JURISDICTIONAL UNCERTAINTY:
THE ALIEN TORT CLAIMS ACT AND NUCLEAR WEAPONS

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> *The very concept of universal jurisdiction is of recent vintage. The sixth edition of Black's Law Dictionary, published in 1990, does not contain even an entry for the term. The closest analogous concept listed is hostes humani generis ("enemies of the human race"). Until recently, the latter term has been applied to pirates, hijackers, and similar outlaws whose crimes were typically committed outside the territory of any state. The notion that heads of state and senior public officials should have the same standing as outlaws before the bar of justice is quite new.*[1] *– Henry Kissinger*

INTRODUCTION

On September 24, 1789, a few short months after the States ratified the Constitution, the First Congress passed the Judiciary Act of 1789.[2] While Congress vested most judicial power in the states, it created original jurisdiction in the federal courts for certain lawsuits brought by aliens.[3] In its current incarnation, the Alien Tort Statute or Alien Tort Claims Act (the "ATCA") reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only,

[1] Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS (July/August 2001).
[2] Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 885 n. 169 (March 2010).
[3] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, Harv. L. Rev. 91-92 (November 1923).

committed in violation of the law of nations or a treaty of the United States."[45]

Jurisdictional questions lie at the heart of nearly all international law disputes. Who may bring a lawsuit against whom in what court and where did the wrong occur? In United States jurisprudence, these questions remain unanswered. Plaintiffs and federal courts rarely invoked the ATCA to establish subject matter jurisdiction during its early history,[6] but a burgeoning number of lawsuits in recent decades has left the Courts of Appeals split on several issues, most notably corporate liability for torts abroad.[7] The Supreme Court tackled many of these most basic questions during the 2012 October term in *Kiobel v. Royal Dutch Petroleum Co.*, a re-argument from last term on expanded certified questions.[8] In *Kiobel*, the plaintiffs and defendant corporations are foreign citizens and the tort alleged occurred in Nigeria. The Court heard oral arguments on October 1, 2012, but has not yet rendered a decision.[9] Until the

[4] 28 U.S.C. §1350 (2012)
[5] The original version of the statute ended "all causes where an alien sues for a tort only (committed in violation of the law of nations." Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789).
[6] Geoffrey M. Sweeney, *Corporate Aiding and Abetting Under the Alien Tort Statute: A Proposal for Evaluating the Facial Plausibility of a Claim*, 56 LOYOLA L. REV. 1037, 1043 n. 26 (Winter 2010).
[7] *See, generally*, Joel Slawotsky, 40 GA. J. INT'L & COMP. LAW 175 (Fall 2011).
[8] *Kiobel v. Royal Dutch Petroleum*, Supreme Court of the United States, Docket No. 10-1491.
[9] Adam Liptak, *Justices Begin Term by Hearing Case Again*, N.Y. TIMES, Oct. 1, 2012, available at http://www.nytimes.com/2012/10/02/us/supreme-court-opens-session-with-human-rights-case.html?_r=0

decision in *Kiobel*, and perhaps even after, the reach of U.S. subject matter jurisdiction in international torts remains hazy.

Nuclear weapons pose unique questions that implicate the application of the ATCA. This paper explores what potential liability corporations, foreign government officials, military personnel, and defense contractors may have for the use, or even the threat of use, of nuclear weapons. It also looks at related statutes such as the Federal Tort Claims Act and the Foreign Sovereign Immunities Act. Innumerable thorny topics stem from prospective lawsuits involving nuclear weapons. Would corporate manufacturers and defense contractors involved in developing weapons and their constitute parts be liable if a nuclear weapon were detonated? Could foreign government officials who make the decision to detonate a bomb in a separate foreign country be sued in U.S. courts over the death of non-U.S. citizens – say Pakistani officials who use a bomb on the Indian subcontinent? Just how far is the reach of the ATCA? And given the diffuse and sometimes temporally delayed effects of nuclear weapons, how would a bomb detonated half-way across the world possibly affect cancer rates in a far-off country thirty years later? What are implications for statutes of limitations? Finally, is the mere *threat* of use of a nuclear weapon a tort? These queries propagate few satisfactory answers, but this paper will delve into the legal bramble of the nuclear weapons miasma.

Section I of this paper will explore the history of the Alien Tort Claims Act, from its enactment to its reinvigoration in 1980. Section II will discuss the ramifications that the past three decades of ATCA litigation have in the context of nuclear weapons by delving into the growing litigation that followed the landmark 1980 Second Circuit decision in *Filartiga v. Pena-Irala,* but focusing largely on the implications of the only Supreme Court case to-date regarding the ATCA, *Sosa v. Alvarez-Machain*.[10] Section II will also look briefly at the interplay among the ATCA, the Federal Tort Claims Act, and the Foreign Sovereign Immunities Act, each of which holds significance pertaining to nuclear weapons. Section III will then address the prospective effects on liability for use or threat of use of nuclear weapons of *Kiobel v. Royal Dutch Petroleum Co.*, currently pending before the Supreme Court.

I. THE HISTORY OF THE ATCA: AN AFTERTHOUGHT IN FEDERAL SUBJECT MATTER JURISDICTION

Scanty legislative history exists regarding the exact reasoning for the passage of the ATCA, but scholars have theorized that three different issues came into play. The first stemmed from the assault of François Barbè-Marbois, the French Consul General to the United States, at the hands of one his

[10] 542 U.S. 692 (2004).

countrymen.[11] A Philadelphia court found the attacker guilty, but the lack of federal options to protect diplomatic immunity bothered some of the Founding Fathers.[12] Then three years later, in a second incident involving a foreign official, New York police officers violated the diplomatic immunity of a Dutch ambassador when they performed an illegal search of his house.[13] Even though New York state law did not recognize diplomatic immunity, the mayor of New York prosecuted the officers at the behest of the Continental Congress and Secretary of State John Jay.[14] Finally, some believe the ATCA was enacted as means to allow British creditors and merchants to pursue claims that they were owed money by American citizens, which was a point of contention between the United States and Great Britain following the Revolutionary War.[15]

A combination of these incidents likely encouraged the First Congress to pass the ATCA as a means to preserve international comity and ensure that "parochial" state courts

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[11] Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 83-84(2011); *Respublica v. DeLongchamps*, 1 U.S. 111 (Court of Oyer and Terminer, at Philadelphia 1784).
[12] *See id*.

[13] Theresa Adamski, *Note: The Alien Tort Claims Act and Corporate Liability: A Threat to the United States' International Relations*, 34 FORDHAM INT'L L.J. 1502, 1508-09 (June 2011) (*citing* George P. Fletcher, Tort Liability for Human Rights Abuses, 11, (2008)).
[14] *Id*.
[15] Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 28 (Fall 1985).

did not violate the rights of non-citizens.[16] The ATCA thus provided a way to incorporate customary international law, such as diplomatic immunity, into the law of the United States.[17] The ATCA provided a means of redress in federal court for aliens who suffered a tort. But the sheer simplicity of the one sentence statute has led to uncertainty over its meaning and intended use. It also seems peculiar that the First Congress went to the trouble of passing the ATCA during their first few months in session, but that the federal courts and alien plaintiffs almost never used it. The ATCA enjoyed relative obscurity over the first two centuries after its enactment. Between 1789 and 1980, federal courts only twice establish subject matter jurisdiction using the ATCA, once in 1795 and again in 1961.[18]

On September 29, 1795, Judge Bee of the U.S. District Court for the District of South Carolina invoked the ATCA in establishing subject matter jurisdiction in a dispute over stolen slaves.[19] After Captain Bolchos captured a Spanish ship, which held slaves not owned by the ship owner, he brought the slaves to slaves South Carolina.[20] The original owner of the slaves, a Spanish citizen, hired Darrel, a British citizen, to

[16] *See* Mamolea, *supra* note 11 at 83-84.
[17] *See id*.
[18] Sweeney, *supra* note 6 at 1043 n. 26.
[19] *Bolchos v. Darrell*, Bee 74, F.Cas. 810, 810 (D.S.C. 1795).
[20] *Id*.

steal the slaves back from Bolchos and sell them.[21] A dispute ensued, and the state court in South Carolina referred the case to federal court as an admiralty case.[22] Judge Bee determined that since Darrel stole the slaves back once they were on dry land, admiralty law did not apply.[23] But Judge Bee held that the federal court did have jurisdiction over the matter under the ATCA.[24] Judge Bee found that since stealing of property is a tort, as slaves were considered at that time, jurisdiction existed under the ATCA "where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States."[25] The United States had a treaty with France regarding neutral property found on captured ships, and Judge Bee applied it to the case.[26] Thus, the first case invoking the ATCA involved rather simple facts of an alien seeking restitution for stolen "property."

One hundred sixty-six years passed before another federal court used the ATCA to establish jurisdiction, in a child-custody case rife with international intrigue. In 1961, the U.S. District Court for the District of Maryland applied the ATCA in a child custody action brought by an alien father whose

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[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 811.

former wife had brought their daughter to the United States.[27] The plaintiff father was Lebanese and served as Lebanon's ambassador to Iran at the time of the lawsuit.[28] He met and married the defendant mother in Lebanon 16 years before the lawsuit, where they married, had a daughter, and later divorced.[29] The mother first took the child to live in nearby Iraq, to which the father consented.[30] But then the mother took their child to Paris and later the United States to live, all while using false information on visas about the child, presumably to hide her whereabouts from the father.[31] Meanwhile, the father received a judgment in The Religious Court of Beirut awarding him custody.[32] The District of Maryland found it had jurisdiction under the ATCA, since "the unlawful taking or withholding of a minor child from the custody of a parent or parents entitled to custody is a tort."[33] The court then, somewhat counter-intuitively, noted the validity of the Lebanese court's custody award, but based on a court-appointed expert psychiatrist's opinion awarded custody to the mother and her new American husband.[34]

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[27] *Adbul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 860-61 (D. Md. 1961)
[28] *Id*. at 859.
[29] *Id*. at 860.
[30] *Id*.
[31] *Id*. at 860-61.
[32] *Id*. at 862.
[33] *Id*. at 862-63.
[34] *Id*. at 865-67.

After 172 years of existence, the ATCA had been used only twice to establish federal subject matter jurisdiction. Even more oddly, the two cases involved the relatively minor and obscure topics of child custody and stolen property (albeit human property under the law of the time). That all changed in 1979 when Peter Weiss of the Center for Constitutional Rights and plaintiffs Dr. Joel Filartiga and his daughter Dolly Filartiga brought a lawsuit in U.S. District Court for the Eastern District of New York against Americo Norberto Peña-Irala, the former Inspector General of police in Asunción, Paraguay.[35] The Filartigas were citizens of Paraguay, and Dr. Filartiga had long been a critic of President Alfredo Stroessner, who had ruled the country for over two decades.[36] On March 29, 1976, Peña-Irala kidnapped, tortured, and killed seventeen year-old Joelito Filartiga, Dr. Filartiga's son and Dolly's brother.[37] Pena-Irala then brought Dolly to his house to show her the body and threatened her.[38] The Filartigas alleged that this was done in response to their political opposition to the government.[39]

[35] *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980). *See also* Peter Weiss, *Should Corporations Have More Leeway to Kill than People Do?*, N.Y. TIMES, Feb. 24, 2012, available at: http://www.nytimes.com/2012/02/25/opinion/should-corporations-have-more-leeway-to-kill-than-people-do.html
[36] *Filartiga*, 630 F.2d at 878.
[37] *Id*.
[38] *Id*.
[39] *Id*.

Dr. Filartiga first filed a criminal lawsuit in Paraguay; Peña-Irala responded by hauling Filartiga's attorney to police headquarters, shackling him to a wall, and threatening to kill him.[40] At the time the Second Circuit heard the case, the criminal proceeding appeared stalled in Asunción after nearly four years.[41] In an odd twist, an employee of Peña-Irala confessed to the killing, but said he did it because he walked in on Joelito and his wife having an affair.[42] Even after the confession, authorities never brought charges against the employee.[43] These lurid facts of Latin American corruption and torture gave rise to the landmark Circuit Court decision that finally gave life to the ATCA more than two centuries after it was enacted by congress.

In their complaint[44], the plaintiffs declared U.S. subject matter jurisdiction under the ATCA and alleged a cause of action arising from:

> *wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration against Torture; the American Declaration of the Rights and Duties*

[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] While the ATCA addresses subject matter jurisdiction, the Filartigas were only able to establish *in personam* jurisdiction over Peña-Irala because he and his spouse had sold their home in Paraguay and moved to the United States in the summer of 1978. They over-stayed their visas and were actually served with the summons and complaint while awaiting deportation at the Brooklyn Navy Yard. The District Judge stayed their deportation pending the results of the civil suit. *Id*. at 879.

> *of Man; and other pertinent declarations, documents, and practices constituting the customary international law of human rights and the law of nations.*[45]

With those bold assertions, the plaintiffs gave new relevance to the ATCA and for the first time brought human rights violations abroad under the purview of U.S. federal courts.[46] Judge Nickerson of the Eastern District of New York had dismissed the case for lack of federal jurisdiction,[47] but the Second Circuit performed a far different analysis.

First, the court considered whether or not Peña-Irala had violated "the law of nations or a treaty of the United States," as required under the ATCA.[48] The court held that, "we find 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 nation."[49] The court looked to the Supreme Court's 1820 decision in *United States v. Smith*[50] for the proper sources of international law, including state practice, custom, judicial decisions, and scholarly writing.[51]

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[45] *Id*. at 879.
[46] Daniel S. DoKos, *Note: Enforcement of Internation Human Rights in the Federal Courts After Filartiga v. Peña-Irala*, 67 VA. L. REV. 1379 (October, 1981).
[47] *Filartiga*, 630 F.2d at 879.
[48] *Id*. at 880.
[49] *Id*.
[50] *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).
[51] *Filartiga*, 630 F.2d at 880.

Next, the court rendered the most important part of its opinion:

> *It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its border, and where the lex loci delecti commissi is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.*[52]

Thus was born a new route for plaintiffs to seek recompense in the U.S. judicial system. The Second Circuit remanded the case to the District Court for trial. At trial, the jury found Peña-Irala liable and rendered a verdict of compensatory and punitive damages of $10,385,364 for the plaintiffs.[53] The *Filartiga* decision ushered in a new era in federal litigation, but without answering all the complex questions that arise from international torts. The period following *Filartiga* will be explored in the next section.

II. The Proliferation of ATCA Claims after *Filartiga* and The Implications for Nuclear Weapons

Though federal courts had only applied the ATCA twice in the 201 years leading up to 1980, since that time, courts have cited to *Filartiga* in at least 256 reported decisions over the

[52] *Id*. at 885.
[53] *Filartiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

past 32 years.[54] While myriad issues have arisen in these cases, this section of the paper will explore the most disputed issues, and those which would be implicated in the context of nuclear weapons.

First, it is important to look to the only Supreme Court precedent that currently exists regarding the ATCA. The Supreme Court decided *Sosa v. Alvarez-Machain*[55] in 2004, which addresses two important questions: 1. who may be found liable for tort under the ATCA; and 2. what torts rise to the level required under the statute. The Drug Enforcement Agency (DEA) implicated Humberto Alvarez-Machain in the 1985 torture and killing of a DEA agent in Guadalaraja, Mexico.[56] A grand jury issued an indictment for Alvarez-Machain in 1990 in U.S. District Court for the Central District of California.[57] The DEA attempted to negotiate his extradition with the Mexican government, but had little luck.[58] They then decided to hire several Mexican citizens, including the petitioner, Jose Francisco Sosa, to take Alvarez-Machain from his home in Mexico and bring him to the

[54] This information was gleaned from a LexisNexis Shepard's report generated on December 4, 2012.
[55] 542 U.S. 692 (2004).
[56] *Id*. at 697.
[57] *Id*.
[58] *Id*. at 698.

United States.[59] The DEA then arrested Alvarez-Machain in Texas.[60]

His criminal case made it all the way up to the Supreme Court over whether the DEA participated in "outrageous government conduct."[61] The Court found his claims without merit and remanded the case for trial.[62] At the end of the trial, the District Court judge rendered an acquittal in favor of Alvarez-Machain before sending the case to the jury.[63] Alvarez-Machain then returned to Mexico and filed a civil case against the DEA and Sosa, claiming jurisdiction under the ATCA.[64] It is important to note that Alvarez-Machain brought his case against two very different types of defendants. The DEA is an agency of the United States government. Sosa is a natural person and citizen of Mexico. The Sosa Court drew a distinction between the applicability of the ATCA to each defendant that has significant impact in the nuclear weapons arena.

First, with respect to the DEA and its agents, Alvarez-Machain brought a cause of action based upon the Federal Tort Claims Act (the "FTCA")[65], not the ATCA. He did this because the FTCA removes sovereign immunity from the United States, its

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[59] *Id*.
[60] *Id*.
[61] *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).
[62] *Sosa*, 542 U.S. at 698.
[63] *Id*.
[64] *Id*.
[65] 21 U.S.C. §878 (2012).

departments, and its employees in tort suits, while the ATCA does not. Generally, the concept of sovereign immunity would shield the government from any liability purported under the ATCA. The FTCA, however, has several notable exceptions, including claims, "arising in a foreign country."[66] This means that the FTCA preserves the United States' sovereign immunity for torts arising in a foreign country. The Ninth Circuit had held that the exception did not apply based on the "headquarters" theory that several federal courts[67] had found in previous cases.[68] The headquarters theory says that the foreign country exception of the FTCA does not apply if the planning and execution of the tort (such as at the DEA office in California) was actually the proximate cause of the tort in another country.[69] The Supreme Court roundly rejected this notion and held that the exception for acts in a foreign country under §2680(k) is absolute.[70] "We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act of omission occurred."[71] One final important note on the

[66] 28 U.S.C. §2680(k) (2012); *Sosa* 542 U.S. at 699.
[67] *See*, *e.g.*, *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978); *Roberts v. United States*, 498 F.2d 520, 522 n.2 (9th Cir. 1974); *Sami v. United States*, 617 F.2d 755, 763 (D.C. Cir. 1979); *In re: Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 737 (C.D. Cal. 1975); *Bryson v. United States*, 463 F. Supp. 908 (E.D. Pa. 1978).
[68] *Sosa* 542 U.S. at 701-02.
[69] *Id*. at 702.
[70] *Id*. at 712.
[71] *Id*.

FTCA is that is only applies to employees who are performing within the scope of their employment.[72]

The implications of the foreign country exception to the FTCA are broad in the context of nuclear weapons. In effect, since there is no right to recovery under the ATCA due to sovereign immunity, military personal, the United States branches of the military, and the U.S. government or its employees in general would not be liable in federal court for any tort related to nuclear weapons where the injury occurs on foreign soil. Not only does mean there could be no claims in the event that the United States purposefully used a nuclear weapon, but this also means there would be no liability in the event of an accident.

By 1987, nearly half of the United States' nuclear warheads in long-range missiles were aboard submarines.[73] An accident with a nuclear warhead aboard one these submarines could cause injury to coastal towns or in the coastal waters of another nation, but the Sosa decision would protect against liability. In addition, the United States currently stores nuclear weapons in five NATO countries: Turkey, The Netherlands, Italy, Germany,

[72] 28 U.S.C. §1346(b).
[73] Richard Halloran, *Submarines Now Dominate U.S. Nuclear Forces*, N.Y. TIMES, Nov. 27, 1987, available at: http://www.nytimes.com/1987/11/27/us/submarines-now-dominate-us-nuclear-forces.html

and Belgium.[74] If a nuclear warhead were accidentally detonated in any of those countries, alien citizens would have no recourse against the parties with the biggest pockets, the United States, its military, and its personnel by way of *respondeat superior.* Obviously, this does not take into account international criminal law or the law of other nations, but any government related entity or employee would not be civilly liable in U.S. federal court.

Aside from the weapons stored in other countries, the United States stores its weapons in thirteen states at home, including in states that border Canada and Mexico.[75] The importance of this is the distinction between the location of the tort and the location of the injury as the Supreme Court explained in *Sosa*.[76] A nuclear weapon that accidentally detonated near the border with either Canada or Mexico would have far-reaching effects in those countries. Even though the detonation and the proximate cause leading up to the detonation would have occurred in U.S. territory, Canadian and Mexican citizens could not bring lawsuits under the ATCA or FTCA relating to any injuries that occurred in their countries. The *Sosa* holding absolutely precludes any of these types of actions.

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[74] Hans M. Kristensen, Federation of American Scientists, Estimated Nuclear Weapons Locations 2009, available at: https://www.fas.org/blog/ssp/2009/11/locations.php
[75] *Id*.
[76] *Sosa*, 542 U.S. at 701-02.

Sosa also has far-reaching implications – on the liability of government contractors. The amount spent on government contractors and thee percentage of the federal workforce that they represent, has increased steadily over the past several decades. Indeed, spending on federal contracts increased from $207 billion in 2000 to $400 billion in 2006.[77] By 2011, the Project on Government Oversight determined that services contracts only (pay for private employees to do government jobs) reached $320 billion.[78] These defense contractors have a hand in all aspects of the United States' nuclear weapons capability. They protect U.S. facilities, manufacture parts to make weapons, and even make the weapons and delivery vehicles themselves.[79] Though Sosa did not involve contractors, only actual DEA employees, its holding applies to all contractors as they are also covered under the FTCA.[80]

In *Boyle v. United Technologies Corp.*, the Court found that the FTCA extended both its liabilities and its protections to all government procurement contracts, as these were a vital arm

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[77] Scott Shane and Ron Nixon, *U.S. Contractors Becoming a Fourth Branch of Government*, N.Y. TIMES, Feb. 4, 2007, available at: http://www.nytimes.com/2007/02/04/world/americas/04iht-web.0204contract.4460796.html?pagewanted=all

[78] Ron Nixon, *Government Pays More on Contracts, Study Finds*, N.Y. TIMES, Sept. 12, 2011, available at: http://www.nytimes.com/2011/09/13/us/13contractor.html

[79] Tim Weiner, *Lockheed and the Future of Warfare*, N.Y. TIMES, Nov. 28, 2004, available at: http://www.nytimes.com/2004/11/28/business/yourmoney/28lock.html?pagewanted=print&position=

[80] *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988).

of the government.[81] The Court protected a private designer of a military helicopter in a products liability action by a deceased Marine's estate.[82] The Court went even further to say that the FTCA preempts any state law claim finding liability to the contrary, based on the federal interest in protecting actions by citizens against the government.[83]

The combination of the *Sosa* and *Boyle* decisions thus creates a large exemption for any person or entity related to the United States' manufacturing or use of nuclear weapons. Not only are government entities and employees protected by the FTCA foreign country exception and the ATCA's impotence against foreign sovereign immunity, but so too would all defense contractors, such as Lockheed Martin, KBR, General Electric, and their employees. One important distinction is that the ATCA might still be able to be applied if these defense contractors do nuclear weapons work for governments other than the United Statutes. But as the United States holds the vast majority of nuclear weapons in the world,[84] the law exempts a large number of potential tortfeasors in actions brought in U.S. courts.

The second part of ATCA jurisdiction in the *Sosa* decision is as against the other defendant, the alien foreign national, Sosa. Here, the Supreme Court held that the ATCA does establish

[81] *Id*.
[82] *Id*.
[83] *Id*. at 507-11.
[84] *See* Kristensen, supra note 73.

subject matter jurisdiction over natural persons. The Court comes to this conclusion quite simply, as it sees nothing that points the other direction.[85] In the realm of nuclear weapons, this implies that individual persons would be liable in tort for injuries sustained from these weapons. Oddly, since this is a tort matter, the individuals that could be held liable would likely have the least ability to pay a monetary judgment. Can one envision a terrorist who detonates a nuclear weapon to have an estate with the value substantial enough to pay damages in civil suit? Certainly not.

As a legal matter, though, this use of the ATCA has growing relevance in a world where nuclear threats come not just from great powers like the United States and Russia, but from non-state actors and terrorists.[86] In reality though, some terrorists and terrorist networks are well-funded. In the wake of 9/11, the Bush Treasury Department froze the assets of many suspected terrorist groups and even individuals thought to support terrorism.[87] These frozen assets could be used to pay ATCA money judgments against natural persons found liable for nuclear weapons related torts. The fact that sword of ATCA

[85] *Sosa*, 542 U.S. at 712-714.
[86] Kenneth C. Brill and Kenneth N. Luongo, *Opinion: Nuclear Terrorism: A Clear Danger*, N.Y. TIMES, Mar. 15, 2012, available at: http://www.nytimes.com/2012/03/16/opinion/nuclear-terrorism-a-clear-*danger*.html
[87] David E. Sanger and Joseph Kahn, Bush Freezes Assets Linked to Terror Network, N.Y. Times, Sept. 15, 2001, available at: http://www.nytimes.com/2001/09/25/international/25CAPI.html

still exists against natural person matters, even though money recovery would be unlikely in many instances.

The threat of individual acts of terrorism is not small. International law enforcement authorities have confirmed at least eighteen cases of stolen or missing fissile material capable of producing a weapon.[88] Moldovan authorities stopped one criminal syndicate from trying to sell highly enriched uranium, but failed in catching one member of the ring thought to possess at least a kilogram.[89] Geo-politics has turned from relations among nation-states to relations in the face of threats from non-state actors.[90] In this sense, the ATCA jurisdiction remains relevant. While the actual ability of non-state actors to pay compensatory and punitive damages seems unlikely, the establishment of jurisdiction over these possible perpetrators of nuclear weapons use is important.

The final part of the *Sosa* decisions holds, perhaps, the greatest importance in the nuclear weapons context. The two early ATCA claims in *Boichos* and *Abdul-Rahman Omar Adra* dealt with relatively common torts: stolen property and child custody. The Court in *Sosa*, however, found that the First Congress likely implied far more serious, and much more circumscribed,

[88] *Id*.
[89] *Id*.
[90] Jeffrey T. Checkel, *The Constructive Turn in International Relations Theory*, 50 WORLD POLITICS 324, Cambridge University Press (January 1998).

circumstances into its brief statutory construction.[91] In *Sosa*, the Court held that the relatively brief, one day detention of Alvarez-Machaim did not rise to the level of tort actionable under the ATCA.[92] The Court further held that the ATCA was merely jurisdictional in nature and did not give rise to claims in and of itself.[93]

The Court suggested four factors to weigh when considering the nature of the tort: 1. Universality of acceptance of the norm; 2. The obligatory (binding) nature of the norm; 3. Specificity; and 4. Prudential considerations such as public policy, political questions, separation of powers, and foreign relations.[94] The Court seemed to reject the mundane use of the ATCA in *Boichos* and *Abdul-Rahman Omar Adra* and require a greater violation of the laws of nations:

> *The prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms...[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.*[95]

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[91] *Sosa*, 452 U.S. at 720-23.
[92] *Id*. at 738.
[93] *Id*. at 713-14.
[94] *Id*. at 723-27.
[95] *Id*. at 725 & 732 .

This portion of *Sosa* raises the question for nuclear weapons: is the use or threat of use of nuclear weapons customary international law, a widely accepted tort among the law of nations that would make it actionable under the ATCA? Is either the use or the threat of use a violation of the law of nations?

The World Health Organization requested an advisory opinion from the International Court of Justice (the "ICJ") on the legality or threat of use of nuclear weapons.[96] The ICJ completed an exhaustive analysis of the subject, which cannot be repeated in a paper of this length, but found:

> *There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such…[but] the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.*[97]

The ICJ opinion suggests that use or threat of use does not rise to level of norm demanded by the *Sosa* court. Piracy has

[96] International Court of Justice, *Press Release: Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, General List No. 93 (1993-1996).
[97] United Nations, General Assembly 49th Session, Agenda Item 62, p. 15 *et seq*. Jan. 9, 1995, available at: http://www.undemocracy.com/A-RES-49-75.pdf

much longer been admonished and numerous long-standing treaties prohibit it.[98] The same cannot be said of nuclear weapons. Indeed, piracy is an ancient art and nuclear weapons a novel invention of the last sixty-five years. Until numerous treaties, much state practice, and indeed, customary international law establish that the threat or use nuclear weapons is a norm from which nations may not derogate, the ATCA may not cover any tort related to these weapons.

III. *KIOBEL* AND CORPORATE LIABILITY UNDER THE ATCA

Finally, any thorough study of civil liability related to nuclear weapons must look to the current case pending before the Supreme Court, *Kiobel v. Royal Dutch Petroleum Co*. In *Kiobel*, the plaintiff Nigerians brought suit against Nigerian, British, and Dutch oil companies, claiming that they aided and abetted the Nigerian government in committing atrocities that violated the law of nations.[99] The Second Circuit, the same Court of Appeals that gave rise to several decades of ATCA litigation after its decision in *Filartiga*, seemed to halt the progress of plaintiffs' cases when it ruled on September 17, 2010 that corporations were not liable under the ATCA.[100] The Second Circuit relied on the standard of tort established in *Sosa* and

[98] *Sosa*, 452 U.S. at 725.
[99] *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 117 (2d Cir. 2010).
[100] *Id*. at 149.

reasoned that, "The concept of corporate liability for violations of customary international law has not achieved universal recognition or acceptance as a norm in the relations of States with each other."[101]

The Supreme Court first heard argument of *Kiobel* in 2011.[102] The Court announced in March, 2012 that it would hear re-argument of the case with an expanded question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[103] Not only would the Court look at whether corporations could be held liable, but it would look at the location of the tort. Some commentators have suggested that the conservative Roberts Court will go so far as to rule against the constitutionality of a U.S. court having jurisdiction over foreign parties for a tort committed abroad.[104]

On October 1, 2012, the Court heard re-argument of the case.[105] The Court appeared not to tip its hand in the way it would decide. Judges of all viewpoints seemed truly interested,

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[101] *Id*.
[102] Lyle Denniston, Kiobel to Be Expanded and Reargued, SCOTUSBlog, Mar. 5, 2012, available at: http://www.scotusblog.com?p=140230
[103] *Kiobel v. Royal Dutch Petroleum, Co.*, Supreme Court of the United States, Docket No. 10-1491.
[104] Denniston, *supra* note 102.
[105] Oral argument transcript available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf

and perhaps baffled, by the complex questions that the case and broad, even universal, jurisdiction raise in the 21st Century. Not just the author of this paper who read the complete transcript of the oral argument, but also respected journalists such as Adam Liptak of the New York Times seem uncertain of the Court's plans for *Kiobel* and the future of the ATCA.[106] Given the current ideological make-up of the Court, though, it seems unlikely that *Kiobel* will yield a decision giving U.S. courts almost universal jurisdiction over torts across the globe.

The Supreme Court will likely render its decision in *Kiobel* in January. With the conservative majority on the Court, much more conservative than the Second Circuit, it seems probable that corporations will be protected from ATCA liability. If so, then few parties would be liable for atrocities committed with nuclear weapons. As described in Section II of this paper, domestic corporations that contract with the U.S. government would be shielded by the FTCA, but this says nothing of the many foreign corporations that would now be shielded if the Court limits ATCA actions against all corporations. Iranian corporations with assets in U.S. banks could not be held liable. Pakistani corporations that aided North Korea in gaining nuclear capabilities would not be liable. Indeed, an 18th century mode

[106] Adam Liptak, *Justices Begin Term by Hearing Case Again*, N.Y. TIMES, Oct. 1, 2012, available at: http://www.nytimes.com/2012/10/02/us/supreme-court-opens-session-with-human-rights-case.html

of understanding, one based on individuals and acts by natural persons, would be ascribed to modern times, an era of corporate veils and complex shields against liability. The author of this paper assumes that the Supreme Court will uphold the Second Circuit and make impotent the ATCA against any atrocities with nuclear weapons where corporations serve as the proximate cause.

CONCLUSION

The modern nuclear arsenal of the United States and those of other nuclear countries possess an immense and immeasurable capacity for destruction. Rogue nations such as Iran and North Korea continue to develop nuclear technologies at an alarming rate. And non-state actors, including terrorist organizations, continue to threaten Western powers. Within the complex gestalt of modern foreign relations, the Alien Tort Claims Act, the Federal Tort Claims Act, and the Foreign Sovereign Immunities Act shield far too many from civil liability within the U.S. court system for claims related to nuclear weapons.

The list of protected entities is vast: the United States, all government departments and personnel, contractors to the U.S. government, foreign governments and foreign officials, and likely next month after the *Kiobel* decision comes down, all corporations. The list of entities subject to liability lacking: natural persons not related to any of the protected

parties in the list above. Who would this include? It could include a lone terrorist who detonated a bomb. It could include a government contractor acting outside the scope of his authority. It could include rogue military commander who disobeyed orders and launched a nuclear warhead. But this is civil tort law. The point of tort law is to afford some measure of economic recovery to the injured to make him whole. The probably tortfeasors with money are protected under U.S. law. Only the lone wolf, from whom a plaintiff could recover little or nothing, could be found liable.

Deterrence is major theme in nuclear weapons scholarship. Deterrence, however, could be broader than the threat of the use of force. Deterrence could come to include the threat of civil liability in U.S. courts. With the vast assets of foreign nations, foreign nationals, and multi-national corporations the lie in U.S. bank accounts, the deterrent effects could be great. The law in its current state, though, provides little in terms of recompense.