A TRUCK STOP INSTEAD OF SAINT PETER'S: THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT IS NOT PERFECT, BUT IT SOLVES SOME OF THE PROBLEMS OF *SOSA* AND *KIOBEL*

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I. INTRODUCTION

After his wife became pregnant, Vannak Prum left their home in Cambodia and crossed over the border to Thailand, as thousands do each year, hoping to find work and return in a few months with enough money to pay the hospital bills.[1] Prum spent the next three years on a Thai fishing boat working twenty-hour days against his will.[2] He witnessed the beatings and murders of fellow slaves while harvesting mackerel and sardines that make up twenty percent of the American market for those fish.[3] Similar means are used in the Thai shrimp industry, the largest in the world, which relies on slave labor in the farming and harvesting of shrimp that is sold at the four largest global retailers in the world: Walmart, Carrefour, Costco, and Tesco.[4]

Shyima Hall, an Egyptian author and activist working to combat human trafficking, was sold when she was eight years old to another Egyptian family that moved to California and forced her to work for up to twenty hours a day for four years, suffering physical and verbal assaults.[5] Domestic workers in the Middle East, India, and around the world are unexpectedly thrown into this thinly veiled cycle of slavery.[6] In Paris, the "City of Light," there are thousands of household slaves, lured from North Africa by promises of a French education in return for au pair services.[7] In reality, the girls are domestic slaves, held under threat of violent beatings and sexual assault, in a state of malnutrition and poor health, to serve their "employers."[8]

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[1] Vannak Prum, *Slavery at Sea*, RADIO FREE ASIA (2011), http://www.rfa.org/english/news/special/HumanTrafficking/vannak.html; Shannon Service & Becky Palmstrom, *Confined To a Thai Fishing Boat, For Three Years*, NAT'L PUB. RADIO (June 19, 2012, 3:06 AM), http://www.npr.org/2012/06/19/155045295/confined-to-a-thai-fishing-boat-for-three-years.

[2] *See* Service & Palmstrom, *supra* note 1.

[3] *See id.*

[4] Kate Hodal, Chris Kelly & Felicity Lawrence, *Revealed: Asian Slave Labour Producing Prawns For Supermarkets in US, UK*, THE GUARDIAN, June 10, 2014, http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour.

[5] DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2014), http://www.state.gov/documents/organization/226844.pdf.

[6] *Id.* at 23, 28.

[7] KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 1–4 (3d ed. 2012).

[8] *See id.*

Brahima Male was twelve years old when he was offered work in Cote d'Ivoire.[9] Once across the border from Mali, he was sold for less than thirty U.S. dollars to a cocoa farmer.[10] The use of forced child labor in the cocoa industry of West Africa is well documented.[11] Poor Malian children are promised money and jobs but are instead sold into slavery in Cote d'Ivoire and Ghana to work without pay under the constant threat of violence in order to harvest the cocoa that provides seventy percent of the world's chocolate.[12] When the widespread use of child slaves on cocoa farms was uncovered by a Knight Ridder Newspapers investigation in 2001, the industry mounted a successful lobbying campaign to defeat proposed legislation that would require the industry to certify their products as "slave free."[13] Meanwhile, in America, children are sold the idea that uncommonly talented elves residing in an uncommonly outfitted Hollow Tree® are responsible for the production of chocolate and cookies.[14] In an advertisement "sure to melt the hearts of audiences everywhere," Nestle Toll House sounds the call to "bake the world a better place."[15]

Human trafficking and forced labor occur in many contexts around the world. In the United States, temporary workers are exploited on farms for little or no pay yet are unable to leave without money or documents, and are

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[9] Sudarsan Raghavan, *Two Boys Tell of Descent Into Slavery*, MILWAUKEE J. SENTINEL, June 25, 2001, *available at* https://web.archive.org/web/20050215094139/http://www.jsonline.com:80/bym/news/jun01/slave26062501.asp.

[10] *Id.*

[11] *See, e.g.*, Miki Mistrati & Roberto Romano, *The Dark Side of Chocolate*, TOP DOCUMENTARY FILMS (2010), http://topdocumentaryfilms.com/dark-side-chocolate/; Sudarsan Raghavan & Sumana Chatterjee, *A Taste of Slavery*, KNIGHT RIDDER NEWSPAPERS, June 24, 2001, http://web.archive.org/web/20060917014323/http://vision.ucsd.edu/~kbranson/stopchocolateslavery/atasteofslavery.html.

[12] Raghavan, *supra* note 9.

[13] Sumana Chatterjee, *Chocolate Firms Launch Fight Against 'Slave Free' Labels: Chocolate Firms Fight 'Slave Free' Effort*, PHILA. INQUIRER, Aug. 1, 2001, http://articles.philly.com/2001-08-01/news/25298857_1_cocoa-farms-chocolate-industry-child-slaves.

[14] *See generally* KEEBLER, http://www.keebler.com; The Museum of Classic Chicago Television, *Keebler Cookies – "Oh, Fudge!,"* YOUTUBE (1980), https://www.youtube.com/watch?v=oUs2lxOxpMQ.

[15] Sylvia G, *JWT & Nestle "Bake The World a Better Place" in Newest Ad For Toll House Cookies*, GREAT-ADS (Sept. 19, 2013), http://great-ads.blogspot.com/2013/09/jwt-nestle-bake-world-better-place-in.html.

often unknowingly violating the terms of their temporary work permits.[16] Workers participating in the H-2 guest worker program have complained of a wide variety of threats and coercion, including wage theft, beatings, rape, starvation, and imprisonment.[17] The number and variety of sex trafficking victims in America and around the world defy simple categorization. More than four million women and children are victims of sex trafficking, including those from less-developed parts of the world like Southeast Asia and the former Soviet Union, but also hundreds of thousands of American youth.[18] Sex trafficking is the third largest criminal enterprise in the world, behind drugs and arms dealing.[19]

Estimates of the number of people suffering as victims of human trafficking vary widely, as the illegal nature of the practice keeps authoritative data hidden.[20] In its 2012 report, the United Nations' International Labour Organization (ILO) estimated 20.9 million people are victims of human trafficking around the world; a conservative estimate that stands in stark contrast to the ILO's previous "minimum estimate" of 12.3 million people in 2005.[21] This means there are more slaves today than at any other time in human history.[22] Alarmingly, there are more slaves living today than the total number of people taken from Africa as part of the transatlantic slave trade that lasted from the sixteenth to nineteenth century.[23]

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[16] Claire Goforth, *How U.S. Guest-Worker Program Helps Keep Human Trafficking Alive*, ORLANDO WKLY., Sept. 9, 2014, http://orlandoweekly.com/news/how-u-s-guest-worker-program-helps-keep-human-trafficking-alive-1.1750167.

[17] Jessica Garrison, Ken Bensinger & Jeremy Singer-Vine, *The New American Slavery: Invited to the U.S., Foreign Workers Find a Nightmare*, BUZZFEED, July 24, 2015, http://www.buzzfeed.com/jessicagarrison/the-new-american-slavery-invited-to-the-us-foreign-workers-f#.yxy9rb12b9.

[18] *See generally* Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking,* FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN (Mar. 2011), https://leb.fbi.gov/2011/march/human-sex-trafficking (discussing the global problem as well as national statistics).

[19] U.N. Office on Drugs and Crime, An Introduction to Human Trafficking: Vulnerability, Impact and Action (2008), https://www.unodc.org/documents/human-trafficking/An_Introduction_to_Human_Trafficking_-_Background_Paper.pdf.

[20] INTERNATIONAL LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOR: RESULTS & METHODOLOGY 11 (2012), *available at* http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf.

[21] *Id.* at 11–13.

[22] FREE THE SLAVES, https://www.freetheslaves.net/page.aspx?pid=301; BALES, *supra* note 7, at 8–10.

[23] BALES, *supra* note 7, at 9.

What all of these examples have in common is the potential to have their harms redressed through civil litigation in the United States. When American citizens and American businesses benefit financially from trafficking and forced labor—here or around the world—there exists a possibility for civil relief. As one of the largest and most powerful economies in the world, it is unsurprising that much of the financial benefit from this global activity lands in the United States. However, when it does, the possibility of redress should land with it as well.

This Note will focus on the use of civil litigation in America to address human trafficking violations around the world. Specifically, this Note will address how the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)[24] provides the much needed tools to overcome some of the restraints apparent from recent decisions that limit the effectiveness of victims seeking accountability through the Alien Torts Statute (ATS).[25] Part II will examine the beginnings of civil litigation under the ATS with the *Filartiga* decision,[26] the first Supreme Court case utilizing the statute after nearly 200 years of inactivity. Part II will then discuss modern litigation under the ATS as a means of combatting human rights violations, focusing on the ways in which the ATS has been used in the past and how its scope and utility has been narrowed through recent Supreme Court decisions. Part III proposes the TVPRA, amended in significant ways in 2008, as a better path in combatting a broad array of human rights violations in light of the hurdles now apparent in litigation under the ATS. Part IV will address impediments and challenges such an approach could face. Part V will compare two recent ATS cases and determine whether the TVPRA would have been a more successful vehicle for those suits.

II. *FILARTIGA*, *SOSA* & *KIOBEL*: THE RISE & REDUCTION OF THE ATS

Under the ATS, U.S. district courts have "original jurisdiction [over] any civil action by an alien for a tort only, committed in violation of the law of

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[24] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) [hereinafter TVPRA] (codified as amended at 18 U.S.C. 1590).

[25] 28 U.S.C. § 1350 (2012). This Note uses the phrase "Alien Tort Statute" or ATS, to maintain consistency with Supreme Court usage. *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2282 (2010); Rasul v. Bush, 542 U.S. 446, 472 (2004).

[26] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

nations or a treaty of the United States."[27] The statute has been used to bring litigation seeking to broaden the scope of accountability around the world for human rights abuses, but the few U.S. Supreme Court cases interpreting the ATS have limited its applicability in important ways. This section will examine the beginnings of litigation under the ATS in modern times with an examination of the *Filartiga* decision. Next, this section will discuss the limitations of the ATS as a tool for victims of human rights abuses in light of the U.S. Supreme Court decisions in *Sosa* and *Kiobel*.[28]

A. Filartiga *and the Birth of Civil Litigation To Combat Human Rights Violations*

The modern American starting point for utilizing civil litigation as a tool to combat human rights violations is *Filartiga v. Pena-Irala*, a case in which the U.S. Court of Appeals for the Second Circuit (Second Circuit) resurrected the ATS—a statute that had lain practically dormant for nearly two centuries.[29] The ATS was enacted by the First Congress in 1789 to grant original jurisdiction to district courts over "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."[30] This brief but sweeping jurisdictional act was designed to allow foreign nationals to sue either another foreign national or a U.S. citizen. However, the ATS was only successfully invoked twice between the First Congress and the inauguration of Ronald Reagan.[31] Interpreting the "law of nations" as synonymous to customary international law, the *Filartiga* Court resurrected the ATS as a possible vehicle for addressing human rights violations around the world.[32]

In *Filartiga*, Dolly Filartiga brought suit against Americo Norberto Pena-Irala for the wrongful death of her brother, Joelito Filartiga.[33] Both citizens of Paraguay, Dolly charged Pena-Irala, the Inspector General of Police in

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[27] 28 U.S.C. § 1350.

[28] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

[29] 630 F.2d 876 (2d Cir. 1980).

[30] Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); 28 U.S.C. § 1350 (2006).

[31] *See* Bradley, *supra* note 30, at 588; Peter Jan Honigsberg, *In Search of a Forum for the Families of the Guantanamo Disappeared*, 90 DENV. U. L. REV. 433, 456 (2012).

[32] *Filartiga*, 630 F.2d at 880–83.

[33] *Id.* at 878.

Asunción, Paraguay, with kidnapping and torturing Joelito to death in 1976.[34] In 1978, Dolly moved to Washington D.C. under a visitor's visa and began seeking permanent political asylum in the United States.[35] Shortly thereafter, she learned of Pena-Irala's own relocation to Brooklyn, NY.[36] Dolly quickly contacted the Immigration and Naturalization Service and filed suit.[37] Pena-Irala was ordered deported, an order that was stayed by the district court judge.[38] However, the district court dismissed the action for lack of subject matter jurisdiction, finding the ATS did not provide federal jurisdiction, and Pena-Irala was returned to Paraguay.[39]

The *Filartiga* Court found that an act of torture by state officials clearly violated the norms of international law and, in doing so, found, "it is clear 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."[40] The Second Circuit concluded that the ATS was consistent with Article III of the Constitution because "[t]he constitutional basis for the [ATS] is the law of nations, which has always been part of the federal common law."[41] The court succinctly swatted away objections that the ATS was an improper basis for jurisdiction, stating, "[t]his is undeniably an action by an alien, for a tort only, committed in violation of the law of nations."[42]

Thus, *Filartiga* opened the door for international human rights violations to be litigated in U.S. courts. Since 1980, hundreds of suits have been brought in the United States alleging a variety of human rights violations around the world.[43]

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[34] *Id.*
[35] *Id.*
[36] *Id.* at 878–79.
[37] *Id.* at 879.
[38] *Id.*
[39] *Id.* at 880.
[40] *Id.* at 881.
[41] *Id.* at 885.
[42] *Id.* at 887.
[43] *See, e.g.*, Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1287 (11th Cir. 2009) ("cruel, degrading, and inhumane treatment," denied on forum non conveniens grounds); Hilao v. Marcos (*In re* Estate of Marcos), 25 F.3d 1467 (9th Cir. 1994) (torture, execution, and disappearance); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (torture, execution, and arbitrary detention); Abebe-Jira v. Negewo, 72 F.3d 844, 845 (11th Cir. 1996) (torture); Kadic v. Karadzic, 70 F.3d 232, 237 (2d Cir. 1995) (genocide).

B. How the ATS Has Been Blunted by U.S. Courts

The Supreme Court has chosen to limit the jurisdictional scope of the ATS on the two occasions it has reviewed the statute.[44] In *Sosa v. Alvarez-Machain*, the Court narrowed the interpretation of customary international norms, limiting the universe of potential causes of action available under the ATS.[45] In *Kiobel v. Royal Dutch Petroleum Co*., the Court restricted the jurisdictional reach of the statute, holding that the ATS was not presumptively extraterritorial.[46] However, the Court left the door slightly open on the issue of how much and what type of conduct within the United States was necessary to overcome the presumption against extraterritoriality.[47] In dicta, the Court noted additional potential restraints on the use of the ATS in both cases, including the possibility of an exhaustion of remedies requirement, susceptibility to a *forum non conveniens* challenge, and the still undecided question of whether the law of nations recognizes corporate liability—the question *Kiobel* was originally expected to answer.[48] This section examines the *Sosa* and *Kiobel* decisions in turn, with an eye toward the sharply reduced scope of cases to which the ATS now applies.

1. Sosa*: Norms of International Law*

In *Sosa,* the Court affirmed the basic nature of the ATS as "a jurisdictional statute creating no new causes of action."[49] This affirmation upheld the jurisdictional reach of the ATS to cases which are found to violate international norms, but at the same time greatly contracted its scope by

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[44] Sosa v. Alvarez-Machain, 542 U.S. 692, 737–38 (2004); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

[45] *Sosa*, 542 U.S. at 736–38.

[46] *Kiobel*, 133 S. Ct. at 1663–69.

[47] *Id.*

[48] *Sosa*, 542 U.S. at 733 n.21 (stating the Court would consider the exhaustion requirement in a more appropriate case); *Kiobel*, 133 S. Ct. at 1663 (granting certiorari to review the Second Circuit's dismissal of an ATS claim on the basis that the law of nations does not recognize corporate liability despite ultimately deciding the case on extraterritorial grounds); Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 89 (D.D.C. 2014) (Exxon failed to prove its burden of an alternative forum sufficient for the court to consider a forum non conveniens challenge); Villeda Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283, 1290 (11th Cir. 2009) (dismissal of ATS and TVPA claims on forum non conveniens grounds).

[49] *Sosa*, 542 U.S. at 724.

defining international norms as "a relatively modest set of actions" similar to the three universally agreed upon norms understood at the time of the statute's enactment in 1789.[50] The offenses cited by the Court as paradigms of eighteenth century offenses of common law were the violation of safe conducts, piracy, and the infringement of ambassador's rights.[51] The Court endorsed *The Paquete Habana* analysis of international law:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[52]

In *Sosa*, this limitation to international norms defeated the plaintiff's claim that arbitrary arrest rose to the level of violating customary international law.[53]

Later cases noted the call for restraint in applying modern international law, however, the analysis set forth in *Sosa* has been interpreted as "suggestive rather than precise."[54] Defining this standard has proven difficult.[55] In attempting to enunciate a set of standards, the Court relied on a grab bag of earlier articulations that the limits of the ATS could be defined within "a handful of heinous actions—each of which violates definable, universal and obligatory norms";[56] "[a]ctionable violations of international

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[50] *Id.* at 720.

[51] *Id.* at 724–25, 732 ("[F]ederal courts should not recognize 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.").

[52] *Id.* at 734.

[53] *Id.* at 695.

[54] Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1019 (9th Cir. 2014) (noting courts must exercise restraint in applying contemporary international law in an ATS case); Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1016 (7th Cir. 2011) ("The Court's effort at definition illustrates rather than solves the problems of notice and legitimacy and is best understood as the statement of a mood—and the mood is one of caution.").

[55] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., dissenting) ("Recognizing that Congress enacted the ATS to permit recovery of damages from pirates and others who violated basic international law norms as understood in 1789, *Sosa* essentially leads today's judges to ask: Who are today's pirates?").

[56] *Sosa*, 542 U.S. at 732–33 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984)) (internal quotation marks omitted).

law must be of a norm that is specific, universal, and obligatory";[57] "[a]nd the determination of whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[58] Later cases have cited the "specific, universal, and obligatory" language as a workable definition and attempted to cite further authoritative sources of international law to determine whether the standard is met.[59]

Although an arbitrary arrest—as in *Sosa*—is now clearly not considered a customary norm of international law, suits alleging more obvious violations of human rights have continued.[60] *Sosa* limited the possible causes of action available to a plaintiff and called on courts to consider the potential flood of litigants to federal courts without such limitations.[61] While this limitation shrinks the scope of potential future litigation, many human trafficking violations such as forced labor and sex trafficking remain within customary international norms.[62]

2. Kiobel*: "Touch and Concern"*

In 2013, the U.S. Supreme Court struck a near fatal blow to the use of the ATS to address human rights violations around the world. In *Kiobel*, Nigerian nationals residing in the United States sued Dutch, British, and Nigerian corporations under the ATS for aiding and abetting the Nigerian government in violations of the law of nations.[63] The unanimous decision in *Kiobel* answered the question of whether the ATS presumptively applied extraterritorially—it does not.[64] However, by not reaching the merits, *Kiobel*

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[57] *Id.* at 732.

[58] *Id.* at 732–33 (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), and *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)) (internal quotation marks omitted).

[59] *Nestle*, 766 F.3d at 1019 (citing In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994)).

[60] *Id.* at 1022; Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 90 (D.D.C. 2014).

[61] *Sosa*, 542 U.S. at 732–33.

[62] *Id.* at 732.

[63] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1660 (2013).

[64] *Id.*

failed to provide a clear rule from the Court as to whether the ATS may be applied to corporations as well as states.[65]

This ruling essentially precludes all claims a victim of human trafficking or forced labor may have against a non-U.S. corporation. The *Kiobel* ruling left open the possibility that a claim could "touch and concern" the United States with "sufficient force to displace the presumption against extraterritorial application," but noted that the amount of force necessary must be greater than "mere corporate presence."[66] Thus, alien suits against foreign corporations would most likely be impossible to maintain against corporations lacking substantial ties to the United States that implicate the specific claims in question.

Commentators are divided on the impact of *Kiobel* on the future of ATS litigation.[67] From a practical perspective, it is difficult to be optimistic about the scope of ATS litigation post-*Kiobel*, even if the issue of corporate liability remains undecided. While it is true that there is still room for litigation of territorial violations of international law under the ATS, in the context of human trafficking in corporate supply chains and many forced labor claims, the most egregious and widespread violations of human trafficking norms occur beyond the territory of the United States. Few corporations large enough to have major international activities routinely implement workplace conditions within the United States that violate international norms because of the great body of existing domestic legislation and case law aimed at protecting workers.[68] What *Kiobel*

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[65] *Id.* at 1663. The Second Circuit initially dismissed the complaint in *Kiobel* on the reasoning that the law of nations does not recognize corporate liability, however, this issue was ultimately not reached as the Court decided the case on extraterritorial grounds. *Id*.

[66] *Id.* at 1669. In a concurring opinion, Justice Breyer noted that the corporations were traded on the New York Stock Exchange but "[t]heir only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors." *Id.* at 1677 (Breyer, J., concurring).

[67] *See* Matteo M. Winkler, *What Remains of the Alien Tort Statute After Kiobel?*, 39 N.C. J. INT'L L. & COM. REG. 171, 172–73 (2013) (finding "not much to fear" in a post-Kiobel landscape because it only eliminates suits against foreign defendants for foreign conduct and leaves the issue of corporate liability unsettled while noting former U.N. Secretary General's Special Representative for Business and Human Rights John G. Ruggie's prediction that "there would be little if anything left of the ATS" if the court found for the defendants, as it did).

[68] *See, e.g.*, Occupational Safety and Health Act, 29 U.S.C. §§ 651–678; Minimum Wage 29 U.S.C. §§ 201–219. *But see* Ruiz v. Fernandez, 949 F. Supp. 2d 1055, 1076 (E.D. Wash. 2013) (migrant workers in the United States); Ramos-Madrigal v. Mendiola Forestry Serv.,

encourages is the further distancing of U.S. corporations between their activities abroad and their corporate headquarters in America by decreasing oversight and increasing the layers of subsidiary and supplier separation. This perversely incentivizes corporate willful blindness, which could be accomplished by the home office concerning itself only with dictating prices and allowing foreign suppliers to concern themselves with the means necessary to achieve the agreed-upon price point.[69]

However, as noted above, the touch and concern test has left the door of opportunity partially open for litigants who are able to state a claim with sufficient plausibility that conduct in the United States substantially relates to their ATS claim. Circuit courts are now grappling with the meaning of the touch and concern test, and four circuit courts have addressed the issue thus far.[70] The Eleventh and Second Circuits are in agreement that corporate citizenship—a greater connection than mere presence—is not enough to overcome the presumption against extraterritoriality under the ATS.[71] The types of additional facts sufficient to overcome the presumption against extraterrioriality have only begun to be discussed at the circuit level.

In *Al Shimari*, the Fourth Circuit found the presumption against extraterritoriality was displaced in a suit alleging acts of torture at the Abu Ghraib prison in Iraq.[72] The court found substantial connections between the United States and the unlawful conduct because the torture was committed by U.S. citizens employed by a U.S. corporation, pursuant to a contract with

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LLC, 799 F. Supp. 2d 958, 960 (W.D. Ark. 2011) (migrant workers); David v. Signal Int'l, LLC, No. CIV.A. 08-1220, 2014 WL 5489359, at *1 (E.D. La. Aug. 13, 2014) (temporary construction workers post-Katrina); Sulastri v. Halsey, No. CV 12-3538 (JS)(ARL), 2014 WL 4904718, at *1 (E.D.N.Y. Aug. 21, 2014), *report and recommendation adopted by*, No. 12-CV-3538 (JS)(ARL), 2014 WL 4904527 (E.D.N.Y. Sept. 30, 2014) (worker recruited from Indonesia to work in couple's basement shoe company).

[69] Raghavan & Chatterjee, *supra* note 11; Hodal, Kelley & Lawrence, *supra* note 4. This is essentially what plaintiffs and nationals in the affected countries are now arguing, that the only way to provide the products—fish meal or chocolate—at the dictated prices is to continue the practice of forced labor. In the case of the Thai shrimping industry, as more Thai citizens enter the middle class, less are amenable to the conditions of the fishing boats and the boat captains are faced with a labor shortfall which they fill with slave labor to meet the quantity and price demands of the current market. Hodal, Kelley & Lawrence, *supra* note 4.

[70] Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 94–95 (D.D.C. 2014); Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520 (4th Cir. 2014); Balintulo v. Daimler AG, 727 F.3d 174, 189–90 (2d Cir. 2013); Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014); Mastafa v. Chevron Corp., 770 F.3d 170, 189 (2d Cir. 2014).

[71] *Balintulo*, 727 F.3d at 189; *Cardona*, 760 F.3d at 1189.

[72] *Al Shimari*, 758 F.3d at 520.

the U.S. government at a U.S. military facility.[73] The D.C. Circuit cited *Al Shimari* favorably, agreeing that U.S. corporate citizenship by itself was not enough, but "when plaintiffs allege U.S. based conduct itself constituting a violation of the ATS" then the presumption against extraterritoriality is overcome.[74] Thus, the touch and concern test is met in the D.C. and Fourth Circuits when there is relevant conduct committed in the United States that indicates "knowledge and encouragement of international law violations abroad."[75]

In *Mastafa v. Chevron Corp.*, the Second Circuit found the presumption against extraterritoriality overcome through the touch and concern test in a case that alleged the U.S. oil company and French bank maintained accounts and made payments routed through U.S. accounts that transmitted kickbacks to Saddam Hussein's regime.[76] Still, this is a much more difficult standard for plaintiffs to meet, even though courts have been accommodating in allowing plaintiffs to amend their complaints in light of the *Kiobel* ruling.[77]

III. HOW THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT (2008) OVERCOMES THE LIMITATIONS OF THE ATS

The TVPRA, though open to criticism on a number of grounds, addresses many of the specific shortcomings exposed in recent litigation under the ATS.[78] The 2008 amendments expressly gave the act extraterritorial jurisdiction.[79] The amended act created a civil claim, in addition to the original criminal liability, against anyone who "knowingly benefits" from a venture which the defendant "knew or should have known" included acts which violate the TVPRA.[80] The causes of action under the TVPRA are specifically defined, and include a wide array of potential activity that violates human rights around the world.[81]

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[73] *Id.* at 528–29.
[74] *Exxon*, 69 F. Supp. 3d at 95.
[75] *Id.*
[76] Mastafa v. Chevron Corp., 770 F.3d 170, 189–90 (2d Cir. 2014).
[77] *Exxon*, 69 F. Supp. 3d at 96.
[78] 18 U.S.C. §§ 1589–1596.
[79] *Id.* § 1596.
[80] *Id.* § 1595.
[81] *Id.* § 1589.

A. Express Extraterritoriality

As an initial matter, the TVPRA explicitly became extraterritorial in jurisdiction through the 2008 amendments. The only remaining limitation on jurisdiction is that an alleged offender must be either a U.S. national, a permanent resident alien, or at least present in the United States.[82] This amendment has been interpreted as a congressional response to decisions such as *Roe v. Bridgestone*, where the trial court dismissed civil lawsuits alleging violations in Liberia, stating that absent a clear congressional intent, legislation "is meant to apply only within the territorial jurisdiction of the United States."[83]

At least one U.S. District Court has found a limitation on the extraterritorial jurisdiction of the TVPRA.[84] Finding the creation of jurisdiction a substantive rather than procedural rule (in contrast to a transfer of existing jurisdiction) the U.S District Court for the Southern District of Texas held the presumption against extraterritorial jurisdiction applied to the TVPRA.[85] Thus, the amendment granting extraterritorial jurisdiction was not given retroactive effect.[86] Should this interpretation of § 1596 stand, the practical effect would be to limit the reach of the statute's jurisdiction to extraterritorial action occurring after 2008.

B. Limitations of Sosa *to Claims that Violate International Norms*

The causes of action under the TVPRA are limited to claims defined as sex trafficking and forced labor.[87] However, these definitions are intentionally broad and include many types of mistreatment and coercion that go beyond the limited causes of action under the ATS.[88] In the criminal

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[82] 18 U.S.C. § 1596(a) (2008).

[83] Kathleen Kim, *The Trafficked Worker As Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 298–99 (2009); John Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007).

[84] Adhikari v. Daoud & Partners, 994 F. Supp. 2d 831 (S.D. Tex. 2014).

[85] *Id.* at 839.

[86] *Id.* at 840. *See also* Cruz v. Maypa, 981 F. Supp. 2d 485, 488 (E.D. Va. 2013) (finding the TVPRA's ten-year statute of limitations, added in 2008, also does not apply retroactively). *But see* Camayo v. John Peroulis & Sons Sheep, Inc., No. 10-CV-00772-MSK-MJW, 2013 WL 3927677, at *2 (D. Colo. July 30, 2013) (applying the ten-year statute of limitations retroactively as a new procedural rule).

[87] 18 U.S.C. §§ 1589, 1591 (2008).

[88] *Id.* § 1589.

context, defendants have consistently urged courts to construe the elements of the TVPRA narrowly; however, courts have instead consistently opted for broader interpretations of the statute.[89] A look at the interlocking definitions of some of the TVPRA's key terms shows that the actions Congress intended to capture with the TVPRA are potentially broader than critics of the act have previously indicated. For example, "severe forms of trafficking in persons" is defined by the TVPRA as:

> (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
> (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.[90]

The TVPRA of 2008 further defined forced labor as occurring:

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
> (2) by means of serious harm or threats of serious harm to that person or another person;
> (3) by means of the abuse or threatened abuse of law or legal process; or
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that

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[89] Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1267–68 (2011); United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011) (noting the "increasingly subtle" means used by modern traffickers and the broad definition of "harm").

[90] 22 U.S.C. § 7102 (2013).

> person or another person would suffer serious harm or physical restraint.[91]

Finally, the legislature defined "serious harm" as

> [A]ny harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.[92]

Due to the expanded scope of liability in the TVPRA to anyone who knowingly benefits from the above violations, the universe of potential defendants was increased beyond primary tortfeasors and even beyond those aiding and abetting a violation of these sections. Courts have found that threats of deportation, withholding of documents, intentional manipulation, and indebtedness to an employer that makes escape unreasonably difficult, are all allegations that may constitute "serious harm" under the statute.[93]

The addition of the "serious harm" definition in 2008 is significant to the TVPRA's potential causes of action. The definition inserts a subjective element in the ostensibly objective standard—finding serious harm to be any physical or nonphysical harm "sufficiently serious . . . to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor" to avoid the harm.[94] This is a much wider net than the "force, fraud, or coercion" limitations of the original act and considers "all the surrounding circumstances" from the perspective of a similarly situated victim.[95] In the criminal context, serious harm was found to include an employer's threat to a live-in housekeeper of owing the employer $8,000 should the housekeeper leave her job.[96] The inclusion of

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[91] 18 U.S.C. § 1589 (2008).

[92] *Id.*

[93] Franco v. Diaz, 51 F. Supp. 3d 235, 246 (E.D.N.Y. 2014) (deportation); Ruiz v. Fernandez, 949 F. Supp. 2d 1055, 1076–77 (E.D. Wash. 2013) (documents); Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd., 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011) (intentional manipulation and indebtedness).

[94] 18 U.S.C. § 1589(c)(2) (2008).

[95] United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011).

[96] *Id.* at 1162.

psychological harm in the definition of serious harm could incorporate a number of instances in which threats were used to induce a person to conduct "labor or services" (the meaning of which is discussed below), and should be capable of capturing causes of action that go far beyond international norms to include unfair, manipulative, or abusive work practices around the world.[97]

C. The Plain Meaning of the TVPRA Includes Corporations

Kiobel left undecided whether the ATS applies to corporations.[98] There is, however, no such ambiguity in the TVPRA. The 2008 amendments broadened the scope of the TVPRA to include a cause of action against "[w]hoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in" forced labor or sex trafficking as defined in the act.[99] For purposes of § 1591, the TVPRA further defines "venture" as "any group of two or more individuals associated in fact, whether or not a legal entity."[100] While § 1591 is limited specifically to "sex trafficking of children or by force, fraud, or coercion," it would be unexceptional to infer that courts would use this definition—as some courts have[101]—throughout the statute when applying the "usual presumption that the same words repeated in different parts of the same statute have the same meaning."[102] Whether those organizations are of an informal nature or of a legal nature as in the case of corporations,[103] the ordinary meaning of the language specifically includes individuals and groups.

In recent years, district court cases from around the country have routinely allowed claims to be alleged against companies and corporations of various types since the amendments were enacted. In *Panwar v. Access Therapies, Inc.*, a foreign national was found to have properly stated a claim

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[97] Kiwanuka v. Bakilana, 844 F. Supp. 2d 107, 114 (D.D.C. 2012) (finding yelling and threats of deportation sufficient psychological harms).

[98] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663.

[99] 18 U.S.C. § 1595(a) (2008).

[100] *Id.* § 1591(e)(5).

[101] La. Mun. Police Emps. Ret. Sys. v. Hershey Co., No. CA 7996-ML, 2013 WL 6120439, at *5 (Del. Ch. Nov. 8, 2013).

[102] Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 584 (2007); Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932).

[103] 18 U.S.C. § 1591(e)(5) (2008).

under the TVPRA for violations by an Indiana corporation for failure to pay, coercion, and threats of financial harm.[104] In *Nuñag-Tanedo v. East Baton Rouge Parish School Board*, Filipino nationals alleged a claim against a teacher-recruitment firm that threatened financial consequences and deportation.[105] The defendants in *Sulastri v. Halsey* included a married couple and their corporation, which used an Indonesian staffing company to find labor for the corporation.[106] Similarly, the plaintiffs in *David v. Signal International, LLC* successfully alleged under the TVPRA threats of serious financial harm by the defendant limited liability corporation.[107] Thus far, in recent cases, many of which have only reached preliminary rulings on summary judgment motions, none of the defendant corporations have asserted that the TVPRA does not apply to corporations. The plain language of the statute supports this interpretation.

IV. POTENTIAL IMPEDIMENTS WITHIN THE TVPRA

The most significant shortcoming of the TVPRA in addressing broad human rights violations in the place of the ATS is the likely exclusion of much noneconomic activity previously thought actionable under the ATS. Implicit support for military and paramilitary activity or acts of otherwise indiscriminate killing likely would not satisfy the purposeful coercion aspect of the TVPRA discussed below. However, even within the wide scope of human trafficking captured by the statute, the TVPRA has been criticized for not going as far as other international measures.[108]

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[104] Panwar v. Access Therapies, Inc., 975 F. Supp. 2d 948, 957–58 (S.D. Ind. 2013), *reconsideration denied*, No. 1:12-CV-00619-TWP-TAB, 2014 WL 2882914 (S.D. Ind. June 25, 2014).

[105] Nuñag-Tanedo v. E. Baton Rouge Parish Sch. Bd., 790 F. Supp. 2d 1134, 1138–39 (C.D. Cal. 2011).

[106] Sulastri v. Halsey, No. CV 12-3538 (JS)(ARL), 2014 WL 4904718, at *1 (E.D.N.Y. Aug. 21, 2014), *report and recommendation adopted by*, No. 12-CV-3538 (JS)(ARL), 2014 WL 4904527 (E.D.N.Y. Sept. 30, 2014).

[107] David v. Signal Int'l, LLC, No. CIV. A. 08-1220, 2014 WL 5489359, at *5 (E.D. La. Aug. 13, 2014).

[108] Mattar, *supra* note 89, at 1294–96.

A. "Severe" Forms of Human Trafficking and the Palermo Protocol

The Trafficking Victims Protection Act was originally passed in 2000 as similar statutory measures were being passed around the world.[109] The statute has been viewed as an implementation of the U.N. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), which required the adoption of specific anti-trafficking statutes by States.[110] Though U.S. courts have interpreted the TVPRA's prohibition on forced labor more broadly than defendants have urged, the Act's statutory definition of "severe forms of human trafficking" has been criticized as being narrower than the Palermo Protocol.[111] The TVPRA's requirement of proving force, fraud, or coercion is not necessary under the Palermo Protocol, which further defines trafficking to include "the abuse of power or of a position of vulnerability" and states that consent expressed by a person in such a vulnerable condition is irrelevant.[112] Conversely, the TVPRA has been criticized as leaving in place the idea that a trafficked person would remain able to consent up to the point of severe force or coercion.[113] Thus, while the TVPRA was a landmark in creating a comprehensive statutory regime for prosecuting human trafficking violations, the Act could have further expanded the statute's reach beyond "severe" forms of human trafficking. However, in light of the broad interpretation of the Act's "coercion" and "serious harm" definitions added in 2008, as well as the inclusion in the amendments of "threats of force" as a severe form of trafficking, the functionality of the TVPRA is such that a

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[109] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 18, 22, 27 & 42 U.S.C.); Mattar, *supra* note 89, at 1294.

[110] Mattar, *supra* note 89, at 1294.

[111] *Id.* at 1295; 22 U.S.C. § 7102.

[112] United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing, the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/Res/55/25, Annex II (Dec. 25, 2003), art. 3(a), 3(b); Karin Dryhurst, *Liability Up the Supply Chain: Corporate Accountability for Labor Trafficking*, 45 N.Y.U. J. INT'L L. & POL. 641, 645–46 (2013).

[113] Jane Kim, Note, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443, 492 (2011).

large portion of the targeted behaviors and violations are captured in its statutory net.[114]

B. The "Knowing" Standard

In an age of complex global supply chains, one of the most practical difficulties of alleging a violation of the TVPRA is proving the knowledge standard. The TVPRA allows for civil liability against "whoever knowingly benefits" from a venture which has engaged in forced labor if those parties were in "knowing or reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services" in violation of the TVPRA.[115] Again, in terms of the modern global supply chain, it is unlikely that major corporate interests would have knowingly and directly engaged in human trafficking.[116] However, it remains unknown precisely how much involvement with a company's suppliers would be necessary to prove a reckless disregard standard.[117] Since the civil cause of action under the TVPRA was established, there have been a distressingly low number of cases brought under the statute; and thus, a lack of case law that has reached the merits from which to draw conclusions.[118]

Some criteria have been set forth by commentators for determining whether a corporation knew or should have known about trafficking violations by suppliers. These include: the terms of the labor contractor agreement, the reasons behind a company externalizing part of its labor force in the first place, and whether the company had any reasonable notice of possible labor trafficking violations.[119] While allowing for greater

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[114] Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 423 (2011).

[115] 18 U.S.C. § 1589(b), (d) (2008).

[116] *See generally* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1025 (9th Cir. 2014) ("This is not to say that the purpose standard is satisfied merely because the defendants intended to profit by doing business in the Ivory Coast. Doing business with child slave owners, however morally reprehensible that may be, does not by itself demonstrate a purpose to support child slavery."); Doe v. Exxon Mobil Corp., 69 F. Supp. 3d 75, 97 (D.D.C. 2014) (allowing plaintiffs an opportunity to amend pleadings in light of *Kiobel* to state a clearer claim of liability as to Exxon).

[117] Dryhurst, *supra* note 112, at 661–62.

[118] *Id.* at 672–73; Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655 (2007).

[119] Dryhurst, *supra* note 112, at 662.

accountability, there is debate as to whether such knowing standards will actually encourage more responsive human trafficking prevention measures or whether such liability rules will lead to less monitoring activity under the theory that the less a company monitors its supply chain, the less the company could be shown to know, decreasing the company's potential liability.[120]

Similar to the ATS pleading issues discussed above, plaintiffs face significant challenges in pleading factual allegations with sufficient specificity to state a claim against a corporation alleged to have only constructive knowledge of a violation under the TVPRA. Courts have found non-specific allegations attributing knowledge to companies who used recruiting companies to hire plaintiffs insufficient to state a claim.[121]

C. The Limitations of "Coercion"

As discussed above, the TVPRA does not extend as far as the Palermo Protocol in the activity it is defined as capturing. Another example of the limitations of the TVPRA is in its definition of "coercion" as required to constitute an actionable claim. It is unclear, and probably unlikely, that the TVPRA captures much noneconomic political or military activity. The TVPRA defines "coercion" as:

> (A) threats of serious harm or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process.[122]

Under the TVPRA, "severe forms of trafficking in persons" includes coercion as an actionable element of the "recruitment, harboring,

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[120] *Id.* at 663.

[121] Kelsey v. Goldstar Estate Buyers Corp., No. 3:13-CV-00354-HU, 2014 WL 1155253, at *6 (D. Or. Mar. 21, 2014) ("Whether it is ultimately sufficient to state a claim, it will only be so if sufficient factual allegations are made of the actual exercise of force, the threats made of the potential use of force, the physical restraints used or threatened, and what serious harm actually befell Plaintiffs or was threatened in sufficient detail to demonstrate a violation of the statutes relied upon.").

[122] 22 U.S.C. § 7102 (2013).

transportation, provision, or obtaining of a person for labor or services."[123] Thus, if a corporation or organization engages in coercion in the pursuit of obtaining "labor or services," then a claim could be applicable against the defendants under the TVPRA.

The interpretation of "labor or services" has received some analysis in criminal cases brought under the TVPRA.[124] The U.S. District Court for the Eastern District of New York interpreted "labor or services" broadly, relying on the ordinary meaning of the words; an approach upheld by the Second Circuit.[125] "The ordinary meaning of the term labor is an 'expenditure of physical or mental effort especially when fatiguing, difficult, or compulsory. The term 'services,' is defined as 'useful labor that does not produce a tangible commodity.' "[126] Under this definition, "labor or services" ordinarily means a useful expenditure of physical or mental effort that does not produce a commodity. This definition could potentially encompass noneconomic activity such as torture or the arbitrary arrest in *Sosa* if the activity was done for the purpose of producing a desired outcome. For example, obtaining a confession, affecting political behavior, or otherwise changing a person's anticipated affirmative behavior to an alternate course that is beneficial to the offending party could arguably suffice.

Using this admittedly broad understanding of labor and services brought about by coercion could capture some portion of noneconomic activity no longer actionable under the ATS. However, this ordinary understanding of labor and services does not easily apply to political or other behavior that essentially amounts to inaction. Political acts such as imprisonment to silence dissent or to punish prior transgressions do not easily fit under the ordinary meaning of "services."[127]

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[123] *Id.*

[124] Mattar, *supra* note 89, at 1267.

[125] United States v. Marcus, 487 F. Supp. 2d 289, 300 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97 (2d Cir. 2008), *rev'd*, 560 U.S. 258 (2010), *and aff'd in part*, *vacated in part, remanded*, 628 F.3d 36 (2d Cir. 2010).

[126] *Marcus*, 487 F. Supp. 2d at 300.

[127] There is an argument that obtaining a person or group's silence and agreement to refrain from dissent is certainly a beneficial service, especially if the behavior was ongoing prior to the torture and stopped or encouraged to be stopped by the torture. Proving the absence of a behavior as a service would be an uphill climb for any plaintiff without clear evidence of the prior behavior the torturer wished to eliminate or alter.

D. Constitutional Challenges

The TVPRA has been challenged on a number of constitutional claims alleging overreach of the Commerce Clause, void for vagueness, and Ex Post Facto grounds.[128] As discussed above, courts have generally concluded that the words of the statute are to be given their ordinary or defined meanings, defeating most claims of vagueness within the sections of the TVPRA.[129] Similarly, claims of congressional overreach under the Commerce Clause have failed.[130] Many cases of forced labor and sex trafficking involve an international element of moving non-citizens across borders, clearly within the scope of the Foreign Commerce Clause's enumerated grant of authority. The Eleventh Circuit found the TVPRA to be part of a "comprehensive regulatory scheme" and that activity such as sex trafficking and forced labor has an "aggregate economic impact on interstate and foreign commerce" justified under rational basis review.[131]

However, the TVPRA has been found to violate the Ex Post Facto Clause of the Constitution.[132] Courts have consistently held that conduct from before the enactment of the TVPRA cannot be the basis of a later claim, though ongoing conduct begun before the statute's enactment and continued thereafter does subject defendants to potential liability under the act.[133] Thus, even though the TVPRA has a ten-year statute of limitations,[134] the alleged relevant conduct must have occurred after both the statute was enacted and after 2008 to take advantage of the plaintiff-friendly amendments such as extraterritorial jurisdiction, and the addition of those who knowingly benefit from forced labor as possible defendants.

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[128] Mattar, *supra* note 89, at 1275.
[129] *Id.* at 1281–82.
[130] *Id.* at 1277.
[131] United States v. Evans, 476 F.3d 1176, 1179 (11th Cir. 2007).
[132] United States v. Marcus, 538 F.3d 97, 98 (2d Cir. 2008), *rev'd*, 560 U.S. 258 (2010); Mattar, *supra* note 89, at 1275.
[133] United States v. Marcus, 560 U.S. 258, 264 (2010) ("[I]f the jury, which was not instructed about the TVPA's enactment date, erroneously convicted Marcus based exclusively on noncriminal, preenactment conduct, Marcus would have a valid due process claim."); Adhikari v. Daoud & Partners, 994 F. Supp. 2d 831, 840 (S.D. Tex. 2014) (finding the addition of extraterritorial jurisdiction to the TVPRA in 2008 was substantive and not procedural and, thus, cannot be applied retroactively); United States v. Jackson, 480 F.3d 1014, 1024 (9th Cir. 2007) ("[A]bhorrent conduct does not give us license to ignore the elements of the criminal statutes that Congress has established.").
[134] 18 U.S.C. § 1595 (2008).

E. Diplomatic Immunity

The TVPRA does not allow for a cause of action against the conduct of foreign diplomats in the United States, the most common infraction being that of domestic servitude.[135] The U.S. District Court for the District of Columbia noted, "the TVP[R]A does not override diplomatic immunity. First, the TVP[R]A is silent as to whether it limits the immunity of diplomats, and courts should not read a statute to modify the United States' treaty obligations in the absence of a clear statement from Congress."[136]

Long-standing interpretive doctrine supports the idea that legislation should not be interpreted to "violate the law of nations or an international agreement to which the United States is a party."[137] Though the TVPRA does not overcome diplomatic immunity as a remedial matter, the 2008 amendments created the ability of the Secretary of State to suspend the issuance of A-3 or G-5 visas to those seeking diplomatic work, "if the Secretary determines that there is credible evidence that 1 or more employees of such mission or international organization have abused or exploited 1 or more nonimmigrants holding an A-3 visa or a G-5 visa, and that the diplomatic mission or international organization tolerated such actions."[138]

Additionally, at least one district court has ruled that former diplomats enjoy residual immunity only for "official acts" and found claims of trafficking and forced labor to be private, not official acts, and thus subject to the court's jurisdiction.[139] While not addressing the issue of human rights violations by diplomats as strongly as it could, the TVPRA does provide the potential to seek out and address trafficking issues on the front end should such potential violations become apparent.

V. CASE STUDIES: ATS V. TVPRA

The biggest barrier to amending pleadings alleging a violation of the ATS to include a TVPRA claim is the possibility that the 2008 amendments do not

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[135] Mattar, *supra* note 89, at 1287–88.

[136] Sabbithi v. Al Saleh, 605 F. Supp. 2d 122, 130 (D.D.C. 2009).

[137] Elizabeth Grant, Comment, *Ignoring the Technicality's Temptation: Interpreting the Citizenship of A Foreign Official Under the Foreign Corrupt Practices Act*, 2 AM. U. BUS. L. REV. 389, 406 (2013) (describing the "Charming Betsy" canon).

[138] 8 U.S.C. § 1375c (2008).

[139] Baoanan v. Baja, 627 F. Supp. 2d 155, 170 (S.D.N.Y. 2009).

apply retroactively. For that reason, though the facts of some cases seem better suited to the TVPRA, the statute would not automatically reach action prior to 2008.[140] However, a look into the reasons why some cases were dismissed under the ATS and an inquiry into how the TVPRA would have been applied under similar circumstances is still instructive for future actions.

This section will explore two types of representative cases brought under the ATS, one economic and one non-economic. Though arguably any action taken by a corporation is taken for an economic purpose, it is necessary to separate the activities of labor, including sex trafficking, from activities of a political nature that companies may take for security purposes. As discussed, actions beyond sex trafficking captured by the TVPRA likely must be those taken in the form of traditional labor and services. Such traditional labor and services are referred to here as economic activity. Non-economic activity, as used here, is activity of a political or military nature, such as killing or torture. This non-economic activity is likely not captured within the TVPRA. This section will compare two cases dismissed under the ATS in order to examine how the TVPRA could potentially deal with cases of an economic and non-economic nature.

A. Economic Activity: Doe I v. Nestle USA, Inc.

There have been few successful claims against corporations in utilizing the aiding and abetting theory of liability under the ATS.[141] Prior to *Kiobel*, these claims could be brought against corporations for human rights violations in their international supply chain, even if the claims were rarely successful.[142] The theory, however, presented a difficult standard to meet. Plaintiffs were required to prove the corporation's purposeful intent "to engage in conduct that it knew would facilitate or cause serious human rights violations."[143] To overcome the presumption against extraterritoriality in an

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[140] It is important to note that only one district court has thus far found the TVPRA's grant of extraterritorial jurisdiction to be non-retroactive. *See* Adhikari v. Daoud & Partners, 994 F. Supp. 2d 831, 840 (S.D. Tex. 2014) (finding the addition of extraterritorial jurisdiction to the TVPRA in 2008 was substantive and not procedural and thus cannot be applied retroactively).

[141] Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1055–65 (2013).

[142] *Id.* at 1056.

[143] *Id.* at 1057.

aiding and abetting claim under the ATS, courts require this showing of purposeful human rights abuses by corporations, as opposed to only knowledge of the activity.[144] In one case, the court stated that the defendants were alleged to have "acted *purposefully* in violating [an international agreement], but merely *knowingly* in aiding and abetting the underlying violations of the law of nations."[145]

In *Doe I v. Nestle USA, Inc.*, three former child slaves of the cocoa industry in Cote d'Ivoire argued an aiding and abetting child slavery theory under the ATS against Nestle USA (Nestle), Cargill Incorporated Company, and Cargill Cocoa.[146] In addition to the well-known human rights violations related to the cocoa trade in West Africa, the plaintiffs alleged the three corporate defendants had first-hand knowledge of child slavery in Cote d'Ivoire gained through "numerous visits" to the farms.[147] The district court dismissed the complaint, finding "that corporations cannot be sued under the ATS, and that even if they could, the plaintiffs failed to allege the elements of a claim for aiding and abetting slave labor."[148] "Although the defendants do not own cocoa farms themselves, they maintain and protect a steady supply of cocoa by forming exclusive buyer/seller relationships with Ivorian farms" and import most of this cocoa into the United States.[149] Through financial and technical support, including training on appropriate labor practices, "the defendants effectively control the production of Ivorian cocoa."[150] Additionally, the court noted the defendants' active lobbying efforts to oppose a 2001 bill that would have required such U.S. importers and manufacturers to certify their products as "slave free."[151] An industry-supported "voluntary enforcement system" was adopted instead.[152] Nevertheless, the plaintiffs in *Doe I* were granted leave to amend their complaint to attempt to state the elements of an aiding and abetting claim under the ATS in light of the *Kiobel* ruling.[153]

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144 Mastafa v. Chevron Corp., 770 F.3d 170, 192–93 (2d Cir. 2014).
145 *Id.* at 193 (emphasis in original).
146 766 F.3d 1013, 1017–18 (9th Cir. 2014).
147 *Id.* at 1017.
148 *Id.* at 1018.
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.* at 1028–29.

As discussed above, such an aiding and abetting theory requires the showing of purposeful intent to commit human rights violations. By contrast, the TVPRA requires only a reckless disregard of the fact that forced labor was used in a venture in which the defendant benefitted financially.[154] This standard would seem to be met in *Doe I* according to the facts relied upon by the court. The companies provided training and financial support on site and actively lobbied against measures designed to curtail such slave labor. This indicates that the defendants at least should have known of the conditions in which the plaintiffs worked. The labor at issue also seems to easily meet the definition of forced labor and coercion under the TVPRA.[155]

The heightened standard required in an aiding and abetting claim under the ATS is necessary to overcome the presumption against extraterritorial jurisdiction. As previously discussed, the TVPRA has been amended to provide extraterritorial jurisdiction explicitly; thus no heightened standard is required. The TVPRA is perhaps most useful in these types of cases which involve economic activity where victims are actually engaged in labor that financially benefits the company. A much more difficult case arises when the company benefits financially not from a person's labor, but from their death.

B. Noneconomic Activity: Kiobel v. Royal Dutch Petroleum Co.

In *Kiobel,* the petitioners were residents of Ogoniland, Nigeria in the 1990s, when the Shell Petroleum Development Company of Nigeria (SPDC) was conducting oil exploration in the area.[156] Residents of Ogoniland protested the environmental impact of the SPDC's activities and the SPDC responded by enlisting the support of the Nigerian Government.[157]

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[154] 18 U.S.C. § 1589(b) (2008).

[155] *Doe I*, 766 F.3d at 1017 ("The plaintiffs in this case . . . were forced to work on Ivorian cocoa plantations for up to fourteen hours per day six days a week, given only scraps of food to eat, and whipped and beaten by overseers. They were locked in small rooms at night and not permitted to leave the plantations, knowing that children who tried to escape would be beaten or tortured. Plaintiff John Doe II witnessed guards cut open the feet of children who attempted to escape, and John Doe III knew that guards forced failed escapees to drink urine.").

[156] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662–63 (2013).

[157] *Id.*

> Throughout the early 1990's, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.[158]

As discussed above, the U.S. Supreme Court did not reach the merits of this aiding and abetting claim under the ATS.[159] Instead, the Court unanimously agreed that the ATS did not apply extraterritorially, leaving for another day the question of whether the ATS may be applied to corporations and states.[160]

As previously noted, the TVPRA is expressly extraterritorial, which would have provided jurisdiction over the activities occurring outside the United States. Additionally, the extraterritorial jurisdiction applies if "an alleged offender is present in the United States, irrespective of the nationality of the alleged offender."[161] Royal Dutch Shell is the parent corporation of Shell Oil Company in the United States.[162] As the third largest company in the world, finding personal jurisdiction over Royal Dutch Shell would be unlikely to present a problem.[163]

Beyond jurisdictional issues, however, the more relevant question is this: could a person's death be considered a "service" of that person, where a company benefits financially from that person's death? In the case of *Kiobel*, the nearby population was killed for engaging in protests. A lack of protests would present a financial benefit to a company in the form of added stability and security. Using the only interpretation of "labor and services" under the TVPRA given by a district court, the term "services" means a useful expenditure of physical or mental effort that does not produce a

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158 *Id.*
159 *Id.* at 1669.
160 *Id.*
161 18 U.S.C. § 1596.
162 *About Us: Who We Are*, http://www.shell.com/abouthpus/wo-we-are.html.
163 *Global 500*, FORTUNE (2015), http://fortune.com/global500/.

commodity.[164] Arguably, a person's death is an ultimate and complete expenditure of physical or mental effort. The killing of a person expends all future mental or physical ability from that person. The benefit derived by the company is due to the omission of an act of protest, as opposed to the standard economic benefit derived from a comissive act of labor. Thus, to financially benefit from the killing of others in order to obtain their labor and services, including the omission of disruptive acts, would be a violation of the TVPRA.

The most glaring problem with this argument is in the tortured reasoning required to articulate it. The fact of the matter is that Congress did not explicitly define forced labor to include such widespread killing in the interests of corporate security. The inclusion of more severe criminal penalties for instances of coercion that cause death only highlights the fact that Congress knew how to include such a provision had they so chosen.[165] This glaring loophole in the TVPRA and also under the ATS post-*Kiobel* creates the perverse outcome that a company is less likely to face liability in the United States for killing a large population of people than they are for enslaving that same population.[166]

VI. CONCLUSION

Civil actions under the TVPRA have been the source of some criticism and very little success since the enactment of the 2008 amendments. There is currently a significant shortage of case law regarding the civil remedy. At the time of this writing, fewer than 100 cases have published rulings or orders since 2008, and of those, only nine have produced summary or default judgments in favor of the plaintiff and none have been fully litigated at trial.[167] Civil actions under the TVPRA are expensive and time-consuming

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[164] United States v. Marcus, 487 F. Supp. 2d 289, 300 (E.D.N.Y. 2007), *vacated*, 538 F.3d 97 (2d Cir. 2008), *rev'd*, 560 U.S. 258 (2010), *and aff'd in part*, *vacated in part, remanded*, 628 F.3d 36 (2d Cir. 2010).

[165] 18 U.S.C. § 1589(d).

[166] Though not the subject of this Note, in light of *Kiobel*, the TVPRA should be amended to expressly include such widespread violence, whether or not it provides actual labor.

[167] Dlamini v. Babb, No. 1:13-CV-2699-WSD, 2014 WL 5761118, at *6 (N.D. Ga. Nov. 5, 2014) (summary judgment); Frankenfield v. Strong, No. 2:12-00054, 2014 WL 1234709, at *6 (M.D. Tenn. Mar. 25, 2014) (default judgment); Francisco v. Susano, No. 10-CV-00332-CMA-MEH, 2013 WL 4849109, at *1 (D. Colo. Sept. 10, 2013) (default judgment); Carazani v. Zegarra, 972 F. Supp. 2d 1, 9 (D.D.C. 2013) (default judgment); Lainez v. Baltazar, No.

to litigate, especially suits alleging extraterritorial violations. Criticism of the TVPRA as less comprehensive than the Palermo Protocol is valid; the statute is far from perfect in many respects. Perhaps the most salient criticism of the TVPRA is that it would not directly capture the conduct at issue in *Kiobel*, *Sosa*, or *Mohamed*, which all involved infractions that were ostensibly of a political, military, or otherwise non-economic nature. However, in light of the specific limitations found in civil suits alleging violations of the ATS, there is a path forward for litigation able to argue at least purposeful coercion through the civil remedy provision and expanded causes of action of the TVPRA. Even in light of its limitations, the TVPRA could address a broad array of human rights violations, affecting millions of victims around the world that are beyond the current scope of the ATS.

5:11-CV-00167-BR, 2013 WL 3288369, at *2 (E.D.N.C. June 28, 2013) (default judgment); Magnifico v. Villanueva, No. 10-CV-80771, 2012 WL 5395026, at *1 (S.D. Fla. Nov. 2, 2012) (default judgment); Doe v. Howard, No. 1:11CV1105 (LO/TRJ), 2012 WL 3834930, at *1 (E.D. Va. Aug. 7, 2012), *report and recommendation adopted*, No. 1:11-CV-1105, 2012 WL 3834929 (E.D. Va. Sept. 4, 2012) (default judgment); Canal v. Dann, No. 09-03366 CW, 2010 WL 3491136, at *4 (N.D. Cal. Sept. 2, 2010) *amended*, No. 09-03366 CW, 2011 WL 3903166 (N.D. Cal. Sept. 6, 2011) (default judgment); Samirah v. Sabhnani, 772 F. Supp. 2d 437, 452 (E.D.N.Y. 2011) (summary judgment).