Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Legislative Prerogative

Michael Garvey
CORPORATE AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE: A LEGISLATIVE PREROGATIVE

Michael Garvey*

Abstract: Since the landmark decision in Filártiga v. Pena-Irala, U.S. courts have struggled determining actionable claims under the enigmatic Alien Tort Statute (ATS). While the Supreme Court recognized the viability of the ATS as a jurisdictional statute in Sosa v. Alvarez-Machain, its scope was restricted to an amorphous “eighteenth century paradigm.” This model has proven to be a murky standard. One of the most contentious and uncertain claims under the ATS involves corporate liability for aiding and abetting human rights violations. This Comment argues that based upon the limited holding of Sosa, aiding and abetting liability would not be recognized as an actionable claim under the ATS. Therefore, similar to the Torture Victim Protection Act, it is Congress’s role to clarify the ATS and ensure that victims of human rights are able to hold complicit corporations liable.

Introduction

In 1980, the Court of Appeals for the Second Circuit held that a Paraguan official residing in New York was civilly liable to the family of Dr. Joel Filártiga for the torture and death of Dr. Filártiga’s son, Joelito. According to Dr. Filártiga, Inspector Americo Norberto Pena-Irala murdered Joelito to quiet Dr. Filártiga, an outspoken critic of Paraguay’s dictator Alfredo Stroessner. What was remarkable about the case was that the torture and murder occurred in Paraguay, and neither party was a United States citizen.

Despite each party’s lack of citizenship, the Filártigas were able to seek redress for their suffering in the United States federal courts four

1 Filártiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).
3 Filártiga, 630 F.2d at 878. The Alien Tort Statute was by and large unknown before the Filártiga case. See Davis, supra note 2, at 3. The Filártigas’ lawyers at the Center for Constitutional Rights were skeptical of utilizing the act because they were afraid that “any such suit would be laughed out of court.” Id.

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years after Joelito’s death. The basis for the decision rested upon an obscure section of the original Judiciary Act known as the Alien Tort Claims Act, or the Alien Tort Statute (ATS). This provision, crafted in 1789 as part of the Judiciary Act, states that federal 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.”

Judge Irving Kaufman, writing for the Second Circuit Court of Appeals, determined that the court had subject matter jurisdiction over the Filártiga’s allegations of torture and extrajudicial murder. Justice Kaufman stated that the judiciary may recognize certain universally recognized violations of international law under the ATS’s grant of jurisdiction for violations against the “law of nations.” Because deliberate torture and murder violate universally accepted norms of international law, the ATS provides federal jurisdiction “whenever an alleged torturer is found and served with process by an alien within our borders.” Pena-Irala was residing in Brooklyn, New York at the time and therefore he was subject to the jurisdiction of the Second Circuit.

Twenty-four years after Filártiga v. Pena-Irala, the Supreme Court decided its only case under the ATS in Sosa v. Alvarez-Machain. Writing for the majority, Justice David Souter held that while the ATS is a purely jurisdictional statute, it is not rendered “stillborn” without a cause of action to compliment its jurisdictional grant. Instead, the Court held

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4 See Davis, supra note 2, at 3.
6 § 1350.
7 Filártiga, 630 F.2d at 878.
8 Id. at 880. At the time of the first Judiciary Act, the “law of nations” was considered part of federal common law. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004). The law of nations governed the norms of behavior of nation states with one another; the conduct of individuals outside of their respective borders but “carrying on an international savor” (for example, mercantile questions), and rules binding individuals in conduct that overlapped with the considerations of state relationships. Id. at 715. The latter included three specific offenses identified by Blackstone: violation of safe conduct, infringement of the rights of ambassadors, and piracy. Id. While the prevailing conception of common law has changed as a result of Erie Railroad Co. v. Tompkins, the law of nations still represents an interstitial area of substantive law that federal courts may recognize under the common law. Id. at 729; see Erie R.R. Co. v. Tompkins, 304 U.S. 58, 78 (1934).
9 Filártiga, 630 F.2d at 878.
10 Davis, supra note 2, at 18. By happenstance, Dr. Filártiga’s daughter, Dolly, determined Pena-Irala’s whereabouts during a trip to Washington, DC. Id.
11 Sosa, 542 U.S. at 738.
12 Id. at 714, 719. Justice Souter rejected the argument that the first Congress passed the ATS “as a jurisdictional convenience to be placed on the shelf for use by a further Congress . . . that might, some day, authorize the creation of causes of action.” Id. at 719.
that the ATS enables federal courts to hear a finite amount of claims defined by the law of nations, as incorporated into federal common law. While the Court did not expressly enumerate actionable claims under the ATS, it did qualify that courts should require claims based “on the present day law of nations to rest on a norm of international character accepted by the civilized world.” Since *Sosa*, courts have struggled with identifying claims that fit into the narrow class of claims permitted under the ATS.

One of the most contentious and elusive questions that remains unresolved under the ATS involves the liability of corporations for aiding and abetting human rights violations. Increasingly over the past twenty years, victims of human rights violations have sought to hold complicit corporations liable for their involvement in gross human rights violations. Because the individual perpetrators are often low level judgment-proof actors, complicit corporations provide victims with a higher profile culpable party that is better able to provide monetary redress. Furthermore, because the corporations are frequently multinational, victims are better able to locate and effectuate service of process than if they are reliant on the happenstance of an individual being found within the borders of the United States. Finally, a more “constructive engagement” is furthered in developing nations by holding corporations liable for complicit conduct than if corporations stand idly by while condoning or abetting human rights violations.

The Justice Department adamantly opposed corporate aiding and abetting liability during President George W. Bush’s administration, arguing that aiding and abetting liability is inconsistent with judicial restraint in cases involving foreign affairs and political questions, an

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13 *Id.* at 712.
14 *Id.* at 725.
15 *See Sosa*, 542 U.S. at 738 (refusing to recognize illegal detention of less than a day as actionable under the ATS); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167–69 (5th Cir. 1999) (refusing to recognize claims of environmental torts and cultural genocide under the ATS); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (recognizing corporate liability for *jus cogens* violations).
17 *See Doe v. Unocal*, 395 F.3d 932, 936 (9th Cir. 2002).
18 *See id.*
19 *See Filártiga*, 630 F.2d 876.
impermissible foray into federal common law, and an improper interference with foreign relations. In contrast, human rights groups have traditionally argued that aiding and abetting liability for gross human rights violations has long been recognized since the Nuremburg Tribunal in 1945. They argue that aiding and abetting liability is incorporated into federal common law as an international norm actionable under the paradigm enunciated in . While no inter-circuit disagreement currently exists over aiding and abetting liability, its viability is in no way certain. Furthermore, there remains disagreement over the appropriate level of complicity required. Is the standard drawn from international law or domestic law?

An opportunity to answer these questions was side-tracked when the Supreme Court denied certiorari in , Inc. v. . This petition arose out of the Second Circuit Court of Appeal’s decision in , v. Barclay National Bank Ltd., which recognized aiding and abetting liability under the ATS. The petition was denied due to a lack of quorum when four of the nine justices recused themselves on account of conflict of interests. The refusal to hear this

21 Brief for the United States as Amicus Curiae in Support of Petitioners at 8–16, Am. Isuzu Motors, 128 S. Ct. 2424 (No. 07–919).
23 Reply Brief for Plaintiff-Appellants at 11, Khulumani, 504 F.3d 254 (No. 05–2326).
24 Cassel, supra note 22, at 322.
25 See Khulumani, 504 F.3d at 277 (Katzmann, J., concurring); id. at 288 (Hall, J., concurring), id. at 337(Korman, J., concurring in part & dissenting in part). Judge Katzmann and Judge Korman ruled that aiding and abetting liability is governed by international law and requires a mens rea of purpose. Id. at 277 (Katzmann, J., dissenting), 337 (Korman J., concurring in part & dissenting in part). However Judge Hall contended that the model should be drawn from federal common law and requires a mens rea of knowledge. Id. at 284, 288 (Hall, J., concurring).
26 See id. at 277, 284.
27 Am. Isuzu Motors, 128 S. Ct. at 2424.
28 See id.; Khulumani, 504 F.3d at 264.
29 See Linda Greenhouse, Conflicts for Justices Halt Appeal in Apartheid Case, N.Y. Times, May 13, 2008, at A14. Justice Alito owns stock in Exxon-Mobil and Bristol-Myers Squibb. See id. Justice Breyer owns stock in several of the companies named. See id. Chief Justice Roberts owns stock in Hewlett-Packard. See id. Justice Kennedy’s reason for recusal appears to be his son’s employment with another defendant, Credit Suisse, a conflict that has led the justice to disqualify himself in previous cases as well. See id.
petition means that the scope and viability of aiding and abetting liability remains in question.\textsuperscript{30}

This Comment argues that Congress, and not the courts, should resolve this uncertainty by providing a clear answer to the question of corporate liability under the ATS.\textsuperscript{31} Part I discusses the Supreme Court’s limited holding in \textit{Sosa} which cautiously restricted the judiciary’s ability to uncover causes of action from federal common law under the ATS.\textsuperscript{32} Part II then explains how the Second Circuit Court of Appeals’ most recent decision in \textit{Khulumani} recognizing aiding and abetting liability does not presently conform to the limited holding of \textit{Sosa}.\textsuperscript{33} Part III details the Torture Victim Prevention Act and argues that Congress is the legitimate branch to resolve questions arising from a statute which delves so deeply into the actions of foreign sovereigns.\textsuperscript{34} Finally, Part IV concludes that when Congress does address such questions, it should provide a cause of action for aiding and abetting liability.\textsuperscript{35} By providing a cause of action for aiding and abetting liability, a clear standard of liability will be set with a uniform level of complicity, thereby avoiding an inevitable clash with the Supreme Court’s limited holding in \textit{Sosa}.\textsuperscript{36}

\begin{footnotesize}
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\item See \textit{Am. Isuzu Motors}, 128 S. Ct. at 2424.
\item Aiding and abetting liability under the ATS will not withstand the limited application of \textit{Sosa}. See \textit{Sosa} 542 U.S. at 732; Virginia Monken Gomez, Note, \textit{The Sosa Standard: What Does It Mean for Future ATS Litigation?}, 33 Pepp. L. Rev. 469, 499 (2006) (“Evaluated on its own, aiding and abetting would seem to meet the same fate as Alvarez-Machain’s arbitrary detention claim [in \textit{Sosa}] . . . . In fact, a broad notion such as aiding and abetting would seem to be the very type of claim the Supreme Court seeks to invalidate by setting forth its stringent standard.”). It is important that Congress recognize aiding and abetting liability as an actionable claim for the development of human rights. \textit{See Unocal}, 395 F.3d at 953.
\item See \textit{Sosa}, 542 U.S. at 725–28.
\item See \textit{Khulumani}, 504 F.3d at 254.
\item See \textit{Sosa}, 542 U.S. at 731.
\item See Hannah Bornstein, Note, \textit{The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority}, 82 Ind. L.J. 1077, 1097–98 (2007). Ms. Bornstein argues that Congress should recognize corporate aiding and abetting liability under the ATS. \textit{Id.} However, Ms. Bornstein also maintains that courts may properly recognize aiding and abetting liability as Congress has implicitly recognized their ability by not amending or repealing the ATS. \textit{Id.} at 1089. Given the Supreme Court’s limited holding in \textit{Sosa}, this Comment argues that aiding and abetting liability is not well defined enough for courts to provide actionable claims under the ATS. \textit{See Sosa}, 542 U.S. at 725.
\item See \textit{Sosa}, 542 U.S. at 731.
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I. The Limited Holding of Sosa

In 2004 the Supreme Court heard its first and only case under the ATS.37 In Sosa, the plaintiff Humberto Alvarez-Machain brought suit against Jose Sosa and several Drug Enforcement Administration (DEA) officials for his illegal detention.38 Alvarez was wanted by the DEA after his indictment for the murder of a DEA agent.39 However, the DEA was unable to obtain his extradition from an uncooperative Mexican government.40 The DEA enlisted Sosa, a Mexican citizen, to abduct Alvarez and bring him to the United States where federal officers arrested Alvarez.41 After being acquitted of murder, Alvarez brought suit against the United States under the Federal Tort Claims Act and against Sosa under the ATS for violating the law of nations.42

In addressing Alvarez’s claim against Sosa, the Court first needed to determine whether or not the ATS provides a cause of action for international violations, or whether it was merely a jurisdictional statute.43 The Supreme Court held that it was both.44 Although the ATS is a jurisdictional statute, the original drafters likely expected the courts to apply their grant of jurisdiction to redress specific and limited violations of the “law of nations” recognized at common law.45 Relying on Blackstone’s list of specific offenses against the law of nations addressed under English common law, the Court surmised that the drafters had three universally recognized claims in mind: violation of safe conduct, infringement upon the rights of ambassadors, and piracy.46

While the Court did not limit the current application of the ATS to these three specific violations, it did command that courts use the same “eighteenth century paradigm” that the drafters envisioned.47 That is,

38 See id. at 697.
39 See id.
40 See id. at 698.
41 Id.
42 See Sosa, 542 U.S. at 698.
43 See id. at 714.
44 See id. at 724.
45 Id.
46 See id. at 715. The impetus for the Alien Tort Claims Act seems to stem from the initial inability of the Continental Congress to “cause infractions of treaties, or the law of nations to be punished.” Id. at 716. This inability was highlighted in May of 1784 when the Continental Congress could not provide redress for the so called “Marbois incident.” Id. Specifically, the United States was embarrassed by not being able to deal with an assault on the Secretary of the French Legion in Philadelphia by French adventurer DeLongchamps. Id.
47 See Sosa, 542 U.S. at 725.
for a claim to be viable under the ATS, it must be as specific and as universally accepted as the three Blackstone violations.48

In Sosa, Justice Souter determined that the illegal detention claim at issue lacked the certainty and specificity necessary to come within the stringent eighteenth century paradigm that the Court had just established.49 The Court reasoned that unlike crimes such as torture or genocide, which are clearly defined and invariably recognized as contrary to the law of nations, a claim for illegal detention could vary from a serious violation to something as mundane as a botched warrant.50 Because of the difficulty in defining which illegal detentions cross the line into actionable claims, the Court held that Mr. Alvarez’s claim failed.51

By requiring that the violation be universal and specific, the Court also stressed judicial caution in discerning actionable claims.52 In particular, Justice Souter highlighted five reasons why judicial application of the ATS is extremely limited.53 First, he noted that the idea of judicial recognition of “common law” has changed from the statute’s inception to present day.54 No longer is common law considered “discovered,” but rather, it is viewed in a positivistic way as the result of judicial creation.55 Second, the judiciary’s role in creating federal common law was drastically reduced by its decision in Erie Railroad Company v. Tompkins; since Erie, “the general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”56 Third, the Court recognized that the decision to create private causes of action is generally best left to the judgment of the legislative branch.57 Fourth, the Court recognized the clear potential for infringement upon the discretion of the legislative and executive branches by unfettered restrictions on actionable claims.58 Finally the Court called for restraint due to

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48 See id. at 732 (“[W]e 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 § 1350 was enacted.”).
49 See id. at 738.
50 See id. at 737–38.
51 See id. at 738.
52 See Sosa, 542 U.S. at 725.
53 See id. at 725–29.
54 See id. at 725.
55 Id. at 725.
56 Id. at 726.
57 See Sosa, 542 U.S. at 727.
58 See id.
the lack of any specific mandate by Congress to create new actionable violations of the “law of nations.”

Despite these powerful limitations, Justice Souter recognized a limited exception that allows the judiciary to recognize specific and universally accepted violations. In support of this exception, Justice Souter noted that Congress enacted the Torture Victim Prevention Act (TVPA) in response to the judiciary’s decision in Filártiga. The TVPA provides clear statutory authorization for action involving torture and extrajudicial killing, thereby affirming the decision of Filártiga.

Other than its requirement that judges remain “vigilant” in their recognition of the ATS claims, the Supreme Court did not provide a bright-line standard for other judges to follow. However, the Court did refer to corporate complicity litigation in the Second Circuit that involved victims of apartheid. While the Court did not explicitly answer whether it considered the victims’ claims actionable, it did suggest that the litigation involved political questions better left to the other two branches of government.

[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.

Id. at 727–28.

59 See id. at 728.

60 See Sosa, 542 U.S. at 729 (“[T]he judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”).


62 Sosa, 542 U.S. at 731 (adding that “[the court] would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations”).

63 See id. at 729.

64 See id. at 732 n.20 (“A related consideration [of whether a norm is sufficiently definite] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”).

65 See id. at 733 n.21.

[T]here are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.

Id.
II. THE SECOND CIRCUIT COURT OF APPEALS DECISION IN KHULUMANI

The most public and expansive litigation to date under the ATS commenced in 2004, when victims of apartheid era South Africa sued nearly every major corporation operating in South Africa during that period. The victims in Khulumani v. Barclay International Bank Ltd. instituted suit against approximately fifty corporate defendants and hundreds of “corporate Does” for “willingly collaborating with the government of South Africa in maintaining a repressive, racially based system known as ‘apartheid.’” After the district court determined that the plaintiffs had failed to establish subject matter jurisdiction under the ATS, the Court of Appeals reversed, recognizing aiding and abetting liability as a viable cause of action under the ATS. In a concurring opinion, Judge Katzmann explained that the district court’s substantive evaluation of the aiding and abetting claim was improperly tainted by prudential considerations, such as the foreign

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67 Id. at 258. The Government of South Africa opposes the litigation. Brief for the United States as Amicus Curiae, supra note 21, at 2. The President of South Africa spoke out against the litigation in front of the National Assembly stating that it is “completely unacceptable that matters that [are] central to the future of our country should be adjudicated upon in foreign courts which [bear] no responsibility for the wellbeing of our country and the observance of the perspective contained in our Constitution on the promotion of national reconciliation.” Id. at 19. While the government seems to oppose the litigation, prominent and distinguished South Africans, such as Archbishop Desmond Tutu, support it. Sampson Mulugeta, Apartheid Suits Reach Overseas, NEWSDAY, Sept. 14, 2002, at A15. Other nations have also stood in opposition to suits against defendant corporations incorporated within their borders. See Brief for the United States as Amicus Curiae, supra note 21, at 1a–6a. The government of the United Kingdom argued in a letter to Secretary of State Condoleezza Rice that the lawsuit “infringes [upon] the sovereign rights of States to regulate their citizens and matters in their own territory.” Id. at 4a–6a.

68 See Khulumani, 504 F.3d at 260. Besides the disagreement over whether aiding and abetting is universally accepted and definite enough to fit within the ATS, the court faced another formidable challenge over whether the decision in Central Bank of Denver v. First Interstate Bank of Denver prevented this type of liability in the ATS cases. See 511 U.S. 164, 182 (1994); Khulumani, 504 F.3d at 282 (Katzmann, J., concurring). In Central Bank, the Supreme Court held that aiding and abetting liability must be explicitly listed in the statutory text. See Central Bank, 511 U.S. at 182 (“[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”). Judge Katzmann disregarded the district court’s adherence to Central Bank, instead arguing that the norm for providing aiding and abetting liability was not a domestic statute but the law of nations, and therefore Central Bank was inapposite. See Khulumani, 504 F.3d at 282 (Katzmann, J., concurring).
policy consequences.\textsuperscript{69} While recognizing that prudential considerations are proper and should be conducted upon remand, the court maintained that the determination of the viability of an aiding and abetting claim is a separate inquiry from the case-specific prudential concerns highlighted by the Supreme Court in \textit{Sosa}.\textsuperscript{70}

Turning to the viability of the victims’ claim, Judge Katzmann canvassed various sources of international law to determine whether, as required by \textit{Sosa}, the requisite “universal recognition” of aiding and abetting liability existed in the international community.\textsuperscript{71} From the London Charter establishing the International Military Tribunal at Nuremberg, to the Rome Statute of the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the military commissions set up after September 11, 2001, Judge Katzmann noted that aiding and abetting has been repeatedly recognized as an accepted form of liability.\textsuperscript{72} Moreover, Judge Katzmann found the provisions requiring liability in the London Charter and the ICTY Statute to be particularly significant because each statute was “intended to codify existing norms of customary international law.”\textsuperscript{73}

While international acceptance is certainly key to the recognition of any claim under the ATS, it is only one of the requisite standards that \textit{Sosa} set forward in order to determine if a claim is cognizable.\textsuperscript{74} As previously noted, a claim under the ATS must have both international “acceptance” and “definite content” to fall within the stringent eighteenth century paradigm that Justice Souter enunciated in \textit{Sosa}.\textsuperscript{75} The latter requirement serves to quiet any concerns regarding judicial common

\textsuperscript{69} See \textit{Khulumani}, 504 F.3d at 262 n.12 (Katzmann, J., concurring).
\textsuperscript{70} See \textit{id.} at 263 (per curiam).
\textsuperscript{71} See \textit{id.} at 270–74 (Katzmann, J., concurring).
\textsuperscript{72} See \textit{id.} at 270–71. The district court reasoned that because the Rome Statute and the statutes for the ICTY and ICTR related to criminal, and not civil, liability, they were not applicable. \textit{Id.} at 270 n.5. However, Judge Katzmann rebutted the court’s reluctance to apply these statutes, stating that “the distinction finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for the purposes of the ATCA [Alien Tort Claims Act].” \textit{Khulumani}, 504 F.3d at 270 n.5 (Katzmann, J., concurring).
\textsuperscript{73} See \textit{id.} at 274.
\textsuperscript{74} See \textit{Sosa}, 542 U.S. at 732.
\textsuperscript{75} See \textit{id.}; Philip Scarborough, Note, \textit{Rules of Decision for Issues Arising Under the Alien Tort Statute}, 107 \textit{Colum. L. Rev.} 457, 479–80 (2007). Mr. Scarborough also recognized the problem with utilizing an unformed standard of liability from international law because, “adopting a new international rule wholesale subjects businesses to evolving standards of international law decided by forums over which there is little or no democratic control.” Scarborough, \textit{supra}, at 480.
law lawmaking and imposes judicial restraint on the judiciary’s federal common lawmaking ability.\textsuperscript{76}

In canvassing the international scope of aiding and abetting liability, Judge Katzmann ultimately incorporated the Rome Statute as his standard for liability under the Alien Tort Claims Act.\textsuperscript{77} Judge Katzmann remarked that the language of the Rome Statute was influential in his choice because, “unlike other sources of international legislation, [the Rome Statute] articulates the \textit{mens rea} required for aiding and abetting liability.”\textsuperscript{78} However, it seems difficult to characterize an international violation as specific and definite if only one legislative source provides a clear level of requisite complicity.\textsuperscript{79} In contrast to the Rome Statute’s requirement for a purposeful \textit{mens rea}, the ICTY and the ICTR tribunal decisions hold that liability is cognizable when an individual provides assistance with “the knowledge that the acts performed by the aider and abettor assist in the commission of the specific crime of the principal.”\textsuperscript{80} Judge Katzmann even conceded that the definiteness of the Rome Statute’s definition was ultimately uncertain.\textsuperscript{81} As evidenced by the three varying opinions of \textit{Khulumani}, while general recognition of aiding and abetting liability exists in the international community, it lacks the definite character necessary to appease the stringent paradigm set up by the Supreme Court in \textit{Sosa}.\textsuperscript{82}

Although courts may properly identify and recognize violations of international law that are specific and definite, any exercise that requires the judicial molding of a claim runs up against the arguments for judicial caution outlined in \textit{Sosa}.\textsuperscript{83} Thus, the aiding and abetting claim that the Second Circuit crafted in \textit{Khulumani} conflicts with the

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\textsuperscript{76} See \textit{Sosa}, 542 U.S. at 732.


\textsuperscript{78} See \textit{Khulumani}, 504 F.3d at 275.

\textsuperscript{79} See \textit{Sosa}, 542 U.S. at 732.

\textsuperscript{80} \textit{Khulumani}, 504 F.3d at 278 (Katzmann, J., concurring).

\textsuperscript{81} See \textit{id.} at 275–76 (Katzmann, J., concurring). “In drawing upon the Rome Statute, I recognize that it has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain.” \textit{Id.}

\textsuperscript{82} See \textit{Sosa}, 542 U.S. at 732. Judge Katzmann notes that his definition “is not necessarily set in stone.” \textit{Khulumani}, 504 F.3d at 277 (Katzmann, J., concurring). Mr. Scarborough also notes that while international third party liability is gaining widespread acceptance, its “contours are still in flux and could change . . . [and] [t]he developing nature of the standard indicates there is general agreement on the underlying principle but continued debate about the specific way in which the standard should be implemented.” Scarborough, \textit{supra} note 75, at 479–80.

\textsuperscript{83} See \textit{Sosa}, 542 U.S. at 725–29.
ideological shift noted in *Sosa* in regard to the common law. As common law was no longer regarded as “discovered” or “found” after the Court’s decision in *Erie*, judges should be particularly weary in formulating their own standards of liability under the auspices of their federal common lawmaking ability. Because aiding and abetting liability is not clearly defined at international law, any recognition thereof necessarily involves judicial formulation of a proper standard of complicity or liability. While Judge Katzmann required purpose for a requisite level of complicity under the ATS, in his concurring opinion, Judge Hall considered knowledge sufficient. In one instance while a defendant may be liable for being “aware” of his role in a tortuous activity, in another he or she would not be liable unless it was their conscious “purpose of facilitating the crime.” If neither the source nor the scope of aiding and abetting liability is certain, the court should defer to the legislative branch for guidance.

III. The Torture Victim Protection Act and the Role of Congress in Creating Aiding and Abetting Liability

In 1992, Congress codified the *Filártiga* decision by passing the TVPA as an amendment to section 1350. The TVPA creates a federal cause of action for both aliens and citizens of the United States “against an individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture . . . or (2)...

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84 See id. at 726.
85 See id. at 725–26.
86 See *Khulumani*, 504 F.3d at 275–76 (Katzmann, J., concurring).
87 Id. at 288 (Hall, J., concurring).
88 See id. at 275–76, 288. As is shown, the determination of the proper mens rea undoubtedly affects the substantive nature of the offence. See id. Therefore, the notion that accessorial liability is an “ancillary rule” which meets the *Sosa* standard anytime it is attached to a universally recognized underlying offense is misguided as both the source and the standard for the substantive mens rea are uncertain. See id.; Herz, supra note 20, at 214.
89 See *Sosa*, 542 U.S. at 727 (“[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to the legislative judgment in the great majority of cases.”).
subjects an individual to extrajudicial killing." The act also defines both “torture” and “extrajudicial killing.”

The purpose of the act is twofold. First, it was intended to provide a clarification of those causes of action already deemed to be actionable under the ATS. Second, the TVPA extends a cause of action to United States citizens for torture and extrajudicial murder committed abroad. Unlike the Alien Tort Claims Act, the Torture Victim Protection Act is not limited to aliens: it extends the cause of action to U.S. citizens as well as non-U.S. citizens. Despite the addition of a cause of action for U.S. citizens, the TVPA only addresses the two basic and universally accepted causes of action of torture and extrajudicial killing.

The ATS remains the sole remedy for every other international human rights violation.

While limited in scope, the value of the TVPA lies with its clear expression of actionable claims and standards of liability. As torture and extrajudicial killing would likely be considered actionable claims under the ATS because of their universal condemnation and definite character in international law, the TVPA does not substantively add to or mod-

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91 106 Stat. at 73–74.
94 Id.

The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act). . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy.

Id.

97 See id.
98 See § 1350 note.
ify the ATS in any way. Rather, Congress intended the TVPA to act as an unequivocal expression of two already accepted violations of the ATS. Despite its elementary nature, the TVPA provides modern recognition by a political branch that these claims are justiciable. In this way, the judiciary is empowered and emboldened to recognize actionable claims of torture and extrajudicial killing.

While this may seem duplicative, Congressional recognition of actionable claims lends authority to the judiciary’s judgment over foreign parties. By enunciating actionable claims under the TVPA, courts are less apt to worry about their ability to divine the “law of nations” from interstitial federal common law. As the Senate report noted, the TVPA was designed to correct “at least one Federal judge [who] has questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit grant of a cause of action by Congress.” Even with universally accepted and customary international law prohibitions against torture and extrajudicial killing, more conservative judges might otherwise feel squeamish deriving causes of action from the “law of nations.”

The Torture and Victim Protection Act also limits political question and separation of powers challenges to the judiciary’s recognition of the ATS causes of action, at least for the two named violations. Despite the viability of a plaintiff’s claims, the uncomfortable situation of sitting in judgment of the actions of another sovereign nation might

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100 H.R. Rep. No. 102–367, at 2 (“Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the statues of customary international law.”).
101 See id. at 2–3.
102 See id. at 3.
103 See id. at 4.
105 See id.
106 See id. at 739.
107 H.R. Rep. No. 102–367, at 4. In particular the House Report singled out Judge Bork’s concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 815 (D.C. Cir. 1984), which “questioned the existence of a private right of action under the Alien Tort Claims Act, reasoning that separation of powers principles required an explicit—and preferably contemporary—grant by Congress of a private right of action.” Id.
108 See id. at 728. There has been a marked increase in these challenges under the current Justice Department. Davis, supra note 2, at 118–25. “Of the thirty-seven cases in which the United States has participated, twenty-two of these occurred during the Bush administration. The Bush administration supported the defendant in every case.” Id. at 125.
have led courts to shy away from hearing viable human rights claims. By amending the ATS with the TVPA, Congress put its stamp of approval on these claims, giving courts and skeptical judges a clear grant of jurisdiction. No longer would judges have to engage in the complicated “eighteenth century paradigm” calculus of Sosa to determine whether torture and extrajudicial killing were actionable; the judiciary would have both a clear invitation to enforce these claims, as well as a definite and uniform standard of liability to apply.

As Justice Souter noted in his opinion in Sosa, it is preferable for Congress to define actionable claims under the ATS rather than rely on judicial interpretation of this enigmatic statute. The political branches of the United States government are given deference within the separation of powers scheme to deal with matters that implicate foreign relations. This is not to say that the judiciary is barred from hearing or involving itself in matters involving foreign affairs; on the contrary, it is sometimes required to involve itself in matters that involve political or foreign policy. However, when a private cause of action is created, especially in the realm of foreign affairs, it is prudent to rely on the legislative branch.

109 See Sosa, 542 U.S. at 727. Justice Souter argued that “[i]t is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” Id.


111 See Sosa, 542 U.S. at 727. Justice Souter referenced the TVPA as providing a clear mandate to the courts in this opinion in Sosa. Id.

112 Id.

113 Baker v. Carr, 369 U.S. 186, 211 (1962). In Baker, Justice Brennan noted that the reason for judicial deference under the political question doctrine in the field of foreign relations was because “resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; [and] many such questions demand single voiced statement of the Government’s views.” Id. Furthermore, it is arguable that the grant of Article I, Section 8 providing Congress with the power to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations” is a textual commitment to the legislative branch and therefore one to which the judiciary should defer. See U.S. Const. art. I, § 8, cl. 10; Baker, 369 U.S. at 217.

114 Baker, 369 U.S. at 211. (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”).

115 See Sosa, 542 U.S. at 727.
IV. The Importance of Recognizing Corporate Liability for Violations of Human Rights

The importance of legislative action with respect to aiding and abetting liability is evident from the Torture and Victim Protection Act. While aiding and abetting liability undoubtedly enjoys a certain amount of international acceptance, it is by no means as clearly defined as torture or extrajudicial killing. Even with clear international standards for torture and extrajudicial killing, the judiciary remained constrained from enforcing viable claims due to prudential considerations until the TVPA. As the varying opinions in Khulumani made evident, both the source and the standard of complicity for aiding and abetting liability remain uncertain. Without legislative action, the success of viable aiding and abetting claims remains highly improbable. With legislative action, a definitive standard of liability similar to those laid down in the Torture Victim Protection Act could be enunciated. In this way, competing views of the appropriate standard of complicity would be avoided. Furthermore, skeptical jurists would no longer have to rely on limited federal common lawmaking ability, but would be

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117 See H.R. Rep. No. 102–367, at 2–3 (“Official torture and summary execution violate standards accepted by virtually every nation. The universal consensus condemning these practices has assumed the status of customary international law.”); Scarborough, supra note 75, at 481–82 (“The definition of corporate aiding and abetting liability for international law violations is unlikely to be clear enough or universally condemned enough to satisfy the Sosa standard.”).
118 H.R. Rep. No. 102–367, at 4. Legislative action would satisfy the major objection raised by the Justice Department with respect to aiding and abetting liability. Brief for the United States as Amicus Curiae, supra note 21, at 8 (“[T]he creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction.”).
120 Davis, supra note 2, at 233. The only successful resolution of an aiding and abetting claim was Doe v. Unocal, which was settled out of court. 403 F.3d 708, 708 (9th Cir. 2005); Saad Gul, The Supreme Court Giveth and the Supreme Court Taketh Away: An Assessment of Corporate Liability Under § 1350, 109 W. Va. L. Rev. 379, 409 (2007).
121 See 106 Stat. at 73.
122 See Khulumani, 504 F.3d at 277, 288, 337.
It is important that Congress provide a remedy for aiding and abetting liability not simply to clarify the murky waters of *Sosa*, but more importantly to ensure victims redress and to prevent human rights violations by states and corporate actors. An example of one of the more poignant instances of the corporate complicity existed in *Doe v. Unocal*. In *Unocal*, the Ninth Circuit Court of Appeals recognized aiding and abetting liability for Unocal’s role in atrocities committed by members of the Myanmar military on local villagers from the Tenasserim region. Unocal Corporation utilized Myanmar military forces to secure the construction of an oil pipeline in Burma. While overseeing the construction of the pipeline, the Myanmar military forces raped, tortured and murdered local Burmese citizens while working for Unocal. There were clear implications that officials from Unocal were complicit in the violations. While settled out of court, the case was the first instance when a corporation was successfully held accountable under the ATS for its involvement in gross human rights violations.

Aside from the overarching need for punishment and vindication of violations similar to *Unocal*, corporate accountability for aiding and abetting human rights is important for several other reasons. First and most basically, the ATS is a civil statute that contemplates money damages. One of the underlying purposes of tort law is to make victims whole by compensating them for their injuries. However, the majority of individual defendants held liable under the ATS are judgment proof because they have no assets. Therefore, while victims are provided a forum to air their grievances, they are typically not “made

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124 *See generally Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002) (recognizing aiding and abetting liability for complicity in human rights violations including forced labor, murder and rape by the Myanmar military while constructing a pipeline).
125 *See id.*
126 *Id.* at 956.
127 *Id.* at 936.
128 *Id.*
129 *Unocal*, 395 F.3d at 937–38. The court cited a particularly notorious quote by Unocal president John Imle discussing the enlistment of the Burmese military for help with the pipeline. *Davis*, *supra* note 2, at 209. Imle stated that “‘if forced labor goes hand in glove with the military, yes there will be more forced labor.” *Id.*
130 *See Davis*, *supra* note 2, at 211.
131 *See id.*
134 *See Davis*, *supra* note 2, at 20.
whole,” at least in terms of monetary compensation.135 Conversely, if culpable, corporations provide victims with a responsible party able to appropriately compensate victims for their suffering.136

Next, by holding corporations liable for their complicity, Congress would incentivize corporations to be proactive (as opposed to passive or even complicit) in ensuring that they are not involved in human rights violations.137 Without aiding and abetting liability, there is no form of accountability preventing corporations from turning a blind eye to oppressive regimes.138 Corporations, once having invested in an abusive regime, have an incentive to maintain the status quo in order to prevent any future challenges to their involvement.139 Furthermore, victims cannot hope to seek redress in their own countries for human rights violations by corporate actors operating within their borders, especially if the state itself is involved in the abuses.140 By holding corporations liable for complicity in human rights violations, there is a real incentive for multinational businesses to actively oppose repressive regimes and voice their opposition to a repressive government’s actions, thereby engaging in a much more “constructive engagement.”141

Conclusion

It has been almost thirty years since the landmark decision of Filártiga utilized the ATS to provide redress for a torture and murder that

136 See Bhashyam, supra note 135, at 246.
137 See Herz, supra note 20, at 222–23. Mr. Herz makes a very strong argument that corporate complicity furthers constructive engagement as opposed to the Justice Department’s argument that third party liability would prevent corporations from investing in questionable states, thereby chilling the liberalizing effects of capitalism. See id. Mr. Herz rightly points out that U.S. companies are hardly promoting democracy and humans rights in their interactions with foreign governments if they are complicit in these same violations. See id.
138 Id. at 210.
139 Id. at 223.
141 Herz, supra note 20, at 222–23. It is also arguable that the only way to reach a guilty state is by seeking redress through a proxy corporation. Roger P. Alford, Arbitrating Human Rights, 83 Notre Dame L. Rev. 505, 506–07 (2008). Professor Alford argues that while victims may not be able to seek redress from foreign states because of sovereign immunity, complicit corporations may be able to share responsibility through their contractual relations with a state or through arbitration. Id. In this way, victims are able to hold states liable, albeit through the third party proxy of a corporation. Id.
occurred in Paraguay.\textsuperscript{142} Since then, the ATS has allowed victims of human rights violations to confront their oppressors, seek redress for their suffering, and air their stories to the world.\textsuperscript{143} Litigation under the ATS since \textit{Filártiga} has grown rapidly, with the most contentious and expansive litigation revolving around the area of corporate liability.\textsuperscript{144} While several district courts recognize aiding and abetting liability as actionable under the ATS, it remains uncertain whether a cause of action for corporate aiding and abetting liability would meet the Supreme Court’s stringent standards enunciated in \textit{Sosa}.\textsuperscript{145} Furthermore, even if aiding and abetting liability is cognizable under the ATS, judges are likely to shy away from dealing with matters that delve so deeply into the foreign affairs of other countries and are therefore apt to dismiss the claims on prudential considerations.\textsuperscript{146} It is the prerogative of Congress to resolve this confusion and uncertainty.\textsuperscript{147} As it did with the TVPA, Congress would be able to provide a legitimate and unified voice with regards to corporate complicity in human rights violations.\textsuperscript{148} In doing so, Congress would send a clear signal to both the international community and to multinational corporations that such behavior is unacceptable and will be punished in United States courts.\textsuperscript{149}

\textsuperscript{142} See \textit{Filártiga} v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). The case “served notice that . . . [U.S.] courts are open to judge actions in any corner of the world.” \textit{Davis}, \textit{supra} note 2, at 21.


Plaintiffs in actions under the Alien Tort Statute (“ATS”) often have no other avenue of relief. The vindication of their rights promotes healing, both for them and for their communities, with the official recognition that the deprivations they suffered are universally condemned. These cases often break down the walls of silence and fear, enabling survivors of unspeakable atrocities to find dignity and composure.

\textit{Id.} (citation omitted).

\textsuperscript{144} See \textit{Khulumani}, 504 F.3d at 258.


\textsuperscript{146} See \textit{Sosa}, 542 U.S. at 727.


\textsuperscript{148} 106 Stat. at 73; Bornstein, \textit{supra} note 35, at 1099–100.

\textsuperscript{149} See 106 Stat. at 73.