THE HISTORICAL AND MODERN FOUNDATIONS FOR AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE

Daniel Diskin*

"The behaving of man is a world of horror . . . ."
~W.H. Auden[1]

INTRODUCTION

The technological advancement that marked the twentieth century was also accompanied by a parade of human-created horrors. Genocidal campaigns to eliminate entire classes of people, and other atrocities, occurred on a scale never previously witnessed.[2] Tragically, both violent ethnic clashes and human rights abuses continue in the modern era.[3] While modern international law seeks to curb

---

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2006. I would like to thank David Mass for suggesting this as a possible topic. I would also like to thank all of the hard-working editors of the *Arizona Law Review* for investing their time and energy into the production of this Note. Finally, I owe a special debt of gratitude to my parents, Barbara and David, who have never failed to provide me with their love and support.

1. W.H. AUDEN, *Danse Macabre*, *reprinted in* COLLECTED POEMS at 130 (Edward Mendelson ed., Random House 1976).

2. *See, e.g.*, Winston P. Nagan & Vivile F. Rodin, *Racism, Genocide, and Mass Murder: Toward a Legal Theory About Group Deprivations*, 17 NAT'L BLACK L.J. 133, 178 (2004) ("Between 1900 and 1987, states, quasi states, and stateless groups have killed some 170,000,000 people. These killings include what legally would be labeled genocide, but also massacres, extra juridical executions, and the like."). For famous research showing the capacity of ordinary people to torture and kill, see STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (Perennial Classics 2004) (1974); Steven Hartwell, *Six Easy Pieces: Teaching Experientially*, 41 SAN DIEGO L. REV. 1011, 1028–30 (2004) (summarizing Milgram's findings and citing to subsequent follow-up studies).

3. *See, e.g.*, TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY (2000) (describing trends in ethnic conflict and identifying groups which remain at risk of facing governmental repression in the future); THE INTERNATIONAL SPREAD OF ETHNIC CONFLICT (David A. Lake & Donald Rothchild eds., 1998); JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY

these practices, critics often argue that it lacks genuine deterrent mechanisms and cannot extend beyond "positive morality."[4] The 1789 "Alien Tort Statute" ("ATS"),[5] however, provides one enforcement mechanism with teeth: as interpreted by the United States judiciary, it allows alien victims of international law abuses to sue in U.S. federal court to recover monetary damages.

The ATS was first passed as a one-sentence provision of the Judiciary Act of 1789.[6] The current version of the statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[7] The statute thus authorizes a foreign claimant to initiate a civil lawsuit in federal court based on violations of the "law of nations." Prior to the landmark case *Filartiga v. Pena-Irala*,[8] decided by the Second Circuit in 1980, federal courts had accepted jurisdiction over only two ATS cases.[9] *Filartiga* held that a claim alleging that a Paraguayan police officer committed torture fell within the scope of the ATS because governmental torture was a violation of international law.[10] Central to the Second Circuit's decision was the conclusion that the "law of nations" includes *modern* international law, as opposed to the law of nations as it existed in 1789.[11] From this seminal decision, an expanding progeny of cases followed.[12]

In recent years, the importance of the ATS has only grown. For example, the ATS provided the basis for a lawsuit filed by survivors and families of the September 11 terrorist attacks,[13] *and* for a lawsuit by Iraqi and Afghan prisoners

---

AND OPPRESSION (2001) (offering a psychological theory explaining group identification and ethnic conflict).

4. *See, e.g.*, JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW: A PRACTICAL APPROACH 15 (2003); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2–3 (2d ed. 1993).

5. 28 U.S.C. § 1350 (2000). The statute is also sometimes referred to as the "Alien Tort Claims Act," but this Note follows the U.S. Supreme Court's usage of the descriptive "Alien Tort Statute." *See, e.g.*, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004) (stating that a primary issue is "whether [the plaintiff] may recover under the *Alien Tort Statute*") (emphasis added).

6. 1 Stat. 73, 77 (1789).

7. 28 U.S.C. § 1350 (2000).

8. 630 F.2d 876 (2d Cir. 1980).

9. *See* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 nn.15–16 (1985) (finding twenty-one reported cases brought prior to *Filartiga* in which plaintiffs sought jurisdiction via the ATS, but only two in which they were successful). Of the twenty-one cases cited by Randall, only three predate 1958, and he did not find a single case during the nineteenth century in which plaintiffs claimed ATS jurisdiction. *Id.* at n.15.

10. *Filartiga*, 630 F.2d at 887.

11. *Id.* at 881.

12. *See infra* Part III.

13. *See* Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (stating that "the September 11 attacks began with the hijacking of four airplanes, and aircraft hijacking is generally recognized as a violation of international law of the type that gives rise to individual liability").

subsequently detained by the United States.[14] The second lawsuit asserts that Defense Secretary Rumsfeld should be personally liable for the now-infamous Abu Ghraib prison abuse scandal, relying in part on a 2002 memo in which he permitted "stress and duress" tactics to be used against Guantanamo Bay prisoners.[15] The lawsuit suggests that the memo conveyed the message to lower-level military personnel that torture was an acceptable interrogation method.[16]

In addition to the cases arising out of the "war on terror," the number of ATS lawsuits targeting corporations for being complicit in human rights abuses overseas has expanded dramatically. Named defendants in these lawsuits include the oil companies Chevron Texaco, Exxon Mobil, Occidental, Royal Dutch Shell, Talisman, and Unocal,[17] and the mining companies Freeport-McMoran, Newmont, Rio Tinto, and the Southern Peru Copper Corporation.[18] Other defendants include Coca-Cola, Fresh Del Monte Produce, The Gap, DynCorp, and Union Carbide (a subsidiary of Dow Chemical.)[19] Finally, the pharmaceutical giant Pfizer was a defendant in a lawsuit, which asserted that the company conducted secret drug tests on Nigerian children.[20]

Other ATS lawsuits implicate companies in notorious historical events. For example, the Ford Motor Company (based on the conduct of a German subsidiary) was a defendant in a lawsuit based on the use of slave labor during

---

14. *See* Frank Davies, *Suit Blames Rumsfeld in Prisoner Abuse Cases*, MIAMI HERALD, Mar. 2, 2005, at A3 (reporting that "[e]ight men who say they were severely tortured by U.S. forces in Iraq and Afghanistan sued Defense Secretary Donald Rumsfeld . . . , asserting that he should be held personally responsible for injuries they suffered because he permitted harsh interrogation tactics").

15. *Id.*

16. *Id.*

17. *See* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Mujica v. Occidental Petroleum, No. 03-2860, 2005 WL 1962635 (C.D. Cal. Apr. 24, 2005); Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229 (N.D. Cal. 2004); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003); Wiwa v. Royal Dutch Petroleum Co.,No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); Doe v. Exxon Mobil Corp., No. 01-CV-1357 (D.D.C. June 19, 2001) (Westlaw, DOCK-ALL); Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc*, 403 F.3d 708 (9th Cir. 2005). *See generally* Symposium, *Oil and International Law: The Geopolitical Significance of Petroleum Corporations*, 36 N.Y.U. J. INT'L L. & POL. 307 (2004).

18. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Maugein v. Newmont Mining Corp., 298 F. Supp. 2d 1124 (D. Colo. 2004); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

19. *See* Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000); Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285 (S.D. Fla. 2003), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2005); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D. Fla. 2003); Doe v. The Gap, Inc., No. CV-01-0031, 2001 WL 1842389 (D.N. Mar. I. Nov. 26, 2001); Arias v. DynCorp, No. 01-CV-01908 (D.D.C. Sept. 11, 2001) (Westlaw, DOCK-ALL).

20. *See* Abdullahi v. Pfizer, Inc., No. 01-CV-8118, 2002 WL 31082956 (S.D.N.Y. Sept. 17, 2002), *vacated in part*, 77 F. App'x 48 (2d Cir. 2003).

World War II, as were several Japanese corporations.[21] One pending lawsuit charges Mercedes-Benz with lending active support to the brutal "dirty war" waged by Argentina's ruling military junta from 1976 to 1983.[22] The central question raised by these cases is whether, and under what conditions, a defendant may be held civilly liable for aiding and abetting a violation of international law—in other words, for giving some form of assistance to a third party who violates international law directly.

There are both practical and ideological reasons explaining the wave of post-*Filartiga* ATS lawsuits against corporations. As a practical matter, plaintiffs have previously had trouble collecting damage awards (which have sometimes been quite large) in ATS lawsuits against foreign government officials.[23] In addition, personal jurisdiction issues are much less likely to arise when a defendant is a multinational corporation as opposed to a foreign government official.[24] Lawsuits against foreign officials may also be barred by foreign governmental immunities.[25]

From an ideological standpoint, the nonprofit human rights attorneys that usually represent plaintiffs in ATS cases[26] seek to hold corporations accountable as actors in what they view as an integrated global community—one in which corporations should not be allowed to shirk responsibility for their actions.[27] Not

---

21. *See* Deutsch v. Turner Corp., 317 F.3d 1005 (9th Cir. 2003); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 122 (2002) (noting that "[a]ccording to recent documentation, over 400 German companies used slave labor made available by the Nazis during the Second World War"); *see also* Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152 (2004) (book review) (discussing cases arising from the Holocaust).

22. *See* John Cassidy, *Mercedes in the Dock: Car Giant is Accused in US Action of Involvement in Argentina's "Disappeared"*, IRISH TIMES, Jan. 28, 2004, at 52.

23. *See* DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 816–17 (3d ed. 2001); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485, 485 (2001) (While few money judgments have yet been collected, successful plaintiffs have expressed great satisfaction in the sense of justice and vindication they have obtained from participation in these lawsuits.").

24. *See* WEISSBRODT ET AL., *supra* note 23, at 791.

25. ATS lawsuits against government officials may have to overcome the Foreign Sovereign Immunities Act, while judicial doctrines such as forum non conveniens also may bar a claim. For these and other obstacles to ATS lawsuits being successful, see generally *id.* at 794–818.

26. *See* Susan Beck, *Insisting on a Contingency: An Obscure 1789 Law Continues to Offer Plaintiffs Counsel International Leverage*, AM. LAW., Feb. 1, 2005, at 27. To use one timely example, the group Human Rights First, along with the American Civil Liberties Union, is providing counsel in a lawsuit by Iraqi and Afghani detainees against Defense Secretary Rumsfeld. *See* Davies, *supra* note 14, at A3.

27. *See, e.g.*, Defending the Alien Tort Claims Act, http://www.earthrights.org/atca/index.shtml (last visited Mar. 27, 2005) (warning that the statute is under attack by the business lobby and noting that "[h]uman rights organizations, religious groups, environment NGOs, and labor unions are defending the ATCA as a critical instrument for upholding the basic standards of international law"). For a discussion of the human rights campaign

surprisingly, the recent ATS litigation has created a backlash. For the business community, ATS cases present a liability threat which may make companies wary of investing in countries with a poor human rights record.[28] For the Bush administration, the modern application of the ATS represents an unwarranted encroachment on the executive branch's foreign policy power.[29]

A significant recent development is the settlement, in March of 2005, of one closely watched ATS case against the petroleum company Unocal.[30] The lawsuit, filed in 1996 by plaintiffs from Myanmar,[31] stemmed from international law violations committed by the Myanmar military, which provided security and other services for Unocal's pipeline.[32] Plaintiffs claimed that Unocal aided and abetted the military's use of forced labor, murder, rape, and torture.[33] The case

---

against corporate overseas conduct, see Rachel Cherington, Note, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of 10B-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1457–58 (2004) (discussing the publicity campaign against Nike's overseas labor practices, and noting separate campaigns against Royal Dutch Shell, Unocal, The Gap, Starbucks Coffee, Levi-Strauss, Macy's, and Liz Claiborne).

28. *See* Brief for the Nat'l Foreign Trade Council et al. as Amici Curiae Supporting Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339); Paul Magnusson, *Making a Federal Case out of Overseas Abuses*, BUS. WK., Nov. 25, 2002, at 78 (describing efforts by the business community to limit the law's application to them).

29. *See generally* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

30. *See* Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1 (reporting that the settlement was finalized on March 21, 2005 and "followed the general outlines of a tentative agreement reached in December"). Unocal put itself up for auction shortly after the tentative settlement agreement. On April 4, 2005, Chevron Texaco announced that it had won the bidding war to acquire Unocal. *See* Jad Mouawad, *Chevron Texaco Offers $16.8 Billion for Unocal*, N.Y. TIMES, Apr. 4, 2005, at C1. This announcement was premature, however, as the China National Offshore Oil Corporation (CNOOC), which is owned by the Chinese government, has initiated a takeover bid valued at $18.5 billion dollars. As it currently stands, there is an ongoing battle to acquire Unocal with political ramifications should the bid of CNOOC succeed. *See* Steve Lohr, *The Big Tug of War over Unocal*, N.Y. TIMES, July 6, 2005, at C1.

31. *See, e.g.*, Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S.F. L. REV. 563, 564 (2003) (stating that Unocal was the first of its kind).

32. *See* Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

33. 395 F.3d at 939–42. For instance, Unocal's president allegedly informed human rights groups in January of 1995 that because of physical threats against the pipeline, Unocal needed to use the military to secure it, and that "[i]f forced labor goes hand and glove with the military yes there will be more forced labor." *Id.* at 941 (emphasis omitted).

settled for close to $30 million [34] and marks the first time that a U.S. corporation has paid compensation to ATS plaintiffs.[35]

Before the settlement, there existed a strong possibility that the case would reach the Supreme Court on the issue of aiding and abetting and conspiracy liability under the ATS.[36] The three initial Ninth Circuit judges all agreed that aiding and abetting liability was possible under the ATS, but split on whether international law or domestic law should control.[37] Two judges favored international law, while a concurrence argued that domestic civil law should apply.[38] Prior to the settlement, the Ninth Circuit vacated the decision and established an *en banc* panel to review the choice of law issue.[39] The panel granted the parties' stipulation to dismiss the lawsuit following the settlement.[40]

This Note suggests that both the majority and concurrence in *Unocal* (and other cases which have followed either approach) took a flawed approach. The majority erred by applying international standards of criminal aiding and abetting in the absence of an explicit congressional grant. While the ATS establishes a civil remedy for acts that are essentially international crimes, domestic law should inform the calculus of when a defendant may be held civilly liable based on an aiding and abetting theory pursuant to the ATS. The concurrence, all the same, erred by endorsing civil liability standards that, in some cases, would not require a strong showing of criminal intent. Because an ATS plaintiff must prove that a defendant participated in a violation of international law in order to sustain a prima facie case under the statute, it would be inappropriate to read Congress's judicial grant as extending to cases in which a defendant lacked scienter to violate the law of nations.

This Note proposes that the standard which should be used in ATS aiding and abetting and conspiracy cases is the *Restatement (Second) of Torts*, section 876, which is the civil counterpart to criminal aiding and abetting. This use comports both with the modern judicial interpretation of the reach of the ATS and the view at common law that the ATS encompassed aiding and abetting liability. In addition, section 876 contains a scienter requirement that is consistent with the structure of the ATS.

The structure of this Note explores both the historical and contemporary framework surrounding the ATS and argues that the ATS should be interpreted to include civil aiding and abetting liability. Specifically, Part I of this Note describes

---

34. *See* Paul Magnusson, *A Milestone For Human Rights*, BUS. WK., Jan. 24, 2005, at 63.

35. *See* Edward Allen et al., *Unocal Pays Out in Burma Abuse Case*, FIN. TIMES, Dec. 14, 2004, at 12. In addition to agreeing to pay monetary damages, Unocal has agreed to set up a fund to pay for improvements to the area in which the abuses took place. Magnusson, *supra* note 28, at 78.

36. *See, e.g.*, Beck, *supra* note 26, at 27 (stating that the Supreme Court was likely to use the case to clarify liability issues under the ATS).

37. *See Unocal*, 395 F.3d at 962–63.

38. *Id.*

39. *Id.* at 978.

40. Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (en banc).

the meaning of the law of nations as it existed in 1789. Part II explicates the modern judicial construction of the statute, including the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.[41] Part III maintains that the First Congress almost certainly anticipated that aiding and abetting and conspiracy liability would attach to the ATS, and also discusses modern international law treaties covering aiding and abetting. Part IV suggests that to infer civil aiding and abetting liability is consistent with *Sosa* and *Central Bank of Denver v. First Interstate Bank of Denver*,[42] the Supreme Court's leading decision on civil aiding and abetting liability. Finally, Part V discusses the judicial approaches to aiding and abetting cases, including the approaches in the *Unocal* case. The Note argues that of the possible approaches, section 876 of the *Restatement (Second) of Torts* is most in line with the underlying purposes of the statute, as it allows for liability based on aiding and abetting in civil lawsuits.

I. ORIGINAL MEANING OF "LAW OF NATIONS"

The direct origins of modern international law began to emerge with the formation of modern nation states in the mid-seventeenth century.[43] In late eighteenth-century America, international law was uncontroversial and was called the "law of nations."[44] Colonial attorneys viewed the law of nations as a derivative of natural law, which could be arrived at by means of enlightened reason.[45] The "law of nations" was composed of codes of behavior governing the interaction between sovereign nations, and those binding norms affecting individuals that fell within the domain of judges to enforce.[46] This latter subset of the law of nations

---

41. *See* Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 50 (2003). In a prior case, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court did not reach the question of the scope of the Alien Tort Statute because it held the lawsuit to be barred by the Foreign Sovereign Immunities Act.

42. 511 U.S. 164 (1994).

43. *See* JANIS, *supra* note 4, at 1–2. International law has a much more ancient lineage as well. *See, e.g., id.* at 1 (referencing treaties and alliances among Jews, Romans, Syrians, and Spartans); C.F. Amerasinghe, *South Asian Antecedents of International Law*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE 3 (Karel Wellens ed., 1998).

44. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.) ("When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 (1989) ("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.").

45. *See* Jay, *supra* note 44, at 822–23; G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 728 (1989) ("The 'law of nations' and the 'law of nature' were closely allied concepts for Marshall and his contemporaries."). In *The Antelope*, Justice Marshall defined the law of nations as "a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other." 23 U.S. (10 Wheat.) 66, 90 (1825).

46. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2755–56 (2004) (describing two subsets of international law in early colonial America).

was seen as existing at common law and, hence, was enforceable even in the absence of legislation.[47]

An influential work on the common law during this period, William Blackstone's *Commentaries on the Laws of England* (based on lectures by Blackstone to his students), contains a noteworthy section on the law of nations. Blackstone described the law of nations as prohibiting the harming of persons granted a safe conduct, prohibiting the harming of ambassadors, and prohibiting piracy.[48] One version of the *Commentaries* indicates that Blackstone also included in his lectures a prohibition against slave trading, as England had come to consider it a form of piracy.[49]

Scholars examining the original intent behind the ATS focus on Blackstone's three proscriptions as providing a clear source of influence for what the "law of nations," as used in the statute, originally connoted.[50] The municipal laws of England provided harsh criminal sanctions for individuals who transgressed the law of nations.[51] In 1790, the United States enacted legislation protecting ambassadors and persons granted safe conduct that closely mirrored the

---

47. *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) ("Early in our history, the question whether international law was state law or federal law was not an issue: it was 'the common law.'"). Laws passed by the legislature regarding the law of nations were viewed as declarative of existing law or as remedies, but not as substantive changes to the common law doctrine of the law of nations. Jay, *supra* note 44, at 829.

48. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2238 (William Carey Jones ed., Bancroft-Whitney Co. 1916) (1765). "Safe conducts" referred to hostilities against persons granted entry during wartime. The protection extended to enemies expressly allowed entry and to subjects of an allied country present "under a general implied safe-conduct." *Id.* at 2238–39.

49. While most editions of Blackstone's *Commentaries* describe just three violations of the law of nations, at least one edition portrays Blackstone as including in his lecture a fourth prohibition against slave trading. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Charles M. Haar ed., Beacon Press 1962) (1765). In *The Antelope*, Chief Justice Marshall decided a case which raised the question of whether the United States' involvement in the slave trade was a violation of the law of nations as a form of piracy. The court held that it was not, basing its rationale on the law of conquest while holding that positive law trumped the law of nature:

> That [the slave trade] is contrary to the law of nature will scarcely be denied. . . . But from the earliest times war has existed, and war confers rights in which all have acquiesced. Among the most enlightened nations of antiquity, one of these was, that the victor might enslave the vanquished. This, which was the usage of all, could not be pronounced repugnant to the law of nations.

23 U.S. (10 Wheat) at 120.

50. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 469 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488–90 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 231–32 (1996); Jay, *supra* note 44, at 824; Randall, *supra* note 9, at 39–41.

51. *See* 4 BLACKSTONE, *supra* note 48, at 2238–43.

English approach.[52] Congress also curbed piracy in the 1790 legislation, though not explicitly invoking the law of nations.[53] However, in 1819 Congress passed legislation that defined piracy as that which the law of nations prohibited.[54] Thus, both the English and American legislatures enacted criminal sanctions to deter persons from committing the violations of the law of nations that Blackstone delineated.

In addition, a non-binding resolution passed by the Continental Congress in 1781 made unambiguous reference to the wrongs described by Blackstone.[55] Congress had a strong desire to assure foreign nations that it would honor the law of nations.[56] The legislation encouraged states to create a civil remedy for violations of safe-conduct granted during wartime, hostile acts against a person granted a "general implied safe conduct," acts against ambassadors, and infractions of treaties and conventions to which the United States was a signatory.[57] One obvious explanation for the omission of piracy is that "Congress itself had authority to appoint courts for the trial of piracies."[58] The legislation thus provides probative evidence that Congress had in mind Blackstone's prohibitions when it enacted similar legislation in 1789 in the form of the ATS.[59]

The "Marbois affair" also surely weighed heavily on the minds of the First Congress when it passed the ATS. The underlying event took place in May 1784, when the Chevalier de Longchamps, a Frenchman "of obscure and worthless character," attacked Francis Barbe Marbois, another Frenchman, on the streets of Philadelphia.[60] The event sparked an international uproar.[61] France claimed criminal jurisdiction, but Pennsylvania refused to extradite de Longchamps.[62] Ultimately, he was tried in Pennsylvania state court under criminal charges for his violation of the law of nations.[63] He received a sentence of slightly more than two

---

52. *See* Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 118. The legislation provided:
> [I]f any person shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

53. *See id.* § 8-12, 1 Stat. at 112–15.

54. *See* Act of Mar. 3, 1819, ch. 77, 3 Stat. 510, 513–14.

55. The legislation was nonbinding due to the institutional limitations of the Continental Congress. *See* Dodge, *supra* note 50, at 226.

56. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2760, n.15 (2004).

57. *See* 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1136–37 (Library of Cong. ed. 1912).

58. Dodge, *supra* note 50, at 227.

59. *Id.* at 231 (stating that the "Judiciary Act enacted all the recommendations of the 1781 resolution").

60 Casto, *supra* note 50, at 491.

61. *Id.*

62. Randall, *supra* note 9, at 24–25.

63. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784). The Court described the relevant factual circumstances of the event, which followed an

years in jail, and was ordered to pay a fine of one hundred French Crowns to the Commonwealth of Pennsylvania.[64] Invoking its common law powers, the Pennyslvania Supreme Court declared that "the law of Nations . . . , in its full extent, is part of the law of this State."[65]

Most international law scholars agree that when Congress passed Oliver Ellsworth's 1789 Judiciary Act, it intended to allow foreigners to bring suit for violations of the law of nations, even if the lawsuit did not implicate a U.S. citizen.[66] As a young nation, the United States had a keen interest in avoiding war by assuring the mercantile powers of the era that it would provide a forum for adjudicating international incidents.[67]

Textually, the only significant difference between the original legislation and the current statutory language is that the original version allowed foreigners to sue in *either* state or federal court, whereas today the statute confines jurisdiction to federal court.[68] Nevertheless, federal courts were seen as more sympathetic to foreign claimants at the time, and therefore there were compelling reasons behind Congress's decision to provide an exclusively federal forum, even if the original legislation allowed actions to be brought in state court.[69] With the historical meaning of the law of nations in mind, one may better understand the modern ATS jurisprudence.

---

encounter between De Longchamps and Marbois on Philadelphia's Market Street, as follows: "De Longchamps struck the cane of Monsieur Marbois, before that gentleman used any violent gestures, or even appeared incensed; but that as soon as the stroke was given, Monsieur Marbois employed his stick with great severity, til the spectators interfered and separated the parties." *Id.* at 111–12.

64. *Id.* at 118.

65. *Id.* at 116.

66. *See* Brief of Professors of Federal Jurisdiction & Legal History et al., as Amici Curiae Supporting Respondents, at 21–22, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339) [hereinafter Brief of Professors] (arguing that Congress intended to allow for lawsuits involving any violation of the law of nations, and that lawsuits between two aliens were actionable); Dodge, *supra* note 50. For alternative views, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002) (arguing that "the First Congress implicitly intended to limit the Alien Tort Statute to suits involving at least one U.S. citizen defendant"); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995) (use of "tort" in 1789 limited lawsuits to prize cases).

67. *See* Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 63 (1988) (arguing that while there were multiple purposes behind the legislation, "the overriding purpose was to maintain a rigorous neutrality in the face of the warring European powers").

68. *Compare* 1 Stat. 73, 77 (1789), *with* 28 U.S.C. § 1350 (2005).

69. *See* Brief of Professors, *supra* note 66, at 9; Casto, *supra* note 50, at 516–22.

II. MODERN INTERPRETATIONS OF "LAW OF NATIONS"

A. The Filartiga *Line of Cases*

The modern history of the Alien Tort Statute begins with *Filartiga v. Pena-Irala*.[70] Plaintiffs were Dolly Filartiga and her father, Dr. Joel Filartiga, citizens of Paraguay.[71] They brought a complaint in federal court alleging, *inter alia*, that Americo Norberto Pena-Irala, a Paraguayan police officer, tortured Dolly's brother Joelito to death in violation of the law of nations.[72] The Filartigas claimed that Pena was retaliating against Dr. Filartiga for voicing opposition to the dictatorship of Alfredo Stroessner.[73]

In ruling on the merits of the Filartigas' ATS claim, the Second Circuit concluded that international law prohibited torture by state actors, and held that the Filartigas' claim was properly brought under §1350. The court concluded that modern international law prohibited any state official from engaging in torture based on "the universal condemnation of torture in numerous international agreements, and the renunciation of torture . . . by virtually all of the nations of the world (in principle if not in practice)."[74] The Second Circuit held that the ATS' grant of jurisdiction over violations of the law of nations includes modern binding customary international law norms.[75] Finding that the modern-day torturer, as "an enemy of all mankind," was analogous to the pirates and slave traders of the past,[76] the Second Circuit found that the ATS provided jurisdiction over the Filartigas' claims.[77] *Filartiga* is a watershed opinion because it held that the law of nations, as it is used in the ATS, includes not just the violations described by Blackstone, but modern international law, such as the prohibition against official torture.

As previously noted, the *Filartiga* decision produced a line of cases extending the ATS to violations of human rights. In addition to torture, federal jurisdiction under the ATS has been held to extend to numerous other claims, including genocide, war crimes, summary execution, forced disappearance,

---

70. 630 F.2d 876 (2d Cir. 1980). As one commentator suggests, "[t]o its supporters, *Filartiga* is the *Brown v. Board of Education* of international human rights, a decision that spawned two decades of ground-breaking litigation both in the United States and abroad." William S. Dodge, *The Constitutionality of the Alien Tort Statute*, 42 VA. J. INT'L L. 687, 687 (2002) (citations omitted).

71. *Filartiga*, 630 F.2d at 878.

72. *Id.* at 878–79.

73. *Id.* at 878. The police brought Dolly to Pena's home after her brother died so that she could see evidence of the suffering which he endured. As she ran horrified from Pena's house, she called out: "Here you have what you have been looking for so long and what you deserve. Now shut up." *Id.* at 878–79.

74. *Id.* at 880.

75. *Id.* at 881 (stating that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today").

76. *Id.* at 890.

77. *Id.* at 887 (concluding that "there can be little doubt that this action is properly brought in federal court. This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations").

slavery, prolonged detention, and cruel, inhuman, and degrading treatment.[78] According to post-*Filartiga* cases, "certain wrongful conduct violates the law of nations . . . [when the conduct] offends norms that have become well-established and universally recognized."[79] The Second Circuit, in *Kadic v. Karadzic*, held that the prohibition against genocide and war crimes could be violated by private actors based on international agreements.[80] However, it did not find that this was so with regard to torture because international treaties had not stated that nongovernmental torture violated international law.[81]

Courts have dismissed actions in which plaintiffs pled violations that were not universally recognized as violations of international law. Lawsuits which were dismissed include, *inter alia*, allegations of the denial of free expression, environmentally destructive practices, and expropriation of private property.[82] While these lawsuits also implicate human rights, courts held that they did not violate universally recognized norms within the meaning of the law of nations. Put slightly differently, they are not international crimes of the sort that give rise to ATS liability.

One noteworthy critique of the *Filartiga* line of cases was articulated by Judge Bork in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.[83] In *Tel-Oren*, victims of a horrific attack against a bus in Israel brought suit alleging violations of the law of nations, including the use of torture and terrorism.[84] Judge

---

78. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (slavery actionable under ATS); William S. Dodge, *Introduction: Brief of Amici Curiae*, 28 HASTINGS INT'L & COMP. L. REV. 95, 95 n.4 (2004) (citing cases). Courts have not unanimously concluded that cruel, inhuman, and degrading treatment is actionable; however, most courts that have considered the matter recently have concluded that a prohibition against cruel, inhuman, and degrading treatment is definable with the requisite specificity. *Compare* Forti v. Suarez-Mason, 694 F. Supp. 707, 712 (N.D. Cal. 1988) (not actionable), *with* Cabello v. Fernández-Larios, 402 F.3d 1148 (11th Cir. 2005), Doe v. Qi, 349 F. Supp. 2d 1258, 1320–22 (N.D. Cal. 2004), Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *7–8 (S.D.N.Y. Feb. 28, 2002), *and* Xuncax v. Gramajo, 886 F. Supp. 162, 185–87 (D. Mass. 1995).

79. Tachiona v. Mugabe, 234 F. Supp. 2d 401, 411 (S.D.N.Y. 2002). *Filartiga* also made this point explicitly, as the Second Circuit noted that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Filartiga*, 630 F.2d at 881 (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)).

80. 70 F.3d 232, 239 (2d Cir. 1995).

81. *Id.* at 243.

82. *See, e.g.*, Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986) (denial of free speech not actionable under 28 U.S.C. § 1350 (2000)); Flores v. S. Peru Copper Corp., 343 F.3d 140, 741 (2d Cir. 2003) (pollution not actionable); Jafari v. Islamic Republic of Iran, 539 F.Supp. 209 (D.C. Ill. 1982) (taking of private property not actionable).

83. 726 F.2d 774, 798 (D.D.C. 1984) (per curium) (Bork, J., concurring). The opinion was noteworthy because the three D.C. Circuit judges who issued the opinion wrote three separate concurring opinions, criticizing each other rather vigorously. *See id.* at 775 (Edwards, J., concurring); *id.* at 823 (Robb, J., concurring).

84. The human tragedy that gave rise to the lawsuit is described in the concurring opinions of Judge Edwards and Judge Bork. On March 11, 1978, members of the Palestine Liberation Organization gathered hostages into a bus, which they seized and drove

Bork's argument was twofold. First, he argued that any violations of modern international human rights were potentially viable only when accompanied by an "explicit grant of action" from Congress.[85] Absent a legislative grant, the court in his view did not have jurisdiction to hear the plaintiffs' case.[86] Second, he suggested that the Second Circuit erred in extending the ATS to include modern international law violations because this went beyond Congress's grant.[87] Judge Bork's critique has come under criticism from scholars who support the *Filartiga* line of reasoning,[88] and most federal courts have continued to apply *Filartiga*.[89]

The *Tel-Oren* opinion was nevertheless largely responsible for spurring Congress to enact the Torture Victim Protection Act ("TVPA") in 1992.[90] The act allows a claimant to bring a civil action against any foreign individual who commits an act of torture or extrajudicial killing.[91] One potentially important difference between the ATS and the TVPA is that the TVPA allows both aliens and U.S. citizens to bring a claim, unlike the ATS, which only allows claims by aliens.[92] While the statute is more limited in reach than the ATS (since it covers only torture and extrajudicial killings), Congress expressed support for the approach taken by *Filartiga* and stated that the ATS "should not be replaced."[93]

---

along the main highway connecting Haifa and Tel Aviv. The terrorists tortured some of their hostages and shot to death occupants of passing cars and some of the passengers of the bus. When police brought the bus to a stop by shooting at the bus's tires and engine, the terrorists reacted by blowing it up with grenades. They killed twenty-two adults and twelve children, and seriously wounded seventy-three adults and fourteen children. *See id.* at 776, 798–99.

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

86. *Id.* at 816.

87. *See id.* at 815.

88. *See, e.g.*, Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985); Dodge, *supra* note 50, at 238–43.

89. As the Supreme Court stated recently, the legitimacy of *Filartiga* "has been assumed by some federal courts for 24 years." Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004).

90. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350). (The legislative history makes explicit reference to Congress's desire to provide a separate authorizing statute in light of Judge Bork's *Tel-Oren* opinion, as both the House and Senate Judiciary Committees stated that "[t]he TVPA would provide such a grant." S. REP. NO. 102-249, at 5 (1991); H.R. REP. NO. 102-367, at 4 (1991)).

91. *Id.*

92. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 176–78 (1995) (finding subject matter jurisdiction over American citizen's claim that she was tortured in Guatemala).

93. *See* Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Statute: A Reality Check*, 16 ST. THOMAS L. REV. 585, 593 (2004) ("The TVPA was expressly viewed as reaffirming a pre-existing cause of action and extending it to U.S. citizens, not as creating a new one and thereby implicitly limiting *Filartiga*."). *But see* Curtis A. Bradley and Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Legislation*, 66 FORDHAM L. REV. 319, 363 (1997) (arguing that the legislative history of the TVPA is ambiguous and that "to the extent

One issue implicating the legitimacy of the ATS line of cases, which has ignited scholarly debate in recent years, is the degree to which customary international law remains part of U.S. federal law in the modern era after *Erie Railroad Co. v. Tompkins*.[94] *Erie* was a watershed opinion that put a stop to the judicial creation of federal "general" common law.[95] For purposes of the ATS, the issue is whether ATS lawsuits "arise under" federal law within the meaning of Article III of the United States Constitution.[96] *Filartiga* found the ATS to be authorized by Article III because "the law of nations . . . has always been part of the federal common law."[97] In other words, the court found that there remained a federal common law that incorporated international law. However, a recent position asserts that international law should not be viewed as part of federal common law following *Erie*.[98] While the debate over the place of international law within the federal system will continue among academics, the Supreme Court put the argument to rest with regard to the ATS in its 2004 decision, *Sosa v. Alvarez-Machain*.[99]

B. Sosa v. Alvarez-Machain*: The Supreme Court's Interpretation*

In *Sosa v. Alvarez-Machain*, the United States Supreme Court rendered its first decision interpreting the language of the ATS.[100] In a narrow sense, the issue before the Court concerning the ATS[101] was whether the plaintiff's claim that he was subjected to an arbitrary arrest was sufficient to warrant jurisdiction under the ATS.[102] From a broader perspective, the issue was whether the federal courts,

---

that the legislative history did approve of *Filartiga*, this approval is inconsistent with actual federal enactments—including the TVPA itself—that indicate that Congress rejects *Filartiga*'s open-ended incorporation of [customary international law] into federal law").

94. 304 U.S. 64 (1938). For a number of viewpoints regarding the proper place of international law within the United States system of federalism following *Erie*, see Symposium, *Federal Courts and Foreign Affairs*, 42 VA. J. INT'L L. 365 (2002).

95. *Erie R.R. Co.*, 304 U.S. at 78.

96. *See* Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 379 (2002). The U.S. Constitution provides that "[t]he judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States." U.S. CONST. art. III, § 2, cl. 1.

97. Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

98. The traditional understanding of international law theorists has comported with the well-known statement in *The Paquete Habana* that "[i]nternational law is part of our law." 175 U.S. 677, 700 (1900). This view, however, has come under renewed scrutiny. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (elaborating on the authors' initial critique). The critique authored by Bradley and Goldsmith generated an intense backlash from international law scholars. *See* Young, *supra* note 96, at 367 n.3 (citing sources of criticism).

99. 124 S. Ct. 2739, 2746 (2004).

100. *See id.*; Hoffman & Zaheer, *supra* note 41, at 50 (stating that *Sosa* was the first such decision).

101. A separate issue that the court addressed in some depth, but not pertinent to this note, is whether the Federal Tort Claims Act authorized the plaintiff's suit against the United States (the court concluded that it did not do so). *See Sosa*, 124 S. Ct. at 2747.

102. *Id.*

beginning with *Filartiga*, had correctly analyzed the ATS to allow claims based on modern-day international law to proceed in federal court.[103]

The plaintiff in the case, Humberto Alvarez-Machain ("Alvarez"), was a Mexican physician who allegedly prolonged the life of a captured agent of the Drug Enforcement Agency ("DEA") as the agent was being tortured.[104] The DEA agent, Enrique Camarena-Salazar, was murdered after a two-day period of interrogation and torture.[105] The DEA requested that the Mexican government transport Alvarez to the United States, where an arrest warrant on murder charges was outstanding.[106] Finding the Mexican government to be uncooperative, the DEA hired a group of Mexican citizens, including Joe Francisco Sosa ("Sosa") to abduct Alvarez and bring him to the United States.[107] Carrying out this plan, the group seized Alvarez, and "held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers."[108]

Prior to the civil lawsuit considered in *Sosa*, the Supreme Court considered whether the United States violated a U.S.-Mexico extradition treaty by kidnapping a Mexican citizen to face criminal charges in the United States. In *United States v. Alvarez-Machain*,[109] the Court held that the seizure of Alvarez did not constitute a violation of the extradition treaty between the United States and Mexico.[110] Alvarez was prosecuted in 1992 in federal court, but the district court granted Alvarez's motion for a judgment of acquittal, finding the evidence against him insufficient.[111] Then, in 1993, Alvarez brought his ATS claim, alleging that his abduction violated the ATS.[112]

The majority opinion in *Sosa*, authored by Justice Souter, sent a mixed message to lower courts regarding how expansively to read the ATS. The opinion was replete with language urging a cautionary approach in inferring a cause of action under the ATS, but at the same time did not overturn any of the post-*Filartiga* doctrines.

---

103. *Id.* (stating that the Supreme Court granted *certiorari* with a desire to clarify the scope of the ATS).

104. *Id.* at 2746.

105. *Id.*

106. *Id.*

107. *Id.* at 2747.

108. *Id.*

109. 504 U.S. 655 (1992).

110. *Id.* at 670 (concluding that Alvarez's "abduction was not in violation of the Extradition Treaty between the United States and Mexico" and that "[t]he fact of respondent's forcible abduction does not . . . prohibit his trial in a court in the United States for violations of the criminal laws of the United States"). Three justices dissented from the majority's holding on the basis that Alvarez was kidnapped in violation of the treaty and international law. *Id.* at 670 (Stevens, J., dissenting). The scholarly response to the opinion has generally (although not unanimously) been harshly critical. *See, e.g.*, Elwood Earl Sanders, Jr., *In Search of an Alternative Remedy for Violations of Extradition Treaties*, 34 SW. U. L. REV. 1, 1 n.4 (2004) (citing sources).

111. *Sosa*, 124 S. Ct. at 2746.

112. *Id.* at 2747.

In urging caution upon the lower courts when faced with ATS lawsuits, the opinion made reference to *Erie Railroad. Co. v. Tompkins* and the demise of judicially created "general" federal common law.[113] The Court also noted that the statute did not explicitly create a private cause of action to enforce modern international law norms,[114] and took judicial notice of the foreign policy implications bound up with finding new violations of international law.[115]

Despite the opinion's argument for caution in inferring new violations of international law that satisfy the requirements of section 1350, the Court declined to hold that *Filartiga* and its progeny committed errors in statutory construction. Rather, the Court declared that "the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[116] The Court also rejected Sosa's argument, reminiscent of Judge Bork's *Tel-Oren* concurrence, that the statute was in effect stillborn in the absence of separate authorizing legislation.[117]

Justice Scalia, joined by two other justices, argued in dissent that *Erie,* and the current positivist view of federal common law, barred recognition of modern ATS human rights claims.[118] However, the majority was not persuaded by this reasoning, stating that even after *Erie* there are "limited enclaves in which federal courts may derive some substantive law in a common law way."[119] The Court cited to its prior opinions recognizing international law as part of U.S. domestic law[120] and concluded that the First Congress would have expected courts to recognize emergent international law norms when it enacted the ATS.[121] The Court also referenced Congress's enactment of the TVPA following the *Tel-Oren* decision as evidence of Congress's affirmation of the result in *Filartiga.*[122]

Setting a threshold for future ATS cases, the Court held that a two-prong standard should be applied to determine whether a plaintiff alleges a violation of the law of nations. First, the claim must "rest on a norm of international character accepted by the civilized world," and second, it must be "defined with specificity comparable to the features of the 18th century paradigms."[123] As the Court

---

113. *Id.* at 2764.

114. *See id.* at 2763 (stating that "we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly").

115. *Id.* (stating that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

116. *Id.* at 2764.

117. *Id.* at 2743.

118. *See, e.g., id.* at 2773 (Scalia, J., dissenting) (suggesting that "the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century").

119. *Id.* at 2764.

120. *Id.*

121. *Id.* at 2765.

122. *Id.* ("Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation [the TVPA] supplementing the judicial determination in some detail.").

123. *Id.* at 2761–62.

recognized, *Sosa* did not create a new standard, but instead rearticulated the two prongs applied by most federal courts that previously considered ATS claims.[124] The Court held that Alvarez's allegation of arbitrary arrest did not allege a violation of the law of nations.[125] However, in substance it validated the analytical approach that lower courts had generally taken in interpreting the law of nations while urging a cautious approach in inferring new international law norms. The reasoning in *Sosa* is consistent with a finding of the imposition of aiding and abetting liability in ATS cases, as discussed below.

III. AIDING AND ABETTING INTERNATIONAL LAW VIOLATIONS

There is ample evidence that the law of nations, as interpreted by U.S. courts at common law, encompassed aiding and abetting liability. There is also extensive evidence of international law changing to encompass aiding and abetting liability after World War II. While domestic law should inform aiding and abetting liability under the ATS, a number of courts have applied international law theories of *criminal* aiding and abetting to ATS cases. This Part, therefore, also gives an overview of international criminal aiding and abetting developments following World War II and continuing to the present time.

A. Aiding and Abetting Under the Law of Nations in 1789

1. Common Law Conception of Aiding and Abetting

The English common law, which America imported, clearly encompassed aiding and abetting liability with regard to principals and accessories. Blackstone informs us that in felony cases[126] the law included a principal in the first degree, and a principal in the second degree, which was "he . . . who is present, aiding and abetting the fact to be done."[127] Persons who were not present at the scene of the crime, but were connected with its performance either before or after the fact, were deemed accessories.[128] The ancient sources of law from which the common law evolved did not punish accessories and principals differently.[129] Common law departed from this formulation to judge accessories *after* the fact as less culpable.[130] In some cases, the common law also extended mercy to accessories before the fact, granting what in Blackstone's era was referred to as the "benefit of clergy."[131] Nevertheless, Blackstone concludes that "the punishment is still much

---

124. *Id.* at 2744.

125. *Id.* at 2767.

126. There was absolutely no distinction drawn between accessories and principals in cases of treason or misdemeanors. *See* 4 BLACKSTONE, *supra* note 48, at 2202–03; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 735 (3d ed. 1982).

127. *See* 4 BLACKSTONE, *supra* note 48, at 2201.

128. *Id.* at 2202.

129. As Blackstone notes: "[T]he general rule of the ancient law (borrowed from the Gothic constitutions) is this, that accessories shall suffer the same punishment as their principals." *Id.* at 2206.

130. *Id.* at 2206.

131. *Id.* at 2207. *See also* PERKINS & BOYCE, *supra* note 126, at 751–52. As explained by one recent commentary:

the same with regard to principals and such accessories as offend *before* the fact is committed."[132]

American courts in the late 1700s and early 1800s adopted the common law approach that criminal accomplices were no less culpable than persons directly perpetrating a crime.[133] A number of cases indicated that persons would be criminally liable for engaging in a common design.[134] For instance, one court declared in an 1800 case that "[i]f any man joins and acts with an assembly of people, his intent is always to be considered and adjudged to be the same as theirs; and the law, in this case, judgeth of the intent by the fact."[135] In a case involving Aaron Burr, a Virginia court similarly concluded in 1807 that "the nature of the conspiracy may be proved by the transactions of any of the conspirators in furtherance of the common design."[136]

Nor was this concept limited to criminal cases. In *civil* actions, persons aiding and abetting as accessories were treated the same as principals in cases decided shortly before or after passage of the ATS.[137] For instance, in the civil lawsuit *Purviance v. Angus*, decided in 1786, the High Court of Errors and Appeals in Pennsylvania declared: "If one does a trespass, and others do nothing but come in aid, *yet all are principal trespassers*."[138] In a case decided in 1818, the New York Supreme Court likewise stated that it was settled law that "[a]ll persons who direct or assist in committing a trespass, or in the conversion of personal property, are in general liable as principals though not benefited by the act."[139] The

---

> The benefit of the clergy had begun prior to the thirteenth century as a right of those in religious orders to avoid punishment in secular courts and instead to be delivered for trial in the bishop's court. Over time, the class of persons who could claim the benefit spread: first to those who were not in orders but assisted such persons; later to all men who could read; and by the end of the sixteenth century, to any man who could feign literacy . . . . In reaction to the widespread availability of the benefit, Parliament gradually took steps to narrow the crimes for which it could be used. By the end of the sixteenth century, murder, robbery, arson, piracy, and buggery were all nonclergyable.

Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 630–31 (2004).

132. 4 BLACKSTONE, *supra* note 48, at 2207.

133. *See, e.g.*, Miller v. Lord Proprietary, 1 H. & McH. 543 (Md. 1774); State v. Mairs, 1 N.J.L. 453 (1795); State v. Arden, 1 S.C.L. (1 Bay) 487 (1795), *overruled by* State v. Torrence, 406 S.E.2d 315 (S.C. 1991); State v. Simmons, 3 S.C.L (1 Brev.) 6 (1794); State v. S.L., 2 Tyl. 249 (Vt. 1803); Commonwealth v. Posey, 8 Va. (4 Call.) 109 (1787).

134. *See, e.g.*, Coyles v. Hurtin, 10 Johns. 85 (N.Y. Sup. Ct. 1813); Commonwealth. v. Eberle, 3 Serg. & Rawle 9 (Pa. 1817); Case of Fries, 9 F. Cas. 924, 931 (C.C.D. Pa. 1800) (No. 5127); United States v. Burr, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694).

135. *Fries*, 9 F. Cas. at 931.

136. *Burr*, 25 F. Cas. at 195.

137. *See, e.g.*, Voss v. Baker, No. 17,012, 28 F. Cas. 1301 (C.C.D.C. 1802); Purviance v. Angus, 1 U.S. (1 Dall.) 180 (Pa. Ct. Err. & App. 1786); Whitaker v. English, 1 S.C.L. (1 Bay) 15 (1784), *overruled by* Rourk v. Selvey, 164 S.E.2d 909 (S.C. 1968).

138. *Purviance*, 1 U.S. (1 Dall.) at 184 (emphasis added).

139. M'Donald v. Hewett, 15 Johns. 349 (N.Y. Sup. Ct. 1818).

civil law as it existed at the time of the First Congress thus applied the same aiding and abetting concepts as were applicable in criminal prosecutions by the state. The above cases demonstrate that common law cases referenced liability based on a common design, and based on assistance in the commission of the torts that existed at common law.

2. The Application of Aiding and Abetting to the Law of Nations at Common Law

Blackstone confirms that those who were accessories to acts in contravention of the law of nations were guilty of a crime. In the case of attacks against persons granted a safe-conduct, "breaking of truce and safe-conducts, or *abetting and receiving the truce-breakers*, was (in affirmance and support of the law of nations) declared to be high treason."[140] Similarly, Blackstone suggests that a person "soliciting" an attack against a foreign ambassador also committed a serious offense against the law of nations.[141] Finally, a person assisting pirates in virtually any way was also guilty of a felonious crime, as English law prohibited "the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise consulting, combining, confederating, or corresponding with them . . . ."[142]

In the United States, the 1790 legislation prohibiting piracy shows that Congress adopted the English approach to aiding and abetting. One provision stated that accessories to piracy would be "deemed, adjudged, and taken to be a pirate, felon, and robber."[143] A separate provision extended to persons that confederated with pirates, including those who encouraged crew members to "turn pirate," traded with pirates, or knowingly communicated with pirates.[144] Thus, the American legislation, like the English law described by Blackstone, prohibited trading, and even communicating, with pirates.

When the Supreme Court held that the law of nations defined piracy as "robbery upon the sea" in *United States v. Smith*,[145] the Court almost certainly did not intend to limit its application to those who robbed, but not those who were accomplices. Sparing the accomplices would have been entirely inconsistent with the view of the criminal law described by Blackstone and transported to early colonial America. Direct evidence that Congress intended the ATS to reach acts of aiding and abetting exists in a 1795 opinion by Attorney General Bradford in which he expressly states that individuals "committing, aiding, or abetting" violations of the laws of war would be liable.[146]

---

140. 4 BLACKSTONE, *supra* note 48, at 2239 (emphasis added).

141. *Id.* at 2241.

142. *Id.* at 2242.

143. *See* Act of Apr. 30, 1790, ch. 9, 1 Stat. 112, 114.

144. *Id.* § 12, 1 Stat. at 115.

145. 18 U.S. (5 Wheat) 153, 162 (1820). This decision, which upheld the 1819 Piracy Act, was part of the Supreme Court's jurisprudence on "general piracy," as opposed to piracy defined by domestic statutes such as the 1790 legislation. *See* White, *supra* note 45, at 732–33.

146. *See* Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).

The Supreme Court's opinion in the case of *Talbot v. Jansen*[147] drew a similar conclusion to that of Attorney General Bradford. In *Talbot*, the Court considered whether Talbot, a French citizen with a commission to capture enemy ships, violated the law of nations when he assisted Ballard, a U.S. citizen, in seizing a Dutch ship.[148] While Holland and France were engaged in war, the United States and Holland maintained a peaceful relationship.[149] The Court held that Talbot was guilty of violating the law of nations by seducing an American citizen into a belligerent act against Holland:

> Talbot knew Ballard's situation, and in particular aided in sitting out the Ami de la Liberte by furnishing her with guns. Without this assistance she would not have been in a state for war .... If [Talbot] was a French citizen, duly naturalized, and if, as such, he had a commission, fairly obtained, he was authorized to capture ships belonging to the enemies of the French Republic, but not warranted in seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers.[150]

Taken together, the evidence is compelling that Congress intended the ATS to reach acts of aiding and abetting. In addition, the modern understanding of international law is consistent with aiding and abetting liability.

B. The Post-World War II Aiding and Abetting Cases against Corporations

Dating back to the aftermath of World War II, corporations that aid and abet violations of modern international law have been found criminally culpable. Immediately following the war, on August 8, 1945, the Soviet Union, the United Kingdom, the United States, and France created the International Military Tribunal in Nuremberg to preside over the trials of alleged war criminals.[151] Several additional courts were also established in 1946 by the four allied powers to try persons charged with "Nuremberg crimes."[152] These crimes were set forth with accompanying definitions in Article 6 of the Nuremberg Charter to include "Crimes against Peace," "War Crimes," and "Crimes against Humanity."[153] Control Council Law No. 10, implementing the 1946 agreement, included a provision expressly providing for aiding and abetting liability. The statute provides: "[A] person is deemed to have committed a crime if he was (a) a principal; (b) was an accessory to the commission of any such crime or ordered or

147. 3 U.S. (3 Dall.) 133 (1795).

148. *Id.* at 133.

149. *Id.* at 151.

150. *Id.* at 156. Ballard was the captain of the Ami de la Liberte, a ship owned by U.S. citizens. *Id.* at 133.

151. *See* Agreement Respecting the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280; WEISSBRODT ET AL., *supra* note 23, at 390. A separate tribunal was created in Tokyo in 1946 to try Japanese war criminals. *Id.* at 391.

152. WEISSBRODT ET AL., *supra* note 23, at 391.

153. *Id.* at 390–91.

abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission."[154]

The United States Military Tribunal, operating under Control Council Law No. 10, tried a number of German industrialists following the war.[155] An apt demonstration of corporate conduct creating complicit liability is *The Flick Case*.[156] In that case, the United States prosecuted Friedrich Flick, a German owner of steel plants, for using slave labor. Flick was convicted because the Tribunal concluded that he was knowledgeable of, and approved of, his deputy's use of Russian slave labor to increase quota outputs.[157] Similarly, in *The I.G. Farben Case*, the Tribunal found Carl Krauch guilty of aiding and abetting the use of slave labor based on his knowledge that business decisions would produce that result, and because he was a "willing participant" in the enslavement.[158] Next, in *The Krupp Case*, defendants also were found guilty of aiding and abetting in slave labor.[159] Finally, in *The Zyklon B Case*, the British Military Court of Hamburg found the defendants liable on the basis that they sold the poison gas Zyklon B to the Nazis knowing that it would be used to kill Jews and others in gas chambers.[160] In all of the above cases, international tribunals demonstrated that those who aid and abet international law violations have themselves violated international law as accessories and are therefore guilty.

In addition to the military tribunals that followed World War II, the United Nations' codification of the Genocide Convention in 1948 also provided for aiding and abetting liability. Article III of the convention is particularly salient as it provides for criminal liability based on conspiracy,[161] and complicity in committing genocide.[162] The treaty evinces an expansive sweep. A corporate defendant that was complicit in genocide would thus have violated international law.

Modern international tribunals codify the post-World War II understanding of international criminal aiding and abetting. Both the international

---

154. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), *reprinted in* VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at XVIII–XXI (1952).

155. *See generally* Ramasastry, *supra* note 21, at 104–13.

156. *See* United States of America v. Friedrich Flick, "The Flick Case," VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1950), 1192.

157. *Id.* at 1202.

158. *See* United States of America v. Carl Krauch, "The Farben Case," VIII TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1997), 1179.

159. *See* United States of America v. Alfried Felix Alwyn Krupp von Bohlen and Halbach, "The Krupp Case," IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1997), 1440.

160. *See* The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 101 (1947) (Brit. Mil. Ct. 1946).

161. *See* Convention on the Prevention and Punishment of the Crime of Genocide art. III(b), Dec. 9, 1948, 78 U.N.T.S 277.

162. *Id.* at III(e).

tribunal for the former Yugoslavia ("I.C.T.Y") and the international tribunal for the former Rwanda ("I.C.T.R") include an identical aiding and abetting provision within their charters.[163] The provision provides for punishment against persons that "planned, instigated, ordered, committed or otherwise aided or abetted in the planning preparation or execution" of proscribed conduct delineated by international law.[164] The Rome Statute of the International Criminal Court ("ICC"), adopted on July 17, 1998, by a vote of 120-to-seven,[165] created a supranational body with jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression. The act, like the I.C.T.Y. and the I.C.T.R., allows for aiding and abetting liability,[166] though whether corporations will be held criminally liable under the ICC remains an open question. Recently, some commentators have suggested the possibility of a test case against corporations with activities in the Democratic Republic of Congo.[167] The ICC prosecutor responsible for prosecuting crimes committed in Congo has stated that "financial transactions . . . for the purchase of arms used in murder, may well provide evidence proving the commission of such atrocities."[168] In any event, all three modern tribunals have aiding and abetting provisions, and demonstrate that

---

163. For helpful background reading on the history and formation of the I.C.T.Y. and the I.C.T.R., respectively, see generally LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1332–66 (4th ed. 2001). Both the former Yugoslavia and Rwanda experienced genocidal violence predating the formation of the tribunals. The U.N. Security Council adopted the I.C.T.Y. in May of 1993 in Security Council Resolution 827, while it adopted the I.C.T.R. in April of 1994 in Resolution 955.

164. Statute of the International Criminal Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. art. 6, U.N. Doc. S/RES/955 (1994), 32 I.L.M. 1598, available at http://www.ictr.org. (last visited Sept. 14, 2005); Statute of the International Tribunal for the Former Yugoslavia, adopted by S.C. Res 827, U.N. SCOR, 48th Sess., 3217th mtg. art. 7, Annex, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1159, *available at* http://www.un.org/icty (last visited Sept. 14, 2005), amended by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998).

165. DAMROSCH ET AL., *supra* note 163, at 1367. The United States was among the seven countries opposing passage of the statute. Academic opinions on the merits of the court have in some cases developed diametrically opposed conclusions. *Compare, e.g.*, Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591 (2002) (arguing that the court will lead to an erosion of intrastate democracy based on its supranational character), *with* Jamie Mayerfeld, *The Democratic Legacy of the International Criminal Court*, 28 FLETCHER F. WORLD AFF. 147 (2004) (arguing that the court will strengthen domestic democratic institutions by acting as a safeguard should countries renege on fundamental liberties).

166. Rome Statute of the International Criminal Court, July 17, 1998, art. 25, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, 1016, *available at* www.un.org/law/icc/statute/romefra.htm (last visited Sept. 14, 2005).

167. *See* Julia Graf, Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo, 11 NO. 2 HUM. RTS. BRIEF 23 (2004); Stephen Kabel, Comment, *Our Business is People (Even if it Kills Them): The Contribution of Multinational Enterprises to the Conflict in the Democratic Republic of Congo*, 12 TUL. J. INT'L & COMP. L. 461 (2004). The conflict in Congo is of horrendous proportions, as more than three million civilians have died since 1998. *See* Graf, *supra*, at 23.

168. Graf, *supra* note 167, at 23.

modern international law extends not solely to those who carry out human rights violations, but also to those who assist in their perpetration.

While modern international law provides support for aiding and abetting liability under the ATS, it would nevertheless be misguided to use the decisions of international tribunals as binding precedents in interpreting a domestic statute. International law is consistent with aiding and abetting liability under the ATS, but domestic tort law provides a sounder legal basis for such liability under a United States statute. While aiding and abetting under the ATS is consistent with Supreme Court precedent, the Restatement (Second) of Torts provides the appropriate standard from which to determine when a person should be held liable under the ATS based on aiding and abetting.

IV. CONSISTENCY OF ATS AIDING AND ABETTING WITH *SOSA* AND *CENTRAL BANK OF DENVER*

Aiding and abetting liability is consistent with *Sosa* and the modern understanding of the law of nations. Moreover, to derive aiding and abetting from the ATS, even in the absence of an explicit statutory provision authorizing aiding and abetting, is consistent with the Supreme Court's reasoning in *Central Bank of Denver*.[169] Because the understanding of the law of nations in 1789 extended to aiding and abetting, *Central Bank*'s holding that aiding and abetting liability was not available in securities litigation is inapposite to the issue as it arises in the context of the ATS.

To begin, the *Sosa* decision is not directly on point with regard to the extent to which corporate defendants may be liable under the ATS. What a violation of the law of nations entails and how far liability should extend are analytically distinct questions. *Sosa* decided the former without resolving the latter. As *Sosa* recognized, the issue of whether private actors may themselves be liable for violating the law of nations is interconnected with the definition of the law of nations.[170] Yet the question of aiding and abetting necessarily assumes that a violation has arisen, as it remains a necessary part of a plaintiff's prima facie case of aiding and abetting. To state the obvious, if there is no underlying violation of the law of nations, a plaintiff's case must be dismissed regardless of whether a defendant aided and abetted the conduct to which a complaint alludes.

One district court recently cited *Sosa*'s reasoning in holding that the ATS does not allow for aiding and abetting liability. The case, *In re South Africa Apartheid Litigation*,[171] was a consolidated class action lawsuit against various corporations that invested in South Africa during the apartheid regime. Plaintiffs cited to the I.C.T.Y. and I.C.T.R. tribunals, the Nuremberg tribunals, and a United

---

169. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1992); *see infra* notes 180–82 and accompanying text.

170. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.20 ("A related consideration [as to whether an international law norm supports a cause of action] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

171. 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

Nations convention condemning apartheid as supporting their proposition that the ATS encompasses aiding and abetting liability.[172] They also cited an earlier decision by a New York district court, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[173] on the basis that the case supported ATS aiding and abetting liability.[174] The court was unconvinced, concluding:

> [T]he [ATS] presently does not provide for aider and abettor liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in *Sosa* that Congress should be deferred to with respect to innovative interpretations of that statute.[175]

In so holding, the district court committed two fundamental errors.[176] First, it misread *Sosa* as standing for the proposition that aiding and abetting liability requires the same level of international support as do violations of the law of nations. As indicated, aiding and abetting is a question of how far liability extends for a violation, while the Court in *Sosa* addressed the antecedent question of what a violation entails. The court's second, and perhaps even more fundamental, error was that it failed to appreciate the extent to which aiding and abetting prevailed at common law.[177] Had the court inquired into the availability of aiding and abetting for international law violations at common law it would not have concluded that the statute requires an "innovative" interpretation to encompass aiding and abetting liability. As previously described, the ATS, correctly interpreted, has *from the start* encompassed aiding and abetting liability based on the application of aiding and abetting at common law.

It may well be that the apartheid case will prove to be something of an outlier, as other courts have concluded that aiding and abetting liability is possible under the ATS. In another post-*Sosa* decision, *In Re Agent Orange Product Liability Litigation*, the district court surveyed the cases and concluded that they overwhelmingly supported aiding and abetting liability.[178] Beyond that, the court concluded that the historical evidence, which the court in *Apartheid Litigation* ignored, supported aiding and abetting under the terms of the ATS. The court concluded, based on its review of the evidence, that "[t]he liability of private actors, as aiders and abettors, for violations of international law was understood at

---

172. *Id.* at 549.

173. 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

174. *Apartheid Litig.*, 346 F. Supp. 2d at 549. *See generally* Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425 (2004) (providing background on the *Talisman* case and the role of the Canadian oil company in massacres in the Sudan).

175. *Apartheid Litig.*, 346 F. Supp. 2d at 550.

176. The court suggested that international law has not developed a universal consensus in regard to aiding and abetting. *See id.* at 549–50. This point is somewhat debatable. At the very least, international law has long held that aiding and abetting international crimes, such as slavery and genocide, may subject persons to criminal liability for their crimes.

177. *See generally supra* Part III.

178. 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005) (citing ATS cases against corporations).

the time the ATS was enacted."[179] Unlike the district court in *In re South Africa Apartheid Litigation*, the district court in *Agent Orange* did not cite *Sosa*'s reasoning as an insurmountable obstacle to aiding and abetting liability under the ATS.[180]

Another issue on which the two New York federal district courts reached different conclusions was whether civil aiding and abetting liability is available under the ATS in light of the Supreme Court's opinion in *Central Bank*. In *Central Bank*, the Supreme Court held that section 10(b) of the Securities Exchange Act of 1934 does not provide for aiding and abetting liability.[181] Although section 10(b) provides for liability in circumstances in which persons "directly or indirectly" commit a violation, the Court held that this language did not lead to the conclusion that aiding and abetting liability was available.[182] Rather, the Court reasoned that "[i]f, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not."[183]

The district court in *Apartheid Litigation* held that the case was directly on point with regard to ATS aiding and abetting, notwithstanding the fact that the ATS references international law.[184] The district court in *Agent Orange* did not accept that *Central Bank* was on point because it reasoned that defendants themselves were charged with violating international law. The court reasoned: "Even under an aiding and abetting theory, civil liability may be established under international law."[185] The court thus referenced the international law tribunal decisions in holding that *Central Bank* was not controlling.

There is, however, a more convincing reason to believe that *Central Bank* is distinguishable. As has been previously established, the "law of nations" in 1789 included aiding and abetting liability under domestic law. Admittedly, Congress did not expressly use the words "aid" and "abet" in the original legislation; however, to do so would have been superfluous given the widespread application of aiding and abetting to all areas of the law at the time. In *Central Bank*, the Court relied heavily on the fact that "Congress has not enacted a general civil aiding and abetting statute."[186] Because the law of nations was understood in 1789 to include aiding and abetting liability, when the ATS created liability for violations of the law of nations, it necessarily also created liability for accomplices to all such violations.

While *Central Bank* and *Sosa* each present a formidable roadblock for aiding and abetting liability under the ATS, neither should preclude it based on the

---

179. *Id.*

180. *See, e.g., id.* at 52 (noting that *Sosa* recognized that corporations may be sued under the ATS).

181. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1992).

182. *Id.* at 176.

183. *Id.* at 177.

184. *See Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004).

185. *See Agent Orange Litig.*, 373 F. Supp. 2d at 52.

186. *Cent. Bank*, 511 U.S. at 181.

simple understanding that such liability would have been available in lawsuits at the end of the eighteenth century. To hold that modern canons of statutory construction preclude aiding and abetting liability when courts at the end of the eighteenth century would clearly have held otherwise would be extremely troubling. Accepting that the statute does allow for aiding and abetting liability, one still must resolve the thorny legal question of what standard should apply because the statute does not expressly provide one.

V. DERIVING A COMPLICIT LIABILITY STANDARD: THE MERITS OF THE RESTATEMENT (SECOND) OF TORTS SECTION 876

Section 876 of the *Restatement (Second) of Torts* should govern future ATS cases in which a plaintiff's allegations rest on theories of complicit liability. Section 876 must be utilized because neither the standards put forth by the majority and minority opinions in *Unocal* nor the approaches offered by the academic literature are appropriate to govern such claims.

A. Critique of the Unocal *Concurrences*

The two-judge majority in the vacated *Unocal* decision invoked international criminal aiding and abetting standards.[187] Specifically, the majority looked to the I.C.T.Y. and I.C.T.R. standards, holding that the standard in ATS aiding and abetting cases is "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime . . . ."[188]

While this standard is similar to section 876, its application to ATS cases is problematic from a historical perspective. The application of this standard leads to one of two logical conclusions, neither of which is satisfactory. Either the ATS did not allow for aiding and abetting liability *until* standards were agreed upon by the international community;[189] or historically, the ATS allowed aiding and abetting liability, but international law standards of criminal aiding and abetting *displaced* the domestic law standards. The first proposition is seriously mistaken in light of the historical evidence that the ATS allowed for aiding and abetting liability from its inception. Given the historical evidence, the only conclusion, if one believes that international law standards should govern, is that domestic law defined aiding and abetting for more than two hundred years until the replacement of domestic law by international law.

The understanding of whether aiding and abetting liability was historically available is much more than an exercise in esoteric inquiry. For example, plaintiffs in the case *In re Holocaust Victim Assets Litigation* alleged that Swiss financial institutions helped fund slavery and thus "collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity,

---

187. *See* Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc*, 403 F.3d 708 (9th Cir. 2005).

188. 395 F.3d 932 at 951.

189. This statement contains the assumption that the international community has reached a consensus as to the standard, which itself is not entirely clear, as indicated by the district court's findings in *Apartheid Litigation*.

crimes against peace, slave labor and genocide."[190] The large class action case ultimately settled for $1.25 billion dollars, and the district court did not have cause to consider the merits of the plaintiffs' claims.[191] Therefore, it is still an open question whether the aiding and abetting standards in the international agreements establishing the I.C.T.Y. and I.C.T.R. could be applied retroactively to hold World War II aiders and abettors liable under a U.S. statute.

In any event, Judge Reinhardt's *Unocal* concurrence correctly argued that choice of law principles favored the application of domestic law. As he suggests, there is a better-defined body of precedent accompanying domestic law.[192] The application of international law tribunal decisions as binding precedent is particularly troublesome when Congress has not explicitly authorized their application.

However, Judge Reinhardt's preference for civil third-party liability standards also raises troubling issues. According to Judge Reinhardt, liability may be established under the ATS based on a showing of joint venture, agency, and reckless disregard.[193] One problem is that, according to standard tort principles, both the joint venture and agency standards encompass strict liability based on the acts of another.[194] To apply these standards in the case of the ATS misunderstands that the ATS authorizes a tort remedy for a crime of international nature. In theory, such an interpretation would allow for corporate liability under the ATS—based on agency or a joint venture—in cases in which a corporation could not be expected to know that its investment would cause human rights violations.

The reckless disregard standard has some merit because it better approximates criminal standards of culpability. A showing of reckless disregard might go some way toward proving that a corporation acted with knowledge that it would cause a violation of international law. The wisest application of the reckless disregard standard, however, is to incorporate it into section 876 of the Restatement (Second) of Torts' requirement that a defendant be knowledgeable that his conduct will effectuate a tortious result.[195] Under this approach, a showing of reckless disregard, while not determinative of liability, may provide strong circumstantial evidence of intent. It also will avoid liability for investment decisions that were, in hindsight, perhaps reckless but did not evidence actual knowledge that the investment would violate international law.

Prior to the Supreme Court's holding in *Central Bank*, that aiding and abetting was not available under section 10(b) of the Securities and Exchange Act of 1934, courts considering aiding and abetting liability under section 10(b) reached similar results. For instance, the Eleventh Circuit declared in one securities case that:

---

190. 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).
191. *Id.*
192. *Unocal*, 395 F.3d at 967.
193. *Id.* at 963.
194. *See* DAN B. DOBBS, THE LAW OF TORTS 910, 933 (2000).
195. *See infra* Section V.B.

> Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it.[196]

Under this approach, severe recklessness may serve to allow a factfinder to infer knowledge and intent to a defendant in cases where the acts themselves give rise to this conclusion.

The same reasoning should be applied to ATS cases. Courts should look to specific business transactions to determine whether the reckless conduct provides evidence that a business must have known that its behavior would likely result in human rights abuses. The key is that reckless conduct must evidence a corporate defendant's awareness that its behavior would likely lead to violations of international law. As discussed below, section 876 of the Restatement (Second) of Torts is consistent with this approach because it contains both a knowledge requirement and a requirement that a defendant either be part of a common design or provide substantial assistance to achieve a tortious result.

B. Section 876 and its Application to the ATS

1. Liability Factors in Section 876

Section 876 of the Restatement (Second) of Torts[197] contains language that is, as one commentator notes, "The most important common law expression of civil aiding and abetting liability . . . ."[198] Section 876 provides:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[199]

Section 876 closely mirrors aiding and abetting liability in criminal law.[200] In addition, federal courts have repeatedly referenced section 876,

---

196. Woods v. Barnett Bank of Ft. Lauderdale, 765 F.2d 1004, 1010 (11th Cir. 1985).

197. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

198. Ronald M. Lepinskas, *Civil Aiding and Abetting Liability in Illinois*, 87 ILL. B.J. 532, 532–33 (1999).

199. RESTATEMENT (SECOND) OF TORTS § 876(a)–(c).

200. *Id.* at 533.

especially subsection b, in civil cases.[201] Importantly, subsection b retains a requirement that an aider and abettor have knowledge that a third person is committing a breach of duty before liability may attach. When one also considers subsections a and c, in which a person is liable upon committing a breach of duty, section 876 goes some distance toward allaying the fears of the business community that strict liability will attach to overseas investments. Section 876, properly understood, only allows for civil liability when a defendant has either been an active participant in a crime or has aided and abetted in the commission of a crime. If the framework of section 876 is utilized as the standard for the ATS, only investments that can be fairly interpreted as providing "substantial assistance" to the commission of international crimes within the meaning of that section will give rise to business liability.

Halberstam v. Welch[202] is still the leading case on civil aiding and abetting liability under section 876, and illustrates the manner in which it allows for civil liability against criminal perpetrators. In that case, the plaintiff brought a wrongful death lawsuit against Linda Hamilton, asserting that she was liable in tort for aiding and abetting, and conspiring in the killing of Michael Halberstam.[203] Circuit Judge Wald, joined by then-Circuit Judges Bork and Scalia, held that section 876 allowed for tort liability in plaintiff's action to recover damages. [204]

Judge Wald's opinion noted that section 876 encompasses both conspiracy liability, and aiding and abetting liability based on "substantial assistance."[205] The two forms of liability are similar, but distinct: conspiracy liability rests on an agreement to participate in wrongful conduct, whereas aiding and abetting focuses on whether a defendant knowingly gave substantial assistance to produce a tortious result.[206] As the court noted, in the case of a civil conspiracy, "once the conspiracy has been formed, all its members are liable for injuries caused by acts pursuant to or in furtherance of the conspiracy."[207] In addition, liability attaches to all conspirators even if one did not directly participate in the wrongful conduct. Thus, the conspirator may be liable under section 876 "so long as the purpose of the tortious action was to advance the overall object of the conspiracy."[208]

The court also examined section 876 in relation to aiding and abetting liability.[209] As noted by the court, the Restatement lists five factors to be considered in deciding whether a defendant offered substantial assistance to

---

201. *Id.*
202. 705 F.2d 472 (D.C. Cir. 1983).
203. *Id.* at 474–75.
204. *Id.* at 489.
205. *Id.* at 477.
206. *Id.* at 478.
207. *Id.* at 481.
208. *Id.*
209. *Id.* As the court noted, there are cases "that are 'pure' aiding-abetting and ones that courts could probably also have found to be civil conspiracies." *Id.* The court identified as one example of pure aiding and abetting a case in which "a person . . . had given verbal encouragement ('Kill him!' and 'Hit him more!') to an assailant." *Id.* (citing Rael v. Cadena, 93 P.2d 822 (N.M. Ct. App. 1979)).

produce an intentional tort.[210] The five factors, as listed in comment d, are: "[T]he nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind."[211] In *Halberstam*, the D.C. Circuit found a sixth factor to be relevant, namely the "duration of the assistance provided."[212]

Halberstram stands for the proposition that circumstantial evidence may be enough to conclude that a defendant was knowledgeable about his role in a criminal enterprise. Applying the facts of the case to the standard set forth in section 876, the court concluded that the evidence, viewed in its entirety, clearly indicated Hamilton knew of her role in a criminal undertaking.[213] Other courts have reached somewhat similar conclusions. For instance, the Sixth Circuit, applying Ohio law, did not find a conflict between the requirement that someone aiding and abetting "have actual knowledge of the primary party's wrongdoing and the statement that it is enough for the aider and abettor to have a general awareness of its role in the other's tortious conduct for liability to attach."[214]

As illustrated by *Halberstam*, section 876 is appropriate for cases in which a tortfeasor sues to recover for an actual crime. Accordingly, this reasoning makes it appropriate to apply to ATS cases.

2. The Merits of Applying Section 876 to ATS Cases

The merits of section 876 do not appear to have been appreciated with regard to ATS cases thus far. As an empirical matter, most courts hearing ATS cases appear to have followed the approach endorsed by the *Unocal* majority—that is, they have applied *international* criminal law on aiding and abetting. This was the approach taken, for example, by the district courts in *Mehinovic v. Vuckovic*,[215] *Presbyterian Church of Sudan v. Talisman Energy Co.*,[216] and *In Re Agent Orange Litigation*.[217]

---

210. *Id.* at 483–84.

211. RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. d (1977).

212. 705 F.2d at 484.

213. The court, applying the facts to the series of crime committed by Bernard Welch, stated:

> Welch's pattern of unaccompanied evening jaunts over five years, his boxes of booty, the smelting of gold and silver, the sudden influx of great wealth, the filtering of all transactions through Hamilton *except* payouts for goods, Hamilton's collusive and unsubstantiated treatment of income and deductions on her tax forms, even her protestations at trial that she knew absolutely *nothing* about Welch's wrongdoing—combine to make the district court's inference that she knew he was engaged in illegal activities acceptable, to say the least.

Id. at 486 (emphasis in original).

214. Aetna Cas. & Sur. Co. v. Leahey Const. Co., 219 F.3d 519 (6th Cir. 2000).

215. 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002) (adopting standard from I.C.T.Y.).

216. 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) (holding that "whether or not aiding and abetting and complicity are recognized with respect to charges of genocide,

Some commentators have put forth interesting alternatives to the purely international law approach in *Unocal*. An article coauthored by counsel for the plaintiffs in *Unocal* suggested that international law should apply, but in cases in which it does not, domestic law should fill in the interstices of liability under the ATS.[218] Another article, while agreeing that the reasoning of both the *Unocal* majority and concurrence was fallacious, provocatively proposes that "*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."[219] These novel approaches—that both international and federal law should apply or, alternatively, that one should ascertain what the majority of domestic courts across the world do—are intriguing but also deeply problematic. Either the ATS calls for domestic law to set a standard for aiding and abetting liability, or it calls for international law to do so. Picking and choosing from other countries' domestic legal systems would yield arbitrary judicial decisions and would be a truly bizarre method of interpreting a U.S. statute.

The principles of aiding and abetting, as supplied by the U.S. domestic law in 1789, comport well with the standard set forth in section 876 of the Restatement. Because aiding and abetting existed at common law under the statute, *some* standard must be applied under modern jurisprudence.[220] Courts have been slow to approach ATS cases in this manner,[221] but with little reason.

The application of section 876 is meritorious because it is consistent with the common law approach, examined in Part III, that domestic remedies be applied to remedy violations of the law of nations. Part III also highlighted Blackstone's suggestion that persons aiding and abetting in violations of the law of nations were criminally liable, and demonstrated that American common law applied aiding and abetting concepts to civil cases. Section 876(a)'s discussion of liability for a person that "does a tortious act in concert with the other or pursuant to a common design with him"[222] is consistent with the common law notion that persons engaged in a common design should all be punished as culpable for the

---

enslavement, war crimes, and the like is a question that must be answered by consulting international law").

217. 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

218. *See* Hoffman & Zaheer, *supra* note 41.

219. John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L. & POL'Y 231, 272.

220. *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (finding that the constitution contains a liberty interest protecting the right to an abortion, but requiring the court to establish "a specific rule, from what in the Constitution is but a general standard"). *Casey* is analogous because courts must set a general rule to govern aiding and abetting liability from what at common law was a general expectation that it would apply in ATS cases.

221. However, one court has recognized section 876 as being applicable to the TVPA. *See* Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386, 2002 WL 319887, at *15 n.19 (S.D.N.Y. Feb. 28, 2002) ("Even if the language and legislative history of the TVPA did not warrant the conclusion that the Act allows for aider and abettor liability, the *Restatement of Torts (Second)* counsels such an interpretation.").

222. RESTATEMENT (SECOND) OF TORTS § 876(a) (1977).

commission of a crime.[223] Subsections b and c discuss liability for persons that offer "substantial assistance" to achieve a tortious end.[224] These provisions are consistent with the common law approach that "[a]ll persons who direct or assist in committing a trespass, or in the conversion of personal property, are in general liable as principals though not benefited by the act."[225] In short, both section 876 and the common law at the time of the ATS similarly embrace liability for persons that engaged in a common design or that offer assistance in the commission of a tort.

Section 876 is in keeping with the underlying purposes behind the ATS and on its own merits should be applied. Section 876 is ideal because violations of the ATS result in what is in effect tort liability stemming from a criminal action—that is exactly what section 876 is supposed to remedy. Application of section 876 also has the benefit of avoiding the troublesome application of international tribunal precedents to a domestic statute or extending liability too far. Both from a legal, and from a public policy perspective of encouraging responsible business investments abroad, section 876 should be applied to ATS cases.

CONCLUSION

At some point, perhaps in the not so distant future, the Supreme Court will almost certainly resolve the question of whether aiding and abetting and complicit theories of liability are permissible under the ATS, which could allow plaintiffs to sue corporate defendants. How the Supreme Court will resolve this question is not entirely clear, but the Court would do well to consult the historic, legislative, and common law records, which support liability for aiding and abetting under the statute. Section 876 is the soundest approach to this question, even though courts have not usually considered its application to the ATS.

One likely possibility is that *Central Bank* frightened plaintiffs' attorneys in ATS cases from pushing the domestic civil aiding and abetting standard. However, the statute itself should be read to include aiding and abetting based on the common law view of the law of nations. Simply put, colonial attorneys assumed it did not need to be explicitly stated that aiders and abettors of violations of the law of nations, such as piracy, would be held accountable. Section 876 also answers the concerns of the business community because it contains a scienter requirement. Therefore, businesses will not be held liable merely by investing in a country with a poor human rights record. The common law and modern jurisprudence both support the application of aiding and abetting, and complicit liability, under the ATS, and the proper standard for this liability is set forth in section 876 of the Restatement (Second) of Torts.

---

223. *See supra* Part III.
224. RESTATEMENT (SECOND) OF TORTS § 876(b)–(c) (1977).
225. M'Donald v. Hewett, 15 Johns. 349 (N.Y. Sup. Ct. 1818).