SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 71 | Issue 4 Article 8

2018

Avoiding the Alien Tort Statute: A Call for Uniformity in State Court Human Rights Litigation

Alicia Pitts
Southern Methodist University, Dedman School of Law, pitts@smu.edu

AVOIDING THE ALIEN TORT STATUTE: A CALL FOR UNIFORMITY IN STATE COURT HUMAN RIGHTS LITIGATION

*Alicia Pitts**

ABSTRACT

For decades, the Alien Tort Statute (ATS) has played a valuable role in human rights litigation in U.S. courts. However, in recent years, the U.S. Supreme Court has limited the ATS's effectiveness in a number of respects. In response to these decisions, many scholars have predicted that litigants will begin to evade the restrictive ATS jurisprudence by bringing traditional ATS cases in state courts. This comment reveals that this tactic has not become as prevalent as scholars predicted and evaluates the only two state court cases uncovered by the author's research. This comment then explains why litigating would-be ATS cases in state court will lead to negative policy implications for the United States, including inconsistent treatment of these claims and degradation of the federal government's ability to "speak with one voice" regarding foreign affairs. To prevent these issues from arising, congressional action is needed to clarify the ATS's intended reach and vest federal courts with exclusive jurisdiction over claims fitting within that reach.

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* J.D. Candidate, SMU Dedman School of Law, 2019; B.A., B.B.A., Southern Methodist University, 2016. Thanks to my husband, Dan, and to my family and friends for always cheering me on.

I. INTRODUCTION

IN the late 1700s, the first United States congress passed a short, one-sentence law called the Alien Tort Statute (ATS).[1] As Judge Friendly famously said, the ATS is a "legal Lohengrin . . . no one seems to know from whence it came."[2] For 170 years, the ATS lay dormant with only a few cases calling upon its jurisdictional grant.[3] However, since the Second Circuit's iconic 1980 decision in *Filartiga v. Pena-Irala*,[4] the ATS has become a staple for human rights litigants seeking relief in American courts.

In recent years, the Supreme Court has issued several decisions vastly undercutting the ATS's power. Not only has the Court diminished available actionable conduct for litigants seeking to bring claims in U.S. courts,[5] but it has also, with its lower court associates, questioned who can be held liable for damages in ATS cases.[6]

In response to the restrictive jurisprudence surrounding the ATS, many scholars have predicted a great rise in state court litigation, where plaintiffs can avoid the ATS entirely by pleading their cases under the transitory tort doctrine. This strategy allows litigants to bring what the author will call "quasi-ATS" or "would-be-ATS" cases in state courts with general jurisdiction and fewer obstacles to relief. Under the transitory tort doctrine, state courts may be able to hear claims otherwise barred by ATS jurisprudence, so long as the state has personal jurisdiction over the defendant.[7] Despite the many law review articles discussing this potential

1. 28 U.S.C. § 1350 (2012).
2. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004) (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).
3. *Id.*
4. 630 F.2d 876 (2d Cir. 1980).
5. *See infra* Part III.A.
6. *See infra* Part III.B.
7. *See infra* Part IV.A. State courts also allow litigants to sue a wider variety of defendants than they could through ATS claims. *See id.*

strategy, after an extensive search,[8] the author uncovered only two state court cases where plaintiffs actually pled actionable ATS claims as state law torts.[9] These two cases illustrate well the benefits and flexibility associated with evading the ATS's restraints to file in state court.

Although giving plaintiffs an avenue for relief is undoubtedly favorable to the achievement of justice, doing so in state courts produces inconsistency harmful to the American legal system and to the United States' foreign policy. As a solution, the author urges congressional action to (1) clarify or modify congress's intended framework for ATS litigation, addressing recent Supreme Court cases and their impacts head-on, and (2) preempt evasive state court litigation by vesting federal courts with exclusive jurisdiction over all ATS claims. This approach allows congress to reclaim an important area of American policy boasting serious foreign affairs implications and further the nation's ability to "speak with one voice" through its political organs.

This comment provides a comprehensive look into ATS jurisprudence and its state court counterparts. Going beyond its predecessors' speculations, this comment provides the first look at actual state court quasi-ATS cases to determine how they have been resolved in reality. First, Part II provides a brief summary of the ATS's history and its rise to popularity in the post-*Filartiga* era. Part III then discusses the aforementioned Supreme Court cases and their harsh impacts on modern human rights litigation. Part IV examines the two would-be-ATS cases uncovered by the author's research. Finally, Part V explores federal and state inconsistencies created by quasi-ATS litigation, proceeds through an assessment of sister-state discrepancies, and concludes with a proposed solution to this problem.

II. ALIEN TORT STATUTE: A BRIEF HISTORY

A. Enactment and Early Use

The Alien Tort Statute[10] has a long history in the American legal system. Passed by the first Congress as part of the Judiciary Act of 1789,[11] the ATS provides 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."[12] Nearly two centuries after its passing, the ATS's constitutionality was upheld in *Filartiga v. Pena-Irala*, when the Second Circuit held that the first Congress had power to vest district courts with jurisdiction via the ATS because "a case properly 'aris[es] under the . . . laws of the United States' for Article III purposes if grounded upon statutes enacted by Congress or upon the

8. *See infra* note 97.
9. *See infra* Part IV.B.
10. 28 U.S.C. § 1350 (2012).
11. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
12. 28 U.S.C. § 1350.

common law of the United States," which includes the law of nations.[13] Despite the ATS's early enactment in American history, the statute remained virtually dormant throughout its first 191 years of existence, granting jurisdiction in only two cases.[14] This dormancy changed, however, following the 1980 *Filartiga* decision.

B. *Filartiga* and the Rise of ATS Litigation

Dolly Filartiga arrived in the United States in 1978 after fleeing political oppression in Paraguay.[15] Her father, Dr. Joel Filartiga, was a longstanding opponent of then-President Alfredo Stroessner.[16] In 1976, allegedly as retaliation against his father's political activities, Dolly's brother Joelito was kidnapped and tortured to death by Americo Norberto Pena-Irala (Pena), a Paraguayan citizen and former government official.[17] After Pena entered the United States in July of 1978, Dolly and her father learned of his whereabouts and quickly served Pena with a summons and civil complaint seeking $10 million in damages, alleging Pena had wrongfully caused her brother's death by torture.[18] The Filartigas' recovery theories included wrongful death statutes, numerous U.N. documents, "and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations."[19] The Filartigas argued that federal subject matter jurisdiction was satisfied on federal question grounds[20] and the newly-rediscovered Alien Tort Statute.[21]

After dismissal at the trial court level for lack of subject matter jurisdiction, the Second Circuit reversed, finding the ATS a constitutionally permissible jurisdictional grant[22] and torture a universally condemned and actionable international norm.[23] The court relied on Supreme Court precedent to justify examining the United Nations Charter, the Universal Declaration of Human Rights, United Nations General Assembly resolutions, scholarly writings, and treaties as sources of contemporary international law, ultimately finding vast support for the universal "right to be free from torture."[24] Further, the court paved the way for future litigation seeking ATS relief from injury incurred abroad by upholding its jurisdiction over "transitory tort claims between individuals over whom they ex-

13. Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) (quoting U.S. Const. art. III, § 2).
14. Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007) (citing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607)) (discussing the history of the ATS).
15. *Filartiga*, 630 F.2d at 878.
16. *Id.*
17. *Id.*
18. *Id.* at 878–79.
19. *Id.* at 879.
20. *Id.* (citing 28 U.S.C. § 1331 (2012)).
21. *Id.* (citing 28 U.S.C. § 1350 (2012)).
22. *See supra* Part II.A.
23. *Filartiga*, 630 F.2d at 880–85 (citing The Paquete Habana, 175 U.S. 677, 700 (1900); United States v. Smith, 28 U.S. (5 Wheat.) 153, 160–61 (1820)).
24. *Id.* at 883–85.

ercise personal jurisdiction, wherever the tort occurred."[25] In the end, four years after Joelito's horrific death, the Filartigas' case was remanded for further proceedings,[26] and the U.S. District Court for the Eastern District of New York awarded them $10,385,364 in expenses and punitive damages.[27]

After *Filartiga*, ATS litigation increased dramatically in U.S. courts. One scholar's survey revealed at least thirty-three nonfrivolous, non-pro se ATS suits between *Filartiga* and the year 1991.[28] Most of the successful cases during this time period sued state officials for torture and extrajudicial killings, claims still common to ATS suits today.[29] A significant number of ATS claims also included "garden-variety" state law tort claims such as assault, battery, or intentional infliction of emotional distress as grounds for relief, which were sometimes successful, depending on the underlying federal claims' successes in each case.[30] Finally, modern studies reveal that over 300 ATS claims have been filed since the *Filartiga* opinion came down.[31] While plaintiffs have never had *overwhelming* success in ATS litigation, one scholar's survey of cases showed that over half of all cases making it to the merits were resolved in favor of the plaintiffs.[32] Unfortunately for plaintiffs, reaching the merits has proven a very burdensome task, as several Supreme Court decisions have limited or cast doubt upon the conduct and defendants available to comprise viable ATS claims.[33]

III. RESTRICTIONS ON THE ATS

As the number of ATS cases has grown, so have the limits on litigants' leeway in pleading actionable ATS claims. In two prominent cases, *Sosa v. Alvarez-Machain*[34] and *Kiobel v. Royal Dutch Petroleum Co.*,[35] the Court limited cognizable causes of action and the extraterritorial reach of the ATS, respectively. Additionally, courts have decreased the number of viable defendants in ATS cases by questioning whether corporations can

25. *Id.* at 885.
26. *Id.* at 889.
27. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).
28. Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053, 1083 n.160 (2015). In 1991, the Torture Victim Protection Act was added to the ATS, allowing U.S. citizens, as well as aliens, to sue individuals acting under color of law who commit torture or extrajudicial killing. *See* Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1991) (codified as amended at 18 U.S.C. § 1350 (2012)).
29. Kenney, *supra* note 28, at 1084.
30. *See, e.g.*, Krishantl v. Rajaratnam, No. 2:09-CV-05395, 2014 WL 1669873, at *14 (D.N.J. Apr. 28, 2014) (allowing claims for aiding and abetting crimes against humanity under the ATS and state common law claims for intentional infliction of emotional distress claims to proceed in suit by bombing victims against a financial supporter of a terrorist group).
31. Kenney, *supra* note 28, at 1073, 1078 tbl.1.
32. *Id.* at 1073.
33. *See id.* (noting that of 325 ATS cases resolved, only 17% made it to the merits).
34. 542 U.S. 692 (2004).
35. 569 U.S. 108 (2013).

be liable for international law violations.[36] Finally, the "state action" requirement required by courts in pleading numerous international norms renders sovereign immunity a nearly-unavoidable obstacle to relief.[37]

A. Limiting Actionable Conduct

1. Sosa*: Accepted and Specific Norms*

In 1990, Mexican doctor Humberto Alvarez-Machain (Alvarez) was indicted for allegedly helping to prolong a kidnapped American Drug Enforcement Administration (DEA) agent's interrogation and torture in Mexico before his eventual murder.[38] After a warrant was issued for Alvarez's arrest and the Mexican government refused to extradite him, the DEA organized and executed a plan to hire Mexican nationals to seize Alvarez and bring him into the United States to stand trial.[39] Mexican defendant Jose Francisco Sosa (Sosa) and his colleagues abducted Alvarez, held him overnight, and then flew him to El Paso, Texas, where he was arrested by federal officers.[40]

After the Supreme Court upheld jurisdiction over Alvarez's criminal case despite his allegedly illegal abduction,[41] Alvarez was tried and ultimately acquitted in 1992.[42] Once Alvarez returned to Mexico, he sued Sosa, a Mexican citizen; four DEA agents; the United States; and five other unnamed Mexicans in federal court using the ATS as his jurisdictional base.[43] The trial court awarded Alvarez $25,000 in damages against Sosa under the ATS for "arbitrary arrest and detention" in violation of the law of nations, an award later affirmed by the Ninth Circuit.[44]

The Supreme Court granted certiorari to determine whether the ATS "[did] no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action," or whether the ATS empowered federal courts to hear claims arising under the law of nations and recognized at common law.[45] Sosa, and the United States as his supporter, argued for the former interpretation, while Alvarez supported the latter.[46] While the Court agreed that the ATS was strictly jurisdictional, it explained that the ATS does *not* require further congressional action to be of use to litigants

36. *See infra* Part III.B.1.
37. *See infra* Part III.B.2.
38. *Sosa*, 542 U.S. at 697–98.
39. *Id.* at 698.
40. *Id.*
41. *Id.* (citing United States v. Alvarez-Machain, 504 U.S. 655, 658 (1992)).
42. *Id.*
43. *Id.*
44. *Id.* at 699 (quoting Alvarez-Machain v. United States, 331 F.3d 604, 620 (9th Cir. 2003), *vacated*, 374 F.3d 1384 (9th Cir. 2004)). Alvarez's claims against the United States and other parties are irrelevant for the purposes of this paper; accordingly, only the ATS claim will be discussed.
45. *Id.* at 712.
46. *Id.*

because such an interpretation would render the ATS "stillborn."[47] Instead, the Court agreed with amici in declaring the ATS to be a jurisdictional grant allowing federal courts to entertain claims for torts in violation of the law of nations, which "would have been recognized within the common law of the time."[48]

Subsequently, the Court addressed the three international law violations recognized when the ATS was passed, namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[49] Since this "narrow set" of judicial remedies for torts "threatening serious consequences in international affairs" was likely what the first Congress had in mind, the Court reasoned, conduct underlying present-day ATS claims must also "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[50] Accordingly, as "relatively brief" arbitrary detention boasts no universal, specific prohibition, the Court ultimately rejected Alvarez's ATS claim and denied him relief under the ATS.[51]

The *Sosa* opinion's acceptance and specificity test has been understood as a reference to what scholars call the norms of customary international law.[52] These norms "result[ ] from a general and consistent practice of states followed by them from a sense of legal obligation."[53] Thus, courts generally hold jurisdiction is satisfied when litigants bring ATS claims satisfying this criteria. Some examples of customary international norms include official or state sponsored torture,[54] genocide,[55] war crimes,[56] and crimes against humanity.[57] By contrast, claims alleging more undefined human rights violations like forced labor and human trafficking,[58] arbi-

47. *Id.* at 712–14.

48. *Id.* at 714.

49. *Id.* at 715.

50. *Id.* at 715, 725.

51. *Id.* at 695.

52. *See* 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3661.1 (4th ed. 2017) (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 132 (2d Cir. 2010)).

53. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (AM. LAW INST. 2017).

54. *See* Ali Shafi v. Palestinian Authority, 642 F.3d 1088, 1091–92 (D.C. Cir. 2011) (noting that torture committed by state actors but *not* by non-state actors forms a sufficient basis for ATS jurisdiction).

55. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 253 (2d Cir. 2009) (noting genocide can be actionable ATS conduct under *Sosa* with or without state action).

56. *See* Mastafa v. Chevron Corp., 770 F.3d 170, 180–81 (2d Cir. 2014) (acknowledging that war crimes can be asserted under the ATS).

57. *See id.* (noting that crimes against humanity can be asserted under the ATS).

58. *See* Licea v. Curacao Drydock Co., Inc., 584 F. Supp. 2d 1355, 1361–63 (S.D. Fla. 2008) (holding ATS jurisdiction valid over forced labor and human trafficking where working conditions were egregious). *But see* Velez v. Sanchez, 693 F.3d 308, 321–23 (2d Cir. 2012) (denying ATS jurisdiction where plaintiffs presented no evidence of physical abuse or confinement).

trary arrest and detention,[59] and terrorism[60] have been more controversial.

In sum, modern ATS litigation requires plaintiffs to surpass high pleading standards to obtain relief. Not only must claimants plead carefully under *Sosa*, acknowledging the universal acceptance and specificity standard, but they must also meet the heightened "plausibility" standard imposed on federal courts by *Bell Atlantic Corp. v. Twombly*[61] and *Ashcroft v. Iqbal*[62] in stating their claims for relief.[63] Even if litigants meet these burdens, however, their labor in meeting the Court's lofty requirements is, by no means, complete.

2. Kiobel*: Presumption Against Extraterritoriality*

Nine years after *Sosa*, the Court unanimously decided *Kiobel v. Royal Dutch Petroleum Co*.[64] *Kiobel* involved several Nigerian plaintiffs residing in the United States who sued in U.S. court under the ATS.[65] The complaint alleged that certain Dutch, British, and Nigerian corporations aided and abetted the Nigerian government's violations of international law in Nigeria.[66] Though the Court originally granted certiorari to decide whether corporations, as a class, could be liable for violations of international law, the Court ultimately opted to resolve the case in the defendants' favor by holding that the presumption against extraterritoriality applies to the ATS.[67]

In deciding *Kiobel*, the Court relied on a series of recent decisions discussing the presumption against extraterritoriality.[68] The presumption provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[69] This canon of construction rests on the "presumption that United States law governs domestically but does not rule the world."[70] The Court held that, since neither the text of the ATS nor the context surrounding its passing indicated that the ATS should

59. *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (denying ATS jurisdiction on arbitrary detention grounds where plaintiff was detained for only eight hours). *But see* Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 465–66 (S.D.N.Y. 2006), *aff'd in part, rev'd in part on other grounds*, 621 F.3d 111 (2d Cir. 2010), *judgment aff'd*, 133 S. Ct. 1659 (2013) (upholding ATS jurisdiction over arbitrary arrest and detention lasting between one day and four weeks).

60. *In re* Chiquita Brands Int'l., Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1321–22 (S.D. Fla. 2011) (terrorism is not sufficiently defined for ATS purposes).

61. 550 U.S. 544 (2007).

62. 556 U.S. 662 (2009).

63. For further discussion of this interplay, see Jordan D. Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318 (2011).

64. 569 U.S. 108 (2013).

65. *Id.* at 111–12.

66. *Id.*

67. *Kiobel*, 569 U.S. at 123–24.

68. *Id.* at 115 (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 248 (2010); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

69. *Id.* (quoting *Morrison*, 561 U.S. at 248).

70. *Id.* (quoting *Microsoft Corp.*, 550 U.S. at 454).

apply to torts occurring abroad, it has no extraterritorial application unless the claims somehow "touch and concern the territory of the United States . . . with sufficient force to displace the presumption."[71] Accordingly, as the alleged human rights violations before the court in *Kiobel* occurred entirely within foreign countries, and "mere corporate presence" in the U.S. was declared an insufficient basis to rebut the presumption, the claimants were denied relief under the ATS.[72]

After *Kiobel*, the majority of fully-resolved ATS cases have been dismissed on extraterritoriality grounds, and defendants have seen their highest-ever win rate.[73] Professor Kenney proposes defendants' win rates are partially due to plaintiffs' voluntary dismissals after *Kiobel*'s deterrent effect.[74] "Foreign cubed" cases involving an alien plaintiff, alien defendant, and tort occurring outside the United States have frequently been dismissed via the presumption for insufficient ties to the United States.[75] Moreover, even "foreign squared" cases involving American defendants have been dismissed on extraterritoriality grounds.[76] Finally, the U.S. Circuit Courts have vastly disagreed on how to interpret and satisfy *Kiobel*'s "touch and concern" standard for rebutting the presumption.[77] This uncertainty, combined with *Sosa*'s lofty standards for proving a violation of the law of nations, has rendered the ATS a risky and arduous route for victims of human rights abuses, as the only viable *actions* sufficient to satisfy ATS jurisdiction are violations of specific and accepted international norms that either occur on U.S. territory or "touch and concern" the United States to a still-mysterious degree.

B. Limiting Defendants

1. The Corporate Liability Question

Over the years, litigants have increasingly used the ATS to sue corporate, rather than individual, defendants for human rights violations.[78] Alleged violations often include "aiding and abetting" recognized violations of human rights by individual perpetrators over whom personal jurisdiction in U.S. courts would be difficult to obtain.[79] While the Fourth,[80] Sev-

71. *Id.* at 115–22, 124–25.
72. *Id.* at 124–25.
73. *See* Kenney, *supra* note 28, at 1105–06 (as of 2015).
74. *Id.*
75. *Id.* (citing Kaplan v. Cent. Bank of Islamic Republic of Iran, 961 F. Supp. 2d 185 (D.D.C. 2013)).
76. *Id.* (citing Doe v. Drummond Co., Inc., 782 F.3d 576, 596 (11th Cir. 2015)) ("Although the U.S. citizenship of Defendants is relevant to our inquiry, this factor is insufficient to permit jurisdiction on its own.").
77. Alicia Pitts, Note, *Extraterritoriality and the Alien Tort Statute—Narrow Application Preserves Crucial Boundaries*, 71 SMU L. Rev. 607, 612–14 (2018).
78. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 112–13 (2015) (where defendants were several foreign corporations).
79. *See id.*; Chemène I. Keitner, *State Courts and Transitory Torts in Human Rights Cases*, 3 U.C. Irvine L. Rev. 81, 82–83 (2013).
80. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2010).

enth,[81] Ninth,[82] Eleventh,[83] and D.C.[84] Circuits have recognized corporate liability under the ATS, the Second Circuit held that corporations *cannot* be liable under the ATS because "[n]o corporation has ever been subject to *any* form of liability . . . under the customary international law of human rights."[85] Thus, the Court concluded, "the ATS . . . simply does not confer jurisdiction over suits against corporations."[86] The Fifth Circuit has not directly addressed the issue.[87]

As discussed earlier, the Supreme Court declined to resolve the corporate liability issue in *Kiobel*, prolonging uncertainty for litigants seeking a viable defendant.[88] This significant question was somewhat resolved by the Supreme Court this term in *Jesner v. Arab Bank, PLC*, when it held that *foreign* corporations could not be held liable under the ATS.[89] This opinion did little to resolve this area of law, however, as it left open the possibility of liability for domestic corporations and still failed to provide clear guidance for courts analyzing the issue.

2. Sovereign Immunity

Finally, the last barrier facing plaintiffs seeking a viable defendant is the sovereign immunity doctrine. Because several violations of the law of nations require state-sponsored conduct as an element of the claim, state representatives and organs are regularly sued under the ATS.[90] Although plaintiffs often attempt to avoid this doctrine by alleging private individuals acted "under color of law" in committing human rights violations, this strategy has not produced overwhelming success.[91] Accordingly, sovereign immunity remains a prominent ground for dismissal in ATS cases against both domestic and foreign sovereigns.[92]

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81. *See* Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011).

82. *See* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014).

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

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

85. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 121 (2d Cir. 2010).

86. *Id.*

87. The Fifth Circuit may have implicitly accepted corporate liability when it dismissed plaintiffs' ATS claims for failure to meet pleading requirements without addressing corporate liability. However, this case was published before corporate liability became such a hotly contested issue. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 164–69 (5th Cir. 1999) (citing FED. R. CIV. P. 8(a)).

88. *See supra* Part III.A.2.

89. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018).

90. *See* 13 JONATHAN I. BLACKMAN, BUSINESS & COMMERCIAL LITIGATION IN FEDERAL COURTS § 137:27 (4th ed. 2017) (discussing state action in ATS litigation).

91. *See id.*; Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) ("The 'color of law' jurisprudence . . . is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.").

92. Kenney, *supra* note 28, at 1077. *See also* Zuza v. Office of High Representative, 107 F. Supp. 3d 90, 93 (D.D.C. 2015) (holding defendant's immunity from suit required dismissal of ATS case for lack of subject-matter jurisdiction).

IV. AN ALTERNATIVE STRATEGY: STATE COURTS AND STATE LAW

Due to the many constraints imposed upon ATS claims in federal court, many scholars have predicted a rise in quasi-ATS litigation in state courts using state tort law.[93] In state courts, tort claims arising in foreign countries may be asserted under the transitory tort doctrine without invoking the ATS at all.[94] Additionally, state courts are not constrained by the strict pleading requirements imposed on the ATS by *Sosa* or those imposed on all claims in *Twombly* and *Iqbal*.[95] Lastly, although state court litigants still face the threat of forum non conveniens dismissal, state court litigation avoids *Kiobel*'s effective ban on claims centering on extraterritorial conduct.[96] Although state court litigation has been widely predicted to follow after the *Kiobel* and *Sosa* decisions, the author's extensive research[97] reflected only two state court quasi-ATS cases since *Kiobel*.[98] This part will explore the benefits of state litigation and conclude by discussing the two recent state court quasi-ATS cases.

A. Transitory Tort Litigation and Its Benefits

State courts enjoy general subject matter jurisdiction with no restraints comparable to those restricting federal courts.[99] Accordingly, it has long been accepted that state courts may hear cases involving torts occurring outside the forum state, so long as the court has personal jurisdiction over the defendant.[100] Finally, state courts are allowed to form their own procedural rules and are, thus, not bound by the federal "plausibility" standard announced in *Twombly* and *Iqbal*.[101] Although many jurisdictions have adopted plausibility, some hold fast to the previous "notice" pleading standard, allowing careful litigants to avoid plausibility if personal jurisdiction over the defendant is available.[102]

Accordingly, would-be ATS plaintiffs can sue in state courts for international law violations, characterized as run-of-the-mill common law torts, without being bound to the "plausibility" standard or the restrictive

93. *See, e.g.*, Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. Irvine L. Rev. 9, 17–20 (2013).
94. *See infra* Part IV.A.
95. *See infra* Part IV.B.1.
96. *See infra* Part IV.B.2.
97. To find these cases, numerous Westlaw searches were conducted seeking cases in civil court from all fifty states. Searches were conducted using various terms and connectors to find cases discussing torts, transitory torts, common ATS conduct, and foreign defendants or territory. Each case was then read to determine whether the plaintiffs could alternatively bring an action under the ATS. Of the hundreds of cases reviewed, only two state court cases met the relevant criteria.
98. *See infra* Part IV.C.
99. *See* U.S. Const. art. III, § 2.
100. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 611 (1990).
101. *See* Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 Yale L.J. Online 109, 109–10 (2010).
102. Joseph W. Owen, *A 'Plausible' Future: Some State Courts Embrace Heightened Pleading After Twombly and Iqbal*, 36 N.C. Cent. L. Rev. 104, 120–27 (2013).

jurisprudence shadowing the ATS.[103] For example, a Sudanese plaintiff alleging a Sudanese citizen performed a terrorist stabbing in Sudan causing harm to his Sudanese family member could be rejected in federal court for lack of subject matter jurisdiction.[104] However, if the perpetrator even steps foot within a U.S. state long enough to be served with process,[105] that same Sudanese plaintiff could bring a state law tort case against him for assault and battery, avoiding the ATS's constraints entirely. Given that a defendant maintaining "minimum contacts" with the United States can potentially be sued in state *or* federal court,[106] one could easily see why a state court tort strategy may be preferred over ATS litigation in this or a similar situation.

B. Recent State Court Cases

1. Acain v. International Plant Services

In *Acain v. International Plant Services*,[107] fifty-seven Filipino former employees of a Texas corporation (IPS) sued in Texas state court alleging human trafficking,[108] along with several contract and tort claims.[109] The named defendants included IPS, the Filipino agency (MBC) that recruited them to work for IPS, and several individual IPS and MBC employees.[110] The plaintiffs' claims alleged that the defendants had engaged in a human trafficking scheme by fraudulently inducing them to sign employment contracts and failing to abide by their terms.[111] Specifically, the plaintiffs alleged they were denied promised payment, placed in debt bondage, threatened with deportation, and refused the option to find employment elsewhere.[112]

At trial, the court dismissed the plaintiffs' claims on international comity grounds, finding the Philippines' Overseas Employment Agency and the country's related, extensive regulations regarding overseas employment of Filipino citizens merited the court's restraint in exercising juris-

103. *See* Hoffman & Stephens, *supra* note 93, at 11; *see also* Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 Notre Dame L. Rev. 1749, 1750 (2014) ("Almost every international law violation is also an intentional tort. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment.").

104. *See In re* Chiquita Brands Int'l., Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1321–22 (S.D. Fla. 2011) (terrorism is too indefinite to meet the *Sosa* test); Kaplan v. Cent. Bank of Islamic Republic of Iran, 961 F. Supp. 2d 185, 204–05 (D.D.C. 2013) (denying jurisdiction in a "foreign cubed" case on extraterritoriality grounds).

105. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 606 (1990) (upholding transient jurisdiction).

106. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).

107. 449 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

108. Human trafficking and forced labor may be actionable ATS conduct if conditions are egregious. *See* Licea v. Curacao Drydock Co., Inc., 584 F. Supp. 2d 1355, 1361–63 (S.D. Fla. 2008).

109. *Acain*, 449 S.W.3d at 657.

110. *Id.*

111. *Id.*

112. *Id.*

diction.[113] On appeal, however, the First District Court of Appeals in Houston reversed, applying the comity test found in the Restatement (Third) of the Foreign Relations Law of the United States.[114] This test recommends courts examine a number of factors and decline to exercise jurisdiction only if it would be "unreasonable."[115] After extensive analysis, the court concluded that several factors supported Texas's exercise of jurisdiction, including many of the parties' Texas residence, the performance of wrongful acts in Texas, and Texas's interest in preventing human trafficking within Texas.[116] The court also noted that forum non conveniens law supported its conclusion, as, under Texas law, "dismissal is proper only if the balance of factors weighs heavily against Texas and in favor of the alternative forum."[117] Accordingly, the case was remanded for further proceedings,[118] a significant win for these would-be ATS plaintiffs.

2. Elmaliach v. Bank of China Ltd.

In *Elmaliach v. Bank of China Ltd.*,[119] fifty Israeli plaintiffs, including family members and estates of deceased individuals killed in terror attacks by Palestine Islamic Jihad (PIJ) and Hamas, sued the Bank of China (BOC), alleging BOC was negligent and breached a statutory duty under Israeli law.[120] In particular, the plaintiffs claimed that BOC's acts "proximately caused" the victims' injuries by "help[ing] facilitate the transfer of millions of dollars between PIJ and Hamas leadership outside Israel and their operatives inside Israel, enabling the two organizations to plan, prepare, and undertake acts of terrorism in Israel."[121] BOC officials allegedly had actual knowledge that the transfers were used for terrorism in April 2005, but refused to stop them until January 2007.[122]

At trial, the parties first disagreed on which country's law should govern. The plaintiffs argued that Israeli law governed the action, as it provided a "unique" private cause of action for a defendant's violation of a statutorily-imposed duty.[123] The defendants, however, argued that New York or Chinese law should apply, as the transfers allegedly occurred in New York and the bank was based in China.[124] The laws of New York and China impose no comparable duty and, thus, would defeat the plaintiffs' negligence claim.[125] After the trial court implicitly applied New

113. *Id.* at 658.
114. *Id.* at 660–64 (citations omitted).
115. *Id.* at 660–61.
116. *Id.* at 664.
117. *Id.*
118. *Id.* at 665.
119. 971 N.Y.S.2d 504 (N.Y. App. Div. 2013).
120. *Id.* at 508.
121. *Id.*
122. *Id.* at 509.
123. *Id.* at 512–13 (referring to the duty against aiding and abetting terrorism).
124. *Id.* at 514–15.
125. *Id.* at 512–13.

York's substantive law, the appellate division reversed this point, choosing Israeli law to govern the action since "Israel, the location of the plaintiffs' injuries, ha[d] the greatest interest in seeing its laws enforced."[126] Finally, the court held that enforcing this Israeli law was appropriate in New York courts, despite China's interest in regulating its banks, and refused to dismiss the case on forum non conveniens grounds.[127] In the end, the court denied BOC's motion to dismiss, allowing the Israeli plaintiffs to pursue the case in New York state court.[128] In doing so, the *Elmaliach* court relied extensively on Second Circuit precedent.[129] Its ruling was consistent with federal law in some respects, but diverged dramatically on extraterritorial grounds.

V. ANALYZING THE DESIRABILITY OF STATE COURT "ATS" LITIGATION

As *Acain* and *Elmaliach* illustrate, there are numerous benefits available to litigants who wish to avoid the ATS's constraints by choosing to plead their cases as run-of-the-mill torts in state court. While some scholars have argued that state court litigation will prove ineffective in practice due to limits like forum non conveniens and conflict of laws,[130] avoiding the ATS altogether will nevertheless dramatically increases plaintiffs' chances at success.[131] Re-characterizing international law violations as "battery," "intentional infliction of emotional distress," or "fraud" lowers pleading standards, frees litigants from limits on extraterritorial conduct, and eludes the corporate liability question. Although this alternative is favorable to plaintiffs and to the U.S.'s role in combating human rights violations, inconsistent treatment of state and federal claimants essentially alleging the same thing could have harmful policy implications for the United States. Not only do inconsistencies abound between federal and state court treatment of ATS or quasi-ATS claims, but they may also arise between states due to state sovereignty and judicial discretion on matters like conflicts of laws and forum non conveniens.

Without clear guidance for states in quasi-ATS litigation, the U.S.'s approach to human rights litigation will become jumbled and unpredictable, leading to issues like forum shopping, conflicting state involvement in foreign affairs, and circumvention of congress's intent in enacting the ATS. As a solution, the author urges congress to supplement or amend the ATS to clarify its desired approach to international human rights litiga-

126. *Id.* at 508–09, 515–16.
127. *Id.* at 518–19.
128. *Id.* at 519.
129. *See id.* at 510–19 (citing Licci American Express Bank Ltd., 704 F. Supp 2d 403 (S.D.N.Y. 2010)).
130. Patrick J. Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45, 61 (2013) (arguing state courts may "shy away" from international law principles in human rights litigation, leading to little relief for plaintiffs in state court actions).
131. This is especially true in "foreign cubed" cases. *See supra* Part III.A.2.

tion and vest exclusive jurisdiction in federal courts to hear cases fitting its intended realm of cases.

As the court declared in *Filartiga*, ATS cases are "fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states."[132] In an increasingly globalized world where human rights abuses are of international concern, Congress must decide, once and for all, how the United States will treat those seeking relief in U.S. courts. The nation's elected representatives, rather than individual state court judges, should choose to widely re-open federal courts, close them entirely, or craft some criteria for properly-brought ATS cases. Exercising congressional authority and preempting state action by requiring careful alertness to "disguised" ATS claims would enable the federal government to decisively "speak . . . with one voice" by taking a determined, uniform approach to human rights litigation.[133]

A. Federal and State Inconsistencies

1. Case Study: Acain *and* Elmaliach *as Federal ATS Claims*

In *Acain* and *Elmaliach*, the plaintiffs' state law claims surpassed every federal ATS hurdle solely due to their choice of forum. This part will examine how *Acain* and *Elmaliach* could have turned out had they been presented as ATS cases in federal court.

First, had *Acain* been asserted as an ATS case in federal court, the outcome would likely have been less favorable to the Filipino plaintiffs. The conduct underlying their human trafficking claim has been accepted under *Sosa* in some courts and rejected in others, usually depending on the plaintiffs' physical and mental suffering at the defendants' hands.[134] In *Acain*, the plaintiffs alleged they were "forced to endure cramped living conditions, subjected to random unannounced visits . . . required to stay at their apartments while unemployed, denied visitors, had their mail opened . . . and threatened with arrest or deportation if they complained about their unemployment."[135] These conditions, while undoubtedly harsh and inhumane, would likely not meet the egregious suffering threshold required for human trafficking harms under the ATS.[136]

Further, the *Acain* plaintiffs satisfied personal jurisdiction over the de-

132. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

133. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 381 (2000).

134. *See* Licea v. Curacao Drydock Co., Inc., 584 F. Supp. 2d 1355, 1361–63 (S.D. Fla. 2008) (holding ATS jurisdiction valid over forced labor and human trafficking where working conditions were egregious). *But see* Velez v. Sanchez, 693 F.3d 308, 321–23 (2d Cir. 2012) (denying ATS jurisdiction where plaintiffs presented no evidence of physical abuse or confinement).

135. Brief for Petitioner-Appellant at 9, Acain v. Int'l Plant Servs., LLC, 449 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (No. 2011-32519).

136. *See Licea*, 584 F. Supp. 2d at 1361–63 (noting plaintiffs were burned and severely electrocuted due to unsafe working conditions and painfully injured after working sixteen-hour days for up to forty-five days straight).

fendants through suing IPS, a Texas corporation.[137] While suing corporate defendants is still an available strategy for the time being, considering the Supreme Court's recent restrictive ATS interpretation and the tendency of the Fifth Circuit (the pertinent federal jurisdiction) to follow suit,[138] the plaintiffs' chances of success in securing a corporate-defendant ATS judgment seem slim to none.

Finally, the *Acain* plaintiffs would likely face difficulty rebutting the presumption against extraterritoriality in federal court, as many of the most important facts alleged occurred abroad. Although a substantial portion of the plaintiffs' labor and financial suppression occurred in Texas, the Filipino individuals were actually recruited, promised work, and presented with "take-it-or-leave-it" contracts after paying their "placement fees" in the Philippines.[139] Depending on whether the actions within Texas were severe enough to constitute an international law violation, an ATS claim could very likely fail on extraterritoriality grounds.[140]

Attempts to bring the *Elmaliach* suit in federal court would likewise be futile. Here, the alien plaintiffs could have attempted to sue the bank in federal court under the ATS for aiding and abetting violations of international law, relying on *Licci by Licci v. Lebanese Canadian Bank, SAL* as precedent.[141] However, they likely would have encountered similar hardships to the plaintiffs in *Acain*.

First, aiding and abetting an international law violation is a well-recognized ATS claim.[142] Terrorism, however, is not always recognized as a sufficient *Sosa* international norm to be aided and abetted.[143] In the Second Circuit, however, the attacks themselves may be characterized as crimes against humanity depending on their seriousness.[144] Thus, the New York plaintiffs may be able to prevail on the *Sosa* test.

Next, the court would consider *Kiobel* and the presumption against extraterritoriality. In *Licci*, the court held that the acts in question "touched and concerned" the United States with sufficient force to displace the presumption against extraterritoriality. This was because the bank allegedly wired money "exclusively" from an account in its New York location

137. *Acain*, 449 S.W.3d at 657.

138. *See* Pitts, *supra* note 77, at 4–11 (discussing the Fifth Circuit's restrictive interpretation of the *Kiobel* "touch and concern" inquiry and noting the interpretation's consistency with likewise restrictive Supreme Court precedent).

139. Brief for Appellant, *supra* note 135, at 7–11.

140. *See* Pitts, *supra* note 77, at 4–5 (citing Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017)).

141. 834 F.3d 201, 204 (2d Cir. 2016) (concluding plaintiffs successfully alleged a bank aided and abetted in terrorist attacks in violation of international law but denying liability on corporate liability grounds).

142. *See id.* at 219–20; Adhikari v. KBR Inc., No. 4:16-CV-2478, 2017 WL 4237923, at *6–7 (S.D. Tex. Sept. 25, 2017).

143. *See* In re Chiquita Brands Int'l., Inc. Alien Tort Statute & S'holder Derivative Litig., 792 F. Supp. 2d 1301, 1321–22 (S.D. Fla. 2011) (terrorism is too indefinite for ATS purposes). *But see Licci*, 834 F.3d at 218–19.

144. *Licci*, 834 F.3d at 218–19 (the court does not distinguish between attacks by Hezbollah as qualifying as either terrorist attacks or crimes against humanity).

with knowledge that the transfers benefited Hezbollah.[145] As the allegations in *Elmaliach* are essentially the same, the plaintiffs might also surpass *Kiobel*'s restriction in federal court.[146] Trouble waits, however, at the corporate liability point. As noted in Part III.A.1. above, the Second Circuit refuses to hold corporations liable under the ATS.[147] Thus, despite overcoming both the *Sosa* and *Kiobel* pleading hurdles, *Elmaliach*'s ATS claim would categorically fail if brought in federal court.

2. Foreign Policy Implications

Throughout history, the U.S. government has carefully protected the federal government's ability to "speak with one voice" regarding foreign affairs. This principle arises commonly in cases involving foreign commerce[148] and diplomacy or recognition.[149] Although neither of these principles is directly or explicitly addressed in ATS suits (and their state court counterparts), both foreign commerce and diplomacy are undoubtedly affected by the United States' approach to human rights litigation.

First, foreign commerce could be upset by inconsistent state court and federal court human rights litigation, depending on the Supreme Court's decision on corporate liability for international law violations.[150] Since defendants are generally amenable to a federal or state court suit wherever plaintiffs can establish that personal jurisdiction exists,[151] foreign corporations may open themselves to uncertain liability by conducting business in various U.S. states.[152] Assuming the Court will follow its recent restrictive ATS interpretation and limit corporate liability in ATS suits, foreign corporations will now need to watch which state courts have opened themselves to quasi-ATS claims in deciding where to operate.[153] Some foreign companies may be deterred or driven to leave states particularly friendly to litigants, limiting available economic opportunities available to those states' citizens and disrupting foreign commerce as a whole. Contrary to the Framers' intent in crafting the American government, allowing state court litigants to avoid the ATS's requirements undermines the federal government's ability to "speak with one voice when regulating commercial relations with foreign governments"[154] by producing serious inconsistencies between federal and state law. These inconsistencies must be addressed for the nation as a whole if this issue is to be avoided.

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145. *Id.* at 217–19.
146. *See* Elmaliach v. Bank of China Ltd., 971 N.Y.S.2d 504, 508–09 (N.Y. App. Div. 2013).
147. *See supra* note 85.
148. *See* Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298, 298 (1994).
149. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2086 (2015).
150. *See supra* Part III.B.1.
151. FED. R. CIV. P. 4.
152. *See* Acain v. v. Int'l Plant Servs., 449 S.W.3d 655 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (allowing suit against corporation to proceed in Texas state court).
153. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316–17 (1945).
154. Limbach v. Hooven & Allison Co., 466 U.S. 353, 359 (1984).

Second, inconsistent state court human rights litigation may disrupt the federal government's uniform approach to foreign human rights litigation, in violation of the Supremacy Clause as it relates to foreign affairs.[155] For example, in *Crosby v. National Foreign Trade Council*,[156] the Court struck down a Massachusetts law "restricting the authority of its agencies to purchase goods or services from companies doing business with Burma" on Supremacy Clause grounds.[157] The Court reasoned that the Massachusetts law surpassed and conflicted with the federal government's existing policy to deal with Burma's human rights issues and was, thus, preempted by federal law.[158] Likewise, in *Zschernig v. Miller*,[159] the Court declared an Oregon probate law unconstitutional when it required state officials to judge foreign officials' credibility and "ma[de] unavoidable judicial criticism of nations" whose governments are established on different principles than the U.S.[160] The Court noted that, although probate regulations are traditionally left to the states, "those regulations must give way if they impair the effective exercise of the Nation's foreign policy."[161] Likewise, traditional state tort litigation should also yield to congressional action when doing so is necessary to promote the Nation's foreign policy.

In ATS cases, state court recognition of otherwise-barred federal ATS claims conflicts with and surpasses federal law by providing state lawsuits where Congress and the Supreme Court (with congressional acquiescence) have foreclosed the same claims through the ATS.[162] As noted above, the *Filartiga* court emphasized the first congress's wisdom in vesting jurisdiction over human rights claims in the federal courts since these cases carry many foreign implications.[163] Allowing state courts to now exceed that carefully delegated authority runs contrary to the principles set forth in *Crosby*.[164] A remedy must be crafted before serious harms come to light.

Finally, allowing states to critique the acts of foreign current or previous state officials, as is often involved in ATS suits,[165] directly contradicts *Miller*.[166] When a court pronounces its judgment in a viable ATS or similar case, the actions alleged are egregious.[167] However, the Supremacy

155. U.S. CONST. art. VI, § 2.
156. 530 U.S. 363 (2000).
157. *Id.* at 366.
158. *Id.* at 373–86.
159. 389 U.S. 429 (1968).
160. *Id.* at 440.
161. *Id.*
162. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–86 (2000) (holding state law unconstitutional where its restrictions went further than federal restrictions).
163. *See* Filartiga v. Pena-Irala, 630 F.3d 876, 890 (2d Cir. 1980).
164. *See Crosby*, 530 U.S. at 373–86.
165. *See, e.g.*, *Filartiga*, 630 F.2d at 878 (defendant was a former government official); Mezerhane v. República Bolivariana de Venezuela, 785 F.3d 545, 545 (11th Cir. 2015) (defendant was a sovereign nation).
166. *See* Zschernig v. Miller, 389 U.S. 429, 440 (1968).
167. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (explaining that actions must be egregious to earn *international* condemnation).

Clause forbids states from effectively overriding a longstanding statute to enact their own foreign policy regarding these violations.[168] Allowing state courts to continue to cast judgments in an essentially executive function is understandably dangerous for the nation as a whole. As in *Crosby* and *Miller*, state court participation in human rights litigation, though valiant and commendable, carries harmful foreign policy implications.[169] Congress should act quickly in this area before inconsistencies proliferate and cause problems between the U.S. and foreign parties in these areas.

B. Sister State Inconsistencies

Beyond just federal and state inconsistencies, state court quasi-ATS litigation could lead to inconsistent treatment between and even *within* the states themselves. As states are free to utilize different frameworks in numerous procedural and substantive inquiries,[170] litigants in different states alleging the same facts could see the application of different laws via conflict of laws analysis.[171] Likewise, litigants may face inconsistent dismissals through the discretionary forum non conveniens doctrine.[172] Finally, those suing even in the *same* state may face inconsistent application of both conflict of laws and forum non conveniens analysis.[173]

For example, there are at least seven different conflict of laws analyses available for state courts to choose from.[174] While a majority of states use the approach found in the Restatement (Second) of Conflicts of Laws, notable deviators include both California and New York,[175] common fora for litigants suing corporations.[176] New York uses a combined modern approach for both tort and contract claims.[177] California, however, splits its scheme by using an interest analysis for tort claims and a combined modern approach in contract claims.[178] Since *Acain* showed that both contract and tort claims can potentially be brought by would-be ATS liti-

168. *See Crosby*, 530 U.S. at 388 ("[T]he existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.").

169. *See id.*; *Miller*, 389 U.S. at 441 ("The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking thorough its . . . courts, is permitted to establish its own foreign policy.").

170. *See* Hoffman & Stephens, *supra* note 93, at 17–18 ("Each state will have its own standards for personal jurisdiction, bounded by constitutional requirements, and its own forum non conveniens jurisprudence. Similarly, each state will have its own pleading requirements, although these are likely to be less demanding than the Supreme Court's requirements in *Iqbal*.").

171. *Id.*

172. *Id.*

173. *See id.* at 19.

174. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 Am. J. Comp. L. 303, 331 tbl.1 (2011).

175. *Id.*

176. *See, e.g.*, Doe I v. Cisco Systs., Inc., 66 F. Supp. 3d 1239 (N.D. Cal. 2014); Guobadia v. Irowa, 103 F. Supp. 3d 325 (E.D.N.Y. 2015).

177. Symeonides, *supra* note 174, at 331 tbl.1.

178. *Id.*

gants,[179] the numerous results obtainable through these tests are concerning when considering the possibility for inconsistencies between and within state court systems.

Regarding choice of law, state courts are free to choose which law they will apply between two or more alternatives when the harms occur in multiple locales.[180] For example, in *Elmaliach*, the plaintiffs obtained relief under an Israeli statute that would have been unavailable had New York or Chinese law been chosen.[181] Even though the defendant was a Chinese company and the relevant monetary transfers occurred through New York branches, Israel's law prevailed because Israel was the "place of the injury" and "ha[d] the greatest interest in regulating conduct within its borders."[182] This result seems a bit counterintuitive when considering that the relevant attacks were actually carried out by absent parties to the litigation; nevertheless, a Chinese bank was held liable in New York court through application of Israeli law.[183] This case illustrates well the appropriateness of ATS claims over state law's discretionary choice of law analysis.

Moreover, allowing this discretionary analysis by state courts in human rights litigation may produce inconsistent results even *within* states. For example, if a separate group of plaintiffs alleged similar facts to those in *Elmaliach*,[184] the court may very well decide New York law should apply, foreclosing relief for these plaintiffs while allowing the case to proceed in *Elmaliach*.[185] These results are unfavorable to the achievement of legal stability when contrasted with the certainty provided by the ATS.

In ATS claims, there is one source of substantive law: well-settled and specifically defined *international* law.[186] Applying international law is favorable in these situations because international norms are binding on *every* party in the world regardless of nationality or the place of the plaintiffs' injury.[187] Applying various state and foreign laws through conflict of laws analysis could produce wide-ranging results not anchored in established precedent. Finally, taking a non-uniform approach to human rights litigation through diverging state court litigation could work contrary to the universalist goal in human rights treaty-making and legislation.[188]

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179. *See* Acain v. Int'l Plant Servs., LLC, 449 S.W.3d 655, 657 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

180. Elmaliach v. Bank of China, Ltd., 971 N.Y.S.2d 504, 512–14 (N.Y. App. Div. 2013) (deciding between New York, Israeli, and Chinese law).

181. *Id.*

182. *Id.* at 202–04.

183. *Id.* at 195.

184. Assuming these hypothetical plaintiffs are not in privity with the *Elmaliach* plaintiffs and, therefore, bound by res judicata. *See* Richards v. Jefferson County, 517 U.S. 793, 798 (1996).

185. *See Elmaliach*, 971 N.Y.S.2d at 519.

186. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

187. *Id.* at 725 ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world").

188. Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 38–42 (2013) (arguing that state court human rights

Furthermore, the discretionary forum non conveniens analysis may produce mixed results on whether plaintiffs can even proceed through the state court system. Although forum non conveniens analysis is present in federal courts as well,[189] state courts, again, run the risk of using forum non conveniens to pass judgments on other countries' judiciaries by requiring a subjective determination on the availability of an "adequate alternative forum."[190] Instead of using forum non conveniens as the primary way to police extraterritorial state court claims, the *Kiobel* framework is preferable from a consistency standpoint.[191] Federal courts utilizing the *Kiobel* ATS jurisprudence have a much more workable standard on which to judge the appropriateness of exercising jurisdiction.[192] Moreover, although interpretations of the "touch and concern" test vary across the Circuits,[193] many contain similar undertones and lead to similar results nationwide. This approach is much cleaner and easier to apply than giving all fifty states and their numerous judges added discretion through forum non conveniens analysis.

C. A Call for Uniformity

As discussed above, state court participation in quasi-ATS litigation brings a dangerous potential for an increasingly fragmented American approach to human rights. In a world where violations of international law are, unfortunately, not all that uncommon,[194] adopting a uniform national policy to address judicial relief for victims should be an urgent and important congressional objective.

First, as Professor Parrish notes in his article, human rights policies have traditionally been crafted on a "multilateral and collaborate" scale rather than within nations through their various subnational parts.[195] Accordingly, the United States has historically used treaties and reservations to treaties as well as federal ATS litigation to express its views.[196] State court litigation, while perhaps a favorable short-term solution for creative litigants seeking refuge from *Sosa* and *Kiobel*, is generally viewed unfavorably by other nations in the world.[197] Moreover, run-of-the-mill state

litigation subverts universalist underpinnings in human rights treaty-making and legislation).

189. *See* Mujica v. AirScan Inc., 771 F.3d 580, 612–14 (9th Cir. 2014).

190. *Id.* (holding Colombia was an adequate alternative forum despite the plaintiffs' fears of physical danger if they returned to Colombia); *see also* Zschernig v. Miller, 389 U.S. 429, 440 (1968).

191. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); *see also* Kenney, *supra* note 28, at 1104–06 (noting that extraterritoriality is the most common grounds for dismissal in ATS cases).

192. Extraterritoriality is at least a guiding principle in ATS cases. *See Kiobel*, 569 U.S. at 124.

193. *See* Pitts, *supra* note 77, at 5–7.

194. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.3d 876, 890 (2d Cir. 1980).

195. Parrish, *supra* note 188, at 27.

196. *Id.* at 27–28.

197. *Id.* at 41 (citing Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, Ga. J. Int'l & Comp. L. 1, 28–29 (1987)).

tort claims fail to capture the gravity of the harm incurred by the victims of international law violations.[198] Furthermore, allowing states to form their own policies is "in tension with" the "universal outlook" required of human rights goals.[199] In this regard, using the "states as laboratories"[200] method underpinning the American federalist system fragments and degrades the universalist approach to human rights policy.[201] The federal government *must* reestablish national uniformity in human rights policy if it will continue to collaborate with other nations to achieve internationally accepted, comprehensive solutions.

D. A Call for Legislative Action

As the law currently stands, American federal courts are not hospitable to human rights claims unless they fall within a very narrow subset of the many international law violations that occur.[202] To cure this uniformity, U.S. lawmakers should remove these quasi-ATS claims from states' hands through (1) amending or supplementing the ATS to clarify its intent regarding human rights litigation in U.S. courts and (2) inhibiting state action by vesting exclusive jurisdiction in federal courts for ATS claims.[203]

The first step in this proposed solution requires deciding whether U.S. federal courts should be reopened to litigants through statutory modification of *Sosa* or *Kiobel*, or whether, alternatively, the current ATS restrictions should limit *all* human rights claims falling within the ATS.

The merits of human rights litigation in U.S. courts are numerous. Allowing alien plaintiffs to sue in U.S. courts may provide relief when their home countries' judiciaries are corrupt[204] or when it would be dangerous for the litigants to return.[205] Further, allowing litigants to sue in U.S. courts allows "U.S. courts to live up to their obligation to enforce the collective will of the community of nations"[206] and provide victims an opportunity to pursue civil liability against their perpetrators.[207] Finally, and perhaps most importantly, ensuring that defendants present in the U.S. are amenable to suit here for their actions (even those that occurred

198. *See* Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 Seton Hall L. Rev. 505, 563 (2016) (concluding that human rights litigation should be brought in state courts as international law violations rather than general tort harms to adequately express the concerns at issue in international law violations).

199. Parrish, *supra* note 188, at 42.

200. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

201. Parrish, *supra* note 188, at 42.

202. *See supra* Part III.

203. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–86 (2000); Zschernig v. Miller, 389 U.S. 429, 440 (1968).

204. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 879–80 (2d Cir. 1980) (noting the plaintiffs argued against forum non conveniens transfer to Paraguayan courts because they believed resorting to Paraguayan courts would be "futile").

205. *See* Mujica v. AirScan Inc., 771 F.3d 580, 612–14 (9th Cir. 2014) (noting that Colombian litigants sought relief in U.S. courts because they would face physical danger if they returned to Colombia).

206. Miller, *supra* note 198, at 518–19 (citing *Filartiga*, 630 F.2d at 585–86).

207. *Id.*

abroad) "prevent[s] the United States from becoming a safe harbor . . . for a torturer or other enemy of mankind."[208]

On the other hand, opening U.S. courts to human rights litigation having nothing to do with this country raises questions about the propriety of injecting westernized beliefs about society into conduct occurring abroad.[209] Accordingly, the Court in *Kiobel* emphasized the "presumption that United States law governs domestically but does not rule the world."[210] Finally, other critics note the distaste for expending judicial resources on cases involving foreign claimants.[211]

Aware of the concerns underlying each position on this issue, the Supreme Court Justices themselves provided numerous alternative standards for ATS litigation.[212] In addition to the majority opinion by Justice Roberts, which held that the presumption against extraterritorial conduct applies to ATS claims unless the claims sufficiently "touch and concern" the U.S. with sufficient force to rebut the presumption, numerous other justices filed concurrences outlining different methodologies.[213] First, Justice Alito provided an even more restrictive view, arguing that an ATS claim should be barred on extraterritoriality grounds "unless the domestic conduct is sufficient to violate an international law norm . . . ."[214] Justice Breyer, however, proposed a more expansive solution with three criteria for ATS jurisdiction. He wrote, "I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest," including "preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind."[215] With these alternatives in view, it seems the majority provides the moderate, though arguably unworkable, standard.

Regardless of the chosen approach, Congress should take action to clarify ATS litigation and permanently restrict state court action in this area, given the foreign policy concerns at issue when states exceed federal law in pronouncing judgment on foreign actors, officials, and governments. By giving federal courts exclusive jurisdiction over human rights litigation through the ATS, state courts will be unable to further fragment U.S. foreign policy and usurp the federal government's role in foreign affairs. Furthermore, federal judges are presumably more qualified and less biased due to reelection concerns, enabling them to appropriately

208. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 127 (2013) (Breyer, J., concurring).

209. *See* Roxanna Altholz, *Chronicle of Death Foretold: The Future of U.S. Human Rights Litigation Post Kiobel*, 102 CALIF. L. REV. 1495, 1511–12 (2014).

210. *Kiobel*, 569 U.S. at 115 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

211. *See, e.g.*, Keitner, *supra* note 79, at 85.

212. *Kiobel*, 569 U.S. at 124–40.

213. *Id.* at 124.

214. *Id.* at 127 (Alito, J., concurring).

215. *Id.* (Breyer, J., concurring).

handle issues like foreign diplomacy and international law. The federal government currently exercises exclusive jurisdiction over important national concerns like immigration,[216] admiralty,[217] and terrorism.[218] Like immigration, admiralty, and terrorism, human rights litigation via the ATS concerns the *nation as a whole* and implicates the U.S.'s foreign affairs in the ways discussed in the previous section of this comment. Adding ATS litigation to the federal government's exclusive jurisdiction is, thus, entirely consistent and appropriate in light of the nation's precedent.

Critics of this approach may be concerned that vesting federal courts with exclusive jurisdiction would only decrease the likelihood of victims obtaining justice by denying litigants the ability to circumvent *Twombly*, *Iqbal*, *Sosa*, and *Kiobel*. Additionally, state courts may want the authority to hear these claims when "the answer will strike closer to home."[219] For example, where "the defendant lives in the neighborhood; . . . the corporation is a citizen of the state, with local headquarters; or . . . local residents are among the victims of the human rights abuses."[220] These drawbacks undeniably weigh in favor of allowing state court litigation. In the end, however, they pale in comparison to the numerous serious dangers associated with circumventing the ATS.

VI. CONCLUSION

In conclusion, the drafters of the ATS likely never predicted the prominent role its brief law now plays in providing relief for human rights litigants in modern America. After the recent restrictive Supreme Court decisions limiting the ATS's availability for litigants, state courts have inadvertently become a haven for otherwise-barred ATS claims. A consistent federal position on ATS litigation would provide stability and possibly even greater relief for victims should Congress choose to broaden available ATS claims. Amendments or supplements reflecting modern congressional views would take the ATS out of the 1790s and give it a much-needed face lift to address today's realities. Likewise, doing so would restore power over this important foreign affairs matter to its intended holder, the federal government. The United States' role as a beacon of hope for hurting individuals is a longstanding American tradition, and empowering federal courts through congressional action to "speak with one voice" in ATS litigation is a timely and urgent goal.

216. *See* Terrace v. Thompson, 263 U.S. 197, 217 (1923).
217. 28 U.S.C. § 1333 (2012).
218. 18 U.S.C. § 2338 (2012).
219. Hoffman & Stephens, *supra* note 93, at 22.
220. *Id.*