AN OASIS IN THE HUMAN RIGHTS LITIGATION DESERT? A ROADMAP TO USING CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 354.8 AS A MEANS OF BREAKING OUT OF THE ALIEN TORT STATUTE STRAITJACKET

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ABSTRACT

As a result of the Supreme Court's increasingly restrictive reading of the Alien Tort Statute ("ATS"), victims of human rights abuses committed abroad have found the federal courthouse door sealed shut. Especially in the wake of *Jesner v. Arab Bank*, where the Court held that foreign corporations cannot be defendants under the ATS, such entities may feel they can act abroad with impunity, without fear of being held accountable in a U.S. court. However, the situation may not be anywhere near as dire as it may seem. Sitting quietly in California's Code of Civil Procedure ("CCP") since 2016, Section 354.8 opens the doors to the largest state court system in the country, offering a powerful, potentially game changing, tool to international human rights litigants who would otherwise be denied access to federal court under the ATS.

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CCP section 354.8 expands the definition of certain torts under state law: assault, battery, wrongful death, and conversion. California law now substantively provides remedies to victims who can demonstrate that the underlying tortious conduct constitutes torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity. The legislative history indicates a clear intent to provide a judicial forum to those who may otherwise be denied access to the courts. This law is unprecedented, unique, and largely unknown to the international human rights community. This Article changes that by providing a roadmap for using California Code of Civil Procedure Section 354.8 as a means of breaking out of the federal ATS litigation straitjacket to pursue civil tort actions for human rights abuses committed abroad in a U.S. court.

This Article provides a primer on ATS caselaw as it has developed over the last thirty years, painting the picture of how the "ATS litigation straitjacket" came to be and thereby highlighting the novelty of California's human rights regime. It then examines exactly what is authorized in CCP section 354.8, specifically the areas that have been the subject of protracted ATS litigation. Analyzing issues related to personal jurisdiction and court access, this Article provides a roadmap for navigating access to California's state court system. The importance of California as a forum for international human rights litigation is discussed by showing how the state already has global influence, and its laws, particularly its human rights laws, already receive international recognition.

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INTRODUCTION

Over the last thirty years, the United States Supreme Court has progressively taken the teeth out of the Alien Tort Statute ("ATS").[1] As a result, federal courts are much less accessible to plaintiffs seeking tort remedies for conduct committed abroad which constitutes human rights violations under international law.[2] Particularly in the wake of *Jesner v. Arab Bank, PLC*,[3] in which the Court held that a foreign corporation could not be a defendant under the ATS, it appears that foreign corporations can act abroad without fear of being held accountable for their conduct in U.S. court.

But what if the situation is nowhere near as dire as it might seem? What if it is the case that while the federal courthouse door under the ATS was closing, the largest state courthouse door in the country opened wide, without much fanfare, offering a powerful new venue for international human rights litigation? In fact, this Article will show that this is the case: with California's adoption of Section 354.8 of its Code of Civil Procedure, its state court system has quietly offered an opening to many litigants who would otherwise be denied access to federal court under the ATS.

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1. 28 U.S.C. § 1350 (2018); *see, e.g.*, Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 CALIF. L. REV. 1495 (2014) (discussing whether the *Kiobel* decision is as devastating to victims of international human rights violations as it seems, as well as other legal avenues for reparations); *see also* Erwin Chemerinsky, *Closing the Courthouse Doors*, 90 DENV. U. L. REV. 317 (2012) (outlining the ways in which the Roberts Court is removing opportunities for individuals to seek redress in courts).

2. *See, e.g.*, Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 398 (2018) ("May states also provide remedies for the victims of international human rights violations? With the Supreme Court closing the door on human rights litigation in U.S. federal courts under the Alien Tort Statute, and with plaintiffs therefore turning to state courts . . . this question has become especially important."); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1470 (2014) ("The assault on the ATS that led to *Kiobel* reflects the vehemence of the state and corporate resistance to the development of meaningful means to enforce international law. That resistance has narrowed the scope of the ATS and left its future unclear."); Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014) (examining the significant barriers that victims of human rights violations face in suing transnational businesses and recommending policy solutions to mitigate these barriers).

3. 138 S. Ct. 1386, 1407 (2018).

We might speculate as to why California's statute has been virtually invisible in the domain of human rights litigation.[4] In early October 2015, all attention was focused on whether then-Governor Jerry Brown was going to sign California's assisted suicide bill ("California End of Life Option Act" or "ABX2-15")[5] into law.[6] Governor Brown ultimately did sign ABX2-15 into law on October 5, 2015.[7] In the media storm surrounding ABX2-15, however, Governor Brown's signing of another bill, AB-15, a day prior, went unnoticed.[8]

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4. In California, the Governor has thirty days to sign or veto legislation in his or her possession on the day the legislature adjourns, otherwise the bill becomes law without the Governor's signature. *See* CAL. CONST. art. IV, § 10(b)(1). In any given year there is typically a flurry of activity in the days before the thirty-day deadline, with the Governor signing or vetoing dozens of bills in a day. *See* Mary Franklin Harvin, *Gov. Newsom Signs (and Vetoes) Reams of Legislation on Last Day of Deadline*, KQED NEWS (Oct. 14, 2019) https://www.kqed.org/news/11779878/governor-newsom-signs-and-vetos-reams-of-legislation-on-last-day-of-deadline [https://perma.cc/87AN-QHLB]; *see also* Press Release, Office of Governor Gavin Newsom, Governor Newsom Takes Final Action of 2019 Legislative Season (Oct. 13, 2019), https://www.gov.ca.gov/2019/10/13/governor-newsom-takes-final-action-of-2019-legislative-season/ [https://perma.cc/7DXB-3FGL] (providing a list of all bills Governor Newsom signed and vetoed on Oct. 13, 2019). With the volume of bills passing the Governor's desk in the days before the deadline, one particular piece of legislation might slip by unnoticed, particularly in a year when a contentious or highly controversial bill is the focus of attention. For example, on October 4, 2015, Governor Brown signed 22 bills into law. *See* Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Issues Legislative Update (Oct. 4, 2015), https://www.ca.gov/archive/gov39/2015/10/04/news19141/index.html [https://perma.cc/88R6-NS5J]. The next day he signed 14 bills and vetoed three. *See* Press Release, Office of Governor Edmund G. Brown, Jr., Governor Issues Legislative Update (Oct. 5, 2015), https://www.ca.gov/archive/gov39/2015/10/05/news19143/index.html [https://perma.cc/33QF-7LL7]. Two days after that, the Governor announced that he had signed another 33 bills and vetoed eight. *See* Press Release, Office of Governor Edmund G. Brown, Jr., Governor Brown Issues Legislative Update (Oct. 7, 2015), https://www.ca.gov/archive/gov39/2015/10/07/news19152/index.html [https://perma.cc/6L4K-NRU5].

5. The California End of Life Option Act (ABX2-15) gives certain terminally ill adults in the State of California the right to ask for and receive a prescription from his or her physician to hasten death, provided certain criteria are met. *See* MED. BOARD OF CAL., LEGISLATIVE ANALYSIS OF ABX 2-15 (2015).

6. *See* Patrick McGreevy, *After Struggling, Jerry Brown Makes Assisted Suicide Legal in California*, L.A. TIMES (Oct. 5, 2015), https://www.latimes.com/local/political/la-me-pc-gov-brown-end-of-life-bill-20151005-story.html (on file with the *Columbia Human Rights Law Review*) (laying out the various constituencies involved in this political battle, including but not limited to the Governor, state legislators, the Catholic Church, lobbying and non-profit groups, a woman profiled by *People* magazine, and a former LAPD detective).

7. *See* Office of Governor Edmund G. Brown, Jr., *supra* note 4.

8. *Id.*

There may also have been some confusion about AB-15: ABX2-15 was often referred to as "AB-15." Moreover, in 2015 there was *both* a regular and a special session of the Legislature, and both sessions produced bills numbered "AB-15." But only the bill from the *regular* session was signed into law under that name, and it is this version of AB-15 that provides a potentially powerful tool for international human rights litigation.

Some threshold questions may be, "Why has Section 354.8 flown under the radar for the last four years? Why have the legal academy and the human rights bar not already discovered it and put it to use?" Certainly, the confusion over the two versions of "AB-15" in 2015 has a part to play, but the biggest factor may be that after passage there was no concerted campaign by either the bill's sponsors or the legislative press corps to make the public aware that Section 354.8 was on the books *and* that it authorized a novel process for human rights litigation.

At first glance, Section 354.8 looks like any other statute of limitations; its neighbors in the Code of Civil Procedure are other, rather esoteric, statutes of limitation.[9] Even for those litigators accustomed to California practice and procedure, there is no obvious reason to go hunting in the state's Code of Civil Procedure for a statute challenging thirty years of federal ATS jurisprudence unless you know specifically what you are looking for. Moreover, assuming that somebody did find Section 345.8 and read it, without a background in ATS litigation it is highly unlikely they would appreciate the gravity of what the Legislature authorized. This Article seeks to bridge the gap between California procedure and the history of ATS jurisprudence over the last three decades to bring Section 354.8 the publicity it sorely deserves.

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9. *See, e.g.*, CAL. CIV. PROC. CODE § 354 (Deering 2019) ("Time of continuance of state-of-war disability not part of limitation period"); CAL. CIV. PROC. CODE § 354.3 (Deering 2019) ("Action to recover Holocaust–era artwork"); CAL. CIV. PROC. CODE § 354.4 (Deering 2019) ("Claim by Armenian Genocide victim, or by heir or beneficiary; Action to be filed on or before December 31, 2016"); CAL. CIV. PROC. CODE § 354.45 (Deering 2019) ("Armenian genocide victims"); CAL. CIV. PROC. CODE § 354.5 (Deering 2019) ("Extension of limitations period for Holocaust victim's claim under insurance policy issued during specified period"); CAL. CIV. PROC. CODE § 354.6 (Deering 2019) ("Compensation for slave and forced labor"); CAL. CIV. PROC. CODE § 354.7 (Deering 2019) ("Legal action by bracero or heir or beneficiary of bracero; Time limitation"); CAL. CIV. PROC. CODE § 355 (Deering 2019) ("Provision where judgment has been reversed").

In enacting AB-15, the California Legislature expanded California human rights law in two principal areas. First, it amended section 52.5 of the Civil Code to extend the statute of limitations for victims of human trafficking to bring a civil action.[10] Second, and more important for international human rights litigation, it added Section 354.8 to the Code of Civil Procedure,[11] which created a ten-year statute of limitations for victims to bring civil tort claims for specified offenses when the conduct would also constitute torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity.[12] The bill also provides a ten-year statute of limitations for bringing a civil suit for the taking of property in violation of international law, or for benefits under an insurance policy when the insurance claim arises out of any conduct that constitutes a human rights violation.[13] Furthermore, AB-15 allows an award of reasonable attorney's fees and litigation costs to a prevailing plaintiff, which could serve as a powerful incentive for firms to take cases from the poorest and most vulnerable claimants. AB-15 does not simply amend a statute of limitations. Rather:

> This bill seeks to address the problem that many human rights abuse victims face after suffering egregious harms from the actions of human rights abusers: bringing their claims to an appropriate court in a timely manner. Due to the nature of human rights abuses, many of these egregious acts occur in foreign countries and in jurisdictions with unfair or unstable legal systems, where victims cannot attain any recourse for the harms they have suffered. In addition, the types of harms that victims suffer as a result of torture, war crimes, genocide, extrajudicial killing, and crimes against humanity generally include physical and psychological harms that cannot be brought to a court within a two-year statute of limitations period. According to the author, it often takes many years for victims to find their way out of perilous circumstances. They typically have very little money or resources and their cases can be especially

10. *See* CAL. CIV. CODE § 52.5 (Deering 2019).

11. *See* CAL. CIV. PROC. CODE § 354.8 (Deering 2019).

12. *See id.* Specifically, the bill allows victims up to ten years to bring a civil tort claim for assault, battery, or wrongful death, when a victim can establish that the abuse also constitutes an act of torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity.

13. ALLISON MERRILEES, CAL. ASSEMB. FLOOR ANALYSIS, CONCURRENCE IN S. AMEND. AB 15 (HOLDEN) 1–3 (Sept. 8, 2015).

> challenging and time consuming. The result is that most human rights claims go unheard, allowing even the most reprehensible human rights abusers to escape justice simply because time is on their side . . . . This bill, as it is proposed to be amended, seeks to extend the statute of limitations for human rights abuses to allow victims of those crimes the time needed to bring their claims to state court if they can establish that their claims result from an egregious abuse of their fundamental rights . . . .[14]

By enacting AB-15, the California Legislature jumped headfirst into the waters of universal jurisdiction for egregious human rights abuses, voicing an unambiguous legislative intent to open the State's courts as wide as constitutionally possible to those victims who otherwise might have no other forum in which to bring suit. In doing so, California addressed each of the "problem areas" that have been the subject of ATS litigation for the last thirty years, providing a clear, efficient means for victims of international human rights abuses to seek redress in tort through its court system.[15] These problem areas relate to the jurisdictional reach of the ATS, whether a cause of action exists under the ATS, and, if so, who may be a defendant in such a suit.

First, the California Legislature specifically identified the causes of action available and the conduct giving rise to those torts.[16] Second, there is no requirement that the defendant be a natural person—the only U.S. jurisdiction, state or federal, where this is expressly permitted—opening the door to foreign corporate liability for human rights abuses committed abroad.[17] There is also no requirement that the plaintiff be an alien.[18] Therefore, U.S. citizens and nationals can also seek ATS-style relief under the California framework, which they are barred from under the federal ATS.[19]

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14. KHADIJAH HARGETT, CAL. ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS OF AB 15 (HOLDEN) 1 (May 5, 2015).

15. *See generally* STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 9–21 (2018) (explaining recent Supreme Court decisions that have narrowed the utility of the ATS for victims of international human rights abuses).

16. *See id.* at 9–11 (discussing Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)).

17. *See id.* at 19–21 (discussing Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018)).

18. *See* CAL. CIV. PROC. CODE § 354.8(a)(3) (Deering 2019).

19. *See id.* at 1.

Moreover, under AB-15 there is no local forum exhaustion requirement before filing suit in California.[20] Finally, the provision of attorneys' fees to a prevailing plaintiff indicates the California Legislature's intent to provide not only a forum, but also the substantive means by which victims of human rights abuses may seek redress.[21]

Years of debate have focused on the propriety of a state offering ATS-style relief, particularly as the Supreme Court has obstructed the path into federal court for international human rights claims. For instance, in March 2018, Professors Seth Davis and Christopher Whytock published an article where they argued that states may provide remedies for international human rights in the same manner that they do for torts and civil rights.[22] They noted that states have independent authority to redress wrongs that also constitute human rights violations, particularly under their tort structures.[23] Fully aware of the severe limitations being placed on the ability of federal courts to hear ATS claims by the Supreme Court, they contend that attention is turning towards state court suits based on domestic and foreign tort law, and on federal suits brought under state tort law.[24] Through three normative arguments,[25] they contend

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20. *See id.* at 8 (discussing Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350)).

21. *See* Flannery v. Prentice, 28 P.3d 860, 867 (Cal. 2001):

> Attorneys considering whether to undertake cases that vindicate fundamental public policies may require statutory assurance that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature and computed by the court. As the high court has recognized, the aim of fee-shifting statutes is "to enable private parties to obtain legal help in seeking redress for injuries resulting from the actual or threatened violation of specific . . . laws. Hence, if plaintiffs . . . find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has been satisfied." (citation omitted).

22. Davis & Whytock, *supra* note 2, at 398.

23. *Id.* at 403.

24. *Id.* at 400.

25. *Id.* at 405:

> Three normative principles follow from our arguments. First, state authority to provide remedies for human rights violations requires no special justification. In the ordinary course, states provide law for the redress of wrongs, including the types of tortious wrongs that human rights litigation typically addresses. State authority to provide redress is the default; the

that certain doctrinal limits on federal ATS litigation, such as political question doctrine, should not be a barrier to state remedies, except in extraordinary cases.[26] Thus, state courts should be able to provide redress for international human rights violations under state law as an independent basis for relief.[27]

Although both Davis and Whytock were at the University of California Irvine School of Law when their article was published, they did not reference or discuss Section 354.8, apparently unaware that California had already amended its tort structure to provide the international human rights relief they envisioned two years prior. Notwithstanding, in proposing that states "have a significant role to play in promoting human rights, including by making their courts available for human rights claims and providing law for adjudicating those claims,"[28] they acknowledge that courts and commentators tend not to consider "the importance of state remedies for human rights and the state interest in providing them."[29]

With that tendency in mind, Davis and Whytock illustrated four court access doctrines and two sets of principles which may limit the application of state law.[30] They argue that when using these doctrines "courts tend to ignore or downplay the state interest in remedying human rights violations."[31] This Article will discuss each

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> limits are what require justification. Second, courts, legislatures, and commentators should not presume that the limits on federal jurisdiction in human rights cases extend to states. The limits on federal ATS litigation may not apply, or may apply differently, to state authority to provide remedies for human rights violations. Third, doctrinal limits on state remedies for human rights violations should not be categorical, but rather developed with awareness of the states' distinct remedial authority within our federal system and applied on a case-by-case basis.

26. *Id.*

27. *See id.* at 406.

28. *Id.* at 452.

29. *Id.* at 453.

30. *Id.* The four court access doctrines: removal, political question, personal jurisdiction, and forum non conveniens. The two sets of principles: federal pre-emption and choice of law.

31. *Id.* at 453 n.331:

> We acknowledge that other doctrines may potentially limit state remedies for human rights violations. These doctrines may, for example, include foreign sovereign immunity and foreign official immunity . . . Space does not allow a thorough discussion of all such doctrines. As a normative matter, however, we argue that the state interest in redressing wrongs

of these court access doctrines and apply them to Section 354.8 as a means of providing a roadmap for litigators to navigate these waters. This Article will also put forward a compelling argument that California's state interest in providing a litigation forum and redress in tort for international human rights violations overcomes any apprehension a court may have about the state's overreach or pretention.

The issue is no longer *whether* California should open its doors to international human rights litigation.[32] It has already done so. Whether state level remedies for human rights are "categorically ill suited to redressing human rights violations" is beside the point;[33] the California Legislature has teed up the ball for litigants to take their shot in state court.[34] This Article moves beyond the theoretical discussion of whether a state can provide this kind of relief, towards providing a practical litigation roadmap anticipating some of the federalism issues that are bound to come up in the exercise of Section 354.8 so that claimants may factor this analysis into their overall litigation calculus.[35]

This Article will argue that under AB-15, California has enacted a potentially game-changing litigation framework for victims of international human rights abuses who would otherwise find their

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should be explicitly considered by courts whenever they apply these doctrines in human rights cases. (citation omitted).

32. *Id. at* 412:

> State remedies for human rights are controversial, however . . . . Supporters of human rights litigation in federal courts under the ATS may worry that state remedies for human rights are at best a distraction, and at worst a threat to U.S. foreign relations and the progressive development of international law.

33. *See id.* at 413.

34. *See id.* at 413 n.86 (citing Ernest A. Young, *Universal Jurisdiction, The Alien Tort Statute and Transnational Public-Law Litigation After* Kiobel*,* 64 DUKE L.J. 1023, 1050 (2015)) (discussing broad consensus among scholars that international law is within the federal realm).

35. *See id.* at 414 ("[T]he categorical approach to state remedies for human rights overlooks states' remedial authority under our system of judicial federalism and their interest in providing remedies for human rights. There is no good reason to presume that state courts and state law are excluded from redressing international human rights violations."); *see also* Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 17 (2013) (arguing that personal jurisdiction and forum non conveniens motions will likely be the initial hurdle in state court human rights cases).

path into federal court blocked by the Supreme Court's increasingly restrictive ATS jurisprudence.[36] The beauty of what California has done really lies in its simplicity. Rather than creating an entirely new statutory scheme, or adopting a "state ATS," California simply expanded the definition of tortious conduct (assault, battery, wrongful death, and conversion) under state law.[37] The legislative history also plainly indicates that the intent was to provide a forum for those who may otherwise be denied access to the courts.[38]

California's AB-15 is both unprecedented and unique, as it is the only provision in state or federal law where a definition of crimes against humanity is codified and made actionable. Further, the definitional language is drawn directly from the Rome Statute of the International Criminal Court, which is broadly recognized by the international community (though not by the United States).[39] In doing this, California's legislature expressed a clear intent that its

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36. *See* Hoffman & Stephens, *supra* note 35, at 12 ("If the Court limits the availability of ATS actions in federal courts, it will usher in a new era of human rights litigation in state courts across the United States.").

37. *See* Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1749–50 (2014):

> Indeed, one could say that the future of human rights litigation in the United States depends on refashioning human rights claims as state or foreign tort violations. Almost every international law violation is also an intentional tort. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment. Rather than pursuing claims for wrongful conduct under the ATS, those same victims could plead violations of domestic or foreign tort laws.

See also Hoffman & Stephens, *supra* note 35, at 18–19 ("Moreover, some of the controversial issues in ATS litigation in recent years will not be controversial in state human rights litigation . . . Overall, theories of liability in state court tort cases are likely to be more expansive and less contested than they have been in ATS litigation.").

38. *See* MERRILEES, *supra* note 13, at 1–3.

39. *See* Press Release, Valentina Stackl, International Corporate Accountability Roundtable, Landmark Human Rights Law Passed in California (Oct. 6, 2015), https://www.icar.ngo/news/2015/10/6/landmark-human-rights-law-passed-in-california [https://perma.cc/7LYH-KCF3]; *see also* Beth Van Schaack, *New California Human Rights Legislation*, JUST SECURITY (Oct. 6, 2015), https://www.justsecurity.org/26619/california-human-rights-legislation/ [https://perma.cc/AK5S-FR5N] (summarizing changes made to California law by AB-15); Press Statement, Richard Boucher, U.S. Dep't of State, International Criminal Court: Letter to U.N. Secretary General Kofi Annan, (May 6, 2002), https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm [https://perma.cc/YV7T-4SWL].

public policy and state human rights law would reflect the international standard.

California's AB-15 provides an alternative route for human rights lawyers who may otherwise think that the courthouse door in the United States is closed on account of restrictive ATS jurisprudence. This Article will provide a roadmap for using California Code of Civil Procedure Section 354.8 as a means of breaking out of the federal ATS litigation straitjacket to pursue civil tort actions for human rights abuses committed abroad in a U.S. court.

Part I will provide a primer on the ATS and the subsequent caselaw which has developed over the last thirty years to paint the picture of how the "ATS litigation straitjacket" came to be. This section will trace the relevant federal decisions from *Filártiga v. Peña-Irala*[40] through the Supreme Court's pronouncement in *Jesner*, up to the Ninth Circuit's opinion in *Doe v. Nestle, S.A. ("Nestle II")*.[41] This background is key to understanding not only the novelty, but the strength, of California's human rights regime.

Part II will examine the text of AB-15, analyzing what exactly the California Legislature authorized in Code of Civil Procedure Section 354.8 and its critical importance in the post-*Jesner* era. Specifically, this section will look at those "problem areas" that have been the subject of ATS litigation over the years and how Section 354.8 addresses those difficulties. Attention will be paid to how each of the actionable torts in Section 354.8 is defined under California law, as well as to any issues in regard to parties to an action who are not natural persons. This section will also discuss the importance of California as a forum for international human rights litigation, arguing that California is no "ordinary" state. Part II closes with an analysis of how California already has international influence, and its laws, including human rights laws, already receive international recognition.

In Part III, the Article will round out the roadmap to using California's court system as a human rights litigation forum by analyzing the issues of personal jurisdiction, forum non conveniens, and federal preemption. These doctrines may obstruct access to state courts or may be asserted by a defendant in an attempt to remove a suit to a potentially more favorable federal forum. There is

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40. 630 F.2d 876 (2d Cir. 1980).

41. *See* Doe v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1124 (9th Cir. 2018).

substantial evidence that the California Legislature intended the reach of Section 354.8 to be expansive. The battle of just how broadly the statute reaches will be fought on the issue of personal jurisdiction.[42] An analysis of the state of personal jurisdiction jurisprudence as it applies to the reach of California's long-arm statute rounds out Part III.

I. A PRIMER ON THE ATS AND THE SUBSEQUENT CASELAW

A. History of the ATS and Its Required Elements

The Alien Tort Statute ("ATS")[43] was initially enacted by the First Congress as part of the Judiciary Act of 1789.[44] As amended, it currently provides that "[t]he 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."[45] However, between 1789 and 1980 the ATS effectively lay dormant, with a paucity of reported cases where the ATS served as a basis for jurisdiction.[46] That changed in 1980 when the Second Circuit decided *Filártiga v. Peña-Irala*.[47] In that case, two Paraguayan citizens (the Filártigas) brought suit in U.S. District Court under the ATS against the former Inspector General of Police in Asunción, Americo Norberto Peña-Irala. Their complaint alleged that Peña-Irala had wrongfully caused the death of their son and brother, Joselito Filártiga, through politically-motivated torture which took place completely in Paraguay.[48] The Second Circuit reversed the district court's dismissal and "[found] that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations" and therefore can serve as a basis for an actionable claim under the

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42. *See* MERRILEES, *supra* note 13, at 1–3.

43. The ATS is also commonly referred to as the Alien Tort Claims Act ("ATCA")—however, because the Supreme Court has consistently referred to the legislation as "the ATS", I will do so in this Article. *See* GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 8 n.17 (2008).

44. MULLIGAN, *supra* note 15, at 1.

45. 28 U.S.C. § 1350 (2018).

46. *See* Taveras v. Taveraz, 477 F.3d 767, 771 (6th Cir. 2007) ("During the first 191 years of its existence, the ATS lay effectively dormant. In fact, during the nearly two centuries after the statute's promulgation, jurisdiction was maintained by the ATS in only two cases."); *see also* MULLIGAN, *supra* note 15, at 5.

47. 630 F.2d 876 (2d Cir. 1980).

48. *Id.* at 878–79.

ATS.[49] Although *Filártiga* never itself reached the Supreme Court, it opened the floodgates of the ATS as a means of getting into federal court. Many of the questions the case left open as to how broadly the ATS might be read have been actively litigated for nearly forty years.[50]

The ensuing litigation over the scope of the ATS and the potential power of California Code of Civil Procedure Section 354.8 makes more sense if we deconstruct the four elements of the ATS and consider them each in turn. The ATS provides federal district courts with jurisdiction to hear cases that meet the following criteria: (1) a civil action;[51] (2) by an alien;[52] (3) for a tort; (4) committed in violation of the law of nations or a treaty of the United States.[53] Bit by bit, the Supreme Court has tightened the ATS litigation straitjacket for

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49. *Id.* at 880; *see also* MULLIGAN, *supra* note 15, at 6 (summarizing the Second Circuit's decision in *Filártiga* and explaining the historical context).

49. MULLIGAN, *supra* note 15, at 6; *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 461 (2011) (detailing how various circuit courts decisions resulted in varying approaches on how to read the ATS).

51. The ATS provides for civil, not criminal, liability. *Cf.* Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) (arguing that the United States prefers civil litigation to criminal human rights prosecutions, and that there are no *Filártiga*-type cases outside the United States because the civil remedy for human rights violations is unique to American legal culture).

52. "Alien" is not defined under the ATS and subsequent cases have not established the exact meaning of this term other than distinguishing from U.S. citizens. *See, e.g.*, Yousuf v. Samantar, 552 F.3d 371, 375 n.1 (4th Cir. 2009) ("To the extent that any of the claims under the ATS are being asserted by plaintiffs who are American citizens, federal subject-matter jurisdiction may be lacking."); Serra v. Lappin, 600 F.3d 1191, 1198 (9th Cir. 2010) ("The scope of the ATS is limited to suits 'by an alien.' The ATS admits no cause of action by non-aliens.") (internal citations omitted). It has not been established whether the definition of "alien" in the Immigration and Nationality Act ("any person not a citizen or national of the United States") would apply. 8 U.S.C. § 1101(a)(3) (2018). For further discussion, *see infra* Part II.B.2 (noting that California Code of Civil Procedure Section 354.8 is not limited to suits by aliens.).

53. The "law of nations" is generally understood to refer to "customary international law." *See* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 116 (2d Cir. 2008) ("[T]he law of nations has become synonymous with the term 'customary international law. . . .'"); *see also* MULLIGAN, *supra* note 15, at 1–2 (discussing the meaning of "law of nations" in *Vietnam Ass'n*); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (Am. Law Inst. 1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

potential litigants by successively raising the bar for certain elements, or narrowing the scope for others. A review of that case law provides a framework for understanding California's solution.

B. From *Filártiga* through *Jesner*–How the Supreme Court Has Progressively Weakened the Potential of the ATS to Provide a Civil Remedy for Human Rights Abuses

1. Is the ATS Solely Jurisdictional, or Does It Also Create a Cause of Action? (*Tel-Oren*)

In the wake of *Filártiga*, as courts began to hear more cases under the ATS, one of the issues that was soon litigated was whether the ATS is solely jurisdictional in nature, or whether it also creates a cause of action for plaintiffs.[54] The D.C. Circuit authored the most prominent of the early decisions addressing this question in the 1984 case, *Tel-Oren v. Libyan Arab Republic. Tel-Oren* involved a group of Israeli citizens—survivors and representatives of the deceased victims of a terrorist attack in Israel—that brought suit under the ATS against foreign defendants, including the Palestine Liberation Organization ("PLO"), who were allegedly responsible for orchestrating the attack.[55] Although the *Tel-Oren* court affirmed the lower court's dismissal of the suit for lack of subject matter jurisdiction, each member of the three-judge panel issued concurring opinions addressing the cause of action issue and providing fodder for future litigation.[56]

The unresolved conflict between the three concurring opinions was whether in crafting the ATS, Congress intended *only* a grant of jurisdiction, or whether it also created a cause of action.[57] Judge Bork contended that the ATS was purely jurisdictional, claiming that "it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."[58] Judge Edwards, on the other hand, disagreed, endorsing the view that the ATS does not require plaintiffs to point to

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54. *See* MULLIGAN, *supra* note 15, at 7.

55. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam).

56. *Id.* Additional defendants included the Libyan Arab Republic, the claims against which the court dismissed for lack of jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1976). *Id.* at 775.

57. *Id.* at 801 (Bork, J., concurring).

58. *Id.*

a specific right to sue under the law of nations in order to establish jurisdiction: they need only show that the defendants' alleged conduct violated the substantive law of nations.[59] Judge Robb, in the final concurring opinion, would have dismissed the case on political question grounds alone.[60]

Although Judge Edwards had specifically requested "direction from the Supreme Court on the proper scope of the obscure [ATS]," it would be another twenty years before the Court, in *Sosa v. Alvarez-Machain,* accepted the invitation to weigh in on whether the ATS provides plaintiffs a cause of action.[61]

2. Is There a Cause of Action in the ATS? (*Sosa v. Alvarez-Machain*)

i. Torture Is Again the Underlying Human Rights Violation at Issue

The underlying event in *Sosa* was the 1985 capture of a Drug Enforcement Administration ("DEA") agent, Enrique Camarena-Salazar.[62] While on assignment in Mexico, the agent was taken to a house in Guadalajara and tortured over the course of two days before being murdered.[63] DEA officials came to believe that a Mexican physician, Humberto Alvarez-Machain ("Alvarez"), had been present at the house and had acted to prolong Camarena-Salazar's life to lengthen the interrogation and the torture.[64] When the Mexican government declined the DEA's request for assistance in extraditing Alvarez, the DEA approved a plan to hire Mexican nationals to abduct Alvarez and bring him to the United States to face trial.[65]

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59. *Id.* at 777 (Edwards, J., concurring).

60. *Id.* at 823 (Robb, J., concurring).

61. *Id.* at 776 (Edwards, J., concurring); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

62. The murder of Enrique "Kiki" Camarena-Salazar became a *cause célèbre* in the U.S. "War on Drugs" and has been the subject of media attention, film depiction, and scholarship for over thirty years. *See, e.g.*, Arthur F. McEvoy, *The Martyrdom and Avenging of Enrique Camarena-Salazar: A Review of Caselaw and Scholarship After Thirty Years*, 23 SW. J. INT'L LAW 39 (2017) (focusing on Enrique Camarena-Salazar's death and the impact the effort to bring his murderers to justice has left on the institutional memory of the Central California U.S. District Court).

63. *Sosa*, 542 U.S. at 697.

64. *Id.*

65. *Id.* at 698.

Among the group of hired Mexican nationals was José Francisco Sosa, the petitioner in the case at issue.

Once in custody, Alvarez moved to dismiss the indictment against him on the grounds that "outrageous government conduct" had violated the extradition treaty between Mexico and the United States.[66] In the first of two decisions arising out of his case, the Supreme Court rejected Alvarez's position and held that his forcible seizure did not affect the federal court's jurisdiction.[67] That case was remanded to district court for trial, where at the close of the Government's case, the district court granted Alvarez's motion for a judgment of acquittal.[68]

After being released from federal custody and returning to Mexico, Alvarez filed suit in 1993 against Sosa and other Mexican nationals under the ATS for violating the law of nations.[69] This case eventually reached the Supreme Court, which granted certiorari to determine the scope of the ATS—specifically, whether it creates, in addition to its grant of federal jurisdiction, a cause of action for an alleged violation of the law of nations.[70]

ii. *Sosa*'s Holding: "Vigilant Doorkeeping" and "Great Caution"

Judge Bork's analysis in *Tel-Oren* would ultimately win the day and come to form the basis of the Court's core holding in *Sosa* determining that the ATS is a jurisdictional statute creating no new causes of action.[71] However, the *Sosa* Court added an important caveat to Judge Bork's absolute denial of a cause of action in the ATS by further holding that "the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law," and that the jurisdictional grant "is best read

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66. *Id.*

67. *Id.* (citing United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992)).

68. *Sosa*, 542 U.S. at 698.

69. Alvarez also sued the United States under the Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1), alleging false arrest. The Court reversed the Ninth Circuit and dismissed the FTCA claim on the grounds that the FTCA exception to waiver of sovereign immunity for claims "arising in a foreign country" applied. *Id.* at 699.

70. *Id.*

71. *Id.* at 724; *see, e.g.*, Bradford R. Clark, *Tel-Oren, Filártiga, and the Meaning of the Alien Tort Statute*, 80 U. CHI. L. REV. DIALOGUE 177, 191 (2013) ("Although *Filártiga* has received more attention over the years, Judge Bork's approach in *Tel-Oren* better anticipated the path of the law, as evidenced by the Supreme Court's opinions in both *Sosa* and *Kiobel*.").

as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[72] This caveat was included to avoid an interpretation of a "stillborn" ATS lying inert until Congress expressly authorized specific causes of action.[73] The Court reasoned that historically, under common law, certain "torts in violation of the law of nations would have been recognized" and would not have required separate legislation to grant a cause of action.[74] In fact, there was no reason to suppose that the First Congress "pass[ed] the ATS as a jurisdictional convenience . . . for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."[75] But if Congress intended the ATS to take effect without further legislation, then what causes of action could be recognized under the "ambient common law of the era"?[76]

Making reference to Blackstone, *Sosa* recognized three violations of 18th-century international law which the First Congress would have envisioned giving rise to private causes of action under the ATS: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[77] Under an 18th-century conception of the common law, Congress would have understood that each of these three torts was actionable under the ATS as a violation of the law of nations, absent any additional enabling language in the statute.[78]

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72. *Sosa*, 542 U.S. at 724.

73. *Id.* at 714.

74. *Id.*

75. *Id.* at 719.

76. Justice Scalia wrote a concurrence in which he echoed Judge Bork's absolute position: only causes of action expressly authorized by Congress are permitted under the ATS, and federal judges have no business crafting common law causes of action. *See id.* at 743 (Scalia, J., concurring) ("In Benthamite terms, creating a federal command (federal common law) out of 'international norms,' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.").

77. *Sosa*, 542 U.S. at 724; *see also* MULLIGAN, *supra* note 15, at 10 n.99 ("A safe conduct is a 'privilege granted by a belligerent allowing an enemy, a neutral, or some other person to travel within or through a designated area for a specified purpose.'" (quoting *Safe Conduct*, BLACK'S LAW DICTIONARY (10th ed. 2014))).

78. Of course, nothing was stopping Congress then, or stops it now, from specifically creating federal causes of action for specific torts, obviating the need to discern what may have been part of the "ambient law of the era." *See, e.g.*, *Sosa*, 542 U.S. at 747 (Scalia, J., concurring) ("Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789 [and]

Nevertheless, the Court further held that "no development in the two centuries" of ATS jurisprudence precludes federal courts from recognizing additional common law claims arising under the law of nations.[79] Courts can consider new common law causes of action under the ATS based on the "present-day law of nations" provided that they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" the Court recognized as applying to the three recognized claims.[80] However, in recognizing additional common law claims under the ATS, lower courts are specifically cautioned to exercise a "restrained conception of [their] discretion" in such analysis.[81]

Sosa establishes a two-step test for courts to recognize a new common-law cause of action under the ATS.[82] First, the threshold question is whether the alleged violation is of a norm that is "specific, universal, and obligatory."[83] Next, provided the first prong is satisfied, the court must then determine whether allowing the case to proceed under the ATS is a "proper exercise of the judicial power."[84] Lower courts are specifically admonished that they should exercise "great caution" and "vigilant doorkeeping" before recognizing additional causes of action under the ATS.[85] Applying this analysis, the Court found that Alvarez's claim for arbitrary arrest and detention failed to meet the strictures of this test for recognizing a claim under the ATS and was therefore dismissed.[86]

Congress understands that difference today . . . ."); *see also* Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. MIAMI INT'L & COMP. L. REV. 285, 293 (2017) ("[The growth of anti-terrorism and human rights litigation] is a development Congress has not only endorsed, but actively promoted. And it strongly suggests that Congress's inaction in the face of the Court's restrictive interpretation of the ATS is not a matter of inattention or inertia.").

79. *Sosa*, 542 U.S. at 724–25 ("We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with [*Filártiga*] has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law . . . .").

80. *Id.* at 725.

81. *Id.*

82. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018).

83. *Id.* at 732 (quoting *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

84. *Id.* at 731.

85. *Id.* at 728–29.

86. *See id.* at 738.

3. Does the ATS Have an Extraterritorial Reach? (*Kiobel*)

i. Do the Underlying Claims "Touch and Concern" the United States?

Eight years after *Sosa*, the Supreme Court took up the issue of whether the ATS confers extraterritorial jurisdiction to hear claims for violations of the law of nations occurring outside the United States in *Kiobel v. Royal Dutch Petroleum Co.*[87] In *Kiobel*, a group of Nigerian nationals residing in the United States filed suit against a group of Dutch, British and Nigerian corporations. They alleged that the corporations had "aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria."[88] The Second Circuit dismissed the entire complaint on the grounds that the law of nations does not recognize corporate liability.[89] Although the Supreme Court initially granted certiorari to consider the issue of corporate liability under the ATS, following oral argument, the Court requested additional briefing on the issue which was ultimately dispositive of the case: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[90] The answer to that question rests on the Court's understanding of a canon of statutory interpretation known as the "presumption against extraterritoriality."

The presumption against extraterritoriality provides that when a federal statute "gives no clear indication of an extraterritorial application, it has none."[91] The presumption "serves to protect against unintended clashes between our laws and those of other nations

87. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 112–113 (2013).

88. *Id.* at 112.

89. *Id.* at 114. Petitioners alleged that the corporations "violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction." *Id.* Interestingly, the first, sixth, and seventh claims that the District Court dismissed in *Kiobel* for failure to state a claim would be actionable under California law. *See infra* Part II.

90. *Kiobel*, 569 U.S. at 114.

91. *Id.* at 115 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)).

which could result in international discord."[92] It further helps "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[93] "Unless there is the affirmative intention of the Congress clearly expressed" to give a statute extraterritorial effect, the Court must "presume it is primarily concerned with domestic conditions."[94]

The Court unanimously concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption."[95] Therefore, the claims of the Nigerian plaintiffs for conduct in Nigeria allegedly in violation of the law of nations were barred.[96] However, almost as an afterthought, Chief Justice Roberts concluded his opinion by suggesting that the presumption might be overcome where "the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against exterritorial application."[97] The Court provided no further explanation on how to apply the "touch and concern" test in an ATS context, a point which was further examined in two concurring opinions.[98]

Part of the difficulty in determining what "touch and concern" means in this context arises from the *Kiobel* majority citing *Morrison v. National Australia Bank, Ltd.* to support the proposition that the presumption against extraterritoriality could be overcome if the claims "touch and concern" the United States.[99] *Morrison*, a pre-*Kiobel* decision analyzing how the presumption of extraterritoriality applies to Section 10(b) of the Securities and Exchange Act of 1934,[100]

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92. *Id.* (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

93. *Id.* at 116; *see* LARRY M. EIG, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 25 (2014).

94. *Morrison*, 561 U.S. at 255 (2010) (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).

95. *Kiobel*, 569 U.S. at 124.

96. *Id.*

97. *Id.* at 124–125.

98. Justice Kennedy wrote a third, single-paragraph, concurring opinion where he noted, "the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation." *See id.* at 125 (Kennedy, J., concurring).

99. *See id.* (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266–273 (2010)).

100. 15 U.S.C. § 78j(b) (2018).

does not define the "touch and concern" test either, and instead applies a "focus" analysis.[101]

Justice Alito, in a concurring opinion joined by Justice Thomas, noted that in *Morrison*, "a cause of action falls outside the scope of the presumption—and is thus not barred by the presumption—only if the event or relationship which was the focus of congressional concern under the relevant statute takes place within the United States."[102] Alito attempts to read the *Morrison* "focus" test backwards to apply to *Sosa*, which came out six years prior, implying that *Sosa* held that when the ATS was enacted, congressional intent was "focused" on the "three principal offenses" that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy."[103] Accordingly, Justice Alito would set out a "broader standard" of a touch and concern test to effectively strengthen the presumption against extraterritoriality.[104]

The remaining opinion was drafted by Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan), in which he concurred in the judgment but not in the Court's reasoning.[105] Although Justice Breyer's concurring opinion would have arrived at the result by a different means, all nine justices were agreed that "[i]n this case, however, the parties and relevant conduct lack sufficient ties to the United States for the ATS to provide jurisdiction."[106] While the three Justices joining Breyer would not have done so on the basis of the presumption against extraterritoriality, the end result was the same: these particular claims by Nigerian nationals, for conduct which took place entirely in Nigeria, was too attenuated to the United States for the ATS to provide jurisdiction.[107] Thus, unlike *Sosa*, the threshold

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101. *See* MULLIGAN, *supra* note 15, at 16.

102. *Kiobel*, 569 U.S. at 126 (Alito, J., concurring) (internal citation omitted).

103. *Id.* ("The Court's decision in Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), makes clear that when the ATS was enacted, congressional concern was focus[ed] . . . on the three principal offenses against the law of nations that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy.") (internal quotation marks and citations omitted).

104. *See id.*

105. *See id.* at 127 (Breyer, J., concurring in judgment).

106. *Id.* at 128 (Breyer, J., concurring in judgment).

107. Six years later, the *Kiobel* case continues. Following the Supreme Court's ruling barring the matter from being heard in the United States under the ATS, the lead plaintiff, Esther Kiobel, brought suit against Royal Dutch Shell in the Netherlands, where their headquarters is located. On May 1, 2019, the

question for the Court was not the cause of action at issue, but *where* the alleged violation of the law of nations took place.

ii. Interpreting *Kiobel* and the Problem of the "Foreign-Cubed" Case

One of the issues arising out of *Kiobel* is that it appears to preclude "foreign-cubed" ATS cases—those in which a foreign plaintiff sues a foreign defendant for tortious conduct that occurred in a foreign nation.[108] A "foreign-squared" case, on the other hand, is one in which the plaintiff or defendant is a U.S. national, or where the harm took place on U.S. soil.[109] Although a foreign-squared case with a U.S. plaintiff would be precluded under the ATS (since the claimant would not be an alien),[110] the door appears to be slightly ajar for a

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District Court of the Hague issued a ruling that Kiobel's claims, the same presented in her original ATS suit, were not time-barred and that the Dutch court did have jurisdiction over the matter. Shell has been ordered to respond to Kiobel's initial demand for documents. *See* Kate Hodal, *Dutch Court Will Hear Widows' Case Against Shell over Deaths of Ogoni Nine*, GUARDIAN (May 1, 2019), https://www.theguardian.com/global-development/2019/may/01/dutch-court-will-hear-widows-case-against-shell-over-deaths-of-ogoni-nine-esther-kiobel-victoria-bera-hague (on file with the *Columbia Human Rights Law Review*); *see also Nigeria/Netherlands: Shell Ruling "a Vital Step Towards Justice*," AMNESTY INT'L (May 1, 2019), https://www.amnesty.org/en/latest/news/2019/05/nigerianetherlandsshell-ruling-a-vital-step-towards-justice/ [https://perma.cc/3D8G-JZKY] (providing an overview of the case).

108. *See, e.g.*, Douglass Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1775 n.20 (2014) ("The phrase 'foreign-cubed' refers to the three foreign aspects of a case: foreign plaintiffs, foreign defendants, and foreign location of the tort."); Ernest A. Young, *Universal Jurisdiction, The Alien Tort Statute and Transnational Public-Law Litigation After* Kiobel*,* 64 DUKE L.J. 1023, 1063–64 (2015) ("*Kiobel* thus seemed to rule out foreign-cubed cases under the ATS, and it suggested a tough road for other ATS claims as well."); *see also* Vivian Grosswald Curran & David Sloss, *Agora: Reflections on* Kiobel*: Reviving Human Rights Litigation After* Kiobel, 107 AM. J. INT'L L. 858, 858 (2013) ("[T]he Court's decision apparently sounds the death knell for 'foreign-cubed' human rights claims under the ATS—that is, cases in which foreign defendants committed human rights abuses against foreign plaintiffs in foreign countries.").

109. *See, e.g.*, Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), http://www.scotusblog.com/2013/04/Kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/ [https://perma.cc/89LB-UWRP] ("'Foreign cubed' cases . . . are off the table. But there may remain significant scope for 'foreign squared' cases—cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil.").

110. *See* 28 U.S.C. § 1350 (2018).

foreign-squared ATS case with a U.S. defendant, provided *Kiobel*'s touch and concern test is satisfied.[111]

The distinction between a foreign-cubed and a foreign-squared ATS case is not mere semantics. It shows how *Kiobel*, more than any other Supreme Court case, has neutralized the ATS as a vehicle for providing relief in federal court for victims of international human rights abuses. Later cases, such as *Jesner v. Arab Bank, PLC*,[112] only seal the courthouse door a bit tighter. The promise of *Filártiga* was to breathe new life into the ATS as a means for fulfilling what the Founders may have perceived as their duty to provide a signal to the world that the new United States would be a proactively responsible international actor. But *Kiobel* effectively reins it in.

iii. Confusion in Applying *Kiobel*'s Touch and Concern Test

Kiobel's lack of clarity in explaining how an ATS claim could satisfy its touch and concern test has resulted in a circuit split. One approach applies a bright-line analysis: i.e., in order to overcome the presumption against extraterritoriality, the conduct which is allegedly a violation of the law of nations must have occurred in the United States. The other approach undertakes a more flexible, fact-intensive, analysis of the underlying conduct.[113] As addressed *infra*, part of the confusion arises from the circuits' interpretation of *Morrison v. National Australia Bank Ltd.*,[114] a case which Chief Justice Roberts mentioned in *Kiobel* without elaboration.[115] *Morrison* predates *Kiobel* by three years and analyzed how the presumption of

111. *See* Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 447–48 (2015).

112. 138 S. Ct. 1386 (2018).

113. *See* MULLIGAN, *supra* note 15, at 15; Note, *Clarifying* Kiobel*'s "Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1910–11 (2017) ("Five circuits have attempted to define the contours of *Kiobel*'s 'touch and concern' test. Their approaches reflect a spectrum between a bright-line rule and a totality of the circumstances standard.").

114. 561 U.S. 247 (2010).

115. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013).

extraterritoriality applies to Section 10(b) of the Securities and Exchange Act of 1934.[116]

In *Morrison*, the plaintiffs argued that even though they had purchased their securities outside the United States on the Australian stock exchange, their claim was domestic because the allegedly deceptive conduct took place in Florida.[117] The Supreme Court disagreed and found that the presumption against extraterritoriality held because the "focus" of Section 10(b) is on the "purchase and sale of securities"—which took place in Australia—not the deceptive conduct which took place in the United States.[118] As part of their application of *Kiobel*'s touch and concern test, circuits have also been split on whether *Morrison*'s "focus" analysis controls in ATS cases.[119]

In 2016, the Supreme Court may have clarified matters a bit in *RJR Nabisco, Inc. v. European Community*.[120] There, the Court applied the presumption against extraterritoriality to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO")[121] in a case brought by the European Community against RJR Nabisco and others on allegations of racketeering in Europe involving money laundering.[122] In discussing its prior jurisprudence on extraterritoriality, including *Kiobel*, the Court explicitly incorporated the "focus" test as part of the analysis.[123] To date, both the Fifth and Ninth Circuits have adopted *RJR Nabisco*'s analysis that *Morrison*'s "focus" test applies to ATS cases.[124] Should other

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116. *See* 15 U.S.C. § 78j(b) (2018) (Section 10(b) prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the "purchase or sale of any security registered on a national securities exchange.").

117. *Morrison*, 561 U.S. at 266.

118. *Id.* at 266–67.

119. *See* MULLIGAN, *supra* note 15, at 16.

120. 136 S. Ct. 2090 (2016).

121. 18 U.S.C. § 1962 (2018).

122. *See RJR Nabisco*, 136 S. Ct. at 2098.

123. *See id.* at 2101 ("*Morrison* and *Kiobel* reflect a two-step framework . . . . At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially . . . . at the second step we determine whether the case involves a domestic application of the statute . . . by looking to the statute's 'focus.'").

124. *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 134 (2017) ("[Appellees] respond[] that *RJR Nabisco* makes clear that *Morrison*'s 'focus' test still governs. We agree."); Doe v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1125 (9th Cir. 2018) ("Because *RJR*

circuits adopt the "focus" test as part of their extraterritoriality analysis, there is still space for these courts to disagree on what the "focus" of the ATS actually is.[125]

4. Corporate Liability Under the ATS (*Jesner*)

i. No Liability for Foreign Corporations Under the ATS

Two years after *RJR Nabisco*, in April 2018, the Supreme Court again weighed in on the scope of the ATS in *Jesner v. Arab Bank, PLC*, this time to resolve the issue for which it had initially granted certiorari in *Kiobel*, but had failed to address: whether corporations may be liable under the ATS.[126] At the time that the Court granted certiorari in *Jesner*, of all the circuits that had considered the issue, only the Second Circuit held that corporations could not be held liable under the ATS.[127] Therefore, while there was a "lingering circuit split" on the issue of corporate liability, it weighed heavily in favor of liability.[128]

At stake in *Jesner* were the claims of approximately 6,000 foreign nationals who alleged that they or their family members were injured by terrorist attacks in the Middle East over a ten-year period.[129] Plaintiffs alleged that Arab Bank, a Jordanian financial institution with a significant stake in the Jordanian economy, helped finance attacks by Hamas and other terrorist groups by maintaining bank accounts for the groups and their fronts, and by allowing those accounts to be used to pay the families of suicide bombers.[130]

Nabisco has indicated that the two-step framework is required in the context of ATS claims, we apply it here.").

125. *See* MULLIGAN, *supra* note 15, at 17.

126. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1395 (2018).

127. *See id.* at 1435 n.13 (Sotomayor, J., dissenting); *see also* MULLIGAN, *supra* note 15, at 17–18 (outlining the bright-line approach to the "touch and concern" test favored in the Fifth and Second Circuits, as opposed to the more flexible methods of interpretation favored in the Fourth, Ninth, and Eleventh Circuits).

128. *See* MULLIGAN, *supra* note 15, at 17.

129. *See Jesner*, 138 S. Ct. at 1394.

130. Plaintiffs alleged that most of this conduct took place in the Middle East. However, they also alleged that Arab Bank used its New York branch to clear dollar-denominated transactions through the Clearing House Interbank Payments System ("CHIPS"):

Jesner was a consolidation of five separate ATS lawsuits filed against Arab Bank in the Eastern District of New York between 2004 and 2010.[131] At the same time that these cases were winding their way through the courts, *Kiobel* was also making its way through the trial court and the Second Circuit.[132] Therefore, as *Kiobel* had yet to be decided by the Supreme Court, courts in the Second Circuit continued to view as binding precedent the broader holding of the Court of Appeals precluding corporate liability, and decided *Jesner* on that basis.[133] Although the Second Circuit acknowledged a "growing consensus among our sister circuits" in favor of corporate liability under the ATS, it acknowledged its own precedent and invited the Supreme Court to again take up the issue and resolve the circuit split.[134] In *Jesner*, the Court accepted the Second Circuit's invitation and held that foreign corporations may not be defendants in suits brought under the ATS.[135] Writing for a 5-4 majority, Justice Kennedy refused to begin his analysis with *Kiobel* to determine whether Arab Bank had sufficient connections to the United States to subject it to jurisdiction under the ATS, despite the Government and several *amici* urging the Court to remand the case for just such a

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> Foreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another. Arab Bank and certain *amici* point out that CHIPS transactions are enormous both in volume and in dollar amounts. The transactions occur predominantly in the United States but are used by major banks both in the United States and abroad. The CHIPS system is used for dollar-denominated transactions and for transactions where the dollar is used as an intermediate currency to facilitate a currency exchange.

Id. at 1394–95. Although the Court ultimately decided the case without needing to perform *Kiobel*'s touch and concern test, the question of whether CHIPS, or any other mechanism for accessing the United States financial system or performing interbank funds transfers, provides sufficient contact to the United States to satisfy personal jurisdiction concerns remains unresolved. *See id.* at 1406.

131. *See id.* at 1394.

132. *See id.* at 1395 (citing Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 120 (2d Cir. 2010). In *Kiobel*, the Second Circuit had held that the ATS does not extend to suits against corporations and decided the suit on that basis, on which the Supreme Court granted certiorari. Since the Supreme Court then requested additional briefing and decided *Kiobel* on the basis of the presumption against extraterritorial application of the ATS, it never reached the issue of whether the ATS extends to suits against foreign corporations. *Id.*

133. *See id.*

134. *In re* Arab Bank, 808 F.3d 144, 156 (2d Cir. 2015).

135. *Jesner*, 138 S. Ct. at 1407.

determination.[136] Instead, Justice Kennedy insisted that before recognizing a common law action under the ATS, federal courts must apply the two-step test announced in *Sosa*.[137]

Assuming that under international law there is a specific norm that can be controlling, it must then be determined whether allowing the case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.[138] Kennedy then framed the question as "whether there is an international-law norm imposing liability on corporations for acts of their employees that contravene fundamental human rights."[139]

Finding "sufficient doubt" on the point of whether there is a specific, universal, and obligatory norm of corporate liability under international law, Kennedy "turn[ed] to *Sosa*'s second

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136. *Id.* at 1398–99.

137. *See id.* at 1399; *see also supra* text accompanying notes 83–86 (detailing test).

138. *See Jesner*, 138 S. Ct. at 1399 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004)).

139. *See id.* at 1399. *But see id.* at 1420 (Sotomayor, J., dissenting). Justice Sotomayor objected to the manner in which Justice Kennedy poses this question and his use of *Sosa* by highlighting the distinction between the identification of norms of customary international law and the mechanisms of enforcing those norms:

> *Sosa*'s norm-specific first step is inapposite to the categorical question whether corporations may be sued under the ATS as a general matter. International law imposes certain obligations that are intended to govern the behavior of states and private actors . . . Among those obligations are substantive prohibitions on certain conduct thought to violate human rights, such as genocide, slavery, extrajudicial killing, and torture . . . Substantive prohibitions like these are the norms at which *Sosa*'s step-one inquiry is aimed and for which *Sosa* requires that there be sufficient international consensus.
>
> *Sosa* does not, however, demand that there be sufficient international consensus with regard to the mechanisms of enforcing these norms, for enforcement is not a question with which customary international law is concerned.

Id. This is key, as Kennedy's analysis is framed around the question of whether there is a specific, universal, and obligatory *norm of corporate liability*, rather than whether holding a corporation liable under the ATS is a mechanism for enforcing those norms. *See id.* at 1401 (Kennedy, J.) ("[E]ven assuming that these cases are relevant examples, at most they demonstrate that corporate liability might be permissible under international law in some circumstances. That falls far short of establishing a specific, universal, and obligatory norm of corporate liability.").

question—whether the Judiciary must defer to Congress, allowing it to determine in the first instance whether that universal norm has been recognized and, if so, whether it is prudent and necessary to direct its enforcement in suits under the ATS."[140] Given the "great caution" that federal courts are warned to exercise before recognizing new forms of liability under the ATS, the *Jesner* Court held that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[141]

Although not specifically addressed in Justice Kennedy's opinion, one of the underlying issues for Arab Bank in the case was the availability of aiding and abetting liability under the ATS.[142] While *Jesner* was decided on the issue of corporate liability, the gravamen of plaintiffs' claims was not that Arab Bank itself had pulled the trigger, or planned and executed terrorist attacks, but that it had served as a "paymaster" for terrorist groups through its branch offices in the West Bank and Gaza Strip.[143] The Supreme Court did not specifically address accomplice liability in *Sosa*, and litigants in that time viewed this as a green light to file ATS complaints on a theory of aiding and abetting.[144] The Ninth Circuit is one of the circuits that has addressed aiding and abetting liability, specifically as to corporate actors, and provided instructions for pleading such a claim.[145]

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140. *See id.* at 1402.

141. *Id.* at 1403.

142. *See id.* at 1429 (Sotomayor, J., dissenting) (explaining Arab Bank's concern of unfairness to the defendant where actors behind terrorist attacks or foreign government officials are not also sued, "[but] the Bank's explanation of this problem reveals that the true source of its grievance is the availability of aiding and abetting liability.").

143. *See* MULLIGAN, *supra* note 15, at 18 n.169 (citing Linde v. Arab Bank, PLC, 269 F.R.D. 186, 192 (E.D.N.Y. 2010)).

144. *See* Ryan S. Lincoln, Comment, *To Proceed with Caution: Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 604 (2010).

145. *See* Doe I v. Nestle USA, Inc. (*Nestle I*), 766 F.3d 1013, 1023–26 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016). At the time this article went to press, the Supreme Court was deliberating about whether to grant cert and hear an appeal of *Nestle USA* and a companion case, *Cargill, Inc. v. Doe I*. On January 13, 2020, the Court asked the Solicitor General's office to file a brief expressing the views of the United States on whether to grant cert. Order List, 589 U.S. ___, 3, SUPREME COURT (Jan. 13, 2020), https://www.supremecourt.gov/orders/courtorders/011320zor_4fc5.pdf [https://perma.cc/B37X-6PPR].

ii. Unresolved Issue of Domestic Corporate Liability: The Ninth Circuit Weighs In

One of the unresolved issues from *Jesner* is whether *domestic* corporations remain open to liability under the ATS.[146] In October 2018, six months after the *Jesner* decision was handed down, the Ninth Circuit issued its decision in *Doe v. Nestle, S.A.* ("*Nestle II*") holding that *Jesner* did not eliminate all corporate liability under the ATS, and therefore a domestic corporation may still be sued under the statute.[147] Since the Court of Appeals provided a detailed analysis of the state of ATS law in the Ninth Circuit, and the application of *Sosa* and *Kiobel* in the Ninth Circuit are germane to any future challenge to California Code of Civil Procedure Section 354.8 in federal court, a careful review of *Nestle II* is warranted.[148]

Plaintiffs in *Nestle II* initially filed suit over a decade ago and the court had first considered the case four years earlier in *Doe I v. Nestle USA, Inc.* ("*Nestle I*").[149] The plaintiffs were former child slaves who were kidnapped and forced to work on cocoa farms in the Ivory Coast for up to fourteen hours a day without pay.[150] Plaintiffs filed an ATS suit in the Central District of California against defendants Nestle USA, Inc., Archer Daniels Midland Company, Cargill Incorporated Company, and Cargill Cocoa, alleging that the defendants aided and abetted child slavery by providing assistance to Ivorian farmers.[151] The defendants were "large manufacturers, purchasers, processors, and retail sellers of cocoa beans."[152] The court then discussed the litigation's prior history:

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146. *See* MULLIGAN, *supra* note 15, at 19 n.174 (citing William S. Dodge, *Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations*, JUST SECURITY (Apr. 26, 2018) https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/ [https://perma.cc/JY4L-BUFT] ("ATS suits against U.S. corporations also face a host of other obstacles . . . *Jesner* does not settle the question of corporate liability for U.S. corporations, and such cases constitute the bulk of litigation against corporations under the ATS.")).

147. *See* Doe v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1124 (9th Cir. 2018).

148. *See infra* Part II.B.2.

149. *See Nestle II*, 906 F.3d at 1123 (citing *Nestle I*, 766 F.3d at 1013).

150. *Id.* at 1122.

151. *Nestle I*, 766 F.3d at 1016. In *Nestle II*, additional defendants were named, including foreign subsidiaries of each named defendant. *See Nestle II*, 906 F.3d at 1122.

152. *Nestle II*, 906 F.3d at 1122–23 ("[D]efendants effectively control cocoa production in the Ivory Coast . . . . with the unilateral goal of finding the cheapest

> On remand after *Nestle I*, defendants moved to dismiss the operative complaint and the district court granted the motion. In its order, the district court concluded that the complaint [sought] an impermissible extraterritorial application of the ATS because defendants engaged domestically only in ordinary business conduct. The district court did not decide whether plaintiffs had stated a claim for aiding and abetting child slavery.[153]

The Court of Appeals acknowledged that the "legal landscape had shifted" since they had last considered the case.[154] In *Nestle I*, the court held that corporations are liable for aiding and abetting slavery.[155]

In *Nestle I*, the court held that "since the prohibition of slavery is 'universal,' it is applicable to all actors, including corporations."[156] Taking note of *Jesner,* the court noted that although it abrogated *Nestle I* insofar as it applied to foreign corporations, it "did not eliminate all corporate liability under the ATS, and . . . therefore continue[d] to follow *Nestle I*'s holding as applied to domestic corporations."[157] Satisfied that an ATS suit could be maintained against a domestic corporate defendant, the court next turned to the application of the claims at issue to these particular defendants under *Kiobel*. In *Nestle I*, the court referenced the confusion generated by *Kiobel*'s citation to *Morrison*'s "focus" test for overcoming the presumption against extraterritoriality as support for the "touch and concern" test advanced by the *Kiobel* court.[158] The

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source of cocoa . . . . Not content to rely on market forces to keep costs low, defendants . . . perpetuate a system built on child slavery to depress labor costs.").

153. *Id.* at 1123.

154. *Id.* at 1123–24 ("The Supreme Court's decisions in *Jesner* and *RJR Nabisco, Inc. v. European Community* . . . require us to revisit parts of *Nestle I*.").

155. *See id.* at 1124 (citing Sarei v. Rio Tinto, PLC, 671 F.3d 736, 746 (9th Cir. 2011) (*en banc*)). *Sarei* adopted a norm specific analysis that determines whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued. First, the analysis proceeds norm-by-norm; there is no categorical rule of corporate immunity or liability. Under the second principle, corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations. Third, norms that are "universal and absolute," or applicable to "all actors" can provide the basis for an ATS claim against a corporation. *See Nestle II*, 906 F.3d at 1124.

156. *Nestle II*, 906 F.3d at 1124.

157. *Id.*

158. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262–69 (2010); *supra* Part I.B.3.i.

court in *Nestle I* declined to follow this test because the Court had not expressly incorporated it.[159]

However, in *Nestle II,* the court again took note of the changed legal landscape since *Nestle I* was decided, referencing the Supreme Court's decision in *RJR Nabisco* which required *Morrison's* "focus" test be applied to ATS claims.[160] Because the Supreme Court indicated in *Kiobel* that the presumption against extraterritoriality applies to the ATS, analysis proceeds to the second step, which asks whether the case involves a domestic application of the statute, by looking to the statute's "focus."[161]

Key for the purposes of this case, the Ninth Circuit rejected the defendants' argument that acts of assistance which took place in the United States were irrelevant because the extraterritoriality analysis should focus on the location where the principal offense—rather than the location of the alleged aiding and abetting—took place.[162] Instead, the court found that "the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States" and held "that the foregoing narrow set of domestic conduct is relevant to the ATS's focus."[163] While the court's finding in regard to domestic corporate liability is significant for future ATS litigation, its simultaneous application of the "focus" test to "aiding and abetting" liability for those corporations and their agents may portend a continued vitality for the ATS in that circuit.[164]

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159. *See Nestle II*, 906 F.3d at 1125:

> In the first appeal of this case, we reasoned that '*Morrison* may be informative precedent for discerning the content of the touch and concern standard, but the opinion in *Kiobel II* did not incorporate *Morrison*'s focus test. *Kiobel II* did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt.

160. *Nestle II*, 906 F.3d at 1123 ("The legal landscape has shifted since we last considered this case, including during the pendency of this appeal. The Supreme Court's decisions in *Jesner* and *RJR Nabisco, Inc.* . . . require us to revisit parts of *Nestle I*."); *see* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) ("*Morrison* and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues.").

161. *See id.* at 1125.

162. *See id.*

163. *Id.* at 1126.

164. *See Nestle I*, 766 F.3d at 1023–27 (discussing aiding and abetting liability under the ATS); *infra* Part II.B.4.

iii. Whither the ATS? Status of the ATS in Light of *Jesner*

Nevertheless, the ATS is suffering a death by a thousand cuts at the Supreme Court. Every time the Court has weighed in on the ATS it has progressively restricted its scope and limited its reach. To date, the Supreme Court has never ruled in the plaintiff's favor in an ATS case,[165] and the current makeup of the Court gives little hope of that changing anytime soon. *Jesner*'s prohibition of foreign corporate liability, combined with *Kiobel*'s presumption against extraterritoriality and the "great caution" and "vigilant doorkeeping" required by *Sosa*'s two-step test, suggests that very few cases will pass the Supreme Court's requirements for ATS jurisdiction.[166]

If, in fact, the Court were to revisit *Sosa* and conclude that federal courts do not have discretion under the ATS to recognize new violations of modern international norms, then there is a possibility that future ATS claims could be limited to the three cases that the Court claims were recognized as actionable violations of the law of nations in 1789: (1) piracy; (2) interference with the rights of ambassadors; and (3) violations of safe conducts.[167] Further, under *Kiobel*, these cases would need to be "foreign squared" with a U.S. defendant and "touch and concern" the United States "with sufficient force to overcome the presumption against extraterritoriality."[168] In such a case, the Supreme Court will have effectively neutralized the ATS as a means for victims of international human rights abuses to seek relief in U.S. federal court, closing the courthouse door and

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165. *See* MULLIGAN, *supra* note 15, at 21. An interesting wildcard in future ATS litigation at the U.S. Supreme Court, as well as in a challenge to the extraterritorial reach of Section 354.8, is Justice Brett Kavanaugh. In his majority opinion in *Kiobel*, Chief Justice Roberts cited a dissent by then-Judge Kavanaugh in support of the proposition that Congress never intended for federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign, as that could generate diplomatic strife. *See Kiobel*, 569 U.S. at 124 (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C Cir. 2011) (Kavanaugh, J., dissenting in part)).

166. *See* Ursula Tracy Doyle, *The Whole Wide World: Recognizing Jus Cogens Violations Under the Alien Tort Statute*, 24 BUFF. HUM. RTS. L. REV. 45, 46 (2017–2018); *see also* Candra Connelly, *The Alien Tort Statute: "An Avant-Garde Tool for Human Rights" or a Camouflaged Curse?*, 87 U. CIN. L. REV. 203, 224 (2018) ("The Supreme Court's failure to recognize corporate liability in the ATS context does not serve as a categorical bar to individuals seeking redress, rather such individuals must jump over more hurdles to bring suit.").

167. *See* MULLIGAN, *supra* note 15, at 21.

168. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

ending the "Era of the ATS" that began with *Filártiga*.[169] Now, with a greater appreciation of just how much the Supreme Court has diminished the ATS as a means to seek redress in federal court for international human rights abuses in the thirty years since *Filártiga*, the scope of how widely California has opened its courthouse doors to those same victims will become apparent.

II. WHAT THE CALIFORNIA LEGISLATURE AUTHORIZED AND ITS CRITICAL IMPORTANCE IN THE POST-*JESNER* ERA

A. What Is California Code of Civil Procedure Section 354.8 and What Does It Provide?

AB-15 added Section 354.8 to the California Code of Civil Procedure ("Section 354.8"), which created a ten-year statute of limitations to bring actions for specified offenses when the conduct would also constitute torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity, as defined therein.[170]

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169. *See* MULLIGAN, *supra* note 15, at 21 ("Such a holding could cabin the scope of ATS jurisdiction so significantly that it potentially could relegate the statute to its status during the long dormancy in which it was a rarely invoked jurisdictional provision.").

170. *See* MERRILEES, *supra* note 13, at 1; *see also* Hoffman & Stephens, *supra* note 35, at 19 n.60 (the ATS contains no statute of limitations, however courts which have considered the issue have applied the 10-year statute of limitations under the Torture Victim Protection Act, 28 U.S.C. § 1350 (2018)). California courts have also recognized a delayed discovery rule, which may in some cases toll a statute of limitations:

> We conclude that, under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis.

Fox v. Ethicon Endo-Surgery, Inc., 110 P.3d 914, 917 (Cal. 2005).

Specifically, Section 354.8(1) allows a victim up to ten years to bring a civil tort claim for assault,[171] battery,[172] or wrongful death[173] when a victim can establish that the underlying conduct constituting the tort would also constitute an act of torture,[174] genocide,[175] a war crime,[176] an attempted extrajudicial killing,[177] or a crime against

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171. CAL. CIV. PROC. CODE § 354.8(a)(1) (Deering 2019).

172. *Id.*

173. CAL. CIV. PROC. CODE § 354.8(a)(2) (Deering 2019).

174. CAL. CIV. PROC. CODE § 354.8(a)(1)(A) (Deering 2019) ("An act of torture, as described in Section 206 of the Penal Code."). The California Penal Code describes torture as follows:

> Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury . . . upon the person of another, is guilty of torture. The crime of torture does not require any proof that the victim suffered pain.

CAL. PENAL CODE § 206 (Deering 2019).

175. CAL. CIV. PROC. CODE § 354.8(a)(1)(B) (Deering 2019) ("An act of genocide, as described in Section 1091(a) of Title 18 of the United States Code."). Genocide is described as follows:

> Basic offense. Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such--(1) kills members of that group; (2) causes serious bodily injury to members of that group; (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques; (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part; (5) imposes measures intended to prevent births within the group; or (6) transfers by force children of the group to another group;
>
> shall be punished as provided in subsection (b).

Genocide Convention Implementation Act of 1987, 28 U.S.C. § 1091(a) (2018). The Genocide Convention Implementation Act was the implementing legislation for the Convention on the Prevention and Punishment of the Crime of Genocide, which the United States signed in 1948, but did not ratify until 1986. *See* John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 469 n.186 (2015) (explaining that the Genocide Convention Implementation Act incorporated the substance of the Convention on the Prevention and Punishment of the Crime of Genocide into U.S. law).

176. CAL. CIV. PROC. CODE § 354.8(a)(1)(C) (Deering 2019) ("A war crime, as defined in Section 2441 of Title 18 of the United States Code."). A war crime is defined as follows:

> Definition. As used in this section the term "war crime" means any conduct--(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or

humanity.[178] It also provides a ten-year statute of limitations for bringing a claim for the taking of property in violation of international law to which either of the following applies: "(1) that

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> any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a grave breach of common Article 3 (as defined in subsection (d)) when committed in the context of and in association with an armed conflict not of an international character; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

18 U.S.C. § 2441(c) (2018).

177. CAL. CIV. PROC. CODE § 354.8(a)(1)(D) (Deering 2019) ("An attempted extrajudicial killing, as defined in Section 3(a) of Public Law 102-256."). An extrajudicial killing is defined as follows:

> Extrajudicial Killing. For the purposes of this Act, the term "extrajudicial killing" means a deliberated 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.

Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73, 73 (2018).

178. CAL. CIV. PROC. CODE § 354.8(a)(1)(E)(i) (Deering 2019). California law defines "crimes against humanity" as follows:

> For purposes of this paragraph, "crimes against humanity" means any of the following acts as part of a widespread or systematic attack directed against a civil population, with knowledge of the attack: (I) Murder. (II) Extermination. (III) Enslavement. (IV) Forcible transfer of population. (V) Arbitrary detention. (VI) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. (VII) Persecution on political, race, national, ethnic, cultural, religious, or gender grounds. (VIII) Enforced disappearance of persons. (IX) Other inhuman acts of similar character intentionally causing great suffering, serious bodily injury, or serious mental injury.

CAL. CIV. PROC. CODE § 354.8(a)(1)(E)(ii) (Deering 2019); *cf*. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, art. 7, 37 I.L.M. 999, 1004, 2187 U.N.T.S. 90, 93 (entered into force July 1, 2002) (the definition of "crimes against humanity" in § 354.8(a)(1)(E)(ii) is drawn directly from the Rome Statute).

property, or any property exchanged for such property, is present in the United States in connection with a commercial activity carried on in the United States by a foreign state; or (2) that property, or any property exchanged for such property, is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."[179] An action seeking benefits under an insurance policy where the claim arises out of the conduct constituting a human rights violation is also subject to the ten-year statute of limitations.[180] A prevailing plaintiff bringing suit under this section may be awarded reasonable attorney's fees and litigation costs including, but not limited to, expert fees and costs.[181]

The potential scope of what California has done in enacting Section 354.8 is breathtaking. The legislature has articulated a clear intent that the state's courthouse doors be opened to allow a forum for victims of international human rights abuses to seek redress.[182] California's potential as a venue for human rights litigation is significant. This is not the case of a small or politically marginal venue opening its doors. With a population of approximately thirty-nine million people, California is the largest state by population, and its state-level gross domestic product (GDP) of $2.7 trillion makes it the fifth largest economy in the world, ahead of the United Kingdom.[183] California's court system is not only the largest in the United States, serving 12% of the U.S. population, but with 2000 judicial officers and more than six million cases, it is also one of the largest in the world.[184] Over the last decade, the California Supreme Court has accepted approximately 83 new cases for review a year, and for the five years from 2012 to 2018, it issued an average of 103 published opinions a year, in comparison to 82 published opinions per

179. CAL. CIV. PROC. CODE § 354.8(a)(3)(A)–(B) (Deering 2019).

180. CAL. CIV. PROC. CODE § 354.8(a)(4) (Deering 2019).

181. CAL. CIV. PROC. CODE § 354.8(d) (Deering 2019).

182. *See* MERRILEES, *supra* note 13, at 2–3.

183. *See* Jonathan J. Cooper, *California Now World's 5th Largest Economy, Surpassing UK*, AP NEWS (May 4, 2018), https://apnews.com/dfe5adff6d3640249e63f5637dfeb995 [https://perma.cc/F57C-XG6M].

184. *See* JUDICIAL COUNCIL OF CALIFORNIA, 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2006–2007 THROUGH 2015–2016, at 4 (2017), http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf [https://perma.cc/W6G7-R35N]; JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: CALIFORNIA JUDICIAL BRANCH 1 (Feb. 2018), http://www.courts.ca.gov/documents/California_Judicial_Branch.pdf [https://perma.cc/XWT2-LY7Y].

year by the United States Supreme Court during the same period.[185] California's state court system has both the resources and the sophistication to be a key player on the international human rights litigation scene. The next section will discuss how Section 354.8 specifically addresses the "problem areas" that have been the subject of ATS litigation over the years, and how the California statute provides a clarity that is missing in the federal ATS.

B. Moving Past "Vigilant Doorkeeping"—Addressing the "Problem Areas" that Have Been the Subject of ATS Litigation Over the Years

1. California Courts Have General Jurisdiction and Are Not Limited by Federal Constraints on Subject Matter Jurisdiction

While it is helpful to evaluate the merits and potential of Section 354.8 in comparison to the ATS, one key difference between the two is that neither the California Legislature nor courts are subject to the same constitutional restraints as Congress and the federal courts.[186] Therefore, the Article III constraints on federal judicial power that have been at the heart of all efforts to reign in the reach of the ATS do not apply to a California state court exercising its

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185. *See* Goodwin Liu, *How the California Supreme Court Actually Works: A Reply to Professor Bussel*, 61 UCLA L. REV. 1246, 1252, 1262 (2014).

186. In 1854, the California Supreme Court stated:

> [T]he Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States.

People v. Coleman, 4 Cal. 46, 49 (Cal. 1854). In 1891, the Court specified:

> [T]he legislature is vested with the whole of the legislative power of the state, and . . . it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power.

In re Madera Irrigation District, 28 P. 272, 307 (Cal. 1891); *see* CAL. CONST. art. VI, § 10 (original jurisdiction of courts); *see also* Richardson v. Superior Court of Los Angeles County, 32 P.2d 405, 405 (Cal. Ct. App. 1934) (holding that the superior court is a court having jurisdiction in all civil actions and proceedings, with stated exceptions, and it is a court of general jurisdiction in equity).

authority to hear a matter brought under California state law.[187] By adding Section 354.8 to its Code of Civil Procedure, and thereby expanding the definition of what constitutes particular tort causes of action, California has addressed several of the problem areas that have served as a basis for the U.S. Supreme Court to undermine the ATS. In doing so, the California statute has provided a more streamlined, efficient means for victims of international human rights abuses to find their way into an American courthouse. A review of several of those key problem areas addressed by the California statute follows.

2. California Specifically Identifies the Causes of Action Available to Litigants

The U.S. Supreme Court has read *Sosa* to establish a two-step test for courts to recognize a common-law cause of action under the ATS.[188] Section 354.8 bypasses the *Sosa* problem of needing to read the tea leaves and discern what causes of action may or may not be available to a litigant by specifically identifying those available, as well as the conduct giving rise to those torts, under California law. This is a key departure from the ATS, given that *Sosa* indicated a reluctance "to infer intent to provide a private cause of action where the statute does not supply one expressly," particularly where that cause of action needed to be discerned from international legal norms.[189] It has historically been the prerogative of the states, as a

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187. Professor Zachary D. Clopton explains:

> One also could imagine state statutes directly incorporating international law. What about a state alien tort statute providing state-court jurisdiction for violations of the law of nations? State statutes could specify causes of action for violations of certain international norms, and such statutes even could provide a cause of action without requiring the plaintiff to show injury in fact, since Article III standing is only a requirement for *federal* jurisdiction.

Zachary D. Clopton, *State Law Litigation of International Norms: Horizontal and Vertical Dimensions*, 108 AM. SOC'Y INT'L L. PROC. 433, 434 (2014).

188. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018).

189. *Id.* at 727. As Professor Donald Earl Childress III explains:

> The major benefit of plaintiffs pleading state or foreign law in federal courts is that it avoids many substantive questions associated with pleading international law under the ATS. By pleading state or foreign law, courts do not have to determine international law and undertake a post-Sosa analysis to determine whether the development of federal common law is appropriate in a given case. Plaintiffs could thus use state or

function of their police power, to provide legal redress in tort as they see fit. California has done so in this case.[190] Rather than forcing its courts to act as "vigilant doorkeeper" or grapple with the question of whether allowing a claim to proceed is a "proper exercise of judicial discretion," the California Legislature has clearly identified those causes of action available to a plaintiff when the allegedly tortious conduct also constitutes the specified human rights violations. A discussion of the specific torts, and how they are defined under California law, elucidates the scope of Section 354.8 and serves as an important bridge from the world of the ATS back into California practice and procedure. Knowing how California defines each of the tort causes of action available under Section 354.8 gives victims and practitioners a clearer roadmap for framing their claims.

i. Assault, Battery, or Both[191]

In California the elements of a cause of action for assault are defined by case law as follows: (1) defendant acted with intent to cause harmful or offensive contact, or threatened to touch plaintiff in a harmful or offensive manner; (2) plaintiff reasonably believed she was about to be touched in a harmful or offensive manner or it reasonably appeared to plaintiff that defendant was about to carry out the threat; (3) plaintiff did not consent to defendant's conduct; (4) plaintiff was harmed; and (5) defendant's conduct was a substantial factor in causing plaintiff's harm.[192]

> foreign law to escape substantive-law limitations that have been imposed on ATS cases by federal courts.

Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 740 (2012).

190. *See Sosa*, 542 U.S. at 727 ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.").

191. *See* CAL. CIV. PROC. CODE § 354.8(a)(1) (Deering 2019).

192. *See* So v. Shin, 151 Cal. Rptr. 3d 257, 269 (Cal. Ct. App. 2013) (citing CACI No. 1301; Plotnik v. Melhaus, 146 Cal. Rptr. 3d 585, 597 (Cal. Ct. App. 2012) ("Generally speaking, an assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present.") (internal quotation marks omitted)); Lowry v. Standard Oil Co. of California, 146 P.2d 57, 60 (Cal. Ct. App. 1944) ("A civil action for assault is based upon an invasion of the right of a person to live without being put in fear of personal harm."); Kiseskey v. Carpenters' Trust for S. Cal., 192 Cal. Rptr. 492, 498 (Cal. Ct. App. 1983) ("The tort of assault is complete when the anticipation of harm occurs.").

The essential elements of battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching.[193]

ii. Wrongful Death[194]

Unlike assault and battery, California's cause of action for wrongful death is defined by statute. The Code of Civil Procedure section 377.60 notes:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons . . . (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.[195]

The purpose of the wrongful death statute "is to provide compensation for the loss of companionship and other losses resulting from the decedent's death."[196] An action for wrongful death is for damages caused by injuries to the plaintiffs as heirs, and not for injuries inflicted upon the decedent.[197]

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193. *See So*, 151 Cal. Rptr. 3d at 269 (citing CACI No. 1300; Kaplan v. Mamelak, 75 Cal. Rptr. 3d 861, 867 (Cal. Ct. App. 2008)); Rains v. Superior Court, 198 Cal. Rptr. 249, 252 (Cal. Ct. App. 1984) ("A battery is a violation of an individual's interest in freedom from intentional, unlawful, harmful or offensive uncontested contacts with his or her person."); Bartosh v. Banning, 59 Cal. Rptr. 382, 387 (Cal. Ct. App. 1967) (assault and battery are intentional torts, negligence is not involved); People v. Mansfield, 245 Cal. Rptr. 800, 802–03 (Cal. Ct. App. 1988) (it has long been established, both in tort and criminal law, that the least touching may constitute battery, force is not required, it need not be violent or severe, it need not cause bodily harm, pain, or leave a mark).

194. *See* CAL. CIV. PROC. CODE § 354.8(a)(2) (Deering 2019).

195. CAL CIV. PROC. CODE § 377.60 (Deering 2019).

196. Phraner v. Cote Mark, 63 Cal. Rptr. 2d 740, 742 (Cal. Ct. App. 1997) (quoting Marks v. Lyerla, 2 Cal. Rprt. 2d 63, 66 (Cal. Ct. App. 1991)).

197. *See* Kunakoff v. Woods, 332 P.2d 773, 775 (Cal. Ct. App. 1958); Fiske v. Willkie, 154 P.2d 725, 727 (Cal. Ct. App. 1945).

iii. Conversion[198]

Section 354.8(a)(3) further provides a ten-year statute of limitations for "an action for the taking of property in violation of international law."[199] Although the statutory text does not make a distinction between real and personal property, the language of subsections A and B suggest that the California Legislature intended to speak about personal property. Nevertheless, absent language to the contrary, there is no reason to assume that they did not intend a broad reading of the term "property" to include an action for taking of real property.[200] However, under California law the tort of conversion applies to personal property, not real property.[201]

The basic elements of the tort of conversion in California are (a) plaintiff's ownership or right to possession of personal property, (b) defendant's disposition of property in a manner inconsistent with plaintiff's property rights, and (c) resulting damages.[202] Taking the property from the plaintiff's possession is a conversion.[203] Even in the case where plaintiff consents, if that consent is obtained by fraud an action for conversion will lie.[204] There need not be a manual taking of the property; any wrongful interference with plaintiff's possession

198. *See* CAL. CIV. PROC. CODE § 354.8(a)(3) (Deering 2019).

199. *Id.*

200. *See* CAL. CIV. PROC. CODE § 1858 (Deering 2019) ("In the construction of a statute . . . the Judge is simply to ascertain . . . what is in terms or in substance contained therein . . . and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.").

201. *See* Salma v. Capon, 74 Cal. Rptr. 3d 873, 889 (Cal. Ct. App. 2008) (finding that the tort of conversion applies to personal property, not real property).

202. *See* Fremont Indem. Co. v. Fremont Gen. Corp., 55 Cal. Rptr. 3d 621, 638 (Cal. Ct. App. 2007); *see also* WITKIN, SUMMARY OF CALIFORNIA LAW § 810(a)(3) 5 (11th ed. 2019) ("An action for conversion properly lies only where there is some substantial interference with possession or the right to possession, and the plaintiff in a conversion suit recovers the full[] value of the property, in effect forcing the defendant to buy it.") (citing Zaslow v. Kroenert, 176 P.2d 1, 7 (Cal. 1946)).

203. *See* Ferraro v. Pac. Fin. Corp., 87 Cal. Rptr. 226, 231 (Cal. Ct. App. 1970).

204. *See* Elliott v. Federated Fruit & Vegetable Growers, 291 P. 681, 683 (Cal. Dist. Ct. App. 1930).

may suffice.[205] The act constituting conversion must be knowing or intentional, but a wrongful intent is not necessary.[206]

Before leaving the discussion of this subsection, it should also be noted that the California Legislature did not define "international law," and therefore the scope of the actions which potentially could fall under this section is likewise broad. Unlike subsections 354.8(a)(2) or (4), which make specific reference to the tortious conduct "described in paragraph (1)" as giving rise to a cause of action, subsection (a)(3) has no such limiting language and is, in fact, the only one to speak broadly of a "violation of international law" as the underlying tortious trigger.

iv. Action Seeking Benefits Under an Insurance Policy[207]

Section 354.8(a)(4) provides a ten-year statute of limitations for "[a]n action seeking benefits under an insurance policy where the insurance claim arises out of any of the conduct described in paragraphs (1) to (3), inclusive."[208] Under California law, the "statute of limitations in insurance litigation depends upon the nature of the cause of action asserted."[209] In California, the statute of limitations to bring an action for breach of a written contract is four years.[210] Most claims that seek the policy benefit itself will fall under the four-year statute of limitations. However, claims for insurance bad faith—wherein plaintiffs allege breach of the implied covenant of good faith and fair dealing—may be limited to two years if they sound

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205. *See* Farmers Ins. Exch. v. Zerin, 61 Cal. Rptr. 2d 707, 709 (Cal. Ct. App. 1997).

206. *See* Henderson v. Sec. Nat'l Bank, 140 Cal. Rptr. 388, 391 (Cal. Ct. App. 1977) ("[T]he action of conversion . . . rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith . . . knowledge nor ignorance, are of the gist of the action.").

207. *See* CAL. CIV. PROC. CODE § 354.8(a)(4) (Deering 2019).

208. *Id.*

209. Heighley v. J.C. Penney Life Ins. Co., 257 F. Supp. 2d 1241, 1257 (C.D. Cal. 2003) (citing Richardson v. Allstate Ins. Co., 172 Cal. Rptr. 423, 426 (Cal. Ct. App. 1981)).

210. *See* CAL. CIV. PROC. CODE § 337(a) (Deering 2019); Krieger v. Nick Alexander Imports, Inc., 285 Cal. Rptr. 717, 726–27 (Cal. Ct. App. 1991) (finding that if a cause of action sounds in contract and tort, the plaintiff is entitled to the benefit of the four-year statute of limitations on a written contract if she elects to proceed on a contract theory).

exclusively in tort.[211] Irrespective of the theory under which plaintiffs seeking benefits under an insurance policy proceed under Section 354.8(a)(4), the availability of a ten-year statute of limitations will mean that in most cases an additional six-year window will be open to litigate the insurance aspects of claims brought under this section.[212] This amplifies the likelihood that as plaintiffs avail themselves of Section 354.8 to name corporate defendants, insurance coverage issues related to both to the duty to defend[213] and the duty to indemnify[214] may become a hotly litigated area as both corporations

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211. *See* CAL. PROC. CODE § 339(1) (Deering 2019); *see also* Egan v. Mut. of Omaha Ins. Co., 620 P.2d 141, 145 (Cal. 1979) ("[T]he law implies in every contract a covenant of good faith and fair dealing. The implied promise requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement.") (citation omitted); *Heighley*, 257 F. Supp. 2d at 1257 (where plaintiff seeks tort remedies for an alleged breach of the implied covenant of good faith and fair dealing, the claim is governed under and is barred by the two-year statute of limitations under Code of Civil Procedure section 339, subdivision 1).

212. *See* CAL. CIV. PROC. CODE § 354.8(b) (Deering 2016) ("An action brought under this section shall not be dismissed for failure to comply with any previously applicable statute of limitations.").

213. *See* Hartford Cas. Ins., Co. v. J.R. Mktg., L.L.C., 353 P.3d 319, 321 (Cal. 2015) ("This court has long maintained that if any claims in a third party complaint against a person or entity protected by a commercial general liability (CGL) insurance policy are even potentially covered by the policy, the insurer must provide its insured with a defense to all the claims."); Horace Mann Ins. Co. v. Barbara B., 846 P.2d 792, 795 ("It is by now a familiar principle that a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity . . . . '[T]he carrier must defend a suit which *potentially* seeks damages within the coverage of the policy.'") (quoting Gray v. Zurich Ins. Co., 65 Cal. 2d 263, 275 (1966)). Implicit in this rule is the principle that the duty to defend is broader. *Id.*

214. Insurers have a duty to pay the proceeds of the losses of an insured. From an insurer's perspective, this is their most important obligation—this is especially true in first-party insurance. This duty to pay the proceeds of an insured is based on the contract between the insurer and insured—in fact, the insurer makes an express promise to fulfill this duty when losses occur. *See* ROBERT H. JERRY II & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW § 90 (5th ed. 2012) ("In liability insurance, the insurer promises to indemnify the insured for sums the insured becomes legally obligated to pay to others, and this duty probably figures more prominently in the insured's expectations than the insurer's duty to defend the insured against covered claims or suits."); Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp., 876 P.2d 1062, 1066 n.6 (Cal. 1994) ("Indemnity is distinguished from the related doctrine of contribution in that the latter 'presupposes a common liability which is shared by the joint tortfeasors on a pro rata basis.'") (quoting Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75 (1960)); *see also* Expressions at Rancho Niguel Ass'n v. Ahmanson Devs., Inc., 103 Cal. Rptr. 2d 895, 898 (Cal. Ct. App. 2001) ("The right

and insurance carriers seek to allocate risk.[215] Further discussion of these coverage issues goes beyond the scope of this Article.

3. No Requirement that the Claimant Be an "Alien"

While it may be helpful to think of Section 354.8 as a "state ATS," one key distinction between it and the federal ATS is that jurisdiction is not limited to claims filed by aliens, i.e., non-U.S. nationals.[216] Therefore, California has opened its courthouse doors to U.S. claimants to seek ATS-style relief in a manner which has never been available in federal court.

4. "Foreign-Cubed" Situations

Whereas one reading of *Kiobel* is that the ATS is only available in a "foreign-squared" case with a foreign plaintiff and a U.S. defendant, Section 354.8 not only allows such a case with a U.S. plaintiff, but on its face also provides for a "foreign-cubed" case involving a foreign plaintiff and a foreign defendant.[217]

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to indemnity flows from payment of a joint legal obligation on another's behalf. The elements . . . for indemnity are (1) a showing of fault on the part of the indemnitor and (2) resulting damages to the indemnitee for which the indemnitor is contractually or equitably responsible.") (citations omitted).

215. It is important that the insurance industry includes human rights in its risk management framework. Failing to consider human rights can lead to the insurance industry facing reputational, legal, and transactional risks. *See, e.g.*, CRO FORUM, HUMAN RIGHTS AND CORPORATE INSURANCE 14 (2014) https://www.thecroforum.org/wp-content/uploads/2014/11/human-rights-and-corporate-insurance-november-2014-2.pdf [https://perma.cc/LV3H-VRPG] ("[E]xpectations of the industry's stakeholders including civil society and policy makers are rising when it comes to human rights. Human rights standards are increasingly being built into international agreements and local regulations. There is also often a strong correlation between respecting human rights and the quality of insured risks."); Eric Marcks, *Avoiding Liability for Human Rights Violations in Project Finance*, 22 ENERGY L.J. 301, 318 (2001) ("Insurance may not cover the human rights risk, however, as insurance coverage does not extend to blameworthy acts of the insured."). The history and development of litigation arising out of Holocaust-claim litigation may prove instructive as it pertains to coverage. *See generally* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (discussing cases litigated in California under state law theories).

216. ALFORD, *supra* note 37, at 1768. *Cf.* CAL. CIV. PROC. CODE § 354.8 (Deering 2019).

217. *See supra* notes 108–112 and accompanying text.

5. No Requirement that the Defendant Be a Natural Person

There is no requirement under Section 354.8 that the defendant be a natural person. Therefore corporations, both foreign and domestic, may be named as defendants and are otherwise subject to tort liability in California.[218] Furthermore, a corporation may be held liable for the intentional torts committed by its employees.[219] In California, corporate director or officer status "neither immunizes a person from individual liability [for tortious conduct] nor subjects him or her to vicarious liability" for such acts.[220] Generally, "directors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done."[221]

However, the California Supreme Court has established two potential avenues for maintaining a tort claim against a corporate officer or director in his or her personal capacity.[222] Given the gravity of the underlying conduct giving rise to a claim under Section 354.8, California courts may be inclined to apply the responsible corporate officer doctrine as a means of attaching personal liability to corporate

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218. *See* CAL. CORP. CODE § 105 (West 2019) ("A corporation or association may be sued as provided in the Code of Civil Procedure.").

219. *See* Carr v. William C. Crowell Co., 171 P.2d 5, 6 (Cal. 1946) ("It is settled that an employer is liable for willful and malicious torts of his employee committed in the scope of the employment."); Lisa M. v. Henry Mayo Newhall Mem'l Hosp., 907 P.2d 358, 361 (Cal. 1995) ("While the employee thus need not have intended to further the employer's interests, the employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work.").

220. Frances T. v. Village Green Owners Ass'n, 723 P.2d 573, 581 (Cal. 1986).

221. PMC, Inc. v. Kadisha, 93 Cal. Rptr. 2d 663, 670 (Cal. Ct. App. 2000) (internal quotation marks omitted).

222. *See id.* at 671 (internal quotation marks omitted):

> [A] plaintiff must first show that [(1)] the director specifically authorized, directed[,] or participated in the allegedly tortious conduct; or [(2)] that although they specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, they negligently failed to take or order appropriate action to avoid the harm. The plaintiff must also allege and prove that an ordinarily prudent person, knowing what the director knew at that time, would not have acted similarly under the circumstances.

officers.[223] Under either analysis, California's broad discovery statute means that claimants will be able to seek documents and depose witnesses regarding what particular corporate boards and directors knew or should have known in relation to what their agents were doing abroad.[224] Plaintiffs' discovery requests will be bolstered by the Ninth Circuit's finding in *Nestle II* that executives in the United States may plausibly perpetuate overseas violations of the law of nations.[225] Certainly, California plaintiffs will want to advance the same argument against corporate defendants.

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223. *See* Valorie Cogswell, *Catching the Rabbit: The Past, Present, and Future of California's Approach to Finding Corporate Officers Civilly Liable Under the Responsible Corporate Officer Doctrine*, 33 ENVIRONS ENVTL. L. & POL'Y J. 343 (2010) (discussing California's potential willingness to more rigorously apply the responsible corporate officer doctrine in civil contexts). As outlined in People v. Roscoe, 87 Cal. Rptr. 3d 187, 189 (Cal. Ct. App. 2008):

> The responsible corporate officer doctrine was developed by the United States Supreme Court to hold corporate officers in responsible positions of authority personally liable for violating strict liability statutes protecting the public welfare. . . . It is a common law theory of liability separate from piercing the corporate veil or imposing personal liability for direct participation in tortious conduct.

The California Court of Appeal has used a three-step test for imposing liability on a corporate officer under the doctrine. As explained in *Roscoe*, 87 Cal. Rptr. 3d at 85 (internal quotation marks omitted):

> [T]he individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.

224. *See* CAL. CIV. PROC. CODE § 2017.010 (West 2019):

> Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, electronically stored information, tangible thing, or land or other property.

225. *See* Doe v. Nestle, S.A. (*Nestle II*), 906 F.3d 1120, 1126 (9th Cir. 2018).

6. Aiding and Abetting Liability in Tort Available in California

Accomplice liability has been fundamental to ATS claims put forward in the years after *Filártiga*.[226] Similarly, aiding and abetting liability in tort is recognized under California law and available as a theory of recovery under Section 354.8.[227] Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort.[228] "The statute of limitations for a cause of action for aiding and abetting a tort is generally the same as the underlying tort."[229] Therefore, an action under Section 354.8 based on a theory of aiding and abetting will also be subject to a ten-year statute of limitations.[230]

7. No Exhaustion Requirement in the Local Forum Before Filing Suit in California

In 1992, Congress passed the Torture Victim Protection Act ("TVPA") which created a civil cause of action for damages against any "individual who under actual or apparent authority, or color of law, of any foreign nation," subjects another individual to torture or extrajudicial killing.[231] The TVPA is codified as a note to the ATS and

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226. Lincoln, *supra* note 144, at 604; *see* Alexander K.A. Greenawalt, *Foreign Assistance Complicity*, 54 COLUM. J. TRANSNAT'L L. 531 (2016).

227. *See* Am. Master Lease LLC v. Idanta Partners, Ltd., 171 Cal. Rptr. 3d 548, 566–67 (Cal. Ct. App. 2014) (internal citations omitted). The court stated:

> California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. "Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person . . . . [L]iability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted."

228. *See* Stueve Bros. Farms, LLC v. Berger Kahn, 166 Cal. Rptr. 3d 116, 132 (Cal. Ct. App. 2013).

229. *Am. Master Lease*, 171 Cal. Rptr. 3d at 570.

230. *See* CAL. CIV. PROC. CODE § 354.8(a) (West 2019).

231. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

it is suggested that it was enacted to provide an "unambiguous basis" for the causes of action recognized by *Filártiga*.[232] Unlike the ATS, the TVPA contains a requirement that plaintiffs exhaust all "adequate and available remedies in the place in which the conduct giving rise to the claim occurred."[233] This has the practical effect of stymieing litigation under the TVPA by adding a remarkably high procedural bar before claimants can find their way into a federal courthouse. The relationship between the TVPA and the ATS is not clearly defined and litigation has resulted in a circuit split as to whether the TVPA's exhaustion requirement should be read into the ATS.[234]

Section 354.8, on the other hand, contains no explicit exhaustion requirement in the local forum and therefore a litigant in California is not required to affirmatively plead compliance therewith. Some commentators have suggested that like international tribunals, American courts should require local exhaustion of remedies before being able to proceed under the ATS.[235] However, without an explicit exhaustion requirement in the statutory text, California courts may elect to require "prudential exhaustion" as a prerequisite to exercising jurisdiction.[236] Requiring prudential exhaustion of local remedies would add a formidable barrier to relief. In this case, it may be argued that if the California Legislature intended exhaustion to serve as a prerequisite to filing suit under Section 354.8, it would have included it explicitly in the statute.[237]

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232. *See* MULLIGAN, *supra* note 15, at 8.

233. *See* 28 U.S.C. § 1350.

234. *See* MULLIGAN, *supra* note 15, at 9 n.82 (citing Enahoro v. Abubakar, 408 F.3d 877, 884–85 (7th Cir. 2005) ("We find that the [TVPA] does, in fact, occupy the field. If it did not, it would be meaningless. No one would plead a cause of action under the [TVPA] and subject himself to its requirements if he could simply plead under international law.")); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1218 (9th Cir. 2007) (exhaustion is not required at this time under the ATS).

235. *See* Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1247 (2006); Lauren Elizabeth Holtzclaw, Note, *Finding a Balance: Creating an International Exhaustion Requirement for the Alien Tort Statute*, 43 GA. L. REV. 1245, 1252 (2009).

236. *See Sarei,* 487 F.3d at 1238 (Bybee, J., dissenting) ("Even if exhaustion were not well developed in international law, we should recognize exhaustion as a prudential principle required by our domestic law, and we should recognize it for the same reasons that we require exhaustion of state, tribal[,] and administrative remedies.")

237. *See* People v. Knowles, 217 P.2d 1, 5 (Cal. 1950) ("If the words of the statute are clear, the court should not add to or alter them to accomplish a

8. Attorneys' Fees and Costs to the Prevailing Plaintiff and Availability of Punitive Damages

A fundamental difference between the ATS and Section 354.8 is that, under Section 354.8, "[a] prevailing plaintiff may be awarded reasonable attorneys' fees and litigation costs including, but not limited to expert witness fees and expenses as part of the costs."[238] The attorneys' fees provision is a strong indication of the California Legislature's intent to open the state's courthouse doors as wide as possible by providing a powerful incentive for lawyers to take these cases.[239] Here, as in several other California fee-shifting statutes, the term "prevailing plaintiff" is not defined; California courts have therefore "adopt[ed] a pragmatic approach, determining prevailing party status based on which party succeeded on a practical level."[240] Under that approach, the court exercises its discretion to determine the prevailing party by analyzing which party realized its litigation objectives.[241] A plaintiff is the prevailing party if they obtained a net monetary recovery or realized their litigation objectives, including via

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purpose that does not appear on the face of the statute or from its legislative history.").

238. CAL. CIV. PROC. CODE § 354.8(d) (West 2019).

239. *See, e.g.*, GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 9–10 (2008):

> What makes the tort remedy so attractive in the United States? The answer is very simple—money. The combination of the jury system and the contingency fee means that tort awards are large and that tort lawyers can receive monetary rewards far in excess of their hourly fee. And let us not forget that we have in mind cases of malicious behavior depriving others of their human rights: these inevitably invite punitive damage awards far in excess of compensatory damages. No other country offers all these incentives to litigate in tort rather than sit and wait for the state to pay for a criminal prosecution.

See also Kathryn A. Sabbeth, *What's Money Got to Do with It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465 (2014) ("Fee-shifting statutes . . . offer an interesting window into which kinds of lawyering Congress has determined would serve the public interest[.]"); Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 907 (2008) (discussing how efforts to shrink the federal government and the "declining role of the federal government as the guarantor of legal rights associated with the political liberalism" contributed to Congress taking active steps to "constrict . . . federal legal services").

240. *See* Graciano v. Robinson Ford Sales, Inc., 50 Cal. Rptr. 3d 273, 281–82 (Cal. Ct. App. 2006).

241. *See id.* at 282.

a settlement agreement.[242] Accordingly, "a plaintiff prevails, in essence, when he gets most or all of what he wanted by filing the action."[243] "Moreover, [a] plaintiff should not be denied attorneys' fees because resolution in the plaintiff's favor was reached by settlement," unless the agreement stipulates otherwise.[244]

The reasonableness of an attorney's fee is also within the discretion of the court.[245] The lodestar figure on which the reasonableness of an attorney's fee is measured may be adjusted up based on a number of factors, including the novelty and difficulty of the litigation and the questions involved, which may be a key factor in early litigation under Section 354.8.[246] The broad litany of items recoverable as litigation costs are specifically identified by statute.[247]

As is the case with the ATS, punitive damages are also available in California for intentional torts[248] and in cases premised on a theory of aiding and abetting.[249] Exemplary damage awards may

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242. *See* Kim v. Euromotors West/Auto Gallery, 56 Cal. Rptr. 3d 780, 786–88 (Cal. Ct. App. 2007).

243. Elster v. Friedman, 260 Cal. Rptr. 148, 151 (Cal. Ct. App. 1989) ("A plaintiff will be considered a prevailing party when the lawsuit was a catalyst motivating defendants to provide the primary relief sought or succeeded in activating defendants to modify their behavior.").

244. *Id.*

245. *See* Lealao v. Beneficial California, Inc., 97 Cal. Rptr. 2d 797, 803 (Cal. Ct. App. 2000).

246. Serrano v. Priest, 569 P.2d 1303, 1316 (Cal. 1977).

247. *See* CAL. CIV. PROC. CODE § 1033.5 (Deering 2019).

248. *See* CAL. CIV. CODE § 3294(a) (Deering 2019) ("[W]here it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."); *see also* CAL. CIV. CODE § 3294(c) (Deering 2019):

> As used in this section, the following definitions shall apply: (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

249. *See* Ayer v. Robinson, 323 P.2d 546, 549 (Cal. Ct. App. 1958) ("A party injured by an unjustified assault may recover damages not only from the actual assailant, but from any other person who aids, abets, counsels or encourages the assault.").

be limited by the U.S. Supreme Court's warning in *State Farm v. Campbell*[250] that there are procedural and substantive constitutional limits on punitive damages.[251] The potential for large punitive damage awards will also be a key factor in parties' litigation calculus under Section 354.8, especially because the California Supreme Court is inclined to promote the state's interest in deterring egregious tortious conduct and typically defers to the discretion of the trial court on questions of punitive damages.[252]

C. Importance of California as a Litigation Forum

1. California Is No Ordinary State

Twenty-six years ago, *Foreign Affairs* published an article entitled "California's Foreign Policy" where the author argued, "California is so big, and its problems so immense, that it needs its own foreign policy. In an era when economics commands foreign relations . . . [this means] a governor and legislature willing to represent the state's interests independently of Washington."[253] At the time, the article estimated that, at approximately $700 billion, California's gross domestic product was the eighth largest in the world.[254]

In the generation since, California's gross domestic product has exploded to $2.7 trillion, making it currently the fifth largest economy in the world, surpassing the United Kingdom.[255] None of this

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250. *See* State Farm Mutual Auto Ins. v. Campbell, 538 U.S. 408, 416 (2003).

251. *See id.* at 418. The Court identifies three guideposts for evaluating the propriety of awards: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.*

252. *See* Kathleen S. Kizer, Note, *California's Punitive Damages Law: Continuing to Punish and Deter Despite* State Farm v. Campbell, 57 HASTINGS L.J. 827, 832 (2004) ("[T]he California Supreme Court has shown how California courts may accommodate the U.S. Supreme Court's concerns without losing sight of the state's longstanding interest in imposing punitive damages that actually seek to deter persons from engaging in intentional tortious conduct that harms others.").

253. James O. Goldsborough, *California's Foreign Policy*, FOREIGN AFFAIRS, Spring 1993, at 88, 89.

254. *Id.* at 88.

255. *See* Cooper, *supra* note 183.

is to suggest that money alone overcomes federalism concerns, or that American foreign policy is the prerogative of the Governor of California and its Legislature, rather than the President and Congress. However, when California acts, it is not simply the case of one small state out of fifty offering its parochial view on the global economy or wagging its finger at foreign elites. On the contrary, by virtue of the size of its economy, its population relative to the United States as a whole, and its global business links, California speaks with a moral, political, and economic authority befitting that position and other countries are well-accustomed to respond accordingly.[256]

2. California Is Already an Actor on the International Human Rights Stage

In 2010, the California Legislature enacted the California Transparency in Supply Chains Act.[257] Companies subject to the Act must post disclosures of anti-trafficking efforts "on their Internet websites related to five specific areas: verification, audits, certification, internal accountability, and training."[258] Companies subject to the Act that take no action as to one, or any, of the five areas are required to comply by posting an affirmative representation to that effect.[259] The Act does not regulate the labor practices of companies required to comply or require them to take any action other than to make the disclosures, which are designed to help consumers make more educated purchasing decisions.[260] The

256. *See* Davis & Whytock, *supra* note 2, at 422 (citing Peter J. Spiro, *Foreign Affairs Federalism*, 70 U. COLO. L. REV. 1223, 1225–26 (1999) ("[T]oday, not only do other countries understand that when California acts on certain matters, it is acting alone, they also enjoy the capacity to retaliate directly and discretely against California.")).

257. California Transparency in Supply Chains Act, Cal. Legis. Serv. Ch. 556, S.B. No. 657 (2010) (codified at CAL. CIV. CODE § 1714.43 and Cal. Rev. & Tax. Code § 19547.5). The Act requires "any company doing business in California that has annual worldwide gross receipts of more than $100 million and that identifies itself as a retail seller or manufacturer on its California tax return" to disclose on their websites, or by written disclosure if they do not have a website, their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale." CAL. DEP'T OF JUSTICE, THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE i (2015).

258. *Id.*; *see also* CAL. CIV. CODE § 1714.43(c) (Deering 2019).

259. *See* CAL. DEP'T OF JUSTICE, *supra* note 257, at 4.

260. *See id.* at 3.

exclusive remedy under the Act is an action for injunctive relief brought by the Attorney General.[261]

The impact of California law in the international arena was demonstrated in 2015 when the United Kingdom adopted its Modern Slavery Act,[262] specifically making reference to the Transparency in Supply Chains Act. When the bill was first introduced in 2013, it contained no provision for requiring businesses to audit and report on modern slavery in their supply chains.[263] The final bill included a comprehensive scheme requiring business to report on transparency throughout their supply chains.[264] In the consultation paper put out by the British Government requesting public comment and feedback on the proposed amendment, California's Transparency in Supply Chains Act was specifically referenced as the catalyst for adding a similar framework to the UK's Modern Slavery Act.[265] In May 2019, the Netherlands passed a supply chain due diligence law, joining

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261. *See* CAL. CIV. CODE § 1714.43(d) (Deering 2019).

262. Modern Slavery Act 2015, c. 30, sch. 1 (Eng.).

263. *See* Michael Pollitt, *Unfinished Abolitionists: Britain Returns to the Frontline of the War on Slavery*, NEW STATESMAN (Oct. 16, 2014), https://www.newstatesman.com/politics/2014/10/unfinished-abolitionists-britain-returns-frontline-war-slavery [https://perma.cc/BR23-SLY3].

264. Modern Slavery Act 2015, c. 30, § 54, sch. 1 (Eng.).

265. *See* HOME OFFICE, MODERN SLAVERY AND SUPPLY CHAINS CONSULTATION, 2015, at 10 (U.K.):

> Transparency in supply chains in relation to modern slavery is an issue that has been discussed and debated for a number of years. In 2010, the state of California introduced the "California Transparency in Supply Chains Act" (the "California Act") which requires retail and manufacturing businesses with worldwide annual gross receipts over $100m, doing a certain amount of their business in California, to disclose their efforts to eradicate slavery from their supply chains. In the UK, the idea was discussed by the Centre for Social Justice in their report "It Happens Here" (published March 2013), which called for legislation modelled on the California Act.

See also HOME OFFICE, MODERN SLAVERY AND SUPPLY CHAINS GOVERNMENT RESPONSE, 2015, at 6 (U.K.):

> A similar transparency provision was introduced in California in 2012 . . . . Our approach draws on the legislation in California but goes further in three important ways. The Modern Slavery Act provision covers: organizations carrying out any part of their business in the UK (there is no requirement for a business to meet a certain level of "footprint" in the UK); all sectors, not just retail and manufacturing; and both goods and services (whereas California covers only supply chains for goods).

Australia and France, which have enacted such laws, and the German and Canadian governments which are considering them.[266] All of this points not only to the fact that when California legislates on human rights issues other countries take notice, but that California has a vested interest in opening its courthouse doors to precisely these kinds of claims.[267]

3. Foreign Countries and Corporations Adjust Their Behavior and Manufacturing Practices to Accommodate California Law

In response to the argument that California is illegitimately conducting its own foreign policy and appropriating federal prerogatives for itself is the rejoinder that foreign countries and corporations have long been accustomed to dealing with California *qua* California and adjusting their behaviors and manufacturing practices to accommodate California law.[268] There is nothing novel about the fact that state-level regulations in certain industries are stricter than federal standards.[269] In fact, a number of countries have already executed bilateral and multilateral accords with California on issues related to trade and investment, including China, India, Israel, Japan, Mexico, and Spain.[270]

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266. *See* Client Alert, *Supply Chain Due Diligence Laws Go Orange—Netherlands Latest to Pass Legislation*, AKIN GUMP STRAUSS HAUER & FELD LLP (May 20, 2019), https://www.akingump.com/en/news-insights/supply-chain-due-diligence-laws-go-orange-netherlands-latest-to.html [https://perma.cc/CYP5-WW8L].

267. *See* Hoffman & Stephens, *supra* note 35, at 22:

> In a few instances, when judges, jurors, or members of the public ask why a case is in a local state court, the answer may be that the claims involve universal wrongs. But far more often the answer will strike closer to home: the case is in a local court because the defendant lives in the neighborhood; because the corporation is a citizen of the state, with local headquarters; or because local residents are among the victims of the human rights abuses.

268. *See* Black v. Vermont Marble Co., 1 Cal. App. 718, 82 P. 1060, 1061 (Cal. Dist. Ct. App. 1905) (stating that when a foreign corporation enters California, it is required to comply with state laws in the conduct of its business).

269. *See* Davis & Whytock, *supra* note 2, at 456 ("Foreign countries are aware that the United States is a federal system, with courts at the state and federal levels that are independent from the other branches of government.").

270. *International Agreements*, CAL. GOVERNOR'S OFF. OF BUS. & ECON. DEV., http://www.business.ca.gov/Programs/International-Affairs-and-Business-Development/InternationalAgreements [https://perma.cc/UC7Y-P4P6].

On climate issues California has long been an advocate of increased environmental protection, a policy which has been embraced by politicians of both parties.[271] That role has increased, and California has assumed an even more proactive global stance on climate in light of the Trump administration's reversal of Obama-era policies on climate change.[272] California was at the forefront of automobile emission standards when it issued its first set in 1967, serving as a catalyst for the federal Clean Air Act of 1970.[273] In the area of air quality, California has often acted as a "superregulator," adopting innovative or stringent regulations which can then be exported to other jurisdictions or to the federal government, resulting in what may be called the "California Effect."[274] Part of this results from the fact that, under the Clean Air Act, California has special status in regulating automobile emissions.[275] Regardless, foreign auto manufacturers, and the governments and ministries that support them and respond to their concerns, are as well-accustomed to staying abreast of political developments and legal proceedings out of Sacramento as they are out of Washington.[276]

Another area where developments in California law are having an international impact is data privacy. In 2018 the California Legislature passed the California Consumer Privacy Act of 2018

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271. *See* Mike Madrid, *California Republicans Have Long Championed the Environment. Trump Is Trashing That Core Belief*, SACRAMENTO BEE (Aug. 16, 2018), https://www.sacbee.com/opinion/california-forum/article216843085.html [https://perma.cc/K96R-E6BC].

272. *See* Coral Davenport & Adam Nagourney, *Fighting Trump on Climate, California Becomes a Global Force*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/us/california-engages-world-and-fights-washington-on-climate-change.html (on file with the *Columbia Human Rights Law Review*).

273. *See* George A. Gonzalez, *Urban Growth and the Politics of Air Pollution: The Establishment of California's Automobile Emission Standards*, 35 POLITY 213, 213–14 (2002).

274. *See* DAVID VOGEL, CALIFORNIA GREENIN': HOW THE GOLDEN STATE BECAME AN ENVIRONMENTAL LEADER 188 (2018) ("In no other area of environmental policy has California had such a direct and substantial impact on environmental policy outside the state's borders.").

275. Clean Air Act, 42 U.S.C. § 7543(e)(2)(A) (2018).

276. *See* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1100 (2009) (citing Clean Air Act, 42 U.S.C. § 7543(b)(1), (e)(2)(A) (2006)); *see also* Daniel C. Vock, *Long Adversaries, Automakers Now Want to Work with California on Emissions*, GOVERNING THE STATES & LOCALITIES (May 17, 2018), https://www.governing.com/topics/transportation-infrastructure/gov-automakers-california-tailpipe-emissions-trump.html [https://perma.cc/3MXS-AUYC].

("CCPA"), which is due to take effect on January 1, 2020.[277] Since May 25, 2018, companies have been working to comply with the European Union's General Data Protection Regulation ("EU GDPR"), which has required significant changes to documentation and data handling practices for companies that operate in the European Union.[278] In many cases, compliance which satisfies EU GDPR will not satisfy the requirements of the CCPA, meaning companies that operate in both jurisdictions will need to develop California-specific approaches.[279] While commentators suggest that the California Legislature may need to step in and bring the CCPA in line with the EU GDPR, or at least provide greater clarity about what the CCPA requires, little ink is spilled suggesting that the legislature's pronouncements on data privacy, which have a clear international impact, is beyond California's purview or expertise.[280]

One of the initial motivations for Congress to pass the ATS may have been "to assure foreign merchants that universal norms and standards of justice would apply even in the hinterland."[281] While California is no hinterland in the world economy, the same argument stands: adoption of Section 354.8 is a legitimate declaration by the California Legislature that augmenting its tort system in this manner fosters the type of business culture that it embodies. Particularly as it pertains to developments in European law, California demonstrates that its legal system is dynamic, both responding to and being shaped by developments in other countries. Arguably, Section 354.8 providing legal redress in tort to victims of international human rights abuses is simply the next step in a jurisprudence which has developed over the course of decades.

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277. *See* California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100–1798.199 (Deering 2019).

278. *See* Council Regulation 2016/679, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L. 119) 1; Lothar Determann, *Analysis: The California Consumer Privacy Act of 2018*, INT'L ASS'N PRIVACY PROFS. (July 2, 2018), https://iapp.org/news/a/analysis-the-california-consumer-privacy-act-of-2018/ [https://perma.cc/5ZDP-ALHW].

279. *See* Determann, s*upra* note 278, ¶ 31.

280. *See id.*; *see also* Joseph W. Guzzetta, *Beyond the Basics of the California Consumer Privacy Act: Unanticipated Challenges in Complying with the New Privacy Law*, 61 ORANGE COUNTY L. 28, 33 (2019) (highlighting potential logistical issues and areas of ambiguity in the California Consumer Privacy Act without questioning the jurisdictional scope of the Act).

281. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 481 (1989).

4. Section 354.8 Is Not a "State ATS"—It's Better

In her dissent in *Jesner*, Justice Sotomayor suggested that a state-law tort claim for conduct alleging a violation of the law of nations does not "contribute[] to the uptake of international human rights norms" in the same way that a federal suit does.[282] That may well be the case, but trivializing a state-law tort remedy for international human rights abuses, particularly when the federal remedy has been effectively neutralized, fails to recognize the clear "state interest in redressing wrongs, including wrongs that are violations of human rights."[283] This is especially true when the remedy the state provides is in a manner consistent with its particular level of expertise, in this case through its tort system.[284]

Section 354.8 is not a "state ATS"—it does not authorize California courts to supply or craft common law remedies under state or federal law to redress violations of customary international law.[285] While California courts may indeed have the power to discern and provide such a common law remedy under the inherent authority they have recognized for themselves to provide a "right of access" to the courts in a "variety of contexts," which includes the right to a judicial remedy for the redress of wrongs, it is not the crux of what is at stake in Section 354.8.[286] Instead, Section 354.8 simply expands the statutory definition of what tortious conduct constitutes assault, battery, wrongful death, and conversion. That such a definition implicates conduct that is the subject of customary international law, and that federal litigants have sought to fashion a remedy for violations of under the ATS, does not mean that California's courts are required to perform the same level of analytical gymnastics to satisfy *Sosa*'s instructions.

In fact, Section 354.8 is crystal clear: if the underlying conduct would constitute torture, a war crime, an attempted extrajudicial killing, or a crime against humanity—all clearly defined

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282. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1434 (2018) (Sotomayor, J., dissenting).

283. *See* Davis & Whytock, *supra* note 2, at 483.

284. *See id.* at 484 ("The right-remedy principle shows that redressing human rights violations is not primarily about foreign relations, but above all about the basic remedial functions of state courts. Any analysis of the potential limits on state remedies must give this state interest explicit, independent, and substantial weight.").

285. *See id.* at 479.

286. *See id.* at 427 (citing Cal. Teachers Ass'n v. State, 975 P.2d 622, 629 (Cal. 1999)).

by statute—then a plaintiff has a cause of action for assault, battery, wrongful death, or conversion. Thirty years of ATS litigation have failed to provide anywhere near the level of clarity that California does in a single section of its Code of Civil Procedure.

III. A ROADMAP TO USING THE CALIFORNIA STATE COURTS AS A HUMAN RIGHTS LITIGATION FORUM

Under Section 354.8, the issue is no longer *whether* California should open its doors to international human rights litigation. It has already done so. Therefore, the most pressing litigation concern is no longer theoretical, but practical: how can litigants navigate forum doctrines and federalism concerns to best ensure that cases are resolved on the merits, not on procedural grounds? The following is a roadmap anticipating some of the issues that are bound to come up in the exercise of Section 354.8 on federalism grounds so that claimants may factor this analysis into their overall litigation calculus and structure their cases accordingly.

A. Navigating the Minefield of Davis and Whytock's Four "Court Access Doctrines"

1. Personal Jurisdiction

i. Specific and General Jurisdiction

The *Kiobel* Court noted that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."[287] The opposite could be said of the California Legislature in its adoption of AB-15, where a clear intent was articulated for the Code of Civil Procedure Section 354.8 to have extraterritorial reach to address claims arising abroad.[288] Therefore, Section 354.8's "*Kiobel* problem" in terms of the

287. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 123 (2013).

288. *See* MERRILEES, *supra* note 13, at 2:

> When the perpetrators of these egregious acts are located in California, they should not be able to avoid claims by hiding behind the fact that the acts took place outside of the state or the country. Many of the foreign locations where human rights violations occur do not have adequate mechanisms in place to allow victims the opportunity to have their abuses addressed. Some of these foreign locations have weaker or corrupt legal

"touch and concern" test is not whether the California Legislature intended to overcome the presumption against extraterritorial application, which is clearly the case, but whether the claims authorized sufficiently "touch and concern" California to satisfy due process: a question of personal jurisdiction.[289]

Davis and Whytock argue that personal jurisdiction is not more of a barrier to plaintiffs seeking remedies for human rights violations than for plaintiffs seeking remedies for other wrongs. However, the issue merits some analysis as it may prove to be a growing barrier for human rights claims against non-U.S. defendants, just as it is for claims against foreign defendants in general.[290] For the most part, forum doctrines, especially for personal jurisdiction and diversity jurisdiction, have been trending in a pro-defendant direction since the Obama administration, a trend which has continued in the Trump years.[291] Due in no small part to the fact that litigation in the United States increasingly has an international character, several of the U.S. Supreme Court's recent pronouncements on personal jurisdiction have been in cases involving foreign defendants.[292]

Commentators have suggested that because cases involving "alien" defendants implicate a different set of due process and federalism concerns than those of domestic defendants, the conventional approach of determining contacts for alien defendants on a state-by-state basis should be replaced by an analysis of

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> systems where victims do not stand a chance to attain redress for their injuries. There have even been instances where the foreign government condones the behavior or violations, so protection for victims are nonexistent. This is why the need for an extended statute of limitations for human rights abuses is so great because an extended statute of limitations allows victims time to escape oppressive environments, heal from their wounds, find legal services and then bring their claims before a fair and just court system.

289. *See* Hoffman & Stephens, *supra* note 35, at 11 ("[A]s long as a state court has personal jurisdiction over the defendant, that court will generally have jurisdiction to hear claims arising out of a human rights violation in a foreign state—claims such as wrongful death, assault and battery, and false imprisonment.").

290. *See* Davis & Whytock, *supra* note 2, at 461.

291. *See* Scott Dodson, *Threats and Opportunities: Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73, 74 (2018).

292. *See* William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1206 (2018).

minimum contacts to the United States as a whole.[293] In the case of a domestic defendant, its home state will always enjoy general jurisdiction over it, therefore having another state assert jurisdiction without minimum contacts "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other states."[294] In the case of an alien defendant, because no state exercises general jurisdiction absent exceptionally unusual circumstances, one state's assertion of specific jurisdiction on the basis of national contacts "does not tread on the domain, or diminish the sovereignty, of any other State."[295] Section 354.8 invites precisely this type of analysis and litigants may argue that California courts should exercise personal jurisdiction on these grounds.[296]

In the meantime, a traditional forum-specific analysis regarding a defendant's minimum contacts with California is in order.[297] Both procedurally and substantively, personal jurisdiction will be the first battleground on which the war over the reach of Section 354.8 will be fought. Thus, developing arguments in favor of California courts exercising jurisdiction over foreign defendants will be as important, if not more important, than arguing in favor of the extraterritorial reach of Section 354.8.[298] California has the broadest

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293. *See id.* at 1208 ("[T]he relevant forum for determining an alien's minimum contacts should be the United States as a whole rather than the particular state in which the court sits . . . . [B]oth the fairness component and the interstate-federalism component of personal jurisdiction support a national-contacts approach for alien defendants.").

294. *See id.* at 1209 (citing J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873, 884 (2011) (plurality opinion)).

295. *See id.* at 1209 (citing J. McIntyre Machinery Ltd. v. Nicastro, 564 U.S. 873, 899 (2011) (Ginsburg, J. dissenting)).

296. In cases where a federal statute or rule provides independent authorization for personal jurisdiction, the constitutionality of personal jurisdiction in federal court is governed by the Due Process Clause of the Fifth Amendment, rather than that of the Fourteenth Amendment. Under a Fifth Amendment analysis it is understood that a defendant's contacts are evaluated to the United States as a whole, rather than to the particular state where the district court is located. *See* Adam N. Steinman, *Access to Justice, Rationality, and Personal Jurisdiction*, 71 VAND. L. REV. 1403, 1414–16 (2018).

297. *See id.* at 1417 ("Not surprisingly, all of the Supreme Court's recent personal jurisdiction decisions—and nearly all of its earlier ones—have hinged upon whether the Due Process Clause of the Fourteenth Amendment would permit a state court to exercise personal jurisdiction over a particular defendant.").

298. *See* CAL. CIV. PROC. CODE § 418.10(a) (Deering 2019) ("A defendant, on or before the last day of his or her time to plead . . . may serve and file a notice of

kind of long arm statute and its courts may exercise jurisdiction over residents and nonresidents alike to the outer limits of constitutional due process.[299] Therefore, California's long arm will reach as far as the U.S. Supreme Court permits—a reach that has been curtailed in recent years.[300]

For purposes of Section 354.8, the personal jurisdiction war will be fought over the issue of whether a case involving a particular defendant falls within California's "specific jurisdiction" or "general jurisdiction." This distinction was first developed in *International Shoe Co. v. Washington*,[301] the "canonical opinion" on how far the outer boundaries of the Due Process Clause of the Fourteenth Amendment stretch to allow a state court to proceed against a defendant.[302] There, the Court held that a state may exercise personal jurisdiction over an out-of-state defendant if the defendant has certain "minimum contacts" with the state such that the suit "does not offend traditional notions of fair play and substantial justice."[303]

International Shoe defined two categories of cases where the court could exercise what has become known as "specific

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motion . . . [t]o quash service of summons on the ground of lack of jurisdiction of the court over him or her."); *see also* State Farm General Ins. Co. v. JT's Frames, Inc., 104 Cal. Rptr. 3d 573, 584 (Cal. Ct. App. 2010) (stating that defendant who files an answer raising lack of jurisdiction as an affirmative defense, rather than immediately moving to quash, waives the jurisdictional defect); Frederick Fell, Inc. v. Superior Court, 111 Cal. Rptr. 219, 221 n.3 (Cal. Ct. App. 1973) (holding that in an action filed by a resident against a foreign corporation, the burden is on the plaintiff to show that the foreign corporation has sufficient contacts with the state to support service of summons on it).

299. *See* CAL. CIV. PROC. CODE § 410.10 (Deering 2019) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *see also* Sanders v. CEG Corp., 157 Cal. Rptr. 252, 255 (Cal. Ct. App. 1979) (holding that Section 410.10 authorizes California courts to exercise jurisdiction over foreign corporations to the fullest extent consistent with due process); Shoei Kako Co. v. Superior Court, 109 Cal. Rptr. 402, 410 (Cal. Ct. App. 1973) (adding that California courts cannot exercise jurisdiction over foreign nationals where doing so would violate an international treaty to which the United States is a party).

300. *See infra* notes 316–329 and accompanying text; *see also* Daimler AG v. Bauman, 571 U.S. 117 (2014) (holding that the existence of significant in-state operations were insufficient to grant a federal court in California general jurisdiction over an out-of-state corporation).

301. 326 U.S. 310 (1945).

302. *See* Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011).

303. *See Int'l Shoe*, 326 U.S. at 316.

jurisdiction."[304] First, as in *International Shoe* itself, jurisdiction unquestionably can be asserted where the corporation's in-state activity is "continuous and systematic" and that activity gave rise to the episode in suit.[305] Alternatively, the commission of certain "single or occasional acts" in a state may be sufficient to render a corporation answerable in that state with respect to those acts, though not with respect to matters unrelated to the forum connections.[306] Adjudicatory authority is specific when the suit arises out of or relates to the defendant's contacts with the forum.[307] Even when a defendant has established the requisite contacts with the forum state, the court evaluates whether jurisdiction would be "reasonable" and comport with "fair play and substantial justice" before exercising specific jurisdiction.[308]

General jurisdiction, on the other hand, allows a court to hear all claims against a defendant, regardless of whether the claims themselves have any connection to the forum state.[309] To the extent that the California Legislature intended to create causes of action for foreign-cubed tort claims in Section 354.8, the clearest path to maintaining such a suit against a foreign corporate defendant is if California courts are able to exercise general jurisdiction over those defendants.[310] In 2011, the Supreme Court held in *Goodyear Dunlop Tires Operations, S.A. v. Brown*[311] that a court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the state are so "continuous and systematic" as to render them "essentially at home in the forum State." [312] For an individual, the "paradigm forum" for the exercise of personal jurisdiction is his

304. *See Goodyear*, 564 U.S. at 923.

305. *See id.* at 923 (citing *Int'l Shoe*, 326 U.S. at 317 (1945)).

306. *See id.* at 923 (citing *Int'l Shoe*, 326 U.S. at 318 (1945)).

307. *See id.* at 923–24 (citing Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)).

308. *See* Steinman, *supra* note 296, at 1410 n.46 (citing Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)); *Helicopteros Nacionales*, 466 U.S. at 414.

309. *See* Steinman, *supra* note 296, at 1409 n.41 (citing *Helicopteros Nacionales*, 466 U.S. at 414 n.9 (1984)); Cornelison v. Chaney, 545 P.2d 264, 266 (Cal. 1976) (stating that under a general jurisdiction analysis, defendants may be sued on causes of action unrelated to their activities within the state).

310. *See supra* Part I.B.3.ii.

311. 564 U.S. 915 (2011).

312. *See id.* at 919.

domicile,[313] whereas for a corporation, the "paradigm forums" for the exercise of general jurisdiction are its state of incorporation and its principal place of business.[314] Although general jurisdiction is not limited to these "paradigm forums," the Supreme Court has indicated that it would have to be an "exceptional case" for a corporate defendant to be subject to general jurisdiction beyond these two.[315]

In *Daimler AG v. Bauman*,[316] the Supreme Court addressed its "essentially at home" framework for exercising jurisdiction in the context of an ATS case filed in California.[317] *Daimler* involved the claims of several Argentinian plaintiffs who sued the German company Daimler AG ("Daimler")[318] in federal district court in California under the ATS.[319] Plaintiffs alleged that during Argentina's 1976–83 "Dirty War," Mercedes-Benz Argentina ("MB Argentina")—Daimler's Argentinian subsidiary—collaborated with Argentine state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, including plaintiffs or plaintiffs' close

313. With regard to individuals, one of the key differences vis-à-vis corporations is the availability of transient, or "tag," jurisdiction where a nonresident is served with process while physically present in the state. *See* Burnham v. Superior Court of Cal., 495 U.S. 604, 610–11 (1990) ("[E]ach State [has] the power to hale before its courts any individual who [can] be found within its borders, and . . . once having acquired jurisdiction . . . by properly serving him with process, the State [can] retain jurisdiction to enter judgment against him, no matter how fleeting his visit."); Martinez v. Aero Caribbean, 764 F. 3d 1062, 1064 (9th Cir. 2014) (holding that *Burnham* does not apply to corporations, the service of process on a corporation's officer within the forum state does not create general personal jurisdiction over the corporation, and a court may exercise general personal jurisdiction over a corporation only when its contacts render it essentially at home in the state), *cert. denied*, 135 S. Ct. 2310 (2015); De Young v. De Young, 165 P.2d 457, 458 (Cal. 1946) (contrasting "residence," the place where one lives, even temporarily, regardless of intent to remain, and "domicile," the place where one resides with the intent to remain indefinitely); *In re* Marriage of Tucker, 277 Cal. Rptr. 403, 408 (Cal. Ct. App. 1991) (specifying that while persons can have several residences concurrently, because of the intent requirement, they can only have one domicile at a time).

314. *See Goodyear*, 564 U.S. at 924.

315. *See* BNSF Ry. v. Tyrrell, 137 S. Ct. 1549, 1558 (2017).

316. 571 U.S. 117 (2014).

317. *See* Steinman, *supra* note 296, at 1421–22. Even though the *Daimler* case was filed in federal court for the Central District of California, personal jurisdiction was based on state law under FED. R. CIV. P. 4(k)(1)(A). *See Daimler*, 571 U.S. at 125.

318. Daimler AG's headquarters are located in Stuttgart, Germany. *Id.* at 123.

319. *Id.* at 121–22.

relatives.[320] Plaintiffs further alleged that Daimler was subject to general jurisdiction in California based on the California contacts of Mercedes-Benz USA, LLC,[321] ("MBUSA")—Daimler's U.S. subsidiary.[322] The district court granted Daimler's motion to dismiss on the grounds that MBUSA's contacts to California could not be attributed to Daimler on the basis of the agency relationship alone.[323] But the Ninth Circuit reversed the district court, and then the Supreme Court granted certiorari on the issue of whether "Daimler is amenable to suit in California courts for claims involving only foreign plaintiffs and conduct occurring entirely abroad."[324]

Justice Ginsburg, writing for the majority, concluded that Daimler was not subject to general jurisdiction in California, even if MBUSA's contacts to the forum could be attributed to Daimler.[325] Under *Goodyear's* "essentially at home" standard, only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction.[326] For purposes of a corporation, those "paradigm forum[s]" are its place of incorporation and its principal place of business, two locations which "have the virtue of being unique—that is, each ordinarily only indicates one place—as well as easily ascertainable."[327] These two are not the *only* places where a corporation may be subject to general jurisdiction, it is simply that these are the "paradigm all-purpose forums."[328] In this case, "[e]ven if MBUSA's contacts could be attributed entirely to Daimler itself, California would not be one of those "paradigms."[329]

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320. *Id.* at 121.

321. *Id.* at 123.

322. Mercedes-Benz USA, LLC is incorporated in Delaware with its principle place of business in New Jersey. *Id.*

323. *Id.* at 124.

324. *Id.* at 123–25. Daimler did not object in the district court to plaintiffs' assertion that California could exercise general jurisdiction over MBUSA; therefore the Supreme Court assumed for purposes of the decision that MBUSA was "at home" in California. *See id.* at 134.

325. *See id.* at 136 ("[I]f we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are imputable to Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."). Justice Sotomayor wrote a separate opinion concurring in the judgment. *See id.* at 142 (Sotomayor, J., concurring in the judgment).

326. *See id.* at 137 (majority opinion).

327. *See id.*

328. *See id.*

329. Steinman, *supra* note 296, at 1422–23 (citing *Daimler*, 571 U.S. at 138–39); *see Daimler*, 571 U.S. at 139 ("Neither Daimler nor MBUSA is

ii. Contrasting the ATS and Section 354.8

Daimler raises interesting questions at the intersection of the ATS and the Court's personal jurisdiction jurisprudence that are germane to Section 354.8 and have yet to be systematically addressed by the Court. Specifically, what is the relationship between *Kiobel*'s presumption against extraterritoriality, aiding and abetting liability under the ATS, and general jurisdiction? As to the plaintiffs in *Daimler,* Justice Ginsburg wrote:

> Plaintiffs invoked the court's general or all-purpose jurisdiction. California, they urge, is a place where Daimler may be sued on any and all claims against it, wherever in the world the claims may arise. For example, as plaintiffs' counsel affirmed, under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California . . . Exercises of personal jurisdiction so exorbitant, we hold, are barred by due process constraints on the assertion of adjudicatory authority.[330]

Yet, to a degree, it is precisely this level of jurisdiction which is at stake for Section 354.8. Provided that one of the "paradigm bases" for general jurisdiction were satisfied, or the "exception case" were established to otherwise make such a finding, then those types of cases could be maintained against a corporate defendant—reaching well beyond the limits of where current ATS jurisprudence stands.

Even if a nonresident defendant's contacts with California are insufficient for general jurisdiction, that defendant may still be subject to jurisdiction on claims related to its activities in California under a specific jurisdiction analysis.[331] California has recognized that specific jurisdiction may be upheld where a nonresident intentionally causes injurious "effects" in the state "of a nature that the State treats as exceptional and subjects to special regulation."[332]

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incorporated in California, nor does either entity have its principal place of business there.").

330. *Daimler*, 571 U.S. at 121–22.

331. *See* Walden v. Fiore, 571 U.S. 277, 283–84 (2014).

332. *See* Jamshid-Negad v. Kessler, 19 Cal. Rptr. 2d 621, 623–24 (Cal. Ct. App. 1993).

The cause of action need not arise within California if there is a sufficient nexus with the defendant's forum-related activities.[333]

Again, it bears repeating that Section 354.8 is not a "state ATS" in the strictest sense of the term: the personal jurisdiction analysis is more nuanced in that it allows for cases brought by domestic plaintiffs, specifically California residents, against foreign defendants in a way that is not available under the ATS. One of the factors to be considered, particularly as to the reasonableness of a court's exercise of specific jurisdiction, is a state policy for providing a forum for this particular litigation, e.g., protection of California residents, or assuring the applicability of California law, both of which are compelling in the case of Section 354.8.[334] While there is no requirement that a plaintiff reside in the forum state for local courts (specifically California courts) to exercise jurisdiction over a nonresident defendant, if a plaintiff is a forum resident, the forum state may have more of an interest in the matter, making it easier to justify an exercise of jurisdiction.[335]

2. Davis and Whytock's Remaining Court Access Doctrines

i. Removal to Federal Court

Removal to federal court is another of the court access doctrines that Davis and Whytock consider as possible limitations on the ability of state courts to provide redress for international human

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333. *See* Cornelison v. Chaney, 545 P.2d 264, 267–68 (Cal. 1976).

334. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); Fisher Governor Co. v. Superior Court of San Francisco, 347 P.2d 1, 2–4 (Cal. Ct. App. 1959).

335. *See* Keeton v. Hustler Magazine Inc., 465 U.S. 770, 780; Epic Communications, Inc. v. Richwave Tech, Inc., 101 Cal. Rptr. 3d 572, 591 (Cal. Ct. App. 2009) (California retains an interest in securing a remedy for wrongs done in the state, even if the victim is not, or has ceased to be a Californian). However, under California law, a nonresident plaintiff, including a foreign corporation, may be required to post an undertaking to secure an award of attorney's fees and costs upon a showing by the moving defendant that there is a reasonable possibility that the moving defendant will obtain judgment in the action. *See* CAL. CIV. PROC. CODE § 1030(a)–(b) (Deering 2019). While CAL. CIV. PROC. CODE § 1032 provides that costs may be recovered by a prevailing party as a matter of right, § 354.8(d) specifically limits attorney's fees and costs to a prevailing plaintiff. *Cf.* Williams v. Chino Valley Indep. Fire Dist. 347 P.3d 976, 988 (Cal. 2015) (An award of attorney's fees and costs should not be made to a prevailing defendant unless the court finds the action was "objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.").

rights violations.[336] They argue that under § 1441 of the U.S. Code,[337] defendants may seek to have state court actions removed to federal court on the basis of either diversity or subject matter jurisdiction.[338] Particularly as to subject matter removal, Davis and Whytock note that defendants may argue that the case "implicates the 'uniquely federal' interest in foreign relations, and so must be heard in a federal forum."[339] However, the Ninth Circuit has shown a particular reluctance to invoke federal jurisdiction over a matter "simply because a foreign government has shown a special interest in its outcome."[340] Notwithstanding, as Davis and Whytock observe, even in cases that are removed because of their foreign relations implications, courts must still apply state substantive law.[341] Therefore, in the case of a Section 354.8 matter removed to federal court, California tort law will be applied.

ii. Political Question

If a defendant successfully removes a Section 354.8 case to federal court, the defendant might then argue that the case presents a nonjusticiable political question and should therefore be dismissed.[342] In *Baker v. Carr*, the Supreme Court identified six characteristics which may identify a case involving a political question, holding that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence [since] [t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases."[343] Accordingly, simply because a case implicates foreign relations does not make it a nonjusticiable political question in federal court.[344]

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336. *See* Davis & Whytock, *supra* note 2, at 454–56.

337. 28 U.S.C. § 1441 (2018).

338. *See* Davis & Whytock, *supra* note 2, at 454.

339. *Id.* at 454 (citing Patrickson v. Dole Food Co., 251 F.3d 795, 801 (9th Cir. 2001)).

340. *Id.* at 455 n.339 (citing *Patrickson*, 251 F.3d at 803).

341. *Id.* at 456.

342. *Id.* at 457.

343. Baker v. Carr, 369 U.S. 186, 217 (1962).

344. *See id.* at 211. The political question doctrine is one of the prudential doctrines by which a federal court may abstain from adjudicating a matter where, for example, a dispute has international implications which could affect foreign governmental and private interests. However, the Court had indicated that these cases are not categorically beyond federal court adjudication. *Id.* ("Yet it is error to

iii. Forum Non Conveniens

Even if a California court has subject matter and personal jurisdiction over a defendant, it may still dismiss an action on the ground of inconvenient forum.[345] Forum non conveniens is "an equitable doctrine invoking the discretionary power of a court to decline the exercise of jurisdiction [to stay or dismiss] it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere."[346] The inquiry is not whether some other state or country may prove to be a better forum than does California, but whether California is a "seriously inconvenient" forum.[347] Plaintiff's choice of forum will not be disturbed unless the court is convinced that: 1) a "suitable" alternative forum exists; and 2) the balance of private and public interest factors makes it "just" that the litigation proceed in the alternative forum.[348]

To find that California is an inconvenient forum, there must be a "suitable" alternative forum available, meaning one in which a valid judgment may be obtained against the defendant.[349] The other

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suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

345. *See* CAL. CIV. CODE § 410.30(a) (Deering 2019) ("When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just.").

346. *See* Stangvik v. Shiley, Inc., 819 P.2d 14, 17 (Cal. 1991).

347. *See* Ford Motor Co. v. Ins. Co. of N. Am., 41 Cal. Rptr. 2d 342, 346 (Cal. Ct. App. 1995).

348. *See Stangvik*, 819 P.2d at 17–18:

> In determining whether to grant a motion based on forum non conveniens, a court must first determine whether the alternate forum is a 'suitable' place for trial. If it is, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called upon to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation.

349. *Id.* at 18.

forum's law need not be as favorable to the plaintiff as the law in the original forum; in fact, the alternative forum's law is irrelevant unless the remedy provided is so clearly inadequate or unsatisfactory that it is no remedy at all.[350] "The 'no remedy at all' exception applies only in rare circumstances, 'such as where the alternative forum is a foreign country whose courts are ruled by a dictatorship, so that there is no independent judiciary or due process of law.'"[351] Even though the "no remedy at all" exception has historically been "rare," it may have a more prominent role for plaintiffs defending against a forum non conveniens motion in a Section 354.8 case.

Nevertheless, the California Supreme Court acknowledged a possible tension between two different pronouncements of the California Legislature, in one case authorizing courts to hear a claim between a foreign plaintiff and a foreign defendant over conduct which took place abroad (a "foreign-cubed" case), "and the other 'authoriz[ing] a court to decline the exercise of jurisdiction in the interest of "substantial justice."'"[352] Litigants under Section 354.8 would be well advised to highlight the statute's legislative history indicating a clear intent on the part of the California Legislature to provide redress for violations of international human rights.[353]

B. Overcoming the Presumption Against Extraterritoriality

The presumption against extraterritoriality, as discussed in *Kiobel* and *Morrison,* is a judge-made canon of statutory construction regarding the territorial reach of *federal* statutes. It should be instructive, but not dispositive, in the analysis of Section 354.8 as a state statute.[354] The Constitution itself does not forbid either Congress or the states from enacting legislation with an extraterritorial reach, or prohibit the federal government or the states from prosecuting conduct committed abroad.[355] Nevertheless,

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350. *Id.* at 19.

351. *See* Shiley Inc. v. Superior Court, 6 Cal. Rptr. 2d 38, 43 (Cal. Ct. App. 1992).

352. *See Stangvik*, 819 P.2d at 20 n.7 (citation omitted).

353. *See* MERRILEES, *supra* note 13.

354. *See* Patrick M. Birney, *Revisiting Presumption Against Extraterritoriality in Avoidance Actions,* 33 AM. BANKR. INST. J. 28, 28–29 (2014).

355. *See* CHARLES DOYLE, CONG. RESEARCH SERV., 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 1 (2016); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1062 (2009) ("State legislatures appear to be subject to some

the California Supreme Court has similarly read a presumption against extraterritoriality into actions by the California Legislature unless an extraterritorial intent is clearly expressed, or reasonably inferred, from the language of the act.[356]

In the case of Section 354.8, an extraterritorial intent is clearly discerned from the legislative history of AB-15.[357] Therefore, as discussed earlier in the Article, the question is not whether the California Legislature intended to reach beyond its borders, but to what extent the Due Process Clause of the Fourteenth Amendment will permit its courts to exercise personal jurisdiction over particular defendants.[358] Whereas an ATS case, provided it can run the federal gauntlet of *Sosa*'s "vigilant doorkeeping," still has to contend with *Kiobel*'s presumption against extraterritoriality before it can even begin to consider issues related to jurisdiction over the parties, a Section 354.8 case is different. In a Section 354.8 case, the first issue to deal with is that of personal jurisdiction, proceeding directly thereafter to the substantive tort claims at issue, thus avoiding the extraterritoriality analysis.

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prohibition against enacting laws with an extraterritorial reach . . . . At the same time, state courts enjoy great apparent latitude to apply the law of their choosing to geographically far-flung disputes . . . .").

356. *See* Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) ("[W]e presume the Legislature did not intend a statute to be operative, with respect to occurrences outside the state . . . unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history.") (internal citation and quotation marks omitted); Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381, 388–89 (2017); Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?,* 102 GEO. L.J. 301, 330–31 (2014).

357. *See, e.g.*, KHADIJA HARGETT, CAL. ASSEMB. COMM. ON JUDICIARY, BILL ANALYSIS OF AB 15 (HOLDEN) 1 (May 4, 2015) ("This bill seeks to address the problem that many human rights abuse victims face . . . bringing their claims to an appropriate court in a timely manner. . . . [M]any of these egregious acts occur . . . in jurisdictions with unfair or unstable legal systems, where victims cannot attain any recourse . . . .").

358. *See* Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 93 (2013) ("Transnational human rights claims brought in U.S. courts based on universal jurisdiction norms should not be dismissed for lack of subject-matter jurisdiction . . . [and those] brought for violations of foreign law should [similarly] not be dismissed . . . where a court of general jurisdiction has personal jurisdiction over the defendant.").

CONCLUSION

Over the last thirty years the Supreme Court has progressively hammered one nail after another into the coffin of the ATS as a means for victims of international human rights abuses to seek redress in federal court. Since *Filártiga* in 1980, the Supreme Court has never ruled in the plaintiff's favor in an ATS case.[359] Each time that the Court has granted certiorari in an ATS case the end result has been to raise the bar ever higher for claimants and make access to the federal courthouse that much more difficult.

Yet, in the middle of all of this, in a manner which has escaped the notoriety befitting its importance, California has opened its state courthouse doors wide to precisely the types of claims that are foreclosed at the federal level. Through the addition of Section 354.8 to its Code of Civil Procedure, California has expanded its tort structure and created a ten-year statute of limitations for civil tort claims for assault, battery, or wrongful death, when a victim can establish that the abuse also constitutes an act of torture, genocide, a war crime, an attempted extrajudicial killing, or a crime against humanity. In addition, Section 354.8 provides a cause of action for a civil suit for the taking of property in violation of international law, or for benefits under an insurance policy when the claim arises out of any conduct that constitutes one of the enumerated human rights violations. Moreover, a prevailing plaintiff in an action brought under Section 354.8 is entitled to an award of reasonable attorneys' fees and costs.

What California has done merits the close attention of the human rights community. This is no local city council passing an ordinance condemning violence abroad, or a judicial backwater simply adding a couple of years to its statute of limitations for battery. California is the fifth largest economy in the world, with the largest state judicial system in the country and an equally large and diversified legal industry. Additionally, the state is already recognized as a player on the international human rights stage, having influenced the British government, among others, in the drafting of their Modern Slavery Act, and there is no reason to believe that as the availability of Section 354.8 becomes more well-known it could not likewise serve as a catalyst for the expansion of other countries' definition of tort.

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359. *See* MULLIGAN, *supra* note 15, at 21.

Section 354.8 truly can be an oasis in the international human rights litigation desert that has developed in the wake of the Supreme Court's ATS jurisprudence. It addresses many of the problematic areas that have been the subject of ATS litigation, not the least of which is the availability of relief against corporate defendants. The untapped potential of Section 354.8 as a means of providing redress to victims of international human rights abuses is far too powerful to leave gathering dust in California's Code of Civil Procedure. Hopefully this Article will help shed light on Section 354.8 and bring it to the attention of those who most need it, as well as those who can start putting it to the use for which it was intended.