finding of past persecution (for instance, in an earlier asylum determination) gives rise to a rebuttable presumption of a future threat. 8 C.F.R. § 208.16(b)(1).

Even if an applicant otherwise meets this burden, withholding of removal is unavailable if the applicant falls within one of the “mandatory denial” categories, for the reason that the applicant:

- “Participated in Nazi persecution, genocide, or any act of torture or extrajudicial killing.” 8 U.S.C. § 1231(b)(3)(B) (referring to 8 U.S.C. § 1227(a)(4)(D)).
- “[O]rdered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(B)(i).
- Constitutes a danger to the community of the United States, given that the person was “convicted by a final judgment of a particularly serious crime.” *Id.* § 1231(b)(3)(B)(ii).
- Committed, it is believed, a “serious nonpolitical crime outside the United States” before arriving in the United States. *Id.* § 1231(b)(3)(B)(iii).

- Poses, it is reasonably believed, a “danger to the security of the United States.” *Id.* § 1231(b)(3)(B)(iv).
- Endorsed or espoused terrorist activity or persuaded others to support terrorist activity. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001), codified at 8 U.S.C. § 1182 (2006).

Individuals who are barred from relief via withholding of removal may also pursue a claim for deferral of removal under the Convention Against Torture, discussed *infra* § III.E.4.d.i.3.

### **i.2. Withholding of Removal Under FARRA, the Foreign Affairs Reform and Restructuring Act of 1998 (CAT Withholding)**

As discussed *supra* § III.E.4.b.ii, FARRA implemented the Convention Against Torture. Federal courts thus encounter the Convention Against Torture in situations in which an individual seeks relief following a final order of removal under Section 242 of the Immigration and Nationality Act, as authorized by Section 2242(d) of FARRA.

Section 2242(d) may only be used as a measure of last resort – it constitutes a form of relief for which applicants may apply only after all other forms of relief have been denied.

Moreover, although questions of law under the Convention Against Torture may be appealed, judicial review “shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the” Immigration and Nationality Act. 8 C.F.R. 208.18(e)(1).

#### **i.2.a. Overall Procedure**

The U.S. courts of appeals are “the sole and exclusive means” for review of any Convention Against Torture claim. 8 U.S.C. § 1252(a)(4) (codifying a provision in the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231).<sup>82</sup> This appellate jurisdiction includes review of constitutional claims or questions of law. *Id.* § 1252(a)(2)(D).

What constitutes a question of law appropriate for review is unsettled in the circuits. *Cf. Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315, 1322 (11th Cir. 2007) (in decision treating meaning of “torture” as mixed question, writings that courts must “apply a legal definition to a set of undisputed or adjudicated historical facts”); *Saintha v. Mukasey*, 516 F.3d 243 (4th Cir.) (declining to “stretch reason” to find a question of law, in what the court held to be a factual question), *cert. denied*, 555 U.S. 1031 (2008).

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<sup>82</sup> Codified in scattered sections of Title 8 of the U.S. Code, the 2005 REAL ID Act modified existing law regarding the standards for security, authentication, and issuance of drivers’ licenses and identification cards. The Act also addressed certain immigration issues pertaining to terrorism.

Individuals subject to removal who believe they will be tortured upon their return normally raise the Convention Against Torture during removal proceedings. The treaty can be invoked either explicitly, when the individual requests relief from an Immigration Judge, or implicitly, when the individual presents evidence indicating that the individual may be tortured in the country of removal. 8 C.F.R. § 208.13(c)(1). A *non-refoulement* claim under the Convention hinges on the definition of “torture.” The federal law implementing this treaty defines torture as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. § 208.18(a)(1).

The burden of proof lies with the applicant for withholding of removal; the applicant must show that it is more likely than not, based on consideration of all evidence “relevant to the possibility of future torture,” that the applicant would be tortured if removed to the proposed country of removal. *Id.* § 208.16(c)(2)-(3). The pertinent federal regulation states that this burden can be met by the uncorroborated testimony of the applicant. *Id.* § 208.16(c)(2). At least one federal appellate court has held, however, that such testimony must offer “specific objective evidence” demonstrating that the applicant will be subject to torture. *Romilus v. Ashcroft*, 385 F.3d 1, 8 (1st Cir. 2004).

On satisfying this burden, the applicant is entitled to protection under the Convention Against Torture, and withholding of removal must be granted, 8 C.F.R. § 208.16(d), unless one of the “mandatory denials,” as listed *supra* § III.E.4.d.i.1, applies. 8 C.F.R. § 208.16 (d)(2). In such case, applicants are eligible only for deferral of removal, as detailed *infra* § III.E.4.d.i.3.

### **i.2.b. Diplomatic Assurances**

During an immigration removal process involving a Convention Against Torture claim, the pertinent federal regulation permits the Secretary of State to intervene and forward to the Attorney General diplomatic assurances from the government of a specific country that “an alien would not be tortured there if the alien were removed to that country.” *Id.* § 208.18(c)(1). The Attorney General, in consultation with the Secretary of State, determines whether the assurances are “reliable.” *Id.* § 208.18(c)(2). If assurances are found to be reliable, the removal may proceed, and the alien’s claim for protection under the Convention Against Torture may not be considered further by an immigration judge, by the Board of Immigration Appeals, or by an asylum officer. *Id.* § 208.18(c)(3).

One court of appeals has ruled that this regulation does not preclude judicial review of removal based on diplomatic assurances. *Khouzam v. Att’y Gen. of the United States*, 549 F.3d 235 (3d Cir. 2008). It reasoned that an applicant must be afforded “an opportunity to test the reliability of diplomatic assurances” that a foreign state has made. *Id.* at 259.

### **i.3. Deferral of Removal Under the Foreign Affairs Reform and Restructuring Act of 1998**

Federal judges also may hear challenges to terminations of deferral-of-removal orders.

#### **i.3.a. Overview**

Under the Convention Against Torture, FARRA, and accompanying federal regulations, an alien who has been ordered removed but has met the burden of showing likelihood of torture on removal is entitled to protection under the Convention; specifically, to the mandatory accompanying remedy, deferral of removal. The alien remains subject to the mandatory categories for denial of withholding of removal, described *supra* § III.E.4.d.i.1. 8 C.F.R. § 1208.17(a).

A deferral may be terminated: either the Immigration and Customs Enforcement, or the original applicant, may file a motion to terminate in the immigration court that ordered the deferral of removal. *Id.* § 1208.17(d)(1) & (e)(1). When brought by Immigrations and Customs Enforcement, the motion should be supported by evidence – not presented at the previous hearing – relevant to the possibility that the alien would be tortured in the country to which removal has been deferred. *Id.* § 1208.17(d). The applicant bears the burden of showing that it is still more likely than not that the applicant will be tortured in the country to which removal has been deferred. *Id.* § 1208.17(d)(3). The judge should make a *de novo* determination. The hearing will have one of two results:

- Deferral will remain in place, or
- Having failed to meet the requisite burden, the applicant will be returned to the country at issue.

The applicant has a right to appeal the termination of deferral to the Board of Immigration Appeals. *Id.* § 1208.17(d)(4). The applicant also may appeal to the federal courts, although at least one court of appeals held that the determination by an immigration judge that a Convention Against Torture deferral of removal claim was not supported by substantial evidence is a factual determination “outside the jurisdictional purview” of the courts. *Bushati v. Gonzales*, 214 Fed. Appx. 556, 558-59 (6th Cir. 2007).

#### **i.3.b. Diplomatic Assurances**

As in the case of withholding of removal, discussed *supra* § III.E.4.d.i.2.b., a deferral of removal also may be terminated if the U.S. Secretary of State forwards adequate diplomatic assurances. 8 C.F.R. § 1208.17(f).

## ii. *Non-refoulement* in the Context of Extradition

Judges also may be asked to consider *non-refoulement* in the context of extradition. Extradition is the judicial process by which a foreign country requests the transfer of a fugitive who has been found in the United States, in order that the fugitive may face criminal proceedings in the requesting country. This process occurs pursuant to two sources of law:

- Federal statutes, found at 18 U.S.C. §§ 3184-3196 (2006), that detail procedures for extradition; and
- The treaty applicable between the specific requesting country and the United States.

A person may seek to block extradition from the United States by raising claims about what might happen following transfer to the requesting country. Typically federal courts will apply what is known as the rule of non-inquiry, and so decline to examine the procedures or treatment awaiting a person in another country. See *Ahmad v. Wigen*, 910 F.2d 1063, 1066-67 (2d Cir. 1990); John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. Rev. 1973 (2010).

In dicta, one court reserved a possible exception to the rule of non-inquiry, if there were proof that the procedures or punishments that a detainee might experience on surrender would be “so antipathetic to a federal court’s sense of decency as to require re-examination of the principle . . . .” *Gallina v. Fraser*, 278 F.2d 77, 78 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960). Despite the fact that a number of cases refer to this passage in *Gallina*, no authority exists for successfully invoking it to bar extradition. See *Cornejo-Barreto v. W.H. Siefert*, 379 F.3d 1075, 1088, *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004).

Should the person make the precise claim that he or she would suffer torture after transfer, that claim also invokes the *non-refoulement* provision of the Convention Against Torture, as discussed *supra* § III.E.4.b.ii. Pursuant to 22 C.F.R. § 95.2 (2012), the Secretary of State must consider whether a person is more likely than not to be tortured in the state requesting extradition when making the determination to extradite.

Whether the federal courts can review the determination of the Secretary of State is an open question. FARRA provides, in Section 2242(d), as reprinted in the notes following 8 U.S.C. § 1231 (2006):

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252).

Moreover, although a 2005 statute has not yet been addressed by the Supreme Court, lower courts have also cited the REAL ID Act of 2005, codified at 8 U.S.C. § 1252(a)(4). This legislation, which was directed at streamlining review in immigration cases, provides in part:

Notwithstanding any other provision of law . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture . . . .

Writing for a unanimous Supreme Court in *Munaf v. Geren*, 553 U.S. 674, 703 n.6 (2008), Chief Justice John G. Roberts, Jr., acknowledged that “claims under the FARR Act may be limited to certain immigration proceedings.” The Court did not reach the question of whether FARRA prohibited petitioners’ transfer, holding that litigants had not properly raised that claim.

U.S. courts of appeals are divided on the issue of reviewing the likelihood of torture:

- The District of Columbia and the Fourth Circuits have held that the statute bars courts from reviewing *non-refoulement* claims made under the Convention and FARRA when extradition is at issue. See *Kiyemba v. Obama*, 561 F.3d 509, 514-15 (D.C. Cir. 2009) (in the context of detention), *cert. denied*, 559 U.S. 1005 (2010); *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007), *cert. dismissed*, 552 U.S. 1135 (2008).
- The Ninth Circuit, sitting *en banc*, held that FARRA and the REAL ID Act do not affect federal habeas corpus jurisdiction over *non-refoulement* claims. *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (per curiam), *cert. denied*, 113 S. Ct. 845 (2013). The court further held: that the rule of non-inquiry has no impact on federal habeas jurisdiction; and, on the merits, that the Secretary of State must make the determination contemplated by 22 C.F.R. § 95.2. But once the Secretary demonstrates compliance with this obligation, the court wrote, no further review is available: “The doctrine of separation of powers and the rule of non-inquiry block any inquiry into the substance of the Secretary’s declaration.” 683 F.3d at 957.
- The Third Circuit noted the possibility of Administrative Procedure Act review, but did not explicitly hold that it is available. *Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006).

### **iii. Non-Refoulement in Other Detention Contexts**

*Non-refoulement*, and particularly claims regarding torture under FARRA, may arise in a range of circumstances related to detention. In particular, individuals held in U.S. custody in the wake of the September 11, 2001, terrorist attacks have invoked *non-refoulement* in an effort to avoid being transferred to another state, including their state of nationality.

In the context of extradition, in 2008, the Supreme Court rejected a *habeas* claim brought by U.S. citizens detained by coalition forces in Iraq. *Munaf v. Geren*, 553 U.S. 674, 703 (2008). The Court based its ruling on grounds other than FARRA. To be precise, the Court concluded

that the detainees had failed to raise a proper claim for relief under that statute: “Neither petitioner asserted a FARR Act claim in his petition for habeas, and the Act was not raised in any of the certiorari filings before this Court.” *Munaf*, 553 U.S. at 703. Even if the claim properly had been raised, the Court wrote that it might have been barred on the grounds that: first, transferring someone already in Iraq to Iraq’s government might not qualify on the ground that “such an individual is not being ‘returned’ to ‘a country’”; and second, “claims under the FARR Act may be limited to certain immigration proceedings.” *Id.* at 702-03 n.6.

In 2010, the Supreme Court declined to hear the case of a Guantánamo detainee who claimed that if he were returned to his native Algeria, he would be tortured. *Naji v. Obama*, 131 S. Ct. 32 (2010) (Roberts, C.J., denying stay). The detainee reportedly was returned despite this contention. Peter Finn, “Guantanamo detainee Naji sent back to Algeria against his will,” *Wash. Post*, July 20, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/19/AR2010071904922.html>.

Two U.S. courts of appeals have given limited application to the FARR Act:

- The District of Columbia Circuits stated that “the FARR Act and the REAL ID Act do not give military transferees . . . a right to judicial review of their likely treatment in the receiving country.” *Omar v. McHugh*, 646 F.3d 13, 15 (D.C. Cir. 2011). Interpreting the plain language of Real ID Act (as quoted *supra* § III.E.4.d.ii.), the court concluded that “only immigration transferees have a right to judicial review of conditions in the receiving country, during a court’s review of a final order of removal.” *Id.* at 18.

The Fourth Circuit held that FARR Act allows claims only for immigration detainees facing removal. *Mironescu v. Costner*, 480 F.3d 664, 674-77 (4th Cir. 2007), *cert. denied*, 552 U.S. 1135 (2008).