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*MNC Liability for International Human Rights Violations under the Alien Tort Claims Act:
A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting
Liability under the Act.*

by

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Part I. Introduction.

Over the past quarter century the Alien Tort Claims Act (ATCA) has emerged from the backwater of federal jurisprudence to become the pre-eminent weapon foreign nationals wield in asserting human rights claims.¹ Not surprisingly, many such plaintiffs have targeted multinational corporations (MNCs).² The reasons for this address both the substantive issues of human rights claims and matters of procedural practicality. As to the former, they include the following: MNCs have the deep pockets to compensate alleged injuries; their name brands provide the publicity necessary to attract international attention;³ and their overseas operations are generally the locus and the *raison d'être* for the alleged wrongs.

¹ Alien Tort Claims Act, 28 USC § 1350. Originally adopted as part of the Judiciary Act of 1789, the act now provides: “[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.” The ATCA went largely unused for about 190 years until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), when the Second Circuit held that the ATCA supported a private cause of action for official acts of torture. *Filartiga* effectively threw open the doors to the federal courts for foreign human rights litigants.

² See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, n.1 (1999) (defining MNC as a “private commercial enterprise that owns or controls production or service facilities outside the country in which it is based,” and encompasses commercial activity conducted by a foreign subsidiary, foreign branch and joint ventures). See also PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12-14 (1995); D. Kokkini-Iatridou & P.J.I.M. de Waart, *Foreign Investments in Developing Countries – Legal Personality of Multinationals in International Law*, 14 NETH. Y.B. INT’L L. 87 (1983), *cited in id.*

³ See Malin Käll, *Oil-Exploration in Nigeria: Procedures Addressing Human Rights Abuses*, in 1 EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW 193, 217 (Ineta Ziemele ed., 2005) (“Victims from the region [in Nigeria] and engaged NGOs were not satisfied with seeking redress in national courts, but also tried to gain international attention. Suits were filed in U.S. courts, communications were sent to the African Commission on Human and Peoples’ Rights, and contacts established with the international community. . . . The plaintiffs [in *Wiwa v. Royal Dutch Petroleum Co.*] alleged that corporate defendants’ conduct had violated international and common law and that the violations were actionable under the Alien Tort Claims Act.”); Earthrights International, Press Release: Historic Advance for International Human Rights: Unocal to Compensate Burmese Villagers, http://www.earthrights.org/news/press_unocal_settle.shtml (last visited October 17, 2005) (“John Doe IX, a plaintiff who had done back-breaking forced labor in the mid 1990’s, said, ‘I don’t

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The procedural reasons, while perhaps not as obvious, are equally compelling. First, many victims of violence done by their own government are unlikely or incapable of seeking justice in their home countries. Second, there is often a “jurisdictional lacuna”, a gap, in international law where the law of the MNC’s home country cannot reach and the law of the host country does not wish to disturb.⁴ The “MNC has transcended national legal systems and ignored the feeble international system to make the imposition of human rights norms nearly impossible.”⁵ The ATCA succeeds in filling this gap by providing both federal jurisdiction and a cause of action for violations of international customary law. As far as providing a forum for validating human rights claims against private actors,⁶ the ATCA is the only game in town. Third, certain defenses available to ATCA defendants (e.g., personal jurisdiction, forum non conveniens, the act of state doctrine,⁷ the doctrine of international comity,⁸ the political question

care about the money. Most of all I wanted the world to know what Unocal did. Now you know.”).

⁴ Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT’L L. & FOREIGN AFF. 81, 86 (1999).

⁵ Daniel Aguirre, *Multinational Corporations and the Realisation of Economic, Social and Cultural Rights*, 35 CAL. W. INT’L L.J. 53, 57 (2004). See also Deltev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1969).

⁶ As will be explained below in the *Kadic* case, the ATCA bucks the general rule that international law only applies to state actors.

⁷ See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964) (“The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory.”); *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (finding that application of the doctrine requires a balancing of interests and that it should not be invoked if the policies underlying the doctrine do not justify its application); *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 451 (2d Cir. 2000) (applying the court’s own gloss on the doctrine in finding error in the district court’s invocation of the doctrine to abstain from hearing a claim brought under the ATCA); see also *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 694 (1976) (allocating the burden of proof to defendants to justify application of the doctrine). But see *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995) (“[I]t would be a rare case in which the act of

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doctrine,⁹ foreign sovereign immunity,¹⁰ and head-of-state immunity¹¹) often result in the foreign government party being dismissed from the case leaving the MNC as the only available defendant.¹² Consequently, liability flows past the foreign government and the MNC is left holding the proverbial bag.

state doctrine precluded suit under section 1350.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (doubting whether the actions of a state official in violation of its country’s constitution and laws, and unratified by its government, could be characterized as an act of state, in an ATCA suit alleging torture); The Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (“[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim . . . is asserted . . . based upon . . . a confiscation or other taking after January 1, 1959 . . . [unless] the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States . . .”). See generally Elliott E. Cheatham & Harold G. Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 88 (1968) (relating the act of state doctrine to the principle of sovereign immunity).

⁸ See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2782 (2004) (Breyer, J., concurring).

⁹ See *Baker v. Carr*, 369 U.S. 186 (1962); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004) (recognizing the serious weight federal courts should give to the Executive Branch’s view of the case’s impact on foreign policy); *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (applying the Baker factors to hold that action brought under the ATCA and TVPA was not precluded by the political question doctrine). *But see Mujica v. Occidental*, 381 F. Supp. 2d 1164, 1191-96 (C.D. Cal. 2005) (barring action on grounds of the political question doctrine); *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (barring action on grounds of political question doctrine). See generally Beth Stephens, *Upsetting Checks and Balances: The Bush Administrations Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

¹⁰ See Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602 et seq. (2005); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that any grant of jurisdiction under the ATCA for actions against foreign sovereign nations was superseded or preempted by the limiting provisions of the FSIA); H.R. REP. NO. 102-367(I), at 5 (2005) (stating that the TVPA is subject to the restrictions of the FSIA).

¹¹ See, e.g., *Lafontant v. Aristide*, 844 F.Supp. 128 (E.D.N.Y. 1994); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (passage of FSIA leaves scope of head-of-state immunity uncertain).

¹² See, e.g., *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in pt., rev’d in pt.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (holding that the military government of Burma and its state-owned company, which was engaged in a joint-venture with the MNC defendants for the construction of a gas pipeline, were entitled to sovereign immunity pursuant to the FSIA because the claims of civil rights abuses did not fall within the commercial activity exception and dismissing them as defendants because they were not necessary and indispensable parties within the meaning of Rule 19 of the Federal Rules of Civil Procedure).

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That is not to suggest that MNCs are ignorant of the social and political context in which their foreign companies operate, especially in the extraction and agricultural industries. Yet, MNCs' foreign operations are often encouraged if not explicitly approved by the United States' legislative and executive branches. This puts an interesting counter-majoritarian twist on the way federal courts have sought to assign civil liability to MNCs through the ATCA.

This paper seeks to elucidate the fundamental sources of ATCA jurisprudence that have modernized the act into the weapon it has become for foreign human rights plaintiffs. It also attempts to describe some of the forms of liability asserted against MNCs, paying special attention to the competing forms of aiding & abetting liability as conceptualized in the *Unocal* case. For a broader history and description of ATCA case law, there exists a wealth of books and articles on the subject.¹³ Part II of this paper will provide a brief and concise review of the three cases every ATCA corporate defendant should know: *Filartiga*, *Kadic* and *Sosa*.¹⁴ These cases lay the groundwork for human rights litigation against MNCs under the ATCA's modern epoch. Part III will address the state-action requirement, for both the ATCA and the Torture Victim Protection Act of 1991 (TVPA).¹⁵ It is the initial hurdle for every litigant and there are various methods for either overcoming it or simply avoiding it entirely depending on which tort-

¹³ See generally LINDA A. WILLET, MICHELE S. SUGGS & M. ALEXIS PENNOTTI, *THE ALIEN TORT STATUTE AND ITS IMPLICATIONS FOR MULTINATIONAL CORPORATIONS* (2003); GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003); Russell G. Donaldson, Annotation, *Construction and Application of Alien Tort Statute (28 U.S.C.A. § 1350), Providing for Federal Jurisdiction Over Alien's Action for Tort Committed in Violation of Law of Nations or Treaty of the United States*, 116 A.L.R. FED. 387 (2005); James L. Buchwalter, Annotation, *Construction and Application of Torture Victim Protection Act of 1991, 28 U.S.C.A. § 1350 Note*, 199 A.L.R. FED. 389 (2005); Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, 21 CAUSES OF ACTION 2D 327 (2005).

¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

¹⁵ 28 U.S.C. §1350 note § 2(a) (2005).

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claim is asserted. Finally, Part IV will address the methods by which MNCs are held liable as aiders and abettors of foreign government tortfeasors.

Part II. Laying the Groundwork.

Filartiga, *Kadic* and *Sosa* provide the background necessary to appreciate where MNCs stand in the modern epoch of the ATCA. Each case marked a significant development in the jurisprudence of MNC liability under the ATCA. *Filartiga* held that an act of official torture constituted a violation of the law of nations and that individuals committing such acts abroad under State authority could be held liable in the United States under the ATCA.¹⁶ *Kadic* held, perhaps more remarkably, that private actors may be held liable under the ATCA for violating the law of nations even when not acting under the auspices of a State. Finally, *Sosa*, for the most part maintained the status quo for ATCA jurisprudence, but sent a stern admonition to the lower courts not to get too relaxed in their determinations of what constitutes a violation of the law of nations.

A. *Filartiga v. Peña-Irala*

Filartiga has been heralded as the case that kicked open the doors of the federal courthouse for international human rights claims.¹⁷ Prior to *Filartiga*, the ATCA was a “legal Lohengrin,”¹⁸ unfamiliar and rarely invoked.¹⁹ Yet since, the Act has attained the peak of

¹⁶ See generally Beth Stevens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1 (2002).

¹⁷ *Filartiga*, 630 F.2d at 887 (“[W]e believe it is sufficient here to construe the [ATCA], not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.”).

¹⁸ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“no one seems to know whence it came”).

¹⁹ See *Filartiga*, 630 F.2d at 887; *Id.* at 888 n.21 (citing *Adra v. Clift*, 195 F.Supp. 857 (D. Md. 1961) (finding ATCA jurisdiction over child custody suit between aliens where falsified passport supplied the international law violation); *Bolchos v. Darrell*, 3 Fed. Cas. 810 (D.S.C. 1795)

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notoriety, equally reviled as it is praised, and used with increasing frequency by human rights plaintiffs for an ever-expanding list of international law violations. Viewed narrowly, the *Filartiga* case recognized official torture as a violation of the law nations such that district courts would have jurisdiction under the ATCA. Viewed broadly, as most human rights plaintiffs and activists prefer to, *Filartiga* provided that a State's treatment of its own citizens could create a human rights oriented private cause of action under the ATCA; it meant that an alien could sue a private individual for an international law violation as long as the act was perpetrated under the color of official authority. Most significantly, perhaps, *Filartiga* freed the ATCA from its eighteenth century moorings by holding that "the constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law"²⁰ and "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations today."²¹

Circuit Judge Irving Kaufman wrote the opinion, reversing the district court's dismissal for lack of subject matter jurisdiction. He held "that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights."²² The plaintiffs' allegations, though startling, are not unfamiliar. Dr. Filartiga and his daughter, citizens of Paraguay residing in the U.S., alleged that Pena-Irala, who was at the time Inspector General of the Police in Asuncion, Paraguay, kidnapped, tortured and murdered the doctor's son

(finding ATCA jurisdiction over suit to determine title to slaves found on board an enemy vessel taken on the high seas)).

²⁰ *Filartiga*, 630 F. 2d at 885.

²¹ *Id.* at 881. *See Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421, 425 (2d. Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989) ("Evolving standards of international law govern who is within the [ATCA's] jurisdictional grant.").

²² *Id.* at 878.

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in retaliation for the father's political activities.²³ Subsequently, Dr. Filartiga commenced a criminal action in Paraguay against Pena and the police. Unfortunately, Filartiga's lawyer was arrested by Pena, shackled to a wall at police headquarters, threatened with death and eventually disbarred. Forum non conveniens, indeed. Plaintiffs sought \$10 million in compensatory and punitive damages for wrongful death and torture and claimed jurisdiction under the ATCA.

The primary issue of subject matter jurisdiction under the ATCA required it to be determined whether the acts alleged by the Filartigas violated the law of nations.²⁴ Kaufman analyzed the issue first, as to the rules applied in ascertaining international law and second, as to the evidence that official torture was indeed prohibited by the law of nations.

In ascertaining the sources of international law, Kaufman looked first to the Supreme Court. In *United States v. Smith*, the Court stated: "the law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"²⁵ The Smith Court found in the writings of Lord Bacon, Grotius and Bochara a consensus rendering piracy "sufficiently and constitutionally defined."²⁶ In *The Paquete Habana*, the Court had held that the works of jurists and commentators might be used as evidence of the "customs and usages of civilized nations" "where there is no treaty, controlling executive or legislative act, or judicial decision."²⁷ Judge Kaufman cited the Statute of the International Court of Justice as reaffirming

²³ *Id.*

²⁴ The plaintiffs did not allege the conduct arose under a treaty of the United States. *Id.* at 880.

²⁵ Filartiga, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. 153, 160-61 (1820)).

²⁶ *Id.* (quoting *Smith*, 18 U.S. at 162).

²⁷ *Id.* (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900), cited with approval in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766-67 (2004)).

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this standard.²⁸ Furthermore, *Habana* announced the requirement that what was formerly only a standard may ripen into a binding rule of international law by ‘the general assent of civilized nations,’”²⁹ and therefore “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”³⁰

Judge Kaufman proceeded to explicate the various sources in which evidence of the international prohibition against torture could be found, namely: international conventions, writings of commentators, national law and U.S. policy. He began with the United Nations Charter for the principle that “a state’s treatment of its own citizens is a matter of international concern.”³¹ The Charter stated that the UN “shall promote universal . . . observance of human rights and fundamental freedoms” with its members pledging to take “joint and separate action” in order to achieve this purpose.³² Evidence of the right to be free from torture as being one such “human right and fundamental freedom” was found in two important U.N. declarations. The Universal Declaration of Human Rights stated, “no one shall be subjected to torture.”³³ The Declaration on the Protection of All Persons from Being Subjected to Torture prohibited any state from permitting torture. It expressly defined torture as “any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public

²⁸ *Id.* at 881 (citing Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 (1945) (in deciding in accordance with international law, the ICJ shall apply international conventions, international custom, general principles of law recognized by civilized nations, and judicial decisions and teachings of highly qualified publicists)).

²⁹ *Id.* (quoting *The Paquete Habana*, 175 U.S. at 694).

³⁰ *Id.* See also *Ware v. Hylton*, 3 U.S. 198 (1796) (distinguishing between “ancient” and “modern” law of nations).

³¹ *Id.* at 881.

³² *Id.* (quoting U.N. Charter arts. 55, 56, 59 Stat. 1033 (1945)).

³³ *Id.* at 882 (quoting Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948)). In a subsequent resolution, the General Assembly “declared that the Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’” *Id.*

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official on a person for such purposes as” obtaining information or a confession, as punishment, or as intimidation.³⁴ Further evidence was found in several other international treaties. The American Convention on Human Rights stated, ‘no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.’³⁵ This principle was echoed in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁶

Kaufman found relevant the writings of several commentators as well. For instance, one such commentator cited by the court found that the Universal Declaration of Human Rights “no longer fits into the dichotomy of binding treaty against non-binding pronouncement, but is rather an authoritative statement of the international community.”³⁷ Other commentators concluded the declaration has become a part of “binding, customary international law.”³⁸ Yet another pointed to states themselves as evidence of an international law, saying the “best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it.”³⁹

Finally, Judge Kaufman found evidence of the international prohibition against torture in national laws and U.S. policy. He cited a survey that stated that torture was implicitly or

³⁴ *Id.* at 883 (quoting Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, at 30, U.N. GAOR Supp. (No. 34) 91, U.N. Doc A/1034 (1975)).

³⁵ *Id.* (quoting Organization of American States, American Convention on Human Rights art. 5, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, 1144 U.N.T.S. 123).

³⁶ *Id.* at 884.

³⁷ *Id.* at 883 (quoting E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964)).

³⁸ *Id.* (citing Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT’L L.J. 813, 816-17 (1978); Waldlock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, INT’L & COMP. L.Q., SUPP. PUBL. NO. 11, 1965, at 15).

³⁹ *Id.* at 884 n.15 (quoting J. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 4-5 (Oxford 1944)).

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expressly prohibited by the constitutions of over fifty-five nations, including the Eighth Amendment of the U.S. Constitution and Article Forty-Five of the Constitution of Paraguay.⁴⁰ Furthermore, U.S. foreign policy expressly promoted the principle that “international law confers fundamental rights upon all people vis-à-vis their own governments.”⁴¹ Sections of title twenty-two of the United States Code declared that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights” and that “the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms.”⁴²

Judge Kaufman ultimately concluded, based upon his examination of the previously described sources from which customary international law is derived, that official torture is prohibited by the law of nations. Consequently, the ATCA may provide federal jurisdiction for a private cause of action alleging official torture.

In the remainder of the opinion, Judge Kaufman contended with several subsidiary arguments advanced by the respondent, including whether federal jurisdiction under the ATCA was consistent with Article III of the Constitution. Kaufman ultimately found that the Act was constitutional in its grant of federal jurisdiction. The Supreme Court had held that a case arises under the laws of the United States for Article III purposes if it is either grounded upon federal statute or United States common law.⁴³ After a review of the history of the Constitution and its relationship with international law at the time of its framing, Kaufman concluded that the law

⁴⁰ *Id.*

⁴¹ *Id.* at 885.

⁴² *Id.* at 885 n.17 (quoting 22 U.S.C. §§ 2304(a)(2), 2151(a)).

⁴³ *Id.* at 886 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 99-100 (1972)).

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nations became part of the common law of the United States upon the adoption of the Constitution. Thus, the ATCA was authorized by Article III.

In arriving at that decision, Kaufman acknowledged as undisputed the fact that domestic state courts could hear claims for torts committed overseas, as long as the act was unlawful where performed. The parties agreed that here, where personal jurisdiction has been obtained, “the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law, state court jurisdiction would be proper.”⁴⁴ In describing what federal policies were consistent with foreign law, Judge Kaufman stated, “the conduct alleged here [i.e. police torture in violation of national law] would be actionable under 42 U.S.C. § 1983 . . . if performed by a government official.”⁴⁵ This statement provided an early indication of what standard the courts would employ in determining whether the alleged international law violation occurred under the color of official authority, thus satisfying the general state-action requirement under international law. However, there is something counter-intuitive in grafting this standard onto the ATCA. Under domestic tort actions, section 1983 is used to attribute the conduct of an individual to the state, yet under the ATCA, section 1983 is used to attribute the conduct of the state, i.e. a state actor, to a private individual, where as here, Filartiga is seeking compensation from Pena-Irala, not Asuncion, Paraguay.

B. *Kadic v. Karadzic* & The Genocide Exception

In reversing the district court’s dismissal for lack of subject matter jurisdiction, the Second Circuit in *Kadic* did something that Scalia would later call “truly remarkable”.⁴⁶ It disregarded Congress’ explicit instructions and held that a private cause of action for genocide

⁴⁴ *Id.*

⁴⁵ *Id.* at 885 n.18.

⁴⁶ *Sosa*, 124 S. Ct. at 2775 (Scalia, J., concurring).

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and war crimes existed under the ATCA, and that such claims may apply against a private actor in his private capacity without a showing of State action. I shall refer to this loophole in international law, a law that generally applies only to State actors,⁴⁷ as the “genocide exception.” In so holding, the *Kadic* court was expanding upon Judge Edwards’s observation in *Tel-Oren* that there are a “handful of crimes” including piracy and slave trading, “to which the law of nations attributes individual liability,” such that state action is not required.⁴⁸ Furthermore, the *Kadic* court applied a “color of law” standard in order to hold that the private actor defendant may be found liable under the ATCA and the TVPA in his capacity as a state actor for additional international law violations that did require official action.

In *Kadic*, several aliens sued Radovan Karadzic, leader of the self-proclaimed Bosnian-Serb republic of “Srpska” (which exercised actual control, and claimed lawful authority, over parts of Bosnia-Herzegovina).⁴⁹ The plaintiffs, Croat-Muslim citizens of Bosnia-Herzegovina (formerly Yugoslavia) alleged they were victims of various atrocities committed by Bosnian-Serb military forces during the Bosnian civil war.⁵⁰ Plaintiffs alleged that Karadzic directed the military forces while acting in an official capacity as either head of the unrecognized state of Srpska or as collaborator acting in concert with the recognized Serbian Republic of the former Yugoslavia.⁵¹ The plaintiffs asserted several causes of action under both the ATCA and the

⁴⁷ See 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769) (“Offenses against [the law of nations are] principally incident to whole states or nations.”) quoted in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2756 (2004).

⁴⁸ *Kadic*, 70 F. 3d at 240 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring)). The Ninth Circuit fully adopted the Second Circuit’s exceptions for ATCA liability without regard to state action in its infamous *Unocal* decision. *Doe I v. Unocal Corp.*, 395 F. 3d 932, 954 (9th Cir. 2002).

⁴⁹ *Kadic*, 70 F.3d at 236-37.

⁵⁰ *Id.* at 237.

⁵¹ *Id.*

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TVPA, namely: genocide, rape, forced prostitution and impregnation, torture, assault and battery, sex and ethnic inequality, summary execution, and wrongful death.⁵²

With regard to its first holding creating the genocide exception, the *Kadic* court examined two issues: first, “whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state,”⁵³ and second, “whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action.”⁵⁴ In carving out its exception, the court discussed a “substantial body of law” in order to hold that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”⁵⁵

The court offered as its first example of the application of the law of nations against private individuals the prohibition against piracy.⁵⁶ The Supreme Court had gone so far as to call pirates the “‘*hostis humani generis*’ (an enemy of all mankind) . . . because they acted ‘without . . . any pretense of public authority.’”⁵⁷ Later examples include the prohibition against the slave trade and the prohibition against certain war crimes.⁵⁸

Having established piracy, slave trade and war crimes as international law violations not requiring state action, the court then stated that the Executive Branch had itself recognized the ATCA as an available remedy against private individuals. First, Attorney General Bradford in

⁵² *Id.*

⁵³ *Id.* at 236.

⁵⁴ *Id.*

⁵⁵ *Id.* at 239.

⁵⁶ *Id.* (citing *United States v. Smith*, 18 U.S. 153, 161 (1820); *United States v. Furlong*, 18 U.S. 184, 196-97 (1820)).

⁵⁷ *Id.* (quoting *The Brig Malek Adhel*, 43 U.S. 210, 232 (1844)). The court also refers the reader to 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (Univ. of Chi. ed. 1979).

⁵⁸ *Id.* (citing M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (1992); Jourdan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992)).

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1795 approved of an ATCA remedy in reference to the plunder of British property by American citizens off the coast of Sierra Leone.⁵⁹ Second, the current administration, in a Statement of Interest addressed to the *Kadic* court, asserted that private persons could be liable under the ATCA for “acts of genocide, war crimes, and other violations of international humanitarian law.”⁶⁰

Next, the court pointed out that the Restatement (Third) of the Foreign Relations Law of the United States declares that “[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”⁶¹ The Restatement carefully distinguishes between international law violations that are actionable when committed by a state⁶² and those that are of “universal concern.”⁶³ The former include genocide, slavery or slave trade, the murder or disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights.⁶⁴ The latter include violations a state may punish “without regard to territoriality or the nationality of the offenders.”⁶⁵ Violations of “universal concern” include piracy, genocide, war crimes, slave trade, hijacking of aircraft, and “perhaps certain acts of terrorism”⁶⁶ The court stated that the inclusion of piracy and aircraft hijacking demonstrates that “offenses of ‘universal concern’

⁵⁹ *Id.* (citing *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795)).

⁶⁰ *Id.* at 239-40.

⁶¹ *Id.* at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. pt.II, intro. note (1986)).

⁶² *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1986)).

⁶³ *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 (1986)).

⁶⁴ *Id.* at 240 n.3 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 702 (1986)).

⁶⁵ *Id.* at 240 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 402(1)(a), (2) (1986)).

⁶⁶ *Id.* at 240 n.4 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 (1986)).

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include those capable of being committed by non-state actors”⁶⁷ and that international law authorizes states to apply civil remedies, such as the ATCA.⁶⁸

The court then proceeded to determine whether genocide, war crimes and torture and summary execution, as alleged by the plaintiffs, are causes of action that may be asserted against a private individual under the ATCA. In support of its holding that genocide is such a violation, the court cited the United Nations as authority. First, the United Nations declared that “genocide is a crime under international law . . . whether the perpetrators are ‘private individuals, public officials or statesman.’”⁶⁹ The United Nations also affirmed Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal where those who persecuted on political, racial or religious grounds may be punished regardless of whether they acted as individuals or members of organizations.⁷⁰ The United Nation’s Convention on Genocide, ratified by the United States in 1989, gives a specific definition of genocide and applies liability for violation of its prohibition against constitutionally responsible leaders, public officials, and private individuals.⁷¹

It is at this point that the court did something “truly remarkable.”⁷² First, it indicated that the Genocide Convention Implementation Act criminalizes genocide regardless of whether the

⁶⁷ *Id.* at 240.

⁶⁸ *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 404 cmt. b (1986)). The court also highlighted the fact that the only two cases invoking the ATCA prior to *Filartiga* asserted liability against private actors. *See Adra v. Clift*, 195 F.Supp 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F.Cas. 810 (D.S.C. 1795) (No. 1,607).

⁶⁹ *Kadic*, 70 F.3d at 241 (quoting G.A. Res. 96(I), at 188-89, U.N. Doc A/64/Add.1 (1946)).

⁷⁰ *Id.* (citing G.A. Res. 95(I), at 188, U.N. Doc. A/64/Add.1 (1946); *In re Extradition of Demjanjuk*, 612 F.Supp. 544, 555 n.11 (N.D. Ohio 1985)).

⁷¹ *Id.* (citing Convention on the Prevention and Punishment of the Crime of Genocide arts. II, IV, Jan. 12, 1951, 78 U.N.T.S. 277 (entered into force for the United States Feb. 23, 1989)).

⁷² *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2775 (Scalia, J., concurring).

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offender is a state-actor (i.e., “whoever commits genocide”)⁷³ if it is committed in the United States or by an American national.⁷⁴ It then reiterated the law’s assertion that it not be “construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.”⁷⁵ Nevertheless, the court held that the ATCA permitted a private remedy for acts of genocide for three reasons. First, it found “the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the [ATCA].”⁷⁶ Second, there was nothing in the law itself or its legislative history suggesting a congressional intent to repeal the ATCA as it applied to genocide. And third, the court found the two laws were not repugnant to each other. Thus, the court held that a cause of action already existed under law, i.e., the ATCA, pre-dating the Genocide Convention Implementation Act, and so the court did not run afoul of Congress’ intention that no new federal causes of action in civil proceedings be created.⁷⁷

Although, how the court may use the implementation law to expand or confirm a preexisting cause of action under the ATCA as applicable to private individuals when that law explicitly denies that it creates any new federal private causes of action is unclear. That is, if genocide existed as a cause of action under the ATCA prior to the implementation law, but was not considered actionable against non-state-actors, then the federal implementation law cannot be used to expand liability to such actors as it would then be creating a new federal private right of action contrary to Congress’ intent. Indeed, the implementation act’s admonition against

⁷³ *Kadic*, 70 F.3d at 242 (quoting Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (1988)).

⁷⁴ *Id.* (citing Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a), (d) (1988)).

⁷⁵ *Id.* (quoting Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092 (1988)).

⁷⁶ *Id.*

⁷⁷ *Id.* at 242 n.6.

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creating a private right of action can be construed as forbidding any expansion of existing notions of liability for acts of genocide. Thus, the *Kadic* court is mistaken to have relied upon the implementation act to justify a claim for genocide against non-state-actors, and must fall back on the Convention on Genocide itself and the other United Nations sources it has cited.

The court next held that war crimes (i.e., murder, rape, torture and arbitrary detention of civilians committed during hostilities) are actionable against private actors under the ATCA. The court cited the Supreme Court as support for the assertion that such atrocities are recognized as violations under international law, which imposes an affirmative duty upon commanders to prevent them.⁷⁸ The court then found that under common Article 3 of the Geneva Conventions, the parties to a conflict who are obligated to abide the convention's requirements of the law of war include "insurgent military groups."⁷⁹ However, the court fails to explain how it arrived at such a conclusion whereby "roving hordes of insurgents", i.e., anti-state-actors, are to be obligated by a treaty which they neither signed nor ratified. That is, unless the court means to imply that such prohibitions against war crimes as existing under the conventions have ripened into international customary law according to which both state and non-state actors may be held liable. However, the court simply stated that the "liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II."⁸⁰ It cited only two articles to support this contention.⁸¹

⁷⁸ *Id.* at 242 (citing *In re Yamashita*, 327 U.S. 1, 14-16 (1946)).

⁷⁹ *Id.* at 243.

⁸⁰ *Id.*

⁸¹ See Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT'L CONCILIATION 304 (April 1949); Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 447 (R. Falk ed., 1976), cited with approval in *Kadic*, 70 F.3d at 243. See also Ann B. Ching, *Evolution of the Command Responsibility Doctrine in Light of the Celebici Decision of the International Criminal Tribunal for the Former Yugoslavia*, 25 N.C. J. INT'L L. &

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At this point, what has been implicit in the court's rationale now becomes explicit. The court is unabashedly blending the concepts on international criminal culpability with domestic private law tort liability. Consequently, private individuals who could be found guilty of international crimes may additionally have private actions asserted against them in tort. The elimination of the "just following orders" defense under international criminal law has resulted in the elimination of the State-action requirement for genocide and war crimes allegations under the ATCA. Yet, perhaps this result is understandable for two basic reasons. First, the ATCA itself refers only to the "law of nations" which was generally accepted as applicable on to States, yet the Act fails to distinguish between public law and private law. Second, the Supreme Court in the *Smith* case explicitly referred to "the works of jurists, writing professedly on *public law*" as a source by which to ascertain the law of nations;⁸² and criminal law is, after all, a subdivision of public law.

As for torture and summary execution, the court declined to extend its *Filartiga* holding to include unofficial acts of private individuals. It maintained that international law proscribed

COM. REG. 167, 167 (1999) (According to the doctrine of superior-subordinate liability "a subordinate cannot escape liability merely because he or she was following the orders of a superior."); *Id.* at n.4 ("The 'just following orders' defense was made infamous in the United States by the actions of U.S. Army Lieutenant Calley at My Lai during the Vietnam War."); *United States v. Calley*, 46 C.M.R. 1131 (1973); James McHenry, *Justice for Foca: The International Criminal Tribunal for Yugoslavia's Prosecution of Rape and Enslavement as Crimes Against Humanity*, 10 TULSA J. COMP. & INT'L L. 183, 211-12 (2002) ("... Article 7 of the ICTY statute explicitly considers individual criminal responsibility for acts committed in relation to the conflict in Yugoslavia; therefore, the ICTY itself has personal jurisdiction to prosecute anyone who may be criminally liable for violations of international law in this setting. Furthermore, Article 7(4) expressly prohibits a "just following orders" defense, although it does allow such a claim as a mitigating factor. Moreover, the ICTY's ability to prosecute individuals reflects a growing trend in international law to expand the legal personality of individuals. Finally, the defense of "just following orders," even if it not prohibited by Article 7(4) of the ICTY enabling statute, has been rejected soundly by international law since Nuremberg.") (emphasis added).

⁸² *United States v. Smith*, 18 U.S. 153, 160-61 (1820) (emphasis added).

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torture and summary execution only when committed by state officials or under color of law.

Thus, a non-state actor may be liable for such acts only when perpetrated in the course of genocide or war crimes.⁸³

Having determined that non-state actors could be held liable for genocide or war crimes in claims brought under the ATCA (i.e., the genocide exception), the court then explored the meaning of the state-action requirement for international law violations in order to determine Karadzic's culpability for torture and summary execution. First, the court found that the state-action requirement is satisfied even if the state on whose behalf the act is done is not recognized by other states. The Restatement (Third) of Foreign Relations Law of the United States does not require a state to be formally recognized by other states as long as it otherwise satisfies the four familiar requirements for statehood (i.e., defined territory, permanent population, under the control of its own government, and engagement or capacity to engage, in formal relations with other states).⁸⁴ In *Ford v. Surget*, Justice Clifford stressed that regardless of the wrongfulness of a state's origin, it "must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation."⁸⁵ Furthermore, the court asserted that federal courts "have regularly given effect to the 'state' action of unrecognized states. The court cited several cases involving secessionist Civil War era states as well as East Germany."⁸⁶ Additionally, customary international human rights law does not

⁸³ *Kadic*, 70 F.3d at 243-44.

⁸⁴ *Id.* at 244 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §§ 201, 202 cmt. b (1986); *Texas v. White*, 74 U.S. 700, 720 (1868)).

⁸⁵ *Id.* (quoting *Ford v. Surget*, 97 U.S. 594, 620 (1878) (Clifford, J., concurring)).

⁸⁶ *Id.* at 244-45 (citing *United States v. Insurance Cos.*, 89 U.S. 99, 101-03 (1875); *Thorington v. Smith*, 75 U.S. 1, 9-12 (1868); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970)).

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distinguish between recognized and unrecognized states in its application.⁸⁷ In dictum, the court appeared to lower the bar for the traditional Blackstonian requirement of state-action in international law where it stated that “it is likely that the state action concept, where applicable for some violations like ‘official’ torture, requires merely *the semblance of official authority*.”⁸⁸

Second, the court found that a claim that an individual acted “in concert” with a state is sufficient to allege that that individual “acted under color of law” for the purposes of satisfying the state-action requirement.⁸⁹ In so doing, the court declared, “[t]he ‘color of law’ jurisprudence of 42 U.S.C. § 1983 is a *relevant guide* to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATCA].”⁹⁰ From whence this “relevant guide” came or why it is appropriate for it to be grafted onto international law claims is not explained. The court cited only one case, from a district court in California, for support.⁹¹ The court then cited *Lugar v. Edmondson Oil Co.* for the rule that “[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”⁹²

As for the TVPA, the court simply affirmed what the act itself and its legislative history state expressly, namely, that state action is required by way of “actual or apparent authority, or

⁸⁷ *Id.* at 245 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §§ 207, 702 (1986)).

⁸⁸ *Id.* (emphasis added).

⁸⁹ *C.f.* Restatement (Second) of Torts § 876(a) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (a) does a tortious act *in concert* with the other or pursuant to a common design with him . . .”) (emphasis added).

⁹⁰ *Id.* (emphasis added).

⁹¹ *Id.* (citing *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987)).

⁹² *Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

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color of law, of any foreign nation.”⁹³ Congress instructed the courts to construe such terms according to principles of agency law and § 1983 jurisprudence, respectively.⁹⁴

As a result of *Kadic*, a private individual or non-state actor may be held liable under the ATCA for genocide, war crimes and violations committed in the course of genocide or war crimes without proof of state-action. In order to allege state-action, § 1983 jurisprudence is to be applied as a “relevant guide” and a defendant may be liable even if acting “under the color” of a de facto or unrecognized state.

C. *Sosa v. Alvarez-Machain*

It took 215 years, but with *Sosa*, the Supreme Court made its first substantial decision on the meaning and scope of the Alien Tort Claims Act.⁹⁵ In it, the Court finally announced a standard for determining what causes of action defendants might be held liable and upon which corporate defendants might hopefully rely. Though long awaited, the decision is not altogether unexpected, for with its standard, the Court in effect toed the line by which most courts already adhered,⁹⁶ namely the “specific, universal and obligatory” standard.⁹⁷ What was surprising,

⁹³ *Id.* (quoting Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note § 2(a) (2005)).

⁹⁴ *Id.* (citing H.R. REP. NO. 102-367(I), at 5 (1991)).

⁹⁵ See generally *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (holding that no exception to Foreign Sovereign Immunity Act applied to give the district court jurisdiction over the Argentine Republic in an action brought by Liberian corporations under the ATCA for destruction of oil tanker on high seas in violation of international law); *Lynch v. Household Finance Corp.*, 405 U.S. 538, n.17 (1972) (pointing out that the ATCA is among a series of special federal statutes that grant jurisdiction in areas that would otherwise fall under the general federal question statute); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (finding that the ATCA indicates a desire by the First Congress to give matters of international significance to the jurisdiction of federal courts rather than the states); *O’Reilly de Camara v. Brooke*, 209 U.S. 45, 52 (1907) (suggesting a cause of action for expropriation of property might be cognizable under a predecessor to section 1350, but the question of ATCA jurisdiction disposed of “on the merits”).

⁹⁶ *Sosa*, 124 S. Ct. at 2765 (“The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala* . . .”).

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however, was that the Court failed to assert a standard for determining how private actors might be liable for a violation requiring state action. The Court not only left the “door ajar” for new causes of action, but for further district court finagling of liability standards by which they could keep MNCs in federal court.

In *Sosa*, the Court heard the case of an alien suing a private individual under the ATCA for allegedly violating an international law prohibiting arbitrary arrest. The plaintiff, Humberto Alvarez-Machain, a Mexican citizen, had previously been acquitted in federal court for the murder of a DEA agent in Mexico. Alvarez now alleged that in order to get him into a U.S. court to be tried for the murder the DEA had enlisted several Mexican civilians, including Jose Sosa, to seize him and bring him across the border from Mexico to the United States so that federal agents could arrest him. In reversing the Ninth Circuit and granting the defendant’s motion to dismiss, the Court decided that Alvarez’ single illegal detention of less than one day did not violate any norm of international law. Thus, Alvarez did not have a cause of action for a tort “in violation of the law of nations” under the ATCA.

In arriving at its decision, the Court announced three important limitations on the scope of the ATCA. First, the ATCA is only jurisdictional. Second, that jurisdiction includes ability to enforce a small number of international norms recognized as part of the common law at the time

⁹⁷ See *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring); *Doe v. Unocal Corp.*, 395 F.3d 932, 945 n.15 (9th Cir. 2002); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997). Since the *Sosa* decision, several courts have retained the “specific, universal and obligatory” standard. See, e.g., *Doe v. Liu Qi*, 349 F.Supp.2d 1258, 1320-28 (N.D. Cal. 2004); *Doe v. Saravia* 348 F.Supp.2d 1112, 1114 (E.D. Cal. 2004). *C.f.* *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1177 n.12 (2005) (“While the Supreme Court did not expressly disavow the ‘specific, universal, and obligatory’ standard, [this] court chooses to closely follow the approach provided by *Sosa*.”).

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the statute was adopted. Third, the Court announced a standard for determining what new causes of action federal courts might properly recognize as within the Act's jurisdiction.

The Court gave three reasons for holding that the ATCA is only a grant of subject matter jurisdiction. The original version of the ATCA passed by the first Congress as part of the Judiciary Act of 1789 provided that the federal district courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."⁹⁸ The *Sosa* Court interpreted "cognizance" as a grant of jurisdiction only, "not power to mold substantive law."⁹⁹ Furthermore, it found that the purposeful placement of the ATCA in § 9 of a statute exclusively concerned with federal-court jurisdiction supports this. Third, it recognized that the difference between jurisdiction and cause of action would have been fully appreciated by the drafters of the Judiciary Act.

Next, the Court held that the ATCA was not stillborn, but was intended to permit the federal courts to hear a narrow set of federal common law actions that were derived from the law of nations. Subject to a nonexistent congressional record, the Court delved into an analysis of the historical circumstances surrounding the drafting of the ATCA, including a brief précis of the Marbois Incident of 1784. The Court concluded that three offenses against the law of nations addressed by the criminal law of England were "probably on minds of the men who drafted the [ATCA] with its reference to tort."¹⁰⁰ These three offenses are: violation of safe conducts, infringement of the rights of ambassadors, and piracy.

Lastly, the Court announced a restrained standard for determining what new causes of action might be asserted by aliens in federal court as a violation of the law of nations. The

⁹⁸ Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79.

⁹⁹ *Sosa*, 124 S. Ct. at 2755.

¹⁰⁰ *Id.* at 2756.

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standard is intended to limit federal courts' discretion in considering claims under the present-day law of nations as elements of the common law. Thus, it requires that any such new claims, first, "rest on a norm of international character", second, that norm must be "accepted by the civilized world,"¹⁰¹ and third, that norm must be "defined with a specificity comparable to the features of the [three] 18th-century paradigms."¹⁰² The Court added two factors for courts to consider: the "practical consequences" of making the new cause of action available in federal court,¹⁰³ and "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a *corporation* or individual."¹⁰⁴

Footnote twenty is the only time the Court made explicit mention of corporations as possible ATCA defendants in its opinion. Unfortunately, the Court failed to approve of any particular standard of liability already being utilized by the federal courts in assessing MNC liability under the ATCA (e.g., "color of law" liability under 42 U.S.C. § 1983 or aiding & abetting liability). It does, however, seem to suggest that whatever liability standard is appropriate for a given norm should be derived from international law rather than domestic law.

¹⁰¹ Does the Court mean by "civilized" the Christian world? *See also* *The Paquete Habana*, 175 U.S. 677, 694, 700 (1900) ("The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy or goodwill. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of *civilized* nations, into a settled rule of international law.... And the Empire of Japan (the last state admitted into the rank of *civilized* nations), by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts....") (emphasis added); Statute of the International Court of Justice, art. 38 ("[T]he ICJ shall apply . . . general principles of law recognized by *civilized* nations. . .") (emphasis added).

¹⁰² As an example of the specificity it requires, the Court cites *United States v. Smith*, 18 U.S. 153, 163-180, n.a (1820) for an illustration of how the law of nations defined piracy.

¹⁰³ *Sosa*, 124 S. Ct. at 2766.

¹⁰⁴ *Id.* at 2766 n.20 (emphasis added). *See also id.* at 2782 ("The norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.") (Breyer, J., concurring).

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Disappointingly, the Court appeared in the footnote to implicitly affirm the cognoscibility of ATCA claims against MNC defendants.

Toward the end of the opinion the Court for a second time mentions private actor liability. In rejecting Alvarez' allegation of arbitrary detention, defined as an officially sanctioned action, the Court appeared to reprove Alvarez in that all of his attempts to demonstrate that his claim is one of well defined and accepted international customary law "assumes that Alvarez could establish that Sosa [a Mexican civilian] was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still [i.e., one not requiring the act to be officially sanctioned]." ¹⁰⁵ This terse statement suggests that the Court approves of holding private actors liable under rules requiring state action. Although, again, it fails to indicate under what standard a private actor might be found to be "acting on behalf of" a state. The Court also seems to have implicitly endorsed *Kadic's* "genocide exception" to the state-action requirement under the ATCA by saying Sosa may need a "broader rule." That broader rule is one in which a private actor may be held liable for violating the norm absent "officially sanctioned action."

Ultimately, "the door is still ajar subject to vigilant doorkeeping and thus open to a narrow class of international norms today." ¹⁰⁶ The Court noted that its position, i.e., authorizing the judicial power to recognize new claims under the law of nations as part of the federal common law, had already been assumed by and was consistent with several federal courts since

¹⁰⁵ *Id.* at 2768.

¹⁰⁶ *Id.* at 2764. *But see id.* at 2774 (Scalia, J., concurring) (arguing that the door represents the common law that was closed by *Erie*). *Erie*, however, only proscribed the application of the general law, or the federal common law, by the district courts sitting in diversity actions. ATCA claims raise the hybrid action of federal question and diversity. And in any case, the district court in an ATCA action would not have to choose between state law and general law, as in *Erie*, but must rather apply the general law in its most general form, that is, international law.

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Filartiga.¹⁰⁷ Furthermore, this position had never met with Congressional disagreement.¹⁰⁸ As a result, after *Sosa*, federal courts continue to enjoy the wide discretion they had since *Filartiga*, this time with the Court's blessing. Unfortunately, corporate defendants are left as unsure as before as to what new causes of actions they may be susceptible to and by what standards their liability might be judged. The trend begun by *Filartiga* and expanded by *Kadic* has been endorsed by *Sosa*, and it is sure to continue, possibly for another 200 years.

III. MNC Liability under the ATCA & TVPA.

The Alien Tort Claims Act contains two grants of jurisdiction for foreign tort claimants. In 1991, Congress codified and expanded upon *Filartiga* with the adoption of the Torture Victim Protection Act (TVPA) and added it as a note to section 1350.¹⁰⁹ Plaintiffs often bring their claims under both the ATCA and the TVPA. Where the ATCA is vague, the TVPA is explicit. Where the ATCA is expansive, the TVPA is narrow. Each has its particular history, rules and limitations. Therefore, when examining the standards by which MNC liability is to be judged, each must be dealt with separately, at least to begin with.

A. The ATCA: State-Action Implied & the Genocide Exception.

The Alien Tort Claims Act provides in its entirety that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the

¹⁰⁷ *Id.* at 2765. See *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88, 104 n.10 (2d Cir. 2000) (“*Filartiga* remains the leading case interpreting the ATCA.”). The Court's alignment with the *Filartiga* school should come as no surprise considering that in 1996 it denied certiorari for *Kadic v. Karadzic*, 70 F.3d 232 (1995), a case which rested upon and implicitly confirmed the principles established by *Filartiga*.

¹⁰⁸ Indeed, Congress approved of the view of *Filartiga* by enacting the Torture Victim Protection Act. See H.R. Rep. No. 102-367, at 4 (1991).

¹⁰⁹ See H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86 (noting that the purposes of TVPA are to codify *Filartiga*, to alleviate separation of powers concerns, and to expand the remedy to include U.S. citizens).

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law of nations or a treaty of the United States.”¹¹⁰ A plaintiff must satisfy three conditions in order to establish federal subject-matter jurisdiction under the ATCA: (1) plaintiff must be an alien (2) suing for a tort (3) committed in violation of the law of nations or U.S. treaty.¹¹¹ “[I]t is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations.”¹¹² It should be apparent after reading *Sosa* that the first and often highest hurdle for anyone hoping to sue a MNC under the ATCA is alleging a violation of the law of nations that a federal court will recognize.

However, the question of whether MNCs are subject to liability at all under the ATCA seems to have been answered in 1997 by the landmark case of *Doe v. Unocal Corp.*¹¹³ For the first time a federal district court held that a corporation and its executive officers could be held liable under the ATCA for violations of international human rights in a foreign country.¹¹⁴ The case is significant for two reasons. First, “it allowed the plaintiffs to seek damages from a U.S. corporation, even if it was only one of several named responsible parties for a violation of the

¹¹⁰ 28 U.S.C. § 1350 (2005).

¹¹¹ See *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (1980); *Kadic v. Karadzic*, 70 F.3d 232, 238 (1995).

¹¹² *Kadic*, 70 F.3d at 238. See also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165-69 (5th Cir. 1999) (dismissing claims of individual human rights violations under the ATCA on the ground that complaint failed to provide “adequate factual specificity”); *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993) (“We have, of course, repeatedly held that in order to state a claim of conspiracy under section 1983 the complaint must contain more than mere conclusory allegations. . . . And while a plaintiff should not plead mere evidence, he should make an effort to provide some ‘details of time and place and the alleged effect of the conspiracy.’”).

¹¹³ *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in pt., rev’d in pt.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005). See generally Earthrights International, Resource Center: *Doe v. Unocal*, <http://www.earthrights.org/unocal/index.shtml> (last visited Oct. 17, 2005).

¹¹⁴ See *infra* app. I.

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ATCA.”¹¹⁵ Second, the court “recognized that corporations are viable defendants for plaintiffs claiming an ATCA violation.”¹¹⁶

The case settled in the spring of 2005, ostensibly as a precondition for a merger between Unocal and ChevronTexaco. Shortly afterward, the legal team for the Burmese plaintiffs made the following statement:

[T]his is a historic victory for human rights and for the corporate accountability movement. Corporations can no longer fool themselves into thinking they can get away with human rights violations. This case will reverberate in corporate boardrooms around the world and will have a deterrent effect on the worst forms of corporate behavior.¹¹⁷

The possibility of the case having a deterrent effect has yet to be determined. Yet there is no doubt that the outcome of the first *Unocal* judgment emboldened victims of human rights violations to seek redress from MNCs in American courts. Since 1997, the number of ATCA suits against MNCs has increased significantly, though none have as yet gone to trial.¹¹⁸ That a corporation may be held legally responsible under the ATCA seems to have become a forgone conclusion for most judges.¹¹⁹

Thus, whether it is an individual or an MNC being sued, the ATCA requires that state-action be alleged (except in certain circumstances).¹²⁰ This requirement is implied by basic principles of international law and federal case law.

¹¹⁵ Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135, 137 (2005).

¹¹⁶ *Id.*

¹¹⁷ Earthrights International, Press Release: Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers, http://www.earthrights.org/news/press_unocal_settle.shtml (last visited Oct. 17, 2005).

¹¹⁸ *See infra* app. I.

¹¹⁹ The same cannot be said for corporate liability under the TVPA.

¹²⁰ *See generally* Ved P. Nanda & David K. Pansius, *The State Action Requirement*, 1 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 9:12 (2005).

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It is a general principle that international law applies only to nations.¹²¹ Customary international law itself, upon which ATCA suits are partly based, is derived from the consistent practice of states acting out of a sense of legal obligation.¹²² Furthermore, the sources and evidence of international law, such as treaties or United Nations declarations, speak in terms of the responsibilities of states, not individuals.¹²³ For example, Article Thirty-Eight of the Statute of the International Court of Justice states that the court, in deciding in accordance with international law, must apply: “international conventions . . . establishing rules expressly recognized by the contesting states, international custom, as evidence of a general practice accepted as law, [and] the general principles of law recognized by civilized nations”¹²⁴ Therefore, violations of international law require state action.

This principle has been adopted in the U.S. and applied to the ATCA through federal case law.¹²⁵ In *Tel-Oren v. Libyan Arab Republic*,¹²⁶ Judge Edwards considered whether non-state actors might be held to the same “behavioral norms” as states. In his concurrence, he noted:

¹²¹ See MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 2 (5th ed., 2004) (“National law is concerned primarily with the legal rights and duties of legal persons (individuals) within the body politic – the state or similar entity. . . . International law, at least as originally conceived, is concerned with the rights and duties of the states themselves. . . . [I]nternational law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations and the African Union.”). See also 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769), cited with approval in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2756 (2004) (“Offenses against the law of nations are principally incident to whole states or nations.”).

¹²² See SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984).

¹²³ See, e.g., Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, ¶ 30, U.N. GAOR Supp. No. 34, U.N. Doc. A/1034 (1975) (Torture is an act inflicted or instigated by a *public official* and “[n]o state shall permit or tolerate torture. . .” and “[e]ach state shall . . . take effective measures to prevent torture”) (emphasis added).

¹²⁴ Statute of the International Court of Justice art. 38, para. 1.

¹²⁵ See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”); *United States v. Smith*, 18 U.S. 153, 160-61 (1820); *In re Estate of Ferdinand E. Marcos Human Rights*

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In the 19th century, the view emerged that states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations. . . . In this century . . . writers have argued that both the rights and duties of international law should be applied to private parties. . . . However, their discussions are more prescriptive than descriptive; they recognize shifts in firmly entrenched doctrine but are unable to define a clear new consensus.¹²⁷

After a thorough review of the historical grounds for liability under the law of nations, Edwards concluded that purely private individuals, i.e., those neither associated with nor acting under the color of any state, may not be held liable for violations of international law under the ATCA.¹²⁸ However, Edwards did recognize a “handful” of historical exceptions permitting private liability for violations of international law, including piracy and slave trading.¹²⁹ Presciently, he added “I have little doubt that the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states”¹³⁰

Judge Rymer of the Ninth Circuit echoed Edwards’ general state-action requirement in *In re Estate of Ferdinand E. Marcos Human Rights Litigation*.¹³¹ There he stated, “Only individuals who have acted under official authority or under color of such authority may violate

Litigation, 978 F.2d 493, 502 (9th Cir. 1992) (“It is also well settled that the law of nations is part of federal common law.”).

¹²⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).

¹²⁷ *Id.* at 794.

¹²⁸ The District of Columbia Circuit Court adopted Judge Edwards’ finding in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985), concluding that customary international law does not reach private, non-state actions.

¹²⁹ *Id.*

¹³⁰ *Id.* at 795. See also Dr. P.K. Menon, *The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine*, 1 J. TRANSNAT’L L. & POL’Y 151 (1992).

¹³¹ *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992).

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international law.”¹³² This principle has been adopted by several other courts and commentators.¹³³

This simple requirement was complicated somewhat after *Argentine Republic v. Amerada Hess Shipping Corp.* There, the Court held that the ATCA could not be used to obtain a forum in the district courts for an action against a sovereign nation or its agents acting in the scope of their official duties because the Foreign Sovereign Immunities Act of 1976¹³⁴ was the sole basis for obtaining jurisdiction over a foreign state in U.S. courts.¹³⁵ That decision, occurring as it did between *Filartiga* and *Kadic*, perhaps explains the recent popularity of suing MNCs. MNCs end up as default defendants for conduct largely committed by the victim’s government. Not only can those governments not be sued under the ATCA, but there are few international forums for victims of human rights abuses that permit suits by individuals against a state. The International Court of Justice only concerns parties that are states.¹³⁶ And it is not generally possible or practical for the victims of atrocities to seek redress in national courts for the acts of their government or of entities in which their government has a favorable interest.¹³⁷ Furthermore, the

¹³² *Id.* at 501-02. *See also* *Doe I v. Unocal Corp.*, 395 F.3d 932, 946 (9th Cir. 2002) (“The [*Kadic* court] [] went on to state that although “acts of rape, torture, and summary execution,” like most crimes, “are proscribed by international law only when committed by state officials or under color of law” to the extent that they were committed in isolation, these crimes “are actionable under the Alien Tort Claims Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes.”).

¹³³ *See, e.g.*, *Bao Ge v. Li Peng*, 201 F.Supp.2d 14, 20 (D.D.C. 2000) (“[A] private party may be liable for violations of the law of nations where the individual was acting as an officer of the state or under color of state law.”); *Doe v. Karadzic*, 866 F.Supp. 734, 740 (S.D.N.Y. 1994) (“Courts that have found causes of action to lie pursuant to § 1350, have done so when state actors violated the law of nations.”).

¹³⁴ 28 U.S.C. §§ 1330, 1602 et seq. (2005).

¹³⁵ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

¹³⁶ Statute of the International Court of Justice art. 34, para. 1.

¹³⁷ *See, e.g.*, *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff’d in pt., rev’d in pt.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (“According to plaintiffs, ‘[t]here is no functioning

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states themselves are often protected by sovereign immunity, the act of state doctrine or the political question doctrine. Thus, victims go after those that they can, the MNCs.¹³⁸

The historical principle that state-action is required in order to attribute liability to an entity for an alleged violation of international law has been embraced by the federal courts. Yet, the matter of what standard should be applied in order to determine whether this requirement has been satisfied is a work in progress among the circuits. As a result, MNCs may be held liable under the ATCA in several ways depending upon the extent of their operations, their relationship with the host country, and the nature of the alleged violations.

B. The TVPA: State-Action Expressed.

The Torture Victim Protection Act (TVPA) provides a private cause of action only for official torture and extrajudicial killing. The law states:

An individual who, under actual or apparent authority, or color of law, of any foreign nation –
(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.¹³⁹

The TVPA requires the plaintiff to exhaust “adequate and available remedies” in the place the conduct occurred,¹⁴⁰ imposes a ten-year statute of limitations,¹⁴¹ and, interestingly,

judiciary in Burma and any suit against defendants would have been and would still be futile and would result in serious reprisals. There is a pervasive atmosphere of terror and repression throughout the country.”).

¹³⁸ The creation of the International Criminal Court may help relieve some of this pressure on the ATCA and MNCs.

¹³⁹ 28 U.S.C. §1350 note § 2(a) (2005).

¹⁴⁰ *Id.* at § 2(b).

¹⁴¹ *Id.* at § 2(c).

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permits suits by U.S. citizens tortured abroad.¹⁴² Section Three provides definitions for “torture” and “extrajudicial killing.”¹⁴³

However, the act does not provide a definition for the term “individual.” Where under the ATCA, courts have generally presumed MNCs may be held liable, this is not so under the TVPA. The absence of a statutory definition for “individual” has created some difference of opinion among the district courts as to whether corporations may be held liable under the TVPA.

Recently, in *Mujica v. Occidental Petroleum Corp.*,¹⁴⁴ Judge Rea of the Central District of California held that corporations are not “individuals” liable under the statute.¹⁴⁵ In *Mujica*, Occidental, an American company based in Los Angeles, operated an oil production facility and pipeline near the plaintiffs’ village of Santo Domingo as part of a joint venture with the Colombian government. The plaintiffs, Colombian civilians, alleged that Occidental provided funding and practical support for a private security company and the Colombian Air Force (CAF) to engage in military operations aimed at protecting the corporation’s interests from left-wing insurgents. During one such military operation, the private security company and the CAF allegedly dropped a cluster bomb on Santo Domingo, killing seventeen civilians. The plaintiffs brought claims under the ATCA, the TVPA and California state law.

Judge Rea based his holding solely upon a reading of the plain language of the TVPA done in a manner that would avoid an “absurd result.”¹⁴⁶ The statute describes one liable as an

¹⁴² H.R. Rep. 102-367(I), at 4 (1991).

¹⁴³ 28 U.S.C. § 1350 note § 3(a), (b) (2005).

¹⁴⁴ *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164 (C.D. Cal. 2005).

¹⁴⁵ *Id.* at 1176. *See also* In re Agent Orange Product Liability Litigation, 373 F.Supp.2d 7, 55-56 (E.D.N.Y. 2005); *Arndt v. UBS AG*, 342 F.Supp.2d 132, 141 (E.D.N.Y. 2004); *Friedman v. Bayer Corp.*, 1999 WL 33457825 (E.D.N.Y. 1999); *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp 362, 382 (E.D. La. 1997).

¹⁴⁶ *Mujica*, 381 F.Supp.2d at 1176 (quoting *Clinton v. City of New York*, 524 U.S. 417, 429 (1998)).

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“individual” who subjects another “individual” to torture or extrajudicial killing. Rea did “not believe it would be possible for corporations to be tortured or killed” or “to feel pain and suffering.”¹⁴⁷ Rea grounded his construction on the principle that “terms should be construed consistently throughout the statute.”¹⁴⁸ Thus, he found the plaintiff’s argument based on *Clinton v. City of New York* to be unpersuasive. There the Court had held the term “individuals” to be synonymous with “persons” under the Line Item Veto Act, observing that “the term ‘person’ ‘often has broader meaning in the law.’”¹⁴⁹ Rea also noted he could not find any “pertinent legislative authority” in congressional committee reports. Ultimately, however, Rea granted Occidental’s 12(b)(6) motion to dismiss pursuant to the political question doctrine.

Beanal v. Freeport-McMoran provides another bit of helpful analysis in support of the rule that corporations are not “individuals,” and thus not liable, under the TVPA.¹⁵⁰ There, the court also applied a plain-language interpretation of the statute. Tom Beanal, an Indonesian citizen, brought several claims under the ATCA and TVPA against an American corporation headquartered in New Orleans that owned a subsidiary in Indonesia which operated open pit copper, silver and gold mines. As part of its 12(b)(6) motion to dismiss, Freeport asserted that the TVPA did not apply to corporations. District Judge Duval began by analyzing the plain meaning of the term “individual” and noting that the term does not typically include a corporation. The court cited Webster’s New Collegiate Dictionary and Black’s Law Dictionary

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932) (“Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning.”)).

¹⁴⁹ *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 428 (1998)).

¹⁵⁰ *Beanal v. Freeport-McMoran, Inc.*, 969 F.Supp 362 (E.D. La. 1997), *aff’d on other grounds*, 197 F.3d 161 (5th Cir. 1999).

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as defining “individual” to mean a “single human being” and “single person” respectively.

Duval relied on an Eleventh Circuit case in support of this finding.¹⁵¹

Where Judge Rea avoided any “pertinent legislative history”, Judge Duval found that declining to apply the TVPA to corporations was “not at odds with congressional intent.”¹⁵² First, there was no legislative history as to whether corporations may be held liable. Second, the House Report states, “Only ‘individuals’, not foreign states, can be sued under the bill.”¹⁵³ Third, the Senate Report confirmed that the statute used the term “individuals” in order to make it clear that foreign states may not be sued, only “individuals.”¹⁵⁴ Duval concluded from this that Congress purposely chose to use the specific term “individual,” and although Congress may not have intended to exclude corporations from liability, the TVPA clearly applies only to “individuals,” which Duval understands to mean natural persons and not corporations.

Despite the seemingly unimpeachable reasoning of Judges Rea and Duval, at least two other courts have come to the opposite conclusion. In *Sinaltrainal v. The Coca-Cola Co.*, the Southern District of Florida held that liability under the TVPA extended to corporations essentially because there was no evidence in the legislative history of a congressional intent to exempt corporations.¹⁵⁵ The court provided three reasons. First, the Senate Report explained that the purpose of the statute was to “permit suits ‘against persons who ordered, abetted, or assisted in torture.’”¹⁵⁶ Second, the Senate Report did not mention any corporate exemptions and

¹⁵¹ *Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539 (11th Cir. 1996) (holding that the term “individual” as used in the bankruptcy code does not include corporations).

¹⁵² *Beanal*, 969 F.Supp at 382.

¹⁵³ *Id.* (quoting H.R. Rep. No. 102-367(I), at 4 (1991)).

¹⁵⁴ *Id.* (citing S. Rep. No. 102-249, at 6 (1991)).

¹⁵⁵ *Sinaltrainal v. The Coca-Cola Co.*, No. 01-3208, 2003 WL 1846195 (S.D. Fla. 2003).

¹⁵⁶ *Id.* at 17 (quoting S. Rep. No. 102-249, at 9-10 (1991)).

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courts have held corporations liable for suits under the ATCA.¹⁵⁷ Third, and unlike Judge Rea in *Mujica*, the court found the holding in *Clinton v. City of New York* to be persuasive. Thus, because other areas of law generally view corporations as persons, if Congress had intended to exempt corporations from the TVPA it would have done so explicitly. The district court for the Northern District of Alabama adopted this reasoning for its holding in *Lacarno v. Drummond Co., Inc.*¹⁵⁸

There are two significant differences between the TVPA and the ATCA. First, the state-action requirement is found expressly in the TVPA while it is only implicit in the ATCA as a hand-me-down from traditional notions of international law. Second, the TVPA pertains to two clearly defined causes of action for torture and extra-judicial killing and so finds sources for standards of application in domestic law. The ATCA, on the other hand, applies to an amorphous and expanding panoply of international law violations and so it is not limited to domestic sources, but may find the standards for application in international sources. Nonetheless, the TVPA's legislative history perhaps warrants a broader cast of liability than the *Mujica* interpretation of "individuals" would indicate. In its report, the Senate Judiciary Committee explained that the TVPA would permit suits "against persons who ordered, abetted, or assisted in torture."¹⁵⁹ In the *Wiwa* case, the Southern District of New York found that the language and legislative history of the Act supports liability for aiders and abettors.¹⁶⁰ Consequently, the ATCA and the TVPA share a common outer limit for MNC liability at "under color of law" and aider & abettor status for, regarding the latter Act, torture and extra-judicial

¹⁵⁷ *Id.*

¹⁵⁸ *Lacarno v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266 (N.D. Ala. 2003).

¹⁵⁹ S. Rep. No. 249, 102nd Cong., 1st Sess. (1991).

¹⁶⁰ *Wiwa v. Royal Dutch/Shell*, 2002 WL 319887, at 16 (S.D.N.Y. 2002).

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killing, and regarding the former Act, an amorphous and expanding catalog of horrors.¹⁶¹ Of course, the ATCA, pursuant to *Kadic's* genocide exception, eschews the state-action/color of law standard completely for genocide, war crimes and international law violations committed in the course of genocide and war crimes.

IV. Aiding & Abetting Standard for MNC-Accomplice Liability and The Latent Jurisprudence of *Unocal*.

While the federal courts have consistently embraced the state-action requirement in applying the ATCA and TVPA, they have employed several standards in order to determine whether a private corporation may be held liable for a State's human rights violations. Two important methods of holding MNCs liable are as direct actors via § 1983 "color of law" jurisprudence, or as third-party accomplices according aiding and abetting standards. Because MNC's are more likely to engage with foreign states as third-party violators, the aiding and abetting standard will be dealt with more thoroughly. What is not clear, however, as is evident from the *Unocal* case, is against which aiding and abetting standard MNC behavior is to be gauged.

As for § 1983 "color of law" liability, one theory as to its use as a source of ATCA liability relies on the notion that an ATCA claim, while based on an international law violation,

¹⁶¹ The ATCA and TVPA also share a common statute of limitations. Although the ATCA does not expressly mention one, several courts have borrowed the TVPA's ten year period of limitations for ATCA actions. *See Doe I v. Unocal*, 395 F. 3d 932, n.13 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005), *Papa v. United States*, 281 F. 3d 1004, 1011-13 (9th Cir. 2002); *Wiwa v. Royal Dutch/Shell*, 2002 WL 319887, at 19 (S.D.N.Y. 2002); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160, 1180 (N.D. Cal. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 462 (D.N.J. 1999); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1195-96 (S.D.N.Y. 1996). *But see Xuncax v. Gramajo*, 886 F. Supp. 162, 191-93 (D. Mass. 1995) (applying Massachusetts' statute of limitations to ATCA claims without considering applicability of the TVPA ten-year limitations period).

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is actually a domestic claim. “[T]he ATCA does not adopt wholesale all principles of international law. Rather, it creates a domestic cause of action for violations of international law.”¹⁶² Furthermore, the Ninth Circuit, using the language of Judge Edwards in *Tel-Oren*, has stated “It is unnecessary that international law provide a *specific* right to sue. International law ‘does not require any particular reaction to violations of law. . . . Whether and how the United States wished to react to such violations are domestic questions.’”¹⁶³ The ATCA is a creature of domestic law. “[A]bsent an international norm of *what* constitutes state action for the *particular* offense, domestic law may provide a reasonable source of guidance.”¹⁶⁴ As a result, many courts have looked to domestic standards of liability by analogy in order to find that MNCs may be liable for certain violations under the ATCA.

Kadic was perhaps the first court to utilize the “color of law” jurisprudence of 42 U.S.C. § 1983 as “a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.”¹⁶⁵ The court held that “a private individual acts under color of law within the meaning of section 1983 when he acts *together with state officials* or *with significant state aid*.”¹⁶⁶ The *Kadic* court held that the Serb villagers had sufficiently alleged the Radovan Karadzic had acted under color of law by claiming that he “acted *in concert* with the former Yugoslavia”¹⁶⁷

¹⁶² *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1139 (C.D. Cal. 2002).

¹⁶³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984) (Edwards, J., concurring) *cited with approval in* *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

¹⁶⁴ *Nanda & Pansius*, *supra* note 118 (emphasis added).

¹⁶⁵ *Kadic*, 70 F. 3d at 245. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987).

¹⁶⁶ *Id.* (emphasis added). *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

¹⁶⁷ *Id.* (emphasis added).

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In *Sosa*, the Supreme Court implicitly affirmed the Second Circuit precedents since *Filartiga* and *Kadic* pertaining “color of law” liability and holding private corporations liable for *jus cogens* violations of international law under the “genocide exception” absent state action. The Court also affirmed the existence of aiding and abetting liability under the ATCA by quoting with approval Attorney General Bradford’s 1795 opinion that any person “committing, aiding, or abetting” attacks on the British would be “liable for punishment under the law of nations.”¹⁶⁸ However, the Court failed to articulate what standard should be applied in evaluating ancillary MNC liability.

Prior to *Sosa*, courts sought standards for the aiding and abetting liability of MNCs from four directions: civil, criminal, domestic and international. The *Unocal* case, although dismissed pursuant to a settlement in 2005 before it could be reheard by the Ninth Circuit *en banc*, provides two useful examples of jurisprudence a federal court might utilize to hold an MNC liable under the ATCA, regardless of state action. The two judge majority employed an international criminal standard borrowed largely from United Nation’s *ad hoc* tribunals. The concurrence, alternatively, concluded that an ATCA action was one of the narrow fields appropriate for the application of federal common law because such actions often implicated United States relations with foreign states. Furthermore, the concurrence found that the federal common law remedy was necessary in order to promote the Congressional policy underlying the ATCA. The result of *Unocal* is to articulate at least three varieties of aiding and abetting liability possible under the ATCA: international criminal law, federal common law, or international criminal law as expressed, integrated and filtered by federal common law.

¹⁶⁸ 1 U.S. Op. Atty. Gen. 57, 59 (1795). *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2759 (2004). *See also Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1174 n.6 (S.D. Cal. 2005).

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In the *Unocal* case, villagers from Myanmar brought an action under the ATCA against the American oil company Unocal Corp. alleging that it had aided and abetted the Myanmar military in the commission of human rights violations in order to facilitate the construction of a gas pipeline.¹⁶⁹ More specifically, the villagers alleged they were subjected to forced labor, murder, rape, and torture. The two-judge majority in *Unocal* looked to international criminal aiding and abetting standards in holding that the villagers had sufficiently pled violations of the law of nations under the ATCA.

First, applying the “specific, universal, and obligatory” international norm standard,¹⁷⁰ the majority held that torture, murder, rape, and forced labor were all *jus cogens* violations and thus violations of the law of nations.¹⁷¹ Second, the court held that since “forced labor is a modern variant of slavery” it is among those “handful of crimes” that do not require state action to give rise to ATCA liability.¹⁷² Furthermore, because the acts of rape, torture and murder were committed in furtherance of forced labor, a la *Kadic’s* genocide exception, state action is not required for such acts either.¹⁷³

With regard to the forced labor claim, the court held that a reasonable factfinder could find Unocal liable under the ATCA for aiding and abetting the Myanmar Military.¹⁷⁴ The aiding

¹⁶⁹ See *Doe I v. Unocal*, 395 F. 3d 932, 939-40 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

¹⁷⁰ *C.f. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765 (2004).

¹⁷¹ *Unocal*, 395 F. 3d at 944-45.

¹⁷² *Id.* at 946-47. In so holding, the court relied on the following authorities: U.S. Constitution, Thirteenth Amendment (“[n]either slavery nor involuntary servitude . . . shall exist within the United States.”); *United State v. Matta-Ballesteros*, 71 F. 3d. 754, 764 n.5 (9th Cir.1995) (slavery constitutes a *jus cogens* violation); *World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001) (implicitly including forced labor in the definition of ‘slavery’ for purposes of the ATCA); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (forced labor violates the law of nations).

¹⁷³ *Id.* at 954.

¹⁷⁴ *Id.* at 947.

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and abetting standard the court applied was that of “*knowing practical assistance or encouragement* that has a *substantial effect* on the perpetration of the crime.”¹⁷⁵ In so doing, the court chose to apply international law rather than the law of Myanmar or California.

To begin with, the court found that the District Court had erred in applying the “active participation” standard.¹⁷⁶ The District Court had borrowed the standard from the Nuremberg Military Tribunal cases involving German industrialists and the Nazi forced labor programs, where it had been applied in order to overcome the “necessity defense.”¹⁷⁷ Unocal had not invoked that defense. Nonetheless, the court agreed that international law as developed by international criminal tribunals contained the applicable substantive law.¹⁷⁸

The court admitted that it is an open choice of law question as to whether international law, the law of the state where the events occurred, or the law of the forum should be applied.¹⁷⁹ The court cited several domestic sources so as to hold that international law was the applicable law. First, it found that in a case such as this where only *jus cogens* violations were alleged,

¹⁷⁵ *Id.* (emphasis added). While not addressing alternative theories of liability, the court mentioned in dictum that joint venture, agency, negligence, and recklessness may be viable theories on the *Unocal* facts, and perhaps more appropriate in other ATCA cases. *Id.* at 947 n.20.

¹⁷⁶ *Id.* at 947.

¹⁷⁷ “Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil.” *Id.* at 948 n.21 (quoting *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1436 (1950) quoting 1 Wharton’s Criminal Law 177 (12th ed. 1932)).

¹⁷⁸ *Id.* at 948.

¹⁷⁹ *Id.* (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88, 105 n.12). See *Xuncax v. Gramajo*, 886 F. Supp. 162, 180-83 (D. Mass. 1995) (international law provides substantive law for ATCA cases); *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 777, 781-82 (D.C. Cir. 1984) (Edwards, J., concurring) (forum’s tort law provides substantive causes of action); *In re Estate of Ferdinand Marcos*, 978 F. 2d 493, 503 (9th Cir. 1992) (tort law of state where underlying events occurred); *Filartiga v. Pena-Irala*, 630 F. 2d 876, 889 (2d Cir. 1980) (district court must perform traditional choice of law analysis to determine whether international law, forum law, or *lex loci delicti* should provide substantive law).

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international law was preferable because, by definition, any state law is either identical to *jus cogens* norms, or it is invalid.¹⁸⁰ Second, looking to foreign or state law for the cause of action “mutes the grave international law aspect of the [ATCA] tort, reducing it to no more (or less) than a garden variety municipal tort.”¹⁸¹ The court noted that the more crucial tension was between international law and Myanmar’s law (where the underlying events occurred).¹⁸² It implied this was because the law of nations had been absorbed into the federal common law and the federal common law was most likely to be the applicable forum law where the action arose under a federal statute. Third, the Ninth Circuit had previously held that the ATCA creates a cause of action as well as confer jurisdiction.¹⁸³ Fourth, the factors of § 6(2) of the Restatement (2d) of Conflict of Laws point to international law: (a) the needs of the international system would be better served by applying international rather than national law; (b) the relevant policies of the forum cannot be ascertained; (d), (f), and (g) the standard adopted dates back to the Nuremberg trials and resembles that in the Restatement (2d) of Torts; (e) the basic policy underlying the field of tort law is to provide remedies for violations of international law.¹⁸⁴

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (citing *Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995)).

¹⁸² *Id.* at 949 n.23.

¹⁸³ *See Papa v. United States*, 281 F. 3d 1004, 1013 (9th Cir. 2002); *Marcos II*, 25 F. 3d 1467, 1474-75 (9th Cir. 1994). *C.f. Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004) (“[A]lthough the [ATCA] is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. 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.”). *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law . . .”).

¹⁸⁴ *Unocal*, 395 F. 3d at 949.

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Upon different facts, however, the analysis may result in the application of forum state's law, federal common law, or the *lex loci delicti*.¹⁸⁵

Having found international law to be the applicable substantive law, the *Unocal* majority next held that standard of aiding and abetting liability under international criminal law was appropriate. First, the distinction between criminal and tort law is not necessarily important: “[h]uman rights law has largely been developed in the context of criminal prosecutions . . . what is a crime in one jurisdiction is often a tort in another jurisdiction . . . and the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law . . .”¹⁸⁶ Second, the trend among District Courts is to look to international criminal tribunals for human rights law standards under the ATCA.¹⁸⁷ Consequently, the *Unocal* court found that recent decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were “*especially helpful* for ascertaining the current standard for aiding and abetting under international law as it pertains to the ACTA.”¹⁸⁸

¹⁸⁵ *Id.* at 949 n.25.

¹⁸⁶ *Id.* at 949.

¹⁸⁷ *See* Cabello Barrueto v. Fernandez Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (applying the statute and a decision of the International Criminal Tribunal for the former Yugoslavia); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (noting that the statutes of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and their recent opinions are particularly relevant for determining international law norms as they apply to the ATCA).

¹⁸⁸ *Unocal*, 395 F. 3d at 949-50. *See also* Filartiga, 630 F. 2d at 880 (“The law of nations may be ascertained by consulting . . . judicial decisions recognizing and enforcing that law.”). The *Unocal* court denied that it was declaring the *Furundzija* aiding and abetting standard to be the controlling standard and so it was not bound by every aspect of the standard. Rather, the tribunal’s decision was merely one of the sources of international law, but not the source of international law. *Unocal*, 395 F. 3d at 951 n.28. *But see* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

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The *Unocal* court relied principally on the ICTY case of *Prosecutor v. Furundzija* and the ICTR case of *Prosecutor v. Musema* for the *actus reus* and *mens rea* of aiding and abetting under international law.¹⁸⁹ The court noted that the *Furundzija* Tribunal had based its standard on an “exhaustive analysis” of international case law and international instruments. The former consisted of decisions by American, British and German courts hearing cases of Nazi war crimes. The latter consisted of the United Nation’s Draft Code of Crimes Against the Peace and Security of Mankind and the Rome Statute of the International Criminal Court.¹⁹⁰ The court observed that it “is hard to argue with the *Furundzija* Tribunal’s reliance on these sources” and the “Tribunal’s reliance on these sources again seems beyond reproach.”¹⁹¹

With regard to the *actus reus*, *Furundzija* held “it requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”¹⁹² Such “assistance” need not be a *conditio sine qua non* for the acts of the principal, but must merely make a significant difference.¹⁹³ The MNC’s acts have a “substantial effect” where “the criminal act most probably would not have occurred in that same way without someone acting in the role that the accomplice [MNC] in fact assumed.”¹⁹⁴ The *Musema* Tribunal similarly defined the standard as “all acts of assistance in the form of either physical or moral support that substantially contribute to the commission of the crime.”¹⁹⁵

With regard to the *mens rea* for aiding and abetting, *Furundzija* required “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator

¹⁸⁹ *Prosecutor v. Furundzija*, IT-95-17/1 T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999); *Prosecutor v. Musema*, ICTR-96-13-T (Jan. 27, 2000).

¹⁹⁰ *Unocal*, 395 F. 3d at 950-51 n.26, n.27 (citing *Ferundzija* at ¶¶ 192-234, 227).

¹⁹¹ *Id.*

¹⁹² *Id.* at 950 (quoting *Furundzija* at ¶ 235).

¹⁹³ *Id.* (citing *Furundzija* at ¶¶ 209, 233).

¹⁹⁴ *Id.* (citing *Prosecutor v. Tadic*, ICTY-94-1, ¶ 688 (May 7, 1997)).

¹⁹⁵ *Id.* (citing *Musema* at ¶ 126).

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in the commission of the crime.”¹⁹⁶ The MNC need neither share the *mens rea* of the principal, nor know the precise crime that the principal intends to commit.¹⁹⁷ If the MNC is “aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, [the MNC] has intended to facilitate the commission of that crime, and is guilty as an aider and abettor.”¹⁹⁸ Similarly, the *Musema* Tribunal required that the accomplice “[know] of the assistance he was providing in the commission of the principal offence.”¹⁹⁹ It sufficed that he “knew or had reason to know” of the principal’s intent to commit the crime, though he did not have to share the same intent.²⁰⁰

Finally, the court noted that the “assistance” and “encouragement” aspects of the *Furundzija* aiding and abetting standard are similar to that of U.S. tort law. According to Section 876(b) of the Restatement (Second) of Torts: “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other’s conduct constitutes a breach of duty and gives *substantial assistance or encouragement* [sic] to the other . . .”²⁰¹

Ultimately, the Ninth Circuit reversed the District Courts grant of summary judgment for *Unocal* and held that the MNC could be liable for the acts of forced labor, murder and rape, but not the acts of torture. However, the court left the question of liability for providing “moral support” for another day. Because there was sufficient evidence that Unocal gave assistance and

¹⁹⁶ *Id.* (citing *Furundzija* at ¶ 245).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 951 (citing *Musema* at ¶ 180).

²⁰⁰ *Id.*

²⁰¹ *Id.* (citing Restatement (Second) of Torts § 876(b) (1979)). *See also id.* at 951 n.28 (citing Restatement (Second) of Torts § 876 cmt.d (stating the “encouragement to act operates as a moral support”).

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encouragement to the Myanmar Military, it was not necessary to decide whether moral support alone would have been enough for liability.²⁰²

Tort Claims	Actus Reus “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”	Mens Rea “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime”
Forced Labor	<p><i>Practical Assistance & Encouragement:</i></p> <ul style="list-style-type: none"> - “hiring the Myanmar Military (MM) to provide security and build infrastructure along the pipeline route in exchange for money or food”²⁰³ - “using photos, surveys, and maps in daily meetings to show the [MM] where to provide security and build infrastructure”²⁰⁴ <p><i>Substantial Effect:</i></p> <ul style="list-style-type: none"> - “forced labor . . . ‘most probably would not have occurred in the same way’ without someone hiring the [MM] to provide security, and without someone showing them where to do it”²⁰⁵ - Unocal Rep. Robinson: “our assertion that [MM] has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny”²⁰⁶ - Unocal Pres. Imle: “if forced labor goes hand and glove with the military yes there will be more forced labor”²⁰⁷ 	<ul style="list-style-type: none"> - “the evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice”²⁰⁸ - “Unocal knew or should reasonably have known that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage [MM] to subject Plaintiffs to forced labor.”²⁰⁹ - Unocal V.P. Lipman: even before Unocal invested in the Project, Unocal was aware that “the option of having the [MM] provide protection for the pipeline construction . . . would [entail] [sic] that they might proceed in the manner that would be out of our control and not be in a manner that we would like to see them proceed,” i.e., “going to excess.”²¹⁰

²⁰² *Id.*

²⁰³ *Id.* at 952, 952 n.29.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 952-53 (quoting *Tadic* at ¶ 688)

²⁰⁶ *Id.* at 953.

²⁰⁷ *Id.*

²⁰⁸ *Id.* (quoting *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000), *aff’d in part, rev’d in part by Doe I v. Unocal Corp.*, 395 F. 3d 932 (9th Cir. 2002)).

²⁰⁹ *Id.*

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<p>Murder & Rape (in furtherance of forced labor)</p>	<p><i>Practical Assistance & Encouragement:</i> - see Forced Labor</p> <p><i>Substantial Effect:</i> - see Forced Labor - Unocal Consultant Haseman’s comment to Unocal: “the most common [human rights violations] [sic] are forced relocation without compensation of families from land near/along the pipeline route; forced labor to work on infrastructure projects supporting the pipeline . . . [and] <i>execution by the army of those opposing such actions</i> [sic].”</p>	<p>- “Unocal knew or should reasonably have know that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage the [MM] to subject Plaintiffs to these acts of violence.”²¹¹</p> <p>- “[B]ecause Unocal knew that acts of violence would probably be committed, it became liable as an aider and abettor when such acts of violence – specifically, murder and rape – were in fact committed.”²¹²</p>
<p>Torture (in furtherance of forced labor)</p>	<p>“The record does not, however, contain sufficient evidence to establish a claim of torture (other than by means of rape) involving Plaintiffs. Although a number of witnesses described acts of extreme physical abuse that might give rise to a claim of torture, the allegations all involved victims other than Plaintiffs. As this is not a class action, such allegations cannot serve to establish the Plaintiffs’ claims of torture here.”²¹³</p>	

The concurring Judge Reinhardt concluded instead that common law theories of third-party liability ought to be applied rather than borrowing a doctrine from the *ad hoc* War Crimes Tribunal for the Former Yugoslavia.²¹⁴ He found that the question of Unocal’s third-party tort liability “should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard.”²¹⁵

In order to prevail against Unocal for the policy of forced labor committed by the Myanmar Military (MM), the plaintiffs must prove that the private entity may be held legally responsible for MM’s human rights violations. According to Reinhardt, this raises two issues of

²¹⁰ *Id.* at 954 n.32.

²¹¹ *Id.* at 956.

²¹² *Id.*

²¹³ *Id.* at 955.

²¹⁴ Doe I, 395 F. 3d at 977-78 (Reinhardt, J., concurring).

²¹⁵ *Id.* at 963.

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first impression: (1) “Under what circumstances may a private entity doing business abroad be held accountable in federal court for international law violations committed by the host government in connection with the business activities of the private entity [?]”;²¹⁶ (2) “[T]o what body of law do we look in order to determine the answer?”²¹⁷

Regarding the body of law issue, Reinhardt ultimately concluded that federal common law was applicable based on Supreme Court precedents and the Restatement (Second)’s choice-of-law analysis. Reinhardt first noted that the face of the ATCA provides that the “law of nations” applies to determine whether a violation has occurred, but it is silent as to what law applies to ancillary issues, i.e. third-party liability.²¹⁸ Instead of looking to international law, however, as the majority did, Reinhardt believed instead that the court was required to look to the federal common law to resolve “ancillary legal issues that arise in ATCA cases” for the following reasons.²¹⁹

The *Erie* case limited the applicability of federal common law to narrow circumstances (e.g., when authorized by Congress).²²⁰ However, in *Texas Industries v. Radcliff Material*, the Supreme Court held that even without congressional authority, “the federal courts should apply federal common law ‘in such narrow areas as those concerned with the rights and obligations of the United States, *interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations*, and admiralty cases.’”²²¹ Reinhardt reasoned that because

²¹⁶ *Id.* at 965.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *See generally* *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

²²¹ *Doe I*, 395 F. 3d at 965 (Reinhardt, J., concurring) (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)) (emphasis added). *See also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins.*”)

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ATCA claims always involve a violation of international law, they consequently very often implicate our relations with foreign nations. He concluded that there are “unique federal interests involved in [ATCA] cases that support the creation of a uniform body of federal common law....”²²²

The second reason Reinhardt gave for the applicability of federal common law is because in the case of the ATCA the federal courts “are required to resolve issues ancillary to a cause of action created by Congress.”²²³ The Supreme Court held in *United States v. Kimbell Foods, Inc.* that where Congress has created the cause of action, the courts should apply federal common law “to fill the interstices of federal legislation.”²²⁴ Thus, “federal common law is applicable where courts are required to implement the policies underlying a federal statute by fashioning appropriate remedies.”²²⁵ Here, it is necessary to apply federal common law in order to fashion an appropriate remedy with respect to the indirect involvement of third parties in the commission of a federal tort.²²⁶

Reinhardt did not think that situations such that arise in this case are so rare that the courts must immediately surrender themselves to international law. “The fact that some of the acts at issue here may have taken place abroad does not militate in favor of applying international law; transnational matters are litigated in federal court, using federal legal

²²² Doe I, 395 F. 3d at 965 (Reinhardt, J., concurring).

²²³ *Id.* at 965-66.

²²⁴ *Id.* at 966 (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979)).

²²⁵ *Id.*

²²⁶ *Id.* The Eleventh Circuit is in agreement with Reinhardt’s position. In *Abebe-Jira v. Negewo*, 72 F. 3d 844, 848 (11th Cir. 1996), it observed that the purpose of the ATCA is “to establish a federal forum where courts may fashion domestic common law remedies to give effect to violation of customary international law.” Doe I, 395 F. 3d at 966 n.4 (Reinhardt, J., concurring).

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standards, more and more frequently as the pace of globalization grows ever more rapid.”²²⁷

Reinhardt stated that the courts should not look to international law principles unless mandated by a statute or the existence of exceptional circumstances.²²⁸ Examples given for appropriate use of international law include interpreting the substantive provisions of the ATCA, the TVPA and certain provisions of the Foreign Sovereign Immunity Act.²²⁹

Furthermore, Reinhardt found it necessary to distinguish between substituting international law for federal common law and merely using international law as a part of federal common law. In the case of the latter, using federal common law does not mean a court must ignore a relevant principle of international law. But in the case of the former, the court would lose the benefits of the “vast experience embodied in the federal common law” and use instead “an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.”²³⁰

Finally, Reinhardt concluded that federal common law was required pursuant to the choice-of-law inquiry of the Restatement (Second) section 6.²³¹ First, “ease in determination and application of the law” is furthered by a well-developed body of federal common law rather than a criminal law standard recently decided in an ad hoc international tribunal.²³² Second, “certainty, predictability and uniformity of result” are more likely where there are available precedents and the stability of the law is not threatened by possible future decisions of un-formed international tribunal created to deal with a unique regional conflict.²³³ Third, the “justified

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at 967.

²³¹ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 (1974).

²³² Doe I, 395 F. 3d at 967 (Reinhardt, J., concurring).

²³³ *Id.*

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expectations” of the parties are more likely to be met by applying the generally well-known federal common law principles of joint liability, agency, and reckless disregard.²³⁴ Fourth, because the policy of the ATCA is to “establish a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law,”²³⁵ the “relevant policy of the forum” is to apply federal common law remedies.²³⁶ Finally, “the basic polic[y] underlying” the field of ATCA law is to “provide an appropriate tort remedy for certain international law violations.”²³⁷ Thus, the application of a tort standard of liability furthers the policy of using tort law to redress international violations while applying an international criminal law standard does not further that objective.²³⁸ Contrary to the majority, Reinhardt would not have the choice of law determination depend on the facts of each particular case.²³⁹

Having concluded that federal common law was applicable, Reinhardt then discounted the possibility of applying the majority’s standard via the common law. First, the ICTY standard adopted by the majority has not achieved sufficient international acceptance to constitute customary international law so that it may become part of the common law.²⁴⁰ And second, the ICTY’s standard is “far too uncertain and inchoate a rule for us to adopt without further elaboration as to its scope by international jurists.”²⁴¹ For example, the “[m]embers of a future ad hoc tribunal elected by representatives of all of the nations that may then belong to the United Nations General Assembly might well define the term quite differently than does the majority

²³⁴ *Id.*

²³⁵ *Id.* at 967-68.

²³⁶ *Id.* at 968.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 969.

²⁴⁰ *Id.* (citing *Filartiga v. Pena-Irala*, 630 F. 2d 876, 881 (2d Cir. 1980)).

²⁴¹ *Id.* at 969-70.

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here.”²⁴² Reinhardt concluded his concurrence by then describing and applying the three applicable federal common law standards of liability that had been alleged by the plaintiffs: joint venture liability (i.e., Unocal and the Myanmar Military were joint venturers), agency liability (i.e., the Myanmar Military was acting as Unocal’s agent), and reckless disregard (i.e., Unocal recklessly disregarded the known risk that by hiring the MM, it would likely engage in human rights abuses to perform the duties Unocal desired it to fulfill in the pipeline construction). Although Reinhardt would have looked to federal common law for the appropriate standards of third-party liability, he nonetheless arrived at the same conclusion that Unocal could be found liable with the evidence as alleged.

The U.S. District Court of the Southern District of New York aligned itself with the position of the *Unocal* majority in *Presbyterian Church of Sudan v. Talisman Energy*.²⁴³ In *Talisman* several residents of Sudan brought a class action under the ATCA alleging that the Canadian energy company had aided and abetted the Sudanese government in a policy of ethnic cleansing in order facilitate oil exploration activities. The court dismissed Talisman’s motion to dismiss by finding that the plaintiffs had adequately alleged that Talisman had aided and abetted with Sudan to commit *jus cogens* violations. Like the *Unocal* majority, the New York court reached almost instinctively to international sources instead of looking first to U.S. concepts of aiding and abetting. This result seems to be mostly a function of the substance of the allegations, i.e., *jus cogens*, of genocide, war crimes and torture. The court stated:

The ATCA provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the ATCA, courts must look to international law. Thus, whether or not aiding and abetting and complicity are

²⁴² *Id.* at 970.

²⁴³ 244 F. Supp. 2d 289 (S.D.N.Y. 2003). The *Talisman* decision also presents an excellent review of much of the Second Circuit’s ATCA jurisprudence.

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recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law.²⁴⁴

The court then proceeded to cite several international criminal law sources of aiding and abetting liability, many of which had also been utilized by the *Unocal* majority, including: the Statute of the International Military Tribunal, the Statutes of the ICTY and the ICTR, the Genocide Convention, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Prosecutor v. Furundzija*, *Prosecutor v. Musema*, and *Prosecutor v. Tadic*.²⁴⁵

The Supreme Court's *Sosa* decision has served to reconfigure the trend articulated in the *Unocal* and *Talisman* courts's aiding and abetting standard. Even the U.S. District Court of the Central District of California recognized as much.²⁴⁶ The *Sosa* Court effectively signaled that a standard more aligned with Judge Reinhardt's concurrence would fair significantly better than the majority's if challenged before the high court.

The *Furundzija* aiding and abetting standard applied by the *Unocal* majority (i.e., knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime) would not pass must under the test for new causes of action for tortuous articulated by the *Sosa* court. According to *Sosa*, new forms of liability must be "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

²⁴⁴ *Id.* at 320.

²⁴⁵ *Id.* at 322-24. *See also* *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1356 (N.D.Ga. 2002) (adopting the aiding and abetting standard of the ICTY and the *Furundzija* case) *declined to follow by* *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005).

²⁴⁶ *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1173 n.6 (C.D. Cal. 2005) (The Ninth Circuit's decision in [*Unocal*] has arguably been altered by the Supreme Court's more recent decision in *Sosa*.").

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recognized.”²⁴⁷ The Court assessed Alvarez’s claim for arbitrary detention in light of *The Paquete Habana* sources of international law:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, 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.²⁴⁸

First, the *Sosa* Court declined to accept two significant international sources as evidence that a cause of action existed for Alvarez’s arbitrary detention claim under the law of nations for ATCA purposes. The Court found the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights did not create a formal rule of international law and had “little utility” under its standard. The former was simply a declaration of principles and the latter was not self-executing and so did not create enforceable obligations in U.S. federal courts.²⁴⁹

Second, the Court found that the rule Alvarez sought was far too broad to find sanction as a binding rule of customary international law. Alvarez relied heavily on a survey of national constitutions and case from the International Court of Justice. He failed to provide any evidence of foreign laws substantiating the type of arbitrary detention he alleged was prohibited under customary international law. Also, the rule Alvarez sought was in direct tension with existing U.S. law. Thus, Alvarez failed to produce specific evidence of the widespread use of the rule he asserted.

²⁴⁷ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761-62 (2004).

²⁴⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²⁴⁹ *Sosa*, 124 S. Ct. at 2767.

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Likewise, the *Unocal* majority has failed to supply the requisite evidence of customary international law to support its application of a standard articulated by an *ad hoc* war crimes tribunal. Judge Reinhardt’s pre-*Sosa* concurrence presciently described the difficulties with the majority’s standard. First, “courts should not *substitute* [sic] international law principles for established federal common law or other domestic law principles ... unless a statute mandates that substitution, or other exceptional circumstances exist.”²⁵⁰ Second, the *Furundzija* rule is too “uncertain and inchoate” to be considered a binding rule of customary international law. And third, the rule adopted was articulated by an *ad hoc* international court created by an international organization of member states. Customary international law, however, is the result of the consistent practice of states themselves, not of an international body. As Reinhardt pointed out, such a standard is susceptible to redefinition by different members of a future *ad hoc* tribunal elected by the different representatives of the states that may then belong to the United Nations General Assembly at that time.²⁵¹ Thus, the *Unocal* standard fails to meet the *Sosa* test for the law of nations under the ATCA, i.e., specificity, well-worn usage, and widespread international acceptance.

V. Conclusion.

The Alien Tort Claims Act has undergone a renaissance in the last ten years. Foreign human rights victims have been compelled to obtain compensation and recognition through the ATCA due to the convergence of several factors, most notably the significant globalization and expansion of MNC activities in the last decade as well as the inability and unwillingness of States and supra-national organizations to close the “legal lacuna” in which such corporations operate. The *Sosa* Court managed to articulate a standard by which future ATCA litigants and

²⁵⁰ *Doe I v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concurring).

²⁵¹ *Id.* at 970.

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judges might craft their remedies. While it is unlikely the decision will stem the tide of litigation against MNCs for human rights violations, it has at least reigned in the more ridiculous attempts at creating broad standards of ex post facto liability. The best way to protect local stakeholders involved in overseas MNC investment activities is to create workable and predictable parameters in which for them to operate. Without predictability and specificity in the rules, whether based on the law of nations or a legal Lohengrin, it is unlikely that any person will be satisfied with the way corporations interact with foreign governments. The *Sosa* Court affirmed the solid embankment the Second Circuit's ATCA jurisprudence had built, and with little disruption, it managed to establish a breakwater to maintain that jurisprudence's place on the U.S. shore against the unremitting surge of international law.