Note

Mind the Gap: Ensuring that Quasi-State Actors Are Held Liable for Human Rights Abuses

*John Tyler Knoblett**

Abstract

In a series of cases decided by the Supreme Court between 2004 and 2018, human rights statutory mechanisms such as the Alien Tort Statute, the Torture Victim Protection Act ("TVPA"), and the Anti-Terrorism Act have been narrowed in reach, limiting the avenues of relief for victims of human rights abuses. In particular, those who are harmed by quasi-state actors ("QSAs")—nonstate actors that possess many characteristics of sovereign states—no longer have any foreseeable means to hail such perpetrators into U.S. courts. This has resulted in a liability gap that runs counter to the intent of Congress when it enacted these statutes and arguably violates U.S. treaty obligations under the Convention Against Torture. Further, prior court practice regarding QSAs has led to inconsistencies in litigation practice and decisions of questionable constitutionality in light of Zivotofsky v. Kerry. *With these problems in mind, Congress should amend the TVPA by expanding the definition of "foreign nation" to encompass QSAs while also safeguarding the President's exclusive power of recognition. This change will ensure that such entities are held accountable for acts of torture and extrajudicial killings by exposing their agents to liability in U.S. courts, thereby preventing the United States from becoming a safe harbor for those who commit atrocities abroad.*

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* J.D., The George Washington University Law School; B.A., University of Illinois at Urbana-Champaign.

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Introduction

In 1995, Azzam Rahim, an American citizen, visited his hometown of Ein Yabroud in the West Bank.[1] While he was playing a game of backgammon in a coffee shop, several plainclothes Palestinian Authority ("PA") intelligence officers approached Rahim and took him to a prison in Jericho.[2] Two days later, an ambulance deliv-

1 Brief for Petitioners at 5, Mohamad v. Palestinian Auth., 566 U.S. 449 (2012) (No. 11-88).

2 *See id.*; Toi Staff, *Senior Fatah Member Hit with Lawsuit upon Arrival at JFK*, Times of Isr. (Apr. 6, 2017, 4:13 AM), https://www.timesofisrael.com/senior-fatah-member-hit-with-lawsuit-upon-arrival-at-jfk [https://perma.cc/2H5T-997R].

ered Azzam's mutilated body to his family.[3] His official cause of death was ruled as cardiac arrest, but an autopsy, revealing several broken ribs, pointed to a more nefarious source.[4] Ten years later, Azzam's son filed suit in the United States against the PA under the Torture Victim Protection Act of 1991 ("TVPA")[5] for the torture and death of his father.[6] After seven years of litigation, the case reached the Supreme Court, which unanimously dismissed the case on the ground that organizations cannot be held liable under the TVPA.[7]

In September 2001, Ali Mahumud Ali Shafi, a Palestinian citizen, visited his mother in the West Bank, where he was arrested by PA security officers.[8] Over the next few months, Ali was beaten and tortured until he was convicted of spying after a 30-minute trial and sentenced to death.[9] Ali escaped his imprisonment and, seven years later, brought suit against the PA under the Alien Tort Statute ("ATS").[10] His case was dismissed by the U.S. Court of Appeals for the District of Columbia Circuit, which held that torture is only actionable under U.S. law when it is directed by a foreign state.[11]

In 2011, Ben-Yosef Livnat was visiting Joseph's Tomb, a holy site in the West Bank, where he was shot and killed by armed gunmen allegedly employed by the PA.[12] His family sued the PA in 2015 under the Anti-Terrorism Act of 1990 ("ATA"),[13] only to see the D.C. Circuit dismiss the case for lack of personal jurisdiction in 2017.[14]

Such cases shine a light on a particular curiosity of human rights litigation: a certain class of defendants, of which the PA is a prominent example, cannot be sued in U.S. courts for their human rights abuses. These quasi-state actors ("QSAs") are neither foreign states nor non-

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3 *See* Staff, *supra* note 2.

4 *See id.*

5 28 U.S.C. § 1350 note (2012).

6 Mohamad v. Rajoub, 664 F. Supp. 2d 20, 21 (D.D.C. 2009); *see* Mohamad v. Palestinian Auth., 566 U.S. at 452.

7 *See* Mohamad v. Palestinian Auth., 566 U.S. at 461.

8 Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1089–90 (D.C. Cir. 2011).

9 *See id.* at 1090.

10 28 U.S.C. § 1350 (2012); *see also Ali Shafi*, 642 F.3d at 1089–90.

11 *See Ali Shafi*, 642 F.3d at 1096.

12 Livnat v. Palestinian Auth., 851 F.3d 45, 46–47 (D.C. Cir. 2017). Two U.S. citizens, Yitzhak and Natan Safra, were also wounded in the attack, and their family filed an identical lawsuit joined with the Livnat family's. *Id.* at 47. This demonstrates that the United States' interest in such suits goes beyond the protection of aliens' human rights abroad, as it also involves the protection and security of the United States' own citizens.

13 18 U.S.C. §§ 2333–2338 (2012).

14 *Livnat*, 851 F.3d at 47, 58.

state actors, in the common meaning of the term.[15] QSAs are unrecognized, nonsovereign entities that possess some, but not all, characteristics of a modern sovereign state.[16] Prior to the Supreme Court's 2014 decision in *Daimler AG v. Bauman*,[17] QSAs were reachable in certain instances under the ATA.[18] But due to the heightened personal-jurisdiction standard established in *Daimler*, there no longer appears to be any means to hail QSAs into U.S. courts.[19]

These not-quite-sovereign, not-quite-private actors fall into a liability gap. They purport to be foreign states but are treated by courts as private actors.[20] This gap has created a series of legal and policy problems ranging from potential constitutional issues of state recognition[21] to inconsistencies in litigation practice.[22] Ultimately, the result is a legal regime that runs counter to Congress's intent in enacting these statutory regimes and that allows human rights abusers to avoid accountability.[23] QSAs should be held liable for human rights violations committed by their agents. To this end, Congress should amend the TVPA's definition of "foreign nation" to encompass QSAs, thereby allowing victims to bring suit against their assailants. This amendment will streamline the litigation process, clarify constitutional issues, ensure that perpetrators of violence can be held accountable, and promote recovery for victims within the U.S. legal system.

Part I of this Note provides a background and history of human rights litigation in the United States, focusing on the ATS and the TVPA but also examining the ATA. Part II gives a primer on QSAs,

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15 Dr. Ya'l Ronen categorizes the Palestinian Authority as a "territorial non-state actor," which this Note calls a QSA. *See* Ya'l Ronen, *Human Rights Obligations of Territorial Non-State Actors*, 46 CORNELL INT'L L.J. 21, 29 (2013).

16 *See infra* Section II.A.

17 571 U.S. 117 (2014).

18 *See infra* Section II.B.

19 *See* Ariel Winawer, Comment, *Too Far from Home: Why* Daimler*'s "At Home" Standard Does Not Apply to Personal Jurisdiction Challenges in Anti-Terrorism Act Cases*, 66 EMORY L.J. 161, 177–81 (2016) (discussing problems in ATA litigation arising from the Court's holding in *Daimler*).

20 *See infra* Section II.B.

21 In the past, courts have treated unrecognized entities as states. *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 244–45 (2d Cir. 1995) (holding that Srpska "satisfe[d] the criteria for a state, for purposes of . . . international law"). Following the Supreme Court's decision in *Zivotofsky v. Kerry*, which held that the President alone may recognize a foreign state, such holdings would likely no longer stand. *See* 135 S. Ct. 2076, 2094 (2015).

22 The PA often makes different legal arguments regarding its status as a foreign state depending on the statute under which a suit is brought. *See infra* Section II.C.2.

23 *See* S. REP. NO. 102-249, at 3 (1991) (noting that the TVPA will "ensure that torturers within their territories are held legally accountable for their acts").

including the definition, examples of such entities, and U.S. courts' treatment of these entities as nonstate actors in the context of human rights litigation. Part II concludes by outlining the policy and legal complications that have arisen from the judicial system's treatment of QSAs. Finally, Part III outlines this Note's proposed solution: amend the TVPA to extend liability to QSAs.

I. International Human Rights Litigation in the United States

Through the triad of the ATS, TVPA, and ATA, Congress opened the American judiciary to foreigners seeking redress for violations of their most basic human rights.[24] This novel idea—that those who commit acts of horror be held accountable no matter where the acts occurred—fits modern notions of human rights but is somewhat a unique American phenomenon.[25] The exercise of universal jurisdiction provided in these statutes—that is, the opening of U.S. courts to suits involving non-U.S. nationals and conduct that occurs abroad—is controversial among legal scholars.[26] These scholars argue that such lawsuits rarely result in successful judgments or fruitful outcomes for plaintiffs.[27] Yet, despite these criticisms, plaintiffs and their attorneys attest to the worth of a successful judgment, even if the damages are never recovered.[28]

Notwithstanding the views of some scholars, Congress values these human rights statutes, as demonstrated through its legislative

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24 It should be noted that while the ATS and TVPA allow suits by foreigners, the ATA only allows American nationals to bring suit. *See infra* notes 31, 98, 120 and accompanying text.

25 *See* Paul Barker, *Universal Civil Jurisdiction and the Extraterritorial Reach of the Alien Tort Statute: The Case of* Kiobel *Before the United States Supreme Court*, 20 U. Miami Int'l & Comp. L. Rev. 1, 34–35, 35 (2012) ("The universal civil jurisdiction conferred on U.S. courts by the ATS and TVPA to date has set the United States apart from the rest of the world.").

26 *See, e.g.*, Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 Duke L.J. 1023, 1087, 1091 (2014) (noting that universal jurisdiction in the criminal context is common but the extension of universal jurisdiction to the civil context remains "controversial").

27 *See, e.g.*, Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel, 102 Calif. L. Rev. 1495, 1522–23 (2014). From 1980 to 2011, fewer than 25 ATS cases have been successful on the merits, and since the 1990s there have been only two TVPA cases where plaintiffs recovered monetary damages. *See id.*

28 *See, e.g.*, Ralph G. Steinhardt, Kiobel *and the Multiple Futures of Corporate Liability for Human Rights Violations*, 28 Md. J. Int'l L. 1, 4 (2013) (recalling that, upon being told that recovering any damages was unlikely, the author's client said, "That's okay, it's enough to be believed."); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 Notre Dame L. Rev. 1467, 1542 (2014) (emphasizing a "symbolic" victory where "[the plaintiff] knows that she won the case filed on behalf of her brother, even though her family has been unable to collect the damage award.").

actions: the TVPA was passed in part to head off potential narrowing of the ATS by U.S. courts, and the ATA has been repeatedly amended to further its reach and scope. Unhindered by the courts, litigants used these statutes extensively for nearly 30 years, until the Supreme Court began limiting their efficacy in 2004.[29] In a slew of decisions since 2004, the Court has closed off various paths to relief for foreign victims.[30] Today, the previously robust field of human rights litigation is but a shadow of its former self.

The following sections outline the current human rights litigation framework. First, this Note explains the history and expansion of the ATS and the Supreme Court's truncation of the ATS's scope. Second, this Note delineates the TVPA's origins, textual composition, and formative cases. Finally, this Note briefly addresses the ATA and its relevance.

A. The Alien Tort Statute

The current ATS states in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[31]

The statutory basis for modern human rights litigation is rooted in a short, ambiguous phrase included in the Judiciary Act of 1789.[32] This more-than-two-hundred-year-old statutory language, today codified in just 33 words, has forever altered U.S. human rights law by allowing countless victims to seek justice; but before becoming an avenue for vindication and justice, the ATS sat largely dormant for centuries.[33] It took an unexpected Second Circuit holding and some clever lawyering for the ATS to transform the world of human rights.

1. The Origin of the Alien Tort Statute

Although the original purpose of the ATS is hotly debated,[34] it is widely thought that it was passed, at least in part, in response to two "notorious episodes" of tortious conduct involving assaults on Euro-

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29 *See infra* note 61–71 and accompanying text.

30 *See infra* Sections I.B, I.C.

31 28 U.S.C. § 1350 (2012).

32 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2012)).

33 *See* Stephens, *supra* note 28, at 1472 ("Between 1795 and 1980, fewer than two dozen reported cases cited the statute, with only one relying on ATS jurisdiction.").

34 *See* IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) (describing the ATS as a "legal Lohengrin; although it has been with us since the first Judiciary Act, no one

pean dignitaries that occurred shortly before the ATS's passage.[35] The federal government, at the time, was not "vested with any judicial [p]owers" to adjudicate such offenses, leading the First Congress to pass the ATS in 1789 to ensure similar incidents could be resolved through U.S. courts.[36]

The original scope of the ATS likely also covered violations of safe conducts[37] and torts involving piracy.[38] But regardless of the original intent of the First Congress, the modern interpretation of the ATS goes far beyond offenses against ambassadors and pirates. With the dawn of the 1980s came the Second Circuit's decision in *Filártiga v. Peña-Irala*,[39] which sparked a "human rights revolution."[40]

In 1976, Joelito Filártiga—the son of Dr. Joel Filártiga, a Paraguayan national and opponent of the Paraguayan government—was kidnapped and tortured to death by Americo Peña-Irala, the inspector general of police in Asuncion, Paraguay.[41] In 1978, Peña-Irala moved to New York City, where Dolly Filártiga, the sister of Joelito, discovered his whereabouts.[42] After Peña-Irala was arrested for overstaying his visa, Dolly served a summons and civil complaint upon Peña-Irala, the contents of which alleged that Peña-Irala was responsi-

seems to know whence it came" (citation omitted)); Stephens, *supra* note 28, at 1467 ("The Alien Tort Statute (ATS) has provoked extensive, passionate debate . . . ." (footnote omitted)).

35 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 120 (2013). The first episode occurred in 1784 when a Frenchman "verbally and physically assaulted the Secretary of the French Legion [Francis Marbois] in Philadelphia." Sosa v. Alvarez-Machain, 542 U.S. 692, 716 (2004). The second incident centered on a New York constable's intrusion into the Dutch ambassador's house to arrest one of the ambassador's servants in 1787. *See id.* at 717; *see also id.* at 716–17 (noting that the inclusion of the ATS in the Judiciary Act of 1789 was in part the framers responding to the "Continental Congress's incapacity to deal with th[e] class of cases" exemplified by the "so-called Marbois incident").

36 *See Sosa*, 542 U.S. at 717 (quoting William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 494 n.152 (1986)).

37 A safe conduct is a "procedure by which a person is permitted to enter or leave a jurisdiction in which he would normally be subject to arrest, detention, or other deprivation." *Safe-conduct*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/safe-conduct [https://perma.cc/7Y3N-AT2D].

38 S*ee Sosa*, 542 U.S. at 715 (explaining that the drafters of the ATS likely considered the recognition in William Blackstone's *Commentaries on the Laws of England* of "three specific offenses against the law of nations[:] . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy").

39 630 F.2d 876 (2d Cir. 1989).

40 Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1753 (2014) (arguing that the Supreme Court's decision in *Kiobel* "signals the end of the *Filártiga* human rights revolution").

41 *Filártiga*, 630 F.2d at 878.

42 *Id.* at 878–79.

ble for the torture and death of Joelito.[43] The complaint asserted subject matter jurisdiction under an old and obscure law: the ATS.[44]

Though the district court dismissed the action for lack of jurisdiction, the Second Circuit agreed with Dolly.[45] The court reversed, holding that "[i]n light of the universal condemnation of torture . . . we find that an act of torture committed by a state official . . . violates established norms of the international law of human rights, and hence *the law of nations.*"[46] With this holding, federal courts became open for the "adjudication of the rights already recognized by international law" under the ATS.[47] *Filártiga*'s significance can be summarized by the case's closing words: "Indeed, for purposes of civil liability [under the ATS], the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[48]

With the Second Circuit's decision in *Filártiga*, the ATS suddenly provided a means for victims of human rights abuses abroad to seek some form of redress in the federal courts of the United States.[49] Courts have since found violations of the law of nations for state acts of arbitrary detention,[50] summary execution,[51] forced disappearance,[52] genocide,[53] war crimes,[54] and crimes against humanity.[55] The jurisdic-

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43 *Id.*

44 *Id.* at 879.

45 *See id.* at 880.

46 *Id.* (emphasis added).

47 *Id.* at 887.

48 *Id.* at 890.

49 The efficacy of lawsuits under the ATS is itself widely debated. *See* Altholz, *supra* note 27, at 1501 ("U.S. court proceedings are inaccessible to most victims, do not address the causes of the violations, and cannot prevent future abuses.").

50 *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547 (N.D. Cal. 1987) (stating that "torture, prolonged arbitrary detention, and summary execution" are actionable claims under the ATS).

51 *See* Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995) (finding that "torture, summary execution, disappearance, and arbitrary detention[] constitute fully recognized violations of international law").

52 *See In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) ("The prohibition against summary execution or causing 'disappearance' is similarly universal, definable, and obligatory.").

53 *See* Kadic v. Karadžić, 70 F.3d 232, 241–42 (2d. Cir. 1995) (finding that a campaign to destroy religious and ethnic groups "clearly state[s] a violation of the international law norm proscribing genocide," as outlined in the Genocide Convention, and therefore was within the subject matter jurisdiction of the ATS).

54 *See id.* at 243 (holding Geneva Convention Common Article 3 binds "all 'parties' to a conflict" and war crimes alleged "would violate the most fundamental norms of the law of war" and thus such acts fall within the scope of the ATS).

55 *See* Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1352–53 (N.D. Ga. 2002) (holding crimes against humanity to be actionable under the ATS and applying the International Military

tion of the ATS was further expanded in 1995 when victims of genocide during the Yugoslav wars brought an action against Radovan Karadžić,[56] also known as the "Butcher of Bosnia."[57] Though Karadžić argued that he could not violate the law of nations as a private individual, the Second Circuit held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[58] The court's endorsement of jurisdiction over nonstate actors led to a new deluge of ATS suits, now against corporations.[59] With the list of potential parties and actionable torts growing ever longer, the Supreme Court finally decided to clarify the scope of the ATS in *Sosa v. Alvarez-Machain*.[60]

2. *An Era Comes to an End: The ATS Before the Court*

The Supreme Court provided no guidance to the circuit courts for nearly 25 years after the *Filártiga* decision.[61] In 2004, it granted certiorari in a case involving a Mexican national who was kidnapped from Mexico, brought to the United States, and detained while awaiting trial.[62] Humberto Alvarez-Machain was soon acquitted, and he brought suit under the ATS against one of his kidnappers, Jose Francisco Sosa, alleging the detention violated the law of nations.[63]

The Supreme Court made several important holdings related to the scope of the ATS. Settling a long debate, the Court held the ATS to be "only jurisdictional" in nature, meaning that any cause of action had to be based in the common law.[64] Finding "that Congress in-

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Tribunal and the Rome Statute of the International Criminal Court's definitions of crimes against humanity).

56 *See Kadic*, 70 F.3d at 236–37.

57 *See* J. Weston Phippen, *Radovan Karadžić's Day of Reckoning*, THE ATLANTIC (Mar. 24, 2016), https://www.theatlantic.com/international/archive/2016/03/bosnia-radovan-karadzic-war-crimes/475233 [https://perma.cc/84EH-LK64]. In 2016, the International Criminal Tribunal for the former Yugoslavia found Karadžić guilty of genocide, war crimes, and crimes against humanity for his role in the Bosnian War. *See id.*

58 *Kadic*, 70 F.3d at 239; *see also id.* at 239–40 (explaining that acts of piracy, slave trading, war crimes, and genocide can violate law of nations regardless of whether state action).

59 A corporation was found within the jurisdiction of the ATS just two years after *Kadic* in *Doe v. Unocal Corp.*, 963 F. Supp. 880, 884–85, 889–91 (C.D. Cal. 1997); *see also* Altholz, *supra* note 27, at 1518 ("After *Kadic v. Karadžić*, an estimated 120 suits have been filed identifying a corporate defendant . . . .").

60 542 U.S. 692 (2004).

61 The Second Circuit decided *Filártiga* in 1980, and the Supreme Court decided *Sosa* in 2004. *See id.* at 731; Filártiga v. Pe–a-Irala, 630 F.2d 876 (2d Cir. 1980).

62 *See Sosa*, 542 U.S. at 697–98.

63 *See id.* at 698.

64 *See id.* at 712.

tended the ATS to furnish jurisdiction for a relatively modest set of actions," the Court, citing *Filártiga*, acknowledged that the list of potential actionable violations had expanded to include claims under "the present-day law of nations."[65] These contemporary violations of the law of nations are cognizable so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[66] In short, these norms must be "specific, universal, and obligatory."[67] This pronouncement validated decades of human rights litigation that started with *Filártiga*,[68] but the Court also called for judicial caution,[69] emphasizing that "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping" and open only "to a narrow class of international norms today."[70] Applying this new standard, the Court held that Alvarez-Machain's claim of arbitrary detention did not fit within this narrow class of norms.[71]

The ATS made its second appearance before the Court in *Kiobel v. Royal Dutch Petroleum Co.*[72] If *Sosa* left the door "still ajar," *Kiobel* slammed it shut.[73] Although the original issue on appeal was whether corporations could be liable under the ATS, the *Kiobel* Court opted instead to address whether a plaintiff's claim under the ATS "may reach conduct occurring in the territory of a foreign sovereign."[74] *Kiobel* was an example of a "foreign-cubed" case, wherein foreign plaintiffs sue foreign defendants for tortious conduct that occurred in a foreign country.[75] The Court found that, based on underly-

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65 *Id.* at 720, 725; *see also id.* at 730–31.

66 *Id.* at 725.

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

68 The Court's citation to "*Filártiga*, *Karadžić*, and *Marcos* with approval . . . suggests that certain norms do satisfy th[e] demanding but entirely traditional standard" outlined in *Sosa*. Steinhardt, *supra* note 28, at 8.

69 The Court outlined five reasons for judicial caution: (1) the concept of common law has changed since the ATS was enacted in 1789—it is no longer "discovered" but instead made; (2) there has been a "significant rethinking of the role" of common law in federal courts (e.g., the *Erie* Doctrine); (3) "a decision to create a private right to action is one better left to legislative judgment . . ."; (4) "recognizing such causes" of action has "potential implications for the foreign relations of the United States"; and (5) there is "no congressional mandate to seek out and define new . . . violations of the law of nations." *Sosa*, 542 U.S. at 725–28.

70 *Id.* at 729.

71 *See id.* at 738.

72 569 U.S. 108 (2013).

73 *See id.* at 124; *Sosa*, 542 U.S. at 729.

74 *Kiobel*, 569 U.S. at 115.

75 *See* Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filártiga, 89 NOTRE DAME L. REV. 1695, 1703 (2014).

ing canons of statutory interpretation, a "presumption against extraterritoriality applies to claims under the ATS" and that only claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption" would be considered valid.[76] This ruling ended the plaintiffs' case and significantly narrowed the scope of ATS litigation.[77]

The *Kiobel* ruling may have created more problems than it solved.[78] The exact meaning of "touch and concern" in particular has created significant debate among scholars[79] and a circuit split.[80] One clear result, however, is that a significant number of ATS cases post-*Kiobel* have been dismissed for lack of jurisdiction due to the presumption against extraterritoriality.[81]

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76 *Kiobel*, 569 U.S. at 124–25.

77 *See* Altholz, *supra* note 27, at 1520 ("In *Kiobel*, the Court eliminated the global cause of action pursued through the ATS.").

78 *See, e.g.*, Alford, *supra* note 40, at 1754 ("The *Kiobel* decision is complex and confusing, offering scant guidance as to how lower courts should proceed when claims touch and concern U.S. territory.").

79 *See, e.g.*, Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1780 (2014) (noting that the *Kiobel* majority "did not necessarily rule out suits against *American* defendants" and that the question of whether this "would sufficiently 'touch and concern' the United States" was "left unanswered"); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in* Kiobel *and Beyond*, 44 GEO. J. INT'L L. 1329, 1345–46 (2013) (arguing that the *Kiobel*'s touch-and-concern analysis should interpreted broadly and be guided by "international legal principles of jurisdiction" such as objective territorial jurisdiction, active personality jurisdiction, passive personality jurisdiction, and the protective principle jurisdiction); Steinhardt, *supra* note 75, at 1705 (arguing that Justice Kennedy's concurrence leaves open the possibility of a more plaintiff-friendly interpretation of "touch and concern," in which the ATS still applies to human rights abuses committed abroad that are outside the reasoning and holding of *Kiobel*); Note, *Clarifying* Kiobel*'s "Touch and Concern" Test*, 130 HARV. L. REV. 1902, 1902–03 (2017) [hereinafter *Clarifying* Kiobel] (arguing for adoption of Justice Alito's view of "touch and concern" that only conduct in the United States is covered by the ATS).

80 The Second and Fifth Circuits have adopted a strict reading, barring nearly all cases except those in which the tort occurred in the United States. *See Clarifying* Kiobel, *supra* note 79, at 1910. The Fourth, Ninth, and Eleventh Circuits have opted for a more flexible reading, considering factors such as the defendant's U.S. citizenship or corporate status in evaluating whether the presumption of extraterritoriality is rebutted. *See id.* at 1910–11.

81 *See, e.g.*, Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197–99 (5th Cir. 2017) (holding insufficient the argument that defendant's U.S.-based employees and U.S. corporate payments was enough to rebut presumption against extraterritoriality); Warfaa v. Ali, 811 F.3d 653, 660–61 (4th Cir. 2016) (noting that defendant's "[m]ere happenstance of residency" in the U.S. was insufficient to rebut presumption against extraterritoriality); Doe v. Drummond Co., 782 F.3d 576, 598 (11th Cir. 2015) (holding corporate activity in United States that allegedly aided and abetted extrajudicial killing in Colombia insufficient to rebut presumption against extraterritoriality); Mujica v. AirScan Inc., 771 F.3d 580, 591 (9th Cir. 2014) (finding that allegations that "actions or decisions furthering . . . [a] conspiracy . . . took place in the United States" were insufficient to rebut presumption against extraterritoriality); Ellul v. Congregation of

The Supreme Court had an opportunity to clarify the *Kiobel* holding in its 2017 ruling in *Jesner v. Arab Bank, PLC*.[82] Though the Court did little to resolve the problems that arose from *Kiobel*'s "touch and concern" language, it did clarify the question of corporate liability.[83] In a 5–4 opinion, the Court held that "it would be inappropriate for courts to extend ATS liability to foreign corporations . . . ."[84] This decision is the latest in the series of decisions discussed in this Note in which the Supreme Court has restricted the jurisdictional reach of the ATS.[85]

The Court's decisions in *Kiobel* and *Jesner* have all but eliminated the ATS as a viable means of redress for foreign plaintiffs seeking vindication in U.S. courts. *Kiobel* excludes a wide class of ATS litigation involving "conduct that took place outside the United States,"[86] and *Jesner* completely forecloses such suits against corporations, which have long been the predominate defendants in ATS actions.[87] This *Kiobel-Jesner* combination leaves litigants looking to other statutory mechanisms like the TVPA.

Christian Bros., 774 F.3d 791, 798 (2d Cir. 2014) (finding defendants U.S. citizenship and presence in U.S. insufficient to rebut presumption against extraterritoriality.); Ben-Haim v. Neeman, 543 Fed. App'x 152, 155 (3d Cir. 2013) (finding that ATS claims based on underlying conduct that "took place in Israel" warranted dismissal under *Kiobel* presumption against extraterritoriality).

82 138 S. Ct. 1386 (2018). This Note does not focus heavily on *Jesner* or its impact on human rights litigation, as the decision came down during the publication process.

83 *See id.* at 1406 ("The Court of Appeals did not address, and the Court need not now decide, whether these allegations are sufficient to 'touch and concern' the United States under *Kiobel*.").

84 *Id.* at 1403. The Court's decision relied not on norms of international law but on an originalist interpretation of the ATS and separation-of-power principles. First, the Court noted that the "principal objective[s] of the statute . . . [were] to avoid foreign entanglements" and "to promote harmony in international relations." *Id.* at 1397, 1406. As such, a 13-year litigation against the largest bank of "Jordan, a critical ally" of the United States, exemplifies "the very foreign-relations tensions the First Congress sought to avoid." *Id.* at 1407. Further, "foreign corporate defendants create unique [diplomatic] problems." *Id.* Second, separation-of-power principles dictate that such diplomatic concerns with "serious foreign policy consequences" are best left with the political branches and not the courts. *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013)).

85 *See supra* notes 61–81 and accompanying text. Justice Kennedy, in a part of the opinion only supported by a plurality of the Court, suggested that Congress could amend the ATS to make remedies available against foreign corporations, much like it had when it determined the boundaries of the TVPA, but this is unlikely given Congress's inaction following *Kiobel*. *See Jesner*, 138 S. Ct. at 1406.

86 Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 Am. J. Int'l L. 509, 512 (2012).

87 See *Jesner*, 138 S. Ct. at 1403.

B. The Torture Victim Protection Act

In 1991, 202 years after the First Congress enacted the ATS, the 102nd Congress passed the TVPA.[88] Despite the immense period of time between their passages, the two statutes are closely intertwined: the TVPA was codified as a note to the ATS.[89] Unlike the ATS, the TVPA creates a substantive cause of action and, accordingly, is quite detailed.[90] While the ATS's broad "violation of the law of nations" language allows for a myriad of underlying torts,[91] the TVPA is limited to acts of torture and extrajudicial killings committed by "individual[s]" acting "under actual or apparent authority, or color of law, of any *foreign nation*."[92] This language, in contrast to ATS caselaw[93] and of particular importance to this Note, explicitly excludes acts of torture or extrajudicial killings committed by nonstate actors.[94] The TVPA also contains an exhaustion-of-remedies requirement.[95] Further, unlike the ATS, the TVPA can apply to conduct outside of the United States.[96] A final key distinction between the ATS and TVPA is that the latter allows for suits by both aliens and Americans.[97]

Legislative history points to three congressional motives behind the TVPA. First, Congress passed the TVPA, in part, as a response to the United States' signing of the United Nations Convention Against

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88 *See* Pub. L. No. 102-256, 106 Stat. 73 (1991) (codified at 28 U.S.C. § 1350 note (2012)); Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77.

89 *See* 28 U.S.C. § 1350 note. For more in-depth analyses of how the ATS and TVPA interact, see Ekaterina Apostolova, Note, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKLEY J. INT'L L. 640 (2010), and Philip Mariani, Comment, *Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 156 U. PA. L. REV. 1383 (2008).

90 *See* Apostolova, *supra* note 89, at 641. The TVPA provides very detailed definitions of "torture" and "extrajudicial killing." The definition of "torture" is pulled directly from the understandings included by the Senate when it ratified the Convention Against Torture, while the definition of "extrajudicial killing" mirrors that found in the Geneva Conventions. *See* S. REP. NO. 102-249, at 6 (1991).

91 *See supra* notes 50–55 and accompanying text.

92 28 U.S.C. § 1350 note (TVPA § 2(a)) (emphasis added).

93 *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995) (holding "certain forms of conduct violate the law of nations" even when committed by nonstate actors).

94 This Note proposes expanding the scope of the TVPA to include QSAs, which are currently treated by U.S. courts as nonstate actors. *See infra* Part III.

95 *See* 28 U.S.C. § 1350 note (TVPA § 2(b)).

96 *See* S. REP. NO. 102-249, at 3–5 (1991) ("[The TVPA] provid[es] a civil cause of action in U.S. courts for torture committed abroad."); *see also* 28 U.S.C. § 1350 note (TVPA § 2(b)) (requiring exhaustion of remedies "in the place in which the conduct giving rise to the claim occurred").

97 *See* James L. Buchwalter, Annotation, *Construction and Application of Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 note*, 199 A.L.R. Fed. 389 § 6 (2005).

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").[98] Congress intended the TVPA "to provide means of civil redress to victims of torture" because "[j]udicial protections . . . are often least effective in those countries where such abuses are most prevalent."[99] Second, Congress aimed for "unambiguous and modern" statutory language that provided a cause of action for victims of torture.[100] Specifically, Congress wanted to codify the central holding in *Filártiga* and ensure there was "a clear and specific remedy" for torture and extrajudicial killing.[101] Third, Congress sought to extend to Americans the civil remedies already provided to aliens under the ATS.[102]

Multiple TVPA actions have made their way up to the Supreme Court, but two cases in particular have had significant impact on the scope of the Act.[103] In 2010, the Court heard arguments in *Samantar v. Yousuf*,[104] a case brought by Somali nationals alleging that Mohamed Ali Samantar, the former prime minister of Somalia, was responsible for acts of torture and extrajudicial killings.[105] Samantar asserted immunity under the Foreign Sovereign Immunities Act ("FSIA"),[106] but the Supreme Court concluded that Samantar was entitled to no immunity under the FSIA, ruling that "there is nothing to suggest we should read 'foreign state' in [the FSIA] to include an official acting on behalf of the foreign state."[107] This case was pivotal for human rights litigation because it held that foreign officials—even former heads of

98 *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; H.R. Rep. No. 102-367, at 3 (1991). The United States officially ratified the CAT in 1994, three years after the passage of the TVPA. *See* Status of *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf [https://perma.cc/E4DS-RYLE] (listing CAT signatories).

99 H.R. Rep. No. 102-367, at 3.

100 *Id.*

101 *Id.* In its report, the House mentioned Judge Bork's opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which questioned whether the ATS provides jurisdiction over acts of torture given a lack of explicit grant by Congress. *See* H.R. Rep. No. 102-367, at 4. Through the TVPA, Congress created such an explicit grant that forestalled, at least temporarily, further judicial efforts to narrow the causes of action under the ATS. *Id.*

102 S. Rep. No. 102-249, at 5 (1991).

103 Besides the two cases discussed in this Section, the TVPA was also at issue in *Daimler AG v. Bauman*, 571 U.S. 117 (2014). *See infra* note 126 and accompanying text.

104 560 U.S. 305 (2010).

105 *See id.* at 308.

106 Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended in scattered sections of 28 U.S.C.).

107 *Samantar*, 560 U.S. at 308, 319.

state—are not shielded from liability under the TVPA and similar statutes.[108]

The Court once again took up a question involving the TVPA in 2011 when it granted certiorari in *Mohamad v. Palestinian Authority*.[109] At 11 pages, the opinion succinctly holds that the TVPA provides a cause of action against individuals only and does not extend liability to corporations, organizations, or other juridical persons.[110] Much like the *Kiobel* and *Jesner* Courts have slammed shut the door to recovery under the ATS, the *Mohamad* Court truncated the ability of victims to attain relief under the TVPA.[111] *Mohamad* made it more difficult to hold perpetrators of torture accountable because, though victims often know the organization that directed the act, they rarely know the identity of the specific torturer.[112] Despite these developments, the TVPA remains a viable avenue for relief for victims of torture and extrajudicial killings, especially when compared to the ATS.[113]

C. *Looking Inward: The Anti-Terrorism Act*

If the ATS and TVPA reflect an era when the United States was a standard-bearer of human rights internationally, the ATA is best described as reflecting an era when the United States looked inward to promote the interests of its nationals before others.[114] Today's ATA was created through a series of bills passed over three decades, beginning with the Military Construction Appropriations Act of 1991[115] and

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108 *See id.* at 319.

109 566 U.S. 449 (2012).

110 *See id.* at 451–52, 461.

111 *See id.* Following *Mohamad*, corporations could still be sued for acts of torture and extrajudicial killings under the ATS. This ATS route, however, was narrowed by *Kiobel* and completely foreclosed with the Court's corporate-liability decision in *Jesner*. *See supra* Section I.A.

112 *See* Cora Lee Allen, Note, *Aiding and Abetting in Torture: Can the Orchestrators of Torture Be Held Liable?*, 44 N. Ky. L. Rev. 149, 149 (2017). Because litigants lack this information, they have advanced aiding-and-abetting theories in order to reach those who direct the acts of torture. *See id.* at 159, 161–62.

113 *See* Hamzah Khan, Note, *TVPA Holds Steady as ATS Shrinks for Redressing Torture Abroad in* Warfaa v. Ali, 25 Tul. J. Int'l & Comp. L. 291, 300–01 (2016).

114 *See generally* Stephen J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-Terrorism Act, and JASTA*, 24 U. Miami Int'l & Comp. L. Rev. 285, 288–89, 293–94, 385–88 (2017) (describing the ATS and TVPA as heralding a "cosmopolitan vision" by which U.S. courts protected human rights globally and the ATA as pursuing a "nationalistic vision" prioritizing the protection of U.S. nationals and territory).

115 *See* Pub. L. No. 101-519, § 132, 104 Stat. 2241, 2250–53 (1990) (codified as amended at 18 U.S.C. §§ 2331–2338 (2012)).

continuing through 2016 with the passage of the Justice Against Sponsors of Terrorism Act.[116]

The civil remedy available for victims of terrorism is codified at § 2333 of title 18 of the U.S. Code.[117] The ATA imposes civil liability on "any person who aids and abets" another in "act[s] of international terrorism committed, planned, or authorized by an organization that ha[s] been designated as a foreign terrorist organization."[118] Terrorism is defined somewhat narrowly, covering only activities "occur[ing] primarily outside" the United States that are intended "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping."[119] One defining characteristic, setting the ATA apart from the ATS and TVPA, is that the ATA's exercise of jurisdiction only over acts that injure "national[s] of the United States."[120] Despite limiting its cause of action to American plaintiffs, the ATA contains no similar limitation with regards to defendants; by its terms, "any person" can be held liable for an act of terrorism.[121] This definition of "person" has resulted in the ATA being a principal avenue for litigants seeking to bring suit against QSAs such as the PA and Palestinian Liberation Organization ("PLO"),[122] a trend that continued until the Supreme Court heightened the standard for general jurisdiction in *Daimler AG v. Bauman*.[123]

On its face, *Daimler* is a reaffirmation of the Court's prior caselaw concerning the due-process protections of general jurisdiction,[124] but its significance to this Note is that it applied this jurisprudence for the first time to human rights statutes, which has had broad

116 Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified at 28 U.S.C. § 1605B (2012)); *see* Schnably, *supra* note 114, at 309 n.60 (describing the legislative history of the ATA).

117 18 U.S.C. § 2333 (2012).

118 *Id.* § 2333(d)(2).

119 *Id.* § 2331(1)(B)–(C).

120 *Id.* § 2333(a).

121 *See id.* at § 2333(d)(2). The ATA defines "person" according to § 1 of title 1 of the U.S. Code, wherein "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *See* 28 U.S.C. § 2333(d)(1).

122 *See* Mark D. Christopher, Note, *Holding Supporters of Terrorism Accountable: The Exercise of General Jurisdiction over the PA and PLO in a Post-*Daimler *Framework*, 45 GA. J. INT'L & COMP. L. 99, 113 & n.106 (2016) (citing six actions brought against the PA and the PLO between 2004 and 2008).

123 571 U.S. 117 (2014).

124 *See id.* at 136–39. The Court repeatedly cites to *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), as setting the standard for general personal jurisdiction. *See Daimler*, 571 U.S. at 136–39.

implications.[125] Though the plaintiffs asserted claims under the ATS and TVPA, the holding had little impact on either statute.[126] Instead, the legal ramifications of *Daimler* were felt most heavily within subsequent ATA litigation.[127]

The plaintiffs brought suit against the corporation Daimler AG on a theory of vicarious liability for the acts of its Argentine subsidiary during Argentina's "Dirty War."[128] Jurisdiction over Daimler was "predicated on the California contacts" of Daimler's American subsidiary, Mercedes-Benz USA ("MBUSA").[129] The Court said such an exercise of general personal jurisdiction was "unacceptably grasping" because "[e]ven assum[ing] that MBUSA is at home in California" it cannot be said that Daimler's "contacts with the State" were enough to "render it *at home* there."[130] The Court added that individuals are "at home" where they are domiciled and corporations are "at home" at both their "place of incorporation" and their "principal place of business."[131] *Daimler* has effectively eliminated the ability of litigants to bring suits against foreign organizations under the ATA because it is difficult, if not impossible, to demonstrate that such organizations are "at home" in the United States.[132]

Following the Court's decision in *Kiobel*, human rights activists turned to the TVPA and the ATA as alternative means for seeking

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125 *See* Alexis Casamassima, Note, *Protecting the Antiterrorism Tools of American Citizens: Limiting the Application of* Daimler*'s "At-Home" Test*, 90 St. John's L. Rev. 1115, 1118 (2016) ("[A]pplying *Daimler* would seriously undermine the purpose of the ATA's civil provision.").

126 *See Daimler*, 571 U.S. at 122. The holding had little impact on either statute largely because *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012), had already "rendered [the] plaintiffs' ATS and TVPA claims [in *Daimler*] infirm." *Daimler*, 571 U.S. at 141. The presumption of extraterritoriality was clearly not rebutted here, and the TVPA only extends liability to individuals, not a corporation like Daimler. *See id.*

127 Stephen J. DiGregoria, Note, *If We Don't Bring Them to Court, the Terrorists Will Have Won: Reinvigorating the Anti-Terrorist Act and General Jurisdiction in a Post-*Daimler *Era*, 82 Brook. L. Rev. 357, 379 (2016) ("*Daimler* has weakened the reach and scope of the ATA and therefore has made it more difficult for American victims to bring their attackers . . . to justice.").

128 *See Daimler*, 571 U.S. at 121.

129 *Id.*

130 *Id.* at 136, 138 (emphasis added).

131 *Id.* at 137 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 924 (2011)).

132 *See* Winawer, *supra* note 19, at 162–63, 163 n.8 (noting a post-*Daimler* trend that ATA cases against the PA are being dismissed for lack of personal jurisdiction). One of the few cases after *Daimler* that have found general jurisdiction over the PLO was overturned upon review. *See* Waldman v. Palestine Liberation Org., 835 F.3d 317, 332 (2d Cir. 2016) ("The district court concluded that it had general jurisdiction over the defendants; however, that conclusion relies on a misreading of the Supreme Court's decision in *Daimler*.").

justice.[133] But with the new general-jurisdiction standards of *Daimler*, only the TVPA appears to be still standing, relatively unscathed by the Court's interpretation.[134] This jurisdictional narrowing has severely hampered the ability of victims to seek redress in U.S. courts, and the state of affairs for victims seeking redress specifically for abuses committed by the agents of QSAs is direr still.

II. Quasi-State Actors: Semisovereign Entities in the Modern Era

The concept of the nation-state as the principal subject of international law finds its origin in the Peace of Westphalia of 1648.[135] But the horrors of the First and Second World Wars brought forth new notions of human rights and state responsibility towards individuals.[136] Though the international system that emerged from World War II was based on principles of nonaggression and human rights, it remained centered on states, saying little about the rights and obligations of nonstate actors.[137]

This lack of international law governing nonstate actors became more apparent towards the end of the 20th century with the emergence of new actors that altered the traditional state-state and state-individual dynamics.[138] The dissolution of Yugoslavia in 1992,[139] the creation of the Palestinian Authority in 1993,[140] the terrorist attacks of

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133 *See* Khan, *supra* note 113, at 296 ("While *Kiobel* appear[s] to have foreclosed a factually similar case to *Filártiga* under the ATS, the TVPA still affords a remedy in certain circumstances."); Schnably, *supra* note 114, at 318, 333–34 (noting Congress's expansion of the ATA despite the Court's retrenchment of ATS jurisdiction).

134 *See supra* note 113 and accompanying text.

135 *See* Ernst Dijxhoorn, Quasi-State Entities and International Criminal Justice 24–25 (2017); Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 Cardozo L. Rev. 1083, 1085 (1996).

136 *See* Sean D. Murphy, Principles of International Law 519–22 (2d ed. 2012). The Geneva Conventions of 1949 form the basis of modern humanitarian law and human rights law. *See id.* at 519–20. Every United Nations member state adheres to the 1949 Conventions. *See id.* at 520.

137 *See id.* at 522 (describing Common Article 3 of the Geneva Conventions, which deals with nonstate actors, as "very broad and lack[ing] [in] detail"); Ronen, *supra* note 15, at 30–31 ("The existing human rights catalogue is, by definition, a catalogue of human rights in state-individual relations.").

138 *See* Dijxhoorn, *supra* note 135, at 187 ("In the 1990s, the main threat to international stability no longer came from states waging war against each other, but from conflicts fought within states.").

139 *See, e.g.*, *id.* at 80–81, 84–87 (describing the Kosovo Liberation Army's role after the dissolution of Yugoslavia).

140 *See The Oslo Accords and the Arab-Israeli Peace Process*, U.S. Dep't St. Off. Historian, https://history.state.gov/milestones/1993-2000/oslo [https://perma.cc/E5A9-RDS5].

September 11, 2001,[141] and the emergence of the Islamic State in 2014[142] are all developments that challenge classic conceptions about nonstate actors. Though the international system "remains largely state-centered,"[143] these events demonstrate that clear-cut labels like "state" and "nonstate" are not as pertinent as they once were; the world has become more complicated.[144]

A. *Defining Quasi-State Actors*

Today, there are entities that straddle the line between statehood and private existence, borrowing characteristics from both without fitting neatly into either designation.[145] These QSAs[146] exploit a legal loophole that allows them some of the advantages of sovereignty without corresponding obligations.[147] This latter issue is the central theme of this Note: the lack of accountability of QSAs for human rights violations.

Defining what a "state" comprises provides a clear comparison, helping demonstrate the unique qualities of QSAs. Within international law there are two theories of statehood.[148] The "constitutive theory" conditions statehood solely upon "recognition by other

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141 *See* David Nakamura & Colum Lynch, *America Marks 10th Anniversary of Sept. 11 Terror Attacks*, WASH. POST (Sept. 11, 2011), https://www.washingtonpost.com/politics/america-marks-10th-anniversary-of-sept-11-terror-attacks/2011/09/11/gIQA9QssJK_story.html [https://perma.cc/E5A9-RDS5].

142 *See ISIS*, HISTORY, https://www.history.com/topics/21st-century/isis [https://perma.cc/XX4N-GGCU] (last updated Aug. 21, 2018); Will McCants, *How the Islamic State Declared War on the World*, FOREIGN POLICY (Nov. 16, 2015, 1:37 PM), https://foreignpolicy.com/2015/11/16/how-the-islamic-state-declared-war-on-the-world-actual-state [https://perma.cc/V9D4-WM6M].

143 Ronen, *supra* note 15, at 22.

144 *See id.*; Natalia Szablewska, *Non-state Actors and Human Rights in Non-international Armed Conflicts*, 32 S. AFR. Y.B. INT'L L. 345, 345 (2007) ("[C]hanges . . . through the emergence of other types of actors . . . have influenced discussions on the need to rethink the traditional understanding of the subjects of international law.").

145 *See* DIJXHOORN, *supra* note 135, at 31–32 ("A [QSA] is, by definition, a non-state actor, but not all non-state actors are [QSAs].").

146 The term "quasi-state actor" is not universally accepted. The terms "quasi-state entity," "de facto state," "unrecognized state," "para-state," and "pseudo-state" have all been used to describe this phenomenon. *See id.* at 31; *see also* McCants, *supra* note 142 (noting the Islamic State has been described as a "proto-state" and a "quasi-state").

147 *See* DARAGH MURRAY, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ARMED GROUPS 10 (2016) (arguing nonstate armed groups "enjoy a form of supreme sovereignty" due to international human rights law's general nonregulation of them); Ronen, *supra* note 15, at 24 (discussing the "need to bridge the gap between the extensive powers of [nonstate actors] and the limited" human rights obligations that apply to them).

148 LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW: CASES AND MATERIALS 286 (6th ed. 2014).

states," regardless of other factors.[149] The more widely accepted "declaratory theory" posits that statehood is based not on recognition by other states but on the fulfillment of four requirements: (1) "a permanent population," (2) "a defined territory," (3) a "government," and (4) the "capacity to enter into [foreign] relations."[150] U.S. courts have acknowledged the legitimacy of both theories.[151]

QSAs fail to fully satisfy the requirements of either theory of statehood. QSAs "lack the formal bases of legitimacy that sovereign states can usually rely on," such as "recognition as a sovereign state among equals."[152] This lack of recognition by other sovereign states blocks statehood under the constitutive theory.[153] QSAs also tend to lack at least one of the four requirements of the declaratory theory.[154] QSAs can further be distinguished from states by their inability to attain full membership in international organizations[155] and their assertions of sovereignty over territory claimed by a recognized state.[156]

However, QSAs also share many important characteristics with states that distinguish QSAs from nonstate actors. They often carry out essential state functions such as "providing security and justice"; "collect[ing] taxes"; providing healthcare, welfare, and education; and

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149 *Id.*

150 Convention on the Rights and Duties of States, arts. 1, 3, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. No. 3802 [hereinafter Montevideo Convention]; *see* DAMROSCH & MURPHY, *supra* note 148, at 286. Despite fewer than 20 states adhering to the Montevideo Convention, many international tribunals cite it and regard it as "reflecting customary international law." *Id.* at 283. A good example of statehood under the declaratory theory is Taiwan, officially the Republic of China. Taiwan's unique situation is discussed further in Part III.

151 *See* Kadic v. Karadžić, 70 F.3d 232, 244–45 (2d Cir. 1995) (acknowledging Srpska could be a state given plaintiff's allegations despite not being officially recognized by the United States).

152 DIJXHOORN, *supra* note 135, at 8.

153 *See* DAMROSCH & MURPHY, *supra* note 148, at 286.

154 For example, U.S. courts have repeatedly stated that Palestine lacks a defined territory due to the ongoing territorial disputes with Israel. *See, e.g.*, Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47–48 (2d Cir. 1991).

155 *See* DIJXHOORN, *supra* note 135, at 8.

156 The state of Somalia lays claim to territory in which the QSA Somaliland claims sovereignty. *See* Jason Beaubien, *Somaliland Wants to Make One Thing Clear: It Is Not Somalia*, NPR (May 30, 2017, 11:19 AM), https://www.npr.org/sections/goatsandsoda/2017/05/30/530703639/somaliland-wants-to-make-one-thing-clear-it-is-not-somalia [https://perma.cc/JFX6-Y5TY]. Similarly, many areas of the occupied West Bank, which the PA hopes will one day form part of a Palestinian state, have been developed as settlements for Israeli citizens; such settlements are considered by many to be illegal under international law. *See* Jodi Rudoren & Jeremy Ashkenas, *Netanyahu and the Settlements*, N.Y. TIMES (Mar. 12, 2015), https://www.nytimes.com/interactive/2015/03/12/world/middleeast/netanyahu-west-bank-settlements-israel-election.html [https://perma.cc/6FQ2-9D2K].

running "a functioning bureaucracy."[157] Like states, which generally exert actual control over their defined territory, QSAs can exert de facto control over a territorial area "beyond the reach of the de jure authority, thereby generating a legal vacuum."[158] That is, QSAs operate outside the "constitutional system of a state."[159] Crucially, QSAs often possess a core feature of the sovereign state: "a monopoly on violence."[160]

For the purposes of this Note, a QSA can be defined as an entity that (1) exerts de facto governmental authority over a territorial area, (2) claims a right of sovereignty over that territory, (3) has not been widely recognized by the international community as a state, and (4) fails in some respect to fully satisfy the requirements of the declaratory theory of statehood.[161] This definition captures the form of legitimacy that distinguishes QSAs from nonstate actors but also encapsulates the legal grey area that QSAs occupy.[162]

Palestinian statehood, for example, is hotly debated,[163] but, as of 2018, Palestine has nevertheless earned the official recognition of 137 states, including China, India, and Russia.[164] Notably, the United States has withheld recognition, which is why Palestine is a QSA under U.S. law.[165] Palestine holds "non-Member observer State status" with the United Nations ("U.N."), is referred to as "the State of

157 Dijxhoorn, *supra* note 135, at 28, 32; Murray, *supra* note 147, at 6 (discussing how "the Islamic State provides services including health, welfare and the administration of justice"); Ronen, *supra* note 15, at 25–30, 27 (arguing that imposing human rights obligations on nonstate actors requires an "apparatus exercising public functions").

158 Murray, *supra* note 147, at 121 (footnote omitted). That QSAs can exert de facto control over a territorial area is the basis of the "de facto control theory." *See id.* A QSA's exercise of de facto authority lends the QSA legal personality, binding it to the human rights obligations mandated by various international treaties and customary international law. *See id.* at 120–22, 126–27.

159 Ronen, *supra* note 15, at 27.

160 Dijxhoorn, *supra* note 135, at 28. Legally speaking, QSAs rarely have a de jure monopoly on violence. Rather, they possess a de facto monopoly on violence, as there is an absence of a de jure sovereign authority. *See id.*

161 *See supra* notes 150, 152–60 and accompanying text.

162 *See supra* notes 152–60 and accompanying text. This definition does not include nonstate actors like nongovernmental organizations, corporations, and foreign terrorist organizations, and also does not include international organizations.

163 *See* Edward W. Said, The Question of Palestine 4 (rev. ed. 1992). The full topic of Palestinian sovereignty is complicated and outside the scope of this Note. For further reading, *The Question of Palestine* is an excellent source for an in-depth history of the Palestinian people through the beginning of the First Intifada. *See generally id.*

164 *See Diplomatic Relations*, Permanent Observer Mission St. Palestine to U.N., http://palestineun.org/about-palestine/diplomatic-relations [https://perma.cc/5DAY-XJTZ].

165 Many U.S. allies, including most countries in the European Union, have also withheld recognition of Palestine. *See id.*

Palestine" by the U.N. Secretariat, and is a party to more than 40 treaties.[166] The official foreign representative of Palestine is the PLO,[167] and the self-government body of the Palestinian people is the PA, created under the Oslo Accords of 1993.[168]

The PA maintains full civil control over 40% of the West Bank and full security control over 18% of the West Bank.[169] As an unrecognized entity that possesses some, but not all, aspects of a statehood, the PA perfectly fits within this Note's definition of QSAs: (1) the PA exerts de facto civil government authority over 40% of the West Bank;[170] (2) the PA claims to be a sovereign entity and has made declarations of independence in the past;[171] (3) though recognized by many states, the PA is not recognized by some of the most important countries like the United States;[172] and (4) the PA, at a minimum, fails to satisfy the defined-territory requirement of the declaratory theory as its borders are still in dispute.[173] Though the PA is the most prominent example of a QSA and the one most widely discussed in this Note due to the significant amount of litigation focused on it, other

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166 *See Status of Palestine*, PERMANENT OBSERVER MISSION ST. PALESTINE TO U.N. (Aug. 1, 2013), http://palestineun.org/status-of-palestine-at-the-united-nations [https://perma.cc/PX8Q-EM9G]; *Treaties & Conventions*, PERMANENT OBSERVER MISSION ST. PALESTINE TO U.N. (Mar. 23, 2015), http://palestineun.org/category/treaties-conventions [https://perma.cc/FLN3-3QNG].

167 *See generally Palestinian Liberation Organization*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Palestine-Liberation-Organization [https://perma.cc/24JE-Z3PL].

168 *See Palestinian Authority*, Encyclopedia Britannica, https://www.britannica.com/topic/Palestinian-Authority [https://perma.cc/L7BM-5HFC]. This Note sometimes uses the abbreviations PLO and PA interchangeably, as courts often do. There are also instances where the named party in a case is the PLO, but the PA is an unnamed party, or vice versa. *Cf. infra* note 199 (citing cases in which the PLO is a named party).

169 *See* Ehab Zahriyeh, *Maps: The Occupation of the West Bank*, ALJAZEERA AM. (July 4, 2014, 10:04 AM), http://america.aljazeera.com/multimedia/2014/7/west-bank-security.html [https://perma.cc/W24M-6FPU]. The Oslo Accords divided the West Bank into three distinct areas distinguished by PA or Israeli civil and security control; the PA maintains full civil and security control over Area A (18% of the territory), civil control only over Area B (22% of the territory), and no civil or security control over Area C (60% of the territory). *Id.*; *see generally* Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, art. XI, Sept. 28, 1995. The Oslo Accords intended that full control over the entire West Bank be transferred to the PA in stages. *See* Zahriyeh, *supra*. This never occurred due to stalled peace negotiations. *See* David M. Halbfinger & Isabel Kershner, *25 Years After Oslo Accords, Mideast Peace Seems Remote as Ever*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/world/middleeast/israel-palestinian-oslo.html [https://perma.cc/KN6D-9RR7].

170 *See* Zahriyeh, *supra* note 169.

171 *See* Youssef M. Ibrahim, *P.L.O. Proclaims Palestine To Be an Independent State; Hints at Recognizing Israel*, N.Y. TIMES, Nov. 15, 1988, at A1.

172 *See supra* note 165 and accompanying text.

173 *See supra* notes 150, 169.

QSAs exist, including Somaliland,[174] the Turkish Republic of Northern Cyprus ("TRNC"),[175] and the Saharawi Arab Democratic Republic.[176]

B. Quasi-State Actor Liability Under U.S. Human Rights Law

In the context of human rights litigation, courts have generally treated QSAs as nonstate actors.[177] Depending on the statute under which a suit is brought, a defendant's status as a nonstate actor is often determinative. Nonstate status narrows accountability under the ATS[178] and precludes liability entirely under the TVPA.[179]

Within ATS litigation, a violation of the law of nations "generally requires state action because the vast majority [of] such alleged violations relate to the interaction between nations."[180] Nonstate actors, however, can also be held liable under the ATS.[181] The distinction is the *type* of violations upon which nonstate actors are sued. U.S. courts widely agree that both state actors and nonstate actors can be held liable for acts of genocide, war crimes, piracy, slavery, and slave trading.[182] Nonstate actors acting alone are generally not liable for acts of

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174 *See* Nora Y.S. Ali, Note, *For Better or for Worse? The Forced Marriage of Sovereignty and Self-Determination*, 47 CORNELL INT'L L. J. 417, 418–19 (2014) (discussing Somaliland's lack of international recognition).

175 The current "state" of TRNC was established after a Turkish military intervention in 1974 and a unilateral declaration of independence in 1983. *See* S.C. Res. 541 (Nov. 18, 1983); DAMROSCH & MURPHY, *supra* note 148, at 1120. Scholars are divided on whether the TRNC is independent or simply a puppet state of Turkey. *Compare* ERSUN N. KURTULUS, STATE SOVEREIGNTY: CONCEPT, PHENOMENON AND RAMIFICATIONS 136 (2005) ("It may be argued that the Turkish Republic of Northern Cyprus, . . . which was only recognized as a state by Turkey . . . , is at the moment of writing the only existent puppet state in the world."), *with* Barry Bartmann, *Political Realities and Legal Anomalies: Revisiting the Politics of International Recognition*, *in* DE FACTO STATES: THE QUEST FOR SOVEREIGNTY 24 (Tozun Bahcheli et al. eds., 2004) ("The political realities on the ground in [TRNC] are those of a separate democratic state . . . .").

176 *See Saharan Arab Democratic Republic*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Saharan-Arab-Democratic-Republic [https://perma.cc/22TT-MTK9].

177 *See infra* notes 185–189 and accompanying text.

178 *See* Ronen, *supra* note 15, at 33–34 (noting that U.S. courts have rejected nonstate actor liability under the ATS for torture but have found liability for acts such as piracy and genocide).

179 The TVPA applies only to agents acting under the direction of a "foreign nation." *See supra* notes 92–96 and accompanying text.

180 Estate of Manook v. Research Triangle Inst., Int'l, 759 F. Supp. 2d 674, 678 (E.D.N.C. 2010).

181 The Second Circuit has held that "certain forms of conduct violate the law of nations," regardless of whether there was state action. *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 239 (2d Cir. 1995).

182 *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002) (agreeing with the Second Circuit that slave trading, genocide, and war crimes "do not require state action" to constitute a violation of the law of nations); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987) (stating that states have jurisdic-

torture and extrajudicial killings, conduct that does not violate the law of nations and thus is outside the scope of the ATS.[183] However, torture and extrajudicial killings committed by nonstate actors can fall within the jurisdiction of the ATS when they are perpetrated under the color of law or in furtherance of other crimes such as genocide or war crimes.[184]

Given this discrepancy between state actors and nonstate actors, ATS and TVPA cases often turn on the court's answer to a simple question: Was the defendant a state actor or acting under the color of law? Two early cases that examined related issues, *Klinghoffer v. S.N.C. Achille Lauro*[185] and *Tel-Oren v. Libyan Arab Republic*,[186] answered this question in the negative: in each case, the PLO was held to not be a state and thus could not be held liable for the alleged acts of torture and extrajudicial killings.[187]

Subsequently, litigants have advanced various legal theories for holding the PA liable under the ATS and TVPA to no avail; each case has ended in dismissal.[188] The Supreme Court has also declined to offer an opinion on whether the PA qualifies as a "foreign nation" under the TVPA.[189]

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tion to punish "certain offenses . . . of universal concern, such as piracy, slave trade, . . . genocide, [and] war crimes").

183 *See, e.g.*, *Kadic*, 70 F.3d at 243 ("[T]orture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law.").

184 *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1267 (11th Cir. 2009) (holding that acts of torture and summary execution "committed in the course of war crimes" violate the law of nations, even if perpetrated by a nonstate actor), *abrogated on other grounds by* Mohamad v. Palestinian Auth., 566 U.S. 449, 453 (2012); *Kadic*, 70 F.3d at 243–44.

185 937 F.2d 44 (2d Cir. 1991).

186 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

187 *See Klinghoffer*, 937 F.2d at 47 (finding that the PA was not a state and therefore not immune to suit under the FSIA); *Tel-Oren* 726 F.2d at 791 (Edwards, J., concurring).

188 *See, e.g.*, Ali Shafi v. Palestinian Auth., 642 F.3d 1088, 1095 (D.C. Cir. 2011) (rejecting appellants' argument that agents of nonstate actors like the PA can nonetheless be public officials for purposes of ATS); Estate of Amergi v. Palestinian Auth., 611 F.3d 1350, 1358–59 (11th Cir. 2010) (rejecting appellants' assertion that a private killing in the course of an armed conflict falls within scope of ATS); Saperstein v. Palestinian Auth., No. 104-cv-20225-PAS, 2006 WL 3804718, at *7–8 (S.D. Fla. Dec. 22, 2006) (rejecting plaintiffs' theory that acts of terrorism committed by private actors constitute war crimes and thus fit within scope of ATS).

189 *See Mohamad*, 566 U.S. at 452 n.1. This issue was not on appeal, but an affirmative finding that the PA qualifies as a foreign nation under the TVPA may have extended such recognition of the PA as a foreign nation to ATS cases as well. *See* Apostolova, *supra* note 89, at 647–52 (discussing cases in which courts have imported TVPA requirements into the ATS).

But courts do not always decline state status to QSAs. In *Kadic v. Karadžić*,[190] the Second Circuit held that the unrecognized QSA Srpska could be a state for purposes of the state-action requirement of the ATS given the plaintiff's allegations.[191] Other instances where QSAs are recognized are rare, but *Doe v. Constant*[192] and *Doe v. Islamic Salvation Front*[193] also touch on this issue. The Second Circuit in *Constant* found Front Revolutionnaire Pour L'Avancement et le Progres d'Haiti ("FRAPH"), a paramilitary group in Haiti, to be operating under the color of law because, among other findings, FRAPH had "worked in concert with the Haitian military to terrorize and repress the civilian population."[194] The D.C. Circuit in *Islamic Salvation Front* declined to dismiss the TVPA claim against the Islamic Salvation Front because the plaintiffs' allegations that the defendant qualified as a de facto state were "extensive."[195]

Unlike the ATS and TVPA, the ATA plainly covers nonstate actors.[196] As such, following the disappointing results of cases brought against the PA and PLO (the QSAs most subject to suit) under the ATS and TVPA, litigants turned to the ATA.[197] By comparison, plaintiffs were far more successful with such suits,[198] as courts found the various defenses put forward by the PA and PLO were insufficient.[199] This trend continued until the Supreme Court's decision in *Daimler*

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190 70 F.3d 232 (2d Cir. 1995).

191 *Id.* at 245 (accepting as alleged that Srpska had a government, held territory with a permanent population, and entered into agreements with other governments).

192 354 F. App'x 543 (2d Cir. 2009).

193 993 F. Supp. 3 (D.D.C. 1998).

194 *Constant*, 354 F. App'x at 545–46. FRAPH qualifies as a QSA for the purposes of this Note because in 1993, at the time of the atrocities, Haiti amounted to a failed state without an internationally recognized governmental authority. *See generally* Jean-Germain Gros, *Towards a Taxonomy of Failed States in the New World Order: Decaying Somalia, Liberia, Rwanda and Haiti*, 17 THIRD WORLD Q. 455, 467 (1996) (describing Haiti as "anaemic" and its "semblance" of state authority as "skeleton [in] form" from 1991 to 1994).

195 *Islamic Salvation Front*, 993 F. Supp. at 9.

196 *See supra* notes 121–22 and accompanying text.

197 *See* Christopher, *supra* note 122, at 111–13, 113 nn.105–06 (citing six separate actions brought against the PA and PLO under the ATA between 2004 and 2008).

198 *See id.* at 103 ("[P]laintiffs have won major victories with record punitive damage awards.").

199 *See, e.g.*, Ungar v. Palestinian Liberation Org., 402 F.3d 274, 292 (1st Cir. 2005) (affirming the lower court's ruling that the PA was not entitled to sovereign immunity because it was not a state); Sokolow v. Palestinian Liberation Org., 583 F. Supp. 2d 451, 458–60 (S.D.N.Y. 2008) (denying defendants' motion to dismiss an ATA claim because subject matter jurisdiction was sufficiently established), *vacated on other grounds*, Waldman v. Palestinian Liberation Org., 835 F.3d 317, 322 (2d Cir. 2016) (reversing district court's finding of personal jurisdiction in light of *Daimler AG v. Bauman*, 571 U.S. 117 (2014)).

made clear that the heighted bar for general jurisdiction for organizations—that their contacts must render them "at home" in the jurisdiction—applied in cases involving human rights abuses.[200] Since *Daimler*, nearly every case brought against the PA or PLO under the ATA has resulted in a dismissal for want of personal jurisdiction.[201]

The ultimate result of these developments in ATS, TVPA, and ATA caselaw is that QSAs can no longer realistically be brought into U.S. courts for their human rights abuses. One by one, each statutory mechanism has been eliminated as a viable avenue for relief: *Kiobel*'s presumption against extraterritoriality eviscerates the foreign reach of the ATS over foreign QSAs;[202] *Jesner*'s finding that the ATS does not encompass corporate liability forecloses bringing such actions against QSAs, even if they can overcome *Kiobel*'s extraterritoriality concerns;[203] *Mohamad*'s holding that the TVPA only covers individual liability, combined with the statute's "foreign nation" requirement, precludes suits against QSAs;[204] and *Daimler*'s general jurisdiction standards make establishing personal jurisdiction over any foreign entity, including QSAs, all but impossible.[205] Regardless of the Supreme Court's intent behind its decisions, Congress surely did not intend for such a limited U.S. human rights regime when it sought to establish a "clear and specific remedy . . . for torture and extrajudicial killing" in addition to the existing ATS.[206]

Regardless, there now exists a liability gap with regards to QSAs where U.S. and foreign victims are left without any effective legal pro-

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200 *See Daimler*, 571 U.S. at 139; *supra* Section I.C.

201 *See, e.g.*, Casamassima, *supra* note 125, at 1117 ("The Second Circuit adopted a position endorsed by several cases coming out of the District Court for the District of Columbia . . . , which have all ruled that federal courts can no longer exercise jurisdiction over foreign sponsors of terrorism as a result of *Daimler*."); *see also* Waldman, 835 F.3d at 344 (dismissing case due to failure to establish personal jurisdiction).

202 *See* 569 U.S. 108 (2013); *supra* notes 72–81.

203 *See* 138 S. Ct. 1386 (2018); *supra* notes 82–87. In several cases, courts have implied that QSAs should be treated as corporate entities. *See, e.g.*, Mohamad v. Palestinian Auth., 566 U.S. 449, 453–54, 461 (2012) (holding that the term "individual" in the TVPA does not encompass corporations or other juridical entities like the PA); Toumazou v. Turkish Republic of N. Cyprus, 71 F. Supp. 3d 7, 13–15 (D.D.C. 2014) (treating the TRNC as a corporate entity for purposes analyzing personal jurisdiction). It follows that *Jesner* categorically bars QSAs from liability under the ATS as corporate entities, even if a plaintiff is able to overcome the presumption of extraterritoriality outlined in *Kiobel*. *See supra* notes 82–87 and accompanying text.

204 *See* 566 U.S. at 453–54, 461; *supra* notes 110–12 and accompanying text.

205 *See* 571 U.S. at 139; *supra* notes 130–32 and accompanying text. The Court's recent decision in *Jesner* categorically bars corporate defendants from suit under the ATS, further narrowing the reach of the statute. *See supra* note 84 and accompanying text.

206 *See* H.R. REP. NO. 102-367, at 3 (1991) (discussing the need for the TVPA even though the ATS existed).

tections in U.S. courts.[207] This de facto foreclosure of QSA accountability raises several questions regarding how the United States and the international community should approach QSAs. But even before the recent truncation of the ATS, TVPA, and ATA, several legal problems related to how U.S. courts approached QSAs existed. The next Section delves into these legal and policy considerations and explains why these problems should prompt Congress to adopt the statutory fix this Note proposes.

C. Legal & Policy Problems of the Quasi-State Actor Human Rights Regime

When amending a decades-old statutory mechanism, it is important to understand why such a change is needed. Before proposing an amendment to the TVPA and the U.S. human rights regime as a whole, this Note evaluates several legal and policy considerations: (1) the importance of the United States' obligations under the CAT, (2) the need to resolve constitutional questions of state recognition following *Zivotofsky v. Kerry*,[208] (3) the desire for consistent litigation strategy in U.S. courts, and (4) the ever-growing number of QSAs on the world stage. Such problems existed in the prior legal regime—i.e., before *Kiobel*, *Mohamad*, and *Daimler*—and they remain in the current regime.

1. Legal Problems

The legal problems of the current regime fall into two categories: potential violations of treaty obligations and constitutional issues related to state recognition. First, the United States' lack of any viable legal mechanism to hold the agents of QSAs accountable for acts of torture is arguably contrary to U.S. treaty obligations under the CAT.[209] Article 5 of the CAT requires each state to "take such measures as may be necessary to establish its jurisdiction over such offences [of torture] in cases where the alleged offender is present in any territory under its jurisdiction."[210] This treaty obligation was a primary motivator of the TVPA as Congress wanted to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States."[211] Despite the broad language of the CAT and the leg-

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207 *Cf.* MURRAY, *supra* note 147, at 10 (noting that the "legal vacuum" surrounding QSAs leaves individuals "without any effective international legal protection").

208 135 S. Ct. 2076 (2015).

209 *See generally* Convention Against Torture, *supra* note 98.

210 *Id.* at part I, art. 5, § 2.

211 S. REP. NO. 102-249, at 3 (1991).

islative history of the TVPA, U.S. courts have said that acts of torture and extrajudicial killings by private groups—and, by extension, QSAs—are not violations of international law and thus are not covered by the CAT.[212] This conclusion may be legally sound under U.S. law,[213] but it constitutes a narrow reading of the CAT's definition of torture, which requires such acts to be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[214]

Such interpretations, however, are not necessarily aligned with international law. Though many scholars maintain that international law does not recognize private acts of torture as violations of humanitarian law, there is far from a universal consensus on the matter.[215] Some have argued that the CAT encompasses "all acts of torture occurring within [the] jurisdiction" of a state, including those committed by private actors, because "the inclusion of the term 'acquiescence' [in Article 1 of the CAT] necessarily allows for a finding of torture by non-state actors or entities."[216] Dr. Daragh Murray contends that international human rights law treaties should be read to "bind non-state armed groups who have displaced the authority of the state."[217] Similarly, Dr. Ya'l Ronen argues that "[t]here is . . . nothing in human rights theory that precludes the imposition of legal obligations on actors other than states" and that "protection of human rights should . . .

212 *See* Kadic v. Karadžić, 70 F.3d 232, 243–44 (2d Cir. 1995) (citing to the CAT as requiring the act of torture to be inflicted by, instigated by, or committed with the consent or acquiescence of a public official).

213 The TVPA limits liability for torture to individuals who act "under actual or apparent authority, or color of law" of a state. *See* 28 U.S.C. § 1350 note (2012) (TVPA § 2(a)).

214 Convention Against Torture, *supra* note 98, part I, art. 1, § 1.

215 *Compare* Rachel Lord, *The Liability of Non-state Actors for Torture in Violation of International Humanitarian Law: An Assessment of the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 4 MELB. J. INT'L L. 112, 137 (2003) ("International humanitarian law instruments provide a strong indication that the [state] status of the perpetrator should not be considered an element of the definition of torture."), *with* Ronen, *supra* note 15, at 47 ("[A]t present, customary international human rights law does not seem to extend beyond states, nor, obviously, does treaty law.").

216 Josephine A. Vining, Note, *Providing Protection from Torture by "Unofficial" Actors: A New Approach to the State Action Requirement of the Convention Against Torture*, 70 BROOK. L. REV. 331, 344–45 (2004); *see also* Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 304 (2003) (suggesting a state's failure to punish or prevent private acts of torture constitutes acquiescence by public officials, and therefore private acts of torture indirectly violate the CAT).

217 MURRAY, *supra* note 147, at 169. He justifies this position on the notion that such "group[s] ha[ve,] in effect, substituted their own authority for that of the state" and thus must be held accountable for their actions as if they were a state. *See id.* at 169–70.

extend to all situations in which these rights are threatened, irrespective of who puts them in jeopardy."[218]

Support for QSA liability under the CAT can also be found in the statements of significant international bodies. The U.N. General Assembly noted upon adoption of the Declaration Against Torture that "the Declaration constituted a 'guideline for all States *and other entities exercising effective power*.'"[219] Further, the U.N. Committee Against Torture[220] has held that a nonstate actor acting as a de facto government authority was considered, "for the purposes of the application of the Convention, within the phrase 'public officials or other persons acting in an official capacity'" and thus capable of committing an act of torture under the terms of the CAT.[221] Philip Alston, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, has acknowledged that nonstate actors should be addressed within human rights law due to their growing importance in world affairs.[222] Notably, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ruled in 2002 that the "public official requirement" for acts of torture "is not a requirement under customary international law."[223] The language these international bodies use does not explicitly endorse liability for traditional nonstate actors but instead describes situations involving an absence of a de jure sovereign authority. Recognition of liability under international law in such circumstances logically indicates that QSAs fall within the scope of the CAT. These statements elucidate the tension between different

218 Ronen, *supra* note 15, at 21.

219 *See* MURRAY, *supra* note 147, at 152 (quoting G.A. Res. 3452 (XXX), at 91 (Dec. 9, 1975)).

220 A function of the Committee is to interpret the CAT. *See Committee Against Torture*, U.N. HUM. RTS. OFF. HIGH COMMISSIONER, https://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx [https://perma.cc/SD3V-7VH7].

221 *See* Elmi v. Australia, U.N. Committee Against Torture, Communication No. 120/1998, § 6.5, U.N. Doc. CAT/C/22/D/120/1998 (May 14, 1999); *see also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 345 (2006). The Committee later described the *Elmi* case as exceptional and declined to extend *Elmi*'s holding to a later complaint of acts by the same actors because an internationally recognized government had been established in Somalia. *See* H.M.H.I. v. Australia, U.N. Committee Against Torture, Communication No. 177/2001, § 6.4, U.N. Doc. CAT/C/28/D/177/2001 (2002).

222 Philip Alston (Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, § 76, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004) ("The traditional approach of international law is that only Governments can violate human rights . . . . [I]n an era when non-State actors are becoming ever more important in world affairs, the Commission risks handicapping itself significantly if it does not respond in a realistic but principled manner.").

223 Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, § 148 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

interpretations of "torture" under international law—namely, the narrow view by the United States and the broader view by authoritative figures in international legal institutions.

The second legal problem is that a court's determination of the state status of a QSA arguably interferes with the President's power of recognition. Courts have been deciding whether QSA defendants have qualified as states for ATS and TVPA claims.[224]

While courts were issuing these decisions, some scholars argued that such determinations of statehood were instead properly within the functions of the executive branch.[225] This legal theory was validated in 2015 with the Supreme Court's decision in *Zivotofsky*—"the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone."[226] Given this clear statement from the Court, the finding of state status in cases like *Kadic* and *Islamic Salvation Front* would likely have been unconstitutional infringements on the President's power of recognition had they been decided the same way post-*Zivotofsky*, because they ran counter to the implied presidential determination that such entities were not states.[227] In 2018, a court evaluating the state status of a QSA defendant in a human rights case would all but certainly treat it as a nonstate actor or risk running afoul of *Zivotofsky*. The statutory solution proposed below shores up any questions of constitutionality by limiting the judiciary's role in the process, relying on Congress to define guidelines and allowing the President the final determination on statehood.[228]

2. *Policy Problems*

Policy problems arising from the status quo include inconsistencies in litigation strategies practiced by QSAs and the ever-increasing number of QSAs within the global community. First, inconsistent litigation practice is best illustrated by examining specific cases involving the PA and PLO. Depending on the statutory mechanism at issue and the timing of the case—whether pre- or post-*Daimler*—the PA and

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224 *See, e.g.*, Kadic v. Karadžić, 70 F.3d 232, 245 (2d Cir. 1995); *see also supra* notes 185–95 and accompanying text.

225 *See, e.g.*, Eric T. Smith, Comment, *State Recognition Under the Foreign Sovereign Immunity Act: Who Decides, the Judiciary or the Executive?* Klinghoffer v. Palestinian Liberation Organization*, 937 F.2d 44 (2d Cir. 1991)*, 6 TEMP. INT'L & COMP. L.J. 169, 189 (1992) ("The executive branch should still decide definitional issues of what constitutes a foreign state.").

226 135 S. Ct. 2076, 2094 (2015).

227 *See supra* Section II.B.

228 *See infra* Sections III.B–.C.

PLO made wildly different legal arguments about their status as a state to avoid liability.

In cases brought under the ATS and TVPA, the PA or PLO would argue that it was *not* a sovereign state, in order to fall outside the subject matter jurisdiction of the statute at issue.[229] A finding by the court that the defendant is a nonstate actor results in smaller set of violations that are actionable under the ATS and total preclusion from recovery under the TVPA. These cases often result in a dismissal for want of subject matter jurisdiction.[230]

This litigation strategy sharply contrasts the arguments that the PA and PLO make in cases brought under the ATA. Pre-*Daimler*, the Palestinian defendants argued that they were a state for purposes of litigation.[231] State recognition would afford the defendants sovereign immunity, from which the court would dismiss the case.[232] The PA's and PLO's approach to ATA cases changed following *Daimler*, focusing more on challenges to personal jurisdiction.[233]

Since 2014, when *Daimler* was decided, through November 2018, neither the PA nor the PLO claimed statehood; instead, they described themselves as private actors entitled to due process rights.[234]

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229 *See, e.g.*, Estate of Amergi v. Palestinian Auth., 611 F.3d 1350, 1358 (11th Cir. 2010) (noting PA's argument that the ATS does not grant subject matter jurisdiction over claims committed by private actors like themselves); Ali Shafi v. Palestinian Auth., 686 F. Supp. 2d 23, 29 (D.D.C. 2010) ("The parties agree that the PA and the PLO are non-state actors."); Saperstein v. Palestinian Auth., No. 1:04-cv-20225, 2006 WL 3804718, at *5 n.6 (S.D. Fla. Dec. 22, 2006) ("Plaintiffs concede that the PA and PLO are not state actors for the purposes of the ATS.").

230 *See supra* notes 185–88 and accompanying text.

231 *See, e.g.*, Ungar v. Palestinian Liberation Org., 402 F.3d 274, 277 (1st Cir. 2005) (explaining that "the PA and the PLO later changed their position" from claiming functional immunity as a functioning governmental entity to "claim[ing] an immunity from suit based on sovereignty" as a state); Sokolow v. Palestinian Liberation Org., 583 F. Supp. 2d 451, 457 (S.D.N.Y. 2008) ("Defendants also argue that sovereign immunity shields them from suit, under the ATA and FSIA . . . ."); Biton v. Palestinian Interim Self-Gov't Auth., 310 F. Supp. 2d 172, 180 (D.D.C. 2004) ("Citing § 2337(2) of the ATA and § 1604 of the FSIA, the defendants move to dismiss this action on the grounds that Palestine is a sovereign entity."); Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424, 428 (S.D.N.Y. 2004) (explaining defendants "assert[] immunity allegedly grounded on the sovereignty of the 'State of Palestine under international law'").

232 The FSIA grants states a presumption of immunity, to which there are only a handful of exceptions. *See* 28 U.S.C. § 1604 (2012).

233 *See supra* notes 200–01 and accompanying text.

234 *See, e.g.*, Livnat v. Palestinian Auth., 851 F.3d 45, 49 (D.C. Cir. 2017) ("And no party here argues that the Palestinian Authority is a *sovereign* foreign state."); Gilmore v. Palestinian Interim Self-Gov't Auth., 843 F.3d 958, 964–65 (D.C. Cir. 2016) (holding that the PA had waived its challenge to personal jurisdiction when it had argued earlier in the case, pre-*Daimler*, that it was "a state under U.S. and international law"); Waldman v. Palestinian Liberation Org., 835 F.3d 317, 326 (2d Cir. 2016) (reviewing the denial of the PA and PLO's post-*Daimler* motion to reconsider the earlier denial of their motion to dismiss for want of jurisdiction).

Given the courts' precedent recognizing the PA and PLO as nonstate actors, nearly every ATA case post-*Daimler* has been dismissed due to lack of personal jurisdiction.[235]

There is nothing inherently wrong with a defendant putting forward varied legal arguments in different cases; however, the situation here does cause some consternation because of official positions on statehood taken by the PA and PLO. The PLO officially declared independence in 1988.[236] In 2011, President Mahmoud Abbas submitted a bid to make Palestine a full member of the United Nations,[237] and in 2012, the United Nations upgraded Palestine's observer status from "entity" to "non-member observer State."[238] This was followed in 2013 with the PA's official name change to the "State of Palestine" within its official documents and at the United Nations.[239] These developments are in tension with the legal arguments made in U.S. courts and are emblematic of the serious policy questions regarding QSAs.[240]

Second, QSAs are becoming much more common as the world progress through the 21st century. Though the caselaw has primarily dealt with Palestine, there are numerous other examples, with more forming every year.[241] New waves of nationalism in 2017 spurred independence movements in Catalonia[242] and Iraqi Kurdistan.[243] Military

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235 *See* Casamassima, *supra* note 125, at 1117 ("The Second Circuit adopted a position endorsed by several cases coming out of the District Court for the District of Columbia . . . , which have all ruled that federal courts can no longer exercise jurisdiction over foreign sponsors of terrorism as a result of *Daimler*.").

236 *See* Ibrahim, *supra* note 171, at A1.

237 *See Palestinian Leader Mahmoud Abbas Makes UN Statehood Bid*, BBC News (Sept. 23, 2011), http://www.bbc.com/news/world-middle-east-15033357 [https://perma.cc/P4SC-UYLX].

238 G.A. Res. 67/19, § 2, Status of Palestine in the United Nations (Dec. 4, 2012); *see* Louis Charbonneau, *Palestinians Win Implicit U.N. Recognition of Sovereign State*, Reuters (Nov. 29, 2012, 1:03 AM), https://www.reuters.com/article/us-palestinians-statehood/palestinians-win-implicit-u-n-recognition-of-sovereign-state-idUSBRE8AR0EG20121129 [https://perma.cc/NEF7-RKWB].

239 *See Palestine: What Is in a Name (Change)?*, Al Jazeera (Jan. 8, 2013, 7:49 AM), https://www.aljazeera.com/programmes/insidestory/2013/01/2013186722389860.html [https://perma.cc/A34Z-RQZK].

240 The complications with QSAs in human rights–violation cases force issues of foreign policy and state recognition upon courts, areas that traditionally fall outside the purview of the judicial system. *See generally* Zivotofsky v. Clinton, 566 U.S. 189, 214 (2012) (Breyer, J., dissenting) ("[T]he creation of wise foreign policy typically lies well beyond the experience or professional capacity of a judge.").

241 Examples already mentioned include Somaliland, the TRNC, and the Saharawi Arab Democratic Republic. *See supra* notes 174–76 and accompanying text.

242 In 2017, the Spanish region of Catalonia unilaterally declared independence, prompting the central government to dissolve the regional government and call for new elections. *See* Raphael Minder & Patrick Kingsley, *Spain Dismisses Catalonia Government After Region De-*

interventions have resulted in de facto states in Eastern Europe.[244] The Syrian civil war has created power vacuums resulting in the formation of quasi-states like Rojava[245] and the Islamic State.[246] Such events demonstrate that the QSA liability gap is not a minute problem centered only on Palestine. If Congress intends to maintain a forum of civil redress for victims, it should not exclude an entire category of entities that are becoming more prevalent from the scope of U.S. human rights statutory regime. As the number of QSAs increases, so too does the potential for atrocities to go unaddressed, which would undermine the U.S. legal regime and call into question the purpose of the ATS, TVPA, and ATA.

III. Bridging the Gap: Amending the TVPA to Encompass Quasi-State Actors

To address the QSA liability gap and resolve the various legal and policy problems with the current statutory regime, a simple legislative solution that addresses the core issue without unnecessarily affecting other statutory provisions is ideal. The most viable statutory mechanism for holding human rights abusers accountable is currently the TVPA.[247] This Note proposes that Congress amend the TVPA by expanding the definition of "foreign nation" to include QSAs.[248] Further, Congress should add a provision that allows the President to intervene in any lawsuit brought under the TVPA in which the

clares Independence, N.Y. Times (Oct. 27, 2017), https://www.nytimes.com/2017/10/27/world/europe/spain-catalonia-puigdemont.html [https://perma.cc/SB2F-PWHW].

243 The autonomous Iraqi Kurdistan region held an independence referendum in September 2017, with 93% voting yes. *See* David Zucchino, *After the Vote, Does the Kurdish Dream of Independence Have a Chance?*, N.Y. Times (Sept. 30, 2017), https://www.nytimes.com/2017/09/30/world/middleeast/kurds-iraq-independence.html [https://perma.cc/7Q5L-X2GM].

244 These de facto states, like Transnistria and South Ossetia, formed after Russia conducted military interventions into the internal conflicts of its neighbors. *See* Robert Orttung & Christopher Walker, *Putin's Frozen Conflicts*, Foreign Pol'y (Feb. 13, 2015, 3:15 PM), http://foreignpolicy.com/2015/02/13/putins-frozen-conflicts [https://perma.cc/S323-U6MG].

245 Rojava is a Kurdish-led autonomous region that has held elections, maintains its own security forces, and is supported by the U.S. military. *See* Wes Enzinna, *A Dream of Secular Utopia in ISIS' Backyard*, N.Y. Times Mag. (Nov. 24, 2015), https://www.nytimes.com/2015/11/29/magazine/a-dream-of-utopia-in-hell.html [https://perma.cc/S2AP-EFFY].

246 Though now largely defeated, the Islamic State was a QSA that ran a fairly complex system of government and controlled wide swaths of Syria from 2014 to 2017. *See* Rukmini Callimachi, *The ISIS Files*, N.Y. Times (Apr. 4, 2018), https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html [https://perma.cc/H2Z6-AD3M].

247 As discussed, only the TVPA still remains relatively unhindered by Supreme Court rulings. *See supra* Section I.B.

248 Currently, the TVPA does not define the term "foreign nation." *See* 28 U.S.C. § 1350 note (2012) (TVPA § 3).

defendant is not officially recognized as a state.[249] These changes would ensure that QSAs are held accountable by exposing their agents to liability for acts of torture and extrajudicial killings, while also safeguarding the President's exclusive power of recognition.[250]

The next Section explains why amending the TVPA is the best solution. The following Section then outlines the proposed statutory language and explains how the amendment should be applied and interpreted. The final Section addresses and analyzes legal questions surrounding the proposal related to the President's power of recognition.

A. Amending the TVPA: A Simple and Straightforward Solution

Amending the TVPA to reach QSAs might seem an odd choice given that the acts of QSAs already can fall within the scope of the ATA and partially within the jurisdiction of the ATS. However, there are several reasons why a TVPA-centered solution is the simplest means to hold QSAs accountable. First, the ATS is no longer a viable statutory mechanism following *Kiobel*'s holding that there exists a presumption against extraterritoriality and *Jesner*'s holding that the ATS does not extend liability to corporations.[251] In order to be effective, any amendment to the ATS regarding QSAs would need to include a provision that removes this presumption and expands the statute's scope to cover corporations. By comparison, the TVPA has no such presumption to overcome.[252]

Second, the ATA is limited to causes of action that arise from acts of international terrorism, and only "national[s] of the United States" may bring suit under the act.[253] Given these restraints, many acts of torture and extrajudicial killings committed by any actors, whether state, nonstate or quasi-state, are excluded from the ATA's jurisdiction.[254] The ATA's definition of "international terrorism" inherently

249 This executive intervention provision is meant to address issues relating to the President's power of recognition. *See infra* Section III.C.

250 This Note intends for QSAs to be held accountable by subjecting their agents to liability under the TVPA as individuals. This Note does not intend to overturn the holding in *Mohamad v. Palestinian Authority*, 566 U.S. 449 (2012), by extending the TVPA liability to other juridical persons, because the Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014), all but foreclosed the possibility of establishing personal jurisdiction over foreign entities like QSAs. *See supra* Section I.C.

251 *See supra* notes 72–87 and accompanying text.

252 *See supra* note 96 and accompanying text.

253 18 U.S.C. § 2333(a) (2012).

254 For an act to qualify as "international terrorism" for which there is ATA jurisdiction, it must "appear to be intended[] (i) to intimidate or coerce a civilian population; (ii) to influence

requires some form of political motivation, which many instances of torture and extrajudicial killing lack; for example, torture for the purpose of gathering intelligence does not require a political motivation.[255] The TVPA allows both U.S. nationals and non-nationals to bring a claim and does not require the political motivations required by the ATA.[256]

Third, *Daimler*'s personal jurisdiction standards make holding foreign organizations accountable under the ATA a nearly insurmountable task.[257] Congress itself may not even be able to rectify the difficulty of establishing personal jurisdiction without constitutional considerations, given *Daimler*'s focus on due process protections.[258] In contrast, TVPA suits cannot be brought against organizations.[259] As such, in suits under the amended TVPA, courts only need to have personal jurisdiction over the individual abuser—presumably met when the abuser is present in the United States in the jurisdiction where a TVPA suit is brought.

Finally, recent court decisions and scholarly writings demonstrate the resilience of the TVPA as an avenue of relief for victims, whereas the same cannot be said about the ATS[260] and ATA.[261] The Fourth Circuit's decision in *Warfaa v. Ali*[262] affirmed that the TVPA is still a viable means for bringing suits for alleged torture and extrajudicial killings.[263] To correctly extend liability to QSAs, Congress should use the TVPA, which is still looked upon favorably by the judiciary, rather than the ATS or ATA, which have been stripped bare by the Supreme Court.

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the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping . . . ." 18 U.S.C. § 2331(1)(B).

255 *See id.*

256 This is apparent from the plain language of the act. *See* 28 U.S.C. § 1350 note (2012) (TVPA §§ 2(a)(1)–(2)).

257 *See supra* notes 125–32 and accompanying text.

258 *See* Daimler AG v. Bauman, 571 U.S. 117, 156 (2014). (Sotomayor, J., concurring) ("[T]he majority short[-]circuits that process by enshrining today's narrow rule of general jurisdiction as a matter of constitutional law.").

259 *See* Mohamad v. Palestinian Auth., 566 U.S. 449, 461 (2012). Indeed, this Note does not pretend to allow suits against organizations but rather places liability on the individual agents of those organizations.

260 *See* Khan, *supra* note 113, at 295–96.

261 *See supra* notes 126–32 and accompanying text.

262 811 F.3d 653 (4th Cir. 2016).

263 *See id.* at 655, 657, 661–62; *see also* Khan, *supra* note 113, at 300 ("[T]he TVPA operates at a democratic peak: with congressional approval in passing the Act and an opportunity for the executive branch to relay foreign policy considerations, the judiciary does not face the problem of scope it has often confronted with the ATS.").

B. Expanding the Definition of "Foreign Nation"

The most straightforward way to guarantee that agents of QSAs can be held accountable for acts of torture and extrajudicial killings is to change the statutory language of the TVPA so that QSAs fit within the term "foreign nation."[264] Numerous Supreme Court decisions have demonstrated that the judiciary is unlikely to expand the current interpretations of the TVPA,[265] and unilateral interventions by the executive branch absent statutory authorization into cases, though technically allowed, will likely only cause confusion. Thus, legislative action is the best way forward.

By defining "foreign nation" and broadening its scope beyond the courts' interpretation, Congress ensures not only that QSAs are held accountable but also that the litigation process is streamlined because the defined term "foreign nation" resolves inconsistencies raised before courts in the past.[266] Defining such a term would not be out of place within the TVPA—the statute already includes detailed definitions of "extrajudicial killing" and "torture."[267] By further defining the term "foreign nation," Congress is simply adding to this list of definitions. Limiting the definition to the TVPA also avoids unnecessary complications with other statutory mechanisms such as the FSIA.[268]

The term "foreign nation" should incorporate three meanings: (1) entities officially recognized as a sovereign state by the United States, (2) entities that meet the requirements of statehood outlined in the Montevideo Convention,[269] and (3) entities that are QSAs. The first two categories parallel the constitutive theory and declaratory

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264 For the full text of the proposed statutory solution, see *infra* Appendix.

265 *See, e.g.*, *Mohamad*, 566 U.S. at 461.

> The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not. *There are no doubt valid arguments for such an extension*. But Congress has seen fit to proceed in more modest steps in the Act, and it is not the province of this branch to do otherwise.

Id. (emphasis added).

266 *See supra* Section II.C.2.

267 *See* 28 U.S.C. § 1350 note (2012) (TVPA § 3). These definitions mirror the reservations, understandings, and declarations that the United States submitted when joining the CAT. *See* Status of *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Treaty Collection, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf [https://perma.cc/2D5N-9CPW] (detailing reservations, understandings, and declarations of each signatory).

268 Extending the definition of "foreign nation" beyond the TVPA may run into complications with the FSIA's definition of "foreign state." *See* 18 U.S.C. § 1603(a) (2012).

269 Recall, the requirements are: (1) "a permanent population," (2) "a defined territory," (3) a "government," and (4) the ability to conduct foreign relations. Montevideo Convention, *supra* note 150, art. 1; *see also* Kadic v. Karadžić, 70 F.3d 232, 244–45 (2d Cir. 1995).

theory of statehood that are already recognized by courts;[270] the last category is new. This last category of QSAs is broad enough to encompass entities like the PA or TRNC but narrow enough to exclude nongovernment organizations, international organizations, corporations, and foreign terrorist organizations.[271]

This Note proposes the following statutory definition for QSAs:

(1) The term "foreign nation" means

. . .

(C) any entity that

(i) exercises de facto governmental authority, independent of that exercised by a sovereign state, over a territorial area;

(ii) self-identifies as an independent sovereign state; and

(iii) does not fall under the definitions outlined in sections (1)(A) and (1)(B) of this Act.

To apply this language and evaluate whether an entity qualifies as a "foreign nation," courts need to analyze four different elements, each of which must be satisfied when considering the totality of the circumstances. First, they must determine whether the entity is exercising "de facto governmental authority." Such authority is found where there exists "an organizational apparatus exercising public functions" typically associated with governments, such as the collection of taxes, provision of healthcare and welfare, education, operation of a justice system, and the exercise of police powers.[272]

Second, courts need to verify that this governmental authority is not "operat[ing] within the constitutional system of a state."[273] This requirement excludes entities such as municipal or state governments of a recognized state. It also leaves out entities that are simply puppets of existing state actors.[274] This requirement furthers the goal of the proposed amendment because it ensures that courts establish TVPA jurisdiction over entities that are currently outside the control of a

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270 *See supra* notes 145–51 and accompanying text.

271 Section (c)(2) of the proposed amendment explicitly states that nongovernment organizations, international organizations, corporations, and foreign terrorist organizations are not covered. *See infra* Appendix.

272 *See* Ronen, *supra* note 15, at 27. For further discussion on government functions, see *supra* notes 157–60 and accompanying text.

273 Ronen, *supra* note 15, at 27.

274 As discussed earlier, some scholars believe the TRNC is a puppet state. *See supra* note 175 and accompanying text. A similar finding by a court would disqualify the TRNC as a QSA or "foreign nation" under the TVPA.

sovereign state and avoids shifting liability to lesser instruments of existing states.

Third, courts must determine, based on facts presented, whether the entity in question actually maintains control over a territorial area. Paired with the "de facto governmental authority" requirement, the QSA's territorial control must be exclusive and must not be shared with any sovereign entity, although a sovereign state may exercise de jure sovereign authority over the QSA's territory.[275] Finally, the entity must have made official statements declaring its independence as a sovereign state.[276] Ultimately, this amendment achieves its goal to clarify, and not complicate, the application of the TVPA to ensure a more equitable application of justice.

C. Zivotofsky*, the Recognition Clause, and Executive Intervention*

Any time a court deals with determinations of statehood, there is potential to infringe the President's exclusive power of recognition.[277] This problem existed in past judicial QSA determinations,[278] and critics of this Note's TVPA amendment may contend that courts still contravene *Zivotofsky* by making decisions, albeit far more limited, regarding statehood status of parties. There seems to be little flexibility in the Court's determination: "[T]he power to recognize foreign states resides in the President *alone* . . . ."[279] There are two reasons, however, to doubt the seriousness of this critique. First, a statutory mechanism exists, the objective of which is remarkably similar to that of the solution proposed here.[280] Second, any questions of constitutionality are resolved by allowing executive intervention in a given case.

On January 1, 1979, the United States formally established full diplomatic relations with the People's Republic of China.[281] In doing so, the United States ended its relations with the Republic of China ("Taiwan") and affirmed that the People's Republic of China was the

275 For example, the internationally recognized government of Somalia maintains de jure sovereignty over the territory that Somaliland considers its own, but Somaliland maintains exclusive control of that territory. *See* Ali, *supra* note 174, at 419. Under the language proposed here, Somaliland would satisfy the third requirement of the definition of "foreign nation."

276 The PLO declared Palestine to be an independent state in 1988, and therefore its statements would satisfy the fourth requirement of the definition of "foreign nation." *See* Ibrahim, *supra* note 171, at A1.

277 *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2094 (2015).

278 *See supra* notes 224–28 and accompanying text.

279 *Zivotofsky*, 135 S. Ct. at 2094 (emphasis added).

280 *See* Taiwan Relations Act, 22 U.S.C. §§ 3301–3316 (2012).

281 W. SCOTT MORTON & CHARLTON M. LEWIS, CHINA 225 (4th ed. 2005).

one true China.[282] In response, Congress passed the Taiwan Relations Act ("TRA") in April 1979, which "outlined a framework for continued robust economic, cultural, and security ties between the United States and Taiwan" but delineated no formal diplomatic structure between the two states.[283] The legal status accorded to Taiwan in the TRA is particularly relevant to the proposal outlined in this Note. The relevant passage states: "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan."[284]

This language in the TRA performs a similar function to this Note's proposed amendment to the TVPA. They both seek to eliminate a legal grey area by treating certain unrecognized entities as states—or "foreign countries"—within specific situations.[285] The TRA tells courts that Taiwan should be treated, for the purpose of U.S. laws relating to foreign relations, as any other foreign state would be treated.[286] This principle remains true despite the fact that the United States does not recognize Taiwan as an independent state and only maintains unofficial relations with the island nation.[287] The proposed amendment to the TVPA performs a similar task: QSAs would be recognized as "foreign nations" for human rights litigation purposes only.

Further support of the TRA's constitutionality can be found within *Zivotofsky*. The majority references the TRA favorably in its analysis of past congressional action in the realm of state recognition.[288] Such action is legitimate as long as it does not challenge "the President's recognition determination as a completed, lawful act."[289]

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282 *See* Henry Kissinger, On China 355 (2011) ("[T]he Chinese conditions for normalization had been explicit and unchanging: . . . establishing diplomatic relations with China exclusively with the government in Beijing.").

283 *See id.* at 356, 381–82.

284 22 U.S.C. § 3303(b)(1).

285 *See id.*

286 *See id.*

287 *See U.S. Relations with Taiwan*, U.S. Dep't of St. (Aug. 31, 2018), https://www.state.gov/r/pa/ei/bgn/35855.htm [https://perma.cc/SX3U-HZPL]. Only about 20 countries recognize Taiwan as an independent sovereign state. *See* Kevin Ponniah, *Taiwan: How China Is Poaching the Island's Diplomatic Allies*, BBC News (June 14, 2017), http://www.bbc.com/news/world-asia-40263581 [https://perma.cc/T7JN-7F8J].

288 The majority in *Zivotofsky* explains that Congress did not question the President's ability to transfer official recognition from Taiwan to China by enacting the TRA. Further, the President supported the TRA when he signed it. Importantly, the Court does not indicate that such legislative action ran contrary to the President's recognition power. *See* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2093–94 (2015).

289 *Id.* at 2094.

In his dissent, Justice Scalia pointed to the TRA as an example of Congress's Article I power "to decide for itself how its laws should handle" disputes over sovereignty.[290] Though Congress enacted the TRA before the Court decided *Zivotofsky*, the Court's discussion of the TRA suggests that it did not infringe the President's power of recognition.[291] A similar statutory mechanism, such as the one proposed here, is likely also constitutional.

Irrespective of *Zivotofsky* or the TRA, the proposed amendment's additional allowance for executive intervention addresses any remaining questions of constitutionality. This provision permits the executive branch to intervene in any TVPA case for which there are concerns about judicial overreach and infringement of the President's power of recognition. It leaves the final determination of TVPA jurisdiction to the President. The proposed language of this provision is as follows:

> This Act should not be construed to impede upon the President's exclusive power of recognition. The President, through the Secretary of State, may intervene in any lawsuit brought under this Act to make a final determination of whether an entity should be recognized as a "foreign nation" within the judicial proceeding. Courts are instructed to give wide deference to the determination of the President in such situations.

This language eliminates any ambiguity regarding the proper role of the courts. Regardless of a court's determination of whether a party qualifies as a "foreign nation," the President has the authority to intervene in any case, thus preserving his or her constitutional power of state recognition.

The Supreme Court has acknowledged that interventions in some judicial determinations are within the power of the executive branch.[292] Prior to the enactment of the FSIA in 1976, it was common practice for the State Department to give its recommendation to courts on whether a state was entitled to sovereign immunity.[293] Though the practice fell out of favor after Congress passed the

290 *Id.* at 2120 (Scalia, J., dissenting). He further states that the TRA "grants Taiwan capacity to sue and be sued, even though the United States does not recognize it as a state." *Id.*

291 *Id.* at 2094 (majority opinion).

292 *See* Republic of Austria v. Altmann, 541 U.S. 677, 701–02 (2004).

293 The Tate Letter of 1952 outlined the United States' rationale behind its adoption of the restrictive theory of sovereign immunity, by which states are only afforded immunity for sovereign or public acts of the state. *See* Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, to Philip B. Pearlman, Acting Attorney Gen. (May 18, 1952), *reprinted in* DAMROSCH &

FSIA,[294] the Supreme Court acknowledged that the executive branch's "opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct . . . might well be entitled to deference . . . ."[295] This instruction to give some deference to executive branch determinations matches the provision in the proposed statute, the sole purpose of which is to preserve the President's power of recognition by deferring to the President's determination of jurisdiction over "*particular* petitioners" such as QSAs.[296] The Supreme Court's approval of limited statutory acknowledgements of unrecognized entities, like the TRA in *Zivotofsky*, combined with the inclusion of an executive-intervention provision, ensures that the proposed statutory language does not infringe upon the President's exclusive power of intervention.

Conclusion

As the world moves further into the 21st century, the traditional international law categorization of entities as either states or nonstates is no longer adequate in the face of an increasingly multifaceted and complex world. This is most evident in the realm of human rights, where the emergence of QSAs such as the PA have significantly complicated human rights litigation. In the United States, the truncation of formerly robust human rights civil litigation mechanisms has created a liability gap where QSAs are not held accountable for acts of torture and extrajudicial killings. Congress should bridge this gap should by passing an amendment to the TVPA that extends jurisdiction to QSAs. The language proposed in this Note resolves outstanding legal and policy problems while reaffirming the United States' "commitment to ensuring that human rights are respected everywhere."[297]

Murphy, *supra* note 148, at 821–24. From 1952 to 1976, the State Department often intervened in cases to inform the court whether a state was entitled to sovereign immunity. *Cf. id.* at 826.

294 *See id.*

295 *Republic of Austria*, 541 U.S. at 701–02 (addressing level of deference given to State Department statements of interest in sovereign immunity case). The Court went on to say that it "express[es] no opinion on the question whether such deference should be granted in cases covered by the FSIA." *Id.* at 702.

296 *See id.*

297 Presidential Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465–66 (Mar. 16, 1992).

Appendix: Proposed Statutory Language

SEC. 3. DEFINITIONS.

. . .

(c) Foreign Nation.—For the purposes of this Act—

(1) the term 'foreign nation' means

(A) any entity that is officially recognized as a sovereign state by the United States;

(B) any entity that possesses

(i) a defined territory;

(ii) a permanent population;

(iii) an independent government in control of a defined territory; and

(iv) the capacity to engage in foreign relations; or

(C) any entity that

(i) exercises de facto governmental authority, independent of that exercised by a sovereign state, over a territorial area;

(ii) self-identifies as an independent sovereign state; and

(iii) does not fall under the definitions outlined in sections (1)(A) and (1)(B) of this Act.

(2) Nongovernmental organizations, international organizations, corporations, and groups designated by the State Department as foreign terrorist organizations are not 'foreign nations.'

SEC. 4. EXECUTIVE RIGHT OF RECOGITION

This Act should not be construed to impede upon the President's exclusive power of recognition. The President, through the Secretary of State, may intervene in any lawsuit brought under this Act to make a final determination of whether an entity should be recognized as a 'foreign nation' within the judicial proceeding. Courts are instructed to give wide deference to the determination of the President in such situations.