HAS THE ALIEN TORT STATUTE MADE A DIFFERENCE?: A HISTORICAL, EMPIRICAL, AND NORMATIVE ASSESSMENT

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The Alien Tort Statute (ATS), which allows aliens to file civil suit in U.S. courts for violations of the law of nations, has been considered by many to be one of the most important legal tools for human rights litigation in the United States and perhaps even the world. The effectiveness of this tool, however, has been gradually eroded in a series of Supreme Court decisions. The statute's latest trip to the Supreme Court came in October Term 2020 in a pair of cases: Nestlé USA, Inc. v. Doe *and* Cargill, Inc. v. Doe, *brought by former enslaved children trafficked from Mali to Côte d'Ivoire to work on cocoa plantations. The Court granted certiorari to consider whether the ATS could be used to seek compensation from corporations. The majority never reached the issue, holding instead that the plaintiffs sought inappropriately to apply the ATS extraterritorially—a decision that could have far-reaching consequences. This is an essential moment, then, to step back and assess the ATS. Before deciding how to move forward, it is necessary to assess where we have been, what the ATS has achieved, where it has fallen short, and to consider the range of options for human rights victims seeking justice.*

To do that, this Article undertakes the most comprehensive empirical study of the ATS to date. Using a database of every single case brought under the ATS in U.S. federal court

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that has resulted in a published opinion, this Article provides a detailed picture of ATS litigation from 1789 to the present. This quantitative data is augmented with detailed interviews with participants on both sides of the modern cases. The Article arrives at three main conclusions that lead to three sets of recommendations. First, the greatest barrier to ATS suits is the limitation on extraterritorial effect of the statute. In light of this finding, we recommend alternative strategies to provide accountability for human rights violations committed outside the United States. Second, plaintiffs generally do not receive significant material benefits from ATS litigation, but they still benefit from the opportunity to be heard and to bring attention to the harms they have suffered. Given this finding, we suggest greater attention to options for non-adversarial dispute resolution. Third, the ATS and other existing tools have proven inadequate for reaching corporate contributions to human rights violations. Hence serious consideration should be given to legislation, including due diligence obligations, aimed directly at this problem.

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INTRODUCTION

The Alien Tort Statute (ATS) has been considered by many to be one of the most important tools for human rights litigation in the United States and perhaps even the world. The statute, enacted by the First Congress in 1789, is brief. It simply states, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] The statute went largely unnoticed until 1980, when the Second Circuit ignited a new era in human rights advocacy by awarding a ten-million-dollar judgment in *Filártiga v. Peña-Irala*[2] against former Paraguayan official Américo Norberto Peña-Irala in a suit brought against him under the ATS for his role in the kidnapping and torture of the son of a political dissident.

Even as it was celebrated by human rights advocates, the ATS became the bane of some scholars, lawyers, and U.S. executive branch officials who came to regard its use by human rights advocates as an inappropriate effort to challenge U.S. foreign policy through the courts. As advocates brought a growing number of suits under the ATS against U.S. and foreign officials in the early 2000s, the U.S. government considered the ATS a growing threat to U.S. foreign policy. Around the same period, ATS lawyers trained their sights on corporations they alleged were complicit in human rights abuses. These corporations had deep pockets that offered the potential of meaningful compensation for plaintiff victims, but those same deep pockets funded powerful legal defenses against ATS suits.

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1 28 U.S.C. § 1350. The term "alien" is defined in U.S. law as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3).

2 630 F.2d 876, 881 (2d Cir. 1980) (holding that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today"). The case was the twenty-fourth to be brought under the ATS that resulted in a published opinion—and the first one that was successful. This is calculated from the ATS Database, described *infra* note 16.

Soon the Supreme Court also entered the fray. Beginning in 2004 with *Sosa v. Alvarez-Machain*[3]—a case that featured a U.S. government official as the defendant—the Supreme Court slowly chipped away at the ATS. The Supreme Court continued its course in 2013 in *Kiobel v. Royal Dutch Petroleum*,[4] declaring that the ATS cause of action did not apply extraterritorially, and in 2018 in *Jesner v. Arab Bank, PLC*, holding that the ATS cause of action did not apply to foreign corporations.[5]

In June 2021, in a pair of cases—*Nestlé USA, Inc. v. Doe* and *Cargill, Inc. v. Doe*[6]—the Supreme Court weighed in on the debate over the meaning and scope of the ATS cause of action for the fifth time.[7] The background of the case illustrates many of the complexities that have characterized ATS suits: in 2005, in response to human rights reports documenting child slavery in the cocoa sector in West Africa,[8] the cocoa industry agreed to a voluntary arrangement aimed at rooting out the "worst forms of child labor."[9] After deeming the voluntary promises inadequate and unsuccessfully advocating for stricter standards, the International Labor Rights Forum filed a class action suit on behalf of three Malian plaintiffs under the ATS against American chocolate companies Nestlé, Cargill, and Archer Daniels Midland (ADM). The suit alleged that these companies aided and abetted the trafficking of the plaintiffs from Mali to the Ivory Coast and the subsequent forced labor and torture these trafficked individuals endured on Ivorian cocoa farms when they were children.[10] They described being "beaten with whips

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3 542 U.S. 692 (2004).

4 569 U.S. 108, 119 (2013).

5 Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

6 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931 (2021). The authors of this article authored an amicus brief in the *Nestlé* and *Cargill* cases. Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Respondents, Nestlé USA, Inc., v. Doe & Cargill, Inc. v. Doe, 141 S. Ct. 1931 (2019) (Nos. 19-416 & 19-453). One of the authors of this article, Oona A. Hathaway, also was counsel of record for amicus briefs in all the aforementioned ATS cases in the U.S. Supreme Court with the exception of *Sosa*.

7 In addition to the aforementioned cases, the Supreme Court decided on the substance of the ATS in *O'Reilly de Camara v. Brooke*, 209 U.S. 45 (1908).

8 *See, e.g.*, Liz Blunt, *The Bitter Taste of Slavery*, BBC NEWS (Sept. 28, 2000), http://news.bbc.co.uk/2/hi/africa/946952.stm [https://perma.cc/H4SF-63N8] (highlighting the presence of slave labor in cocoa farming).

9 Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (2001), https://web.archive.org/web/20151208022828/http://www.cocoainitiative.org/en/documents-manager/english/54-harkin-engel-protocol/file [https://perma.cc/GPY6-56MN].

10 Doe v. Nestlé, S.A., 748 F. Supp. 2d 1057, 1063–64 (C.D. Cal. 2010); *see* Lise Colyer, *Class Action Against Chocolate Giants Could Win Damages for 50,000*

and tree branches" and forced to work "twelve to fourteen hours per day, at least six days per week" without pay.[11] Fifteen years into the litigation, the Supreme Court granted certiorari to consider whether the ATS could be used to seek compensation from corporations. The majority opinion never reached the issue, however, holding instead that the plaintiffs inappropriately sought to apply the ATS extraterritorially.[12] While the decision was not as bad for plaintiffs in ATS suits against corporate defendants as some had expected—indeed, there were five votes favoring corporate liability under the ATS[13]—some lamented that the decision could have broad implications for both the future of the ATS and for the extraterritoriality doctrine more generally.[14]

This is a critical moment to step back and assess the ATS. While the statute remains intact, the latest case is a serious blow to its continued utility for victims of human rights violations. Depending on how broadly this latest restriction on the scope of the ATS is interpreted by the lower courts, the case could bring an end to the *Filártiga* line of cases under the ATS—cases brought against individuals for human rights violations committed abroad.[15] Long considered the inviolable core of the ATS, this now longstanding form of liability under

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Child Slaves, QUOTA (Mar. 4, 2021), https://quota.media/class-action-against-cocoa-giants-could-win-damages-for-50000-child-slaves/ [https://perma.cc/42EX-UZ5H]. The plaintiffs also alleged violations of the Torture Victim Protection Act (TVPA) and California state law claims, with human rights group Global Exchange joining as an additional plaintiff only on the state law claims. *Doe*, 748 F. Supp. 2d at 1063–64.

11 Brief in Opposition at 3, Nestlé U.S.A., Inc. v. Doe, 141 S. Ct. 1931 (2019) (No. 19-416) On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

12 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021) (holding that allegations of "operational decisions" and other "general corporate activity . . . do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct").

13 *Id.* at 1947 n.4 (Sotomayor, J., concurring in part and concurring in the judgment) (noting that Justice Sotomayor and "four other Justices" would reject corporate immunity from suit under the ATS).

14 *See* William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (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/V5WF-BVU4].

15 The plaintiffs' lawyers sought to amend their complaint and continue to litigate the case. Terry Collingsworth, *U.S. Supreme Court Dismisses Claims Against Nestlé and Cargill and Remands to Trial Court*, BUS. & HUM. RTS. RES. CTR. (June 17, 2021), https://www.business-humanrights.org/it/ultime-notizie/us-supreme-court-dismisses-claims-against-nestl%C3%A9-and-cargill-and-remands-to-trial-court/ [https://perma.cc/VEP3-Q8X7]. However, the Ninth Circuit affirmed the District Court's dismissal and plaintiffs were not permitted to

the ATS may no longer be viable post-*Nestlé*. Before deciding how to move forward, it is necessary to assess where we have been, what the ATS has achieved, where it has fallen short, and to consider the range of options for human rights victims seeking justice.

Although the ATS has been the subject of a wealth of scholarship over the years, there has yet to be a comprehensive empirical assessment of the cases brought under the statute in federal court—and the results of those cases. To fill that gap, this Article undertakes the most comprehensive empirical study to date. For this analysis, we constructed a database of every single case brought under the Alien Tort Statute in U.S. federal court that has resulted in a published opinion.[16] This

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amend. E-mail from Paul Hoffman to Oona Hathaway (Aug. 5, 2021, 13:09 EST) (on file with author).

16 This database, which will be made public upon publication of this Article, includes all published ATS opinions, plus opinions that appear in the Federal Appendix. Oona A. Hathaway, Christopher Ewell & Ellen Nohle, ATS Database [hereinafter ATS Database]. We focused on published opinions in significant part because unpublished opinions have no precedential value. Moreover, most of our data is analyzed according to lines of opinions in a single case; hence, a case will be captured in our data as long as at least *one* opinion in the case is published. In addition, for settlements and awards, we gathered data on both published and unpublished cases. Finally, we coded a random sample of unpublished ATS opinions available on LexisNexis. To produce the random sample, we searched in LexisNexis for the term "alien tort," with "publication status" of "unreported," where the opinion was issued before June 30, 2021. This produced an initial set of 797 unpublished opinions. We determined based on an initial review that 153 of these unpublished opinions were part of the same case as at least one published opinion in the published opinion database. Sixteen of the remaining 643 opinions appeared in the Federal Appendix, which we included in the published opinion database. Working with our research assistant team, we coded 273 randomly sampled cases, representing well more than necessary for a 99%±10% confidence interval. Of the 273, we determined that 98, or 36%, were not ATS cases. This left 175 confirmed unpublished ATS opinions. On closer inspection of these 175, we found that 68, or 39% are already represented in the published opinion dataset because at least one opinion in the same case has been published (this is in addition to the 153 identified earlier). Hence, out of the original 273 opinions in the random sample, only 107 opinions represent ATS cases that are not already covered in the published opinion database. Notably, 51 of these 107, or about 48%, were issued in cases filed by at least one *pro se* plaintiff, and in not one of these 51 opinions did the court find ATS jurisdiction. Of the 56 unpublished opinions in cases not filed by *pro se* plaintiffs, the court found ATS jurisdiction in only six, and plaintiffs won on the merits in only two—both default judgments. Doe v. Ejercito De Liberacion Nacional, No. 10-CV-21517-HUCK/O'SULLIVAN, 2013 U.S. Dist. LEXIS 186742 (S.D. Fla. Sept. 12, 2013) (default judgment arising from the FARC and ELN's international kidnapping, torture, and ransom of the plaintiff, John Doe); Lizarbe v. Hurtado, No. 07-21783-CIV-JORDAN, 2008 U.S. Dist. LEXIS 109517 (S.D. Fla. Mar. 4, 2008) (default judgment against defendant arising from claims of unlawful killing, torture, and violation of civil and political rights brought under the ATS and the TVPA, although the court only awarded monetary damages under the TVPA). The overall results from the

yielded a database of 531 total opinions published from 1789 through June 2021. With a team of research assistants, we analyzed every one of these opinions to unearth detailed information on the claims made, the nationality of the plaintiffs and defendants, where the harms occurred, whether U.S. or foreign government officials were sued, other forms of U.S. government involvement, international law claims made, and the outcomes of the cases—including not only whether the plaintiffs succeeded or not, but whether, if they succeeded, they received any financial renumeration, and, if they failed, on what grounds. The resulting picture is much more comprehensive and detailed than any prior work on the ATS or, indeed, any related statute. We then augment this picture with interviews with participants on both sides of the modern cases, including lawyers, plaintiffs, and representatives from local partner organizations.[17]

Part I begins by examining the history and original purpose of the ATS before turning to the many twists and turns of the statute over the last four decades. The history begins with the statute's mysterious origins, documenting its often-overlooked reemergence in the late 1960s and 1970s, when a series of unsuccessful cases were filed under the statute. It then describes the growth of the ATS as a tool of human rights litigation after the successful *Filártiga* decision in 1980.[18] It examines the decision of litigants to make what many regard as a fateful turn to suing corporations who were complicit in human rights violations—a move that increased the chances of winning substantial monetary compensation for plaintiffs but brought well-financed top-level lawyering talent into the courtroom intent on defeating ATS claims. And it documents the continued survival, but slow decline, of the ATS. This retelling of the history of the ATS is augmented by novel empirical evidence drawn from the database of ATS opinions and interviews with participants in ATS cases.

Part II steps back to provide a big picture assessment of ATS litigation. Human rights litigation presents a confluence of individual and collective interests. Drawing on interviews, we examine the goals of the different participants in ATS suits and

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random sample of unpublished opinions available on LexisNexis lead us to conclude that it was a reasonable decision to focus our analysis on the published opinions. These data will be made available along with the published opinion database.

17 As noted *supra* note †, we sought and received approval from Yale's Human Research Protection Program Institutional Review Board for these interviews.

18 *See* 630 F.2d 876 (2d Cir. 1980).

how ATS litigation has contributed to these goals. This Part defines and assesses four separate categories of benefits that ATS litigants seek: individual material benefits, collective material benefits, individual normative benefits, and collective normative benefits. A key insight this Part aims to offer is that individual material benefits (most obviously money damages) are one, but not the only, aim of ATS litigation. To assess the success of ATS litigation—and similar public interest impact litigation—it is essential to adopt a broader vision of the purpose of that litigation.

Part III looks ahead. It arrives at three main conclusions that lead to three sets of recommendations. First, the evidence shows that the greatest barrier to ATS suits is the limitation on extraterritorial effect of the statute—established first in *Kiobel* and expanded in *Nestlé*. In light of this finding, we recommend alternative strategies to reach human rights violations that take place outside the United States. Second, the evidence demonstrates that plaintiffs generally do not receive significant material benefits from ATS litigation, but they still value the opportunity to be heard and to bring attention to the harms they have suffered. Given this finding, we suggest greater attention to options for non-adversarial dispute resolution. Third, we find that the ATS and other existing tools have proven inadequate for reaching corporate contributions to human rights violations. Hence serious consideration should be given to legislation, including due diligence obligations, aimed directly at this problem. Europe has begun to develop rules to do just this, and the U.S. should consider following suit.

I
THE HISTORY OF THE ALIEN TORT STATUTE

The Alien Tort Statute has generated a multitude of lawsuits and extensive scholarly commentary on its scope, application, and historical purpose.[19] Here we trace the history of

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19 *See, e.g.*, Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 550 (2011) (exploring the differences between the present-day law of nations and the law of nations of 1789); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 226–27 (1996) (describing historical types of suits imposing liability for violations of the law of nations); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491 (1986) (explaining the development of civil liability for violations of the law of nations); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83

the ATS from 1789 through its reemergence in the mid-1900s. Though others have written about the origins and history of the ATS, this recounting is distinctive in that it incorporates the recollections of lawyers who have participated in the use of the ATS since the mid-1970s to challenge human rights abusers around the world. It also incorporates data analysis from the aforementioned database of all published ATS decisions since the ATS was first enacted.

A. Reemergence of the Alien Tort Statute

After an unsuccessful attempt in 1793,[20] the ATS was successfully invoked in court in 1795 in *Bolchos v. Darrel*.[21] In a sad twist of fate for a statute that has become an important tool for human rights advocates, the ATS was first used in a case that treated enslaved and trafficked people as mere "property" whose ownership was in dispute.[22] A French captain had seized a Spanish ship and the slaves held onboard as a prize of war.[23] A British mortgagee (a citizen of a neutral state), however, claimed that he had a legal right to the slaves—and, via an agent, he seized and sold them.[24] The court sided with the French captain, finding that, while the law of nations would ordinarily restore neutral property to its owner, under the U.S. treaty with France, neutral property put on board an enemy's ship was subject to forfeit.[25] It thus ordered the British mort-

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AM. J. INT'L L. 461, 476–77 (1989) (describing the initial obligations of the law of nations); Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2065 (2013) (book review) (exploring the genesis of human rights doctrine); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587–92 (2002) (examining the early history of the ATS and its implications for construction of the statute); Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 1, 1–3 (2012) (focusing on an opinion issued by U.S. Attorney General William Bradford that references the ATS). Many briefs filed in ATS cases have also engaged the history. The most recent is Brief of Amici Curiae Professors of Legal History Barbara Aronstein Black, Nikolas Bowie, William R. Castro, Martin S. Flaherty, David Golove, Eliga H. Gould, Stanley N. Katz, Samuel Moyn, and Anne-Marie Slaughter in Support of Respondents, Nestlé USA, Inc. v. Doe & Cargill, Inc. v. Doe, 141 S. Ct. 1931 (2019) (No. 19-416 & 19-453).

20 Moxon v. The Fanny, 17 F. Cas. 942, 947–48 (D. Pa. 1793) (the statute was held as an improper jurisdictional grant over an action involving both a property action and a tort, given the restriction of "tort only").

21 Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795); *see also* Thomas M. Pohl, *From Blackbeard to Bin Laden: The Re-Emergence of the Alien Tort Claims Act of 1789 and Its Potential Impact on the Global War on Terrorism*, 34 J. LEGIS. 77, 80–81 (2008) (detailing the significance of *Bolchos v. Darrel*).

22 *Bolchos*, 3 F. Cas. at 810.

23 *Id.*

24 *Id.*

25 *Id.* at 811.

gagee to either return the slaves or equivalent monetary compensation.[26]

The next published judicial decision under the ATS did not come until more than a century later. In 1908, the U.S. Supreme Court held in *O'Reilly de Camara v. Brooke* that a Spanish citizen's claim for loss of emoluments (profits) from a hereditary title in Cuba under the ATS was invalid.[27] The Spanish citizen, Maria Francisca O'Reilly de Camara, had filed suit against the American governor of Cuba (Major General Brooke), arguing that she had been improperly denied her property rights as the holder of a heritable office in Cuba.[28] The Court held that it would not declare an act to be a tort in violation of the law of nations "when the Executive, Congress and the treaty-making power all have adopted the act"—here, in the form of the Platt Amendment.[29] In any case, the Court found that her property rights in the office did not survive the end of Spanish sovereignty over Cuba.[30]

For the next 50 years, the ATS remained in hibernation. With a rise in human rights activism in the period following World War II, the ATS began to be cited again in court decisions, starting with *Pauling v. McElroy*[31] in 1958. Most of these early postwar cases were unsuccessful: overall there were eighteen unsuccessful attempts to assert jurisdiction under the ATS in the 20th century prior to the decision in *Filártiga* in 1980.[32] In only one case, *Abdul-Rahman Omar Adra v. Clift*,[33] in 1961, did a court find jurisdiction under the ATS. The case involved an international child custody dispute between a Lebanese father, an Iraqi mother, and the mother's American husband.[34] The court found that the interference with the father's custody rights constituted a tort in violation of the law of nations and was a proper cause of action under the ATS. Nonetheless, the court denied the relief plaintiff sought—the return of his daughter to his custody—as outside its proper judicial power. Instead, the court offered only declaratory relief.[35]

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26 *Id.*

27 209 U.S. 45, 45 (1908).

28 *Id.* at 48–49.

29 *Id.* at 52.

30 *Id.* at 52–53.

31 164 F. Supp. 390 (D.D.C. 1958).

32 *See* ATS Database, *supra* note 16.

33 195 F. Supp. 857 (D. Md. 1961).

34 *Id.* at 859.

35 *Id.* at 862–65, 67.

The shift began in 1980 with *Filártiga v. Peña-Irala*, filed by Peter Weiss and his team at the Center for Constitutional Rights.[36] In a landmark decision, the Second Circuit recognized a substantive claim under the ATS based on the international law prohibition on torture and reversed the district court's earlier dismissal for lack of subject matter jurisdiction.[37] The plaintiffs—Paraguayan national Dr. Joel Filártiga, a prominent political activist, and his daughter Dolly Filártiga—asserted that Paraguayan police officer Américo Norberto Peña-Irala, who was at the time living in the United States, tortured Dolly's brother Joelito to death in Paraguay "in retaliation for his father's political activities and beliefs."[38] The Carter Administration filed a brief in support of the Filártigas.[39] Despite some initial concerns among some government lawyers about foreign policy consequences,[40] the U.S. argued that where "there is a consensus in the international community that the right is protected" and there exists "a widely shared understanding of the scope of [its] protection," there is "little danger that judicial enforcement will impair our foreign policy efforts."[41] In contrast, a refusal "might seriously damage the credibility of our nation's commitment to . . . human rights."[42] In a now famous decision, the Second Circuit held that "international law confers fundamental rights upon all people vis-a-vis their own governments,"[43] and that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[44] The court "construe[d] the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[45] On remand, the District Court granted a default judgment and awarded

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36 630 F.2d 876 (2d Cir. 1980). For the story behind the decision to file the *Filártiga* case, see MARIA ARMOUDIAN, LAWYERS BEYOND BORDERS: ADVANCING INTERNATIONAL HUMAN RIGHTS THROUGH LOCAL LAWS AND COURTS 20–22 (2021).

37 *Filártiga*, 630 F.2d at 876.

38 *Id.* at 878.

39 Memorandum for the United States as Amicus Curiae, Filártiga v. Peña-Irala, 630 F.2d 876 (2d. Cir. 1980) (No. 79-6090).

40 Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1482 (2014) (describing the statement of Honorable Roberts B. Owen, Legal Adviser, U.S. Dep't of State).

41 Memorandum for the United States as Amicus Curiae, *supra* note 39, at 22.

42 *Id.* at 22–23.

43 *Filártiga*, 630 F.2d at 885.

44 *Id.* at 880.

45 *Id.* at 887.

damages of over ten million dollars.[46] Peña-Irala, who had been deported by the time the case was decided, had no assets in the United States so the plaintiffs never received any payments.[47]

The legal and symbolic success of the *Filártiga* litigation inspired a generation of human rights lawyers and led to an influx of ATS cases.[48] Paul Hoffman, today one of the leading ATS lawyers in the country, recalled,

> The earliest recollection I have about the ATS is I was teaching human rights at Loyola Law School in the summer of 1980. I was about to get to the part of the course about whether you could use [human rights] law in U.S. courts. I was about to say you couldn't. And then *Filártiga* came down. And all of a sudden, things looked different. . . . When I read it, I thought, "I'm going to start doing these cases."[49]

Beth Stephens, who would bring a number of ATS cases for the Center for Constitutional Rights ("CCR"), also noted that the decision was a turning point: "I was hired [by CCR] to take on an international human rights docket. Part of my mandate was to bring more ATS cases and expand the *Filártiga* precedent."[50] For the most part, scholars reacted positively to the decision as well.[51]

The next significant judicial ruling on the ATS following *Filártiga*, however, tempered some of the initial optimism about the statute. In 1984, the D.C. Circuit issued a *per curiam* decision dismissing *Tel-Oren v. Libyan Arab Republic*, in which the plaintiffs had sought ATS jurisdiction based on acts of terrorism.[52] In his concurring opinion, Judge Robert Bork argued that the ATS did not authorize federal courts to recognize causes of action, such as violations of the law of nations with-

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46 Filártiga v. Peña-Irala, 577 F. Supp. 860, 860 (E.D.N.Y. 1984).

47 *See Filártiga v. Peña-Irala: Historic Case*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/fil-rtiga-v-pe-irala [https://perma.cc/U5CV-DHCP] (last modified Jan. 3, 2019).

48 Zoom Interview with Beth Stephens, L. Professor, Rutgers L. Sch. (Jan. 12, 2021) [hereinafter Stephens Interview].

49 Zoom Interview with Paul Hoffman, Partner, Schonbrun Seplow Harris Hoffman & Zeldes (Dec. 8, 2020) [hereinafter Hoffman Interview].

50 Stephens Interview, *supra* note 48.

51 *See generally* Symposium, *Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on* Filártiga v. Peña-Irala, 11 GA. J. INT'L & COMP. L. 305 (1981) (presenting a collection of scholarly essays analyzing the impact of the *Filártiga v. Peña-Irala* decision by the Second Circuit on international jurisprudence).

52 726 F.2d 774, 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985).

out congressional action.[53] The plaintiffs sought review in the Supreme Court and the Reagan administration weighed in against granting certiorari, arguing that the dismissal was correct, echoing reasons given by Judge Bork.[54] The Court declined to grant the certiorari petition. While seen by human rights advocates as a setback, *Tel-Oren* did not stop the flow of ATS cases, though the concerns raised by Judge Bork continued to shadow the statute. In 1991, in part in an effort to answer these concerns, Congress enacted the Torture Victim Protection Act, allowing the filing of civil claims in U.S. courts against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing.[55]

ATS cases post-*Filártiga* initially resembled the *Filártiga* model, with lawsuits filed against individual perpetrators—what Hoffman calls the first "strand" of ATS litigation.[56] A series of ATS cases were filed, for example, against former President of the Philippines, Ferdinand Marcos, alleging torture and other human rights abuses. These cases eventually resulted in a large compensatory judgment for the plaintiffs, though the defendant paid only a small fraction of the award.[57] In these early years after the "rediscovery" of the ATS, a number of ATS suits succeeded in part because plaintiffs won default judgments.[58] Advocates were aware that there was a risk that the statute would not last. As Stephens put it, "We knew there was a risk of a split in the circuits. We wanted to strengthen it if we could and get as much as we could before we lost it."[59] The Supreme Court rejected several certiorari petitions during this period, allowing ATS cases to continue to play out in the lower courts.[60]

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53 *Id.* at 798–99 (Bork, J., concurring).

54 Brief for the United States as Amicus Curiae, Tel-Oren v. Libyan Arab Republic, 470 U.S. 1003 (1985) (No. 83-2052).

55 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (1994)); *see* William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1590–91 (2014).

56 Hoffman Interview, *supra* note 49.

57 *See* Hilao v. Estate of Marcos (*In re* Estate of Marcos Hum. Rts. Litig.), 25 F.3d 1467, 1469 (9th Cir. 1994); Nick Davies, *The $10bn Question: What Happened to the Marcos Millions?*, THE GUARDIAN (May 7, 2016), https://www.theguardian.com/world/2016/may/07/10bn-dollar-question-marcos-millions-nick-davies [https://perma.cc/982P-VUVD].

58 For example, the ruling on remand in *Filártiga* was a default judgment. *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 860 (E.D.N.Y. 1984).

59 Stephens Interview, *supra* note 48.

60 *See, e.g.*, Negewo v. Abebe-Jiri, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); Karadžić v. Kadic, 70 F.3d 232, *cert. denied*, 518 U.S. 1005 (1996); Marcos-Manotoc v. Trajano, 978 F.2d 493, *cert. denied*, 508 U.S. 972

Stephens describes the first two decades in the ATS's history post-*Filártiga* as its "honeymoon phase."[61] It was a period when the statute went largely unchallenged and activists "lauded the statute as a means to define and strengthen both the substance of human rights norms and their enforcement."[62] Harold Koh wrote a decade after the decision that "[i]n *Filártiga*, transnational public law litigants finally found their *Brown v. Board of Education*."[63] Another ATS lawyer, however, notes that human rights lawyers' approaches to early ATS cases lacked an overarching strategy, in contrast with the National Association for the Advancement of Colored People's approach to civil rights litigation like *Brown*, and that lawyers largely did not coordinate on the "selection of the proper vehicles."[64] Others agreed that there was not a great deal of strategic case selection, explaining that human rights lawyers brought claims on behalf of plaintiffs even if the chances of success were slight. As one advocate put it:

> We tend to be asked to bring some of those "challenging" cases—challenging in the legal and political sense. Yes, it might bring pushback and we might get a bad result. I don't think . . . we take that lightly. . . . I have an issue of a deep frustration [with] . . . the idea that [the law is] there to sit on a shelf and shine.[65]

B. Increasing Challenges to ATS Lawsuits

The rise in ATS lawsuits in the decades after *Filártiga* prompted a great deal of scholarly debate, including famously about the role of international law in federal courts post-*Erie*.[66] Meanwhile litigants increasingly targeted U.S. government officials and foreign allied government officials. The number of

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(1993); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, *cert. denied*, 470 U.S. 1003 (1985).

61 Stephens, *supra* note 40 at 1490.

62 *Id.*

63 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

64 Zoom Interview with ATS Lawyer 2 (Dec. 1, 2020) [hereinafter ATS Lawyer 2 Interview].

65 Zoom Interview with Katherine Gallagher, Senior Staff Att'y, Ctr. for Const. Rts. (Feb. 24, 2021) [hereinafter Gallagher Interview].

66 Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–17 (1997). In *Erie Railroad Co. v. Tompkins*, the Supreme Court held that federal courts lack judicial power to create general federal common law. 304 U.S. 64, 79–80 (1938). Bradley and Goldsmith argued that *Erie* called into question the status of customary international law as federal common law. Bradley & Goldsmith, *supra* at 849–59.

these suits dramatically increased in the early 2000s. In response, the data show the U.S. government more frequently weighed into ATS cases, often against the plaintiffs and in favor of defendants. At the same time, the number of suits against deep-pocketed corporate actors grew as well. This, in turn, resulted in a well-funded effort to undermine the statute.[67]

1. *Turn Towards U.S. Officials and Foreign Government Officials*

Beginning in the mid-1980s, a growing number of ATS suits were aimed at U.S. officials and foreign allied government officials. Hoffman describes this as the second "strand" of ATS litigation, which came about in part as a result of criticisms of human rights organizations for not "suing U.S. officials, only foreign officials" for alleged human rights abuses.[68] An initial driving force behind ATS litigation among human rights organizations was to hold the U.S. government officials accountable for human rights abuses committed abroad.[69] Peter Weiss, the attorney from the CCR who filed the *Filártiga* case, publicly stated that the human rights community was looking for a way to sue the U.S. military for war crimes and atrocities committed abroad, such as the My Lai massacre of Vietnamese civilians in 1968, in U.S. courts.[70] When immunity bars made it difficult to sue U.S. officials directly, lawyers looked for foreign officials who had worked with the U.S. government to sue instead.[71]

One of the goals for U.S.-based human rights organizations in cases such as *Filártiga* was to combat U.S. government support for dictatorial regimes engaged in torture and mass suppression of political activists.[72] By bringing cases against foreign officials supported by the U.S. government, human rights organizations aimed to expose U.S. ties to these regimes.[73] Marco Simons, General Counsel at EarthRights Inter-

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67 William Dodge offers a complementary account of the post-*Filártiga* period that explores the decision to apply international law rather than foreign domestic law. Dodge, *supra* note 55, at 1582–83.

68 Hoffman Interview, *supra* note 49.

69 Gallagher Interview, *supra* note 65.

70 Radiolab, *Enemy of Mankind*, WNYC STUDIOS, at 14:30 (Oct. 24, 2017), https://radiolab.org/episodes/radiolab-enemy-mankind [https://perma.cc/K5X8-4BAR].

71 *See* Jacques deLisle, *Human Rights, Civil Wrongs and Foreign Relations: A "Sinical" Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad*, 52 DEPAUL L. REV. 473, 473–78 (2002).

72 Gallagher Interview, *supra* note 65. This is an example of what we describe in Subsection II.B.2 as a collective normative goal.

73 *Id.*

national and longtime ATS lawyer, noted: "The ATS project began as part of the 1980s, 1990s effort to show U.S. government hypocrisy over human rights especially in Latin America. The early cases were about calling out human rights abusers in Latin American governments that were close to the U.S."[74] Indeed, while many identify the turn to suing corporations in the 1990s as the beginning of a backlash against the ATS, others see this pushback as overdetermined. Simons explained, "Sooner or later you would see politically sensitive cases rising up to higher levels in the court system."[75] Stephens agreed: "I think the statute was tolerated when it went after politically unpopular defendants. The backlash wasn't just because of corporations."[76]

The intellectual foundations for the backlash were laid in the late 1990s and early 2000s. In 1997, Professors Curtis Bradley and Jack Goldsmith contended that *Filártiga* and its progeny relied on the faulty premise that customary international law is part of the federal common law.[77] In 2001, the concept of "lawfare" was first popularized by Charlie Dunlap, a retired Major General in the U.S. Airforce who went on to teach at Duke Law School. In a paper presented at the Carr Center for Human Rights Policy at Harvard's Kennedy School of Government, Dunlap asked, "Is lawfare turning warfare into unfair? In other words, is international law undercutting the ability of the U.S. to conduct effective military interventions?"[78] Dunlap focused on the use of lawfare to "destroy the *will* to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions" by "mak[ing] it appear that the U.S. is waging war in violation of

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74 Zoom Interview with Marco Simons, General Counsel, EarthRights Int'l (Jan 12, 2021) [hereinafter Simons Interview].

75 *Id.*

76 Stephens Interview, *supra* note 48.

77 Bradley & Goldsmith, *supra* note 66, at 816–17. Such arguments were consistent with a larger conservative push at the time against judicial law-making. *See* JAY M. FEINMAN, UN-MAKING LAW: THE CONSERVATIVE CAMPAIGN TO ROLL BACK THE COMMON LAW 6, 172–89 (2004) ("[The] conservative era that follow[ed] the liberalism of the 1960s and 1970s . . . [and] the un-making of the common law [were] part of a comprehensive campaign to reshape American government . . . ."). Harold Hongju Koh wrote a direct response to Bradley and Goldsmith, which the *Harvard Law Review* published along with Bradley and Goldsmith's reply. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1824 (1998).

78 CHARLES J. DUNLAP, JR., LAW AND MILITARY INTERVENTIONS: PRESERVING HUMANITARIAN VALUES IN 21ST CONFLICTS 1 (2001), https://web.archive.org/web/20111229105923/http://www.duke.edu/~pfeaver/dunlap.pdf [https://perma.cc/9V94-5ZHC].

the letter or spirit of LOAC."[79] Law, he warned, can be a "potent weapon" against the United States.[80] Though Dunlap never mentioned the ATS, the term "lawfare" became a rallying cry for those skeptical of ATS litigation. When the website "Lawfare" was founded almost a decade later, it swept within its ambit "the use of law as a weapon of conflict" and the "depressing reality that America remains at war with itself over the law governing its warfare with others"—expressly including topics ranging from cybersecurity to the ATS.[81]

At the same time, suits against U.S. and foreign government officials began to boom. Figure 1 shows that the U.S. government and officials and foreign governments and officials were targets of early ATS suits that resulted in published opinions even from the very beginning.[82] There have been twenty-nine cases resulting in published opinions against the United States government, fifty-seven against U.S. federal officials, ten against U.S. government agencies, and nine against U.S. government contractors. Such cases became much more common after the September 11 attacks, particularly after it was revealed that the United States and its contractors had carried out a program of torture of detainees.[83]

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79 *Id.* at 4.

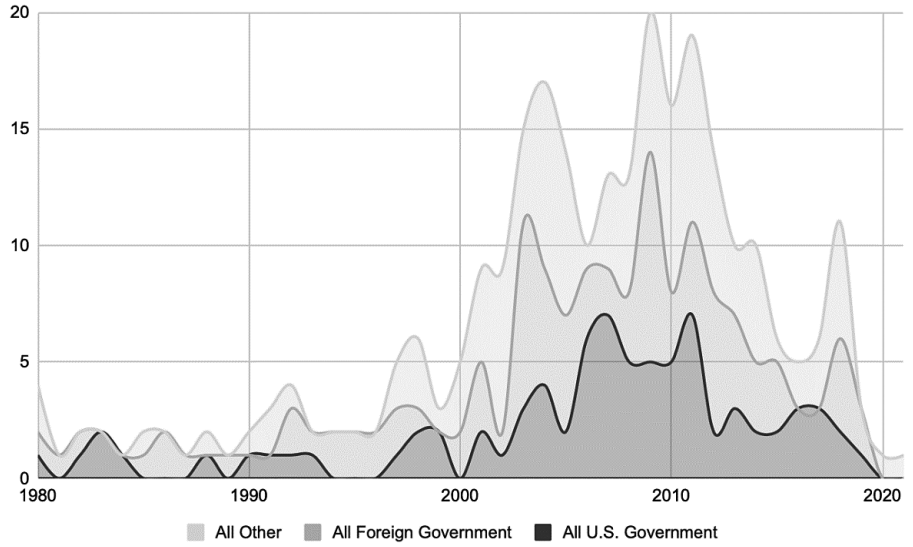
80 *Id.* at 1.

81 *About Lawfare: A Brief History of the Term and the Site*, LAWFARE, https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site [https://perma.cc/UU7L-XS6S] (last visited Oct. 29, 2021). Dunlap later elaborated on the history of the term "lawfare" on his blog, *Lawfire*. Charlie Dunlap, *Yes, There is Consensus That 'Lawfare' Exists . . . but America Still Needs a Strategy for It*, LAWFIRE (Sept. 23, 2021), https://sites.duke.edu/lawfire/2021/09/23/yes-there-is-consensus-that-lawfare-exists-but-america-still-needs-a-strategy-for-it/ [https://perma.cc/P3XL-FCPD].

82 This is a stacked chart (meaning that totals are cumulative). "All U.S. government" includes U.S. government, U.S. federal official, U.S. federal agency, State or local government entity, State or local government official, and federal government contractor. Although federal government contractors are subject to different legal rules and are able to rely on different legal defenses than federal employees, we include them here to provide a comprehensive picture of suits alleging U.S. government-sponsored wrongdoing. "All foreign government" includes foreign states, foreign officials, and former foreign officials. All data are generated using just the first published opinion if there is more than one published opinion in the same case (to avoid double-counting). ATS Database, *supra* note 16.

83 ATS Database, *supra* note 16.

FIGURE 1: ALL FOREIGN AND U.S. GOVERNMENT DEFENDANTS



A series of ATS lawsuits were filed against the Bush administration for its treatment of political prisoners and detainees during the "war on terror." Hope Metcalf, who represented victims of torture at the hands of U.S. officials recalls, "we ran into seven thousand different obstacles, some jurisdictional, some prudential" and "none of the ATS lawsuits progressed except against private contractors many years later."[84] Many of these never even made it to a published opinion, meaning they are not reflected in our dataset. John Bellinger, Legal Adviser at the U.S. Department of State during President Bush's second term, did not recall suits against U.S. officials as a significant concern—likely because by the time he was Legal Adviser, it was clear that most would not survive immunity bars and other obstacles to reaching the merits.[85]

A key turning point for the ATS came in one of the rare ATS suits against U.S. officials to survive those obstacles to reach a decision on the merits. *Alvarez-Machain v. U.S.* (later *Sosa v. Alvarez-Machain*)[86] was brought by a Mexican doctor, abducted as part of an investigation for murder of a U.S. Drug Enforce-

84 Zoom Interview with Hope Metcalf, Clinical Lecturer L., Rsch. Scholar L. & Exec. Dir., Orville H. Schell, Jr. Ctr. for Int'l Hum. Rts., Yale L. Sch. (Nov. 19, 2020) [hereinafter Metcalf Interview]. *See, e.g.*, Saleh v. Titan Corp., 580 F.3d 1, 16–17 (D.C. Cir. 2009) (concerning human rights violations committed by U.S. government contractors at the Abu Ghraib prison in Iraq).

85 Zoom Interview with John Bellinger, Legal Advisor, U.S. Dep't of State (Feb. 22, 2021) [hereinafter Bellinger Interview].

86 542 U.S. 692, 714 (2004).

ment Agency (DEA) official in Mexico, who sued DEA agents under the ATS for kidnapping and torture.[87] When the case reached the Supreme Court, many in the human rights community feared that it would be the end of the ATS. The Court decided in favor of the defendants, but it largely affirmed the *Filártiga* line of cases.[88] The Court outlined a two-part test for determining whether a claim is actionable under the ATS: first, the international norm at issue must be "specific, universal, and obligatory,"[89] and, second, it must be a proper exercise of judicial discretion.[90] The Court's decision was considered "a surprise victory"[91]: "it was the Supreme Court saying there are certain claims you *can* bring."[92] As Hoffman, who argued the case in the Supreme Court, later put it, "we won by losing."[93]

If the Court thought it had trimmed the sails of the ATS by circumscribing the scope of the international law violations that could be brought under it, it was wrong. As Figure 1 shows, the number of ATS cases grew to the highest levels yet in the years after *Sosa*. Why that happened is far from clear, but it may have been that the unexpected outcome revived interest in the statute. Another ATS lawyer thinks that the lower courts mis-read *Sosa*:

> The lower courts egged this on because they misread *Sosa*. . . . The whole point in *Sosa* was that there is no cause of action; it's all federal common law. The justices thought the courts would be hesitant to create new federal common law, but it turns out Justice Scalia was right that there is no such thing as just leaving the door open a crack.[94]

Part of the reason the case had little effect may also have been that the first multi-million-dollar settlement in an ATS case against a company also took place in the same year—2004—and may have counteracted whatever dampening effect *Sosa* might otherwise have had.[95]

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87 96 F.3d 1246, 1247 (9th Cir. 1996).

88 *Sosa*, 542 U.S. at 732. One lawyer speculated that this was done to keep Justice Anthony Kennedy in the majority. Zoom Interview with ATS Lawyer 6 (Sept. 14, 2021) [hereinafter ATS Lawyer 6 Interview].

89 *Sosa*, 542 U.S. at 732 (quoting Hilao v. Estate of Marcos (*In re* Estate of Marcos Hum. Rts. Litig.), 25 F.3d 1467, 1475 (9th Cir. 1994)).

90 *Id.* at 732–33.

91 ATS Lawyer 2 Interview, *supra* note 64; *see* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 224–25 (2003).

92 Zoom Interview with ATS Lawyer 5 (Mar. 22, 2021) [hereinafter ATS Lawyer 5 Interview].

93 Hoffman Interview, *supra* note 49.

94 ATS Lawyer 6 Interview, *supra* note 88.

95 *See infra* notes 130–139 and accompanying text.

With ATS suits on the rise, the U.S. government began to weigh in more often. Bellinger, who became Legal Adviser in 2005, recalled that ATS cases against foreign officials were a thorn in the side of U.S. foreign policy: "I got to know the Alien Tort Statute because so many foreign governments came to complain to me when I was Legal Adviser."[96] "Their argument," he recalled, "was that this is a violation of international law . . ., this is a violation of jurisdictional norms."[97] They argued, "We don't think [U.S.] courts should be adjudicating cases that involve a foreign official or foreign companies acting on the territory of a foreign country."[98] Indeed, he recalled, "They were fond of twitting us by saying 'you complain about the ICC and its universal criminal jurisdiction, but here you have set up these civil courts that essentially have universal civil jurisdiction.'"[99] Scholars, too, had by then long emphasized the costs of ATS lawsuits to foreign relations. Curtis Bradley observed in 2001 that such suits had threatened to displace the executive's judgment, straining delicate relationships, incrementally heightening the risk of military conflicts, and inviting retaliatory lawsuits.[100] Foreign nations would later go on to weigh in directly by filing amicus curiae briefs with the Supreme Court.[101]

Growing concerns about ATS suits helped prompt the Bush administration to take the position that the ATS does not apply extraterritorially at the certiorari stage in *American Isuzu*

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96 Bellinger Interview, *supra* note 85.

97 *Id.*

98 *Id.*

99 *Id.*

100 Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 460–64 (2001).

101 For example, in *Kiobel v. Royal Dutch Petroleum Co.*, Germany, the United Kingdom, and the Netherlands submitted amicus curiae briefs in favor of the defendants (respondents at the time). Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491); Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491). Foreign policy concerns were not all on one side, however. There were foreign government briefs filed on behalf of plaintiffs (petitioners at the time), as well. *See* Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491); Supplemental Brief of Volker Beck and Christoph Strässer, Members of Parliament of the Federal Republic of Germany, Amici Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491). In addition, a number of foreign scholars, jurists, and organizations filed amicus briefs in support of plaintiffs (petitioners at the time).

Motors Inc. v. Ntsebeza,[102] a case filed on behalf of all persons living in South Africa between 1948 and 1994 against more than fifty U.S. and foreign corporations that did business in South Africa during the apartheid era for harms committed during apartheid.[103] One lawyer noted that the decision to file the brief signaled intense interest from the government: "I can't remember when the government last submitted an uninvited cert stage Supreme Court brief."[104] In it, the U.S. government argued that "extraterritorial aiding and abetting liability under the ATS interferes with the nation's foreign relations."[105] Four justices recused themselves, and the Court determined it could not hear the case.[106] The issues raised, however, would reappear before long.

The Bush administration also helped put foreign official immunity on the map in ATS suits. One ATS lawyer speculated that the U.S. government was suddenly concerned about foreign official immunity because of new suits against Israeli officials and because of U.S. officials' own vulnerability to suit abroad: "[S]uits against Rumsfeld and other USG officials in foreign courts made foreign official immunity an issue that the USG cared about for the first time."[107] This lawyer added, "The answer to the question 'how would you feel if we sued your officials' used to be 'we don't torture people.' After the Bush administration, we couldn't say that anymore."[108] In 2007, in *Matar v. Dichter*, the U.S. government submitted a brief arguing for foreign official immunity for the former Director of the Israeli General Security Service, Avraham Dichter, who had been sued for his role in the "targeted killings" of a suspected terrorist in the Gaza Strip that resulted in the death of fifteen people and injury to more than 150.[109] The brief for the United States,

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102 553 U.S. 1028 (2008).

103 Bellinger Interview, *supra* note 85.

104 ATS Lawyer 6 Interview, *supra* note 88.

105 Brief for the United States as Amicus Curiae in Support of Petitioners at 12, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919).

106 *Am. Isuzu Motors Inc.*, 553 U.S. at 1028–29 ("Because the Court lacks a quorum . . . the judgment is affirmed . . . with the same effect as upon affirmance by an equally divided Court."). That affirmance, one lawyer explained, meant the Second Circuit decision remained good law, causing Judge José Cabranes to look for an alternative rationale for ending such suits: "He landed on the corporate liability theory, which proved to be a bad idea." Interview with ATS Lawyer 7 (Sept. 14, 2021) [hereinafter ATS Lawyer 7 Interview].

107 E-mail from ATS Lawyer 2 to Oona Hathaway (Aug. 4, 2021) (on file with author) [hereinafter E-mail from ATS Lawyer 2].

108 *Id.*

109 Brief for the United States of America as Amicus Curiae in Support of Affirmance at 4, Matar v. Dichter, 563 F.3d 9 (2d. Cir. 2009) (No. 07-2579-cv)

filed by Bellinger and other U.S. government officials, argued that Dichter enjoyed immunity and that the executive branch's "determination is conclusive."[110] "Allowing foreign officials to be sued in U.S. courts for their official conduct," the brief maintained, "would depart from customary international law, aggravate our relations with the foreign states involved, and potentially expose our own officials to similar suits abroad."[111] The Court deferred to the executive branch's determination and declined jurisdiction.[112]

U.S. government submissions in ATS suits ballooned starting in the early 2000s. The Carter administration had filed the first formal non-party document in an ATS suit in the *Filártiga* case in 1980—an amicus brief favoring petitioners in the case. In the following two decades, the U.S. government intervened only thirteen times in the cases in our database. That changed during the Bush administration. The administration opposed "involvement of both the judiciary and private party litigants in cases involving foreign affairs,"[113] and it accordingly opposed enforcement of the human rights agenda through the courts.[114] In 2001, President Bush's first Legal Adviser, William H. Taft IV, sent a letter via the Department of Justice in response to a request by a district court judge for the opinion of the Department of State "as to the effect, if any, that adjudication of [*Sarei v. Rio Tinto*] suit may have on the foreign policy of the [U]nited States."[115] That was the first of what would be forty-one interventions we were able to document in cases decided during the Bush administration. According to Bellinger, many of these interventions were in response to requests from

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[hereinafter Matar, Brief for the United States]. When immunity issues had been raised in earlier ATS cases, the foreign government had often waived immunity. *See, e.g.*, Paul v. Avril, 812 F. Supp. 207, 210 (S.D. Fla. 1993) (suit against Haitian officials); Hilao v. Estate of Marcos (*In re* Estate of Marcos Hum. Rts. Litig.), 25 F.3d 1467, 1472 n.7 (9th Cir. 1994) (suit against an ex-president of the Philippines).

110 Matar, Brief for the United States, *supra* note 109, at 3.

111 *Id.* at 2.

112 Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) ("Here, the Executive Branch has urged the courts to decline jurisdiction over appellants' suit, and under our traditional rule of deference to such Executive determinations, we do so.").

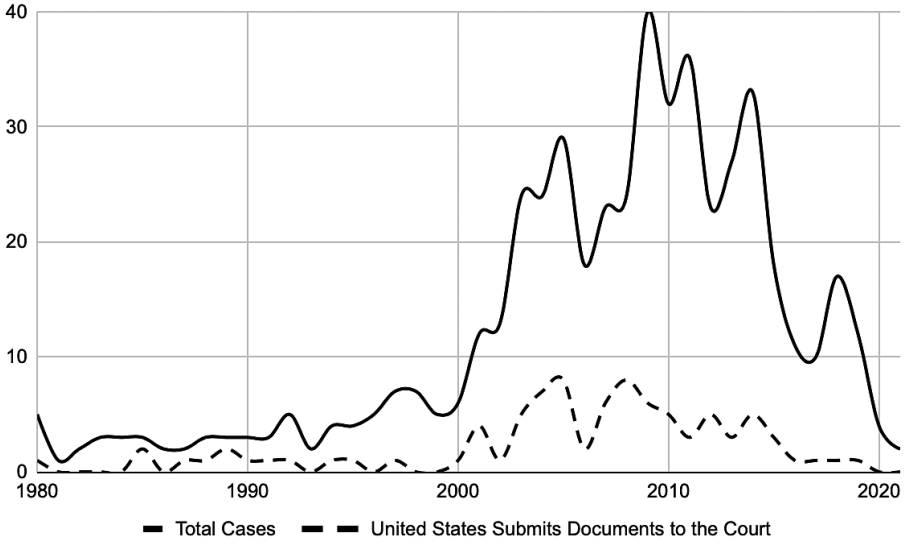
113 Stephens, *supra* note 40, at 1502.

114 Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 185 (2004).

115 Letter from William H. Taft, IV, Legal Adviser, Dep't of State, to Robert D. McCallum, Jr., Assistant Att'y Gen., Dep't of Just. (Oct. 31, 2001), https://2009-2017.state.gov/documents/organization/16529.pdf [https://perma.cc/NX5D-QZZD] (referencing Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc)).

judges in the cases: "If a federal judge asks for our views," Bellinger recalled, "we usually do write back."[116] In total, about half of U.S. government interventions came in the form of amicus briefs or other formal legal documents (50), and half in the form of a statement of interest or letter to the court (48). Of all U.S. government non-party interventions in ATS suits, sixty-two favored defendants, six favored plaintiffs, and eight favored neither side.[117] As Figure 2 shows, all U.S. government interventions in cases fell off during the Obama and Trump administrations.[118]

FIGURE 2: U.S. GOVERNMENT SUBMISSIONS TO THE COURT



It was not just foreign officials that ATS suits targeted. The ATS was frequently trained on foreign defendants of all kinds, including, as the next section will explore, foreign corporations. With a total of 172 suits resulting in at least one published

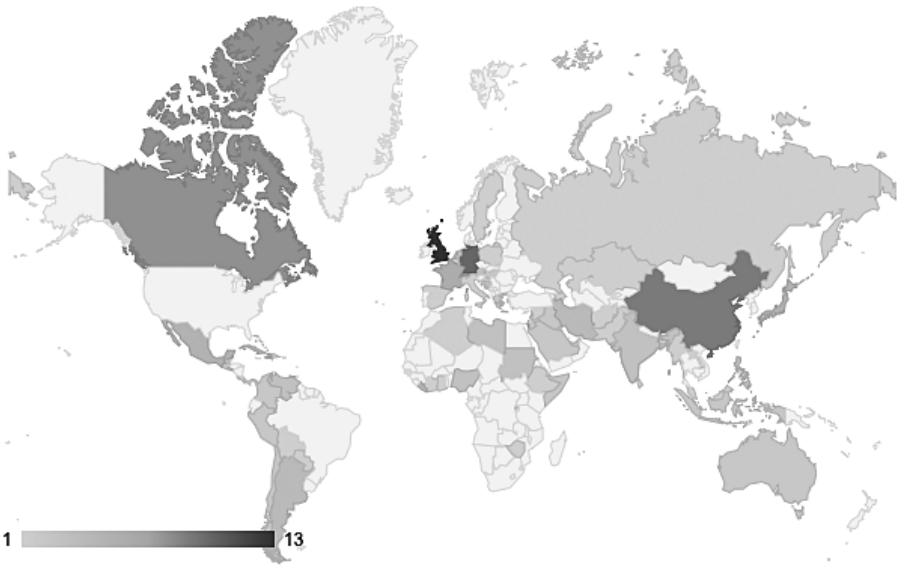
116 Bellinger Interview, *supra* note 85.

117 There were another twelve amicus briefs we have not located that are not included in these figures because we could not determine which side they favored. In some cases, the U.S. government filed more than one type of document (for instance, it sometimes filed both an amicus brief *and* a statement of interest, usually at different stages in the case). Hence, the total number of documents submitted by the U.S. government exceeds the number of cases in which the U.S. government intervened.

118 All data is from ATS Database, *supra* note 16. Figure 2 is based on all published opinions. Government submissions were determined by looking for references in the cases to a government submission, as well as by examining the State Department's *Digest of United States Practice in International Law* for each year to identify possible court submissions.

opinion,[119] the United States far outweighs every other *individual* state as the state of nationality for defendants in ATS suits. Yet foreign defendants as a whole outnumber domestic ones—there were 164 suits that resulted in at least one published opinion against foreign defendants from seventy-three different countries. As can be seen from Figure 3 below, the most common non-U.S. targets for cases that resulted in at least one published opinion were the United Kingdom (13), Germany (10), China (9), Canada (8), Switzerland (8), Israel (not including Palestinian Territories, which are recorded separately) (7), and France (6).[120]

FIGURE 3: NATIONALITY OF FOREIGN DEFENDANTS IN ATS SUITS (EXCLUDING U.S.)

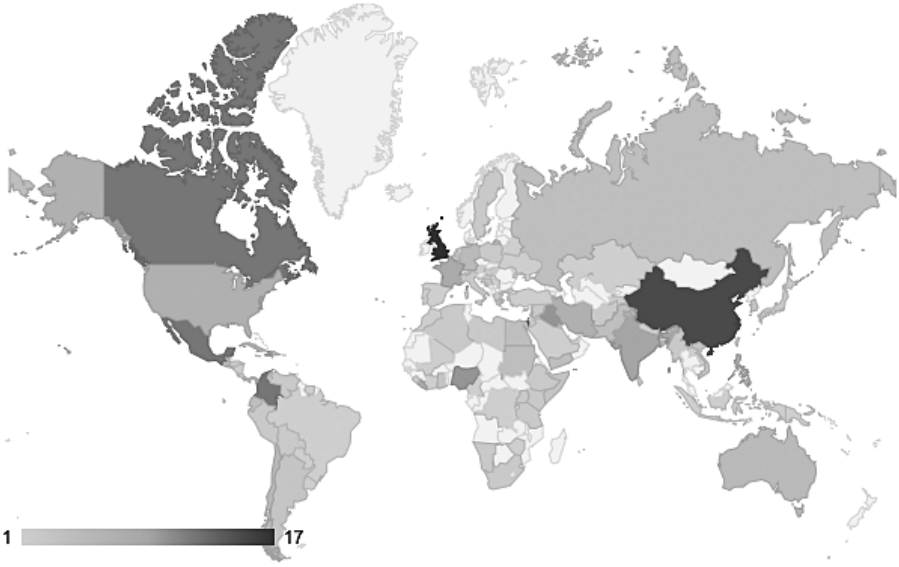


[119] One might ask whether this number includes frivolous or poorly argued lawsuits—including, for example, pro se suits by prisoners, who are by definition not represented by counsel and thus are less likely to present successful legal arguments. This does not appear to be the case. Only 41 of the 531 published opinions were issued in suits brought by pro se plaintiffs. ATS Database, *supra* note 16. It is likely that frivolous lawsuits were resolved in unpublished opinions. Indeed, as noted earlier in a random sample of ATS suits that resulted in an unpublished opinion, almost half were brought by pro se plaintiffs, and only two out of 107 resulted in positive outcomes for the plaintiffs—both in default judgments. *Id.*

[120] These totals and the data in Figure 3 are based on the nationality of the defendant in a suit that resulted in at least one published opinion, using just the first published opinion if there is more than one published opinion in the same case. It should be noted that several cases had multiple defendants and some cases had defendants from both the United States and from other countries. *Id.*

Perhaps not so surprisingly, plaintiffs originated from many of the same countries as defendants. By definition, ATS suits must be brought by aliens (that is, non-U.S. citizens).[121] They hail from 106 countries. As can be seen from Figure 4 below, the most common countries of nationality for plaintiffs in cases that resulted in at least one published opinion were the United Kingdom (17), China (15), Israel (not including Palestinian Territories) (14), Canada (12), Colombia (12), Mexico (12), Nigeria (10), and Iraq (10).[122]

FIGURE 4: NATIONALITY OF PLAINTIFFS IN ATS SUITS



The use of the ATS to pursue foreign defendants, often for their conduct abroad, would soon become a key vulnerability for the statute.

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121 Seven ATS cases that resulted in at least one published opinion were brought by U.S. citizens. Five were dismissed because the plaintiffs were not aliens. Two presented more complicated questions. *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004), was brought by U.S. descendants of former African slaves. The court dismissed on statute of limitations grounds. *Id.* at 1075. In *Sai v. Clinton*, 778 F. Supp. 2d. 1, 2 (D.D.C. 2011), a native Hawaiian plaintiff sued the United States government for a violation of the Liliuokalani Assignment, an 1893 agreement between the United States and the Kingdom of Hawaii, arguing that he was a citizen of the Kingdom of Hawaii. The court dismissed on political question grounds. *Id.* at 8.

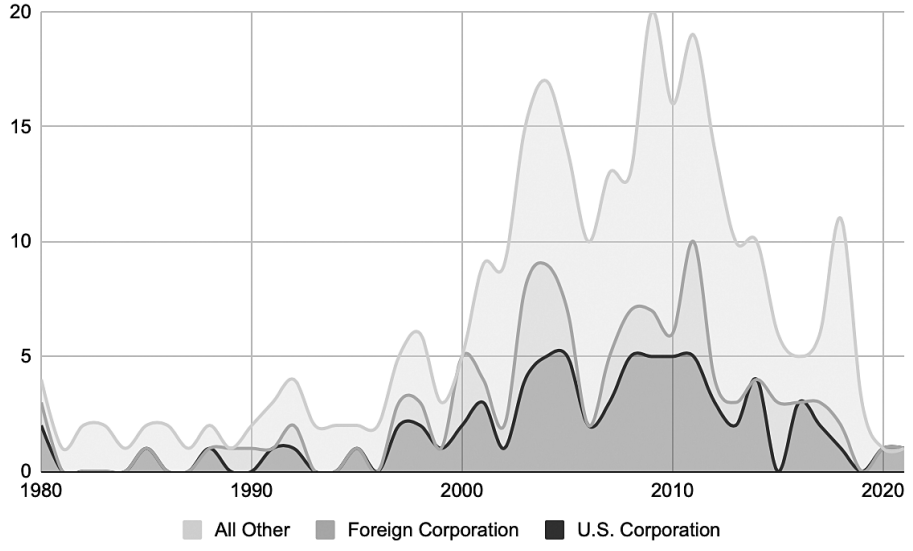
122 These totals and the data in Figure 4 are based on the nationality of the plaintiffs in a suit that resulted in at least one published opinion, using just the first published opinion if there is more than one published opinion in the same case. ATS Database, *supra* note 16.

2. *Turn Towards Corporate Defendants*

Even as suits against U.S. officials and foreign government officials were making their way through the courts, a third "strand" of ATS cases was also emerging—cases against corporate defendants.[123]

A case that helped precipitate the turn towards corporate defendants was, curiously enough, a case that did not involve a single corporation. In 1996, the Second Circuit held in *Kadic v. Karadžić* that a private actor could be held liable for a violation of the law of nations under the ATS, since some international law violations do not require state action.[124] The Clinton administration supported the recognition of ATS causes of action against private individuals and argued that the case would not interfere in U.S. foreign affairs.[125] Stephens recalled that after that case, "Paul Hoffman said what about a corporation? If you can file [against] a private individual, why not a corporation?"[126] As can be seen from Figure 5, there had been a small handful of cases filed against corporations before 1996, but *Kadic* helped spark a flow of new cases.[127]

FIGURE 5: ATS CASES AGAINST CORPORATE DEFENDANTS



123 *Id.*
124 70 F.3d 232, 236 (2d Cir. 1995).
125 Statement of Interest of the United States at 2, Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035 & 94-9069).
126 Stephens Interview, *supra* note 48.
127 All data are generated using just the first published opinion if there is more than one published opinion in the same case. ATS Database, *supra* note 16.

There were several cases in 1997 and 1998 against Austrian, German, and Swiss corporations for contributions to human rights violations during the Holocaust, some of which alleged jurisdiction partially under the ATS.[128] One case settled for over a billion dollars.[129] But the key moment came in 2002, when the Ninth Circuit reversed the district court's summary judgment for defendant Unocal Corp., a California-based corporation, holding that it could be held liable under the ATS for aiding and abetting forced labor, torture, and executions committed by military officials along an oil pipeline in Myanmar.[130]

The *Unocal* case grew out of a collaboration between three University of Virginia Law School students: Tyler Giannini, Katherine Redford, and Mark Bromley,[131] local activists in Myanmar; the CCR; and other human rights lawyers.[132] Giannini, Redford, and Burmese activist Ka Hsaw Wa went on to found the non-profit EarthRights International (ERI).[133] Giannini recalls that the group had three aims for the suit: first, to address the "actual harm[ ] [that was] occurring for [the] plaintiffs"; second, to support ERI's "integrated advocacy" focused on the "legal (not just litigation but law), campaigns" and "community-based approaches" to justice in Myanmar; and third, to file an ATS case against a corporate defendant that was unlikely to be "bogged down due to *forum non conveniens*," as Myanmar was unlikely to be seen as an appropriate forum.[134] The Ninth Circuit's ruling resulted in an undisclosed but substantial settlement payout to the plaintiffs in 2004,[135] sending a shock wave through the ATS community and leading to an influx of ATS cases against corporations.

As more ATS suits targeted U.S. corporations doing business abroad, the Bush administration increasingly weighed in

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128 Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L. Q. 795, 806–07 nn. 29–30 (2002).

129 *Id.* at 799; Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349, 354 (2012).

130 Doe I v. Unocal Corp., 395 F.3d 932, 962–63 (9th Cir. 2002).

131 Interestingly, Giannini and Redford were former students of Jack Goldsmith and Curtis Bradley. Zoom Interview with Tyler Giannini (Jan. 12, 2021) [hereinafter Giannini Interview].

132 Katie Redford & Beth Stephens, *The Story of* Doe v. Unocal: *Justice Delayed But Not Denied, in* HUMAN RIGHTS ADVOCACY STORIES 443, 449 (Deena R. Hurwitz & Margaret L. Satterthwaite eds., 2009).

133 *Id.* at 441.

134 Giannini Interview, *supra* note 131.

135 Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES (Dec. 14, 2004), https://www.nytimes.com/2004/12/14/business/unocal-settles-rights-suit-in-myanmar.html [https://perma.cc/A628-ZUPT].

to oppose them. As noted above, Bellinger first raised the idea that the ATS does not apply extraterritorially in 2007.[136] In other cases, the U.S. government argued that suing U.S. companies doing business abroad threatened to undermine U.S. foreign policy. In an ATS case against Exxon Mobil in Indonesia, also in 2007,[137] the Bush administration argued that the case could have "potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism."[138] The administration continued: "[i]t may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia. . . ."[139]

There has been ongoing debate among ATS lawyers as to whether the turn towards suing corporations was for the good. One long-time ATS lawyer argues that the turn towards corporate defendants "tainted the reputation of the ATS."[140] It brought into ATS litigation a number of lawyers who were not so much interested in human rights as they were in gaining quick, large settlements from corporations.[141] Curtis Bradley, who was Counselor to the Legal Adviser at the Department of State in 2004, when the fallout from *Unocal* began to be felt, agrees that "the ATS litigation died in part because of the money."[142] He explained, "The early litigation sought money but was not primarily about it. And it often targeted unpopular defendants from countries that did not raise high foreign relations issues for the United States."[143] That changed after *Unocal*: "The availability of real money in the corporate cases changed everything. It brought in mass-tort plaintiffs' firms, and they were not concerned about long-term strategy."[144]

Some have contended that the *Unocal* decision was the beginning of the end of the ATS, as it brought the best lawyers that money could pay for into the courtroom to argue *against*

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136 *See supra* notes 109–112 and accompanying text.

137 Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007).

138 Doe v. Exxon Mobil Corp., 391 F. Supp. 3d 76, 85 (D.D.C. 2019) (quoting Letter from William H. Taft, IV, Legal Adviser, Dep't of State, to the Honorable Louis F. Oberdorfer, U. S. Dist. Judge, U.S. Dist. Ct. for D.C. 1–2 (July 29, 2002)).

139 *Id.*

140 Zoom Interview with ATS Lawyer 3 (Jan. 12, 2021) [hereinafter ATS Lawyer 3 Interview].

141 Stephens Interview, *supra* note 48.

142 E-mail Interview with Curtis Bradley, Professor of Law, Univ. Chi. L. Sch. (Dec. 10, 2021).

143 *Id.*

144 *Id.*

ATS liability.[145] Hoffman recalled a conversation with a fellow attorney who warned at the time: "you can't just start suing corporations like this; the capitalist system will not let you succeed. All of the forces of society will crush you."[146] Stephens, too, acknowledges that "[t]he corporate cases certainly triggered a much larger body of well-funded opponents."[147] Nonetheless, no advocate we spoke with expressed regret about the turn to corporate defendants. Many shared the view of one advocate, who said:

> There were people whose rights were being violated. This is the statute that allowed us to sue them. That's why we went into court. . . . What are we saying [if we don't sue powerful defendants]? We'll only hold people accountable if they can't fight back? What kind of human rights litigation is that?[148]

Simons contends that there may be a "good argument to be made that [ATS cases] would have flown under the radar for longer if not for the corporate cases."[149] But he points out that the cases against U.S. officials had already generated substantial opposition.[150] There was push-back against early ATS cases from the Reagan and H.W. Bush administrations, which largely preceded the rise of corporate cases.[151] Giannini also describes increased resistance to ATS cases as a double-edged sword, because "the more powerful a tool becomes, the greater the political pushback against the use of the tool will get," while "[i]f you have no backlash then you have no impact."[152] Stephens similarly argues that as a matter of law and policy, "corporations need to be held accountable" and that the increased pushback from corporate defendants should not have deterred corporate accountability.[153] Ralph Steinhardt, another long-

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145 Zoom Interview with ATS Lawyer 1 (Nov. 30, 2020); Stephens, *supra* note 40, at 1518–19; *see also* David Corn, *Corporate Human Rights*, THE NATION (June 27, 2002), https://www.thenation.com/article/archive/corporate-human-rights/ [https://perma.cc/EW5Q-Z8V4] (observing that corporations were "watching and waiting—to see if Third World locals screwed by transnationals can find justice in [U.S.] courts far from their villages").

146 Hoffman Interview, *supra* note 49.

147 Stephens Interview, *supra* note 48.

148 ATS Lawyer 5 Interview, *supra* note 92.

149 Simons Interview, *supra* note 74. Giannini, too, argues that while "the dominant narrative is that the corporate cases opened a resource box of defense counsel that wasn't there before," it is "a partially incomplete story to say there wasn't backlash against this litigation until the corporate cases." Giannini Interview, *supra* note 131.

150 Simons Interview, *supra* note 74.

151 Giannini Interview, *supra* note 131.

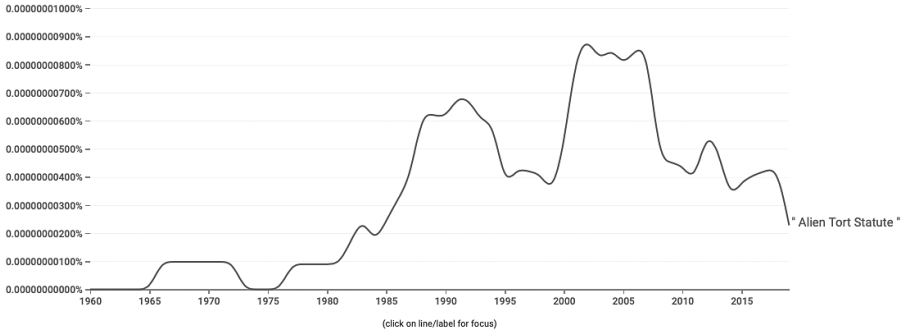
152 *Id.*

153 Stephens Interview, *supra* note 48.

time ATS lawyer, argues that recent attention to corporate defendant ATS cases exaggerates the fear that the "court has been whittling away at the ATS," since court decisions have consistently "preserv[ed] cases in the *Filártiga* model."[154] (He offered this assessment, it should be noted, before the Court issued its decision in *Nestlé*, in which the Court may have put an end to the *Filártiga* model, as explained below.)

Those who contend that the decision to target corporations was not the sole reason that ATS suits ran into opposition are undoubtedly correct. As the previous subsection showed, the U.S. government had begun weighing in against ATS suits well before the *Unocal* decision, indeed as early as 1984. More likely, the two strands of litigation—one against U.S. and foreign government officials and the other against corporations—together raised the stakes of ATS litigation, which in turn contributed to more effective advocacy on behalf of defendants.[155] It also raised the salience of the cases themselves—attracting greater media attention. Figure 6, a Google N-gram for "Alien Tort Statute," shows a bump in attention beginning in the mid-1980s, a decline over the early 1990s, and then a bump again beginning in 1998. While the rising opposition meant plaintiffs often lost in court, the cases may have won attention to the issues they raised nonetheless—a point to which we will return in the next Part.

FIGURE 6: GOOGLE N-GRAM OF "ALIEN TORT STATUTE"



154 Zoom Interview with Ralph Steinhardt (Jan. 12, 2021) [hereinafter Steinhardt Interview].

155 It is worth noting that the bill that Senator Feinstein introduced in 2005 to limit the impact of the ATS, which was subsequently withdrawn, would have made it more difficult to bring suits against both corporate entities and foreign public officials. *See* Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005) (showing that the bill was introduced in Senate on Oct. 17, 2005 and informally withdrawn on Oct. 25, 2005).

Other lawyers argue that the problem with the turn to suing corporations was not so much that it brought out top lawyers. It was instead that "going after corporations required the types of legal theories that were going to be hard to sustain if you take *Sosa* seriously—especially the part that talks about reasons to be cautious in creating new causes of action."[156] The cases against corporations often rested on the theory that they "aided and abetted" human rights violations by the governments of the countries where they operated. As one lawyer noted, "For years, the U.S. government had encouraged businesses to do business in bad countries on the theory that it would make them better."[157] These suits threatened to undermine that policy. It effectively meant, this lawyer maintained, that "you can be held liable for aiding and abetting just for doing business in a country."[158] Another lawyer echoed this concern: "What's the end game? No company can do business in [country]? Would that really change anything on the ground for the better?"[159]

Moreover, winning the large settlement in *Unocal* was justifiably celebrated as a major victory, but it may nonetheless have carried some downsides for the human rights movement. The settlement got the attention of lawyers beyond the human rights advocates who had largely brought ATS cases to date. A lawyer who has worked on post-*Unocal* cases explained, "One issue is that once you get money judgments in these cases, you can't curate the cases. You get a bunch of lawyers that are not picking cases well and don't particularly care about the movement. That became a problem."[160] Hoffman agreed: "The motivation for the class action lawyers was mainly money. Those of us on the public interest side were motivated by human rights. It's more of a labor of love."[161] He noted, however, that the problem was short-lived: "At this point, a lot of the big class action law firms have dropped out because you can't make money."[162]

C. The Continued Survival, but Slow Decline, of the ATS

As noted above, the 2004 Supreme Court decision in *Sosa* did little to halt the rise in ATS suits, despite widespread expec-

156 ATS Lawyer 6 Interview, *supra* note 88.
157 *Id.*
158 *Id.*
159 ATS Lawyer 7 Interview, *supra* note 106.
160 ATS Lawyer 6 Interview, *supra* note 88.
161 Hoffman Interview, *supra* note 49.
162 *Id.*

tations to the contrary. But corporate attorneys were not done challenging the ATS, and in 2011 another case reached the Supreme Court—this time, it seemed, the Court would finally put an end to corporate liability under the ATS. *Kiobel v. Royal Dutch Petroleum Co.* concerned corporate aiding and abetting of human rights violations in Nigeria. The Second Circuit had held that international law did not recognize a universally obligatory norm of corporate liability and that the ATS cause of action therefore did not provide jurisdiction over claims against corporations.[163] Several other circuits disagreed,[164] setting up a circuit split on the issue. The plaintiffs, as the losing parties in the Second Circuit, faced the question of whether to seek certiorari in the Supreme Court or live with the loss. Many ATS practitioners believed that *Kiobel* was a dangerous vehicle for raising the question of corporate liability in the Supreme Court because it involved a foreign company.[165] Nonetheless, the lawyers decided to seek certiorari (one ATS lawyer speculated that the decision was driven in part by the fact that the attorneys below had pursued the case for years on a contingency fee basis and, thus, didn't want to accept the loss).[166] The Court granted certiorari to resolve the corporate liability question.[167]

After the first oral argument in the spring of 2012, however, the Court ordered a second round of briefing and argument on the issue of extraterritoriality—that is, whether the ATS applied outside the United States.[168] This issue, first raised in 2007 by the Bush administration, was raised in the

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163 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010), *aff'd on other grounds*, 569 U.S. 108 (2013).

164 Sarei v. Rio Tinto, PLC, 671 F.3d 736, 748 (9th Cir. 2011) (en banc); Doe v. Exxon Mobil Corp., 654 F.3d 11, 84 (D.C. Cir. 2011); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008).

165 As one ATS practitioner describes, unlike the coordinated legal fight against school segregation in the mid-20th century, where cases were carefully selected, "ATS litigation has never looked anything like that. There has never been a plan for selecting the proper vehicles. You then ended up with *Sosa*, a surprise victory, but the cases that came up after that [in the Supreme Court] were both against foreign corporations, and they led predictably to the exclusion of extraterritoriality and liability for foreign corporations." ATS Lawyer 2 Interview, *supra* note 64.

166 E-mail from ATS Lawyer 2, *supra* note 107. Notably, there was support for the petition among human rights groups, who argued that corporations could and should be held accountable under international law for conduct over which the ATS provides jurisdiction. *See* Brief of Amici Curiae International Human Rights Organizations & International Law Experts in Support of Petitioners at 3–4, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491).

167 Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 801, 961–62 (2011).

168 Reargument Order, Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244, 1244 (2012) (No. 10-1491).

first round of briefing by the same lawyers, John Bellinger and Paul Clement, now in a private capacity.[169] That brief likely helped prompt the Court's decision to order the second round of briefing and argument on that issue—the issue on which it ultimately decided the case. In its decision in 2013, the Supreme Court held that the ATS cause of action did not apply to wholly extraterritorial conduct.[170] Only claims that "touch and concern the territory of the United States . . . with sufficient force" will displace the "presumption against extraterritoriality," and "mere corporate presence" in the United States is insufficient.[171] In the end, the Court did not rule on the question of corporate liability, though each side found language in the opinion to favor their view.[172]

As Figure 7 shows, while *Sosa* did not have a dampening effect on ATS suits, *Kiobel* appears to have contributed to a substantial decline. At least one lawyer involved in ATS litigation contends, however, that *Kiobel* was not as important to the slide of corporate human rights suits as was an ATS case decided a year later—*Daimler AG v. Bauman*[173]—which significantly limited the capacity of U.S. courts to exercise personal jurisdiction over foreign corporations. As he put it, "Most of the cases kicked out under *Kiobel* are cases that wouldn't be maintainable under *Daimler*. That's ironically true of *Kiobel* itself."[174] This is difficult to assess because such cases may never be filed at all or may fail before they make it to the published opinion stage. Among the cases in our database, only six failed on grounds of personal jurisdiction. By contrast, twenty-seven failed under *Kiobel*'s "touch and concern" test.[175] It is worth noting that ATS cases against U.S. corporations may in many cases be continued under different legal theories,

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169 Brief of Amici Curiae BP America, Caterpillar, Conoco Phillips, General Electric, Honeywell & International Business Machines in Support of Respondents at 2, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491).

170 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013). Foreign governments had submitted briefing to the court asking it to constrain the statute's extraterritorial reach. *See* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 2, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491).

171 *Kiobel*, 569 U.S. at 124–25, 140.

172 Stephens, *supra* note 40, at 1520–21.

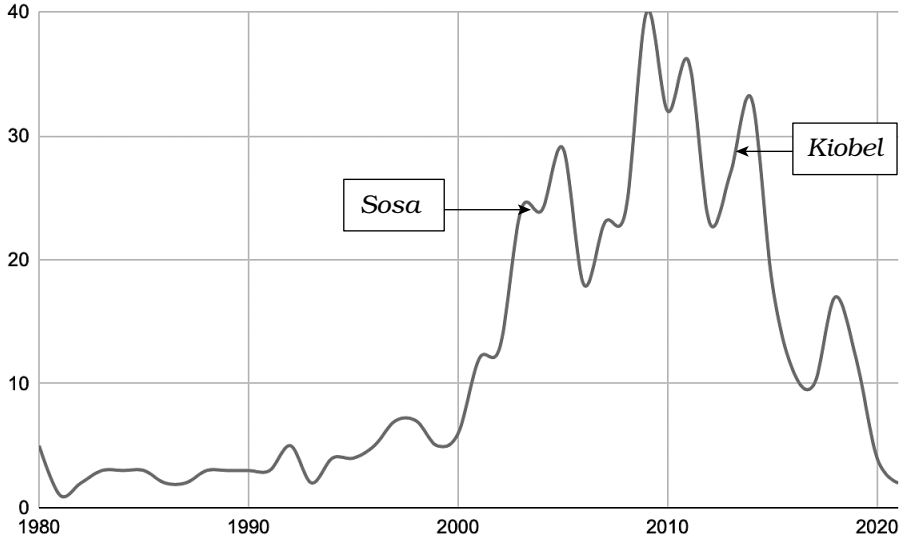
173 *See* 571 U.S. 117, 139 (2014).

174 Simons Interview, *supra* note 74.

175 ATS Database, *supra* note 16.

whereas cases that fail for lack of personal jurisdiction may not.[176]

FIGURE 7: TOTAL PUBLISHED ATS DECISIONS OVER TIME



The Supreme Court, in a case again fueled by significant corporate money, nonetheless returned to the corporate liability question five years later in *Jesner v. Arab Bank, PLC*,[177] brought by relatives of victims of terrorist attacks in Israel and Palestine against a Jordanian bank for its alleged financial contributions to terrorist organizations. The Court held that an ATS suit cannot be brought against a foreign corporation for conduct outside the United States.[178] The plurality opinion authored by Justice Kennedy suggested skepticism of general corporate liability,[179] but Justices Alito and Gorsuch wrote separately and only joined the sections that specifically excluded foreign corporations.[180] In *Nestlé USA, Inc. v. Doe* and *Cargill Inc. v. Doe*, the question of corporate liability was before the Court once more, this time specifically regarding the poten-

176 Simons Interview, *supra* note 74. *See, e.g.*, Complaint & Demand for Jury Trial at 139, Jane Doe 8 v. Chiquita Brands Int'l, Inc., No. 20-3244 (D.N.J. Mar. 25, 2020), https://earthrights.org/wp-content/uploads/Jane-Doe-8-v.-Chiquita-Complaint-New-Claims-March-2020.pdf [https://perma.cc/9DWD-4JME] (alleging violations under New Jersey state tort law and Colombian law).

177 138 S. Ct. 1386 (2018).

178 *Id.* at 1389.

179 *Id.* at 1402–03 (plurality opinion) ("[C]aution extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations.").

180 *Id.* at 1408 (Alito, J., concurring); *id.* at 1412 (Gorsuch, J., concurring).

tial liability of U.S. corporations Nestlé USA and Cargill for allegedly aiding and abetting child slavery, forced labor, and human trafficking on cocoa plantations in Cote D'Ivoire.[181] While this time there were five votes *favoring* corporate liability, the plaintiffs' win below was, nonetheless, reversed and remanded on the ground that the statute did not apply to the extraterritorial conduct at issue in the case.[182]

That holding, as noted earlier, could be even more damaging than had the Court ruled against corporate liability, as it threatens to exclude all ATS suits for extraterritorial conduct—even those that follow the *Filártiga* model.[183] Most ATS suits, after all, are brought for violations that take place outside the United States. In our database, 75 cases were brought for harm that took place in the United States. The remaining 220 were brought for violations that took place outside the United States. As Figure 8 shows, these non-U.S. cases were brought for harm around the globe—including 95 different countries.[184]

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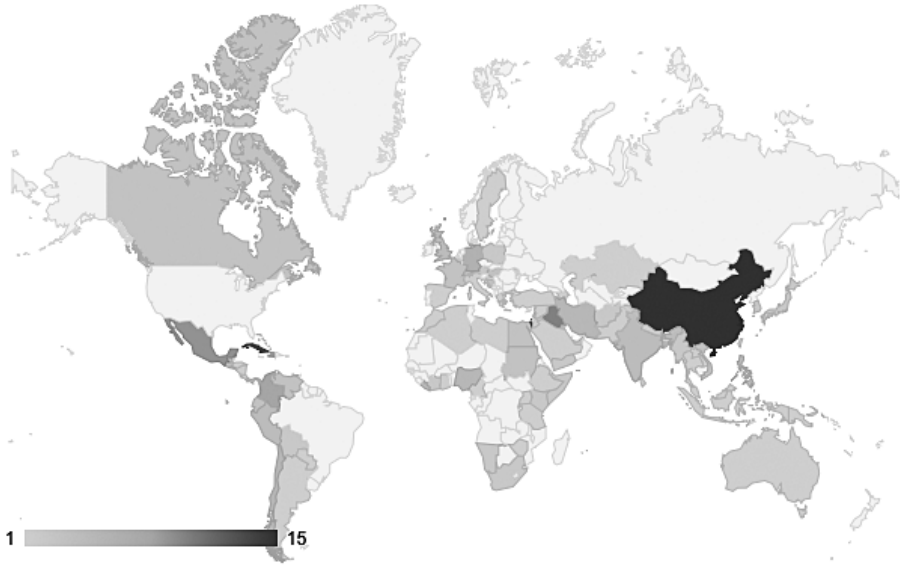
181 Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1947 n.4 (2021) (Sotomayor, J., concurring).

182 *Id.* at 1936.

183 Although, in the *Moses Thomas* case, the District Court for the Eastern District of Pennsylvania found that *Kiobel*'s "touch and concern" test was satisfied with respect to the acts of a former colonel of the Liberian military sued under the ATS and the TVPA for war crimes and crimes against humanity. Jane W. v. Thomas, 560 F. Supp. 3d. 855, 873 (E.D. Penn. 2021).

184 Some cases were brought for harms that occurred on the High Seas and for some cases the location of the harm could not be determined. All data in this paragraph and Figure 8 are generated using just the first published opinion if there is more than one published opinion in the same case. ATS Database, *supra* note 16.

FIGURE 8: LOCATION OF HARM IN ATS SUITS (EXCLUDING U.S.)



Several advocates note that the decline of the ATS is as much a matter of politics as law. As one advocate put it, "One more justice on the other side would have made a huge difference."[185] Hoffman echoed this view as he awaited the Court's decision in *Nestlé*, in which he represented the plaintiffs before the Supreme Court:

> If *Bush v. Gore* had gone the other way, this would be a different story and if 75,000 people voted differently in 2012, we would be talking about my expected big victory in *Doe v. Nestlé*. As a litigator, it's hard to predict big political shifts. We now are trying to hold on to what we accomplished. That's not where we wanted to be. But we continue to think about other ways to accomplish the same goals.[186]

Looking back across the history of the ATS, the federal courts issued a total of 531 published opinions in ATS cases.[187] Those 531 opinions were rendered in 300 separate lines of cases.[188] Plaintiffs alleged a wide range of international law violations in these cases and often alleged multiple violations in a single case (see Table 1). The most commonly alleged

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185 ATS Lawyer 5 Interview, *supra* note 92.

186 Hoffman Interview, *supra* note 49.

187 Calculations in this paragraph and in Table 1 are based on ATS Database, *supra* note 16.

188 Notably, there were 295 first published opinions, but 300 total lines of cases (and 300 final opinions). That is because some cases split before they concluded, generating more than one line of cases.

types of violations of the law of nations were torture (25% of cases); deprivation of liberty (23% of cases); and cruel, inhuman, or degrading treatment (22% of cases), illustrating that many ATS cases followed the *Filártiga* model.[189]

TABLE 1: INTERNATIONAL LAW VIOLATIONS ALLEGED IN ATS CASES

International Law Violation Alleged	Number of cases	Percent of total
Torture	73	24.75%
Deprivation of liberty	68	23.05%
Cruel, inhuman or degrading treatment (CIDT)	66	22.37%
Unlawful killing	53	17.97%
Violation of the law of armed conflict	50	16.95%
Violation of civil and political rights (CPR)	34	11.53%
Violation of due process	34	11.53%
Crimes against humanity	34	11.53%
Other international law violation	31	10.51%
Forced labor	26	8.81%
Violation of an international agreement	24	8.14%
None	24	8.14%
Genocide	21	7.12%
Unlawful interference with property	20	6.78%
Terrorism	14	4.75%

Only 52 of the 300 lines of cases ultimately resulted in judgments in favor of the plaintiffs on the ATS claim.[190] Table 2 shows what reasons were given for a decision when an ATS case resulted in a ruling against the plaintiffs (because courts may give more than one reason, the total sums to more than 100%). The significant plurality (about 34%) of cases end because the court finds that there is not an actionable violation of the law of nations.[191] This has, from the beginning, been a key reason that ATS suits fail. Indeed, among the first twenty un-

189 Because a single case can include allegations of more than one violation, the total adds up to more than 100%.

190 ATS Database, *supra* note 16. Some cases that were unsuccessful under the ATS were, however, still successful on other claims. For example, in *Dacer v. Estrada*, the District Court issued a default judgment against the defendant under the TVPA but not under the ATS. Dacer v. Estrada, No. C 10-04165 WHA, 2014 U.S. Dist. LEXIS 7923, at *7 (N.D. Cal. 2014).

191 In cases where the court found that the plaintiffs had not sufficiently alleged an actionable violation of the law of nations, the most common allegations were violation of an international agreement (12 cases), violation of the law of armed conflict (9 cases), deprivation of liberty (8 cases), and deprivation of due process (8 cases). ATS Database, *supra* note 16.

successful ATS suits, fifteen failed on this basis.[192] The Supreme Court's 2004 *Sosa* decision, which affirmed that actionable violations of international law must be "specific, universal, and obligatory,"[193] had a modest effect in part because courts had long cast a critical eye on international law claims. The immunity bar is the second most common reason that ATS suits fail, which illustrates the difficulty that victims of international law violations face in general in cases against government officials. Of the 69 cases that failed due to an immunity bar, 49% were against U.S. defendants, and 51% were against foreign defendants.[194] The third most common reason is failure to "touch and concern" the United States, based on the Supreme Court's 2013 decision in *Kiobel*.

TABLE 2: CHIEF REASONS GIVEN IN ATS DECISIONS AGAINST PLAINTIFFS

Reason given for unfavorable decision	Number of cases	Percent of total
Not an actionable violation of the law of nations or treaty of the U.S.	85	36.02%
Barred by immunity doctrine	69	29.24%
Conduct does not sufficiently touch and concern U.S. to displace presumption against extraterritoriality	27	11.44%
Non-justiciable political question	18	7.63%
Failure to establish aiding and abetting	12	5.08%
Statute of limitations exceeded	12	5.08%
Personal jurisdiction	6	2.54%
Improper use of the ATS	5	2.12%
Barred by *forum non conveniens*	5	2.12%
Plaintiffs are not aliens	5	2.12%
Other ruling not in favor of plaintiffs	30	12.71%

Looking at the top six categories over the time period from 1980 to 2020, we can see more starkly the impact that *Kiobel*

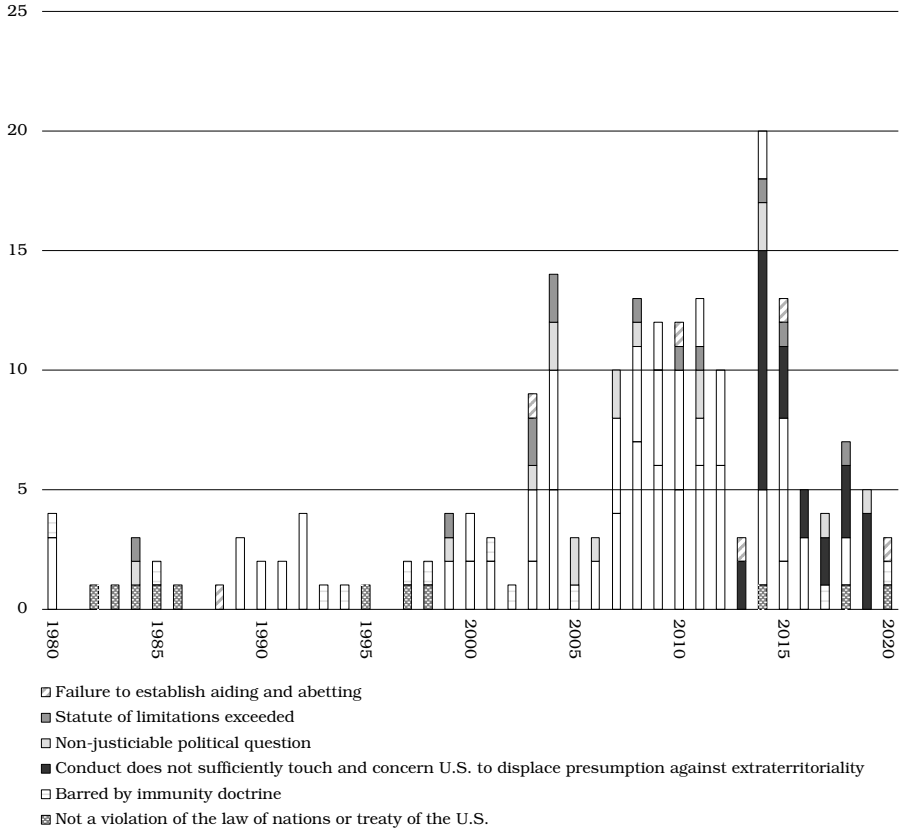
192 *Id.*

193 Sosa v. Alvarez-Machain, 542 U.S. 692, 748 (2004).

194 ATS Database, *supra* note 16. It is worth noting that jurisprudence on the common law immunity doctrine and the Foreign Sovereign Immunities Act continues to evolve. For example, in 2021 the Supreme Court held that the expropriation exception of the FSIA incorporates the domestic takings rule, thereby recognizing that a foreign sovereign's taking of its own nationals' property is not a violation of international law. Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 715 (2021).

had on ATS suits. While the failure to "touch and concern" the United States is the third most common reason for decisions against ATS plaintiffs overall, it is the *leading* reason in the years after *Kiobel*. By contrast, the failure to establish that there is a violation of the law of nations sufficient to permit the case to proceed under the ATS has long been a reason ATS suits fail. While there was a bump in this rationale post-*Sosa*, it was modest.

FIGURE 9: CHIEF REASONS GIVEN IN ATS DECISIONS AGAINST PLAINTIFFS OVER TIME



II
ASSESSING THE IMPACT OF THE ATS

Part I reviewed the history of the ATS since its resurgence in the mid-20th century. But what impact did those cases have? One way to answer that question is to look at how courts have resolved ATS cases. While court rulings tell one part of the statute's story, however, they do not necessarily reveal the

full extent to which the ATS has served plaintiffs' goals. In this Part, we develop a fuller account of the main litigation aims that have fueled ATS suits and provide an initial assessment of whether those aims were met. This prepares the way for Part III, in which we ask—if the goals of ATS plaintiffs extend beyond what the ATS can deliver, how else can these goals be met?

We begin by noting that the legal profession has a tendency to focus on the financial outcomes of litigation. The question "was the lawsuit successful?" is often taken to mean "did the plaintiff win?" Then the next question is *what* did the plaintiff win? Money is often, though not always, the relevant measure—did the plaintiff get monetary compensation and if so, how much? That's particularly true for a tort suit. Even a successful case can be seen as a waste if it results in a favorable ruling but payment is not forthcoming—meaning that neither the plaintiff receives compensation nor, generally, their attorneys get paid for their work on the case. While compensation is undoubtedly an important aspect of people's perception of justice, socio-legal scholars have long advocated for a more nuanced view of what constitutes "success" in dispute resolution, based on a richer set of goals that plaintiffs have when filing a legal complaint.[195] 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.

A first distinction emerged between the goals of the individual plaintiffs on the one hand, and the goals of the many others with an interest in the lawsuits and the issue being litigated on the other. Conceptually, human rights are individual, in that they belong to the individual person, and their judicial enforcement centers around the individual's right to a remedy.[196] At

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195 *See, e.g.*, Catherine R. Albiston, Lauren B. Edelman & Joy Milligan, *The Dispute Tree and the Legal Forest*, 10 ANN. REV. L. & SOC. SCI. 105, 109, 124 (2014) (using a "dispute resolution tree" metaphor to describe various aims of public interest litigation, where the material remedies of litigation are the "fruit" of the tree's branches, and symbolic outcomes, including abstract indicia of justice such as being able to tell one's story and recognition of harm (for example, an apology), are the figurative tree's "flowers").

196 These individual rights are codified in human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), which enshrines the individual rights to life, liberty, and freedom of movement, among many others. International Covenant on Civil and Political Rights arts. 6, 9, 12, Dec. 16, 1966, 999 U.N.T.S. 171. *See also* Koen De Feyter, *Law Meets Sociology in Human Rights*, 40 DEV. & SOC'Y 45, 56 (2011) (noting that the litigation of individual claims is the primary strategy for establishing violations and securing reparation in human rights law).

the same time, because human rights are inherent to every human being and express fundamental socio-moral values, their enforcement has a collective value as well.[197] In addition, even a single human rights violation can signal broader patterns of social injustice. As Simons put it, "[T]he individual plaintiff is typically part of a larger community of victims who has also been affected by the violation."[198]

A second distinction arises between the material and normative aims that have inspired ATS lawsuits. The primary example of a material goal is monetary compensation; others include restitution of property or restoration of employment. Normative aims, by contrast, are focused on the vindication of rights and acknowledgement of responsibility. For many ATS plaintiffs, exposing a wrongdoing and receiving public affirmation of their rights is sometimes even more important than obtaining monetary compensation. Veteran ATS litigator Beth Stephens explained, "[We would tell our clients], [y]ou'll be able to tell you[r] story . . . . People responded that yes this terrible thing happened to me and I want to expose it."[199] She continued: "The best . . . cases I worked on [were ones] where we really tried to do that. The cases are often criticized as merely symbolic. That misunderstand[s] the importance of symbolism."[200] Normative aims may also include norm development, which contributes to the formation of customary international law by influencing both general state practice and *opinio juris*.[201] The four sets of goals defined by these two dimensions are summarized in Table 3.

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197 Indeed, human rights instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide set out *erga omnes* obligations owed to the international community. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; *see* Priya Urs, *Obligations* Erga Omnes *and the Question of Standing Before the International Court of Justice*, 34 LEIDEN J. INT'L L. 505, 505–06 (2021).

198 Simons Interview, *supra* note 74.

199 Stephens Interview, *supra* note 48.

200 *Id.*

201 *See* Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 124 (2018), https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf [https://perma.cc/SDX4-DPHB].

TABLE 3: FOUR GOALS OF ATS LITIGATION

	Individual	**Collective**
Material	Material benefits to plaintiffs (e.g., individual monetary awards, restitution)	Material benefits to a group (e.g., resources to rebuild a community, funding for human rights organizations)
Normative	Normative goals of the plaintiffs (e.g. affirmation of rights; exposing wrongdoing; holding perpetrators accountable; preventing future harm)	Normative goals of a group (e.g. shed light on anti-normative practices; strengthen protection of vulnerable groups through legal and policy development; mobilize for political action)

It is worth noting from the outset that the line between these goals can be blurry—for example, material benefits can serve as important tokens of justice and aid in norm development. Tensions can also arise between these different goals.[202] For example, settlement of a case might lead to substantial material benefits, but could hamper the public affirmation of individual rights, the progressive development of the law, and the opportunity to expose a wrongdoing—because settlements often mean that the courts do not resolve the legal issues presented, and they often come with confidentiality agreements attached. Indeed, the common law can often favor powerful repeat players (such as corporations and governments), who can settle cases that risk producing a precedent harmful to their interests.[203] Nonetheless, settlements might sometimes advance normative goals. The settlement with Unocal described in Section I.B.2., demonstrates that the shared understanding of the law can be influenced by cases that are settled even though there is no formal legal precedent.

Table 3 focuses on the goals of plaintiffs and their communities and advocates in bringing ATS suits. It is important to note that plaintiffs are not the only ones who make the decisions to initiate and maintain ATS suits. Most plaintiffs in ATS suits do not have the funds to pursue their cases and they rely on lawyers willing to take the suits pro bono or on a contin-

202 *See* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 841 (2013); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 319 (1988).

203 *See* Albiston, Edelman & Milligan, *supra* note 195, at 115–16; Depoorter, *supra* note 202, at 825–26.

gency fee basis. Lawyers that take such suits do so in pursuit of their own material and normative goals. Difficult, even ethically and professionally problematic, situations may arise if the goals of the lawyer or organization supporting the lawsuit are at odds with the goals or interests of the plaintiffs. The lawyers we spoke with made clear that their clients' interests come first. But divining those interests can be difficult. The challenge is complicated by the fact that ATS plaintiffs are by necessity foreign nationals, who might not be familiar with the American legal system, and therefore rely on their lawyers to explain what can reasonably be expected from an ATS lawsuit.[204] Stephens, for example, describes how the CCR went to great lengths to ensure that "clients were completely aware of the risks and likelihoods of collecting an award, and that they would be doing this because they wanted accountability."[205] She continued, "we were used to telling clients not to do this if that's your goal—to get money. That was nice, but can't be expected."[206] Nonetheless, she acknowledged that some clients were undoubtedly disappointed that they didn't get any money.[207]

Law school clinics and centers are not immune from such concerns.[208] For them, ATS suits often serve pedagogical goals in addition to the clients' interests. They also serve as vehicles for the personal normative goals of the faculty and students involved. As Sam Moyn put it, "ATS litigation . . . historically and recently seems also to be about giving US lawyers something to do with in the US legal system to help. The appeal of the ATS to US law professors and clinics for this reason should not be ignored."[209]

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204 Suleiman Abdullah Salim, one of the plaintiffs in the ATS case *Salim v. Mitchell*, was first approached by a Tanzanian law firm, which told him that a case alleging abuse during his detention in U.S. custody would be completed quickly. Zoom Interview with Suleiman Abdullah Salim (Martin Mayiani trans., Sept. 17, 2021) [hereinafter Salim Interview]. However, the Tanzanian lawyers were not familiar with U.S. litigation or the U.S. court system. Once Salim connected with experienced ATS lawyers, he received a more accurate assessment of the prospects for the case and how long it would take. *Id.*

205 Stephens Interview, *supra* note 48.

206 *Id.*

207 *Id.*

208 One of the authors, Oona Hathaway, directs the Yale Law School Center for Global Legal Challenges, which has filed several amicus briefs in ATS suits.

209 E-mail from Samuel Moyn to Oona Hathaway (Sept. 2, 2021) (on file with author); *see also* Samuel Moyn, *Why the Court Was Right About the Alien Tort Statute: A Better Way to Promote Human Rights*, FOREIGN AFFS. (May 2, 2013), https://www.foreignaffairs.com/articles/united-states/2013-05-02/why-court-was-right-about-alien-tort-statute [https://perma.cc/XE38-PRT8].

A. Individual Goals

International law conceptualizes individual goals within the framework of the right to an effective remedy.[210] This right is set out in the main international and regional human rights instruments,[211] and is elaborated upon in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines).[212] The individual remedy has both material and normative elements, which we elaborate below.

1. *Material*

The Basic Principles and Guidelines identify three core components to the right to a remedy, one of which is "[a]dequate, effective and prompt reparation for harm suffered."[213] These reparations can include material benefits—for example restitution (e.g., restoration of employment or return of property), compensation (e.g., monetary damages), and rehabilitation (e.g., therapeutic care or social services).[214] Empirical research in other areas of civil litigation has suggested that only a small proportion of plaintiffs are primarily motivated by monetary compensation. For example, in one study, Tamara Relis interviewed seventeen plaintiffs in medical malpractice suits and found that only 18% reported monetary compensation as a primary objective; only one considered it to be the sole

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210 For a discussion in relation to corporate defendants, see generally Gwynne L. Skinner, *Beyond* Kiobel*: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-*Kiobel*) World*, 46 COLUM. HUM. RTS. L. REV. 158 (2014).

211 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S 85; Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S 3; American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and People's Rights art. 7, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221.

212 G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

213 *Id.* Principle VII.

214 *Id.* Principle IX.

objective.[215] Rather, plaintiffs litigated for a number of reasons: admittance of fault/responsibility (59%), non-repetition (59%), answers/truth (53%), apology (41%), retribution for conduct (41%), acknowledgement of harm (35%), and punishment (24%).[216] Relis also found that lawyers tend to greatly overestimate the importance of financial considerations to their clients; a majority of them believed that monetary compensation was their client's primary aim.[217]

Interviews conducted with ATS participants for this article show that, for most, monetary compensation has not been the primary motivation for litigation. Unlike the lawyers in Relis's study, the majority of ATS lawyers we interviewed were cognizant of the fact that plaintiffs were typically not primarily "in it for the money."[218] As Simons stated, ATS plaintiffs "are all different humans and have different interests."[219] Reminiscing about his work with plaintiffs in the *Marcos* case, Steinhardt explained[220]: "Overwhelmingly, they are not in it for the money, which is a good thing. I am reminded of what a client said in the wake of [a favorable ruling]. I told my client that there was a chance she wouldn't see a dime of [the judgment]. She said something I haven't forgotten. She said, that's OK, it's enough to be believed."[221]

That said, money is still the dominant way in which modern society expresses worth, and monetary compensation remains an important indicium of justice (moreover, the other form of traditionally important relief, injunctive relief, is not available in this context).[222] Indeed, it was partly due to frustration that the truth and reconciliation process set up in South Africa in the mid-90s did not result in compensation to

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215 Tamara Relis, "*It's Not About the Money!": A Theory on Misconceptions of Plaintiffs' Litigation Aims*, 68 U. PITT. L. REV. 701, 723 (2007).

216 *Id.* The percentages exceed 100% in total, because plaintiffs may litigate for more than one reason.

217 *Id.* at 718.

218 Admittedly, there may be some selection effect at work here. We spoke primarily with lawyers who have been involved in ATS litigation from the perspective of human rights advocacy. Most of them did so from nonprofit organizations that were not seeking to make money off of the cases. They are more likely to place normative goals at the center of their work.

219 Simons Interview, *supra* note 74.

220 *In re* Estate of Marcos Hum. Rts. Litig., 910 F. Supp. 1460 (D. Haw. 1995).

221 Steinhardt Interview, *supra* note 154. Of course, it is possible that some lawyers are primarily motivated by financial reward, which can create a possible conflict of interest, as discussed above.

222 For example, monetary reparations remain a rallying cry for several justice movements, including for Black communities that are descendants of African slaves in the United States. *See* A. Mechele Dickerson, *Designing Slavery Reparations: Lessons from Complex Litigation*, 98 TEX. L. REV. 1255, 1256 (2020).

survivors of the apartheid regime that the *Khulumani* lawsuit was brought under the ATS in U.S. courts.[223] Marjorie Jobson, the National Director of Khulumani Support Group in South Africa, recalls: "The ATS suit was one of the most hopeful things that happened for victims and survivors. . . . [I]t lit a flame in everyone's hearts and minds that if we can't get justice in South Africa, we can get it in the U.S. through the ATS."[224] Others have also emphasized the instrumental value of monetary compensation to satisfy often dire needs of ATS plaintiffs, their families, and their communities. As Simons put it, "There are some plaintiffs who simply want to provide for their families. In those cases, the question is how the ATS contributes to their ability to recover—and it can help in that respect."[225]

Based on our research, the ATS has not been a success story from the perspective of individual material benefits. According to our assessment, since the first ATS case was decided in 1793, only twenty-five cases have resulted in monetary judgments that were not subsequently overturned.[226] These cases represent a total monetary award of approximately $69 billion, with far and away the largest award being the $60.3 billion judgment for 374 plaintiffs in *Mwani v. Al Qaeda*,[227] followed by the $1.96 billion award in *In re Estate of Marcos Human Rights Litigation*.[228] Importantly, however, only six out of these twenty-five awards appear to have been collected, and only partially, typically because defendants lacked financial resources.[229] For example, plaintiffs in the *Mwani* case never collected any of the award,[230] and those in the *Marcos* case recovered less than 1%.[231] As Appendix A shows, failure to collect is the rule, not the exception.

Since material benefits generally depend on a favorable judicial outcome for plaintiffs, and these have been rare in the history of the ATS, conscientious lawyers are likely to dissuade clients whose primary objective is compensation from pursuing

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223 Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258 (2d Cir. 2007).

224 Zoom Interview with Dr. Marjorie Jobson, Nat'l Dir., Khulumani Support Grp. (Mar. 1, 2021) [hereinafter Jobson Interview].

225 Simons Interview, *supra* note 74.

226 *See infra* Appendix A.

227 No. 99-125 (JMF), 2014 U.S. Dist. LEXIS 163169, at *10 (D.D.C. Nov. 18, 2014).

228 910 F. Supp. 1460, 1464 (D. Haw. 1995).

229 *See infra* Appendix A.

230 Adam Klasfeld, *Bombing Victims Win Big, if Symbolic, Victory*, COURTHOUSE NEWS SERV. (Nov. 19, 2014), https://www.courthousenews.com/bombing-victims-win-big-if-symbolic-victory/ [https://perma.cc/435H-DFHE].

231 Davies, *supra* note 57.

an ATS claim.[232] However, it is also possible that the process of litigation can lead to a settlement in satisfaction of the plaintiff's material goals. In *Abiola v. Abubakar*, for example, a Nigerian woman sued a former general of the military junta and head of state of Nigeria for causing the death of her parents, who were pro-democracy activists. After five years of litigation in the United States, the parties settled for $650,000. As part of the settlement, the plaintiff agreed to join in a request to set aside an earlier judgment in which the court had found that Nigeria did not provide an adequate forum for the lawsuit.[233] In agreeing to the arrangement, the district court noted that a "somewhat unusual factor in this case is that the [prior] decision may be considered to impact (via embarrassment or otherwise) a non-party to this case, which just happens to be the party funding the settlement—namely, the government of Nigeria."[234] This, however, illustrates again the tension between material and normative aims, as the settlement meant the judgment regarding the insufficiency of Nigerian courts would no longer be available to future litigants. Ka Hsaw Wa, Co-founder and Executive Director of EarthRights International, who helped bring the *Unocal* case also expressed this tension in relation to the *Unocal* settlement: "I personally didn't take it as 'we won.' I wanted to win in the court. . . . But we could get some of what our community and what the people asked for." He went on to explain that the plaintiffs "chose to settle" because "[w]hen you have money, you can . . . afford to go to a place where you know it is safer, and you can buy food and milk. You can go someplace where you can send your kids to school."[235]

We were able to document thirty-three ATS cases that settled before reaching a judgment on the merits.[236] The precise terms of these settlements are generally confidential, but some details can be found in public reporting on the cases. Several of the settlements resulted in multimillion-dollar payments to plaintiffs. For instance, the *Unocal* case led to a settlement that

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232 For instance, Stephens describes how, when she was in charge of the human rights docket at the Center for Constitutional Rights (CCR) she would tell her clients, "[don't] do this if that's your goal—to get money." Stephens Interview, *supra* note 48.

233 Abiola v. Abubaker, No. 02 C 6093, 2008 U.S. Dist. LEXIS 2937, at *2 (N.D. Ill. Jan. 15, 2008).

234 *Id.* at *4.

235 Zoom Interview with Ka Hsaw Wa, Co-founder and Executive Director of EarthRights International (Mar. 8, 2022) [hereinafter Interview with Ka Hsaw Wa].

236 For a comprehensive overview of all the settlements we were able to document, see *infra* Appendix B.

is believed to be in the millions of dollars.[237] Likewise, the plaintiffs in *Nestlé* received a "substantial amount of money" in 2016 in a settlement with the former defendant, ADM.[238] This has allowed each of the plaintiffs, who are now all living in Mali again, "to buy a piece of land and put a house on it."[239] Moreover, unlike money damages awarded in court, it appears that most of the settlements are in fact paid. That is likely because plaintiffs will not settle a case unless there is a strong chance of true recovery.

As noted earlier, while settled cases can bring significant material benefits for the individuals and sometimes the groups that brought the suits, settlements raise difficult questions about the tradeoff between material and normative objectives. While some of the settlements are public (for example, the settlement in *Wiwa v. Royal Dutch Petroleum Co.*,[240] which provided $15.5 million), most are not. The majority of the settlements we documented had confidential terms—indeed, many defendants settle precisely to avoid bad publicity that would come from exposing the terrible events at issue in the cases, as well as the legal precedents that might come from allowing the case to come to resolution in the courts. But, as the next sub-section will address, exposure of the wrong and progressive development of the law are often an important part of what plaintiffs seek through litigation. One lawyer describes how, "[i]n some cases, we get great testimony [in depositions]. In those cases, it often settles and doesn't come to light."[241] As a result, "it doesn't further the truth-seeking role at all. They got into it to tell their story and then their story is lost, because they have to agree to deep six it in order to get their money."[242] Still, a plaintiff may feel some level of personal relief from telling their story in private through a settlement process that results in a payment, even if their story is not made public.

Mohamed Ahmed Ben Soud, one of three plaintiffs in a suit against James Elmer Mitchell and John Jessen, psychologists contracted by the CIA to design, implement, and oversee the

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237 Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN (Dec. 14, 2004), https://www.theguardian.com/world/2004/dec/15/burma.duncancampbell [https://perma.cc/GJ5M-435G].

238 Colyer, *supra* note 10.

239 *Id.*

240 626 F. Supp. 2d 377 (S.D.N.Y. 2009).

241 ATS Lawyer 3 Interview, *supra* note 140.

242 *Id.*

agency's torture program from 2001 to 2005,[243] expressed this tension. The suit, *Salim v. Mitchell*,[244] led to a settlement of an undisclosed amount.[245] Ben Soud described getting a great deal of satisfaction from telling his story and bringing out the facts of his experience in the course of the litigation. However, he noted, the settlement meant that he now cannot speak freely about his abuse: "One thing that I am not satisfied by is that I am not able to speak about it . . . . I think that being able to talk about what happened would be able to help me with my own mental health and addressing my trauma."[246]

2. *Normative*

In addition to individual material goals, plaintiffs who pursue ATS litigation have normative aims that may be as important to them, if not more so. Indeed, while reparations for harm can be material, they can also include what lawyers refer to as "satisfaction" and guarantees of non-repetition.[247] Examples of "satisfaction" include measures aimed at stopping continuing violations, public disclosure of truth, official declarations restoring the dignity and reputation of the victim, sanctions against the perpetrator, commemoration and tributes to victims, and public apologies.[248]

According to our interviewees, ATS plaintiffs have been motivated to pursue litigation precisely to have their dignity restored, to expose the wrong committed against them, and to hold the perpetrators accountable. As Steven Watt, Senior Staff Attorney at the American Civil Liberties Union (ACLU), put it, "They [his clients] wanted an acknowledgement and an official apology. And they didn't want a repeat of what had happened to them to happen to others."[249] One of his clients, Ben Soud, recounted the following about the time he was in CIA detention and subjected to abuse: "I . . . [continued to] create hope in myself that one day I will be out and will be able

243 For more on the abuse Ben Soud suffered, see Matt Apuzzo, Sheri Fink & James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html [https://perma.cc/QB6H-ZLAZ].

244 268 F. Supp. 3d 1132 (E.D. Wash. 2017).

245 Zoom Interview with Mohamed Ahmed Ben Soud (Safwan Amin trans.) (Sept. 14, 2021) [hereinafter Ben Soud Interview].

246 *Id.*

247 Basic Principles and Guidelines, *supra* note 212, Principle IX, §§ 22–23.

248 *Id.* § 22.

249 Zoom Interview with Steven Watt, Senior Staff Att'y, Am. Civ. Liberties Union (Mar. 8, 2021) [hereinafter Watt Interview].

to reveal what had happened, that I will be able to tell my story."[250]

The vast majority of favorable judgments for plaintiffs in ATS suits have been procedural or jurisdictional victories that allowed the case to move forward, for example affirming that the case was not barred by a statute of limitations or *forum non conveniens*. In total, 148 out of the 531 total published opinions, or about 28% of published opinions, resulted in a favorable ruling for at least one of the plaintiffs.[251] Out of these 148 favorable opinions, 94 found that at least one of the plaintiffs had alleged a cognizable violation of the law of nations.[252] While only twenty-five cases resulted in an eventual monetary judgment,[253] far more had their harms judicially recognized as a violation of international law in at least one court, even if some were later overruled on appeal or dismissed on another ground.

Individual normative goals can also be satisfied through the process of participating in litigation. A core component of the right to a remedy is the right to "equal and effective access to justice."[254] Access to justice means having the opportunity to have one's day in court.[255] By exercising this opportunity, plaintiffs can realize normative objectives such as exposing wrongful conduct. Simons emphasized that "[m]any of our clients are interested in this truth-telling function. They want the world to know what happened and they want people [to be held] accountable on those terms."[256] Another lawyer observed that "it is really the truth-seeking function that motivates the plaintiffs" and "even the deposition is a relief because they will have told their story and are being listened to."[257] Stephens likewise notes that most ATS plaintiffs pursue litigation "because they wanted to expose what had happened to them and to get a chance to air the facts, to tell their story in court."[258] Terrence Collingsworth, one of the lawyers for the *Nestlé* plaintiffs, observed, "[T]hey're all activists now. They help us get the word out. They're very much into trying to make sure this doesn't

250 Ben Soud Interview, *supra* note 245.
251 ATS Database, *supra* note 16.
252 *Id.*
253 *See infra* Appendix A.
254 Basic Principles and Guidelines, *supra* note 212, Principle VII.
255 *Id.* Principle VIII.
256 Simons Interview, *supra* note 74.
257 ATS Lawyer 3 Interview, *supra* note 140.
258 Stephens Interview, *supra* note 48.

happen again."[259] Ben Soud agreed that participating in the process of litigation felt purposeful: "Even though the measure[s] were extensive, it was a tiring process, and there was a lot of travel, I actually enjoyed the process. I felt like it was for a higher purpose, which was to reveal the truth and achieve justice and reveal what had happened."[260] Yet both he and Salim, who was a plaintiff in the same suit, noted that their full participation in the legal process was impeded by restrictions on their ability to travel to the United States.[261]

The possibility of satisfying individual litigation aims through the litigation *process*, regardless of ultimate outcome, suggests that an assessment of the "success" of the ATS as a vehicle for individual justice cannot simply be a matter of counting favorable judgments. Even if the court does not ultimately rule for the plaintiffs, the ATS has offered thousands of survivors of human rights abuse the opportunity to expose the truth of their experiences through discovery and testimony and to have a measure of agency and dignity restored through the act of publicly asserting their rights. Ledum Mitee, the former Nigerian legal counsel to Nigerian activist Ken Saro-Wiwa (Saro-Wiwa's estate brought the case *Wiwa v. Royal Dutch Petroleum Co.*),[262] who is himself a survivor of human rights abuses, described how even just the process of filing a lawsuit can have a profound impact on victims, "lift[ing] spirits" and providing "a profound sense of hope that justice can be . . . achieved."[263]

Interviewees also explained that many survivors of human rights abuse found that simply bringing a lawsuit under the ATS and labeling the abuse they had endured as a violation of their rights was beneficial. For example, Simons described how putting the correct label on wrongful conduct—calling torture "torture"—can serve an important remedial function for survivors.[264] One ATS lawyer remembered a case in which the plaintiffs ultimately lost: "They [the clients] didn't want money, they wanted an apology and [the defendant] wasn't prepared to give it. I think they didn't mind losing though. Telling their

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259 Colyer, *supra* note 10.
260 Ben Soud Interview, *supra* note 245.
261 *Id.*; Salim Interview, *supra* note 204.
262 226 F.3d 88 (2d Cir. 2000).
263 Zoom Interview with Ledum Mitee (Mar. 1, 2021) [hereinafter Mitee Interview].
264 *See* Simons Interview, *supra* note 74.

story and building a movement was important."[265] Watt similarly recalled, "All those suits [post-9/11 suits by victims of torture and extraordinary rendition], they never got to the merits. But I wouldn't say they weren't successful. There was a process of accountability. There was still an accounting in the filing of the complaint itself."[266] He explained, "I told them that the chances were good that this wouldn't get past a motion to dismiss. Trying to explain that is so hard. Regardless of that they wanted to try. They wanted to have their day in court."[267] He added, "Suleiman and the other clients in the litigation that settled before trial, that litigation process and accounting was powerful for them. They felt they got their acknowledgement of wrongdoing."[268] Ben Soud agreed: "I wanted to be able to explain what happened to me," and he felt the case gave him that opportunity.[269]

B. Collective Goals

Albeit structured around the individual victim's right to an effective remedy, ATS litigation is frequently funded and organized by public interest groups whose goals extend beyond the situation of the individual plaintiff.[270] For example, Collingsworth explained that the International Labor Rights Forum was motivated to bring the ATS suit against Nestlé, Cargill, and ADM partly because of the cocoa industry's failure to adequately address child labor through the voluntary protocol.[271] Popularly known as "impact litigation" or "public interest litigation," this phenomenon shares roots with the civil rights movement, famously through cases such as *Brown v. Board of Education*.[272] The growth of aggregate and class action suits has demonstrated the potential of civil litigation in pursuit of collective goals. As Deborah Hensler observed with respect to cases against corporations: "what were once viewed as singular disputes between individuals or between an individual and a

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265 ATS Lawyer 3 Interview, *supra* note 140 (minor modifications made to protect anonymity).

266 Watt Interview, *supra* note 249.

267 *Id.*

268 *Id.*

269 Ben Soud Interview, *supra* note 245.

270 Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation*, 31 FLA. J. INT'L L. 121, 123 (2019). *See also* Koh, *supra* note 63, at 2347–48 (1991) (arguing that transnational public law litigants "bring 'public actions,' asking courts to declare and explicate public norms, often with the goal of provoking institutional reform").

271 Colyer, *supra* note 10.

272 347 U.S. 483 (1954).

corporation . . . are now viewed increasingly as group struggles against multinational corporations . . . , properly resolvable in court."[273]

1. *Material*

ATS lawsuits often pursue material benefits to assist not only the named plaintiffs but also the communities they represent. There have been a few class action cases brought under the ATS that specifically sought to compensate an entire class of plaintiffs. For instance, a case against a Swiss bank alleging international law violations relating to the Holocaust brought on behalf of millions of survivors resulted in a settlement of over 1.2 billion dollars.[274] Because there were so many claimants, the large award meant only small amounts of money for each plaintiff. Nonetheless, as one ATS lawyer put it, "lots of them were living in the Eastern Bloc and didn't have a television or running water and even a small amount of money was enough to help them move forward."[275] Additionally, to realize collective material goals, awards to specifically named plaintiffs are sometimes designed to provide for an entire group or community to which the plaintiffs belong. In one of the rare instances where plaintiffs were able to partially collect on a monetary award, they distributed the money to fellow survivors of the Raboteu massacre in Haiti and to support social services for Haitian refugees.[276]

Settlements have also been designed to satisfy collective material interests. In the *Unocal* case,[277] for example, the plaintiffs, who had been displaced by a pipeline project, used the settlement money to recreate the village they had been forced to flee, including building a church and school.[278] Hoffman recalls, "We had a reunion after the settlement and we went to a remote region on the Thai-Burma border . . . where they had recreated their village. To them, that was the ultimate success—they were able to recreate their lost lives."[279]

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273 Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 8 (2009).

274 Bilsky, *supra* note 129, at 354.

275 ATS Lawyer 3 Interview, *supra* note 140 (minor modifications made to protect anonymity).

276 Jean v. Dorélien, 431 F.3d 776 (11th Cir. 2005). *See Crimes Against Humanity Under Haitian High Command, Jean v. Dorélien*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/jean-v-dorelien/ [https://perma.cc/P2FK-ERXS] (last visited Oct. 13, 2021).

277 *See supra* text accompanying notes 130–135.

278 Hoffman Interview, *supra* note 49.

279 *Id.*

Hoffman described how he often has conversations with plaintiffs about what they want to do with any money they receive: "We try in talking to plaintiffs [t]o encourag[e] them to view themselves as representatives of their communities."[280] Other plaintiff-side lawyers, however, are more cautious about suggesting clients use their awards in any particular way. Steinhart explained, "I think when you enter into a client relationship with a particular human being, that imposes an obligation and a limit on the kind of advice you can give. I remember arguments over how you would structure a settlement for someone who has no conception of that amount of money. I am not going to interject myself into that calculus."[281]

While collective material goals are typically outcome-dependent, in that they require a favorable ruling on the merits or a settlement agreement, in some cases the media attention generated by an ATS suit has contributed to defendants "voluntarily" providing assistance to the community that has been harmed. For example, Alfred Brownell, a Liberian lawyer who was involved in *Flomo v. Firestone Natural Rubber Co., LLC*,[282] an ATS case concerning allegations of hazardous child labor on Firestone's rubber plantations in Liberia, described how, despite the plaintiffs' loss in the Seventh Circuit, Firestone—embarrassed by the publicity around the case—built a new high school and several new homes for rubber plantation workers in the community adjacent to the rubber plantation.[283]

It is also worth noting that bringing an ATS suit can lead to material benefits for lawyers and nonprofit organizations involved in the cases, which can enable them to continue their mission. For instance, simply pursuing an ATS case can help human rights organizations to fundraise. As one lawyer who has worked on the plaintiff side described it, "just bringing a lawsuit, regardless of the outcome, helps with fundraising, which is the lifeblood of these organizations."[284] Lawyers also have the potential to earn substantial direct monetary benefits through contingency or attorneys' fees—and for some, that was likely an important motivator for bringing suit.[285] Of course,

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280 *Id.*

281 Steinhardt Interview, *supra* note 154.

282 643 F.3d 1013 (7th Cir. 2011).

283 Zoom Interview with Alfred Brownell (Jan. 28, 2021) [hereinafter Brownell Interview].

284 ATS Lawyer 2 Interview, *supra* note 64.

285 Salim recounted that when it became clear that his case would not settle quickly, the Tanzanian law firm he initially worked with—which was not pursuing the case under the ATS—lost interest in the case. Salim Interview, *supra* note

such motivations have to be carefully considered by attorneys—and they have to be attentive to the importance of ensuring that the litigation remains in their clients' best interests, not simply their own.

2. *Normative*

The efficacy of achieving legal reform and social change through litigation has been the subject of long debate, not just in the ATS or human rights context. In the United States, the second half of the twentieth century was generally marked by optimism about the potential of achieving critical social change through the courts.[286] Optimism around public interest litigation wavered at the end of the twentieth century, and was increasingly replaced by skepticism.[287] In 1991, Gerald Rosenberg famously declared social-change litigation a "hollow hope."[288] He argued that courts, which "lack power over either the 'sword or the purse,'" are institutionally constrained from producing significant political or social change.[289] This roundabout rejection of court-driven reform was met with significant criticism at the time,[290] but many contemporary legal scholars have come to agree with the conclusion that courts cannot be the main drivers of social change.[291] ATS litigation implies a procedural focus on the individual plaintiffs, and a narrow, legal framing of harm that Critical Legal Scholars have argued cannot properly address the "plight of a community or a structural cause of violations."[292] For instance, De Feyter cautions that "focus[ing] on [successful litigation of] individual violations may create the false impression that structural causes underlying the violations are addressed, and impede real action."[293] When individuals succeed, that success does not translate, at

204. Salim was later connected to the ACLU, which brought the ATS suit on his behalf. *Id.*

286 *See* Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1556, 1558 (2017).

287 Depoorter, *supra* note 202, at 819, 825.

288 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

289 *Id.* at 3.

290 *See, e.g.*, Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1765 (1993) (book review) (criticizing Rosenberg for ignoring significant academic literature that contradicts his claims).

291 *See, e.g.*, Richard Delgado, *A Comment on Rosenberg's New Edition of* The Hollow Hope, 103 NW. U. L. REV. COLLOQUY 147, 148 (2008) (offering support for Rosenberg's contentions).

292 De Feyter, *supra* note 196, at 56.

293 *Id.*

least not directly, into a change in the underlying legal situation that gave rise to the violation in the first place.

It is challenging to measure empirically the social or normative impact of human rights litigation, given the complex causal environment.[294] For example, Donald and Mottershaw examined the policy impact of ten cases relating to human rights violations by public officials brought in the United Kingdom after the Human Rights Act came into force in 2000. They concluded that, although they could identify some discrete impacts in the years after the ten legal proceedings were completed, such as changes to prison rules, "it was rarely possible to discern a clear line of cause and effect."[295] In another study, Kim and Sikkink compiled and analyzed a dataset of domestic and international human rights prosecutions of individuals, often state officials, in 100 transitional countries.[296] They found that the legal proceedings had a deterrence effect on human rights violations within the country and led to some improvements in overall human rights protection.[297] They noted, however, that most of these countries used both prosecution and truth commissions and that the effect on human rights improvement could not be solely attributed to one cause. Rather, "both normative pressures and material punishment are at work in deterrence, and the combination of the two . . . is more effective than either pure punishment or pure normative pressure."[298]

We see this same dynamic in the ATS context. Overwhelmingly, the lawyers we spoke with identified the primary value of the ATS in terms of its anticipated normative output: in the broader impact that human rights litigation can have on reinforcing norms and changing behavior.[299] Three themes emerged from our interviews regarding the collective normative goals of ATS litigation: progressive development of the law,

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294 Alice Donald & Elizabeth Mottershaw, *Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK*, 1 J. HUM. RTS. PRAC. 339, 345 (2009).

295 *Id.* at 352. Additionally, they found that institutional barriers often hindered wider human rights improvements, such as lack of funding or capacity to increase housing stock for disabled persons despite a promising court ruling. *Id.* at 354.

296 The authors use three definitions for transition: "democratic transition, transition from civil war, and transition by state creation." Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUD. Q. 939, 946 (2010).

297 *Id.* at 957.

298 *Id.* at 941.

299 For a similar view, see Susan H. Farbstein, *Perspectives from a Practitioner: Lessons Learned from the* Apartheid *Litigation*, 61 HARV. INT'L L.J. 451, 466 (2020).

strengthening government accountability for human rights violations, and improving corporate compliance with human rights norms.

a. *Raising Awareness and Encouraging Progressive Development of the Law*

In describing the *Nestlé v. Doe* litigation, Hoffman stated that "the goal is to get rid of child slavery, not [just] get a judgment against Nestlé and Cargill."[300] He explained that he and his colleagues have always thought of ATS litigation "as part of a larger human rights movement and the cases should be litigated in a way that creates interest and support for accountability generally."[301] Hope Metcalf describes this group of lawyers as being "outraged by what happens to people" and that "they do ATS litigation as a cause."[302]

Even if ATS lawsuits are not likely to generate broad-scale social transformation of the kind legal liberalism once imagined, they can still contribute to strengthening specific human rights norms and accountability standards. 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.[303] Several of the legal practitioners and scholars we spoke with explained their involvement in ATS suits by reference to the importance of strengthening respect for international law.[304] Stephens explained that public interest organizations "are largely bringing these cases to make statements on international law and put some teeth to the enforcement of international law."[305] International law scholars, in particular, emphasized the function of the ATS in providing U.S. courts with a basis to exercise jurisdiction over serious violations of international law.[306]

The gradual chipping away at the precedent set in *Filártiga*, described in Part I, has limited the role the ATS can play in contributing to the enforcement of international law in U.S. courts. Still, just like some individual goals can be satisfied

300 Hoffman Interview, *supra* note 49.
301 *Id.*
302 Metcalf Interview, *supra* note 84.
303 *See* Albiston, Edelman & Milligan, *supra* note 195, at 117.
304 Stephens Interview, *supra* note 48.
305 *Id.*
306 Metcalf Interview, *supra* note 84 ("There is a fealty to the ATS as a vehicle among some . . . who fought for the idea of universal jurisdiction. They are loyal to the ATS as an institution.").

through the very process of litigation, certain collective normative goals, such as exposing the inadequacy of the regulatory status quo and educating policy and lawmakers on the requirements of international law, do not depend on a favorable court ruling.[307] In some cases, an ATS lawsuit might have been pursued precisely for the purpose of excavating and publicizing the anti-normative conduct, both through the trial and pre-trial civil discovery.[308] Furthermore, the public platform provided by litigating a human rights case in federal court has been seized upon by advocacy groups to reinforce other methods of social change.[309] For example, Tyler Giannini explains that the ATS forms part of integrated advocacy, a community-based approach also involving media campaigns, education, and coalition-building.[310] Similarly, Hoffman underscores that litigation "is just a tool and not even the most important tool."[311] "But," he concludes, "it can help in organizing people and shaping public opinion."[312]

Some scholars have even argued that an adverse legal outcome can, perhaps counterintuitively, be effective in pushing the human rights agenda forward.[313] Depoorter maintains that a judgment against a plaintiff in a contentious case could actually have several benefits for the associated social movement.[314] By highlighting a gap between the law and the general public's conception of justice, a loss in court can generate greater sympathy for the social movement's cause and increase pressure for political reform.[315] Depoorter posits that

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307 Along these lines, Schrempf-Stirling & Wettstein suggest that the "educational and regulatory functions show that there are good reasons to facilitate human rights litigation in domestic legislative systems, despite the limited prospects of actually reaching guilty verdicts." Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies*, 145 J. BUS. ETHICS 545, 546 (2017).

308 This may also be the case where an ATS lawsuit forms part of transnational lawyering, and civil discovery is sought in U.S. courts to support a case that is being litigated in a foreign country or before an international tribunal. Metcalf Interview, *supra* note 84.

309 *See* Giannini Interview, *supra* note 131.

310 *Id.*

311 Hoffman Interview, *supra* note 49.

312 *Id.*

313 For example, De Feyter suggests that "[l]egal victories in human rights cases may be of symbolic value, and of immediate practical use only to the individual claimant." De Feyter, *supra* note 196, at 56. Douglas NeJaime argues that the outrage over losing a lawsuit can push social movements to political activism for legislative and policy reform. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 947 (2011).

314 Depoorter, *supra* note 202, at 834–36.

315 *Id.*

"[j]udicial deference clearly shifts the burden to policymakers and their constituents. . . . [I]f courts insist that their hands are tied by legislation, some of the public attention and pressure shifts to legislators."[316] By contrast, the argument goes, a judgment in favor of the plaintiff risks resulting in political complacency and creating a false impression that broader, structural problems exemplified by the individual violation have been resolved, a narrative that can discourage public mobilization.[317] Litigation can also inspire pushback both at home and abroad that might in some cases inhibit the development of human rights law.[318]

There are clear indications that frustration over the ATS has inspired legal and policy development to strengthen human rights protection. For example, one impetus for the advocacy that led to the passage of the Torture Victim Protection Act of 1991 (TVPA)[319] was that some of the original plaintiffs in the *Marcos* case had become U.S. citizens during the course of the proceedings and were, therefore, excluded from ATS suits, which was seen as unjust.[320] For the specific causes of action covered (torture and extrajudicial killing), the TVPA expanded the scope of human rights litigation beyond the ATS by allowing for both U.S. citizens and aliens to file claims against foreign officials.[321] It is also possible that the fact that

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316 *Id.* at 821–22.

317 Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2039 (2008).

318 *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 77, ¶ 48 (Feb. 14) (separate opinion of Judges Higgins, Kooijmans, and Buergenthal) ("While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally."); Jones v. Ministry of Interior of Kingdom of Saudi Arabia, [2006] UKHL 26, [20], [84] (appeal taken from Eng.) (ATS cases do not "express principles widely shared and observed among other nations" and characterizing ATS cases as "contrary to current international law"). Work on constitutional backlash is instructive here. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007) (explaining how constitutional adjudications can give rise to backlash).

319 28 U.S.C. § 1350 note (Torture Victim Protection Act); Stephens, *supra* note 40, at 1488–89.

320 Hoffman Interview, *supra* note 49. There were a number of non-ATS cases, like *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991), which revealed the difficulties faced by U.S. citizens pursuing civil litigation in cases involving terrorism, that also contributed to the TVPA. As noted earlier, the TVPA can also be viewed as a reaction to Judge Bork's opinion in *Tel-Oren*, endorsing the idea that there must be a cause of action based on federal statutory law for torts that violate international law. *See supra* notes 52–55 and accompanying text.

321 H.R. REP. NO. 102-367, at 4 (1991) ("The TVPA would . . . enhance the remedy already available under section 1350 in an important respect: While the

corporations have often escaped liability under the ATS has contributed to legislative initiatives to enhance corporate legal accountability, such as expressly including corporate liability in the 2000 Victims of Trafficking Protection Reauthorization Act (TVPRA).[322]

If success is defined by the entrepreneurs of a legal strategy as including a process that exposes wrongdoing and inadequacies in the legal protection of rights, that might change the selection criteria for cases—for instance, pressing forward claims that might not be most likely to succeed in court but that are likely to generate pressure for change.[323] This could be one explanation for the continued filing of ATS cases, despite the overall low success rate in obtaining monetary awards.[324] Yet, if the strategy is to lose the case to prompt legal or policy reform, that gives rise to ethical concerns, unless plaintiffs are of the same mind.

b. *Strengthening U.S. Government Accountability for Human Rights Violations*

According to several ATS lawyers, a push for U.S. government accountability for human rights abuses committed abroad was one of the initial driving forces behind the human rights community's interest in ATS litigation. Almost all of these cases were quickly dismissed on sovereign immunity grounds. Katherine Gallagher, who has worked on numerous cases representing victims of alleged U.S. government torture during the so-called "war on terror," recalled, "[n]one of the cases I have done in 15 years have gone to trial."[325] She noted that while there was a first round of ATS cases directly targeting U.S. officials during the Reagan administration and then a second round against U.S. officials under the Bush administration, there were few concrete outcomes for plaintiffs from these cases.[326] As our data in Part I indicate, the immunity doctrine was a significant bar for cases against U.S. officials.

Salim v. Mitchell is the only ATS case concerning U.S. use of torture as an officially sanctioned interrogation tactic that

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Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.").

322 18 U.S.C. § 1596(a).

323 *See, e.g.*, Depoorter, *supra* note 202, at 845 (explaining that the gains of momentum might offset litigation losses).

324 *Id.*

325 Gallagher Interview, *supra* note 65.

326 *Id.*

has led to monetary remuneration for plaintiffs.[327] In another case, 72 Iraqi plaintiffs in the ATS suit *Al-Quraishi v. L-3 Services* settled in 2012 with a U.S.-based contractor for the contractor's role in the torture of prisoners at Abu Ghraib and other prisons in Iraq in violation of U.S. and international law.[328] The case alleged a conspiracy between the contractors and low-level U.S. military officials, rather than torture as an official U.S. policy.[329] The U.S. government consistently intervened in ATS cases alleging torture by senior U.S. officials in the war on terror to argue that the only appropriate remedy was a suit against the United States under the Federal Tort Claims Act.[330] The U.S. has failed to hold U.S. senior officials accountable for their involvement in the torture of detainees in the early 2000s.[331] Nonetheless, Steven Watt argued that "[t]he filing of ATS litigation and the intentional push for media pressure alongside litigation is what saw changes in government policy and practices."[332] Watt also links the Obama administration's decommission of the CIA's Rendition, Detention and Interrogation (RDI) program in part to public outcry over acts of torture and media attention surrounding civil suits.[333]

Furthermore, Gallagher believes that international investigations into U.S. misconduct likely would not have come about without consistent efforts to hold U.S. officials accountable in U.S. courts, including through ATS litigation.[334] In March 2020, the Appeals Chamber of the International Criminal Court (ICC) authorized an investigation into the U.S. torture program in Afghanistan and other international crimes.[335]

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327 268 F. Supp. 3d 1132 (E.D. Wash. 2017). For more on the case, see *supra* text accompanying notes 243–246.

328 657 F.3d 201 (4th Cir. 2011); *Al-Quraishi, et al. v. Nakhla and L-3 Services: Historic Case*, CTR. CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/al-quraishi-et-al-v-nakhla-and-l-3-services [https://perma.cc/RB4F-29P7] (last modified Sept. 8, 2021).

329 *Id.*

330 *See, e.g.*, *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 114–15 (D.D.C. 2007) ("[T]he plaintiffs' lawsuit is converted to one against the United States under the Federal Tort Claims Act, in which case Rumsfeld, Pappas, Karpinski and Sanchez shall be dismissed as parties and the United States shall be substituted as the sole defendant for all international law claims raised under the Alien Tort Statute."); 28 U.S.C. § 2769(b)(1).

331 The legislative enactment of the TVPA also excluded U.S. officials from its scope, allowing only for cases alleging torture committed under the color of foreign law. 28 U.S.C. § 1350 note (Torture Victim Protection Act § 2(a)).

332 Watt Interview, *supra* note 249.

333 *Id.*

334 Gallagher Interview, *supra* note 65.

335 Situation in the Islamic Republic of Afghanistan, ICC-02/17-138 OA4, Judgment on the Appeal Against the Decision on the Authorization of an Investi-

While the U.S. is not a party to the Rome Statute, the ICC has jurisdiction over crimes committed by non-parties, including U.S. actors, on the territory of a State party—including Afghanistan and several countries in which CIA "black sites" operated.[336] Gallagher explained, "[b]ecause of the failure of civil remedy at home [alongside a lack of criminal prosecutions]—you now have these openings at the ICC."[337] She also stated that despite the significant pushback from the U.S. government against cases filed against U.S. officials and foreign allied governments, she believed these cases were worth pursuing due to 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.[338] Such suits also focus continued attention on the failure to provide any serious accountability for government officials responsible. In ATS suits filed against foreign nationals, however, the role of U.S. government officials in the alleged international law violations has been downplayed to circumvent legal hurdles, such as immunity bars or the political question doctrine, thus sacrificing the potential for U.S. government accountability for the sake of achieving litigation success.[339]

c. *Improving Corporate Compliance with Human Rights*

A third theme that emerged in interviews is the use of the ATS to expose corporate misconduct and strengthen corporate

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gation into the Situation in the Islamic Republic of Afghanistan (Mar. 5, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_00828.PDF [https://perma.cc/8PA2-KNR2].

336 Rome Statute of the International Criminal Court art. 12(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

337 Gallagher Interview, *supra* note 65.

338 *Id.*

339 For further discussion of this phenomenon, see, for example, 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, 165 (2017) ("American support for the Marcos regime was obscured at trial. . . ."). Natalie Davidson argues that the *Filártiga* and *Marcos* cases served to silence discussions of U.S. complicity in the rights violations. NATALIE DAVIDSON, AMERICAN TRANSITIONAL JUSTICE: WRITING COLD WAR HISTORY IN HUMAN RIGHTS LITIGATION 4 (Stefan-Ludwig Hoffmann & Samuel Moyn eds. 2020) ("[*Filártiga* and *Marcos*] served not only to affirm international norms and promote individual accountability but also to establish a highly distorted historical record of repression in the Western bloc, all the while rearranging relations between the United States and its former allies."). Davidson's work explores the impact of the *Filártiga* and *Marcos* cases in Paraguay and the Philippines and what she calls the "local reinterpretation" of those cases. *Id.* at 78.

accountability for human rights abuses.[340] Ledum Mitee expressed his frustration over the apparent impunity of multinational corporations in Nigeria, invoking a traditional saying: "the cobweb traps insects but the birds are able [to] pass through the web."[341] For him, the ATS was a way to extend and strengthen the web of accountability. According to Ralph Steinhardt, ATS corporate-defendant suits were partly pursued to provide "the scaffolding that allowed the building to be built, that building being corporate social responsibility."[342] Similarly, Hoffman describes how "the whole goal was creating a foundation for holding corporations accountable in a situation where there wasn't really any other regime that did that."[343]

According to corporations affected by ATS suits, ATS litigation has had a palpable impact on their business practices, which they view as detrimental to U.S. commerce and the economic development of the countries where the alleged harm took place.[344] For instance, the amicus brief for the Chamber of Commerce in *Kiobel* argued that the mere "filing of an ATS case . . . can topple corporate stock values and debt ratings. . . ."[345] However, a comprehensive study of the impact of ATS cases on corporations by Shayak Sarkar suggests the opposite: there were "no statistically significant effects of the first filing, first closure, any filing, or any closure on securities' prices" for corporate defendants in ATS suits.[346] Instead, Sarkar found that "appellate precedent that decreases the viability of such ATS litigation against corporate defendants positively impacts ATS defendants' stock prices."[347] He hypothesizes that ATS litigation provides little or no new, unexpected information to investors.[348] John Ruggie, former UN Special Representative for Business and Human Rights, like-

340 Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 450-51 (2001); Farbstein, *supra* note 299, at 484.

341 Mitee Interview, *supra* note 263.

342 Steinhardt Interview, *supra* note 154.

343 Hoffman Interview, *supra* note 49.

344 *See, e.g.*, Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners at 1, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919) ("[S]uch litigation . . . deters much-needed American business activity in certain parts of the world.").

345 Supplemental Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents at 26, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491).

346 Shayak Sarkar, Essays on Development, Finance, and International Law 7 (2018) (Ph.D. dissertation, Harvard University) (on file with Office for Scholarly Communication, Harvard University).

347 *Id.*

348 *Id.* at 10.

wise concluded that the financial implications of the suits were minor. A bigger cost was time:

> I interviewed a number of CEOs whose companies had been sued. The answer I got more often than not was that they weren't particularly concerned about the financial implications, the reputational thing doesn't last long, but the amount of time taken with depositions and the like became a major interference with the life of the company. Stock rarely went down, reputation was a factor but tended not to last, but the entire C-suite was occupied with giving depositions and that was a big problem for the company.[349]

Although there have been few final rulings on the merits against corporate ATS defendants, the ATS is still seen by many as having contributed to the broader business and human rights agenda. The only ATS case that resulted in a monetary judgment against a corporate defendant was *Licea v. Curaçao Drydock Co.*,[350] which is also one of the few cases where the judgment was at least partially collected (after enforcement proceedings before a Singaporean Court).[351] According to Ruggie, even though they did not have a large financial impact, ATS lawsuits against corporations "had a significant impact" on the visibility of human rights issues in corporations.[352] He explained, "Corporations always had a community relations department. That's where the issue [of human rights] resided in the past. But once the ATS looked like a serious threat, the lawyers moved in and tried to manage the human rights cases."[353] That elevated human rights concerns within the companies and led the entire leadership to be more aware of the issue.

Corporate self-regulation and voluntary commitments to human rights standards increased during the 1980s and 1990s, amid growing concerns about the impact of business on human rights, arguably in part as a direct result of ATS law-

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349 Telephone Interview with John Ruggie, Former U.N Sec'y-Gen.'s Special Representative Bus. & Hum. Rts. (Dec. 7, 2020) [hereinafter Ruggie Interview].

350 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008).

351 *Alien Tort Litigation Comes to Singapore: International Enforcement of Judgments Based on Corporate Human Rights Abuse*, HERBERT SMITH FREEHILLS (June 3, 2015), https://hsfnotes.com/publicinternationallaw/2015/06/03/alien-tort-litigation-comes-to-singapore-international-enforcement-of-judgments-based-on-corporate-human-rights-abuse/ [https://perma.cc/LE7M-PJHD]; *see also* Appendix B.

352 Ruggie Interview, *supra* note 349.

353 *Id.*

suits.[354] The United Nations Global Compact outlines ten principles for corporations inspired by human rights law and the sustainable development goals.[355] As of the end of 2021, the Compact had been signed by 162 countries and nearly 15,000 companies.[356] In 2011, the United Nations Office of the High Commissioner for Human Rights issued the nonbinding *UN Guiding Principles on Business and Human Rights* (UNGP), developed by Ruggie and his office.[357] The UNGP received widespread support from the international business community,[358] and it has been complemented by numerous multi-stakeholder initiatives relating to business and human rights, such as the Voluntary Principles on Security and Human Rights,[359] the Extractive Industries Transparency Initiative,[360] the Kimberley Process,[361] the Global Network Initiative Principles,[362] and a push for a new treaty to address the global corporate accountability gap.[363]

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354 Hope Metcalf points out that, "ATS lawsuits have probably been most effective in ways that are less public, that is, in terms of driving corporate compliance initiatives." Metcalf Interview, *supra* note 84. Likewise, Tyler Giannini states that, "[w]ithout over-emphasizing the ATS, it had a significant influence on the business and human rights agenda." Giannini Interview, *supra* note 131.

355 *The Ten Principles of the UN Global Compact*, U.N. GLOB. COMPACT, https://www.unglobalcompact.org/what-is-gc/mission/principles [https://perma.cc/EKK8-XJCP] (last visited Dec. 16, 2021).

356 U.N. GLOB. COMPACT, https://unglobalcompact.org/ [https://perma.cc/YPJ2-ZTYP] (last visited Dec. 16, 2021).

357 U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 31 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/3WPR-7KCA] [hereinafter UN Guiding Principles].

358 Leigh A. Payne & Gabriel Pereira, *Corporate Complicity in International Human Rights Violations*, 12 ANN. REV. L. & SOC. SCI. 63, 67 (2016).

359 VOLUNTARY PRINCIPLES ON SEC. AND HUM. RTS., https://www.voluntaryprinciples.org [https://perma.cc/GHU3-8FMJ] (last visited Dec. 16, 2021).

360 THE EXTRACTIVE INDUS. TRANSPARENCY INITIATIVE, https://eiti.org [https://perma.cc/W5DN-GGJB] (last visited Dec. 16, 2021).

361 THE KIMBERLEY PROCESS, https://www.kimberleyprocess.com [https://perma.cc/CTE8-8B2Y] (last visited Dec. 16, 2021).

362 *The GNI Principles*, GLOBAL NETWORK INITIATIVE, https://globalnetworkinitiative.org/gni-principles/ [https://perma.cc/ZB9V-Y6U9] (last visited Dec. 16, 2021).

363 U.N. Hum. Rts. Council, Open-Ended Intergovernmental Working Group, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Third Revised Draft) (Aug. 17, 2021), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf [https://perma.cc/XQ6Q-T5ZR]; *Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx [https://perma.cc/J9UF-BQX6] (last visited Jan. 22, 2022); *see* Olivier de Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41, 43 (2015).

Ruggie suggests that human rights litigation can have a deterrence effect by "more broadly reinforce[ing] the necessity for companies everywhere to develop effective systems to manage the actual and potential adverse human rights impacts of their operations and business relationships."[364] Being subject to a lawsuit, even if it is not expected to result in a ruling for the plaintiff, can still impose costs. There is also a chance that the lawsuit will inspire future government-imposed regulations.[365] Schrempf-Stirling and Wettstein found that all but four of forty-one companies involved in fifty-five lawsuits (not restricted to ATS cases) alleging human rights violations had adopted human rights policies and other corporate social responsibility (CSR) measures following these lawsuits.[366] However, the authors also acknowledge that "the fact that companies started to publish CSR reports does not necessarily mean that they have improved their practices."[367] Clearly, if the goal of litigation is to change corporate conduct, it is not sufficient to show a correlation between lawsuits and the adoption of CSR measures. It would be necessary to establish that the adoption of CSR measures actually results in improved human rights practices. Empirically speaking, that is a much more challenging task.[368]

Brownell recounted that the *Flomo* case[369] had a significant impact on Firestone's practices in the country. He stated that when Firestone was operating in Liberia starting in the 1920s, "the whole U.S. government was behind them," and for many years "when Firestone spoke, the Liberian government listened. What Firestone said happened, period."[370] Brownell credits the ATS lawsuit, at least in part, with triggering changes

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364 JOHN G. RUGGIE, JUST BUSINESS. MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS 197–98 (2013).

365 *See*, *e.g.*, Schrempf-Stirling & Wettstein, *supra* note 307, at 556 ("[C]orporations might engage in self-regulation to avoid potential government-imposed regulation . . . ."); Ratner, *supra* note 340, at 474.

366 Schrempf-Stirling & Wettstein, *supra* note 307, at 549. For example, ExxonMobil and Chevron implemented CSR policies after being defendants in ATS suits. *See id.* at 548.

367 *Id.* at 559–60.

368 Scholars are divided on whether voluntary CSR measures ultimately strengthen human rights compliance. *Compare* Mary-Hunter McDonnell, Brayden G King & Sarah A. Soule, *A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges*, 80 AM. SOC. REV. 654, 655 (2015) (highlighting ways in which voluntary CSR measures have succeeded), *with* Payne & Pereira, *supra* note 358, at 66–68 (surveying scholarly accounts of the deficiencies of voluntary CSR measures).

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

370 Brownell Interview, *supra* note 283.

to this imperialistic dynamic.[371] He recalled that a concessionary land contract between Firestone and the Liberian government was up for renewal around the time the ATS case was filed, and the international public outcry over child labor issues on the plantations led to the concession being renegotiated and Liberia's president speaking out directly against Firestone's practices. In addition, "before the lawsuit, it was impossible for workers to have any collective bargaining on the plantation," but that "after we filed the lawsuit, the workers could elect their own union members."[372] Brownell emphasized that the lawsuit was an integral component of generating global attention, "If we hadn't filed the claim, who would have heard about Flomo, the youngest plaintiff in the case? Would the company have responded? The head of the company had to give an interview to explain what they were doing. That itself was a victory."[373]

A number of the ATS lawyers we interviewed, however, were more skeptical about the deterrence effect of ATS litigation on corporations, at least when considered in isolation.[374] Mitee, for example, described how human rights litigation against a parent company in the United States and Europe put pressure on locally incorporated companies in Nigeria to make changes to their practices, but that these changes did not necessarily result in improved human rights practices. He mentioned that some companies were starting to contract out tasks that were considered high-risk from the perspective of the threat of litigation.[375] Brownell also described how, despite some tangible victories for rubber workers in Liberia after the *Flomo* case, foreign corporations operating in West Africa recognized the danger the ATS posed to their businesses and organized a concerted effort to push back on accountability, which has made filing newer cases in the U.S. much more difficult, even as corporate human rights abuses and environ-

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371 The *Flomo* suit was filed alongside a growing international Stop Firestone Campaign, involving Brownell's organization Green Advocates and international NGOs like the International Labor Rights Forum, which Brownell credits for collectively influencing Firestone's behavior. *See* Brownell Interview, *supra* note 283; *see also* Bama Athreya, *White Man's "Burden" and the New Colonialism in West African Cocoa Production,* 5 RACE/ETHNICITY: MULTIDISCIPLINARY GLOB. CONTEXTS 51, 56–57 (2011) (discussing the Stop Firestone Campaign).

372 Brownell Interview, *supra* note 283.

373 *Id.*

374 *But see* Simons Interview, *supra* note 74 ("I can't say it was a mistake to go in that direction because it has had a big impact on corporate cases.").

375 Mitee Interview, *supra* note 263.

mental degradation persist.[376] There is also evidence that, even as foreign chocolate companies operating in West Africa advertise extensive front-facing corporate social responsibility policies, farmers still fail to earn a living wage and child labor persists.[377]

The ATS may also have had a positive impact by contributing to the growing willingness of foreign courts to address corporate human rights abuses. One particularly interesting example is offered by the case, *Kiobel v. Royal Dutch Petroleum Co.* Initially filed in U.S. courts as an ATS case, it was dismissed after years of litigation by the U.S. Supreme Court on the grounds that the ATS does not apply extraterritorially to foreign corporations.[378] Esther Kiobel and three other Nigerian women then brought the suit in the Netherlands, which is the country in which Royal Dutch Shell is headquartered.[379] That suit, which is still ongoing, is proceeding under Nigerian law, which incorporates human rights law and provides no statute of limitations for human rights violations.[380] The suit follows on successful cases against Shell in Dutch courts holding it liable for oil spills in Nigeria.[381] This in turn followed a separate case in which Shell had agreed to pay out over £55 million in out of court compensation for two oil spills in Nigeria in 2008.[382] Recently, moreover, a Dutch court ruled against Shell

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376 Brownell Interview, *supra* note 283.

377 CORP. ACCOUNTABILITY LAB, EMPTY PROMISES: THE FAILURE OF VOLUNTARY CORPORATE SOCIAL RESPONSIBILITY INITIATIVES TO IMPROVE FARMER INCOMES IN THE IVORIAN COCOA SECTOR 9 (2019).

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

379 Esther and her lawyers had been required to destroy the documents when the case was dismissed. Relying on the Foreign Legal Assistance Statute, 28 U.S.C. § 1782, the Southern District of New York granted their request that Shell's law firm, Cravath, turn over the documents. However, the Second Circuit reversed that order. Kiobel v. Cravath, Swain & Moore, LLP, 895 F.3d 238, 240–41 (2d Cir. 2018).

380 Rechtbank Den Haag 1 mei 2019, ECLI:NL:RBDHA:2019:4233, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2019:6670 [https://perma.cc/SU6S-3MLH].

381 Rechtbank Den Haag, 30 januari 2013, ECLI:NL:RBDHA:2013:BY9854,), https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2013:BY9854 [https://perma.cc/F8XT-8WNX]; David Vetter, *Niger Delta Oil Spills: Shell Ruled Responsible in Landmark Verdict,* FORBES (Jan. 29, 2021), https://www.forbes.com/sites/davidrvetter/2021/01/29/niger-delta-oil-spills-shell-ruled-responsible-in-landmark-verdict/?sh=134c674a465e [https://perma.cc/8HML-77P8].

382 John Vidal, *Shell Announces £55m Payout for Nigeria Oil Spills*, THE GUARDIAN (Jan. 6, 2015), https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills [https://perma.cc/6X7Q-5VYQ].

in a case brought by seven environmental organizations and over 17,000 Dutch citizens for its role in climate change.[383]

C. The Price of Litigation

That a defendant incurs costs as a result of litigation is generally viewed as incidental to or even as part of the objective of a successful litigation strategy. However, individual plaintiffs and groups that pursue ATS lawsuits also pay a price, and that price is also part of the ATS's story and the evaluation of its impact.

The entrance fee to trial in the United States is hefty.[384] Human rights litigation demands resources that are generally out of reach for most foreign survivors of human rights abuse, therefore necessitating the support of interest groups and legal practitioners willing to offer their services pro bono or on a contingency fee basis.[385] We found that out of ATS cases that resulted in at least one published opinion where attorney data was available, 22% involved non-profit organizations while 44% involved only private law firms (which may have offered their services pro bono or on a contingency fee basis), 17% were brought by solo practitioners, and 11% were pro se. This financial dependence, as well as the lack of knowledge most plaintiffs have of the U.S. justice system, can place victims of human rights violations in a position of vulnerability. They risk having their complaint co-opted by actors whose goals may be honorable, but not necessarily consistent with their own.

In addition to the financial burden of ATS litigation and the partnerships it might compel, ATS plaintiffs often need to wait many years before a final judgment is issued.[386] One ATS lawyer described how, in one case where the breadwinner of a family had been killed, the plaintiff was seeking compensation to put her children through school. The case was still ongoing

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383 *Historic Victory: Judge Forces Shell to Drastically Reduce CO2 Emissions*, FRIENDS OF THE EARTH INT'L (May 26, 2021), https://www.foei.org/features/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions [https://perma.cc/WSR7-AQQL].

384 *See* Albiston, Edelman & Milligan, *supra* note 195, at 125 (explaining that litigation has high entrance fees and requires the guidance of a trained professional).

385 *See* Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2313 (2004) (noting how the first generation of ATCA suits was filed by human rights groups and pro-bono lawyers).

386 Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 338 (2005).

by the time the children had become adults.[387] There is also a significant risk that there will never be a ruling on the merits, and that the case will eventually be dismissed.[388] This could cause the plaintiff further psychological stress and the legal system's failure to provide a remedy "may strike them [plaintiffs] as a failure to acknowledge [the] seriousness" of their experience.[389]

Further costs to plaintiffs stemming from the litigation process include the risk of re-traumatization, as they relive painful experiences, particularly during interrogations from a defendant's lawyers.[390] Salim recounted that his deposition felt like it was intended to induce a flashback to the torture to which he had been subjected to in U.S. custody.[391] Salim and Mohamed's lawyer, Steven Watt, explained:

> [o]ne of the consequences of torture, is [post-traumatic stress disorder] PTSD. Every time they tell their story, you retraumatize them. I was worried I was going to do more damage than good by getting them to tell their story. But I think you can create an environment where it feels safe.[392]

There is also the substantial danger of intimidation by corporate or governmental actors whose interests are threatened by the lawsuit. One ATS lawyer affirmed that "the personal risk to plaintiffs in ATS cases cannot be understated. Some of them are scared that they will be killed. They are enormously brave."[393] A recent example is the ATS suit *Jane W. v. Thomas*, filed in 2021, alleging that the defendant, a former colonel in Liberian military, committed war crimes and crimes against humanity during the First Liberian Civil War, where the court granted the plaintiffs' request to proceed anonymously "[d]ue to justified fear of reprisals in Liberia."[394]

In addition to these individual costs, there are collective costs as well. Human rights litigation consumes considerable amounts of time, money, and energy on the part of social move-

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387 ATS Lawyer 3 Interview, *supra* note 140.

388 O'Connell, *supra* note 386, at 339.

389 *Id.*

390 Salim Interview, *supra* note 204. *See also* ARMOUDIAN, *supra* note 36, at 145–52 (discussing the risk of emotional trauma for survivors in human rights litigation).

391 Salim Interview, *supra* note 204.

392 Watt Interview, *supra* note 249.

393 ATS Lawyer 3 Interview, *supra* note 140.

394 Jane W. v. Thomas, 560 F. Supp. 3d 855, 865 n. 1, 891 (E.D. Penn. 2021) (finding that "Thomas has leveraged his contacts in the country's security forces . . . to harass individuals suspected of being associated with this action").

ments and the legal community.[395] By engaging in litigation, organizations might siphon off resources from other, possibly more effective, strategies.[396] One ATS lawyer, who often works on the defense side, sees these cases as a "massive resource misallocation."[397] Yet, this way of looking at the role of litigation might be misrepresenting as a zero-sum game what is in fact a much more complex calculation. Many so-called "movement lawyers" use litigation to reinforce, not detract from, other tactics employed by the organization, such as litigation abroad, media campaigns, coalition-building and protests.[398] Litigation can be an effective part of a grassroots human rights campaign. Even the lawyer who expressed skepticism about these cases acknowledged that, "[i]f the goal is to shame people, that's a different thing . . . there, they were more successful."[399]

ATS litigation has also sometimes contributed to negative precedent from the perspective of human rights advocacy. For example, the expansion of the presumption on extraterritoriality in *Kiobel*[400] and constrictions on personal jurisdiction requirements in *Daimler* have had broad negative impact on the capacity to pursue accountability for human rights violations.[401] As powerful repeat players in ATS suits, corporations have been able to strategically settle cases that risk creating precedents prejudicial to their interests. As a result, the cases corporations litigate to conclusion often establish legal precedents that are counterproductive for those seeking the progressive development of human rights law.[402] Additional costs may include the potential backlash from opposition groups in the event of a favorable court ruling[403] and the marginalization of more radical claims for social change that do not fit the narrative lawyers construct for court.[404]

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395 ROSENBERG, *supra* note 288, at 339, 343.

396 *Id.* at 343.

397 Interview with ATS Lawyer 7, *supra* note 106.

398 Giannini Interview, *supra* note 131; *see, e.g.*, Ayako Hatano, *Can Strategic Human Rights Litigation Complement Social Movements? A Case Study of the Movement Against Racism and Hate Speech in Japan*, 14 U. PA. ASIAN L. REV. 228, 272 (2019) (highlighting the success of litigation as a complement to other forms of advocacy and key tool for the anti-racism movement in Japan).

399 Interview with ATS Lawyer 7, *supra* note 106.

400 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117 (2013).

401 Daimler AG v. Bauman, 571 U.S. 117, 122 (2014).

402 For examples of decisions involving corporate actors that restricted access to the courts for foreign human rights litigants, see *Kiobel,* 569 U.S. at 117; *Daimler,* 571 U.S. at 122; Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018); Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

403 ROSENBERG, *supra* note 288, at 341–42.

404 *See* Albiston, Edelman & Milligan, *supra* note 195, at 124.

Furthermore, normative developments inspired by ATS litigation can have unforeseen consequences. Hoffman recalls that the potential benefits and drawbacks of advocating for a defined legislated cause of action under the ATS were rightfully "hotly debated," since human rights advocates did not want the TVPA to be used to undermine litigation in cases without congressionally defined causes of action, a worry that has been realized in some subsequent litigation.[405]

III
LOOKING AHEAD: PROTECTING HUMAN RIGHTS

Now that we have outlined the key goals that underpin ATS litigation, we are in a position to step back and assess the impact of the statute and consider what reforms might help achieve those goals. Our review of the history and impact of the ATS in Parts I and II lead us to three key conclusions.

First, it was the exclusion of extraterritorial conduct from the scope of the ATS that had the most devastating impact on ATS suits, leading to the steady decline in cases after 2012—a decline that we predict will continue after *Nestlé*. The Bush administration took a particularly active role opposing ATS suits, which it viewed as interfering with the foreign policy prerogatives of the executive branch.[406] The message that the administration advocated—that the application of the statute to conduct in other countries interfered with U.S. foreign policy—took root and eventually resulted in the decision in *Kiobel* and more recently in *Nestlé* to severely limit the ATS's application to extraterritorial conduct, even by U.S. actors. The concerns that motivated this opposition strike many international lawyers as puzzling. After all, the international human rights norms that the ATS allows victims to enforce are almost all *erga omnes* and *jus cogens* norms—that is, norms that are, by definition, universal and from which states are not permitted to derogate.[407] The common law presumption against extraterri-

405 Hoffman Interview, *supra* note 49.

406 The Court determined in *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010), that it would almost entirely defer to the executive branch's recommendations regarding immunity. We expected that this would have a significant effect on cases, but while suits against U.S. and foreign government officials fell, immunity did not become a more common reason for decisions against plaintiffs in cases in our database. It is possible, if not likely, that it nonetheless had an impact, discouraging new cases or leading to unpublished dismissals.

407 Indeed, international law scholar Leila Sadat notes that notions of universal jurisdiction over human rights violations, at least in the criminal context, are "flourishing abroad" and that it is an "interesting irony that our cases[,] which were so admired[,] are now being abandoned, just as the rest of the world

torial application of U.S. law is usually thought to be aimed at preventing the U.S. from inappropriately applying its own—sometimes distinctive—legal rules to conduct in other sovereign jurisdictions. But why should that presumption apply to the conduct of a U.S. corporation engaging in violations of universal legal obligations, even if outside the United States? Nonetheless, the international lawyers who hold this view have lost that fight. Barring legislative reversal,[408] the ATS will likely no longer apply to conduct that takes place exclusively abroad without any associated "domestic conduct"—which is to say it will no longer apply to many of the situations for which it has been used.

Second, it is impossible to ignore that by conventional measures of success for tort suits—money awarded to the plaintiffs and by reference to the individual victim's right to an effective remedy under international law[409]—the ATS has proven to be a disappointment. As noted above, only twenty-five cases have resulted in monetary judgments for plaintiffs that were not subsequently overturned, and only six of these awards appear to have been collected, and only partially.[410] Settlements have been slightly more successful, as we were able to document thirty-three successful settlements or partial settlements.[411] It is difficult to assess precisely how significant these were, however, because the terms are almost all undis-

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is . . . catching up." E-mail from Professor Leila Sadat to Oona Hathaway (Sept. 21, 2021) (on file with author).

408 As of this writing, there are efforts under way to extend the ATS extraterritorially through legislation. In particular, there is proposed legislation, on which the authors have provided input, to apply the extraterritoriality provision of the TVPRA to the ATS. Alien Tort Statute Clarification Act, S. 4155, 117th Con. (2022). Another possible approach for expanding U.S. civil liability is to amend the TVPA or TVPRA or introduce legislation to expand the international law violations covered under those laws. *See, e.g.*, Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, *in* ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 341, 361 (Margaret M. deGuzman & Diane Marie Amann, eds., 2018) ("[I]ncluding superior responsibility as a punishable form of responsibility would extend the reach of US law . . . ."). There have also been longstanding legislative reform efforts to provide U.S. domestic legal liability for crimes against humanity. *Senator Durbin's Speech Highlights ABA Working Group on Crimes Against Humanity*, INT'L CRIM. JUST. TODAY (Apr. 8, 2015), https://www.international-criminal-justice-today.org/news/senator-durbins-speech-highlights-aba-working-group-on-crimes-against-humanity/ [https://perma.cc/AVT8-QE2U] (expressing Senator Durbin's intent to reintroduce the Crimes Against Humanity legislation in Congress).

409 International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171, art. 2(3).

410 *See infra* Appendix A.

411 *See infra* Appendix B.; *see* William J. Aceves, *Solving the Settlement Puzzle in Human Rights Litigation*, 35 GEO J. LEGAL ETH. 105, 152–61 (2022).

closed. Put differently, in its entire history, the ATS has led to documented money payments to only thirty-nine groups of plaintiffs in total. Even though these payments are meaningful to the victims who have received them, that is a relatively meager result given the massive legal resources devoted to the litigation project. This does not mean that ATS litigation has been fruitless, however. As Part II shows, there are substantial normative benefits that can arise from litigation—particularly the opportunity for the plaintiffs to tell their stories, to be heard and believed, and, in the process, to bring attention to the abuses that they have suffered and thus potentially motivate policy changes to address the causes of those harms.

Third, our data helps settle a longstanding dispute over whether targeting corporations was a mistake. Observers have argued that targeting corporations brought out better defense lawyers who were able to effectively counter the arguments of human rights advocates in court and thus turned the tide against the ATS. Certainly, corporations brought strong lawyers into the courtroom. But many strong lawyers were already there. The boom in ATS suits that worked their way into published opinions beginning around 2000 involved cases against not just corporations, but also the U.S. government and U.S. government officials. This brought U.S. government lawyers into ATS suits, almost always on the side of defendants. Meanwhile, from a material perspective, ATS suits against corporations led to some of the most lucrative settlements for plaintiffs. More than half of the settlements we were able to document were in suits against corporations—and many of those were for millions of dollars (money that was, by and large, actually paid).[412] Without these settlements, the material benefits to plaintiffs from the ATS would be modest indeed. Even losing ATS suits against corporations have cast a spotlight on serious weaknesses in the human rights framework, increasing both the pressure for voluntary corporate compliance mechanisms and exposing the need to redress these shortcomings.

These conclusions also lead us to three main sets of recommendations. First, if the greatest barrier to ATS suits is the prohibition on extraterritorial effects of the statute, advocates need to seek out other strategies to reach human rights violations that take place outside the United States. While there remain options for pursuing such cases in U.S. courts—and a

412 *See infra* Appendix B.

number of ATS cases continue post *Nestlé*[413]—more could be done to focus attention on developing complementary options for pursing these cases outside the U.S., either in the jurisdictions where the harm took place or in the home countries of the perpetrators, although these cases face significant barriers as well. Second, if normative benefits are some of the primary benefits of ATS litigation, then we may ask whether there are alternative or complementary ways for human rights victims to pursue these aims. Litigation is extraordinarily resource intensive and thus necessarily focused on a small number of people. Perhaps it is time to give greater attention to non-adversarial dispute resolution options that enable a larger number of victims to obtain reparations for harm suffered. In short, litigation is not the only—and not always the best—way to achieve these valuable aims. Third, if, as appears to be the case, existing tools are inadequate for reaching the corporate role in human rights violations, serious consideration should be given to legislation, including due diligence requirements, aimed directly at this problem. Europe has begun to develop legislation to do just this, and the U.S. should follow suit.[414]

A. Addressing Human Rights Violations Outside the United States

There remain a number of options for reaching extraterritorial human rights violations in U.S. courts. The ATS itself could be revived if Congress were to add an extraterritoriality provision.[415] There are, moreover, other statutes that have ex-

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413 *See, e.g.*, Order at 1, Doe v. Cisco Sys., Inc., No. 15-16909 (9th Cir. July 1, 2021) (directing parties to file supplemental briefs in an ATS case, re-set for oral argument in the Ninth Circuit after *Nestlé*); *see also Al Shimari et al. v. CACI*, CTR. FOR CONST. RTS., https://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al [https://perma.cc/JM7S-T6ZK] (last visited Oct. 14, 2021) (providing a case timeline for *Al Shimari v. CACI*, "a federal lawsuit brought by the Center for Constitutional Rights on behalf of four Iraqi torture victims against U.S.-based government contractor CACI International Inc. and CACI Premier Technology, Inc."). Interestingly, after *Nestlé*, the District Court for the Eastern District of Pennsylvania granted summary judgment to the plaintiffs in an ATS suit, even though the events at issue took place outside the United States. Jane W. v. Thomas, 560 F. Supp. 3d 855, 856 (E.D. Pa. 2021).

414 Lara Wolters, *Corporate Due Diligence and Corporate Accountability*, LEGIS. TRAIN SCHEDULE (Oct. 22, 2021), https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-corporate-due-diligence [https://perma.cc/ZR67-3A9V].

415 This could be done using the extraterritoriality language it enacted in the 2008 amendment of the TVPRA. 18 U.S.C. § 1596(a)(1)–(2). Alternatively, Congress could ensure that an extraterritoriality amendment to the ATS reaches defendants with minimum contacts with the United States who are not physically present through language that explicitly grants extraterritorial jurisdiction if a

traterritorial reach. The TVPA provides a remedy for violations of the international prohibitions on torture and extrajudicial killing by persons acting under actual or apparent authority of a foreign nation,[416] although corporations are excluded from liability.[417] The TVPRA, meanwhile, extends liability to corporations and individuals[418] that violate the international prohibitions on slavery, forced labor, and human trafficking.[419] Plaintiffs can also continue to pursue tort cases in U.S. state courts, a strategy that has been a complement to ATS suits for decades.[420]

Another approach—and one that shows growing promise—is pursuing cases in international and foreign courts. International courts have been a part of the conversation for some time. The European Court of Human Rights,[421] and the Inter-

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"defendant is subject to personal jurisdiction in the United States." Congress could also amend the ATS to expressly provide for aiding and abetting liability, which 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.

416 28 U.S.C. § 1350 note (Torture Victim Protection Act).

417 Mohamad v. Palestinian Auth., 566 U.S. 449, 461 (2012).

418 18 U.S.C. § 1595(a).

419 18 U.S.C. §§ 1581, 1583. A complaint has been filed under the TVPRA against the defendants in the ongoing ATS case against Nestlé and Cargill, along with other corporations who, plaintiffs argue, "continue to profit from the labor of millions of children harvesting cocoa for these multinational giants." Complaint for Injunctive Relief & Damages at 2, Coubaly v. Nestlé U.S.A, No. 1:21-cv-00386 (D.D.C. Feb 12, 2021). Some recent case law on the TVPRA, however, has demonstrated judicial reticence to recognize extraterritorial application of the TVPRA's civil provisions. Doe v. Apple Inc., No. 1:19-cv-03737 (CJN), 2021 U.S. Dist. LEXIS 237710, at *3 (D.D.C. Nov. 2, 2021).

420 Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 13 (2013). State courts are courts of general subject matter jurisdiction, overcoming one of the main hurdles to ATS suits, and state tort claims are not subject to the presumption against extraterritoriality. Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091–94 (2014). These suits are constrained, however, by one-to-three-year statutes of limitations, as well as personal jurisdiction and choice of law hurdles. *See* Hoffman & Stephens, *supra* note 420, at 18–19; Anthony J. Colangelo & Kristina A. Kiik, *Spatial Legality, Due Process, and Choice of Law in Human Rights Litigation Under U.S. State Law*, 3 U.C. IRVINE L. REV. 63, 74 (2013). Some ATS lawyers have also resisted the shift to state courts because it just "doesn't seem right to call torture battery." Hoffman Interview, *supra* note 49. *But see* Simons Interview, *supra* note 74 ("Even if the case doesn't use [human rights] labels, they can still be used in the storytelling . . . . What that doesn't give you is progressive development of [human rights] law, but it can [still] help with public advocacy.").

421 The European Court of Human Rights has long provided a forum for bringing human rights claims against members of the European Community—and when it finds a violation, the Court can require material recompense as part of the remedy. *See HUDOC Database,* EUR. CT. HUM. RTS., https://hudoc.echr.coe.int/ [https://perma.cc/WG7R-DQYY] (last visited Oct. 6, 2021).

American Commission on Human Rights (IACHR)[422] allow individuals to seek remedial action for human rights abuses. Both have limited geographical focus and are only available to victims in states that have accepted jurisdiction.[423] The IACHR, whose jurisdiction extends to the United States, has provided a forum for some cases that have been unsuccessfully pursued under the ATS. In one case that has recently been decided on the merits, the IACHR found the United States responsible for violating the human rights of a former detainee at the Guantánamo Bay detention facility.[424] This is the IACHR's first decision concerning United States action during the "war on terror" and so it remains to be seen whether the United States will comply with any of the IACHR's recommendations (it has a poor record of compliance with the IACHR generally).[425] Victims of human rights abuse could also, under certain conditions, file an individual complaint with one of the United Nations treaty bodies that oversee compliance with human rights treaties.[426] This option is, however, closed to victims of abuse at the hands of U.S. government officials because the

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422 *See, e.g.*, El-Masri v. United States, Case Petition 419-08, Inter-Am. Comm'n H.R., Report No. 21/16, OEA/Ser.L/V/II.157, doc. 25 (2016) (addressing a German citizen's petition before the Inter-American Commission seeking redress for human rights violations he suffered while subjected to the U.S. extraordinary rendition program); *see also* El-Masri v. United States, 479 F.3d 296, 299 (4th Cir. 2007) (addressing appellant's claim alleging that "defendants were involved in a CIA operation [where Appellant] was detained and interrogated in violation of his rights under the Constitution and international law").

423 The African Court on Human and Peoples' Rights also has the potential to be an important source of human rights remedies. Under Article 8(3), states may declare that they are willing to accept the right of individual application. Protocol on the Statute of the African Court of Justice and Human Rights Protocol on the Statute of the African Court of Justice and Human Rights art. 8(3), July 1, 2008, 48 I.L.M. 317. So far nine states have made the declaration, but it has rarely been utilized.

424 *See* Ameziane v. United States, Case 12.865, Inter-Am. Comm'n H.R., Report No. 229/20, OEA/Ser.L/V/II, doc. 39 (2020).

425 Lisa Reinsberg, *IACHR Condemns Guantánamo Abuses in First "War on Terror" Decision*, JUST SEC. (July 7, 2020), https://www.justsecurity.org/71150/iachr-condemns-guantanamo-abuses-in-first-war-on-terror-decision/ [https://perma.cc/DP7F-GGBE]; INTER-AM. COMM'N ON HUM. RTS., ANNUAL REPORT 2019, CHAPTER II: THE PETITIONS, CASES, AND PRECAUTIONARY MEASURES SYSTEM 51 (2019).

426 These include the Human Rights Committee; the Committee on Elimination of Discrimination against Women; the Committee against Torture; the Committee on the Elimination of Racial Discrimination; the Committee on the Rights of Persons with Disabilities; the Committee on Enforced Disappearance; the Committee on Economic, Social and Cultural Rights; and the Committee on the Rights of the Child. For further information, see the website of the Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#againstwhom [https://perma.cc/SP63-WBCY].

United States has not consented to any individual complaint mechanisms.

Steven Watt explained that, despite enforcement challenges, the process of filing a suit before an international court can still provide an important benefit for plaintiffs: "The U.S. doesn't even really consider the judgments of international bodies, I have kind of lost faith in these systems. That said, the clients don't lose faith in these systems. The clients still want to proceed because it is all part of their healing process."[427] With respect to international criminal tribunals, even if most of them do not have powers to order financial compensation for individual plaintiffs, they can nonetheless provide important avenues for an individual to tell their story and for normative human rights development.[428]

An emerging option for lawsuits against those responsible for human rights abuses is to bring them in foreign domestic courts. A number of countries, some following the example of U.S. ATS suits, have begun allowing such cases. The Canadian Supreme Court, for example, recently held that international norms could be applied under Canadian law, allowing a case to move forward on behalf of three Eritreans against Nevsun Resources, a mining company, for human rights abuses that occurred in Eritrea.[429] The U.K. Supreme Court similarly permitted a case brought by Zambian citizens for alleged toxic emissions to proceed against a mining company in Zambia, whose parent company is incorporated and domiciled in the United Kingdom.[430] The U.K. Supreme Court also ruled in early 2021 that cases brought by the Bille community and the Ogale people of Ogoniland in Nigeria against Royal Dutch Shell could proceed in U.K. courts.[431] In September 2021, the French Court of Cassation overturned a decision by a lower court to dismiss charges brought against the cement company Lafarge for complicity in crimes against humanity in the war in Syria and in May 2022 the Paris Court of Appeals affirmed that the company can be charged with aiding and abetting crimes

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427 Watt Interview, *supra* note 249.

428 *See* Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 333-34 (2007); Oona A. Hathaway, Alexandra Francis, Aaron Haviland, Srinath Reddy Kethireddy & Alyssa T. Yamamoto, *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1596 (2019).

429 Nevsun Resources Ltd. v. Araya, 2020 SCC 5, paras. 90 & 132 (Can.).

430 *See* Vedanta Res. PLC v. Lungowe [2019] UKSC 20, [87] (appeal taken from Eng.).

431 *Shell in Nigeria: Polluted Communities 'Can Sue in English Courts,'* BBC NEWS (Feb. 12, 2021), https://www.bbc.com/news/world-africa-56041189 [https://perma.cc/K8TE-XFMT].

against humanity.[432] And these are just a few examples of a growing number of foreign cases for human rights and environmental violations proceeding in foreign courts. The Business and Human Rights Center collection of cases, for example, shows twenty-one transnational lawsuits against corporations for torture and ill treatment alone—all but four of them in the last two decades.[433]

Criminal cases for human rights violations have also recently proceeded in foreign domestic courts. For example, in late 2021, the Higher Regional Court in Frankfurt, Germany, convicted Taha Al-J. for genocide and crimes against humanity against the Yazidis in Iraq — the first domestic court to rule on the crime of genocide.[434] Also in Germany, two former Syrian regime officials were convicted in separate trials for their participation in human rights violations in Syria.[435] In France, eight Lafarge executives have been charged with financing a terrorist group and endangering the lives of the firm's former Syrian staff.[436]

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432 News Wires, *French Firm Lafarge Loses Bid to Dismiss 'Crimes Against Humanity' Case in Syria*, FRANCE 24 (Sept. 7, 2021), https://www.france24.com/en/europe/20210907-french-firm-lafarge-loses-bid-to-dismiss-crimes-against-humanity-case-in-syria [https://perma.cc/6VXD-PN73]; Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html [https://perma.cc/KQ77-5BQQ].

433 *Latest News*, BUS. & HUM. RTS. LEGAL CTR., https://www.business-humanrights.org/en/latest-news/?&content_types=lawsuits&issues=13&type_of_litigation=TRANSNATIONAL [https://perma.cc/MAS4-963W] (last visited Nov. 5, 2021).

434 Press Release, *Higher Regional Court Frankfurt/Main Sentences Taha Al-J. to Lifelong Imprisonment for Genocide and Other Criminal* Offences, ORDENTLICHE GERICHTSBARKEIT HESSEN (Nov. 30, 2021), https://ordentliche-gerichtsbarkeit.hessen.de/pressemitteilungen/higher-regional-court-frankfurtmain-sentences-taha-al-j-to-lifelong-imprisonment [https://perma.cc/CVF8-WH7G].

435 Eyad al-Gharib was convicted of aiding and abetting the torture and detention of protesters. Hannah El-Hitami, *Germany: Lessons from the First Conviction of an Agent of the Syrian Regime*, JUSTICEINFO.NET (Mar. 1, 2021), https://www.justiceinfo.net/en/74369-syria-germany-symbolic-importance-first-conviction-syrian-regime-official.html [https://perma.cc/694Z-6UH4]. Anwar Raslan was convicted of torture and killing for his role running a prison in Damascus. Hannah El-Hitami, *Anwar Raslan's Conviction: "The Beginning of a Wider Struggle,"* JUSTICEINFO.NET (Jan. 20, 2022), https://www.justiceinfo.net/en/86775-anwar-raslan-conviction-beginning-wider-struggle.html [https://perma.cc/65M9-WLUZ].

436 *See French Firm Lafarge Loses Bid to Dismiss 'Crimes Against Humanity' Case in Syria*, FRANCE 24 (Sept. 7, 2021), https://www.france24.com/en/europe/20210907-french-firm-lafarge-loses-bid-to-dismiss-crimes-against-humanity-case-in-syria [https://perma.cc/2PH6-ZTJF]. The company also faced charges for its complicity in crimes against humanity in Syria's civil war. *Id.*

A number of international treaties also provide for civil remedies for violations of the treaty obligations.[437] A notable example is the Rome Statute of the International Criminal Court, which provides for civil remedies without territorial limits for victims of the four crimes covered under the statute: genocide, crimes against humanity, war crimes, and the crime of aggression.[438] Many states that became a party to the ICC's Rome Statute, moreover, have enacted legislation to criminalize the four crimes in the statute. They did so largely to take advantage of the Statute's complementarity provision, under which the ICC only takes jurisdiction over the case if there is no adequate domestic process of accountability.[439] While the complementarity provision requires only criminal jurisdiction, many of the states that enacted legislation for this purpose either explicitly or implicitly created civil liability as well. As explained in an amicus brief for the European Commission in *Sosa v. Alvarez-Machain*, "[i]n these [legal] systems, civil jurisdiction would extend to the same category of cases as universal criminal jurisdiction."[440] That is because many of these jurisdictions allow private citizens harmed by a criminal action to append a civil claim to the criminal case—hence, wherever there is universal criminal jurisdiction, there is universal civil jurisdiction as well.[441] In France, to take just one example, the Code of Criminal Procedure provides that a "civil action may be exercised at the same time as the public [criminal] prosecution and before the same court. It is admissible for any cause of damage, whether material, bodily or moral, which ensues from

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437 *See, e.g.*, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) art. 24(4), Dec. 20, 2006, 2716 U.N.T.S. 3 ("Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.").

438 Rome Statute of the International Criminal Court, July 17, 1998 arts. 5 & 75, 2187 U.N.T.S. 90.

439 *Id.* art. 1.

440 Brief of Amicus Curiae the European Commission in Support of Neither Party at 21–22, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339).

441 For example, there are ongoing investigations in France, Germany, and Sweden that could lead to the prosecutions of President Bashar al-Assad and members of his government over the use of chemical weapons against civilians. *See* Marlise Simons, *Criminal Inquiries Loom Over al-Assad's Use of Chemical Arms in Syria*, N.Y. TIMES (Mar. 2, 2021), https://www.nytimes.com/2021/03/02/world/europe/syria-chemical-weapons-assad.html?referringSource=ArticleShare [https://perma.cc/W5LH-VPM6]; *Swedish Criminal Investigation of Chemical Weapons Attacks in Syria*, OPEN SOC'Y JUST. INITIATIVE, https://www.justiceinitiative.org/litigation/swedish-criminal-investigation-of-chemical-weapons-attacks-in-syria [https://perma.cc/YQ7T-PESL] (last visited July 11, 2022).

the actions prosecuted."[442] In short, where there is extraterritorial criminal jurisdiction over the Rome Statute crimes, there is often matching civil jurisdiction as well—and that offers victims of those violations an opportunity to pursue civil claims in those foreign courts.

In addition to developing litigation options in Western industrialized countries that often host the corporations that aid and abet violations, more could be done to support more robust domestic accountability mechanisms in countries in which human rights violations take place. Brownell contends that a key goal of the human rights movement should not be simply to improve accountability for corporations and other actors from Europe and the United States that participate in or aid and abet human rights abuses, but to enable local rule of law mechanisms to hold responsible actors accountable in the countries in which the abuses take place: "We felt that, we live in a country where our judiciary is not independent or accountable, so immediately you think of foreign fora — in Europe or the US — to address the problem. But we realized that we had to build up similar capacity in West Africa."[443]

A benefit of strengthening capacity to bring such suits in plaintiffs' home countries is that the vast majority of potential plaintiffs are unlikely to have access to the NGO connections or resources to bring a suit against a defendant in the United States or Europe but could potentially bring a case before a domestic court in their home countries. However, such local cases still face many obstacles. First, plaintiff home countries are often characterized by overburdened judicial systems that fare poorly on rule of law indicators.[444] In an interview, Mitee described the challenges of bringing a case before a Nigerian court and the lack of faith that many local plaintiffs have in the judiciary: "A foremost problem is the weak institutions in Nigeria, the fact that the companies are able to exploit some of the

442 Code de Procédure Pénale [C. pr. pén.] [Criminal Procedure Code] art. 3 (Fr.). For several more examples, see Supplemental Brief of Yale Law School Center for Global Legal Challenges as Amicus Curiae in Support of Petitioners at 30–33, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) (No. 10-1491). All of the cases and statutes cited in the brief are posted at the Yale Law Library's "Sources for Supplemental Brief of Yale Law School Center for Global Legal Challenges Kiobel v. Royal Dutch Petroleum," https://documents.law.yale.edu/kiobel-v-royal-dutch [https://perma.cc/8V8V-9MUH] (listing eleven foreign cases and sixty-one foreign statutes).

443 Brownell Interview, *supra* note 283.

444 *See WJP Rule of Law Index*, WORLD JUST. PROJECT, https://worldjusticeproject.org/rule-of-law-index/global/2020/Regulatory%20Enforcement/ [perma.cc/5D34-6JXZ] (last visited Oct. 27, 2021).

legal weaknesses of the system here to protract a case for many years."[445] Mitee further explained: "If there is a judgment against Shell here in Nigeria, maybe the public condemnation is not as strong than if they were held accountable in the Netherlands" and that when "these issues are not on the front page of international newspapers, they do not exist."[446] Similarly, Ka Hsaw Wa described how the plaintiffs in the *Unocal* case, who had been unable to get justice in Burma, felt that, "because the United States took this case they are going to be able to get justice."[447] These cases might therefore not further the normative goals of individual plaintiffs as successfully as an ATS suit in the United States or litigation in another Western country where the corporations are headquartered. Second, the subsidiaries through which foreign corporations frequently operate often have more limited capacity to provide financial compensation to victims.[448] Third, enforcing a judgment issued in a court in the Global South against a defendant whose assets are located in the Global North can require further complex litigation.[449] Finally, plaintiffs and their families may be subject to retaliation for seeking judicial remedies against powerful actors.[450] International support and atten-

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445 Mitee Interview, *supra* note 263. *See also* AXEL MARX ET AL., ACCESS TO LEGAL REMEDIES FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSES IN THIRD COUNTRIES 57 (Feb. 2019), https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf [https://perma.cc/9E7C-NT8N] (describing "a judgment from the Benin Judicial Division of the Federal Court of Nigeria of 14 November 2005 in which the court held that gas flaring violates the right to life and dignity of persons, and Shell and NNPC were ordered to take immediate steps to stop gas flaring in the community, which, to date, has still not been enforced").

446 Mitee Interview, *supra* note 263.

447 Interview with Ka Hsaw Wa, *supra* note 235.

448 MARX ET AL., *supra* note 445, at 47 (detailing that after the Chilean Supreme Court ordered the Chilean mining company Promel S.A., which had been contracted by the Swedish mining company Boliden to import Swedish mineral waste to Chile, to pay eight million pesos in damages to each of 374 injured parties, Promel S.A. declared bankruptcy and the judgment was never paid out).

449 *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 152 (2013); Sara Randazzo, *Litigation Without End: Chevron Battles on in 28-Year-Old Ecuador Lawsuit*, WALL ST. J. (May 2, 2021), https://www.wsj.com/articles/litigation-without-end-chevron-battles-on-in-28-year-old-ecuador-lawsuit-11619975500 [https://perma.cc/RL26-DE2M]. One ATS lawyer noted that the problems in the Ecuador suit were unusual and that absent significant misconduct in the initial suit, getting foreign judgments enforced in the United States is generally not difficult. E-mail from ATS Lawyer 2, *supra* note 107.

450 *See, e.g.*, Randazzo, *supra* note 449 (detailing Chevron's perceived retaliation against lawyer Steven Donziger who represented Chevron's opponents in Ecuador, bringing oil pollution charges).

tion to local cases can provide some measure of accountability, but the dangers can nonetheless be difficult to overcome.

U.S. courts can also play an important role in supporting foreign lawsuits through enforcement of federal laws like the Foreign Legal Assistance Statute (commonly known as Section 1782), which allows an "interested person" to obtain documents and information from individuals located in the United States to support foreign litigation.[451] However, as the Second Circuit's reversal of a discovery order under Section 1782 in *Kiobel v. Cravath* indicates, the path forward under this statute can present its own difficulties, at least with respect to obtaining access to privileged information for use in foreign litigation.[452] Broadly, a stronger nexus of courts and lawyers in different jurisdictions, which plaintiffs and human rights advocates can utilize to support human rights litigation, can assist in overcoming legal and political hurdles. There have been significant efforts to forge such connections through creating global networks of advocates; that work remains both important and challenging.

B. Non-Adversarial Dispute Resolution

There is a common tendency among lawyers to equate accountability with legal accountability and to perceive courts as the essential institution to legitimize dispute resolution outcomes.[453] But courts have never been the exclusive forum in which grievances are redressed. Movement lawyers use a combination of "domestic litigation, regional [human rights] litigation," and non-adversarial dispute resolution mechanisms to achieve their human rights aims.[454] The last of these—non-adversarial dispute resolution—remains a relatively underdeveloped tool for achieving human rights victims' goals.

Non-adversarial dispute resolution mechanisms include mediation, conciliation, arbitration, and combinations thereof. In mediation and conciliation, a third party facilitates a consensual agreement between the parties, with a conciliator typically performing a more active role than a mediator, offering possible solutions to the dispute. In arbitration, the parties agree to abide by the decision of a third party, which can gener-

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451 28 U.S.C. § 1782.

452 Kiobel v. Cravath, Swaine & Moore, LLC, 895 F.3d 238, 240–41 (2d Cir. 2018).

453 Kishanthi Parella, *The Stewardship of Trust in the Global Value Chain*, 56 VA. J. INT'L L. 585, 589 (2016).

454 Brownell Interview, *supra* note 283.

ally be enforced in courts in case of non-compliance.[455] The increasing popularity of such mechanisms reflects a belief that different kinds of disputes may need different kinds of responses, and that "no one legal or informal dispute process can serve for all human disputing."[456] It also takes into account that persons in different cultures may have different preferences in terms of how disputes are settled, including whether the emphasis should be on dialogue or formal determination of legal entitlements.[457]

Proponents of non-adversarial dispute resolution mechanisms in particular stress the benefits of "increased party autonomy, empowerment and creative and tailored remedies."[458] Part of the impetus for the initial rise of the alternative dispute resolution (ADR) movement was the discontent perceived in the 1960s and 70s with the monopolization of dispute resolution by courts and lawyers.[459] Skeptics of ADR and other forms of non-adversarial dispute resolution, on the other hand, caution against the "diversion of disputes away from courts as public bodies as well as the risk of exposure of the parties to power imbalances and inequality of arms in the resolution of the dispute."[460] Part of the concern is that the "privatization" of justice is incompatible with the collective normative goals of

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455 *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards arts. 1 & 3, June 10, 1958, 330 U.N.T.S. 3.

456 Carrie J. Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, 15 INT'L ENCYC. SOC. & BEHAV. SCIS. 70, 70 (2015).

457 *See, e.g.*, Kariuki Muigua, Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms 13 (CIArb Africa Region Centenary Conference 2015), http://kmco.co.ke/wp-content/uploads/2018/08/Empowering-the-Kenyan-People-through-Alternative-Dispute-Resolution-Mechanisms.pdf [https://perma.cc/L8FH-CUZW] (noting that "dispute resolution in many non-Western traditions . . . is not the ascertainment of legal rights and the allocation of blame and entitlement" but rather reconciliation).

458 Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR*, 26 EUR. J. INT'L L. 607, 609 (2015); *see also* Barnali Choudhury, *Beyond the Alien Tort Claims Act: Alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses*, 26 NW. J. INT'L L. & BUS. 43, 61–63 (2005) (analyzing specialized tribunals "as another appropriate forum for combating transnational corporate abuses").

459 Menkel-Meadow, *supra* note 456, at 71.

460 McGregor, *supra* note 458, at 609. *See generally* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075–85 (1984) (framing settlement as "the civil analogue of plea bargaining" where "justice may not be done"); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676–79 (1986) (observing problems with ADR, particularly when applied to matters of public law or the rights of marginalized groups); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2619–29 (1995) (revisiting Owen Fiss's arguments against settlements but noting that settlements have become increasingly common).

human rights litigation, including the reinforcement of public values and contribution to the development of the law through precedent.[461] Moreover, some non-adversarial options might not satisfy collective normative interests in public accountability and norm development. For these reasons and others, many in the human rights community view non-adversarial dispute resolution with understandable skepticism.

Despite these drawbacks, the findings of this Article make clear that litigation is far from a complete solution to the problem of human rights abuses and that victims of human rights abuses need more options for seeking accountability. Here we examine three ways in which non-adversarial dispute resolution might be used to benefit human rights victims.

1. *International Investment Arbitration*

Some scholars are increasingly pointing to international arbitration as a possible path to advancing human rights.[462] Arbitration has become the preferred mechanism of dispute resolution in international investment agreements (IIAs). Commercial actors who are doing business in countries with underdeveloped formal legal systems often prefer international arbitration because it permits creative and simple processes "that are not overly attached to any one jurisdiction's substantive law."[463] Arbitral tribunals have traditionally not been willing to adjudicate on alleged violations of international human rights law. In contrast, investment arbitration tribunals have at times enforced investment contract clauses that human

461 Menkel-Meadow, *supra* note 456, at 73.

462 *See, e.g.*, Choudhury, *supra* note 458, at 68 (noting that international mechanisms are better suited in holding corporate entities accountable); Adam H. Bradlow, Note, *Human Rights Impact Litigation in ISDS: A Proposal for Enabling Private Parties to Bring Human Rights Claims through Investor-State Dispute Settlement Mechanisms*, 43 YALE J. INT'L L. 355, 384–88 (2018) (arguing that the ISDS regime presents a vehicle for promoting human rights because "ISDS mechanisms can provide a unique, private right of action . . . against governments attacking human rights" and "governments routinely comply with ISDS arbitral awards"); Fabio Giuseppe Santacroce, *The Applicability of Human Rights Law in International Investment Disputes*, 34 ICSID REV. 136, 136 (2019) (presenting multiple rationales for the applicability of human rights law in international investment disputes, including human rights law's place in international law, express and implied references to human rights in investment treaties, and the systematic integration principle of international law).

463 Menkel-Meadow, *supra* note 456, at 73–74.

rights organizations have argued are in violation of international human rights law.[464]

However, the resistance of arbitral tribunals to enforcing human rights norms may be starting to erode.[465] In *Urbaser v. Argentina*, an ICSID tribunal recognized that it had jurisdiction to hear counterclaims raised by the host state, Argentina, alleging that the activities of the investor were harming the human rights of its population.[466] An arbitral tribunal may also permit submission of amici curiae briefs from third parties when the dispute involves the interests of the broader community, including in protecting human rights.[467]

Both investors and host states may rely on human rights law to advance claims or defenses, although the likelihood of success against an investor is currently small. The *Urbaser* tribunal held that under the current regime of international human rights law, investors do not have positive obligations to take measures to protect the human rights of a host state's population.[468] To overcome this limitation, states can include express provisions in IIAs, requiring both investors and host states to respect human rights norms.[469] Indeed, a growing number of "new generation" IIAs make reference to human rights, either in the preamble[470] or in the operative part of the treaty.[471] One significant limitation, however, remains. Unless

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464 ELIZABETH LEISERSON, KATHERINE MUNYAN, AISHA SAAD & ALYSSA YAMAMOTO, GOVERNANCE OF AGRICULTURAL CONCESSIONS IN LIBERIA: ANALYSIS AND DISCUSSION OF POSSIBLE REFORMS 47 (2017).

465 *See, e.g.*, Santacroce, *supra* note 462, at 138 (enumerating multiple cases in which "international human rights law [may] be invoked in the context of a State's defence against . . . [an] investment claim").

466 Urbaser S.A. & Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Arg. Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 1143–55 (Dec. 8, 2016), 18 ICSID Rep. 554 (2020).

467 *See, e.g.*, Piero Foresti, Ida Laura de Carli, and others v. Republic of S. Afr., ICSID Case No. ARB(AF)/07/01, Award, ¶ 25 (Aug. 4, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C90/DC1651_En.pdf [https://perma.cc/PYL7-3V7E] (stating that a tribunal allowed the submission of two amici briefs, including one by the International Commission of Jurists).

468 *Urbaser*, ICSID Case No. ARB/07/26, ¶ 1209.

469 *See* Santacroce, *supra* note 462, at 144–45.

470 For example, the preamble to the EU-Singapore Free Trade agreement states that the parties have "regard to the principles articulated in the Universal Declaration of Human Rights [of 1948]." Free Trade Agreement Between the European Union and the Republic of Singapore, E.U.-Sing., Nov. 14, 2019, 2019 O.J. (L 294) 3.

471 For example, the bilateral investment treaty between Morocco and Nigeria states that "investors and investments shall uphold human rights in the host state" and "shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties." Reciprocal Investment Promotion

states also decide to grant third parties a right to initiate arbitral proceedings, the utility of the mechanisms to enforce human rights depends entirely on the host state to bring a claim against a corporation on behalf of individuals whose human rights the corporation has violated. Governments might be reluctant to do so based on financial interests, fearing to lose not only the business of the malfeasant corporation but future investment opportunities as well. If a state is unwilling to bring a claim, a corporate investor might be able to use international arbitration to hold the host state accountable for human rights violations in which the corporation was complicit. Roger Alford suggests that corporations who have been successfully sued for "aiding and abetting" human rights violations, where the host state was the primary perpetrator, could use international arbitration to "secure its share of liability, either in the form of contribution or indemnification."[472] Effectively, this approach leverages the power of corporations to increase the cost for states that commit human rights abuses.

Scholars have made a more ambitious proposal, namely, to create an international arbitration tribunal to resolve business-related human rights complaints.[473] Another approach is the creation of model rules that can be applied by a number of arbitral bodies. Following this second model, a group of international lawyers spent five years developing the Hague Rules on Business and Human Rights Arbitration, launched in December 2019. These model arbitration rules take into consideration the different interests involved in human rights enforcement and incorporate the effectiveness criteria for non-judicial grievance mechanisms outlined in the UN Guiding Principles on Human Rights and Business.[474] The drafting

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and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria art. 18(2) & (4), Dec. 3, 2016, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download [https://perma.cc/KXJ7-N34B]; *see* Santacroce, *supra* note 462, at 144–45.

472 Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 506 (2008).

473 Claes Cronstedt & Robert C. Thompson, *A Proposal for an International Arbitration Tribunal on Business and Human Rights*, 57 HARV. INT'L L.J. 66, 67–68 (2016).

474 UN Guiding Principles, *supra* note 357, at 33–24. The Guiding Principles set in motion a process that led to the Hague Rules on Business and Human Rights Arbitration. BRUNO SIMMA ET AL., INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES (2018) [hereinafter INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES], https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf [https://perma.cc/TC7Z-NLXJ]; BRUNO

team for the Rules made clear that such arbitration is not intended as an alternative to strengthening the capacity of domestic legal systems to effectively address business-related human rights violations or the development of international law in the area of business and human rights, but rather is meant to serve as a stop-gap measure "until such solutions become available."[475]

2. *Internal Grievance Mechanisms*

As an alternative to an arbitration proceeding, which is administered by an impartial body, it has become more common for companies and international financial institutions to provide access to internal grievance mechanisms for individuals harmed by their activities.[476] Many large banks have signed on to the Equator Principles and require clients they finance to provide grievance mechanisms for local communities.[477] By making available these mechanisms, corporations can early on detect harmful practices and prevent individual grievances from developing into organized opposition against their projects as well as stave off reputational harm that might result from litigation. Assuming that the internal grievance mechanism is effective, its suitability to redress human rights violations is an open question. Benefits may include the "speed of access and remediation," as well as relatively low costs.[478] Other benefits could include the proximity and inclusivity of the process, if designed based on dialogue with the local community.[479] Still, these processes might not be suitable in all circumstances and, as the Guiding Principles emphasize, they

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SIMMA ET AL., THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf [https://perma.cc/VED4-NLET].

475 INTERNATIONAL ARBITRATION OF BUSINESS AND HUMAN RIGHTS DISPUTES, *supra* note 474, at 4.

476 Some human rights groups have started focusing specifically on these internal mechanisms as potential remedial options for victims of human rights abuses. *See Accountability Office FAQs*, ACCOUNTABILITY COUNSEL, https://www.accountabilitycounsel.org/accountability-resources/accountability-office-faqs/ [https://perma.cc/NA7A-DSLZ] (last visited Dec. 21, 2021).

477 The Equator Principles are a framework adopted by financial institutions to assess and manage social and environmental risks in project financing. EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES 13 (2020), https://equator-principles.com/wp-content/uploads/2021/02/The-Equator-Principles-July-2020.pdf [https://perma.cc/NSQ3-99LX].

478 UN Guiding Principles, *supra* note 357, at 31.

479 Parella, *supra* note 453, at 634.

must not "preclude access to judicial or other non-judicial grievance mechanisms."[480]

3. *Truth Commissions*

Another potential avenue for survivors of human rights abuse to obtain accountability is through truth commissions. These are official, non-adversarial bodies of limited duration that investigate human rights abuse, including through testimony, with the goal of officially acknowledging truths.[481] Truth commissions form part of the toolkit of transitional justice processes that respond to "systemic or widespread violations of human rights . . . [in] recognition for the victims and to promote possibilities for peace, reconciliation, and democracy."[482] Although it is rare for transitional justice processes to address corporate complicity, Payne and Pereira predict that this is changing in recognition of the "unique role of businesses" in facilitating atrocities.[483]

For the first time, the South African Truth and Reconciliation Commission (TRC) engaged directly with companies that had been complicit in apartheid, in the form of "Business Hearings."[484] The South African TRC has, however, also been criticized for failing to deliver justice, in particular by not providing remedies to those harmed by corporate complicity in human rights violations.[485] Marjorie Jobson, a leader of one of the organizational plaintiffs in an ATS suit concerning corporate liability for crimes committed during apartheid, echoed these criticisms of the TRC mechanisms: "The truth commissions failed victims and survivors. You have to improve people's lives and you have to get people into economic activities. The state

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480 UN Guiding Principles, *supra* note 357, at 32.

481 Huma Haider, *Transitional Justice*, GSDRC (Aug. 2016), https://gsdrc.org/topic-guides/transitional-justice/concepts-and-mechanisms/mechanisms/truth-commissions/ [https://perma.cc/NRA5-8RTQ].

482 Leigh A. Payne & Gabriel Pereira, *Accountability for Corporate Complicity in Human Rights Violations: Argentina's Transitional Justice Innovation?*, *in* THE ECONOMIC ACCOMPLICES TO THE ARGENTINE DICTATORSHIP: OUTSTANDING DEBTS 29, 30 (Horacio Verbitsky & Juan Pablo Bohoslavsky eds., Laura Pérez Carrara trans., 2015) (quoting *What Is Transitional Justice?*, INT'L CTR. TRANSITIONAL JUST., www.ictj.org/about/transitional-justice [https://perma.cc/AH9R-HWBG] (last visited July 16, 2009)).

483 *Id.* at 31–32.

484 For the 1997 business hearing transcripts, see *Special Hearings Transcripts*, TRUTH & RECONCILIATION COMM'N, https://www.justice.gov.za/trc/special/index.htm#bh [https://perma.cc/2VVM-ABNR] (last visited Oct. 3, 2021).

485 *See* Geeta Koska, *Corporate Accountability in Times of Transition: The Role of Restorative Justice in the South African Truth and Reconciliation Commission*, 4 RESTORATIVE JUST. 41, 57 (2016).

has no policy on reparations . . . ."[486] This suggests that even though material reparations may not be the primary motivating factor for human rights victims, the importance of financial remedy cannot be ignored in achieving justice long-term. One of our other interviewees cautioned, "If people don't have justice, that boils over and violence happens."[487]

In short, non-adversarial dispute resolution, like civil litigation, has shortcomings and benefits that need to be evaluated based on the objectives sought. As the same interviewee put it, "There are advantages and disadvantages to each. Sometimes we get much better testimony in court than does a TRC."[488] Then again, as already noted, that testimony, when taken as part of litigation, may not be made public because it may lead to a confidential settlement that precludes disclosure.[489]

C. Corporate Accountability for Human Rights Abuses

There are litigation options beyond tort suits against a corporation to tackle corporate human rights abuse in and outside the United States. One option is to pursue criminal or civil cases against corporate *executives* rather than corporations.[490] The theory is that shareholders, some (perhaps many) of whom are passive investors, are the ones who bear the costs when liability is imposed on the corporation, while the *managers* who committed the wrongs face few consequences. On this view, it is preferable to hold the managers responsible: they are the ones who are responsible for the decisions that led to the wrongdoing, and they are in the best position to avoid making such decisions in the future. However, establishing a legal link between individual corporate executive action and human rights abuses remains a significant obstacle to such suits.[491]

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486 Jobson Interview, *supra* note 224.

487 ATS Lawyer 3 Interview, *supra* note 140.

488 *Id.*

489 *Id.*

490 *See* JUSTICE IAN BINNIE ET AL., THE CORPORATE CRIMES PRINCIPLES: ADVANCING INVESTIGATIONS AND PROSECUTIONS IN HUMAN RIGHTS CASES 47 (2016); Jennifer M. Green, *Corporate Torts: International Human Rights and Superior Officers*, 17 CHI. J. INT'L L. 447, 450 (2017).

491 *See, e.g.*, Green, *supra* note 490, at 452 (citing Doe v. Drummond, 782 F.3d 576 (11th Cir. 2015)) (stating that in the first U.S. case addressing superior responsibility for corporate officers under the ATS or TVPA, the Court held that a certain type of liability did not apply to them, but on appeal, "the legal ruling was reversed, but the U.S. Court of Appeals for the Eleventh Circuit held that there were insufficient facts to link the plaintiffs to the defendants and dismissed the allegations"). In *Doe v. Drummond*, the Eleventh Circuit held that a civilian corporate officer "could *feasibly* be held liable under the [superior responsibility] doc-

An ATS lawyer explained, "It is a great theory, corporate officer liability, but the problem really is *Twombly* and *Iqbal*. As we are attempting to sue individual officers, the courts are tightening up what you need to plead. How are you supposed to get the information that this nice corporate officer was involved in human rights violations?"[492]

A related approach that might not face these evidentiary challenges would be to encourage shareholder lawsuits and other tools of shareholder activism against companies that have engaged in wrongdoing. Shareholder suits have proven successful as a tool for forcing companies to take more action to address climate change. Such suits have been largely untried in the human rights context. As Nick Grono recently argued, "Those of us working to put an end to this abuse [including modern slavery in supply chains] should look to the successful tactics of climate activists, putting energy into pressure-based strategies and campaigns against corporate wrongdoing."[493]

Another emerging alternative is legislation requiring companies to engage in due diligence for human rights violations. Such laws, which require corporations to take steps to ensure they are not contributing to human rights violations either directly or indirectly, are proliferating in Europe and could serve as a model for U.S. legislation.[494] The French Duty of Vigilance

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trine provided the plaintiffs demonstrated a superior-subordinate relationship" and the corporate officer was in the "requisite position of authority and control," although the plaintiff's allegations were inadequate to establish that link in the case. *Drummond*, 782 F.3d at 610.

492 ATS Lawyer 5 Interview, *supra* note 92. There are other options as well. In the *Unocal* case, advocates for the plaintiffs sought (ultimately unsuccessfully) to have California revoke the company's charter. ROBERT BENSON, CHALLENGING CORPORATE RULE: THE PETITION TO REVOKE UNOCAL'S CHARTER AS A GUIDE TO CITIZEN ACTION 69 (1999).

493 Nick Grono, *What the Climate Movement Can Teach Us About Ending Modern Slavery*, THOMPSON REUTERS FOUNDATION NEWS (July 28, 2021), https://news.trust.org/item/20210728110832-yiq04/ [https://perma.cc/MGR2-P6XF]; *see, e.g.*, Gall v. Exxon Corp., 418 F. Supp. 508, 509, 518–19 (S.D.N.Y. 1976) (describing a shareholder's derivative lawsuit brought against board members of Exxon for acquiescing in the payment of bribes to officials in the Italian state oil company; though unsuccessful, it demonstrates the possibility of such suits).

494 *See, e.g.*, Gesetz uber die unternehmerischen Sorgfaltspflichten in Lieferketten [Das Lieferkettengesetz] [The Supply Chain Act], July 16, 2021, BUNDESGESETZBLATT [BGBL. I] at 2959 (Ger.); Kamerstukken 34 506, Wet zorgplicht kinderarbeid [Child Labor Duty of Care Act] (Neth.) (May 14, 2019) (enters into force in 2022); Prop 150 L: Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven) [Act on Business Transparency and Work on Basic Human Rights and Decent Working Conditions (Transparency Act)] (Norway) (June 10, 2021) (enters into force July 1, 2022); Modern Slavery Act 2015 c. 30 (UK); *see also* GABRIELLE HOLLY &

Law, a national-level mandate covering corporate due diligence requirements for all human rights, requires companies with more than 5,000 employees in France (or 10,000 employees in France or abroad) to establish, implement, and publish a "vigilance plan" to address risks within their supply chains.[495] Under the law, the onus falls onto the claimant "to prove that a [company's] failure to establish or effectively implement a vigilance plan (the breach) is what caused the damage," which can "prove difficult in practice when the evidence is detained by the company."[496] Despite these hurdles, the law, the first of its kind, has led to several lawsuits and formal notices of noncompliance to French companies.[497] A proposed amendment to the Swiss Constitution, which failed to pass during a public referendum in November 2020, similarly would have required due diligence for extraterritorial human rights violations, but it would have put the onus on the corporation rather than the claimant. Specifically, it would have imposed a strict liability standard for corporations for extraterritorial human rights violations, and corporations would have been permitted to prove due diligence as a defense.[498]

CLAIRE METHVEN O'BRIEN, DANISH INST. HUM. RTS., HUMAN RIGHTS DUE DILIGENCE LAWS: KEY CONSIDERATIONS (2021), https://www.humanrights.dk/sites/humanrights.dk/files/media/document/Human_rights_due_diligence_laws_-_briefing_on_civil_liability_for_due_diligence_failures_2021_accessible.pdf [https://perma.cc/28PW-4B53] (describing emerging European due diligence laws and standards). Pierre-Hugues Verdier and Paul Stephan have made a related proposal, building on the existing Foreign Corrupt Practices Act. Pierre-Hugues Verdier & Paul Stephan, *After ATS Litigation: A FCPA for Human Rights?*, LAWFARE (May 7, 2018), https://www.lawfareblog.com/after-ats-litigation-fcpa-human-rights [https://perma.cc/9X7X-QHBR]; Pierre-Hugues Verdier & Paul B. Stephan, *International Human Rights and Multinational Corporations: An FCPA Approach*, 101 B.U. L. REV. 1359, 1361 (2021).

495 Loi 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Law 2017-399 of March 27, 2017 relating to the duty of vigilance of parent companies and ordering companies] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 28, 2017 [hereinafter French Duty of Vigilance Law].

496 Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69 INT'L & COMPAR. L. Q. 789, 803 (2020).

497 *France's Duty of Vigilance Law*, BUS. & HUM. RTS. RES. CTR. (Mar. 16, 2021), https://www.business-humanrights.org/en/big-issues/corporate-legal-accountability/frances-duty-of-vigilance-law/[https://perma.cc/RCK8-9W4Z].

498 *See* Michael R. Littenberg, Anne-Marie L. Beliveau, Nellie V. Binder, Thomas Reutter & Annette Weber, *Mandatory Human Rights Due Diligence Initiative Brought to a Public Vote in Switzerland—Initiative Fails, Parliament Indirect Counterproposal Moves Forward*, ROPES & GRAY (Dec. 1, 2020), https://www.ropesgray.com/en/newsroom/alerts/2020/12/Mandatory-Human-Rights-Due-Diligence-Initiative-Brought-to-a-Public-Vote-in-Switzerland [https://perma.cc/989L-2SHP].

A new European Union (EU)-wide mandatory human rights due diligence in corporate supply chains directive will apply to limited liability companies that meet specified size and turnover thresholds incorporated in the EU, as well as non-EU companies that sell goods or services within the EU and meet specified turnover thresholds—including, of course, U.S. companies.[499] The new EU directive is still in flux, but it will likely require all Member States to enact a legal duty to "ensure that companies conduct human rights and environmental due diligence" in their value chain, including the operations of their subcontractors.[500] Unless an entity can show that it does not cause or contribute to any potential or actual adverse impacts, it must establish, implement, and publicly disclose a due diligence strategy, subject to Member State investigation, evaluation, and sanctions in cases of non-compliance.[501] The directive is intended to complement existing state-level legislation, which has included both industry-specific and national-level mandates,[502] as well as EU legislation on due diligence requirements in specific sectors, such as conflict minerals and timber.[503] It has also helped prompt discussions in other EU countries, which have recently enacted or are considering their own legislation to address corporate liability for supply chain abuses.[504]

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499 *See Commission Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, at 46–47, COM (2022) 71 final (Feb. 23, 2022), https://eur-lex.europa.eu/resource.html?uri=Cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=pdf [https://perma.cc/7C3P-N4BX], [hereinafter Eur. Comm. Proposal]. The proposal will next go to the European Parliament and the Council for approval. *See Corporate Sustainability Due Diligence*, EUR. COMM., https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en [https://perma.cc/7RJZ-7JWE] (last visited July 13, 2022).

500 Eur. Comm. Proposal, *supra* note 499, at 53–54; *see* Jo En Low & Suyin Tan, *EU Mandatory Environmental and Human Rights Due Diligence Law—What You Need to Know*, NAT'L L. REV. (Mar. 15, 2021), https://www.natlawreview.com/article/eu-mandatory-environmental-and-human-rights-due-diligence-law-what-you-need-to-know [https://perma.cc/6RQ4-5QEY].

501 *See* Eur. Comm. Proposal, *supra* note 499, at 53–58, 63–65.

502 For examples of such laws, see *supra* note 490.

503 Council Regulation 2017/821, 2017 O.J. (L 130) 1, 1 (EU) (demonstrating that the Council is "laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas"); Council Regulation 995/2010, 2010 O.J. (L 295) 23, 23 ("laying down the obligations of operators who place timber and timber products on the market").

504 Germany adopted the Supply Chain Due Diligence Act in June 2021, and the act will come into force on January 1, 2023. Tobias Koppmann et al., *The New German Supply Chain Due Diligence Act (with a View Across the Border)*, NAT'L L. REV. (July 14, 2021), https://www.natlawreview.com/article/new-german-sup-

Since many U.S. corporations operate and do business in the EU, the EU directive could significantly impact U.S. corporate behavior and incentivize U.S. corporate engagement with similar legislation in the United States. Indeed, a limited due diligence law already exists in the United States: Section 1307 of the Tariff Act of 1930 prohibits importing any product that was "mined, produced, or manufactured wholly or in part . . . by convict labor," including "forced or indentured child labor."[505] With the emergence of expansive due diligence rules in Europe, U.S. corporations have expressed a desire for a "competitive level-playing field, increase[d] legal certainty about . . . standards expected from companies to respect human rights and the environment, [and] clarif[ied] legal consequences for when responsibilities are not met."[506] Some cor-

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ply-chain-due-diligence-act-view-across-border [https://perma.cc/8PUE-9MFW]. The Netherlands has passed a Child Labor Due Diligence Law, which enters into effect in mid-2022. Wet Zorgplicht Kinderarbeid [Dutch Child Labour Due Diligence Law] 14 May 2019; *Evaluation and Revision of Policy on Responsible Business Conduct*, GOV'T OF THE NETH, https://www.government.nl/topics/responsible-business-conduct-rbc/evaluation-and-renewal-of-rbc-policy [https://perma.cc/PUZ7-DU2S] (last visited Oct. 4, 2021). Outside the EU, Australia has policies that prohibit slavery in the supply chain. *Modern Slavery Bill 2018* (Cth) (Austl.). For more, *see* LISE SMIT ET AL., EUR. COMM'N, STUDY ON DUE DILIGENCE REQUIREMENTS THROUGH THE SUPPLY CHAIN 17–19 (2020); *An EU Mandatory Due Diligence Legislation to Promote Businesses' Respect for Human Rights and the Environment*, AMNESTY INT'L (Sept. 1, 2020), https://www.amnesty.org/download/Documents/IOR6029592020ENGLISH.PDF [https://perma.cc/WG75-FRS3].

505 19 U.S.C. § 1307; *see, e.g.*, *Fact Sheet: New U.S. Government Actions on Forced Labor in Xinjiang*, WHITE HOUSE (Jun. 24, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/ [https://perma.cc/9XUH-938T] (stressing that the United States will not tolerate forced labor in its supply chains, including in Xinjiang). U.S. Customs and Border Protection (CBP) enforces Section 1307, but any person who has "reason to believe that [any class of] merchandise . . . [that] is being, or is likely to be, imported into the United States" is being produced by forced labor may communicate that belief to CBP. 19 C.F.R. § 12.42(b). For example, in September 2021, the Campaign for Accountability filed a formal complaint with CBP citing research demonstrating forced labor in Apple's supply chain in China. *CfA Files Complaint Over Forced Labor in Apple's Supply Chain*, TECH TRANSPARENCY PROJECT (Sept. 27, 2021), https://www.techtransparencyproject.org/articles/cfa-files-complaint-over-forced-labor-apples-supply-chain [https://perma.cc/YM94-H96H].

506 *Support for EU Framework on Mandatory Human Rights and Environmental Due Diligence*, BUS. & HUM. RTS. RES. CTR. (Sept. 2, 2020), https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf [https://perma.cc/AWL6-6J5R]; *see also List of Large Businesses, Associations & Investors with Public Statements & Endorsements in Support of Mandatory Due Diligence Regulation*, BUS. & HUM. RTS. RES. CTR. (June 6, 2019), https://www.business-humanrights.org/en/latest-news/list-of-large-businesses-associations-investors-with-public-statements-endorsements-in-support-of-mandatory-due-diligence-regulation/ [https://perma.cc/4NLZ-WJH4] (providing

porations, including chocolate manufacturers, which have come under harsh criticism and litigation for abuses in their supply chains, support due diligence legislation in both Europe and the United States.[507] Many corporations favor in particular a debated component of the EU directive that would allow due diligence as an affirmative defense to human rights violations.[508] Virginie Mahn, the human rights lead for American snack food company Mondelez, stated that companies want "to have confidence they can be transparent about risks in their supply chains without fearing that they will be exposed to increased risk of litigation."[509] Others contend, however, that a due diligence defense could have perverse effects on corporate practice and "lead companies to approach their due diligence obligations as a mere tick-box exercise," if there are insufficient regulatory safeguards and mandated reviews of due diligence standards.[510]

CONCLUSION

For decades now, the ATS has been carrying the hopes and expectations of thousands of victims of human rights abuse and members of the human rights community. Victims have relied on the statute to vindicate the rights they have on paper and to remedy the harm inflicted on them. Human rights organizations, meanwhile, have sought to use the ATS not only to achieve justice for survivors, but also for future victims of human rights violations by strengthening accountability norms.

Has the ATS made a difference? Yes, but not necessarily in the ways one might expect. ATS suits have not been very successful in bringing about monetary awards that are actually paid. Nonetheless, the process of litigation has led to a number of significant monetary settlements, including for the plaintiffs

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a list of companies with statements supporting mandatory due diligence regulation).

507 Peter Whoriskey, *Chocolate Companies Ask for a Taste of Government Regulation*, WASH. POST (Dec. 31, 2019), https://www.washingtonpost.com/business/2019/12/31/chocolate-companies-ask-taste-government-regulation/ [https://perma.cc/KBK7-HQAF].

508 Eur. Comm. Proposal, *supra* note 499, at 65.

509 Benjamin Fox, *Companies Will Support EU Law on Due Diligence, but Need Assurances on Liability*, EURACTIV (Mar. 19, 2019), https://www.euractiv.com/section/economy-jobs/interview/companies-will-support-eu-law-on-due-diligence-but-need-assurances-on-liability/ [https://perma.cc/89BK-Z84N].

510 Bueno & Bright, *supra* note 496, at 790; CLAIRE BRIGHT, DIANA LICA, AXEL MARX & GEERT VAN CALSTER, OPTIONS FOR MANDATORY HUMAN RIGHTS DUE DILIGENCE IN BELGIUM 63 (2020).

in *Nestlé*.[511] These payments have undoubtedly made a difference in the lives of the people who received the payments, allowing them and their families to rebuild their lives and often their communities. And yet the percentage of ATS plaintiffs to receive such payments remains small. Moreover, the incidence of private settlement of ATS complaints has brought to the fore the tension between the material and normative aims of human rights cases, because private dispute resolution generally precludes public scrutiny of the human rights violations, and it often represents a missed opportunity to affirm and develop legal norms and standards of accountability.

ATS litigation has also brought normative benefits not always reflected in financial payments: Through the process of litigation, survivors of human rights abuse have been able to exercise their voices and reclaim a measure of dignity by defending their rights. ATS suits have also exposed inadequacies in the current legal regime, providing ammunition to human rights organizations that advocate for legal and policy reform. Perhaps the greatest contribution of ATS suits to the collective interest in greater accountability for human rights abuse has been the exposure of the mismatch between social expectations about the protection of human rights and the actual legal protection of these rights. The inadequacies exposed by ATS suits played a role, for example, in the passage of the Torture Victim Protection Act. And ATS suits have brought attention to violations of human rights that have in some cases produced meaningful changes in the lives of those whose rights had been long ignored. It remains to be seen whether the latest setback for the ATS will prompt similar reform—encouraging the U.S. Congress to enact legislation to address the gap in accountability for U.S. corporations aiding and abetting human rights violations outside the U.S.

The story of the ATS offers lessons that extend far beyond the ATS itself and even beyond human rights litigation: litigation is a tool that can be used by those seeking social or legal reform. And yet, because each case usually focuses on the harm done to one person or a small group of people, it represents only a small slice of a much more expansive problem. By design, litigation alone cannot bring about broad social change. Instead, 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

511 *See* Colyer, *supra* note 10.

long been ignored to bring about legislative reform and change in practice on the ground. In the wake of the latest setback to the ATS, advocates have an opportunity to think once again about alternative ways to pursue their aims—whether though litigation in foreign courts, alternative dispute resolution mechanisms, or legislative and other reforms to bring about changes in corporate practices. It may be that the ATS will make its greatest difference by exposing the limits of litigation alone to secure even the most basic human rights.

APPENDICES

APPENDIX A: MONETARY DAMAGES IN ATS SUITS

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Award Amount**	**Collected?**
Filártiga v. Peña-Irala	1984	577 F. Supp. 860	Torture	$10.385 million	No.[512]
Forti v. Suarez-Mason	1988	694 F. Supp. 707	Forced disappearance; cruel, inhuman or degrading treatment	$8 million	The claimants were only able to recover $400 through a local bank account where Suarez-Mason's wife was receiving a monthly check.[513]
Martinez-Baca v. Suarez-Mason	1988	No. C-87-2057-SC	Arbitrary detention; torture; cruel, inhuman, or degrading treatment	$21.171 million	No. Defendant Suarez-Mason claimed he was destitute and never paid the award.[514]
Quiros de Rapaport v. Suarez-Mason	1989	No. C87-2266 JPV	Loss of companionship, affection, consortium, and future financial support	$60 million	No. Defendant Suarez-Mason claimed he was destitute and never paid the award.[515]
Paul v. Avril	1994	901 F. Supp. 330	Arbitrary detention; torture; cruel, inhuman or degrading treatment	$41 million	Award was likely never collected. Defendant Avril fled the United States after the judgement.[516]

512 *Filártiga v. Peña-Irala: Historic Case*, *supra* note 47.

513 ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 64 (2004).

514 Myrna Oliver, *G. Suarez Mason, 81; Ex-General Linked to Argentina's 'Dirty* War,' L.A. TIMES (June 22, 2005), https://www.latimes.com/archives/la-xpm-2005-jun-22-me-mason22-story.html [https://perma.cc/KD3E-9SR5].

515 *Id.*

516 Reuters, *Former Haitian Ruler Is Released From Prison, Then Rearrested*, N.Y. TIMES (Apr. 16, 2002), https://www.nytimes.com/2002/04/16/international/americas/former-haitian-ruler-is-released-from-prison-then.html [https://perma.cc/WEQ2-38L5].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Award Amount**	**Collected?**
Xuncax v. Gramajo	1995	886 F. Supp. 162	Torture; summary execution; disappearance; arbitrary detention; cruel, inhuman or degrading treatment	$47.5 million	No. "In Guatemala, Gramajo indicated he had no intention of paying his victims anything."[517]
In re Estate of Marcos Human Rights Litigation	1995	910 F. Supp. 1460	Torture; cruel, inhuman or degrading treatment; unlawful killing; deprivation of liberty	$1.966 billion	Partially collected. Plaintiffs have reportedly been able to recover "less than 1%" of the $1.96 billion monetary award.[518]
Kadic v. Karadžić	1996	74 F.3d 377	Torture; genocide	$745 million	No. Karadžić never made "any payment of any kind."[519] Judgement granting monetary award was renewed in a New York state judgement in 2020.[520]
Abebe-Jira v. Negewo	1996	72 F.3d 844	Torture; cruel, inhuman, and degrading treatment	$1.5 million	Partially collected. The plaintiffs were able to collect $798, which the NYT reports was "donated to charity."[521]

517 *Xuncax v. Gramajo and Ortiz v. Gramajo: Historic Case*, CTR. FOR CONST. RTS (Oct. 9, 2007), https://ccrjustice.org/home/what-we-do/our-cases/xuncax-v-gramajo-and-ortiz-v-gramajo [https://perma.cc/885L-4CZC].

518 Davies, *supra* note 57.

519 Rachel Irwin, *Civil Actions Offer Some Closure for Bosnia Victims*, INST. FOR WAR & PEACE REPORTING (Apr. 26, 2011), https://iwpr.net/global-voices/civil-actions-offer-some-closure-bosnia-victims [https://perma.cc/2ZLF-Z9CY].

520 Kadic v. Karadžić, No. 93-CV-1163 (LAP), 2020 U.S. Dist. LEXIS 231427, at *5 (S.D.N.Y. Dec. 9, 2020).

521 Andrew Rice, *The Long Interrogation*, N.Y. TIMES (June 4, 2006), https://www.nytimes.com/2006/06/04/magazine/04torturer.html [https://perma.cc/Q3P5-JP3B].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Award Amount**	**Collected?**
Mushikiwabo v. Barayagwiza	1996	1996 U.S. Dist. LEXIS 4409	Genocide	$105.27 million	No. Defendant was sentenced to 35 years of imprisonment by the ICTR and died in 2010.[522]
Doe v. Karadžić	1998	182 F.R.D. 424	Genocide; torture	$4.5 billion	No. Karadžić never made "any payment of any kind."[523] Judgement granting monetary award was renewed in a New York state judgement in 2020.[524]
Mehinovic v. Vuckovic	2002	198 F. Supp. 2d 1322	Torture; cruel, inhuman or degrading treatment; arbitrary detention; war crimes; crimes against humanity; genocide	$140 million	Likely never collected: "The question then is whether the symbolic value of the judgment is sufficient when the enforcement of the award does not follow."[525]

522 Barayagwiza, Jean-Bosco, HAGUE JUST. PORTAL, http://www.haguejustice portal.net/index.php?id=8410 [https://perma.cc/57Y4-M4JM] (last viewed Aug. 1, 2021).

523 Irwin, *supra* note 519.

524 Kadic, 2020 U.S. Dist. LEXIS 231427, at *5.

525 Miriam Cohen, *The Role of National Courts and Mechanisms in Realizing Reparative Justice for International Crimes*, *in* REALIZING REPARATIVE JUSTICE FOR INTERNATIONAL CRIMES 191 (2020).

Case Name	Year	Citation	International law claim alleged as basis for ATS jurisdiction	Award Amount	Collected?
Chavez v. Carranza	2004	407 F. Supp. 2d 925	Extra-judicial killing; torture; crimes against humanity; cruel, inhuman or degrading treatment or punishment	$6 million	Partially collected. CJA "pursued collection of the $6 million judgment against Carranza and successfully garnished one of his bank accounts,"[526] but it is unclear how much was recovered. Before Carranza died in 2017, he claimed that the damages were "patently excessive" for a "senior citizen on Social Security."[527]
Doe v. Saravia	2004	348 F. Supp. 2d 1112	Extra-judicial killing; crimes against humanity	$10 million	No. Defendant disappeared shortly before the trial[528] and remains in hiding as of 2018.[529]
Cabello v. Fernández-Larios	2005	402 F.3d 1148	Extra-judicial killing; torture, crimes against humanity; cruel, inhuman or degrading punishment	$4 million	Collection status unknown.

526 *Campaign of Violence Against Salvadoran Civilians: Chavez v. Carranza*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/chavez-v-carranza/#:~:text=A%20jury%20found%20Carranza%20responsible,of%20%246%20million%20in%20damages.&text=the%20verdict%20was%20also%20the,forces%20during%20the%20civil%20war [https://perma.cc/88RR-X4GE] (last viewed Aug. 1, 2021).

527 Chavez v. Carranza, No. 03-2932 M1/P, 2006 U.S. Dist. LEXIS 63257, at *30 (W.D. Tenn. Aug. 15, 2006).

528 Carlos Dada, *How We Killed Archbishop Romero*, EL FARO (Mar. 25, 2010), www.elfaro.net/es/201003/noticias/1416/How-we-killed-Archbishop-Romero.htm?tpl=11 [https://perma.cc/UCP5-EACG].

529 Rhina Guidos, *Judge Orders Arrest of Longtime Suspect in St. Romero's 1980 Killing*, NAT'L CATH. REP. (Oct. 24, 2018), https://www.ncronline.org/news/world/judge-orders-arrest-longtime-suspect-st-romeros-1980-killing [https://perma.cc/HMG7-HRFK].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Award Amount**	**Collected?**
Jean v. Dorélien	2005	431 F.3d 776	Torture; arbitrary detention; cruel, inhuman, or degrading treatment; extra-judicial killing	$4.3 million	Partially collected. CJA collected $580,000 by seizing a portion of Dorélien's winnings in the Florida Lottery.[530] The plaintiffs used the award to distribute "hundreds of thousands of dollars to fellow survivors of the Raboteau massacre and to support social services to Haitian refugees."[531]
Arce v. Garcia	2006	434 F.3d 1254	Torture	$54.6 million	Likely never collected. According to CJA, the defendants were "deported back to El Salvador after immigration judges found them responsible for human rights crimes, including the torture of CJA's clients."[532]

530 *Crimes Against Humanity Under Haitian High Command: Jean v. Dorélien*, CTR. FOR. JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/jean-v-dorelien/ [https://perma.cc/E329-5RU9] (last viewed Aug. 1, 2021).

531 *Id.*

532 *Human Rights Crimes Under Salvadoran Defense Ministers: Romagoza Acre v. Garcia and Vides Casanova*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/romagoza-arce-v-garcia-and-vides-casanova/ [https://perma.cc/3QPF-8GNB] (last viewed Aug. 1, 2021).

Case Name	Year	Citation	International law claim alleged as basis for ATS jurisdiction	Award Amount	Collected?
Licea v. Curaçao Drydock Co.	2008	584 F. Supp. 2d 1355	Forced labor	$80 million	Partially collected. $82,618 was collected in 2014 after plaintiffs were granted a garnishee order to claim a portion of the defendant's assets in Singapore.[533] In 2015, Singapore's High Court confirmed that the compensatory element of the ATS judgment was enforceable in Singapore.[534]
Saludes v. República de Cuba	2009	655 F. Supp. 2d 1290	Torture; arbitrary arrest; cruel, inhuman or degrading treatment; restriction on assembly; denial of the right to a fair trial; crimes against humanity	$27.5 million	Collection status unknown.

533 *Alien Tort Litigation Comes to Singapore: International Enforcement of Judgments Based on Corporate Human Rights Abuse*, *supra* note 351.

534 *Curaçao Drydock Company Lawsuit (re forced labour)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/cura%C3%A7ao-drydock-company-lawsuit-re-forced-labour/ [https://perma.cc/4UFY-MX65] (last viewed Aug. 1, 2021).

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Award Amount**	**Collected?**
Doe v. Constant	2009	354 F. Appx 543	Torture; attempted extra-judicial killing; crimes against humanity	$19 million	No. "[Defendant] was eventually tried for mortgage fraud in New York state court[.] CJA intervened and convinced the judge to reject a 1–3 year plea bargain, citing [his] human rights abuses. [Defendant] was later convicted and sentenced to 12–37 years."[535]
Magnifico v. Villanueva	2012	2012 U.S. Dist. LEXIS 158544	Forced labor; human trafficking	$13.55 million	Collection status unknown.
Mwani v. Al Qaeda	2014	2014 U.S. Dist. LEXIS 135599	Terrorism	$822.38 million	No.[536]
Mwani v. Al Qaeda	2014	2014 U.S. Dist. LEXIS 163169	Terrorism	$60.33 billion	No. Defendant did not participate or acknowledge the ATS trial.[537]
Yousuf v. Samantar (*In re* Samantar)	2015	537 B.R. 250	Torture; indiscriminate killings and human rights abuses	$21 million	Collection status unknown.

535 *Rape and Death Squad Violence in Haiti: Doe v. Constant*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/doe-v-constant/ [https://perma.cc/3P4R-38PK] (last viewed Aug. 1, 2021).

536 *Blast Victims Set to Seek ICC Help*, SAMRACK (Aug. 7, 2016), https://samrack.com/blast-victims-set-to-seek-icc-help/ [https://perma.cc/9QWF-S6TL].

537 Klasfeld, *supra* note 230.

APPENDIX B: SETTLEMENTS IN ATS SUITS

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
In re Holocaust Victim Assets Litig.	1998	1998 U.S. Dist. LEXIS 18014	Slavery; forced labor	"Chief Judge Korman suggested $1.25 billion as a settlement amount. Both sides accepted the amount in principle the next day."[538] Related litigation produced additional settlements, but connection to ATS is unclear.	$1.25 billion
Doe v. Unocal Corp.	2002	395 F.3d 932	Forced labor; extra-judicial killing; rape; torture	Settlement confidential, but there is public information: "UNOCAL agreed to provide funds to improve living conditions in the region, in addition to providing compensation."[539] "[T]he settlement in principle will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programmes to improve living conditions, health care and education and protect the rights of people from the pipeline region."[540]	

538 Neuborne, *supra* note 128, at 806–08 n. 29–34.

539 *John Doe I et al. v. UNOCAL Corp. et al.*, INT'L CRIMES DATABASE, http://www.internationalcrimesdatabase.org/Case/992/Doe-I-et-al-v-UNOCAL-et-al/ [https://perma.cc/9EAC-6YX9] (last visited July 16, 2022).

540 Campbell, *supra* note 237.

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
Jama v. INS	2004	334 F. Supp. 2d 662	Cruel, inhuman, or degrading treatment	Due to "various settlements" (undisclosed) only nine of twenty initial plaintiffs remained to trial. The jury decided against plaintiffs on the ATS but awarded one plaintiff $100,001 in compensatory damages for violation of her rights under the RFRA.[541]	
In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.	2004	340 F. Supp. 2d 494	Failure to pay benefits following the deaths of the policy holders for damage to their property during the Holocaust	Settlement approved but unclear if it was ever paid.[542]	
Abiola v. Abubakar	2006	435 F. Supp. 2d 830	Torture; extra-judicial killing	Monetary settlement with public terms.[543]	$650,000

541 Pauline Daniels, *The Ins and Outs of the Jama Case Part I*, STATES OF INCARCERATION, https://statesofincarceration.org/story/ins-and-outs-jama-case-part-i [https://perma.cc/JQH9-6L53] (last visited July 16, 2022).

542 Paul Belkin, Kathleen Ann Ruane & Baird Webel, *Holocaust-Era Insurance Claims: Background and Proposed Legislation* 13, n. 32, CONG. RSCH. SERV. (July 13, 2011), https://www.hsdl.org/?view&did=682801 [https://perma.cc/CA5C-ZLBQ].

543 *Hafsat Abiola et al. (Plaintiffs) v. Abdulsalami Abubakar (Defendant)*, INT'L CRIMES DATABASE, http://www.internationalcrimesdatabase.org/Case/931/Abiola-et-al-v-Abubakar/ [https://perma.cc/4JLR-4NCE] (last visited July 16, 2022).

Case Name	Year	Citation	International law claim alleged as basis for ATS jurisdiction	Settlement Details	Amount (if known)
Iqbal v. Hasty	2007	490 F.3d 143	Cruel, inhuman or degrading treatment	One plaintiff's claim ended in settlement: "After Judge Gleeson's ruling on the motions to dismiss, the United States settled Elmaghraby's claims by payment of $300,000."[544]	$300,000
Xiaoning v. Yahoo!	2007	No. 4:07-cv-02151-CW	Torture; forced labor; arbitrary detention	Settlement terms confidential, but details have emerged in subsequent litigation.[545]	$6.4 million to victims and their families; $17.3 million to Laogai Research Foundation to set up a human rights fund.

544 *Ashcroft v. Iqbal – Petition*, U.S. DEP'T OF JUST. (Oct. 21, 2014), https://www.justice.gov/osg/brief/ashcroft-v-iqbal-petition [https://perma.cc/H6GT-NDNR].

545 Joint Stipulation of Dismissal at 1, Xiaoning v. Yahoo! Inc., No. 4:07-cv-02151-CW (N.D. Cal. Nov. 28, 2007) (stipulation of dismissal with prejudice based on private settlement understanding among parties); Aceves, *supra* note 411, at 156; He Depu v. Oath Holdings, Inc., 531 F. Supp. 3d 219, 225 (D.D.C. 2021) ("As part of a settlement agreement . . . Yahoo paid $17.3 million to create the Yahoo Human Rights Fund, a portion of which was to be distributed to other Chinese dissidents who were imprisoned based on their online activity."); Confidential Settlement, Release, and Foundation Agreement, Exhibit A, Xiaoning v. Yahoo! Inc., No. 1:17-cv-006535-JDB, at 3 (N.D. Cal. July 2, 2020) (detailing both the settlement money paid to the victims and their families and the settlement money paid to the Laogai Foundation to set up a human rights fund).

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
Abdullahi v. Pfizer, Inc.	2009	562 F.3d 163	Involuntary medical experimentation and lack of informed consent	"Pfizer and Kano state reached a final settlement in August 2009. The parties agreed to a settlement figure of $75 million."[546]	$75 million
Wiwa v. Royal Dutch Petroleum Co.	2009	626 F. Supp. 2d 377	Crimes against humanity; violation of the freedom of assembly	"The settlement, whose terms are public, provides a total of $15.5 million. These funds will compensate the 10 plaintiffs, who include family members of the deceased victims; establish a Trust intended to benefit the Ogoni people; and cover a portion of plaintiffs' legal fees and costs."[547]	$15.5 million

546 *Pfizer Lawsuit (re Administration of Experimental Drug in Nigeria, filed in Nigeria)*, BUS. & HUM. RTS. RES. CTR., https://www.business-humanrights.org/en/latest-news/pfizer-lawsuit-re-administration-of-experimental-drug-in-nigeria-filed-in-nigeria/ [https://perma.cc/ZUS8-Y8SK] (last visited July 16, 2022). *See also Nigeria, Pfizer Reach Settlement on Drug Lawsuit*, REUTERS (July 27, 2009), https://www.reuters.com/article/us-nigeria-pfizer-idUSTRE56Q2TO20090727 [https://perma.cc/629G-ZG78].

547 Press Release, *Settlement Reached in Human Rights Cases Against Royal Dutch/Shell*, CTR. FOR CONST. RTS. (June 8, 2009), https://ccrjustice.org/home/press-center/press-releases/settlement-reached-human-rights-cases-against-royal-dutchshell [https://perma.cc/PAC7-3K8V].

Case Name	Year	Citation	International law claim alleged as basis for ATS jurisdiction	Settlement Details	Amount (if known)
Ntsebeza v. Daimler AG (*In re* S. African Apartheid Litig.)	2009	617 F. Supp. 2d 228	Apartheid; denial of the right to a nationality; extra-judicial killing; torture; cruel, inhuman, or degrading treatment	Settlement terms confidential, but public information available: "The *Mail & Guardian* understands the total amount of the settlement is $1.5-million, to be split between the Khulumani group and the claimants represented by Ntsebeza."[548] "A settlement between General Motors and victims of Apartheid was finalised in May 2012."[549]	$1.5 million
Baoanan v. Baja	2009	627 F. Supp. 2d 155	Slavery and slavery-like practices	Settled for an undisclosed amount.[550]	
In re Xe Servs. Alien Tort Litig.	2009	665 F. Supp. 2d 569	War crimes	Settlement terms confidential.[551]	

548 Adrian Ephraim, *US General Motors Settles Apartheid Reparations Claim*, THE MAIL & GUARDIAN (Feb. 29, 2012), https://mg.co.za/article/2012-02-29-us-general-motors-settles-apartheid-reparations-claim/ [https://perma.cc/DQ9U-UPWL].

549 *Khulumani et al. v. Barclays National Bank et al., and Lungisile Ntsbeza et al v. Daimler AG et al.*, INT'L CRIMES DATABASE, http://www.internationalcrimesdatabase.org/Case/1155/South-African-Apartheid-Litigation/ [https://perma.cc/YT7D-83VR].

550 FEDERAL CIVIL HUMAN TRAFFICKING CASES INVOLVING ALLEGATIONS OF DOMESTIC SERVITUDE, The Human Trafficking Legal Center (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Civil-Human-Trafficking-Cases-Involving-Allegations-of-Domestic-Servitude-.pdf [https://perma.cc/8GNG-HGS5]; Grace Chang, *This Is What Trafficking Looks Like*, *in* IMMIGRANT WOMEN WORKERS IN THE NEOLIBERAL AGE 62 (Nilda Flores-Gonzalez, Anna Romina Guevarra, Maura Toro-Morin & Grace Chang, eds. 2013).

551 *Abtan, et al. v. Prince, et al. and Albazzaz, et al. v. Prince, et al.: Historic Case*, CTR. FOR CONST. RTS. (Aug. 11, 2017), https://ccrjustice.org/home/what-we-do/our-cases/abtan-et-al-v-prince-et-al-and-albazzaz-et-al-v-prince-et-al [https://perma.cc/F8S8-WHJ4].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
In re Terrorist Attacks on September 11, 2001	2010	740 F. Supp. 2d 494	Terrorism; airplane hijacking	"In 2010, 18 of the 21 property damage claimants entered into a settlement with the aviation defendants for $1.2 billion."[552]	$1.2 billion
Al-Quraishi v. L-3 Servs. Inc.	2012	657 F.3d 201	Torture; cruel, inhuman or degrading treatment (CIDT); violation of the law of armed conflict	"After years of litigation, a settlement was reached on October 10, 2012, marking the first positive resolution to a U.S. civil case challenging detainee treatment outside the United States in the larger 'war on terror' context."[553]	
Garcia v. Chapman	2012	911 F. Supp. 2d 1222	Arbitrary detention; torture	Settled for an undisclosed amount.[554]	

552 Timothy S. Tomasik, *The 'Lesser of Two' Rule: The Application of the New York Collateral Set-off Rule to Property Claims Borught in the September 11 Litigation*, CHI. DAILY L. BULL. (2012), https://www.tkklaw.com/pdf/the-lesser-of-two-rule.pdf [https://perma.cc/5QDP-BQJV].

553 *Al-Quraishi, et al. v. Nakhla and L-3 Services: Historic Case*, *supra* note 328.

554 Stacy St. Clair & Jodi S. Cohen, *How Cubs' Aroldis Chapman Helped the Castro Regime Before Cuban Defection*, CHI. TRIB. (Oct. 6, 2016), https://www.chicagotribune.com/news/ct-cubs-aroldis-chapman-cuba-20161005-story.html [https://perma.cc/8SGA-YGMP].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
Estate of Hernandez-Rojas *ex rel.* Hernandez v. United States	2014	62 F. Supp. 3d 1169	Physical abuse	"A San Diego federal judge on Thursday tentatively approved the U.S. government's offer to pay $1 million to the children of a Mexican man who died after being beaten and shot with a Taser at the San Ysidro Port of Entry, ending seven years of litigation in the lawsuit that has brought national attention to use of force at the border."[555]	$1 million
In re Arab Bank, PLC Alien Tort Statute Litig.	2015	808 F.3d 144	Knowingly sponsoring suicide bombings and other murderous attacks on innocent civilians by providing banking and administrative services	"That case settled—reportedly for more than $1 billion—before the damages phase concluded."[556]	More than $1 billion

555 Kristina Davis, *San Diego Judge Poised to Approve $1 Million Settlement in Border Death Case*, SAN DIEGO UNION-TRIB. (Mar. 2, 2017), https://www.sandiegouniontribune.com/news/courts/sd-me-hernandez-settlement-20170302-story.html [https://perma.cc/2SAE-T7S8].

556 Carlos F. Concepción and Johanna Oliver Rousseaux, *Evolution of the ATA and Third-Party Liability for Terrorist Acts*, FOCUS ON FIN. INSTS. (Winter 2017), https://www.jonesday.com/files/Publication/96762fcf-3cb0-40ee-9ceb-d59e217ca9fb/Presentation/PublicationAttachment/5c394a82-eb45-4a0b-9e86-d9969ac8206d/IDQ-2017-01-Evolution%20of%20the%20ATA.pdf [https://perma.cc/GWB7-HDYN].

Case Name	**Year**	**Citation**	**International law claim alleged as basis for ATS jurisdiction**	**Settlement Details**	**Amount (if known)**
Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y	2015	153 F. Supp. 3d 1291	Encroachment safe navigation; piracy; terrorism	"The parties to the contempt action settled these proceedings with a payment from SSCS to ICR and KS of $2.55 million."[557]	$2.55 million
Doe v. Nestle, S.A.	2016	906 F.3d 1120	Forced labor; cruel, inhuman or degrading treatment	Plaintiffs settled with one defendant, Archer Daniels Midland, in 2016 for an undisclosed amount of money.[558] In 2015, ADM sold its cocoa business for $1.3 billion.[559]	
Adhikari v. Kellogg Brown & Root, Inc.	2017	845 F.3d 184	Aiding and abetting forced labor; human trafficking	"Although Plaintiffs settled with Daoud, they have continued their lawsuit against KBR."[560]	

557 Press Release, *Settlement Agreed in Legal Action Against Sea Shepherd*, INST. OF CRUSTACEAN RSCH. (Aug. 23, 2016), https://www.icrwhale.org/160823ReleaseENG.html [https://perma.cc/H4WW-428U]. *See* Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc'y, 153 F. Supp. 3d 1291 (W.D. Wash. 2015).

558 Colyer, *supra* note 10; *see* Tina Bellon, *U.S. Appeals Court Revives Nestle Child Slavery Lawsuit*, REUTERS (Oct. 23, 2018), https://www.reuters.com/article/usa-court-nestle-idINKCN1MX2V6/[https://perma.cc/JA37-WHAT].

559 *ADM Sells Cocoa Business as Lawsuit on Child Slavery Continues*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING (June 5, 2015), https://investigatemidwest.org/2015/06/15/adm-sells-cocoa-business-as-lawsuit-on-child-slavery-continues/[https://perma.cc/974D-U8JE].

560 Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017).

Case Name	Year	Citation	International law claim alleged as basis for ATS jurisdiction	Settlement Details	Amount (if known)
Salim v. Mitchell	2017	268 F. Supp. 3d 1132	Torture	"In a first for a case involving CIA torture, the American Civil Liberties Union announced a settlement today in the lawsuit against the two psychologists who designed and implemented the agency's brutal program. . . . The full terms of the settlement agreement are confidential."[561]	
Aragon v. Ku	2017	277 F. Supp. 3d 1055	Forced labor	"The parties reached a confidential settlement in August."[562]	

561 *CIA Torture Psychologists Settle Lawsuit: On Eve of Trial, Psychologists Agree to Historic Settlement in ACLU Case on Behalf of Three Torture Victims*, ACLU (Aug. 17, 2017), https://www.aclu.org/press-releases/cia-torture-psychologists-settle-lawsuit [https://perma.cc/EN8P-YVV2].

562 Emma Nelson, *Owner Appeals After St. Paul Closes Double Dragon Foods, Condemns Building After Inspection*, STAR TRIBUNE (Sept. 25, 2018), https://www.startribune.com/st-paul-closes-grocery-store-condemns-building-after-inspection/494301771/ [https://perma.cc/Z494-YTH3].