The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Jndicial and Legislative Authority

HANNAH R. BORNSTEIN*

INTRODUCTION

In the 2004 case *Sosa v. Alvarez-Machain*,[1] the United States Supreme Court settled one part of an ongoing debate. The debate centers around the Alien Tort Claims Act ("ATCA"), which allows for suit by "an alien for a tort only, in violation of the law of nations or a treaty of the United States."[2] Enacted in 1789, use of the ATCA remained dormant until 1980, when a federal court in *Filartiga v. Pena-Irala*[3] allowed a Paraguayan woman to bring suit against a Paraguayan government official who had tortured and killed her brother.[4] After the *Filartiga* decision, critics of the ATCA argued that it granted federal courts jurisdiction over ATCA claims but did not create a private right of action.[5] The Supreme Court, however, ruled that the ATCA not only grants jurisdiction, but also creates a private right of action.[6] This decision thus allows human rights victims and their advocates to use the ATCA against individuals who violate the "law of nations"—meaning those individuals who violate certain rules of customary international law.[7] However, a footnote in the *Sosa* opinion highlights one of the most important yet unanswered questions in the continued debate concerning the scope of the ATCA: "A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[8]

Prior to *Sosa*, the question of corporate liability under the ATCA was raised but left unanswered in *Doe I v. Unocal Corp.*[9] In the 1990s, Unocal, a United States company, developed a gas reserve and constructed a pipeline in Burma.[10] Unocal utilized the Burmese government to provide security for the project.[11] Through the course of providing such security, members of the Burmese government raped, tortured, and

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* J.D. Candidate, Indiana University School of Law–Bloomington, 2007. B.A., Brandeis University, 2002, History and German. I would like to thank Professor David Fidler for his invaluable guidance, knowledge, and comments. I would also like to thank Professor Christiana Ochoa, as the idea for this Note originated in her International Business Transactions class.

1. 542 U.S. 692 (2004).
2. 28 U.S.C. § 1350 (2000).
3. 630 F.2d 876 (2d Cir. 1980).
4. *Id.* at 878.
5. *Sosa*, 542 U.S. at 697.
6. *Id.* at 714, 719–20.
7. Beth Stephens, Sosa v. Alvarez-Machain*: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 555 (2004) (maintaining that after *Sosa* "the heart and soul of [ATCA] jurisprudence remains intact: redress for individuals who have suffered egregious violations of their human rights"). *See also* Flores v. S. Peru Copper Corp., 406 F.3d 65, 69 (2d Cir. 2003) ("In the context of the ATCA, we have consistently used the term 'customary international law' as a synonym for the term 'the law of nations.'").
8. *Sosa*, 542 U.S. at 732 n.20.
9. 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).
10. *Id.* at 937–38.
11. *Id.*

murdered local Burmese citizens in connection with forced labor for the project.[12] The harms inflicted upon Burmese citizens by the Unocal project resulted in a lawsuit against Unocal under the ATCA. The Ninth Circuit initially held that the ATCA could apply to Unocal.[13] However, the court subsequently vacated this holding in light of the fact that *Sosa* was pending before the Supreme Court.[14] Following *Sosa*, the Unocal litigation ultimately culminated in a settlement in 2005 for the Burmese plaintiffs. EarthRights International, who brought the case on behalf of the plaintiffs, praised the settlement, calling it "a historic victory for human rights and for the corporate accountability movement."[15] While the case settled favorably for the plaintiffs, a settlement does not create precedent, and thus no court has yet held a corporation liable under the ATCA.

As transnational corporate activity increases, so too does the likelihood of facing ATCA litigation. For example, on December 28, 2005, Daewoo International Corporation announced it had formally secured a large gas reserve in Burma.[16] At a minimum, the reserve is expected to produce over 600 million barrels of crude oil, and Daewoo expects the company's value to significantly increase as a result of its investment in the reserve.[17] Daewoo owns a sixty percent stake in the project and will work in conjunction with another Korean gas company and two Indian oil companies.[18] The Burmese government also expects to realize a significant revenue stream from the project.[19]

While Daewoo and the Burmese government expect to profit from the project, human rights groups and other advocates have voiced significant concern over the potentially devastating impact on local Burmese citizens. Burma's military government has a long history of human rights abuses, and as a result, the United States government has emphatically expressed its disapproval of the current military government.[20] The Burmese people suffered enormously from the Unocal project.[21] As

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12. *Id.* at 939.

13. *Id.* at 937.

14. Doe I v. Unocal Corp., 395 F.3d 978, 978–89 (9th Cir. 2002).

15. EarthRights International, *Historical Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers*, Apr. 2, 2005, http://www.earthrights.org/legalfeature/historic_advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html (follow PDF file symbol at top of page).

16. Press Release, *Daewoo Secures Giant Gas Reserve in Myanmar* (Dec. 28, 2005) http://www.daewoo.com/english/press/pr_new_list.jsp?work=read&u_id=3049.

17. *Id.*

18. *Id.*

19. Executive Summary—Shwe Gas Movement [For a Sustainable Future in a Free and Democratic Burma], http://www.shwe.org/about-shwe/front-page (last visited May 8, 2007) ("[The] Shwe fields are destined to become the Burmese military government's largest single source of foreign income.").

20. Paula J. Dobriansky, Under Sec'y for Democracy and Global Affairs, Remarks at Brookings-Bern Project on Internal Displacement with National Endowment for Democracy and Church World Service (Oct. 26, 2005), http://www.state.gov/g/rls/rm/2005/55844.htm ("[W]e continue to speak out and act against the regime's abuses and in support of Burma's democratic opposition. The United States works with like-minded countries to maintain maximum international pressure on the Burmese regime through UN resolutions, robust bilateral and multilateral sanctions, public diplomacy, and democracy and human rights programs. At the most recent session of the UN Commission on Human Rights, the United States stood with other

history foreshadows, the military government almost certainly will play an active role in providing security and assistance for Daewoo's new project. Human rights abuses similar to those suffered in *Unocal* likely may occur again in conjunction with the Daewoo project. Opponents believe that the project will result in harms to local Burmese citizens consisting of forced relocation, forced labor, torture, rape, and extrajudicial killings, as well as environmental and cultural degradation.[22]

Additionally, ATCA cases against other corporations have been filed in the Ninth Circuit. Very recently, in *Sarei v. Rio Tinto*,[23] the Ninth Circuit decided one aspect of a claim by residents of Papua New Guinea (PNG) against Rio Tinto, an international mining company based out of London.[24] The plaintiffs alleged that the PNG government "committed atrocious human rights abuses and war crimes at the behest of Rio Tinto."[25] The Ninth Circuit, addressing initial questions of jurisdiction, reversed the district court's decision to dismiss the case based on the act of state doctrine, the political question doctrine, and the doctrine of international comity; the Ninth Circuit also held that exhaustion of local remedies did not apply to this case.[26] The Ninth Circuit remanded the case to the district court for further proceedings, and the case is still before the district court at this time.[27]

Individuals or groups suing companies such as Daewoo[28] or Rio Tinto for a violation of the law of nations under the ATCA can expect to face opposition to the claims on a number of grounds. First, even though *Sosa* holds that the ATCA allows a private right of action, opponents of the ATCA may argue that within the American legal system, Congress—not the courts—should deal with questions of foreign relations and international law; thus, when courts declare that certain acts violate customary international law, they are overstepping their constitutionally prescribed boundaries. This line of reasoning is referred to herein as the separation-of-powers argument. Second, no evidence of a corporate standard of liability exists under customary international law, a fact making it unfair for courts to declare and apply

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allies and partners to pass a resolution by consensus on Burma.").

21. Doe I v. Unocal Corp., 395 F.3d 932, 937–40 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

22. *See* Human Rights Abuses—Shwe Gas Movement [For a Sustainable Future in a Free and Democratic Burma], http://www.shwe.org/issues/militarization-and-human-rights-abuses (last visited May 8, 2007).

23. 456 F.3d 1069 (2006).

24. *Id.* at 1075.

25. *Id.*

26. *Id.* at 1074.

27. *See id.* at 1100. The Ninth Circuit also made it clear that the question concerning the standard of liability was not presented to the court for purposes of this appeal. *Id.* at 1079 n.6.

28. Although Daewoo is a Korean and thus foreign-owned company, obtaining personal jurisdiction over Daewoo may in fact be likely, as Daewoo owns several subsidiaries in the United States. In another ATCA case, where Sudanese plaintiffs brought claims against a Canadian energy company for violations of the ATCA, the Southern District of New York found personal jurisdiction over the Canadian-owned company because the company owned and operated a subsidiary in New York, and the Canadian company thus met the test for "continuous, permanent, and substantial activity in New York." *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 329–31 (S.D.N.Y. 2003) (quoting Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000). One of Daewoo's subsidiaries is in Los Angeles, and the likelihood that the Ninth Circuit might have to revisit the issue of corporate liability in the near future is strong.

liability standards in a post hoc fashion (the "standard of liability" and "fundamental fairness" arguments). Third, if a federal court holds a corporation liable under the ATCA, opponents of the ATCA are likely to urge Congress to repeal the Act altogether.

This Note confronts these arguments, and argues that although Congress by and large handles matters of international law and politics, since the 1980 decision in *Filartiga*, Congress has neither altered the text of the ATCA nor repealed it altogether.[29] Congress, therefore, has implicitly granted federal courts the authority to decide what acts will violate customary international law under the ATCA. After establishing that federal courts are not violating any separation-of-powers principles by entertaining claims made under the ATCA, this Note addresses the proper standard of liability a federal court should apply to a corporation accused of violating customary international law. This Note argues that federal courts should look to the Torture Victims Protection Act to establish a standard of liability under customary international law for actions involving a corporation's complicity with a state actor. In declaring a standard of liability based on customary international law that involves private action taken by a corporate actor, a federal judge should use the standard of liability used for individuals in the seminal ATCA case *Kadic v. Karadžić*.[30]

Resolution of the ambiguity of corporate liability is crucial for three reasons. First, new cases against corporations will, in all likelihood, be filed under the ATCA. Second, plaintiffs, defendants, and the courts deciding these cases need clarity.[31] Third, resolving the ambiguity gives corporations prospective clarity with respect to their future behavior. A clear standard will allow corporations to assess the risks of foreign investment more accurately and lower transaction costs. According to Professor Steven Ratner, "The . . . atmosphere of uncertainty will be detrimental to both the protection

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29. The Military Commissions Act of 2006 does prevent federal courts from exercising ATCA jurisdiction over claims against United States military and personnel concerning any aspect of the detention of an alien detained as an enemy combatant if the alien was detained after September 11, 2001; this, in effect, amends the ATCA with respect to these potential defendants. Military Commissions Act of 2006 § 7(a)(2), (b), Pub. L. No. 109-366, 120 Stat. 2600.

30. 70 F.3d 232, 236 (2d Cir. 1995) (holding that Karadžić as an individual "may be found liable for genocide, war crimes, and crimes against humanity in his private capacity").

31. Some federal courts still look to the standard of liability set forth in *Unocal*. *See Presbyterian Church of Sudan*, 244 F. Supp. at 314 (denying the corporation's motion to dismiss based on lack of subject matter jurisdiction and citing to the aiding and abetting standard established by the Ninth Circuit in *Unocal* in denying the motion). However, the standard has been criticized and attacked. *See* John Haberstroh, *The Alien Tort Claims Act &* Doe v. Unocal*: A* Paquete-Habana *Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 268–73 (2004) (criticizing the Ninth Circuit's reliance on international *criminal* tribunals to establish a *civil* complicity standard and recommending a *Paquete-Habana* approach, where a federal court would review aiding and abetting standards of tort violations throughout the world's legal systems); Edwin V. Woodsome, Jr., and T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 89 (2003) (criticizing the Ninth Circuit's interpretation of the standards set forth in the international criminal tribunals). Thus, in light of the fact that the Ninth Circuit vacated its opinion and that the standard set has been criticized, corporations cannot be certain of what standard other federal courts might use.

of human rights and the economic wealth that private business activity has created worldwide."[32] A federal court must apply a standard so that all parties involved may move forward efficiently and with an adequate measure of predictability.[33]

In light of the range of arguments and controversies surrounding the ATCA, this Note then recommends specific actions Congress can take that will quiet the debate surrounding the separation-of-powers argument, the standard of liability argument, and the fundamental fairness argument. This Note argues that Congress should amend the ATCA, eliminate the phrase "the law of nations," and instead list the specific acts that are redressible under the Act. Such an amendment should mirror the Torture Victims Protection Act[34] and the Military Commissions Act of 2006,[35] where Congress supplied a specific list of what constitutes torture in the former, and which acts violate Geneva Convention Common Article III in the latter. This Note argues that Congress should amend the ATCA to list the specific acts for which state officials, individuals, and corporations can be held liable. In doing so, Congress will have (a) established a standard of liability not only for state officials, but also for private individuals and corporations; (b) put corporations on notice of which acts will give rise to liability under the ATCA; and (c) created a powerful state practice capable of influencing the way in which other states approach the issue of corporate liability for torts committed in violation of customary international law.

Part I of this Note presents the evolution of cases interpreting the ATCA. The evolution of case law shows how, beginning with *Filartiga* and ending with *Sosa*, ATCA case law has departed from the original intent of the statute. Part II addresses the separation-of-powers argument and argues that post-*Sosa*, absent congressional action to effectively amend or repeal the ATCA, federal courts are not violating the separation-of-powers principle by determining what acts violate customary international law under the ATCA. Part III then examines the standard of corporate liability a federal court should establish in the event that Congress fails to amend or repeal the ATCA. Because courts and commentators continue to look to the Ninth Circuit's decision in *Unocal*, this Note examines the ambiguities the Ninth Circuit created in *Unocal*. This Note then argues that the standard set by the Ninth Circuit is incorrect, and recommends the standards federal courts should apply in the future, absent congressional action to amend or repeal the ATCA. Part IV then recommends the amendments Congress should make to the ATCA. Congress must specify which acts will create liability under the ATCA not only because such action will end the separation-of-powers debate, but also because it will confer democratic legitimacy upon the idea that if corporations commit *grave* breaches of international law, they can and will be held accountable.

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32. Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 448 (2001).

33. In positing that international legal standards apply to corporations, Steven Ratner writes, "Without some international legal standards, we will likely continue to witness both excessive claims made against [corporations] for their responsibility and counterclaims by corporate actors against such accountability." *Id.*

34. 28 U.S.C. § 1350 (2000).

35. § 6(d), Pub. L. No. 109-366, 120 Stat. 2600.

I. EVOLUTION OF THE ATCA

The full text of the ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[36] Enacted in 1789, the First Congress failed to create any meaningful legislative history concerning the purpose and scope of the ATCA.[37] A review of historical events at the time, however, sheds light on the original purpose of the Act. The Continental Congress had a difficult time compelling states to vindicate rights sounding in the law of nations, particularly rights under treaties and the rights of ambassadors.[38] For example, in the Marbois "incident," the Secretary of the French Legion was assaulted in Philadelphia.[39] While the French government wanted Mr. Marbois's rights vindicated, the Continental Congress lacked the power to require Pennsylvania to act.[40] Against this background, the Framers passed the Judiciary Act, which enhanced the federal government's power over the affairs of ambassadors and diplomacy, among other things.[41] The ATCA was part of the general plan to vest the federal judiciary with jurisdiction over specific causes of action.[42] Thus, it is important to note that the ATCA was not designed to vindicate the rights of foreigners for harms incurred overseas, but to vindicate the rights of foreigners whose international rights[43] had been violated while in U.S. territory.

Plaintiffs seldom invoked the statute until 1980,[44] when the Second Circuit allowed the ATCA to be applied against a Paraguayan government official who had tortured and killed the plaintiffs' immediate family member.[45] International law prohibited official torture, and the court held that the federal courts had jurisdiction under the

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36. 28 U.S.C. § 1350 (2000).

37. Sosa v. Alvarez-Machain, 542 U.S. 692, 718 (2004).

38. *See id.* at 717.

39. *Id.* at 716.

40. *See id.* at 717. The Continental Congress could pass a resolution "recommending" that states take a course of action.

> The Congress could only pass resolutions, one approving the state-court proceedings . . . another directing the Secretary of Foreign Affairs to apologize and to 'explain to Mr. De Marhois [sic] the difficulties that may arise . . . from the nature of a federal union,' . . . and to explain to the representative of Louis XVI that 'many allowances are to be made for' the young Nation.

Id. at 717 n.11 (internal citations omitted).

41. *Id.* at 717. Article III, Section 2 of the United States Constitution vests the "Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls.'" *Id. See also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) ("There is evidence . . . that the intent of [the ATCA] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

42. *See Sosa*, 524 U.S. at 717–18.

43. The rights available to individuals at this time were very limited; these rights were essentially limited to "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 715 (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *68).

44. Lori Delaney, Note, Flores v. Southern Peru Copper Corporation: *The Second Circuit Fails to Set a Threshold for Corporate Alien Tort Claims Act Liability*, 25 NW. J. INT'L L. & BUS. 205, 208 (2004).

45. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

ATCA to hear the case regardless of the fact that a foreign official committed the torture.[46] Thus, 1980 marks the beginning of the present debate over the scope of the ATCA: against whom does the ATCA apply? *Filartiga* and other cases prior to *Unocal* began to shed some light on the question.

A. Filartiga v. Pena-Irala[47]

The Second Circuit's decision in *Filartiga* established the framework for all subsequent ATCA litigation. Dolly Filartiga and her father, Dr. Joel Filartiga, filed suit in the Eastern District of New York against Americo Noberto Pena-Irala.[48] The Filartigas alleged that Pena-Irala had tortured and killed Joelito Filartiga, Dolly's brother and Dr. Filartiga's son.[49] At the time the Filartigas filed the suit, they possessed Paraguayan citizenship.[50] Mr. Pena-Irala worked for the Paraguayan government and had Paraguayan citizenship as well.[51] Dolly had entered the United States and sought political asylum by the time of the suit.[52] The Filartigas served Mr. Pena-Irala with a summons and complaint while he was in the United States on a tourist visa.[53]

The Second Circuit examined Supreme Court precedent in order to determine whether the prohibition against torture constituted customary international law. The Second Circuit identified three sources to which a federal court may refer to establish the existence of a rule of customary international law: academic commentary, the "usage and practice of nations," or judicial decisions.[54] The Second Circuit examined the United Nations Charter and a number of United Nations declarations and concluded by saying, "Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations."[55] The Second Circuit also stated that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[56]

In this decision, the Second Circuit opened the doors of federal courthouses to ATCA litigation from anywhere in the world so that plaintiffs could allege violations of

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46. *Id.* at 880.

47. Several works trace in-depth the evolution of *Filartiga v. Pena-Irala* and the cases following. *See* Delaney, *supra* note 44, at 207–18; Lorelle Londis, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 155–78 (2005); Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1506–27 (2004).

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

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 878–79.

54. *Id.* at 880 (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61 (1820)). The Second Circuit also cited *The Paquete Habana*, 175 U.S. 677 (1900), where the Supreme Court held that if no treaty, legislative act, or judicial decision existed, courts must look to the customs of nations. Courts may ascertain those customs by looking to academic commentary. *Filartiga*, 630 F.2d at 880–81 (citing *Paquete Habana*, 175 U.S. at 700).

55. *Filartiga*, 630 F.2d at 883 (citing *Smith*, 18 U.S. (5 Wheat.) at 160–61).

56. *Id.* at 881.

the prohibition against torture and perhaps other rules of customary international law. The Second Circuit's decision also set the stage for academic commentators and judges to begin struggling with the separation-of-powers question and the issue of whether federal courts should interpret the evolution of customary international law.

B. Tel-Oren v. Libyan Arab Republic[57]

At this point in the evolution of the ATCA case law, Judge Bork's concurring opinion in *Tel-Oren* reflects the growing concern that the federal courts should not be interpreting the evolution of customary international law. In *Tel-Oren*, the D.C. Circuit issued a per curiam opinion, dismissing for lack of subject matter jurisdiction an action brought predominantly by Israeli citizens who were survivors or representatives of individuals killed during an armed assault on a bus in Israel.[58] The per curiam opinion said nothing about the basis for the dismissal, but Judge Bork elaborated upon his reasoning. Citing the separation-of-powers principle, Judge Bork asserted that the executive and legislative branches, not the judiciary, should determine questions involving foreign relations and the status of customary international law.[59] Due to his concern for the separation-of-powers principle, Judge Bork opined that the ATCA granted jurisdiction only, and that a separate cause of action had to be found in order for the appellants to continue.[60] He stated that treaties, the common law, acts of Congress, and customary international law all failed to grant an express cause of action for torture, and he therefore determined that the appellants lacked a viable cause of action.[61]

C. Kadic v. Karadžić[62] *and Its Progeny*

The scope of the ATCA broadened in 1995 in *Kadic* when the Second Circuit expanded the ATCA to include liability for certain private, individual actions. A group of plaintiffs consisting of Croats and Muslims from Bosnia-Herzegovina sued Karadžić, the president of a Bosnian-Serb republic within Bosnia-Herzogevina.[63] The plaintiffs alleged that Karadžić ordered and directed acts including rape, torture, and summary execution.[64] The plaintiffs served suit on him while he was in New York visiting the United Nations.[65] The district court held that, because Karadžić's republic did not constitute a formally recognized state, Karadžić did not commit any violations under the color of state law.[66] The Second Circuit reversed, holding that certain acts—genocide, war crimes, or slavery—violated the law of nations when committed by state actors or private individuals.[67] The Second Circuit held that Karadžić as an individual

57. 726 F.2d 774 (D.C. Cir. 1984) (per curiam).
58. *Id.* at 775.
59. *Id.* at 801–05, 808 (Bork, J., concurring).
60. *Id.* at 801–02.
61. *Id.* at 808–19.
62. 70 F.3d 232 (2d Cir. 1995).
63. *Id.* at 236–37.
64. *Id.*
65. *Id.* at 237.
66. *Id.*
67. *Id.* at 239–40 ("[w]e do not agree that the law of nations, as understood in the modern

"may be found liable for genocide, war crimes, and crimes against humanity in his private capacity."[68] Whereas *Filartiga* allowed suit against a public official, the Second Circuit in *Kadic* opened the door for private liability under the ATCA for violations of certain rules of customary international law. The decision, however, created the possibility that plaintiffs could apply the ATCA not only against individual persons but also against corporations.[69]

Indeed, following the Second Circuit's decision in *Kadic*, lawsuits against corporations proliferated. Most lawsuits against corporations have been dismissed for lack of subject matter jurisdiction or other jurisdictional grounds, such as forum non conviens.[70] Nevertheless, not only has the number of lawsuits increased, but the subject matter of the claims also has expanded to include environmental and social harms, as plaintiffs arguably have attempted to determine the boundary of the "law of nations" under the ATCA. Two cases reflect this phenomenon: *Beanal v. Freeport-McMoran, Inc.*[71] and *Flores v. Southern Peru Copper Corp.*[72]

In *Beanal*, the plaintiffs attempted to hold Freeport-McMoran Copper and Gold ("Freeport McMoran"), a mining company, liable for environmental harms and "cultural genocide,"[73] alleging that Freeport McMoran's mining activities harmed the environment and surrounding habitat to such an extent that the tribal community was forced to relocate.[74] These allegations represent an expansion of the nature of claims brought under the ATCA: whereas the plaintiffs in *Filartiga* and *Kadic* brought claims concerning acts of torture and war crimes—acts that are much less controversial in terms of whether they rise to a level of violating customary international law—the plaintiffs in *Beanal* attempted to argue that acts resulting in environmental abuses and "cultural genocide" also rose to the level of violating customary international law. The Fifth Circuit, however, refused to allow the plaintiffs' claims to go forward. The court held that cultural genocide "has [not] achieved universal acceptance as a discrete violation of international law."[75]

Similar attempts to broaden the scope of the ATCA's application have been made in other federal jurisdictions. For instance, in *Flores*, the Second Circuit addressed claims brought by Peruvian nationals against the Southern Peru Copper Corporation (SPCC), which maintained its headquarters in Arizona and conducted its primary business

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era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy.").

68. *Id.* at 236.

69. *But see* Delaney, *supra* note 44, at 213 (arguing that *Kadic* limits the ATCA to private individuals only and does not apply to corporations).

70. For a list of cases brought against corporations after the decision in *Kadic*, see Delaney, *supra* note 44, at 208–09 n.26.

71. 197 F.3d 161 (5th Cir. 1999).

72. No. 02-9008, 2003 WL 24049712 (2d Cir. Aug. 29, 2003) (depublished). Per the request of the court, this case has been withdrawn from publication, and an amended opinion will be issued. At the present time, citations will appear to page numbers starting at page one, as indicated on Westlaw.

73. *Beanal*, 197 F.3d at 163.

74. *Id.*

75. *Id.* at 168.

operations in Peru.[76] The plaintiffs argued that SPCC committed egregious environmental harms, alleging that SPCC emitted "large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water."[77] The plaintiffs claimed that these harms violated customary international law by violating their "right to life [and] right to health."[78] The Second Circuit ruled against the plaintiffs and held that SPCC's acts did not constitute violations of customary international law. The court held that the "'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law."[79] The court also held that customary international law does not prohibit intranational pollution.[80] Thus, the Second Circuit rejected the plaintiffs' attempt to expand the scope of the ATCA to cover acts committed by corporations involving harms caused by environmental abuses.

D. The Debate Leading Up to Sosa v. Alvarez-Machain[81]

Doe I v. Unocal Corp. is arguably the most well-known ATCA case. The district court dismissed the plaintiffs' claims, ruling that Unocal did not incur liability for complicity with state action, as Unocal did not satisfy the "color of law" standard.[82] Additionally, the court held that Unocal did not incur liability for private action because it did not actively participate in causing the plaintiffs' injuries.[83] On appeal, the Ninth Circuit initially held that Unocal would be found liable for aiding and abetting the Burmese government in forced labor if the plaintiffs could show that Unocal engaged in "knowing practical assistance or encouragement that [had] a substantial effect on the perpetration of the crime."[84] The Ninth Circuit vacated the decision pending the Supreme Court's decision in *Sosa v. Alvarez-Machain*.[85] After *Sosa*, the case settled before reaching the jury on the merits.[86]

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76. *Flores*, 2003 WL 24049712, at *1.

77. *Id.* at *2.

78. *Id.*

79. *Id.* (citing Amended Complaint at ¶¶ 1, 59–75, *Flores*, 2003 WL 24049712 (No. 02-9008)).

80. *Id.* at *18; *cf.* The United Nations Conference on the Environment, June 5–16, 1972, Stockholm, Swed., *Declaration of the United Nations Conference on the Human Environment*, Principle 21, U.N. Doc. A/CONF.48/14/Rev. 1 (1973), *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503 (requiring states, under environmental law, to ensure that activities within their domestic jurisdiction or control do not cause damage to the environment of other states).

81. 542 U.S. 692 (2004).

82. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1307, 1310 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

83. *Id.* at 1310.

84. *Unocal*, 395 F.3d at 947. In establishing this aiding and abetting standard, the three-judge panel placed particular emphasis on decisions established by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. *Id.* at 949–50. For criticism of the Ninth Circuit's choice of law analysis, see Haberstroh, *supra* note 31, at 257–68.

85. *Unocal*, 395 F.3d at 952–54.

86. EarthRights International, *"Final Settlement Reached in* Doe v. Unocal," Mar. 21, 2005, http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html.

E. Sosa v. Alvarez-Machain

Despite the increase in litigation under the ATCA since *Filartiga*, the United States Supreme Court did not review any ATCA cases until its 2004 *Sosa* decision. *Sosa* involved an individual defendant who assisted the United States government in arresting Mr. Alvarez-Machain in Mexico for alleged complicity in the murder of a DEA official.[87] The Court denied Alvarez-Machain's claim on the grounds that his arbitrary arrest did not rise to the level of violating the law of nations.[88] Prior to the ruling, a hot debate arose over whether the ATCA granted only jurisdiction or also created a private cause of action.[89] There was also a debate as to the exact meaning of "to violate the law of nations."[90] The Court clarified that the ATCA did in fact create a private cause of action as well as grant jurisdiction.[91] Contrary to Judge Bork's 1984 concurrence in *Tel-Oren v. Libyan Arab Republic*,[92] the Court also ruled that lower federal courts must find that a claim "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[93] The latter ruling, although it still does not provide maximum clarity as to what modern actions fall within this paradigm, precludes claims like those made in *Flores* and *Beanal* from going forward. The Court in *Sosa* did not address whether a corporation could be held liable under the ATCA; rather, in a footnote, it acknowledged that liability under the ATCA for private actors, including corporations, remains a "related consideration."[94]

Human rights advocates praised *Sosa* because it does not require plaintiffs to establish a separate cause of action. As one commentator opined, "[*Sosa*] is a clear victory for those human rights advocates who view the statute as a means to hold the most egregious perpetrators accountable for the most egregious violations of international law."[95] Yet two questions remain after *Sosa*: first, does the ATCA apply to corporations? *Unocal* points to a trend moving in that direction, but the Supreme Court left the question open. Second, what rules of customary international law within

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87. Sosa v. Alvarez-Machain, 542 U.S. 692, 697–98 (2004).

88. *Id.* at 738.

89. *See* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002) (arguing that the ATCA does not create a private right of action); Gabriel D. Pinilla, Comment, *Corporate Liability for Human Rights Violations on Foreign Soil: A Historical and Prospective Analysis of the Alien Tort Claims Controversy*, 16 ST. THOMAS L. REV. 687, 702–08 (2004) (engaging in an extensive analysis of the arguments for and against recognizing a private cause of action under the ATCA).

90. *See* Tawny A. Bridgeford, Case Note, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1038–50 (2003) (arguing that the Ninth Circuit's decision in *Unocal* erroneously declared that forced labor is a modern variant of slavery).

91. *Sosa*, 542 U.S. at 724.

92. See *supra* Part I.B.

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

94. *Id.* at 732 n.20.

95. *See* Stephens, *supra* note 7, at 535.

Sosa's paradigm could actually be violated by corporations, either in connection with states or independent of state action?[96]

II. THE SEPARATION-OF-POWERS ARGUMENT

Article III of the United States Constitution governs the jurisdiction of the federal courts:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made . . . to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States . . . .[97]

Thus, in *Filartiga*, the Second Circuit had to determine whether it had jurisdiction to hear the case. The case did not involve a diversity action between citizens of two states, nor did it involve a claim arising under the Constitution or a treaty.[98] The Second Circuit held, however, that the "law of nations," or customary international law, is part of the "Laws of the United States."[99] The court stated, "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[100] The court went on to say that a case arises under the laws of the United States if it is "grounded upon statutes enacted by Congress or upon the common law of the United States"; since the law of nations is part of the common law, it is also part of the "laws of the United States." Therefore, the court had jurisdiction to hear Filartiga's claim.[101]

Opponents of the ATCA argue that, if a political branch has not expressly incorporated a rule of customary international law, federal courts should not decide what actions violate the customary international law rule. These critics argue that, post-*Erie*, the political branches must expressly incorporate international law into domestic law, and only then may the courts decide whether an actor has violated that law.[102] Thus, in the absence of any incorporation by Congress, they argue that customary international law is not federal law and cannot impose any duties on nonstate actors.[103]

This argument is based on the idea that determinations of whether the United States recoguizes a rule of customary international law rest with the political branches of the

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96. Armin Rosencranz & David Louk, Doe v. Unocal*: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 CHAP. L. REV. 135, 151 (2005) ("It is unclear from *Sosa* whether corporations that 'aid and abet' repressive foreign governments with whom they do business may be hcld liable under the ATCA.").

97. U.S. CONST. art. III, § 2.

98. *Cf.* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 851 (1997).

99. *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980).

100. *Id.* at 885.

101. *Id.* at 886.

102. *See* Bradley & Goldsmith, *supra* note 98, at 849, 852–53.

103. *Id.* at 831–34. *See also* Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507, 539 (2006).

federal government. These opponents rely "on the principle that the federal political branches, and not the courts, are constitutionally authorized and institutionally competent to make foreign relations judgments."[104] Thus, to include customary international law as part of the great body of federal common law—that is, court-made law—would disrupt the balance of power prescribed by the Constitution.[105] Curtis Bradley and Jack Goldsmith criticize the present state of the ATCA doctrine because it allows judges to make their own personal decisions as to what is customary international law.[106] Donal Kochan agrees, stating, "To the extent private plaintiffs are allowed to sue nation-states or corporations acting in concert with such states for alleged human rights' abuses, judicial decisions necessarily make pronouncements regarding the appropriate behavior of foreign countries."[107]

On the other side of the debate are those who believe that customary international law will apply despite a lack of incorporation by the political branches:

> In the absence of such incorporation of [customary international law] norms by the federal political branches, the prevailing view is that [customary international law] nevertheless has the status of federal law, in the form of federal common law. Under this view, no congressional authorization is necessary in order for courts to apply [customary international law] as federal law; indeed, courts are bound to do so even in the absence of such authorization.[108]

Thus, proponents of the federal common law interpretation of the ATCA do not believe that the political branches must specifically state which acts violate the law of nations in order for courts to hear claims under the ATCA and decide what acts violate the law of nations.[109]

Although the Supreme Court held in *Sosa* that the ATCA does create a private cause of action for egregious violations of certain rules of customary international law, a strong separation-of-powers argument persists that Congress must still clarify which rules of customary international law fall within the scope of the ATCA. The problem, however, is that Congress had numerous opportunities to either amend or repeal the ATCA since *Filartiga* if it did not wish for the courts to make determinations regarding what rules of customary international law fall within the ATCA's scope. Congress could have acted in 1980 when the Second Circuit opened the doors of the ATCA with the *Filartiga* decision, or in 1995 when the Second Circuit held in *Kadic* that an individual may be held liable under the ATCA for a limited number of acts that do not require state action. Congress also could have acted in response to the multiple decisions rendered in the *Doe I v. Unocal Corp.* litigation. Most importantly, Congress could have acted in 2004 when the Supreme Court declared in *Sosa* that the ATCA created a private cause of action for violations of certain types of rules of customary

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104. Bradley & Goldsmith, *supra* note 98, at 861.

105. *See id.* at 861.

106. *Id.* at 864.

107. Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Enduring and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 130 (2005).

108. Bradley & Goldsmith, *supra* note 98, at 820 (citations omitted).

109. Political branches, nevertheless, can still incorporate customary international law, so the matter does not rest entirely within the judicial domain.

international law. Over two years have passed since the *Sosa* decision. The failure of Congress to either fully amend[110] or repeal the Act may indicate that Congress is content to let the federal courts decide which rules of customary international law fall within the scope of the ATCA. In light of congressional inaction, we must assume that Congress does not believe that federal courts violate the separation-of-powers doctrine when they decide cases under the ATCA. Therefore, courts should continue to follow the guidelines set forth by the Supreme Court in *Sosa* to determine what rules of customary international law fall under the ATCA.

However, even if the separation-of-powers question has subsided after *Sosa*, federal courts will continue to face further problems when deciding ATCA cases. Establishing a standard of liability for corporate conduct is one such problem.

III. THE STANDARD OF LIABILITY ARGUMENT

This Part addresses the standard of liability applicable to corporations under the Act. Under customary international law and the ATCA, what should the standard of liability be if a corporation "aids and abets" a foreign government? Should corporations be held liable only for acts committed in conjunction with state action, or can corporations be held liable for private action as well? If corporations can be held liable without connection to state action, what is the standard of liability for such private action?

A. The Problem of Establishing a Standard Under Customary International Law

Customary international law is defined as follows: "[A] general and consistent practice of states followed by them from a sense of legal obligation."[111] This definition consists of objective and subjective requirements. Not only must a practice be followed by states, the states themselves must also have a "sense" of a legal obligation to follow the practice.

There are fundamental problems with this definition. An inherent circularity lies within its requirements: "[H]ow, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?"[112] In other words, a practice becomes law when states sense they have a legal obligation to follow it. But how can states sense a legal obligation until something has become a law? Problems other than the circularity issue exist as well.[113] For example, in assessing whether something constitutes general and consistent state practice, one must decide whether to analyze "word versus action" evidence.[114] Analyzing word versus action evidence

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110. *But see supra* note 29.

111. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

112. *Id.* § 102(2) cmt. 2.

113. For an in-depth analysis of the flaws inherent in the definition of customary international law, see David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GERMAN Y.B. INT'L L. 198, 199–216 (1996); *see also* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005).

114. Fidler, *supra* note 113, at 202.

raises further problems when words and actions differ,[115] when a state's words don't match its intentions,[116] or when states behave in a certain manner without explaining the rationale behind their behavior.[117] Despite the circularity and other innate difficulties within this basic definition, this definition of customary international law remains the one within which courts must operate.

B. Does Customary International Law Apply to Corporations?

Classical international law only applied to states and their actions.[118] World War II and its aftermath, however, significantly influenced both international law and human rights concepts. After World War II, international law evolved to prohibit certain acts, including "torture, genocide, summary or extra-judicial execution, [and] war crimes."[119] For example, at Nuremberg, individual Germans—rather than Germany itself—were held accountable for atrocities committed during the War. In terms of corporate behavior, several German industrialists were charged at Nuremberg individually for their role in assisting the Nazis.[120] The growth of international rules applicable directly to individual behavior can be traced to the Nuremberg Trials, in international humanitarian law building on the Nuremberg precedent, and the development of international criminal law that held nonstate actors accountable for their actions under international law.[121]

In addition to the evolution of international law norms in the mid-twentieth century, recent decades have also witnessed significant change within the global community.[122] Globalization has increased, and significantly more companies invest and conduct business abroad.[123] Corporations do business outside of their home nation and thus often operate outside of the realm of the home nation's law, making it difficult for the home nation to hold a corporation accountable given traditional international rules of extraterritorial application of domestic law.[124] Host nations also may have difficulties holding corporations accountable, either because the host nation lacks the resources or the desire to hold corporations accountable, or because the host nation actually encourages the corporation to engage in conduct that violates international law.[125]

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115. *Id.* at 207.

116. *Id.* at 203.

117. *Id.* at 205.

118. *See, e.g.*, Sukanya Pillay, *And Justice For All? Globalization, Multinational Corporations, and the Need for Legally Enforceable Human Rights Protections*, 81 U. DET. MERCY L. REV. 489, 502 (2004).

119. Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality Check*, 16 ST. THOMAS L. REV. 585, 591 (2004).

120. *E.g.*, Ratner, *supra* note 32, at 447–48; Woodsome & White, *supra* note 31, at 100–03.

121. See Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 58–59 (1992).

122. *Cf.* Scott, *supra* note 47, at 1527.

123. *See* Ratner, *supra* note 32, at 459 ("Annual increases in foreign investment have significantly outpaced growth in international trade.").

124. *See, e.g.*, Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).

125. Ratner, *supra* note 32, at 461–63.

Because corporations increasingly do more business internationally, the traditional view of international law governing only state actors has shifted to a more modern viewpoint that international law governs individuals, nongovernmental organizations, and corporations.[126] As one commentator observes, "International law, especially in the last two decades or so, has seen far greater participation by non-state entities in the processes that lead to its development."[127] Although nonstate entities have increased their participation in the process of making international law,[128] the question remains whether corporations can be directly liable for actions in violation of customary international law.

Courts should carefully analyze arguments maintaining that international law already imposes direct obligations on corporations. Professor Steven Ratner, in an article on corporate accountability for human rights abuses, writes that "[i]n reviewing recent trends, one discovers that international law has already effectively recognized duties of corporations. . . . The question is not whether nonstate actors have rights and duties, but what those rights and duties are."[129] Ratner's arguments, however, are not entirely persuasive. Ratner gives examples of corporate "duties" in areas such as international labor law, international environmental law, and international law against corruption.[130] However, most of the "international duties" arise through treaty law, and require *states* to implement the treaty into domestic law. After the implementation, the corporation has duties; but these duties are domestic obligations rather than international obligations. Furthermore, even if corporations were to have duties under customary international law as Ratner claims, the examples from international labor and environmental law will not rise to the narrow level of accepted claims of customary international law required by *Sosa*.

The trend seen throughout ATCA litigation, however, is to recognize the possibility of corporate liability under customary international law. For example, *Unocal*'s complicity standard clearly indicates that the Ninth Circuit believed customary international law applied to corporations, as does its most recent decision in *Sarei*. The most persuasive argument for holding corporations liable under the ATCA is that corporations are "legal persons," and just as individuals can be liable under the ATCA for certain actions, so can corporations. Furthermore, if a federal court eventually holds that the ATCA applies to corporations, it will create a strong showing of state practice, which can be utilized by other federal courts and other countries in establishing that certain, limited customary international law rules will apply to corporations.[131]

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126. *See* Dr. Isabella D. Bunn, *Global Advocacy for Corporate Accountability: Transatlantic Perspectives from the NGO Community*, 19 AM. U. INT'L L. REV. 1265, 1301–04 (2004); Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT'L & COMP. L. REV. 429, 440–44 (2004); Scott, *supra* note 47, at 1513.

127. Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 309 (2004).

128. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 204–07 (Jeffrey L. Dunoff, Steven R. Ratner, & David Wippman, eds., 2d ed. 2006).

129. Ratner, *supra* note 32, at 475–76.

130. *Id.* at 477–88.

131. Again, because Congress has not repealed or significantly amended the ATCA, federal courts will not violate separation-of-powers principles by applying customary international law to corporations under the ATCA.

C. Doe I v. Unocal Corp.: *Did the Ninth Circuit Establish the Right Standard of Liability?*

It is important to bear in mind that the ATCA is a federal statute, and not a constitutional grant of jurisdiction. As with any statutory law, if Congress does not like the court's interpretation of the statute, it can simply amend the statute to eviscerate the court's holding. Therefore, any federal court that imposes liability on a corporation must do so carefully.

1. The Standard Established for Corporate Complicity with State Violations of Customary International Law

In examining whether Unocal would be liable for violations of customary international law, the district court granted Unocal's motion for summary judgment and ruled on both the complicity argument as well as the individual liability argument: (1) with respect to the complicity argument, the court ruled that Unocal was not the proximate cause of the government's violations because the plaintiffs had provided insufficient evidence as to whether Unocal exercised control over the government's actions, and thus the plaintiffs had no "color of law" claim against Unocal;[132] and (2) although forced labor had become a modern variant of slavery, and thus Unocal potentially could be liable for its individual actions, Unocal would not be individually liable because the plaintiffs had failed to prove that Unocal actively participated in or "sought to employ" forced labor.[133] In other words, the plaintiffs failed to prove that Unocal's actions met the standard required for complicity with state action or that Unocal's actions gave rise to private, individual liability.

On appeal, a three-judge panel of the Ninth Circuit reversed the district court's decision to grant Unocal's motion for summary judgment.[134] Upon review, the panel agreed with the district court's ruling that forced labor was a modern variant of slavery, and stated "[a]ccordingly, forced labor, like traditional variants of slave trading, is among the 'handful of crimes . . . to which the law of nations attributes *individual liability*.'"[135] It is worth noting that the court, without analysis, assumed that standards for individual liability applied to corporations and that individual criminal liability can translate into individual civil liability. The panel consulted the International War Crimes Tribunals for Yugoslavia and Rwanda to establish the complicity standard.[136] The panel stated that Unocal would be found liable for aiding and abetting the Burmese government with respect to violating the prohibition on forced labor if the plaintiffs could show that Unocal engaged in "knowing practical assistance or encouragement that [had] a substantial effect on the perpetration of the crime."[137] In

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132. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294, 1307 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

133. *Id.* at 1310.

134. *Unocal*, 395 F.3d at 937.

135. *Id.* at 946 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 794–95 (D.C. Cir. 1984) (Edwards, J., concurring) (emphasis in original)).

136. *Id.* at 949–50. For criticism of the Ninth Circuit's choice of law analysis, see Haberstroh, *supra* note 31, at 231.

137. *Unocal*, 395 F.3d at 947.

reversing the district court, the panel concluded that the plaintiffs had presented sufficient evidence that a genuine issue of material fact existed as to whether Unocal gave knowing practical assistance or encouragement to the Burmese military in its commissions of forced labor, as well as rape and murder in connection with forced labor.[138] However, the panel also concluded that the plaintiffs had presented insufficient evidence for finding a genuine issue of material fact as to their claims of torture in connection with forced labor.[139] But as the following Section demonstrates, the standard adopted by this three-judge panel is vague and ambiguous.[140]

2. Ambiguities Created by the Standard

The panel's standard for corporate complicity to a government's actions created ambiguities because it failed to clarify whether a corporation's liability must be tied to state action that violates customary international law. Several appellate courts have agreed that liability can attach for certain acts committed by private individuals if the acts are committed in pursuit of activities such as genocide, war crimes, or forced labor.[141] The ambiguity in *Unocal* is that the panel established a corporate complicity standard that expressly tied corporate behavior to significant state action that violated customary international law, but it did so without noting whether such state action was required for the corporate complicity claim.

The panel stated that Unocal could be liable for its own private actions. The Ninth Circuit panel stated that "forced labor is a modern variant of slavery that, like traditional variants of slave trading, does not require state action to give rise to liability under the ATCA."[142] The panel then immediately launched into its analysis for establishing a standard that would hold Unocal liable for aiding and abetting the Burmese government[143]—a standard for complicity with state action. The facts of the case warrant this criticism. The panel found that both Unocal and the government were involved in the conduct: "The practical assistance took the form of [Unocal] hiring the Myanmar Military to provide security and build infrastructure along the pipeline route

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138. *Id.* at 952–54.

139. *Id.*

140. In 2003, in light of the Supreme Court's grant of certiorari in *Sosa*, the Ninth Circuit ordered that the case be reheard en banc, and specifically stated, "The three-judge panel opinion shall not be cited as precedent by or to this court or any district of the Ninth Circuit, except to the extent adopted by the en banc court." *Id.* at 978–79. Despite the fact that the Ninth Circuit vacated the standard established by the opinion of the three-member panel—and thus eliminated any explicit precedent in the Ninth Circuit holding corporations liable under the ATCA—other federal courts continue to look to the panel's decision for guidance. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003). Thus, the *Doe v. Unocal* standard remains both important and controversial for ATCA jurisprudence on corporate liability. The Ninth Circuit in *Sarei* noted that "[w]e do not reach the separate question, which has not been presented to us on appeal, of what standard must govern such determinations of liability. Whether and how the plaintiffs will be able to prove their dramatic allegations are questions for another day." Sarei v. Rio Tinto, 456 F.3d 1069, 1079 n.6 (9th Cir. 2006).

141. Kadic v. Karadžić, 70 F.3d 232, 242–43 (2d Cir. 1996).

142. *Unocal*, 395 F.3d at 947.

143. *Id.*

in exchange for money or food . . . [as well as] using photos, surveys, and maps in daily meetings to show the Myanmar Military where to provide security and build infrastructure."[144] The panel's opinion thus appears to operate under the assumption that Unocal's actions might give rise to private liability, but in effect sets a standard for when a corporation aids and abets a state actor. One must therefore question the future applicability of the ATCA to private conduct that does not involve state action, even though the opinion's dicta indicates that Unocal could have been held liable for private conduct as well. Thus, the problem with this standard lies not only in whether the ATCA applies to a corporation that aids and abets another private actor, but more importantly, whether the ATCA will apply to private corporate conduct. This question illustrates the importance in the panel's failure to specify whether it analyzed Unocal's complicity with the Burmese government from a private liability standpoint versus a state action standpoint.

3. Recommendations for a New Standard: Corporate Complicity

Federal courts should take a cue from the ambiguities and vagueness created by the Ninth Circuit's opinion in *Unocal*. Absent clarification from Congress,[145] a court faced with a scenario involving corporate liability under the ATCA should specify whether the facts of a case warrant the establishment and application of a standard for corporate complicity or a standard for private liability. This Note first recommends changes to the analysis regarding the actual standard of complicity established by the Ninth Circuit.

When a judge attempts to establish what constitutes corporate complicity under customary international law, one reference to which the judge might be tempted to look is the decisions of international criminal tribunals. However, this approach is not without complication. The problem with examining international criminal tribunals for insight on corporate complicity is that these tribunals establish an accomplice standard for *criminal* accomplice liability.[146] The dilemma arising from looking to international criminal tribunals for a tort standard lies in the fact that different standards and consequences exist between crimes and torts; criminal standards tend to be more stringent than tort standards. Under the ATCA, a judge must establish a standard of liability for third-party liability for a *civil* tort. Thus, the Ninth Circuit looked to international precedent that does not adequately reflect the circumstances under which a corporate actor can be held civilly liable as a third party.

Another source to which a judge might look in establishing a standard for corporate complicity is the general and consistent practice of states.[147] Although doing so might reflect a more accurate understanding of state behavior with respect to this issue, this exercise may not produce a satisfactory rule of customary international law. Indeed, this may prove difficult because specific standards for tort liability—recklessness, negligence, gross negligence, strict liability—likely vary from state to state.

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144. *Id.* at 952.

145. *See infra* Part IV.

146. *See* Haberstroh, *supra* note 31, at 260–61.

147. For criticism of the Ninth Circuit's choice of law analysis, see *id.* at 231. He argues that federal courts should look to the domestic laws of all the countries to determine what is consistent state practice.

Another source a judge might consider is the United States' "sense of legal obligation," or *opinio juris*.[148] *Opinio juris* reflects a better understanding of how the United States views corporate responsibility under international law and also provides a more efficient method of crafting a standard of liability. The district court in *Doe I v. Unocal Corp.*[149] immediately looked to Section 1983 jurisprudence to determine the standard of liability of corporate complicity.[150] Section 1983 jurisprudence, however, does not govern acts committed abroad. A statute that does govern acts committed abroad is the Torture Victims Protection Act (TVPA), and it thus represents a more accurate version of what the United States Congress believes to be its *international* legal obligations.[151]

The TVPA begins, "An individual who, under actual or apparent authority, or color of law, of any foreign nation . . . ."[152] This statement implicitly defines torture as requiring state action. However, this statement can also be interpreted as creating a standard of liability for complicity with state action: an actor will be liable for complicity with state action if the actor is the state's agent or acts under color of state law. This standard of liability then opens the door for courts to apply agency law (actual or apparent authority) or color of law analysis.

Once a court looks to the TVPA for the standard of liability in ATCA jurisprudence, *then* it can look to black-letter agency law or Section 1983 jurisprudence to supplement the gaps as to whether a corporation has acted under color of law. This approach reflects past federal court interpretation of the TVPA.[153] Section 1983 jurisprudence has four criteria for determining whether a private party has acted under color of law: "public function, state compulsion, nexus, and joint action."[154] These tests for whether a private party acted under color of law, in addition to the tests for actual authority and apparent authority, leave a plaintiff with six different theories under which a corporation may be held liable. However, a judge must first go through the TVPA "color of law" standard to get to agency law or Section 1983 analysis.

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148. BLACK'S LAW DICTIONARY (7th ed. 1999) (defining *opinio juris* as "[t]he principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral obligation) mandates the conduct or practice").

149. 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff'd in part, rev'd in part*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

150. *Id.* at 1305.

151. 28 U.S.C. § 1350 (2000).

152. *Id.*

153. *See, e.g.*, Tachiona v. Mugabe, 169 F. Supp. 2d 259, 315–16 (S.D.N.Y. 2001) (confirming that the legislative history of the TVPA requires courts to apply agency or color of law analysis and that Section 1983 jurisprudence serves as a relevant guide for color of law questions).

154. *Unocal*, 110 F. Supp. 2d at 1305 (citing George v. Pacific-CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir. 1996)).

4. Recommendations for a Standard for Private Corporate Action Not Under the Color of Law

In deciding whether a corporation should be liable for acts it committed as a private actor, a federal court should, absent congressional direction,[155] look to the substantive definitions of the acts identified in *Kadic* that will trigger private liability. *Kadic* stated that individuals could be liable for private actions involving death, torture, and degrading treatment *committed during acts of genocide, war crimes, or slavery.*[156] This creates a very limited amount of actual corporate liability. Unless a corporation itself is single-handedly engaging in acts of genocide, committing war crimes, or engaging in forced labor (which courts have declared to be a modern variant of slavery[157]), then standards of liability for private acts will not apply.

Given the general substance of these rules of customary international law, only in extreme situations would the ATCA hold a corporation liable for private action. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

> [A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.[158]

This definition requires intent, and thus only in extreme circumstances where plaintiffs can show that a corporation had the intent to exterminate a group of people will a corporation face liability under the ATCA for these acts. Using the definition of genocide as an example, if courts impose private corporate liability only to the acts *Kadic* identified as triggering such liability, corporations will face private liability only for the most extreme and egregious abuses of human rights.

IV. IF CONGRESS DECIDES TO TAKE ACTION CONCERNING THE ATCA, IT SHOULD AMEND THE ACT RATHER THAN REPEAL IT

As soon as a federal court holds a corporation liable under the ATCA, corporations across the United States likely will urge Congress to take action and repeal the Act altogether. Instead of repealing the Act, Congress should replicate the steps it took in the Torture Victim Protection Act and the Military Commissions Act of 2006.[159] In both of these Acts, Congress identified the specific actions that constitute violations of

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155. *See infra*, Part IV.

156. *See supra* text accompanying note 68.

157. *See supra* text accompanying note 133.

158. Convention on the Prevention and Punishment of the Crime of Genocide, Article 2.

159. As noted above, the Military Commissions Act of 2006 does prevent federal courts from exercising ATCA jurisdiction over claims against United States military and personnel concerning any aspect of the detention of an alien detained as enemy combatant if the alien was detained after September 11, 2001. *See supra* note 29.

these Acts. If Congress specifically identified the types of torts for which a public official, private individual, or corporation can be held liable under the ATCA, Congress would: (1) solve the separation-of-powers argument; (2) provide the courts with specific guidance on which claims have legitimacy under the ATCA, thus lessening controversies about standards of liability; (3) clarify that the ATCA applies to purely private action;[160] and (4) put corporations on notice of what rules apply to their global behavior for purposes of the ATCA, thus solving the "fundamental fairness" argument advanced by corporations.

A. The Torture Victims Protection Act

The text of the TVPA is straightforward. It allows for civil damages if an *individual*, acting as an agent of a state or under color of law, subjects another individual to torture or extrajudicial killings.[161] The TVPA places an exhaustion requirement on the individual bringing the suit and places a ten-year statute of limitations on the suit.[162] Thus, the TVPA eliminates many of the problems that the sparse text of the ATCA has generated. Under the TVPA, judges know that individuals can be held liable in certain circumstances and are aware of the standard of liability. Judges know for which actions an individual may be held liable, and they also know that plaintiffs must exhaust remedies available in their home countries. Moreover, judges know that a plaintiff has only ten years to bring the suit. An amendment to the ATCA clarifying these ambiguities will be invaluable to plaintiffs, corporations, judges, and politicians.

B. The Military Commissions Act of 2006

In the timeframe following the September 11 attacks and the United States' invasion of Afghanistan, serious questions arose about the Bush Administration's policies toward detainees. The government asserted that Common Article 3 of the Geneva Conventions ("Common Article 3") did not apply to Al Qaeda detainees.[163] The Supreme Court's decision in *Hamdan v. Rumsfeld*,[164] however, rejected the government's interpretation of Common Article 3. Hamdan challenged the legality of the government's established military tribunals.[165] The Supreme Court held that although Congress had passed a statute authorizing military tribunals, the government had not followed Congress's conditions, and these tribunals therefore violated Common Article 3.[166] Congress responded by passing the Military Commissions Act of

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160. This would also be consistent with the original intent of the statute; for instance, attacks on ambassadors by private individuals were one of the concerns the Framers likely had in mind when they wrote the ATCA. *See supra* notes 36–43 and accompanying text.

161. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350(2)(a) (2000).

162. *Id.* § 1350(2)(b), (c).

163. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS, *supra* note 128, at 1008–09 (citing Memorandum from Alberto R. Gonzales, White House Counsel, to President George W. Bush, Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict With Al Qaeda and the Taliban (Jan. 25, 2002)).

164. 126 S. Ct. 2749 (2006).

165. *Id.* at 2759.

166. *Id.* at 2798. The Court held that the Geneva Conventions, as laws of war, are judicially

2006,[167] an attempt to give legislative authority and guidance to the military commissions proposed by President Bush. Whether or not one agrees with the substance of the 2006 Act,[168] Congress did create a specific list of acts that will violate Common Article 3 of the Geneva Conventions. Among those acts that violate Common Article 3 of the Geneva Convention are torture, cruel or inhuman treatment, performance of biological experiments, murder, mutilation or maiming, rape, sexual assault or abuse, and taking hostages.[169] Congress has thus taken the job of deciding what violates Common Article 3 of the Geneva Conventions away from the federal courts with respect to this issue.

C. A Proposed Revision to the ATCA

Just as it did in the TVPA and the Military Commissions Act of 2006, Congress should take action, eliminate the phrase "the law of nations," and specifically define the torts that will support a claim under the ATCA. In addition to specifying the types of acts that can be enforced under the ATCA, an amended version of the ATCA should also specify that a plaintiff may bring suit against both natural and legal persons. An additional benefit of congressional action of this nature is that once Congress specifies the types of conduct that are actionable, NGOs and human rights organizations can lobby Congress to further amend the Act to add additional rules subject to the ATCA. Congress could then, under its discretion, create tort liability for environmental and other acts that do not fit within *Sosa*'s paradigm—whereas, given *Sosa*, the judiciary cannot. Then the debate over the possible expansion of conduct recognizable under the Act will take place in Congress—a political branch of the United States government—relieving the courts of any role in the debate.

An amended version of the Act would expand the instances of conduct for which individuals (whether natural or juridical) can be held liable for private action. While a federal court must be very careful to stay within the bounds already established by international law, Congress, as the legislative branch, can and should expand individual liability beyond what is recognized under customary international law. By doing so, Congress will put corporations on notice of the types of behavior that will violate the ATCA, thereby sending a strong message that it will not tolerate egregious corporate behavior that violates basic notions of human rights and liberties. This message, emanating from Congress as the representative of the people of the United States, confers a democratic legitimacy unrealized if liability were imposed by the judiciary.

CONCLUSION

The most attractive solution to solve the current debate surrounding ATCA jurisprudence and corporate liability is for Congress to amend the Act to clarify how it

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enforceable by incorporation through the Military Code of Uniform Justice. *Id.* at 2794.

167. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. §§ 948a to 950w & 42 U.S.C. § 2000dd-0).

168. *See* Amnesty International, United States of America, Military Commissions Act of 2006—Turning Bad Policy Into Bad Law, http://web.amnesty.org/library/index/ENGAMR511542006 (last visited October 19, 2006).

169. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2633-34, §6(b).

applies to corporate behavior overseas. In the amendment, Congress should provide a detailed list of types of conduct that bring rise to ATCA liability, as well the actors that can be held liable under the Act. In the absence of such congressional action, however, federal courts, in formulating standards of liability against corporations, should make specific distinctions as to whether the standard applies to conduct involving state action or whether it applies to private action only. In crafting a standard for corporate conduct involving state action post-*Sosa*, the courts should not follow the standards formulated by the district and appellate courts in *Unocal*, but rather should use the TVPA as their starting point for the standard, since the TVPA reflects the United States' view of the nature of its international legal obligations. If federal courts are faced with claims of private action, they should apply the very narrow standard of liability set forth in *Kadic*, which limits personal liability to acts of torture and killing committed in the course of genocide, war crimes, and slavery.

A congressional amendment will also put corporations on notice of the types of conduct for which they can be liable under the Act. Such an amendment will provide a check on corporations that commit gross and egregious human rights violations. Corporations play critical roles in the world's economies. While some corporations argue that applying the ATCA against corporations will hinder foreign investment, it is difficult to accept the argument that when a corporation knowingly engages in or assists in conduct that results in the most heinous and severe human rights violations, the corporation is truly "investing" in a foreign country and contributing to that country's welfare. To the contrary, such acts do little but detract from the historical progress the world's nations have made toward bettering the lives and minimum standards of all peoples.