2011

When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation

Jordan D. Shepherd

Note

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Jordan D. Shepherd∗

In 2004, the U.S. Supreme Court considered a claim by a Mexican national against U.S. Drug Enforcement Agency agents and other defendants under the Alien Tort Statute (ATS), which provides federal jurisdiction over tort claims by aliens.[1] The plaintiff argued that the ATS provided U.S. courts with subject-matter jurisdiction to hear and remedy his claim for arbitrary detention in violation of international law.[2] The Court did not agree, but neither did it disagree. Although the Court found that his particular claim did not implicate a cognizable norm of customary international law,[3] it saw no "reason . . . to shut the door" for federal courts to exercise jurisdiction over certain common-law causes of action pleaded under the ATS.[4] The Court's holding validated almost twenty-five years of human rights case law that has been used to hold individual and corporate violators accountable for human rights norms.[5]

∗ J.D. May 2011, University of Minnesota Law School; M.A. 2006, Texas Tech University. For tremendous support and encouragement throughout law school, I sincerely thank Professors Jennifer Green, David Weissbrodt, and Duane Krohnke. I appreciate the dedication of the Editors and Staff of the *Minnesota Law Review*, especially Nadia Aboussir, Joe Hansen, and Laura Arneson. I dedicate this Note to Jennifer Neal Heuss: without you, none of this would be possible.

1. Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see also* 28 U.S.C. § 1350 (2006). While courts have also used the terms "Alien Tort Claims Act" and "Alien Tort Act," most courts—and this Note—now use "Alien Tort Statute." *See* Viet. Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 113 & n.2 (2d Cir. 2008) (explaining the development and citing cases).

2. *Sosa*, 542 U.S. at 697.

3. *Id.* at 738.

4. *Id.* at 731.

5. *See* Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 170 (2005) (discussing the line of cases that began with *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980)).

While many procedural and substantive issues remain unresolved, courts continue to recognize causes of action for torture and other human rights violations in the global effort to end impunity.[6]

In 2009, the U.S. Supreme Court considered a claim by a Pakistani national against John Ashcroft and Robert Mueller, the United States' top law enforcement officials at the time.[7] Bringing a *Bivens*[8] action for unconstitutional racial and religious discrimination by government officials, the plaintiff alleged that these defendants had designed and implemented a policy intended to discriminate against Arab-Muslims in the immediate aftermath of 9/11.[9] The Court extended its *Bell Atlantic v. Twombly* plausibility standard[10] to reject his allegations as "conclusory" and dismiss his claims as not "plausible."[11] In a move widely interpreted as a major overhaul of the U.S. system of notice pleading,[12] the Court granted the defendants' Rule 12(b)(6) motion to dismiss the complaint and apparently adopted heightened pleading standards in "'all civil actions.'"[13]

Taken together, these two Supreme Court decisions have specific implications in human rights litigation. First, the holding of *Sosa* on subject-matter jurisdiction has set a high threshold for courts to hear cases seeking to hold human rights violators accountable for their actions in U.S. courts.[14] Following the Supreme Court's emphasis on judicial discretion in that case,[15] litigants progressively have faced and surmounted a number of procedural and substantive hurdles in applying the modern

6. *Id.* at 224–26.

7. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

8. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

9. *Iqbal*, 129 S. Ct. at 1942–43.

10. 550 U.S. 544, 556 (2007).

11. *Iqbal*, 129 S. Ct. at 1950–51.

12. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 850–51 (2010) (retracting his pre-*Iqbal* interpretation of *Twombly*).

13. *Iqbal*, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

14. *See generally* Beth Stephens, Sosa v. Alvarez-Machain*: "The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 551 (2004) (discussing challenges and noting the "cautious approach" to recognizing actionable norms found in *Sosa* and in most lower courts).

15. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) (requiring federal courts to exercise "a restrained conception of . . . discretion" in recognizing causes of action under the ATS).

ATS.[16] Subsequently, *Iqbal*'s revision of pleading standards in civil litigation creates a potential procedural barrier to ATS suits seeking to vindicate the rights of victims of egregious human rights violations. For ATS claims, like the discrimination claim in *Iqbal*,[17] discovery is a vital tool to obtain evidence that is beyond the control of plaintiffs. In the pre-*Iqbal* world of civil litigation, pleadings were the first, simple step to move a case to the fact-bound inquiries of discovery.[18] Following the Court's interpretation of Federal Rule of Civil Procedure 8(a)(2) to require a plausible statement of the claim for relief, many plaintiffs may be caught in a "catch 22." To reach discovery and the factual evidence needed to substantiate the claim, a plaintiff must file a well-pleaded complaint; yet after *Iqbal*, a complaint is only well-pleaded if it already reflects factual material that may be obtainable only through discovery.[19] It seems the movement to bring human rights violators to justice must clear a burdensome procedural hurdle.[20]

This Note considers the effects on human rights litigation under the ATS of the Supreme Court's new statement on pleading standards in *Iqbal*. Part I describes the development of the ATS, as well as that of pleading standards in U.S. civil litigation. Part II analyzes ATS motions to dismiss in light of the new pleading standard, focusing on the variety of ways different jurisdictions have approached plausibility pleading in ATS cases. It considers courts' recognition (or lack thereof) of the distinction between jurisdictional motions to dismiss under

16. Joseph T. McLaughlin & Justin H. Bell, *Mass Litigation: New Limitations on the Exercise of Jurisdiction Under the Alien Tort Statute*, ALI-ABA COURSE OF STUDY, SN066 ALI-ABA 199, 209–16 (2008) (discussing doctrines and citing cases).

17. Brief for Respondent Javaid Iqbal at 18–19, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015) (discussing the Second Circuit's receptivity toward "cabined" discovery).

18. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 824–26 (2010) (giving the historical background of pleadings).

19. Brief for National Civil Rights Organizations as Amici Curiae Supporting Respondents at 10, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015) (expanding this argument and giving examples from civil rights cases).

20. In the context of civil rights suits, this problem is well known. *See, e.g.*, A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post*-Conley *Era*, 52 HOW. L.J. 99 (2008) (analyzing the early effects of *Twombly* on civil rights claims). Senator Arlen Specter introduced a bill immediately after the Court decided *Iqbal* in an attempt to counter the effects of that decision. *See* Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). Representative Jerrold Nadler introduced a similar bill in the House. *See* Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

Rule 12(b)(1) and merits-based challenges under Rule 12(b)(6) along with their respective standards of review. Part III finds that the broad similarities between the Court's policy justifications in *Sosa* and *Twombly-Iqbal* support the narrow application of the former to Rule 12(b)(1) motions and the latter to Rule 12(b)(6) motions. This Note concludes that this narrow approach, found more clearly in the case law of the Second Circuit rather than the Eleventh, adequately balances the needs of plaintiffs and defendants in Rule 12 motions in human rights litigation.

I. *SOSA*'S HISTORICAL PARADIGM TEST AND *IQBAL*'S PLAUSIBILITY STANDARD

To set the backdrop for the discussion of pleading standards in ATS cases, this Part develops in two sections. The first section begins by describing the development of human rights litigation—from the enactment of the ATS in 1789, through the seminal case of *Filártiga v. Peña-Irala*,[21] to the Supreme Court's only comprehensive analysis of the statute in *Sosa v. Alvarez-Machain*.[22] It then expounds *Sosa*'s test for ATS subject-matter jurisdiction and, finally, reviews how courts have applied that test. The next section considers pleading standards under the Federal Rules of Civil Procedure and whether the Court's decisions in *Twombly* and *Iqbal* heightened those pleading standards. This overview—first, of ATS litigation, and second, of pleading standards—lays the groundwork for an analysis of the unique interaction of *Sosa* and *Twombly-Iqbal* in understanding the plausibility standard in human rights litigation.

A. THE ALIEN TORT STATUTE: FROM 1789 TO THE PRESENT

Enacted in the First Judiciary Act of 1789, Judge Friendly once dubbed the ATS a "legal Lohengrin."[23] It is now a key federal statute in the transnational struggle to end impunity for human rights violators.[24] This overview of the historical devel-

21. 630 F.2d 876 (2d Cir. 1980).

22. 542 U.S. 692 (2004).

23. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (stating that "no one seems to know whence it came").

24. Other important federal laws are the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)), and the Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (codified at 22 U.S.C. § 1701 (2006)).

opment of litigation under the ATS and its current scope under *Sosa* contextualizes its role in federal motion practice today. Understanding the relationship between subject-matter jurisdiction and stating a claim for relief is important to this Note's analysis of the plausibility standard in ATS litigation.

1. The Development of the ATS

In its current form, the ATS provides that "[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."[25] Since its enactment by the First Congress, the statute has not undergone major revision.[26] Reading the amendments as superficial rather than substantive,[27] the *Sosa* Court interpreted the statute as a product of the paradigms of the late eighteenth century.[28]

In practice, the ATS lay dormant in the U.S. Code for most of its existence.[29] A human rights lawsuit filed in 1979 on behalf of the Filártiga family of Paraguay revived the ATS.[30] The Second Circuit in 1980 allowed a civil claim for damages arising out of allegations of torture and extrajudicial killing of Joelito Filártiga by a Paraguayan police official who was a political opponent of the young man's father.[31] In *Filártiga*, the court recognized that the ATS provided jurisdiction to hear the

25. 28 U.S.C. § 1350.

26. The minor, cosmetic changes were of two types. The first type of change reflected the phraseological development of the federal rules. *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.4 (1986) (indicating that "causes" in the original Act was changed to "suits" then "civil action"). The second change concerns the removal of explicit reference to concurrent state jurisdiction. *Id.* (noting that this does not eliminate state jurisdiction because the statute is not included in the section designating cases over which federal jurisdiction is exclusive); *see also* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 120–27 (2d ed. 2008) (discussing state courts as a forum for human rights claims).

27. *Sosa*, 542 U.S. at 713 n.10 (2004) (stating that the statute "has been slightly modified on a number of occasions"); *see also* H.R. REP. NO. 80-308, at A124 (1947) (noting that "[c]hanges were made in phraseology").

28. *Sosa*, 542 U.S. at 724–25 (explicating the statute's scope in relation to piracy, safe conducts, and diplomatic injuries).

29. An April 26, 2011, Westlaw search for federal case citations to the statute in the nearly 200-year period *before* 1980 yielded twenty-two results. Westlaw search of "ALLFEDS" database using terms: ["28 u.s.c. § 1350" & da(bef 1980)] on April 26, 2011.

30. Complaint ¶ 4, Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79 Civ. 917), *available at* http://avalon.law.yale.edu/diana/13june.asp.

31. *Filártiga*, 630 F.2d at 878.

case.[32] Although it indicated that analyzing ATS jurisdiction required "a more searching preliminary review of the merits,"[33] the court held that the plaintiffs had a cause of action for torture as a violation of universally recognized norms of customary international law.[34]

Following this watershed decision, the ATS received much more judicial attention than at any time in its history.[35] An important follow-up decision came four years later in *Tel-Oren v. Libyan Arab Republic*.[36] A three-judge panel on the D.C. Circuit agreed that the district court had properly dismissed the claim by a group of aliens for torture and other tortious conduct, but each judge wrote separately, unable to agree with each other's reasoning.[37] Judge Edwards, in a widely regarded opinion,[38] approved of the *Filártiga* interpretation of the ATS but distinguished the instant case on the facts.[39] Judge Bork, on the other hand, found the ATS to be solely jurisdictional in nature such that "there [must] be an explicit grant of a cause of action" for federal courts to be available.[40] In the shortest of the three opinions, Judge Robb argued that the case presented a nonjusticiable political question.[41]

The Edwards-Bork debate signified the division of the major competing views of the ATS across the federal judiciary and legal academy in the following years. Under the view generally accepted following *Filártiga*, the ATS not only provided subject-matter jurisdiction but also provided a cause of action for viola-

32. *Id.* at 887 n.22 (deciding specifically to rest federal subject-matter jurisdiction on the ATS rather than the federal question provision of 28 U.S.C. § 1331 (1993)).

33. *Id.* at 887.

34. *Id.* at 884 (using "customary international law" and "law of nations" synonymously); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (same).

35. *Compare supra* note 29 and accompanying text (using a search for cases in the nearly 200-year period *before* 1980 to return twenty-two cases), *with* a Westlaw search of "ALLFEDS" database using terms: ["28 u.s.c. § 1350" & da(aft 1980)] on April 26, 2011 (using the same search for cases in the thirty-year period *after* 1980 to return 633 cases).

36. 726 F.2d 774 (D.C. Cir. 1984) (per curiam).

37. *Id.* at 775.

38. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004) (citing Judge Edwards's opinion with approval).

39. *Tel-Oren*, 726 F.2d at 791 (Edwards, J., concurring).

40. *Id.* at 801 (Bork, J., concurring).

41. *Id.* at 823 (Robb, J., concurring).

tions of the law of nations.[42] Under the Borkian perspective,[43] the ATS would be a simple jurisdictional statute with no force unless Congress took further action to provide a statutory cause of action.[44] Most courts, however, largely were not persuaded by Judge Bork's attack on *Filártiga* and continued to hear and decide cases under the ATS.[45] Over twenty years later, the Supreme Court responded to Judge Edwards's request in *Tel-Oren* for guidance[46] by endorsing his opinion and the *Filártiga* court's use of this statute to hold modern human rights violators accountable in *Sosa*.[47]

2. *Sosa*'s Historical Paradigm Test

Hearing a claim by a Mexican doctor that his arrest and detention by U.S. citizens and law enforcement officials had been arbitrary, the Court found that the ATS provides a limited grant of subject-matter jurisdiction over federal common-law causes of action.[48] Weighing in on the broader debate, the Court held that the ATS was "only jurisdictional,"[49] while finding that this jurisdictional grant incorporated causes of action compara-

42. *See* Brief in Opposition to Petition for Writ of Certiorari at 7–10, *Sosa*, 542 U.S.692 (No. 96-1890) (collecting cases); *see also* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2383–88 (1991) (discussing the grounds for implying a right of action under the ATS).

43. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 205 (D.C. Cir. 1985) (referring favorably to Judge Bork's approach in an opinion by future Justice Scalia and with future Justice Ginsburg filing a separate concurrence); Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118 (WHP), 2005 WL 1870811, at *1 n.1 (S.D.N.Y. Aug. 9, 2005), *rev'd*, 562 F.3d 163 (2d Cir. 2009); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 873 & n.357 (1997).

44. Congress did just that with respect to torture and extrajudicial killings in the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2006)). Yet the legislative history in both the Senate and the House shows a clear endorsement of the *Filártiga* view of the ATS. S. REP. NO. 102-249, at 4 (1991); H.R. REP. NO. 102-367, at 86 (1991). Congress passed the Torture Victim Protection Act of 1991 (TVPA) supplement to the ATS to repudiate, rather than validate, Judge Bork's opinion. *Id.*

45. *See* Coliver, Green & Hoffman, *supra* note 5, at 224–26; Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 52 VA. J. INT'L L. 353, 359 & nn.35–36 (2011) (stating that "Bork's separation of powers critique never gained substantial currency outside the D.C. Circuit").

46. *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court.").

47. 542 U.S. 692 (2004).

48. *Id.* at 712.

49. *Id.*

ble to those recognized at common law at the time of the 1789 enactment of the ATS.[50] Thus, for a modern claim to be cognizable under the "law of nations" clause of the ATS, the Court held that it must rest on an international norm that is universal and specifically defined.[51]

In defining this "historical paradigm test"[52] for ATS jurisdiction, the court carved out a moderate position between the two sides' arguments. Dr. Alvarez-Machain presented the broad view that the ATS simultaneously granted jurisdiction and conferred a new cause of action for violations of the law of nations.[53] Yet, while the Court would not take this more expansive view, it dismissed the Borkian restrictive interpretation, which would leave the ATS a dead letter.[54] In this case, the Court declined to exercise jurisdiction over this plaintiff's claim.[55] Yet the Court provided the standard for recognizing new causes of action for norms having no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 [the ATS] was enacted."[56] Thus the Court validated the cautious discretion employed by lower courts to recognize other causes of action as international human rights norm evolve.[57]

The *Sosa* Court provided that the ATS is a federal jurisdictional statute incorporating existent international law.[58] It is

50. *Id.* at 724 (giving as examples "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy").

51. *Id.* at 725 ("[W]e think courts should require any claim based on the present-day law of nations to 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.").

52. Paul Hoffman & Adrienne Quarry, *The Alien Tort Statute: An Introduction for Civil Rights Lawyers*, 2 L.A. PUB. INT. L.J. 129, 140 (2010), *available at* http://www.lapilj.org/uploads/1/7/9/9/1799330/hoffman_-_converted.pdf (coining this term for *Sosa*'s analysis).

53. *Sosa*, 542 U.S. at 713.

54. *Id.* at 719 (rejecting the view that "the ATS is a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature").

55. *Id.* at 738 (refusing to find a violation in "a single illegal detention of less than a day").

56. *Id.* at 732. The Court cited with approval the standards enunciated in *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980), *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring), and *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994). *See Sosa*, 542 U.S. at 732.

57. *Sosa*, 542 U.S. at 725.

58. *Id.* at 724 ("In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical mate-

not an unadorned, and thus "stillborn," jurisdictional statute,[59] but it does not automatically include all violations of customary international law.[60] What this jurisdictional statute does include is the common law of international torts at the time of its enactment in the 1789 Judiciary Act.[61] This definition of an ATS norm under the historical paradigm test incorporates the substantive norm, or cause of action, from international law but looks to federal common law to determine whether there is relief from the defendant's specific conduct—that is, whether there is a remedy.[62] The Court's decision clarified, to a great degree, the role of international human rights norms in the ATS and the discretion of lower courts to develop federal common law in this "interstitial area[] of particular federal interest."[63] However, courts have not always been clear about the procedural distinction between subject-matter jurisdiction and stating a claim for relief in the ATS context—an issue to which this Note now turns.

3. ATS Jurisdiction and Stating an ATS Claim for Relief

The jurisdiction-merits distinction is fundamental in federal civil procedure.[64] It is found in the organization of the Federal Rules of Civil Procedure.[65] A Rule 12(b)(1) motion to dis-

rials is that the statute was intended to have practical effect the moment it became law.").

59. *Id.* at 714 (referring to Sosa's arguments).

60. *Id.* at 713 (noting *Alvarez-Machain*'s view of the ATS).

61. *Id.* at 724 ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

62. One commentator argues that a cause of action under *Sosa* is a "hybrid" or "mixed" cause of action since it at once relies on international law and federal common law. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 638–44 (2006).

63. *Sosa*, 542 U.S. at 726 (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 726–27 (1979)).

64. Although using the term "merits" to stand in for "stating a claim upon which relief may be granted" elides important distinctions in those concepts, such distinctions are not key to my analysis, which instead focuses on the distinction between subject-matter jurisdiction and stating a claim. For ease in this Note, I refer to a jurisdiction-merits distinction where the Supreme Court has employed the phrase "the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy." Arbaugh v. Y&H Corp., 546 U.S. 500, 511 (2006).

65. *Compare* FED. R. CIV. P. 8(a)(1) (requiring "a short and plain statement of the grounds for the court's jurisdiction"), *and* FED. R. CIV. P. 12(b)(1) (providing the defense of "lack of subject-matter jurisdiction"), *with* FED.

miss on jurisdictional grounds is "analytically different" from a Rule 12(b)(6) motion to dismiss for failure to state a claim.[66] Wright and Miller describe the former as "flexible, often serving as a procedural vehicle for raising various residual defenses,"[67] but failure to state a claim is not among such defenses.[68] The Supreme Court on numerous occasions has upheld and reiterated this distinction.[69] Further, the *Steel Company v. Citizens for a Better Environment* rule requires that subject-matter jurisdictional issues be determined fully before considering a claim's merit.[70] In the ATS context, commentators have highlighted the need for courts to rigorously police this distinction for analytical soundness.[71]

In spite of this general view, courts hearing motions to dismiss ATS cases often are unclear about which of the two motions they are considering.[72] Some courts review the motion

R. CIV. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief"), *and* FED. R. CIV. P. 12(b)(6) (providing the defense of "failure to state a claim upon which relief can be granted").

66. *E.g.*, 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350, at 106 (3d ed. 2004) ("[T]he former determines whether the plaintiff has a right to be in the particular court and the latter is an adjudication as to whether a cognizable legal claim has been stated.").

67. *See id.* § 1350 *passim* (listing the defenses of mootness, political question, and others).

68. *See id.* §§ 1355–1357 (discussing separately the Rule 12(b)(6) motion).

69. 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case."); Bell v. Hood, 327 U.S. 678, 682 (1946) ("Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

70. *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)); *see also* Laura S. Fitzgerald, *Is Jurisdiction Jurisdictional?*, 95 NW. U. L. REV. 1207, 1214–16 (2001) (considering the Court's "jurisdiction-first" rule, but noting some exceptions).

71. STEPHENS ET AL., *supra* note 26, at 29–31 (disputing *Filártiga*'s statement that ATS cases require "more searching preliminary review of the merits" at the jurisdictional stage based on the jurisdiction-merits distinction); *see also* Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 580–84 (2007) (discussing the conflation of jurisdiction and merits under 28 U.S.C. § 1331 (1993) "arising-under" jurisdiction).

72. Even the *Sosa* Court never explicitly stated whether it was dismissing the claims based on lack of jurisdiction or for failure to state a claim for relief. *See* Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1006 (S.D. Ind. 2007) (analyzing *Sosa*).

strictly on jurisdictional grounds,[73] while others discuss it in terms of stating a claim,[74] and still others discuss jurisdiction as a function of the claim stated.[75] Additionally, courts generally do not appear to be mindful of this distinction or whether it matters to their analysis.[76] *Roe v. Bridgestone Corp.*, an opinion from the Southern District of Indiana, stands in contrast because it directly addressed this issue, adequately balancing the necessities of general procedural doctrine with the dictates of *Sosa* in ATS context.[77]

In *Bridgestone Corp.*, the court confronted allegations of forced labor of both adults and children on a Liberian rubber plantation.[78] In response to defendants' motion to dismiss for lack of subject-matter jurisdiction, the court enunciated the historical paradigm test and noted that plaintiffs need only allege "colorable and arguable" violations—rather than a completely proven violation—of the law of nations to sustain subject-matter jurisdiction.[79] The court further emphasized the jurisdiction-merits distinction by rejecting defendants' attempt to incorporate a "higher standard" for ATS jurisdiction from the *Filártiga* and *Kadic v. Karadzic* cases.[80] The court rightly fol-

73. *See, e.g.*, *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1301 (S.D. Fla. 2006) (dismissing for failure to state a claim).

74. *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1270 (11th Cir. 2009) (affirming the lower court, which had dismissed the complaint for failure to state a claim, but characterizing the dismissal as jurisdictional); Wiwa v. Royal Dutch Petroleum Co., 626 F. Supp. 2d 377, 382 (S.D.N.Y. 2009) (distinguishing between a jurisdictional challenge and merits-related questions that are irrelevant at the jurisdictional stage).

75. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 (2d Cir. 2009) (stating that the district court had dismissed the case "based on its determination that it lacked subject-matter jurisdiction because plaintiffs failed to state claims under the ATS"); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 309–10 (2d Cir. 2007) (Korma, J., concurring); Flores v. S. Peru Copper Corp., 414 F.3d 233, 255 n.30 (2d Cir. 2003).

76. *But see, e.g.*, Chowdhury v. WorldTel Bangl. Holding, Ltd., 588 F. Supp. 2d 375, 379 n.1 (E.D.N.Y. 2008) (noting that whether the motion is on jurisdiction or failure to state a claim is a "very substantial issue," but declining to distinguish which type it is because the parties "skirted" the issue).

77. *Bridgestone Corp.*, 492 F. Supp. 2d at 1006.

78. *Id.* at 990.

79. *Id.* at 1004; *cf.* Arbaugh v. Y&H Corp., 546 U.S. 500, 513 (2006) (stating that § 1331 arising-under jurisdiction requires a plaintiff to plead "a colorable claim" for relief (citing Bell v. Hood, 327 U.S. 678, 681–85 (1946))).

80. *Bridgestone Corp.*, 492 F. Supp. 2d at 1004–05 ("[I]t is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)." (quoting Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995))).

lowed those courts that do not conflate jurisdiction and stating a claim, and it acknowledged that a heightened pleading standard at the jurisdictional stage is not acceptable after *Sosa*.[81]

One final note on ATS jurisdiction relates to the two types of challenges on motions to dismiss for lack of subject-matter jurisdiction. Some pre-*Sosa* courts distinguished between facial and factual motions to challenge a claim on jurisdictional grounds.[82] A facial challenge is a direct challenge to the legal sufficiency of the claim.[83] In such a motion, a court accepts as true all the allegations of the complaint and considers only that which is contained within the four corners of the complaint.[84] A defendant who challenges the jurisdictional allegations themselves presents a factual challenge.[85] In such a case, a court will not consider the complaint presumptively truthful but will weigh the defendant's evidence against the allegations of the plaintiff, who has the burden of proving jurisdiction.[86] Under a factual challenge, courts look to extrinsic evidence to determine whether the jurisdictional facts present a case that the courts have the power to adjudicate.[87] Although a Rule 12(b)(1) facial attack and a Rule 12(b)(6) challenge to the claim have similar procedural requirements,[88] this similarity does not dictate the wholesale importation of the Rule 12(b)(6) standard into the

81. *Id.* at 1005–06; *see also* Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 686–87 (S.D. Tex. 2009) (citing the *Bridgestone Corp.* case and following this approach to distinguish the jurisdiction issue from the pleadings issue); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 307–08 (S.D.N.Y. 2003) (questioning the higher standard of review).

82. *See, e.g.*, Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1129–30 (C.D. Cal. 2002) (distinguishing the two types of challenges to subject-matter jurisdiction); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 437–38 (D.N.J. 1999) (making the same distinction between factual and facial attacks of subject-matter jurisdiction). The Eleventh Circuit has also recently taken the same approach. *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009).

83. *Iwanowa*, 67 F. Supp. 2d at 438.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 255 n.30 (2d Cir. 2003) (allowing consideration of materials outside of the pleadings when addressing a factual challenge); *Sarei*, 221 F. Supp. 2d at 1129; *see also* STEPHENS ET AL., *supra* note 26, at 452 (discussing the role of factual material in pleading ATS cases).

88. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009) ("As it does when considering a motion to dismiss for failure to state a claim, a court considering a motion to dismiss for lack of subject matter jurisdiction construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged in the complaint as true.").

Rule 12(b)(1) context. A court credits as true the complaint's allegations in a facial attack because it is limited to those averments, and the plaintiff's burden in proving jurisdiction is mitigated by the presumption of truthfulness of the plaintiff's allegations. Beyond these superficial similarities, the analytical difference between jurisdiction and merits requires that the standards of review remain distinct,[89] a point to which this Note will return later.

In sum, courts are not always clear whether they are examining a challenge to subject-matter jurisdiction under Rule 12(b)(1), which requires the complaint to satisfy the historical paradigm test of *Sosa*, or a challenge to the sufficiency of the claim under Rule 12(b)(6), which has an entirely different standard of review. That standard of review derives from *Twombly* and *Iqbal* and is considered in the next section on pleading standards. A general understanding of plausibility pleading allows for an analysis of these specific pleading issues as they impact ATS lawsuits.

B. FEDERAL PLEADING STANDARDS: FROM 1938 TO THE PRESENT

The Supreme Court's recent interpretation of Rule 8's pleading requirements in Rule 12 motion practice has important implications on ATS litigation. The simplified, notice pleading standard governing all civil claims since the inception of the Federal Rules is no longer current. The duo of *Twombly* and *Iqbal* repudiated that standard by creating a more stringent test of a complaint's sufficiency in stating a claim for relief, which may be fatal to a number of valid claims.[90] This section discusses the development of federal pleading standards in order to provide background for an analysis of pleading requirements in human rights claims under the ATS.

Prior to 1938, litigation in the United States proceeded under a system of code pleading.[91] To bring a claim before the courts, a claimant had to list the "dry, naked, actual facts" of her case in a prescribed pattern, carefully avoiding any refer-

89. *See supra* notes 64–71 and accompanying text.

90. *See* Brief of National Civil Rights Organizations, *supra* note 19, at 10–11 (citing examples of how even plaintiffs with valid claims may find it nearly impossible to survive the *Iqbal* pleading standard).

91. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003); *see also* CHARLES E. CLARK, CODE PLEADING 22 (2d ed. 1947).

ence to laws or legal standards.[92] Elaborate rules developed, based on the assumption "that statements of fact and conclusions of law could be sharply distinguished."[93] Being "widely criticized for overemphasizing form over substance,"[94] the legal realist critique of the early twentieth century ended this formalistic method of pleading.[95] In its stead, a simplified and liberal model of pleadings allowed greater access to the courts.[96]

The Supreme Court promulgated these simplified pleading requirements,[97] which came to be known as "notice pleading,"[98] at Rule 8(a)(2) of the new Federal Rules of Civil Procedure.[99] Rule 8(a)(2) requires a plaintiff to provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[100] The rule mentioned neither facts nor law and, thus, reflected a policy decision that required very little of the claimant to open the doors to the federal courthouse.[101] This uniform pleading model had four distinct functions,[102] of which the primary function was notice, according to the Supreme Court in

92. Bone, *supra* note 12, at 863 (quoting JOHN NORTON POMEROY, CODE REMEDIES 560–61 (4th ed. 1904)).

93. *Id.*

94. Fairman, *supra* note 91, at 990.

95. One realist scholar, for example, found "no logical difference between permissible factual allegations and impermissible legal conclusions." Bone, *supra* note 12, at 864 (citing Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921)).

96. *See* Fairman, *supra* note 91, at 990 (noting how the adoption of the federal rules ensured that litigants would "have their day in court" and created a "new procedural system that massively de-emphasize[d] the role of pleadings").

97. The Rules Enabling Act vests this authority in the Court. *See* Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (codified as amended at 28 U.S.C. §§ 2071–2074 (2006)).

98. A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008).

99. Another rule, 9(b), heightens the pleading standard for fraud and mistake by requiring a party to state such allegations "with particularity." FED. R. CIV. P. 9(b). Application of this rule is generally not problematic, *see* Clermont & Yeazell, *supra* note 18, at 854 (referring to "seventy years of [judicial] interpretation of the 'particularity' requirement"), and it is not at issue in this Note.

100. FED. R. CIV. P. 8(a)(2).

101. *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 875–76 (2009) (discussing the policy arguments underlying pleading standards).

102. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 87 (3d ed. 2004) (describing the four functions of pleading as providing notice to the parties, giving some facts, narrowing the issues for litigation, and quickly and easily disposing of sham claims or defenses).

Conley v. Gibson.[103] A complaint was only dismissed on a Rule 12(b)(6) motion if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts" to support a claim for relief.[104] The *Conley* notice pleading regime, arising from the liberal policy choice of the federal rules, lasted for fifty years.

Before the Court's major overhaul of this precedent in 2007, the Court had two occasions to consider the role in the federal system of "heightened" pleading standards.[105] First, in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, the Court acknowledged the competing policy arguments of plaintiffs, who seek a broad right of access to courts, and official defendants, who desire protection from suits that may be distracting or harmful to the public interest.[106] It ultimately stated that summary judgment and controlled discovery must supply the requisite protections unless the federal rules are amended to rebalance the policy goals.[107] Next, in *Swierkiewicz v. Sorema N.A.*, the Court found that the simple allegations in petitioner's claim were sufficient under "Rule 8(a)'s simplified notice pleading standard," and again deferred any statement on the defendant's policy arguments to the established rules amendment process.[108]

In this fairly settled area of the law,[109] the Supreme Court's decision in *Twombly* abrogated a single phrase of the *Conley* decision,[110] overruled no precedent,[111] and purported not

103. 355 U.S. 41, 47 (1957) (requiring the complaint to give "fair notice" of the claim to allow a defendant to prepare an adequate defense).

104. *Id.* at 45–46.

105. *See generally* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (discussing the cases analyzing pleading standards leading up to *Twombly*).

106. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166–68 (1993).

107. *Id.* at 168.

108. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513–15 (2002).

109. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 573 (2007) (Stevens, J., dissenting) (describing the majority's holding as a "dramatic departure from settled procedural law").

110. *Id.* at 562–63 (majority opinion) (giving "*Conley*'s 'no set of facts' language" its "retirement"); *see also* Erickson v. Pardus, 551 U.S. 89, 93–94 (2007) (discussing Rule 8(a)(2)'s "liberal pleading standard" and citing with approval *Conley*'s "fair notice" requirement, indicating that the remainder of the *Conley* decision remains intact).

111. *See Twombly*, 550 U.S. at 547 (noting that the Court's current analysis "does not run counter to *Swierkiewicz*").

to heighten pleading standards.[112] The plaintiff based his Sherman Act[113] allegations on evidence of "parallel conduct,"[114] which could have occurred by coincidence rather than illicit agreement.[115] Announcing a new rubric of "plausibility,"[116] the Court required that a claim present "enough factual matter (taken as true) to suggest that an agreement was made."[117] In light of the potentially massive expense of discovery to defendants,[118] the Court held that a claim must do more than give fair notice and leave "open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts.'"[119] A complaint must rise "above the speculative level"[120] and make a factual "'showing'" of the grounds for relief.[121] Finding that "the plaintiffs here [had] not nudged their claims across the line from conceivable to plausible," the Court dismissed the claim.[122]

Following *Twombly*, courts and commentators attempted to reconcile the Supreme Court's decision with the federal rules and the precedent interpreting them.[123] The main question in this interim period was whether the plausibility standard would be limited to antitrust claims,[124] be limited to cases that

112. *Id.* at 569 n.14 ("In reaching this conclusion, we do not apply any 'heightened' pleading standard . . . .").

113. 15 U.S.C. § 1 (2006).

114. *Twombly*, 550 U.S. at 550.

115. *Id.* at 557.

116. *Id.*

117. *Id.* at 556.

118. *Id.* at 558.

119. *Id.* at 561 (alteration in original) (citing Conley v. Gibson, 355 U.S. 41, 45 (1957)).

120. *Id.* at 555.

121. *Id.* at 556 n.3 (quoting FED. R. CIV. P. 8(a)(2)).

122. *Id.* at 570.

123. *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) (rejecting "a universal standard of heightened fact pleading" despite receiving "conflicting signals" from the Supreme Court, and instead favoring "a flexible 'plausibility standard'"), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 604–06 (2006) (discussing various pleading standards following *Twombly*'s holding); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 5 (2009) (attempting to create a holistic theory of pleading).

124. *See* Bone, *supra* note 101, at 882–90 (discussing the "modest" impact of the decision).

bore structural similarities to antitrust claims,[125] or apply to every civil suit.[126] The answer came shortly thereafter in *Iqbal*: "plausibility" is inherent in Rule 8(a)(2)'s "showing" requirement and thus applies to "'all civil actions'" under the Rules.[127]

The plaintiff Javaid Iqbal, a Pakistani Muslim, was arrested for immigration infractions soon after the events of September 11, 2001.[128] Federal law enforcement officials classified him as "of high interest" and moved him and many others so designated to a special detention center where he underwent unnecessary and degrading treatment on account of his race or religion in violation of his constitutional rights.[129] The Supreme Court upheld the dismissal of his complaint against John Ashcroft and Robert Mueller, which alleged that they had designed and implemented the policy that led to these violations.[130] The Court explained the "two working principles" of pleadings from *Twombly*: (1) a court must accept all "factual allegations" as true, but need not credit "legal conclusions," and (2) only a "plausible" claim for relief is sufficient to withstand a motion to dismiss for failure to state a claim.[131] Operating under those principles, the Court used a two-pronged analysis to determine the sufficiency of the claim. First, the allegations that were not entitled to a presumption of truth (the "legal conclusions") were excised from the statement of the claim.[132] Here, the Court determined the allegation that the policy of detaining Muslims and Arabs such as Mr. Iqbal indicated a discriminatory intent on account of race or religion was a legal conclusion because it was "nothing more than a 'formulaic recitation of the elements'" of the claim.[133] Second, the remaining factual allegations were reviewed to determine whether they "plausibly suggest an entitlement to relief."[134] Because the Court had eliminated the key allegation of discriminatory intent, the Court deemed the

125. *See* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 99 (2007) (finding *Twombly*'s holding useful in a small subset of cases).

126. *See* Spencer, *supra* note 20, at 103 (analyzing the effects of *Twombly* on civil rights litigation).

127. Iqbal, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

128. *Id.* at 1942.

129. *Id.* at 1943–44.

130. *Id.* at 1944.

131. *Id.* at 1949–50.

132. *Id.* at 1951.

133. *Id.* (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

134. *Id.*

blue-penciled complaint insufficient and dismissed the case against these two defendants.[135]

The Supreme Court's requirements for pleadings drastically changed in appearance in a short period of time. Although the Court purported to make minimal changes in response to important policy issues, the ramifications of its holdings on a vast array of substantive areas of law remain to be seen. Moving into the arena of human rights litigation, these developments have begun to impact the arguments of litigants and decisions of courts on plausibly pleading claims for human rights violations. The next Part reviews this impact by discussing the role of the plausibility standard in ATS cases across federal jurisdictions.

II. PLAUSIBILITY PLEADING IN THE ATS CONTEXT:NEW STANDARD OR NEW TERMINOLOGY?

Many scholars have emphasized the radical or revolutionary nature of the *Twombly* and *Iqbal* decisions in the previously settled area of pleading practices.[136] The publication of articles about how to plausibly plead certain legal doctrines or claims is further indication that scholars believe the introduction of a pleading standard based on plausibility has changed the previous requirements necessary to make a case.[137] Empiricists also are publishing evaluations of the meaning and effect of plausibility pleading on various areas of the law.[138] This Part considers the impact of *Twombly* and *Iqbal* on federal courts' analyses of motions to dismiss ATS claims. A review of these human rights cases to which district and circuit courts have applied a plausibility analysis reveals the beginnings of trends

135. *Id.* at 1952. The Supreme Court remanded to the Second Circuit, *id.* at 1954, which then remanded to the district court to determine whether respondent can "seek leave to amend his deficient complaint." Iqbal v. Ashcroft, 574 F.3d 820, 821 (2d Cir. 2009).

136. *See, e.g.*, Clermont & Yeazell, *supra* note 18, at 823 ("The Court has revolutionized the law of pleading . . . . [T]hey have destabilized the entire system of civil litigation.").

137. *See, e.g.*, Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627 (2009); Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613 (2011).

138. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556–57 (2010) (finding statistically significant increases in dismissals on Rule 12(b)(6) motions following *Twombly* and *Iqbal*, especially in constitutional civil rights cases). For an early, nonempirical but comprehensive survey of pleadings in civil rights claims following *Twombly*, see generally Spencer, *supra* note 20.

in application.[139] One generally applicable trend is clear. In most courts' boilerplate exposition of the legal standard on a motion to dismiss, quotations from *Twombly* and *Iqbal* have replaced most references to *Conley*.[140] Whether the new incantations in ATS suits represent a paradigm shift in pleadings[141] or simply new terminology for a gradual trend[142] is the focus of this analysis.

This Part proceeds in three sections. The first focuses on the role of plausibility pleading in the courts of the Second Circuit, the circuit that first dealt with both *Twombly*[143] and *Iqbal*.[144] The second section focuses on the Eleventh Circuit's method and those courts that have followed it. The comparison of these two methods will show that plausibility pleading is neither consistently applied nor as detrimental to human rights litigation as it could be, except in a few initial cases from the Eleventh Circuit. The third section discusses various types of factual allegations and their relationship to the standard required by *Twombly-Iqbal*. This Part shows that the *Twombly-Iqbal* standard should apply only to Rule 12(b)(6) motions to dismiss for failure to state a claim, and not to Rule 12(b)(1) motions to dismiss for lack of subject-matter jurisdiction. Courts

139. To show the scope of this analysis, a Westlaw search of ALLFEDS for ["alien tort" & iqbal OR twombly] on April 26, 2011 yielded eighty results, not all of which actually applied the pleading standards to human rights claims. Note that these numbers are merely contextual and not empirical analysis.

140. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010) (citing to the language of *Twombly* and *Iqbal* in setting forth the standard of review for motion to dismiss decisions); *id.* at 191 (Leval, J., concurring) (echoing, again, the *Twombly* and *Iqbal* standards). Before *Twombly*'s 2007 decision, 65 cases out of 382 ATS cases cited *Conley*. The number of ATS cases citing *Conley* drops to only 8 out of 225 after 2007. *Compare* Westlaw searches of ALLFEDS for ["conley v. gibson" & "alien tort" & da(bef 2007)] and ["alien tort" & da(bef 2007)] on April 26, 2011 (finding that 65 out of 382 ATS cases cited *Conley*), *with* Westlaw searches of ALLFEDS for ["conley v. gibson" & "alien tort" & da(aft 2007)] and ["alien tort" & da(aft 2007)] on April 26, 2011 (finding 8 out of 225 ATS cases cited *Conley*).

141. *See* JOSHUA CIVIN & DEBO P. ADEGBILE, RESTORING ACCESS TO JUSTICE: THE IMPACT OF *IQBAL* AND *TWOMBLY* ON THE FEDERAL CIVIL RIGHTS LITIGATION 2 (2010), *available at* http://www.acslaw.org/files/Civin%20and%20Adegbile%20issue%20brief%20final%20(9-14-10).pdf (urging legislative action to reverse the "detrimental impact" of the pleadings decisions).

142. *See generally* Fairman, *supra* note 91 (describing the gradual progression of heightened pleading over the years).

143. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003).

144. Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 7, 2005), *aff'd in part, rev'd in part sub nom.* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

must properly characterize motions to dismiss as challenging either subject-matter jurisdiction or the factual sufficiency of the claim so that they may apply *Sosa* to the former and *Twombly-Iqbal* to the latter.

A. PLAUSIBILITY IN THE SECOND CIRCUIT

The Second Circuit first breathed new life into the modern ATS with the 1980 *Filártiga* decision, and it continues to face many important issues regarding the ATS's scope.[145] Applying *Sosa* to novel factual scenarios, the Second Circuit and some district courts in the circuit recently have upheld claims recognizing modern human rights violations as adequate under the historical paradigm test.[146] Courts in this circuit have also been grappling with the relevance of the new pleading standard in analyzing disputed substantive issues such as aiding and abetting liability and the state action requirement.[147] This subpart focuses on those Second Circuit cases' interpretation and application of the *Twombly-Iqbal* pleading standard.

In hearing motions to dismiss ATS cases, courts in the Second Circuit now cite *Twombly* or *Iqbal* (or both) for the standard of review for a Rule12(b)(6) motion.[148] Yet a closer look at these decisions reveals that the courts do not always implement *Iqbal*'s two-pronged approach of ignoring all "conclusory" allegations or legal conclusions and testing the remaining factual allegations for sufficient plausibility.[149] For example, in *Kiobel*, Judge Leval's concurrence began its review of the adequacy of the pleading of aiding and abetting liability for a variety of international norms by reciting the plausibility standard.[150] Judge Leval then considered the general and the specific acts alleged in the complaint to constitute aiding and abetting,

145. *See, e.g.*, *Kiobel*, 621 F.3d at 120 (discussing the notion of corporate liability for international crimes).

146. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 177 (2d Cir. 2009) (holding that the prohibition of nonconsensual medical experimentation is a "customary international law norm" sufficient to confer a cause of action under the ATS).

147. *See, e.g.*, Lev v. Arab Bank, PLC, No. 08 CV 3251(NG)(VVP), 2010 WL 623636, at *1 (E.D.N.Y. Jan. 29, 2010) (analyzing a motion to dismiss in the context of a claim of aiding and abetting terrorism by a bank); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 271–72 (E.D.N.Y. 2007) (following the examples of *Sosa* and *Filártiga* in deciding whether to recognize a claim under the ATS for aiding and abetting terrorism by a bank).

148. *See Kiobel*, 621 F.3d at 123–24; *id.* at 191 (Leval, J., concurring).

149. *See supra* notes 131–36 and accompanying text.

150. *Kiobel*, 621 F.3d at 191.

but he never applied the first prong to strike out any of the allegations or to find some worthy of the presumption of truthfulness and others unworthy.[151] He did not move to an application of prong two to consider the legal sufficiency of any remaining allegations that are presumed true. Rather, this concurrence presumed all of the general allegations and specific actions to be true but found they were "legally insufficient" for aiding and abetting liability "because they [did] not support a reasonable inference that Shell provided substantial assistance to the Nigerian government *with a purpose to advance or facilitate* the Nigerian government's violations."[152] That reasoning is an application of the Second Circuit's purpose standard for aiding and abetting liability.[153] The veneer of plausibility language does not make this a strict application of *Iqbal*. The concurrence stated that, by "[p]utting together these two rules [from *Iqbal* and *Talisman*]," the complaint must be dismissed.[154] In this opinion, the application of the *Talisman* purpose rule was most dispositive while the *Iqbal* plausibility rule provided merely the framework. Judge Leval's use of the *Iqbal* standard relied on his judicial "common sense," rather than a rigid application of that precedent's steps.[155] In *Lev v. Arab Bank, PLC*, the district court took the same tack with respect to the pleadings to allow the claim of aiding and abetting terrorist attacks to proceed.[156] The court quoted language from *Iqbal* on the plausibility standard and cited both *Twombly* and *Iqbal*,[157] but it then credited all factual allegations as true and distinguished the case at bar from *Talisman*.[158] Again, the *Iqbal* standard provided merely the terminology with which the court undertook the *Talisman* legal analysis.

Abdullahi v. Pfizer, Inc. represents a similar, but pre-*Iqbal*, analysis on the legal issue of the state action requirement.[159] The Second Circuit cited *Twombly* and its decision in *Iqbal v.*

151. *Id.* at 191–93.

152. *Id.* at 192.

153. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247 (2d Cir. 2009).

154. *Kiobel*, 621 F.3d at 154.

155. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

156. Lev v. Arab Bank, PLC, No. 08 CV 3251(NG)(VVP), 2010 WL 623636, at *3 (E.D.N.Y. Jan. 29, 2010) (stating that *Twombly* and *Iqbal* "do not require the repeated incantation of key words" to survive a motion to dismiss).

157. *Id.* at *1.

158. *Id.* at *2–3.

159. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

Hasty for the plausibility standard of review.[160] In the analysis, however, all allegations were presumed true and the majority found them adequate "[a]t the pleading stage."[161] The dissent took issue with one "conclusory" allegation, but the thrust of the dissent's argument hinged on the legal issue of "consent" in the medical experiments and whether the alleged state actions satisfied the legal meaning of "decisive step" under 42 U.S.C. § 1983 jurisprudence.[162] The debate between majority and dissent focused more on whether the allegations satisfied the legal standard for state action than on whether to presume the allegations were true or to remove them from the legal analysis of the claim's sufficiency.[163] Similarly, a 2008 district court decision quoted the *Twombly* pleading standard but decided the case on the mens rea element for aiding and abetting liability.[164]

Second Circuit cases, and those courts around the country that have followed suit, have retained a liberal view of pleading standards even within the rubric of the *Twombly-Iqbal* plausibility standard.[165] These courts have incorporated the lexicon of *Twombly* and *Iqbal*, and they are conversant in those precedents and their "common sense" function.[166] In spite of those decisions, however, these courts tend to analyze ATS claims and defenses on the more nuanced legal debates in the field[167]—for example, the purpose standard for aiding and abetting liability or the state action requirement for certain international law violations. This may not be surprising since courts in this circuit first dealt with the *Twombly* and *Iqbal* cases and in light of the circuit's decision in *Iqbal v. Hasty*, which more liberally applied *Twombly* than the Supreme Court did on those

160. *Id.* at 172 n.6.

161. *Id.* at 188–89.

162. *Id.* at 210–12 (Wesley, J., dissenting).

163. *Id.* at 188–89 (majority opinion); *id.* at 211 (Wesley, J., dissenting); *see also* Bigio v. Coca-Cola Co., No. 97 Civ. 2858(BSJ), 2010 WL 3377503, at *7–8 (S.D.N.Y. Aug. 23, 2010); Estate of Manook v. Research Triangle Inst., Int'l, Nos. 5:10-CV-72-D, 5:10-CV-73-D, 2010 WL 3199874, at *3–4 (E.D.N.C. Aug. 12, 2010).

164. Mastafa v. Austl. Wheat Bd. Ltd., No. 07 Civ. 7955(GEL), 2008 WL 4378443, at *4 (S.D.N.Y. Sept. 25, 2008).

165. *See, e.g.*, Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 681–82 (S.D. Tex. 2009).

166. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

167. *See, e.g.*, *Adhikari*, 697 F. Supp. 2d at 685–88.

facts.[168] Although the language of a Rule 12(b)(6) motion has changed, the courts remain focused on the broader ATS questions in the circuit.

In addition to the more liberal view of *Twombly-Iqbal*, the Second Circuit's motion analyses have been clear about the difference in type and standard of view between Rule 12(b)(1) motions and Rule 12(b)(6) motions. In cases such as *Kiobel*, the Second Circuit neither conflated jurisdiction and stating a claim, nor applied a more stringent standard of review.[169] The court, like many post-*Iqbal* courts, used boilerplate language from *Twombly* and *Iqbal* rather than *Conley* to provide the new terminology of the standard.[170] Yet their application of plausibility is not a heightening of the requirements at the motion to dismiss stage. The Second Circuit has incorporated the Supreme Court's pleading standard in a limited and focused manner. These courts have applied it appropriately to only Rule 12(b)(6) motions and have discussed it usefully in the context of the broader substantive questions at issue.[171] As the next subpart reveals, the courts of the Eleventh Circuit have not followed this focused approach to plausibility pleading in human rights cases.

B. PLAUSIBILITY IN THE ELEVENTH CIRCUIT

As the preceding section shows, the plausibility standard has yet to make waves in the Second Circuit. A few recent cases in the Eleventh Circuit, however, reveal more noticeable effects of *Twombly* and *Iqbal*. Unlike the Second Circuit, the Eleventh Circuit had some tendency toward a heightening of pleading requirements in the ATS. Whether these initial cases reflect a broader ongoing trend is not clear.[172] Yet, some cases in the circuit have implemented the plausibility decisions in a manner

168. Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev'd sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937.

169. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124–25 (2d Cir. 2010).

170. *See id.* at 123–24; *id.* at 191–93 (Leval, J., concurring).

171. *See* Rosaleen T. O'Gara, Note, *Procedural Dismissals Under the Alien Tort Statute*, 52 ARIZ. L. REV. 797, 820–22 (2010) (arguing that courts should tackle substantive issues directly instead of dismissing ATS cases on procedural grounds).

172. But see *Estate of Amergi ex rel. Amergi v. Palestinian Authority*, 611 F.3d 1350 (11th Cir. 2010), for an Eleventh Circuit decision that properly reviewed a jurisdictional motion to dismiss an ATS claim without reference to *Iqbal*.

that heightens the pleading standard without being explicit about this goal or approach.

The leading Eleventh Circuit decision applying a plausibility standard of review to ATS claims is *Sinaltrainal v. Coca-Cola Co.*[173] The court described its standard of review in the terms of *Twombly* and *Iqbal*,[174] and it stated that a Rule 12(b)(1) facial challenge to jurisdiction has the same safeguards and standard as a Rule 12(b)(6) challenge to the sufficiency of the claim.[175] The court, then, moved to the two-pronged analysis of *Iqbal* and rejected those allegations in the complaint it found "conclusory" or implausible.[176] With constant reference to plausibility, the court rejected plaintiffs' allegations of state action, of conspiracy, of torture, and of war crimes.[177] With little left in the complaint to construe favorably to the plaintiffs,[178] the court dismissed the ATS and TVPA claims.[179] In so doing, the court made precise, if inaccurate, decisions regarding jurisdiction and stating a claim for relief. The court applied the same Rule 12(b)(6) plausibility analysis to both ATS and TVPA claims.[180] Yet, it characterized the ATS dismissal as one for lack of subject-matter jurisdiction and the TVPA dismissal as a failure to state a plausible claim for relief.[181]

To understand this development in the Eleventh Circuit, the broader context of ATS motion practice in its courts is instructive. In the district court's pre-*Twombly* decision in *Sinaltrainal*, the court faced "difficult" questions of law and fact.[182] In determining ATS jurisdiction and whether the complaint stated a claim, the court conflated the jurisdiction and suffi-

173. 578 F.3d 1252, 1260–61, 1268 (11th Cir. 2009).

174. *Id.* at 1260–61, 1265 n.14 (avoiding explicitly the issue of a "heightened pleading standard").

175. *Id.* at 1260.

176. *Id.* at 1266–68. *But cf.* Michael Eaton, Note, *The Key to the Courthouse Door: The Effect of* Ashcroft v. Iqbal *and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 321–23 (2011) (arguing that the Eleventh Circuit did not adequately apply the first prong of the *Iqbal* analysis and simply jumped to the second prong).

177. *Sinaltrainal*, 578 F.3d at 1266–68.

178. *See id.* at 1260.

179. *Id.* at 1269–70.

180. *Compare id.* at 1266–69 (ATS claims), *with id.* at 1269–70 (TVPA claims).

181. *Id.* at 1270.

182. *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1275 (S.D. Fla. 2006), *aff'd in part, vacated in part sub nom.* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252.

ciency of the claim.[183] It then proceeded to apply an explicitly "heightened pleading standard" to the issue of subject-matter jurisdiction.[184] The court applied a heightened Rule 12(b)(6) standard to a jurisdictional issue in the ATS and TVPA—erring as to both the type of motion and the standard of review.

In spite of the Supreme Court disfavoring heightened pleading standards,[185] the Eleventh circuit, like a number of courts, has used a heightened standard in some contexts.[186] The *Sinaltrainal* district court examined and relied on the Eleventh Circuit's decision in *Aldana v. Del Monte Produce, Inc.* to disregard "conclusory" allegations.[187] Notably, the *Aldana* decision, which validated this rejection of conclusory allegations, does not consider its approach to pleading to be heightened.[188] While the district court in *Aldana*,[189] just like the district court in *Sinaltrainal*,[190] had taken a heightened approach to pleading requirements, the Eleventh Circuit refused to consider this approach heightened in either case.[191] The Eleventh Circuit applied *Iqbal* in its move toward stricter pleading standards in this particular ATS case.[192]

These developments contrast with ATS cases in the Second Circuit, where plausibility pleading has had relatively minimal impact on the disposition of motions to dismiss.[193] The Eleventh Circuit has relied heavily on *Twombly* and *Iqbal* to analyze motions to dismiss ATS cases.[194] Commentators lamenting the

183. *Id.* at 1284 ("Arguably, the distinction between the 12(b)(1) and 12(b)(6) standards may be somewhat blurred in the context of an ATCA case.").

184. *Id.* at 1286–87 ("[I]t is appropriate to require some heightened pleading standard when determining whether the complaints in the instant cases sufficiently plead facts showing that Defendants violated the law of nations.").

185. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007).

186. *See* Fairman, *supra* note 91, at 1059.

187. *In re Sinaltrainal*, 474 F. Supp. 2d at 1284 (citing Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1253 (11th Cir. 2005)).

188. *See Aldana*, 416 F.3d at 1253.

189. Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003), *aff'd in part, vacated in part sub nom.* Aldana v. Del. Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005).

190. *In re Sinaltrainal*, 474 F. Supp. 2d at 1287.

191. *See* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1265 n.14 (11th Cir. 2009); *Aldana*, 416 F.3d at 1253 (stating that "some minimal pleading standard does still exist").

192. A number of courts have followed this model. *See, e.g.*, *In re* XE Servs. Alien Tort Litig., 665 F. Supp. 2d 569, 589 (E.D. Va. 2009).

193. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 191–93 (2d Cir. 2010).

194. *See, e.g.*, *Sinaltrainal*, 578 F.3d at 1260–61.

harsh effects on plaintiffs of plausibility pleadings[195] need not look further than the Eleventh Circuit's ATS decisions. However, a review of the substantive law that the Eleventh Circuit has applied in the ATS context may explain this divergence from the Second Circuit.

On a number of ATS issues,[196] the Eleventh Circuit standards are more favorable to plaintiffs than those of the Second Circuit. Apparently, the strictness of pleading requirements is inversely related to the strictness of substantive legal requirements for bringing an ATS case. That is, the use of strict pleading requirements ratchets up the difficulty in bringing an ATS case where the substantive legal requirements are more permissive (Eleventh Circuit), whereas a more stringent legal standard on the substantive issues obviates the necessity of heightened pleading requirements (Second Circuit). Further, this reliance on procedural mechanisms to dismiss hard cases gives an unwarranted reason to sidestep the pressing substantive issues in ATS litigation today.[197] In addition to ignoring *Sosa*'s delegation of discretion to the lower federal courts, this Eleventh Circuit method highlights many courts' misunderstandings about ATS jurisdiction and stating an ATS claim.

As exemplified by the Eleventh Circuit's decision in *Sinaltrainal*,[198] many courts make two fundamental errors when considering plausibility pleading in human rights cases. The first is to conflate the question of jurisdiction under Rule 12(b)(1) with that of the sufficiency of a claim under Rule 12(b)(6).[199] The second follows from the first: courts apply the standard of review of the latter in analyzing the former.[200] The courts of the Eleventh Circuit directly reviewed the tough question of ATS jurisdiction,[201] unlike the many courts which have glossed over the issue.[202] However, the conclusion by the circuit

195. *See, e.g.*, CIVIN & ADEGBILE, *supra* note 141, at 1.

196. *See, e.g.*, *Sinaltrainal*, 578 F.3d at 1263 (allowing corporate liability); Cabello v. Fernández-Larios, 402 F.3d 1148, 1158 (11th Cir. 2005) (requiring a mens rea of knowledge, not purpose, for aiding and abetting liability).

197. O'Gara, *supra* note 171, at 820.

198. *Sinaltrainal*, 578 F.3d at 1268–69.

199. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 (2d Cir. 2009).

200. *See, e.g.*, *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1301 (S.D. Fla. 2006), *aff'd in part, vacated in part sub nom.* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252.

201. *See, e.g.*, *Sinaltrainal*, 578 F.3d at 1266; *In re Sinaltrainal*, 474 F. Supp. 2d at 1275.

202. *See, e.g.*, Chowdhury v. WorldTel Bangl. Holding, Ltd., 588 F. Supp. 2d 375, 378–80 (E.D.N.Y. 2008).

court that "fail[ing] to state a plausible claim for relief" supports dismissal "for lack of subject-matter jurisdiction"[203] misses the point of *Sosa*. As the *Bridgestone* opinion made clear, conflating these two analytically distinct issues is not a sound method to determine the viability of an ATS claim.[204] The power to speak the law of a particular issue is not the same as whether a particular set of facts implicates the need for a remedy under specified legal rights. The former necessarily precedes the latter, and a federal court cannot consider the latter if the former is lacking.[205] Further, the Eleventh Circuit's factual-facial distinction does not compel its result. Although the procedural assurances of a facial challenge to jurisdiction bear some similarities to Rule 12(b)(6) motions, that fact alone does not open the door to a review of the merits of a claim at the jurisdictional stage.[206]

Contrary to the view of the *Sinaltrainal* court, *Sosa* did not conflate jurisdiction and merits in devising the historical paradigm test.[207] To determine ATS jurisdiction, it did not require a plausible claim under the law of nations; it demanded that the expression of the law of nations on a violation be "specific, universal, and obligatory."[208] This legal question precedes the determination that a fact scenario plausibly implicates that international norm. Thus, to the extent that *Iqbal*'s plausibility analysis applies in ATS suits, it does not apply to jurisdictional motions to dismiss an ATS—or any other—suit.[209]

203. *Sinaltrainal*, 578 F.3d at 1269.

204. *See* Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1004–06 (S.D. Ind. 2007).

205. *See* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998).

206. *See id*.; Bell v. Hood, 327 U.S. 678, 682 (1945).

207. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

208. *Id.* (quoting *In re* Estate of Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)).

209. One district court went so far as to cite, then disregard, *Iqbal* in the ATS context, stating that "[n]othing in *Iqbal* suggests that the pleading standard it articulates applies to ATCA claims." Sarei v. Rio Tinto PLC, 650 F. Supp. 2d 1004, 1021 n.44 (C.D. Cal. 2009). An initial reaction to the court's discussion is that it missed *Iqbal*'s point on its transsubstantive application. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (quoting FED. R. CIV. P. 1, but then stating that *Twombly* "applies to antitrust and discrimination suits alike"); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 506 (2009) ("[T]he plausibility standard is a transsubstantive pleading standard applicable to all claims brought in federal court."). On closer examination, however, the court's result (although it gives no reasoning) is supportable because *Iqbal* is not "transprocedural"—

C. THE APPLICABILITY OF *TWOMBLY-IQBAL* IN ATS CASES

The diversity of application of plausibility pleading, especially in the Eleventh and Second Circuits, indicates the need for reflection on the meaning of this pleading standard in human rights litigation. After establishing ATS jurisdiction under *Sosa*'s historical paradigms test, a claim must have the facial plausibility that *Twombly-Iqbal* requires to withstand a Rule 12(b)(6) challenge. To flesh out the narrow scope of the plausibility standard, this section discusses the nature of factual allegations that are permissible under *Twombly-Iqbal*.

A court must accept as true "all well-pleaded, nonconclusory factual allegations in the complaint."[210] Accepting these facts, judges must rely on their "experience and common sense" to decide whether the complaint is plausible.[211] Under *Twombly-Iqbal*, courts must determine what facts are sufficiently nonconclusory and whether those facts present a plausible claim for relief.[212] One type of fact entitled to the presumption of truthfulness is one alleged upon information and belief.[213] The *Sinaltrainal* court reacted with some hostility to certain allegations that the plaintiffs had made "on information and belief."[214] Finding that they did not allow for a "reasonable inference" of liability, the Eleventh Circuit struck out those allegations.[215] The Second Circuit recently has clarified that the simple fact that an allegation is based on the plaintiff's information and belief does not make it suspect.[216] Rather, facts alleged on information and belief may be credited when either "the facts are peculiarly within the possession and control of

that is, its Rule 12(b)(6) analysis does not apply to a Rule 12(b)(1) motion. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 567 (2010) (stating that the Supreme Court has not extended the *Twombly-Iqbal* standard from Rule 8(a)(2) to Rule 8(a)(1), but arguing in favor of such a move); *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3 (2007) (relying on the term "showing" in Rule 8(a)(2), which is not present in Rule 8(a)(1), for its holding).

210. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010).

211. *Iqbal*, 129 S. Ct. at 1950.

212. *Id.*

213. *See* Opening Brief of Appellant at 24–26, Shan v. China Constr. Bank Corp., No. 10-2992 (2d Cir. Nov. 8, 2010), 2010 WL 4715538 (raising this argument and citing Second Circuit case law).

214. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1949).

215. *Id.*

216. *See* Arista Records, L.L.C. v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010).

the defendant"[217] or "the belief is based on factual information that makes the inference of culpability plausible."[218] Further, even conclusory statements may survive *Iqbal*'s first prong when they are based on sufficient, even circumstantial, evidence.[219] In sum, the plausibility standard allows crediting allegations even when based on information in a defendants' control, on belief when it is based on facts, and on circumstantial evidence—as long as the court may reasonably infer liability may be substantiated through discovery or at later stages of litigation.

Another type of factual allegation in ATS cases—those of conspiracy—tends to get particularized treatment under the plausibility standard.[220] In cases alleging some form of conspiracy to commit human rights violations, courts often apply the analysis of *Twombly* by analogizing (or distinguishing) the facts in a given case.[221] Plausible conspiracy, without any consideration of *Iqbal*'s analysis, requires that the allegations demonstrate more than parallel conduct and allow for the plausible inference that an agreement exists.[222] The District of Maryland, in *Al-Quraishi v. Nakhla*, found that the allegations of a conspiracy to commit acts of torture were sufficient because the facts allowed an inference of more than simple parallel conduct and the absence of an agreement was the more implausible deduction.[223] The court viewed the facts most favorable to the plaintiff and allowed conspiracy to be proven by circumstantial evidence.[224] To respond to defendants' argument that the conspiracy allegations were "conclusory," the court refused to

217. *Id.* (citing Boykin v. KeyCorp, 521 F.3d 202, 215 (2d Cir. 2008)).

218. *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

219. *See* Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702, 767–68 (D. Md. 2010) (conspiracy claims).

220. *See id.*; *see also* Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 703 (E.D. Va. 2009).

221. *See Al Shimari*, 657 F. Supp. 2d at 729–31. *But see* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1268 (11th Cir. 2009) (applying the *Iqbal* analysis to all claims, including conspiracy claims).

222. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 550–51, 564 (2007); *cf.* Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of* Bell Atlantic v. Twombly*?*, 76 FORDHAM L. REV. 2177, 2207–08 (2008) (discussing the similarities of antitrust and ATS accomplice liability suits, and arguing for the application of *Twombly* in both cases).

223. *Al-Quraishi*, 728 F. Supp. 2d at 766–67.

224. *Id.* at 765. Interestingly, the court determined that the facts were sufficient for both conspiracy and aiding and abetting liability. *Id.* at 766.

strike the conclusory statements because they were "'supported by factual allegations.'"[225] That is, conclusory statements provide a useful framework that specific allegations can flesh out. This special application of *Twombly* to conspiracy cases shows that courts may find the plausibility standard has greater relevance to particular cases rather than "'all civil actions.'"[226]

Thus employed, the plausibility standard may serve the purpose of pleadings in our adversarial system. The standard ensures that, at the pleadings stage, courts can differentiate unmeritorious suits based on insufficient factual allegations and legitimate claims that arise from actual defendant culpability. The Second Circuit's application of the *Twombly-Iqbal* standard, in contrast to that seen in the Eleventh Circuit's initial cases, does that in a way that is true both to *Sosa* and to *Twombly* and *Iqbal*. Judge Leval's "common sense" balance between the *Iqbal* methodology and the substantive ATS issues provides just such a model.[227] When approaching the plausibility standard in human rights litigation, courts must apply the *Twombly-Iqbal* standard only to Rule 12(b)(6) motions and they must do so in a limited and focused way to balance the needs of plaintiffs and defendants in the early stages of civil litigation. This legal analysis is supported by the policy analysis the Supreme Court has undertaken in the pleadings and ATS realms, which is the focus of the next Part.

III. THE ROLE OF PLAUSIBILITY IN MOTIONS TO DISMISS HUMAN RIGHTS CLAIMS

This Part concludes that plausibility pleading has only a circumscribed role in human rights litigation under the ATS. Courts need not apply a heightened plausibility standard to issues of ATS jurisdiction as the Eleventh Circuit and other courts have done.[228] Not only does the foregoing analysis lead to this conclusion, but the substantial overlap of policy concerns in *Twombly-Iqbal* and *Sosa* decisions supports such an implementation of the standard. The practical effects and policy jus-

225. *Id.* at 767 (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)).

226. *Iqbal*, 129 S. Ct. at 1953 (quoting FED. R. CIV. P. 1).

227. *Id.* at 1950.

228. Some courts have done the reverse. *See e.g.*, *In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1275–76 (S.D. Fla. 2006) (justifying the application of the *Iqbal* standard because of the *Sosa* policy of "judicial caution"), *aff'd in part, vacated in part sub nom.* Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009).

tifications of *Sosa* are similar to those in *Twombly-Iqbal*. Thus, courts can rest assured that, by analyzing jurisdictional challenges under *Sosa* and merits challenges under *Twombly-Iqbal*, they adequately are balancing the needs of defendants and plaintiffs. To explicate this conclusion, this Part examines and compares the policy behind these recent decisions.

The major policy concern behind *Twombly* was the proper role of discovery.[229] While arguably the federal rules policy worked "not to keep litigants out of court but rather to keep them in,"[230] the Supreme Court justified its interpretation of Rule 8(a)(2) in *Twombly* because expensive and time-consuming litigation should be weeded out at the earliest possible phase.[231] The Court determined that discovery in an antitrust case can be unwieldy and too costly for defendants[232] and that it was inefficient and unfair to defendants to allow a suit to move to the discovery stage on the basis of flimsy pleadings.[233] The concern with unwieldy discovery is likewise present in ATS litigation, which may focus on events, people, and evidence spread across continents. The *Sosa* Court, while not addressing this concern directly, responds to it by setting a "high bar to new private causes of action."[234] *Sosa*'s standard is sufficiently strenuous to weed out unmeritorious claims without also eliminating legitimate claims that will gain strength through discovery.[235]

The *Iqbal* Court similarly was concerned with "unlock[ing] the doors of discovery."[236] In *Iqbal*, the Court's emphasis on discovery arose out of the specific arguments in the case.[237] Because of the defendants' claims to qualified immunity, the costs

229. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–60 (2007); *see also Iqbal*, 129 S. Ct. at 1953–54.

230. *Twombly*, 550 U.S. at 575 (Stevens, J. dissenting).

231. *Id.* at 558–59 (majority opinion).

232. *Id.* at 558–64.

233. *Id.* at 558; *see also* Spencer, *supra* note 123, at 21–25 (arguing that, in balancing efficiency and justice in pleading standards, the Supreme Court tipped the scales toward the side of efficiency).

234. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

235. Consider the court's disposition of a motion to dismiss in *In re XE Services Alien Tort Litigation*, 665 F. Supp. 2d 569 (E.D. Va. 2009): the court, in its dismissal order of a number of claims, simultaneously granted leave to amend. *Id.* at 603. Such an action indicates that the court did not judge the claims, which were filed before *Iqbal*, to be unmeritorious even though they failed the plausibility test.

236. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

237. *See id.* at 1945–46.

of discovery went beyond monetary burdens.[238] In addition to the discovery costs in time and money upon government officials, the defendants complained that the ex ante impediment of a threat of lawsuits might limit officials' ability to complete their duties.[239] The possibility that discovery might lead to revealing sensitive executive branch information, especially regarding the U.S. government's national security efforts in response to the events of September 11, 2001, increased this concern.[240] The Court announced its more stringent pleading standard in light of discovery concerns in antitrust litigation.[241] Yet the Court did not explicitly apply that heightened plausibility standard to "'all civil actions'" until faced with a case concerning the more sensitive area of national security, the separation of powers between courts and the political branches, and judicial review of high-ranking executive branch officials' actions.[242]

The *Iqbal* Court's policy concerns in a strict pleading standard overlapped greatly with the *Sosa* Court's policy concerns in limiting actionable causes in ATS litigation. In "argu[ing] for great caution in adapting the law of nations to private rights," Justice Souter's majority opinion presented five major concerns.[243] These policy concerns focused on the role of federal common law post-*Erie*, the role of the legislature in the process of creating private rights of action, and, especially, the impact that ATS suits on foreign relations and executive power in that arena.[244] The Court affirmed the position of the ATS in providing jurisdiction for certain causes of action in international law, but only after carefully weighing the sensitive concerns arising out of U.S. foreign relations, the separation of powers between the courts and the political branches, and the role of executive power operating in that area.[245] The policies and the effects of *Iqbal*'s new heightened pleading standard, thus, are substantially the same as those enunciated in the ATS context by *Sosa*.

The Court's standard for ATS jurisdiction in *Sosa* sufficiently upped the ante in ATS suits to weed out meritless

238. *See id.* at 1953–54.
239. *Id.*
240. *Id.* at 1953.
241. *Id.*
242. *Id.* (quoting FED. R. CIV. P. 1).
243. Sosa v. Alvarez-Machain, 542 U.S. 692, 725–28 (2004).
244. *Id.*
245. *See id.* at 728–31.

claims. While not requiring fact pleading, the standard's requirements presented a high bar for defining a cause of action at the jurisdictional stage. The Court justified this standard for ATS claims because of concerns with the federal judiciary's role with respect to foreign relations and the expenses of international human rights litigation.[246] These policy justifications are closely tracked by the Court's reasoning in *Twombly* and *Iqbal*.[247] The *Iqbal* Court justified this new standard because of the serious policy implications of discovery regarding national security issues and the work of executive branch officials in responding to crises.[248] Thus, these two sets of precedents, when properly applied in their respective procedural arenas, can protect defendants from costly and meritless litigation while allowing plaintiffs the free and easy access to courts that our justice system promises.

CONCLUSION

When *Twombly* came down in 2007, commentators and litigants alike questioned the meaning and scope of this decision. The Supreme Court largely answered those questions in *Iqbal* two years later. Now as the legal profession and the legal academy try to respond to the new decisions on plausibility standards, this Note has attempted a fill the gap in the literature concerning the effects of the new standard on human rights litigation under the ATS. This analysis of pleading standards in motions to dismiss reveals that courts are not only unclear about what *Twombly-Iqbal* means for ATS cases, but that courts still struggle with the appropriate application of *Sosa* to pleading ATS cases. Thus, this Note clarifies the historical paradigm test of ATS subject-matter jurisdiction under *Sosa* and highlights the proper approach to plausibility pleading following *Twombly-Iqbal*. Properly understanding the legal distinction between those two concepts as well as the policy considerations animating these two lines of cases indicates that plausibility does not and need not have a huge impact in ATS litigation. Instead of fulfilling the prophecy that plausibility will irreparably damage litigants' access to justice, courts should apply a narrowly tailored version of the plausibility pleading standard in Rule 12(b)(6) motions to dismiss ATS

246. *Id.* at 725–28.

247. *Iqbal*, 129 S. Ct. at 1946, 1953–54; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007).

248. *Iqbal*, 129 S. Ct. at 1953–54.

claims to balance the needs of plaintiffs and defendants in holding human rights violators accountable.