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LIABILITY FOR TORTS IN VIOLATION OF INTERNATIONAL
LAW: NO HOOK UNDER *SOSA* FOR SECONDARY,
COMPLICIT ACTORS

HELENA LYNCH*

*“This old but little used section is a kind of legal Lohengrin;
although it has been with us since the first Judiciary Act . . .
no one seems to know whence it came.”*¹

I. INTRODUCTION

Under the Alien Tort Statute (ATS), United States federal courts provide a forum for causes of action brought by aliens for torts committed in violation of international law.² Until *Sosa v. Alvarez-Machain*,³ however, it was not certain whether the ATS simply provided a jurisdictional grant to the federal courts or a substantive cause of action for violations of international law.⁴ In *Sosa*, the United States Supreme Court held that while the statute does not create a cause of action, the statute does provide a forum for a narrow field of already-recognized causes of action for “tort[s] . . . committed in violation of the law of nations.”⁵ The Court did not address whether secondary actors — i.e., those complicit in the violations — could also be held liable under the ATS. The most visible of the current ATS cases, however, involve claims against complicit,

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1. Circuit Judge Henry Friendly, referring to the Alien Tort Statute. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

2. The statute reads: “The District Courts shall have original jurisdiction of any civil claim by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” 28 U.S.C. § 1350 (2000).

3. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

4. *See id.* at 713; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

5. *Sosa*, 542 U.S. at 724. This is a fine distinction: The petitioner, Humberto Alvarez-Machain, contended that the statute itself was intended as authority for the creation of a new cause of action for torts in violation of international law. *Id.* at 713. The Court disagreed with this interpretation. *Id.* The Court did agree, however, that torts in violation of international law are recognized within the common law and that it is these common law-defined causes of action in violation of international law that the ATS authorizes federal courts to hear. *Id.* at 724.

or secondary, actors who allegedly provided support to those who violate the law of nations.⁶ Given *Sosa*'s narrow definition of what may be recognized as a 'tort committed in violation of the law of nations,' are there now any grounds under the ATS for holding liable those who provide material support to the primary actors?

This Note contends that the standard set by *Sosa* effectively renders complicity claims not actionable under the ATS. Pre-*Sosa*, the only complicity standard in international law arguably cognizable under the ATS was the aiding and abetting standard that was developed by the International Tribunals for Rwanda and the former Yugoslavia. The aiding and abetting standard ultimately fails, however, to satisfy the criteria to constitute a cause of action under the ATS as set forth in *Sosa*. It is neither sufficiently universally recognized nor defined with sufficient specificity so as to satisfy *Sosa*.

This Note further contends that other asserted standards by which to measure the liability of secondary actors under the ATS — including domestic federal common law standards such as joint venture liability and reckless disregard, and the state action analysis under 42 U.S.C. § 1983⁷ — are inapplicable. Because the ATS is a vehicle for a narrow class of causes of action in international law, causes of action for complicity must be defined under international law, not under domestic federal standards.

As a result, since neither the aiding and abetting nor other asserted standards for rendering liable secondary actors satisfy *Sosa*, complicit actors are essentially untouchable under the ATS unless they are in direct control of the primary actors.⁸

Part II of this Note examines the history of the ATS and the debates regarding its current application. Additionally, Part II discusses the extent to which *Sosa* has ratified the causes of action that

6. *E.g.*, *Doe v. Unocal*, 110 F. Supp.2d 1294 (C.D. Cal. 2000) (villagers suing Unocal Corporation as a complicit or secondary actor for providing support to the Myanmar government's violations of the law of nations), *rev'd in part, aff'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

7. Under the state action analysis, if the complicit actors were state actors, then their conduct would violate international law for purposes of the ATS if the conduct of the primary actors did as such. *See Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

8. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996) (holding the defendant liable for genocide based on his direct command of the primary actors).

have been recognized to date under the ATS. Part III discusses the need to settle on a workable standard for determining alleged complicity in violations of international law. Part IV examines the various approaches taken by courts to assess liability against indirect actors, and the international precedent and legal authority for the aiding and abetting standard. Finally, Part IV discusses why there is no standard for complicity cognizable under the ATS.

II. A HISTORY OF THE ALIEN TORT STATUTE AND THE IMPACT OF *SOSA v. ALVAREZ-MACHAIN*

The original version of the ATS was enacted as part of the Judiciary Act of 1789, drafted by the first Congress.⁹ As it stands today, the statute 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.”¹⁰ Remarking on the mystery surrounding the ATS, Judge Henry Friendly of the United States Court of Appeals for the Second Circuit wrote, “[t]his old and little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came.”¹¹ Like Lohengrin,¹² the statute remained hidden, its identity nearly unknown for almost two hundred years, until a Paraguayan woman journeyed to New York and pursued the Paraguayan police inspector who had tortured and murdered her younger brother in Paraguay.¹³ Her journey resulted in the landmark case *Filartiga v. Pena-Irala*.¹⁴ She brought her claim under the ATS, and, on appeal, the Second Circuit ruled that torture committed by a state actor against a citizen

9. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) (current version at 28 U.S.C. § 1350 (2000)).

10. 28 U.S.C. § 1350 (2000).

11. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

12. Lohengrin is the knight of the swan in a German legend whose identity, too, long remained unknown: According to the legend, Lohengrin betrothed his bride on the condition that she shall not ask his identity; when she breached the condition, Lohengrin revealed his identity and then departed forever. ENCYCLOPEDIA BRITANNICA, INC., 14 ENCYCLOPEDIA BRITANNICA 337 (1948).

13. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

14. 630 F.2d 876.

constitutes an actionable violation of international law under the ATS.¹⁵

Twenty-five years have passed since *Filartiga*, and courts hearing ATS cases are still primarily concerned with whether the claims before them involve issues of international law. The Second Circuit, in *Kadic v. Karadzic*,¹⁶ framed the issue as it typically appears in ATS cases: “The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.”¹⁷ In *Filartiga*, the Second Circuit stated that “a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations.”¹⁸

The *Filartiga* court’s use of the word “threshold” is telling of the importance attached to the determination of whether an alleged act violates the law of nations. The Supreme Court has confirmed what twenty-five years of case history established — that not all violations of the law of nations will qualify as a cause of action under the ATS.¹⁹ In its first major decision on the issue, the Supreme Court held:

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [the ATS], we are persuaded 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 [the ATS] was enacted.²⁰

Thus, the Court has declared that the ATS acts as a vehicle for those causes of action in international law that are recognized in the common law, without the need for separate legislatively defined rights

15. *Id.*

16. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1996).

17. *Id.*

18. *Filartiga*, 630 F.2d at 880.

19. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

20. *Id.* at 732. The Court’s reading of the history of the enactment of the statute determines that the statute, when drafted, was meant to apply to a “modest number of international law violations with a potential for personal liability at the time.” *Id.* at 724. This circumspect list included only violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 715 (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

of action. How did the Court derive the parameters of the authority granted by this single sentence, with no visible legislative history, of the Judiciary Act of 1789?

A. *The Alien Tort Statute: What Did Congress Intend?*

1. The Fledgling Nation Needed a Mechanism to Redress International Law Violations

According to the *Sosa* court, there existed a sphere of international law in which “rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”²¹ In other words, this sphere existed where the state-based and individual-based principles of international law overlapped. It was this “hybrid” area that Blackstone was referring to when he identified three offenses against the law of nations that were recognized by the criminal law of England: (1) violation of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.²² Although these acts were punishable by domestic courts, they could still have consequences in international relations. As the Court explained, “An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war.”²³

As the *Sosa* court noted, the young United States government was particularly preoccupied with this hybrid area.²⁴ The Continental Congress, “hamstrung by its inability to ‘cause infractions of treaties, or the law of nations to be punished,’”²⁵ in 1781 called upon

21. *Id.* at 715. The court noted that this sphere was in addition to the two discrete principles, or spheres, of international law already in operation at the time the ATS was enacted, namely (1) the traditional notion of international law, which is restricted to relationships between states, and (2) the more “pedestrian” area of judge-made international law, which regulates the conduct of individuals, primarily those involved with the mercantile trade. *Id.* at 714–715.

22. *Id.* (citing WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

23. *Id.* at 715 (citation omitted).

24. *See id.* at 715–716.

25. *Id.* at 716 (citing J. MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)).

the state legislatures to provide remedies for essentially the same three violations enumerated by Blackstone.²⁶ Congress made the same request again in 1784, after an incident in which the Secretary of the French Legion, Francis Barbe Marbois, was verbally and physically assaulted in Philadelphia.²⁷

As a result of this assault, “the French minister plenipotentiary lodged a formal protest with the Continental Congress”²⁸ and threatened to leave Pennsylvania unless he was fully satisfied by the outcome of the dispute.²⁹ In *Respublica v. Longchamps*,³⁰ the Chief Justice of Pennsylvania held that an assault on the French Consul General was “an infraction on the law of nations. This law, in its full extent, is part of law of this State, and is to be collected from the practice of different Nations, and the authority of writers.”³¹ The

26. As the Court explains, the Continental Congress implored “state legislatures ‘to provide expeditious, exemplary, and adequate punishment’ for ‘the violation of safe conducts or passports, . . . of hostility against such as are in amity, . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . .’ [and] ‘infractions of treaties and conventions to which the United States are [sic] a party.’” *Id.* (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136–37 (G. Hunt ed. 1912) (all omissions and first alteration in original)). Connecticut is the only state to have acted upon this request. *Id.* (citing FIRST LAWS OF THE STATE OF CONNECTICUT 82, 83 (J. Cushing ed. 1982)).

27. *Id.* at 716–717; see *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

28. *Sosa*, 542 U.S. at 717 n.11 (citing 27 JOURNALS OF THE CONTINENTAL CONGRESS 478 (G. Hunt ed. 1928) (1784)).

29. *Id.* (citing Letter from Samuel Hardy to Gov. Benjamin Harrison of Virginia (June 24, 1784), in 7 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 558, 559 (E. Burnett ed. 1934)).

30. *Longchamps*, 1 U.S. 111.

31. *Id.* at 116. The court also asserted that law of nations was considered part of the common law in England: In discussing a similar case heard by the Court of King’s Bench, the opinion states, “the Court never doubted, that the law of nations formed a part of the law of England, and that a violation of this general law could be punished by them . . .” *Id.* at 117. Some debate has occurred as to whether the law of nations was part of the Colonies, and therefore became the common law of the various States, or whether the law of nations became part of our federal law when the Nation was formed, but *Banco National de Cuba v. Sabbatino*, 376 U.S. 398 (1964), is considered to have authoritatively resolved this dispute in favor of the federal judiciary. For more on this topic, see generally Howard Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (being mainly a response to Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), which suggested that federal courts do not have the authority to integrate customary international law standards into their precedent without prior political branch action). It now seems settled that “[f]ederal jurisdiction over cases involving international law is clear.” *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir.

case was to be decided according to the principles of the law of nations, which formed a part of the municipal law of Pennsylvania.³² The court found that the international status of the offense was justified because one who commits an attack on a foreign minister “not only affronts the Sovereign he represents, but also hurts the common safety and well being of nations; he is guilty of a crime against the whole world.”³³ The message was clear that, although this case was adjudicated in a municipal state court, the court’s task was to apply principles of international law.³⁴ The Continental Congress passed a resolution approving of the state court proceedings in the case and asked the Secretary of Foreign Affairs to apologize to Marbois.³⁵ The original draft of the ATS, included in the first Judiciary Act, read: “[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”³⁶

2. The Debate: Pure Jurisdictional Grant or Authority to Entertain Causes of Action?

In *Sosa*,³⁷ defendant-petitioner *Sosa* argued that the ATS provides only a jurisdictional grant to federal courts and that the stat-

1980). The *Filartiga* court stated that, under the Articles of Confederation, the several states had applied the law of nations as part of their common law, but with the founding of the “more perfect union” in 1789, the law of nations became of federal concern. *Id.* at 877–78.

32. *Longchamps*, 1 U.S. at 114.

33. *Id.* at 116.

34. The case was to be “determined on the principles of the law of nations, which form a part of the municipal law of Pennsylvania.” *Id.* at 114.

35. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 n.11 (2004) (citing 27 JOURNALS OF THE CONTINENTAL CONGRESS 503 (Worthington C. Ford et al. eds. 1903–37); 28 JOURNALS OF THE CONTINENTAL CONGRESS 314 (Worthington C. Ford et al. eds. 1903–37)).

36. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (current version at 28 U.S.C. § 1350 (2000)). For a good description of the ATS (and a comparison of the 1789 version with the current version), see *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

37. The underlying facts of *Sosa* are summarized as follows: Drug Enforcement Agency (DEA) agents in the United States suspected the respondent, Humberto Alvarez-Machain, a physician, of participating in the 1985 torture and murder of DEA agent Enrique Camarena-Salazar. *Sosa*, 542 U.S. at 697. After a federal grand jury in California indicted Alvarez-Machain, negotiations between the DEA and the Mexican govern-

ute provides no authority for courts to recognize causes of action without independent Congressional action.³⁸ Respondent Alvarez-Machain argued that the statute grants courts the authority to create new causes of action for torts in violation of international law.³⁹ The Supreme Court found that there was no legislative history on the question: "There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section."⁴⁰ Nevertheless, the Court, based on its reading of history, declared that "[a]lthough we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."⁴¹

This debate was not new. In *Tel-Oren v. Libyan Arab Republic*, which involved a claim under the ATS arising from a terrorist attack on a passenger bus in Israel, three judges on the Court of Appeals for the District of Columbia Circuit wrote three separate concurring opinions.⁴² The *Tel-Oren* court dismissed the claim, but each judge on the panel expressed different reasons for so doing. In his concurrence, Judge Edwards argued that the ATS provides both a right of action and a forum.⁴³ He reasoned that to deny that a cause of action is implied in the statute would be to nullify the law of nations portion of the ATS, since it "relegates decisions on such

ment for extradition of Alvarez-Machain to the United States failed. *Id.* at 698. The DEA then hired a group of Mexican nationals to seize Alvarez-Machain and bring him to the United States for arrest and trial. *Id.* Sosa was one of the group of Mexican nationals that abducted Alvarez-Machain to the United States. *Id.* Alvarez-Machain first moved to dismiss the indictment as "outrageous government conduct." *Id.* The Ninth Circuit granted the motion, but the Supreme Court reversed. *Id.* Alvarez-Machain then brought a civil suit against Sosa and others under the Federal Tort Claims Act, and against Sosa alone under the ATS, claiming that his arbitrary arrest and detention constituted a tort in violation of the law of nations. *Id.* at 698-99.

38. *Id.* at 712.

39. *Id.* at 713.

40. *Id.* at 718.

41. *Id.* at 712.

42. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

43. *Id.* at 777 (Edwards, J., concurring).

questions to the states themselves”⁴⁴ Edwards distinguished the ATS from Section 1331, which is a purely jurisdictional grant and requires that an action “arise under” the laws of the United States.⁴⁵ In contrast, according to Edwards’s opinion, the ATS “only mandates a ‘violation of the law of nations’ in order to create a cause of action. The language of the statute is explicit on this issue: by its express terms, nothing more than a violation of the law of nations is required to invoke [the ATS].”⁴⁶ Nevertheless, Edwards opined that the acts of torture committed by the PLO, heinous as they were, were not actionable under the ATS because torture could not be considered a violation of the law of nations when committed by a non-state party.⁴⁷

Judge Bork, in a separate concurrence, maintained that the ATS, like Section 1331, is a purely jurisdictional grant, and that Separation of Powers principles prevent courts from recognizing causes of action not otherwise specifically granted by Congress.⁴⁸ Bork agreed with the district court that the ATS must be interpreted narrowly to require a private right of action in international law,⁴⁹ and he accepted the well-established premise that international law is part of the common law of the United States.⁵⁰ He contended, however, that this merely means that international law is not statutory or constitutional: According to Bork, international law may be applied in municipal courts, but does not provide a “right to ask for judicial relief.”⁵¹ Additionally, Bork reasoned, a broad reading of the ATS — one that would provide a right of action in international law — is not advisable: “[C]onsiderations of separation of powers . . . provide ample reason for refusing to take steps that would plunge federal courts into the foreign affairs of the United

44. *Id.* at 778.

45. 28 U.S. § 1331 (2000) (stating in full, “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

46. *Tel-Oren*, 726 F.2d at 779 (Edwards, J., concurring).

47. *Id.* at 791–796.

48. *Id.* at 799 (Bork, J., concurring).

49. *See id.* at 800.

50. *Id.*

51. *Id.* at 811.

States.”⁵² He reasoned that such involvement by the courts would cause conflicts between the United States and other nations and pointed out that history shows that the ATS was enacted to open federal courts to aliens in order to *avoid* conflicts.⁵³

Judge Robb, in the third concurring opinion, thought that the case should be decided based on the political question doctrine,⁵⁴ and he criticized the use of the ATS in *Filartiga* because he thought that employing the statute to further human rights goals “may very well rebound to the decisive disadvantage of the nation. A plaintiff’s individual victory, if it entails embarrassing disclosures of this country’s approach to the control of the terrorist phenomenon, may in fact be the collective’s defeat.”⁵⁵

In the aftermath of *Tel-Oren*, business groups and the United States government have tended to adopt the views of both Judges Bork and Robb and have opposed the use of the statute for any purpose, absent independent Congressional action.⁵⁶ Human rights groups, in contrast, have sided with a reading of the statute that is, perhaps, even broader than the one advanced by Judge Edwards.⁵⁷ The Supreme Court’s reading of the statute in *Sosa*, however, produced a result more reminiscent of Edwards’s. The Court found that “the first Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the

52. *Id.*

53. *Id.* at 812.

54. *Id.* at 823 (Robb, J., concurring).

55. *Id.* at 827 n.5.

56. See, e.g., Thomas Niles, *The Very Long Arm of American Law*, FINANCIAL TIMES, Nov. 6, 2002, at 15; John E. Howard, Op-Ed., *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE, Oct. 2002, available at U.S. Chamber of Commerce, <http://www.uschamber.com/press/opeds/0210howardlitigation.htm> (last visited Jan. 2, 2006). The United States government has submitted an appellate brief in support of the defendant in *Sosa*. See Brief for the U.S. as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581.

57. See, e.g., HUMAN RIGHTS WATCH, DEFEND THE ALIEN TORT CLAIMS ACT (2003), <http://www.hrw.org/campaigns/atca> (last visited Jan. 2, 2006); EARTH RIGHTS INTERNATIONAL, DEFENDING THE ALIEN TORT CLAIMS ACT (2004), <http://www.earthrights.org/atca/index.shtml> (last visited Jan. 2, 2006).

creation of causes of action”⁵⁸ The Court saw the ATS as having an immediate, but not broad, effect: “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.”⁵⁹ Furthermore, the Court saw no evidence that Congress had any other violations in mind than the three enumerated by Blackstone — (1) violations of safe conducts, (2) infringement of the rights of ambassadors, and (3) piracy.⁶⁰ Neither did the Court find reason to conclude that any “development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations”⁶¹ Thus, just as the common law recognized certain violations of international law when the statute was enacted in 1789, today international law is part of the common law of the United States.

The Court nevertheless perceived several reasons for courts to approach the question with caution: (1) “the prevailing conception of the common law has changed since 1790 in a way that counsels restraint in judicially applying internationally generated norms;”⁶² (2) the post-*Erie* re-thinking of the role of federal courts in creating common law;⁶³ (3) “a decision to create a private right of action is one better left to legislative judgment in the great majority of cases;”⁶⁴ (4) the potential collateral consequences of creating a private right of action in international law, and the potential foreign relations implications of doing so;⁶⁵ and (5) no Congressional man-

58. *Sosa*, 542 U.S. at 719. The Court explained that “[t]he anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect.” *Id.* Interestingly, the most likely draftsman was Oliver Ellsworth, who was a member of the Connecticut legislature when it honored Congress’s request to create remedies for violations of the law of nations. *Id.* (citing generally W. BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905)).

59. *Id.* at 720.

60. *Id.*

61. *Id.* at 724–25.

62. *Id.* at 725.

63. *Id.* at 726 (citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and describing *Erie* as “the watershed in which we denied the existence of any federal ‘general’ common law”).

64. *Id.* at 727.

65. *Id.* at 727–28 (stating that “[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite an-

date exists for courts to “seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”⁶⁶

Ultimately, *Sosa* held that when the ATS was enacted in 1789, the common law, as it then existed, would provide a limited number of causes of action.⁶⁷ Thus, *Sosa* retained the common law view of 1789: Under the ATS today, customary international law will provide only a limited number of causes of action. The mere existence, according to this reasoning, of an international customary norm does not necessarily give rise to a cause of action for its violation under the ATS. The Court explained that in 1789, as today, “some, but few, torts in violation of the law of nations were understood to be within the common law.”⁶⁸ Thus, “courts should require 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.”⁶⁹ Specifically, causes of action will be recognized today under the ATS if they are defined in international law with the same level of specificity and universal ac-

other to consider suits under rules that would go so far as to claim a limit on the power of a foreign government over their own citizens . . .”). This list was apparently not meant to be exhaustive. The Court also mentioned an argument made in an amicus brief that exhaustion of municipal remedies and attempts to bring claims in international tribunals should be prerequisites to ATS claims. *Id.* at 732 n.20. The Court also stated “[a]nother possible limitation . . . is a policy of case-specific deference to the political branches.” *Id.* at 733 n.21. The example cited to was the South African government’s position on the case *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); the South African government stated that these types of cases interfere with the policy of the Truth and Reconciliation Commission, which “‘deliberately avoided a “victor’s justice” approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.’” *Sosa*, 542 U.S. at 733 (quoting Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa (July 11, 2003), reprinted in Brief of the Government of Commonwealth of Australia et al. as Amici Curiae in Support of Petitioner app. b, at 7a). Given the position of the South African government, there is a strong argument that, in some situations, federal courts should defer to the Executive Branch’s judgment on the matter. *Id.*

66. *Sosa*, 542 U.S. at 728.

67. *Id.* at 712.

68. *Id.* at 720.

69. *Id.* at 749.

ceptance as violations of safe conduct, infringement of rights of ambassadors, and piracy were defined in 1789.

B. Much of the ATS Precedent Remains Intact

The *Sosa* court said much about the lower courts' handling of previous ATS cases when it declared that "[t]his limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court."⁷⁰ The Court pointed to examples in which courts had applied stringent standards when recognizing rights of action in international law. The examples include *Filartiga's* characterization of the torturer as "like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind,"⁷¹ and Judge Edwards's suggestion in *Tel-Oren* that ATS jurisdiction reaches "a handful of heinous actions — each of which violates definable, universal and obligatory norms."⁷² The *Sosa* court cited with approval the standard relied upon by the Ninth Circuit: "'Actionable violations of international law must be of a norm that is specific, universal, and obligatory.'"⁷³ The court also referred to *United States v. Smith*,⁷⁴ a

70. *Id.* at 732. Although the Court did not discuss the inverse, the result of the application of reasoning congruous with *Sosa* is that courts have consistently dismissed ATS cases that did not rest upon clearly defined violations of international law. *See, e.g.*, *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160 (holding that "the asserted 'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law. As noted above, in order to state a claim under the [ATS], we have required that a plaintiff allege a violation of a 'clear and unambiguous' rule of customary international law."). *See also* *Beanal v. Freeport-McMoran*, 197 F.3d 161, 167 (5th Cir. 1999) (stating that customary international law cannot be established by reference to "abstract rights and liberties devoid of articulable or discernable standards and regulations"). Additionally, the *Alvarez-Machain v. United States* case, which *Sosa* reversed, had dismissed the cross-border aspect of the claim. 331 F.3d 604 (9th Cir. 2003), *rev'd sub nom. Sosa*, 542 U.S. 692. Regarding the cross-border abduction claim, the *Alvarez-Machain* court stated: "Because a human rights norm recognizing an individual's right to be free from transborder abductions has not reached a status of international accord sufficient to render it 'obligatory' or 'universal,' it cannot qualify as an actionable norm under the [ATS]. This is a case where aspiration has not yet ripened into obligation." *Id.* at 620.

71. *Sosa*, 542 U.S. at 732 (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

72. *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984)).

73. *Id.* (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

seventeenth-century case, as an example of a case “illustrating the specificity with which the law of nations defined piracy.”⁷⁵ The *Smith* court wrote:

There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy. The same doctrine is held by all the great writers on maritime law, in terms that admit of no reasonable doubt. The common law, too, recogni[z]es and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, (which is part of the common law,) [sic] as an offence against the universal law of society, a pirate being deemed an enemy of the human race.⁷⁶

The *Sosa* court’s citing these examples implies that federal courts had consistently applied its hitherto unarticulated rule.

The central inquiry in ATS cases typically must begin with the question whether the subject claims are violations of a customary international norm.⁷⁷ Customary international law has been defined as “result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation.”⁷⁸ Two components are apparent in this modern definition of customary international law: (1) It results from a general and consistent practice of states, and (2) it is followed by them from a sense of legal obligation. As the examples cited by the *Sosa* Court indicate, however,

74. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

75. *Sosa*, 542 U.S. at 732 (citing *Smith*, 18 U.S. 153).

76. *Smith*, 18 U.S. at 162.

77. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (stating that “a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations”); *see also* *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1996) (stating that “[t]he first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law”).

78. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (2) (1987). In the context of prize law, *The Paquete Habana* court described the process: “By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coastal fishing vessels . . . have been recognized as exempt . . . from capture as prize of war.” *The Paquete Habana*, 175 U.S. 677, 688 (1900).

federal courts adjudicating claims under the ATS have tended to hold the bar higher than this modern definition of what constitutes a customary binding norm of international law.⁷⁹

While the first prong of the test for a customary binding norm requires that a practice be “general and consistent,” rather than universal, federal courts adjudicating ATS claims have consistently, although not unanimously, required universality. The *Filartiga* court referred to a universal standard in its inquiry as to whether official torture constitutes an actionable violation of international law:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.⁸⁰

Some scholars have argued that the *Filartiga* court actually required no more than a showing of customary international law in order to adjudicate a claim under the ATS.⁸¹ In contrast to the above language, the court stated: “Having examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the works of jurists — we conclude that official torture is now prohibited by the law of nations.”⁸² The court, however, followed by stating that “[t]he prohibition is clear and unambiguous.”⁸³ Moreover, the frequency with which the *Filartiga* court

79. Exceptions exist. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996) (“We read the statute as requiring no more than an allegation of a violation of the law of nations in order to invoke [the ATS].”).

80. *Filartiga*, 630 F.2d at 880.

81. See, e.g., William S. Dodge, *Which Torts in Violation of the Law of Nations?*, 24 HASTINGS INT’L & COMP. L. REV. 351, 352 (2001); see also Luciana Reali, *Alvarez-Machain v. United States: How Should the Ninth Circuit Determine Which Torts Are Actionable Under the Alien Tort Statute?*, 17 N.Y. INT’L L. REV. 51, 62 (2004). Reali argues that this is the proper standard and the one actually employed by the *Filartiga* court, and that this standard is broader than the tripartite “specific, universal and obligatory” test that most post-*Filartiga* courts have employed. *Id.* at 61–62.

82. *Filartiga*, 630 F.2d at 884 (citation omitted).

83. *Id.*

referred to the universal assent of the prohibition on torture belies the argument. For example, the court stated that “[t]urning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations.”⁸⁴ The *Filartiga* court further observed that “[t]he requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”⁸⁵ Although the court referred to the “general assent” of nations, the actual standard applied was universality.

As the *Sosa* court noted, subsequent to *Filartiga* many courts used a standard that required that the tort be in violation of a norm that is “‘universal, definable, and obligatory.’”⁸⁶ Although this standard has been attributed to the *Filartiga* court, it is instead traceable to a subsequent law review article that attempted to limit *Filartiga*’s scope.⁸⁷ In *Tel-Oren*, the D.C. Circuit referred both to this standard and to the authors of the law review article when it expressed in dicta that certain “heinous actions” will be considered violations of international law even if committed by private actors.⁸⁸ This dicta was later adopted as rule of law by *Kadic*.⁸⁹

The *Sosa* case itself is instructive (although *Sosa* emphasized the concept of specificity perhaps more than universality): In *Sosa*, the Supreme Court reversed the Ninth Circuit, which had ruled

84. *Id.* at 883.

85. *Id.* at 881.

86. Dodge, *supra* note 81, at 353 (quoting *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987)); *see also* *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (“Actionable violations of international law must be of a norm that is specific, universal, and obligatory.”); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 370 (E.D. La. 1997) (“To be recognized as an international tort under [the ATS], the alleged violation must be definable, obligatory [rather than hortatory], and universally condemned.”).

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87. Dodge, *supra* note 81, at 354–55 (quoting Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Statute after Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53 (1981)). *See also* Reali, *supra* note 81, at 62.

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88. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1982). *Tel Oren* was dismissed, however, because the court ultimately decided that a politically motivated terrorist attack was not a violation of international law, regardless of how reprehensible it may be considered under our domestic norms. *Id.*

89. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

that there was an international prohibition against arbitrary arrest and detention.⁹⁰ The Ninth Circuit had applied the “specific, universal, and obligatory” test, which it had adopted in *In re Estate of Marcos Human Rights Litigation*.⁹¹ The arbitrary arrest and detention claim met the *Alvarez-Machain v. United States* court’s standard: The Ninth Circuit had observed that specific prohibitions of acts of arbitrary arrest and detention are “codified in every major comprehensive human rights instrument and [are] reflected in at least 119 national constitutions.”⁹² The Ninth Circuit noted that the United Nations Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights both explicitly prohibit arbitrary arrest and detention.⁹³ However, the Supreme Court disagreed, pointing out that neither of these instruments imposes legal obligations on its own authority.⁹⁴ In its attempt to show that prohibition of arbitrary arrest and detention has been established as a customary norm, the Ninth Circuit had also cited the Restatement (Third) of the Foreign Relations Law of the United States (“Restatement of Foreign Relations Law”), which enumerates arbitrary arrest and detention as a prohibited offense.⁹⁵ The Supreme Court found that the Restatement of Foreign Relations Law actually undermined the support for the proposition that a broad prohibition has been established in international law against arbitrary arrest and detention, since the Restatement of Foreign Relations Law refers to “‘prolonged arbitrary detention’”⁹⁶ as opposed to mere “arbitrary” detention.⁹⁷ Additionally, the Ninth Circuit relied upon the fact that consensus exists among many nations in recognizing a pro-

90. *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *rev’d sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

91. *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (1995). The *In re Marcos* court cited *Filartiga* as a source for the “specific, universal, and obligatory” standard, although the test did not originate in *Filartiga*. *Id.*

92. *Alvarez-Machain*, 331, F.3d at 620.

93. *Id.* at 620–621.

94. *Sosa*, 542 U.S. at 735. It should be noted that the singular fact that these instruments do not impose legal obligations was not sufficient to defeat the status of arbitrary arrest and detention as prohibited by customary norm.

95. *Alvarez-Machain*, 331 F.3d at 621.

96. *Sosa*, 542 U.S. at 737 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) (emphasis added)).

97. *Id.* (emphasis added).

hibition against arbitrary detention.⁹⁸ The Supreme Court found that although such consensus exists, it is “at a high level of generality”⁹⁹ and therefore lacks the required degree of specificity.

The second component of customary international law is that a practice be “followed . . . from a sense of legal obligation.”¹⁰⁰ This *opinion juris* requirement has presented more difficulty. States often follow practices initially out of a sense of *moral obligation* or *courtesy*, but “it is often difficult to determine when that transformation into *law* has taken place.”¹⁰¹ In adjudicating ATS claims, courts have relied on the distinction between norms that meet this definition and norms that are “adopted for moral or political reasons, but not out of a sense of legal obligation”¹⁰² and therefore “do not give rise to rules of customary international law.”¹⁰³ The Second Circuit, in *Flores v. Southern Peru Copper Corp.*, described the standard as a violation of “those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.”¹⁰⁴ The *Flores* court stressed the requirement that the norm be a legal obligation and not one that is acceded to merely for moral or political reasons; also, the norm must be sufficiently definite and not so general as to be simply “aspirational.”¹⁰⁵ The Ninth Circuit made a similar distinction in *Alvarez-Machain* when it found that cross-border abduction did not meet the standard for a violation of international law under the ATS.¹⁰⁶ The court explained:

Because a human rights norm recognizing an individual’s right to be free from transborder abductions has not reached a status of international accord sufficient to render it “obligatory” or “universal,” it cannot qualify as

98. *Alvarez-Machain*, 331 F.2d at 621.

99. *Sosa*, 542 U.S. at 736 n.27.

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

101. *Id.* at § 102 cmt. c. (emphasis added).

102. *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 154 (2d Cir. 2003).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Alvarez-Machain v. United States*, 331 F.3d 604, 620 (9th Cir. 2003), *rev’d sub nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

an actionable norm under the [ATS]. This is a case where aspiration has not yet ripened into obligation.¹⁰⁷

Here the court made an emphatic distinction between broad policy declarations and specific prohibitions.

Another method used by courts to determine international law violations under the ATS is the distinction between the several concerns that states may have in common and the truly mutual concerns of nations. In its inquiry as to whether official torture violates the law of nations, *Filartiga* relied on this distinction.¹⁰⁸ This analysis actually predates the modern ATS cases. In the *Brig Malek Adhel v. United States* case,¹⁰⁹ the Court illustrated this distinction in explaining why piracy is a violation of the law of nations while robbery is not: “A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of *any or all nations*, without any regard to right or duty, or any pretence of public authority.”¹¹⁰ Similarly, in 1861, U.S. District Court Judge Peleg Sprague stated that “[p]irates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them”¹¹¹

More recently, in *IIT v. Vencap, Ltd.*, which addressed the application of the ATS to fraud allegations in a multinational context, the court noted that the mere fact that every nation’s municipal law may prohibit theft does not incorporate “the Eighth Commandment ‘Thou Shalt not steal’ [into] the law of nations.”¹¹² The *Filartiga* court observed that “[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a

107. *Id.*

108. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute.”).

109. *Brig Malek Adhel v. United States*, 43 U.S. (2 How.) 210 (1844).

110. *Id.* at 232 (emphasis added).

111. Charge to Grand Jury — Treason and Piracy, 30 F. Cas. 1049 (C.C. D. Mass. 1861) (No. 18,277).

112. *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

wrong generally recognized becomes an international law violation within the meaning of the [ATS].”¹¹³

The *Sosa* court did not make an explicit pronouncement as to the proper sources of international law, so it is worthwhile to examine the sources used by the cases that *Sosa* cites with approval — *Filartiga*, which relied on the *Smith*¹¹⁴ and *The Paquete Habana*¹¹⁵ cases.¹¹⁶ In defining the sources for international law, the *Smith* court stated that “[w]hat the law of nations on this subject is, 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 recognising [sic] and enforcing that law.”¹¹⁷ Echoing the language in *Smith*, the *Paquete Habana* court stated as the sources of authority for international law “the customs and usages of civilized nations; and, as evidence of these, . . . the works of jurists and commentators, who . . . have made themselves peculiarly well acquainted with the subjects of which they treat.”¹¹⁸ *Filartiga* not only looked to the *Smith* and *Paquete Habana* courts’ scholarly and jurisprudential focus and to the writings of modern day international law scholars,¹¹⁹ but also had the benefit of modern international human rights instruments, including (1) the Statute of the International Court of Justice (ICJ),¹²⁰ (2) the United Nations Charter,¹²¹ and (3) the Universal Declaration on Human Rights.¹²² The *Filartiga* court looked to the Statute of the International Court

113. *Filartiga*, 630 F.2d at 888 (2d Cir. 1980) (citing *ITT*, 519 F.2d at 1015).

114. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

115. *The Paquete Habana*, 175 U.S. 677 (1900).

116. *Filartiga*, 630 F.2d at 880–81.

117. *Smith*, 18 U.S. at 160–61.

118. *Paquete Habana*, 175 U.S. at 700.

119. *Filartiga*, 630 F.2d at 879 n.4 (quoting Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, who states, “it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations,” and citing Thomas Franck, professor of international law at New York University and director of the New York University Center for International Studies, who claims “that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions” (no citations in original)).

120. *Id.* at 881.

121. *Id.*

122. *Id.* at 882. There are several references in the *Filartiga* opinion that indicate the validity of reliance on modern sources of authority: The opinion mentions that even the district court, which had dismissed the case on jurisdictional grounds, had

of Justice (ICJ Statute),¹²³ to which the United States and all members of the United Nations are parties, to determine the proper sources for international law.¹²⁴ Article 38 of the ICJ Statute lists the authorities on which the ICJ relies:

The [ICJ], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognized by civilized nations;
- d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary* means for the determination of rules of law.¹²⁵

recognized the emerging norm of recognizing official torture as a violation of international law. *Id.* at 880.

123. Drafted in 1946 at the San Francisco Conference, the Statute reflects the principles of Chapter XIV of the United Nations Charter. “Whilst [the statute] forms an integral part of the Charter, it is not incorporated into it, but is simply annexed.” The International Court of Justice History Page, <http://www.icj-cij.org> (follow “Welcome to ICJ-CIJ.ORG” hyperlink; then follow “General Information” hyperlink; then follow “A guide to the history, composition, jurisdiction, procedure and decisions of the Court” hyperlink; then follow “History” hyperlink) (last visited Jan. 5, 2006).

124. *Filartiga*, 630 F.3d at 881.

125. Statute of the International Court of Justice art. 38, June 26, 1945, *available at* <http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm> (emphasis added). The Statute clearly states that the judicial decisions and scholarly works are “subsidiary means” for establishing the rule of law. *Id.* *Filartiga* did not elaborate on the distinction between primary and secondary sources of international law; recent case law, however, has focused more strictly on the distinction between primary and secondary sources of international law and has emphasized that scholarly works and judicial opinions fall squarely in the secondary category. For example, the *United States v. Yousef* court recently found that “we look primarily to the formal lawmaking and official actions of States and only secondarily to the works of scholars as evidence of the established practice of States.” 327 F.3d 56, 103 (2d Cir. 2003). And the *Flores v. Southern Peru Copper Corp.* court followed the *Yousef* reasoning and refused to consider judicial decisions as primary sources of customary international law. 343 F.3d 140 (2d Cir. 2003). This approach was followed by Professor Clive Parry of Cambridge University, on whom the *Yousef* court also relied: Professor Parry observed that “the writings of publicists are an acceptable additional source to shed light on a particular question of

Having stated that federal courts have generally adhered to strict standards for recognizing claims under the ATS, it is not surprising that the *Sosa* court, referring to the role of the federal judiciary in the context of the ATS, said that “no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases beginning with *Filartiga* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law”¹²⁶ Notably, *Erie Railroad Co. v. Tompkins*, which circumscribed the concept of a federal common law,¹²⁷ did little to change the role of federal courts with regard to international law: “International disputes implicating . . . our relations with foreign nations are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist.”¹²⁸ The Court affirmed that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”¹²⁹ Having established that federal courts have authority to recognize certain causes of action under the ATS, *Sosa* leaves open the question whether any complicity-based causes of action meet the standard for recognition.

international law only when ‘recourse must also be had’ beyond the ‘opinions,’ ‘decisions,’ and ‘acts’ of States, and only then to a lesser degree than to more authoritative evidence, such as the State’s own ‘declarations,’ laws,’ and ‘instructions’ to its agents.” *Yousef*, 327 F.3d at 94 (citation omitted). In contrast, the *Filartiga* court noted that the court in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), derived its certainty about the universal consensus on the prohibition against piracy from the scholarly works of Grotius, Bochar, “and other commentators.” *Filartiga*, 630 F.2d at 880.

126. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724–25 (2004) (citation omitted).

127. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that the concept of a general federal common law is no longer considered valid).

128. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The *Sosa* court quotes *Texas Indus.*, *Sosa*, 542 U.S. at 730, and Justice Scalia, in his concurring opinion, notes that the ATS was enacted before *Erie*, when the idea of a general federal common law was accepted; the ATS was enacted based on an understanding that “rested upon a notion of general common law that has been repudiated by *Erie*.” *Id.* at 744 (Scalia, J., concurring). Scalia argues that because general federal common law no longer exists, federal courts no longer have authority to apply the law of nations as part of federal common law. *Id.* at 744–45.

129. *Sosa*, 542 U.S. at 729.

III. THE COURTS ARE WITHOUT A STANDARD FOR COMPLICITY UNDER THE ATS

There currently is no *Sosa*-approved standard under which to adjudicate whether complicity in acts that constitute violations of international law under the ATS (and under *Sosa*) is itself actionable under the ATS. This is hardly surprising. After all, when the drafters of the First Judiciary Act of 1789 perceived the need to grant the federal courts jurisdiction to hear claims by aliens of violations of international law,¹³⁰ they likely did not foresee the events that would occur more than two hundred years later surrounding the Yadana natural gas pipeline project and a group of villagers from Myanmar's Tenasserim region. This pipeline project was run by Unocal Corporation ("Unocal Corp."), a California oil and natural gas exploration company,¹³¹ in partnership with the government of Myanmar and led to the *Doe v. Unocal* case.¹³² The ATS was the basis for claims by the villagers that the Myanmar government, through the actions of its military officers, violated the law of nations by committing human rights abuses including forced labor, rape, torture, and murder in support of the pipeline project; moreover, the ATS was used as the basis for liability against not only the government but also Unocal Corp.: the plaintiffs claimed that Unocal Corp. should be held liable for its alleged supporting role in the acts.¹³³

It is also likely that the drafters of the ATS did not envision a group of South African citizens who suffered for fifty years under apartheid. The South African citizens, in *In re South African Apartheid Litigation*,¹³⁴ alleged that various companies that invested

130. The original version of what is now referred to as the Alien Tort Statute read: "The district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (current version at 28 U.S.C. § 1350 (2000)).

131. See Unocal Corporation Myanmar Project Page, <http://www.unocal.com/myanmar/index.htm> (last visited Jan. 5, 2006).

132. *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

133. *Id.* at 936-37.

134. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

in the country should be held liable for their business activities and investments during the rule of the apartheid regime.¹³⁵

The *Unocal* plaintiffs alleged that Unocal Corp. provided material, logistical, and monetary support to the military officers, and that liability could be assessed against the corporation for its alleged supporting role.¹³⁶ The underlying alleged actions of the military — facilitating forced labor and committing extrajudicial killing, rape, and torture — were found to be actionable as violations of international law under the ATS.¹³⁷ The Ninth Circuit initially also held that Unocal Corp. could be brought to trial under the ATS for its supporting role in the actions of the military, and adopted the international law-based aiding and abetting standard.¹³⁸ Subsequently, the Ninth Circuit vacated the decision by the three-judge panel and decided to rehear the case en banc¹³⁹ to decide whether to assess the secondary liability, if any, of Unocal Corp. under the aiding and abetting standard or under federal common law standards that were suggested by the concurring opinion. Both the Ninth Circuit's original decision and the vacatur occurred before *Sosa*. No resolution will be forthcoming under the *Sosa* regime, however: In December of 2004 it was announced that the parties had entered into settlement negotiations,¹⁴⁰ and in March of 2005 the case settled on undisclosed terms.¹⁴¹

The South African plaintiffs faced a different result. The district court dismissed the case based upon the plaintiffs' failure to state a claim in international law; as a result, the court lacked jurisdiction under the ATS, which requires by its terms that claims allege international law violations: Although the court accepted that the alleged underlying acts of the South African government consti-

135. *Id.*

136. *Unocal*, 395 F.3d at 936–37.

137. *Id.* at 945. Early cases used the terms “Alien Tort Claims Act” or “ATCA,” and much of the commentary on the topic uses these terms. Considering that *Sosa* is the first major treatment of the statute by the Supreme Court, the new moniker, Alien Tort Statute or ATS, will likely stick.

138. *Id.* at 947–49.

139. *Doe v. Unocal*, 395 F.3d 978 (9th Cir. 2003).

140. *E.g.*, *Unocal Settles Rights Suit in Myanmar*, NEW YORK TIMES, Dec. 14, 2004, at C6; Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TIMES, Dec. 14, 2004, at A1.

141. *E.g.*, Mark Lifsher, *Unocal Settles Human Rights Suit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1.

tuted violations of international law,¹⁴² the court nevertheless rejected all of the plaintiffs' secondary liability theories, including aiding and abetting.¹⁴³

What is lacking, then, is a clear standard for adjudicating questions of complicity in violations of international law under the ATS. The inquiry into the proper standard must begin with the question of whether the proposed standard must be sought under international law or under U.S. domestic law. The *Unocal* court initially decided that the potential liability of Unocal Corp. for its alleged supporting role in the actions of the Myanmar military should be assessed under an international aiding and abetting standard, which the court found was an established international law rule.¹⁴⁴ The court in *In re Apartheid Litigation* — in contrast to *Unocal*, in which the court had no Supreme Court guidance — held that aiding and abetting an international law violation was not “itself an international law violation that is universally accepted as a legal obligation.”¹⁴⁵ The court concluded that aiding and abetting was not

142. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004) (“Plaintiffs have alleged a veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination.”). The opinion also notes that the United Nations General Assembly “deemed apartheid ‘a crime against humanity.’” *Id.* at 545.

143. *Id.* at 548 (“Tested by these [*Sosa*] precepts, it is clear that plaintiffs’ causes of action under the [ATS] must be dismissed.”). The court explained that “[a]lthough it is clear that the actions of the apartheid regime were repugnant, and that the decisions of the defendants to do business with that regime may have been morally suspect or ‘embarrassing,’ it is this Court’s job to apply the law and not some normative or moral ideal.” *Id.* at 548 (citation omitted).

144. *Unocal*, 395 F.3d at 948–49. The court relied mainly on the factors listed in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969); these factors include the needs of the international law system, the “relevant policies of the forum,” and considerations of notice, uniformity, and predictability. *Id.* at 968 n.6. The court also considered that since the purpose of the statute is to provide tort remedies for violations of international law, “this goal is furthered by the application of international law.” *Id.* at 949. The court applied the aiding and abetting standard and found that issues of fact existed as to whether Unocal Corp.’s actions met this standard. *Id.* at 953. *See also* *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (holding that Royal Dutch Petroleum could be held liable for the actions of the Nigerian government based on the “joint action” test developed under 42 U.S.C. § 1983 state action jurisprudence); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (finding defendant Talisman incorrect in asserting that aiding and abetting and complicity theories are not actionable under the ATS).

145. *In re Apartheid Litig.*, 346 F. Supp. 2d at 549.

defined in international law with the clarity or specificity required by *Sosa*.¹⁴⁶ Little has changed since 1984, when Judge Edwards declared in *Tel-Oren*:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the “law of nations.” As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.¹⁴⁷

Thus, while *Sosa* has provided guidance for courts in recognizing rights of action under the ATS, there is currently no agreed-upon standard regarding the determination of liability for complicity in these violations.

The problem created by the lack of consensus on a complicity standard is illustrated by comparing the Ninth Circuit’s *Unocal* decisions with the decision in *Presbyterian Church of Sudan v. Talisman Energy Corp.*¹⁴⁸ In *Unocal*, the Ninth Circuit adopted the aiding an abetting standard articulated by the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY, respectively).¹⁴⁹ The concurring opinion in *Unocal* disagreed with the

146. *Id.* (holding that “plaintiffs will need to show that either aiding and abetting international law violations or doing business in apartheid South Africa are violations of the law of nations that are ‘accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms’ such as piracy and crimes against ambassadors” (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004))).

147. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring).

148. *Presbyterian Church*, 244 F. Supp. 2d 289.

149. *Unocal*, 395 F.3d at 949–50. The International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 by the United Nations Security Council, pursuant to the Security Council’s authority under Chapter VII of the United Nations Charter. See Statute of the International Tribunal for the Former Yugoslavia, May 3, 1993, 32 I.L.M. 1192 (1993) [hereinafter International Tribunal Statute — Yugoslavia]. The International Criminal Tribunal for Rwanda (ICTR) was established in 1994 under the same authority. See Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1602 (1994) [hereinafter International Tribunal Statute — Rwanda]. Chapter VII of the U.N. Charter is entitled: “Action with respect to the peace, breaches of the peace, and acts of aggression.” U.N. Charter ch. VII. Article 39 proclaims: “The Security Council shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measure shall be taken in accordance with Articles 41 and 42.” *Id.* at art. 39. Articles 41 and 42 concern the various measures available to the Security Council. See *id.* at arts. 41–42. While

majority's reasoning in adopting the ICTY aiding and abetting standard and urged the use of domestic common law standards to decide the issue of complicity liability.¹⁵⁰ Soon after the Ninth Circuit's decision to vacate the initial *Unocal* decision,¹⁵¹ *Presbyterian Church of Sudan* was decided in the Southern District of New York, announcing a denial of summary judgment based on the same aiding and abetting standard, the uncertainty of which, in part, prompted the Ninth Circuit to vacate the *Unocal* decision.¹⁵²

Additionally, in 2002, in *Wiwa v. Royal Dutch Petroleum Co.*,¹⁵³ the Southern District of New York denied summary judgment to the defendants for claims based on complicity, but used an entirely different set of standards based on state action under 42 U.S.C. § 1983¹⁵⁴ jurisprudence: "To determine whether a private actor acts under color of law in the context of a claim under [the ATS] and the TVPA [the Torture Victims Protection Act], the Court must look to the standards developed under 42 U.S.C. § 1983."¹⁵⁵ More recently, the same court, in *In re Apartheid Litigation*, declared that

creation of prosecuting tribunals is not expressly mentioned, the enumerated list is not exclusive or exhaustive. See U.N. Charter ch. VII.

150. *Unocal*, 395 F.3d at 963, 969 (Reinhardt, J., concurring) (proposing that the question of liability for complicity is ancillary to the issue of liability for the underlying actions, and that the federal common law principles of joint venture, agency, and reckless disregard should be applied).

151. *Doe v. Unocal*, 395 F.3d 978 (9th Cir. 2003) (announcing rehearing en banc).

152. *Presbyterian Church*, 244 F. Supp. 2d at 320–21.

153. *Wiwa v. Royal Dutch Petroleum*, 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

154. § 1983 reads in full:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

155. *Wiwa*, 2002 WL 319887, at *13 (citing *Kadic v. Karadzic*, 70 F.3d 232, 242 (2nd Cir. 1995)).

aiding and abetting is not a universally recognized legal obligation.¹⁵⁶ The court implied, however, that the state action analysis used by the *Wiwa* court was a proper way to assess secondary liability under the ATS.¹⁵⁷ Therefore, a sufficient showing of state action could, on that theory, arguably subject secondary actors to liability under the ATS.

Until the December 2004 announcement of settlement negotiations in the *Unocal* case,¹⁵⁸ the parties were awaiting a decision after a rehearing en banc by the Ninth Circuit. The question presented for rehearing en banc revealed the heart of the problem:

Under the Alien Tort Statute, may Unocal Corporation be held liable for the forced labor, murder, rape, and torture inflicted on natives of Burma/Myanmar by the Myanmar Military in the course of construction of a gas pipeline? In order to determine if Unocal may be held liable for the acts of the government of Myanmar, should the federal courts apply an international-law aiding and abetting standard, or should Unocal's liability be resolved according to general federal common law tort principles?¹⁵⁹

The *Unocal* majority had found that the factors listed in the Restatement (Second) of Conflict of Laws¹⁶⁰ supported the application of principles of international law.¹⁶¹ These factors included, “the

156. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004).

157. *Id.* at 548. Rather than declaring that state action is not a proper basis upon which to assess liability of indirect actors, the court held: “Here, plaintiffs do not allege actions by the defendants that elevate them to the status of state actors in the commission of torture, genocide, killings, and other serious crimes.” *Id.* The court distinguished the facts in *Wiwa*: “In *Wiwa*, plaintiffs alleged that defendants actively cooperated with Nigerian officials in the suppression of a group that was in opposition to the defendants’ activities in the region. Defendants made payments to the military, contracted to purchase weapons for the military, coordinated raids on the group, and paid the military to violently respond to opposition. These activities are not present here.” *Id.* at 549 (citations omitted).

158. See *supra* notes 140–41 and accompanying text.

159. Status Report and Summary of Pending En Banc Cases, United States Court of Appeals for the Ninth Circuit (June 13, 2005) (on file with the *New York Law School Law Review*).

160. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969).

161. *Doe v. Unocal*, 395 F.3d 932, 949 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

needs . . . of the international system[],’¹⁶² “‘the relevant policies of the forum,’¹⁶³ and, perhaps most importantly, “regarding ‘the protection of justified expectations,’ the ‘certainty, predictability and uniformity of result, and the ease in the determination and application of the law to be applied.’”¹⁶⁴ The *Unocal* majority added that, since the purpose behind the ATS is to provide remedies for torts based on international law violations, the purpose of the statute is better served by applying international law to the complicity allegations, which are also tort-related.¹⁶⁵ Similarly, the Southern District of New York, in *Presbyterian Church of Sudan*,¹⁶⁶ concluded that “in order to determine whether a cause of action exists under the [ATS], courts must look to international law.”¹⁶⁷

Recently, the court in *In re Terrorist Attacks on September 11, 2001*¹⁶⁸ found that the ATS “may provide a basis for a concerted action claim of material support by alien-Plaintiffs here.”¹⁶⁹ The case, involving secondary liability for the terrorist attacks of September 11, 2001, relied on *Presbyterian Church of Sudan*, which noted that “‘courts, including the Second Circuit, have almost unanimously permitted actions premised on a theory of aiding and abetting and conspiracy.’”¹⁷⁰ The *Presbyterian Church of Sudan* court’s phrasing of its holding, however, is problematic, as is the *In re Terrorist Attacks* court’s reliance on it; a more accurate way to phrase the situation is: While the Second Circuit, like most others, has permitted actions premised on aiding and abetting and conspiracy in various domestic tort claims and criminal cases,¹⁷¹ there is *no* Second Circuit case law involving aiding and abetting or conspiracy

162. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)) (alteration in original).

163. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

164. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

165. *Id.*

166. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

167. *Id.* at 321.

168. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

169. *Id.* at 826.

170. *Id.* (quoting *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 321).

171. Aiding and abetting is commonly relied upon in various domestic criminal and civil contexts. For example, aiding and abetting a breach of fiduciary duty is a civil cause of action in state courts. *See, e.g., Briarpatch, Ltd. v. Phoenix Pictures, Inc.*, 373

theories under the ATS or under any international law based cause of action. The court found that the ATS provides a cause of action where “(1) an alien sues (2) for a tort (3) committed in *violation of the law of nations (i.e., international law)*.”¹⁷² The court then reasoned that, since “aircraft hijacking is generally recognized as a violation of international law,”¹⁷³ the ATS provides a cause of action for aiding and abetting such an offense because there is Second Circuit precedent applying aiding and abetting theories.¹⁷⁴ The ATS provides a forum for certain causes of action in international law that are recognized in our common law. The Second Circuit, however, has applied only domestic aiding and abetting theories. An action for aiding and abetting under the ATS must be defined in *international law*.

Sosa has now directed that courts use caution and demand specificity when recognizing rights of action under customary international law. *Sosa* has implicitly ratified the rights of action — torture, genocide, forced labor, certain war crimes — that have been recognized in the modern ATS cases,¹⁷⁵ but where does *Sosa* leave the complicity standard? A cause of action for complicity under the ATS does not currently exist under *Sosa*'s strictly limited field. Such a cause of action must be defined in international law. An approach that initially applies international law to the underlying allegations but then applies domestic law to the complicity claims would undermine the concerns for notice, uniformity, and predictability noted by the *Unocal* court. Further, because actions based on complicity have been treated as separate causes of action, the language of the statute itself — authorizing suits for torts committed in violation of international law — mandates that the complicity claims be defined in international law.

F.3d 296 (2d Cir. 2004). For a discussion of aiding and abetting in U.S. state and federal criminal law, see WAYNE R. LAFAVE, *CRIMINAL LAW* (4th ed. 2003).

172. *In re Terrorist Attacks*, 349 F. Supp. 2d at 826 (quoting *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)) (emphasis added).

173. *Id.* (quoting *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp.2d 86, 100 (D.C. Cir. 2003)).

174. *Id.* (citing *Burnett*, 274 F. Supp. 2d. 86; *Presbyterian Church of Sudan*, 244 F. Supp. 2d 289).

175. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33 & nn.20–21 (discussing *Filartiga* and *Kadic*, and the codification of *Filartiga* by the Torture Victims Protection Act (TVPA)).

IV. HOW SHOULD COURTS APPROACH COMPLICITY IN INTERNATIONAL LAW VIOLATIONS?

Sosa effectively renders complicity not actionable under the ATS. Complicity in international law violations is a distinct cause of action that must be assessed under an international law standard.¹⁷⁶ However, complicity fails the international law standard articulated by *Sosa*.

At the time *Unocal* was decided, only international law norms that met the ‘universal, specific, and obligatory’ standard were cognizable under the ATS. The *Unocal* court applied this standard to the underlying claims,¹⁷⁷ but did not subject the aiding and abetting claims to the same test. The court essentially determined that the aiding and abetting standard’s existence as an international law norm was a sufficient basis for its application to the complicity claims. According to the plain language of the statute, which requires that the cause of action be based on a “tort only, in violation of international law,”¹⁷⁸ the mere existence of a standard in international law would perhaps be sufficient justification for its application to claims brought under the ATS. In ATS case law, however, courts have consistently required more than the mere existence of an international law standard.¹⁷⁹ Following *Sosa*, the bar is arguably even higher: *Sosa* instructs that the ATS was enacted for the narrow purpose of addressing a few specifically defined violations of international law.¹⁸⁰ This further calls into question both the application of domestic standards to complicity claims under the ATS, and the application of international standards that do not meet the same specificity and universality criteria as those applied to the underlying claims.

Complicit actors have been held liable under the ATS, but only when their involvement was such that they were treated as direct

176. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

177. *Doe v. Unocal*, 395 F.3d 932, 944–45 (9th Cir. 2002), *vacated, reh’g granted*, 395 F.3d 978 (9th Cir. 2003).

178. 28 U.S.C. § 1350 (2000).

179. *See supra* Part II.B.

180. *Sosa*, 542 U.S. at 729 (noting that “the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority”).

actors. In *Kadic*, for example, the claim against Karadzic, the defendant, was based on his capacity as president of the self-proclaimed republic known as Srpska.¹⁸¹ The opinion makes no mention of any direct actions taken by Kadic. The allegations were that “[i]n his capacity as President, Karadzic possess[ed] ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated on plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command.”¹⁸² Essentially, Karadzic’s level of control over the direct actors rendered him liable as if he himself were a direct actor. The complete control that the defendant exercised over the primary actors renders the facts of *Kadic* distinct from cases such as *Unocal*, in which there is attenuation between the acts of the primary and secondary actors and in which there are serious questions about the level of control the secondary actors commanded over the primary actors. In cases such as *Kadic*, then, it is appropriate to fold the analysis of liability with respect to the secondary actors into that of the primary actors. In cases such as *Unocal*, however, a separate analysis of the liability of the secondary actors is warranted.

A. Domestic Law Approaches

1. State Action Requirement and § 1983 Analysis

Pre-*Sosa*, courts held that complicit secondary actors who are not state actors can be held liable for the conduct of primary actors who are state actors if such primary actors’ conduct constitutes a violation of international law.¹⁸³ The state action analysis, however, breaks down when applied to causes of action for complicity under the ATS when the primary actor is not a state actor: Because violations of international law may be committed by private actors, ATS claims are not limited to conduct by state actors, whereas the state action analysis is *by definition* limited to cases in which the primary actors are state actors. Post-*Sosa*, moreover, even if the primary actor is a state actor, the state action test, essentially a *federal common*

181. *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995).

182. *Id.*

183. *Wiwa v. Royal Dutch Petroleum*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *In re S. Afr. Apartheid Litig.*, 346 F. Supp.2d 538 (S.D.N.Y. 2004).

law standard, is not applicable to causes of action for complicity under the ATS because the statute provides a forum for torts committed in violation of *the law of nations* only.

The issue of which violations, if any, of international law may be actionable under the ATS against private actors was addressed in *Tel-Oren*.¹⁸⁴ There was no majority opinion in that case, and the case was dismissed for failure to state a claim based on a norm of international law. One of the more frequently cited statements made by Judge Edwards in his concurring opinion was that there exists a “handful of crimes to which the law of nations attributes individual responsibility.”¹⁸⁵ Judge Edwards concluded that it was not coincidental that the *Filartiga* court, in declaring torture actionable under the ATS as a violation of the law of nations, compared the torturer to pirates and slave traders, whom he called *hostis humanis generis* — enemies of all mankind.¹⁸⁶ Judge Edwards explained that “[h]istorically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nations capturing them.”¹⁸⁷ Later, *Kadic* cited to Edwards’s opinion in *Tel-Oren*, along with other authority, in declaring that the law of nations no longer limits its reach to state action.¹⁸⁸ Nevertheless, the offenses for which liability can be assessed against non-state actors are limited. Judge Ed-

184. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). As Judge Edwards noted, there was precedent establishing that liability could be assessed under the ATS against a private actor for a violation of international law. *Id.* at 793 & n.24 (Edwards, J., concurring). In *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), the Maryland District Court declared that the law of nations and private international law are not mutually exclusive. “The injunctions of international law that may applicable to the private individual do not necessarily disappear when he enters the territory of his own or of any other State. He learns that there are acts of which that law there itself forbids the commission by any one whomsoever.” *Id.* at 864. The case of *Bolchos v. Darrel*, 3 F. Cas. 810 (D. S.C. 1795), cited to the original version of the ATS (contained in section 9 of the Judiciary Act of the first Congress) for authority granting the court jurisdiction. *Bolchos* concerned a captor’s claim for restitution of property that was seized from the captured enemy ship. *Id.* The “property” in question consisted of slaves on board the ship. *Id.* If no other rebuttal exists for those who decline to accept the *Filartiga* court’s admonition that we must define international law as it exists today and not as it was in 1789, the facts of the *Bolchos* case should suffice.

185. *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring).

186. *Id.* at 781 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

187. *Id.*

188. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

wards noted that *Filartiga* concerned official torture, whereas *Tel-Oren* concerned acts by the PLO, which the court did not recognize as an official body.¹⁸⁹ Edwards was not willing to “extend the definition of the ‘law of nations’”¹⁹⁰ to include torture among the handful of crimes for which individual liability may be assessed.¹⁹¹ The *Kadic* court indicated that these offenses are limited to piracy, slave trade and certain war crimes;¹⁹² claims for other offenses may be pursued to the extent that the defendant is shown to be a state actor.¹⁹³

While there was no need in *Kadic* or *Tel-Oren* to address what standard should determine whether a defendant was a state actor for adjudicating violations of international law for which state action is still a requirement, other courts have looked to the jurisprudence surrounding 42 U.S.C. § 1983 for guidance.¹⁹⁴ The *Wiwa* court, having concluded that the plaintiffs must demonstrate state action in order for their claims to proceed,¹⁹⁵ looked to the standards developed under § 1983 and explained that “[t]he relevant test in this case is the ‘joint action’ test, under which private actors are considered state actors if they are ‘willful participant[s] in joint action with the State or its agents.’”¹⁹⁶ The court was satisfied that

189. *Tel-Oren*, 726 F. 2d at 791 & n.21 (Edwards, J., concurring).

190. *Id.* at 792.

191. *Id.* at 795.

192. *Kadic*, 70 F. 3d. at 239–40.

193. *Id.* at 244.

194. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum*, 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

195. *Wiwa*, 2002 WL 319887 at *13 (citations omitted). The *Wiwa* plaintiffs also asserted claims under section 2 of the Torture Victims Protection Act (TVPA), which reads, in relevant part:

Establishment of civil action.

(a) Liability. An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350(2) (2000). Thus the TVPA expressly limits its reach to state actors. Additionally, since the TVPA, unlike the ATS, provides a federal, statutorily defined cause of action, federal courts properly apply domestic standards and precedent to TVPA claims.

196. *Wiwa*, 2002 WL 319887 at *13 (citing *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)) (second alteration in original).

the plaintiffs had supported a theory of joint action based on a “substantial degree of cooperative action”¹⁹⁷ between the corporate defendants and the Nigerian government, which had carried out the alleged acts in violation of international law.¹⁹⁸ Implicit in the court’s analysis, however, was the erroneous requirement that the primary actor be a *state* actor.

Further, the *Wiwa* court did not examine the propriety of applying federal common law, developed in the context of a federal statute, to assess secondary liability for violations of international law under the ATS. The complicity analysis was melded with the state action analysis. The result was the application of a *domestic* federal standard to determine whether a right of action existed in *international* law against secondary actors. This approach is erroneous when applied to complicity claims because the plain language of the ATS demands that an international standard be applied to assess a cause of action for a tort only, committed in violation of the law of nations.

The plaintiffs in *In re Apartheid Litigation* relied on *Wiwa*’s § 1983 state action analysis in their allegations of state action by the defendants who had invested in South Africa during the apartheid regime.¹⁹⁹ The court did not question the *Wiwa* analysis, instead distinguishing the cases factually by pointing to the much higher level of engagement of the *Wiwa* defendants with the subject host government as compared to the South African defendants’ involvement with the apartheid regime. The *In re Apartheid Litigation* court noted that “[i]n *Wiwa*, plaintiffs alleged that defendants actively cooperated with Nigerian officials. . . . Defendants made payments to the military, contracted to purchase weapons for the military, coordinated raids on the group, and paid the military to violently respond to opposition. These activities are not present here.”²⁰⁰ The *In re Apartheid Litigation* court, by distinguishing the case from *Wiwa* on its facts rather than on its law, effectively affirmed the use of the § 1983 jurisprudence as a mechanism for assessing secondary liability in international law.

197. *Id.*

198. *Id.*

199. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 548–49 (S.D.N.Y. 2004).

200. *Id.* at 549.

2. Other Federal Common Law Approaches

The *Unocal* decision may have been vacated, at least in part, because the concurring opinion by Judge Reinhardt endorsed the use of various domestic federal common law principles to resolve the complicity issue.²⁰¹ Reinhardt's position, as expressed in his concurrence, that federal common law should be applied to the complicity liability issue was premised upon his (1) consideration of this issue as ancillary to the question of direct liability to the underlying acts; (2) characterization of Unocal Corp.'s role as derivative and based on third party liability; and (3) classification of the underlying right of action as legislatively derived.²⁰²

Judge Reinhardt apparently saw the court's task as one of judicial interpretation and application of a legislatively defined right of action. Reinhardt stated, "There is another reason why the application of federal common law is appropriate here: we are required to resolve issues ancillary to a cause of action created by Congress. The Supreme Court has stated that in such cases, courts should apply federal common law 'to fill the interstices of federal legislation.'"²⁰³ This authority of the court to fill interstices of legislative rights of action is inapposite because claims under the ATS involve rights of action defined *not* by legislation but by international law norms recognized under common law. In *Sosa*, the Supreme Court held that the ATS is a jurisdictional statute created to grant power to the courts to hear cases involving a "modest number of international law violations with a potential for personal liability at the time,"²⁰⁴ and, "a narrow class of international norms today."²⁰⁵ Yet the question remains whether courts should apply municipal federal common law to fill the interstices of an international law-based right of action — particularly in ATS cases, when the standard is a universal one.

Reinhardt, in his *Unocal* concurrence, stated that "courts should not substitute international law principles for established

201. *Doe v. Unocal*, 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (proposing that the question of liability for complicity is ancillary to the issue of liability for the underlying actions), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

202. *Id.*

203. *Id.* at 965 (citing *United States v. Kimbell Foods*, 440 U.S. 715, 727 (1979)).

204. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

205. *Id.* at 729.

federal common law or other domestic law principles . . . unless a statute mandates that substitution”²⁰⁶ The ATS, by its terms, mandates a substitution of international law principles for domestic law. The statute provides jurisdiction “for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁰⁷ The proposed use of the domestic principles of joint venture liability,²⁰⁸ agency liability,²⁰⁹ and reckless disregard²¹⁰ would substitute domestic principles when those of international law are mandated.

B. *International Law Approach*

The reasons for applying standards of international law to claims arising from the primary conduct under the ATS apply equally to claims based on the secondary, complicit acts.²¹¹ In regard to the aiding and abetting standard, this raises the question of why the distinction matters whether the standard applied is domestic or international when the two are nearly identical. The *Unocal* court noted the similarity between the aiding and abetting standard under international law and the aiding and abetting standard under domestic tort law:

The *Furundzija* standard for aiding and abetting liability under international criminal law can be summarized as knowing practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. At least with respect to assistance and encouragement, this standard is similar to the standard for aiding and abetting under domestic tort law. Thus, the Restatement of Torts states: “For harm resulting to a third person from the tortious conduct of another, one is sub-

206. *Unocal*, 395 F.3d at 966 (Reinhardt, J. concurring) (emphasis omitted).

207. 28 U.S.C. § 1350 (2000).

208. *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring). Interestingly, after stating that all factors in the choice-of-law inquiry point toward federal common law, *id.* at 967, and that joint venture theory is a well-established common law principle, *id.*, the concurrence states, “the principle that a member of a joint venture is liable for the torts of its co-venturer is well established in international law” *Id.* at 971.

209. *Id.* at 972–73. As with the joint venture theory, the concurrence points out that agency theory is well-established in international law.

210. *Id.* at 974.

211. See *Unocal*, 395 F.3d 932; *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

ject 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"²¹²

So although *Unocal* emphasized that the ATS was enacted to provide a right of action in international law,²¹³ that right of action was ultimately defined by a standard identical to our own domestic law.

The *Unocal* court, however, found that the factors listed in Restatement (Second) of Conflict of Laws supported the application of international law principles.²¹⁴ These factors included, "the needs . . . of the international system[],"²¹⁵ "the relevant policies of the forum,"²¹⁶ and, perhaps most importantly, "regarding 'the protection of justified expectations,' the 'certainty, predictability and uniformity of result, and the ease in the determination and application of the law to be applied.'"²¹⁷ Additionally, the purpose behind the ATS is to provide remedies for torts based on international law violations.²¹⁸ Therefore, the purpose of the statute is better served by applying international law to the complicity allegations, which are also tort-related.²¹⁹ In a more recent decision, *Presbyterian Church of Sudan*, the court followed the same reasoning.²²⁰ Now that *Sosa* may have rendered the aiding and

212. *Unocal*, 395 F.3d at 951 (quoting RESTATEMENT (SECOND) OF TORTS § 876 (1979)).

213. *Id.* at 948–49.

214. *Id.* at 949 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

215. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)) (alteration in original).

216. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

217. *Id.* (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969)).

218. *Id.*

219. *Id.*

220. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) ("The [ATS] provides a cause of action in tort for breaches of international law. In order to determine whether a cause of action exists under the [ATS], courts must look to international law. Thus, whether or not aiding and abetting and complicity are recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law.") (citations omitted). The court also afforded extensive treatment to the question whether corporations are capable of violations of international law. The opinion draws on extensive authority to support its holding that corporations are capable of violating international law. By implication, the case holds that corporations may be sued under the ATS. The Supreme Court has not ruled on this issue, although there is language in *Sosa* indicating that

abetting standard inapplicable under the ATS, it is more important for the complicity analysis to be firmly placed in international law.

1. Does the Aiding and Abetting Standard Satisfy *Sosa*?

Having decided that the complicity allegations should be decided according to international law, the *Unocal* court announced that it would adopt the aiding and abetting standard initially articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) and subsequently followed and further explained by the International Criminal Tribunal for Rwanda (ICTR).²²¹ The standard was derived from the ICTY's examination of the post-World War II statutes that were adopted in order to prosecute war criminals for atrocities and from the case law that developed from those prosecutions.²²² Essentially, the ICTY and ICTR found that the aiding and abetting standard was established as customary international law, and several U.S. courts agreed that the standard was well established in international law.²²³

corporations are included in the ambit of the ATS: "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 an individual." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004) (emphasis added).

221. *Unocal*, 395 F.3d at 950–51. The Tribunals included an additional element of "moral support" that the *Unocal* court declined to adopt. The majority reasoned that, the adoption of the aiding and abetting standard was in large part validated by its similarity to established precedent, as illustrated by the Restatement (Second) of Torts. *Id.* The Restatement provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." RESTATEMENTS (SECOND) OF TORTS § 876 (1979). In contrast, the standard articulated by the International Criminal Tribunal for the former Yugoslavia is: "The *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." *Unocal*, 395 F.2d at 950 (citation omitted). The court declined to adopt the 'moral support' element, which had no corresponding element in domestic precedent. *Id.* at 951 & n.28. The concurrence found this selective incorporation of an international law standard problematic. *Id.* at 963 (Reinhardt, J., concurring). A full exploration of this issue is a topic for another paper; however, it should be noted that the element of moral support is articulated in the alternative. Regarding the *mens rea*, what is required is, "knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime." *Id.* at 950 (quoting Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 235, 245 (Dec. 10, 1998)).

222. See *Unocal*, 395 F.3d at 948–49.

223. See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) (examining aiding and abetting standard and finding, "Principles of accomplice liabil-

The aiding and abetting standard, which calls for “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime,”²²⁴ meets the definition of a customary international law norm, but it fails to meet the *Sosa* criteria for purposes of the ATS. In order for a federal court to find that the aiding and abetting standard satisfies *Sosa*, such court must find that the standard is an international law 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.”²²⁵ Specifically, the inquiry must turn to whether the norm is as definite, specific, and widely accepted as the prohibitions against violation of safe conducts, infringement of the rights of ambassadors, and piracy were at the time the ATS was enacted.²²⁶ Additionally, courts must be satisfied that the standard does not offend the prudential considerations articulated by the Supreme Court.²²⁷

Recently, the *In re Apartheid Litigation* court disagreed that the aiding and abetting standard was “universally accepted as a legal obligation.”²²⁸ The court explicitly declared that the aiding and abetting standard must satisfy *Sosa* for a cause of action in complicity to lie under the ATS.²²⁹ Whether or not the standard would

ity are well-established under international law.”); *Unocal*, 395 F.2d at 950 n.26 (“The *Furundzija* Tribunal based its *actus reus* standard for aiding and abetting on an exhaustive analysis of international case law and international instruments.”); *Presbyterian Church of Sudan*, 244 F. Supp. 2d at 322 (“Indeed, the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law . . .”).

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

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

226. *Id.* at 724, 729 (holding that “we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy,” and further explaining that “[t]he jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority.”).

227. *Id.* at 725–28.

228. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004).

229. *Id.* (“[P]laintiffs will need to show that either aiding international law violations or doing business in apartheid South Africa are violations of the law of nations that are ‘accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms’ such as piracy and crimes against ambassadors.” (quoting *Sosa*, 542 U.S. at 725)).

satisfy customary international standard in a context outside the ATS was not addressed. The court only noted that none of the sources offered by the plaintiffs to establish the status of the aiding and abetting standard under international law “establish[ed] a clearly-defined norm for [ATS] purposes.”²³⁰ The court relied on the Supreme Court’s discussion of aiding and abetting in *Central Bank of Denver v. First Interstate Bank of Denver*.²³¹ *Central Bank* concerned the application of aider and abettor liability in actions arising under section 10(b) of the Securities Exchange Act of 1934.²³² The *In re Apartheid Litigation* court held that “where Congress has not explicitly provided for aider and abettor liability in civil causes of action, it should not be inferred.”²³³ The court found that “the [ATS] presently does not provide for aider and abettor liability, and this Court will not write it into the statute.”²³⁴ This, however, does not answer the inquiry into specificity or universality that *Sosa* requires.

The *In re Apartheid Litigation* court appears to have applied the same analysis that Judge Reinhardt applied in his concurrence in *Unocal* by viewing causes of action under the ATS as statutorily defined: The court declared that the ATS does not provide for aider and abettor liability, but the court failed to note that the ATS does not provide in *any* enumerative way for any liability, except for a “tort only, in violation of the law of nations”²³⁵ The cause of action is defined by international law, not by the ATS, so the absence of specific language within the ATS regarding aiding and abetting is irrelevant, and the court’s focus of attention on whether to ‘write it into the statute’ is misplaced. The court’s treatment, however, of the *Sosa* prudential factors is particularly apt consider-

230. *Id.* at 549–50 (emphasis added).

231. *Id.* at 550 (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994)).

232. *Cent. Bank*, 511 U.S. at 166 (explaining that “[a]s we have interpreted it, § 10(b) of the Securities Exchange Act of 1934 imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities. In this case, we must answer . . . whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice”).

233. *In re Apartheid Litig.*, 346 F. Supp. 2d at 550 (citing *Cent. Bank*, 511 U.S. at 181–82, 189–90).

234. *Id.*

235. 28 U.S.C. § 1350 (2000).

ing *Sosa* had discussed the (then-)pending *In re Apartheid Litigation* case: The *Sosa* court found that “another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.”²³⁶ Although the *Sosa* claim was disposed of without such application, the Court pointed to *In re Apartheid Litigation* as a specific case in which such deference would be required:

The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which “deliberately avoided a ‘victors’ justice’ approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill.”²³⁷

This approach, which *Sosa* acknowledged but to which *In re Apartheid Litigation* did not allude, points all of the prudential factors away from adjudicating the case under *any* standard, not only the aiding and abetting standard. This and the absence of any analysis of the specificity or universality of the aiding and abetting standard, therefore, somewhat limit the precedential value of *In re Apartheid Litigation* for other secondary liability claims that may arise under different circumstances.

2. Must the Complicity Standard Satisfy *Sosa*?

The two pre-*Sosa* cases that have applied the aiding and abetting standard under the ATS, *Unocal* and *Presbyterian Church of Sudan*, both applied a different standard to the underlying allegations than they did to the complicity claims.

Unocal applied the ‘specific, universal, and obligatory’ standard, which was then the majority approach to ATS claims, to the underlying claims against the primary actors, the Myanmar military. Although the ultimate issue in *Unocal* was Unocal Corp.’s alleged complicity, the court’s initial inquiry was whether the underlying claims were violations of international law: The court stated that

236. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

237. *Id.* at 733 (quoting Declaration by Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa (July 11, 2003), reprinted in Brief of the Government of Commonwealth of Australia et al. as Amici Curiae in Support of the Petitioner app. b, at 7a, *Sosa*, 542 U.S. 692 (2004) (No. 03-339)).

“[o]ne threshold question in any [ATS] case is whether the alleged tort is a violation of the law of nations.”²³⁸ *Unocal* utilized the benefit of recent precedent assessing human rights violations and the intervening twenty years of relevant ATS precedent.²³⁹ However, the court also engaged in a direct inquiry into the sources of international law, requiring, at a minimum, a showing of “universal, specific, and obligatory”²⁴⁰ international norms and holding that forced labor meets the most rigorous standard of a *jus cogens*²⁴¹ violation of international law. The court looked to the United Nations Universal Declaration of Human Rights (banning “slavery and servitude” and establishing the right to “free choice of employment”),²⁴² the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (the London Agreement) (establishing an International Military Tribunal for prosecution of war crimes, including “deportation to slave labor” and crimes against humanity, including “enslavement”),²⁴³ and the Charter of the In-

238. *Doe v. Unocal*, 395 F.3d 932, 945 (9th Cir. 2002), *vacated, reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

239. *Id.* See, e.g., *United States v. Matta-Ballestros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (noting that torture, murder, genocide and slavery are *jus cogens* norms) (citing *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (“We conclude that the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*.”)). The *Unocal* court also relied on precedent that declared rape a form of torture. *Unocal*, 395 F.3d at 945 (citing *Farmer v. Brennan*, 511 U.S. 825, 852, 854 (1994) (Blackmun, J., concurring) (describing brutal prison rape as “the equivalent of” and “nothing less than *torture*” (emphasis added)); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (describing allegations of “murder, rape, forced impregnation, and *other forms of torture*” (emphasis added)); *In re Extradition of Suarez-Mason*, 984 F. Supp. 676, 682 (N.D. Cal. 1988) (stating that “shock sessions were interspersed with rapes and *other forms of torture*” (emphasis added))).

240. *Unocal*, 395 F.3d at 944 (“We have held that the [ATS] also provides a cause of action, as long as ‘plaintiffs . . . allege a violation of “specific, universal, and obligatory” international norms as part of [their] [ATS] claim.’”) (omission and second alteration in original) (citation omitted).

241. *Id.* at 945 (holding that “forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation”). *Jus cogens* (jes KOH-jenz) is a Latin phrase meaning “compelling law,” and is used to refer to 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.” BLACKS LAW DICTIONARY (8th ed. 2004).

242. Universal Declaration of Human Rights, G.A. Res. 217A (III), ¶¶ 4, 23(1), U.N. Doc A/810 at 71 (Dec. 10, 1948).

243. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) and Charter of the International Military

ternational Military Tribunal (making forced labor a war crime)²⁴⁴ as part of its inquiry into sources of international law.²⁴⁵ *Unocal* also looked to the Thirteenth Amendment of the U.S. Constitution,²⁴⁶ which had been characterized by the Supreme Court as having been enacted to maintain a system of free and voluntary labor.²⁴⁷

In determining the standard to apply to the complicity claims against the secondary actors, *Unocal* found “recent decisions by the [ICTY] and [ICTR] especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the [ATS].”²⁴⁸ This statement implies that the aiding and abetting standard is the current standard under international law, and that it is the current standard applicable to the ATS. There was no further inquiry as to whether the aiding and abetting standard satisfied the specific, universal, and obligatory standard — or whether it was even required to do so. The court’s subsequent discussion of the methodology of the ICTY and ICTR in developing and articulating the aiding and abetting standard²⁴⁹ demonstrates just what this standard may currently be in international law, but there was no comparable demonstration of how it meets the ‘specific, universal, and obligatory’ test that the court had identified for recognizing violations under the ATS.

Presbyterian Church of Sudan applied a different standard to the underlying claims of the primary conduct than it did to the complicity claims. Regarding the primary claims, the court found that rights of action under the ATS must be based on conduct that violates “well established, universally recognized norms of international law,”²⁵⁰ and that “[u]nder the [ATS], any violation of a specific, universal, and obligatory international norm is actionable”²⁵¹ Regarding the complicity claims, however, the court

Tribunal, Charter arts. 6(b)–(c), Aug. 8, 1945, 82 U.N.T.S. 280, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited Jan. 6, 2006).

244. *Id.* at Charter art. 6(b).

245. *Unocal*, 395 F.3d at 945.

246. U.S. CONST. amend. XIII.

247. *Unocal*, 395 F.3d at 946 (citing *Pollock v. Williams*, 322 U.S. 4, 17 (1944)).

248. *Id.* at 950.

249. *Id.* at 951.

250. *Presbyterian Church of Sudan v. Talisman*, 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003).

251. *Id.* at 306.

found that “whether or not aiding and abetting and complicity are recognized with respect to charges of genocide, enslavement, war crimes, and the like is a question that must be answered by consulting international law,”²⁵² and that “the concept of complicit liability for . . . aiding and abetting is *well-developed* in international law”²⁵³ The court did not explain the disparity between the ‘specific, universal, and obligatory’ requirement for the primary claims and the ‘well-developed’ standard in international law it applied to the complicity claims.²⁵⁴

As noted before, *Filartiga* explained why the *prima facie* legal hurdle for recognition under the ATS is higher than that of mere binding international law: “The requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”²⁵⁵ Whether or not this fully explains the traditional approach, the current reality is that the recognition of rights of action in international law under the ATS must satisfy a higher standard than customary international law. In spite of the caution which has traditionally been employed and is now expressly required, there is evidence of a broader acceptance of international norms. In addition to its cautious language, *Filartiga* emphasized that the ATS does not create new rights under international law; instead, it should be construed “simply as opening the federal courts for adjudication of rights already recognized by international law.”²⁵⁶ Similarly, *Paquete Habana*, in discussing sources of international law, had declared that “[s]uch works are resorted to by judicial tribunals, not for the speculations of their

252. *Id.* at 320.

253. *Id.* at 322 (emphasis added).

254. Similarly, in *Mehinovic v. Vuckovic*, the district court found that the underlying allegations were actionable under international law because they “contravene[d] ‘well established, universally recognized norms of international law,’” and that the relevant international norms were “specific, universal and obligatory.” *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) (citation omitted). As to the claims of secondary liability, however, the court was satisfied that aiding and abetting was the appropriate standard to apply because “[p]rinciples of accomplice liability are *well-established* under international law. *Id.* (emphasis added).

255. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

256. *Id.* at 887.

authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”²⁵⁷ If the prohibition against aiding and abetting is already recognized in international law, then perhaps once a primary claim passes the *Sosa* threshold, the complicity standard will be assessed based on a customary international law standard.

There is reason to believe that applying a different standard to allegations of complicity will not be well received by the lower federal courts or by the Supreme Court. The *Sosa* decision allowing the lower federal courts to recognize rights of action in international law at all was seen by some as problematic:

That approach . . . of course again relegated to the lower federal courts the task of grappling with and determining what offenses against international law fit within that narrow class of offenses. The consequences of leaving that door open, as Justice Scalia stated [in *Sosa*], were not only to make the task of the lower federal courts immeasurably more difficult, but also to invite the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision in *Sosa*.²⁵⁸

This resistance is likely to be even stronger in the face of an approach that allows courts to apply a broader standard to complicit acts. However, there is reason to ask: Will courts prefer, instead, to leave potential plaintiffs without any remedy at all against complicit actors? The judicial interest in providing a complete remedy²⁵⁹ may demand that courts consider using the aiding and abetting standard based upon its current status as a mere customary binding international norm, in spite of its shortcomings under *Sosa*.

257. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

258. *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004).

259. *See, e.g.*, 30A C.J.S. *Equity* § 24 (explaining that “[a] remedy at law cannot be considered adequate, so as to prevent equitable relief, unless it covers the entire case made by the bill in equity. To oust equitable jurisdiction, the remedy at law has been required to be so complete that it attains the full end and justice of the case, reaching the whole mischief and securing the whole right of the party. So, where a legal remedy is available, but would afford only a partial protection of plaintiff’s entire right, or would not entirely adjust the rights of the parties, such remedy is incomplete and inadequate, and for that reason equity will interpose.” This implies the judicial interest of providing a *complete* remedy — if possible, at law; or else, in equity) (citations omitted).

The aiding and abetting standard arguably has reached the status of customary international law, in spite of its relatively recent birth. The first component of customary international law is that it “results from general and consistent practice of states”²⁶⁰ The implication is that of a slow process whereby understandings develop gradually, from the bottom up. In the modern world, however, this process appears to have been expedited by increased ease of communication and by the very existence of the United Nations and U.N. General Assembly procedures, in “greatly foreshortening the requisite time to establish customary law and affording an economical mode to articulate consensus about common interest.”²⁶¹ The International Court of Justice (ICJ) has stated that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law.”²⁶² The ICJ was referring to the international legal status of the 1945 Truman Proclamation, in which the United States declared that a coastal state “had an original, natural and exclusive right to the continental shelf off its shores.”²⁶³ The ICJ found, in 1969, that the principle articulated in the Truman Proclamation, uttered just over twenty years prior, was the applicable principle of international law.²⁶⁴

The standard for aiding and abetting the crimes enumerated in the various international instruments was developed in various decisions by the ICTY, in particular, in *Prosecutor v. Furundzija*.²⁶⁵ *Furundzija* held that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement or moral support which has a substantial effect on the perpetration

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

261. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY ORIENTED PERSPECTIVE 350 (2d ed. 2000).

262. *North Sea Cont'l Shelf Cases*, 1969 I.C.J. 3, 44 (Feb. 20, 1969), quoted in RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporters notes 2 (1987).

263. *North Sea Cont'l Shelf*, 1969 I.C.J. at 44. A case summary of *North Sea Cont'l Shelf* is available at <http://www.icj-cij.org/icjwww/idecisions/isummaries/icsummary690220.htm> (last visited Jan. 6, 2006).

264. *North Sea Cont'l Shelf*, 1969 I.C.J. at 44.

265. *Doe v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002), vacated, reh'g granted, 395 F.3d 978 (9th Cir. 2003) (citing *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 235 (Dec. 10, 1998)).

of the crime.”²⁶⁶ *Unocal* summarized the standard as consisting of “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”²⁶⁷ The ICTY and ICTR statutes grant the tribunals authority to prosecute genocide, including “complicity in genocide,”²⁶⁸ and other crimes against humanity.²⁶⁹ Both statutes provide that “[a] person who planned, instigated, ordered, committed or otherwise *aided and abetted* in the planning, preparation or execution of a listed crime . . . shall be individually responsible for the crime.”²⁷⁰

The ICTY’s primary sources were the London Agreement,²⁷¹ the Charter of the International Military Tribunal for the Far East

266. *Furundzija*, Case No. IT-95-17/1-T at ¶ 235, *quoted in Unocal*, 395 F.3d at 950. The tribunal reasoned that practical assistance need not have actually caused the act to occur, only that “the acts of the accomplice make a significant difference to the commission of the criminal act by the principal.” *Id.* at ¶ 233, *quoted in Unocal*, 395 F.3d at 950. The *mens rea* requirement, according to the tribunal, is actual or constructive “knowledge that [the accomplice’s] actions will assist the perpetrator in the commission of the crime.” *Id.* Regarding the *mens rea*, the tribunal held that the accomplice does not need to share the *mens rea* of the perpetrator, and that the required knowledge does not have to be of the specific acts that are to occur. *Id.* at ¶ 245, *quoted in Unocal*, 395 F.3d at 950. If the accused accomplice “is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate commission of that crime, and is guilty as an aider and abettor.” *Id.*, *quoted in Unocal*, 395 F.3d at 950–51.

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

268. International Tribunal Statute — Yugoslavia, *supra* note 149, at art. 4(3)(e); International Tribunal Statute — Rwanda, *supra* note 149, at art. 2(3)(e).

269. International Tribunal Statute — Yugoslavia, *supra* note 149, at arts. 4–5; International Tribunal Statute — Rwanda, *supra* note 149, at arts. 2–3.

270. International Tribunal Statute — Yugoslavia, *supra* note 149, at art. 7(1) (emphasis added); International Tribunal Statute — Rwanda, *supra* note 149, at art. 6(1) (emphasis added).

271. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.S. 280, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited Jan. 6, 2006). The London Agreement was entered into by the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Socialist Republics, and the provisional Government of French Republic. *Id.* The London Agreement adopts the Charter of the International Military Tribunal (which later became known as the Nuremberg Tribunal) as an integral part of the London Agreement. *Id.* at art. 2. The Charter of the International Military Tribunal in turn establishes secondary liability. *Id.* at Charter art. 6.

establishing the Tokyo Tribunal,²⁷² and the Control Council Law No. 10.²⁷³ These treaties and statutes consistently announce that complicity in crimes is subject to liability, but no standards are set forth to determine at what level and under what circumstances such complicity subjects the complicit actor to liability. *Furundzija*'s analysis of the case law, however, revealed some general themes,²⁷⁴ which are: "additional confidence to his companions;"²⁷⁵ presence, combined with authority;²⁷⁶ the requirement that the acts of the complicit party must have a substantial effect on the principals;²⁷⁷ and the requirement of knowledge that the acts would be carried out.²⁷⁸ In its inquiry into the required *mens rea* on the part of the accomplice, the court found that the case law overwhelmingly held that the accomplice need not share the *mens rea* of the direct actor,

272. Charter of the International Military Tribunal for the Far East, art. 5(c), Jan. 19, 1946 (containing a provision on secondary liability identical to that of the Nuremberg Tribunal), available at <http://www.yale.edu/lawweb/avalon/imtfech.htm> (last visited Jan. 6, 2006).

273. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/imt10.htm> (last visited Jan. 6, 2006). The Control Council Law No. 10 was adopted, "in order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal." *Id.*

274. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 193–95 (Dec. 10, 1998).

275. Trial of Franz Schonfeld and Nine Others, Essen, 11–26 June 1946, Vol. XI, Law Reports 69, 70, quoted in *Furundzija*, Case No. IT-95-17/1-T at ¶ 201 & n.224.

276. Strafsenat, Urteil vom 10. August 1948 gegen L. u. a. StS 37/48 (Entscheidungen, Vol. I, pp. 53–56), quoted in *Furundzija*, Case No. IT-95-17/1-T at ¶ 208 & n.230 (referring to *Urteil vom 10. August* as "the Synagogue case"). The *Furundzija* court's analysis of this factor is the basis for the "moral support" element, which was not adopted by the *Unocal* court. See *Doe v. Unocal*, 395 F.3d 932, 951 & n.28 (9th Cir. 2002), vacated, reh'g granted, 395 F.3d 978 (9th Cir. 2003).

277. Trial of Otto Ohlendorf and Others (Einsatzgruppen), in *Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No.10*, Vol. IV, cited in *Furundzija*, Case No. IT-95-17/1-T at ¶ 217 & n.239.

278. See *Furundzija*, Case No. IT-95-17/1-T at ¶¶ 219–21 (citing and quoting *Trial of Otto Ohlendorf and Others*). The court concluded that in "the Einsatzgruppen case, knowledge, rather than intent, was held to be the requisite mental element." *Id.* at ¶ 237.

though knowledge on the part of the accomplice must be proven for liability to attach.²⁷⁹

This aiding and abetting jurisprudence in international law has been called ‘well developed.’²⁸⁰ The ICTY recently declared that “the reference in article 4(3)(e) of the Statute [of the ICTY] to ‘complicity in genocide’ can and does include aiding and abetting,”²⁸¹ and that “aiding and abetting genocide does not represent an addition to crimes known to customary international law but has always formed part of that law.”²⁸² Before *Sosa*, courts found that when the underlying acts satisfied the ‘universal, specific, and obligatory’ test, the aiding and abetting standard was applicable for purposes of the ATS according to the ‘well-developed’ test. This begs the question: Following *Sosa*, if the prohibition against the underlying acts is sufficiently specific as to satisfy *Sosa*, then may the complicity aspect of the claim still be ascertained based upon rules that are ‘well-developed’ in customary international law? This result seems to defy the reasoning of *Sosa* but perhaps will be applied as an interim measure until relevant international law principles develop.

IV. CONCLUSION

Now that the U.S. Supreme Court has spoken on the requirements for recognizing causes of action in international law under the Alien Tort Statute, the next challenge will likely be the recognition of complicity claims under the statute. It is likely that courts deciding ATS cases involving the aiding and abetting standard will follow *In re Apartheid Litigation* and hold that a complicit liability claim does not survive scrutiny under *Sosa*. Additionally, the application of § 1983 analysis in assessing an international law-based right of action will likely not survive review by the Court. *Sosa* indicates that the Court is inclined to restrict the discretion of the lower courts in adjudicating ATS claims. Thus, it is unlikely that the

279. *Id.* at ¶ 236.

280. See *Unocal*, 395 F.3d 932; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003).

281. *Prosecutor v. Krstic*, Case No: IT-98-33-A, Judgment, pt. VIII(G)(1), ¶ 64 (Apr. 19, 2004) (Shahabuddeen, J., dissenting in part) (agreeing with the majority on this issue).

282. *Id.* at ¶ 68 (agreeing with the majority on this issue).

Court will find that the secondary liability assessment need not satisfy the test it has already established for the primary liability claims. The possibility exists that equitable concerns will force an interim solution. Nevertheless, ATS plaintiffs must recognize the possibility that, absent further developments in international law, there simply exists no cognizable complicity standard under the statute.

