War Crimes, Inc.: The ATS Case against the U.S. Weapons Industry for Aiding and Abetting Atrocities in Yemen

Elizabeth Beavers
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Elizabeth Beavers*

Abstract

The U.S. weapons industry provides much of the weaponry necessary to facilitate indiscriminate mass bombings by a Saudi-led coalition in Yemen, many of which amount to war crimes. The Alien Tort Statute (ATS) provides an avenue for Yemeni survivors to seek redress in U.S. Courts for unlawful strikes knowingly facilitated by U.S. weapons companies. This Article will assess, in four sections, the viability of an ATS case against a U.S. weapons manufacturer. The first section will outline the relevant background of the conflict in Yemen and the role that the United States government and weapons industry plays in fueling the conflict. The second section will set up the necessary background for a hypothetical ATS case by first detailing the relevant precedent, then identifying potential Yemeni plaintiffs. The third section will walk through three hurdles that our plaintiff will face in order to successfully mount their ATS case: (1) supporting claims that meet the test established by the Supreme Court’s decision in Sosa v. Alvarez-Machain;1 (2) establishing that the claims sufficiently “touch and concern” the territory of the United States as required by Kiobel v. Royal Dutch Petroleum Co.;2 and (3) arguing that U.S. corporations may face liability under the ATS. The fourth and final section will walk through potential defenses that our corporate defendant may raise and why they should fail.

* Elizabeth Beavers is currently a LL.M. student at Georgetown University Law Center in National Security & International Human Rights Law. Elizabeth served as Associate Policy Director for the Indivisible Project and led the organization’s advocacy efforts on foreign policy, national security, democracy, and human rights. Before that, Elizabeth was the Senior Campaigner on national security and human rights for the U.S. section of Amnesty International, where she worked to reform the U.S. government’s national security policies in line with international human rights standards through high-level advocacy, media engagement, and grassroots organizing. Elizabeth also managed the Militarism & Civil Liberties program at the Friends Committee on National Legislation. She is a Senior Fellow with Data for Progress and Vice President of the board of the National Religious Campaign Against Torture.

“I quickly went to the farm. There, I found a horrifying scene, and I saw my sisters and sister-in-law and all of my brother’s children and sisters’ children dead. None of them were left.” – Salehah Sara, survivor of a strike in Yemen by a Raytheon-made bomb.4

“I lay down next to my husband and I told him, ‘[w]e will die together.’” – Abeer Jubari, survivor of a strike in Yemen by a Raytheon-made bomb.5

“It was a very touching scene because they were hugging each other . . . Khalid’s hand was cut off, and I realized the hand we had found earlier was his.” – Saeed Al-Sufiyani, on recovering the remains of his neighbor and her son in the rubble of a strike in Yemen by a Boeing-made bomb.6

“I heard the sound [of the explosion] and got worried, so I sent my other son, Muhammed, to go look for his brother. He found [Ali’s] body on the beach, with shrapnel in his head.” – Muqrin Mudarij, survivor of a strike in Yemen by a Textron Systems-made bomb.7

5. Id. at 47.
6. Id. at 50.
7. Id. at 69.
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INTRODUCTION

In August 2018, CNN flashed a graphic on-screen with a map of Yemen and markings detailing civilian casualties resulting from recent airstrikes in the country’s ongoing civil war. In an unusual step, the graphic included labels identifying the American companies that manufactured and sold each bomb responsible for those casualties. This visual brought into sharp relief a harrowing reality: Yemen is burning, and American corporations are helping it happen.

The U.S. weapons industry provides much of the weaponry necessary to facilitate indiscriminate mass bombings by a Saudi-led coalition in Yemen, many of which amount to war crimes. The stories referenced in this Article represent just a few of the lives harmed in the course of the Yemen civil war. Yet despite consistent public reporting detailing the damage and calls from the international community to halt sales, the flow

8. Shorrock, supra note 3.
of weapons from the United States remains seemingly endless, and accountability is in short supply.

The Alien Tort Statute (ATS) provides an avenue for Yemeni survivors to seek redress in U.S. Courts for unlawful strikes knowingly facilitated by U.S. weapons companies. This Article will assess, in four sections, the viability of an ATS case against a U.S. weapons manufacturer like Lockheed Martin or Raytheon. The first section will outline the relevant background of the conflict in Yemen and the role that the United States government and weapons industry plays in fueling the conflict. The second section will set up the necessary background for an ATS case by first detailing the relevant precedent, then identifying potential Yemeni plaintiffs. The third section will walk through three hurdles that our plaintiff will face in order to successfully mount their ATS case: (1) supporting claims that meet the test established by the Supreme Court’s decision in Sosa v. Alvarez-Machain,9 (2) establishing that the claims sufficiently “touch and concern” the territory of the United States as required by Kiobel v. Royal Dutch Petroleum Co.;10 and (3) arguing that U.S. corporations may face liability under the ATS. The fourth and final section will walk through potential defenses that our corporate defendant may raise and why they should fail.

I. THE CONFLICT IN YEMEN AND THE ROLE OF U.S. WEAPONS MANUFACTURERS

A. Background Context of the Conflict

What began as a civil war has escalated into an internationally-involved bloodbath.11 The current war in Yemen launched in 2015 between the government and a rebel group known as the Houthis that overtook the Yemeni capital of Sanaa.12 President Abdo Rabbo Mansour Hadi’s government requested assistance from Saudi Arabia in pushing back against the rebel incursion,13 and a Saudi-led coalition, including

13. U.N. GROUP OF EMINENT INTERNATIONAL AND REGIONAL EXPERTS ON YEMEN, SITUATION OF HUMAN RIGHTS IN YEMEN, INCLUDING VIOLATIONS AND ABUSES SINCE SEPTEMBER
nine Middle Eastern and North African countries, subsequently began bombing Yemen with the stated goal of restoring Hadi to the presidency.\textsuperscript{14} The Saudis insisted at the outset that the war would conclude quickly, yet the coalition’s air campaign has thus far proved unsuccessful in dislodging the Houthis.\textsuperscript{15}

A Group of Eminent Experts assembled by the U.N. High Commissioner for Human Rights released a report in September 2019 detailing its findings that all parties to the conflict have committed serious violations of international humanitarian law and international human rights law\textsuperscript{16} and that indiscriminate Saudi-led coalition airstrikes are responsible for most of the civilian casualties and “may lead to criminal responsibility for war crimes at all levels of command.”\textsuperscript{17} Accurate counts are difficult to ascertain given the abysmal conditions on the ground,\textsuperscript{18} but estimates as of this writing indicate that the death toll from the bombing has surpassed 100,000 and is rapidly climbing.\textsuperscript{19}

\textsuperscript{14} Mohamed Bazzi, The United States Could End the War in Yemen If It Wanted To, ATLANTIC (Sept. 30, 2018), https://www.theatlantic.com/international/archive/2018/09/iran-yemen-saudi-arabia/571465/. Many also characterize the conflict as a proxy Saudi-Iran war, as Iran has opportunistically seized upon the conflict to increase its regional influence via support to the Houthis. The level of Iran’s support to the Houthis is disputed.; Adam Taylor, Why Iran is getting the blame for an attack on Saudi Arabia claimed by Yemen’s Houthis, WASH. POST (Sept. 16, 2019, 1:07 PM), https://www.washingtonpost.com/world/2019/09/16/why-iran-is-getting-blame-an-attack-saudi-arabia-claimed-yemens-houthis/; Mareike Transfeld, Iran’s Small Hand in Yemen, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 14, 12017), https://carnegieendowment.org/sada/67988.

\textsuperscript{15} GRP. OF EMINENT EXPERTS, supra note 14, at 221.

\textsuperscript{16} Id. Note that The Saudi-led coalition rejects these characterizations. See, e.g., Nima Elbagir et al., Bomb that Killed 40 Children in Yemen Was Supplied By the US, CNN (Aug. 17, 2018, 7:50 PM), https://www.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html (“The democratically elected government of Yemen has been displaced by an Iranian-backed insurgency by minority Houthi militias. The coalition is in Yemen with the support of the U.N. Security Council to restore the legitimate government. The coalition is operating in accordance with international humanitarian law, taking all practical measures to minimize civilian casualties. Every civilian casualty is a tragedy.”).

\textsuperscript{17} Kareem Fahim, The deadly war in Yemen rages on. So why does the death toll stand still?, WASH. POST (Aug. 3, 2018, 6:00 AM), https://www.washingtonpost.com/world/the-deadly-war-in-yemen-rages-on-so-why-does-the-death-toll-stand-still/-2018/08/02/c6d9ebca-90 22-11e8-ae59-01880ec5f1d_story.html?utm_term=8d50227fdae (“It is almost certainly conservative and possibly grossly underestimated, according to U.N. officials and analysts who study the conflict. . . . The undercount would reflect in part the impossible task of tallying deaths in war zones, where parties to the hostilities provide exaggerated figures while independent monitors are stymied by the violence and shifting battle lines.”).

\textsuperscript{18} Sany Magdy, Report: Death toll from Yemen’s war hit 100,000 since 2015, ASSOCIATED PRESS (Oct. 31, 2019), https://apnews.com/b7f039269a394b7aa2b46430e3d9b6bc.
Aside from the deaths caused by the pummeling of bombs, the United Nations has declared the situation arising out of the Yemen conflict to be “the world’s worst humanitarian crisis.”\textsuperscript{20} The Saudi-led bombing campaign has decimated civilian infrastructure such as hospitals, schools, and avenues for humanitarian aid.\textsuperscript{21} The war has forced more than four million Yemenis to flee from their homes, pushed between eight and ten million people to the brink of famine, and has reduced four in five Yemenis to such grave poverty that they require humanitarian assistance for survival.\textsuperscript{22} The war’s destruction also led to the world’s worst modern outbreak of cholera, which has disproportionately struck the children of Yemen.\textsuperscript{23}

As a United Nations humanitarian chief explained, “This is not an unforeseen or coincidental result of forces beyond our control. It is a direct consequence of the actions of the parties and supporters of the conflict.”\textsuperscript{24} Of course, a certain amount of civilian harm is foreseeable in any conflict, but some harms are illegal and demand accountability.

### B. A Brief History of the U.S. Role

Before delving into the potential liability of U.S. companies for such harm, it is important to look at the context of overall U.S. participation in the conflict. When the Saudi-led coalition launched its intervention in Yemen’s civil war, then-President Obama authorized U.S. logistical support.\textsuperscript{25} This included U.S. formation of the “Joint Combined Planning Cell” in Riyadh to provide the coalition with operational advice in...
support of its activities, and the U.S. military initiated further support via intelligence sharing and mid-air refueling of coalition jets.\textsuperscript{26}

Perhaps the most significant source of U.S. support for the Yemen war lies in its pipeline of weapons and equipment to the Saudi-led coalition. The Obama administration’s offer of arms support to the Saudis ballooned to more than $115 billion worth of weaponry by the time President Obama left office,\textsuperscript{27} much of it intended to replenish Saudi stockpiles used up in the Yemen conflict.\textsuperscript{28} At the time, this was the largest amount of arms sales to Saudi Arabia under any president in U.S. history.\textsuperscript{29} As the Saudi-led coalition’s activities went “off the rails,” as described by at least one former official,\textsuperscript{30} some within the Obama administration began to fear legal consequences for complicity in the destruction.\textsuperscript{31} Eventually, the Obama administration decided to suspend sales of precision-guided munitions to the Saudis.\textsuperscript{32}

The Trump administration quickly reversed this decision upon taking office, announcing a massive new arms deal.\textsuperscript{33} Since the coalition entered the Yemen conflict in March of 2015, the U.S. has struck deals amounting to at least $68 billion with the two leading coalition partners orchestrating the airstrikes, Saudi Arabia and the United Arab Emirates.\textsuperscript{34}

\begin{itemize}
\item[29.] Id.
\item[30.] Nicolas Niarchos, \textit{How the U.S. is Making the War in Yemen Worse}, \textit{New Yorker} (Jan. 15, 2018) (quoting a former State Department official during the Obama administration: “It got to the point where the Saudi intervention was going so off the rails it was destroying the country.”), https://www.newyorker.com/magazine/2018/01/22/how-the-us-is-making-the-war-in-yemen-worse.
\item[33.] Id.
\end{itemize}
States has warned that the coalition should not expect a “blank che[ck]]” of support.\textsuperscript{35} Yet more than three years have passed since that warning, and the U.S. government continues to provide arms and assistance as the Yemen war rages on.

In the face of congressional pushback,\textsuperscript{36} the Trump administration went so far as to declare an emergency under the auspices of the Arms Export Control Act in order to bypass congressional oversight of ramped-up arms sales to Saudi Arabia and the United Arab Emirates totaling more than $8 billion in May of 2019.\textsuperscript{37}

The U.N. Eminent Expert report bemoaned the “pervasive lack of accountability” that has surrounded the parties to the Yemen conflict for the serious violations of international humanitarian and human rights law.\textsuperscript{38} Further, the panel called upon third party states to stop funneling weapons into the conflict, as it exacerbates the suffering and places third parties at risk of becoming accessories to war crimes.\textsuperscript{39}

II. THE ALIEN TORTS STATUTE: AN AVENUE OF ACCOUNTABILITY?

An avenue for accountability that has not yet been explored is litigation under the Alien Tort Statute in U.S. courts.\textsuperscript{40} While the U.S.


\textsuperscript{37} \textit{SECURITY ASSISTANCE MONITOR, PRESIDENT TRUMP BYPASSES CONGRESS} (June 5, 2019), http://securityassistance.org/fact_sheet/president-trump-expedites-arms-saudi-arabia-uae; A bipartisan group of lawmakers introduced measures to block these emergency sales, stating that “selling more bombs to the Saudis simply means that the famine and cholera outbreak in Yemen will get worse, Iran will get stronger, and Al Qaeda and ISIS will continue to flourish amidst the chaos of the civil war. Saudi Arabia treats us like the junior partner in this relationship, chopping up U.S. residents and torturing others, all the while demanding we remain silent and sell them more weapons. The U.S.-Saudi relationship needs to change, and it’s clear that only Congress can make that happen.” Menendez, Graham, Murphy, Paul, Leahy, Young, Reed Announce 22 Joint Resolutions to Block Weapons Sales to Saudi Arabia and UAE Without Congressional Approval (June 5, 2019), https://www.foreign.senate.gov/press/ranking/release/menendez-graham-murphy-paul-leahy-young-reed-announce-22-joint-resolutions-to-block-weapons-sales-to-saudi-arabia-and-uae-without-congressional-approval; The Trump administration also vetoed these congressional attempts to override the sales. Michael D. Shear & Catie Edmonson, \textit{Trump Vetoes Bipartisan Resolutions Blocking Arms Sales to Gulf Nations}, \textit{N.Y. TIMES} (July 24, 2019).

\textsuperscript{38} \textit{GRP. OF EMINENT EXPERTS, supra} note 14, at 2.

\textsuperscript{39} Id.

\textsuperscript{40} Other efforts abound to stop the carnage in Yemen and hold those responsible accountable. In Europe, streams of litigation have launched, and some have been met with initial success in challenging government licensing of arms sales to Saudi Arabia for use in the Yemen
government is likely immune from most litigation arising from its complicity in the conflict, an individual directly impacted by the U.S.-backed, Saudi-led coalition airstrikes in Yemen may have a successful claim under the ATS for damages in U.S. courts against a weapons manufacturer for aiding and abetting war crimes in Yemen by knowingly providing the weapons used by the coalition to target civilians.\footnote{Oona A. Hathaway, Aaron Haviland, Srinath Reddy Kethireddy, Alyssa T. Yamamoto, \textit{Yemen: Is the U.S. Breaking the Law?}, 10 \textsc{Harv. Nat’l Sec. J.} 1, 51 (2019) (“Although sovereign immunity protects officials and States involved in the Saudi-led coalition from suit under the ATS, U.S. corporations that manufacture and supply weapons to the coalition could potentially be liable for aiding and abetting violations committed using those weapons.”).}

A. \textit{ATS Precedent}

As courts have noted when examining its text, the brevity of the ATS “belies the magnitude of its implications.”\footnote{In re \textit{XE Servs. Alien Tort Litig.}, 665 F. Supp. 2d 569, 577 (E.D. Va. 2009).} Its mere thirty-three words are contained within the first Judiciary Act passed in 1789: “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\footnote{Alien’s action for tort, 28 U.S.C. § 1350.}

The modern era of ATS litigation was born with \textit{Filartiga v. Pena-Irela} in 1980 when the Second Circuit ruled that foreign national plaintiffs could bring torts claims under the ATS alleging violations of customary international law.\footnote{\textit{Filartiga v. Pena-Irala}, 630 F.2d 876 (2d Cir. 1980).} The court reasoned that the modern human rights abuser was “like the pirate and slave trader before him . . . an enemy of all mankind” and that this decision would be a “small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”\footnote{\textit{Id.} at 890.}

A flood of ATS litigation opened after this decision. But since then, the Supreme Court has placed additional contours and constraints upon the ATS’s scope. In 2004, in *Sosa v. Alvarez-Machain*, the Court determined that the ATS’s original reach was intended to extend to offenses against ambassadors, violations of safe conduct, and piracy, and that modern claims under the statute may therefore only be cognizable if they are binding norms with no “less definite content and acceptance among civilized nations” than those originally contemplated. *Sosa* left the door open to ATS claims alleging breaches of “definable, universal, and obligatory norms.”

The Supreme Court again addressed the Alien Tort Statute in 2013 with *Kiobel v. Royal Dutch Petroleum Co.* This time, the majority determined that a presumption against extraterritorial application of statutes extends to the ATS, but again left the door open to cases in which claims “touch and concern the territory of the United States . . . with sufficient force to displace the presumption.” In 2018, the Court further narrowed the scope of ATS liability in *Jesner v. Arab Bank* by prohibiting claims against foreign corporations.

### B. Potential Plaintiffs

There are, unfortunately, quite a few potential plaintiffs who may be poised to bring an ATS claim against a U.S. company for aiding and abetting war crimes. On March 15, 2016, two airstrikes detonated bombs made by General Dynamics and guided by a Boeing-made system in a

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48. *Id.* at 732.  
49. *Id.* The *Sosa* holding determined that arbitrary arrest and detention did not meet this standard.  
51. *Id.* at 133. In their concurring opinion, Justices Breyer, Ginsburg, Sotomayor and Kagan disagreed with the presumption against extraterritoriality approach and recommended an alternate test. (Breyer, J., concurring) (“Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant’s conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”).  
52. *Jesner v. Arab Bank*, 138 U.S. 1386, 1401 (2018). Though three justices would have closed off ATS claims against corporate defendants entirely, the majority holding pointed to foreign policy questions uniquely posed by foreign corporate defendants and excluded them from ATS liability as a matter of judicial caution.
crowded marketplace, killing at least 97 civilians, including 25 children.\textsuperscript{53} On April 22, 2018, the coalition hurled a Raytheon-manufactured bomb at a wedding party, killing 21 civilians, including 11 children.\textsuperscript{54} In October 2017, the coalition struck a funeral hall with a Raytheon-made bomb, killing more than 140 mourners and wounding at least 500 more,\textsuperscript{55} in what a senior State Department official called a “foolish strike” that reportedly “appalled” U.S. officials.\textsuperscript{56}

But perhaps the most egregious instance ripe for an ATS claim occurred on August 9, 2018. On the way to a field trip to celebrate the end of the summer session, a school bus packed with young boys stopped for snacks at a busy market\textsuperscript{57} and was incinerated by a Saudi-led coalition strike using a 500-pound Lockheed Martin bomb.\textsuperscript{58} The boys’ teacher survived the attack: “I heard a loud explosion, and there was dust and smoke everywhere,” he said. “The scene can’t be described—there was body parts and blood everywhere.”\textsuperscript{59}

For purposes of this Article, we will use this as a test case by imagining that our hypothetical plaintiff is a surviving close relative of one of the decedent children struck by the bomb on the school bus. To

\begin{flushright}
\textsuperscript{53}Human Rights Watch, Yemen: US Bombs Used in Deadliest Market Strike (Apr.

\textsuperscript{54}Nima Elbagir, Salma Abdelaziz, & Laura Smith-Spark, Made in America, CNN

\textsuperscript{55}The Saudi coalition initially declined to comment other than to say they would investigate. Shuaib Almosawa, Wedding is Hit By Airstrike in Yemen, Killing More Than 20, N.Y. Times (Apr. 23, 2018).

\textsuperscript{56}The coalition investigations team disputed that there was a wedding taking place in the targeted area despite widespread eyewitness accounts but admitted that rules of engagement were not followed. Mwatana, supra note 4, 73–78.


\textsuperscript{59}Id.
\end{flushright}
that end, we turn next to identifying the hurdles that our plaintiff must overcome.

III. THE PLAINTIFF’S CASE

A. Hurdle One: Can the Plaintiff Support Claims that Meet the Sosa Test?

Our plaintiff must first establish that the underlying alleged tortious conduct—in this case, violations of international humanitarian law amounting to war crimes—constitutes an actionable breach of the “law of nations” under the ATS. Sosa’s test insists that the norm breached must be as “definable, universal, and obligatory” in customary international law as those originally contemplated by the Alien Tort Statute.

1. War Crimes

The substantive rules of international humanitarian law set forward principles of armed conflict that balance military needs with humanitarian concerns. Hostilities between states and non-state actors are characterized as non-international armed conflicts and are governed by treaty obligations, including Common Article 3 of the Geneva Conventions and the Second Additional Protocol of 1977, as well as customary international law. Under these rules, attacks on military targets that are indiscriminate (not specifically targeted to the military objective), as well as attacks that are disproportionate (causing excessive civilian casualties relative to the military advantage), are also prohibited. Serious violations of international humanitarian law, such as intentional or reckless attacks directed at civilians, amount to war crimes.

To discern whether these rules have ripened into customary international law (“the law of nations”) sufficient to pass the Sosa test, we assess whether there is a widespread practice among states acting under a sense of legal obligation. Virtually every country in the world

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60. Notably, our corporate defendant is accused of aiding and abetting these atrocities, not of directly committing them. Nonetheless, we must first assess whether the underlying violation passes muster.
62. GRP. OF EMINENT EXPERTS, supra note 14.
64. INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Ch. 44, Rule 156 (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule156).
65. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted
is a party to the Geneva Conventions, setting forth the rules of international humanitarian law. Numerous international criminal tribunals have included jurisdiction for prosecution of war crimes, including Nuremberg, the International Criminal Court, the Special Court for Sierra Leone, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The U.N. Secretary-General has noted that these rules are considered "beyond any doubt customary law." U.S. courts have indeed consistently held that the prohibition against war crimes is sufficiently specific, universal, and obligatory within customary international law as to it, shall apply... international custom, as evidence of a general practice accepted as law."; Continental Shelf case (Libyan Arab Jamahiriy a v. Malta), Judgement, 1985, ICJ 29–30 ("It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States."); Restatement (Third) of Foreign Relations Law § 102 (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("...resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.").


67. Charter of the IMT, art. 6(b), Aug. 8, 1945 (establishing jurisdiction over "war crimes: namely, violations of the laws or customs of war").

68. Rome Statute of the International Criminal Court, art. 8(2)(a), July 17, 1998 (establishing war crimes as one of the "most serious crimes of concern to the international community").

69. Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, art. 1(1), Aug. 14, 2020 ("The Special Court shall...have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law.").

70. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Commited in the Territory of the Former Yugoslavia Since 1991, art. 1, May 25, 1993 [hereinafter ICTY] ("The [ICTY] shall have the power to prosecute persons responsible for serious violations of international humanitarian law...").

71. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, art. 4, 1994 [hereinafter ICTR] (establishing "the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions ... and of Additional Protocol II thereto.").

to pass the standard set forth by Sosa to establish a claim under the Alien Tort Statute.\textsuperscript{73}

Once establishing that the underlying wrongful act of war crimes passes the Sosa test, our plaintiff must next apply the law to the facts of this case. As this war is between the government of Yemen and the Houthis, a non-state armed group, the Yemen war qualifies as a non-international armed conflict.\textsuperscript{74} The members of the Saudi-led coalition entered the armed conflict as cobelligerents when they initiated their intervention into the fighting on the side of the Yemeni government in March 2015.\textsuperscript{75} As such, all parties to the Yemen conflict are bound by the applicable rules of international humanitarian law. This means that to prove that the airstrike constituted a war crime, the plaintiff in our case must show that the Saudi-led coalition: (1) had the purpose of killing civilians; (2) knew that the probable consequence of the strike would be to kill civilians in violation of the principle of distinction; or (3) knew that the probable consequence of the strike would be to kill civilians in violation of the principle of proportionality.\textsuperscript{76}

Though establishing the necessary facts will be one of the more difficult components of our plaintiff’s case, there is nonetheless ample evidence in support. Leading human rights observers believe the strike in our test case that demolished a school bus packed with young boys in August 2018 constitutes a war crime.\textsuperscript{77} Witness descriptions indicate that the bomb struck a crowded market in Dahyan, landing right next to the bus, which was parked at a grocery store on the way to the field trip.\textsuperscript{78} The International Committee of the Red Cross’ delegation to Yemen reported that 51 died in that strike and that 79 were wounded.\textsuperscript{79} Reports indicate that at least 40 of the dead were children\textsuperscript{80} and that most were under the age of 10.\textsuperscript{81} Aerial footage of the strike location at the time and date of the attack demonstrates that a hovering aircraft could have clearly

\textsuperscript{73}See, e.g., Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996); Warfaa v. Ali, 811 F.3d 653, 658 (4th Cir. 2016); Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011); In re Chiquita Brands Intern., Inc. Alien Tort Statute and Shareholder Derivative Litigation, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

\textsuperscript{74}GRP. OF EMINENT EXPERTS, supra note 143, at 12.

\textsuperscript{75}Id.


\textsuperscript{78}Id.

\textsuperscript{79}Elbagir et al., supra note 18.

\textsuperscript{80}Id.

\textsuperscript{81}Johannes Bruwer (@JohannesBruwer1) TWITTER (Aug. 9, 2018 5:15 AM), https://twitter.com/JohannesBruwer1/status/1027483425287143427.
seen a bustling road with civilian traffic before striking.\textsuperscript{82} This indicates that the coalition knew or should have known the bomb would disproportionately kill civilians, serving as evidence of the required mens rea to establish a war crime.

The coalition’s own account of this strike has changed many times. Despite video evidence to the contrary,\textsuperscript{83} the Saudi-led coalition first disputed that there were children on the bus\textsuperscript{84} and insisted that the “attack in Saada was a legitimate military operation . . . and was carried out in accordance with international humanitarian law.”\textsuperscript{85} Later, the coalition agreed to investigate the strike.\textsuperscript{86} An investigation team set up by the Saudi-led coalition then admitted that the location of the strike resulted in “unjustifiable” collateral damage,\textsuperscript{87} but insisted that the bus was nonetheless a legitimate target by alleging there was a Houthi leader onboard.\textsuperscript{88} As the United Nations Panel of Eminent Experts noted, in addition to concerns about the impartiality and thoroughness of the coalition’s investigations team, this explanation fails to account for the principle of proportionality by claiming a single Houthi leader, even if actually on board the bus, would justify a strike placing dozens of civilians, mostly children, at risk.\textsuperscript{89} The coalition ultimately noted “mistakes in compliance to the rules of engagement” but said that the bus should have been targeted in a more open area, not that it shouldn’t have been struck at all.\textsuperscript{90}

\textsuperscript{83} Elbagir et al., supra note 59.
\textsuperscript{87} AL JAZEERA, supra note 87.
\textsuperscript{89} GRP. OF EMINENT EXPERTS, supra note 14, at 112.
\textsuperscript{90} Salma Abdelaziz, Alla Eshchenko & Joe Sterling, \textit{Saudi-led coalition admits ‘mistakes’ made in deadly bus attack in Yemen}, CNN (Sept. 2, 2018 6:15 AM), https://www.cnn.com/2018/09/01/middleeast/saudi-coalition-yemen-attack/index.html. Eyewitnesses dispute the possibility that there could have been a military target on board the bus or nearby at all: “All of those who died were residents, children and shop owners,” Reuters, supra note 86. “I am really shocked because there is no military base or troops in that area,” said the Red Crescent office director.
“Grotesque, shameful, indignant. Blatant disregard for rules of war when a bus carrying innocent school children is fair game for attack,” said the head of the Norwegian Refugee Council.91 “Attacking children is the lowest any party of this conflict can go,” said the UNICEF Yemen Resident Representative; “[t]here is no justification whatsoever to attacking children.”92

2. Aiding and Abetting

Establishing that the coalition strike in question constituted a violation of the law of nations in keeping with Sosa is merely the first step, as it is the underlying harm upon which our plaintiff’s claim is based. The next hurdle is determining whether aiding and abetting also meets the Sosa

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91. Reuters, supra note 86.
standard and whether the defendant corporation indeed aided and abetted the underlying war crime.

Courts have uniformly found aiding and abetting to be a viable cause of action under the Alien Tort Statute.\textsuperscript{94} In so holding, they have looked to the wealth of evidence that, at the time of ATS’ passage, aiding and abetting was recognized as a violation of the law of nations. Indeed, a long American legal tradition has recognized secondary liability for international law violations both in common law\textsuperscript{95} and in statutes.\textsuperscript{96}

An abundance of state practice and opinion juris demonstrates aiding and abetting liability as a matter of customary international law. Post-World War II tribunals recognized criminal responsibility for aiding and abetting as a core principle.\textsuperscript{97} The London Charter set forth liability for “accomplices participating in the formulation or execution of a common plan or conspiracy to commit” other crimes subject to the Tribunal’s jurisdiction. The Nuremberg Principles Resolution, codifying principles emerging from the London Charter and the Nuremberg trials, established that “[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.”\textsuperscript{98} U.S. courts have recognized these decisions as authoritative

\textsuperscript{94} See Doc v. Exxon Mobil Corp., 654 F.3d 11, 19 (D.C. Cir. 2011) (“Virtually every court to address the issue, before and after Sosa, has so held, recognizing secondary liability for violations of international law since the founding of the Republic.”); see also Bowoto v. Chevron Corp., 2006 WL 2455752 (N.D. Cal. 2006) (noting that the vast majority of courts to have considered the issue have found that aiding and abetting liability is available under the ATS, a trend that survived the Supreme Court's decision in Sosa).

\textsuperscript{95} See, e.g., Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 167-68, 1 L. Ed. 540 (1795) (Iredell, J.); The Amiable Nancy, 1 F. Cas. 765, 768 (C.C.D.N.Y. 1817) (No. 331); Henfield’s Case, 11 F. Cas. 1099 (C.C.D.Pa.1793) (No. 6,360).

\textsuperscript{96} Crimes Act of 1790, ch. 9, § 10, 1 Stat. 112, 114 (1790) (deeming “an accessory [sic] to . . . piracies” anyone who “knowingly and willingly aided” piracy). There is evidence that aiding and abetting liability for private actors for violating international law was well understood at the time of the ATS’ passage. Breach of Neutrality, 1 Op. Att’y Gen. 57, 59 (1795).

\textsuperscript{97} Khulamani v. Barclay Nat. Bank Ltd., 504 F.3d 254, 273 (2d Cir. 2007) (Katzmann, J., concurring).

\textsuperscript{98} Int’l Law Commission, Principles of International Law Recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal, Principle VII (1950), https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf. Similarly, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda extended responsibility to “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of a crime, recognizing this standard as existing customary international law. ICTY, supra note 71, at art. 7; ICTR, supra note 72, at art. 6; Rep. of U.N. Secretary-General, supra note 73, at ¶ 39. The Rome Statute for the International Criminal Court recognizes liability for aiding and abetting, and tribunals have convicted individuals for secondary liability of war crimes. Rome Statute, supra note 69, art. 25(3)(c).
sources of customary international law. Specifically, in the context of corporate aiding and abetting of war crimes, the International Committee of the Red Cross has concluded that “an arms dealer who sells weapons to a client knowing that the weapons are to be used to commit war crimes is complicit in the crimes, regardless of whether he or she shares the client’s motivations.”

Despite the widespread recognition of aiding and abetting as a vehicle for liability under the ATS under the Sosa standard, courts remain split on the appropriate standard to apply, creating another hurdle for our hypothetical plaintiff. The majority of courts recognizing aiding and abetting as actionable under the ATS have adopted the “knowledge” standard set forth by most international tribunals. Under this standard, the plaintiff must show there was “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.” Conversely, the Second and Fourth Circuits have adopted the more restrictive “purpose” standard of the Rome Statute, creating the International Criminal Court, which only recognizes aiding and abetting liability when the defendant’s actions are “for the purpose of facilitating the commission” of violations of the law of nations.

Many experts believe that the “purpose” test is inappropriate for ATS litigation and that the “knowledge” mens rea element should govern standard. This argument is persuasive, as international criminal tribunals have consistently asserted that customary international law simply requires the “knowledge” standard. Further, the U.S. Department of Defense’s own regulations indicate that knowledge alone is sufficient;


100. Amnesty Int’l, Outsourcing Responsibility: Human Rights Policies in the Defence Sector (ACT 30/0893/2019 (Sept. 2019). Note also that the Arms Trade Treaty requires states to refrain from transferring arms if they have knowledge that they will be used for war crimes. The United States is a signatory to the Arms Trade Treaty but has not ratified it. Arms Trade Treaty, art. 6-7, Dec. 2014.

101. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258–59 (2d Cir. 2009) (requiring that a defendant act with purpose to meet the mens rea element of aiding and abetting liability); but see Cabello v. Fernandez-Larios, 402 F.3d 1148, 1158–59 (11th Cir. 2005) (identifying knowledge of illegality as sufficient).


103. John Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002).

104. See Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); Aziz v. Alcolac, Inc., 658 F.3d 388, 399–400 (4th Cir. 2011).

105. See Brief of David J. Scheffer, Director of the Center for International Human Rights as Amicus Curiae in Support of the Issuance of a Writ of Certiorari, Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009) (No. 09-1020).
the prosecution in the 9/11 case against Khalid Sheik Mohamed et al. in the military commissions relying on the knowledge standard for aiding and abetting, arguing that it was supported by customary international law.\textsuperscript{106}

\begin{itemize}
\item \textbf{106.} Ryan Goodman, *The Law of Aiding and Abetting (Alleged) War Crimes: How to Assess US and UK Support for Saudi Strikes in Yemen*, JUST SECURITY (Sept. 1, 2016), https://www.justsecurity.org/32656/law-aiding-abetting-alleged-war-crimes-assess-uk-support-saudi-strikes-yemen/. If our plaintiff’s claim were to come before a court that instead adopted the higher threshold of the “purpose” mens rea standard, the hurdle would become more difficult to clear but there is precedent to suggest it may nonetheless prevail. In the case of *Doe v. Nestle USA, Inc.*, the Ninth Circuit found in an ATS case that Nestle had aided and abetted slavery in the Ivory Coast by supporting farmers utilizing child labor to harvest cocoa. *Doe v. Nestle USA, Inc.*, 766 F.3d 1013 (9th Cir. 2014). The court determined that Nestle’s mens rea was sufficient under either the purpose or knowledge standard. *Id.* at 1026. In establishing that the conduct was purposeful, the court reasoned that the “defendants placed increased revenues before basic human welfare.” *Id.* at 1024. The court went on to explain, “Driven by the goal to reduce costs in any way possible, the defendants allegedly supported the use of child slavery, the cheapest form of labor available. These allegations explain how the use of child slavery benefitted the defendants and furthered their operational goals in the Ivory Coast, and therefore, the allegations support the inference that the defendants acted with the purpose to facilitate child slavery.” *Id.* The *Doe* court further distinguished this case from *Presbyterian Church of Sudan v. Talisman Energy Inc.* where the Fourth Circuit found that the “purpose” mens rea standard was not met in another case where the defendant corporation’s product was allegedly used to harm the civilian population. The company in that case built roads in Sudan to support an oil extraction project and the roads were also used for military activities. The court explained in making the distinction that “the defendant did not in any way benefit from the underlying human rights atrocities...and in fact, those atrocities ran contrary to the defendant’s goals in the area, and even forced the defendant to abandon its operations.” *Id.* In deciding *Doe*, the Ninth Circuit emphasized that while the mens rea element would not be “satisfied merely because the defendants intended to profit by doing business in the Ivory Coast,” purpose may be inferred by the corporation declining to use its power to stop the underlying wrongs. *Id.* at 1025. Our plaintiff may seek to employ similar rationale by arguing that the contractor defendant’s goals are furthered by Saudi atrocities and that they continue to purposefully facilitate them by aggressively pursuing expanded sales without leveraging their role to impose corresponding civilian protection requirements. Indeed, the Yemen war has become a cash cow for the U.S. weapons industry. Alex Kane, *Here’s Exactly Who’s Profiting From the War on Yemen*, IN THESE TIMES (May 20, 2019), https://inthesetimes.com/features/us-saudi-arabia-yemen-war-arms-sales.html (“The war in Yemen has been particularly lucrative for General Dynamics, Boeing and Raytheon, which have received hundreds of millions of dollars in Saudi weapons deals. All three corporations have highlighted business with Saudi Arabia in their reports to shareholders. Since the war began in March 2015, General Dynamics’ stock price has risen from about $135 to $169 per share, Raytheon’s from about $108 to more than $180, and Boeing’s from about $150 to $360.”) Lockheed Martin’s growth as a company depends heavily on increasing sales to the Saudis. Lockheed created a division in 2013 devoted solely to foreign military sales, and the company’s chief executive, Marillyn Hewson, has said that Lockheed needs to increase foreign business—with a goal of global arms sales becoming 25% to 30% of its revenue. Aaron Gregg & Christian Davenport, *Defense contractors stand with White House on Saudi arms sales*, WASH. POST (Oct. 25, 2018), https://www.washingtonpost.com/business/2018/10/25/defense-contractors-stand-with-white-house-saudi-arms-sales/ (“Lockheed has made selling to foreign governments a key target for growth. Earlier this year, Hewson said her company’s international sales had jumped from 17 percent of total sales in 2013 to 30 percent,
Turning first to the actus reus, available sources evidence suggests that a plaintiff in our case might utilize to show that the defendant corporation substantially assisted in the underlying indiscriminate strike in multiple instances throughout the Yemen conflict. American weapons manufacturers have been called the "backbone" of the Saudi-led coalition's war crimes in Yemen, and experts believe the coalition's atrocities would be impossible without the funnel of arms provided by these U.S. companies. More than 90% of U.S. arms offers made to Saudi Arabia over the past decade include the following top four American weapons manufacturers: Boeing, General Dynamics, Lockheed Martin, and Raytheon. When pressed to answer for the civilian deaths caused by U.S. bombs, one U.S. official bluntly stated, "Well, what difference does that make? We are providing the refueling and support to Saudi aircraft. We are also selling them munition. . . We are not denying that." 

in 2017. Saudi Arabia played a key role in that growth, she said, and made it clear that the relationship would continue.

Client Profile: Lockheed Martin, OPEN SECRETS, https://www.opensecrets.org/lobby/clientsum.php?id=D000000104&year=2018 (last visited July 16, 2019); Mashal Hashem & James Allen, The lobbyists who profit from war crimes in Yemen, NAT'L MEMO (May 18, 2019), https://www.nationalmemo.com/the-lobbyists-who-profit-from-war-crimes-in-yemen/?cn-reload=1. There is no publicly available evidence that Lockheed Martin or Raytheon have pursued measures to condition their sales on the coalition's compliance with international humanitarian law. Our plaintiff may point to these Herculean efforts to expand their weapons pipeline to Saudi Arabia and the United Arab Emirates without corresponding civilian protection measures as evidence that the defendant company views the continued brutality of the Yemen war is essential to its expanded growth and thus is purposefully aiding and abetting the coalition's war crimes by continuing to sell the weapons that perpetuate the conflict.


109. Ryan, supra note 76.
In the specific case of the Dahyan school bus strike, Lockheed Martin’s assistance was crucial to the operation, as the company manufactured and sold the weapon to the Saudi-led coalition that was utilized in the attack. Reporting indicates that shrapnel remnants near the location of the bomb’s impact included the front control fin of a GBU-12 Paveway II, a 500-pound laser-guided MK-82 bomb. This debris carried a serial number that the Defense Logistic Agency’s online database confirms was manufactured by Lockheed Martin. As described earlier in this article, this is just one of many unlawful strikes by the Saudi-led coalition in Yemen in which debris remnants reveal a reliance on U.S.-made weapons.

Such debris may provide evidence establishing not only that the defendant weapons manufacturer in a similar ATS case completed the actus reus by providing the bomb, but it also may help demonstrate that they did so with the requisite intent under the “knowledge” standard to complete the mens rea element. U.S. companies have been selling weapons to Saudi Arabia and other coalition countries long before the conflict in Yemen began. Accordingly, bombs used in some of these strikes may come from older stockpiles, making it difficult if not impossible in some cases to demonstrate that Lockheed Martin, Raytheon, or any other company knew their weapons would be used for gross violations of the laws of war in Yemen when they originally sold

110. Elbagir et al., supra note 18.
111. Cruickshank, supra note 83.
112. Elbagir et al., supra note 18 (photograph of weapons remnant from air strike in Dahyan bearing identification markings).
113. Hartung, supra note 29.
them. A manufacturing date could not be found on the debris in our test case but has been found in debris from other similarly-situated strikes.\footnote{In our Dahyan test case, the available debris appears only to reveal that Lockheed Martin manufactured the weapon but does not specify when it was made or sold. Some researchers believe it may have been part of a massive transfer of arms to Saudi Arabia that was noticed to Congress in November 2015. See Cruikshank, supra note 83. A press statement by Lockheed at the time boasted of its sales of Paveways to foreign governments, possibly a direct reference to the exact sale in question. \textit{Lockheed Martin, U.S. Air Force Awards Lockheed Martin Majority Share of Paveway II Plus Laser Guided Bomb Contract} (2015), https://news.lockheedmartin.com/2015-10-28-U-S-Air-Force-Awards-Lockheed-Martin-Majority-Share-of-Paveway-TM-II-Plus-Laser-Guided-Bomb-Contract. But other strikes pinpoint a more definite timeline, as they have left behind debris with markings that identify not only who made the bomb, but when. These markings tell us that many coalition war crimes were committed with U.S.-made bombs that were not even built until after the current conflict began and thus necessarily were sold and transferred since that time. \textit{MWATANA for Human Rights et al., supra} note 5, at 15. In such cases with a definitive timeline establishing that the weapons were made and sold after the conflict began, it will be difficult for the defendant corporation to deny that they knew how their weapons would be used when they sold them.}

Nonetheless, one piece of evidence our plaintiff may draw upon to establish the requisite “knowledge” mens rea is the fact that public accounts of atrocities have consistently emerged since the Saudi-led coalition began the bombing campaign in Yemen.\footnote{See Elbagir et al., supra note 59.} News outlets such as \textit{The Guardian},\footnote{See, e.g., Kareem Shaheen, \textit{Air strike on Yemeni refugee camp by Saudi-led coalition kills at least 40}, \textit{Guardian} (Mar. 30, 2015), https://www.theguardian.com/world/2015/mar/30/air-strike-refugee-camp-houthi-controlled-northern-yemen-kills-at-least-21.} \textit{The New York Times},\footnote{See, e.g., Saeed Al-Batati and Kareem Fahim, \textit{Rebels in Yemen Battle for Control of Strategic Port City}, N.Y. TIMES (Apr. 1, 2015), https://www.nytimes.com/2015/04/02/world/middleeast/dozens-of-civilians-die-in-yemen-as-factory-is-hit.html.} and BBC News\footnote{\textit{Yemen crisis: Fighting intensifies in Aden}, BBC NEWS (Apr. 2, 2015), https://www.bbc.com/news/world-middle-east-32156539.} issued public reports documenting mass civilian casualties from the earliest days of the conflict, describing strikes on schools, mosques, and cattle markets,\footnote{Id.} as well as coalition attacks that “ripped through markets, apartment buildings, and refugee camps.”\footnote{Kareem Fahim, \textit{Air strikes take toll on civilians in Yemen war}, N.Y. TIMES (Sept. 12, 2015), https://www.nytimes.com/2015/09/13/world/middleeast/airstrikes-hit-civilians-yemen-war.html.} Public-facing reporting has only increased as the war has progressed, and U.S. weapons have played an increasingly prominent role.\footnote{Elbagir et al., supra note 59.} Additionally, human rights groups have published field research throughout the duration of the conflict, documenting apparent war crimes and publicly warning that continued arms sales would likely constitute aiding and abetting.\footnote{See, e.g., Amnesty Int’l, supra note 41; MWATANA for Human Rights et al., supra note 5; Human Rights Watch, supra note 78.} There has been


enough public evidence to reportedly provoke U.S. government officials to fear criminal liability for providing the weapons.\(^{123}\) Hence the arms suppliers must be privy to the same information.

Further hampering defense contractors’ ability to claim that they do not know that their weapons are being used to target civilians in Yemen is the fact that they are frequently asked to comment on it. Reporters and researchers continue to ask pointed questions to the weapons industry about its complicity in the slaughter of civilians in Yemen. Recent examples include Amnesty International and the Washington Post questioning Lockheed, Raytheon, and other top weapons companies.\(^{124}\) Though the industry typically chooses to hide behind the U.S. government in response, they do not deny knowledge.\(^{125}\) After the Dahyan strike, Lockheed was specifically questioned about the use of its weapon and deflected questions to the Defense Department.\(^{126}\)

B. Hurdle Two: Do the Claims Pass the Kiobel Test?

The next piece in our plaintiff’s puzzle is overcoming the test set forth by the Supreme Court in its Kiobel decision, where it determined that the ATS claim must “touch and concern” the territory of the United States “with sufficient force” so as to “displace” the presumption against the

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126. Julian Borger, US supplied bomb that killed 40 children on Yemen school bus, GUARDIAN (Aug. 19, 2018), https://www.theguardian.com/world/2018/aug/19/us-supplied-bomb-that-killed-40-children-school-bus-yemen. In more private settings, company leaders have commented more directly. Just a few months after the conflict began, Ronald L. Perrilloux Jr., Lockheed’s director of international business for the Middle East and North Africa, spoke on a panel at an event promoting the U.S.-Saudi alliance and sponsored by leading oil, gas, and defense industry titans. At the event, he acknowledged but disputed the “hostile media reports” contributing to public pushback against sending support to the Yemen conflict. He went on to sympathize with the Saudi-led coalition’s view that “the application of human rights laws” are disproportionately used against them compared to others such as China, constitute “a significant irritant.” Lee Fang, Lockheed Martin, Boeing Rally Around Saudi Arabia, Wave Off Humanitarian Concerns, INTERCEPT (Oct. 23, 2015), https://theintercept.com/2015/10/23/saudi-arabia-boeing-lockheed-martin/. Shortly thereafter, Congress was notified of a massive arms sale to Saudi Arabia that some believe could have contained the Lockheed Martin-made bomb used to blow up the school bus full of children in Dahyan. See, e.g., Cruickshank, A Saudi War-Crime in Yemen? Analysing the Dahyan Bombing, BELLINGCAT (Aug. 18, 2018), https://www.bellingcat.com/news/mena/2018/08/18/19432/.
extraterritorial reach of statutes. The Court’s majority didn’t provide clear guidance on what would pass the “touch and concern” test, but instead narrowly ruled on what does not pass the test: a fact pattern with all “relevant conduct” occurring abroad between foreign plaintiffs and defendants.

Lower courts have wrestled with applying the post-Kiobel standard in ATS cases against U.S. corporations for claims that involve both foreign and domestic activities, but have found relevant factors to include the nationality of the corporation, citizenship of the employees whose conduct is in question, the location in which key decisions and approvals took place, and whether the U.S. government provided support like a contractual agreement, payment, and security clearances domestically.

An illustrative case is Al-Shimari v. CACI Premier Technology, Inc. In this case, foreign plaintiffs brought suit against a U.S. corporation for alleged torture sustained during detention in Iraq. Using a “fact-based inquiry” as instructed by Kiobel, the Fourth Circuit emphasized that

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128. All three of Kiobel’s concurrences made clear that the Court left these questions unanswered. Id. at 125 (Kennedy, J., concurring) (“[T]he Court is careful to leave open a number of significant questions regarding the reach and interpretation of the [ATS].”); Id. at 125–26 (Alito, J., concurring) commenting that the Court’s touch and concern “formulation obviously leaves much unanswered”); id. at 131 (Breyer, J., concurring in the judgment) (“[The Court] offers only limited help in deciding the question presented.... It leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’”).

129. In Kiobel, Nigerian petitioners brought claim against a foreign corporation based on conduct occurring in Nigeria, in which a “mere corporate presence” in the U.S. by the defendant (i.e., listing on the New York Stock Exchange and affiliation with a public relations office) was not enough to displace the presumption. Id. at 125.

130. Essentially, the courts are split on whether “significant contacts within the United States are sufficient to trigger ATS jurisdiction or whether the violation of the ‘law of nations’ that is the subject matter of the ATS must itself take place within the United States.” John B. Bellinger, III and R. Reeves Anderson, As Kiobel Turns Two: How the Supreme Court is Leaving the Details to Lower Courts, INST. FOR LEGAL REFORM (Aug. 2015), https://www.instituteforlegalreform.com/uploads/sites/1/Kiobel_v6.pdf. Some have determined that Kiobel’s holding means that the more stringent “focus test” derived from Morrison v. National Australia Bank Ltd. should also be applied, requiring that the courts examine whether the conduct that was the focus of the statute took place inside the United States, essentially requiring the tortious activity to occur domestically. See, e.g., Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184 (5th Cir. 2017); Doe v. Drummond Co., 782 F.3d 576 (11th Cir. 2015); Mastafa v. Chevron Corp., 770 F.3d 170 (2d Cir. 2014); See also John Bellinger and Andy Wang, The Alien Tort Statute and the Morrison “Focus” Test: Still Disagreement After RJR Nabisco, LAWFARE (Feb. 21, 2017, 1:02 PM), https://www.lawfareblog.com/alien-tort-statute-and-morrison-focus-test-still-disagreement-after-rjr-nabisco. Other courts have rejected applying the Morrison “focus test” and examined the weight of the facts to determine whether enough relevant domestic conduct occurred in order to sufficiently rebut the presumption against extraterritoriality.


132. Id. at 525.

133. Id. at 520.
though the injuries were sustained abroad, the totality of the claims touched and concerned the United States sufficiently in that the defendant was a U.S. corporation, the defendant’s employees involved in the alleged torture were U.S. citizens, and that aiding and abetting activity had occurred within the United States when corporate managers implicitly encouraged the misconduct.134

Conversely, the Ninth Circuit in *Mujica v. AirScan Inc.* dismissed a claim brought under the ATS by Colombian plaintiffs against an oil company and a private security firm, both U.S. corporations, for alleged complicity in a bombing in Colombia.135 In that case, the defendant corporations acted in tandem with the Colombian government to conduct a raid against insurgents in order to protect an oil pipeline project that knowingly targeted civilians. The corporate’ defendants’ support to the Colombian government included providing space to plan the attack, providing a plane, and giving other material and logistical support, all while located in Colombia. In dismissing the ATS claim, the court reasoned that all of the conduct alleged, from planning to execution, occurred outside the United States and that the only allegations offered by the plaintiff of U.S.-based conduct involved speculation that some of the planning could have occurred within the United States.136 The Ninth Circuit thus held that the defendant’s status as a U.S. corporation was insufficient in itself to overcome the *Kiobel* “touch and concern” test.137

Our plaintiff’s case is more like *Al-Shimari* than *Mujica*, with a strong argument that their claim sufficiently touches and concerns the U.S. as to rebut the presumption as prescribed by *Kiobel*. If, for example, our plaintiff is a surviving family member of a decedent in the Dahyan bus strike, they will likely point to the fact that though the bombing took place in Yemen, the aiding and abetting took place in the United States. Lockheed Martin is a U.S. company headquartered in Bethesda, Maryland.138 The company manufactured the bomb in the U.S.,139 conducted the sales, and received the money from within the U.S., and public statements indicate that corporate leadership within the U.S. has aggressively pursued additional sales to Saudi Arabia and UAE

134. *Id.* at 528–29.
135. *Mujica v. AirScan Inc.*, 771 F.3d 580, 584. (9th Cir. 2014).
136. *Id.* at 592.
137. *Id.* at 594.
throughout the conflict. Further, Lockheed Martin is the largest but not
the only entity in a sprawling weapons industry\textsuperscript{140} that is tightly
intertwined with the U.S. government in protecting and procuring these
sales. Unlike \textit{Mujica}, in which the acts of aiding and abetting took place
entirely outside the United States, the decision-making and
implementation of the support in our case appear to have taken place
entirely inside the United States.\textsuperscript{141}

Our plaintiff thus is likely to argue that, as the company in question is
a U.S. corporation that built the weapon in the U.S. and worked with the
U.S. government within the U.S. to make the sale that enabled the
unlawful strike, the claim “touches and concerns” the U.S. so as to meet
the \textit{Kiobel} standard.

\textbf{C. Hurdle Three: Can U.S. Corporations be Sued for Aiding and
Abetting War Crimes Under the ATS?}

The corporate defendant in this case will likely ask the courts to hold
that U.S. corporations may not be held liable for international law
violations under the ATS. Though the Supreme Court has held that
foreign corporations may not be sued under the ATS, the question of U.S.
corporate liability remains open, and our plaintiff should argue that U.S.
corporations can and must be held accountable for violations of human
rights obligations through ATS channels.

To exclude them from liability would be out of step with history, as
well as domestic and international legal precedent. When the Second
Circuit split from other appellate courts to entirely preclude corporate
liability under the ATS, the majority’s analysis was in error. Judge
Leval’s concurrence in that case emphasized that international law sets
the substantive norms but leaves implementation decisions to the
municipal law of states.\textsuperscript{142} Similarly, when the Supreme Court
determined in \textit{Jesner v. Arab Bank} that foreign corporations categorically
could not be held liable under the ATS\textsuperscript{143} in part because corporate

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\item \textsuperscript{140} Samuel Stebbins & Evan Comen, \textit{Military spending: 20 companies profiting the most from war}, \textit{USA Today} (Feb. 21, 2019), https://www.usatoday.com/story/money/2019/02/21/military-spending-defense-contractors-profiting-from-war-weapons-sales/39092315/.
\item \textsuperscript{141} This is what can be inferred by public-facing information, though the discovery process would be required to pinpoint with specificity when and where each decision and action took place.
\item \textsuperscript{142} \textit{Kiobel v. Royal Dutch Petroleum Co.}, 621 F.3d 111, 152 (2d Cir. 2010) (“Contrary to what the majority opinion asserts, for purposes of the ATS, the critical question is not whether customary international law does or does not establish corporate liability for violations of human rights, but rather whether today corporate entities can be said to be the bearer of rights and obligations directly under international law.”).
\item \textsuperscript{143} \textit{Jesner v. Arab Bank, PLC}, 138 S. Ct. 1386, 1400 (2018). Jesner’s majority distinguished between foreign and U.S. corporations as a matter of judicial restraint, but a plurality would have barred corporate ATS liability completely.
\end{itemize}
\end{footnotesize}
liability has not ripened into a norm of customary international law, Justice Sotomayor’s dissent insisted this reasoning “fundamentally misconceives how international law works.”\textsuperscript{144} Indeed, the analysis for whether a corporation may be a subject of international law is an altogether different question than whether the substantive wrong meets the narrow \textit{Sosa} test for justiciability.

The International Court of Justice has emphasized that the “requirements of international life” include a responsibility to integrate agents of power into an international governance structure that furthers the objectives of fundamental human rights.\textsuperscript{145} This reality is increasingly reflected in international soft law such as the Universal Declaration of Human Rights,\textsuperscript{146} the U.N. Guiding Principles on Business and Human Rights,\textsuperscript{147} and can be seen in international tribunal precedents such as Nuremberg.\textsuperscript{148}

\textsuperscript{144} Id. at 1419 (Sotomayor, J., dissenting).

\textsuperscript{145} Gunter Handl, \textit{In Re South African Apartheid Litigation and Beyond: Corporate Liability for Aiding and Abetting under the Alien Tort Statute}, 53 GERM. YBK. OF INT’L L. 425, 433 (2010) (“Such capacity or status, as the International Court of Justice’s (I.C.J.) analysis in the Reparations for Injuries Case makes clear, reflects “the requirements of international life,” or – as in the case of corporate actors, specifically – “the need of the community to integrate agents of effective power into an international governance structure that underpins the fundamental objectives and values of international society.”) (citing Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 1949, p. 8 (Apr. 11, 1949)).

\textsuperscript{146} Id. at 437 (“Further, the Universal Declaration of Human Rights which lays down a “common standard for all peoples and all nations” and commits “every individual and every organ of society […] to promote respect for these rights and freedoms and […] to secure their universal and effective recognition and observance.” As Professor Henkin observes, its reference to “every individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace.””) (citing Louis Henkin, \textit{The Universal Declaration at 50 and the Challenge of Global Markets}, 25 BROOK. J. INT’L L. 29 (1999)).


In U.S. domestic law, corporations enjoy increasingly broad rights, and so it stands to reason that they must also bear responsibilities.\textsuperscript{149} Indeed, the D.C. Circuit Court has asserted that “[t]he notion that corporations could be held liable for their torts...would not have been surprising to the First Congress that enacted the ATS.”\textsuperscript{150} At the time of drafting, companies were regularly held accountable in the courts for their actions, including violations of international law,\textsuperscript{151} yet the drafters of the ATS declined to exclude corporations from liability or otherwise specify in its text who a foreign national could sue for violations of the law of nations.\textsuperscript{152}

As such, most U.S. courts to take up the issue have determined that corporations may be held liable under the ATS\textsuperscript{153} The Seventh Circuit reasoned in Flomo v. Firestone Co. that “corporate tort liability is common around the world” and pointed to the illogical outcome of barring corporate liability in which “a pirate can be sued under the Alien Tort Statute but not a pirate corporation.”\textsuperscript{154}

Indisputably, the Supreme Court’s ATS decisions are trending toward narrowing the scope of cognizable claims. But for now, U.S. corporate accountability survives, and our plaintiff’s case is a particularly compelling example of why it must continue.

IV. POTENTIAL DEFENSES THAT THE CORPORATE DEFENDANT MAY RAISE

Our weapons manufacturer defendant will likely attempt to claim derivative sovereign immunity against this ATS lawsuit. The companies that manufacture and supply the weapons consistently deflect to the U.S. government when asked to comment on their role in the civilian destruction in Yemen. Thus, it follows that they would seek to cloak themselves in the U.S. government’s sovereign immunity against claims.\textsuperscript{155}

\begin{itemize}
  \item \textsuperscript{149} Harold H. Koh, \textit{Separating Myth from Reality About Corporate Responsibility Litigation}, 7 J. INT’L ECON. L. 263, 365 (2014) ("If corporations have rights under international law, by parity of reasoning, they must have duties as well.").
  \item \textsuperscript{150} Doe v. Exxon Mobil Corp., 654 F.3d 11, 48 (D.C. Cir. 2011).
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} See Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001); Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008); Sarei v. Rio Tinto, PLC, 487 F.3d 1193 (9th Cir. 2007); \textit{but see} Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010).
  \item \textsuperscript{154} Flomo v. Firestone Nat. Rubber Co., LLC., 643 F.3d 1013, 1017 (7th Cir. 2011).
  \item \textsuperscript{155} Lockheed Martin spokespersons have asserted that they simply follow U.S. policy: William Hartung, \textit{Defense Contractors are Tightening their Grip on Our Government}, THE
\end{itemize}
Per federal common law, as derived from English common law, the U.S. government cannot be sued without its consent.\textsuperscript{156} With the increasingly intertwined role of private companies in government functions, courts have fashioned the doctrine of derivative sovereign immunity to clarify when and how this protection may be imputed to government contractors. In 2018, the Supreme Court stated clearly in \textit{Campbell-Ewald v. Gomez} that federal contractors do not share the government’s unqualified immunity from liability and litigation.\textsuperscript{157} Instead, through precedent first established in \textit{Yearsley v. W.A. Ross Const. Co.}, contractors, acting as agents of the federal government, may be shielded against lawsuits if (1) they are acting within the authority delegated to them by the government, and (2) the authority was lawfully delegated.\textsuperscript{158}

But a weapons manufacturer facing an ATS suit in our case would not be eligible for derivative sovereign immunity. When contractors such as Lockheed Martin or Raytheon sell weapons to Saudi Arabia or the United Arab Emirates, they are performing commercial transactions through one of two channels: Direct Commercial Sales (DCS) and Foreign Military Sales (FMS).\textsuperscript{159} In the FMS process, the sale is government-to-government, and the Pentagon plays a central role by securing the agreement, facilitating the sale, and contracting out production of the weaponry to the contractor. In the DCS process, the company negotiates the sale directly with the foreign government and secures an export license from the State Department but does not include the U.S. government as a party to the sale. Though it is difficult to ascertain from publicly available documentation precisely which channel the weapon in


\textsuperscript{157} Campbell-Ewald Co. v. Gomez, 136 U.S. 663, 672 (2016).


our Dahyan test case passed through,\footnote{160} in either scenario, this defense should fail.

The DCS process categorically places the contractor’s activities outside the scheme contemplated by \textit{Yearsley} and its progeny. Derivative sovereign immunity is limited to contractors acting as an agent of the federal government, in which the government provides “reasonably precise” instructions to a contractor to carry out a government function without its own discretion in the design process.\footnote{161} By negotiating and carrying out a sale directly with a foreign government through DCS channels, the contractor is not performing work as an agent of the U.S. government and thus may not invoke \textit{Yearsley} immunity.\footnote{162}

But even if the contractor has engaged in the FMS process and is thus more likely to be found an agent of the government (or, should courts disagree that the \textit{Yearsley} standard categorically does not apply to a defendant completing a sale pursuant to DCS channels), the contractor should still fail in its attempt to invoke derivative sovereign immunity as it cannot overcome the required elements. For though the first element may be met (acting within the bounds of the authority granted by the United States government), the second element would not (the activity must be lawfully authorized), as the U.S. government cannot lawfully authorize the aiding and abetting of war crimes.\footnote{163} Thus, an attempted defense of derivative sovereign immunity should fail.

\footnotetext[160]{The identification number on the debris at the Dahyan site allows public identification of which manufacturer made the bomb, but not when or how.}

\footnotetext[161]{See Cabalce v. Thomas E. Blanchard & Associates, 797 F.3d 720, 732 (9th Cir. 2015) ("We have held that derivative sovereign immunity ... is limited to cases in which a contractor 'had no discretion in the design process and completely followed government specifications.'").}

\footnotetext[162]{In re Hanford Nuclear Reservation Litig., 534 F.3d 986, 1001 (9th Cir. 2008); see also McCrossin v. IMO Indus., Inc., No. 3:14-CV-05382, 2015 WL 575155, *7 (W.D. Wash. Feb. 11, 2015) ("[t]he Yearsley Court based this defense on traditional agency principles where the contractor-agent had no discretion in the design process").}

\footnotetext[163]{See Al Shimari v. CACI Premier Tech., Inc., 840 F.3d 147, 157 (4th Cir. 2016). ("[T]he military cannot lawfully exercise its authority by directing a contractor to engage in unlawful activity."); Filarsky v. Delia, 566 U.S. 377, 395 (2012) ("Qualified immunity may be overcome ... if the defendant knew or should have known that his conduct violated a right 'clearly established' at the time of the episode in suit."); Ginsburg, J., concurring (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)); Ruddell v. Triple Canopy Inc., No. 1:15-cv-01331 (LMB/JFA), 2016 WL 4529951 (E.D. Va. Aug. 29, 2016) (When “Congress has prohibited the federal sovereign” from taking an action, the government cannot lawfully authorize a contractor to take that same action). Our corporate defendants may protest, as have others facing ATS claims, that it is unfair for them to be left alone “holding the bag” for activity from which the government is immune from liability. See Filarsky, 566 U.S. at 391 ("Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity."); see also Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516 (4th Cir. 2014); Salim v. Mitchell, 268 F. Supp. 3d 1132 (E.D. Wash. 2017). This argument does not pass muster. As the Eastern District of New York pointed out when}
Similarly, our corporate defendant should also fail in any attempt to argue the non-justiciability of this claim by invoking political question concerns or the act of state doctrine. Turning first to whether the claim constitutes a non-justiciable political question, our defendant may assert that courts shouldn’t weigh in, as it may interfere with U.S. foreign policy decisions better suited for the political branches. But in the same Baker v. Carr decision in which the Supreme Court established factors indicating non-justiciability (such as deference to political branches on certain policy matters), it also dismissed a categorical pronouncement that “every case or controversy which touches foreign relations lies beyond judicial cognizance.”\(^{164}\) Indeed, though foreign affairs are constitutionally delegated to the political branches, it is the judiciary’s role to determine what the law is and whether there has been a violation,\(^{165}\) and the ATS itself constitutes a congressional assignment to the courts to review violations of the law of nations.\(^{166}\) Moreover, as a hypothetical plaintiff in our case would not be challenging U.S. foreign policy so much as they would be seeking damages resulting from a commercial transaction by a private actor, the claim does not constitute a non-justiciable political question.

considering an ATS case against the corporation that supplied Agent Orange for use in the Vietnam War: “‘Unfairness’ to government contractors is not a convincing ground for ignoring their corporate liability under international law since... to establish liability, the plaintiffs would have to show that the usage was illegal under international law; the defendants knew how their product would be used; and, that with knowledge, they supplied the product, facilitating and becoming a party to the illegality.” In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 91 (E.D.N.Y. 2005). This is exactly what our plaintiff will seek to establish, and thus derivative sovereign immunity will not suffice in defense. Relatedly, it is essential to once again point out that business entities have their own agency and responsibilities apart from the government’s. Beyond legal standards, companies simply do not have to fulfill contracts that they know are likely to perpetuate unlawful behaviors. Weapons manufacturers are not passive actors in this or any conflict and should not be able to hide behind the government to avoid responsibility for their decisions. See Amnesty Int’l, supra note 41, at 4 (“Like all companies, corporates operating in the defense sector must put in place proactive preventive measures to address the human rights risks that the misuse of their products and services pose. These measures should include robust human rights due diligence policies and processes – separate from those of the state – to identify, prevent, mitigate and account for how companies address both their potential and actual human rights impacts.”).


165. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); U.S. Const. art. III § 2; see also W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 408-10 (1990) (finding there is no general “principle of abstention” that allows courts to dismiss a case simply because it implicates U.S. foreign policy).

166. See Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (“Congress, however, has not only expressed no disagreement with our view of the proper exercise of judicial power, but has responded... by enacting legislation supplementing the judicial determination in some detail.”).
Neither should the act of state doctrine preclude our plaintiff’s case from moving forward. Though it is well-established that courts will not “sit in judgment on the acts of” another government, they are cautious in allowing such concerns to bar cases involving purely commercial activity. Further, as made clear by the Supreme Court, “the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it.” This was emphasized by the court in *Filartiga*, which held that violations of clear international legal consensus could not be considered unreviewable under the act of state doctrine and thus launched the modern era of ATS litigation.

**CONCLUSION**

Courts have placed increasingly high hurdles before plaintiffs seeking relief under the ATS. But our hypothetical plaintiff can overcome those hurdles. The harm suffered by Yemeni civilians is not an unfortunate but necessary byproduct of a foreign war. It is the result of business decisions made by American companies in the United States to manufacture and sell American bombs that garner billions of American dollars, with the approval of the U.S. government. It is a continuing result from years of complicity and a refusal to alter those business decisions despite the knowledge that the bombs are being used to commit war crimes. Those decisions have consequences, and the ATS provides one avenue for accountability. The weapons manufacturers must face that accountability, rather than continuing to hide behind the U.S. government. As a member of the U.N. expert panel on Yemen said, “There are no clean hands in this conflict. Everybody, everybody is responsible.”

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170. Filartiga v. Pena-Irela, 557 F. Supp. 860, 862 (E.D.N.Y. 1984) (“Where the principle of international law is as clear and universal as the Court of Appeals has found it to be, there is no reason to suppose that this court's assumption of jurisdiction would give justifiable offense to Paraguay.”).