ENCOURAGING CORPORATE SOCIAL RESPONSIBILITY
WITH THE ALIEN TORT STATUTE

By: Alexandria Nguyen

INTRODUCTION

In 1980, Filartiga v. Pena-Irala resurrected the once-dormant Alien Tort Claims Act, also known as Alien Tort Statute (“ATS”), in the United States federal district courts. Under the ATS, aliens file suit in the federal district courts under the premise of subject matter jurisdiction, seeking redress for wrongs committed in contravention of the “law of nations or a treaty of the United States.” Since Filartiga, the Courts have “published only nine significant decisions on the ATS” with the Supreme Court deciding only one ATS case in its entire history.

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1a Alexandria Nguyen is a recent law graduate from St. Thomas University in Miami, Florida. Alexandria would like to especially thank Professor Hatamyar-Moore for sponsoring her in her Independent Research course. Without her support and guidance, this article would not have been possible.

1 Alien's Action for Tort (Alien Tort Statute), 28 U.S.C. § 1350 (2010); Judiciary Act of 1789, ch. 20, s 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. s 135028 U.S.C. s 135028 U.S.C. s 1350 U.S.C. s 1350. An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death. Id. Filartiga was the first modern case to hold that torture is a violation of customary international law and to revive the ATS, which was adopted in 1789 as part of the Judiciary Act. Filartiga v. Pena-Irala, 630 F.2d 876, 878, 884 (2d Cir. 1980). This case involved a Paraguayan citizen whose son was tortured and killed by a Paraguayan official, then living in the United States. See id. The district court dismissed the action for lack of subject matter jurisdiction. However, the Court of Appeals for the Second Circuit reversed the trial court’s decision, holding that a violation of international law of human rights occurred. Id. The Court of Appeals ruled that whenever an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Claims Act, also known as ATS, provides federal jurisdiction. Id.; see generally, J. Russell Jackson, Alien Tort Claims Act Cases Keep Coming, Nat’l L. J. (2009), available at http://www.skadden.com/content/Publications/Publications1866_0.pdf.


3 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 116-7 (2d Cir. 2010), reh’g denied, 642 F.3d 268 (2d Cir. 2011) and cert. granted, 10-1491, 10-1492, 11 WL 4905479 (U.S. Oct. 17, 2011); see generally, e.g., Sosa, 542 U.S. at 692; Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir.2009); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir.2009); Viet. Assoc. for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104 (2d Cir.2008); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir.2007) aff'd sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028, 128 S. Ct. 2424, 171 L. Ed. 2d 225 (2008); Flores v. S. Peru Copper Corp., 343 F.3d 1
Nevertheless, a majority of these claims are brought into the Southern District of New York.\(^4\) One of the greatest difficulties that federal courts have faced is interpreting a statute that may affect foreign relations. As Justice Scalia suggested in *Sosa v. Alvarez-Machain*, the courts welcome any “congressional guidance” as to the exercise of jurisdiction that has “potential to affect foreign relations.”\(^5\)

Part I discusses the historical backdrop for the ATS, and examines the pertinent case law and the procedural history of these cases dealing with claims brought into federal courts by aliens that allege human rights violation. Part II addresses government interference with ATS litigation through the filing of amicus briefs. Part III discusses cases involving briefs filed by the Department of Justice and/or the Executive Branch calling for dismissal. Part IV emphasizes the importance of the ATS and provides reasons in support of ATS litigation, highlighting the need for corporate liability.

I. ALIEN TORT STATUTE

As part of the Judiciary Act of 1789, Congress implemented the ATS in response to the threat of piracy against American commerce.\(^6\) The federal statute states the following: “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.”\(^7\) In other words, the ATS provides subject matter jurisdiction in United States district courts for aliens to bring a

\(^4\) See generally id.; Jackson, *supra* note 1.
\(^5\) *Sosa*, 542 U.S. at 731.
\(^6\) Jackson, *supra* note 1.
\(^7\) 28 U.S.C. § 1350.
tort action.\textsuperscript{8} At the time, Congress intended for the ATS to address conduct such as “the violation of safe conduct, infringement of the rights of ambassadors, and piracy.”\textsuperscript{9} Consequently, with changing times, such conduct has been expanded to include claims such as war crimes and torture.\textsuperscript{10}

Additionally, Congress enacted “the Torture Victims Protection Act of 1991 (“TVPA”) to comply with the Torture Convention,”\textsuperscript{11} providing that a civil action can only be brought against “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation, undertakes conduct prohibited by the Act.”\textsuperscript{12} In response to Filartiga, the TVPA was intended to provide “clear statutory authorization for action involving torture and extrajudicial killing, thereby affirming the decision of Filartiga.”\textsuperscript{13} The TVPA, cited as a note to the ATS, was intended to codify the Filartiga opinion, in order to alleviate separation of powers concerns, and to expand remedy to include American citizens.\textsuperscript{14}

\begin{footnotes}
\item[9] Sosa, 542 U.S. at 715. The three violations of the law of nations listed by Blackstone were piracy, offenses against ambassadors, and violations of safe conducts. \textit{Id.}; see \textit{Filartiga}, 630 F.2d at 876; Jackson, \textit{supra} note 1.
\item[10] See generally \textit{Kadic}, 70 F.3d at 232; Jackson, \textit{supra} note 1.
\end{footnotes}
In fact, upon the enactment of the TVPA, “Congress [] expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts,” alleging gross human rights violations.\textsuperscript{15} The TVPA creates “creates liability under U.S. law where under color of law, of any foreign nation an individual is subject to torture or extra judicial killing, and [] extends its remedy not only to aliens but to any individual, thus covering citizens of the United States as well.”\textsuperscript{16} The TVPA was enacted with purposes of “carry[ing] out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.”\textsuperscript{17} Here, the TVPA recognizes torture and extrajudicial killings, two of the causes of action recognized under customary international law.\textsuperscript{18} The TVPA sets guidelines such as liability, remedies, statute of limitations, and definitions for the causes of action.\textsuperscript{19}

Further, legislative history indicates that language from the TVPA “was intended to make [] clear that the plaintiff must establish some [foreign] governmental involvement in the torture or killing to prove a claim, and that the statute does not attempt to deal with torture or killing by purely private groups.”\textsuperscript{20} Additionally, Congress has “noted that universal condemnation of

\textsuperscript{15} Wiwa, 226 F.3d at 106. Congress noted that universal condemnation of human rights abuses provide[s] scant comfort to the numerous victims of gross violations if they are without a forum to remedy the wrong. House Report at 3, 1992 U.S.C.C.A.N. at 85.

\textsuperscript{16} 28 U.S.C. § 1350; TVPA § 2(a); Wiwa, 226 F.3d at 104-05.


\textsuperscript{18} Kadic, 70 F.3d at 236. This Court found liability for genocide, war crimes, and crimes against humanity in one’s private capacity and for other violations in one’s capacity as a state actor. Id.

\textsuperscript{19} H.R. 2092; 28 U.S.C. § 1350. It provided for civil causes of action only against [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation, undertakes conduct prohibited by the Act. See e.g., TVPA § 2(a); Khulumani, 504 F.3d at 317.

\textsuperscript{20} Kadic, 70 F.3d at 245 (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87). By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing “under actual or apparent authority, or color of law, of any foreign nation.” Id.; see also TVPA § 2(a).
human rights abuses provide[s] scant comfort to the numerous victims of gross violations if they are without a forum to remedy the wrong,” which suggests that U.S. policy “favor[s] the adjudication of such suits in U.S. Courts.”\textsuperscript{21} However, despite the additional guidance from the TPVA, the federal courts have been unable to ascertain and address the proper interpretation of the ATS.\textsuperscript{22}

II. ATS CASE LAW

In 1980, \textit{Filartiga} was the first case to recognize the ATS as a “viable basis for relief” by a federal appellate court.\textsuperscript{23} A Paraguayan family brought a claim under the ATS against a Paraguayan police officer for torture and wrongful death of their seventeen-year-old son, Joelito Filartiga.\textsuperscript{24} The district court originally dismissed the claim, “construing the grant of jurisdiction over torts committed in violation of the law of nations as excluding law governing a state's treatment of its own citizens.”\textsuperscript{25} The Second Circuit ruled that the ATS “provided federal jurisdiction,”\textsuperscript{26} reasoning that “modern international law clearly prohibits state-sponsored torture;” therefore, there was a violation of the law of nations.\textsuperscript{27} The court reversed the lower court’s decision, allowing the case to proceed.\textsuperscript{28} On remand, Pena-Irala no longer wished to continue litigation and the court granted a default in favor of the plaintiff\textsuperscript{29} and entered a judgment in the amount of $10,385,364.\textsuperscript{30}

\textsuperscript{22} Philip Mariani, \textit{Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act}, 156 U. PA. L. REV. 1383, 1385 (2008).
\textsuperscript{23} See e.g., \textit{Filartiga}, 630 F.2d 876; \textit{Flores}, 343 F.3d at 149.
\textsuperscript{26} See \textit{Filartiga}, 630 F.2d 876; Herz, \textit{supra} note 24, at 211.
\textsuperscript{27} \textit{Filartiga} v. Pena-Irala, 577 F. Supp. at 861.
\textsuperscript{28} \textit{Filartiga}, 577 F. Supp. at 861.
\textsuperscript{29} Id. at 867.
Expanding the range of offenses, the Court provided that the ATS grants subject matter jurisdiction over “(1) tort actions, (2) brought by aliens (only), (3) for violations of the law of nations (also called customary international law) including, as a general matter, war crimes and crimes against humanity.” The Second Circuit held “that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties,” and that the ATS “provides federal jurisdiction” over torture claims, which likened the torturer to the pirate and slave trader of old, “an enemy of all mankind.”

The Filartiga court not only held that the ATS provides a jurisdictional basis for suit, but also recognized the existence of a private right of action exclusively for aliens seeking to remedy violations of customary international law or of a treaty of the United States. The Court expanded upon the original standard as intended at the time of enactment in 1789, holding that the “courts must interpret international law not as it was 1789, but as it has evolved and exists among the nations of the world today.” However, Judge Kaufman cautioned that “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely

32 See e.g., 28 U.S.C. § 1350; Kiobel, 621 F.3d at 116 (citing Filartiga, 630 F.2d at 887); Flores, 343 F.3d at 148; Kadic, 70 F.3d at 238. “[T]he Court held that the [ATS] creates a cause of action rather than just conferring jurisdiction in cases involving international law violations.” Carter, supra note 31, at 635.
33 See Filartiga, 630 F.2d 876. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations. Id. at 880.
34 Id. at 878.
35 Id. at 890.
36 Flores, 343 F.3d at 149-50. It was sufficient to… construe the ATS… simply as opening the federal courts for adjudication of the rights already recognized by international law. Filartiga, 630 F.2d at 887.
37 Filartiga, 630 F.2d at 881. The District Court noted that, in order to allege a violation of customary international law, “a plaintiff must demonstrate that a defendant's alleged conduct violated ‘well-established, universally
several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”

In 1993, in *Bi v. Union Carbide Chemicals & Plastics Co. Inc.*, Indian victims commenced ATS litigation in the Second Circuit against Union Carbide Corporation for injuries sustained in a devastating gas leak at a plant, operated by Union Carbide Corporation, often referred to as the Bhopal explosion. The United States District Court for the Southern District of New York dismissed the claims based on forum non conveniens. Because the Indian government granted “exclusive authority to represent the victims of [this] disaster,” filing suit in India on behalf of the victims and reaching settlement. Later, two more lawsuits were filed in Texas state court on behalf of other victims in the Bhopal industrial disaster. These suits were ultimately transferred to the Southern District of New York, which again dismissed the claims for forum non conveniens. On appeal, the Second Circuit affirmed the lower court’s dismissal.

In 1995, the Second Circuit encountered another ATS case, *Kadic v. Karadzic*, which held that because “subject-matter jurisdiction exists, that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other

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38 *Presbyterian*, Inc., 582 F.3d at 254 (citing *Filartiga*, 630 F.2d at 888.
39 *See* *Bi v. Union Carbide Chemicals & Plastics Co. Inc.*, 984 F.2d 582 (2d Cir. 1993).
40 *See* *id*.
41 *Id.*; *see also* *Khulumani*, 504 F.3d at 301-02 (2d Cir. 2007).
42 *See* *id*.
44 *Id.*; *see also* *Khulumani*, 504 F.3d at 301-02.
45 *Bi*, 984 F.2d at 587.
46 *See* *Kadic*, 70 F.3d 232. Two groups of victims from Bosnia-Herzegovina brought ATS claims against the self-proclaimed president of an unrecognized Bosnian-Serb entity. *Id.*
violations in his capacity as a state actor.” Groups of victims from Bosnia-Herzegovina brought ATS claims against the self-proclaimed president of an unrecognized Bosnian-Serb republic of Srpska. The district court dismissed the action for lack of subject matter jurisdiction. On appeal, the court reversed and remanded, holding that “subject-matter jurisdiction exist[ed], [and] that “Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.” On remand, the trial court maintained the same views as the Court of Appeals.

The Second Circuit expanded upon the *Filartiga* opinion and extended liability to private actors “provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.” Further, the Court stated that “torture and summary execution – when not perpetrated in the course of genocide or war crimes – are proscribed by international law only when committed by state officials or under color of law.”

The *Kadic* court conferred subject matter jurisdiction if three conditions are met: (1) that an alien sues (2) for a tort (3) committed in violation of the law of nations. While *Kadic* concluded that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals,” the Court also recognized

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47 Id.  
48 Id.  
49 Id.  
50 *Kadic*, 70 F.3d at 236.  
52 *Kadic*, 70 F.3d at 239-40, 245; cf. *Khulumani*, 504 F.3d at 281. Recognizing the responsibility of private aiders and abettors merely permits private actors who substantially assist state actors to violate international law and do so for the purpose of facilitating the unlawful activity to be held accountable for their actions. *Khulumani*, 504 F.3d at 281.  
53 *Kadic*, 70 F.3d at 243. “The ‘color of law’ jurisprudence of 42 U.S.C. §1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.” Id. at 245.  
54 Id. at 238; id. at 245; *Abdullahi*, 562 F.3d at 188; Doe v. Constant, 354 F. App’x 543, 545 (2d Cir. 2009).  
55 See e.g., *Kadic*, 70 F.3d at 239; *Presbyterian*, 582 F.3d at 254-55.
“claims for genocide and war crimes against individuals could proceed without state action.”

Further, Kadic “held that the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the [ATS].” The Court cautioned again, as it did in Filartiga, that “not every case touching foreign relations is nonjusticiable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights.”

In 1997, in Doe I. v. Unocal, the Ninth Circuit first addressed an ATS claim when Burmese farmers commenced a class action suit against defendants, the Burmese Government Unocal Corp., Total S.A., the Myanmar Oil and Gas Enterprise, the State Law and Order Restoration Council, and individuals, John Imle, President of Unocal, and Roger C. Beach Chairman and Chief Executive Officer of Unocal. The Burmese plaintiffs alleged that the defendant-corporations, through the “military, intelligence and/or police forces, have used and continue to use violence and intimidation to relocate whole villages, enslave farmers living in the area of the proposed pipeline, and steal farmers' property for the benefit of the pipeline” for natural gas. In response to the litigation, the corporate defendant, Unocal, filed a motion to dismiss, asserting that “adjudication of plaintiffs’ claims would interfere with U.S. foreign policy,” arguing that “Congress demonstrated an official U.S. policy of refraining from steps

56 Id.
57 Kadic, 70 F.3d at 242; Khulumani, 504 F.3d at 320.
58 Id.; accord Filartiga, 630 F.2d 876.
60 Id.
61 Herz, supra note 24, at 225; see Doe I, 963 F. Supp. at 892, 895 n.17.
that might serve only to isolate the Burmese Government;” thus, hinder[ing] efforts toward reform.\textsuperscript{62}

In this case, the district court denied the defendants' motion to dismiss for subject matter jurisdiction\textsuperscript{63} and conferred “subject-matter jurisdiction over plaintiffs' claims.”\textsuperscript{64} The district court granted in part and denied in part Unocal’s motion to dismiss for lack of subject-matter jurisdiction, failure to join a party, and failure to state a claim.\textsuperscript{65} The district court held that: (1) plaintiffs’ allegations that the military were agents, co-venturers and co-conspirators of Unocal adequately alleged state action for purposes of those claims such as torture that require state action; (2) plaintiffs’ forced labor claims did not require any state action at all; and (3) plaintiffs’ allegations that Unocal knew or should have known that the military would provide forced labor for the project and that Unocal was aware of and benefitted from abuses committed on its behalf was sufficient to state a claim.\textsuperscript{66} The district court reasoned that the “[p]laintiffs [] pled sufficient facts to survive Unocal's motion to dismiss … and their claims are not barred by the applicable statutes of limitation because factual question exist concerning whether the applicable limitations periods were tolled.”\textsuperscript{67} After the dismissal of claims against the Myanmar government and French oil company Myanmar Oil, the plaintiffs appealed the district court’s grant of Unocal’s motion for summary judgment.\textsuperscript{68}

\begin{footnotesize}
\begin{enumerate}
\item [62] Herz, supra note 24, at 225; see Doe I, 963 F. Supp. at 892, 895 n.17.
\item [63] See Doe I, 963 F. Supp. at 892, 895 n.17; Carter, supra note 31, at 636; Herz, supra note 24, at 211.
\item [64] Doe I, 963 F. Supp. at 898.
\item [65] Id. at 883.
\item [66] See id.; see also Herz, supra note 24, at 211.
\item [67] Doe I, 963 F. Supp. at 898.
\item [68] Doe I v. Unocal Corp., 395 F.3d 932, 944 (9th Cir. 2002) on reh’g en banc sub nom. John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).
\end{enumerate}
\end{footnotesize}
On appeal, the Court of Appeals for the Ninth Circuit affirmed in part, holding that the plaintiffs’ allegations “sufficiently alleged violations of the law of nations under the [ATS],” and reversed the lower court’s decision. The Doe court held that “a reasonable factfinder could find that Unocal's conduct met this standard” for aiding and abetting and “reverse[d] the District Court’s grant of Unocal's motion for summary judgment on Plaintiffs' forced labor claims under the ATCA.” The Ninth Circuit granted rehearing en banc and subsequently, granted the parties’ stipulated motion to dismiss.

Another dismissed case was Bigio v. Coca-Cola Co., where in 1998, the Bigio family, owners of land and factories in Egypt, sued Coca-Cola Company, alleging that the Egyptian government wrongfully seized the plaintiffs’ property in Egypt due to the plaintiffs were Jewish. In this case, the district court dismissed the plaintiff’s claim for lack of subject matter jurisdiction. The Court of Appeals reversed and remanded to the trial court. Subsequently, the District Court dismissed the claim yet again, but this time on international comity and alternatively, forum non conveniens grounds. The Court of Appeals held that “the dismissal of this case on grounds of international comity and forum non conveniens was therefore erroneous as a matter of law.” Ultimately, the Court again reversed and remanded the trial court’s

69 Id.
70 Id. at 937.
71 Id. at 947.
72 Id. at 953.
73 Doe I, 395 F.3d at 979.
74 John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005).
75 Complaint, Bigio v. The Coca-Cola Co., 1997 WL 3466432 (No. 197CV02858).
77 Bigio v. Coca-Cola Co., 239 F.3d 440, 455 (2d Cir. 2000).
79 Bigio v. Coca-Cola Co., 448 F.3d 176, 180 (2d Cir. 2006).
decision because the district court applied the wrong legal standard\textsuperscript{80} and “failed to take account of the deference due the plaintiffs’ legitimate choice of forum.”\textsuperscript{81} On remand once again, the trial court granted the defendants’ motion to dismiss and denied the plaintiffs’ motion for summary judgment on liability as moot.\textsuperscript{82}

Five years later in 2000, the Second Circuit in \textit{Wiwa v. Royal Dutch Petroleum Co.}, reiterated its holding in \textit{Kadic} by stating that the ATS reaches the conduct of private parties provided that their conduct is undertaken under the color of state authority or violates a norm of international law that is recognized as extending to the conduct of private parties.\textsuperscript{83} Nigerian expatriates sued two corporations incorporated in the Netherlands and the United Kingdom for human rights violations.\textsuperscript{84} The Nigerian plaintiffs alleged that the corporations “provided money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages.”\textsuperscript{85} The court in \textit{Wiwa} held that the district court properly exercised jurisdiction over the defendants, but reversed the district court’s dismissal for forum non conveniens.\textsuperscript{86} This Court reasoned that, as a matter of law, in balancing the competing interests, the district court did not accord proper significance to a choice of forum by lawful U.S. resident plaintiffs or to the policy interest implicit in our federal statutory law in providing a forum for adjudication of claims of violations of the law of nations.\textsuperscript{87}

\textsuperscript{80} \textit{Id.} at 178.
\textsuperscript{81} \textit{Id.} at 180.
\textsuperscript{83} See e.g., \textit{Wiwa}, 226 F.3d at 104; \textit{Khulumani}, 504 F.3d at 312. \textit{Wiwa} was brought in the United States District Court for the Southern District of New York on November 8, 1996 and later an amended complaint on April 29, 1997. \textit{Wiwa}, 226 F.3d at 93.
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Wiwa}, 226 F.3d at 93.
\textsuperscript{86} \textit{Id.} at 92. Forum non conveniens is a theory that applies only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified. \textit{Piper Aircraft Co. v. Hartzell Propeller Inc. v. Reyno}, 454 U.S. 235, 246 (1981), \textit{reh’g denied}, 455 U.S. 928 (1982).
\textsuperscript{87} \textit{Wiwa}, 226 F.3d at 99-100.
InWiwa, Nigerian citizens filed an ATS claim against the defendant corporations, Royal Dutch Petroleum Company and Shell Transport and Trading Company for “provid[ing] money, weapons, and logistical support to the Nigerian military, including the vehicles and ammunition used in the raids on the villages.” The defendants, Royal Dutch Petroleum Company, Shell Transport and Trading Company, and Brian Anderson, the country chairman of Nigeria for Royal Dutch / Shell and managing Director of Shell Nigeria, collectively filed a motion to dismiss on three bases: (1) lack of personal jurisdiction; (2) forum non conveniens; and (3) failure to state a claim. The district court held that the defendants were subject to personal jurisdiction, but ultimately dismissed the claim for forum non conveniens, based on the “adequacy of a British forum.” The Court of Appeals reversed and remanded the lower court’s dismissal for forum non conveniens, for reconsideration of “the defendants’ motion to dismiss [] for failure to state a claim.” On reconsideration, the district court “grant[ed] defendants' motion to dismiss the actions” for failure to state a claim.

In 2009, after the Wiwa court dismissed the case, the Nigerian plaintiffs refiled an amended complaint as Kiobel v. Royal Dutch Petroleum Co., within the Second Circuit once again, and bringing an ATS claim for aiding and abetting. The district court granted the

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88 Id. at 93.
91 Wiwa, 2002 WL 319887.
92 Wiwa, 226 F.3d at 99.
93 Wiwa, 2002 WL 319887.
94 FED. R. CIV. P. 12(b)(6); Wiwa, 226. F.3d at 108.
95 Wiwa, 2002 WL 319887; see also Fed.R.Civ.P. 12(b)(6).
96 Kiobel, 456 F. Supp. 2d at 459. On May 17, 2004, Plaintiffs filed an amended complaint (“Amended Complaint”). Defendants thereafter filed a motion to strike the Amended Complaint or, in the alternative, to dismiss it (“Second Motion to Dismiss”). Id.
97 Id. at 463. Plaintiffs' claims are essentially claims for secondary liability, i.e., claims that Defendants “facilitated,” “conspired with,” “participated in,” “aided and abetted,” or “cooperated with” government actors or government activity in violation of international law. Id. (citing Am. Compl. ¶¶ 80, 90, 94, 98, 102, 107, 112, 116).
defendants’ second motion to dismiss on the plaintiffs’ claims for extrajudicial killings, rights to life, liberty, security and association, forced exile, and property destruction, and denied it as to crimes against humanity, torture, and arbitrary arrest and detention.98

Following Wiwa, in 2002, the Second Circuit encountered the ATS again in Flores v. S. Peru Copper Corp., noting that “neither Congress nor the Supreme Court ha[d] definitively resolved the complex and controversial questions regarding the meaning and scope of the [ATS].”99 Residents of Ilo, Peru, along with representatives of deceased residents brought an ATS claim, averring that the “pollution from Southern Peru Copper Corporation’s copper mining, refining, and smelting operations in and around Ilo caused plaintiffs' or their decedents' severe lung disease.”100 The district court “dismiss[ed] the complaint for lack of subject matter jurisdiction.”101 On appeal, the Court affirmed the district court’s decision to “dismiss[] [the] plaintiffs' complaint for lack of jurisdiction and failure to state a claim under the [ATS].”102 On appeal, the Court ruled that the majority of the claims be dismissed.103 Furthermore, Judge Jose Cabranes noted that “the majority's rule conflicts with two centuries of federal precedent on the ATS, and deals a blow to the efforts of international law to protect human rights.”104

The Court of Appeals “emphasized that the scope of the ATS’s jurisdictional grant should be determined by reference to international law,”105 as stated in Kadic, which “require[ed] courts

98 Id. at 468.
99 Flores, 414 F.3d at 247; Khulumani, 504 F.3d at 264.
100 See e.g., Flores, 414 F.3d at 237; Flores, 253 F. Supp. 2d at 512. For the last forty years, Defendant's copper mining operations have created and caused egregious and deadly pollution in and around Ilo, causing loss of life, health and property in violation of the law of nations and/or treaties of the United States, with the full knowledge and/or reckless disregard of the Defendant. Plaintiffs and others living in and around Ilo have suffered said loss of life and health. Amended Complaint ¶1, Flores v. S. Peru Copper Corp., 2001 WL 34636198 (No. 00 Civ. 9812 (CSH)).
101 Flores, 253 F. Supp. 2d at 544.
102 Flores, 414 F.3d at 266.
103 Kiobel, 621 F.3d at 196.
104 Id.
105 Khulumani, 504 F.3d at 269.
to engage in a ‘searching review’ of international law to verify that subject matter lies for a particular action.”

The Second Circuit took a step further and evaluated the proper sources of international law “identified by the Statute of the International Court of Justice” in order to determine whether an offense meets the requirements under the ATS.

Moreover, the *Flores* Court held that the law of nations, or “customary international law, is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.” While the Second Circuit “surveyed the state of ATS case law and engaged in a detailed analysis of the ATS and related principles of international law,” the Court, once again, echoed its warning as it did in *Filartiga* and *Kadic*: “in determining what offenses violate customary international law, courts must proceed with extraordinary care and restraint.”

The Court noted that “[c]ustomary international law rules proscribing crimes against humanity, including genocide and war crimes, have been enforceable against individuals since World War II.” Ultimately, the Second Circuit limited the ATS jurisdiction “to alleged

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106 *Kadic*, 70 F.3d at 238.
107 *Khulumani*, 504 F.3d at 267 (citing *Flores*, 414 F.3d at 250-51; citing ICJ Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060). The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. ICJ Statute, art. 38, June 26, 1945, 59 Stat. 1055, 1060.
108 *Khulumani*, 504 F.3d at 267 (citing *Flores*, 414 F.3d at 248).
109 *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003).
110 *Presbyterian*, 582 F.3d at 256. Customary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II. See *Flores*, 414 F.3d 233, 244 n. 18 (citing Brigadier General Telford Taylor, U.S.A., Chief of Counsel for War Crimes, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10*, at 109 (William S. Hein & Co., Inc. 1997) (“[T]he major legal significance of the [Nuremberg] ... judgments, lies ... in those portions of the judgments dealing with the area of personal responsibility for international law crimes.”); 1 *Oppenheim's International Law* 505 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed.1996) (discussing the principle of individual responsibility for war crimes and crimes against humanity); see also *Theodor Meron, International Criminalization of Internal Atrocities*, 89 Am. J. Int'l L. 554, 572 (1995) (citing Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 2 Brit. Y.B. Int'l L. 58, 65 (1944), as first proposing universal jurisdiction over individual war criminals). For example, the Charter of the International Military Tribunal, which authorized the punishment of the major war criminals of the European Axis, provided that
violations of those clear and unambiguous rules by which [nation] [s]tates universally abide, or
to which they accede, out of a sense of legal obligation and mutual concern.”

Today’s current application of the ATS “is governed by the Supreme Court’s explication
of the statute in *Sosa v. Alvarez-Machain*. In *Sosa*, a Mexican national, Humberto Alvarez-
Machain, later acquitted of murder, brought an ATS claim against the United States government,
Drug Enforcement Agency (DEA) agents, former Mexican policemen, and Mexican civilians
after being abducted and transported to the United States for prosecution. The district court
granted the defendants’ motion to dismiss in part and denied it in part. On appeal, the Ninth
Circuit affirmed the district court’s decision to dismiss Alvarez-Machain’s claims for violation of
his constitutional rights, and to deny the “government’s defense based on the statute of
limitations” and motions to dismiss based on qualified immunity. The Ninth Circuit also
reversed the district court’s ruling to bar the TVPA claims and remanded the case.

On remand, the district court granted summary judgment for Alvarez against Sosa for
“kidnapping and arbitrary detention,” granted summary judgment in favor of the United States,
ruling that “Alvarez’s apprehension was privileged and was not a false arrest under California

“there shall be individual responsibility” for “war crimes” and for “crimes against humanity.” Charter of the
International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the

111 *Abdullahi*, 562 F.3d at 173 (citing *Flores*, 414 F.3d at 252).
112 *See Sosa*, 542 U.S. 692; *Philip A. Scarborough, Rules of Decision For Issues Arising Under The Alien Tort
113 Alvarez-Machain v. United States, 96 F.3d 1246, 1248 *opinion amended and superseded*, 107 F.3d 696 (9th Cir.
1996). Alvarez’s claims included an administrative claim against the United States, under the Federal Tort Claims
Act (FTCA), 28 U.S.C. § 2401(b); claims for kidnapping; torture; cruel and inhuman and degrading treatment or
punishment; prolonged arbitrary detention; assault and battery; false imprisonment; intentional infliction of
emotional distress; false arrest; negligent employment of public employees and agents; negligent infliction of
emotional distress; violations of the Fourth, Fifth and Eighth Amendments to the United States Constitution; and a
claim under the TVPA against defendants Garate-Bustamante and Sosa. Alvarez-Machain v. United States, 107 F.3d
696, 699 (9th Cir. 1996).
114 *Id.*
115 *Id.* at 1248.
116 *Id.* at 1253.
law,” and “substituted the United States for the DEA agents.” As a result, the district court concluded that Alvarez may recover under the ATS for his detention, but ruled in favor of Sosa on the remaining claims. Following Sosa’s and Alvarez’s cross-appeals, on rehearing en banc, the three-judge panel ruled in favor of the plaintiff-Alvarez by “affirm[ing] Sosa's liability on the [ATS] claims, [upholding] the substitution and damages rulings under ATS, and revers[ing] the dismissal of Alvarez’s FTCA claims.” Addressing an ATS case for the first time, the Supreme Court “granted certiorari … to clarify the scope of both the FTCA and the ATS” and reversed the judgment of the Court of Appeals.

The Supreme Court “endorsed [the prior courts’] prior approach[es] to the [ATS] [and] recognized that the Act created jurisdiction for a narrow set of violations of international law.” While the previous Courts allowed cases when plaintiffs alleged their “causes of action are statutorily authorized,” The Supreme Court in Sosa deviated from previous court holdings and held that “the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.” The Sosa court limited and narrowed the broad scope of the ATS asserted in Filartga, holding “that the ATS is a

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117 Id.
119 Id. at 610.
120 Id. at 611.
121 Alvarez-Machain v. United States, 284 F.3d 1039 (9th Cir. 2002).
122 Alvarez-Machain, 331 F.3d at 611.
123 Sosa, 542 U.S. 692.
125 Sosa, 542 U.S. at 738.
126 Khulumani, 504 F.3d at 264. Congress intended the [ATS] to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Sosa, 542 U.S. at 720.
127 Khulumani, 504 F.3d at 265 (citing Kadic, 70 F.3d at 246).
128 Sosa, 542 U.S. at 714.
129 Kiobel, 456 F. Supp. 2d at 463.
jurisdictional statute only, creating no cause of action. In addition, Justice Souter highlighted justifications for limiting judicial application of the ATS. Sosa further held that federal courts may recognize claims "based on the present-day law of nations" provided that the claims rest on "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized." Although the Court was unable to resolve "all of the complex and controversial questions" the ATS raises, Sosa did clarify, to a significant degree, the analysis of ATS claims. The Supreme Court held that federal courts retained the ability to adapt the law of nations to private rights by recognizing further international norms as judicially enforceable today. However, the Supreme Court warned that "courts applying ATS should be careful on a case-by-case basis not to interfere with U.S. foreign policy."

The Sosa court further explained that "for a plaintiff injured in a foreign country, then, the presumptive choice in U.S. courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability." Nonetheless, despite ruling that the ATS is purely

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130 Kiobel, 621 F.3d at 125.
132 Kiobel, 621 F.3d at 125-6 (citing Sosa, 542 U.S. at 725). Sosa cited five reasons for courts to exercise great caution before recognizing violations of international law that were not recognized in 1789: First, ... the [modern] understanding that the law is not so much found or discovered as it is either made or created[..] Second, ... an equally significant rethinking of the role of the federal courts in making it [..] Third, [the modern view that] a decision to create a private right of action is one better left to legislative judgment in the great majority of cases[..] Fourth, ... risks of adverse foreign policy consequences [; and] Fifth[..] [the lack of a] congressional mandate to seek out and define new and debatable violations of the law of nations. Presbyterian, 582 F.3d at 255-56 (citing Sosa, 542 U.S. at 725-28); see Garvey, supra note 131, at 387-88.
133 Khulumani, 504 F.3d at 264.
134 Id. at 265 (citing Sosa, 542 U.S. at 728-9).
135 See Herz, supra note 24, at 213.
136 Sosa, 542 U.S. at 706.
jurisdictional, the Supreme Court cited to *Erie R. Co. v. Tompkins* and indicated that “the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”

The Supreme Court further stated “courts must apply principle[s] limiting the availability of relief beyond the requirement that the international law norm whose violation is alleged be sufficiently defined.” The Supreme Court did “reject the views of the Court minority that civil tort liability does lie under the ATS.” Instead, the Supreme Court opined that “damages are properly awarded under the ATS not because any rule of international law imposes damages, but because the United States has exercised the option left to it by international law to allow civil suits.” As Philip Scarborough described, *Sosa* acknowledged that the violations of the law of nations “could encompass anything that the international community condemned universally and that was as specifically defined as the three paradigmatic Blackstone violations.”

In 2008, another ATS case, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, was presented before the Second Circuit. Here, “Vietnamese nationals and an organization, The Vietnamese Association for Victims of Agent Orange/Dioxin” commenced a products liability lawsuit against over thirty corporations, claiming that the defendant-

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137 *Id.* at 694-95 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). *Erie* was the watershed in which we denied the existence of any federal general common law, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly. *Erie*, 304 U.S. at 78.

138 *Sosa*, 542 U.S. at 712.

139 *Khulumani*, 504 F.3d at 295-96 (citing *Sosa*, 542 U.S. at 733 n.21).

140 *Kiobel*, 621 F.3d at 176.

141 *Id.* at 184.

142 Scarborough, *supra* note 112, at 468-69. The three violations of the law of nations listed by Blackstone were piracy, offenses against ambassadors, and violations of safe conducts. *Sosa*, 542 U.S. at 715.

143 See generally *Vietnam*, 517 F.3d 104.


corporations “violated international law by manufacturing and supplying Agent Orange and other herbicides used by the United States military during the Vietnam War.” The district court dismissed the claim, ruling that “[t]here is no basis for any of the claims of plaintiffs under the domestic law of any nation or state or under any form of international law.” On appeal, the Court of Appeals affirmed the lower court’s judgment for dismissal. By concluding that the ATS did not support such claims, the Court reasoned that “the sources of law on which the appellants relied did not define a norm prohibiting the wartime use of Agent Orange that was both universal and sufficiently specific to satisfy the requirements of Sosa.”

Later in 2009, the Second Circuit Court addressed another ATS lawsuit, In re South African Litigation, when South African plaintiffs commenced multiple actions in eight district courts, alleging that the defendant-corporations “support[ed] and facilitate[d] Apartheid's destructive and civil goals [...] and, these companies derived exorbitant profits and benefits from

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147 Agent Orange, 373 F. Supp. 2d at 145.

148 Vietnam, 517 F.3d at 124.

149 See id. at 119-23.


151 Id.
and during Apartheid.” In August 2002, the Judicial Panel on Multidistrict Litigation transferred all related actions to the Southern District of New York. In 2004, the district court dismissed each of the plaintiffs’ claims due to lack of subject matter jurisdiction under the ATS and failure to state a claim. Ultimately, the Second Circuit affirmed the district court’s decision in part, dismissing the consolidated class action. The Court dismissed the “Digwamaje Plaintiffs' TVPA claims,” vacated and remanded “the district court's dismissal of the plaintiffs' [ATS] claims” and “the district court's order denying plaintiffs' motion for leave to amend.” On remand, two amended consolidated complaints were filed, which went before the district court. The district court denied the defendants’ motion for certification of an interlocutory appeal and the defendant’s request for a stay. The district court later granted in part the defendants’ motion to dismiss the amended consolidated complaints and denied it in part, and denied the plaintiffs’ motion to “re-solicit views of governments of United States and South Africa.” The district court also denied the defendants’ motion for certification of an interlocutory appeal. In October 2009, the district court granted the Union Bank of Switzerland A.G.’s motion for entry of final judgment due to the dismissal of the plaintiff’s

152 See Complaint, Digwamaje, et. al., v. IBM Corporation, et. al., 2002 WL 34481492 (No. 02 CV 6218); see also In re South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009), reconsideration denied (May 27, 2009), certificate of appealability denied, 624 F. Supp. 2d 336 (S.D.N.Y. 2009) and motion to certify appeal denied, 02 MDL 1499 (SAS), 2009 WL 5177981 (S.D.N.Y. Dec. 31, 2009).
153 Khulumani, 504 F.3d at 258.
154 Apartheid Litigation, 346 F. Supp. 2d at 554, 557.
155 See e.g., Apartheid Litigation, 617 F. Supp. 2d at 228; Khulumani, 504 F.3d at 254.
156 Khulumani, 504 F.3d at 259.
157 Id. at 260. The Court of Appeals justified its decision to vacate the district court’s dismissal based on its belief that the district court erred in holding that aiding and abetting violations of customary international law cannot provide a basis for ATCA jurisdiction. Id.
158 Id.
159 Apartheid Litigation, 617 F. Supp. 2d at 245 (citing Complaint, Ntsebeza, et. al., v. Daimler AG, et. al., 2002 WL 32153622 (No. 02 CV 4712); see Complaint, Digwamaje, et. al., v. IBM Corporation, et. al., 2002 WL 34481492 (No. 02 CV 6218)).
161 Apartheid Litigation, 617 F. Supp. 2d at 296.
claim against this particular defendant.\textsuperscript{163} At this time, the Court had not yet made any decision regarding corporate liability and thus, denied the defendants’ motion for certification of interlocutory appeal on the issue of corporate liability.\textsuperscript{164}

The Second Circuit Court addressed \textit{Khulumani v. Barclay National Bank, Ltd.}, one of the consolidated cases in \textit{In re South African Litigation}, and discussed “whether an artificial entity that is allegedly used as a vehicle for the commission of a crime against humanity may be held vicariously liable.”\textsuperscript{165} \textit{Khulumani} was the first cases when the Second Circuit granted jurisdiction over a multinational corporation,\textsuperscript{166} holding that a plaintiff may plead a theory of aiding and abetting liability under the ATS.\textsuperscript{167} The Circuit Court remains split over “the standard for pleading such liability.”\textsuperscript{168}

Weighing in \textit{Twombly}’s new pleading standard, in \textit{Khulumani}, Judge Katzmann observed that aiding and abetting liability, much like corporate liability, “does not constitute a discrete criminal offense but only serves as a more particularized way of identifying the persons involved” in the underlying offense.\textsuperscript{169} Comparing the liability of non-state actors in \textit{Sosa},\textsuperscript{170} Judge Katzmann discussed that the \textit{Sosa} principle is equally applicable to the question as to the source when determining “whether the scope of liability for a violation of international law should extend to aiders and abettors.”\textsuperscript{171} However, in previous cases, the Circuit Court made no

\begin{footnotesize}
\begin{enumerate}
\item[A\textsuperscript{162}] \textit{Apartheid Litigation}, 624 F. Supp. 2d at 343.
\item[A\textsuperscript{163}] \textit{In re S. African Apartheid Litig.}, 02 MDL 1499 (SAS), 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009).
\item[A\textsuperscript{164}] \textit{In re S. African Apartheid Litig.}, 2009 WL 5177981 (S.D.N.Y. Dec. 31, 2009).
\item[A\textsuperscript{165}] \textit{Khulumani}, 504 F.3d at 321.
\item[A\textsuperscript{166}] \textit{Id.} at 321.
\item[A\textsuperscript{167}] \textit{Id.} at 260.
\item[A\textsuperscript{168}] \textit{Id.} at 257.
\item[A\textsuperscript{169}] \textit{Kiobel}, 621 F.3d at 129 (citing \textit{Khulumani}, 504 F.3d at 254).
\item[A\textsuperscript{170}] \textit{Sosa}, 542 U.S. at 732 n. 20.
\item[A\textsuperscript{171}] \textit{Kiobel}, 621 F.3d at 129 (citing \textit{Khulumani}, 504 F.3d at 283); \textit{cf. Sosa}, 542 U.S. at 732 n. 20 (classifying both corporations and individuals as private actor[s]).
\end{enumerate}
\end{footnotesize}
distinction as to the issue of liability between corporations and private individuals and the Sosa court “classified both corporations and individuals as private actors.” Here, the Second Circuit made this distinction between private individuals and corporations, by expanding liability and holding “that the ATS conferred jurisdiction over multinational corporations” for “aid[ing] and abet[ing] violations of customary international law.” Furthermore, the Second Circuit agrees that the scope of ATS liability is governed by international law. Here, Judge Katzmann opined that “while domestic law might provide guidance on whether to recognize a violation of international norms, it cannot render conduct actionable under the ATS.”

Again, in 2009, the Second Circuit applied the Sosa opinion in Presbyterian Church of Sudan v. Talisman Energy and defined “aiding and abetting.” Sudanese plaintiffs, on behalf of all non-Muslim Africans in southern Sudan, brought suit the Republic of Sudan and a Canadian corporation, Talisman Energy, Inc. (“Talisman”) for international law violations of genocide, crimes against humanity, and war crimes. The plaintiffs alleged that Talisman aided and abetted with the Sudanese government in the ethnic cleansing of “civilian populations

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172 Khulumani, 504 F.3d at 282-83; see Bigio, 239 F.3d at 447 (discussing whether Coca-Cola can violated ‘the law of nations’ as a non-governmental entity); see also Flores, 414 F.3d at 244 (stating that certain activities are of universal concern and therefore constitute violations of customary international law not only when they are committed by state actors, but also when they are committed by private individuals) (citing Kadic, 70 F.3d at 239-40).

173 Khulumani, 504 F.3d at 283 (citing Sosa, 542 U.S. at 732 n. 2).

174 Id. at 260; Presbyterian, 582 F.3d at 259 (citing Khulumani, 504 F.3d at 277. Citing to Sosa, Judge Katzmann adopted “that a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime. Presbyterian, 582 F.3d at 259.

175 See, e.g., Khulumani, 504 F.3d at 321 (2d Cir. 2007); Bigio, 239 F.3d 440; Flores, 414 F.3d 233.

176 Presbyterian, 582 F.3d at 258 (citing Khulumani, 504 F.3d at 270).

177 Id. at 244. ICTY Statute provides that a “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” ICTY Statute at art. 7(1).

surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities.”

The district court denied Talisman’s motion to dismiss Presbyterian’s amended complaint. The district court then granted the defendant, Talisman’s motion for summary judgment and denied the plaintiffs’ motion to amend. The trial court also granted Talisman’s motion for entry of judgment in favor of the defendant. On appeal, the Second Circuit affirmed the lower court’s grant for summary judgment, concluding that “these theories were insufficiently pled.”

Reaffirming the Sosa principles, the Presbyterian court here held that “the standard for imposing accessorial liability under the ATS must be drawn from international law; and that under international law, a claimant must show that the defendant provided substantial assistance [with the principal party for] the purpose of facilitating the alleged offenses.” Applying that standard, the Circuit Court affirmed the district court’s grant of summary judgment in favor of the defendant-corporation, Talisman, because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in southern Sudan. Ultimately, the Second Circuit established that:

To show that a defendant aided and abetted a violation of international law, an ATS plaintiff must show: 1) that the principal [i.e., the foreign government] violated international law; 2) that the defendant knew of the specific violation; 3) that the defendant acted with the intent to assist that violation, that is, the defendant specifically

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179 Presbyterian, 244 F. Supp. 2d at 296. The term “ethnic cleansing” emerged from the tragedy in the former Yugoslavia and is a translation of the Serbo-Croatian term, etnicko cis cenje. It is commonly understood to be a euphemism for genocide. Unlike genocide, however, “ethnic cleansing” is not a legal term of art; therefore, the Court uses quotation marks when citing the term. Id. at 296, n.2.
180 Id. Talisman filed a motion to dismiss based on lack of subject matter jurisdiction, lack of personal jurisdiction, lack of plaintiffs’ standing, forum non conveniens, international comity, act of state doctrine, political question doctrine, failure to join necessary and indispensable parties, and because equity does not require a useless act. Id.
181 Presbyterian, 453 F. Supp. 2d at 689.
183 Presbyterian, 582 F.3d at 268.
184 Id. at 247-48; see also Sosa, 542 U.S. at 692.
185 Presbyterian, 582 F.3d at 247-48.
directed his acts to assist in the specific violation; 4) that the defendant's acts had a substantial effect upon the success of the criminal venture; and 5) that the defendant was aware that the acts assisted the specific violation.\textsuperscript{186}

The Court cited to Judge Katzmann and defined aiding and abetting liability as liability under international law “when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”\textsuperscript{187}

In addition, the Court also established “the mens rea standard for aiding and abetting liability in ATS actions as ‘purpose rather than knowledge alone.’”\textsuperscript{188} The Circuit Court was mindful that “intent must often be demonstrated by the circumstances, and there may well be an ATS case in which a genuine issue of fact as to a defendant's intent to aid and abet the principal could be inferred.”\textsuperscript{189} In this case, the Presbyterian court granted summary judgment in favor of the defendant, Talisman, due to “insufficient facts or circumstances suggesting that Talisman acted with the purpose to advance violations of international humanitarian law.”\textsuperscript{190}

Later in 2009, in Abdullahi v. Pfizer, Nigerian children and their guardians brought an ATS claim against Pfizer, Inc. (“Pfizer”), a drug manufacturing company, within the Second Circuit Court for “violat[ions] of a customary international law norm prohibiting involuntary medical experimentation on humans when it tested an experimental antibiotic on children in

\textsuperscript{186} Presbyterian, 582 F.3d at 253 (citing Presbyterian, 453 F. Supp. 2d at 639). Unfortunately, in a later case, Judge Katzmann and Judge Korman of the Second Circuit opined that “even if there is a sufficient international consensus for imposing liability on individuals who purposefully aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who knowingly (but not purposefully) aid and abet a violation of international law.” Id.; cf. Khulumani, 504 F.3d at 276 (Katzmann, J., concurring); cf. Khulumani, 504 F.2d at 333 (Korman, J., concurring in part and dissenting in part).

\textsuperscript{187} Presbyterian, 582 F.3d at 258 (2d Cir. 2009) (citing Khulumani, 504 F.3d at 277.

\textsuperscript{188} Id. at 259. Liability for civil conspiracy is in substance the same thing as aiding and abetting liability. See e.g., Scarborough, supra note 112, at 502 n. 153; Restatement (Second) of Torts § 876 (1979); K & S P'ship v. Cont'l Bank, N.A., 952 F.2d 971, 980 (8th Cir. 1991). The general rule is that mens rea must be proven as to all elements of the offense. United States v. Hussein, 351 F.3d 9, 17 (1st Cir. 2003).

\textsuperscript{189} Presbyterian, 582 F.3d at 264.

\textsuperscript{190} Id. at 264.
Nigeria, including themselves, without their consent or knowledge.


Also known as the Trovan study, the medical experimentation “cause[d] significant side effects in children such as joint disease, abnormal cartilage growth (osteochondiosis, a disease resulting in bone deformation) and liver damage.”192 The district court granted the defendant’s motion to dismiss for forum non conveniens.193 On appeal, the Court of Appeals vacated and remanded the case “to determine what precipitated the dismissal in Zango and to evaluate whether that impacts the District Court’s forum non conveniens analysis.”194 Additionally, the circuit court remanded the case to determine whether Nigeria served as an adequate alternative forum.195 On remand, after the parties “submitted the record of the Zango proceedings,”196 the district court granted Pzifer’s motion to dismiss for failure to state a claim.197

Citing to Bell Atl. Corp. v. Twombly, the Second Circuit ruled that in order for an ATS claim “to survive dismissal, the plaintiff[s] must provide the grounds upon which [their] claim rests through factual allegations sufficient to raise a right to relief above the speculative level.”198 With the Twombly plausibility standard in mind,199 in Pfizer, the Circuit Court held that “[plaintiffs] have pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects

193 Id.
194 Abdullahi v. Pfizer, Inc., 77 F. App’x 48, 53 (2d Cir. 2003). Plaintiffs [] made a motion that we take judicial notice of the fact that “[a] parallel action filed in Nigeria [Zango v. Pfizer, No. FHC/K/CS/204/2001], involving different plaintiffs but the same course of conduct by Pfizer, was dismissed on August 19, 2002.” Id. at 52.
195 Id. at 51-52.
197 Id.
198 Abdullahi, 562 F.3d at 172 (citing ATSI Commc’ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir.2007) and Twombly, 127 S.Ct. at 1965).
without their consent;” therefore, “ATS jurisdiction exists over plaintiffs’ claims.” In 2010, a settlement of $75 million was reached with Pfizer, Inc., establishing “a $35 million trust fund from which participants in the Trovan study can seek compensation,” on the condition that all claims against Pfizer is released. In the administration of the trust fund to claimants, a board was established to oversee identification of actual participants in the Trovan study, by collecting DNA samples for testing.

The Second Circuit faced another ATS case in 2010, Liu Bo Shan v. China Construction Bank Corp. The plaintiff, Liu Bo Shan, brought suit against the China Construction Bank Corporation (“China Bank”), under the ATS and TVPA, alleging that he was punished because he had “discovered that the Bank had issued false bank deposit certificates” as a result of his auditing assignment. In the plaintiff’s complaint, Liu Bo Shan filed suit in the United States District Court for the Southern District of New York, against China Bank, Shan’s former employer, for acting in conjunction with the Chinese police, causing him to be “imprisoned, beaten, burned repeatedly with cigarettes, water tortured, and made to stand for numerous hours

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200 Abdullahi, 562 F.3d at 187; see, e.g., Twombly, 550 U.S. at 544; Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). A complaint is insufficient as a matter of law unless it pleads specific facts that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Iqbal, 129 S. Ct. at 1937.

201 Brief for the United States as Amicus Curiae at 8, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (2d Cir. 2010) (No. 09-34).


204 Shan, 2010 WL 2595095.
in a jail cell flooded with water where he could not sit or lie for a period of eleven days.” The plaintiff, Liu Bo Shan, presented three alternative theories for liability against China Bank, which were direct liability, aiding and abetting liability, and liability as a co-conspirator. The district court granted the Bank’s motion to dismiss for failure to state a “plausible theory of direct liability” against China Bank as an aider-and-abettor and co-conspirator of the Chinese police. The Second Circuit affirmed the lower court’s decision to grant the motion to dismiss.

The Circuit Court referred to *Presbyterian* and held that “if ATS liability could be established by knowledge of those abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts.” Therefore, “[s]uch measures are not the province of private parties but are, instead, properly reserved to governments and multinational organizations.” Deferring to the pleading standards set forth in *Iqbal* and *Twombly*, the Circuit Court here reviewed the challenged dismissal de novo. The Court subsequently determined that the amended complaint was properly dismissed for failure to

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206 Shan, 421 F. App’x. at 89. To state a claim for aiding and abetting under international law, a plaintiff must allege that defendant (1) provided “substantial assistance” to the perpetrator; and (2) acted with the “purpose” of facilitating the alleged offenses, rather than with mere knowledge. *Id.* at 93 (citing *Presbyterian*, 582 F.3d at 247).
207 Shan, 2010 WL 2595095.
208 *Id.*
209 *Id.*
210 *Id.*
211 *Id.* at 95.
212 *Presbyterian*, 582 F.3d at 264. Sudanese Plaintiffs filed suit against a Canadian Corporation for aiding or abetting or conspiring with the Sudanese government to commit human rights abuses. *Id.*
213 *Id.*
214 Shan, 421 F. App’x at 90; see e.g., *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 570; see also Standards of Appellate Review in the Federal Circuit: Substance and Semantics, 11 FED. CIRCUIT B.J. 279, 385 n.35 (2002). The Federal Circuit has alternatively labeled the strictest standard of review plenary, full, and independent review. *Id.*
state a claim against China Bank on the theories of direct liability, aiding and abetting liability, and liability as a co-conspirator.”

In 2010, in *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, American plaintiffs commenced suit against Chiquita Brands International, Inc. in the Southern District of Florida, alleging “wrongful death, aiding and abetting wrongful death, false imprisonment, aiding and abetting false imprisonment, intentional infliction of emotional distress, aiding and abetting intentional infliction of emotional distress, negligent infliction of emotional distress, assault, and aiding and abetting assault under various state tort laws” in connection with the Colombian terrorist organization known as Fuerzas Armadas Revolucionarias de Colombia (“FARC”). The district court ruled that the “[p]laintiffs have sufficiently alleged aiding and abetting liability,” and granted the defendant’s motion to dismiss in part and dismissed the defendant’s remaining claims. In July 2011, the district court granted Chiquita’s motions to dismiss for the plaintiffs’ following ATS claims for terrorism and material support to terrorist organizations, cruel, inhuman, or degrading treatment; violation of the rights to life, liberty and security of person and peaceful assembly and association; and consistent pattern of gross violations of human rights, Plaintiffs' state-law claims, Plaintiffs' Colombia-law claims, and Perez Plaintiffs' FARC-based claims. The district court also denied the plaintiffs’ ATS claims for torture, extrajudicial killing, war crimes, and crimes against

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Questions of law are subject to full and independent review (sometimes referred to as ‘de novo’ or ‘plenary’ review). See *In re Asahi/America, Inc.*, 68 F.3d 442, 445 (Fed. Cir. 1995).

215 *Shan*, 421 F. App’x at 95. A private individual will be held liable under the ATS if he ‘acted in concert with’ the state, i.e., ‘under color of law.’” *Id.* (quoting *Kadic*, 70 F.3d at 245).


217 *Id.* at 1311.

218 *Id.* at 1317.

humanity, and TVPA claims for torture and extrajudicial killing. The trial court reasoned that the “[p]laintiffs' terrorism-based claims are not actionable under the ATS,” the plaintiffs “detailed facts supporting the requisite elements of their crimes-against-humanity claims,” and plaintiffs “sufficiently alleged that the AUC committed primary international-law violations for torture, extrajudicial killing, war crimes, and crimes against humanity.”

In 2010, in Abecassis v. Wyatt, victims or families of victims of “terrorist attacks in Israel between 2000 and 2003” brought suit against defendant companies and individuals involved in the oil business for violating the United Nations Oil-for-Food Program, by “purchas[ing] oil from Iraq-either directly from Saddam Hussein's government or from third parties who had purchased the oil from Hussein-and made payments that violated the United Nations Oil-for-Food Program.” The district court in Texas granted the defendants’ motions to dismiss for lack of standing and motions to dismiss for failure to state a claim. After being granted leave to amend, the plaintiffs re-pled its claim under the Antiterrorist Act, the district court denied the defendant’s motion to dismiss, but granted the motion to dismiss the conspiracy allegations, the allegations based on violations of 18 U.S.C. § 2332(d) limitations.

220 Id.
221 Id. at 1321.
222 Id. at 1338.
223 Id. at 1344. Plaintiffs, citizens and residents of Colombia, are the family members of trade unionists, banana-plantation workers, political organizers, social activists, and others tortured and killed by the Autodefensas Unidas de Colombia (“AUC”), a paramilitary organization operating in Colombia. Chiquita, 792 F. Supp. 2d at 1305.
225 Id. at 627. The Oil-for-Food Program required anyone buying oil from Iraq to pay the purchase money into an escrow account monitored by the United Nations. Funds from this account could only be used for humanitarian purposes. Id.
226 Id. at 667.
228 Abecassis, 785 F. Supp. 2d at 654; Criminal Penalties, 18 U.S.C. § 2332 (2011). No prosecution for any offense described in this section shall be undertaken by the United States except on written certification of the Attorney General or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions that, in the judgment of the certifying official, such offense was intended to coerce, intimidate, or retaliate against a government or a civilian population. 18 U.S.C. § 2332.
In 2011, *Dacer v. Estrada* was commenced in the Northern District Court of California by family members of Salvador Dacer, “a prominent and influential publicist in the Philippines” who was tortured and killed in November 2000.” The plaintiffs alleged that seven individuals were “responsible for their father's torture and death,” and orchestrated his death because he was a “threat to [the individuals’] political power.” The district court denied one of the defendants, Michael Ray Aquino’s motion to dismiss, stating that “Aquino has not pled exhaustion as an affirmative defense in an answer to the complaint” and should file a summary judgment on the issue of exhaustion after both parties had the “opportunity to develop the evidence needed to prove and rebut the exhaustion defense.” In December 2011, the district court readdressed the issue regarding exhaustion and subsequently denied the defendant’s motion for summary judgment on plaintiff’s claims under the ATS and TVPA. The district court reasoned that the defendant, Aquino, “only [made] conclusory allegations that exhaustion should apply and submits no evidence on this issue,” and did not meet his burden to show that exhaustion is required for plaintiffs' claims under the [ATS], and failed to “show that legal remedies in the Philippines against defendant are effective.”

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230 *Id.*
231 *Id.*
232 *Id.* Defendant Michael Ray Aquino now moves to dismiss the complaint because plaintiffs supposedly have not exhausted their legal remedies in the Philippines. *Id.*
235 *Id.* To prevail on a defense of exhaustion for claims under the [ATS], defendant must first show that exhaustion is required. *Id.* (citing *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 830-31 (9th Cir.2008) (en banc)). Exhaustion may be required if the action lacks a significant nexus to the United States or does not pertain to an offense of universal concern. *Id.* (citing *Sarei*, 550 F.3d at 825).
236 *Id.* Although the plaintiff may rebut this showing with a demonstration of the futility of exhaustion, the ultimate burden remains with the defendant. *Dacer*, 2011 WL 6099381 (citing *Sarei*, 550 F.3d at 832). While exhaustion is a statutory requirement for claims under the TVPA, it is only a prudential requirement for claims under the [ATS]. *Id.* (citing *Sarei*, 550 F.3d at 827).
237 *Id.*
In July 2011, in Escarria v. Montano, the plaintiff, a federal prisoner convicted for cocaine distribution, filed a TVPA, codified under the ATS, and Bivens action against the U.S. government for injunctive relief and monetary damages. The plaintiff alleged that he was on a Panamanian fishing vessel, when a United States vessel approached and the plaintiff suffered from first, second, and third degree burns from an explosion. The court noted that “with respect to Plaintiff's claims against Defendants in their official capacities, all courts that have addressed the issue agree that the [ATS] does not itself waive the sovereign immunity of the United States.” Ultimately, the district court granted the United States’ motion to dismiss due to lack of subject matter jurisdiction and held that the “[p]laintiff has not shown that he has exhausted his administrative remedies, and the exhaustion requirement is jurisdictional.”

III. GOVERNMENT INTERFERENCE WITH ATS LITIGATION

In recent years, these “high profile federal court cases” were filed under the premise of the ATS, alleging “severe and pervasive” human rights violations. Due to the relevant nature of these cases, the Bush Administration filed a number of amicus briefs contesting ATS

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239 Escarria-Montano, 797 F. Supp. 2d at 22-23.

240 Id. at 23.

241 Id. at 24 (citing Bieregu v. Ashcroft, 259 F.Supp.2d 342, 354 (D.N.J.2003)).

242 Id. at 25; see Mohammed v. Rumsfeld, 649 F.3d 762, 775 (D.C.Cir. June 21, 2011) (concluding that “[t]he district court [ ] properly dismissed the [unexhausted] ATS claims under FRCP 12(b)(1) for lack of subject matter jurisdiction.”). Id.

243 Herz, supra note 24, at 208. The kinds of abuses alleged are often severe and pervasive, including, for example, allegations that ExxonMobil abetted genocide and crimes against humanity by the Indonesian military during a conflict with Acehnese rebels in order to protect its natural gas facilities, and that Talisman Energy assisted in genocide and ethnic cleansing committed by the Sudanese government to clear areas surrounding its oil concessions in Southern Sudan.
litigation. In those briefs, the Executive Branch expressed two primary concerns: (1) that “[ATS] lawsuits [will] make it difficult for the executive branch to negotiate foreign policy;” and (2) that the increase in ATS lawsuits will “overwhelm the overseas American business community with accusations of human rights abuse.”

In the ATS cases, aliens sued multinational corporations, operating abroad, for violations, often alleged as severe and pervasive, committed by “agents of foreign governments.” Many of these cases have resulted in dismissal for various reasons such as failure to state a claim, forum non conveniens, and sovereign immunity. According to Richard Herz, the Bush Administration made arguments for dismissal “regardless of whether the alleged victims can prove their claims.” Herz describes the Bush Administration’s opposition to “the recognition of aiding and abetting liability,” contending that such “liability should never be available.”

Herz states one of the public policy concerns asserted by the Bush Administration, which contended that allowing aiding and abetting liability would “interfere[] with the United States’ ability to use constructive engagement in conducting foreign relations.” Thus, the recognition

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244 Id. According to the Executive, U.S. foreign policy concerns for advancing human rights require that corporations not be held liable for aiding and abetting even the most egregious violations of universally recognized human rights norms. Id.

245 Carter, supra note 31, at 640.

246 Carter, supra note 31, at 642.

247 Herz, supra note 24, at 208.

248 Herz, supra note 24, at 208.

249 Herz, supra note 24, at 217-18; see e.g., Brief for the United States of America as Amicus Curiae Supporting Respondents at 4, Khulumani v. Barclay Nat. Bank, 509 F.3d 148 (2d Cir. 2007) (05-2141-CV, 05-2336-CV) (“[R]ecognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment.”); Supplemental Brief of the United States of America as Amicus Curiae Supporting Respondents at 14, Doe I v. Unocal, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628). available at http://www.earthrights.org/files/Legal%20Docs/Unocal/dojunocalbrief.pdf (“Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices.”); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 16-18,Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2006), (No. 05-36210), 2006 WL 2952505.

250 Herz, supra note 24, at 217.18. Advocates of “constructive engagement” or the “development model” maintain that investment can be an effective means for catalyzing reform. Id. at 209; see e.g., Brief for the United States of
of any liability in ATS cases should be precluded. Herz also indicated that the Bush Administration “denie[d] any obligation to show that the U.S. even has a constructive engagement policy toward the country involved.”

As indicated in Herz’s article, the Bush Administration argued ATS liability is incompatible with national foreign policy because such recognition of aiding and abetting liability would “limit[] the government's ability to use economic engagement as a tool for promoting human rights.”

ATS litigation would “seriously threaten [] crucial diplomatic efforts.” For example, ATS litigation created a conflict of interest for the “Bush [A]dministration's efforts to recruit allies in Muslim-majority countries in the war on terror,” such as Indonesia.

However, in support of constructive engagement and in opposition to the Administration’s arguments and justifications, proponents countered with the following arguments: first, through global interactions, U.S. corporations will promote democracy and human rights by “conveying democratic values and pushing for respect for the rule of law.” Second, proponents describe that investment in upholding human rights as sacred may be an

American as Amicus Curiae Supporting Respondents at 4, Khulumani v. Barclay Nat. Bank, 509 F.3d 148 (2d Cir. 2007) (05-2141-CV, 05-2336-CV) (“[R]ecognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment.”); Supplemental Brief of the United States of America as Amicus Curiae Supporting Respondents at 14, Doe I v. Unocal, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628), available at http://www.earthrights.org/files/Legal%20Docs/Unocal/dojunocalbrief.pdf (“Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices.”); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 16-18, Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2006), (No. 05-36210), 2006 WL 2952505.

Herz, supra note 24, at 227.

Herz, supra note 24, at 208.

Carter, supra note 31, at 641.

Carter, supra note 31, at 641.


Herz, supra note 24, at 209.
Such reform involves the “encouragemen[t] and promotion [of] positive change in the domestic policies of developing countries on issues relevant to U.S. interests.”

Kevin Carter in his article explained another argument put forward by the Bush Administration, which claimed a negative effect on global investment and the obstruction to policy implementation. More specifically, fear of aiding and abetting liability may hamper U.S. and foreign corporate investment in countries where “economic development may have the most positive impact on economic and political conditions.”

Economic development would provide an opportunity for the Executive Branch to use “[e]conomic measures, such as promoting investment or the threat of sanctions,” in order to encourage national foreign policy. Similarly, Herz stated the Bush Administration proposed a similar argument in *Sosa* that ATS litigation would chip away at the effectiveness of the threat of sanctions.

Further, Carter suggests that the Bush Administration, with the support of the U.S. business community and members of Congress, sought “to limit or foreclose lawsuits against American companies and protect U.S. foreign policy interests and foreign direct investment.” The reason behind the Bush Administration’s proposal to limit or foreclose litigation is the possibility litigation would compromise the “corporations’ ability to expand operations, generate

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257 Herz, supra note 24, at 209.
258 Khulumani, 504 F.3d at 297.
259 Carter, supra note 31, at 643
260 Herz, supra note 24, at 218. “[T]he prospect of costly litigation and potential liability in U.S. courts for operating in a country whose government implements oppressive policies will discourage the U.S. (and other foreign) corporations from investing in many areas of the developing world, where investment is most needed and can have the most forceful and positive impact on both economic and political conditions.” Khulumani, 504 F.3d at 297.
261 Herz, supra note 24, at 218.
262 See Brief for the United States as Respondent Supporting Petitioner at 44, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581. Economic measures, such as promoting investment or the threat of sanctions, are an important tool that the Executive uses in conducting the Nation's foreign policy. But see also Herz, supra note 24, at 232.
263 Carter, supra note 31, at 631.
Additional to Michael Garvey explains in his article that during the Bush Administration, the Justice Department contended that “aiding and abetting liability is inconsistent with judicial restraint in cases involving foreign affairs and political questions, an impermissible foray into federal common law, and an improper interference with foreign relations.”

While human rights advocacy groups state that aiding and abetting liability has “long been recognized since the Nuremburg Tribunal in 1945,” the U.S. government has consistently reaffirmed the position that “private persons may be found liable under the [ATS] for acts of genocide, war crimes, and other violations of international humanitarian law.”

The Executive Branch had made similar arguments such as those previously presented, in their amicus briefs, in response to ATS litigation. First, in July 2002, a lawsuit was filed against Exxon Mobil for the assault and torture of Indonesian workers. The U.S. government also contended in its brief that the “official U.S. policy for promoting human rights” involves

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264 Carter, supra note 31, at 639.
265 Garvey, supra note 131, at 383-84 (citing Brief for the United States as Amicus Curiae in Support of Petitioners at 8-10, Am. Isuzu Motors, 128 S. Ct. 2424 (No. 07-919)). As this Court has explained, the creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction. Brief for the United States as Amicus Curiae in Support of Petitioners at 8, Am. Isuzu Motors, 128 S. Ct. 2424 (No. 07-919) (citing Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994). Such “a vast expansion of federal law,” id. at 183, is all the more inappropriate where, as here, it raises significant “risks of adverse foreign policy consequences,” Brief for the United States as Amicus Curiae in Support of Petitioners at 8, Am. Isuzu Motors, 128 S. Ct. 2424 (No. 07-919) (citing Sosa, 542 U.S. at 728)).
267 Kadic, 70 F.3d at 239-40; see also Statement of Interest of the United States at 13. The Restatement (Third) of the Foreign Relations Law of the United States (1986) (Restatement (Third)) proclaims: Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide. Restatement (Third) pt. II, introductory note).
sanctions and engagement, which needs to be preserved as a U.S. foreign policy tool.\textsuperscript{269} In response to the District of Columbia Court of Appeal’s request for a brief on the “potential negative effect on foreign policy strategies in Southeast Asia, the State Department requested dismissal of the lawsuit.\textsuperscript{270} Specifically, the State Department reasoned that in this case, the Indonesian government may respond to this litigation by “curtailing cooperation with the United States” and the litigation may “disrupt the ongoing and extensive [U.S.] efforts to secure Indonesia’s cooperation in the fight against international terrorist activity.”\textsuperscript{271}

In the ATS landmark case, \textit{Sosa}, addressed by the United States Supreme Court in 2004, “[d]ozens of amicus briefs were filed in support on each side.”\textsuperscript{272} While corporate supporters asserted “the law should not be applicable absent separate legislation by Congress,” the Bush Administration vocalized that “the [ATS] law should cease to function.”\textsuperscript{273} Carter states that the Administration claimed in its brief that the Executive Branch needs deference and flexibility

\textsuperscript{269} Herz, \textit{supra} note 24, at 234 (citing Supplemental Brief for the United States of America as Amicus Curiae at 11-15, Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628)). These lawsuits challenge the “constructive engagement” strategy embodied in the Burma Sanctions Act, undermine U.S. policy to promote free trade and economic development, and promote “diplomatic friction” by allowing foreign citizens to use the U.S. judicial system as an avenue to indirectly challenge the acts of their own government, even when - as in this case - the political branches have granted that government immunity from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(5). Supplemental Reply Brief of Defendants-Appellees at 10-11, John DOE I et al., Plaintiffs-Appellants, v. UNOCAL CORPORATION et al., Defendants-Appellees, John Roe III et al, Plaintiffs-Appellants, v. Unocal Corporation et al., Defendants-Appellees., 2004 WL 2402875 (9th Cir. 2004) (Nos. 00-56603, 00-56628, 00-57195, 00-57197)).

\textsuperscript{270} Carter, \textit{supra} note 31, at 641. The Court has similarly recognized that the threat of litigation against lower level government officials for conduct taken within the scope of their employment threatens the efficiency and initiative of the Executive Branch sufficiently to warrant immediate appeal from the denial of a motion to dismiss on grounds of qualified immunity or under the Westfall Act. Brief for the United States as Amicus Curiae, at 11, Exxon Mobil Corp v. Doe, 2008 WL 2095734 (No. 07-81) (citing \textit{Mitchell v. Forsyth}, 472 U.S. 511, 530 (1985); \textit{Osborn v. Haley}, 549 U.S. 225 (2007)).

\textsuperscript{271} Carter, \textit{supra} note 31, at 641 (citing Letter from William H. Taft, IV, Legal Adviser, U.S. Department of State, to Hon. Louis F. Oberdorfer, U.S. District Court, District of Columbia 1 (July 29, 2002) (on file with the Columbia Journal of Transnational Law)). “[T]he Department of State believes that adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the ongoing struggle against international terrorism.”).

\textsuperscript{272} Carter, \textit{supra} note 31, at 638.

\textsuperscript{273} Carter, \textit{supra} note 31, at 638.
from the courts and flexibility in order to balance “its human rights agenda with its trade, investment, and economic cooperation agendas.”

Accordingly, in response to the *Sosa* litigation, the “National Foreign Trade Council and a number of other pro-business organizations” argued that ATS litigation challenges the United States’ political decisions and its policy “to increase international trade, investment, and economic cooperation as a central means of promoting human rights.” Both Herz and Carter bring to light the Bush Administration’s support of *Sosa’s* argument that “the ATS was purely jurisdictional and did not create or authorize courts to recognize a right of action without a further act of Congress” as it has done before. However, the Supreme Court rejected the Administration’s argument and concluded the ATS provided a cause of action for “the modest number of international law violations with a potential for personal liability at the time;” thus, “no further congressional action is required.”

In 2009, in *Khulumani*, the U.S. Government submitted an amicus brief to the U.S. Court of Appeals for the Second Circuit in response to ATS claims brought against corporations operating in South Africa. Initially, the South African government, though not a party in this litigation, opposed such litigation and even submitted a declaration of its interests in the matter,

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274 Carter, *supra* note 31, at 642. Foreign plaintiffs and the lawyers and organizations supporting them - often pursuing thinly disguised political agendas - have adopted the statute as a vehicle to embarrass foreign governments and to pressure U.S. companies to abandon foreign investments. Brief for Nat’l Foreign Trade Council, et al. as Amici Curiae Supporting Petitioner at 4, 13-14, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339). In some cases, the ATS has been used to challenge private foreign investment that the political branches of the United States have explicitly condoned or encouraged.


276 See Herz, *supra* note 24, at 212; see also Carter, *supra* note 31, at 638.

277 Herz, *supra* note 24, at 212; see *Sosa*, 542 U.S. at 692.

278 See Brief for the United States As Amicus Curiae in Support of Petitioners at 3, *American Isuzu Motors, Inc. v. Ntsebeza*, 2008 WL 408389 (2d Cir. 2008) (No. 07-919). It explained that “[i]n a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation’s doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.” *Id.*
urging dismissal of the case.\textsuperscript{279} However, as litigation went on and the ATS’s application was gradually limited by the courts, the South African government no longer opposed the litigation.\textsuperscript{280} One of the arguments the U.S. government provided was interference with the use of “foreign policy options” when dealing with regimes with “oppressive human rights practices.”\textsuperscript{281} The Government asserted that the imposition of aiding and abetting liability against U.S. corporations would create uncertainty as to private liability and deter economic engagement and foreign investment.\textsuperscript{282}

Like the cases cited above, courts usually permit aiding and abetting claims because “customary international law contemplates such liability and because the statute itself is specifically tied to conduct that violates international law.”\textsuperscript{283} By recognizing such liability, the courts in ATS cases defer to international law in their legal analyses.\textsuperscript{284} Customary international law requires either knowledge or purpose.\textsuperscript{285} Typically, a knowledge standard is applied in most


\textsuperscript{280} Wuerth, \textit{supra} note 280, at 1959 (citing Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States, July 11, 2003 [hereinafter Declaration by Justice Minister Penuell Manduna], \textit{available at: http:// www.info.gov.za/view/DownloadFileAction?id=70180}). It is the government’s submission that as these proceedings interfere with a sovereign’s efforts to address matters in which it has the predominant interest, such proceedings should be dismissed. Declaration by Justice Minister Penuell Maduna on Apartheid Litigation in the United States, July 11, 2003 [hereinafter Declaration by Justice Minister Penuell Manduna], \textit{available at: http:// www.info.gov.za/view/DownloadFileAction?id=70180}).

\textsuperscript{281} Herz, \textit{supra} note 24, at 218.

\textsuperscript{282} See Herz, \textit{supra} note 24, at 218.

\textsuperscript{283} Wuerth, \textit{supra} note 280, at 1950.

\textsuperscript{284} Wuerth, \textit{supra} note 280, at 1950.

\textsuperscript{285} Wuerth, \textit{supra} note 280, at 1952-53. The Court in \textit{Talisman} held that the mens rea standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone. \textit{Presbyterian}, 582 F.3d at 259 (citing \textit{Khulumani}, 504 F.3d at 288).
cases despite the existence of the purpose standard.\textsuperscript{286} With these considerations in mind, aiding and abetting liability must be “universally condemned and well defined to satisfy \textit{Sosa}.”\textsuperscript{287}

**IV. REASONS FOR ATS LITIGATION**

Ironically, in order to display American efforts to fulfill international responsibilities, the U.S. government has repeatedly cited the ATS to the United Nations.\textsuperscript{288} Yet it appears the Bush Administration has made diligent attempts to restrict liability under the ATS.\textsuperscript{289} Herz opines these attempts will “undoubtedly be perceived as retrenchment of the U.S. commitment to human rights enforcement, or as evidence of a double standard under which the United States turns a blind eye to the transgressions of its own corporate citizens while asking other nations to adhere to human rights norms.”\textsuperscript{290}

As a result, such restrictions would lead to lost opportunity to recruit corporations as “advocates for democracy.”\textsuperscript{291} Further restriction may convey to the global community that “Westerners do not respect democratic values” and that “human rights can be subordinated to economic objectives.”\textsuperscript{292} Herz illustrated the Bush Administration’s indifference towards imposing sanctions and punishing U.S. companies for gross human violations can only have a negative effect on foreign regimes.\textsuperscript{293} An example of the Bush Administration’s detachment is the lack of empirical or any other evidence that suggests the decline of foreign investment due to

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\textsuperscript{287} \textit{Scarborough, supra} note 112, at 502.
\textsuperscript{288} \textit{Herz, supra} note 24, at 231.
\textsuperscript{289} \textit{Herz, supra} note 24, at 231.
\textsuperscript{290} \textit{Herz, supra} note 24, at 231.
\textsuperscript{291} \textit{Herz, supra} note 24, at 231.
\textsuperscript{292} \textit{Herz, supra} note 24, at 223.
\textsuperscript{293} \textit{Herz, supra} note 24, at 233.
potential aiding and abetting liability for human rights abuses or to any effect, that corporations with substantial foreign investments will discontinue its existing projects.294

Some arguments have been made that courts in ATS cases should give deference to the Bush Administration on a case-by-case basis when dealing with national foreign policy.295 In spite of this argument, it is important to consider that as a world leader, “other countries and international actors may look to these U.S. decisions as evidence of the content of international law.”296 By not holding U.S. corporations accountable for human rights abuses, the U.S. government runs the risk of setting the example that “the United States government is not committed to promoting reform, or at least that it is unwilling to sacrifice the narrow economic interests of a few U.S. multinationals in order to protect human rights by placing even modest limits on their actions abroad.”297 Supporters indicate that deference is particularly appropriate where the Government has a strong interest and role in the “formation of a particular norm of customary international law.”298

Surely, the Government has the “expertise and informational advantages”299 when dealing with foreign policy. However, the consequences of the Bush Administration’s policy for deferment include “the possibility of inconsistent positions over time [], [the] inconsistent positions from one case to another, potential pressure by foreign governments and corporations on the executive branch, and difficulties that may arise when the government does not choose to

294 Herz, supra note 24, at 235; see Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1998, 2187 U.N.T.S. 90, 105 (establishing individual criminal liability for persons who aid[ ], abet[ ] or otherwise assist[ ] in [a covered crime’s] commission or its attempted commission, including providing the means for its commission).
295 Wuerth, supra note 280, at 1956.
296 Wuerth, supra note 280, at 1956-57.
297 Herz, supra note 24, at 230.
298 Wuerth, supra note 280, at 1956-57.
299 Wuerth, supra note 280, at 1956-57.
express an opinion." 300 Deference to the Bush Administration would only lead to inconsistent positions in ATS cases. 301

While the courts should not ignore international standards, the courts should apply federal and state standards under U.S. law. In fact, “many state courts and Circuit Courts, including the Second Circuit, have adopted the Restatement's aiding and abetting standard.” 302 A number of international treaties have included an aiding and abetting standard in its provisions. 303 For example, the governing Statute of the International Criminal Tribunal for Former Yugoslavia states that “actus reus [of aiding and abetting] consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime, while the mens rea required is the knowledge that these acts assist the commission of the offence.” 304 The legislative history of the U.S. refers to language that confirms that “the plaintiff must establish some governmental involvement in the torture or killing to prove a claim, and that

300 Wuerth, supra note 280, at 1958. These problems are familiar from the foreign sovereign immunity context, in which deference to the executive branch proved undesirable in cases that raised questions about the immunity of foreign sovereigns, and the Foreign Sovereign Immunities Act of 1976 was eventually enacted.

301 Wuerth, supra note 280, at 1959.

302 Khulumani, 504 F.3d at 288 (citing Halberstam v. Welch, 705 F.2d 472 (D.C.Cir.1983). The Supreme Court has described Halberstam v. Welch, 705 F.2d 472 (D.C.Cir.1983), as “a comprehensive opinion on the subject [of aiding and abetting]. Id. at 287. Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. Halberstam, 705 F.2d at 477. The Restatement suggests five factors in making this determination: ‘the 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 tortfeasor and his state of mind.’ ” Id. at 478 (quoting Restatement (Second) of Torts § 876 cmt. d).


304 See Khulumani, 504 F.3d at 277 (citing Furundzija, Trial Chamber Judgment, ¶ 235); see also Herz, supra note 24, at 216. Under the ICTY Statute, the tribunal has jurisdiction over four clusters of crimes: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. See ICTY Statute arts. 2-5.
the statute does not attempt to deal with torture or killing by purely private groups.”

In further support, while reading *Presbyterian* and *Iqbal* together, these two cases “establish a requirement that, for a complaint to properly allege a defendant’s complicity in human rights abuses perpetrated by officials of a foreign government, it must plead specific facts supporting a reasonable inference that the defendant acted with a purpose of bringing about the abuses.”

Foreign policy and diplomacy are important, but corporate liability and duties have become “an increasingly unsettled area of international law, and using domestic law to hold companies liable for conduct that violates international norms may be consistent with the development of customary international law in this area.”

Dealing with this unsettled area of law, it is imperative to utilize the ATS as a tool for “regulating corporate behavior and helping uphold the United States' purported commitment to human rights around the world.”

Because of the uncertainty, ATS litigation has sparked a debate regarding corporate liability that focuses on the promotion of democracy, human rights, and development, but also the disadvantages of corporate liability. Our global economy is so interconnected that American corporations are present in nearly every country in the world. Because corporations operate overseas under the jurisdiction of often more lenient laws, corporate liability for human rights violations would encourage “social justice for foreign citizens employed by or working alongside American multinational corporations.”

Allowing deference to the Executive Branch would not only

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306 *Kiobel*, 621 F.2d at 188 (citing *Iqbal*, 129 S. Ct. at 1937; *Presbyterian*, 582 F.3d at 244).


310 Carter, *supra* note 31, at 644. Alien Tort Statute cases often involve companies that allegedly abetted abuses committed on their behalf by repressive government security forces. The potential for ATS liability for such conduct should force companies to conduct due diligence and implement operational safeguards to decrease the risk that
“obstruct[] social change and democratization,” but the “United States and other Western countries lose [would] credibility on the world stage when they do away with corporate regulatory mechanisms like the [ATS].”

The Bush Administration’s the frivolous claims under the ATS threaten foreign investment is meritless. The Administration fails to include evidence that shows “it is often American multinational companies' exploitative behavior that fuels anger among foreign populations and instigates terrorism in the first place.” In fact, most of the corporations named in ATS lawsuits are American companies. While numerous procedural filters already exist to keep weak or frivolous ATS claims out of the courts, the courts also have “established reasonable guidelines about the sorts of plaintiffs that should have standing.” The claims that survive the procedural filters do hold some merit. Deferring to the Bush Administration’s argument that liability “seriously threaten[s] U.S. foreign direct investment or foreign policy efforts” would be consequential. But even if it did, facing any negative outcome that may result would be well worth the costs imposed to prevent egregious human rights violations on foreign workers.

their government partners or members of the security forces will commit abuses on their behalf, or that the company will be complicit in such abuses. Herz, supra note 24, at 227-28.

311 Carter, supra note 31, at 650.

312 Carter, supra note 31, at 645.

313 Carter, supra note 31, at 650; see generally, e.g., Sosa, 542 U.S. at 692; Abdallah, 562 F.3d at 163; Presbyterian 582 F.3d at 244; Vietnam, 517 F.3d at 104; Khulumani, 504 F.3d at 254; Flores., 343 F.3d at 140; Kadic, 70 F.3d at 232; Wiwa, 226 F.3d at 88; Bigio, 239 F.3d at 440; Filartiga, 630 F.2d at 876.

314 Carter, supra note 31, at 650. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Twombly, 550 U.S. at 555; Fed. R. Civ. P. 12(b)(6). The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

315 Carter, supra note 31, at 650.

316 Carter, supra note 31, at 650.

317 Carter, supra note 31, at 650.
As a corporation that has the privilege to operate within the jurisdiction of another country, corporations should not be able to hide behind the ATS after “they support[ed], participate[d] in, and benefit[ed] financially from human rights abuses.”\textsuperscript{318} Instead, the purpose of corporate presence should not only provide for foreign investment, but it should deter human rights violations and promote growth and development.\textsuperscript{319} Claims brought under the premise of the ATS should continue to be brought and deference to the Government should be maintained to some degree because such litigation may affect national foreign policy. However, any involvement by the Executive Branch should not be absolutely dispositive. In \textit{Sosa}, Justice Scalia “welcome[d] any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.”\textsuperscript{320} Seeking congressional guidance, Justice Scalia further stated that Congress can neither do anything to “shut the door to the law of nations” nor has it tried to “modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”\textsuperscript{321} Since this opinion, “Congress has had ample opportunity under both Republican and Democratic administrations to restrict or eliminate ATS cases against corporations, but has not done so.”\textsuperscript{322}

In an attempt to resolve some of the common issues facing the district courts, a bill entitled the “Alien Tort Statute Reform Act” was introduced in the Senate, to propose an amendment to the ATS to “clarify jurisdiction of Federal Courts over a tort action brought by an

\textsuperscript{318} Wuerth, \textit{supra note} 280, at 1965. [A]ll citizens of the United States... who should render themselves liable to punishment under the laws of nations, by committing, aiding, or abetting hostilities... would not receive the protection of the United States. \textit{See} Scarborough, \textit{supra note} 112, at 502 n. 146; \textit{see also} Breach of Neutrality, I Op. Att'y Gen. 57, 59 (1795).

\textsuperscript{319} Wuerth, \textit{supra note} 280, at 1965.

\textsuperscript{320} \textit{Sosa}, 542 U.S. at 731.

\textsuperscript{321} \textit{Id}.

\textsuperscript{322} Wuerth, \textit{supra note} 280, at 1965.
alien.”323 This bill was a response to the Sosa amicus briefs filed by pro-corporation groups opposing ATS litigation.324 However, since the bill was “referred to the Committee on the Judiciary,” no further action has taken place since 2005,325 and no changes have been made since the referral.

Because international law does not clearly address the issue of civil corporate liability and this particular area is constantly changing and developing,326 it is imperative that the courts address unresolved issues that arise in ATS litigation and narrow the scope of the ATS as needed. Moreover, Congress has a “strong interest in providing broad civil redress for the limited offense actionable under the ATS,” which currently, there will be corporate liability only when the underlying conduct meets Sosa’s high standard for specificity and uniformity.327

Legal and foreign policy debates have arisen due to allegations of human rights violations, resulting from U.S. corporations’ partnerships with foreign governments.328 The Administration argues that the ATS litigation interferes with constructive engagement, but in reality, “proactive opposition to abuses is required in order for engagement to be constructive.”329 To encourage democracy and human rights protections, promoting corporate liability and social responsibility will motivate “regimes with economic ties to Western governments […] to protect those ties by improving their reputations, presumably through

323 See Mariani, supra note 22, at 1384; see also Carter, supra note 31, at 645. One member of Congress recently responded to the Sosa court's request for guidance on the ATCA's future scope. Carter, supra note 31, at 645. On October 15, 2005, California Senator Dianne Feinstein, a Democrat, introduced Senate Bill S.1874, titled the Alien Tort Statute Reform Act. Rather than simply list the offenses that would trigger [ATS] jurisdiction, the bill recommended changing the Act wholesale. Carter, supra note 31, at 645. According to Senator Feinstein, one of the bill's purposes was to clarify jurisdiction of the federal courts in [ATS] cases following the Sosa decision. More broadly, the drafters designed the bill to balance the competing interests of U.S. companies and human rights groups. Carter, supra note 31, at 645.
324 Carter, supra note 31, at 645-46.
325 Mariani, supra note 22, at 1438, n. 1; S. 1874, 109th Cong. (2005).
326 See Wuerth, supra note 280, at 1965-67.
327 See Wuerth, supra note 280, at 1965-67.
328 Herz, supra note 24, at 208.
Lastly, by bringing light to human rights violations, in relation to the corporations accused, “investors purportedly will press for at least those forms of liberalization that improve the business environment, and will hopefully “demand respect for the rule of law so that disputes will be resolved fairly.”

As noted by the Assistant Secretary of State for Economic and Business Affairs, American companies should serve as models for the type of business practices the international community should follow. Doing so would promote a greater sense of social responsibility not only amongst the American business community, but also for the global business community. Public scrutiny would require the U.S. government to “comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world;” thus, the ATS would contribute to its foreign policy function. It is true that courts must be mindful that ATS litigation increases “the risk of large verdicts and serious harm to corporate reputation, […] forc[ing] companies to alter the way they interact with repressive regimes or members of foreign militaries that provide corporate security.” Lack of threat of corporate liability would only result in detachment from corporations because they would face no consequences for their abuses.

While the Executive Branch argued that ATS aiding and abetting liability will impede upon the Government’s efforts to enforce constructive engagement, as a foreign policy mechanism, tort liability may contribute to a viable constructive engagement policy, rendering

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329 Herz, supra note 24, at 220.
330 Herz, supra note 24, at 220-21. Moreover, Western governments can use the interactions with and leverage over repressive regimes that come with economic ties to press those regimes for reform. Id. at 221.
331 Herz, supra note 24, at 221.
332 Herz, supra note 24, at 223.
333 Herz, supra note 24, at 223.
334 Herz, supra note 24, at 235.
335 Herz, supra note 24, at 210.
the policy, in fact, more effective. The Bush Administration’s arguments ignored the need for responsible behavior by corporations, and also it made the assumption that corporate presence in a repressive regime will further the constructive engagement policy. The Bush Administration went on to say allowing liability may persuade corporate decision making to refuse investment in “such countries if the [ATS] encompasses complicity liability.” Acquiescing to the Administration’s demands would mean that the Executive Branch would make the sole determination as to “whether human rights abuses likely to result from a particular project are somehow outweighed by potential engagement benefits, and it would preclude the Judiciary from considering the issue,” leaving discretion to investing corporations. Maintaining ATS liability without government intervention would show the international community the U.S. government will not defend abettors and that dictatorships will not be supported for it’s the commission of egregious human rights abuses.

Since the Obama Administration took office in 2009, some ATS suits have been filed. However, in 2010, Abdullahi was the only case where the Obama Administration submitted an amicus brief in relation to an ATS case. In this brief, the U.S. government suggested that the Court deny the writ of certiori, stating that the petitioner presented no good reason for the court to “address[] whether state action is required for a valid ATS claim arising out of

336 Herz, supra note 24, at 210.
337 Herz, supra note 24, at 210.
338 Herz, supra note 24, at 210.
339 Herz, supra note 24, at 210.
340 Herz, supra note 24, at 226-27.
341 Herz, supra note 24, at 238.
342 See e.g., Abdullahi, 562 F.3d at 168; Dacer, 2011 WL 3611354; Shan, 2010 WL 2595095 (S.D.N.Y. 2010); Chiquita, 690 F. Supp. 2d at 1299; Abecassis, 785 F. Supp. 2d at 654.
343 Brief for the United States as Amicus Curiae at 19, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (2d Cir. 2010) (No. 09-34).
344 Brief for the United States as Amicus Curiae at 1, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (No. 09-34).
nonconsensual medical testing by a purely private actor.” The Obama Administration stated that “the district court may again exercise its discretion to dismiss the complaints on forum non conveniens grounds,” making “clear that forum non conveniens is the kind of threshold, non-merits issue that can be considered at any time.” The Obama Administration confirmed that “the district court acted consistently with Second Circuit precedent holding that the international-law norm that is allegedly violated must satisfy the Sosa standards in order for subject-matter jurisdiction to exist under the ATS.” No other amicus briefs relating to ATS litigation have been filed.

CONCLUSION

The ATS litigation caused an increase of amicus briefs filed by the Bush Administration calling for dismissal, which is often the result in most cases. While the Bush Administration may have a valid argument supporting the maintenance of good foreign relations, it should not be done at the risk of potential human rights violations alleged in these ATS lawsuits. The number of lawsuits bringing ATS claims will continue and will not stop. As suggested in Sosa, Congress bring some guidance and clarity to the courts regarding ATS claims. The purpose of the Alien Tort Statute is to allow foreign plaintiffs to seek redress for gross human rights violations by American citizens and corporations. Perhaps, the threat of liability will encourage corporate social responsibility while abroad. In most cases, corporations operate overseas under the jurisdiction of foreign countries with usually more lenient laws. Corporations try to avoid corporate liability by hiding behind the economic theory embraced by the Bush Administration. Although the Obama Administration has not taken a strong stance on the foreign policy issue,

345 Brief for the United States as Amicus Curiae at 17, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (No. 09-34).
346 Brief for the United States as Amicus Curiae at 19, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (No. 09-34).
347 Brief for the United States as Amicus Curiae at 19, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (No. 09-34).
such as in *Abdullahi*, one can hope that as more ATS cases reach the courts that the Administration will take the opportunity to take a strong stance in pending and future ATS cases.

The importance of ATS litigation thus far brought more attention as well as transparency to corporate liability, particularly on corporate operations overseas. Although ATS litigation has been left on the back burner amidst the current political climate, more ATS claims will be brought. The Obama Administration should not turn a blind eye. Rather, the Obama Administration should take action, whether it is to clarify on the numerous unresolved issues, divert from the former administration’s position, or urge Congress to reform the ATS. Any action will further streamline the ATS litigation within the court system as more and more claims are brought, as welcomed by Justice Scalia. Regardless of what action is taken, the ATS is here to stay and will continue to hold great importance by encouraging corporate social responsibility.

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348 Brief for the United States as Amicus Curiae at 20, Pfizer Inc. v. Abdullahi, 2010 WL 2214874 (2 (No. 09-34).