EXTRATERRITORIALITY IN A NEVADA SHIPPING CONTAINER: ACCOUNTABILITY FOR DRONE WARFARE THROUGH THE POST-*NESTLÉ* ALIEN TORT STATUTE

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Annually, the United States military spends millions of dollars to privatize its drone warfare program through the use of private contractors. While the private contractors have consequently become the backbone of American drone warfare, the military has continued to defend its elusive decision-making authority in the chain of command. Since the global war on the Middle East, this dysfunctional hierarchy has resulted in a costly gap in liability for thousands of foreign civilian victims of drone strikes. This Note explores how the privatized dynamic behind the deadly operations of U.S. drone warfare can be grounds for a claim under the Alien Tort Statute (ATS). Though the ATS is seldom used as the sole basis for recovery, the recent Supreme Court decision in *Nestlé* has highlighted the liability domestic corporations, like the private contractors, may face under the statute for their tortious conduct abroad. Accordingly, this Note crafts a hypothetical ATS claim not only to illustrate how the United States sanctions mass violations of international human rights, but also to advance a legal remedy for victims of highly technologized warfare, which has caused complex collateral consequences on civilian lives. Ultimately, this Note urges judicial and legislative codification of the ATS's extraterritorial reach to better facilitate the statute's purpose in a modern era. Support for a transnational quality is rooted in legislation, economic benefits, and, importantly, normative benefits for civilian victims.

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INTRODUCTION

Inside a shipping container located in the Nevada desert sits a three-person unit of the 867th Attack Squadron: a sensor operator, an intelligence analyst, and a pilot.[1] For months, the unit closely monitors a target play with his kids and travel to and from work. Then, "the customer" orders a strike, and the pilot presses "the red button."[2] Once the pilot successfully pushes the red button, Hellfire missiles strike and kill a victim located across the globe.[3] Sometimes, it is a terrorist on the United States' most-wanted list; other times, the unit erroneously kills a civilian dad walking down the street but then moves on to finding the intended target.[4] The fatal miscalculation is now a problem for the customer to resolve.[5]

Many of the specifics of how the U.S. military's drone warfare is orchestrated are classified.[6] Concerns about the tactical, ethical, and legal side effects of drone warfare at large have been raised by scholars, activists, government officials, and others.[7] And yet, the

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1. David Phillips, *The Unseen Scars of Those Who Kill Via Remote Control*, N.Y. TIMES (Apr. 15, 2022), https://www.nytimes.com/2022/04/15/us/drones-airstrikes-ptsd.html (on file with the *Columbia Human Rights Law Review*).

2. *Id.* (noting that "the customer" may be a ground force commander, the CIA, or a classified Special Operations authority who selects the target and orders the missile strike).

3. *Id.*

4. *Id.*

5. *Id.*

6. To note, scholars and the U.S. military also refer to drones and remote drone warfare in other terms that may be synonymous or associated in some capacity. *See, e.g.*, Keric D. Clanahan, *Drone-Sourcing? United States Air Force Unmanned Aircraft Systems, Inherently Governmental Functions, and the Role of Contractors*, 22 FED. CIR. BAR J. 1, 3 n.8 (2012) (explaining that unmanned aerial vehicles (UAVs), Remotely Piloted Aircraft (RPAs), and drones refer to individual aircraft; Unmanned Aircraft Systems (UAS) refer to the aggregate systems of equipment, information technology, and multiple aircraft); M.C. Elish, *Remote Split: A History of US Drone Operations and the Distributed Labor of War*, 42(6) SCI., TECH., & HUM. VALUES 1100, 1101 (2017) (calling them "remote split operations"); *Unmanned Aircraft Systems (UAS): DoD Purpose and Operational Use*, U.S. DEP'T OF DEF., https://dod.defense.gov/UAS/ [https://perma.cc/4PL5-8MSY] (referring to "unmanned aircraft systems").

7. Elish, *supra* note 6, at 1101 ("While the majority of Americans support drone strikes . . . , significant concerns about the legality and morality, as well as efficacy, of long-term drone operations have been raised from all sides . . . ." (citations omitted)); *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killings: Hearing Before the Subcomm. on the Const., C.R. & Hum. Rts. of the S. Comm. on the Judiciary*, 113th Cong. 3 (2013) [hereinafter *Hearing on Drone Wars*] ("That is why many in the national security

United States government has heralded drone warfare as a modern mechanism through which the military can be "both effective and moral."[8] By emphasizing the role of modern technology, including lasers and GPS technology, the U.S. military has cloaked its anti-terrorism strategy in "drone essentialism"—the pretense that a military strategy centered around the development and use of drones "inevitably minimizes suffering."[9]

However, scholars have rightly identified that the fatal flaw of drone essentialism is that it frames imprecise strikes as mere accidents, despite their lethality and frequency.[10] Thus, a more nuanced and informed understanding of the collateral consequences of drone warfare requires that society look beyond its mere technological capacities and comprehend "the operational cultures of the agencies that deploy them, and the enculturated instincts, assumptions, and practices of the operators whose thumbs hover over the red button."[11]

An analysis of the operators behind drone warfare reveals a spectrum of military personnel, contractors, manufacturers, analysts, and importantly, lawyers that are either located in the United States or conducting business therein.[12] In other words, there are at least

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community are concerned that we may undermine our counterterrorism efforts if we do not carefully measure the benefits and costs of targeted killing."); *see generally* Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Strikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html (on file with the *Columbia Human Rights Law Review*) (highlighting the human impact of these attacks through criticisms made by public figures).

8. Hugh Gusterson, *Drone Warfare in Waziristan and the New Military Humanism*, 60 CURRENT ANTHROPOLOGY (SUPPLEMENT 19) S77, S77 (Feb. 2019) (internal citations and quotation marks omitted).

9. *Id.* at S79.

10. *See id.* (defining "drone essentialism" as the assumption that the drone's technological properties allow for a use that is "essentially singular in nature except for occasional accidents"); Sarah Kreps, *US Faces Immense Obstacles to Continued Drone War in Afghanistan*, BROOKINGS INST. (Oct. 19, 2021), https://www.brookings.edu/techstream/us-faces-immense-obstacles-to-continued-drone-war-in-afghanistan/ [https://perma.cc/R33E-USDW] ("Such 'drone essentialism' promotes what the scholar Hugh Gusterson calls a narrow focus on 'the agentic capacity of drones' and comes with a key tradeoff.")

11. Gusterson, *supra* note 8, at S79.

12. *See* Elish, *supra* note 6, at 1103 (listing the personnel involved in an average drone flight); TRAVIS L. NORTON, INST. FOR DEF. ANALYSES, STAFFING FOR UNMANNED AIRCRAFT SYSTEMS (UAS) OPERATIONS 7–12 (2016) (outlining the categories of "performers available to DoD's UAS enterprise").

hundreds of people and entities involved in any one drone strike—any one of which may commit, or facilitate the commission of, fatal errors.[13] While sovereign immunity protections may shield the U.S. military from demands for accountability, the rest of the chain may not be so protected.[14] Thus, drone strike targets and individuals in their surrounding environments who have been monitored for days, weeks, and months should have recourse to demand damages and justice from the operations entourage that plans and causes their injury.[15] This Note will focus on the feasibility of using the Alien Tort Statute (ATS) as such a tool.[16] Specifically, foreign plaintiffs may take advantage of the Supreme Court's recent stance on subjecting domestic corporations to the ATS.[17]

The ATS "established original district court jurisdiction over 'all causes where a [foreign national] sues for a tort only (committed) in violation of the law of nations.'"[18] Despite this jurisdictional grant, potential plaintiffs seldom employed the ATS until the "modern line

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13. *See* Elish, *supra* note 6, at 1103–06 (accounting for the personnel involved for a variety of drone types).

14. Natalie R. Davidson, *Shifting the Lens on Alien Tort Statute Litigation: Narrating US Hegemony in* Filártiga *and* Marcos, 28 EUR. J. INT'L L. 147, 167 (2017) (citing *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005)).

15. This Note uses the term "justice" in its most inclusive, holistic sense based on ATS-plaintiffs who have described their "satisfactions" to include monetary and normative benefits (truth-telling; exposure; restoring the victim's dignity and reputation; improving or shaping practices and international law; commemorations; global attention; and public apologies). Christopher Ewell et al., *Why We Need the Alien Tort Statute Clarification Act Now*, JUST SEC. (Oct. 27, 2022), https://www.justsecurity.org/83732/why-we-need-the-alien-tort-statute-clarification-act-now/ [https://perma.cc/2URL-PTDL] [hereinafter *Why We Need the ATSCA Now*]; Christopher Ewell et al., *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. 1205, 1253 (2022) [hereinafter *Has the Alien Tort Statute Made a Difference?*].

16. 28 U.S.C. § 1350. The ATS is also referred to as the Alien Tort Claims Act or Alien Tort Act. JOACHIM ZEKOLL ET AL., TRANSNATIONAL CIVIL LITIGATION 163 (2013).

17. Oona A. Hathaway, Nestlé USA, Inc. v. Doe *and* Cargill, Inc. v. Doe*: The Twists and Turns of the Alien Tort Statute*, 5 AM. CONST. SOC'Y SUP. CT. REV. 163, 170–71 (2020–2021). In this Note, I refer to the class of eligible plaintiffs in an ATS lawsuit as "foreign plaintiffs," rather than using the statute's own language, which refers to foreign plaintiffs as "aliens." The decision to rephrase such a class of plaintiffs does not change the substance of the statute's elements.

18. Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (citing the Judiciary Act of 1789, ch. 20 § 9(b), 1 Stat. 73, 77).

of cases" was kickstarted by *Filártiga v. Peña-Irala* in 1980.[19] Between 1980 and the early 2000s, the ATS experienced its heyday of international human rights litigation in the United States.[20] However, since the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, jurisprudential and separation-of-power concerns have dramatically brought the breadth and applicability of the ATS to a near screeching halt.[21] Nevertheless, the *Nestlé USA, Inc. v. Doe* decision in 2021 has buttressed one of the remaining threads by which the statute now dangles: ATS liability against *domestic* corporations.[22]

In the jurisprudential landscape of the ATS after the Supreme Court's decision in *Nestlé*, it is particularly crucial that forthcoming legal arguments, including this Note, provide clarity for how domestic corporations can actually be held accountable for tortious business practices that implicate foreign victims and

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19. *Id.* (calling the ATS a "rarely-invoked provision"); Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004) (noting "the birth of the modern line of cases beginning with [*Filártiga*]").

20. *Why We Need the ATSCA Now*, *supra* note 15 ("For about three decades thereafter, ATS suits grew rapidly in the United States, reaching a high point in the early 2000s . . .."); Andrew B. Mohraz, *The Impact of the U.S. Supreme Court's Decision in* Sosa v. Alvarez-Machain *(2004) on the Alien Tort Statute*, 12 L. & BUS. REV. AMERICAS 363, 366 (2006) (describing the three major categories of ATS lawsuits brought under the ATS following *Filártiga*).

21. *See Sosa*, 542 U.S. at 725–29 (listing a series of reasons why the ATS should be exercised with caution); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (barring application of the ATS to claims of misconduct that occurred on foreign territory); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1405–06 (2018) (holding that foreign corporations cannot be subject to ATS liability due to international diplomacy and economic concerns); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021) (holding that a U.S. corporation was not subject to ATS liability for its alleged misconduct abroad because plaintiffs failed to allege more than "general corporate activity").

22. *Nestlé*, 141 S. Ct. at 1936–37 (establishing that plaintiffs may succeed on an ATS claim against a domestic corporation if they sufficiently "allege more domestic conduct than general corporate activity"); *id.* at 1941 (Gorsuch, J., concurring) ("Nothing in the ATS supplies corporations with special protections against suit."); *id.* at 1943–44 (Sotomayor, J., concurring in part and dissenting in part) (supporting the judgment only on the basis of plaintiffs' failure to sufficiently "allege a domestic application of the [ATS]"); *id.* at 1950 (Alito, J., dissenting) ("Corporate status does not justify special immunity."); *see also* CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE: A PRIMER 22 (2022), https://sgp.fas.org/crs/misc/R44947.pdf [https://perma.cc/4J4R-FW6H] [hereinafter ATS PRIMER] ("[F]ive Justices in *Nestlé* either authored or joined concurring opinions which argued that domestic corporations can be held liable to the same extent as natural persons.").

jurisdictions.[23] The *Nestlé* Court's fragmented decision regarding the cognizable causes of action under the ATS leaves unanswered what kinds of claims would realistically be successful.[24] On the other hand, the Court made amply clear that domestic corporations are not shielded from ATS liability.[25]

This Note will thus argue that courts must avoid any literal or myopic interpretation of the statute's extraterritoriality to avoid an egregiously absurd legal conclusion. That is, if future courts require a stricter pleading of a tortious conduct's nexus to the United States, then the very fact that a domestic corporation's misconduct occurred abroad will bar an ATS claim. Or, multinational domestic corporations will too easily defend against an ATS claim by delegating the misconduct abroad to avoid any cognizable connection to the United States. Not only would that jurisprudence moot the very purpose of the ATS, but it would also run counter to the Court's most recent confirmation that the statute can indeed subject a domestic corporation to liability.[26]

The following analysis will illustrate the importance of seeking liability against American corporations that are responsible for fatal employments of advanced technology. It does so by identifying how the elusive chain of command between the U.S. military and private contractors has allowed for a grave and costly

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23. *Nestlé*, 141 S. Ct. at 1937 ("To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity."); Hathaway, *supra* note 17, at 174 (arguing that if the *Nestlé* decision is interpreted as finding plaintiffs' pleadings to be insufficient, then plaintiffs must simply allege more specifically how the corporate conduct in the United States facilitated or caused the tort abroad).

24. William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/LXL4-PV2G] (summarizing the divergent views on the *Sosa* cause-of-action precedent); Hathaway, *supra* note 17, at 166–169 (outlining how each opinion took sides on the cause-of-action issue); Kayla Winarksy Green & Timothy McKenzie, *Looking Without and Looking Within:* Nestlé v. Doe *and the Legacy of the Alien Tort Statute*, ASIL INSIGHTS, July 15, 2021, at 4–5 ("[I]t remains at least theoretically possible for plaintiffs to sue U.S. companies for aiding and abetting violations of international law taking place abroad.").

25. *See* Dodge, *supra* note 24 ("Although the majority opinion in *Nestlé* did not address the question of corporate liability, five Justices saw no reason to distinguish between corporations and natural persons as defendants.").

26. *See* Hathaway, *supra* note 17 at 170 (explaining the reasoning behind the decision to adopt this interpretation).

gap in liability for civilian deaths caused by drone strikes. With the aid of investigative journalism and direct testimony, this Note argues that justice can in fact be achieved by breaking down that dysfunctional hierarchy and revealing the very real responsibilities private contractors hold in drone warfare. A hypothetical ATS claim against such a private contractor will show how foreign plaintiffs can tie their claims to corporate actors.[27]

The use of drone warfare as the operative framework is especially important to highlight the absurdity and potency of advancing a strict extraterritoriality requirement under the ATS. Remote drone strikes are a prime example of the convoluted intersection of technologically advanced weaponry, the potential for human rights violations, and widespread, lucrative corporate practices.[28] Since the U.S. military's implementation of drone warfare in 2001, the government has heralded it as a modern feat capable of being "more lawful and more consistent with human rights and humanitarian law than the alternatives."[29] And yet, drone warfare has systematically caused mass collateral damage in the form of countless civilian deaths of women and children, behavioral mis-profiling, and mistaken identities.[30] All the while, private companies contracted to carry out drone warfare pocket millions of dollars annually for their role.[31] This Note demands corporate accountability for drone warfare in the hope that it can be a model for addressing

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27. However, this Note does not go so far as to make an argument or conclusion regarding supply chain accountability at large, which would require theories, jurisprudence, and exemplifications that go beyond the scope of this Note.

28. *See* Clanahan, *supra* note 6, at 3 (calling drones a "striking" example of key issues at the junction of the War on Terror, recent war technology, and the government's unprecedented involvement of contractors).

29. Gusterson, *supra* note 8, at S77 (internal quotation marks omitted) (quoting Harold Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Speech at the Annual Meeting of the American Society of International Law (March 25, 2010)).

30. *Id.* at S79–80.

31. *See, e.g.*, Abigail Fielding-Smith & Crofton Black, *Reaping the Rewards: How Private Sector is Cashing in on Pentagon's 'Insatiable Demand' for Drone War Intelligence*, BUREAU OF INVESTIGATIVE JOURNALISM (Jul. 30, 2015), https://www.thebureauinvestigates.com/stories/2015-07-30/reaping-the-rewards-how-private-sector-is-cashing-in-on-pentagons-insatiable-demand-for-drone-war-intelligence [https://perma.cc/SEG3-H88Z] ("[MacAulay-Brown] asked for $60 million to perform these [contracting] functions over three years."); *id.* ("[Air Force Special Operations Command] has paid out $12 million for the first year, with options on the contract due to last until January 2018.").

the consequences of future technological advancements in the military arena.[32]

Part I will begin by providing a historical overview of the ATS and its seminal precedents that shaped the statute's capacity to serve as a banner for international human rights litigation. Then, Part I will turn to the current legal elements of the ATS, considering the caselaw that has elasticized and constricted the range of circumstances in which an ATS claim is viable. Even just an aerial view of the dialogue among the courts illustrates the contested and powerful nature of the statute, and perhaps why the Supreme Court's most recent stance in *Nestlé* was so fractured. Part I will conclude by providing background on American drone warfare and identifying how and why private, civilian contractors should be held liable under the ATS for their substantial and active role in drone strikes. Next, Part II will present a hypothetical ATS claim using the private analysts' conduct described in Part I as the basis for the allegations. Finally, in Part III, this Note argues for explicit judicial recognition of the ATS's extraterritorial reach in order to support current legislative efforts, facilitate economic transparency and efficiency, and empower victims to seek material and normative redress.

I. BACKGROUND ON THE ALIEN TORT STATUTE AND THE U.S. MILITARY'S DRONE WARFARE PROGRAM

A. Alien Tort Statute Precedents

The Alien Tort Statute (ATS) was passed by the First Congress through the Judiciary Act of 1789, also known as the First Judiciary Act, as a means of promoting foreign relations and authorizing limited

32. *See* Paul D. Shinkman, *A Slippery Slope for Drone Warfare?*, U.S. NEWS (Aug. 21, 2015, 4:19 PM), https://www.usnews.com/news/articles/2015/08/21/pentagon-opening-drone-missions-to-private-contractors (on file with the *Columbia Human Rights Law Review*) (discussing, from the perspective of a former military drone operator, the "natural progression" away from manned aircraft and even more toward unmanned aircraft); David S. Cloud, *Civilian Contractors Playing Key Roles in U.S. Drone Operations*, L.A. TIMES (Dec. 29, 2011, 12:00 AM), https://www.latimes.com/nation/la-xpm-2011-dec-29-la-fg-drones-civilians-20111230-story.html [https://perma.cc/2MNQ-QY5T] (reporting that Science Applications International Corporation, Inc. has a $49 million multiyear contract with the Air Force to help analyze drone video and other intelligence).

actions for violations of international norms.[33] Today, the one-sentence jurisdictional statute reads: "The district courts shall have original jurisdiction of any civil action by a [foreign plaintiff] for a tort only, committed in violation of the law of nations or a treaty of the United States."[34] Beyond the formal elements of the statute, several seminal cases have shaped the ATS against evolving concerns for the separation of powers, international diplomacy, and statutory interpretation. The complex and vacillating caselaw is crucial to illustrate how courts' reluctant and guarded posture towards the ATS has ultimately added texture to its legal elements.

1. *Filártiga v. Peña-Irala*[35]: Revival of the Alien Tort Statute

Between 1789 and the Second Circuit Court of Appeals' 1980 decision in *Filártiga*, the ATS was "relatively dormant," only having been invoked twice in that period.[36] The Filártigas were Paraguayan citizens who brought suit in the Eastern District of New York against Peña-Irala, another Paraguayan citizen, for the wrongful death of their family member.[37] They alleged that Peña-Irala, acting in his capacity as Inspector General of Police in Paraguay, kidnapped, tortured, and killed a family member in retaliation for one of the plaintiff's political beliefs.[38] Although the torture occurred in Paraguay, *Filártiga* upheld federal jurisdiction under the ATS and found that "an act of torture committed by a state official against one

33. Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (noting that the First Congress passed the ATS in its "[implementation of] the constitutional mandate for national control over foreign relations"); Zekoll et al., *supra* note 16, at 164 ("[M]any of the concerns regarding international relations that lay behind the general grant of alienage jurisdiction, as well as other grants of jurisdiction, may have prompted this provision . . . ."); Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 ("(b) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.").

34. 28 U.S.C. § 1350.

35. 630 F.2d 876 (2d Cir. 1980).

36. Jordan Clark, Kiobel*'s Unintended Consequences: The Emergence of Transnational Litigation in State Court*, 41 ECOLOGY L. Q. 243, 246 (2014); *Filártiga*, 630 F.2d at 887 n.21 (first citing Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961); and then Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) as two cases using the ATS as a basis for jurisdiction since its enactment in 1789).

37. *Filártiga*, 630 F.2d at 878.

38. *Id.*

held in detention violates established norms of the international law of human rights, and hence the law of nations."[39]

In his majority opinion, Judge Kaufman expounded on how "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law[,]" and thus binds the United States, even in the absence of a congressional enactment.[40] In determining what the law of nations proscribes, the court supported the consultation of "the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law."[41] The court then created a framework that calls upon other courts to "interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[42] Although the court cautioned that the standard for a universally recognized norm is "a stringent one" and does not adopt the power to define new rights, *Filártiga* expressly "open[ed] the federal courts" for foreign plaintiffs to redress violations of extant international law.[43]

Many commentators speaking on the impact of *Filártiga* highlight its expansive and evolutionary stance toward what may constitute an international norm.[44] Consequently, it became a landmark case that kickstarted an era of human rights advocacy where foreign nationals could sue under the ATS for wrongful violations of

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39. *Id.* at 880.

40. *Id.* at 885–87.

41. *Id.* at 880 (first citing United States v. Smith, 18 U.S. 153, 160–61 (1820); and then Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 295 (E.D. Pa. 1963)). The opinion also speaks extensively about "an expectation of adherence" to the Universal Declaration of Human Rights and its recognized international human rights obligations. *Id.* at 881–83.

42. *Id.* at 881.

43. *Id.* at 881, 887.

44. ATS PRIMER, *supra* note 22, at 7 n.61 ("Since the 1980 court of appeals decision in *Filartiga v. Peña-Irala* permitting a wide of range of human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States." (quoting Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co*.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 601 (2013))); Karen E. Holt, Filartiga v. Pena-Irala *After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. INT'L & COMP. L. 543, 547 (1990) ("The *Filartiga* court was hailed as one 'educated in modern international law, which recognized its constitutional authority and responsibility to apply that law in appropriate cases.'" (quoting Kathryn Burke et al. *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 321 (1983))).

international law.[45] However, as the following precedents show, post-*Filártiga* optimism for transnational human rights litigation would soon result in heavy-handed limitations to the ATS.[46]

2. *Tel-Oren v. Libyan Arab Republic*[47]: Is there a Cause of Action?

In 1984, Israeli nationals filed suit in the District Court of D.C. against the Palestine Liberation Organization (PLO) and other entities alleging that plaintiffs were victims and survivors of a terrorist attack orchestrated by the PLO.[48] The D.C. Circuit Court of Appeals upheld in a per curiam opinion the District Court's dismissal of the claims "for lack of subject matter jurisdiction and as barred by

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45. *See Historic Case:* Filártiga v. Peña-Irala, CTR. FOR CONST. RTS. (last modified Jan. 3, 2019) https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala [https://perma.cc/UHW4-5TZ4] ("The circuit court completely rejected its earlier narrow interpretation of international law and opened the door of the federal courts to civil actions by aliens and citizens alike for damages for human rights violations."); ATS PRIMER, *supra* note 22, at 7 ("[*Filártiga*] was a highly influential decision that caused the ATS to 'skyrocket' into prominence as a vehicle for asserting civil claims in U.S. federal courts for human rights violations even when the events underlying the claims occurred outside the United States." (footnotes omitted)); Holt, *supra* note 44, at 549 ("[M]any felt that after *Filartiga* the Alien Tort Statute 'provides the best means by which to hold an individual or, perhaps, a nation responsible for violation of human rights committed abroad.'" (quoting Michael Bazyler, *Litigating the International Law of Human Rights: A "How-To" Approach*, 7 WHITTIER L. REV. 713, 724 (1985))); Davidson, *supra* note 14, at 147 ("*Filártiga v. Peña-Irala* has been called the *Brown v. Board of Education* of international human rights litigation." (citing Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991))). *But see Ewell*, *supra* note 15, at 1218 (explaining that an ATS lawyer noted that human rights attorneys did not approach early ATS cases with the "overarching strategy" that is characteristic of the NAACP's approach to civil rights litigation). This Note takes ironic notice of Davidson's reference to Koh who during his tenure as the legal adviser of the Department of State under the Obama administration heavily reasoned and supported the use of drone warfare as a method of self-defense in the war on terror. Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NPR (Mar. 26, 2010, 2:45 AM), https://www.npr.org/templates/story/story.php?storyId=125206000 [https://perma.cc/33D4-AZ9D].

46. Davidson, *supra* note 14, at 167 ("[C]onservative scholars and politicians have challenged increasingly the legitimacy of the *Filártiga* doctrine, especially from the mid-1990s when corporations and other powerful defendants began to be sued." (citing Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1491–1505 (2014))).

47. 726 F.2d 774 (D.C. Cir. 1984).

48. *Id.* at 776.

the applicable statute of limitations."[49] However, the three splintered, concurring opinions signaled to future courts the need to resolve a contested but key issue of the ATS: whether the statute was purely jurisdictional or if it also provided a private cause of action.[50]

Judge Edwards's concurrence set the stage with an unreserved call for help: "This case deals with an area of the law that cries out for clarification by the Supreme Court."[51] Judge Edwards went on to staunchly disagree with Judge Bork's rationale by asserting that statutory language, legislative history, and precedent demonstrate that Congress did *not* intend the ATS to require an express cause of action to be found in the law of nations.[52] Further, Judge Edwards reasoned that the ATS itself provides a right to sue in addition to a forum.[53] His concurrence ultimately agreed with dismissing the claim because the allegations lacked an official state actor, unlike in *Filártiga*,[54] and terrorism was not a cognizable violation of international law.[55]

Judge Bork's concurrence was doctrinally the opposite of Judge Edwards's opinion, and he seemed painfully aware of this in his conclusion that "the three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of [the ATS] will have to await clarification elsewhere."[56] Judge Bork's opinion was chiefly guided "by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations."[57] Similarly, Judge Bork opined that the political question doctrine could arguably bar the claim entirely.[58] In addition to his concern for inappropriate judicial interference, Judge Bork asserted that the ATS was strictly jurisdictional and did not "even by implication authorize individuals

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49. *Id.* at 775.
50. *See* discussion *infra*.
51. *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring).
52. *Id.* at 779.
53. *Id.* at 780 ("Indeed, a 1907 opinion of the United States Attorney General . . . asserts that section 1350 provides both a right to sue and a forum.").
54. 630 F.2d 876 (2d Cir. 1980); *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) ("[I] do not believe the consensus on non-official torture warrants an extension of *Filartiga*.").
55. *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring) ("I do not believe that under current law terrorist attacks amount to law of nations violations.").
56. *Id.* at 823 (Bork, J., concurring).
57. *Id.* at 799.
58. *Id.* at 803.

to bring such cases."[59] This concurrence painted a mysterious and undesirable picture of the ATS as "a special problem" in need of clear, unambiguous authorization from Congress.[60]

Lastly, Senior Circuit Judge Robb found the case nonjusticiable based on the political question doctrine.[61] Judge Robb described the "impossible-to-accomplish judicial task" of adjudicating on terrorist activities in the international order, which he labeled as squarely beyond "the traditional judicial reticence" maintained for foreign affairs.[62] The concurrence listed the dangers of interfering with the executive and legislative branches' more appropriate role in such matters, including: "embarrassment to the nation;" the use of U.S. forums for political propaganda; and the "debasement of commonly accepted notions of civilized conduct."[63]

Ultimately, all three judges disagreed with each other in rationale, but Judge Bork and Judge Robb's contested debate over the cause-of-action question would eventually be resolved by the Supreme Court in *Sosa v. Alvarez-Machain*.[64]

3. *Sosa v. Alvarez-Machain*[65]: Addressing Cause of Action

The Supreme Court first directly addressed the scope of the ATS in the 2004 *Sosa* decision. After the U.S. Drug Enforcement Administration (DEA) failed to negotiate with the Mexican government for the procurement of Alvarez-Machain for his alleged involvement in the torture and murder of a DEA agent, the DEA planned and orchestrated his abduction.[66] Mexican nationals, including Sosa, were hired to seize Alvarez-Machain and bring him to

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59. *Id.* at 811.

60. *Id.* at 812 (referencing the lack of direct evidence regarding the First Congress' intentions for the ATS).

61. *Id.* at 823 (Robb, J., concurring) ("It seems to me that the political question doctrine controls. This case is nonjusticiable.").

62. *Id.* at 823–25.

63. *Id.* at 825–26.

64. 542 U.S. 692 (2004); ATS PRIMER, *supra* note 22, at 8 ("Ultimately, it was the broader, doctrinal disagreement between Judge Bork and Judge Edwards over the cause-of-action question that would eventually become the subject of a landmark Supreme Court decision 20 years later, *Sosa v. Alvarez-Machain* . . . ." (citation omitted)).

65. 542 U.S. 692 (2004).

66. *Id.* at 697–98.

Texas where he was indicted.[67] Alvarez-Machain, upon his acquittal and return to Mexico, sued Sosa under the ATS for his arbitrary arrest and detention.[68] Building on the debate in *Tel-Oren*,[69] the *Sosa* Court finally decided the question of whether the ATS provides for a cause of action.

The Court held that "although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."[70] Writing for the majority, Justice Souter concluded that the ATS was not enacted "as a jurisdictional convenience to be placed on the shelf" to await possible legislative authorization of a right to sue.[71] Instead, the Court inferred that the common law granted a cause of action for the three paradigmatic violations of international law at the time: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[72] The Court went further to find "no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses."[73]

Curiously though, Justice Souter simultaneously assumed that no development since the ATS's enactment in 1789 "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[74] This jurisprudential backflip did not go unnoticed. In his concurrence, Justice Scalia criticized Justice Souter's greenlight for judge-made common law in a post-*Erie* world as an "illegitimate lawmaking endeavor" and "nonsense upon stilts."[75] Justice Breyer's concurrence, though not as scathing, raised "comity concerns" for when an American court is asked to adjudicate foreign conduct under the ATS.[76] Still, *Sosa* holds that, with respect to the international norms covered by the ATS, "judicial power should be exercised on the

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67. *Id.* at 698.
68. *Id.* at 698–99.
69. 726 F.2d 774 (D.C. Cir. 1984).
70. *Sosa*, 542 U.S. at 724.
71. *Id.* at 719.
72. *Id.* at 724; 4 WILLIAM BLACKSTONE, COMMENTARIES *68 ("The principal offence against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement on the rights of ambassadors; and 3. Piracy.").
73. *Sosa*, 542 U.S. at 724–25.
74. *Id.*
75. *Id.* at 750–51, 743 (Scalia, J., concurring in part).
76. *Id.* at 761 (Breyer, J., concurring in part).

understanding that the door is still ajar subject to vigilant doorkeeping . . . ."[77] The majority found that to otherwise close the proverbial door would be to "avert [federal courts'] gaze entirely from any international norm intended to protect individuals."[78] The Court also nodded to concerns for the separation of powers by inviting Congress to check any such judicial exercise "at any time."[79]

Sosa has been interpreted as setting forth a two-step discretionary framework to determine whether a purportedly international norm qualifies as such for purposes of ATS liability.[80] Specifically, any claim must (1) "be of a norm that is specific, universal, and obligatory"[81] and (2) "involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[82] This test is seen to have empowered the ATS to continue "largely unabated" as a remedy for human rights violations.[83] Still, *Sosa* carefully warned federal courts to exercise this discretion with "judicial caution," and the Court would capitalize on that in *Nestlé*.[84]

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77. *Id.* at 729 (majority opinion).

78. *Id.* at 730.

79. *Id.* at 731.

80. ATS PRIMER, *supra* note 22, at 11–12; *see also* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1945 (2021) (Sotomayor, J., concurring in part) ("[T]his Court has read *Sosa* to announce a two-step test for recognizing the availability of a cause of action under the ATS.").

81. *Sosa*, 542 U.S. at 732 (citing *In re* Est. of Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)); ATS PRIMER, *supra* note 22, at 12.

82. *Sosa*, 542 U.S. at 732–33; ATS PRIMER, *supra* note 22, at 12.

83. ATS PRIMER, *supra* note 22, at 12 (internal quotation marks omitted) (quoting John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 2 (2009)); *see also* Mohraz, *supra* note 20 ("The Court made clear that the ATS will remain an available—though clearly limited—avenue for plaintiffs seeking redress for international law violations . . ..").

84. *Sosa*, 542 U.S. at 725–28 ("A series of reasons argues for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]."); *see infra* Section I.A.4; *see also* Mohraz, *supra* note 20 (citing Jonathan H. Adler, Sosa *Justice*, NAT'L REV. ONLINE (Jul. 21, 2004), https://www.nationalreview.com/2004/07/sosa-justice-jonathan-h-adler/) [https://perma.cc/GD2G-226N] (arguing that Souter's opinion "makes all the right noises about the dangers of unrestrained federal court international lawmaking, but it didn't take that final step that would have restricted it in any meaningful way").

4. *Kiobel v. Royal Dutch Petroleum*[85]: "Touch and Concern" Extraterritoriality Heightens the Standard

In *Kiobel*, Nigerian nationals residing in the United States brought an ATS suit in the Southern District of New York against a group of Dutch, British, and Nigerian corporations, alleging that they aided and abetted the Nigerian government in violating the law of nations.[86] Specifically, the plaintiffs claimed that the defendant corporations provided Nigerian authorities with food, transportation, compensation, and access to property to facilitate the violent suppression of demonstrations.[87] The Supreme Court's decision primarily addressed whether the ATS is applicable to violations committed abroad,[88] though it also provided important context regarding corporate accountability.

In his majority opinion, Chief Justice Roberts held that the ATS does not provide for liability when "all the relevant conduct took place outside the United States."[89] The Court relied on the "presumption against extraterritorial application," which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[90] In the context of international relations, the majority noted that this canon reflects the "presumption that United States law governs domestically but does not rule the world" absent a clear intention by Congress.[91]

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85. 569 U.S. 108 (2013).

86. *Id.* at 111–12.

87. *Id.* at 113.

88. *Id.* at 114.

89. *Id.* at 124–25. *Kiobel* has also been referred to as the "foreign cubed" case because it was a suit brought by a *foreign* plaintiff against a *foreign* defendant for alleged torts that occurred in a *foreign* nation. *See* ATS PRIMER, *supra* note 22, at 14 n.133 (citing various sources utilizing the "foreign cubed" reference).

90. *Kiobel*, 569 U.S. at 115 (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010)). The Court found as insufficient evidence of congressional intent both the fact that the ATS is a remedy for foreign plaintiffs and that the statutory text reads "*any* civil action." *Id.* at 118 (emphasis in original).

91. *Id.* at 115–16 (quoting Microsoft Corp. v. AT & T Corp., 550 U.S. 437, 454 (2007)); *see also id.* at 116 ("Indeed, the danger of unwanted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do."). Justice Breyer wrote a concurring opinion, which was joined by Justices Ginsburg, Sotomayor, and Kagan, which stated that the presumption against extraterritoriality was not applicable to the ATS because it "was enacted with 'foreign matters' in mind," including piracy, which, he argued, necessarily applied

The *Kiobel* majority went on to reject the plaintiffs' various arguments in favor of rebutting the presumption against extraterritoriality.[92] However, in its concluding words, the opinion provided that claims of conduct in a foreign country that "touch and concern" U.S. territory must sufficiently overcome the presumption against extraterritorial application.[93] Further, the Court asserted that because "[c]orporations are often present in many countries, . . . it would reach too far to say that mere corporate presence suffices" for ATS liability.[94] Without further guidance, lower federal courts were left to interpret a "touch and concern" test that also severely restricted their ability to determine violations of international law, as was prescribed in *Sosa*.[95]

U.S. law to a foreign jurisdiction. *Id.* at 129–31 (Breyer, J., concurring). Justice Breyer instead asserted that jurisdiction should be appropriate under the ATS where "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest," including "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Id.* at 127. This doctrine has been interpreted as an endorsement of universal civil jurisdiction, a topic not within the scope of this Note. Paul David Mora, *The Alien Tort Statute After* Kiobel*: The Possibility for Unlawful Assertions of Universal Civil Jurisdiction Still Remains*, 63 INT'L & COMPAR. L. Q. 699, 706–07 (2014).

92. *See Kiobel*, 569 U.S. at 118–23 (rejecting petitioners' arguments based on tort doctrine and historical background).

93. *Id.* at 124–25.

94. *Id.* at 125.

95. *See* ATS PRIMER, *supra* note 22, at 13 (arguing that a lack of further explanation as to what suffices the "touch and concern" test led to "divergent interpretations in the lower courts"); Clark, *supra* note 36, at 252 (asserting that *Kiobel*'s "touch and concern" requirement "severely curtails" the lower courts' ability to determine international law violations in accordance with *Sosa*); Luke D. Anderson, *An Exception to* Jesner*: Preventing U.S. Corporations and Their Subsidiaries from Avoiding Liability for Harms Caused Abroad*, 34 EMORY INT'L L. REV. 997, 998 n.16 (2020) ("It is not entirely clear what conduct satisfies the 'touch and concern' requirement in *Kiobel*."); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) (establishing a restrictive standard based on the three paradigmatic cases of piracy, violation of safe conducts, and infringement of ambassadors' rights). Justice Alito, in his concurrence, suggested that under his "broader standard," only domestic conduct that qualifies as a violation of an international norm under *Sosa* satisfies the "touch and concern" requirement and defeats the presumption against extraterritoriality. *Kiobel*, 569 U.S. at 126–27 (Alito, J., concurring); *see also* ATS PRIMER, *supra* note 22, at 14–15 (noting that lower courts have had difficulty resolving cases "in which there is some connection" to the United States).

Moreover, *Kiobel* dealt a heavy blow to international human rights litigation, which had relied on the ATS to bring suits for conduct that occurred abroad.[96] While the decision severely limited eligible claims to those of domestic violations of international law, or at least those acts that sufficiently "touched and concerned" U.S. territory, it suggested the viability of pursuing corporate accountability.[97] However, the following case analysis shows how the Court again narrowed the scope of the ATS.

5. *Jesner v. Arab Bank, PLC*[98]: Practical Considerations for Foreign Corporations

Between 2004 and 2010, approximately 6,000 plaintiffs across five ATS lawsuits brought claims as the victims of terrorist attacks in the Middle East or as representatives of such victims.[99] In *Jesner*, plaintiffs alleged that Arab Bank financially facilitated the attacks, including through the use of its New York branch and transactions through the Clearing House Interbank Payments System (CHIPS) that predominantly took place in the United States.[100]

Given that *Kiobel* did not directly resolve whether the ATS can subject *foreign* corporations to liability, the Court in *Jesner* relied on *Sosa*'s second prong to hold that the ATS does not extend to suits against foreign corporations due to practical considerations.[101] Other

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96. ATS PRIMER, *supra* note 22, at 14 & n.132 ("Many commentators interpret *Kiobel* as having significantly limited the ATS as a vehicle to redress human right abuses in U.S. courts."); Hathaway, *supra* note 17, at 176 ("An analysis of all published opinions issued in ATS suits after 2013 shows that over forty percent of those that failed cited *Kiobel*'s 'touch and concern' test as a reason the case could not proceed.").

97. *Kiobel*, 569 U.S. at 124–25 ("Corporations are often present in many countries, and it would reach too far to say that *mere corporate presence suffices*." (emphasis added)).

98. 138 S. Ct. 1386 (2018).

99. *Id.* at 1394.

100. *Id.* at 1394–95.

101. *Id.* at 1395 ("The rationale of the [*Kiobel*] holding, however, was not that the ATS does not extend to suits against foreign corporations. That question was left unresolved."); *id.* at 1403 ("In light of the foreign-policy and separation-of-powers concerns inherent in ATS litigation . . . absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."). *Jesner* also invokes the *Sosa* framework to assess various other issues: whether international law governs or imposes corporate liability; whether any corporation can be held liable under the ATS under the *Sosa* standard for an international norm; and whether any new causes of action can be recognized under the ATS. *Id.* at 1398–1403. Those questions are ultimately unanswered and

concerns against extending the ATS to foreign corporations included: the existing option to file ATS claims against individual corporate employees; inviting foreign states to subject U.S. corporations to foreign liability laws and thus discouraging American entrepreneurship; and generally allowing the political branches to provide redress without causing international discord.[102]

While a majority of the Court agreed to bar ATS claims against foreign corporations, *Jesner* was a plurality opinion with several concurrences and a dissent.[103] Justices Thomas, Alito, and Gorsuch each wrote a concurring opinion that primarily pushed to narrow the scope of the ATS and of judicial discretion in its application based on concerns regarding the separation of powers and international diplomacy.[104] In Justice Sotomayor's dissent, joined by Justices Ginsburg, Breyer, and Kagan, she argued that corporate entities should not be immunized from ATS liability, a position she argued was explicitly supported by the Executive Branch and Congress.[105]

Given the accumulation of restrictions imposed by *Kiobel*, *Sosa*, and now *Jesner*, some viewed the ATS as an unviable means of seeking redress for human rights violations.[106] The Supreme Court would again address the capacity of the ATS in 2021, leading us to the present-day condition of the statute.

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left for the political branches. *Id.*; *see also* Anderson, *supra* note 95, at 1006 (noting that, while the *Jesner* Court raised questions about corporate liability under the ATS and the possibility of new causes of action under the ATS, it "specifically limited the holding of *Jesner* to bar suits against only foreign corporations").

102. *Jesner*, 138 S. Ct. at 1405–06.

103. See ATS PRIMER, *supra* note 22, at 17–18, for a summary of the divergent opinions. See Anderson, *supra* note 95, at 1006–07, for a more detailed account.

104. *Jesner*, 138 S. Ct. at 1408 (Thomas, J., concurring); *id.* at 1408–12 (Alito, J., concurring); *id.* at 1412–19 (Gorsuch, J., concurring).

105. *Jesner*, 138 S.Ct at 1419–37 (Sotomayor, J., dissenting).

106. ATS PRIMER, *supra* note 22, at 18 (summarizing the post-*Jesner* debate regarding practicality of the ATS); Anderson, *supra* note 95, at 1010 ("*Jesner* will only increase the existing hurdles to bringing a[n ATS] suit."); Hathaway, *supra* note 17, at 164 (arguing that "[i]n each [of *Sosa*, *Kiobel*, and *Jesner*], the death of the [ATS] was prophesied," but "the Court pulled back at the last moment, unwilling to deal the coup de grâce that would finally bring an end to the hopes of human rights victims seeking justice in U.S. courts").

6. *Nestlé USA, Inc. v. Doe*[107]: "Focus" Extraterritoriality and Domestic Corporate Liability

Six plaintiffs from Mali were allegedly trafficked into Côte d'lvoire as child slaves to produce cocoa.[108] They sued Nestlé and Cargill—two U.S.-based companies in the cocoa industry—under the ATS for aiding and abetting child slavery.[109] Plaintiffs argued that Nestlé and Cargill's "economic leverage" over the plantations showed that they "knew or should have known" that the farms exploited child slavery, even if they did not own or operate them.[110] Despite Plaintiffs' contention that the ATS applied domestically to Nestlé and Cargill, the Court decided that it would be an improper extraterritorial application because the relevant conduct occurred abroad.[111]

The decision, authored by Justice Thomas, utilized a different two-step framework than that used in *Sosa*. Instead, he analyzed the *Nestlé* facts under a test outlined in *RJR Nabisco, Inc. v. European Community*[112] to determine whether the ATS could be applied extraterritorially.[113] All of the Justices except for Justice Alito joined in the *RJR* analysis.[114] First, the Court presumed that a statute only applies domestically unless there is "a clear, affirmative indication" of extraterritoriality.[115] Here, the Court reiterated the holding in *Kiobel* and found that the language of the ATS does not rebut the presumption, and thus the ATS does not have "extraterritorial reach."[116]

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107. 138 S. Ct. 1386 (2018).

108. *Id.* at 1935.

109. *Id.*

110. *Id.* (explaining that Nestlé and Cargill had exclusive rights to purchase cocoa from the farms in exchange for providing technical and financial resources, including training, fertilizer, tools, and cash).

111. *Id.* at 1936–37.

112. 579 U.S. 325, 337 (2016).

113. *Nestlé*, 141 S. Ct. at 1936.

114. *Id.* at 1950 (Alito, J., dissenting) (opining that the Court did not grant certiorari on the question of extraterritoriality); Hathaway, *supra* note 17, at 173 (noting that all the Justices, except for Justice Alito, joined Justice Thomas in his reliance on *RJR*, rather than the "touch and concern" test).

115. *Nestlé*, 141 S. Ct. at 1936 (citing *RJR Nabisco*, 579 U.S. at 337) (internal quotations omitted).

116. *Id.* (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124, 117–18 (2013)).

Second, because the ATS does not explicitly apply extraterritorially, "plaintiffs must establish that the conduct relevant to the statute's focus occurred in the United States." If satisfied, this would permit a domestic application of the statute even if some of the conduct occurred abroad.[117] Here, the Court found that all of the alleged aiding and abetting occurred abroad.[118] Moreover, the Court found insufficient the argument that all of the defendants' "major operational decision[s]" were made in the United States.[119] Importantly, the Court made no mention of *Kiobel*'s "touch and concern" requirement that had previously been understood to control the extraterritoriality of the ATS.[120]

Justice Thomas then went further and asserted that federal courts must not recognize *any* new causes of action beyond Blackstone's three paradigms because the ATS is an inherent "reason to defer to Congress."[121] Justice Thomas argued that such a reading would be in line with *Sosa* and other ATS-precedents, all of which denied the creation of a new cause of action under the second step of the *Sosa* framework.[122] Importantly, only Justices Gorsuch and Kavanaugh joined this portion of the opinion.[123] On the other hand, Justice Sotomayor, joined in her concurrence by Justices Breyer and Kagan, asserted that *not* permitting the recognition of causes of action under the ATS would itself be second-guessing the First Congress' legislative decision.[124]

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117. *Id.* (citing *RJR Nabisco*, 579 U.S. at 337).

118. *Id.* at 1937.

119. *Id.* ("To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity.").

120. *Kiobel*, 569 U.S. at 124–26; ATS PRIMER, *supra* note 22, at 20 (noting the Court's use of the "focus" test in place of the "touch and concern" requirement).

121. *Nestlé*, 141 S. Ct. at 1937–40; *see also id.* at 1944 (Sotomayor, J., concurring in part) (claiming that Justice Thomas's argument would overrule *Sosa* "in all but name").

122. *See id.* at 1938–39 (majority opinion) (arguing that a cause of action under the ATS "invariably" implicates foreign policy which in turn should be deferred to the political branches).

123. *See id.* at 1943 (Gorsuch, J., concurring) ("However vigilant the doorkeeper, the truth is this is a door *Sosa* should not have cracked.").

124. *Id.* at 1945–46 (Sotomayor, J., concurring in part).

There are several major takeaways from *Nestlé*.[125] Importantly for this Note, domestic corporations are not shielded from ATS liability.[126] In addition, the question of whether to recognize causes of action under the ATS was left at a draw among the *Nestlé* justices, and thus undecided.[127] Lastly, the *RJR* "focus" analysis certainly garnered the majority's approval in place of the *Kiobel* "touch and concern" requirement.[128] However, it remains possible that the difference between the two frameworks can be bridged by connecting the tort to the alleged corporate conduct in the United States.[129] This Note will adopt that argument to demonstrate that the extraterritoriality standard of the ATS is met by certain actors in the chain of remote drone strikes. The next Section will summarize the elements of the ATS while accounting for the caselaw's added nuances.

B. Application of the Alien Tort Statute

The formal elements of an ATS claim include: (1) a civil action, (2) by an individual who is not a U.S. national, (3) for a tort, and (4) in violation of the law of nations or a treaty of the United States.[130] However, given how ATS precedent has added—and perhaps

125. *See generally* Hathaway, *supra* note 17, at 169–76 (laying out interpretations of *Nestlé* regarding the issue of cause of action under the ATS, domestic corporate liability, and the holding on extraterritoriality); ATS PRIMER, *supra* note 22, at 22 (interpreting the *Nestlé* holding on ATS liability for domestic corporate liability).

126. *See Nestlé*, 141 S. Ct. at 1940 (Gorsuch, J., concurring) ("That is a good thing: The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."); *id.* at 1948 n.4 ("[T]here is no reason to insulate domestic corporations from liability for law-of-nations violations simply because they are legal rather than natural persons."); *id.* at 1950 (Alito, J., dissenting) ("Corporate status does not justify special immunity.").

127. Hathaway, *supra* note 17, at 168 ("Perhaps what is most notable about this exchange is that there are three justices favoring each position, and three justices sitting it out.").

128. *See Nestlé*, 141 S. Ct. at 1936 (referring to *RJR*'s "focus" test as the second step in its two-part extraterritoriality test); *see also* RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337 (2016) (laying out the "focus" analysis); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013) (laying out the "touch and concern" requirement).

129. Hathaway, *supra* note 17, at 175 (conjecturing that *Nestlé* may "simply mean that plaintiffs must more specifically allege that the corporate conduct in the United States specifically aided and abetted the human rights violations abroad.").

130. Alien Tort Statute, 28 U.S.C. § 1350; *see also* ATS PRIMER, *supra* note 22, at 1–2 (deconstructing the elements of the ATS).

retracted—nuances, this Section will summarize how the statute operates today. It will pay special attention to the issue of what causes of action exist under the ATS, if any, as well as its extraterritorial application. To be clear, there are still uncertainties about those issues following *Nestlé*, as detailed in the previous Section.[131] This Note's central argument will demonstrate how those strengths and weaknesses of the ATS facilitate a hypothetical case against drone warfare.

1. A Civil Action

The ATS only allows for civil liability and does not permit criminal liability.[132]

2. By an Individual Who Is Not a U.S. National

The ATS is unique in that it grants jurisdiction to U.S. courts only for claims filed by non-U.S. nationals.[133] For purposes of the ATS and this Note, "non-U.S. national" means "any person who is not a citizen or national of the United States."[134]

3. For a Tort

The ATS "requires the commission of a tort in order to impose liability."[135] In general, a tort is "a civil wrong, other than breach of contract, for which a remedy can be obtained, [usually] in the form of damages[.]"[136]

4. In Violation of the Law of Nations or a Treaty of the United States

This element of the ATS encompasses the debate over the door that was left ajar in *Sosa* and the viability of causes of action

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131. *Nestlé*, 141 S. Ct. 1931; *see supra* Section I.A.6.

132. 28 U.S.C. § 1350; *see also* ATS PRIMER, *supra* note 22, at 1 (deconstructing the elements of the ATS).

133. 28 U.S.C. § 1350; *see also* ATS PRIMER, *supra* note 22, at 1 ("A crucial, distinctive feature of the ATS is that it provides jurisdiction for U.S. courts to hear claims filed only by [foreign nationals].").

134. 8 U.S.C. § 1101(a)(3).

135. Bieregu v. Ashcroft, 259 F. Supp. 2d 342, 353 (D.N.J. 2003).

136. ATS PRIMER, *supra* note 22, at 1 (quoting *Tort*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

beyond Blackstone's three paradigms.[137] The alleged tort must violate the law of nations or a treaty of the United States, but as evidenced by *Nestlé*, a debate persists about what conduct is covered.[138]

Sosa's two-prong analysis for identifying an actionable claim under the ATS remains good law today, despite the efforts of Justices Thomas, Gorsuch, and Kavanaugh to effectively overturn it.[139] This Note subscribes to Justice Sotomayor's fierce defense of *Sosa* and adheres to Supreme Court precedent.[140] To reiterate, *Sosa* held that "the door is still ajar" to recognizing international norms as valid, actionable claims under the ATS, albeit "subject to vigilant doorkeeping."[141] Such claims must meet the "threshold" of relying on "specific, universal, and obligatory" norms under international law that extend to the perpetrator.[142] In addition, *Sosa* requires judicial consideration of "the practical consequences" of recognizing such claims.[143]

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137. Sosa v. Alvarez-Machain, 542 U.S. 692, 730 (2004) ("[T]he door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."); *see also* ATS PRIMER, *supra* note 22, at 23 & n.219 (discussing interpretations of the cause-of-action debate).

138. *See supra* Section I.A.6.

139. *See, e.g.*, Dodge, *supra* note 24 ("Justice Gorsuch (joined by Justice Kavanaugh) largely echoed Justice Thomas but suggested more explicitly that the Court should overrule *Sosa* . . . ."); Hathaway, *supra* note 17, at 169 ("Chief Justice John Roberts and Justice Amy Coney Barrett, meanwhile, declined to join Part III of Justice Thomas's opinion without explanation.").

140. *See generally* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1944–50 (2021) (Sotomayor, J., concurring in part) (confirming that *Sosa* did not completely "close the door" on recognizing causes of action under the ATS and arguing that the enacting Congress expected federal courts to do so); Beth Van Schaack, Nestlé & Cargill v. Doe*: What's Not in the Supreme Court's Opinions*, JUST SEC. (June 30, 2021), https://www.justsecurity.org/77120/nestle-cargill-v-doe-whats-not-in-the-supreme-courts-opinions/ [https://perma.cc/5VKZ-U65Y] ("In reading Justice Thomas's opinion, readers should not be misled by Part III, . . . [which] amounts to little more than Justice Thomas's aspirations to overturn *Sosa*.").

141. *Sosa*, 542 U.S. at 729.

142. *Sosa*, 542 U.S. at 732 (reading *Tel-Oren* as "suggesting that the 'limits of section 1350's reach' are defined by 'a handful of heinous actions—each of which violates definable, universal and obligatory norms'" (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring))); *see also* Oona A. Hathaway et al., Nestlé & Cargill v. Doe *Series: The Prohibitions on Slavery, Forced Labor, and Human Trafficking Meet the Sosa Test*, JUST SEC. (Nov. 23, 2020), https://www.justsecurity.org/73508/nestle-cargill-v-doe-series-the-prohibitions-on-slavery-forced-labor-and-human-trafficking-meet-the-sosa-test/ [https://perma.cc/WT8N-6B48] (summarizing the *Sosa* holding with respect to recognizing causes of action).

143. *Sosa*, 542 U.S. at 732.

5. Extraterritoriality

According to *Nestlé*, application of the ATS must also satisfy the *RJR* extraterritoriality framework.[144] The ATS does not expressly indicate extraterritorial application, and thus it fails the first step of statutory analysis under *RJR*.[145] With respect to the second step, however, *Nestlé* leaves unresolved what kinds of conduct would satisfy the "focus" of the ATS.[146] The *Nestlé* Court declined to resolve both the defendants' argument that the "conduct relevant to the [ATS's] focus" is the conduct directly causing the injury and the plaintiffs' argument that it is the conduct that violates international law.[147]

One commentary by Professor William Dodge following the *Nestlé* decision outlines the "broad implications" the Court's reliance on the *RJR* test will have, particularly on claims against individual defendants and extraterritorial applications outside of the human rights context.[148] However, Professor Oona Hathaway draws a potential, but significant, distinction for ATS claims against domestic corporations that is most relevant for this Note.[149] Based on oral argument and the Justices' past opinions, she argues that, in the corporate context, the *RJR* framework may only require more specific allegations that "connect the dots" between the conduct in the United States and the injuries abroad.[150]

Ultimately, the *RJR* analysis does not undo the necessity for plaintiffs to sufficiently allege *some* conduct in the United States—a requirement that was also inferred from the *Kiobel* "touch and concern" requirement.[151] As such, there are doubts about the viability

144. *Nestlé*, 141 S. Ct. at 1936 (citing RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 337 (2016)).

145. *Id.*

146. Dodge, *supra* note 24; *see also Nestlé*, 141 S. Ct. at 1937 ("To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity."). *RJR* itself does not provide further clarity since, as Dodge notes, the language about "conduct relevant to the statute's focus" was dictum. Dodge, *supra* note 24.

147. *See Nestlé*, 141 S. Ct. at 1936–37 (describing the parties' dispute about what conduct is relevant to the ATS's "focus"); Green & McKenzie, *supra* note 24, at 5 (commenting that it is unclear what form of "conduct" suffices since the Court declined both parties' arguments).

148. Dodge, *supra* note 24.

149. Hathaway, *supra* note 17, at 174–75.

150. *Id.*

151. *See id.* at 176 ("Moreover, it's far from clear that the differences between *Kiobel* and *RJR* are so stark.").

of an ATS claim against an individual defendant whose illegal conduct occurred abroad—the so-called "*Filártiga* model."[152] However, for purposes of this Note, an analysis of domestic corporations committing conduct in the United States capitalizes on the part of the glass that remains half full. The next two Sections introduce the viability of such an ATS claim by identifying the domestic control center behind a facially international machine.

C. Background on U.S. Drone Warfare and Targeted Killings[153]

Since the passage of the 2001 law authorizing the use of military force against those responsible for the September 11th terrorist attacks, the United States has commissioned remote drone warfare in various regions, including Pakistan, Yemen, Somalia, Iraq, and Syria.[154] The use of drones in U.S. military campaigns has been ardently defended by the government, national security experts, and even some human rights lawyers as an extraordinary tool that is more accurate and lawful due to its ability to monitor for long periods

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152. *See id.* at 174 ("Dodge is clearly right about cases in the *Filártiga* model. After all, few individuals plan their foreign law of nations violations in the United States."); Dodge, *supra* note 24 ("With respect to ATS cases, if plaintiffs must show relevant conduct in the United States, it is hard to see how traditional ATS cases against individual defendants can continue."). *But see* Green & McKenzie, *supra* note 24, at 5 (suggesting that if courts emphasize the ATS's "focus" on denying a safe harbor in the U.S. to enemy individuals, then the *Filártiga* model "might persevere").

153. This Note's analysis focuses solely on drones with "Remote Split Operations" which require satellite communications between a station in the foreign target area and a remote base in the United States. Clanahan, *supra* note 6, at 9. This Note does not deal with smaller drone technology which is solely controlled by personnel in the foreign target area. *Id.* at 11.

154. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 124 (2001) ("Joint Resolution to authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States."); *Hearing on Drone Wars*, *supra* note 7, at 3 ("Instead, the administration has attempted to ground its use of drones in a statute, the 2001 Congressional Authorization to Use Military Force."); HARRY H. RIMM ET AL., SECOND CIRCUIT JUDICIAL CONFERENCE REPORT OF PROCEEDINGS: CYBER-SECURITY IN THE AGE OF CYBER-TERRORISM 12–13 (2014) (discussing how the U.S. has gone further and asserted the right to use force against organizations or persons outside the theater of armed conflict in certain circumstances); JAMES IGOE WALSH & MARCUS SCHULZKE, DRONES AND SUPPORT FOR THE USE OF FORCE 6–7 (2018) (listing the regions targeted by U.S. drone warfare in the 21st century).

of time and attack based on precise coordinates.[155] Moreover, the U.S. military garnered public favor by advertising that the use of drones would reduce certain costs of war, including sparing the lives of American soldiers.[156] However, there have consistently been valid moral and legal concerns regarding the collateral effects on civilians in the regions where drone warfare is conducted.[157]

Characterized as "targeted killings," as opposed to assassinations, drone strikes are the "intentional killing by a government or its agents of a combatant who is not in custody, either out of self-defense or because the target is a combatant in an armed conflict."[158] The laws of war also authorize the intentional killing of civilians where their deaths are not disproportionate in number or to the importance of the intended target.[159] Thus, where civilian deaths do occur as collateral to the killing of a combatant, the U.S. government is not under "a general duty to investigate (or

155. Gusterson, *supra* note 8, at S77–78; Khan, *supra* note 7 ("President Barack Obama called it 'the most precise air campaign in history.'"); RIMM ET AL., *supra* note 154, at 14 ("Drone strikes, she added, offer the promise of increased accuracy, which is a good thing from a human rights perspective.").

156. WALSH & SCHULZKE, *supra* note 154, at 6 ("The pilot invulnerability that drones allow eliminates a key cost of military action: the military casualties that undermine domestic political support for the conflict."); Gusterson, *supra* note 8, at S85 ("In other words, the United States turned to drones because they offered a way to kill the enemy without having American soldiers come home in body bags.").

157. *See Hearing on Drone Wars*, *supra* note 7, at 3 ("There are, however, long-term consequences, especially when these air strikes kill innocent civilians."); RIMM ET AL., *supra* note 154, at 13 ("Estimates of civilian losses are as high as 30,000, but the true number is difficult to assess, partly because the distinction between combatant and civilian is the subject of debate . . . ."); Gusterson, *supra* note 8, at S77–78 ("Thus technical arguments about civilian casualties, claims of precision targeting, and counter-factual narratives about casualties in hypothetical alternative scenarios play an important role in American public discourses about military intervention, with new technologies often presented as magically salvationist actors in the drama.").

158. RIMM ET AL., *supra* note 154, at 11.

159. *Id.* at 13 ("[T]here are certain circumstances in which civilians can be lawful collateral damage, including where there is an expectation that an attack with a lawful objective will not result in loss of life or property disproportionate to the expected concrete and direct military advantage."); Gusterson, *supra* note 8, at S81 ("Drone operators and their commanders may see that civilians will be killed along with targeted insurgents but, weighing the number of expected civilian casualties against the importance of the combatant or combatants they are trying to kill, they proceed anyway, usually under the advice of military lawyers.").

compensate civilian victims) . . . ."[160] And when public attention is drawn to collateral damage, the Pentagon is protected by its ability to produce barebones summaries that largely characterize civilian casualties as "unfortunate, unavoidable and uncommon."[161]

Concerns about drone warfare are heightened for "signature strikes," which constitute the majority of drone attacks.[162] In contrast to "personality strikes"—targets with known identities placed on an official list[163]—signature strikes are targeted "because they exhibit an appearance or behavior that is associated with insurgents."[164] Hugh Gusterson, Professor of Anthropology and International Affairs at George Washington University, coined the term "narrative in-filling" to describe the process of monitoring the behaviors of unknown targets in the pursuit of a signature strike.[165] He provides a glaring example of an erroneous strike after monitors assumed a convoy of families in Afghanistan were members of the Taliban because they stopped to pray at dawn.[166]

A *New York Times* Investigative Report on drone warfare provided several more examples of signature strikes on civilians and civilian property—incidents characterized as mistakes despite evidence disputing the operators' supposed lack of knowledge.[167] These examples include: supposed explosives that were most likely bags of cotton; a supposed ISIS headquarters that was a longtime home to a civilian family; and an adult male associated with ISIS who turned out to be an elderly female.[168]

There are countless victims of wrongful monitoring, attempted strikes, and targeted killings; the sheer numbers highlight the traumatic experience of living under the constant threat of U.S. drone

160. RIMM ET AL., *supra* note 154, at 14.

161. Khan, *supra* note 7.

162. Gusterson, *supra* note 8, at S79 (citation omitted) (referring to signature strikes as "a term that was classified for many years but became widely known thanks to investigative journalists").

163. Despite the seemingly more precise nature of personality strikes, a human rights report revealed their inaccuracy in attacking even "high-value" insurgent leaders who were reported dead, on average, several times before their actual confirmed death. *Id.* at S80

164. *Id.* (citation omitted).

165. *Id.* at S79–80.

166. *Id.* at S79.

167. Azmat Khan, *The Human Toll of America's Air Wars*, N.Y. TIMES (Dec. 19, 2021), https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html (on file with the *Columbia Human Rights Law Review*).

168 *Id.*

warfare.[169] In furtherance of this Note's demand for justice, visibility, and accountability for these individuals, the ensuing analysis does not attempt to chronicle all of the examples of erroneous strikes. Instead, this Note focuses on the contracted perpetrators in the chain of operation for a drone strike and their culpability for the wrongful injuries that these victims share.

D. The Civilian Perpetrators Behind a Drone Strike Operation

While the U.S. military may be able to tout that drone warfare protects more U.S. military bodies, it has had to rely on more total personnel to operate drones, including civilian actors.[170] The U.S. military relies on hundreds of civilian entities to fill the "kill chain" behind drone strike missions.[171] A single 24-hour mission for some drones takes approximately 160 to 180 personnel; more complex drone systems can take 300 to 500.[172] The complex web of military and nonmilitary actors includes: "grounded flight operators, sensor operators, communications technicians, and imagery analysts; fielded forces and personnel directing takeoff, landing, and recovery procedures; and forward deployed maintenance and logistics crews . . . ."[173]

In response to concerns about civilian parties involved in the operation of armed drones, the U.S. military cited domestic and

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169. *See generally Drone Warfare*, BUREAU OF INVESTIGATIVE JOURNALISM (2020), https://www.thebureauinvestigates.com/projects/drone-war [https://perma.cc/RU4T-NTMQ] (investigating and documenting database of U.S. drone strikes and other covert actions in Pakistan, Afghanistan, Yemen, and Somalia between 2010 and 2020).

170. Cloud, *supra* note 32 ("It takes more people to operate unmanned aircraft than it does to fly traditional warplanes that have a pilot and crew.").

171. Keric D. Clanahan, *Wielding a "Very Long, People-Intensive Spear": Inherently Governmental Functions and the Role of Contractors in U.S. Department of Defense Unmanned Aircraft Systems Missions*, 70 AIR FORCE L. REV. 162, 165 (2013) (describing "kill chain" as the process used to prepare a drone mission which includes the following six steps: find; fix; track; target; engage; and assess); Kira Zalan & Emmanuel Freudenthal, *Private U.S. Contractors Part of 'Kill Chain' in African Anti-Terrorist Ops*, NEWSWEEK (Aug. 14, 2020, 9:13 AM), https://www.newsweek.com/private-us-contractors-part-kill-chain-african-anti-terrorist-ops-1524902 [https://perma.cc/RXL3-MKFA] ("[E]ven if private contractors are not involved in combat, they become 'part of the kill chain' by providing intelligence for airstrikes."); Cloud, *supra* note 32 ("Without civilian contractors, U.S. drone operations would grind to a halt.").

172. Clanahan, *supra* note 6, at 10.

173. *Id.* at 9.

international law and asserted that "[c]ontractors may operate an armed drone but they cannot make the decision to deploy the weapon system."[174] In the same response, the spokesperson assured that any combatant decisions based on "substantial discretion or value judgments" were made by military officials.[175] But wary views on civilian involvement in the "kill chain" are not exclusive to human rights activists and the like.[176] For example, while he was a Captain in the Air Force Judge Advocate General's Corps, now-Lieutenant Colonel Keric D. Clanahan pushed for the government to retain many of the roles that have been contracted out because they are "inherently governmental functions."[177] In the following subsections, this Note identifies the relevant civilian perpetrators that are part of the "kill chain" and demonstrates how and why they are eligible defendants in a hypothetical ATS claim.

1. The Contracted Eyes and Brains of U.S. Drone Warfare

A central concern about civilian personnel in remote drone warfare is the influence and authority that contracted analysts hold in the "kill chain." Specifically, investigative journalism and reports have revealed several key "private sector companies operating at the heart of the US's surveillance and targeting networks."[178] These companies, which include Science Applications International

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174. Zalan & Freudenthal, *supra* note 171; *see also* Clanahan, *supra* note 6, at 2 n.6 (providing resources for an overview of the "legal, ethical, economic, military, and diplomatic issues arising from the U.S. Government's heavy reliance on overseas contractor support . . . .").

175. Zalan & Freudenthal, *supra* note 171.

176. *See, e.g.*, Fielding-Smith & Black, *supra* note 31 (specialist in military contracting points to weaknesses in legal oversight of contractors); Cloud, *supra* note 32 (chief lawyer for Air Force Operations Law Division warned of how civilian personnel in the kill chain may violate international laws of war).

177. Clanahan, *supra* note 6, at 5 (arguing for action from Congress to help ensure the government does not outsource "inherently governmental" roles to a contractor workforce); Clanahan, *supra* note 171, at 176–77 (examining what roles should not be contracted due to their "inherently governmental" nature). It is important to note that while Clanahan's perspective as a military member himself is enlightening for this Note, his argument includes a demand for Congress to provide even more military funding and resources so that the government can better dominate remote drone operations. Clanahan, *supra* note 6, at 5. Conversely, this Note advances a method of obtaining justice for the victims of that same warfare. In fact, greater exclusive control by the U.S. government over the drone strike missions would pose greater obstacles rooted in sovereign immunity and national security protections.

178. Fielding-Smith & Black, *supra* note 31.

Corporation, Inc. (SAIC), MacAulay-Brown, Zel Technologies, and L-3 Services (now L3Harris Technologies), provide hundreds of civilian analysts to the Pentagon to assist in collecting intelligence for drone warfare.[179]

The analysts' role in intelligence collection is comprehensive and can provide the primary basis upon which military commanders press "the red button."[180] Based on actual contracts between the Department of Defense (DOD) and private contractors, we know that the government uses guarded and elusive language to outline the analysts' obligations in order to depict military control over final decision-making.[181] For example, contracts carefully place phrases like "[t]he contractor shall assist the Government" or "[r]esponsibility for validating and releasing imagery-based products resides with the Government."[182]

However, the language is not so opaque as to hide the contractors' intensely involved position in the "kill chain." For example, DOD's contract with Zel Technologies spells out categories of contracted support for its Intelligence, Surveillance, and Reconnaissance (ISR) program, which include: ISR Collection Management; ISR Mission Planning Support; and ISR Geospatial and Imagery Intelligence.[183] Within those categories, contracted analysts are specifically tasked with:

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179. Crofton Black & Abigail Fielding-Smith, *Identifying the Companies Involved in Pentagon Drone Operations: The Contracts, How We Got the Data*, BUREAU OF INVESTIGATIVE JOURNALISM (Jul. 30, 2015), https://www.thebureauinvestigates.com/stories/2015-07-30/identifying-the-companies-involved-in-pentagon-drone-operations-the-contracts-how-we-got-the-data [https://perma.cc/HBR5-7H2V] (sharing obtained transaction records and contracts between the Department of Defense and private companies); *see, e.g.*, Fielding-Smith & Black, *supra* note 31 (reporting that MacAulay-Brown was asked to provide 187 analysts).

180. *See, e.g.*, Clanahan, *supra* note 6, at 29 ("[T]he decision [to fire a drone strike in February 2010] was largely based upon intelligence analysis being conducted and reported by a civilian contractor."); Clanahan, *supra* note 171, at 186 ("For example, there have been situations where contractors have played important roles in the processing of intelligence that ultimately led to decisions to initiate air strikes.").

181. *See generally* Fielding-Smith & Black, *supra* note 31 (describing how a private contractor with the necessary expertise may act as "right-hand man" despite military efforts to maintain control over the chain of command).

182. Zel Technologies Contract at 8, *in* Black & Fielding-Smith, *supra* note 179.

183. *Id.* at 6–8.

- Providing "research and analytical support on *real-world* and *exercise/wargames events*";[184]
- Assisting "in *operational mission execution activities* [which] include pre-mission preparation, *in-progress mission activities* and post-mission wrap-up procedures";[185]
- Producing and disseminating "*tailored*, imagery-based products (e.g., stills, 360 analytical products, vehicle/personnel follows, video clips) in response to mission requirement";[186] and
- Integrating data "into the planning, *threat analysis, targeting*, and assessment processes."[187]

In lay terms, "contractors review live footage gathered by drones and spy planes flying over areas of interest, and help uniformed colleagues decide whether people they spot are potential enemies or civilians."[188] Their reviews include long-term surveillance of activities, people, and places to prepare, for example, a signature strike based on intelligence gathered about what is "normal" in a targeted area.[189] In turn, a contracted "screener" uses their discretion to deliver to military personnel a notable "observation" based on their intelligence-gathering.[190] An analyst's direct message to the military unit physically in charge of the drone sensor operator can then trigger the authorization for the use of force, which is "hard to retract" once communicated.[191]

Despite disclaimers that analysts are not practicing any substantial discretion on the "final" decision-making (i.e., pushing the "red button"),[192] analysts provide the "first level analysis, design, [and] engineering" for simulations ranging from "peacetime readiness

184. *Id.* at 7 (emphasis added).
185. *Id.* (emphasis added).
186. *Id.* at 8 (emphasis added).
187. *Id.* (emphasis added); *see also* Fielding-Smith & Black, *supra* note 31 ("[I]n military-speak, targeting can refer to surveillance of people and objects as well as *lethal strikes*." (emphasis added)).
188. Abigail Fielding-Smith et al., *Revealed: Private Firms at Heart of US Drone Warfare*, THE GUARDIAN (Jul. 30, 2015, 7:30 AM), https://www.theguardian.com/us-news/2015/jul/30/revealed-private-firms-at-heart-of-us-drone-warfare [https://perma.cc/42LA-MEE2].
189. *Id.* (describing contractors' responsibility).
190. Fielding-Smith & Black, *supra* note 31. In high-paced scenarios, the military personnel may cut out the screener and receive direct intelligence from the analysts. *Id.*
191. Fielding-Smith & Black, *supra* note 31.
192. Fielding-Smith et al., *supra* note 188 ("[O]nly military personnel operate armed drones and take final targeting decisions . . . .").

to *full-scale warfare*."[193] They are generally tasked with "the *development* of tactics, techniques, procedures, *operational implementation* and collection optimization plans."[194] In addition, they are asked to use their qualifications to "evaluate[] emerging technologies" and provide expertise on specific regions, such as Somalia, Syria, and the Gulf States.[195]

Direct testimony from contracted analysts illustrates more viscerally how both their work product *and* discretionary calls "in effect place[] them within the military chain of command."[196] A contractor stated that analysts' subject matter expertise leads them to "act as a 'righthand man'" to military officials who "lean on [them] to make better mission-related decisions."[197] Since contractors are "almost exclusively ex-military" themselves, they are often more experienced with the subject matter of drone footage than current military actors "who are frequently moved between posts."[198] In describing the stakes of a contractor's analysis, one contractor stated that a "misidentification of an enemy combatant with a weapon and a female carrying a broom can have dire consequences."[199] One can infer, then, that analysts' deliverables to the military "side" of the "kill chain" may not be as distinct as the U.S. government claims.

Another interview with contractors revealed that a qualified analyst in the context of drone monitoring must have "a vested interest in the mission" due to the "long durations of monotonous and low activity levels."[200] Analysts seem painfully aware that a mistake on their end can kill people and thus know that their "main role . . . is to ensure that does not happen."[201] In the same interview, one contractor agreed that he is "not the one shooting," but that "[i]t could be argued that [he] was responsible."[202] The government's claim that contractors "do[] not have the authority to decide on the overall course of action" is empty at worst and confusing at best given the

193. Zel Technologies Contract at 3 (emphasis added), *in* Black & Fielding-Smith, *supra* note 179.

194. *Id.* at 7 (emphasis added).

195. *Id.* at 9.

196. Fielding-Smith et al., *supra* note 188.

197. *Id.*

198. *Id.*; *see also* Fielding-Smith & Black, *supra* note 31 (stressing the difference between soldiers who are either "fresh out of high school" or moved around despite their competency and analysts who have years of experience).

199. Fielding-Smith et al., *supra* note 188.

200. Fielding-Smith & Black, *supra* note 31.

201. *Id.*

202. *Id.*

scale of the analysts' role throughout the process.[203] The military's authority to confirm the imagery analysis seems undisputed—but arguably devoid of much worth since, based on another interview, analysts' responsibilities up until the military's point of decision include: telling crew members when to abort a strike; receiving "blowback" when mistakes are made; and being the "subject matter expert[s]."[204] In sum, a contractor has "an important role in all the events that have led up to the determination for using force on the target."[205]

The U.S. military has not shied away from confirming that remote drones have greatly increased the intelligence capacity of warfare.[206] With that comes an "insatiable demand" for more ISR than the military is equipped to handle.[207] In fact, a retired three-star general who oversaw the ISR expansion stated, "[w]e're drowning in data."[208] That is where contractors step in to provide ISR "support," which "the Department of Defense has relied quite extensively on . . . ."[209] In turn, proper management and oversight of contractors have been a source of concern during high demand.[210]

Neither military experts nor contractors have hidden the fact that the combination of the contractor's powerful role in the "kill chain" with an immense workload causes contractors to approach the line—or even cross the line, as this Note suggests—into "inherently governmental functions."[211] U.S. military leaders and experts have urged drone operators to be careful given the fragility of that line.[212]

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203. Clanahan, *supra* note 6, at 28–29 (citing Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56237–38 (September 12, 2011)).

204. Fielding-Smith & Black, *supra* note 31.

205. *Id.*

206. *Id.* ("It's like being able to talk on a can and string before, and now I have a smartphone.").

207. *Id.*

208. *Id.*

209. Clanahan, *supra* note 6, at 26.

210. Fielding-Smith & Black, *supra* note 31 ("But past experience in Iraq and Afghanistan suggests that management of military contractors does not always work perfectly in practice, especially when demand for the services they provide is surging.").

211. Clanahan, *supra* note 171, at 185 fig.3 (visualizing contractor activities that cross the spectrum between governmental functions that are and are not inherently governmental).

212. *Id.* at 188 ("In response, the remedy is to avoid contractors crossing the line of inherently governmental functions."); Fielding-Smith & Black, *supra* note 31 ("If the ratio [of contractors to governmental personnel] balloons, oversight

Contractors themselves, as already described, have echoed a similar anxiety given that their analyses can "influence[] the whole mindset of the people with their hands on the triggers" in "the most hostile way."[213] Theoretically then, drone warfare is active combat operated by a clear command structure that separates the military personnel from civilian contractors. In reality, however, private puppeteers pull the trigger.

2. Why Contracted Analysts Should Be Held Accountable Under an ATS Claim

The previous subsection shows that the execution of a drone strike heavily involves civilian contractors. Whether one frames the contractor's contribution as discretionary or not, it is difficult to dispute the argument that it is highly necessary and valuable for drone surveillance and strikes to be accurate and informed.[214] "[W]ithout good intelligence, the commander is operating at a huge disadvantage."[215] Given that neither the U.S. military nor the contracted analysts themselves dispute the substantial and risky role that contractors play in the "kill chain," contractors should be subject to ATS liability for any conduct that amounts to a direct or facilitating role in wrongful injuries to civilian victims.

The ensuing analysis of a hypothetical claim against private contractors refers only to those whose services occur in the United States at remote control stations. This is in order to argue successfully within the extraterritoriality parameters set forth in *Nestlé* and *RJR*, as explained in subsection I.A.6.[216] An American contractor that primarily carries out its function in a foreign jurisdiction, such as a deployed maintenance contractor, would most likely fail to defeat the presumption against extraterritoriality.[217]

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could easily break down, and the current prohibition on contractors making targeted decisions could become meaningless.").

213. Fielding-Smith & Black, *supra* note 31.

214. Clanahan, *supra* note 171, at 176 ("Contractors provide the backbone for current Navy and Marine UAS intelligence missions and analysis.").

215. *Id.* at 184.

216. Clanahan, *supra* note 6, at 9 (describing how remote split operations work); Nestlé USA, Inc. v. Doe, 141 S. Ct. at1931, 1936 (2021) (holding that the *RJR* two-step framework applies to ATS extraterritoriality); RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. at 325, 337 (2016) (establishing the two-step framework).

217. *Nestlé*, 141 S. Ct. at 1936–37 (explaining that, despite general operational decisions made in the United States, nearly all the conduct alleged occurred abroad and thus failed to defeat the presumption against

Thus, the next Part demonstrates how a defense contractor sitting in domestic territory may be liable for a remote drone strike that executed the contractor's contractual obligations.

II. HYPOTHETICAL APPLICATION OF AN ATS CLAIM AGAINST THE PRIVATE CONTRACTORS IN THE KILL CHAIN

Having set the stage for seeking accountability from a private contractor in the "kill chain" of a drone operation, this Note now turns to the legal elements of a hypothetical ATS claim. In alleging that the defendant contractor committed these violations, this Note incorporates the full range of activities that private contractors are known to be responsible for in the "kill chain," as described in Part I. In other words, for each cause of action, the hypothetical assumes that the contractor's analysts did in fact participate in the drone strike based on the various ISR services contractors are known to provide.

The discussion of this hypothetical lawsuit urges courts to recognize that private contractors directly and independently violate the law of nations; it also buttresses these allegations with claims that contractors aid and abet the United States military in certain violations. Though the Supreme Court has not directly addressed whether the ATS covers aiding and abetting claims, norms of international law support interpreting the statute to impose secondary liability without requiring a *Sosa*-standard cause of action specifically for aiding and abetting.[218]

By discussing the breadth of violations for which private contractors are responsible, either directly or indirectly, this Note attempts to close the gap in a troubling catch-22. That is, the U.S. federal government claims authority as the final decision-maker—the "red button" pusher in drone strikes—to avoid betraying that it has

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extraterritoriality); *see generally* Clanahan, *supra* note 6, at 23 (explaining the immense reliance on contractors working alongside military personnel for important functions).

220. Brief for Philip Alston et al. as Amici Curiae Supporting Plaintiffs at 1–2, Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009) (No. 05-56175), 2006 WL 6202353, at *2 ("[I]nternational law in these forms does in fact recognize liability for aiding and abetting fundamental violations of international law."). *But see Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1279–80 n.415 ("[A]iding and abetting liability . . . has not yet been addressed by the Supreme Court but has led to a number of losses for plaintiffs in ATS suits in the circuit courts.").

contracted out "inherently governmental functions" reserved for combatants.[219] At the same time, the government admits that it could not operate its drone warfare without private contractors.[220] As discussed in Part I, despite a theoretical distinction in the chain of command between military and civilian personnel, the realities of executing a drone strike and overseeing the "kill chain" prove that that distinction is either artificial or dysfunctional.[221] Thus, private contractors' active participation before, during, and after the course of a drone strike warrants ATS liability.

A. Civil Action

This hypothetical claim would be limited to civil liability as per the statutory scope of the ATS. The plaintiff ("Plaintiff") would seek monetary damages in name but would likely have other normative motivations for bringing suit.[222] The value of the nonmonetary goals of an ATS claim are discussed at length in Part III.

B. By an Individual Who Is Not a U.S. National

Plaintiff would be an individual who is a foreign national. Based on the heavy use of drone warfare in the U.S. "War on Terror," an injured individual who is a citizen of Iraq or Afghanistan, for example, could be a viable plaintiff. The Bureau of Investigative Journalism's database of confirmed U.S. airstrikes and civilian deaths provides a helpful catalog of victims of U.S. drone strikes.[223] While this hypothetical claim may be applicable to more than one injured individual, this Note will proceed with just one plaintiff to avoid legal analyses beyond its scope, such as class certification or standing.

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221. *See supra* Section I.D.

222. *See supra* Section I.D.

223. *See supra* Section I.D.

224. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1244 ("Through interviews with a wide range of former participants in ATS lawsuits, we discovered that monetary compensation was only one, and often not the predominant, reason for pursuing litigation.").

225. *See generally Drone Warfare*, *supra* note 169 (providing database of confirmed U.S. drone strikes in Afghanistan, Pakistan, Somalia, and Yemen between 2010 and 2020).

C. For a Tort

This hypothetical ATS claim alleges unjustified torts drawn from real-life investigations and testimonies. Injuries that U.S. drone strikes have actually caused in the past include: death; serious bodily injury; mental and psychological torture; and deprivation of liberty.[224] All of these injuries could coexist, even in a singular family unit.[225] For example, Paul D. Shinkman, a national security correspondent, reported on how one drone strike caused the following life-altering injuries to one family: death of the grandmother; severe wounds to a grandchild, which posed prohibitively expensive recovery costs; and mental and physical trauma, which prevented the grandchild from going outside, attending school, or sleeping peacefully at night.[226]

Another study by Professor Metin Başoğlu, an international expert on war, torture, and trauma victims, depicted the breadth of mental trauma that accompanies physical trauma for victims of drone warfare.[227] Exposure to "multiple, unpredictable, uncontrollable stressors that threaten physical and/or psychological well-being" combined with the "lack of control over the stressors" causes trauma indicative of torture.[228] Analysts directly contribute to such torture by designing and facilitating the execution of repeat strikes that can occur in quick succession, planning unpredictable "signature" strikes, and conducting prolonged drone surveillance of which victims are aware due to the noise of the drones.[229]

Defendant contractors would be liable for their substantial role in the commission of these torts through planned intelligence for premeditated drone strikes. In particular, where it is proven that

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226. *See generally* Khan, *supra* note 167 (interviewing victims or family members of victims who have suffered the listed injuries due to drone strikes); *see also* Paul D. Shinkman, *After a Drone Strike: Pakistani Family Documents Harrowing Experience*, U.S. NEWS (Oct. 28, 2013, 5:47 PM), https://www.usnews.com/news/articles/2013/10/28/after-a-drone-strike-pakistani-family-documents-harrowing-experience (on file with the *Columbia Human Rights Law Review*) (interviewing a Pakistani family affected by a U.S. drone strike).

227. *See* Shinkman, *supra* note 224.

228. *Id.*

229. Metin Başoğlu, *Drone Strikes or Mass Torture? – A Learning Theory Analysis*, MASS TRAUMA, MENTAL HEALTH & HUM. RTS.: METIN BAŞOĞLU'S WEBSITE & BLOG ON NAT. DISASTERS, WAR, & TORTURE (Nov. 25, 2012), https://metinbasoglu.wordpress.com/2012/11/25/drone-warfare-or-mass-torture-a-learning-theory-analysis/. [https://perma.cc/N6X8-QQS5].

230. *Id.*

231. *Id.*

there was no imminent threat to the United States as shown by intelligence gathered by analysts, such injuries would not be justified.[230] An erroneous signature strike against a civilian would be a prime case for a plaintiff because it entails a deliberate killing of an unidentified (i.e., noncombatant civilian) target based on analysts' extensive surveillance and profiling.[231] Based on the analysis of a contractor's role in ISR in Part I, a plaintiff would be able to show that the analysts directed or aided and abetted the tort by identifying a target, engineering the implementation of a drone strike, and communicating the mission design to military personnel, which in effect triggered the use of force.[232]

Ultimately, the ATS claim would have to rest on an act that is not justified by the laws of war but that instead erroneously and admittedly targeted a civilian that should not have been injured.[233] The laws of war can allow for the intentional killing of civilians so long as it is proportionate to the importance of the intended mission.[234] While the laws of war and the attendant potential for war crimes are topics beyond the scope of this Note, it is essential to highlight that the distinction between an injury that is justified by the laws of war and an injury that is not may be a helpful criterion for a successful ATS claim based on wartime conduct. The next Section summarizes torts that either emerged from the context of war crimes or are highly relevant to armed conflict.

D. In Violation of the Law of Nations or a U.S. Treaty

At the time of the ATS's enactment in 1789, William Blackstone defined the "law of nations" as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."[235] And despite "the

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232. *See* Brief of Appellants at 8, Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093) ("[T]here must be an imminent threat to U.S. life that cannot be neutralized through non-lethal means.").

233. *See* Gusterson, *supra* note 8, at S79–80 (describing how signature strikes may kill innocent individuals based on behavior profiling, including one incident in which U.S. operators erroneously attacked a convoy of families in Afghanistan and killed over a dozen children).

234. *See supra* Part I.

235. *See id.* at S78 (arguing that the civilian death would not be "deemed 'proportionate,' and therefore acceptable, within the frame of the laws of war").

236. *Id.* at S81.

237. Anuja Chowdhury, Annotation, *The Alien Tort Statute in the United States: U.S. Compliance with International Law Norms Following* Nestlé v. Doe,

poverty of drafting history," the "law of nations" has been interpreted to include both "the general norms governing the behavior of national states with each other" and mercantile practices.[236] However, ATS case law shows that courts have consistently been uncomfortable with a broad interpretation of the term and ultimately adopted the *Sosa* standard that applicable international norms must be "specific, universal, and obligatory."[237]

The following subsections briefly outline several viable causes of action under the ATS that conform with violations of international law according to both caselaw and scholarship. Those include: extrajudicial killing; torture; crimes against humanity; cruel, inhuman, and degrading treatment; and violation of the laws of war. This Note does not present a comprehensive analysis into the domestic and international jurisprudence for each cause of action, which would profoundly expand its scope. Instead, the Note presents a skeletal framework, with appropriate references to caselaw, to suggest how specified torts in the real world lend precedential support on the cause-of-action issue for this hypothetical claim. Courts must not "presume[] that the drone program reflects consistent application of a uniform policy, and that strikes do not violate U.S. or international law and cannot constitute war crimes."[238] On the contrary, courts should recognize these causes of action for this hypothetical ATS claim in order to honor the international human right to a remedy.[239]

1. Extrajudicial Killing

"The United States, through the [Torture Victim Protection Act], has recognized that extrajudicial killing, no matter where it

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54 N.Y.U. J. INT'L L. & POL'Y 139, 143–44 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *66).

238. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714–18 (2004) (providing a historical overview of what the "law of nations" included at the time of the First Congress).

239. *Sosa*, 542 U.S. at 732–33; *See also Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1241 ("The significant plurality (about 34%) of cases end because the court finds that there is not an actionable violation of the law of nations.").

240. Brief for Brandon Bryant et al. as Amici Curiae Supporting Appellants at 5, Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093), 2016 WL 4524240, at *5.

241. Brief for The John Marshall Law School International Human Rights Clinic as Amici Curiae Supporting Plaintiff-Appellant at 2–3, Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093), 2016 WL 4524242, at *2–3.

takes place, should be prohibited."[240] Although the precise definition of extrajudicial killing is contested, the Torture Victim Protection Act (TVPA) relies on international law to define it as "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."[241] Courts have recognized extrajudicial killings as a violation of international norms and an appropriate cause of action for ATS claims.[242]

Though the U.S. military "enjoys broad discretion in using military force abroad," that discretion is not limitless[243]—and certainly does not transfer to private actors. The right to life is a fundamental right and courts have even scrutinized sovereign violations of that liberty.[244] As such, it is imperative that courts deter drone strikes that wrongfully murder civilians based on ambiguous suspicions without "trial and conviction."[245]

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242. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1178 (C.D. Cal. 2005); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

243. Torture Victim Protection Act § 3(a); William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 119, 123 (2018).

244. *See, e.g.*, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 36 (D.D.C. 2010) ("Plaintiff is correct insofar as many U.S. courts have recognized a customary international law norm against past state-sponsored extrajudicial killing as the basis for an ATS claim."); *Mujica*, 381 F. Supp. 2d at 1179 ("Thus, the Court holds that there is a binding customary international law norm against extrajudicial killing."); Mamani v. Berzain, 654 F.3d 1148, 1152 (11th Cir. 2011) ("Broadly speaking, this Court has decided that 'crimes against humanity' and 'extrajudicial killings' may give rise to a cause of action under the ATS."); Warfaa v. Ali, 33 F. Supp. 3d 653, 663 (E.D. Va. 2014) ("[P]rohibitions against extrajudicial killing and torture are foundational international norms, meaning that no state . . . may condone such acts."); *see generally Has the Alien Tort Statute Made a Difference?*, *supra* note 15, app. at 1302 (listing ATS cases that led to judgements in favor of plaintiffs based on international law claims including extrajudicial killing).

245. Brief of Appellants at 12, Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093).

246. *See id*. at 18 ("Courts have repeatedly recognized that because the right to life is a fundamental right . . . ."); Brief of Dr. Agnes S. Callamard, U.N. Special Rapporteur, as Amici Curiae Supporting Petitioners at 4, Jaber v. United States, 861 F.3d 241 (D.C. Cir. Oct. 30, 2017) (No. 17-472), 2017 WL 5041478, at *4 ("In international human rights law, the right not to be arbitrarily deprived of life is a foundational right, one which is applicable at all times, in all circumstances, and from which no derogation is permitted.").

247. Gusterson, *supra* note 8, at S79 ("But sometimes the behavioral signature is more ambiguous . . . ."); Brief of Appellants at 18, Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017) (No. 16-5093) ("[T]he courts have applied the

2. Torture

"[T]he existence of the TVPA is strong evidence that the prohibition against torture is a binding customary international law norm."[246] American law has fully embraced the prohibition against torture as defined by the Convention Against Torture (CAT).[247] CAT defines "torture" as the intentional infliction of "severe pain or suffering, whether physical or mental" for purposes including obtainment of a confession, punishment, or intimidation.[248] Moreover, the Restatement (Third) of Foreign Relations Law has listed "torture or other cruel, inhuman or degrading treatment or punishment" as a violation of customary human rights law.[249] Consequently, torture has been a recognized cause of action for multiple ATS lawsuits.[250]

In this hypothetical case, courts are urged to recognize a cause of action for both physical and mental torture. As described in Başoğlu's analysis, victims can allege many torturous effects of drone surveillance and strikes.[251] These effects can include post-traumatic stress disorder (PTSD), loss of body parts, constant fear of death, fear-

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strictest scrutiny even where the government takes life pursuant to a sentence imposed after trial and conviction.").

248. Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179. (C.D. Cal. 2005).

249. *See* Definition of Torture Under 18 U.S.C. §§ 2340–2340A, 28 Op. O.L.C. 297, 297 (2004), https://www.justice.gov/file/18791/download [https://perma.cc/4HYZ-AMFP] ("Torture is abhorrent both to American law and values and to international norms."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

250. Definition of Torture, *supra* note 247, at 300–01.

251. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

252. *See, e.g.*, In re Samantar, 537 B.R. 250, 253 n. 2 (E.D. Va. 2015) (citing Yousuf v. Samantar, 599 F.3d 763, 775–76 (4th Cir. 2012)) ("Prohibitions against the acts involved in this case—torture, summary execution and prolonged arbitrary imprisonment—are among these universally agreed-upon norms."); Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980)) ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."); *see generally Has the Alien Tort Statute Made a Difference?*, *supra* note 15, app. at 1302 (listing ATS cases that led to judgements in favor of plaintiffs based on international law claims including torture).

253. *See generally* Başoğlu, *supra* note 227 (explaining the psychological impacts of torture and how these effects are mirrored in those who have experienced drone strikes).

based inability to step outside one's home, displacement, and adverse effects on trade.[252]

3. Crimes Against Humanity

Crimes against humanity have been generally defined to include "murder, enslavement, deportation or forcible transfer, torture, rape or other inhumane acts, committed as part of a widespread [or] systematic attack directed against a civilian population."[253] Encompassing the causes of action for extrajudicial killing and torture, the concept of crimes against humanity draws upon similar values and principles. Accordingly, several courts have recognized crimes against humanity as a cause of action for an ATS claim.[254]

Courts have inferred both the requirement that an attack be "committed as part of a widespread or systematic attack" and that the perpetrator committed the attack with the "simple intent" and knowledge that their action is part of the attack.[255] Here, signature strikes, or at least their preparation and planning, can arguably be considered to be "directed" at the civilian population of a targeted area

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254. *Id.*

255. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 257 (2d Cir. 2009).

256. *Id.* at 257 (not contesting crimes against humanity as an "enumerated tort[]" cognizable under the ATS); Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) ("[Defendant] may be found liable for genocide, war crimes, and crimes against humanity in his private capacity . . . ."); Flores v. Southern Peru Copper Corp., 414 F.3d 233, 244 n.18 (2003) ("Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II." (citation omitted)); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1179–80 (C.D. Cal. 2005) ("Numerous federal courts have previously recognized that customary international law prohibits crimes against humanity."); *see generally Has the Alien Tort Statute Made a Difference?*, *supra* note 15, app. at 1302 (listing ATS cases that led to judgements in favor of plaintiffs based on international law claims including crimes against humanity).

257. Rome Statute of the International Criminal Court art. 7, Jul. 1, 2002, 2187 U.N.T.S. 38544 (outlining the elements of crimes against humanity); *Crimes Against Humanity*, UNITED NATIONS, https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml [https://perma.cc/SXZ3-8AVQ] (providing the background and definition of the Rome Statute on crimes against humanity); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 226 F.R.D. 456, 480 (S.D.N.Y. 2005) (noting "the requirement that the underlying acts be part of a 'widespread' and 'systematic' attack").

since analysts and drone operators fully know that they are surveilling non-militants.[256] Contracted services are particularly relevant due to their intense and prolonged surveillance of civilians in an effort to tag them as a strike target. As described above, it is this very method of close and constant supervision that is known to have caused severe torturous effects on civilian victims.[257] Moreover, even after a signature strike, "the government still does not know 'the precise identities of who [was] killed,'" which only reinforces the analysts' role in injuring civilians without justification.[258]

4. Cruel, Inhuman, and Degrading Treatment

Although it is a part of the Rome Statute and other definitions for crimes against humanity, cruel, inhuman, and degrading treatment has been recognized as its own cause of action under ATS claims.[259] This cause of action has been evaluated as part of a spectrum that includes other actionable violations, such as torture, and can include "mental or physical suffering, anguish, humiliation, fear and debasement . . . ."[260] Despite the lack of a universal definition, the cause of action for cruel, inhuman, and degrading treatment has been recognized for injuries similar to the ones relevant here.

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258. Jaber v. United States, 861 F.3d 241, 251 (D.C. Cir. 2017) ("[Signature] strikes target unidentified individuals based on where they live, who they associate with, and whether they engage in behavior commonly associated with militants."); Gusterson, *supra* note 8, at S79–80 (describing how signature strikes target people based on behavioral profiling).

259. *See supra* Section II.C.

260. *Jaber*, 851 F.3d at 251 (Brown, J., concurring).

261. *Mujica*, 381 F. Supp. 2d at 1181; Doe v. Qi, 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004) (finding a claim for cruel, inhuman or degrading treatment in violation of the ATCA for one of the plaintiffs); Xuncax v. Gramajo, 886 F. Supp. 162, 190 (D. Mass. 1995) (finding proper ATS jurisdiction to hear plaintiffs' claims which include cruel, inhuman or degrading treatment); Jane W. v. Thomas, 560 F. Supp. 3d 855, 883–84 (E.D. Pa. 2021) (finding that cruel, inhuman or degrading treatment is an actionable violation of the ATS); *see generally Has the Alien Tort Statute Made a Difference?*, *supra* note 15, app. at 1302 (listing ATS cases that led to judgements in favor of plaintiffs based on international law claims including cruel, inhuman or degrading treatment). *But see* Aldana v. Del Monte Fresh Product, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir.2005) (finding "no basis in law" to recognize cruel, inhuman, degrading treatment or punishment as a cause of action under the ATS).

262. *Qi*, 349 F. Supp. 2d at 1321 (stating that international law finds cruel, inhuman or degrading treatment to be those acts "falling short of torture").

The analysis for torture that is based on victim testimony about life under drone warfare may be adapted here for an analysis of cruel, inhuman, and degrading treatment. For example, it would include the experiences of those victims who have seen family members be subjected to one or more attacks or those who have been deprived of their liberty due to constant surveillance.[261] Additionally, evidence of victims' mental anguish and trauma due to the nature of unexpected, repetitive, or destructive strikes may serve as a basis for liability.[262]

5. The Laws of War

Lastly, the laws of war refer to principles of the Geneva Conventions, codified in the War Crimes Act of 1996, that limit the use of lethal force during armed conflict.[263] As held in *Kadic*, "liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II . . .."[264] Accordingly, "current government regulations specifically instruct contractors to notify their employees that they can be held liable under [the War Crimes Act of 1996]" for war crime offenses such as "torture, cruel inhuman and degrading treatment, and willfully causing great suffering and serious bodily injury to Plaintiffs, as well as civil conspiracy to commit war crimes and aiding and abetting the commission of war crimes."[265] Here, analysts' conduct falls squarely into liability for the commission or the aiding and abetting of war crimes.

E. Extraterritoriality

In *Kiobel*, the Supreme Court held that the ATS does not expressly allow extraterritorial application of the statute.[266] Thus, this hypothetical ATS claim must rely on the second step of the *Nestlé* holding and accordingly establish that "the conduct relevant to the statute's focus occurred in the United States . . . even if other conduct

263. *Id.* at 1323–24 (citations omitted).

264. *Jane W.*, 560 F. Supp. 3d at 884 (citation omitted).

265. Al Shimari v. CACI Premier Tech., Inc., 263 F. Supp. 3d 595, 605 (E.D. Va. 2017) ("The content of this norm is provided by the War Crimes Act of 1996, which states that a war crime includes any conduct 'defined as a grave breach' of any of the Geneva Conventions . . . ."); 18 U.S.C.A. § 2441 (codifying the Geneva Conventions of August 12, 1949).

266. Kadic v. Karadzic, 70 F.3d 232, 243. (2d Cir. 1995).

267. *Al Shimari*, 263 F. Supp. 3d at 605.

268. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936 (2021) (citing Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013)).

occurred abroad."[267] The Court did not resolve what conduct constitutes the statute's "focus." Thus, this hypothetical claim will look to successful arguments that have been made post-*Nestlé* to argue that the contractors' conduct, which occurred in remote stations within the United States, sufficiently defeats the presumption against extraterritoriality. Given the uncertainty of what suffices to be the "focus" of the ATS, it is imperative to push for aiding and abetting to be recognized as grounds for ATS liability.

1. Post-*Nestlé* Caselaw on Extraterritoriality

In *Estate of Alvarez v. Johns Hopkins University*, the District Court of Maryland held that, while the *Nestlé* court "adjusted the standard for assessing extraterritoriality," it did "nothing" to change the "landscape" of the previous *Kiobel* "touch and concern" requirement for extraterritoriality.[268] The court further reasoned that, had the Supreme Court wanted to limit the standard to only the location of the "direct tortious conduct," it would have done so.[269] Similarly, the court asserted that *Nestlé* did not bar courts from considering "all conduct constituting the aiding and abetting of, or a conspiracy to commit, a violation of the law of nations in analyzing the question of extraterritoriality."[270] The holding went on to suggest that plaintiffs sufficiently alleged domestic conduct relevant to the ATS's focus because "the nonconsensual human medical experiments were *conceived, designed, and approved* in the United States, by United States citizens working for both the *United States government and United States institutions*."[271] The court went further to state, "no nonconsensual human medical experiments would have occurred in Guatemala in the absence of this domestic conduct creating and authorizing the Guatemala Experiments."[272]

Estate of Alvarez relied heavily on *Al Shimari*, which was decided under the *Kiobel* standard but has a striking resemblance to

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269. *Nestlé*, 141 S. Ct. at 1936 (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).

270. Est. of Alvarez v. Johns Hopkins Univ., 598 F. Supp. 3d 301, 317 (D. Md. 2022). To note, at the time of writing this analysis, this case is on appeal, and a decision has not yet been rendered.

271. *Id.*

272. *Id.*

273. *Id.* at 318 (emphasis added).

274. *Id.* Ultimately, the court did not conclude on the issue of extraterritoriality based on agency grounds.

this hypothetical claim on factual grounds.[273] In *Al Shimari*, plaintiffs sued a corporation contracted by the U.S. government for the torture and abusive conduct against people imprisoned in Abu Ghraib in Iraq.[274] There, the court found sufficient domestic conduct to rebut the presumption against extraterritoriality based, in relevant part, on the following reasons: the contractor was a U.S. corporation; the contractor's employees had U.S. citizenship; the corporation's contract to perform services for the U.S. government was issued domestically; contracted managers located in the United States "gave tacit approval" for the torture committed abroad; and the TVPA and § 2340A show Congress's express intent for foreign plaintiffs to have access to U.S. courts to hold U.S. citizens accountable for torture committed abroad.[275]

In *Jam v. International Finance Corporation*, Senior Circuit Judge Randolph of the D.C. Circuit Court utilized the *Nestlé* "focus" test in his concurrence.[276] The case was brought under the Foreign Sovereign Immunity Act (FSIA), which looks to where the "gravamen" of the complaint occurred in order to impose liability.[277] Judge Randolph stated that the *Nestlé* "focus" analysis "is the same" as the FSIA "gravamen" one, thus buttressing why plaintiffs in that case failed to show any actionable conduct in the United States.[278] Specifically, plaintiffs only alleged that "general corporate activity" in the form of "financing decisions" was located in the United States, which was an insufficient connection to the alleged harm in India.[279]

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275. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530–31 (4th Cir. 2014) (concluding that plaintiffs' ATS claims sufficiently "touch and concern" U.S. territory to displace the presumption against extraterritoriality). To note, at the time of writing this analysis, this case has been heard on a post-*Nestlé* motion to dismiss, and a decision has not yet been rendered.

276. *Id.* at 521.

277. *Id.* at 530–31 (providing reasons for concluding that plaintiffs' claims suffice the "touch and concern" test); *see also* Est. of Alvarez v. Johns Hopkins Univ., 598 F. Supp. 3d 301, 318–19 (D. Md. 2022) (analogizing the court's reasoning to that of the *Al Shimari* court).

278. Jam v. Int'l Fin. Corp., 3 F.4th 405, 411 (D.C. Cir. 2021).

279. *Id.* at 408–09.

280. *Id.* at 411–12.

281. *Id.* at 412.

2. This Hypothetical Claim Sufficiently Rebuts the Presumption Against Extraterritoriality Under *Nestlé*

Based on this caselaw, this hypothetical claim would have a strong argument for extraterritorial application of the ATS. In this hypothetical, even though the plaintiff suffered the injuries while on foreign territory, the contractors' conduct substantially or even entirely occurred within the United States.

Analysts carried out all of the services relevant to the torts while stationed domestically.[280] Like in *Estate of Alvarez*, neither the final pushing of the "red button" (which happened in the United States) nor the actual drone activity abroad would have occurred, absent "this domestic conduct of creating and authorizing" the strike.[281] As already analyzed in Part I, the analysts' express duties were to: monitor and collect data; analyze imagery and footage; engineer and develop "tactics, techniques, procedures, operational implementation and collection optimization plans" for "real-world" events; provide support before, during, and after operational missions; and produce "tailored" products and recommendations on threats and targets.[282] Contracted managers in the United States also approved the analyses, which can be a "pattern of life" interpreted from thousands of hours, and communicated them to military personnel.[283]

The facts here share even more qualities with *Al Shimari*.[284] The defendant here is a U.S. corporation (e.g., Zel Technologies); defendant corporation's analysts include those with U.S. citizenship; and the contract with DoD was issued in the United States.[285] In sum, the defendant corporation and its contracted services provide the same sufficiency with respect to domestic conduct as did the defendant in *Al Shimari*.

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282. Clanahan, *supra* note 6, at 9 (describing a U.S.-based team of drone operators, including contracted analysts).

283. Est. of Alvarez v. Johns Hopkins Univ., 598 F. Supp. 3d 301, 318 (2022).

284. Zel Technologies Contract at 11–13, *in* Black & Fielding-Smith, *supra* note 179.

285. Fielding-Smith & Black, *supra* note 31.

286. Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 531 (4th Cir. 2014).

287. *See, e.g.*, Zel Technologies Contract, *in* Black & Fielding-Smith, *supra* note 179 (providing an example of a Department of Defense contract issued in the United States with a U.S. corporation).

Contractors' activities and the intensity of their contribution to the ultimate death or injuries of civilians abroad are "qualitatively distinct" from the insufficient claims in *Nestlé*, which only pleaded "general corporate activity" in the United States.[286] To reiterate, contracted work product is the brain behind drone warfare's supposed precision and effectiveness—a crucial contribution to the U.S. drone program that contractors and military personnel alike fully acknowledge.[287] Thus, the defendant contractor's conduct in this hypothetical case is not limited to "operational decisions" that are common and generic to most corporations.[288] Instead, Plaintiff's allegations are firmly rooted in the immense amount of substantive and interpretative intelligence that ultimately leads to a drone strike, regardless of the military commander who gets to push the "red button."

III. JUDICIAL AND NORMATIVE SUPPORT FOR THE EXTRATERRITORIAL APPLICATION OF THE ATS

This Note does not propose that the ATS is by any means a perfect remedy. While the hypothetical claim against private contractors in the "kill chain" of drone warfare illustrates the viability and potency of finding liability, it also demonstrates the dizzying density of the statute. Moreover, there are alternative forms of remedying violations of international law, as well as empirical evidence that successful ATS claims often fail to actually compensate the plaintiffs.[289]

Nonetheless, there are practical and policy justifications for why advocates and legal scholars should use the ATS to break through the lack of transparency around how drone warfare is orchestrated and protected. In the post-*Nestlé* ATS landscape, it is imperative that claimants are able to fluently demand

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288. *Estate of Alvarez*, 598 F. Supp. 3d at 317–18 (describing the alleged domestic activity as "qualitatively distinct" from the insufficient "general corporate activity" in *Nestlé*); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) ("Pleading general corporate activity is no better.").

289. *See* Fielding-Smith & Black, *supra* note 31 (explaining that contracted analysts help the U.S. military manage the "insatiable demand" for ISR); Clanahan, *supra* note 171, at 184 ("Precise targeting increases mission effectiveness, and minimizes civilian injury and death.").

290. *Nestlé*, 141 S. Ct. at 1937.

291. *See Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1212 (concluding that plaintiffs do not receive significant material benefits and suggesting alternative options for dispute resolution).

extraterritoriality so that the state and private conglomerates cannot use the U.S. judicial system to preclude accountability for their mass violations of international human rights.

Consequently, the ATS must continue its unique and significant role in human rights litigation through extraterritorial reach. Despite the current uncertainty of the "focus" standard, courts should not move backward and undo the ATS's transnational capacity. This last Part advocates for either formal codification or concrete judicial recognition of the statute's extraterritoriality due to the normative and jurisprudential values it provides for victims of international human rights violations.

A. Legal Alternatives to the ATS

A judicial remedy that is often implicated in ATS litigation is the TVPA.[290] The statute authorizes civil liability for extrajudicial killings and torture, and it expressly provides a cause of action for both U.S. and foreign nationals.[291] Human rights litigation can, and often does, include claims arising under both the ATS and TVPA—adding to a robust body of evidence showing that the statutes are meant to complement each other to create the greatest impact.

The legislative history of the TVPA shows that the statute was intended to "bolster and extend the rights provided by the ATS."[292] In her concurrence in *Nestlé*, Justice Sotomayor explained that according to the Committee Reports made during the passage of the TVPA, the statute "would establish an unambiguous and modern basis for a cause of action" for torture and extrajudicial killing, but the ATS "has other important uses and should not be replaced."[293] Chiefly, the TVPA does "not exhaust the list of actions that may appropriately be covered be [sic] [the ATS]."[294] The House Report goes further and warns that the ATS "should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary

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292. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). Another common legal remedy raised in this sphere of human rights violations is the Foreign Sovereign Immunities Act (FSIA), which is only available against foreign governments. Pub. L. No. 94-583, 90 Stat. 2891 (1976).

293. Torture Victim Protection Act § 3.

294. Aceves, *supra* note 241, at 122.

295. *See Nestlé*, 141 S. Ct. at 1949 n.7 (Sotomayor, J., concurring in part) (pointing to the TVPA's legislative history); H.R. REP. NO. 102-367, pt. 1, at 3 (1991) (stating TVPA's purpose and that it should not replace the ATS).

296. H.R. REP. NO. 102-367, pt. 1, at 4 (1991).

international law."[295] Thus, the ATS serves an important role in preserving a judicial remedy for violations of international norms that are beyond the scope of the TVPA or that come into judicial recognition.

B. Recent Congressional Support for the Constitution and Expansion of the ATS

Continuing legislative support for the ATS is indicated through the introduction of the Alien Tort Statute Clarification Act (ATSCA) in May 2022 by Senators Richard Durbin (D-IL) and Sherrod Brown (D-OH).[296] Similarly, during the September 2022 Senate Judiciary Committee hearing on a proposed expansion of the U.S. war crimes statute, Senator Jon Ossoff (D-GA) also raised legislative attention to the ATS.[297]

The ATSCA would assert that "the [ATS] remains an important tool for addressing international law violations" and specifically addresses corporate accountability.[298] The bill proposes amending the ATS to clarify that federal courts have extraterritorial jurisdiction over all defendants that are U.S. nationals, U.S. legal permanent residents, or present in the United States regardless of nationality.[299] If passed, the ATSCA would confirm "the transnational nature of international law" and "that, yes, the United States intends

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297. *Id.*

298. S. 4155, 117th Cong. (2022).

299. Justin Cole, *11 Takeaways from Senate Hearing on Expanding War Crimes Act and a Crimes Against Humanity Statute*, JUST SEC. (Oct. 3, 2022), https://www.justsecurity.org/83339/11-takeaways-from-senate-hearing-on-expanding-war-crimes-act-and-a-crimes-against-humanity-statute/ [https://perma.cc/5YYM-GHGQ].

300. S. 4155 § 2.

301. *Id.* § 3; *see also Why We Need the ATSCA Now*, *supra* note 15 (explaining that the ATSCA would "[affirm] that the ATS applies extraterritorially and thereby [ensure] that non-Americans have the opportunity to file civil suits in U.S. courts for violations of international law that occur abroad . . . ."); Reynolds Taylor & Laynie Barringer, *The ATS Clarification Act Can Protect Human Rights and Level the Playing Field for U.S. Businesses*, TRANSNAT'L LITIG. BLOG (June 1, 2022), https://tlblog.org/ats-clarification-act-can-level-the-playing-field/ [https://perma.cc/8MTU-R7WN] (describing how the ATSCA "will clarify the extraterritorial reach of the Alien Tort Statute (ATS) and expand the state's jurisdiction to cover all defendants 'present in' the United States."). The ATSCA would also be in contrast to Senator Dianne Feinstein's (D-CA) subsequently withdrawn proposal in 2005 which "would have made it more difficult to bring suits against both corporate entities and foreign public officials." *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1234 n.155.

to play its role in disciplining human rights abusers with sufficient connections to the United States."[300]

C. Economic Support for Extraterritorial Application of the ATS

Businesses have also chimed in on the benefits of clarifying the extraterritorial reach of the ATS.[301] Small and mid-sized cocoa companies submitted an amicus brief in *Nestlé* arguing that narrowing the ATS so as to eliminate corporate and aiding-and-abetting liability would disadvantage businesses that either cannot avoid liability through supply chains or operate at higher costs to comply with international human rights laws.[302] Moreover, other than holding multinational corporations accountable, ATS extraterritoriality would be "excellent for the U.S. economy."[303]

There is evidence that despite investing in social responsibility, large corporations are able to engage in more corruptive and exploitative practices, allowing them a wrongful competitive advantage.[304] Thus, the ATSCA would: allow the private sector to become more "stable, predictable, and transparent;" "level[] the playing field;" and avoid creating a domestic safe harbor for large corporations committing human rights violations abroad.[305] Finally, guaranteeing the extraterritoriality of the ATS would bring the United States in line with several other countries that exercise

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302. *Why We Need the ATSCA Now*, *supra* note 15.

303. *See generally* Taylor & Barringer, *supra* note 299 (arguing that the ATSCA would encourage competition by leveling the playing field between law-abiding companies and those that would commit international crimes to gain an unfair advantage).

304. Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents at 10–11, Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453), 2020 WL 6291304, at *10–11.

305. Taylor & Barringer, *supra* note 299.

306. *Id.* (alleging that industry giants are known to use their "extensive resources and influence" to commit a host of violations, including "fund[ing] foreign terrorist organizations, collud[ing] with local authorities to execute individuals who challenge unethical business practices, and support[ing] the kidnapping and torture of workers by military dictatorships"); *see generally* DAN ESTY ET AL., TOWARD ENHANCED SUSTAINABILITY DISCLOSURE: IDENTIFYING OBSTACLES TO BROADER AND MORE ACTIONABLE ESG REPORTING (2020) (analysis of significant inconsistencies in ESG reporting due to differing methodologies, self-serving interests, and lack of regulation).

307. *Id.*

extraterritorial jurisdiction over violations by national corporations.[306]

In the context of human rights violations committed during drone warfare, there is a double-edged sword of which to be wary. By pushing the valid economic benefits of greater corporate accountability, contractors may turn to contractually assigning more of their responsibilities or liabilities to the U.S. government. That in turn may actually shield the violations at issue even more due to sovereign protections, such as sovereign immunity, laws of war, and the political questions doctrine. Congress could also go further and authorize even greater discretion by the U.S. military. Hopefully, those risks could still be mitigated by international laws that can be enforced through different channels. Nonetheless, this poses the need to carefully avoid any perverse incentive to further convolute or obscure the operative dynamic between the government and private contractors.

D. Monetary Compensation to Victims

As a civil remedy, the ATS has the capacity to bring large sums of monetary compensation to victims, especially if the defendant is a corporation. However, an empirical study published in 2022 has identified only twenty-five cases since 1793 (the year the first ATS case was decided) in which a court awarded a monetary judgment and that award was not later overturned.[307] The largest award was approximately $60.3 billion, with the second greatest being $1.96 billion.[308] Moreover, "only six out of these twenty-five awards appear to have been collected, and only partially" at that.[309] The study also provides a list of known settlements of ATS claims and their amounts.[310]

The potential for a substantial monetary award can obviously be an influential factor in bringing an ATS claim. But, as discussed in

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308. *Why We Need the ATSCA Now*, *supra* note 15 (identifying Canada, the United Kingdom, the Netherlands, and France as countries that exercise such jurisdiction).

309. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1250; *see also id*. app. A (displaying a chart of monetary damages awarded in ATS suits). This analysis does not include adjudications that may have happened subsequent to the report's publication which was last revised on October 10, 2022.

310. *Id.* at 1250.

311. *Id.*

312. *Id.* app. B (providing a chart of known settlements in ATS claims).

the next Section, plaintiffs have not placed as much emphasis on it as one may expect.[311] Nonetheless, plaintiffs who are able to collect a portion of their reward understandably benefit greatly. For example, the victim in this Note's hypothetical claim would likely be in need of financial assistance if a drone strike destroyed their home, caused severe injuries requiring expensive medical treatment, or forced them to flee the area. And even a small amount of money could help cover the initial costs of an escape from immediate danger.[312]

E. Powerful Normative Benefits to Victims

Rather than hyper-focusing on the compensation structure of ATS wins, scholars, lawyers, and activists have correctly pushed "for a more nuanced view of what constitutes 'success' . . . ."[313] In fact, comprehensive interviews with former ATS litigants revealed that "monetary compensation was only one, and often not the predominant, reason for pursuing litigation."[314] ATS plaintiffs were often motivated by "[t]ruth-telling, exposing wrongdoers, reclaiming dignity, contributing to improved practices, and strengthening respect for international law . . . ."[315] These normative benefits are in fact wins for plaintiffs and victims in their shared communities, whether or not a case ends in a favorable judgment.[316]

With the invocation of a federal statute claiming violations of international norms comes public attention at local and even international levels.[317] And "[t]he impact of the media on resolving a

313. *See* discussion *infra* Section III.E.

314. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1257 (quoting an ATS lawyer discussing a real case of successful claimants who benefitted greatly in the Eastern Bloc where they "didn't have a television or running water").

315. *Id.* at 1244.

316. *Id.*

317. *Why We Need the ATSCA Now*, *supra* note 15.

318. This Section relies heavily on and summarizes Christopher Ewell, Oona A. Hathaway, and Ellen Nohle's comprehensive assessment of the ATS that was published in 2022. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15. This Note encourages the reader to reference the report itself for a more detailed understanding of the authors' approach and personal conclusions about the trajectory of the ATS.

319. Holt, *supra* note 44, at 568 ("The novelty of the international perspective, particularly where a case has been raised in an international forum, is appealing to the media." (quoting Stephen A. Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, *in* NEW DIRECTIONS IN HUMAN RIGHTS 109, 124 (Ellen L. Lutz et al. eds., 1989))).

case must not be underestimated."[318] When an ATS claim exposes a human rights violation, especially in association with the U.S. government, it "can signal broader patterns of social injustice" that pervade the plaintiff's community.[319] For victims of American drone warfare, exposing the depth of the private contractors' roles can help unravel the overall secrecy and awe around military operations.

For example, Raytheon Missiles & Defense recently announced a $207 million contract with the U.S. Army to provide small unmanned aircraft that combine drone and laser technology to detect and defeat threats from other drones.[320] A reporter has already tested out some of that equipment.[321] The system is assembled by technicians and fired "through a program running on a laptop."[322] It seems as though this information has been made public to celebrate a feat of technology and military prowess. Yet, when inevitable collateral damage impacts civilians, the ATS can be its own journalistic tool to reveal the violent and fatal impacts. Judicial recognition of the hypothetical claim in this Note would thus make it more feasible for future courts to approach more instances of civilian death at the intersection of warfare and technology.

ATS claims that build on each other, like the hypothetical claim in this Note, can allow courts and society at large to more easily comprehend the need for accountability. Of course, settlement agreements do not directly create precedent and they may silence victims.[323] However, the existence or threat of ATS litigation can also have a "deterrence effect" by forcing private companies to reinforce their due diligence and social responsibility obligations.[324] And it is

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320. *Id.* (quoting Stephen A. Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor*, *in* NEW DIRECTIONS IN HUMAN RIGHTS 109, 124 (Ellen L. Lutz et al. eds., 1989)).

321. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1245.

322. *Raytheon Missiles & Defense Awarded $207 Million Counter-UAS Contract*, RAYTHEON (Oct. 10, 2022), https://www.raytheonmissilesanddefense.com/news/2022/10/06/rmd-awarded-207-million-counter-uas-contract [https://perma.cc/9B52-942P].

323. Kelsey D. Atherton, *What It's Like to Fire Raytheon's Powerful Anti-Drone Laser*, POPULAR SCI. (Oct. 31, 2022, 7:00 AM), https://www.popsci.com/technology/firing-raytheon-laser-weapon/ [https://perma.cc/5VBK-94TR].

324. *Id.*

325. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1252.

326. *Id.* at 1270.

possible that a victim "feel[s] some level of personal relief from telling their story in private . . . even if their story is not made public."[325]

That leads to another normative benefit associated with the ATS: the development of international human rights law.[326] One seasoned ATS litigator highlighted the importance of "norm development, which contributes to the formation of customary international law by influencing both general state practice and *opinio juris*."[327] Just like any other body of precedents, successful ATS claims can advance legal and political policies that are more readily able to protect vulnerable groups and victims when and if they come forward.[328] Bringing a claim of human rights violations against behemoths like private defense contractors or the U.S. government is both daunting and easily obstructed, including by judicial reluctance to review acts related to foreign policy.[329] But with repeated public exposure of those violations, gradual transparency of the facts, and judicial acknowledgment, it is this Note's hope that plaintiffs will be supported by a more victim-friendly and informed infrastructure.

At the same time, using victims' experiences in an ATS claim for the sake of developing a body of law or political movement certainly gives rise to ethical concerns.[330] Molding a legal strategy to be more amenable for future cases—even if for other plaintiffs in comparable situations—simultaneously detracts from human rights advocacy's emphasis on putting the victims and their experiences first. Thus, while lawyers, scholars, and activists may face some degree of trial-and-error in their efforts seeking to perpetuate

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327. *Id.* at 1252.

328. *Id.* at 1245.

329. *Id.*

330. *See id.* at 1261 ("A ruling reaffirming the legal norm at issue can set a precedent confirming or extending the applicability of international law, thus potentially benefitting a large number of people whose rights are thereby recognized.").

331. *See, e.g.*, CONG. RSCH. SERV., LSB10759, THE POLITICAL QUESTION DOCTRINE: FOREIGN AFFAIRS AS A POLITICAL QUESTION (PART 4) 1–2 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10759 [https://perma.cc/Y3EH-54EL] (arguing that the political questions doctrine bars judicial surveillance of the military because that is committed to the political branches by the Constitution and policy); *Saleh v. Titan Corp.*, 580 F.3d 1, 8 (D.C. Cir. 2009) (reasoning that the adjudication of tort liability for government contractors "will as often as not devolve into an exercise in finger-pointing between the defendant contractor and the military, requiring extensive judicial probing of the government's wartime policies").

332. *Has the Alien Tort Statute Made a Difference?*, *supra* note 15, at 1264.

successful change, it is important that plaintiffs be "of the same mind."[331]

According to another veteran ATS lawyer, some ATS litigants can feel a sense of victory simply through the opportunity to tell their story aloud and to confront perpetrators.[332] She described "the 'moments of regaining of power' she saw for her clients when they were able to confront U.S. officials in court, even if the case was quickly dismissed."[333] However, here there is another risk whereby victims are forced to relive their traumas in the legal arena, which can be unsympathetic, sterile, and intimidating.[334] While a victim cannot avoid telling their story, even in non-adversarial settings, advocates must try to create a comfortable environment and nurture their stories so that they feel they have had their rightful day in court.[335] There can be "an accounting in the filing of the complaint itself," and thus lawyers should be careful to strike the right balance.[336]

As Christopher Ewell, Oona A. Hathaway, and Ellen Nohle argue in their comprehensive assessment of ATS litigation practically to date, litigating a human rights case can "reinforce other methods of social change."[337] They ultimately conclude that "litigation is most effective when used in tandem with other strategies—including activism, harnessing media attention, and highlighting the individual stories of those who have long been ignored to bring about legislative reform and change in practice on the ground."[338] The advancement and support of a community-based approach may be one of the most impactful benefits of the ATS. Paul Hoffman, the litigator behind many of the statute's seminal cases, has echoed that sentiment and emphasized that litigation is but one tool, perhaps not even the most important one, that "can help in organizing people and shaping public opinion."[339]

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333. *Id.*

334. *Id.* at 1266.

335. *Id.*

336. *See id.* at 1274 ("Every time you tell their story, you retraumatize them.").

337. *See id.* at 1256 (discussing how some plaintiffs in ATS cases ask counselors to file suits "to have their day in court," despite knowing that their claims likely will not survive a motion to dismiss).

338. *Id.*

339. *Id.* at 1262.

340. *Id.* at 1300–01.

341. *Id.* at 1262. Paul Hoffman worked on and delivered oral argument for several ATS cases, including: Sosa v. Alvarez-Machain, 542 U.S. 692, 696 (2004);

CONCLUSION

ATS litigation "has played a substantial role in achieving justice for individuals and communities that have faced human rights violations around the world" despite its erosion through Supreme Court decisions.[340] Yet, there remain egregious gaps in accountability for certain violations of international norms. The hypothetical ATS claim analyzed in this Note is meant to illustrate one such violation that demands special attention.

The U.S. government has been executing its reign of drone terror for decades now, and there is no reason to believe it is going away any time soon.[341] Since the inception of drone warfare, thousands of innocent civilians have lost their lives due to erroneous drone strikes.[342] Yet, those fatal misfires are directed by an extremely intricate web of intelligence gathering that relies substantially on private, civilian analysts who are not official U.S. combatants. Such an incongruence between a highly informed decision-making process and the senseless murder and torture of so many civilians thus begs the central questions: *Is there liability? If so, against whom? If not, why not?*

This Note finds that while there should be liability, both the U.S. government and private contractors have evaded it by constructing an elusive chain of actors. The military is allowed to spend millions of dollars annually to rely on private analysts, without whom the collateral damage from drone strikes would likely be higher. But because someone in uniform gets to push the "red button," the military can take the trophy if the strike is accurate. However, if the target was, in actuality, a grandmother hanging her laundry outside, then the military can shield itself from responsibility and reprimand the analysts for planning an inaccurate mission. No matter the actor, there is a devastated civilian family on the other

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Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 110 (2013); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1934 (2021).

342. *Why We Need the ATSCA Now*, *supra* note 15.

343. *See generally* Atherton, *supra* note 321 (discussing importance of drones in modern warfare).

344. *See* Khan, supra note 7 (noting that Pentagon documents revealed "the deaths of thousands of civilians, many of them children"); *Drone Warfare: History of Drone Warfare*, supra note 169 ("[Drone warfare] has also killed hundreds, if not thousands of civilians, according to data collected by the Bureau and the NGO Airwars . . . .").

side of the world whose greatest fear from the constant buzz of hovering drones has just materialized.

The ATS is a promising vehicle for justice, visibility, and change. It has power in its tenured codification into U.S. law since 1789. And despite efforts by U.S. courts and activists to whittle the statute into an impossible remedy, it still promises accountability from domestic corporations—an accountability with the capacity to empower victims, drive social change, and shape international law. The Supreme Court has, as recently as 2021, all but confirmed that courts have the power to make that happen. Congress has followed up with a clear demand to codify the extraterritorial reach of the ATS in a way that will allow human rights advocacy to substantially breach the walls protecting American corporations that profit in the millions while they violate the basic, fundamental rights of people across the globe.

In her concurrence in *Jaber*, Judge Brown invoked the clichéd image of advanced technology warping society into an apocalyptic chaos.[343] But her message—or perhaps warning—is potent. We know how foolish it would be to trust the executive and legislative branches of government to rein in their own authority to exercise military force in politically charged environments, such as the one surrounding the "War on Terror." While the U.S. judicial system has much room to improve in its own politicized arena, it has a duty to act as a steward for the claims of victims of flagrant human rights violations perpetrated by the U.S. government. The ATS is but one tool in addressing the collateral consequences of American drone warfare that are almost exclusively felt by civilians in other countries who are tortured, killed, and maimed by an invisible enemy. Together with reforms based in community activism and non-adversarial dispute resolution, a successful ATS claim against the "private eyes" and brains of drone warfare can serve as a model for a humane, responsible, and lawful relationship with technology in the future.[344]

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345. Jaber v. United States, 861 F.3d 241, 253 (D.C. Cir. 2017) (Brown, J., concurring) ("The spread of drones cannot be stopped, but the U.S. can still influence how they are used in the global community—including, someday, seeking recourse should our enemies turn these powerful weapons 180 degrees to target our homeland."). This Note takes ironic notice of Judge Brown's appointment to the bench by former President George W. Bush, who spearheaded the use of drone warfare in the War on Terror and staunchly defended it in the face of known murders of innocent civilians.

346. Fielding-Smith & Black, *supra* note 31.