

# DEFENDING ACTIONS AGAINST CORPORATE CLIENTS OF PRIVATE SECURITY COMPANIES

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## INTRODUCTION

As corporations consider approaches for doing business in or near unstable parts of the world, some will face increased concerns for whether they are taking appropriate steps to ensure employee safety. Corporations lacking the internal resources to establish security protocols for higher-risk locales may choose to outsource that function to private security contractors. Viewpoints on doing so can differ.

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Critics note that private security companies have, at times, generated controversy and attracted negative publicity.<sup>1</sup> On the other hand, a multinational corporation's sending its employees into potentially hazardous regions of the world - without adequately providing for employee or facility safety - poses its own set of reputational and legal risks.<sup>2</sup> Responsible private security companies can help some companies responsibly manage those risks.<sup>3</sup>

Incidents involving a private security company's use of force in response to real or perceived threats can and do occur, however. Those affected by these incidents sometimes elect to pursue legal action in the United States - perhaps with the perception that the U.S. legal system may be more transparent and efficient than that in their home country.<sup>4</sup> Claimants may also view the U.S. court system as more able to provide a more just (or financially appropriate) remedy.<sup>5</sup>

This article provides some background on the private security industry and how it has evolved principally from serving sovereigns or governments to also serving the private sector. This article also discusses the types of legal action that corporations may face if they retain private security companies to provide for employee or facility security outside the United

1. See, e.g., Audrey Gillan, *Blackwater: Private U.S. Security Firm Mired in Iraq Controversy*, THE GUARDIAN (Jan. 29, 2009, 11:46 PM), <https://www.theguardian.com/world/2009/jan/29/blackwater-iraq-security-contractor> [<https://perma.cc/4NKJ-HG7U>] (describing controversies involving the private security contractor Blackwater).

2. See, e.g., Patrick Sullivan, *Family of Man Killed in Iraq Sues Contractor*, RECORD-EAGLE (June 5, 2009), <http://static.record-eagle.com/2005/jun/05hulett.htm> [<https://perma.cc/WLD9-SFYD>] (detailing the story of an employee killed while working for the corporation Halliburton in Iraq); *Grieving Daughter Sues Halliburton*, CNN MONEY, (Mar. 31, 2005, 10:46 AM), [http://money.cnn.com/2005/03/31/news/international/iraq\\_halliburton/](http://money.cnn.com/2005/03/31/news/international/iraq_halliburton/) [<https://perma.cc/XAD7-AZHC>] (describing a lawsuit against Halliburton alleging the company did not properly protect one of its employees who was killed in Iraq).

3. See Kevin Strom et al., *The Private Security Industry: A Review of the Definitions, Available Data Sources, and Paths Moving Forward* § 2.1 (unpublished report, U.S. Dep't of Justice, on file with National Criminal Justice Reference Service, Dec. 2010), <https://www.ncjrs.gov/pdffiles1/bjs/grants/232781.pdf> [<https://perma.cc/ZHA8-UZ2T>] (noting experts attending American Society for Industrial Security International (ASIS) symposium identified risk management as one of 18 core elements of private security field).

4. See, e.g., *Holding Private Security Contractors Accountable: The Case Against Blackwater*, CTR. FOR CONSTITUTIONAL RTS. NEWSLETTER (Ctr. for Constitutional Rts. Justice, New York, N.Y.), Winter 2007 1-2, [http://ccrjustice.org/sites/default/files/assets/files/newsletters/CCR\\_Newsletter\\_winter07.pdf](http://ccrjustice.org/sites/default/files/assets/files/newsletters/CCR_Newsletter_winter07.pdf) [<https://perma.cc/8J3K-47PQ>] (noting that a suit brought on behalf of Iraqi citizens in U.S. alleged that a private military contractor "fostered a culture of lawlessness . . . encouraging them to act in company's financial interests at the expense of human life").

5. *Id.* (alleging further that the State Department's "action demonstrates the importance of *civil damages* cases . . . for seeking justice when the government is protecting corporate interests at the expense of human life") (emphasis added).

States, if incidents occur, and if legal action is brought in the U.S. Finally, this article reviews legal arguments which have been successful when defending corporations in these actions. Certain of these arguments are distinct to this area of litigation.

### I. INDUSTRY BACKGROUND

In today's parlance, the term "private military company" ("PMC") usually connotes a firm providing surrogate military services to a government or sovereign. PMCs are often associated with the furnishing of military or military-support services which employer or host countries lack the ability or inclination to provide for themselves, and outsource to a private sector entity.<sup>6</sup>

The term "private security company" ("PSC") can have different connotations, indicating firms which are apt to be limited to providing security services for corporate personnel or privately-owned installations, and also for certain governmental personnel or dignitaries traveling outside their home countries.<sup>7</sup>

In practice, the distinction between PMCs and PSCs can be blurry. Certain firms offer both types of services.<sup>8</sup> And within a single firm, personnel and resources may migrate between providing military and support services for governments and providing security for private corporations - depending on demand, conditions to be addressed, etc. For example, noted PMC/PSC Aegis Defense Services describes itself as "a major security provider to the US government" but as also having "a significant portfolio of [o]il and [g]as sector clients."<sup>9</sup>

#### A. *Alumni of western militaries often populate well-regarded PMCs and PSCs.*

Reputable PMCs or PSCs typically originate in militarily-advanced

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6. James M. O'Brien, *Private Military Companies: An Assessment* 4 (Sept. 2008) (unpublished thesis, Naval Postgraduate School, Monterey, California) (on file with author), [http://calhoun.nps.edu/bitstream/handle/10945/3961/08Sep\\_OBrien.pdf?sequence=1](http://calhoun.nps.edu/bitstream/handle/10945/3961/08Sep_OBrien.pdf?sequence=1) [<https://perma.cc/ULZ9-9HDA>] (noting "proxy military companies fall under the larger PMC definition").

7. *Id.* (opining that "private security companies are a type of PMC, but with a comparatively reduced mission set").

8. *Id.* (commenting on a firm which acts as a "prototypical 'all-purpose' private military company.").

9. *Security Companies*, EMBASSY OF THE U.S. (last updated June 19, 2016), [http://iraq.usembassy.gov/consular/us/resources/security\\_companies.html](http://iraq.usembassy.gov/consular/us/resources/security_companies.html) [<https://perma.cc/8KCJ-VK4V>].

countries.<sup>10</sup> Former officers of developed nations' militaries tend to hold leadership positions in more reputable firms.<sup>11</sup> Military personnel's migrating into work with PMCs or PSCs has been attributed to several causes including military downsizing, early retirement incentives, and the financial benefits of PMC employment<sup>12</sup> as compared to regular military pay.<sup>13</sup> While even elite soldiers' salaries may be like those of mid-level government employees, some - but by no means all - contract PMC personnel can be compensated with per-day rates resembling those of private-sector consultants.<sup>14</sup>

Of interest to both tax-payers and potential clients, a Congressional Budget Office ("CBO") report notes that the costs of certain private security contractors are comparable to those of a U.S. military unit performing similar functions, particularly when peacetime breaks are considered.<sup>15</sup> During peacetime, private contracts need not be renewed,

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10. *The Private Military Companies Perspective*, in HOUSE OF COMMONS-SELECT COMM. ON FOREIGN AFFAIRS MINUTES OF EVIDENCE Ch. 2.1 (Aug. 1, 2002), <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmffaff/922/2061322.htm> [<https://perma.cc/4XJ8-VYB7>] (describing how PMCs and PSCs generally originate in advanced, western countries).

11. PMCs operating in the so-called "lethal capability" market generally work with a small number of permanent staff, but maintain contact with personnel who can be called upon for different contracts. *Id.* at Ch. 2.2.4. Strategic Consulting International, for example, reportedly has maintained a permanent staff of about twelve people, but has or had contacts with another 150 or so who could be available for projects as needed. *Id.* at Ch. 2.2.3. Some claim that the PMC Executive Outcomes had a permanent staff of only about thirty, but could raise a battalion of 650 men within 15 days. *Id.* Only paying for additional personnel on an as-needed basis obviously economizes on overhead expenses.

12. To an extent, these trends may cannibalize the west's militaries, particularly within the officer echelons. See Rebecca Weiner, *Private Military Contractors Come with Strings Attached*, HARVARD KENNEDY SCHOOL BELFER CTR. NEWSLETTER (Belford Ctr. for Science and Int'l Affairs), Winter 2005-06, at 1, available at <http://www.belfercenter.org/publication/private-military-contractors-come-strings-attached> [<https://perma.cc/WW43-NJC4>]. Lured by reports of cash-salary increases up to 400%, hundreds of soldiers have decided not to re-enlist, and instead have entered the private sector. *Id.* Fortunately for the U.S., government reports also indicate that the increased employment of private military contractors in Iraq and Afghanistan, for example, did not appear to have increased attrition of military personnel. *Contractors' Support of U.S. Operations in Iraq*, CONGRESSIONAL BUDGET OFFICE REP. 11 (Aug. 2008) (citing U.S. GOV'T ACCOUNT. OFFICE REP. at 35 (2005)).

13. HOUSE OF COMMONS, *supra* note 10, at Ch. 2.2 (discussing the reasons for PMC emergence).

14. Weiner, *supra* note 12, at 1 (discussing PMC employment payment).

15. For perspective, in 2007, private security guards working for companies like Blackwater USA and DynCorp International were earning up to \$1,222 per day, or about \$445,000 per year; in contrast, a U.S. Army sergeant earned \$140 to \$190 per day in pay and benefits, or about \$51,100 to \$69,350 a year. U.S. CONGRESSIONAL BUDGET OFFICE REP., *supra* note 12, at 8. The report explains that the "figure of \$1,222 a day represents the contractor's billing rate, not the amount paid to the contractor's employees. The billing rate

while regular military units are typically maintained in full force structure.<sup>16</sup>

B. *Increased instability in regions with hard-power vacuums has increased demand for PMCs and PSCs.*

Certain factors likely contributed to PMCs and PSCs appearing on governmental and corporate radars.<sup>17</sup> One observer notes, “[N]ot coincidentally, the rise of these companies . . . coincid[ed] with the pullback of western nations<sup>18</sup> and the United Nations from peace-keeping and peace-enforcing.”<sup>19</sup> Also, there appears to be little doubt that PMCs populated by many recently-retired military personnel have emerged to fill voids when conflicts have erupted after the Cold War.<sup>20</sup> Military vacuums

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is greater than an employee’s pay because it includes the contractor’s indirect costs, overhead and profit.” *Id.* at 14.

16. *Id.*

17. See Strom *et al.*, *supra* note 3, at § 4.4.5 (“Privatization of military functions has also seen an upswing . . . [A]n estimated 20,000 individuals have been hired as contract private military guards in Iraq. Private military guards may ‘provide logistical support to armed forces and also perform protection, training, consulting, and planning services . . . [and] some . . . actually engage in combat under contract.’”) (citations omitted).

18. Increased use of PSCs or PMCs is not confined to non-western governments. In Iraq, the U.S. employed 155,000 contractors – or about the same as the number of U.S. soldiers there – while toward the end of the Afghanistan campaign, 207,000 contractors supported 175,000 soldiers. *America’s Paid Boots on the Ground*, THE WEEK (Nov. 8, 2014), <http://theweek.com/articles/442453/americas-paid-boots-ground> [<https://perma.cc/8N6E-2DH7>]. In 2006, there were an estimated 20,000 contractors working for an estimated sixty PMCs in conflicts where western interests were implicated. Rebecca Weiner, *supra* note 12. Increasingly, PMCs contract to handle core military functions, such as combat training, interrogation, operational support and strategic planning. *Id.* And, according to the report of a meeting of PMC industry experts conducted under U.N. auspices, there are now a very large number of PMC contractors operating in what has become a \$100 billion industry. Lindsey Cameron, *Private Military Companies: Their Status Under International Humanitarian Law and its Impact on Their Regulation*, 88 INT’L REV. RED CROSS 573, 575 (Sept. 2006) (citing Report of the Third Meeting of Experts on traditional new forms of mercenary activity, UN Doc. E/CN.4/2005/23, ¶ 12). Toward the end of 2014, there were some 1,600 military contractors still working for the U.S. in Iraq. *Id.* The PMC industry now appears to be a significant part of the United States’ combat, anti-terror and security landscape. Steven Schooner, a former White House military procurement official who studied contractor policy at George Washington University, asserts that Americans need to be aware that their “government has increasingly delegated to the private sector the responsibility to stand in harm’s way and, if required, die for America.” *Id.*

19. See, e.g., HOUSE OF COMMONS, *supra* note 10, at Ch. 2.2.3 (quoting Herbert Howe, *Global Order and Security Privatisation*, INST. FOR NAT’L STRATEGIC STUDIES, No. 140 (May 1998)).

20. See David Isenberg, *Private Military Contractors and the U.S. Grand Strategy*, INT’L PEACE RESEARCH INST. (“PRIO”), Jan. 2009, at 5 (describing how the military

in areas of conflict have contributed to demand for PMCs on the part of governments formerly supported by super-powers; these governments want continued military assistance in the absence of superpower or U.N. support.<sup>21</sup>

In addition, the elimination of Saddam Hussein in Iraq, efforts to restrain or topple or undermine the Assad regime in Syria while concurrently containing and defeating ISIS, and other disturbances to prior governmental orders in the region, together with “hard-power” vacuums, have caused long-suppressed ethnic, political, or religious rivalries in the Middle East to resurface. These changes have led to a number of intra-state and cross-border conflicts between ethnic or religious groups - increasing instability in certain countries and adding urgency to the need to protect corporate employees or facilities which may be nearby.

Also, recent terror attacks in Europe and increased political instability in areas of Africa, for example - all at a time when the West may be reluctant to increase commitments of their own militaries or peace-keeping personnel<sup>22</sup> - have also likely fueled demand for private security companies’ services.

*C. The industry and observers have spoken to a number of concerns.  
Concerns Encountered; Responsive Viewpoints*

Corporations considering engaging a PSC or PMC are likely to encounter questions of whether these firms employ adequately trained and disciplined individuals. These concerns can result, for example, from the U.S. government’s use of the firms involved in misconduct or incidents like the mistreatment of prisoners at Abu Ghraib<sup>23</sup> or the shootings at Nisour Square in Iraq.

Despite well-publicized negative incidents, others contend that PSCs are the future of international corporate security. Some predict that PMCs may also become the future of United Nations or other joint peace-keeping efforts.<sup>24</sup> Still others assert that PSCs perform necessary services that in-house corporate security staff are incapable of performing, and that PMCs provide military or support functions that the U.N., as well as foreign

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continually turned more to private contractors as the Cold War concluded).

21. See HOUSE OF COMMONS, *supra* note 10, at Ch. 2.1 (explaining how losing superpower’s support had led to the expanding role of PMCs in certain nations).

22. *Id.* (discussing the increase in PMC services).

23. Cameron, *supra* note 18.

24. See *id.* at 598 (citing, among others, Max Boot, *Darfur Solution: Send in the Mercenaries*, L.A. TIMES, May 31, 2006, at B13, and Kristen Fricchione, *The Casualties in Evolving Warfare: Impact of Private Military Firms’ Proliferation on the International Community*, 23 WISC. INT’L L.J. (Fall 2005)).

governments which aspire to become more democratic, are unable to provide. In some cases, critics of U.N. peacekeeping forces have even called for private security firms to take over command from those forces.<sup>25</sup>

The positive experiences of certain governments with well-trained PMCs appear to have improved private-sector opportunities for PSCs.<sup>26</sup> Even in contexts arguably resembling adventurism, PMCs have informed advocates.

In 1995, for example, the political and investment climate in the west-African region near Sierra Leone was very unstable. In a closely-observed move, that country's government (with financing provided, in part, by the International Monetary Fund) engaged a PMC to help force Liberian-backed rebel forces out of the country. Once Sierra Leone terminated this engagement, the violence promptly returned.<sup>27</sup> Observers state that only after a British-led military intervention stiffened a floundering U.N. peacekeeping mission<sup>28</sup> did the country stabilize to the point that major companies again considered investing in the affected region.

Dr. Christopher Spearin of the Canadian Forces College Department of Defence Studies has noted that, in Sierra Leone, the host nation's military stated that PMCs "did a positive job . . . [W]e did not consider them mercenaries but as people bringing in some sanity" to an otherwise untenable and violent environment.<sup>29</sup>

Other advocates argue that PMCs can have more practical impact – and can be more cost-efficient – than U.N.-sponsored security forces assigned to unstable regions. One authority laments:

With a depressing dearth of nations volunteering to send more competent troops, the U.N. is forced to rely on . . . inept militaries to do their peace keeping and peace enforcement. . . [A]s a result, the U.N. is often left with world's least competent soldiers to do the world's most difficult peace missions, almost ensuring failures and setbacks such as Angola . . . [,] Sierra

25. Isenberg, *supra* note 20.

26. CHRISTOPHER KINSEY, CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE SECURITY COMPANIES 10 (2006) (stating that "[e]ven though private military and security companies are relatively new to international security, they are increasingly being recognized by governments, civil societies and international organizations as *legitimate* actors that can have a positive impact on international security") (emphasis added).

27. Simon Akam, *The Vagabond King*, NEW STATESMAN 4 (Feb. 2, 2012), available at <http://www.newstatesman.com/africa/2012/01/sierra-leone-strasser-war> [<https://perma.cc/PU3G-FK6L>].

28. *Id.* at 5.

29. HOUSE OF COMMONS, *supra* note 10, at Ch. 2.2.5.

Leone[, and other unstable areas.]<sup>30</sup>

House of Commons' minutes observe that, as of August 2002, the operations that the U.N. undertook in Sierra Leone after PMC engagements were terminated cost over a half a billion dollars – and many would question whether the results were worth a fraction of that amount.<sup>31</sup>

In contrasting these U.N. peacekeeping or policing efforts with PMC engagements, Tim Spicer, a founder of Aegis Defence Services, noted that “UN involvement in Angola cost \$1 million a day – \$365 million a year – and achieved absolutely nothing,” while “Executive Outcomes charged the Angola government \$80 million for two years and got Unita to the conference table, putting an end to the war in a couple of months.”<sup>32</sup>

For these and other reasons, PMC engagements have increased significantly since the late 1980's.<sup>33</sup> PMCs were employed in Desert Storm in 1991, in the Balkans in the mid-1990s, and subsequently in both Iraq and Afghanistan.<sup>34</sup> PMCs have been engaged in approximately 80 conflicts in the decade from 1990 to 2000 alone.<sup>35</sup>

*D. As engaging PMCs becomes more acceptable for governments, PSCs have become a more common option in the private sector.*

In part because PMCs have achieved positive results for certain governmental clients – while simultaneously avoiding too many controversies – western governments have appeared more receptive to engaging PMCs.

The U.S. Department of Defense, for example, contracted with Aegis Defence Services to provide security support services to the Project and Contracting Office, which was responsible for managing reconstruction programs in Iraq and Afghanistan and also to provide security for the Oil-for-Food inquiry.<sup>36</sup> Also, in May 2011, it was announced that the U.S. military would pull out of Baghdad and be replaced by eight PMCs and PSCs which would take over security operations.<sup>37</sup> Aegis Defence Services

30. *Id.* at Ch. 2.4.

31. *Id.*

32. *Id.* (quoting LT. COL. C. SPICER OBE, AN UNORTHODOX SOLDIER (Mainstream Publ'g 1999)).

33. Isenberg, *supra* note 20, at 12.

34. *Id.*

35. *Id.* at 13.

36. See generally *Aegis Defence Services*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Aegis\\_Defence\\_Services](https://en.wikipedia.org/wiki/Aegis_Defence_Services) [https://perma.cc/L4UA-QW4C] (last modified Dec. 10, 2016, 10:49 PM) (describing the nature of Aegis Defence Services' offerings).

37. *Id.*

also received a contract from the U.S. Department of State to provide security at the U.S. Embassy in Kabul, Afghanistan.<sup>38</sup>

A private corporation's contracting with a PSC may draw less public scrutiny than, for example, the U.S. Department of State's or an African host government's employing a PMC. But it seems apparent that, as contracting with PMCs has become more common among governments, contracting with PSCs has similarly become more common for private companies.

For example, some have publicly called for shipping companies to engage PSCs to help protect crew members, vessels and cargoes in pirate-plagued waters off the east coast of Somalia, as "everyone recognizes that the regular naval ships are not going to stay there."<sup>39</sup> If ship-owners need to increase security onboard their ships by arming someone, the argument goes, it would be better to rely on trained professional contractors than to simply give arms to inexperienced crew members.<sup>40</sup>

The situation has progressed to the point that the website for the U.S. Embassy in Baghdad, Iraq (to give one example) provides a list of PSCs available to companies or persons doing business in that country.<sup>41</sup> The website is careful to note the list does not constitute an endorsement by the U.S. government.<sup>42</sup> Nevertheless, the listing gives the impression that the U.S. Embassy is aware that private corporations may need the services of a PSC in the country, and that, depending on circumstances, engaging a PSC is not frowned upon by the U.S. government.

## II. LEGAL ACTIONS

Certain PSC employees working in unstable areas are often armed. And the types of environments necessitating engagement of a PSC in the first instance are often those where the potential for conflict exists. Given the potential for conflict which causes PSCs to be hired in the first instance, and given that types of protective services that PSCs are expected to provide, clients should not be surprised if incidents involving the use of force sometimes occur.

Rightly or wrongly, the United States are viewed as a litigious society. When incidents involving PSCs occur, affected locals – whether genuinely

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38. *Id.*

39. David Isenberg, *Pirates, PSCs and Lawyers*, THE HUFFINGTON POST (May 27, 2010, 12:37 PM), [http://www.huffingtonpost.com/david-isenberg/pirates-psc-and-lawyers\\_b\\_592036.html](http://www.huffingtonpost.com/david-isenberg/pirates-psc-and-lawyers_b_592036.html) [<https://perma.cc/RRP4-4LU5>].

40. *Id.*

41. See EMBASSY OF THE U.S., *supra* note 9 (listing available PSC companies).

42. See *id.* (stating that the "U.S. government assumes no responsibility for the professional ability or integrity of the persons or firms whose names appear on the list")

wronged or merely opportunistic – may bring action in the U.S. with the view that this country has an accessible, transparent and, at times, generous legal system.

Generally speaking, legal actions implicating PSCs result from claims brought under the Alien Tort Statute (“ATS”) or claims under state tort law. In addition, some plaintiffs raise claims under the Torture Victim Protection Act (“TVPA”). The following discussion addresses some of the principal issues PSC clients can encounter in addressing these claims.

#### A. *Alien Tort Statute*

The Alien Tort Statute is a federal statute, first enacted in 1789, providing that “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.”<sup>43</sup> The ATS, however, “is a jurisdictional statute” only, and creates “no new causes of action.”<sup>44</sup> The plain language of the ATS states it will not confer jurisdiction for claims unless the plaintiff is “an alien . . . suing for a tort committed in violation of international law.”<sup>45</sup>

ATS claims have three elements: (1) the plaintiff must be an alien, (2) suing for a tort, (3) which has been committed in violation of international law.<sup>46</sup> Generally, the cases suggest that an “alien” within the meaning of the ATS means a non-U.S. citizen.<sup>47</sup>

##### 1. Jurisdictional Prerequisites

Before reaching the merits of an alien’s international law tort claim, courts must be satisfied that the jurisdictional prerequisites are satisfied.<sup>48</sup>

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43. 28 U.S.C. § 1350 (2015).

44. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

45. *Doe v. Drummond Co.*, 782 F.3d 576, 583 (11th Cir. 2015).

46. *See, e.g., Balaco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1344 (11th Cir. 2011) (providing the basic elements of an ATS tort claim).

47. *See, e.g., Sai v. Clinton*, 778 F. Supp. 2d 1, 7 (D.D.C. 2011) (noting potential need to “conclude that Plaintiff is an alien capable of bringing claims under the Alien Tort Statute rather than a U.S. citizen”), *aff’d*, No. 11-5142, 2011 WL 4917030 (D.D.C. Sept. 26, 2011); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 39 (D.D.C. 2010) (stating that an ATS claim failed as a result of the putative plaintiff’s U.S. citizenship).

48. Generally, courts hold that the ATS imposes no requirement that a plaintiff first exhaust his or her remedies in the foreign jurisdiction where the alleged wrong occurred. *See, e.g., Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 484 (D. Md. 2009), *aff’d in part, dismissed in part*, 402 F. App’x 834 (4th Cir. 2010), and cases cited therein. Courts, however, have recognized that, while the ATS contains no rigid exhaustion requirement,

a U.S. Court might, as a matter of international comity, stay an Alien Tort suit

Decisions addressing these jurisdictional requisites constitute much of ATS case law.

The cases indicate that courts must assure themselves that: (1) the complaint pleads a violation of the law of nations, (2) the presumption against extraterritorial application of the ATS, announced by the Supreme Court in *Kiobel II*,<sup>49</sup> does not bar the claim, (3) customary international law, or the body of law recognized as the “law of nations,” recognizes the asserted liability of the defendant, and (4) the theory of liability alleged by plaintiffs, for example, aiding and abetting or conspiracy, is also recognized by customary international law.<sup>50</sup> Defects in any of these jurisdictional requirements will be fatal to the plaintiff’s claims, but courts have discretion as to the order and manner of considering jurisdictional prerequisites.<sup>51</sup>

Also, depending on the circuit, the ATS may not confer jurisdiction where the defendant is a corporation.<sup>52</sup>

a. *A Hurdle: Pleading a Violation of the Law of Nations - the Alleged Misconduct Must be Severe*

In the typical case involving a corporation’s engaging a PSC or PMC, the non-U.S. citizen will bring action under the ATS against both the PSC and its corporate client seeking compensation for torts based on a violation of “international law” or the law of nations.<sup>53</sup>

Though the ATS was part of the 1789 Judiciary Act, the Supreme Court did not directly address the statute until a 2004 decision, *Sosa v. Alvarez-Machain*.<sup>54</sup> Noting reasons for “great caution in adapting the law of nations to private rights,”<sup>55</sup> the Court observed that the Act contemplates that “district courts would recognize private causes of action for certain torts in violation of the law of nations” based on “specific, universal, and

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that had been filed in the U.S. Court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that.

Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011).

49. *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), 133 S. Ct. 1659 (2013).

50. *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 165-66 (2d Cir. 2015).

51. *Id.*

52. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 145 (2d Cir. 2010), *aff’d on other grounds*, 133 S. Ct. 1659, 1668-69 (U.S. 2013).

53. See KRISTINE A. HUSKEY, THE AMERICAN WAY: PRIVATE MILITARY CONTRACTORS & U.S. LAW AFTER 9/11, AN UPDATE – 2010 34 (Priv-War Report Nat’l Report Series 3/10, Oct. 1, 2010), available at <http://ssrn.com/abstract=2184090> [<https://perma.cc/E35C-PEMS>].

54. 542 U.S. 692, 697 (2004).

55. *Id.* at 728 (citation omitted).

obligatory” international law norms.<sup>56</sup>

*Sosa* is interpreted to mean that, to be actionable under the ATS, the alleged misconduct supporting jurisdiction must be *severe*. An appropriate ATS defendant is “an enemy of all mankind” (and consequently, an enemy of most sovereigns) who has engaged in one of the “handful of heinous actions. . . which violate definable, universal and obligatory norms.”<sup>57</sup> For example, appropriate ATS defendants include, “the torturer . . . the pirate and slave trader.”<sup>58</sup>

Consistent with this “high bar,”<sup>59</sup> the Court found that a short-term, allegedly “arbitrary” detention was not a violation of a “norm of customary international law so well defined as to support” an ATS claim.<sup>60</sup> Specifically, “a single illegal detention of [a Mexican national] of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support [a] federal remedy.”<sup>61</sup>

More severe misconduct also may not suffice. For example, murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the ATS as a violation of customary international law because the “nations of the world” have not demonstrated that this wrong is “of mutual, and not merely several, concern.”<sup>62</sup>

Lower federal courts continue to parse through the misconduct rising to the level of violating “specific, universal and obligatory” norms. Generally speaking, to be actionable under the ATS, the misconduct must be extreme, for example, torture or something equivalently reprehensible, as opposed to arbitrary detentions without cause, racial or religious discrimination by private parties or entities, exposure of individuals to chemical hazards, etc.<sup>63</sup>

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56. *Id.* at 725, 732.

57. *Id.* at 732 (citation omitted).

58. *Id.* (citation omitted).

59. *Id.* at 727.

60. *Id.* at 736, 738.

61. *Id.* at 738.

62. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003).

63. *See, e.g., Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (stating that “torture [is] . . . prohibited by law of nations.”). *Cf. Mora v. New York*, 524 F.3d 183, 208 (2d Cir. 2008) (holding that “detention without being informed of the availability of consular notification and access” is not a “tort in violation of customary international law cognizable under the ATS”); *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 117-23 (2d Cir. 2008) (noting a “lack of consensus in international community on whether proscription on poison” would apply to use of herbicide that harmed people when “[p]laintiffs nowhere allege that the government intended to harm human beings through its use of Agent Orange”); *Bigio v. Coca-Cola Co.*, 293 F.3d 440, 448 (2d

Practitioners should be aware that courts (and litigants) still wrestle with a precise definition of misconduct violating international law, given that law's "soft, indeterminate character."<sup>64</sup>

b. *The presumption against extra-territorial application bars many claims.*

A significant jurisdictional hurdle for ATS claims is also found in the presumption against extra-territorial application.

In *Kiobel II*, the Supreme Court addressed whether an ATS "claim may reach conduct occurring in the territory of a foreign sovereign."<sup>65</sup> In *Kiobel II*, Nigerian petitioners who became U.S. residents filed claims under the ATS against Dutch, British and Nigerian corporations based on events that occurred in Nigeria.<sup>66</sup> These corporations had only attenuated contacts with United States – for example, their shares traded on the New York Stock Exchange and an affiliated investor-relations office existed in New York City.<sup>67</sup> The Supreme Court determined the ATS claims were barred, holding that "the presumption against extra-territoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption."<sup>68</sup>

The Supreme Court noted alongside its holding that "all the relevant conduct took place outside the United States."<sup>69</sup> Though the Court did not hold that plaintiffs may never bring ATS claims based upon extra-territorial conduct, it made clear that, to be viable, such claims must "touch and concern the territory of the United States" and "must do so with sufficient force to displace the presumption against extra territorial application."<sup>70</sup>

Because *Kiobel II* was a so-called "'foreign-cubed' case" – a foreign plaintiff suing a foreign defendant where the relevant conduct occurred on foreign soil – the events therein neither touched nor concerned U.S. territory with sufficient force to displace the presumption against extra-territorial application.<sup>71</sup>

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Cir. 2000) (stating when committed by private actor, "neither racial nor religious discrimination" is a violation of the law of nations; but "war crimes and genocide are actionable under the Alien Tort Claims Act" when committed by private actor).

64. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011) (citations omitted); *see id.* at 1016 ("[S]ome of the most widely accepted international norms are vague, such as 'genocide' and 'torture.'").

65. *Kiobel II*, 133 S. Ct. 1659, 1664 (U.S. 2013).

66. *Id.* at 1662-63.

67. *Id.* at 1677-78 (Breyer, J. concurring).

68. *Id.* at 1669.

69. *Id.*

70. *Id.*

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

The court in *Kiobel II* did not fully explain its “touch and concern” language, nor did it precisely define “sufficient force” or “relevant conduct.”<sup>72</sup> The Court also did not address what constitutes more than a “mere corporate presence” in the U.S. sufficing to permit jurisdiction.<sup>73</sup> Courts continue to work through these issues.

i. Second Circuit – Two Prongs

The Second Circuit in *Mastafa v. Chevron Corp.* determined that “domestic contacts” are at the heart of *Kiobel*’s touch-and-concern inquiry, observing that “evaluation of the presumption’s application to a particular case is essentially an inquiry into whether the domestic contacts are sufficient to avoid triggering the presumption at all.”<sup>74</sup> Examining the complaint, the *Mastafa* court found allegations only of “some ‘contact’ between the injuries alleged [which occurred extraterritorially] and the territory of the United States.”<sup>75</sup> Thus, the presumption against extraterritoriality was triggered, but not “self-evidently dispositive”; further jurisdictional inquiry was needed.<sup>76</sup>

The Second Circuit then relied on *Morrison v. Nat’l Austl. Bank Ltd.*,<sup>77</sup> an earlier Supreme Court case applying the presumption against extraterritoriality to cases arising under the Securities Exchange Act.<sup>78</sup> In *Morrison*, the Court set forth the “focus” test, which requires courts to determine whether “the ‘focus’ of congressional concern,” or the conduct “that the statute seeks to ‘regulate,’” occurred in the territory of the United States.<sup>79</sup>

Applying this focus test, the Second Circuit found that the focus of jurisdictional inquiries under the ATS should be on “the *conduct* alleged to violate the law of nations, and the *location* of that conduct.”<sup>80</sup> In *Mastafa*, this was conduct “alleged to aid and abet the violation.”<sup>81</sup> The court in *Mastafa* determined that to displace the presumption against extraterritoriality, the complaint must plead two prongs:

- (1) conduct of the defendant that “touch[es] and concern[s]” the

72. See *Kiobel II*, 133 S. Ct. at 1669 (holding that the presumption against extraterritoriality applies to ATS claims).

73. *Id.*

74. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182 (2d Cir. 2014).

75. *Id.* at 182-83 (internal quotation marks omitted).

76. *Id.* at 183.

77. *Id.* (citing 561 U.S. 247, 255 (2010)).

78. 561 U.S. 247, 255 (2010).

79. *Id.* at 266-67.

80. *Mastafa*, 770 F.3d at 185 (emphasis added).

81. *Id.* at 185, 195.

United States with sufficient force to displace the presumption against extraterritoriality, *and* (2) that the *same conduct*, upon preliminary examination, states a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations.<sup>82</sup>

Thus, the inquiry depended on “alleged conduct by *anyone* — U.S. citizen or not — that took place in the United States and aided and abetted a violation of the law of nations.”<sup>83</sup>

The Second Circuit noted that the plaintiffs had “alleged specific, domestic conduct,” including the defendants’ oil-purchase transactions and financing oil transactions, from within the United States and the facilitation of illicit payments and financing arrangements through a U.S.-based bank account.<sup>84</sup> Given these specific and non-conclusory allegations of domestic conduct, the *Mastafa* court found that the plaintiffs’ claims appeared to touch and concern the United States with sufficient force to displace the presumption and satisfy the “first prong” of the court’s jurisdictional analysis.<sup>85</sup>

Though domestic conduct displaced the presumption against extraterritoriality, the plaintiffs’ claims nonetheless failed the second prong of the court’s jurisdictional inquiry. Specifically, plaintiffs failed to plausibly plead that the defendants’ aiding and abetting of the international law violations met the *mens rea* standard of the Second Circuit.<sup>86</sup> Sufficient pleading would require a plaintiff to plausibly allege that defendants acted with the *purpose or intent* “to aid and abet violations of *customary international law*.”<sup>87</sup> While the plaintiffs’ complaint appeared to allege something akin to purpose, it did so only in conclusory terms.<sup>88</sup> Consequently, the *Mastafa* court concluded it could not exercise jurisdiction over the plaintiffs’ claims.<sup>89</sup>

#### ii. Fourth Circuit – Weight of U.S.-Related Facts Giving Rise to the Claim

In *Al Shimari v. CACI Premier Tech, Inc.*, an action against a military contractor, the Fourth Circuit noted that *Kiobel II* “broadly stated that the

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82. *Id.* at 187.

83. *Id.* at 189.

84. *Id.* at 195.

85. *Id.*

86. *See id.* at 193-96 (stating that allegations of the requisite *mens rea* standard were made only in “conclusory terms”).

87. *Id.* at 193.

88. *Id.* at 194.

89. *Id.* at 195-96.

‘claims,’ rather than the alleged tortious conduct, must touch and concern United States territory with sufficient force.”<sup>90</sup> The Fourth Circuit reasoned that the Supreme Court’s language instructs lower courts to “apply a fact-based analysis” and that “courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory.”<sup>91</sup> Rather, courts should “consider all the facts that give rise to ATS claims, including the parties’ identities and their relationship to the causes of action.”<sup>92</sup>

Applying this fact-based analysis, the Fourth Circuit found several factors relevant (and, together, dispositive) including (1) the defendant’s status as a U.S. corporation, (2) the U.S. citizenship of defendant’s employees who allegedly committed acts of torture, (3) the U.S. connections arising from the defendant corporation’s and its employees’ contracting with, and obtaining security clearances from, the U.S. government,<sup>93</sup> (4) the allegations that defendant aided and abetted torture through conduct that took place within the United States, for example, corporate managers located in the United States becoming aware of reports of misconduct, seeking to “cover up” misconduct, and “implicitly, if not expressly, encourag[ing] it,”<sup>94</sup> and (5) “the expressed intent of Congress, through enactment of the TVPA and 18 U.S.C. § 2340A to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.”<sup>95</sup>

Weighing all of these factors, the *Al Shimari* court held that the plaintiffs’ claims touched and concerned the territory of the United States with sufficient force to displace the presumption against extraterritorial application of the ATS, so that the ATS conferred jurisdiction on the district court.<sup>96</sup>

### iii. Ninth Circuit – Concrete Conduct in the U.S. Relevant to the Wrongdoing

In *Mujica v. AirScan Inc.*, plaintiffs sued AirScan Inc., a Florida-based

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90. 758 F.3d 516, 527 (4th Cir. 2014) (quoting *Kiobel II*, 133 S. Ct. at 1669).

91. *Id.* at 527-28 (citing BLACK’S LAW DICTIONARY 281 (9th ed. 2009)) (establishing that a “claim” is the “aggregate of operative facts giving rise to a right enforceable by a court”); *see also id.* at 528 (articulating that “it is not sufficient merely to say that because the actual injuries were inflicted abroad, the *claims* do not touch and concern United States territory”).

92. *Id.* at 527.

93. *Id.* at 530-31.

94. *Id.* at 531 (internal quotation marks omitted).

95. *Id.*

96. *Id.*

private security firm, and its energy-sector client Occidental Petroleum Corp. (“Occidental”) after deaths and injuries occurred during an air bombing in Santo Domingo, Colombia.<sup>97</sup> Plaintiffs alleged that AirScan provided security for Occidental against pipeline attacks by leftist insurgents in Colombia, and that defendants had worked with the Colombian military to provide it with financial and other assistance to further Occidental’s commercial interests.<sup>98</sup> Plaintiffs also alleged that Occidental provided AirScan and the Colombian military with a room in its Colombian offices for planning an air raid on the Santo Domingo location.<sup>99</sup>

According to plaintiffs, AirScan and the Colombian Air Force (“CAF”) conducted the air raid only to protect Occidental’s oil pipeline; the raid was not conducted on behalf of the Colombian government.<sup>100</sup> Further, three AirScan employees and a CAF liaison piloted a plane funded by Occidental and bearing CAF markings. AirScan used the plane to provide CAF with aerial surveillance to identify targets and deploy troops on the ground.<sup>101</sup> A cluster bomb dropped by a CAF helicopter also allegedly destroyed homes, killed seventeen civilians and wounded twenty-five others; afterwards, CAF troops allegedly ransacked homes in Santo Domingo.<sup>102</sup>

On these facts, the Court in *Mujica* observed that the “allegations that form the basis of Plaintiffs’ claims exclusively concern conduct that occurred in Colombia.”<sup>103</sup> At most, the plaintiffs only “speculate[d] that some of [the] conduct . . . could have occurred in the United States.”<sup>104</sup> Further, the plaintiffs’ speculation about domestic conduct was found in their reply brief, which was filed only after the *Kiobel II* decision was issued.<sup>105</sup>

The lack of any concrete conduct in the U.S. caused the Ninth Circuit to dismiss the plaintiffs’ claims. The *Mujica* Court reasoned:

[i]n the absence of . . . allegations of conduct in the United States, the only remaining nexus between Plaintiffs’ claims and this country is . . . that Defendants are both U.S. corporations. That fact . . . [wa]s not enough to establish that the ATS claims here ‘touch and concern’ the United States with sufficient force”

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97. 771 F.3d 580, 585 (9th Cir. 2014).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014).

103. *Id.* at 592.

104. *Id.*

105. *Id.* at 591.

under *Kiobel II*.<sup>106</sup>

While a “defendant’s U.S. citizenship or corporate status is one factor that, in conjunction with other factors,” might “establish a sufficient connection between an ATS claim and the . . . United States to satisfy *Kiobel*.” However, “the Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national.”<sup>107</sup>

*Mujica* indicates that mere incorporation of a defendant company in a U.S. state, or the mere U.S. citizenship of involved individuals - without some relevant conduct occurring *within the U.S.* - will not permit bringing an ATS claim.<sup>108</sup>

#### iv. Eleventh Circuit – Specific, Reasonably Extensive Allegations of Conduct Within the U.S.

Reviewing both its own case law<sup>109</sup> and other precedents in what it called a “crowded legal landscape,”<sup>110</sup> the Eleventh Circuit in *Doe v. Drummond Co.* described its task as determining whether the ATS applies “when aspects of the claims occur both domestically and extraterritorially.”<sup>111</sup>

The *Drummond* court observed that cases usually fit into one of three scenarios. First, if “*no* relevant aspects of an ATS claim occur within the United States, the presumption against extraterritoriality prevents jurisdiction”; second, “if *some* relevant aspects of the claim occur within the United States, we must determine whether the presumption is displaced.”<sup>112</sup> “In a third scenario wherein *all* relevant aspects occur within the United States, the presumption against extraterritoriality would obviously not apply — there would be no extraterritorial component to the claim.”<sup>113</sup>

The Eleventh Circuit noted that the second type of scenario before it

106. *Id.* at 594 (emphasis added).

107. *Id.*; *see also id.* at n. 11 (stating that all courts to have addressed the issue, except one, have dismissed ATS claims where the only connection to the U.S. was the defendant’s U.S. citizenship).

108. *Id.* at n. 9 (stating that “[w]e do not contend that this factor is irrelevant to the *Kiobel* inquiry; we merely hold that it is not dispositive of that inquiry”).

109. *See Doe v. Drummond Co.*, 278 F.3d 576, 589-592 (11th Cir. 2015) (analyzing *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Baloco v. Drummond Co. (Baloco II)*, 767 F.3d 1229 (11th Cir. 2014)).

110. *Drummond*, 782 F.3d at 592.

111. *Id.*

112. *Id.* at n. 23.

113. *Id.* at 592-593, n. 23.

was a “fact-intensive inquiry.”<sup>114</sup> Analyzing the facts before it, the court also stated the “site of the conduct alleged is relevant and carries significant weight.”<sup>115</sup> Even when the claim is for secondary responsibility, the court determined it must consider the location of underlying conduct, such as where the actual injuries were inflicted.<sup>116</sup> “Further, the domestic conduct alleged must meet a ‘minimum factual predicate’ to warrant the extraterritorial application of the ATS.”<sup>117</sup> That is, courts must consider whether the claims are focused within the United States and “whether the plaintiffs have proffered allegations and evidence to the ‘degree necessary’ to warrant displacing the presumption.”<sup>118</sup>

Analyzing these factors, the *Drummond* court conceded that plaintiffs’ claims were brought against U.S. citizens and entities who resided in and conducted business within the United States.<sup>119</sup> But while the U.S. citizenship of the defendants was relevant, that factor was “insufficient to permit jurisdiction on its own.”<sup>120</sup> Though defendants’ alleged support of a “U.S.-designated terrorist organization” was also relevant, this factor likewise “[did] not strike with ‘sufficient force’ to displace the presumption and permit jurisdiction.”<sup>121</sup> Rather, displacement would be warranted only “if enough relevant conduct occurred within the United States.”<sup>122</sup>

In *Drummond*, the plaintiffs claimed that the defendants aided, abetted and conspired with the paramilitary group Autodefensas Unidas de Colombia (“AUC”) from within the United States, resulting in war crimes and the extrajudicial killing of plaintiffs’ decedents in Colombia.<sup>123</sup> The Court noted that the “domestic or extraterritorial location of all conduct in support of those claims is relevant to the jurisdictional inquiry.”<sup>124</sup> Hence, the extraterritorial deaths of plaintiffs’ family members was relevant to plaintiffs’ claims that the AUC’s killing of their family members constituted extrajudicial killings or war crimes violating international law.<sup>125</sup> However, plaintiffs also alleged relevant domestic conduct on the part of defendants, for example, that defendants’ actions within the United States — such as making decisions to engage with the AUC, and agreeing

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114. *Id.* at 592.

115. *Drummond*, 782 F.3d at 592.

116. *Id.* at 593.

117. *Id.*

118. *Id.*

119. *Id.* at 595.

120. *Id.* at 596.

121. *Drummond*, 782 F.3d at 597 (citation omitted).

122. *Id.*

123. *Id.* at 598.

124. *Id.*

125. *Id.*

to fund the AUC — aided and abetted the AUC.<sup>126</sup>

The *Drummond* court ultimately concluded that plaintiffs' claims did not allege sufficient domestic conduct to displace the presumption against extraterritoriality.<sup>127</sup> Plaintiffs alleged generally that defendants made funding and policy decisions in the United States.<sup>128</sup> But plaintiffs also alleged specifically that agreements between defendants and the perpetrators of the killings, the planning and execution of the extrajudicial killings and war crimes, the collaboration by defendants' employees with the AUC, and the actual funding of the AUC, all took place in Colombia.<sup>129</sup> In light of Eleventh Circuit precedent, the domestic location of some decision-making did not outweigh the extraterritorial location of the rest of Plaintiffs' claims.<sup>130</sup>

Moreover, plaintiffs' allegations of domestic conduct and connections were not extensive or specific.<sup>131</sup> For example, plaintiffs generally alleged that an employee of a defendant obtained consent within the United States to provide substantial financial and material support to the AUC.<sup>132</sup> These were the same types of allegations that the Eleventh Circuit had already rejected as insufficient.<sup>133</sup>

The *Drummond* court determined that the U.S. citizenship and corporate status of defendants, the U.S. interests implicated by plaintiffs' claims, and the U.S.-based conduct were all relevant in determining whether plaintiffs' claims had a U.S. focus and touched and concerned the territory of the United States.<sup>134</sup> But on the facts presented, those factors were insufficient to displace the presumption against extraterritoriality.<sup>135</sup>

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126. *Id.*

127. *Drummond*, 782 F.3d at 598.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 599.

133. *Drummond*, 782 F.3d at 599 (citing *Baloco v. Drummond Co.*, 767 F.3d 1229 (11th Cir. 2014)).

134. *Id.* at 600.

135. *Id.*

- c. *Does international law recognize the asserted liability of the defendants?*
- i. State actor vs. non-state actor distinction: non-state actors can be liable for genocide and war crimes, but not necessarily for summary execution and torture.

Whether an ATS action may be brought against a private person or corporation, as contrasted to governments or governmental agents or officials, is another question that courts continue to address with varying results. Some jurists note that the Supreme Court's decision in *Sosa* "repeatedly emphasizes the need for restraint in extending liability to a defendant who is 'a private actor such as a corporation or individual.'"<sup>136</sup> And in *Tel-Oren v. Libyan Arab Republic*, the D.C. Circuit indicated that plaintiffs' ATS claim was barred because there was no consensus on whether international law applied to torture committed by private, or non-state, actors.<sup>137</sup>

In *Kadic v. Karadzic*, however, the Second Circuit held that international law's prohibition on genocide and war crimes applied regardless of whether the defendant, arguably a private individual, acted on behalf of a recognized state.<sup>138</sup> While the defendant was not an official of a recognized government, he was the self-proclaimed president of the unrecognized Bosnian-Serb Republic in the Bosnia-Herzegovina region,

136. *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 948 (9th Cir. 2015) (Bea, J., dissenting) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, n. 20 (2004)).

137. *Tel-Oren v. Libyan Arab Rep.*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) ("[I]t is worthwhile to consider . . . whether torture today is among the handful of crimes to which the law of nations attributes individual responsibility. Definitions of torture set out in international documents suggest it is not. . . . I decline to read section 1350 to cover torture by non-state actors, absent guidance from the Supreme Court on the statute's use of the term 'law of nations.'"); *see also* *Ali Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) ("insufficient consensus . . . that torture by private actors violates international law."); *Saleh v. Titan Corp.*, 580 F.3d 1, 13 (D.C. Cir. 2009) (noting that rule of *Tel-Oren* and *Sanchez-Espinosa v. Regan*, another case holding ATS provides no cause of action against private actors, both survive the Supreme Court's decision in *Sosa*).

138. *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1996) ("Appellants' allegations that Karadzic personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy . . . groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadzic acted under color of law or as a private individual."); *id.* at 243 ("all 'parties' to a conflict – which includes insurgent military groups – are obliged to adhere to the most fundamental requirements of the law of war . . . . The liability of private individuals for committing war crimes has been recognized since World War I.').

and had command authority over the military forces who allegedly committed systematic rape, forced prostitution, forced impregnation and torture.<sup>139</sup>

*Kadic* further indicated that—while private individuals can be liable under the ATS for genocide<sup>140</sup> and war crimes as defined by the Geneva Convention<sup>141</sup> - they may not necessarily be liable for torture or summary execution unless committed as part of the genocide or war crimes.<sup>142</sup>

ii. Majority view: Corporations can be liable, but as the result of varying theories.

In *Kiobel v. Royal Dutch Petroleum Co.* (“*Kiobel I*”), the Second Circuit clearly stated that “imposing liability on corporations,” as opposed to natural persons,

for violations of customary international law has not attained a discernible, much less universal, acceptance among nations of the world . . . . [B]ecause corporate liability is not recognized as a ‘specific, universal, and obligatory’ norm . . . it is not a rule that customary international law that we may apply under the ATS.<sup>143</sup>

The Second Circuit concluded, “[I]nsofar as plaintiffs in this action seek to hold only corporations liable for their conduct in Nigeria . . . under the ATS, their claims must be dismissed for lack of subject matter jurisdiction.”<sup>144</sup>

In a subsequent case, however, the D.C. Circuit in *Doe v. Exxon Mobil Corp.* determined that corporations can be liable for torts committed by their agents and noted it would create a “bizarre anomaly [in tort law] to immunize corporations from liability for the conduct of their agents in lawsuits brought for ‘shockingly egregious violations of universally recognized principles of international law.’”<sup>145</sup> The court later vacated *Doe*

139. *Id.* at 237 (discussing the issue of subject matter jurisdiction).

140. *See, e.g.*, The Geneva Convention on Genocide arts. II, IV, Dec. 9 1948, 78 U.N.T.S. 277 (indicating what constitutes genocide as well as providing associated rules); *see also* Geneva Convention Implementation Act of 1987, 19 U.S.C. § 1091 (1988) (providing a bill to implement the International Convention on the Prevention and Punishment of Genocide).

141. 70 F.3d at 243.

142. *Id.* (“torture and summary execution – when not perpetrated in the course of genocide or war crimes – are proscribed by international law only when committed by state officials or under color of law.”).

143. *Kiobel v. Royal Dutch Petrol. Co.*, 621 F.3d 111, 145 (2d Cir. 2010) (emphasis added), *aff’d on other grounds*, 133 S. Ct. 1659, 1668-69 (2013).

144. *Id.*

145. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011), *vacated on other grounds*, 527 F. App’x 7 (D.C. Cir. 2013).

on other grounds, however.<sup>146</sup>

More recently, in *In re Arab Bank PLC Alien Tort Statute Litig.*, the Second Circuit affirmed the *Kiobel I* view despite acknowledging that the Supreme Court may have suggested otherwise, and despite also acknowledging that the Second Circuit appears isolated in its position:

We conclude that *Kiobel I* is and remains the law of this Circuit, notwithstanding the Supreme Court's decision in *Kiobel II*<sup>147</sup> affirming this Court's judgment on other grounds. . . . [O]ur view [is] that *Kiobel II* suggests that the ATS may allow for corporate liability and our observation that there is a growing consensus among our sister circuits to that effect. Indeed, on the issue of corporate liability under the ATS, *Kiobel I* now appears to swim alone against the tide.<sup>148</sup>

In contrast to *Kiobel I*, the Seventh Circuit has determined that “corporate liability is possible under the Alien Tort Statute” but also noted that “plaintiffs concede[d] that corporate liability for . . . violations [of customary international law] is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decision-making level.”<sup>149</sup>

The Ninth Circuit has adopted what it calls a “norm-by-norm analysis of corporate liability” under the ATS.<sup>150</sup> Under this approach, “for each ATS claim asserted by the plaintiffs, a court should look to international law and determine whether corporations are subject to the norms underlying that claim.”<sup>151</sup> For example, the Ninth Circuit had previously determined that the “norm against genocide and the norm against war crimes” apply to “states, individuals and groups.”<sup>152</sup> Further, these “norms were ‘universal’ or applicable to ‘all actors,’ and, consequently, applicable to corporations.”<sup>153</sup>

In *Doe I v. Nestle USA, Inc.*, the Ninth Circuit reaffirmed three principles it had previously articulated.<sup>154</sup> First, “the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or

146. 527 F. App'x 7 (D.C. Cir. 2013).

147. *Kiobel II*, 133 S. Ct. 1659 (2013).

148. *In re Arab Bank*, 808 F.3d 144, 151 (2d Cir. 2015), *cert. granted sub nom. Jesner v. Arab Bank PLC*, No. 16-499, 2017 WL 1199472 (U.S. Apr. 3, 2017).

149. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1020-21 (7th Cir. 2011).

150. *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1021 (9th Cir. 2014).

151. *Id.* (citing *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 747 (9th Cir. 2011), *vacated on other grounds*, 133 S. Ct. 1995 (2013)).

152. *Id.*

153. *Id.*

154. *Id.* at 122.

liability.”<sup>155</sup> Second, “corporate liability under the ATS does not depend on the existence of international precedent enforcing legal norms against corporations.”<sup>156</sup> Third, “norms that are ‘universal and absolute’ or applicable to ‘all actors’ can provide the basis for an ATS claim against a corporation.”<sup>157</sup> For example, “the prohibition against slavery is universal and may be asserted against . . . corporate defendants.”<sup>158</sup>

Like the Seventh and Ninth Circuits, the Eleventh Circuit – without much elaboration – has held that corporations can be liable under the ATS.<sup>159</sup>

d. *Does international law recognize the plaintiff’s theory of liability?*

This jurisdictional prerequisite can be significant for clients or client corporations of PSCs or PMCs. The client usually is not alleged to have directly engaged in acts so heinous as to violate definable, universal and obligatory norms, nor to have directly committed misconduct like torture, piracy or slave trading. More typically, the allegations are that the client aided or abetted the violation of international law, or conspired with others to violate that law, giving rise to secondary or accessorial liability.

i. Aiding and abetting liability requires a *mens rea* of purpose or intent and an *actus reus* of knowing practical assistance with a substantial effect.

For aiding and abetting claims, customary international law, as opposed domestic law, provides the legal standard for what constitutes aiding and abetting ATS claims.<sup>160</sup> Under this standard, circuit courts have generally held that the *mens rea* required for aiding and abetting or

155. *Id.* (citing *Sarei*, 671 F.3d at 747-48).

156. *Id.* (citing *Sarei*, 671 F.3d at 760-61).

157. *Id.* (citing *Sarei*, 671 F.3d at 760).

158. *Id.*

159. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *see also In re South African Apartheid Litig.*, 15 F. Supp. 3d 454, 461 (S.D.N.Y. 2014) (noting that Seventh, Ninth, Eleventh, and D.C. Circuits have held that corporations can be liable under the ATS, describing *Kiobel I* opinion as a “stark outlier” and finding that corporations can be liable under the ATS despite *Kiobel I*).

160. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (stating “[w]e agree that *Sosa* and our precedents send us to international law to find the standard for accessorial liability”); *see also, Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 276 (2d Cir. 2007) (Katzmann, J., concurring) (noting that the *mens rea* statute in Rome for accomplice liability is typical of others internationally).

conspiracy liability is purpose or intent rather than mere knowledge.<sup>161</sup> Specifically, the defendant must have the “purpose of facilitating the [alleged violation]”<sup>162</sup> or the “purpose or intent to facilitate the commission of the specific offenses alleged.”<sup>163</sup> This “demanding pleading standard” is satisfied with “detailed factual allegations.”<sup>164</sup>

The *actus reus* required for aiding and abetting is usually phrased as “knowing practical assistance or encouragement which has a substantial effect on the perpetration” of the wrong.<sup>165</sup> The assistance need not constitute an “indispensable element” of the wrong; rather, a plaintiff must show that the wrong “most probably would not have occurred in the same way had not someone acted in the role the accused in fact assumed.”<sup>166</sup>

Merely “supplying a violator of the law of nations with funds” as part of a commercial transaction, without more, cannot constitute aiding and abetting a violation of international law.<sup>167</sup> But allegations that a corporate defendant “facilitated arms shipments” used in “carrying out attacks” and paid the organization alleged to be carrying out the attacks “every month for approximately seven years,” on the other hand, sufficed to allege substantial assistance and *actus reus*.<sup>168</sup>

ii. Conspiracy liability is less settled.

Conspiracy liability under the ATS is less settled. Some courts

161. *Presbyterian Church of Sudan*, 582 F.3d at 259 (“hold[ing] that the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone.”); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) (“agree[ing] with the Second Circuit that a purpose standard alone has gained ‘the requisite acceptance among civilized nations for application under the ATS.’”) (citation omitted); *see also Doe v. Drummond Co.*, No. 2:09-CV-01041, 2010 WL 9450019 at \*15 (N.D. Ala. Apr. 30, 2010) (asserting that “[a] claim of conspiracy under the ATS/TVPA requires the same proof of *mens rea* as aiding and abetting claims – a showing of intent, and not merely knowledge”).

162. *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 948 (9th Cir. 2015) (Bea, J., dissenting) (citations omitted) (holding that an “aiding and abetting ATS defendant must act with the purpose of facilitating the criminal act”) (emphasis added).

163. *In re Chiquita Brands Int’l, Inc. Alien Tort Statute Litig.*, 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011).

164. *Id.* at 1345, 1347.

165. *Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 653, 666 (S.D.N.Y. 2006) (citations omitted), *aff’d*, 582 F.3d 244 (2d Cir. 2009); *see also Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 286-87 (E.D.N.Y. 2007) (quoting *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, 235, Dec. 10, 1998 and explaining the standards for enforcing liability on secondary parties for aiding and abetting charges).

166. *Almog*, 471 F. Supp. 2d at 287; *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 667 (citation omitted).

167. *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).

168. *Chiquita Brands*, 792 F. Supp. 2d at 1350.

continue to note that whether there is conspiracy liability under the ATS remains an open question in their circuit.<sup>169</sup> Other circuit courts plainly state that conspiracy liability is “cognizable under the ATS.”<sup>170</sup>

In the district courts, pleading conspiracy entails a predictable set of elements, for example, that (1) the corporate defendant or client and a PSC agreed to commit a recognized international law violation, (2) the corporate defendant or client joined the agreement with the purpose or intent to facilitate the commission of the violation, and (3) the PSC committed the violation.<sup>171</sup> Litigants should be aware that at least one court has held that conspiracy liability under the ATS “may only attach where the goal of the conspiracy was either to commit genocide or to commit aggressive war.”<sup>172</sup>

## 2. Statute of Limitations

The ATS does not specify a statute of limitations.<sup>173</sup> In the absence of a limitations period prescribed by the statute, federal courts borrow the local state’s limitations period unless “a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes.”<sup>174</sup> Consistent with this approach, several courts have found that the appropriate analogy for an ATS claims’ limitations period is that found in the TVPA, which provides a ten-year statute of limitations.<sup>175</sup>

## 3. Jurisprudential, or Discretionary, Exhaustion of Remedies

Generally, courts hold that the ATS imposes no express requirement

169. See, e.g., *Mastafa v. Chevron Corp.*, 770 F.3d 170, 181 (2d Cir. 2014) (citing *Presbyterian Church of Sudan*, 582 F.3d at 260 and discussing conspiracy liability in the Second Circuit).

170. E.g., *Doe v. Drummond Co.*, 782 F.3d 576, 597 (11th Cir. 2015) (finding that the precedent in the circuit recognizes the claims under the ATS).

171. *Chiquita Brands*, 792 F. Supp. 2d at 1351.

172. *Presbyterian Church of Sudan v. Talisman Energy*, 453 F. Supp. 2d 653, 664-65 (S.D.N.Y. 2006)

173. See, e.g., *Ellul v. Congregation of Christian Bros.*, 774 F.3d 791, 799 (2d Cir. 2014) (explaining that no decision has been made by the Second Circuit with respect to the statute of limitations and claims under the ATS).

174. *Northstar Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (internal quotation marks omitted).

175. See, e.g., *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (stating that all courts that have made a decision regarding the statute of limitations have chosen ten years as the limit); *Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005) (noting that the statute of limitations is subject to the equitable tolling doctrine); *Van Tu v. Koster*, 364 F.3d 1196, 1199 (10th Cir. 2004) (analogizing to similar cases and determining that the ten year statute of limitations applies); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002) (claiming that the nature of the injury requires a charitable statute of limitations period).

that a plaintiff first exhaust his remedies in the foreign jurisdiction where the alleged wrong occurred.<sup>176</sup> But while the ATS contains no rigid exhaustion requirement, U.S. courts may as a matter of comity stay or dismiss a case without prejudice to allow the country where the alleged wrong occurred to address it.<sup>177</sup> Though not a prerequisite to subject-matter jurisdiction, exhaustion of local remedies appears to have gained traction as a factor a court may consider before exercising jurisdiction to determine the merits.

a. *A weak U.S. nexus strengthens the case for comity.*

A lack of a significant U.S. “nexus” is an important consideration in evaluating whether plaintiffs should be required to exhaust their local remedies in accordance with principles of international comity.<sup>178</sup> The lack of a significant United States nexus to the allegations militates in favor of comity.<sup>179</sup> Where, for example, the claims involve a foreign corporation’s complicity in acts on foreign soil that affected only aliens, the situation lacks the traditional bases for exercising the United States’ sovereign jurisdiction to prescribe laws, namely nationality, territoriality, and domestic effect within the United States.<sup>180</sup>

The Ninth Circuit in *Sarei v. Rio Tinto PLC* accordingly noted that, while truly heinous conduct – torture, crimes against humanity, war crimes, etc. – may implicate matters of “universal concern,” that jurisdiction may exist does not mean that U.S. courts should necessarily exercise it.<sup>181</sup> The court in *Sarei* also noted that the basis for exercising *civil* jurisdiction, such as that under the ATS, is not as well-settled as the basis for *criminal* jurisdiction.<sup>182</sup> The caution advised in *Sosa* counsels that in ATS cases where the nexus to the U.S. is weak, courts should carefully consider the question of exhaustion, particularly – though not exclusively – when the

176. See, e.g., *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 484 (D. Md. 2009), *aff’d in part, dism’d in part*, 402 F. App’x 834 (4th Cir. 2010) (finding that the plaintiffs need not exhaust all remedies to state the claim), and cases cited therein.

177. Courts have stated that:

[w]hat is true is that a U.S. court might, as a matter of international comity, stay an Alien Tort suit that had been filed in the U.S. court, in order to give the courts of the nation in which the violation had occurred a chance to remedy it, provided that the nation seemed willing and able to do that.

*Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011).

178. *Sarei v. Rio Tinto PLC*, 550 F.3d 822, 831 (9th Cir. 2008).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

claims do not involve matters of “universal concern.”<sup>183</sup>

b. *Burdens in the Exhaustion Inquiry*

Courts considering jurisprudential exhaustion under the ATS have determined the defendant bears the burden to plead and justify an exhaustion requirement, including the availability of local remedies.<sup>184</sup> Once a defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were “ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.”<sup>185</sup> To “exhaust” requires more than a plaintiff initiating suit; the plaintiff must obtain a final decision of the highest court in the legal system at issue, or show that the state of local law or availability of further remedies would make further appeals futile.<sup>186</sup>

B. *Torture Victims Protection Act*

Even when an ATS claim would be unsuccessful, plaintiffs may be able to use the TVPA to proceed with their action.<sup>187</sup> In contrast with the ATS – which contains a specific jurisdictional grant but creates no causes of action – the TVPA provides causes of action but contains no jurisdictional grant.<sup>188</sup> Federal courts’ jurisdiction to consider TVPA claims, where present, is based on the general federal question jurisdictional statute, 28 U.S.C. § 1331.<sup>189</sup>

The TVPA provides an explicit federal law claim, stating that an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or [who] . . . 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.<sup>190</sup>

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183. *Id.*

184. *Sarei*, 550 F.3d at 832.

185. *Id.* (citation omitted).

186. *Id.*

187. *Doe v. Drummond Co.*, 782 F.3d 576, 601 (11th Cir. 2015).

188. *Id.*

189. *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008).

190. 28 U.S.C. § 1350, § 2(a) (2012).

### 1. Differences as Compared to the ATS

Certain other features further distinguish the TVPA from the ATS.

#### a. *U.S. citizens may bring TVPA claims.*

First, the TVPA empowers both United States citizens and aliens to recover for acts of torture and extrajudicial killing.<sup>191</sup> Causes of action do not accrue solely in favor of aliens.

#### b. *Express Requirement of State Action*

Second, “[t]here is an express requirement of state action in the [TVPA].”<sup>192</sup> This requirement entails two sub-parts.<sup>193</sup> First, the private actor can be held liable only when “there [exists] a symbiotic relationship between [that] private actor and the government that involves the torture or the killing alleged in the complaint.”<sup>194</sup> Second, the plaintiff may prove the relationship existed “by presenting evidence of the active participation of a single official.”<sup>195</sup>

In *Romero v. Drummond*,<sup>196</sup> for example, a labor union and relatives of deceased union leaders sought to bring action under the TVPA against a corporate defendant to recover based on the alleged recruitment, by the executives of a U.S. corporation’s Colombian subsidiary, of paramilitary forces who allegedly tortured and murdered union leaders.<sup>197</sup>

The case law in this area is developing. But in *Romero*, proof of only a “general relationship” between paramilitaries who were accused of wrongdoing and the Colombian government’s military or government officials – without proof that this relationship involved the wrongs made the subject of the complaint – did not show action under color of law.<sup>198</sup> Evidence that a government official knew of the wrongs committed – without evidence that the government was involved in those wrongs – also

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191. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (“[T]he TVPA extended the [ATS], which had been limited to aliens, to allow citizens of the United States to bring suits for torture and extrajudicial killings in United States courts.”).

192. *Romero*, 552 F.3d at 1316.

193. *Id.* at 1317.

194. *Id.* at 1316–17.

195. *Romero*, 552 F.3d at 1317.

196. *Romero* was decided before *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

197. *Romero*, 552 F.3d at 1309.

198. *See Id.* at 1317 (ruling that the relationship between the parties in question must involve the subject of the complaint in order for plaintiffs to satisfy their burden).

did not show action under color of law.<sup>199</sup> Further, showing that a corporation was aware that the foreign government sometimes supported paramilitaries likewise was not evidence of state action or action under color of law.<sup>200</sup> In addition, a declaration by an individual that he became a government official one year after a meeting with the paramilitary forces which allegedly committed the wrongs did not show state action or action under color of law.<sup>201</sup>

Cases like *Romero* suggest that a TVPA plaintiff's showing action under color of law involving the torture or killing alleged in the complaint is a relatively firm requirement for bringing the TVPA cause of action.<sup>202</sup>

c. *An Exhaustion Requirement with Doubts Resolved in Favor of Plaintiff*

Unlike the ATS, the TVPA contains a written exhaustion requirement stating that a "court shall decline to hear a claim. . . if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred."<sup>203</sup> The question of exhaustion is for the court, not the jury.<sup>204</sup>

At least one case suggests that a failure to exhaust local remedies will result in dismissal for lack of subject matter jurisdiction.<sup>205</sup> Other cases, however, suggest that exhaustion of remedies is *not* jurisdictional.<sup>206</sup> What may be clear is that exhaustion of remedies is an effective affirmative defense, but one where the defendant initially bears the burden of proof.<sup>207</sup>

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199. *Id.*

200. *Id.*

201. *Id.*

202. *Cf. Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1346 (11th Cir. 2011) (interpreting *Romero* to say that there is an express requirement of state action in the TVPA).

203. *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 (9th Cir. 1996) (quoting 28 U.S.C. § 1350, § 2(b)).

204. *Id.*

205. *See Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003) (interpreting 28 U.S.C. § 1350, § 2(b) to say that if local remedies are not exhausted, a district court must dismiss the TVPA claim).

206. *See, e.g., Rojas Mamani v. Sanchez Berzain*, 636 F.Supp.2d 1326, 1328 (S.D. Fla. 2009) (ruling that TVPA's exhaustion requirement is "not jurisdictional in the 'subject-matter' sense"); *Cabello Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360, 1365 (S.D. Fla. 2003) (citing four cases from other districts in which courts ruled that the TVPA's exhaustion requirement is not jurisdictional).

207. *Sarei v. Rio Tinto PLC*, 550 F.3d 822, 832 (9th Cir. 2008) (citation omitted); *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); *see also Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 484 (D. Md. 2009), *aff'd in part, dism'd in part*, 402 F. App'x 834 (4th Cir. 2010) (stating that under the TVPA, defendants bear the burden of proving that adequate local

The same burden-shifting analysis that is used for the ATS then applies to the TVPA's express exhaustion requirement.

That is, the defendant bears the burden to plead and justify the exhaustion requirement, including the availability of local remedies.<sup>208</sup> The burden then shifts to the plaintiff to demonstrate the futility of exhaustion, but the ultimate burden remains with the defendant.<sup>209</sup> In addition, TVPA cases appear to suggest that any doubts as to whether plaintiff has shown exhaustion of local remedies should be resolved in the plaintiff's favor.<sup>210</sup>

d. *No Liability for Corporations or Other Organizations*

In contrast to a majority view holding that corporations can be liable under the ATS, there exists no liability for companies or organizations under the TVPA. In *Mohamad v. Palestinian Auth.*, the Supreme Court examined the TVPA and held that the term "individual," as used in the statute, "encompasses only natural persons."<sup>211</sup> Thus, the TVPA "does not impose liability against organizations."<sup>212</sup>

Based on *Mohamad*, the Ninth Circuit in *Mujica* affirmed dismissal of plaintiffs' TVPA claims against defendants, both the PMC AirScan and its client Occidental Petroleum, because defendants were "both corporations rather than natural persons."<sup>213</sup>

e. *Definitions for Actionable Wrongs Forming the Basis of Claims*

The TVPA avoids some of the murkiness encountered under the ATS in seeking to define, for example, a tort "in violation of international law" by providing relatively detailed definitions of the "torture" and "extrajudicial killings" actionable under this Act.<sup>214</sup>

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remedies do not exist).

208. See *Sarei*, 550 F.3d at 832 (explaining that the burden-shifting under the ATV, that defendants must plead and justify exhaustion of local remedies, is present under the TVPA).

209. *Id.*

210. See *Jean*, 431 F.3d at 782 (citing numerous cases from other circuits holding that any disputes concerning the TVPA and exhaustion requirement should be resolved in the plaintiff's favor).

211. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012).

212. *Id.*

213. *Mujica v. AirScan Inc.*, 771 F.3d 580, 591 (9th Cir. 2014); see also *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1188-89 (11th Cir. 2014) (observing that defendant companies were not natural persons so that the "claims under the TVPA must be dismissed").

214. The TVPA defines torture as:

(b) Torture. — For the purposes of this Act —

f. *Extraterritorial application*

Whether a TVPA claim's being based on extra-territorial conduct may limit a federal court's section 1331 jurisdiction has given rise to some judicial analysis.<sup>215</sup> Generally, courts have determined that the language of the TVPA and its legislative history both show it applies extraterritorially.<sup>216</sup>

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . 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; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from —

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

28 U.S.C. § 1350 n. § 3(b).

The TVPA defines "extrajudicial killing" as:

. . . a deliberate 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 peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

28 U.S.C. § 1350 n. § 3(a).

The fact that the TVPA and ATS employ different definitions of "torture" and "extrajudicial killing" may have concrete consequences. The difference means "each statute provides a means to recover for torture [and extrajudicial killing] as [those] term[s] separately draw [] [their] meaning[s] from each statute." *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008) (quotation marks omitted).

215. See *Doe v. Drummond Co.*, 782 F.3d 576, 602 (11th Cir. 2015).

216. *Id.*; see also, e.g., *Morrison v. National Austrl. Bank*, 561 U.S. 247, 255 (2010); S. Rep. No. 102-249, at 3-5 (1991); *Chowdhury v. Worldtel Bangl. Holding, Inc.*, 746 F.3d 42, 51 (2d Cir. 2014); H. Rep. No. 102-367 at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 85 (indicating extraterritorial application).

g. *Knowledge and Active Assistance Required for Secondary Liability*

The TVPA contemplates liability against those who did not “personally execute the torture or extrajudicial killing.”<sup>217</sup> Specifically, the TVPA permits indirect liability, or aider and abettor liability, for those who order, abet or assist a violation.<sup>218</sup> One circuit court has interpreted the TVPA’s legislative history to mean there is an “expansive view of liability under the TVPA” so that “responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.”<sup>219</sup>

Notably, the *mens rea* standard for this TVPA claim is more lenient than under the ATS. To address indirect liability, courts state that a plaintiff must show (by a preponderance of the evidence) the individual’s “active participation” in the wrongful act, for example, that the “defendants gave knowing substantial assistance to the individuals committing the wrongful act.”<sup>220</sup> Hence, the standard for secondary liability is described as a “knowledge” *mens rea* and a “substantial assistance” *actus reus*.<sup>221</sup>

Ultimately, in *Drummond*, the court concluded that summary judgment for the two individual defendants, corporate officers James Tracy and Augusto Jimenez, was proper.<sup>222</sup> After adequate time for discovery, plaintiffs uncovered no evidence that Tracy or Jimenez had any knowledge of an alleged corporate scheme to fund or support the paramilitary group which allegedly committed extra-judicial killings and war crimes in the course of providing “security” for the U.S. corporation’s mining operations in Colombia - much less evidence that they had any part in such a scheme, or control over those who allegedly did.<sup>223</sup> Also, the district court found that there was no evidence that Tracy knew that noncombatants were being murdered along the rail lines, and further noted an absence of any evidence of Tracy’s knowledge that the paramilitary group was allegedly being paid

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217. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012).

218. *Drummond*, 782 F.3d at 604 (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-59 (11th Cir. 2005)); *see id.* at 1157 (“An examination of legislative history shows that the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting or assisting in the violation.”) (citing S. Rep. No. 102-249, at 8-9 (1991)).

219. *Drummond*, 782 F.3d at 607 (quoting S. Rep. No. 102-249, at 9).

220. *Id.* at 604.

221. *Id.* at 608.

222. *Id.* at 604-05.

223. *Drummond*, 782 F.3d at 581, 604.

by Drummond.<sup>224</sup>

Similarly, the district court found that plaintiffs had proffered no admissible evidence with regard to Jimenez's knowledge other than general awareness of the presence of the paramilitary group near the mining operations and the group's violent methods.<sup>225</sup> Consequently, there was no evidence of *mens rea* to adequately impose secondary liability on the corporate officers.<sup>226</sup>

At least one appeals court has acknowledged that TVPA claimants may face significant hurdles in bringing suit against individuals employed by or working on behalf of a company.<sup>227</sup> The Supreme Court has also noted obstacles which can make TVPA claims challenging for would-be plaintiffs; for example, "[v]ictims may be unable to identify the men and women who subjected them to [the violation], all the while knowing the organization for whom they work."<sup>228</sup> Real-world plaintiffs may encounter such challenges in pursuing their claims, and their allegations may not yield sufficient admissible evidence after discovery to sustain their TVPA action against the individual defendants.<sup>229</sup> Nevertheless, this is the legislative scheme in which TVPA plaintiffs must operate.

#### h. *Superior or Command Liability*

Noting that domestic law – rather than international law – should typically guide interpreting the TVPA, the court in *Drummond* also acknowledged that legislative history makes clear that, at times, courts should instead interpret the TVPA per international law.<sup>230</sup> Adoption of the superior or command responsibility doctrine, the court concluded, is one of these instances.<sup>231</sup>

The command responsibility doctrine has three elements:

(1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violating of the laws of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates

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224. *Id.* at 604.

225. *Id.* at 605.

226. *Id.* at 604-05.

227. *Id.* at 611.

228. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1710 (2012).

229. *Drummond*, 782 F.3d at 581, 611.

230. *Id.* at 609.

231. *Id.*

after the commission of the crimes.<sup>232</sup>

In *Drummond*, the Eleventh Circuit noted that a civilian superior – including a civilian corporate officer – “could *feasibly* be held liable under the doctrine, provided the plaintiffs demonstrated a superior-subordinate relationship between the civilian and the perpetrator, averring that the civilian was in the requisite position of authority and control.”<sup>233</sup> The court was also careful to note that the command responsibility doctrine is not “broadly available to be used against all defendants under the TVPA”; rather, it is available “if the requisite degree of responsibility, authority, and control is present to support liability.”<sup>234</sup>

## 2. Who may bring a claim for the extrajudicial killing?

Courts have held that the disjunctive “or” in the TVPA’s language should be read as creating two different alternatives treated separately.<sup>235</sup> This means that either the “legal representative of the victim” or “a person who has shown that he or she could be a claimant in a wrongful death action for the victim” can recover damages under the TVPA.<sup>236</sup>

### a. *Legal Representatives*

Courts have provided little guidance on who may qualify as the victim’s legal representative. Victims of extrajudicial killings obviously cannot bring their own claims. Whether a person qualifies as the “legal representative” of such victim appears to hinge on whether the individual bringing the claim is the executor or executrix of the decedent’s estate.<sup>237</sup>

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232. *Id.* (citing *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002)).

233. *Id.* at 610.

234. *Id.*

235. *See, e.g., Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347 (11th Cir. 2011).

236. *Id.*

237. The Torture Victim Protection Act, 28 U.S.C. § 1350 n. § 2(a)(2), provides that the victim’s “legal representative” or “any person who may be a claimant in an action for wrongful death” may recover based on an extrajudicial killing. *Id.* In explaining this provision, the House of Representatives Committee Report stated that “[c]ourts may look to state law for guidance as to which parties would be proper wrongful death claimants.” H.R. 256, 102d Cong. (1st Sess. 1991). The Senate Committee Report elaborated:

The legislation permits suit by the victim or the victim’s legal representative or a beneficiary in a wrongful death action. The term “legal representative” is used only to include situations in which the executor or executrix of the decedent’s estate is suing or in which an individual is appearing in court as a “friend” of the victim because of that victim’s mental or physical incapacity or

b. *Choice of law for who is a proper claimant*

At least one court, the Eleventh Circuit in *Baloco*, has determined that (1) “state law should govern the determination of whether a plaintiff is a claimant in an action for wrongful death [but (2)] where state law would provide no remedy, a court may apply the foreign law that would recognize the plaintiff’s claim.”<sup>238</sup> The *Baloco* court noted that the TVPA’s language does not indicate whether, in applying the relevant state’s law, a court should apply that state’s “whole law,” including any choice-of-law principles, or only the state’s “internal law.”<sup>239</sup> Ultimately, the *Baloco* court decided it did not need to choose between the “whole law” and the internal law of Alabama, the forum state. Under Colombian law, the decedents’ children would be proper wrongful death claimants.<sup>240</sup> Thus, the fact that Alabama choice-of-law rules would dictate that Colombian law applied (making the children proper claimants), while Alabama internal law would leave the children with no remedy, was ultimately of no moment.

3. Statute of Limitations

The TVPA includes a ten-year statute of limitations.<sup>241</sup>

C. *Common Law Torts*

Plaintiffs bringing claims under the ATS or claims under the TVPA

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youthful age. The term “beneficiary in a wrongful death action” is generally intended to be limited to those persons recognized as legal claimants in a wrongful death action under Anglo–American law.

S.R 249, 102d Cong. (1st Sess. 1991) (footnote omitted).

In a footnote, the Senate Committee Report added: “[w]here application of Anglo–American law would result in no remedy whatsoever for an extrajudicial killing, however, application of foreign law recognizing a claim by a more distant relation in a wrongful death action is appropriate.” *Id.* at n. 10 (citation omitted). As an example, the Report cited *In re Air Crash Disaster Near New Orleans, Louisiana* in which the court allowed a nephew’s claim even though Louisiana law provided no remedy. 789 F.2d 1092, 1097–98 (5th Cir. 1986), *rev’d in part on other grounds*, 821 F.2d 1147, 1170 (5th Cir. 1987), *vacated on other grounds*, 490 U.S. 1032 (1989).

238. *Baloco ex rel. Tapia*, 640 F.3d at 1349.

239. *Id.*

240. *See id.* at 1349-50 (noting that children are capable of bringing wrongful death suits).

241. *See Sikhs for Justice, Inc. v. Gandhi*, 614 F. App’x 29, 31 n. 3 (2d Cir. 2015) (discussing the ten-year statute of limitations in the TVPA and citing 28 U.S.C. § 1350 n. § 27(c), which provides a ten-year statute of limitations).

also may allege common law tort claims arising from the same facts. Because ATS or TVPA claims present federal question jurisdiction, state law claims are typically filed in or removed to federal court based on supplemental jurisdiction or pendent jurisdiction.<sup>242</sup> These claims can include, for example, assault and battery, wrongful death, false arrest, wrongful imprisonment, intentional infliction of emotional distress, negligence, as well as negligent hiring, training and/or supervision.<sup>243</sup>

The advantage to a plaintiff of bringing state law tort claims based on PSC conduct is that the categories of persons or companies who can be sued in common law tort are generally broader than under the ATS or TVPA. Plaintiffs asserting common law torts encounter obstacles nonetheless.

1. State tort laws do not apply to extraterritorial conduct.

In *In re Chiquita Brands Alien Tort Statute and Shareholder Derivative Litigation*, plaintiffs asserted various common law torts under the laws of “Florida, New Jersey, Ohio, the District of Columbia, and in some cases the law of ‘any other applicable jurisdiction.’”<sup>244</sup> The *Chiquita* plaintiffs’ claims included assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, negligent hiring, negligence per se, and loss of consortium.<sup>245</sup>

The *Chiquita* court noted that the plaintiffs’ state law claims were premised on acts committed by para-militaries against Colombian civilians which occurred in Colombia during Colombia’s civil war.<sup>246</sup> There were no allegations that the alleged conduct had, or intended to have, a substantial effect within the states of Florida, New Jersey, Ohio, or within the District of Columbia.<sup>247</sup> Nor were the state law claims alleged, such as ordinary tort claims for assault and battery, negligence, wrongful death, etc., matters of universal concern recognized by the community of nations.<sup>248</sup> Accordingly, the court in *Chiquita* held that the civil tort laws of

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242. See e.g., *Gruenke v. Seip*, 225 F.3d 290, 308 (4th Cir. 2000) (discussing supplemental jurisdiction under 28 U.S.C. § 1367); *Hassen v. Nahyan*, No. CV 09-01106, 2010 WL 9538408 at \*7 n. 5 (C.D. Cal. Sept. 17, 2010) (stating that “[i]f the Court has personal jurisdiction over Defendants as to Plaintiff’s TVPA cause of action, then the Court may exercise pendent personal jurisdiction over the state tort causes of action”).

243. See *HUSKEY*, *supra* note 53, at 37 (discussing various causes of action under the ATS and TVPA).

244. 792 F. Supp. 2d 1301, 1355 (S.D. Fla. 2011).

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

Florida, Ohio, New Jersey, and the District of Columbia did not apply to the alleged torts based on extraterritorial conduct, and dismissed those claims.<sup>249</sup>

## 2. No Basis for Purported Federal Common Law Claims

Some litigants have sought to bring tort claims like survival and wrongful death claims as “federal common law” claims.<sup>250</sup> Noting that, with few exceptions, there is no general federal common law, courts have dismissed these purported claims, stating that there is “no sound basis for them.”<sup>251</sup>

## 3. Courts may decline supplemental jurisdiction over foreign law tort claims.

Given that state and purported federal common law tort claims can meet these ends, it is no surprise that other plaintiffs have alleged tort claims under the law of the jurisdiction where the alleged wrongdoing occurred. These foreign-law tort claims may also be dismissed when a district court refuses to exercise supplemental jurisdiction over them.

Claims under ATS and TVPA are based on federal statutes, giving rise to jurisdiction in federal courts. In exercising jurisdiction over these federal claims, a court may exercise supplemental jurisdiction over non-federal claims under 28 U.S.C. § 1367. But a district court may also “decline supplemental jurisdiction when ‘the claim raises a novel or complex issue of state law.’”<sup>252</sup> In at least one case, the court declined to exercise supplemental jurisdiction over a plaintiff’s wrongful death claims, finding that the claims presented sufficiently complex issues under foreign (i.e. Colombian) law that it would have been difficult for the court to correctly apply that law.<sup>253</sup>

Circuit courts have also affirmed a district court’s discretionary decision to decline to exercise supplemental jurisdiction over foreign state law tort claims due to the difficulty inherent in reconciling conflicting translations of foreign legal precedents, navigating the complexity of the parties’ submissions, and discerning foreign law requisites for wrongful

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249. *Id.* at 1317.

250. *See, e.g.,* *Almog v. Arab Bank*, 471 F. Supp. 2d 257, 295 (E.D.N.Y. 2007) (dismissing claims because they were based on federal common law).

251. *Id.* at 294.

252. *Doe v. Drummond Co.*, 278 F.3d 576, 611 (11th Cir. 2015) (citations omitted) (discussing when a court may decline supplemental jurisdiction).

253. *Id.* at 611-12 (declining supplemental jurisdiction due to the complexity of the Colombian laws at issue).

death claims.<sup>254</sup>

Given the difficulty of showing that a district court abused its discretion in declining to exercise supplemental jurisdiction over foreign-state tort law claims,<sup>255</sup> litigants should anticipate that a court may decline to exercise supplemental jurisdiction over such claims.

#### 4. Dismissal Based on International Comity

Federal courts also may dismiss state law tort claims based upon doctrine of international comity.<sup>256</sup> This doctrine is described as the “golden rule among nations”<sup>257</sup> and as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>258</sup>

In particular, the second strain of this doctrine, “comity among courts” or “adjudicatory comity,” is “viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.”<sup>259</sup>

Increasingly, courts may be of the view that a “true conflict” between the domestic law and foreign law is not a predicate or requirement for international comity.<sup>260</sup> Courts have not required proof of a true conflict when considering application of adjudicatory comity.<sup>261</sup> Instead, courts look to a list of factors bearing on their discretion to invoke comity. A frequently cited list is taken from the Eleventh Circuit’s decision in *Ungaro-Benages v. Dredner Bank Ag*; it includes “[1] the strength of the

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254. *Romero v. Drummond Co.*, 552 F.3d 1303, 1318 (11th Cir. 2008) (discussing and affirming the district court’s decision to decline to consider the plaintiff’s wrongful death claim under Colombian law).

255. *See e.g., Drummond*, 278 F.3d at 612 (finding that the district court did not abuse its discretion).

256. *See e.g., Mujica v. AirScan Inc.*, 771 F.3d 580, 596-97 (9th Cir. 2014) (dismissing a state law tort claim based on the doctrine of international comity).

257. *Id.* at 608 (describing international comity).

258. *Id.* at 597 (citations omitted) (discussing international comity); *see also* *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for Southern District of Iowa*, 482 U.S. 522, 543 n. 27 (1987) (stating that “[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states”).

259. *Mujica*, 771 F.3d at 599 (discussing a part of the international comity doctrine).

260. *Id.* (refining the “true conflict” analysis to require proof of such a conflict “only in cases where *prescriptive* comity is at issue – that is, where a party claims that it is subject to conflicting regulatory schemes, such as antitrust laws or bankruptcy rules that apply extraterritorially”).

261. *Id.* at 601 (discussing international comity).

United States' interests in using a foreign forum, [2] the strength of the foreign government's interests, and [3] the adequacy of the alternative forum."<sup>262</sup> The Ninth Circuit has sub-divided the first factor, U.S. interests,<sup>263</sup> and the third factor, adequacy of the forum,<sup>264</sup> into additional lists of non-exclusive factors.

These factors obviously can be case-specific and country-specific. However, they appear to offer courts which are disinclined to hear foreign tort law claims another basis for dismissal.

### III. THOUGHTS FOR A DISCUSSION OF POLICY AND COMPREHENSIVE LEGISLATION

In a democracy, the state should have a monopoly on the legitimate use of violence in the interest of public order.<sup>265</sup> In practice however, PMCs act as an extension of the state. Though governments may outsource some of their use-of-force function to PMCs, backlash against using PMCs can result - and the legitimacy of democracies can be questioned and eroded - if the public disapproves of a PMCs conduct. Negative perceptions and consequences can result from incidents involving the perceived disproportionate use of force.<sup>266</sup>

Perhaps because the public perceives that the United States' regulation and control of PMCs, and the government's oversight process for contracting with PMCs,<sup>267</sup> are well thought-out and sound, there is little reason to predict that the U.S.'s trend toward contracting with PMCs will decrease. PMCs serving in Iraq alone, for example, have benefitted from annual contracts with the U.S. at an amount estimated to be more than \$1

262. *Ungaro-Benages v. Dresdner Bank Ag*, 379 F.3d 1227, 1238 (11<sup>th</sup> Cir. 2004).

263. Non-exclusive factors to assess U.S. interests include: (1) the location of the conduct in question, (2) the nationality of the parties, (2) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests. *Mujica*, 771 F.3d at 604; *see id.* at 607 (analyzing how foreign interests mirror that of U.S. interests).

264. When evaluating the adequacy of the of the foreign forum, courts consider decisions rendered by that alternative forum and ask "(1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial [and] . . . repugnant to fundamental principles of what is decent and just." *Id.* at 608 (citations omitted).

265. *See generally* MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Oxford Univ. Press 1964) (discussing the state's use of violence).

266. *See* O'Brien, *supra* note 6, at 5 (discussing PMCs in combat zones and their potential problems).

267. *See, e.g., id.* at 27-28, 53-55 (noting the "FY2007 and FY2008 Defense Authorization Acts seek to reign in all PMCs and make them more accountable for actions").

billion.<sup>268</sup> And the role of PMCs in that region has only appeared to grow with the myriad tasks that PMCs currently perform for the U.S. military.<sup>269</sup>

As noted, coincident with democracies outsourcing more of their military functions to PMCs, private corporations - rather than appealing to governments for protection in, for example, the Middle East, or in shipping lanes off the east African coast - are increasingly contracting directly with PSCs to provide security in or near unstable regions outside the U.S. Instead of appealing to the U.S. government to use taxpayer funds to protect them or their personnel overseas, private companies increasingly short-circuit that process by paying for the security function themselves and hiring private companies to perform what, in some circumstances, would have in the past been a governmental function. As one can see from, for example, the Citizen Services section of the website for the U.S. Embassy in Iraq, the United States is aware of this trend.

Given that corporations chartered by states in the U.S. are contracting with private companies to provide services which the U.S. government (or governments aligned with it) have historically provided for U.S. interests overseas, it seems clear that the federal government has a legitimate interest in regulating that process.

All the above observations are easy. As usual, the devil is in the details for any proposal to address them.

Most would agree that the ATS is, by American standards, an ancient statute. This Act and more recent case law interpreting it form much of the legal authority in this area, as supplemented by the TVPA and by garden-variety tort, choice-of-law, and comity principles. Given the growth in private corporations' use of PSCs, some would argue that a better approach would be for Congress to preempt the current patchwork of laws from various areas with a modernized statute addressed specifically to private corporations' contracting with PSCs to provide services outside the U.S. Advantages for the public, the U.S. government, the PSC industry, and its clients from a new statute could include:

- Greater predictability in the law. There are currently conflicts in the

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268. *Id.* at 1 (discussing U.S. contracts with PMCs during the military operations in Iraq). See, e.g., Junio Valerio Palomba, *Private Military Companies and the Pursuit of Legitimacy*, E-INTERNATIONAL RELATIONS (Oct. 2, 2009), available at <http://www.e-ir.info/2009/10/02/private-military-security-companies-and-the-pursuit-of-legitimacy/> [<https://perma.cc/9R3M-79JJ>] (citing Rita Abrahamsen, Michael C. Williams, *The Globalization of Private Security*, ISP/NSC Briefing Paper 05/02) (Chatham House, London Oct. 2005) (stating that “[t]he current estimated value of the global private security sector is in fact close to \$100 billion and it represents one of the fastest growing sectors of the economy worldwide”).

269. See, O’Brien, *supra* note 6, at 1 (discussing a recent situation where the U.S. employed PMCs).

case law which mean that clients of PSCs encounter different results depending on where in the U.S. they are sued. Legislation can eliminate those conflicts. And clearly drafted legislation would likely allow the PSC industry to plan and to conduct itself with greater legal precision than a body of law made up largely of court cases which can evolve sporadically and without public comment being received.

□ Greater comfort on the part of the public with the PSC industry. Many of the concerns about PSC activities could be addressed with better transparency. Legislation could enable a certification body, and provide for the promulgation of standards to be met before PSCs could enter contracts with private corporations.

If the public perceives that a capable body has promulgated sensible standards for PSCs, and that PSCs are required to meet those standards before being permitted to contract with private corporations, some concerns around the PSC industry might be significantly reduced.

□ Business and efficiency concerns. Similar to, but distinct from, issues of clarity in the law for those who bring or defend actions against PSC clients, are issues of business efficiency. Litigation to the side, putting all the rules in one place in a preemptive, well thought-out piece of legislation would better allow PSCs and their clients to execute business plans in a way that plans to obey the law and avoid litigation in the first instance. This is a legitimate business concern. From a purely business perspective, avoiding litigation is its own reward.

On the flip side, both claimants' firms and claimants themselves have financial (as opposed to legal) concerns about the costs vs. benefits of embarking down a litigation path. Again, a single, preemptive body of clear law would better allow claimants and their lawyers to weigh the business pros and cons in determining whether and how to initiate and execute litigation.

□ International confidence in the United States' policy. PSCs are often populated by alumni of western militaries. PSCs are also often headquartered in western democracies, including the U.S. In addition, the corporate clients of PSCs are very often U.S. or western companies (whose appetites for PSC services show little sign of abating).

In these circumstances, the U.S. Government's having a modern, clear, and sensible plan for oversight of a growing private industry which has the capability to apply deadly force is appropriate. Being aware of the industry's growth, recognizing the need for the industry in the private sector, and responding with a modern legal scheme would indicate that the United States' government is aware and responsible.

## CONCLUSION

Corporations employing personnel or maintaining facilities in or near unstable regions of the world, or near areas where terrorist acts can occur, are increasingly likely to retain PSCs. To perform the functions for which they are engaged, PSC personnel are at times armed. Given the functions for which PSCs are retained and the environments where they work, client corporations should not be surprised if incidents involving the use of force sometimes occur.

When these incidents occur, affected members of the local population sometimes seek to bring legal action against the client corporations in the U.S. As shown above, client corporations have a number of relatively well-established defenses and defensive theories to assert in response.