First-Party Liability for Violations of the Law of Nations: Apply International Law, the Law of the Situs, or Domestic Standards

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THIRD-PARTY LIABILITY FOR VIOLATIONS OF
THE LAW OF NATIONS: APPLY
INTERNATIONAL LAW, THE LAW OF THE SITUS,
OR DOMESTIC STANDARDS?

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I. INTRODUCTION

Accountability for international human rights violations is increasingly being sought in United States domestic courts. The Alien Tort Statute (the “ATS”)¹ has been used to hold individuals and corporations, which are subject to personal jurisdiction in U.S. federal courts, liable for their involvement in human rights violations around the world. Traditionally, the ATS has applied to human rights violations committed by agents of foreign nations.² An interesting development in the application of the statute is the recent effort by plaintiffs to use the ATS to sue transnational corporations for violations of international law in countries outside the United States.³ As private individuals and corporations continue to be sued, the ATS could become a powerful tool to increase corporate accountability for contributions to or involvement in international violations of human rights.⁴

In holding corporations vicariously liable for their involvement in violations of the law of nations, courts have

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1. 28 U.S.C. § 1350 (2006). This statute is also commonly referred to as the Alien Tort Claims Act (the “ATCA”).
2. See infra Part II.A-B.
3. See infra Part II.B.
been inconsistent in determining which legal standard applies. Courts have turned to vicarious liability standards found in international law, domestic law, and the law of the situs. This inconsistency has led to unpredictability in what standard will apply to individual or corporate defendants when they are charged with violating the law of nations. This choice of law problem could potentially result in various notice or due process challenges, even when all of the other elements of a claim are met.

This comment will focus on whether courts should apply international law, domestic law, or the law of the situs to determine the appropriate standard for third party liability in the ATS. First, it will discuss early ATS practice, setting the background for holding corporations liable under third-party standards of liability. In recent years the trend has moved from holding foreign individuals who come to the United States liable for international violations they participated in overseas, to holding corporations liable for their actions in foreign states.

Next, it will discuss Sosa v. Alvarez-Machain, the landmark case in which the Supreme Court set the standard for finding substantive norms cognizable under the ATS. The Court held that for a claim to be brought under the ATS, it must be based on an international norm that is accepted by the civilized world and is defined with "specificity." The paper will then analyze the current issue of deciding what legal standards apply to different forms of liability under the ATS. It will examine the different sources of law used to

5. See infra Parts II.A-B.
6. See infra Part II.B.
7. See infra Part II.B. Courts have held corporations liable through such standards as complicity liability, aiding and abetting, and joint criminal enterprise ("JCE"). Tarek F. Maassarani, Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act, 38 N.Y.U. J. INT'L L. & POL. 39, 39 (2005) ("[A]lternative forms of complicity—primarily joint criminal enterprise, but also conspiracy, instigation, and procurement—arising from the influential and growing jurisprudence of the international criminal tribunals and comments briefly on their implications for ATCA litigation against corporations . . . .").
8. See infra Part II.C.
10. See infra Part III.
determine third-party liability under the ATS, including international law (to the extent that it can be ascertained through customary international law, general principles, or case law), United States federal law, and the law of the situs. Finally, the paper concludes that United States courts should apply international law where there is a universally accepted and clearly defined international law standard. In situations where such international standards do not exist, courts should apply either U.S. federal standards of liability or the standard applicable in the country where the violation occurred.

II. BACKGROUND

A. Alien Tort Statute History

Two statutes give United States federal courts jurisdiction to hear claims for international law violations: the 1789 Alien Torts Claims Act (commonly referred to as the Alien Tort Statute, or ATS) and the Torture Victim Protection Act of 1991 (the "TVPA"). The ATS, part of the Judiciary Act of 1789, grants U.S. courts jurisdiction over any dispute where an alien sues "for a tort only, committed in violation of the law of nations or a treaty of the United States." The ATS enables foreigners to seek compensation in the United States for violations of international law. The TVPA lends additional support by providing aliens as well as U.S. citizens a cause of action in federal courts for claims of

11. See infra Parts III.A–C.
12. See infra Part V.
13. See infra Part V. The determination of which standard to apply should be based on the law that is the most established in order to ensure that the defendant was on notice of liability for their actions.
The TVPA reinforced the legitimacy of litigation under the ATS and filled in some of
the holes that ATS cases had exposed.\(^{20}\)

ATS and TVPA cases provide a U.S. forum for victims to
tell their stories to a court and to create a judicial record of
their suffering.\(^{21}\) Although damage awards under the ATS
and TVPA are hard to enforce, victims have increasingly been
able to recover.\(^{22}\) This sends a message to others that such
conduct is unacceptable.\(^{23}\) Victims are empowered and
perpetrators are, in effect, barred from the United States for
fear of enforcement actions. These suits also allow U.S.
courts to articulate principles of international law that are
applicable in the United States and to contribute to the
international protection of human rights by providing a venue
for victims to seek justice.\(^{24}\)

B. Alien Tort Statute Practice Pre-Sosa—Setting the Stage
for Corporate Liability

Although the ATS has been part of the United States
code since 1789, it went practically unused for almost 200
years. However, in the past thirty years, victims have used
the ATS to hold state actors, private actors, and corporations
liable for their involvement in violations of the law of nations
around the world. The first time the statute was activated, in
Filartiga v. Pran-Irala,\(^{25}\) the Second Circuit held that
deliberate torture, perpetrated under the color of official
authority, violates universally accepted norms of
international human rights law, and that such a violation of


\(^{20}\) May I Speak Freely? Media for Social Change, Fighting Impunity in

\(^{21}\) See Francisco Rivera, Inter-American Justice: Now Available in a U.S.

\(^{22}\) See Human Rights Watch, Background on the Alien Tort Claims Act

\(^{23}\) See id.

\(^{24}\) See Rivera, supra note 21, at 896–97.

\(^{25}\) Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Filartiga v. Pena-
Irala involved a suit by relatives of a Paraguayan who was kidnapped and
tortured to death by the defendant, a Paraguayan police official. Id. The
Second Circuit Court of Appeals decided that the Alien Tort Claims Act allows
victims to sue in U.S. courts for serious violations of international human rights
law. Human Rights Watch, supra note 22.
international law constitutes a violation of the domestic law of the United States, giving rise to a claim under the ATS. After that decision, victims used the ATS from 1980–1996 primarily to sue foreign officials who are subject to United States jurisdiction. Through litigation of ATS cases, U.S. courts have recognized that a limited number of international common law torts violate the law of nations. These include genocide, crimes against humanity, war crimes, torture, “disappearances,” extra-judicial executions, and forced labor and prolonged arbitrary detention. Victims may now bring claims for such abuses under the ATS.

Traditionally, the defendants in ATS suits were foreign


28. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (“Persons may be susceptible to civil liability if they commit either a crime traditionally warranting universal jurisdiction or an offense that comparably violates current norms of international law. To identify such crimes, I look for guidance to the RESTATEMENT OF THE LAW OF FOREIGN RELATIONS (REVISED) § 702 (Tent. Draft No. 3, 1982), which enumerates as violations of international law state-practiced, encouraged, or condoned (a) genocide . . . .”).

29. See Doe v. Saravia, 348 F. Supp. 2d 1112, 1144, 1154 (E.D. Cal. 2004) (finding that “both extrajudicial killings and crimes against humanity meet the specific, universal obligatory standard,” allowing them to be recognized as a claim under the present day law of nations) (“The international prohibition of crimes against humanity is explicitly codified in several multilateral agreements and has been extensively litigated in international tribunals, constituting a body of doctrinal exposition.”).

30. See Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (“[W]e hold that 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 violations in his capacity as a state actor, and that he is not immune from service of process.”).


32. See Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (“[T]he submitted materials are sufficient to establish the existence of a universal and obligatory international proscription of the tort of ‘causing disappearance.’”).

33. See Saravia, 348 F. Supp. 2d at 1144 (“[T]he facts pleaded in the Complaint establish Plaintiff’s claims of extrajudicial killing in violation of the TVPA and extrajudicial killing and crimes against humanity in violation of the ATCA.”).

34. See Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (determining that slave trade is cognizable under the ATS).

35. See Human Rights Watch, supra note 22.
government officials or foreign state actors who committed violations of international law while acting under the color of law. However, the trend in U.S. courts is shifting. Now, U.S. courts are holding private actors, such as foreign or U.S. corporations, liable for violations of the law of nations under the ATS. Victims have filed ATS suits against multinational corporations accused of direct complicity in crimes committed by foreign governments and their security forces.

Expanding on the precedent set by the Nuremberg criminal tribunals after World War II, which held non-state actors accountable for international human rights violations, U.S. courts have held that corporations can be brought into court under an ATS claim depending upon the nature of the offense alleged. In several post-World War II cases, the heads of German corporations who contributed to Nazi war efforts were prosecuted for war crimes and crimes against humanity. These were some of the first cases to hold individuals responsible for violations of international law, thus modifying the notion that the state is the sole actor responsible for international law violations. These cases revealed a willingness to “contemplate corporate responsibility at the international level” by prominent legal decision makers of the time.

The Second Circuit utilized the same reasoning several decades later in Kadic v. Karadzic, which extended ATS liability for certain violations of international law to private parties and individual actors. The court in Kadic held that aspects of the law of nations could reach the conduct of

37. Id.
39. Id.
40. See Steven R. Ratner, Corporations and Human Rights: A Theory of Legal Responsibility, 111 YALE L.J. 443, 477–78 (2001) (noting that in “three cases, United States v. Flick, United States v. Krauch (the I.G. Farben Case), and United States v. Krupp, the leaders of large German industries were prosecuted for crimes against peace (i.e., initiating World War II), war crimes, and crimes against humanity”).
41. See Rivera, supra note 36, at 254.
42. Ratner, supra note 40, at 477.
44. See id. at 239; Rivera, supra note 36.
private parties, provided their conduct occurred under the color of state authority or violated a norm of international law that is recognized as extending to the conduct of private parties. The Second Circuit concluded that Karadzic's conduct violated well-established and universally recognized norms of international law. The court specifically rejected Karadzic's contention that Filartiga was distinguishable on the basis that the law of nations was confined to state action. Rather, the court held 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." Examples of actionable private conduct the court cited included participation in the slave trade and war crimes. The court's recognition of private liability for human rights violations has been affirmed in later judicial opinions, the opinion of the Executive Branch, and the Restatement of

46. See Kadic, 70 F.3d at 242. The Plaintiffs in this case allege in their complaint that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadzic, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadzic possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Kardzic and carried out by the military forces under his command. The complaints allege that Karadzic acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

Id. at 236–37.

47. See id.
48. Id. at 239.
49. Id.
50. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (concluding that there exists a "handful of crimes to which the law of nations attributes individual responsibility").
51. See Kadic, 70 F.3d at 239–40 ("The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of
Foreign Relations Law.\textsuperscript{52} Taken together, these sources established liability of private non-state actors for offenses of "universal concern."\textsuperscript{53}

The court in \textit{Kadic} extended the number of potential defendants over which courts have jurisdiction in ATS claims by enabling courts to hold private actors and multinational corporations liable for violations committed while overseas.\textsuperscript{54} This is particularly significant for corporate defendants because the decision established the opportunity for victims to sue private parties responsible for or contributing to the violations of the law of nations.\textsuperscript{55} In these cases, the key issue is whether the company was engaged in an activity where it could be found vicariously liable for the international violation.\textsuperscript{56} This can be established by showing elements of knowledge, practical support, or encouragement to the agent carrying out the action that constitutes a cognizable violation of the law of nations.\textsuperscript{57} Violations in corporate cases are based on vicarious liability because state agents outside the scope of U.S. personal jurisdiction are the real malefactors. Courts have used a combination of federal common law standards and standards set out in international tribunals to establish the aiding and abetting standard utilized to hold corporations liable and achieve justice in U.S. courts.\textsuperscript{58}
Further expanding the potential to find corporations liable under the ATS, cases following *Kadic* have extended the reasoning behind finding private actors liable. The courts' reasoning is that private corporations are essentially "persons" under the law and therefore do not have immunity under domestic or international law.

Support of the United States and many U.S. corporations has strengthened the legitimacy of holding corporations liable under the ATS. For example, corporations have voluntarily signed codes of conduct or similar initiatives, making it clear that "corporate interests are not incompatible with human rights concerns." Because of the courts' expansion of corporate liability under the ATS, there has been an increase in corporate ATS lawsuits. This has given rise to the issue of what standard of liability is applicable to hold corporations vicariously liable for their actions. *Doe I v. Unocal Corp.*, a moral support which has a substantial effect on the perpetration of the crime...

59. See id. at 946 (noting that a private company utilizing slave labor may be subject to liability under the ATS); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

60. See Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1263 (holding that the TVPA applies to corporations); Rivera, supra note 36, at 254 n.20 (citing Sinaltrainal v. Coca Cola Co., 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) ("Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.").


62. Rivera, supra note 36, at 262.

63. Id. ("In fact, these voluntary initiatives cover a much broader range of rights than the few fundamental human rights covered under the ATS.").

64. See id. at 254 n.22 ("[O]n April 24, 2003, a suit was filed against Occidental Petroleum and its security contractor, Airscan, Inc., for their role in the murder of innocent civilians in the hamlet of Santo Domingo, Colombia on December 13, 1998. On April 5, 2003, attorney Ed Fagan filed a 6.1 billion dollar lawsuit in New York and Nevada on behalf of former workers of the diamond companies Anglo American and De Beers, alleging that the former workers were wrongly fired for labor strikes, subjected to forced labor, and were attacked, imprisoned, and tortured during labor protests." (citations omitted).

65. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).
Ninth Circuit case based on the ATS, provides a discussion on the appropriate choice of law to determine the standard for aiding and abetting with the majority advocating the use of international law and a concurring judge arguing for the use of federal common law standards. Subsequent cases have further explored and expanded upon the applicability of the ATS to actions engaged in by corporations. Courts must now decide whether they should apply international law, domestic common law, or the law of the situs, to determine the appropriate standard for third party liability in such cases.

C. Defining the Cognizable Alien Tort Statute Claim in Sosa v. Alvarez-Machian

Until 2004, there was not a clear explanation or interpretation of what constituted a violation of the law of nations and, therefore, what constituted a cognizable claim under the ATS. However, in its most recent decision interpreting the ATS, Sosa v. Alvarez-Machain, the U.S. Supreme Court set the standard for finding substantive norms cognizable under the ATS. The Court stated that, “at the time of enactment, the jurisdiction enables federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”

According to the Court, the law of nations at the time the ATS was enacted was comprised of two elements: general norms of how nations behaved and interacted with one another, and “as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries.

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66. See infra Part IV.A–B.
67. See Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1263 (N.D. Ala. 2003) (holding that violation to right of association is actionable under the ATCA); Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (“Given [that] private individuals are liable for violations of international law in certain circumstances, there is no logical reason why corporations should not be held liable, at least in cases of jus cogens violations.”).
68. See infra Part III.
70. Id.
71. Id.
72. See id. (“This influenced the executive and legislative branches more than the judicial.”).
and consequently carrying an international savor."\textsuperscript{73} The Court looked to the time period before the passing of the ATS to analyze Congress's efforts to address the law of nations in U.S. courts.\textsuperscript{74} Ultimately, it decided that the ATS is more than a strictly jurisdictional statute.\textsuperscript{75} The Court determined that, in 1789, few torts in violation of the law of nations were understood to be within the common law, and, thus, they were unable to claim these torts under the ATS.\textsuperscript{76} At the time, the statute was understood to be enacted on the belief that the common law would provide a cause of action for the international law violations with a potential for personal liability.\textsuperscript{77}

The \textit{Sosa} Court recognized the strong argument that judicial caution should be exercised when considering individual claims raised under the ATS.\textsuperscript{78} Because these claims are based on international common law, there is a potential for judges to exercise judicial activism, which is what the Court is cautioning. Common law has changed from what it was when the statute was originally implemented to what it is now.\textsuperscript{79} Today, "there is a general understanding that the law is not so much found or discovered as it is either made or created."\textsuperscript{780} The jurisdictional grant was originally understood to apply to the enforcement of a small number of international norms that a federal court could properly recognize as within the common law.\textsuperscript{81} In this vein, the \textit{Sosa} Court limited the subject matter covered by the ATS by

\begin{itemize}
  \item \textsuperscript{73} \textit{Id.} at 715.
  \item \textsuperscript{74} \textit{Id.} at 716.
  \item \textsuperscript{75} \textit{See} Sosa v. Alvarez-Machain, 542 U.S. 692, 719-20 (2004) ("[T]he First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use be a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. . . . [A]dditionally, Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.").
  \item \textsuperscript{76} \textit{Id.} at 720.
  \item \textsuperscript{77} \textit{Id.} at 724.
  \item \textsuperscript{78} \textit{Id.}
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{See id.} at 725 ("[W]e now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction (\textit{Erie}), that federal courts have no authority to derive 'general' common law.").
\end{itemize}
requiring "any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."  

The Court recognized that a "narrow class of international norms" provide for causes of action under the ATS today. The Supreme Court has affirmed that domestic law of the United States does, in fact, recognize the law of nations. As further support for the legitimacy of the subject matter carved out by federal courts deciding ATS cases, the Court noted that Congress has not disagreed with this interpretation. In fact, Congress has enacted legislation, such as the TVPA, to aid in enforcing ATS judgments decided in federal courts.

The Court ultimately decided that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATS] was enacted." The determination of whether a norm is sufficiently definite to support a cause of action should involve taking into consideration the practical consequences of making that cause available to litigants in the federal courts.

The Court has recognized various sources of international law. Absent a treaty, controlling executive or legislative act, or judicial decision, it is appropriate to apply the customs and usages of civilized nations. Additionally, "courts recognize the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat as a

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82. *Id.* at 725.
83. *Id.*
84. *Id.* at 729–30 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (recognizing that "international disputes implicating ... our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist)).
85. *Id.* at 730–31.
86. *See supra* Part II.A.
88. *Id.* at 732–33.
89. *Id.*
90. *Id.* at 734.
91. *Id.*
legitimate source of international law." Judicial tribunals resort to such works, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of that the law really is.

Therefore to bring a claim, the plaintiff needs to allege a violation of a "norm of customary international law so well defined as to support the creation of a federal remedy." Sosa resolved the issue of what constitutes a cognizable threshold claim under ATS, determining that international law is applicable. However, the decision in Sosa left open the question of which body of law determines ancillary issues such as the source for standards of third-party liability. Should courts also look to international law and, if there is not a universally accepted, clearly defined standard of liability, should courts determine that there is no claim to be raised? Or, should courts simply apply the standards applicable in U.S. federal suits that they have expertise in applying?

D. Holding Corporations Liable in Unocal

The Ninth Circuit case, Doe I v. Unocal Corp., provided a discussion about the applicable choice of law under the ATS with respect to the complicity standard to hold a corporation liable. The majority looked at international criminal law jurisprudence to determine the standard required to establish third-party liability for a violation of the law of nations. In 1992, Unocal began participating in a joint venture in Myanmar to extract natural gas and to create a pipeline to transport the gas through Myanmar. The Myanmar military aided the project by providing several battalions of soldiers for security, building helipads, and clearing roads along the proposed pipeline route. There is evidence that

92. Id.
94. Id. at 738.
95. Id. at 692.
96. Doe I v. Unocal Corp., 395 F.3d 932, 947–53 (9th Cir. 2002).
97. See Id. at 937 (looking to the aiding and abetting standard described in decisions of the international criminal tribunals of Rwanda (ICTR) and Yugoslavia (ICTY)).
98. Id. at 937.
99. Id. at 937–38.
Unocal was notified by several sources that the Myanmar military was engaged in forced labor, murder, rape, and other human rights violations while they were supporting Unocal's project. Despite this knowledge, Unocal continued to work on and operate the pipeline, all the while accepting support from the Myanmar military. In 1996, plaintiffs filed suit in the U.S. District Court for the Central District of California, claiming that Unocal and the Myanmar Military had violated the ATS. The court dismissed the claims against the Myanmar Military and a Myanmar-owned oil company because they were protected under the Foreign Sovereign Immunities Act. However, the court allowed the claim against Unocal to proceed.

The Ninth Circuit remanded, but held that Unocal could be held liable for its complicity in human rights violations that were committed by the Myanmar military. The court found that the "plaintiffs had presented evidence that Unocal knowingly provided assistance to the military in its commission of forced labor, murder, and rape." The court first decided that the plaintiffs had established the requisite subject matter jurisdiction hurdle by claiming a tort that is cognizable under the ATS. It then addressed the question arising in almost every ATS case against a corporation or private actor, of whether the alleged tort requires the private party to engage in state action, and if so, whether the private party in fact engaged in such state action. The court concluded that there are some situations, like the one in Unocal, in which state action is not required.

100. Id. at 939–40.
101. Id.
102. Doe I v. Unocal Corp, 395 F.3d 932, 942–43 (9th Cir. 2002).
103. Id. at 943–44.
104. Id.
105. Rivera, supra note 36, at 252.
106. Id.
107. Unocal Corp., 395 F.3d at 945.
108. Id.
109. Id. at 944–46 ("There are a 'handful of crimes,' including slave trading, to which the law of nations attributes individual liability,' such that state action is not required. . . . Although 'acts of rape, torture, and summary execution,' like most crimes, 'are proscribed by international law only when committed by state officials or under color of law' to the extent that they were committed in isolation, these crimes 'are actionable under the Alien Tort [Claims] Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes.'").
Since state action was not required, the court went on to discuss the applicable standard for aiding and abetting liability under the ATS. The court determined that it should apply international law as developed in decisions by international criminal tribunals, such as the Nuremberg Military Tribunals, to determine the applicable substantive law.

III. IDENTIFICATION OF THE LEGAL PROBLEM

Throughout post-Sosa litigation, courts have continued to hold private individuals and corporations personally liable under the ATS through standards such as command responsibility or aiding and abetting. The ATS, however, is ambiguous as to how courts should handle the intricacies that arise throughout the course of litigation, including how the alleged tort should be evaluated and litigated in a federal district court once a party meets the jurisdictional requirement of stating a claim under the law of nations. Judicial interpretation of the ATS has been complicated by the complete absence of legislative history. The ATS is not

110. See id. at 947–49.
111. See id. at 948 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)) (“The law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law’ or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”).
112. See Barrueto v. Larios, 402 F.3d 1148, 1157–58 (11th Cir. 2005) (upholding a jury instruction stating that the defendant could be held liable for aiding and abetting torture and extrajudicial killing if he “substantially assisted some person or persons who personally committed or caused the wrongful acts” and “knew that his actions would assist in the legal or wrongful activity at the time he provided the assistance”); see also Doe v. Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (looking to a pre-Sosa decision to determine that a defendant can be liable for aiding and abetting under the ATS).
114. Trajano v. Marcos, 978 F.2d 493, 498 (9th Cir. 1992) (“The debates that led to the Act’s passage contain no reference to the Alien Tort Statute, and there is no direct evidence of what the First Congress intended it to accomplish.”); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003) (“Despite the fact that the ATCA has existed for over two hundred years, little is known of the framers’ intentions in adopting it—the legislative history of the Judiciary Act does not refer to Section 1350.”); Lucien J. Dhooge, The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism, 35 GEO. J. INT’L L. 3, 10 n.28 (2003) (citing Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.10 (2d Cir. 2000) (“The original purposes of the ATCA remain the subject of some
mentioned in the debates surrounding the adoption of the first Judiciary Act, and there is no evidence of what its drafters intended by its inclusion. In addition to lack of legislative history, there is also speculation on the legislative intent of the drafters. Interpreting the ATS in modern times is complicated even further by the lack of any substantial judicial precedent until the 1980s.

Although Sosa addressed and answered the debate regarding the cognizable threshold question, there is still debate about what choice of law should apply when the courts are faced with determining whether or not to apply various forms of vicarious liability. This is the issue with which courts are faced when hearing an ATS claim against corporations. The success of claims under the ATS against a corporation depends on whether the offense is universally

 controversial . . . [since] [t]he Act has no formal legislative history. . . . [T]he intent of the original legislators . . . is forever hidden from our view by the scarcity of relevant evidence . . . ."

115. See Dhooge, supra note 114, at 10 n.29.
116. See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (stating that, the debates over the Judiciary Act in the House and Senate do not mention the ATS provisions).
117. Dhooge, supra note 114, at 11 ("Some postulate that it was related to national security and sovereign considerations. These commentators have concluded that the ATS was intended to shield the United States from foreign threats resulting from erroneous interpretations of international law by the states, protect the physical integrity of foreign ambassadors serving in the United States, prevent piracy, and serve as a 'badge of honor' signifying the arrival of the United States in the community of nations. Other commentators have focused upon economic realities [arguing that] the ATS was intended to bolster the economy by encouraging immigration and foreign investment through the assurance that the United States would conduct itself in accordance with the law of nations.").
118. See id. at 12–13 (citing O'Reilly de Camara v. Brooke, 209 U.S. 45, 51 (1908) (suggesting in passing that the ATCA may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state.)); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 (9th Cir. 1975) (noting in dicta that injuries accruing as a result of the evacuation could be addressed pursuant to the ATCA); Adra v. Clift, 195 F. Supp. 857, 863–65 (D. Md. 1961) (holding that wrongful withholding of custody constituted an actionable tort, and the misuse of a passport to gain the child's entry into the United States was a violation of international law); Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (concluding that the ATCA granted jurisdiction with respect to a dispute concerning title to slaves seized on a captured enemy vessel).
119. See Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (advocating for the use of international law standards); Id. at 963 (Reinhardt, J. concurring) (arguing for the application of domestic federal law).
condemned and well-defined,\textsuperscript{120} (2) whether the offense requires the plaintiff to establish state action, and (3) whether the corporation as a private actor can be held liable for acts of the state or other parties under theories of third-party liability.\textsuperscript{121}

Once a plaintiff bringing an ATS claim against a corporation claims a universally condemned and definable offense, the plaintiff must also show that the alleged violation is actionable against private parties without a showing of state action.\textsuperscript{122} Or, if state action is required, that the action of the defendant was sufficiently linked with state action to form a basis for the claim.\textsuperscript{123} Thus far, courts have held only four violations of the law of nations as actionable without state action: genocide,\textsuperscript{124} war crimes,\textsuperscript{125} forced labor or slavery,\textsuperscript{126} and crimes against humanity.\textsuperscript{127} Additional violations, including torture, rape, and summary execution, are only actionable without a showing of state action when perpetrated in the context of genocide, war crimes, forced labor or slavery, and crimes against humanity.\textsuperscript{128} If the alleged violation requires a showing of state action, U.S. courts have used the joint action test,\textsuperscript{129} the nexus test,\textsuperscript{130}

\begin{footnotes}
\footnotetext[120]{120. This is the standard set out in \textit{Sosa} v. \textit{Alvarez-Machain}, 542 U.S. 692 (2004); \textit{supra} Part II.C.}
\footnotetext[121]{121. Rivera, \textit{supra} note 36, at 269.}
\footnotetext[122]{122. \textit{Id.} at 272.}
\footnotetext[123]{123. \textit{Id.}}
\footnotetext[125]{125. \textit{Kadic}, 70 F.3d at 232.}
\footnotetext[126]{126. \textit{Doe I} v. \textit{Unocal Corp.}, 395 F.3d 932, 932 (2002).}
\footnotetext[127]{127. \textit{See} \textit{Kadic}, 70 F.3d at 232; \textit{see also} \textit{Wiwa} v. \textit{Royal Dutch Petroleum Co.}, 226 F.3d 88, 92 (2d Cir. 2000).}
\footnotetext[128]{128. \textit{See} Rivera, \textit{supra} note 36, at 273 n.110. ("In \textit{Wiwa}, the Southern District of NY discussed when state action would be necessary for claims of crimes against humanity, and found that \textit{Kadic} did not foreclose the possibility that other violations, when committed within the context of crimes against humanity, do not require state action. Further, according to the Rome Statute of the International Criminal Court, certain violations could constitute crimes against humanity, thus eliminating the state action requirement, if committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.'") (citations omitted).}
\footnotetext[129]{129. \textit{See} \textit{id.} at 273 ("Under the joint action test, a plaintiff must show that a state actor was a willful participant acting jointly or in concert with the actors of the deprivation of rights. . . . Under this test, state acquiescence or approval of the deprivation of rights is probably not enough to establish the state actor requirement. The State actor must have participated, influenced or played an integral part in the conduct.").}
\end{footnotes}
and/or the symbiotic relationship test to determine whether the plaintiff can bring the claim. Meeting these requirements establishes that the named defendant is an acceptable defendant for an ATS case.

Once it is determined that a corporation or private individual is an acceptable defendant under the ATS, courts determine the applicable standard for different sources of third-party liability, such as conspiracy, complicity, or aiding and abetting. In the Unocal case, Judge Reinhardt argued in his concurring opinion that the courts must decide whether international law or federal common law is applicable for the various standards of liability and ancillary questions that arise throughout the course of litigating an ATS claim. He emphasized that the choice of law "does not depend on the facts of the particular case, nor does it vary with the particular circumstances of the case." Thus, he believed that a controlling legal principle must govern the legal questions involved, regardless of the particular facts of a case.

Ultimately, the choice of law determination that courts are faced with is whether U.S. federal courts should apply international law, the law of situs, or U.S. domestic standards of liability to the ancillary claims made against corporations or private individuals. Although the defendants typically come to the United States and are thus bound by U.S. laws while here, should they be bound by U.S. standards of liability for acts unrelated to the United States? If so, should

130. See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1980) (applying the nexus test and emphasizing that the key inquiry nonetheless must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself).

131. See Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 269, 328 (S.D.N.Y. 2003) (application of joint action test); Sinaltrainal v. Coca-Cola Co., 256 F. Supp 2d 1345, 1353 (S.D. Fla. 2003) (explaining that a symbiotic relationship existed when two parties confer benefits on each other such that their interdependence is essential to the other's success); see also Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 363, 370 (E.D. La. 1997) (giving a discussion of the various tests to meet the requirement of state action).

132. See Maassarani, supra note 7, at 39.

133. Doe I v. Unocal Corp., 395 F.3d 932, 968 (9th Cir. 2002) (Reinhardt, J., concurring).

134. Id.

135. Id. ("What varies from case to case is not the question of governing law, but whether liability attaches in the particular instance.").
this occur in all situations, or only limited situations? Is it more persuasive to apply domestic federal law when U.S. corporations are involved? Should we apply international standards when there are universal, definite standards of liability?

These are all questions the courts must weigh when determining which standard of liability to apply when assessing the defendant’s action. To make this determination courts have turned to domestic law, general principles of international law or the law of the situs to determine whether the defendant is liable under third-party liability. This lack of consistency leads to confusion as well as potential notice and due process issues. The next section will analyze how these theories have been applied in the courts ruling on ATS cases.

IV. ANALYSIS

A. International Law

International law must provide a “clear and unambiguous” right to support an ATS claim. There are four primary sources for establishing international law: international conventions and treaties establishing expressly recognized rules, customary international law, judicial decisions, and works of “highly qualified” legal scholars.


137. See id. at 324.

138. Nathaniel Burney, International Law: A Brief Primer for Informational Purposes Only (2007), http://www.burneylawfirm.com/international_law_primer.htm (Treaties are “international agreements [that] are governed, not by contract law, but by the Vienna Convention on Treaty Law. Under it, states can do anything they want to agree to, unless it violates a peremptory norm.”).

139. See, e.g., Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (noting that customary international law is something done as a general practice—not because it is expedient or convenient, but because it is considered law, out of a sense of legal requirement); Hagen, supra note 136, at 323 (stating that customary international law is established by the custom or practice of states, evidenced by formal lawmaking and official actions of states, acting out of legal obligation).

140. For example, courts have utilized decisions by the International Criminal Tribunal of Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to determine applicable international law. See Doe I v. Unocal Corp., 395 F.3d 932, 950–51 (9th Cir. 2002).
Article 38 of the Statute of the International Court of Justice\textsuperscript{142} defines these sources of international law.\textsuperscript{143} These are the places that U.S. courts have turned to when they have elected to apply international law standards of third-party liability in ATS suits.

Analysis of the \textit{Unocal} case highlights the issues the court faces when applying vicarious liability standards and how the court has dealt with these issues. The court explained that, throughout the history of ATS cases, courts have applied international law, the law of the state where the underlying events occurred, or the law of the forum state.\textsuperscript{144} The court further stated that when \textit{jus cogens}\textsuperscript{145} violations are alleged, it may be preferable to apply international law rather than the law of any particular state.\textsuperscript{146} The reasoning behind this proposition was that the law of any particular state is

\textsuperscript{141} See Hagen, supra note 136, at 323.

\textsuperscript{142} See U.N. Charter ch. II art. 38, available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (stating to first, look to international conventions and other treaties, second, look to customary international law as evidence of a general practice accepted as law, third, look to general principles of law recognized by civilized nations, and fourth, look to subsidiary determinations of law, such as, judicial decisions and works of highly qualified legal scholars).

\textsuperscript{143} See Burney, supra note 138.

\textsuperscript{144} See generally Barrueto v. Larios, 205 F. Supp. 2d 1325, 1333 (S.D. Fla. 2002) (concluding, on the basis of the statute of and a decision by the International Criminal Tribunal for the former Yugoslavia, that defendants “may be held liable under the ATS for . . . aiding and abetting the actions taken by military officials”); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (noting that among “various contemporary sources” for ascertaining the norms of international law as they pertain to the ATS, “the statutes of the [International Criminal Tribunal for the former Yugoslavia] and the International Criminal Tribunal for Rwanda, and recent opinions of these tribunals are particularly relevant”); Burney, supra note 138, at 950 (finding “recent decisions by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the ATS”).

\textsuperscript{145} “A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted.” BLACK'S LAW DICTIONARY 715 (abr. 8th ed. 2005).

\textsuperscript{146} See Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (“Because ‘the law of nations is part of federal common law,’ the choice between international law and the law of the forum state . . . is less crucial than the choice between international law and the law of the state in which the underlying events occurred. . . . [T]he standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the choice between international and domestic law even less crucial.”).
either identical to the *jus cogens* norm of international law, or it is invalid.\textsuperscript{147} The *Unocal* court supported its determination that international law should apply, by citing the *Restatement (Second) of Conflict of Laws* section six.\textsuperscript{148} The court argued that first, “the needs of the . . . international system” are better served by applying international rather than national law.\textsuperscript{149} Second, “the relevant policies of the forum” cannot be ascertained by referring to one out-of-circuit decision which happens to favor federal common law and ignoring other decisions which have favored other law, including international law.\textsuperscript{150} Third, regarding “the protections of justified expectations,” the “certainty, predictability and uniformity of result,” and the “ease in the determination and application of the law to be applied,” the standard adopted by the majority, although from a recent case, is actually grounded in the Nuremburg trials and is similar to the *Restatement (Second) of Torts*.\textsuperscript{151} Finally, “the basic policy underlying the particular field of law” is to provide tort remedies for violations of international law.\textsuperscript{152}

The court limited its holding to the proposition that application of international law is appropriate to the facts of this particular case. It stated that, “in other cases with different facts, application of the law of the forum state—including federal common law—or the law of the state where the events occurred may be appropriate.”\textsuperscript{153} The court explained that international law should determine the “applicable substantive law” to govern whether Unocal bore third-party liability under ATS.\textsuperscript{154} The court reasoned that using international law better served the needs of the international system and ultimately fulfilled the ATS’s purpose of “provid[ing] tort remedies for violations of

\textsuperscript{147} Id.

\textsuperscript{148} Id. at 949. Support for the application of international law over the law of the state in which the underlying events occurred or U.S. domestic common law is found in the *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 6 (1969).

\textsuperscript{149} Id.

\textsuperscript{150} Id.; see *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 n.12 (2d Cir. 2000).

\textsuperscript{151} Doe I v. Unocal Corp., 395 F.3d 932, 949 (9th Cir. 2002).

\textsuperscript{152} Id.

\textsuperscript{153} Id. at 949 n.25.

\textsuperscript{154} Id. at 949.
There is additional support for the Ninth Circuit's determination that use of international law is appropriate to determine the standard of third party liability. In the Sosa appeal to the U.S. Supreme Court, foreign governments and the European Commission filed amicus curiae briefs in support of applying international law. In these briefs, the European Commission called for U.S. courts to "rigorously apply international law" both "to determine the conduct that gives rise to a violation of the law of nations" and "to determine the actors who may be subject to liability." The U.S. tried to argue that no cause of action could be inferred from customary international law norms unless such norms had been affirmatively adopted and made enforceable by the political branches of the United States. In its opinion, the Supreme Court rejected the United State's position that only customary international law norms adopted and made enforceable by the political branches could serve as the basis for such causes of action. This leaves open the possibility that the Supreme Court will embrace the reasoning of the majority in Unocal to apply international law to determine the standard of third-party liability.

In the context of international law, there are five different theories of third party liability that are arguably clearly defined and universally accepted enough to be argued in an ATS case in federal court: aiding and abetting, joint criminal enterprise, conspiracy, instigation, and procurement.

1. *Aiding and Abetting*

The Ninth Circuit case, *Doe I v. Unocal Corp.*, provides discussion about the applicable choice of law with respect to the aiding and abetting standard under ATS. The majority looked at international criminal law jurisprudence to determine the standard required to establish third-party liability based on a charge of aiding and abetting a violation

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155. *Id.*
157. *Id.*
158. *Id.*
of the law of nations. The majority in *Unocal* utilized the international standard of aiding and abetting established by the ICTR and ICTY, as an argument for finding Unocal liable for the human rights violations that occurred. The international crime of aiding and abetting is defined as: "knowing and practical assistance or encouragement that has a substantial effect on the perpetration of the crime." The importance of using international standards such as aiding and abetting is that such complicity standards allow plaintiffs to "hold a corporation directly liable as an accomplice in crime, not just vicariously liable through a principle-agent relationship with the tortfeasor" (which is typically the case when applying U.S. domestic standards of liability). Finding a corporation liable under the international standard of aiding and abetting is "the same as being culpable of knowingly 'supplying the killer with a gun,' as these companies are providing the funds, equipment, directives, logistics, and motivation to carry out rape, murder, forced labor, and other abuses."

2. Joint Criminal Enterprise

Courts could apply the standard for joint criminal enterprise ("JCE") that was discussed in the ICTY case, *Prosecutor v. Tadic.* The *Tadic* decision discussed three categories of liability for JCE. The first, referred to as

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161. *See Unocal Corp.*, 395 F.3d at 937 (looking to the aiding and abetting standard described in decisions of the international criminal tribunals of Rwanda (ICTR) and Yugoslavia (ICTY)).
162. "Aiding and abetting liability allows plaintiffs to hold a corporation directly liable as an accomplice in crime, not just vicariously liable through a principle-agent relationship with the tortfeasor." *Maassarani,* *supra* note 7, at 44.
164. *Id.* at 947.
165. *See Maassarani,* *supra* note 7, at 44–45.
166. *See id.* at 45.
167. *See Maassarani,* *supra* note 7, at 52 (describing the "new form of joint criminal enterprise ("JCE")" accomplice liability that was based on the understanding that criminal liability limited to the material perpetrator improperly denies criminal liability of the co-perpetrator, while accomplice liability still "understate[s] the degree of their criminal responsibility" ) (citations omitted). The majority in *Unocal* utilized the international standard of aiding and abetting established by the International Criminal Tribunal for Rwanda (the "ICTR") and the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"), as an argument for finding Unocal liable for the human rights violations that occurred. *Unocal Corp.*, 395 F.3d at 949–50.
collective liability, "is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention." The second category, referred to as the "concentration camp" cases, applies when "the offences charged were alleged to have been committed by members of military or administrative units" thus linking them by nature of their authoritative positions. The final category "concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose."

The Appeals Chamber then outlined the actus reas and mens rea elements for each JCE category. There must be a common plan, design, or purpose that amounts to or involves the commission of a crime. However, it is not necessary that the plan, design, or purpose have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a purity of persons acts in unison to put into effect a joint criminal enterprise. The requisite participation need not involve commission of a specific crime, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. This is most likely where corporations will be found to be liable as participating in the JCE.

As for the requisite mens rea element, in the "co-perpetrator" class, shared intent to perpetrate the alleged crime, or a common state of mind must be shown. In the

168. Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 196–200 (July 15, 1999), available at http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf. Collective liability is proven by showing "the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design, (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill." Id.

169. Id. ¶¶ 202–03.
170. Id. ¶¶ 204–19.
171. Id. ¶¶ 210–12.
172. Id. ¶¶ 210–14.
173. Id. ¶ 221.
175. Id. ¶¶ 220, 228.
“concentration camp” scenario, personal knowledge of the system of ill treatment, as well as the intent to further this common concerted system of ill-treatment is required.\footnote{176} In the “unintended crime” situation, responsibility for a crime outside the scope of that agreed upon in the common plan arises when, “under the circumstances of the case (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.”\footnote{177}

In its opinion, the Appeals Chamber demonstrated that JCE is well established and distinct from aiding and abetting under international law.\footnote{178} Furthermore, in \textit{Hamdan v. Rumsfeld}\footnote{179} the ICTY’s JCE theory of liability was cited favorably by a plurality of the Supreme Court’s Justices.\footnote{180} Additionally, the Southern District of Florida has utilized JCE, emphasizing that such form of accomplice liability is well established in customary international law.\footnote{181} Therefore, it appears that the international standard of JCE laid out in the \textit{Tadic} case is widely accepted and defined with enough specificity to be a potential standard utilized in U.S. federal courts.

\section{Conspiracy}

In addition to JCE, there is an international standard to determine conspiracy to which courts could turn during the course of an ATS litigation. The accepted international standard for conspiracy can be found in the Nuremberg statute: “‘Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.’”\footnote{182} The international standard for conspiracy...
has also been upheld "as a well established principle of international customary law by at least two U.S. District Courts."\(^{183}\) Conspiracy is distinguishable from the JCE standard of liability because in conspiracy there is a requisite showing that the activities were committed in furtherance of the common purpose.\(^{184}\) In addition, section 876 of the Restatement (Second) of Torts provides analogous civil liability under domestic law for "a tortious act [done] in concert with [another] or pursuant to a common design . . . ."\(^{185}\) Since this standard is found in both widely recognized international law and in U.S. domestic law, corporations should take this potential liability into consideration when doing business abroad.

4. Instigation

The international standard for instigation has been most extensively utilized by the ICTR, usually in cases that deal with vocal incitement to genocide and instigation of crowds to violence.\(^{186}\) In the Akayesu case, the ICTR held a defendant—though not a participant in the crime—liable for instigation with the direct or specific intent to do so, he or she prompts another to commit an offence, which is then committed "through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice," as well as omissions when there exists a clear duty to act.\(^{187}\)

The plaintiff must show that the instigation was a "clear contributing factor" to the perpetration of the crime, but it need not be that "the crime would not have occurred without the accused's involvement."\(^{188}\) The applicability of instigation

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183. Maassarani, supra note 7, at 58–59 (citing Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 321 (S.D.N.Y. 2003) (holding that ATCA suits may proceed based on theories of conspiracy and aiding and abetting); Barrueto, 205 F. Supp. 2d at 1333; Eastman Kodak, Co. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997) ("[T]he Court believes that it would be a strange tort system the imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through coercive use of state power.").

184. Id. at 57.

185. Id. at 60.

186. Id. at 61 (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 482, 536 (Sept. 2, 1998)).

187. Id. at 61.

188. Id. (citing Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and
has been limited mainly to the genocide situation in Rwanda. Liability for instigation is also recognized by U.S. tort law:

[For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself [or if he] induces the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own . . . . 189

5. Procurement

Courts can also look to the ICTR's decisions to determine the standard for procurement. 190 This standard was applied in the Unocal and Talisman191 cases, where "the corporation provided the host government with funding, facilities, or equipment to secure its operations, all the while fully cognizant of the fact that it would go towards human rights abuses as forced labor, torture, and extrajudicial killing."192 Thus, there are various standards clearly laid out in international law that U.S domestic courts could apply to determine accomplice liability in ATS claims where corporations are named as the defendant.

B. Federal Common Law

Some jurists believe that courts should not be applying international standards, but should apply domestic standards of third-party liability when confronted with the issue in ATS suits. 193 Justice Reinhardt, concurring in the Unocal decision, agreed with the result of the case, but rejected the majority's application of international criminal law standards of third-party liability. 194 He instead urged for application of federal

190. See Maassarani, supra note 7, at 62 (quoting Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 482, 536 (Sept. 2, 1998) (“The provision of ‘weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes’ is commonly known as procurement.”)).
192. See Maassarani, supra note 7, at 63-64.
193. See Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring).
194. Id.
common law tort principles such as agency, joint venture, and recklessness liability. 195

Judge Reinhardt claimed that the court should “look to traditional civil tort principles embodied in federal common law, rather than to evolving standards of international law, such as a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal.” 196 He further claimed that the text of the statute made it clear that international law applies when determining whether a violation of the law of nations has occurred. 197 However, according to Judge Reinhardt, there was no indication from the language of the ATS which body of law should apply to ancillary issues that may arise. 198 Looking at federal common law, Judge Reinhardt commented that, although federal courts only apply federal common law in limited circumstances, “international relations constitute one category of cases in which federal common law is frequently applied.” 199 Judge Reinhardt concludes that, since ATS cases involve the violation of international law, they almost always implicate foreign relations, and federal common law should be applied. 200

Judge Reinhardt stated that, “there is a distinction between substituting international law for federal common law and making proper use of international law as a part of federal common law.” 201 He argued that courts should refrain from substituting international law principles for established federal common law unless a statute mandates such substitution. 202 When determining the choice of law to apply to a case, Judge Reinhardt urged courts to consider the factors set forth in the Restatement (Second) of Conflict of Laws section six. 203 He argued that these factors weighed in

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195. Id.; Rivera, supra note 36, at 274.
196. Unocal Corp., 395 F.3d at 964–65 (Reinhardt, J., concurring).
197. See id.
198. Id.
199. Id.
200. See id. at 965 (“There are unique federal interests involved in Alien Torts Claims Act cases that support the creation of a uniform body of federal common law to facilitate the implementation of such claims.”).
201. Doe I v. Unocal Corp., 395 F.3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring).
202. See id. at 966.
203. Id. at 967–68; see also THE RESTATMENT (SECOND) OF CONFLICT OF LAWS, supra note 148, § 6.
favor of applying federal common law in ATS cases.\textsuperscript{204} To begin, "ease in the determination and application of the law to be applied" is furthered by applying a well-developed body of law, not a standard purported in an ad hoc tribunal recently created.\textsuperscript{205} Additionally, "certainty, predictability and uniformity of result" have a higher chance of being obtained when a well-founded precedent upon which to rely exists.\textsuperscript{206} Finally, "the basic policy[il] underlying the particular field of law" is to provide appropriate tort remedies for international law violations.\textsuperscript{207} Thus, Judge Reinhardt argued that applying domestic common law was the appropriate choice of law, according to the \textit{Restatement (Second) of Conflict of Laws}.\textsuperscript{208}

In addition to the Ninth Circuit, the Eleventh Circuit has also held that "the purpose of the ATS is 'to establish a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.'"\textsuperscript{209} Furthermore, resolving the question of when third-party liability arises is a basic legal matter that is routinely determined by federal courts.\textsuperscript{210} The New York district court's holding in the South Africa Apartheid cases show additional judicial resistance to applying international law to ATS claims.\textsuperscript{211} The court there stated that international aiding and abetting standards are not sufficiently "universal, definable, and obligatory" to be recognizable under international law.\textsuperscript{212} Thus, the court

\begin{itemize}
\item \textsuperscript{204} \textit{Unocal Corp.}, 395 F.3d at 967–68.
\item \textsuperscript{205} \textit{Id}.
\item \textsuperscript{206} \textit{Id}.
\item \textsuperscript{207} \textit{Id}. at 968.
\item \textsuperscript{208} \textit{See id}. ("[T]he application of third-party liability standards generally applicable to tort cases directly furthers the basic policy of using tort law to redress international wrongs, whereas the application of international criminal law doctrines does not advance that objective . . . . [B]ecause Supreme Court precedent concerning the application of federal common law dictates its application here, and because the accepted choice of law factors overwhelmingly militate in favor of applying federal common law, [the court should] derive a third-party liability standard for ATS cases from that body of law.").
\item \textsuperscript{209} \textit{Id}. at 966 n.4 (quoting Abebe-Jira v, Negewo, 72 F.3d 844, 848 (11th Cir. 1996)).
\item \textsuperscript{210} \textit{Doe I v. Unocal Corp.}, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concurring).
\item \textsuperscript{211} \textit{See In re S. African Apartheid Litig.}, 346 F. Supp. 2d 538, 551–53 (S.D.N.Y 2002).
\item \textsuperscript{212} \textit{See id}.
\end{itemize}
applied domestic tort law.\textsuperscript{213} Moreover, the Ninth Circuit in \textit{Sarei v. Rio Tinto, PLC} recently held that "courts applying the [ATS] draw on federal common law, and there are well-settled theories of vicarious liability under federal common law."\textsuperscript{214}

In addition to the fact that not all jurists believe that international standards of vicarious liability should be applied, there are also legal scholars who criticize the Ninth Circuit's application of international law in \textit{Unocal} to determine standards of liability in ATS cases.\textsuperscript{215} Such scholars argue that courts attempting to follow \textit{Unocal} and applying international law beyond the ATS's grant of subject matter jurisdiction "may find themselves undertaking the unwieldy analysis of whether there is an international norm, whether that norm has been violated, and whether the violation is actionable in court."\textsuperscript{216} Extending the application of international law beyond ATS's jurisdictional grant invites judicial "creativity" in the many cases where international law does not provide clear guidance.\textsuperscript{217} Critics of the application of international law to determine third-party liability fear that such utilization would lead to inconsistent and unpredictable decisions.\textsuperscript{218}

\textbf{C. Domestic Law of the Nation Where the Violation Occurred}

There is also an argument that courts should look to the

\textsuperscript{213} \textit{Id.} at 554.
\textsuperscript{214} Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007), \textit{reh'g en banc granted} 499 F.3d 923 (9th Cir. 2007).
\textsuperscript{216} \textit{Id.} at 1529.
\textsuperscript{217} See \textit{id.} at 1529.
\textsuperscript{218} \textit{Id.} at 1529–30 ("[E]ven assuming that a district court could reach a definitive international law conclusion on each ancillary question arising in litigation, such determinations would remain ultimately unpredictable. For example, in \textit{Unocal}, the majority relied principally on two international criminal tribunal cases decided in 1998 and 2000, respectively. How could \textit{Unocal}, the Myanmar Military, or the plaintiff villagers have understood the legal consequences of the alleged actions before 1998 if the source of the majority's principle did not emerge until then? Since \textit{Unocal}, plaintiffs have begun to bring lawsuits against hundreds of corporations for actions that occurred as far back as 1960. . . . Because courts in ATS cases apply the international law in force at the time of decision, not at the time the action in question occurred, this problem is likely to arise frequently.").
law of the situs when determining applicable standards for various forms of third-party liability. In Filartiga, the court ruled that Paraguayan law was the appropriate source to determine the standard for setting compensatory damages. However, since there were no punitive damages recognized in Paraguayan law, the court also looked to international law to determine the standard for those types of damages to be awarded.

V. PROPOSAL

When courts are faced with determining where to find the applicable standard to apply to third-party liability in ATS cases, courts should follow the international law standard laid out by the majority in Unocal. U.S. domestic courts should apply international law when it is sufficiently established and well-defined. This would address the complaints of those challenging the legitimacy of the district courts that hold corporations liable under complicity standards. International law should be utilized to determine the standard of third-party liability, assuming there is a universally recognized and clearly defined standard. If there are no jus cogens norms or universally recognized international standards for the alleged liability, courts should be free to apply the law of the situs or U.S. domestic law. Currently courts do not go through this type of analysis, but simply differ by Circuit as to what standard applies. This has the potential to lead to forum shopping to pick a Circuit that applies standards more favorable to that particular case. Courts should instead focus on the defendant and adopt the most established standard available to ensure full notice, due process, and fundamental fairness. This would result in something similar to that proposed by the court in Tachiona v. Mugabe, which advocated a case-by-case approach, making use of "federal common law, the forum state, the foreign jurisdiction most affected, international law or a combination of these sources."

219. See Filartiga v. Pena-Irala, 630 F. 2d 876 (2d Cir. 1980).
220. Id. at 865.
221. Id.
222. See Maassarani, supra note 7, at 46.
224. Id. at 411.
Applying an international standard is the most efficient and fair way to ensure full notice to the defendant engaging in violations of the law of nations. It is presumed that an individual or corporation will be on notice that they will be held liable to standards with truly universal recognition. In doing this, U.S. courts are holding individuals or corporations liable for a violation of an international norm that was committed in a foreign state. Since the act was not committed in U.S. territory, the defendant is more likely to believe that he is held to standards universally recognized by the international community, not the intricacies of U.S. domestic law.

If the courts apply a standard of liability that is followed in customary international law, they have a greater likelihood of satisfying the maxim *nullum crimen sine lege*. The basis of this maxim is that "criminal law ought to be certain, so that people can know in advance whether the conduct on which they are about to embark is criminal or not." It would be unfair to hold an individual actor or corporation liable for actions if it was not on notice that such action could lead to a type of third-party liability. Additionally, requiring private actors to be knowledgeable of all the particulars of United States federal standards of tortious third-party liability seems unduly burdensome when there are customary international law standards of liability of which the whole world is presumably on notice. Thus, based simply on the principles of fairness and notice, international standards should apply where appropriate.

Furthermore, the use of international standards of liability will help to strengthen the international community. As part of the international community, the United States should apply, when appropriate, standards set forth and recognized internationally. Applying such standards, if they truly meet the requirements of customary international law, would not conflict with U.S. domestic jurisdiction. In fact, "[w]hen an international legal principle achieves sufficient international acceptance that it constitutes customary international law, it also becomes part of the federal common

226. Id.
Third-Party Liability

Furthermore, "[a]ll international legal principles do not automatically become a part of the federal common law; only those that achieve the status of customary international law or are included in international treaties are incorporated as part of federal common law." A customary law "results from a general and consistent practice of states followed by them from a sense of legal obligation." The necessary check is in place so that international claims do not conflict with domestic jurisdiction.

Applying international standards of liability also arguably makes the ATS itself more legitimate. Since the statute is international in nature, it makes sense to utilize international norms, where applicable, throughout the litigation process. This would seem to aid in the consistency and efficiency of the whole process of litigating ATS claims. For the reasons stated above, international law should be followed when applying standards of third-party liability in ATS litigation.

However, a universal and clearly defined international standard will not exist for all sources of liability. Thus, courts should apply either domestic law or the law of the situs to determine the applicable standards by which the courts are able to hold parties liable for violations of international law. Defendants should not escape liability simply because no form of vicarious liability is well defined in the international community when a standard of liability is defined and applicable in either the state where the violation occurred or in U.S. domestic law. If the violations occurred in a state with a clearly developed and operative legal system, where the actor charged with violating the law of nations was presumably on notice that his actions may give rise to liability, the law of the situs should be applied. This rationale is justified by the notice issue that could potentially rise throughout the course of litigation, as the actor is presumed to be on notice of the laws that apply to his or her behavior in the country he or she is located. Therefore, applying the law of situs could eliminate any lack of notice.

228. Doe I v. Unocal Corp., 395 F.3d 932, 969 (9th Cir. 2002); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102 (1986).
229. Unocal Corp., 395 F.3d at 969; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, supra note 228, § 102.
defense potentially available to the defendant.

The problem with only applying the law of the situs is that most violations of the law of nations occur in developing nations that do not have a strong, operative legal system. Therefore, if there is not a universal, well-defined international law or clearly developed law of situs that U.S. courts could effectively apply, U.S. domestic courts should freely apply U.S. domestic law to determine the standard of third-party liability. The defendants should only be hailed into U.S. courts if such courts have personal jurisdiction over them. A corporation may subject itself to personal jurisdiction in federal courts of the United States by purposefully availing itself through minimum contacts with the forum state, which are continuous and systematic, or highly related to the cause of action.\textsuperscript{230} By putting themselves in a position where a court has personal jurisdiction over them, the defendants presumably would have the reasonable expectation of accountability to U.S. laws. Therefore, they would be on notice of the different standards of liability for which they could be charged. This reasoning is especially persuasive when American corporations are being named as defendants. These corporations will certainly be on notice of the standards of liability applicable for violations of U.S. law.

The proposed approach satisfies all of the required elements to establish an ATS claim. Since the threshold violation must be a violation of international law, the international aspect of the tort is covered. The claims are brought in United States domestic courts, and therefore, determining liability is sufficiently addressed by the standards laid out in U.S. domestic courts. There is the potential for inconsistency if U.S. courts are required to apply standards set out in international tribunals or by international legal scholars that is not universally accepted or defined clearly. Applying U.S. domestic law is acceptable because U.S. courts are knowledgeable in applying their own standards of liability. Furthermore, the United States is contributing to the international protection of human rights by providing a venue for victims seeking justice against the

\textsuperscript{230} See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (establishing the \textit{purposefully availed} standard); Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing the \textit{minimum contacts} standard).
individual perpetrators of the violations. The courts should be able to apply their own well-defined standards of liability to cases brought under their jurisdiction when there is no other universally accepted standard to apply.

VI. CONCLUSION

Although practically unused for almost 200 years, the ATS has become a powerful tool for U.S. courts to hold actors liable for their participation in committing international violations of human rights. It has been used to hold state officials, private actors, and corporations liable for their contribution to violations of the law of nations.231 For every ATS claim, the plaintiff(s) must assert a violation of an international norm that is universally recognized and defined with specificity. This was the standard set out by the Supreme Court in Sosa, the Court's most recent decision interpreting the ATS.232 If a corporation or private actor is being sued through third-party liability, courts must determine first whether state action is required for the tort alleged, and second, what standard of third-party liability applies.233 Based on the requirement of notice and the notions of fairness and efficiency, courts should utilize internationally established standards of third-party liability, assuming such a standard exists for the type of liability being alleged (i.e. complicity) with universal recognition and a clear definition.234 If no international standard exists, then U.S. courts can and should apply U.S. domestic standards of liability or the law of the situs to hold corporations and individual actors liable for their contributions to international human rights violations.235

231. See supra Part II.A–B.
232. See supra Part II.C.
233. See supra Part III.
234. See supra Part V.
235. See supra Part V.