ATCA & *Doe v. Unocal*: A *Paquete Habana* Approach to the Rescue

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The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.[1]

The exalted power of administering judicially the law of natioans . . . . What a beautiful and magnificent prospect of government is now opened . . . . The sluices of discord, devastation, and war are shut: those of harmony, improvement, and happiness are opened.[2]

I. Introduction

20 years ago Judge Edwards made his now well-known plea for Supreme Court clarification of the "Alien Tort Claims Act" (ATCA)[3] and the law of nations.[4]

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[1] *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980), *internal quote from The Paquete Habana*, 175 U.S. 677, 694 (1900) [hereinafter '*Habana*'].

[2] Supreme Court Justice James Wilson (from a series of lectures delivered at the College of Pennsylvania, 1790-1791) Of Man, as a Member of the Great Commonwealth of Nations, in The Works of James Wilson 282 (R. McLoskey ed., 1967), *quoted in* Douglas J. Sylvester, International Law As Sword Or Shield? Early American Foreign Policy and the Law Of Nations, 32 N.Y.U. J. Intl L. & Pol. 1, 60 (1999). *See also* William Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 505 (1986).

[3] *Codified at* 28 USC § 1350. ATCA is not an "Act"; Alien Tort Statute is a more accurate but less widely used designation. See, e.g., Curtis A. Bradley, Universal Jurisdiction and US Law, 2001 U. Chi. Legal F. 323, 342 (2001). Others would prefer the statute be called the Alien Tort Clause, since it was in fact a clause in Section 9 of the Judiciary Act of 1789. William S. Dodge, The Historical Origins of

His plea echoes through a series of recent Ninth Circuit alien tort claim decisions here labeled *Unocal I, II,* and *III*. The litigation concerns Unocal's alleged complicity in Burmese security forces' use of forced labor to construct oil and gas pipeline facilities.[5] *Unocal III* is a vacated appellate court decision, recently reheard en banc.[6] A final Ninth Circuit decision is expected in the fall of 2003.[7]

The Alien Tort Statute: A Response to the "Originalists", 19 Hastings Int'l & Comp. L. Rev. 221, fn.6 (1996).

[4] *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (C.A.D.C., 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'"). Judge Robb disagreed in the same per curiam decision ("When a case presents broad and novel questions of this sort, courts ought not to appeal for guidance to the Supreme Court, but should instead look to Congress and the President. Should these branches of the Government decide that questions of this sort are proper subjects for judicial inquiry, they can then provide the courts with the guidelines by which such inquiries should proceed.") 726 F.2d at 827 (Robb opinion).

The terms 'customary international law' and 'the law of nations' are treated here as equivalent. *See Siderman de Blake v. Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) ("customary international law [is] the direct descendant of the law of nations"); *and Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 7 (D.D.C. 1998) ("The law of nations [is] currently known as international customary law. . . .").

[5] *Doe v. Unocal Corp.* 963 F. Supp. 880 (C.D. Cal. 1997) [hereinafter "*Unocal I*"]; *Doe v. Unocal Corp.* 110 F. Supp. 2d 1294 (C.D. Cal. 2000) [hereinafter "*Unocal II*"]; and *Doe v. Unocal Corp,* --- F.3d ---, 2002 WL 31063976 (9th Cir., September 18, 2002) [hereinafter "*Unocal III*"]. At times the litigation as a whole will be referred to as *Doe v. Unocal*.

[6] The en banc order is at *Doe v. Unocal Corp.*, 2003 U.S. App. LEXIS 2716 (9th Cir., Feb. 14, 2003). For a news report on the hearing, *see* Jason Hoppin, 9th Circuit Wrestles With ATCA Standards, The Recorder, June 18, 2003, available at

A rehearing decision that largely affirms the appellate court may compel Supreme Court review, and then we may have the long overdue update of judicial rules for determining customary international law.[8] This in turn would clarify which international human rights violations, and what behavior in complicity with those violations, fall within the scope of ATCA.[9]

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http://www.law.com/jsp/newswire_article.jsp?id=1055463665626 (last accessed September 20, 2003). An unofficial transcript of the en banc hearing is provided by one of the NGOs assisting the plaintiffs, Earthrights International: http://www.earthrights.org/unocal/enbanctranscript.doc (last visited September 22, 2003). See *infra* note 22 and accompanying text for further information on the NGOs assisting the plaintiffs.

[7] *See* Harold H. Koh, Wrong on Rights, Yale Global Online, July 18, 2003, available at http://yaleglobal.yale.edu/display.article?id=2121 (last accessed 8/7/03).

[8] Customary international law is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987); cf. Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1031 (entered into force Oct. 24, 1945) (stating that the Court shall apply "international custom, as evidence of a general practice accepted as law").

[9] For this reason, the now seven years of litigation have been closely watched by allies of international corporations and human rights advocates. *See* Marcia Coyle, 9th Circuit Spurns U.S. Over Alien Tort Claims, National Law Journal, June 10, 2003, available at http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1052440857507&t=LawArticle (writing that *Doe v. Unocal* is "viewed as pivotal by human rights and corporate defense lawyers in the fight over ATCA.") (page unavailable online)*; and* Jenna Greene, Gathering Storm, Legal Times, July 23, 2003, available at http://www.law.com/jsp/newswire_article.jsp?id=1058416406911 (last accessed September 20, 2003) (Greene writes that the case is closely watched. Regarding

The Ninth Circuit en banc oral arguments took place on June 17, 2003. As expected, the judges' main interest was whether the appellate court was correct to submit Unocal's actions to an aiding-and-abetting standard derived from ad hoc international criminal tribunal decisions.[10] The judges indicated they are considering the *Unocal III* concurrence, which had suggested instead applying a federal civil common law standard to the aid-and-abet claims.[11]

However, by presenting itself with only those two choices, the appeals court displays the unpalatable alternatives U.S. courts are normally presented in making customary international law determinations. A third and better alternative is to institute a judicial practice – in a substantive international law matter such as the applicable aiding-and-abetting standard – of freshly determining such standards from the consensus among the world's domestic legal systems. This might be called a "*Paquete Habana*" approach, but a natural extension in line with the increased scope and domestic penetration of international law. Such an approach should be applied to Unocal's conduct, because ATCA subsumes only customary international law torts, and actions – Unocal's aiding and abetting conduct the critical consideration here – which would not generate civil or criminal liability in the vast majority of the world's legal systems should not be considered law of nations torts. A *Paquete Habana*

ATCA, she states that "[b]usiness advocates nationwide are sounding the alarm about the once-obscure 1789 statute…" with "[g]round zero in the fight … *Doe v. Unocal*." She adds that "[l]abor and human rights activists, religious groups, environmental organizations and plaintiffs' lawyers are mobilized to defend the statute…") Id. (page unavailable online).

[10] *Doe v. Unocal Corp*., 2003 U.S. App. LEXIS 2716 (9th Cir., Feb. 14, 2003) (en banc rehearing order).

[11] *Id*.

approach, in essence, recognizes the consensual nature of customary international law, that it must derive from settled practice among the nations of the world.

ATCA itself may receive a fresh review if the Supreme Court considers *Unocal III*. Concerned by a statute unbound by the 'new' customary international law, the Court might seek to dim the statute's usefulness in international human rights litigation.[12] The Court might even align itself with the scholarship of Judge Robert Bork and others, who have long advocated limiting ATCA to law of nations torts actionable in the 1790s, or to torts taking place in the U.S.[13] Instead, with a

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[12] *See* Curtis A. Bradley, The Status of Customary International Law in the U.S. Courts – Before and After Erie, Volume 25, Number 3, Denv. J. of Int'l L. & Policy (1997) (A critic of the new customary international law, Bradley states that it "differs from traditional customary international law in several fundamental ways: it can arise much more quickly; it is based less on actual state practice and more on international pronouncements, such as UN General Assembly resolutions and multilateral treaties; and, perhaps most importantly, it purports to regulate not the relations of states among themselves, but rather a state's treatment of its own citizens."). For other critical views, *see* Patrick Kelly, The Twilight of Customary International Law, 40 Va. J. Int'l L. 449 (2000); *and* Jack L. Goldsmith and Eric A. Posner, Understanding the Resemblance Between Modern and Traditional Customary International Law, 40 Va. J. Int'l L. 639 (2000); *see also* Louis Henkin, Human Rights and State "Sovereignty", 25 Ga. J. Int'l. & Comp. L. 31 (1995-1996) (Henkin argues that binding international human rights norms can be discovered through examination of liberal national constitutions, and are "not based on. . . state practice at all.") *Quoted* at 38.

[13] *See Tel-Oren*, 726 F.2d at 810-816 (D.C. Cir. 1984) (Bork, J., concurring); Alfred P. Rubin, Professor D'Amato's Concept of American Jurisdiction Is Seriously Mistaken, 79 Am. J. Int'l L. 105 (1985).

The *Doe v. Unocal* defendants and the Department of Justice show their sympathies in briefs submitted to the en banc panel reviewing the case. Both feature as their main arguments Bork's position that ATCA does not provide a cause of

modernized *Paquete Habana*, the Court should resist Bork's historically inaccurate position and at the same time reject the new, non-consensual, non-positivist customary international law.

After briefly describing the human rights violations in Burma that gave rise to litigation against Unocal, this paper begins to connect ATCA with those wrongs by examining the early history of the alien tort statute, in particular its original purpose. The paper finds that early history generally in harmony with the statute's revival in modern international human rights litigation, which includes the Unocal litigation. The paper begins discussion of the modern era with *Filartiga v. Pena-Irala*, an

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action. Supplemental Brief of Defendants-Appellees, filed April 23, 2003, available at http://www.unocal.com/myanmar/enbanc_brief/pdf; *and* Brief for the United States of America As Amicus Curiae, May 8, 2003, available at http://www.unocal.com/myanmar/doj/pdf. The plaintiffs filed a response to the Department of Justice brief. Plaintiffs-Appellants Supplemental Brief in Opposition to Amicus Curiae Brief Filed by the United States, filed June 2, 2003, available at http://www.ccr-ny.org/v2/legal/corporate_accountability/docs/OppositionBrieftoDOJ.pdf.

At the en banc hearing, Ninth Circuit judges appeared little interested in the approach to ATCA taken by Bork. *See* Hoppin, *supra* note 6 ("Several times when [Unocal lawyer M. Randall Oppenheimer] was asked about aiding and abetting standards, he responded with the caveat that he was only engaging the question hypothetically, since he believes the case cannot be brought under the ATCA. The judges seemed to pay little mind to his protestations.") Id. (page unavailable online). See also *See* Coyle, *supra* note 9. Coyle writes that the en banc 9th Circuit – in its June, 2003 *Alvarez-Machain v. U.S.*, No. 99-56772, and *Alvarez-Machain v. Sosa*, No. 99-56880 decisions – ignored the Justice Department argument that ATCA does not create a cause of action and therefore does not allow aliens to bring claims for conduct taking place in other countries. "The en banc 9th Circuit ignored the government's request to revisit precedents or an analysis of the statute…")

offspring of the birth of modern international human rights law in the Nuremberg Tribunal. The discussion of ATCA concludes by reviewing the controversy surrounding Judge Bork's opinion in the Tel-Oren decision, and finds the *Filartiga* human rights litigation tradition more compatible with an originalist understanding of ATCA than Judge Bork's ATCA scholarship.

Finally, the paper examines the Unocal litigation, in particular the *Unocal III* decision, which employed a notion of customary international law that appears to escape the boundaries of the *Filartiga* tradition, deriving its legal standards inappropriately from Nuremberg-style ad hoc criminal tribunals. Such a practice inaccurately suggests that the tribunals have established a customary international law independent of the practice of sovereign states and their legal systems. A common-sense examination of choice of law principles suggests the *Paquete Habana* methodology be applied not merely to primary violations of customary international law – such as the forced labor allegations against the Myanmar military government – but also to substantive legal issues ancillary to the primary ones, in this instance the third-party complicity standard to be applied to Unocal's behavior.

II. Human Rights Violations in Burma

The Unocal decisions concern a class action suit brought by farmers from the Tenasserim region of Burma (also internationally recognized as Myanmar) against, among others, Unocal Corp. ("Unocal"), Total S.A. ("Total"), and the Burma's military government.[14] The farmers alleged that the Burmese military (through a state-

[14] Burma's military government is called the State Law and Order Restoration Council, or SLORC. *Unocal I* and *Unocal II* use the acronym. *Unocal I*, 963 F. Supp.

owned oil and gas company) had committed international human rights violations in furtherance of a Unocal, Total and Burmese military joint venture, the Yadana gas pipeline project.[15] The Burmese military and security forces allegedly used the farmers as slave labor for the pipeline project, and raped, tortured and murdered those who refused.[16] Plaintiffs alleged that Unocal and Total, by using the services of the Burmese security forces with some awareness of their practices, had in effect themselves used the Burmese farmers as slave labor for the pipeline project.[17] Successive Burma regimes' have "long and well-known history of imposing forced labor on their citizens."[18]

The Unocal litigation originated with a Burmese trade union leader, U Maung Maung, and his serendipitous contact with a Georgetown law school student, Douglas Steele.[19] U Maung Maung, an exile in Thailand, was dismayed by the flood of refugees escaping from Burma who told him of forced labor and associated rape, torture and murder on the Unocal-Total pipeline project.[20] He wondered aloud to Steele whether any action could be brought against Unocal in U.S. courts, and Steele

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at 883, and *Unocal II*, 110 F. Supp. 2d at 1296. *Unocal III* instead uses the term "the Myanmar military." *Unocal III*, --- F.3d --- at 1.

[15] *Unocal I*, 963 F. Supp. at 883.

[16] *Id*. at 883.

[17] *Id*. at 883.

[18] *Unocal III*, --- F.3d --- at 4.

[19] *See* Terry Collingsworth, The Key Human Rights Challenge: Developing Enforcement Mechanisms, 15 Harv. Hum. Rts. J. 183, 187 (2002).

[20] *Id*. at 183. U Maung Maung was General Secretary of the Federation of Trade Unions of Burma (FTUB).

investigated.[21] Steele eventually contacted the International Labor Rights Fund in Washington, D.C.,[22] which filed a claim against Unocal in September 1996.[23] It was the first ATCA-based international human rights action against a U.S. corporation.[24]

III. ATCA, From Intent to Revival

A. Original Intent and Early History

A legal understanding of the case brought against Unocal must start with an understanding of ATCA, but based on more than the statute's reasonably clear wording. ATCA, adopted in 1789 and codified at 28 U.S.C. § 1350, declares that the federal district courts 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." From the wording alone the statute is clear – it allows a civil action to be brought in federal courts (1) by an alien (2) for a tort (3) committed in violation of

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[21] *Id*. Steele was working as a legal intern with an adviser to the FTUB.

[22] The organization's website is www.laborrights.org. Two other NGOs assisting the plaintiffs are EarthRights International of Washington, D.C. and Chiang Mai, Thailand, whose Unocal webpage is at http://www.earthrights.org/unocal/index.shtml, and New York's Center for Constitutional Rights, whose *Doe v. Unocal* webpage is at http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmm&Content=45.

[23] *See* Collingsworth, *supra* note 19 at 187.

[24] *Id*.

international law. Who can be sued is not limited, and might include aliens as well as U.S. citizens.[25]

However, the statute's rare use before its human rights litigation revival – only twenty-one cases had invoked jurisdiction under ATCA before 1980[26] – made courts, and scholars anxious that revived usage be in accord with the statute's original meaning and purpose for Congress.[27] So courts have striven to interpret ATCA in light of Judge Learned Hand's counsel that "statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."[28]

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[25] The class of defendants would in time be restricted to aliens alone, though neither the statute nor the limited early case imply such a restriction. *See* William S. Dodge, Symposium: Which Torts in Violation of International Law?, 24 Hastings Int'l & Comp. L. Rev. 351 (2001).

[26] *See* Kenneth C. Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute, 18 N.Y.U. J. Intl. L. & Pol. 1, 4-5 n.15 (1985).

[27] *See* Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. J. Int'l L. 461, 463 (1989) ("The current debate over the meaning and scope of the Statute is being waged on historical turf. … An original intent argument may seem particularly attractive because the Statute virtually lay fallow for 200 years."). Burley would later change her last name to Slaughter. *See Tel-Oren*, in particular the concurring opinions by Bork and Edwards, for thorough examinations of ATCA's background and historical context. *Tel-Oren*, 726 F.2d 774 (D.C. Cir. 1984).

[28] *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

Yet the statute was once famously declared "a kind of legal Lohengrin,"[29] and a complete account of its purpose and object may not be possible. There is, for example, no record of discussions in Congress leading up to enactment of ATCA.[30] Nonetheless, many windows into Congressional thinking are available, and the origins and general purposes of ATCA turn out to be reasonably clear.[31] First of all, it is evident the statute was the product of a broad effort by a militarily weak nation reliant on international commerce to gain control over its voice in foreign relations.[32] One

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[29] *ITT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975) (stating that "although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.") Lohengrin, a legendary figure depicted in the Wagner opera of the same name, was a mysterious knight who refused to reveal his full identity to his bride. *See* Courtney Shaw, Note: Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act, 54 Stan. L. Rev. 1359, fn. 33 (2002).

[30] *See* Ivan Poullaos, Note: The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations, 80 Wash. U. L.Q. 327, 329 (2002); *and Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (citing 1 Annals of Cong. 782-833 (J. Gales ed., 1789) ("The debates over the Judiciary Act in the House--the Senate debates were not recorded--nowhere mention the provision, not even, so far as we are aware, indirectly.").

[31] *See* Randall, *supra* note 26 at 11 ("True, no specific legislative history exists on the Judiciary Act; but other historical and legislative sources, when pieced together, adequately indicate the statute's origins and purposes."); *and* William S. Dodge, The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 Va. J. Intl L. 687, n.27 (2002) (declaring that, in the wake of considerable legal historical research, "it is fair to say that the Alien Tort Statute is no longer a 'legal Lohengrin' …")

[32] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964), described ATCA as one of several provisions in the Judiciary Act "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal

element of that voice was treatment of tort actions by foreigners for international law violations.[33]

Scholarly disagreement arises when discussion moves from those general purposes to more specific ones. Scholars pose two main purpose for the statute (both will be discussed in detail shortly). Some see a 'defensive' purpose: that the statute was conceived of as a defensive measure to remove a potential cause for international conflict with the U.S. from the diplomatic arsenal of aggressive mercantile powers.[34] Another viewpoint is that the statute's purpose was 'assertive', that it was a by-product and expression of a struggle by neutrals – during an era of near constant war – for 'free trade' with belligerent nations.[35] The U.S. took up this campaign alongside other militarily weak nations dependent on international commerce, and the battle was

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institutions." *See also* Randall, *supra* note 26 at 72 (1985) ("[T]he federal government's plenary authority over matters touching foreign relations motivated the statute's promulgation.").

[33] *See Tel-Oren*, 726 F.2d at 812 (D.C. Cir. 1984) (Bork, J., concurring) ("those who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with other nations."); Randall, *supra* note 26 at 72 (1985) ("the statute's origin and purpose are . . . linked to the drafters' concern with extending federal authority over certain tort actions brought by aliens where federal jurisdiction might otherwise have been unavailable. . . ."); *and, generally*, Dodge, *supra* note 3.

[34] *See, e.g.*, Anthony D'Amato, Editorial Comment: The Alien Tort Statute and the Founding of the Constitution, 82 Am. J. Intl L. 62, 64 (1988), and Stewart Jay, The Status of the Law of Nations in Early American Law, 42 Vand. L. Rev. 819, 840 (1989) ("At the practical level, the need to avoid a violation that would give a more powerful country cause for war explained the insistence on following the law of nations.).

[35] *See* Sylvester, *supra* note 2. Sylvester's thesis will be more expansively explored later in this subsection.

waged by means of moral persuasion; there was little else to work with against the mercantile world powers.[36] The moral character of the struggle made it both natural and strategic to remove resolution of international law disputes, including alien tort suits, from the 'interested' political branches to the loftier realm of the judiciary.[37] The judiciary's job, after all, was to detect, define and interpret natural law and morality, and the federal judiciary could best be expected to establish a uniform and prominent 'national position' on the law of nations in accord with and supportive of U.S. policy and commercial interests.[38]

Actually, there need be no real disagreement about ATCA's purposes: the two objectives described are both compatible and supported by the historical evidence.[39] Therefore, we will proceed under the well-supported supposition that ATCA had both defensive and assertive purposes. The comparative priority Congress gave to those two goals remains uncertain, yet this is not critical for a modern understanding of ATCA in the human rights litigation context. What is necessary, however, is a more detailed grasp of the background and context of the statute and its purposes, in order to gain the best possible understanding of Congressional intent and how it might fit with use of the statute for redress of international human rights violations.

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[36] *Id*.

[37] *Id*.

[38] *Id*.

[39] Douglas J. Sylvester, who makes the case for the assertive purpose, acknowledges both purposes' existence: "Legal historians and scholars alike believe that the law of nations was used as a shield. A proper understanding of the period demonstrates that it was used just as often as a sword to achieve specific policy goals of the young country." Sylvester, *supra* note 2 at 7. For the defensive purpose, *see* D'Amato, *supra* note 34 at 64.

Regarding the 'defensive' purpose, ominously in 1789 a powerful enemy could interpret denial of an adequate judicial forum to an alien tort claimant as official approval of the wrongful tort against the alien, and, consequently, as an affront to the foreigner's home country.[40] Emmerich de Vattel, the most influential international law scholar in the early days of the U.S., stated specifically that "denial of justice" to aliens abroad was one justification for initiation of a war of reprisal by the foreign national's home country.[41] Prior to passage of ATCA, consequently, perceived mistreatment of an alien tort claim by a state court – with no federal influence over that forum and no judicial alternative provided for the alien – could readily mutate into a transnational insult, drawing the U.S. into a war or lesser international incident.[42] Therefore, a standard contention is that ATCA's primary attraction was its

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[40] Kathryn L. Pryor, Note: Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act? 29 Va. J. International L. 969, 971 (1989).

[41] *See* D'Amato, *supra* note 34 at 64. The quotation is from Emmerich de Vattel, The Law of Nations, bk. II, ch. XVIII, §350, at 230- 31 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). Although on this matter he reflected a wide consensus, Vattel was less influential in France and Britain than he was among the militarily weak trading nations. *See* also Dennis R. Nolan, Sir William Blackstone and the New American Republic: A Study of Intellectual Impact, 51 N.Y.U. L. Rev. 731 (1976) (Nolan discusses Blackstone's influence on the Founders.).

[42] Pryor, *supra* note 40 at 972. *See also Tel-Oren*, 726 F.2d at 783 (D.C. Cir. 1984) (Edwards, J., concurring). "Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory.... If the court's decision constitutes a denial of justice, or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts.... A private act, committed by an individual against an individual, might thereby escalate into an international confrontation."

assurance against or at least maximization of federal control over such a scenario.[43] Alexander Hamilton commented in the Federalist Papers, "As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned."[44] ATCA would before long provide such federal cognizance over torts in violation of international law.

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[43] D'Amato, *supra* note 34 at 64 (1988) (D'Amato writes that ATCA's original, "overriding purpose was to maintain a rigorous neutrality in the face of the warring European powers. The United States was still weak militarily, compared to England, France and Spain. Many years would be needed before the new nation could stand firm against any aggressive threat from abroad. During the formative years of buildup, it was imperative that no excuse, no casus belli, be given to a foreign power.").

See also Alexander Hamilton in the Federalist Papers ("As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.") The Federalist No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961). *Quoted in* Dodge, *supra* note 3 at 236. The Federalist Papers were originally published in 1787and 1788.

[44] The Federalist No. 80, *supra* note 43 at 476 (Alexander Hamilton). *Quoted in* Dodge, *supra* note 3 at 236. Note that such a purpose for ATCA indicates it can be used against foreign as well as U.S. nationals when a 'law of nations' tort is committed. *See in this regard,* William S. Dodge, Symposium: Which Torts in Violation of International Law?, 24 Hastings Int'l & Comp. L. Rev. 351 (2001).

One ‘defensive’ concern vis a vis the Great Powers of the day involved states’ refusal to enforce treaties between the federal government and foreign nations.[45] Of particular concern, the treaty ending the Revolutionary War promised payment of debts to British creditors, but in fact state courts many times blocked efforts to collect the debts.[46] Britain as a consequence repeatedly threatened reprisals, jeopardizing U.S. security.[47] ATCA could have provided a means of redress, because treaty violation injuries were torts in violation of the law of nations.

Two 1780s violations of diplomatic privileges, one an assault, are further examples of the federal powerlessness the new Congress wanted to alleviate with ATCA. “The Marbois Affair” is better known, and concerned a 1784 threat and assault upon French Consul General Francis Barbe Marbois in Philadelphia.[48] An international clamor ensued, the case was widely discussed by key federal figures, and Congress stepped in to offer a reward for capture of the assailant, Chevalier De Longchamps, a French citizen.[49]

The federal government could do no more, as it had judicial jurisdiction over neither crimes nor torts in violation of international law. This inadequacy was of wide concern, and in 1785 the Continental Congress was forced to explain to Marbois that federal powers were confined by “the nature of the federal union in which each State

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[45] Beth Stephens, Federalism and Foreign Affairs: Congress's Power To "Define and Punish . . . Offenses Against the Law of Nations", 42 Wm. & Mary L. Rev. 447, 466 (2000).

[46] *Id*. at 466-467.

[47] *Id*. at 467.

[48] The details of the story are not in dispute. This recapitulation is drawn from Dodge, *supra* note 3 at 229-230; *and* Dodge, *supra* note 31 at 693-695.

[49] *See* Dodge, *supra* note 3 at 229-230; and Stephens, *supra* note 45 at 466.

retains a distinct and absolute sovereignty in all matters not expressly delegated to Congress leaving them only that of advising in many of those cases in which other governments decree."[50]

Pennsylvania handled the criminal prosecution of Longchamps well from the national perspective: he was tried and convicted of violating the law of nations, which was held to be part of Pennsylvania common law. A civil action was not available to aliens under Pennsylvania law – the state had disregarded a 1781 Congressional resolution asking that such redress be made available by the states[51] – and no tort suit was filed in the affair.[52]

The other display of federal inability to punish a violation of diplomatic privileges occurred in 1788, when a New York City police officer entered Dutch ambassador Van Berckel's residence and arrested one of his servants.[53] Secretary Jay complained that the federal government apparently was not vested "with any judicial Powers competent to the Cognizance and Judgment of such Cases."[54] Fortunately again for relations with a world power, a state court found the officer guilty of violating international law and sentenced him to three months in jail.[55]

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[50] 28 Journals of the Continental Congress 1774-1789 (Library of Congress, 1912) at 314, *quoted in* Dodge, *supra* note 3 at 229-230.

[51] *See* Dodge, *supra* note 31 at 692-693. *See also* Dodge, *supra* note 3 at 229-230.

[52] *See* Dodge, *supra* note 31 at 694-695.

[53] *See* Dodge, *supra* note 3 at 230 (1996).

[54] *See* 34 Journals of the Continental Congress 1774-1789 (Library of Congress, 1912) at 111, *quoted in* Dodge, *supra* note 3 at 230.

[55] *See* Dodge, *supra* note 3 at 230.

Fears in Congress that other states would not handle such cases as well as Pennsylvania led to passage of a 1785 resolution asking Secretary of Foreign Affairs, John Jay "to report the draft of an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privileges and immunities of public Ministers from foreign powers."[56] There is no record of Jay having prepared such a draft.

Perhaps he was put off by the feeble response to the 1781 Congressional recommendation mentioned in reference to the Marbois affair. That resolution had asked states to create criminal sanctions for certain international law violations against aliens and, summarizes William Dodge, to authorize "(1) tort suits by the injured party against the tortfeasor, and (2) suits by the United States against the tortfeasor to reimburse the United States for compensation paid to the injured party."[57] While the text of the resolution indicates the tortfeasor in the second case had to be a U.S. citizen, a Connecticut bill in response to the Congressional resolution went further and allowed such suits against "any Person or Persons whatsoever."[58] Unlike Connecticut, however, it appears many states did not follow up on Congressional urging that they provide for criminal sanctions and law suits against law of nations violators.[59]

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[56] 29 Journals of the Continental Congress 1774-1789 (Gaillard Hunt ed., 1912) at 655, *quoted in* Dodge, *supra* note 31 at n.39 (2002).

[57] *See* Dodge, *supra* note 31 at 692-693.

[58] *See* Dodge, *supra* note 31 at 693, *quoting* 4 The Public Records of the State of Connecticut for the Year 1782, at 157 (Leonard Woods Labaree ed., 1942).

[59] *See* Dodge, *supra* note 31 at 694-5.

The figure of Oliver Ellsworth ties the Congressional recommendations with the state and federal statutory acts. He was a member of the Continental Congress that passed the 1781 resolution asking that states enact laws allowing damage suits and establishing criminal sanctions for international law violations against aliens.[60] He was also a member of the 1782 Connecticut General Assembly that responded as described above to the Congressional recommendation.[61] Finally, he was responsible for writing most of the Judiciary Act of 1789, including Section 9.[62] The 'ATCA' sub-section of Section 9, of course, in line with the 1781 recommendation and the Connecticut law, gave district courts jurisdiction over suits by an injured alien against his or her tortfeasor for law of nations violations.

ATCA might placate foreign powers because federal courts were considered more consistent and less biased toward foreigners than state courts.[63] In general, they

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[60] *See* Dodge, *supra* note 3 at 228-229. The recommendation asked that states enact laws that would "authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." Dodge, *supra* note 31 at 692, *quoting* 21 Journals of the Continental Congress 1774-1789 (Gaillard Hunt ed., 1912) at 1137.

[61] *See* Dodge, *supra* note 31 at 692-693. Dodge notes, *id*. n.32, that the Connecticut statute allows suits by aliens for any tort, not just for torts in violation of the law of nations.

[62] Dodge, *supra* note 31 at 695.

[63] *See Tel-Oren*, 726 F.2d at 782-783, *and* Dodge, *supra* note 3 at 235 (1996) (writing that among the factors motivating provision of the alien tort statute were "a desire for uniformity in the interpretation of the law of nations, and a fear that state courts would be hostile to alien claims."). As matters turned out, federal judicial uniformity was not all it could have been, due to gaps in Supreme Court appellate jurisdiction. See Dodge, *supra* note 3 at n.101; *and* William S. Dodge, Note, Congressional Control of Supreme Court Appellate Jurisdiction: Why the Original

would be more likely to give to alien claims consideration that would be regarded favorably by the non-citizen's home country. Federal courts also would be expected to be more sensitive to U.S. national interest implications of cases involving aliens.[64]

Note, by the way, the joining together of crime and tort in the 1781 Congressional resolution, the 1782 Connecticut law, and the 1789 Judiciary Act. An intention to expand the nation's civil liability international law duties beyond the very limited scope set down by Blackstone was, for example, evident in the 1781 resolution.[65] Anne-Marie Burley (later Slaughter) argues the wider scope of redress recommended in the resolution "was an entirely logical addition, implicitly recognizing that justice under the law of nations could require making the victim whole as well as punishing the transgressor."[66] The Judiciary Act of 1789 carried forward the concept of parallel civil and criminal sanctions for law of nations violations, granting federal courts jurisdiction over common-law crimes "cognizable under the authority of the United States" – which included crimes in violation of international law – alongside federal jurisdiction and a cause of action for alien tort claims.[67] Judiciary Act author Ellsworth appeared to suppose, quite reasonably, that

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Jurisdiction Clause Suggests an "Essential Role," 100 Yale L.J. 1013, 1017 n.19 (1991).

[64] Pryor, *supra* note 40 at 971.

[65] While Blackstone saw law of nations violations primarily as crimes, but also wrote that civil liability in the form of restitution against a transgressor was available under the law of nations for violation of a safe-conduct. *See* Dodge, *supra* note 3 at 226 & n.35, quoting 4 William Blackstone, Commentaries *69-70. *See also* Burley, *supra* note 27 at 477 & n.74 (1989).

[66] Burley, *supra* note 27 at 477.

[67] *See* Dodge, *supra* note 3 at 231, *quoting* The Judiciary Act of 1789, ch. 20, s. 9, 1 Stat. 73, 76-77.

there might be a variety of possible offenses against international law, some of which were best resolved by criminal sanctions, others by civil damages to the injured, and some by a combination of criminal and civil sanctions.[68]

Just like that offered for a 'defensive' purpose, there is also sufficient evidence for an assertive purpose for ATCA. That evidence, however, takes a more abstract turn, starting with the Founders' fondness for Vattel and "Continental" international law doctrine.[69] That doctrine was aligned with U.S. commercial and security interests and early leaders of the United States made it their own.[70] Furthermore, they wanted to lift it up against rival Anglo-French doctrine – or, perhaps more accurately, establish it against the Anglo-French opposition to Continental law of nations doctrine becoming the widely accepted international law.[71] This provided an assertive purpose for ATCA, because its advocates hoped it would promote and solidify international acceptance of Continental international law doctrine as 'the' international law doctrine, by subjecting international tort conflicts to a consistent and 'disinterested' U.S. judicial treatment that happened to advance and establish Continental doctrine.[72]

The specific doctrinal concern of early U.S. leaders, in an era of near constant military conflict between France and Britain, was the degree to which international

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[68] Burley, *supra* note 27 at 477.

[69] "The Continent" generally describes the European nations other than the two mercantile heavyweights, France and Great Britain.

[70] Sylvester, *supra* note 2 at 66 ("To start, it must be understood that the "American" theory of the law of nations was an adaptation of the Continental philosophies on the law of nations.").

[71] *See* Sylvester, *supra* note 2 at 43-44, 66.

[72] *See* Sylvester, *supra* note 2 at 30-31 (1999).

law would favor belligerent or neutral rights in commerce.[73] The Americans advocated an understanding of the law of nations that strongly favored neutral rights,[74] with Vattel the most prominent of the American "pantheon" of international law jurists promoting that conception.[75] In fact, early post-Colonial judicial decisions cited almost exclusively to five international law scholars from three nations – The Netherlands, Austria, and Denmark – which, like the U.S., were heavily dependent on international trade for their economic prosperity, militarily weak, and usually neutrals in wars between the mercantile powers.[76] "Not surprisingly," writes Douglas Sylvester, "their understandings of the law of nations heavily favored neutral rights at

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[73] It was "an age of the basest diplomatic intrigue, of hostilities too rarely assuaged in periods of peace, and of the utmost ruthlessness in the conduct of hostilities." Edwin Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 Am. J. Int'l L. 239, 241 (1932), *quoted in* Sylvester, *supra* note 2 at 5.

[74] Sylvester, *supra* note 2 at 37, 64 (1999).

[75] *See* Sylvester, *supra* note 2 at 67 ("Grotius, Bynkershoek, Wolff, Vattel, and Pufendorf formed the American pantheon of writers on the law of nations. According to Edwin Dickinson, early American judicial decisions implicating the law of nations cited almost exclusively to these Continental writers, and they were quoted quite frequently for propositions about the law of nations: in all, in the 1780s and 1790s, there were nine citations to Pufendorf, sixteen to Grotius, twenty-five to Bynkershoek, and a staggering ninety-two to Vattel.") The Dickinson citation is to Edwin Dickinson, Changing Concepts and the Doctrine of Incorporation, 26 Am. J. Int'l L. 239, 259 n.132 (1932)) *See also* Sean D. Murphy, The U.S. Lawyer-Statesman At Times Of Crisis: A Look at Colonial America, 95 Am. Socy Intl L. Proc. 99, 105 (2001).("[I]n the thirty years after ratification of the Constitution, U.S. courts would turn to Vattel as their favorite authority on the theory of international law."); *and* Jay, *supra* note 34 at 823 ("In ascertaining principles of the law of nations, lawyers and judges of [the post-colonial] era relied heavily on continental treatise writers, Vattel being the most often consulted by Americans.").

[76] *See* Sylvester, *supra* note 2 at 40-41.

the expense of belligerent rights. In so doing, these writers envisioned an international society predicated on peaceful relationships forged through trade."[77]

The early leaders of the Republic were very much attracted to Vattel's vision of an international relations based on natural law guaranteeing security and the benefits of trade to all states large and small.[78] Under Vattel's international law standard – which he believed continental Europe already reflected – the concerted power of the entire community of nations, both out of obligation and from realization of the commercial and security benefits of the rule of the law of nations, would overcome any country that dared suppress the rights of another.[79]

The new nation's leaders were idealistic enough to believe that successful promotion of Continental international law might allow U.S. relations with the world to stabilize into such a Vattelian system.[80] And so, in the Republic's early years, the U.S. engaged in a "proactive foreign policy based not on simple nationalistic self-interest" but rather on promotion for the U.S., through advancement of Continental/American law of nations doctrine, of a de-militarized, commerce-driven international relations.[81] Such relations would realize two central hopes of early American foreign policy: "first, that international commerce should be predicated on a

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[77] *See* Sylvester, *supra* note 2 at 67.

[78] *See* Emmerich de Vattel, The Law of Nations at lxii (J. Chitty ed. 1863) (original edition published in 1758) ("A dwarf is as much a man as a giant; a small Republic is no less a sovereign state than the most powerful kingdom."), *quoted in* Jay, *supra* note 34 at 840.

[79] Sylvester, *supra* note 2 at 41.

[80] For an example of such idealism, see the quotation of Judge Wilson that begins this essay.

[81] Sylvester, *supra* note 2 at 41.

theory of neutral rights and free trade, and second, that economic measures, not armed conflict, were the proper response to belligerence."[82]

These views conflicted with those of the dominant mercantile powers, England and France. In fact, Edmund Genet, minister of France to the United States in the early 1790s, belittled the international status of neutral rights as "diplomatic subtleties" and "aphorisms of Vattel and others. . . ."[83]

England more explicitly challenged the American understanding of neutral rights when it announced, in 1756, that the commerce of neutral nations with belligerent states in wartime would be restricted to peacetime levels.[84] Continental theory and its U.S. advocates advanced the much more liberal neutral trading rights doctrine: that it had an unrestricted right to trade with belligerents during a war. Thomas Jefferson argued that

> when two nations go to war, those who chuse [sic] to live in peace retain their natural right to pursue their [commerce], to carry the produce of their industry, for exchange, to all nations, belligerent or neutral, as usual, to go and come

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[82] Sylvester, *supra* note 2 at 43.

[83] Sylvester, *supra* note 2 at 43, quoting Letter from Thomas Jefferson to Gouverneur Morris, United States Minister to France (Aug. 16, 1793), in 6 The Writings of Thomas Jefferson 371, 379 (quoting Letter from Edmund Genet to Thomas Jefferson (June 22, 1793)) (Paul Leicester Ford ed., 1899).

[84] *See* Sylvester, *supra* note 2 at 45, and Valuari at 91.

freely without injury or molestation, and in short, that the war among others shall be for them as if it did not exist.[85]

U.S. advocates of Continental law of nations theory also favored the "free ships" doctrine, which precluded from seizure all goods found in a neutral vessel, including belligerent goods.[86] Under this understanding, if France, while at war with Great Britain, were to stop an American ship and find English goods on board, those goods would not be condemned as prize.[87]

Neutral rights was occasionally a topic of contention in federal judicial decisions of the 1790s, and judges did advance continental law of nations doctrine.[88] With international law "within their exclusive control," Sylvester writes, "federal courts used their decisions to support the needs of a commerce-based system. In order to do this, the law of nations needed to strengthen commitments towards neutral trade--at the expense of belligerent rights."[89] Nonetheless, "it was only by rigorous application, even in cases against the specific interests of Americans, that these rights

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[85] Sylvester, *supra* note 2 at 45, quoting Letter from Thomas Jefferson to Thomas Pinckney (Dec. 20, 1793), in 27 The Papers of Thomas Jefferson 55 (Julian P. Boyd ed., 1953).

[86] Sylvester, *supra* note 2 at 44 ("In the 1780s Congress codified [the free ships doctrine] into American law, and at least once this enactment formed the rule of decision in a case.").

[87] Sylvester, *supra* note 2 at 44. 'Prize' is the wartime capture of ships or cargo, by privateers and other forces of belligerent nations during time of war, and is "therefore liable to being condemned or appropriated as enemy property." Black's Law Dictionary 1218 (1999).

[88] *See* Sylvester, *supra* note 2 at 31-36.

[89] Sylvester, *supra* note 2 at 64.

could hope to be vindicated in international relations."[90] Fitting into this overall strategy is ATCA's assertive purpose of promoting Continental doctrine on neutral rights and free trade. In sum, that assertive objective and the previously described defensive were the statute's purposes.

However, despite its embodiment of those two important objectives, ATCA was rarely made use of. In the 1790s, only two cases and one U.S. Attorney General opinion are available for possible insight into the statute's original intent.[91] In the first case, *Moxon v. The Fanny*,[92] a 1793 district court denied federal court jurisdiction on political question grounds,[93] but in dicta stated that ATCA jurisdiction would have been denied even without the political question roadblock, because plaintiffs had sued for both restitution and for damages. Therefore, they had not sued for a "tort only" as the statute demanded.[94] The second case, *Bolchos v. Darrel*,[95] involved the capture,

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[90] Sylvester, *supra* note 2 at 35.

[91] Dodge, *supra* note 3 at 251. There likely are other cases or Attorney General opinions unrecorded or unpreserved. William Casto notes an early Attorney General opinion that does not explicitly mention ATCA but does refer to an ambassador prosecuting "an indictment in district court"; this appears to rely on the statute because an ambassador could not prosecute a criminal suit. Casto, supra note 2 at 504 n.208 (discussing 1 Op. Att'y Gen. 141 (1804)).

[92] 17 F. Cas. 942 (D. Pa. 1793) (No. 9895)

[93] *Moxon*, 17 F. Cas. 946-7.

[94] Dodge, *supra* note 3 at 252. As Dodge states, the interpretation of the court was that "only" meant only one remedy, for damages, could be sought under ATCA, which meant the *Moxon* suit could have been made acceptable to the court simply by deleting from it the restitution claim. This is contrary to another possible interpretation of "for a tort only" under which, if the events in issue give rise to types of claims in addition to tort claims, the federal court must refuse jurisdiction. *See generally*, for this second point of view, Joseph M. Sweeney, A Tort Only in

by a French privateer, of slaves mortgaged to a Spanish citizen, with the mortgagee a British citizen. In port the mortgagee's agent seized the slaves. The privateer brought suit for the proceeds of the sale. On an initial matter, the court claimed jurisdiction in the admiralty. It then added, on its jurisdictional right: "Besides, as the 9th section of the Judiciary Act . . . gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point."[96] The preceding indicates that ATCA grants more than jurisdiction in the admiralty, that its grant is in fact the wide-ranging one indicated on its face. In any event, though the court stated it would have restored the property to the neutral mortgagor under the law of nations, it ruled in favor of the French privateer because of a treaty between the U.S. and France stating that "the property of friends found on board the vessels of an enemy shall be forfeited."[97]

In the same year as *Bolchos*, 1795, ATCA was suggested as a remedy for victims of an attack on the British colony of Sierra Leone by a French fleet led by an American slave trader.[98] The British Ambassador officially protested, and doing

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Violation of the Law of Nations, 18 Hastings Intl & Comp. L. Rev. 445 (1995). (Sweeney states ATCA was directed at captures of prize in which "the legality of the capture was not in issue, and the suit was 'only' for the reparation in damages of a wrong related to a capture.") *Id*. at 482. Dodge, *supra* note 3 at 243-256, answers Sweeney's argument. Sweeney's restrictive interpretation of ATCA was rejected by the Second Circuit in *Kadic v. Karadzic*, 74 F.3d 377 (2nd Cir. 1996).

95 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

96 *Id*.

97 *Id*.

98 D'Amato, *supra* note 34 at 66.

nothing was not a safe response. However, if the U.S. paid reparations directly to Great Britain surely France would have been angered.[99] "Fortunately, the Founding Fathers had foreseen this very dilemma a half-dozen years earlier when they enacted the Alien Tort Statute," enthuses modern commentator Anthony D'Amato. Attorney General William Bradford issued an official opinion directing the British to the statute, which offered a solution especially felicitous for the U.S. since an ATCA suit by the British would have necessitated litigating from the standpoint of the U.S./Continental understanding of the law of nations.[100]

And then for 185 years activity dropped off considerably, for reasons that are uncertain. It may have been because for most of those years the law of nations was understood to concern primarily affairs between nations and not between individuals and nations.[101] Also, the wider purposes of the statute rapidly fell away, as the U.S.

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[99] *Id*.

[100] Specifically, Bradford stated, "there can be no doubt that the company [the Sierra Leone company] or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States; ... such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose. . . ." D'Amato, *supra* note 34 at 66 (1988), *quoting* 1 Op. Att'y Gen. 57, 59 (1795).

Similarly, a 1907 opinion of the Attorney General, regarding injuries caused by violation of a U.S. treaty covering the Rio Grande U.S.-Mexico border, stated that ATCA provided both jurisdiction and a cause of action for the private Mexican citizens who wanted to sue. See 26 Op. Att'y Gen. 250 (1907), discussed in Randall, *supra* note 26 at 49-50.

[101] *See*, e.g., Anne-Marie Slaughter, Symposium: Rogue Regimes and the Individualization of International Law, 36 New Eng. L. Rev. 815, 816 (2002) (Although several exceptions have been widely accepted, the Westphalian

effort to establish a Continental doctrine of neutral rights and free trade was overwhelmed by the need to accommodate the mercantile powers, France and Great Britain.[102]

The discussion of purposes and objects now complete, several implications of the ATCA's original meaning and purpose appear relevant to the revival of the statute as a vehicle for international human rights actions. First of all, and generally, ATCA served a straightforward purpose, to advance the national interest by putting a federal stamp on the law of nations, this having both defensive and assertive motivations. Secondly, and the historical context of the assertive objective especially puts this on view, Congressional leaders saw the statute as part of an effort to put the legal 'voice' of the U.S. consistently behind one version of international law, in a time of international conflict over the 'true' law of nations. The assertive purpose for the statute, therefore, assumes the malleability of international law, since that purpose is to establish more firmly or to reform the law of nations advantageously for the U.S. The nobler language of the day stated that international law had recently improved

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formulation of relations between nations held that"what sovereign governments did within their own borders was of no concern to their neighbors. States were the subjects of international law; international law regulated only political and economic relations between states, not within them.").

[102] The "fragile consensus" in the U.S. for pursuit, through non-military measures, of an international system based on neutral rights and free trade had been destroyed by 1809. Sylvester, *supra* note 2 at 55. "Unfortunately for the new country, without sufficient economic or military power to force adherence to neutral trading doctrines, this foreign policy was doomed to failure in the wake of the great conflicts of the 1790s and 1800s." Sylvester, *supra* note 2 at 44-45.

with the times,[103] and conceivably would develop further in the future.[104] The law of nations was understood as changeable – even though derived from and a subclass of immutable natural law – because it was a reflection of human reason's only gradual and imperfect progression in awareness of underlying natural law.[105] A third implication was that Congress seemed to understand the statute might be employed in a wide variety of alien tort claims, which explains in part its broad language. Congress apparently meant what it said, and did not want the statute only to be applied to a

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[103] Jefferson stated in 1793 that the principles of the law of nations "have been liberalized in latter times by the refinement of manners and morals..." *See* Sylvester at 59, *quoting* Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 6 The Writings of Thomas Jefferson 243 (Paul Leicester Ford ed., 1899). Further, Jefferson would write in 1816:

> [L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.

Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 10 The Writings of Thomas Jefferson 42-43 (Paul Leicester Ford ed., 1899). *Quoted in* Sylvester at 59.

[104] The decision in *Habana*, 175 U.S. 677, was guided in part by just such progress in the law of nations. The question was whether fishing ships were protected by international law from capture during wartime. Though a 1798 English case had stated such protection was a rule only of international comity, the Court held that "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." *Id*. at 694.

[105] *See* the quotations from Jefferson at supra note 103.

specific subclass of torts, for instance those ancillary to the capture of 'prize'.[106] Finally, and this matter awaits further exploration in the following sub-section, ATCA was originally understood to provide plaintiffs with both a general and specific cause of action.[107] This last matter became quite controversial early in the modern revival of ATCA as a vehicle for international human rights actions.

B. The *Filartiga* Tradition: ATCA's Modern Revival

Up to 1980, only twenty-one cases had invoked jurisdiction under ATCA, and no one paid much attention to it, human rights advocates included.[108] In that year, however, a victim of crimes against humanity in Paraguay used the statute successfully in a U.S. federal court.[109] Dr. Joel Filartiga, a Paraguayan physician who had arrived in the US in 1978, alleged that Americao Peña-Irala was responsible for the torture and killing of Filartiga's 17-year-old son. Filartiga initiated legal action in Paraguay, but his attorney was arrested, threatened with death by Peña-Irala, and disbarred without just cause. In 1979 Peña-Irala was discovered living in the US and held for deportation. A federal court served a summons on him for wrongfully causing the death of Filartiga's son, and plaintiffs sought to have the deportation enjoined to ensure Peña-Irala's availability for trial. The legal action was brought principally under the jurisdiction of ATCA.[110] A lower court dismissed the complaint for lack of subject matter jurisdiction, and during the appeal Peña-Irala was deported back to Paraguay.

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[106] *See* Sweeney, supra note 94 at 482.

[107] *See* Dodge, *supra* note 3 at 237-240.

[108] *See* Randall, *supra* note 26 at 4-5 n.15 (1985).

[109] Filartiga, 630 F.2d at 876.

[110] *Id*. at 879.

The lower court decision was reversed in favor of *Filartiga* by appellate judge Irving R. Kaufman, who found ATCA applicable in its provision for federal court jurisdiction.[111] Kaufman held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."[112] Overruling the lower court on another matter, Judge Kaufman stated that courts "must interpret international law not as it was in 1789, but as it has evolved and exists today among the nations of the world today."[113] On remand, Peña-Irala took no part in the case, and the court awarded punitive damages of $5 million each to Filartiga and his daughter. The judgment was never collected.

In the past two decades *Filartiga* has been used as a point of reference in more than a hundred cases, and ATCA has been utilized in several dozen U.S. human rights actions.[114] Nevertheless, it is still unclear how useful the statute is or will be in enforcing international human rights claims. A straightforward concern, for example, continues to be the difficulty collecting damage awards.[115] In addition, it is not yet

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[111] *Id*. at 878

[112] *Id*. at 878.

[113] *Id*. at 881. *See also Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

[114] *See* Henry J. Steiner & Philip Alston, International Human Rights in Context 1049 (2000). *See* Beth Stephens, Taking Pride in International Human Rights Litigation, 2 Chi. J. Intl. L. 485, 485 (2001) for the numbers of ATCA cases.

[115] *See* Charles Curlett, Introductory Remarks–Alien Tort Claims Act, International Law Weekend Proceedings, ILSA Journal of International and Comparative Law 273 (Spring, 2000) ("Although [ATCA litigation has] generated two billion dollars in damage awards, none has been collected."); *and* Shirin Sinnar, Book Note: Torture as Tort: Comparative Perspectives on the Development of

clear how heavily federal courts will burden ATCA-based human rights claims under a range of judicial doctrines prompted by litigation of international matters. Judges have found international comity, forum non conveniens, sovereign immunity, and the act of state, color of law (or state action), and political question doctrines relevant to consideration of ATCA claims.[116]

C. Judge Bork v. ATCA

Despite the documentary and indirect evidence available regarding the original purposes of ATCA, Judge Robert Bork, in a concurrence to the 1985 per curiam *Tel-Oren v. Libyan Arab Republic* decision, contended Congress was unaware of the changing nature of the law of nations.[117] Therefore, he insisted, Congress intended ATCA to concern only acts that in 1789 were in violation of the law of nations.[118] Bork's position has not been supported in the courts. In line with the history presented

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Transnational Human Rights Litigation, 38 Stan. J. Intl L.331 (2002) (noting, on the subject of ATCA law suits, that while "obtaining redress from perpetrators is often cited as an objective of transnational human rights cases, few claimants actually receive compensation even after a favorable judgment").

[116] *See, generally*, Phillip I. Blumberg, Asserting Human Rights Against Multinational Corporations under United States Law: Conceptual and Procedural Problems, 50 Am. J. Comp. L. 493 (2002), *and* John Haberstroh, *In re World War II Era Japanese Forced Labor Litigation* and Obstacles to International Human Rights Claims in U.S. Courts, 10 Asian Law Journal 253 (2003). An examination of these obstacles is outside the scope of this paper.

[117] *See Tel-Oren*, 726 F.2d at 810-816 (D.C. Cir. 1984) (Bork, J., concurring).

[118] *Id*. Dodge describes this position as "demonstrably incorrect." Dodge, *supra* note 3 at 241.

in the sub-section A, the modern scholarly and judicial consensus is that the law of nations is changeable.[119]

Judge Bork also asserted that the statute provided only a grant of jurisdiction, meaning that ATCA claimants would have to find a cause of action elsewhere for any claim that, in 1789, had not been understood to have a cause of action attached. [120] Dodge rejects this position as "patently antihistorical,"[121] continuing directly:

> The very notion of an express cause of action did not appear until 1848 – nearly sixty years after Congress passed the Alien Tort Clause. In 1789, it was understood that the common law provided the right to sue for a tort in violation of the law of nations, just as it provided the right to sue for any other kind of tort.[122]

In addition, as is nearly explicit in sub-section A, ATCA's original purpose and intent were to grant foreigners the right to sue for tort claims in federal courts,

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[119] Dodge refers to this as the prevailing view. Dodge, *supra* note 3 at 223 *See also Kadic*, 70 F.3d 232.

[120] *See Tel-Oren*, 726 F.2d at 801 (D.C. Cir. 1984) (Bork, J., concurring) ("[I]t is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."). In the late 18th Century, according to Blackstone, "[t]he principal offences against the law of nations . . . are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of embassadors; and, 3. Piracy." 4 William Blackstone, Commentaries *68 (*quoted in* Dodge, *supra* note 3 at 226).

[121] Dodge, *supra* note 3 at 237.

[122] Dodge, *supra* note 3 at 237-238.

and early use of the statute actuated this understanding.[123] The judicial consensus is that a cause of action is implicit in ATCA. *Doe v Unocal*'s Ninth Circuit agrees, finding the statute provides a cause of action.[124]

In contrast to Bork's apparent understanding of the statute, ATCA is most accurately understood as 'merely' allowing an already existing substantive right of action to be exercised in a new venue, the federal courts.[125] *Filartiga*, for example read 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."[126] ATCA, after all, was not a replacement for, but only added to a common law right of action already available in state courts.[127] The state courts today still have concurrent jurisdiction with the federal circuit over tort claims advanced by non-citizens, and can

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[123] *See generally*, Dodge, *supra* note 3; Burley, *supra* note 27 at 463; Anthony D'Amato, What Does Tel-Oren Tell Lawyers?: Judge Bork's Concept of the Law of Nations is Seriously Mistaken, 79 Am. J. Intl L. 92 (1985); *and* Randall, *supra* note 26 at 72.

[124] *See Unocal II*, 110 F. Supp. 2d at 1303, and *Unocal III*, --- F.3d --- at 8.

[125] *Filartiga*, 630 F.2d at 887. *See also* Tel-Oren, 726 F.2d at 780 n.5 (D.C. Cir. 1984) (Edwards, J., concurring) ((Referring to the passage from *Filartiga* cited in the text, Edwards stated, "I construe this phrase to mean that aliens granted substantive rights under international law may assert them under § 1350. This conclusion . . . results in part from the noticeable absence of any discussion in Filartiga on the question whether international law granted a right of action.").

[126] *Id*.

[127] District court jurisdiction under the Alien Tort Clause was "concurrent with the courts of the several States, or the circuit courts, as the case may be." Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (now § 1350). *Cited in* Dodge, *supra* note 3 at n.100.

also deal with torts in violation of international law.[128] This right under international law to make a tort claim in state courts arose in the colonial era not from state statutes but from the incorporation into state law of the law of nations, through the inclusion of the law of nations in the American colonies' common law.[129]

In sum, Bork's position is an challenge weak in scholarship, and the revival of ATCA as an instrument advancing international human rights is solidly compatible with the statute's original purposes and the Founders' understanding of the law of nations. In that light, therefore, it would be a shame if an aggressively conservative Supreme Court were, in a review of *Unocal III*, to demolish this human rights weapon. The loss might be especially bitter since the entry point for Supreme Court

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[128] *See* D'Amato, *supra* note 34 at 65 (1988). *See also* the state court litigation discussed *infra* note 288, which involves the same international law violations as those alleged in Forced Labor; and the state court litigation discussed *infra* note 103, concerning the alleged international law violations of Unocal in Burma.

[129] *See* Dodge, *supra* note 3 at 232 (*quoting* Blackstone (4 William Blackstone, Commentary *67), "'the law of nations . . . is . . . adopted in it's [sic] full extent by the common law, and is held to be a part of the law of the land.'"); *and* Jay, *supra* note 34 at 825 ("American revolutionaries held as a fundamental article of faith that the colonists were entitled to the protection of the common law. … In the early years of the American Republic, federal judges, leading political figures, and commentators commonly stated that the law of nations was part of the law of the United States."). *See also* Dodge, *supra* note 3 at 232 (Partly in answer to the contention that ATCA establishes only federal jurisdiction and not a cause of action, Dodge states that in early post-revolutionary America, "violations of the law of nations were widely recognized as common-law crimes. … [and torts] were the civil counterparts of crimes… The important point is that in 1789 neither crimes nor torts in violation of the law of nations required positive legislation to be actionable; both were cognizable at common law.")

involvement is an ostensibly mundane but so far intractable task, the working out a third-party liability standard to apply to Unocal's conduct.

IV. *Doe v. Unocal* Sources Third-Party Complicity

A. Three Decisions in Search of a Standard

The Unocal decisions build on *Filartiga*'s solid foundation, but whether they do so wisely is a matter to explore. First of all, *Doe v Unocal* has dealt with the third-party liability standard by considering it a reverse "state action' or "color of law" issue. Under this view, the liability of Unocal depends on whether its conduct meets some standard for complicity with the state's first-party torts. In an alien tort claim, meeting such a standard triggers tort liability and it triggers classification of Unocal's 'private-party' acts as state action, usually a necessary element of a customary international law violation.[130]

Looked at as a whole, *Doe v. Unocal* is a muddle on how to go about finding and establishing the liability standard. For example, as the following brief overview illustrates, each decision of the three decisions, in its re-analysis of the complicity issue, has incorporated new sources of law. The plaintiffs won an initial victory in *Unocal I*: the 1997 decision relied on § 1983 'color of law' doctrine to develop a

[130] There are exceptions to the state action requirement, however. *See Unocal II*, 110 F. Supp. 2d at 1305 ("[T]he law of nations has historically been applied to private actors for the crimes of piracy and slave trading, and for certain war crimes."); *and Kadic*, 70 F.3d at 239-244 (removing the state actor requirement from genocide and war crimes).

complicity standard for Unocal's conduct.[131] *Unocal II* reversed the earlier decision in 2000,[132] in part, incidentally, because there was a heavier legal burden on the plaintiffs.[133] *Unocal II* also employed § 1983 doctrine, but dismissed the action because the private and public defendants did not share a common unlawful goal.[134] Innovatively, the decision enlisted relevant Nuremberg Tribunals decisions to support its third-party liability standard.[135] Two years later, *Unocal III* overruled *Unocal II* [136] While it agreed with consulting Nuremberg tribunal decisions, it rejected *Unocal II*s readings of them.[137] *Unocal III*'s innovation was to give standard-setting weight to decisions by two recently formed ad hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[138] Finally, a February 2003 Ninth Circuit order sets aside *Unocal III* for en banc review, and again returns to the third-party liability issue, indicating it will address the disagreement in the *Unocal III* majority and concurring opinions over what standard to use.[139]

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[131] *Unocal I*, 963 F. Supp. at 890-891.

[132] *Unocal II*, 110 F. Supp. 2d 1294.

[133] *See* Shaw, *supra* note 29 at 1372 (""The [*Unocal I* judge] dealt with the case during a Rule 12(b)(6) motion for failure to state a claim, and he allowed the plaintiffs to proceed. Later, however, [the *Unocal II* judge] considered the claim as part of the more stringent standard for summary judgment.").

[134] *Unocal II*, 110 F. Supp. 2d at 1306-1307.

[135] *Unocal II*, 110 F. Supp. 2d at 1309-1310.

[136] *Unocal III*, --- F.3d ---.

[137] *Unocal III*, --- F.3d --- at 10.

[138] *Unocal III*, --- F.3d --- at 12-13.

[139] *See* Koh, supra note 7.

As noted, the *Doe v. Unocal* decisions have focused on the state action question, but one with a reversed causation of the usual state action analysis. In this regard, both *Unocal I* and *II* used the joint action test, one of four federal common law tests sanctioned by the Supreme Court for determining whether private action is sufficiently connected with official acts to trigger private liability for action 'under color of law.'[140] The joint action test asks whether private parties and complicit state officials have acted "in concert" to effect a deprivation of constitutional rights.[141] Courts find state action where there is a "substantial degree of cooperative action" between state and private actors in the deprivation of constitutional rights.[142]

In *Unocal I* plaintiffs alleged that Unocal and state officials were jointly engaged in forced labor and other human rights violations in furtherance of the pipeline project. The court agreed, and decided the allegations were sufficient to support subject-matter jurisdiction under ATCA.[143] Notably, however, during its review of court decisions related to joint action, *Unocal I* commented that "some courts have found that the joint action test requires that the state and private actors 'share a common, unconstitutional goal.'"[144] It was this lack of a shared

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[140] *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 377-78 (1995) (identifying the four tests as nexus, state compulsion, public function and joint action).

[141] *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1453 (10th Cir. 1995).

[142] *Neil Young Freedom Concert*, 49 F.3d at 1453.

[143] *Unocal I*, 963 F. Supp. at 891.

[144] *Gallagher*, 49 F.3d at 1453, *citing Cunningham v. Southlake Ctr. for Mental Health, Inc.*, 924 F.2d 106, 107 (7th Cir. 1991).

unconstitutional goal between Unocal and the Myanmar military that would be central to the *Unocal II* reversal of the earlier decision.

The *Unocal I* decision also found the Second Circuit's 1995 *Kadic* decision instructive. *Kadic* innovatively made use of 42 U.S.C. § 1983 'color of law' jurisprudence in order to classify as state action private party human rights violations in the former Yugoslavia. Color of law jurisprudence had first been employed in the civil rights era to challenge, as state action, nominally private deprivations of civil rights.[145] *Kadic* explained that color of law extends the liability associated with state action to any individual who "acts together with state officials or with significant state aid."[146] For such an individual the § 1983 jurisprudence "is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under [ATCA]."[147]

Unocal I was cheered as a substantial victory for human rights abuse victims because it recognized a "'knew or should have known' theory against a corporation that 'looked the other way' and benefited from atrocious acts."[148] Human rights

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[145] *See, e.g.*, *United States v. Price*, 383 U.S. 787, 794 n.7 (1966) (stating, "In cases under [42 U.S.C.] § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment"); *and Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (finding a basis for relief under § 1983 when a police officer and employee of a private firm "reached an understanding" to violate plaintiff's constitutional rights). *See also, however*, *Collins v. Womancare*, 878 F.2d 1145, 1148 (9th Cir. 1989) (finding that the Supreme Court had made a distinction between the color of law and state action concepts).

[146] *See Kadic*, 70 F.3d at 245.

[147] *Id.*.

[148] John Christopher Anderson, Respecting Human Rights: Multinational Corporations Strike Out, 2 U. Pa. J. Lab. & Emp. L. 463, 500 (2000).

advocates' hopes were of course deflated by *Unocal II*.[149] A critical difference with *Unocal I* was *Unocal II*'s more demanding interpretation of the joint action test.[150] In order to classify their acts as state action, the court held, corporations must do more than benefit from state wrongdoing. Specifically, they must conspire or participate with the state in the violations of international law, and exercise control over the actions of the state.[151] Working from the § 1983 case law, the court stated,

> In order for a private individual to be liable for a § 1983 violation when the state actor commits the challenged conduct, the plaintiff must establish that the private individual was the proximate cause of the violation. . . In order to establish proximate cause, a plaintiff must prove that the private individuals exercised control over the government official's decision to commit the section 1983 violation.[152]

The Nuremberg Tribunal characterizations of joint action and complicity also underpin the *Unocal II* understanding of the joint action test.[153] According to the court, Nuremberg rested its guilty verdicts in several trials of industrialists who had used Third Reich slave labor "not on the defendants' knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful

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[149] *See, e.g.*, Maria Ellinikos, American MNCs Continue to Profit from the Use of Forced and Slave Labor, 35 Colum. J. L. & Soc. 1, 12 ("As the Unocal case law reveals, all legal efforts to provide relief for the forced laborers in Burma thus far remain fruitless.").

[150] *Unocal II*, 110 F. Supp. 2d at 1305-1306; and *Unocal I*, 963 F. Supp. at 890, citing Dennis v. Sparks, 449 U.S. 24, 27 (1980).

[151] *Unocal II*, 110 F. Supp. 2d at 1305-1307.

[152] *Id*. at 1307, citing *King v. Massarweh*, 782 F.2d 825, 829 (9th Cir.1986).

[153] *Id*. at 1309-1310.

conduct."[154] In fact, the tribunal acquitted defendants who had not exercised initiative in acquiring forced labor.[155] Examining Unocal's actions, the *Unocal II*court agreed that the evidence suggested the corporation knew that forced labor was being used and that it was benefiting from its use.[156] Guided by Nuremberg, however, the court ruled that such a showing did not establish liability under international law, since Unocal had not actively sought the use of forced labor.[157]

Comment on *Unocal II* has criticized its use of the joint action test and its "active participation" standard, citing several international tribunal decisions' less stringent tests for classification of private party acts as state action.[158] Notably

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[154] *Id*. at 1310. *Unocal III* rejected application of this standard ("The District Court incorrectly borrowed the 'active participation' standard for liability from war crimes cases before Nuremberg Military Tribunals involving the role of German industrialists in the Nazi forced labor program during the Second World War. The Military Tribunals applied the 'active participation' standard in these cases only to overcome the defendants' 'necessity defense.' In the present case, Unocal did not invoke – and could not have invoked – the necessity defense." *Unocal III*, --- F.3d --- at 10. The Nuremberg tribunal, the court noted, defined that defense as follows: "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*., quoting *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1436 (1950), which itself was quoting 1 Wharton's Criminal Law 177 (12th ed. 1932). The court also stated that a reasonable fact finder might find Unocal liability even if the "active participation" standard were applied. *Id*.

[155] *Id*. at 1310.

[156] *Id*.

[157] *Id*.

[158] *See* Craig Forcese, Note: ATCA's Achilles Heel, 26 YJIL 487, 508 (2001); *and, generally*, Brad J. Kieserman, Comment: Profits and Principles: Promoting

undemanding is the standard in *Prosecutor v. Tadic*,[159] where the Appeals Chamber of the ICTY dealt, in a prosecution appeal of a trial court judgment,[160] with ascription of responsibility to a state for a private (paramilitary) group's acts on its behalf.[161] *Tadic* found that individual action could be 'under color of law' without substantial state involvement. Specifically, "when a State entrusts a private individual (or group of individuals) with the specific task of performing lawful actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State," state action can be found without substantial participation by the state in the non-state actors' international law violations. [162] In such a case, "by analogy with the rules concerning State responsibility for acts of State officials acting ultra vires," *Tadic* asserted that the state becomes responsible for the private individuals' acts with the specific request to act on the state's behalf. [163]

Multinational Corporate Responsibility by Amending the Alien Tort Claims Act, 48 Cath. U.L. Rev. 881, 882 (1999) (criticizing the rejection by multinational corporations of responsibility "for the abusive conduct of their foreign host governments.")

[159] *Prosecutor v. Tadic*, Judgment of the Appeals Chamber, ICTY-94-1-A (July 15, 1999) [hereinafter, "*Tadic 1999*"]. *Unocal III* applied *Prosecutor v. Tadic*, No. IT-94-1-T (May 7, 1997) (Opinion and Judgment) [hereinafter, "*Tadic 1997*"] and several other ICTY cases in its analysis of Unocal complicity. *See Unocal III*, --- F.3d --- at 12-15.

[160] *Tadic 1997*.

[161] *Tadic 1999* at ¶ 97.

[162] *Id*. at ¶ 119.

[163] *Id*. "Ultra vires" refers to actions "beyond the scope of power allowed or granted by law." Black's Law Dictionary 1525 (1999).

However, as we noted at the outset of this section, what about the reverse? Would private individuals, such as the *Doe v. Unocal* defendants, become responsible for state acts if they had specifically requested the state to act on their behalf? Only such reversed causation would seem to make the *Tadic* scenario apply to *Doe v. Unocal*. But the question in effect had already been answered: *Unocal I* had reversed the third and first party roles, finding the complicit private party liable, and under 'color of law,' for the state's first-party acts.[164] In fact, one commentator has suggested ATCA decisions are "evidently very comfortable" using state action doctrine to attach liability for state acts to complicit private parties.[165]

Unocal III employed an updated version of the *Tadic* test.[166] Specifically, the court made use of another ICTY case, *Prosecutor v. Furundzija*,[167] importing its aiding and abetting actus reus standard, which required "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[168] *Unocal III* then returned to the 1997 *Tadic* trial chamber decision to clarify when the accomplice's acts have the required "substantial effect on the perpetration of the crime," stating they have such effect when "the criminal act most probably would not have occurred in the same way [without] someone act[ing] in the role that the [accomplice] in fact assumed."[169]

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[164] *Unocal I*, 963 F. Supp. at 891.

[165] *See* Forcese, *supra* note 158 at 498.

[166] *See Unocal III*, --- F.3d --- at 12-16.

[167] ICTY-95-17/1-T (Dec. 10, 1998), reprinted in 38 I.L.M. 317 (1999), *quoted in Unocal III* at 12.

[168] *Furundzija* at ¶ 209, quoted in *Unocal III*, --- F.3d --- at 12.

[169] *Unocal III*, --- F.3d --- at 12, with internal quote from *Tadic 1997*, ¶ 688.

For the mens rea aiding and abetting standard, *Unocal III* again turns to *Furundzija*, which held the requirement to be constructive (i.e., a reasonable person's) or actual "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime."[170] Further, "it is not necessary for the accomplice to share the mens rea of the perpetrator, in the sense of positive intention to commit the crime."[171] Finally, the aider and abettor is not required to know the precise crime the principal intends to commit.[172] Instead, if the accomplice "is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[173] The court comes close to declaring its "Furundzija standard" the current criterion for aiding and abetting liability under international law.[174]

Unocal III declared that applying the criminal tribunal test in a tort action is not problematic, since the international criminal standard is similar enough to the domestic tort law aiding and abetting standard.[175] It derives the latter from the Restatement (Second) of Torts (1979): "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... (b) knows that the

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[170] *Furundzija* at ¶ 245, quoted in *Unocal III*, --- F.3d --- at 12.

[171] *Id*. at ¶ 245, quoted in *Unocal III*, --- F.3d --- at 13.

[172] *Id*.

[173] *Id*.

[174] The concurrence accuses the majority of this. *Unocal III*, --- F.3d --- at 30 (Steinhardt, J., concurring). The majority disagrees (*Unocal III*, --- F.3d --- at 13). The majority writes that, "with respect to practical assistance and encouragement, these [ICTY and ICTR] decisions accurately reflect 'the current standard for aiding and abetting under international law as it pertains to the ATCA'. *Unocal III*, --- F.3d --- at 12, internal quote from *Unocal III*, --- F.3d --- at 13.

[175] *Unocal III*, --- F.3d --- at 13.

other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself...."[176] Note, however, that the standard adopted by *Unocal III* gives no weight to the last four words of the preceding quotation, if they mean that an aiding and abetting element is an intent to encourage or assist the first party's specific breach of duty.

In sum, then, *Unocal III* derives both its actus reus aiding and abetting requirement – "practical assistance or encouragement which has a substantial effect on the perpetration of the crime of, in the present case, forced labor"[177] – and its mens rea requirement – "actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime." – from *Furundzija*.[178]

As will be discussed in the following section, the *Unocal III* concurrence disagrees with the majority's third-party aiding and abetting standard because it

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[176] Restatement (Second) of Torts (1979) § 876, *quoted in Unocal III*, --- F.3d --- at 13.

[177] *Unocal III*, --- F.3d --- at 14. The court excludes from its actus reus requirement the *Furundzija* sub-element "moral support" (*Unocal III*, --- F.3d --- at 13), and is criticized as inconsistent by the concurrence. ("[B]y substituting international law standards for federal common law, rather than following federal common law and incorporating those portions of international law that attract sufficient legal support, the majority has lost whatever opportunity it had to pick and choose the aspects of international law that it finds appealing. Having declared that international law governs, and that the Yugoslav Tribunal's standard constitutes the controlling international law, the majority cannot then escape the implications of being bound by the law it has selected.") *Unocal III*, --- F.3d --- at 30, n.9 (Steinhardt, J., concurring).

[178] *Id*. at 15.

rejects its sources of law. In brief, the concurrence would reject the standards developed from "evolving standards of international law, such as a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal," and instead would develop a liability rule from federal common law principles.[179] The principles of agency, joint venture and reckless disregard are well established in the federal common law, "and disputed questions of fact exist with respect to each."[180] Thus, like the majority, the concurrence found the plaintiffs entitled to go to trial.[181]

The concurrence is one indication that *Unocal III* has not finally settled the third-party liability issue, especially regarding its sources of law, and the February 2003 Ninth Circuit order for an en banc review is another.[182] That order indicates the en banc panel will consider closely the concurrence and majority liability standard disagreement.[183] Beyond the en banc review, the Supreme Court may await its chance to speak on the issue.

B. *Unocal III*'s Choice of Law Confusion

1. Introduction

The *Doe v. Unocal* judges are experiencing conflict of law difficulties, or at least that is one way to explain the several incarnations of the liability standard throughout the litigation. The conflicting analyses of the choice of law issue by the *Unocal III* majority and concurrence may help to illustrate the problem. Both look to

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[179] *Id*. at 26 (Reinhardt, J., concurring).

[180] *Id*. at 30-35, quoted passage at 30 (Reinhardt, J., concurring).

[181] *Id*. at 30 (Reinhardt, J., concurring).

[182] *Doe v. Unocal Corp*., 2003 U.S. App. LEXIS 2716 (9th Cir., Feb. 14, 2003).

[183] *See* Koh, *supra* note 7 (discussing the June en banc hearing).

The Restatement (Second) of Conflict of Laws,[184] as Ninth Circuit precedent insists.[185] The seven restatement factors are as follows:

> (1) the needs of the interstate and international systems[,] (2) the relevant policies of the forum, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability and uniformity of result, and (7) ease in the determination and application of the law to be applied.[186]

The majority argues that the above factors compel it to apply international law generally, and specifically the third-party liability standards derived from the Nuremberg, ICTY and ICTR international criminal tribunals. The majority argues its choice is favored by factors (1), (4), (5), (6), and (7) above, and finds factor (2) at worst neutral.[187] Specifically, regarding factor (1), it states that the needs of the international system are best served by applying an international standard for aiding and abetting. Regarding factor (2), the majority finds the forum has no settled standard to disturb, so the adoption of the international tribunal-based standard will not upset existing forum policy. The fifth factor, advancing the underlying policy of the concerned field of law, also favors international law. The underlying policy,

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[184] Restatement (Second) of Conflict of Laws § 6 at 10 (1971).

[185] *See In re Vortex Fishing Sys., Inc.*, 277 F.3d 1057, 1069 (9th Cir.2002) ("Federal choice of law rules follow the approach of the Restatement (Second) of Conflict of Laws.").

[186] *Unocal III*, --- F.3d --- at 28 (Steinhardt, J., concurring). Except for the numbering, this exactly restates the Restatement, § 6 at 10 (1971).

[187] *Unocal III*, --- F.3d --- at 11.

which the majority says is "to provide tort remedies for violations of international law," is best served by international law.[188] Finally, on factors (4), (6), and (7), the majority states that the standard it adopts, "from an admittedly recent case," nonetheless reaches back at least to the Nuremberg tribunal and is similar to the standard set down in the Restatement (Second) of Torts.[189]

The concurrence argues instead for application of a third-party liability standard grounded in federal common law principles. It states that factors (2), (4), (5), (6), and (7) favor application of federal common law regarding third-party liability, and finds factors (1) and (3) neutral, if not also favoring federal common law. Regarding factor (2), the concurrence states the forum's relevant policy is creation of a federal forum "where courts may fashion domestic common law remedies" for torts in violation of customary international law.[190] On the protection of justified expectations, the fourth factor, the concurrence believes those expectations would be limited, since no Ninth Circuit direct precedent exists for third-party ATCA liability. That said, the federal common law principles of agency, joint-venture liability, and reckless disregard are well known and regularly applied in many contexts, while the tribunal standard is new and the nature of tribunals makes their law unsettled. As for factor (5), the policy underlying the field of law is to provide "an appropriate tort remedy" for customary international law violations, and "[t]he application of third-party liability standards generally applicable to tort cases directly furthers the basic

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[188] *Id*. at 11.

[189] *Id*. at 11.

[190] *Id*. at 28 (Steinhardt, J., concurring), quoting Abebe Jira v. Negewo, 72 F.3d 844, 848 (11th Cir.1996).

policy of using tort law to redress international wrongs…"[191] Regarding factor (6), the concurrence argues future decisions' "certainty, predictability and uniformity of result" would be enhanced by the wealth of precedent available in federal common law and by independence from "the future decisions of some as-yet unformed international tribunal established to deal with other unique regional conflicts." Finally, the concurrence argues that the well-developed federal common law is most compatible with factor (7), "ease in the determination and application of the law to be applied." The concurrence finds the remaining choice-of-law factors, (1) and (3), "neutral, at the least," and certainly not contrary to the use of federal common law.

2. Against the Concurrence's Federal Common Law Approach

Both the majority and concurrence analyses point out the central weakness in the other side's choice of law. The choice of law by the concurrence, for example, appears to reduce an ATCA tort to what the majority terms "a garden-variety municipal tort."[192] This results from treating the statute as "essentially a jurisdictional grant only," and then looking to domestic tort law for the cause of action.[193] In other words, the concurrence in part determines whether there is an ATCA cause of action from "the internal law of a nation as opposed to international law."[194] Making such a determination from municipal law disserves the emerging international human rights regime. For example, one scholar maintains, if judges worldwide are to build "an enduring jurisprudence of international human rights law, it will be because those

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[191] *Id*. at 28.

[192] *Id*. at 11, quoting Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D.Mass.1995) (internal quotes omitted).

[193] *Id*.

[194] Black's Law Dictionary 831 (Abridged 7th ed. 2000).

norms converge from adjudications in multiple jurisdictions each reflecting the socio-political structures of its constitution, while seeking to conform local practices to evolving *international standards*" (emphasis added).[195]

Yet, the concurrence's interpretation is permitted by the wording of ATCA, since that statute does not declare what law should determine matters ancillary to the primary one of finding a tort in violation of international law. This paper simply argues that an alternative reading, based on a common-sense and equally accurate understanding of the purposes and objectives of the statute, should override the concurrence's interpretation. In this regard, recall first that the statute's general objective was to bring the law of nations under sway of the federal judiciary. In addition, note that ATCA refers to a jurisdictional grant alone simply because a grant of a cause of action was assumed, due to the widespread late 18th Century understanding that a cause of action was already available through the incorporation of natural law into federal and state common law. The law of nations, therefore, marks out the character of the cause of action. From the perspective of such an understanding, to find Unocal potentially liable with a third-party standard less stringent than that of international law, as I believe the concurrence does, allows ATCA to stray far from its focus, the violation of norms commanding the world's "general assent."[196]

The Eleventh Circuit appeals court case quoted at the beginning of this paragraph also exposes difficulties in the concurrence's position.[197] In its efforts to

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[195] M.O. Chibundu, Making Customary International Law through Municipal Adjudication: A Structural Inquiry, 39 VA. J. INT'L L. 1069, 1148 (1999).

[196] *Filartiga*, 630 F.2d at 881, quoting *Habana*, 175 U.S. at 694

[197] *Abebe-Jira*, 72 F.3d at 848.

establish a federal remedy that will "give effect to violations of customary international law," it is incongruous to use the same statute to provide remedies for violations of federal common law alone. Preferable to this conception of ATCA is, at the first opportunity – when the decision on a grant of jurisdiction is made – to have customary international law and its substantive standards control regarding the alleged acts of all defendants, including those facing allegations of complicity.

As indicated, the concurrence argues that federal common law should be drawn from to establish a third-party liability standard, because that matter is "ancillary" rather than substantive.[198] The concurrence correctly understands as substantive the tort itself, and understands as ancillary that which does not create or define the first party's acts. And yet another understanding is that "substantive law" is "the part of the law that creates, defines, and regulates the rights, duties, and the powers of the parties."[199] From this perspective, the liability standard for the third party is substantive law. As even the concurrence agrees, international law should interpret "the substantive component of the ATCA."[200] As a matter of common sense, of course, the liability standard has been far more than subordinate or ancillary: at

[198] *Unocal III*, --- F.3d --- at 27 (Steinhardt, J., concurring) ("Nor is there any reason to apply international law to the question of third-party liability simply because international law applies to the substantive violation; as discussed above, federal common law is properly invoked when the statute at issue leaves an ancillary question unanswered…").

[199] Black's Law Dictionary 1161, Abridged 7th Ed., 2000.

[200] *Unocal III*, --- F.3d --- at 27.

every step of the litigation it has been singularly critical in determining whether the case is dismissed or goes forward.[201]

To sum up, while ATCA explicitly grants federal courts jurisdiction over torts in violation of customary international law, the natural law which had already 'granted' the statute's cause of action was concerned only with violations of international law, for example, violations by third parties of rights and duties derived from international law. The statute was not meant to allow federal jurisdiction over parties in violation only of municipal law, and courts should bar wider application of the statute. This should preclude application of a federal common law standard to the third party's wrongs.

3. Against the Majority's International Tribunal Approach

The majority is right to reject the use of federal common law for determining a liability rule, and properly decides to find the standard in international law. The majority's error is in where it looks for the international standard. The concurrence justly derides the majority's use of a third-party liability rule only recently generated by the International Criminal Tribunal for the Former Yugoslavia, or ICTY.[202]

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[201] In *Unocals I, II* and *III*, the liability issue has decided whether the plaintiffs' case goes forward or is dismissed. See the case text and accompanying footnotes infra at… Anything, of course, no matter how important to a legal determination of liability, might conceivably be considered supplementary or subordinate to something else. But this is taking advantage of the flexible meanings of words rather than a serious legal argument.

[202] *Unocal III*, --- F.3d --- at 24 (Steinhardt, J., concurring).

The standard set down by that tribunal was peculiarly broad, as seen in several paragraphs of the 1997 *Tadic* decision (paragraphing omitted), spelling out the standard cited in *Unocal III*:

> The Trial Chamber finds that aiding and abetting includes all acts of assistance by words or acts that lend encouragement or support, as long as the requisite intent is present. Under this theory, … [if] presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it. Moreover, when an accused is present and participates in the beating of one person and remains with the group when it moves on to beat another person, his presence would have an encouraging effect, even if he does not physically take part in this second beating, and he should be viewed as participating in this second beating as well. However, actual physical presence when the crime is committed is not necessary[, but] the acts of the accused must be direct and substantial.[203]

This standard was "legally suspect" even for Michael Scharf, a prominent ICTY 'insider' and a supporter of the *Tadic* judgment.[204] More evidence is needed in

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[203] *Tadic 1997* at ¶¶ 689-691.

[204] Michael P. Scharf, Trial and Error: An Assessment of the First Judgment of the Yugolavia War Crimes Tribunal, 30 N.Y.U. J. Intl L & Pol. 167, 200 (1998). ("In short, viewed through American eyes, justice was done in [*Tadic 1997*], though it could have been done better."). Scharf is co-author of a guide to the inner workings of the ICTY, cited for guidance in *Tadic 1997* at ¶ 536. Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former*

the U.S., writes Scharf, to find criminal liability for aiding and abetting. "For a conviction, there must be proof that the defendant either physically assisted the perpetrator in the commission of the crime, stood by with intent (known to the perpetrator) to render aid if needed, or that he commanded, counseled, or otherwise encouraged the perpetrator to commit the crime."[205] "In the absence of contributing actual aid, criminal liability cannot lie unless the bystander's approval is manifested by some word or act, such that it affects the mind of the perpetrator."[206] The "encouragement" element of the standard, for example, is reminiscent of the prosecution's proposed standard in what Scharf calls "the infamous Big Dan's rape trial,"[207] later the subject of a popular movie, The Accused. In that trial, the prosecution theory was that cheering bystanders had contributed to the crime of rape. The defendants so accused were acquitted of the charges.[208]

To develop such a standard, the ICTY makes overly restrictive surveys of judicial decisions to discover applicable international law, concentrating nearly exclusively on Nazi-era military tribunal cases. In *Tadic*, for example, Nazi-era war crimes and crimes against humanity decisions were the only cases looked at in its

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Yugoslavia (1995). He has also written an account of *Tadic 1997*, Balkan Justice (1997).

[205] Scharf, *supra* note 204 at 190, *citing* Rollin M. Perkins & Ronald N. Boyce, Criminal Law 724 (3d ed. 1982).

[206] *Id*., *citing* Perkins & Boyce at 742.

[207] *Id*. at 188. The decision is *Commonwealth v. Viera*, 401 Mass. 828, 519 N.E.2d 1320 (1987). The case was later the subject of a well-known movie, The Accused (Paramount, 1988).

[208] *See* Ruth Marcus, Other Defendants Acquitted; 2 More Convicted in Barroom Rape, Wash. Post, Mar. 23, 1984, at A1. *Cited in* Scharf, *supra* note 204 at 190.

examination of the aiding and abetting issue.[209] Specifically, the decision's "Required extent of participation" section first discusses the Nuremberg Tribunal's *Dachau* case, noting that its third element of required proof was that the accused had to have "encouraged, aided and abetted, or participated" in enforcing that notorious Nazi concentration camp's systematic deprivations and cruelties.[210] This is the last time in the sub-section the court refers to the encouragement notion. In the following paragraph, *Tadic* discusses another Nuremberg concentration camp case, *Mauthausen* case, which concerned the practice of mass extermination in gas chambers.[211] The court understandably employed a remarkably lenient extent of participation standard, "[t]hat any official, governmental, military or civil . . . or any guard or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognized laws, customs and practices of civilized nations…"[212] The next paragraph concerns two successive camp commanders at Auschwitz, the first of whom was convicted as an accessory to the murder of 750 individuals, based on his involvement in "procuring Zyklon B gas, constructing gas ovens, arranging for trucks to transport inmates to the gas chambers, and alerting the camp bureaucracy as to the imminent arrival of transports." The following paragraph cites another WWII war crimes tribunal case, in this case conducted by the British Military Court just after the war, in which each of the defendants was found guilty because all "knew that they were going to the woods for

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[209] *Tadic 1997* at ¶¶ 682 to 687.

[210] *Id*. at ¶ 682, citing Vol. XI, Law Reports of Trials of War Criminals (U.N. War Crimes Commission London, 1949) [hereinafter "Law Reports"] 13.

[211] *Id*. at ¶ 683.

[212] *Id*., citing Vol. XI, Law Reports, 15.

the purpose of killing the victims" and therefore they were engaged in a common unlawful enterprise.[213] The individual who "stayed in the car to prevent strangers from disturbing the two who were engaged in killing the victims" did not escape culpability.[214] The next case involved the brutalization and killing of downed WWII U.S. pilots by civilians while they were being paraded through the streets of a German town.[215] Guards who stood by during the lynching and the official who ordered the parade were among the convicted.[216] Finally, two more WWII cases are cited, these before a French military tribunal. From *Gustav Becker, Wilhelm Weber and 18 Others*,[217] *Ferrarese*,[218] and several other cases, the *Tadic* court derives the accused-unfriendly principal that "not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced."[219]

In the equivalent *Furundzija* sub-sections,[220] putting aside from ICTY and ICTR decisions, only the same or similar trials are examined, all from the Nuremberg

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[213] *Id*. at ¶ 685, citing *Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24-26 Nov., 1945, Vol. I Law Reports 35, 43 (1947).

[214] *Id*.

[215] Case. no. 12-489, *United States v. Kurt Goebell et al*, Report, Survey of the Trials of War Crimes Held at Dachau,Germany, 2-3 (15 Sept. 1948).

[216] *Id*.

[217] Vol. VII *Law Reports* 67, 70.

[218] *Id*. at 71.

[219] *Tadic 1997* at ¶ 687, citing Vol. VII *Law Reports* 67, 70.

[220] "Nature of Assistance," *Furundzija* at ¶¶ 199-216, and "Effect of Assistance on the Act of the Principal," *Furundzija* at ¶¶ 217-226.

tribunals or other courts whose concerns were Nazi-era atrocities.[221] Once again, by the way, support for the notion that encouragement only may constitute the mens rea of aiding and abetting is quite sparse. It is found in only two cases, in *Dachau* again and in *The Synagogue Case*, decided by the German Supreme Court in occupied Germany.[222] That court held that the status of the accused as a "longtime militant of the Nazi party," along with his general knowledge of the perpetrators' criminal enterprise, were enough to establish the crime's mens rea element, even though the defendant had not planned, ordered, or taken part in the crime against humanity, the destruction of a synagogue.[223]

The exclusive focus on the Nazis and their atrocities makes for a mens rea standard of culpability that may be appropriate only for such perpetrators of unmatched evil.[224] As noted above, the Nazi-focused military tribunals did not seem averse even to establishing catch-all standards that assured nearly any German with

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[221] This is recognized in *Unocal III* at n.26, although it describes *Furundzija* as undertaking "an exhaustive analysis of international case law" in pursuit of its actus reus aiding and abetting standard. ("The international case law it considered consisted chiefly of decisions by American and British military courts and tribunals dealing with Nazi war crimes, as well as German courts in the British and French occupied zones dealing with such crimes in the aftermath of the Second World War.") It is conceivable, of course, that all the third-party liability and aiding-and-abetting international case law involves Nazi-era criminals.

[222] *Furundzija* at ¶¶ 205-209, citing the case at Strafsenat. Urteil vom 10. August 1948 gegen K. und A. StS 18/48 (Entscheidungen, Vol. I, pp. 53 and 56).

[223] *Id*. at ¶ 209, citing the same case.

[224] The Nazi regime is "the epitome of absolute evil in Western culture…" Gerry J. Simpson, Didactic and Dissident Histories in War Crimes Trials, 60 Alb. L. Rev. 801, 811 (1997).

authority at the Mauthausen concentration camp was found guilty of crimes against humanity.[225]

Such exceptional standards have been devised – by the tribunals for Nazi-era offenses and by the ICTY and ICTR – because of a perceived duty to convict large numbers of individuals culpable in widespread outbreaks of extraordinary evil. [226] The

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[225] *See Tadic 1997*, ¶ 683, citing Vol. XI, Law Reports, 15.

[226] *See* Scott T. Johnson, On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia, 10 Int'l Legal Persp. 111, 192 (1998) ("All of [the ICTY's] branches, including the judiciary, are slanted toward fulfilling the Security Council mandate of achieving results: that means convictions not acquittals. As a result, the ICTY in its current incarnation cannot fairly adjudicate matters in a neutral and detached way."); *and* Student Note, Developments in the Law: Fair Trials and the Role of International Criminal Defense 114 Harv. L. Rev. 1982, 1994 (2001) [hereinafter 'Student Note'] ("There is little credible evidence of bias for or against any of the ethnic or national groups prominent at the tribunals as defendants or victims. There is somewhat more evidence of a bias against defendants generally, including as critics have noted, the "prosecutorial zeal" demonstrated by judges in public remarks regarding the need for the tribunals to succeed."); and Larry A. Hammond, Testimony of Larry A. Hammond Before the House International Relations Committee, Feb. 28, 2002, archived at http://www.osbornmaledon.com/press/articles/hammond_testimony_house_of_rep.htm (last visited Sept. 18, 2003) (stating that the ICTY judges and prosecutors are subject to "an always present pressure to gain convictions"). A former justice department attorney, Hammond served on a 1993 ABA task force charged with recommending procedural rules to the ICTY. *Id*.

The contrast between ordinary crime and acts of extraordinary evil is considered in Miriam J. Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, 15 Harv. Hum. Rts. J. 39 (2002). *See also* Michael Scharf & Valerie Epps, The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslavia War Crimes Tribunal,

exemplar of such evil is the practice of genocide, and the creation of the ad hoc tribunals is commonly understood as an attempt to put a stop that atrocity.[227] An innovative student note in the 2001 Harvard Law Review, in fact, comes right out and says what must be on the mind of many a tribunal judge, that the disutility of acquitting a genocidaire is a harm of an order of magnitude greater than the harm of freeing an ordinary murderer.[228] The writer then asks, "If the presumption of innocence really reflects 'a rational world,' should not the prosecutor's burden of persuasion drop considerably in cases involving charges of genocide?"[229] In part through the indirect means of standard setting, the ICTY may be attempting to achieve that goal.[230]

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29 Cornell Int'l L.J. 635, 642 (1996) (Scharf: "In the summer of 1992, the world learned of the existence of Serb-run concentration camps in Bosnia-Herzegovina, with conditions reminiscent of the Nazi-run camps of World War II. Soon, daily reports of acts of unspeakable barbarity committed in the Balkans began to fill the pages of our newspapers…. For the first time since World War II, genocide had returned to Europe.").

[227] *See, e.g.*, Symposium: Telford Taylor Panel: Critical Perspectives On The Nuremberg Trial, 12 N.Y.L. Sch. J. Hum. Rts. 453, 458 (1995). (Panelist Ruti Teitel describes the ad hoc tribunals' origins as "current attempts in Yugoslavia and in Rwanda to stop genocide." *Id*. at 458. Panelist Jonathan Bush notes the "new international tribunals established to try genocide in Rwanda and the former Yugoslavia." Id. at 460.)

[228] Student Note, *supra* note 226 at 1992.

[229] *Id*.; *see also* Jacob Katz Cogan, International Criminal Courts and Fair Trials: Difficulties and Prospects, 27 Yale J. Int'l L. 111, 114 (2002) ("The extreme character of the crimes alleged before international criminal courts makes the case for accountability stronger than in domestic prosecutions.").

[230] For comment on ICTY unfairness to the defense, *see* Matthew M. DeFrank, Note: ICTY Provisional Release: Current Practice, A Dissenting Voice, And the Case

Ultimately, then, war crime trials and their standards are for "the Hitlers, the Goerings, the Pol Pots, the Milosevics, the Karadzics, and other architects of genocide…"[231] Perhaps they should not be for 'ordinary murderers,' as their

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for a Rule Change, 80 Tex. L. Rev. 1429 (2002) ("A growing body of academic literature has criticized the Tribunal for denying its accused procedural protections necessary for fair trials."); Vincent M. Creta, The Search for Justice in the Former Yugoslavia and Beyond: Analyzing the Rights of the Accused Under the Statue and the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, 20 Hous. J. Int'l L. 381, 390-417 (1998); Johnson, *supra* note 226; Student Note, *supra* note 226 at 1994-1996; Cogan, *supra* note 229, *quoted infra*, notes 238 and 239. *See also* Simon Jenkins, The New Order that Splits the World, The Times (London), Jan. 31, 2001, archived at http://www.casi.org.uk/discuss/2001/msg00102.html (last visited Sept. 16, 2003) (describing the tribunal as "absurdly partisan").

Regarding bias during the trial of Milosevic, *see* John Laughland, If This Man Is a War Criminal, Where Is All the Evidence?, Mail on Sunday (London) 54, Aug. 25, 2002, 2002 WL 23304850. (Presiding Judge Richard May "has distinguished himself throughout the trial by his belligerence towards Milosevic and in particular for his habit of interrupting Milosevic, even sometimes switching off his microphone, whenever the former Yugoslav leader's cross-examination shows up inconsistencies in a witness's evidence."). It is also useful to look at the trancripts of the ICTY trials. *See, e.g.*, *Prosecutor v. Milosevic*, Case No. IT-02-54, Trial Transcript, pp. 9012-9045 (Aug. 28, 2002), available at http://www.milosevic-trial.org/trial/2002-08-28.htm (The transcript displays presiding judge Richard May's obstructive and belligerent behavior toward Milosevic, and complete permissiveness toward the witness, a BBC reporter. *Id*. at 9012-9043. Note also the lack of any response to Milosevic's complaint about delivery of extensively revised witness testimony the night before the next witness's testimony. *Id*. at 9044-9045.)

[231] Davida E Kellogg, Jus Post Bellum: The Importance of War Crimes Trials, Parameters 8799, October 1, 2002, at 2002 WL 18222363. It is incongruous for Kellogg to group Milosevic and Karadzic with Pol Pot and the Nazis; the evidence that those two are guilty of genocide is sparse indeed. Nonetheless, the comment

multitudes of purposes may take precedence over the dispensation of justice for matters of less-than-extraordinary evil.[232] And perhaps this helps explain why their

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indicates that tribunals are set up in the wake of perceptions of extraordinary evil. Regarding the absence of evidence against Milosevic, *see* Laughland, *supra* note 230.

The importance of Holocaust imagery in motivating the creation of the ICTY is discussed in Frédéric Mégret, The Politics of International Criminal Justice, European Journal of International Law, Feb. 09, 2003, available at http://ejil.org/journal/Vol13/No5/br1-03.html. Megret reviews seven books on the Balkan crisis, writing that all agree the decisive turn toward international involvement came in the wake of 1992 media reports and images of Nazi-style concentration camps in Bosnia. Regarding the Bosnia conflict, a senior BBC correspondent writes that "a climate was created in which it was very hard to understand what was really going on, because everything came to be seen through the filter of the Holocaust. " John Simpson, Strange Places, Questionable People 444-445 (1998).

[232] For a practical view of the purposes of international criminal tribunals, see Antonio Cassese, Reflections on International Criminal Justice, 61 Mod. L. Rev. 1, 1-6 (1998).(Cassese states the principal aims of tribunal justice as 1) distinguishing culpable perpetrators from others of the same ethnic or other group, 2) dissipating calls for revenge by showing victims that perpetrators are being punished, 3) fostering reconciliation by ensuring that perpetrators pay for the crimes, and 4) creating a reliable record of past atrocities.) Cassese is the former chief judge and President of the ICTY. See Johnson, *supra* note 226 at n.172.

Gerry J. Simpson, supra note 224, offers a theoretical discussion of war crimes tribunal purposes. One of the functions described is legitimation, Simpson stating that tribunals are "intended to legitimate or … exculpate the culture which tries the criminal." *Id*. at 829. Later he adds, "there is a sense that war crimes trials, in revealing to us what war crimes are, also tell us that other acts are not in this category. In this way, Nuremberg tells us that Nagasaki was not a war crime and that the Soviet invasion of Finland in 1941 was not aggression. Similarly, a message of the [Klaus] Barbie trial is that torture in Algeria is not a war crime or that Vichy France was not as anti-semitic as Nazi Germany." *Id*. *See also* Joan Phillips, The Case Against War Crimes Tribunals, The Nation, Feb. 1995, archived at http://www.balkan-

standards diverge from the practice in U.S. criminal courts, as Michael Scharf has confirmed. Our federal courts, therefore, should draw back from and reconsider applying ICTY and ICTR tribunal standards in their courts. Special rules for conditions of absolute evil should not underpin generalized international law.

In addition to tribunals' standard-setting problems in general, the specific nature and purpose of the ICTY and ICTR also generate legal dangers and difficulties.[233] First of all, of course, each is ad hoc,[234] formed for a particular purpose

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archive.org.yu/politics/myth/articles/feb95.Joan_Phillips.html ("The concept of war crimes appears to be an ideological construction of New World order politics, used to legitimize the international pecking order by branding some as criminals and casting others in the role of judges.")

The ICTY tribunal may be functioning in such a manner, in particular after NATO's air war on Yugoslavia appeared to violate laws of war. *See* Amnesty International, NATO/Federal Republic of Yugoslavia 'Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force (2000); *and* Andreas Laursen, NATO, The War Over Kosovo, And the ICTY Investigation, 17 Am. U. Int'l L. Rev. 765 (2002). The legitimation purpose may also have been present at the birth of the ICTY, to deflect a sense that the West, in particular Germany and the Vatican, had encouraged a disintegration of Yugoslavia that would turn with near inevitability to widespread inter-ethnic warfare. The Vatican was the first country to recognize Croatia and Germany the second; such recognition all but assured the break-up of Yugoslavia. Carl K. Savich, The Origins and Causes of the Bosnian Civil War (2002), at http://www.serbianna.com/columns/savich/; *but see also* Bette Denich, Unmaking Multi-Ethnicity in Yugoslavia: Metamorphosis Observed, *Anthropology of East Europe Review* Autumn, 1993, available at http://condor.depaul.edu/~rrotenbe/aeer/aeer11_1/denich.html. Denich notes that the long-term growth of inter-ethnic alienation and distrust was also an essential factor in Yugoslavia's disintegration.

[233] *See Unocal III*, --- F.3d --- at 27 (Steinhardt, J., concurring) ("The [ICTY] was formed with the limited mandate of adjudicating allegations of human rights abuses

whose fulfillment may warrant veering from the course of simple justice. The United Nations Security Council established the ICTY, for example, in response to a finding of widespread and severe human rights abuses during the bloody disintegration of the former Yugoslavia.[235] The Security Council stated directly that an intended purpose, in addition to that of dispensing justice, was to contribute to "the restoration and maintenance of peace."[236] Other moral and political purposes may also have entered into the formation of the tribunal,[237] and there are ongoing concerns over its political

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that took place in the Balkans in the last decade. Established by Security Council Resolution 827 in May, 1993, it is a temporary body whose members are elected for four-year terms by the members of the United Nations General Assembly. The [ICTR] … is a similarly-constituted body.")

[234] Black's Law Dictionary 33, abridged edition (2000).

[235] *Tadic 1997* at ¶ 2. The ICTY was established pursuant to Security Council Resolution 808, adopted February 22, 1993, and Security Council Resolution 827, adopted May 25, 1993. *See* U.N. Doc. S/RES/808(1993); U.N. Doc. S/RES/827 (1993). The finding regarding widespread human rights abuses in Yugoslavia was established by an independent commission, formed pursuant to an earlier UN Security Council resolution.

[236] *Tadic 1997* at ¶ 2. Another authoritative voice, UN Under-Secretary-General for Legal Affairs, Carl August Fleischhauer, stated the ICTY had three main goals: "ending war crimes, bringing the perpetrators to justice and breaking an endless cycle of ethnic violence and retribution." *See* Scharf & Epps, supra note 226 at 660. The Ambassador to the United Nations, Madeleine Albright, stated the primary purpose of the tribunal should be to "establish the historical record before the guilty can reinvent the truth." *Id*.

[237] *See* Yves Beigbeder, Judging War Criminals: The Politics of International Justice 171 (1999) (writing that establishment of the ICTY was a "substitute for an effective, timely, military intervention [during the Bosnian crisis] by the UN Security Council."); Aleksa Djilas, The Politicized Tribunal, IWPR Tribunal Update, July 25, 2001, available at

independence.[238] This politicization is problematic, and should weaken confidence in the impartiality of the 'work product' of the ICTY, including the legal standards it

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http://www.globalpolicy.org/intljustice/tribunals/2001/0725icty.htm. (Djilas infers, from its indictments and other practices, that the tribunal's purposes include punishing NATO's enemies and rewarding its friends); David Binder, The Ironic Justice of Kosovo, MSNBC (US), March 17, 2000; archived at http://www.geocities.com/cpa_blacktown/20000319balkamsnus.htm. (Binder a New York Times correspondent for the Balkans since 1963, stated, that "[p]ortraying the Serbs as [the origin of evil in the Balkans] is an unwritten doctrine adopted by the State Department at the beginning of the Yugoslav conflicts and continued today, a doctrine endorsed and spread by the mainstream media, human rights groups and even some religious communities."); Gerry J. Simpson, supra notes 224 and 232; *and* Phillips, supra note 232.

[238] *See, e.g.*, Jamie Shea, Press Conference Given by Jamie Shea, NATO Spokesperson, and Major General Walter Jertz, SHAPE Spokesperson (May 16, 1999), available at http:// www.nato.int/kosovo/press/p990516b.htm. (Shea, in response to a question regarding ICTY jurisdiction over NATO actions in Kosovo, stated as follows: "I think we have to distinguish between the theoretical and the practical. I believe that when [Chief Prosecutor] Justice Arbour starts her investigation [into the events in Kosovo], she will because we will allow her to. It's not Milosevic that has allowed Justice Arbour her visa to go to Kosovo to carry out her investigations. If her court, as we want, is to be allowed access, it will be because of NATO"); John Laughland, This Is Not Justice, The Guardian (UK), February 16, 2002, at http://www.guardian.co.uk/Archive/Article/0,4273,4357313,00.html. (By refusing to investigate NATO attacks on Yugoslavia, "the strict circumscription of the circumstances under which war may be waged (ius ad bellum) has now been replaced by an infinitely malleable series of double-standards about how it may be waged (ius in bello): on Jamie Shea's own admission in 1999, these standards are deployed in the service of the Hague's pay-masters, the Nato states."); Michael Scharf & Epps, *supra* note 226 at 645 (Scharf: "Although the Yugoslavia Tribunal is designed to be independent from the Security Council, one cannot ignore the facts that the Security Council selected the Tribunal's prosecutor and proposed a short list of judges from

establishes for itself. In the tribunals' place, international law in general – "the" international law, so to speak – should draw its norms and standards from permanent, democratically accountable legal regimes, in which the dispensation of justice is the overarching and dominant purpose.[239]

The third-party liability standard might be where the ICTY is most tempted to be partial. The success or failure of the ad hoc tribunal, after all, has from the start been widely seen to involve convicting certain national leaders with 'command responsibility' for human rights violations in the former Yugoslavia.[240] Therefore,

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which the General Assembly chose. Indeed, given that the battle for control of Bosnia was in large measure a religious war between Bosnian Muslims and Bosnian Serbs, it is astonishing that four of the eleven judges elected by the General Assembly upon the nomination of the Council come from states with predominantly Muslim populations."); *and* Cogan, *supra* note 229 at 119 (Cogan writes that "[i]n model domestic judicial systems, … the right to prepare a defense, equality of arms, and judicial independence… are all more or less taken for granted. … [I]n international criminal courts at present, such an assumption would be unwarranted.").

[239] Regarding democratic accountability, *see* Cogan, *supra* note 229 at 114. Cogan laments the absence, in international trials "of a strong community of 'watchdog' observers for fair trial proceedings." *Id*. He concludes that "the realm of international criminal justice is distinguished from domestic criminal justice not simply because accountability [for crimes of such an extreme nature] and sovereignty [in pursuit of, for example, national security objectives] weigh heavier in this context, but also because of the absence of an effective counterweight to check these interests." *Id*.

[240] The frame of mind was evident in the run-up to the Tribunal's creation. Julia Preston, U.N. Creates Tribunal to Try War Crimes in Yugoslav Warfare, Wash. Post, p. 3, Feb. 23, 1993, archived at http://www-tech.mit.edu/V113/N8/tribunal.08w.html ("Last fall, Secretary of State Lawrence S. Eagleburger singled out a number of top Serb politicians and military figures – including Bosnian Serb leader Radovan

there has been an always present temptation to create a third-party liability standard as helpful as possible to tribunal prosecutors. If the tribunal has given in to that temptation, then its third-party liability standard is exceptionally likely to be unique, and out of line both with 'normal' international law and standards of liability in the world's domestic legal systems.

The *Tadic* appeals chamber decision may be an example of an ICTY predisposition regarding third-party liability matters. The trial chamber majority had dismissed certain charges because Serbia had not exercised effective control over the Bosnian Serb forces.[241] In a sharp dissenting opinion, Judge Gabrielle Kirk McDonald argued for a much lower threshold for finding an individual a de facto agent of a foreign government.[242] ICTY ally Scharf agreed, urgently pointing out the damage a high threshold might do to the future case against the ICTY's ultimate quarry: "the ruling may effectively lift the responsibility for atrocities committed during most of

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Karadzic and his powerful patron in neighboring Serbia, President Slobodan Milosevic – as ultimately responsible for war crimes committed by their underlings."). The following comment by a prominent human rights lawyer on the Slobodan Milosevic trial also indicates ICTY insiders' frame of mind: "the whole point of this trial is to show that those who are primarily responsible, who set the ball rolling, can be reached, and not just the foot soldiers who commit the atrocities and bury the bodies." Geoffrey Robertson, quoted in CNN Intl., Q&A Late Afternoon: Slobodan Milosevic Takes Offensive, February 15, 2002, accessed at 2002 WL 5129332. I assume the CNN rush transcript has mislabeled well-known British human rights lawyer Geoffrey Robertson as Jeffry Robertson. For Robertson's insider credentials, *see* Marlise Simons, Milosevic Trial Settles Into Slow But Judicious Routine, N.Y. Times, March 3, 2003, p. 4 (reporting that Robertson had been selected "to head the new special court for war crimes in Sierra Leone.")

[241] *Tadic 1997*, ¶605.

[242] *Tadic 1997*, Dissent ¶ 7.

the three and a half year-long conflict [in Bosnia] from Serbian leader Slobodan Milosevic."[243] The Tadic appeals court reversed that aspect of the trial chamber decision.[244]

In sum, it is deeply troubling, in light of the specialized nature of the ICTY, the indications of bias (in particular, for *Doe v. Unocal*, regarding command responsibility matters), and the restricted 'case law' upon which the tribunal draws, to find that federal courts are "increasingly turning to the decisions by international criminal tribunals for instructions regarding the standards of international human rights law under our civil ATCA."[245] Moreover, the ICTY third-party liability standard simply is not the 'world standard', as common sense would understand that phrase.

D. Instead, a *Paquete Habana* Approach

The *Unocal III* error, as has just been suggested, is an inability to discover a third-party liability standard which has grown, "by the general assent of nations, into a settled rule of international law."[246] But how should a court go about discovering such rules for matters, such as third-party complicity with a regime's internal human rights violations, which only after Nuremberg became firm 'traditional' international law terrain?[247] How are U.S. courts to avoid imposing upon other countries our own

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[243] Scharf, *supra* note 204 at 196. *See also* Gregory Townsend, State Responsibility for Acts of De Facto Agents, 14 Ariz. J. Int'l & Comp. L. 635 (1997).

[244] *Tadic 1999*, ¶¶ 156-162.

[245] *Unocal III* at 12.

[246] *Habana*, 175 U.S. at 694.

[247] *See* Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1, 9 (1982) (stating that prior to

"idiosyncratic legal rules," in a pretense of applying international law?[248] On the other hand, federal courts also must resist being compelled to adopt, from "an amorphous entity – i.e., the 'law of nations' – standards of liability applicable in concrete situations."[249] Courts need to find tangible sources of law – and not the ad hoc law formed to deal with extraordinary evil – in order to determine the present-day international law.

In pursuit of the concrete, courts should look to the 1900 Supreme Court case, *The Paquete Habana*.[250] The case – which concerned a matter of traditional international law, a belligerent's seizure as 'prize' of coastal fishing vessels – demonstrated the modern, positivist method for determining customary international law rules.[251] The court stated that for the purpose of ascertaining and administering customary international law,

> where 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

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Nuremberg individual citizens (and their rights) were the concern of domestic law alone; "apart from a few anomalous cases ... [they] were not subjects of rights and duties under international law"); *and* Makau Mutua, From Nuremberg to the Rwanda Tribunal: Justice or Retribution?, 6 Buff. Hum. Rts. L. Rev. 77, 82 (2000) (noting that Nuremberg provided a foundation for the "international criminalization of internal atrocities," despite its subordination of justice to politics).

[248] *Filartiga,* 630 F.2d at 881.

[249] *Tel-Oren,* 726 F.2d at 781 (Edwards, J., concurring).

[250] 175 U.S. 677. The case demanded determination of the customary international law standard for the treatment of local fishing vessels by warring parties.

[251] *Id.*

> 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.[252]

The decision presents a lengthy historical review, based on primary sources, of actual state practices.[253] The review starts with the early 15th Century and proceeds up to the contemporary practice of the "civilized nations."[254] Next, secondary sources are surveyed, allowing the court to peruse the opinions of leading jurists, "witnesses of the sentiments and usages of civilized nations."[255] The goal of the reviews of the primary and secondary sources is to determine whether a legal rule has gathered the "general assent of civilized nations." That requirement "is a stringent one," the *Filartiga* court would later write.[256]

After the Nuremberg expansion of international law to internal matters previously not subjects of international law, internal judicial practice must be given prominence in deciding international standards, where, as will increasingly be the case, it is the most representative state practice available. This would be less an

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[252] *Habana*, 175 U.S. at 700.

[253] *Habana*, 175 U.S. at686- 700.

[254] The court understands the 'civilized nations' to be the European powers and the U.S., along with the recent addition of "the Empire of Japan. . . the last state admitted into the rank of civilized nations." *Habana*, 175 U.S. at700. The court also implicitly brings Argentina into the civilized circle through its references to the eminent Argentine jurist Calvo. *Id*. at 703.

[255] *Habana*, 175 U.S. at700- 708. The quoted passage is at 701.

[256] *Filartiga*, 630 F.2d at 881.

innovation than a change in the valuation of domestic law vis a vis the law of international tribunals and courts. As *Habana* indicates, for example, courts have long relied on nation states' domestic laws as one form of evidence for customary international law norms; that case does so itself, citing domestic laws regarding cross-border maritime matters.[257] *Filartiga* provides another example, finding it important that "torture is prohibited, either expressly or implicitly, by the constitutions of over fifty-five nations, including . . . the United States."[258] For *Doe v. Unocal*, therefore, an approach in line with *Habana* might examine the world's domestic legal systems for their treatment of third-party tort liability and its near equivalents.[259]

Support for giving higher priority to the standards of domestic legal systems is also found by looking again at standard materials on the sources of customary international law. Fundamental in determining customary international law, of course, according to the Restatement on Foreign Relations Law, is the "general and consistent practice of states followed by them from a sense of legal obligation."[260] The sources of customary international law are also declared in the Statute of the International

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[257] *See, e.g.*, *Habana*, 175 U.S. at 689 (referring to a French ordinance regarding capture of fishing vessels), at 691 (citing a French legal order releasing English fishermen), and at 694 (discussing a decision by an English court). *See also* M. Erin Kelly, Comment: Customary International Law in United States Courts, 32 Vill. L. Rev. 1089, 1122 (1987) (stating that "courts may look to the domestic laws of the United States and other states as evidence of a norm").

[258] *Filartiga*, 630 F.2d at 884 & note 13.

[259] The *Unocal III* concurrence takes a very brief look at the standards of three "national legal systems" and from this concludes that "[t]he status of joint liability as a general principle of law is supported . . . by the fact that it is fundamental to 'major legal systems.'" *Unocal III* at 30 (Steinhardt, J., concurring).

[260] Restatement (Third) of Foreign Relations Law § 102(2) (1987).

Court of Justice (ICJ), which is "generally regarded as a complete statement of the sources of international law":[261]

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.[262]

While the ICJ provision explicitly places judicial decisions in a subordinate position to the practices and customs of nations, judicial decisions may be given greater weight if they are helpful in determining the state practice.[263] "Case law, ranked as subsidiary in subsection (d), nevertheless may reflect the meaning of an ambiguous treaty provision . . . as evidence of the subsequent practice of states."[264]

Further guidance on whether conduct has attained the status of customary international law is offered in the following description of characteristics that acts

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[261] Ian Brownlie, Principles of Public International Law 3 (5th ed. 1998).

[262] Statute of the International Court of Justice, *supra* note 8 at 1055 (1945).

[263] Restatement (Third) of Foreign Relations Law § 102(2) (1987). An example of the appropriate use of a subsection (d) source is provided in David L. Nersessian, The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, 37 Tex. Int'l L.J. 231, 238 (2002) ("Case law, ranked as subsidiary in subsection (d), nevertheless may reflect the meaning of an ambiguous treaty provision . . . as evidence of the subsequent practice of states.").

[264] Nersessian, *supra* note 263 at 238.

"obligatory under or consistent with international law" are required to possess: "(1) 'concordant practice' by a number of states relating to a particular situation; (2) continuation of that practice over 'a considerable period of time'; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states."[265] The first two of these requirements are better met – in a positivist conception of international law– by legal rules and standards that are widely shared among the world's domestic legal systems, rather than by rules and standards from the ad hoc international criminal tribunals.

E. Conclusion

ATCA represents, both originally and in the present day, a commitment by the United States to bring aliens' customary international law concerns into its federal courts. Our federal courts should carry forward our country's early vow to be receptive to authentic 'law of nations' alien tort claims, which in the present day are often international human rights lawsuits. However, the greatest advocates of ATCA as a vehicle for such human rights claims may actually threaten the statute, when they attempt to use ATCA to attack wrongs, such as the softer shades of third-party complicity, which a world consensus has not decided are in violation of customary international law. If courts allow expansion of international law not based on consensus, and refuse it the guidance of actual, permanent legal regimes, they are breaking with the positivist legal tradition. In this light, perhaps the *Unocal III* judges

[265] Henry J. Steiner, et al, Transnational Legal Problems, 4th Ed. 240 (1994), citing, with internal quotes, Hudson, Working Paper on Article 24 of the Statute of the International Law Commission, YEARBOOK. OF THE INTERNATIONAL LAW COMMISSION, Vol. II 26, U.N.Doc. A/CN.4/16 (1950).

were misdirected by *U.S. v. Smith*, an 1820 Supreme Court decision which stated that 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*."[266] *Smith* does not give state practice greater weight than the learned writings of academics and other jurists; in fact, first mentioned are the jurists. It is classic natural law advice, and should be looked on skeptically by those wary of the 'new' customary international law.[267]

Doe v. Unocal should avoid the methodology of natural law and instead discover the consensus practice within the world's legal systems regarding domestic aiding and abetting tort violations. Gathering many legal systems' rules together, one

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[266] *Unocal III* at 11, *quoting Filartiga*, 630 F.2d at 880, which in turn was quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)) (emphasis added by the *Unocal III* court).

[267] *See* the citations at note 12. Justice Story wrote in 1822 of the law of nations connection to natural law: "Every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations." *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551), overruled on other grounds, 23 U.S. (10 Wheat.) 66 (1825). *See also* Jay, *supra* note 34 at 822, writing that at the end of the Eighteenth Century "a consensus existed that the law of nations rested in large measure on natural law. As Emmerich de Vattel contended, and Americans repeated, 'the law of Nations is originally no other than the law of Nature applied to Nations.'" The sub-quote is from Emmerich de Vattel, The Law of Nations lvi (J. Chitty ed. 1863) (original edition published in 1758). *Id*. at n.11, Jay also cites the following charge to a grand jury by James Wilson: "The law of nations has its foundation in the principles of natural law, applied to states; and in voluntary institutions, arising from custom or convention." Charge to the Grand Jury for the District of Virginia 16 (May 23, 1791) (A. Davis ed. 1791), 2 the Works of James Wilson 813 (R. McCloskey ed. 1967).

would likely find the most stringent third-party liability standards nearly universally create tort liability, while progressively more relaxed complicity rules are less and less the object of consensus. Perhaps the more stringent complicity standard of *Unocal II* would be found near universal in domestic practice among nations, and the modified ICTY standard adopted by *Unocal III* far from universal. In fact, while the ICTY standard is similar to some of the domestic common law third-party tort liability standards in use, it is certainly not the consensus even in the United States, as the *Unocal II* decision makes clear.[268] So, while it was and is morally wrong for the Unocal Corporation to knowingly or constructively be a party to an increase in the brutal human rights violations perpetrated by the Burmese military, Unocal's complicity with human rights violations would likely not reach a consensus customary international law standard derived from domestic legal systems' practice. In sum, then, though a *Paquete Habana* approach might vanquish the *Doe v. Unocal* plaintiffs, ATCA itself would remain alive as a vehicle for attacking violations of customary international human rights law, if those wrongs violate the laws and standards of the world's legal systems.[269]

Instead of looking to *Habana*, however, conservatives on the Supreme Court, if *Doe v. Unocal* reaches it, would likely be tempted by the 'originalist' arguments of Bork and Sweeney. If those views were victorious, international human rights actions

[268] *See supra* notes 133-151 and accompanying text.

[269] Not just, of course, among those *The Paquete Habana* regarded as "civilized." *Habana*, 175 U.S. at 694.

under ATCA would come to an end.[270] Unlike the originalists' outcome, taking the *Habana* approach would be in accord with the statute's literal meaning and original intent, so one hopes it would be a more attractive option for the Court.

In any case, the legacy of *Filartiga* is under threat. It is threatened by the originalists, of course, but its circumscribed sense of customary international law is also endangered by the new customary international law, a descendant of the visionary remarks by Judge Wilson quoted at the outset of this paper. Federal judges should resist such self-inflation and return to the grounded positivism of *The Paquete Habana*. They need to reassure those of us who do not want to take wing and fly with Judge Wilson that we do in fact "live in a more positivist age," and that modern day courts really do "feel less comfortable 'creating' international law. . ."[271]

[270] Both Bork and Sweeney would exclude all ATCA-based human rights actions. *See* Tel-Oren at 813 (Bork, J., concurring), and Sweeney, *supra* notes 73 and 94. *See also, generally*, sub-section III.C and accompanying footnotes.

[271] Dodge, *supra* note 25 at 353, commenting on the quotation from Judge Story (*The La Jeune Eugenie*, 26 F. Cas. at 846) reproduced *supra* note 267.