Boston College Law Review

Volume 59
Issue 8 *Reforming International Investment Law*

Article 17

11-19-2018

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Recommended Citation
Srish Khakurel, *The Circuit Split on Mens Rea for Aiding and Abetting Liability Under the Alien Tort Statute*, 59 B.C.L. Rev. 2953 (2018),
https://lawdigitalcommons.bc.edu/bclr/vol59/iss8/17

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THE CIRCUIT SPLIT ON MENS REA FOR AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT STATUTE

Abstract: For decades since the Second Circuit Court of Appeals' landmark decision in *Filartiga v. Pena-Irala*, the Alien Tort Statute has provided tools for human rights litigation in American federal courts. Nevertheless, after some controversial decisions by the U.S. Supreme Court and the Second Circuit in recent years, the scope of liability under the statute has diminished and the future of ATS human rights litigation is uncertain. In this context, one of the key issues is the level of culpability required for a defendant to be liable for assisting the human rights breaches of a third party. Specifically, the issue is whether the requisite mens rea is knowledge or purpose. After surveying the sources that courts have looked at to answer this question, this Note concludes that the appropriate mens rea standard should be knowledge.

INTRODUCTION

A U.S. district court in Georgia awards an Ethiopian citizen half a million dollars in damages from a local leader of the former Dergue military junta for his involvement in her torture.[1] A jury in New York issues a verdict of $750 million dollars against the president of a self-declared country within Bosnia-Herzegovina for heinous crimes committed during the Bosnian Civil War.[2] Pfizer enters a settlement of seventy-five million dollars after Nigerian plaintiffs sued the company in the United States for illicit, unconsented drug trials that led to the disability and death of several children.[3] From Paraguayan na-

[1] Abebe-Jira v. Negewo, 72 F.3d 844, 845–46 (11th Cir. 1996) (affirming the district court's award of compensatory and punitive damages); *see also* Andrew Rice, *The Long Interrogation*, N.Y. TIMES (June 4, 2006), http://www.nytimes.com/2006/06/04/magazine/04torturer.html?pagewanted=all&mtrref=www.google.com [https://perma.cc/EDU9-TFSS] (documenting the story of defendant Negewo).

[2] *See* Verdict Form, Kadic v. Karadzic, No. 93 Civ. 1163 (PKL), 1–12 (S.D.N.Y. Aug. 10, 2000) (piling on punitive and compensatory damages against Radovan Karadžić); *see also* Kadic v. Karadzic, 70 F.3d 232, 236–37 (2d Cir. 1995) (summarizing the allegations made by the plaintiffs); Julian Borger & Owen Bowcott, *Radovan Karadžić Sentenced to 40 Years for Srebrenica Genocide*, THE GUARDIAN (Mar. 24, 2016), https://www.theguardian.com/world/2016/ mar/24/radovan-karadzic-criminally-responsible-for-genocide-at-srebenica [https://perma.cc/5FAT-UBWQ] (reporting on the recent trial and forty-year prison sentence of Karadžić by the United Nations (U.N.) tribunal in The Hague).

[3] *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163, 169–70 (2d Cir. 2009) (outlining the allegations of the complaint); Nicole Perlroth, *Pfizer Finalizing Settlement in Nigerian Drug Suit*, FORBES (Apr. 3, 2009), https://www.forbes.com/2009/04/03/pfizer-kano-trovan-business-healthcare-settlement.html#3572ba4026f9 [https://perma.cc/TKB9-2K7S] (reporting on the settlement); *see also* Sarah Boseley, *WikiLeaks Cables: Pfizer 'Used Dirty Tricks to Avoid Clinical Trial Payout*,' THE GUARDIAN (Dec. 9,

tionals suing their government officials for torture, to Burmese farmers filing class actions against multinational corporations for aiding atrocities by foreign militaries, the Alien Tort Statute ("ATS") provides an important avenue for human rights litigation in U.S. federal courts.[4] Simply put, the statute gives federal district courts jurisdiction over suits by non-citizens for torts in breach of international law.[5] For foreign victims of inhumane atrocities that come from countries that offer no legal recourse, the ATS has been a powerful emblem of hope and justice.[6]

The significance of the ATS in today's political climate cannot be overstated given the rise of political extremism and its implications for the enforcement of human rights worldwide.[7] Violations have noticeably been on the rise in recent years.[8] Thanks to the concerted efforts of human rights organizations and the media, the culpability of corporate actors in the interconnected global economy has increasingly come to light.[9]

2010), https://www.theguardian.com/business/2010/dec/09/wikileaks-cables-pfizer-nigeria [https://perma.cc/F2KQ-ZG9Y] (reporting on damning evidence that WikiLeaks had found against Pfizer on this matter).

[4] 28 U.S.C. § 1350 (2012) (providing federal court jurisdiction to foreign plaintiffs); *see* Alex Markels, *Showdown for a Tool in Rights Lawsuits*, N.Y. TIMES (June 15, 2013), http://www.nytimes.com/2003/06/15/business/showdown-for-a-tool-in-rights-lawsuits.html [https://perma.cc/UC2Z-YCZM] (describing the facts of a case brought by plaintiffs against Unocal under the Alien Tort Statute ("ATS")); Arthur D. Wolf, *Filipinos May Sue Marcos in U.S. Courts*, N.Y. TIMES (Mar. 9, 1986), https://www.nytimes.com/1986/03/09/weekinreview/l-filipinos-may-sue-marcos-in-us-courts-494386.html [https://perma.cc/7DU8-JB92] (noting the facts of the ATS case brought by Paraguayan plaintiffs).

[5] 28 U.S.C. § 1350.

[6] *See* Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009), http://www.nytimes.com/2009/06/09/business/global/09shell.html?mtrref=www.google.com [https://perma.cc/9R72-DB9J] (quoting Ken Saro-Wiwa Jr., whose father was killed by the Nigerian army for his environmental activism, who said "[i]t's a relief also that we've been able to draw a line over the past. And from a legal perspective, this historic case means that corporations will have to be much more careful"); Dolly Filártiga, *American Courts, Global Justice*, N.Y. TIMES (Mar. 30, 2004), http://www.nytimes.com/2004/03/30/opinion/american-courts-global-justice.html [https://perma.cc/VA49-2ZQF] ("I came to this country in 1978 hoping simply to look a killer in the eye. With the help of American law, I got so much more.").

[7] *See* Kenneth Roth, *Foreword* to HUMAN RIGHTS WATCH, WORLD REPORT 2018: EVENTS OF 2017, at viii (2017) (noting the increase in "authoritarian populists" and the subsequent decline in human rights enforcement); Salil Shetty, *Foreword* to AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2017/18: THE STATE OF THE WORLD'S HUMAN RIGHTS 12 (2018) (noting the "grim consequences for human rights" due to political actors' recent tendency to "demoniz[e]" people on the basis of identity).

[8] *See* Marilyn Croser, *Human Rights Violations Have Increased 70% Since 2008 Globally*, THE GUARDIAN (Sept. 9, 2014), https://www.theguardian.com/sustainable-business/2014/sep/09/human-rights-violations-increase-corporate-responsibility [https://perma.cc/GL2G-EEQM] (noting the dramatic increases in human rights breaches between 2008 and 2014).

[9] *See* Christine Bader, *Companies Commit Human-Rights Abuses in America, Too*, THE ATLANTIC (May 28, 2014), https://www.theatlantic.com/business/archive/2014/05/human-rights-abuses-happen-in-america-too/371702/ [https://perma.cc/T82T-9DNV] (noting corporate involvement in human rights breaches including in the United States); *Human Rights Abuses in Your Shopping Basket*, AMNESTY INT'L (Nov. 30, 2016), https://www.amnesty.org/en/latest/news/2016/11/sustainable-

Unfortunately, the scope of ATS litigation has recently begun to diminish.[10] Specifically, in 2013, in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel II*"), the U.S. Supreme Court read into the statute a requirement that claims brought through ATS need to "touch and concern" the United States with "sufficient force."[11] A significant volume of ATS litigation prior to *Kiobel II* had involved foreign plaintiffs suing foreign defendants for conduct occurring outside the United States, which might not ordinarily meet *Kiobel II*'s touch and concern standard.[12] Most recently, 2018, in *Jesner v. Arab Bank, PLC*, the Court held that "foreign corporations" cannot be liable under the statute.[13]

The scope of ATS litigation has been declining since the Second Circuit Court of Appeals' decision in 2010 in *Kiobel v. Royal Dutch Petroleum Co.* ("*Kiobel I*") ended all ATS liability for corporations, although that court seems to be an outlier.[14] This is because many suits under the ATS are brought by foreign plaintiffs against international corporations for "aiding and abetting" human rights breaches by their respective countries.[15] Equally relevant to such suits is the mens rea standard of ATS liability for aiding and abetting human rights breaches, an issue on which U.S. circuit courts are currently split.[16] The

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palm-oil-abuse-exposed/ [https://perma.cc/2JYX-BW34] (noting the involvement of brands like Nestle and Unilever in perpetuating child labor); *Industry Giants Fail to Tackle Child Labour Allegations in Cobalt Battery Supply Chains*, AMNESTY INT'L (Nov. 15, 2017), https://www.amnesty.org/en/latest/news/2017/11/industry-giants-fail-to-tackle-child-labour-allegations-in-cobalt-battery-supply-chains/ [https://perma.cc/89XL-WNSY] (noting leading electronics manufacturers' involvement in "cobalt supply chains" that use child labor and are rife with serious health hazards).

[10] *See infra* notes 11–14 and accompanying text.

[11] Kiobel v. Royal Dutch Petroleum Co. (*Kiobel II*), 569 U.S. 108, 124–25 (2013).

[12] *See* Gregory H. Fox & Yunjoo Goze, *International Human Rights Litigation After Kiobel*, 92 MICH. B.J. 44, 45–46 (2013) (noting the prevalence of the foreign plaintiff, defendant, and conduct "fact patterns" and *Kiobel II*'s "restrictive" holding); *The Alien Tort Statute: Holding Human Rights Abusers Accountable*, EARTHRIGHTS INT'L, https://earthrights.org/how-we-work/litigation-and-legal-advocacy/legal-strategies/alien-tort-statute/ [https://perma.cc/6FWB-9ZSU] (noting that while some district courts have used *Kiobel II* broadly to dismiss cases with domestic defendants for domestic conduct, other courts have interpreted the opinion very narrowly).

[13] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402–03, 1408 (2018) (citing "foreign policy" and "separation-of-powers" concerns).

[14] *See* Kiobel v. Royal Dutch Petroleum Co. (*Kiobel I*), 621 F.3d 111, 145 (2d Cir. 2010), *aff'd*, 569 U.S. 108 (2013) (holding that ATS claims against corporations non-actionable); *see also* Doe v. Exxon Mobil Corp., 654 F.3d 11, 57 (*Doe VIII*) (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013) (rejecting the Second Circuit's resolution of ATS corporate liability and noting that several courts have been entertaining ATS claims against corporate entities). *Doe VIII* was overturned on other grounds. *Doe VIII*, 527 F. App'x 7.

[15] *See* Fox & Goze, *supra* note 12, at 45 (noting the "proliferation" of corporate aiding and abetting liability claims starting in the "mid-1990s"); EARTHRIGHTS INT'L, *supra* note 12 (noting the difference between initial ATS cases against individuals and the later cases against corporate defendants).

[16] *Compare Doe VIII*, 654 F.3d at 39 (holding knowledge to be the appropriate mens rea for ATS aiding and abetting liability), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (finding a purpose requirement for ATS liability for aiding and abetting).

split concerns whether knowledge or purpose is the appropriate mens rea.[17] The mens rea issue, which is the topic of this Note, is particularly important due to other difficulties that courts have imposed on ATS plaintiffs.[18]

Part I of this Note provides an overview of the ATS and the relevant Supreme Court case law, as well an overview of the circuit split on the mens rea standard for aiding and abetting liability.[19] Part II discusses the various sources that courts have looked to determine the appropriate mens rea standard.[20] Part III synthesizes the various sources discussed in Part II and argues that a knowledge mens rea is the proper standard.[21]

I. THE ALIEN TORT STATUTE AND THE CIRCUIT SPLIT ON AIDING AND ABETTING LIABILITY

Although the appropriate mens rea for aiding and abetting liability is the main preoccupation of this Note, the statute is itself a puzzle worth exploring in light of the unclear text and legislative history.[22] Section A of this Part discusses these aspects of the statute as well as the Supreme Court cases interpreting it.[23] Section B gives a brief overview of the circuit split before delving into why courts disagree in Part II.[24]

A. Alien Tort Statute Overview

The Alien Tort Claims Act, commonly known as the Alien Tort Statute, gives federal district courts jurisdiction over suits by non-citizens for torts in "violation of the law of nations" or U.S. treaties.[25] The sentence-long provision was enacted by the First Congress through the Judiciary Act of 1789—a statute solely devoted to addressing "federal-court jurisdiction."[26] The wording of the ATS has changed very little since its initial incarnation, and the statute gives

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[17] *See, e.g.*, Aziz v. Alcolac, Inc., 658 F.3d 388, 401 (4th Cir. 2011) (requiring purpose); Doe v. Unocal Corp. (*Doe I*), 395 F.3d 932, 951 (9th Cir. 2002), *rev'd en banc* 403 F.3d 708 (9th Cir. 2005) (requiring knowledge).

[18] *See supra* notes 14–17 and accompanying text.

[19] *See infra* notes 22–136 and accompanying text.

[20] *See infra* notes 137–214 and accompanying text.

[21] *See infra* notes 215–259 and accompanying text.

[22] *See infra* notes 25–83 and accompanying text.

[23] *See infra* notes 25–94 and accompanying text.

[24] *See infra* notes 95–136 and accompanying text.

[25] 28 U.S.C § 1350 (2012); Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 113 n.2 (2d Cir. 2008) (noting that the Second Circuit has used Alien Tort Claims Act and Alien Tort Statute interchangeably). The U.S. Supreme Court has preferred the latter phrase. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004) (describing 28 U.S.C. § 1350 as the ATS).

[26] 28 U.S.C § 1350; Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (1789) ("[D]istrict courts . . . shall also have cognizance . . . 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."); *Sosa*, 542 U.S. at 712–13 (emphasizing the "jurisdictional nature" of ATS).

no further guidance on how courts should interpret its vague jurisdictional mandate.[27] Modern courts have struggled to understand the meaning of and reasons for its enactment because of the lack of legislative history.[28] For this reason, Judge Henry Friendly of the Second Circuit Court of Appeals once equated the statute with an enigmatic character in German legend who disappears when asked about where he came.[29] To further complicate statutory interpretation, there is a shortage of early judicial decisions because ATS litigation was rare—the statute was asserted successfully only two times for almost two centuries after its enactment.[30]

The ATS was revived and brought into prominence in 1980 by the Second Circuit Court of Appeals' decision in *Filartiga v. Pena-Irala*.[31] The case involved foreign plaintiffs suing a foreign defendant for conduct alleged to have occurred outside the United States after locating and serving the defendant inside U.S. borders.[32] The plaintiffs claimed that Pena, a then high-ranking police officer in Paraguay, had abducted, tortured, and killed their son/brother because of his father's political ideologies and involvements.[33]

The key issue before the court was whether or not torture violated the "law of nations," giving the court subject matter jurisdiction.[34] Citing old Su-

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[27] *See* 28 U.S.C § 1350 (using very few words to outline broad, general principles).

[28] *See id.*; *Sosa*, 542 U.S. at 713, 718–19 (finding congressional intent behind the "terse provision" hard to pin down because of the lack of records of "congressional discussion" and debate, or any meaningful changes in redrafting); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (noting that there are no traces of Senate debates on the Judiciary Act, and the House debate does not reference the ATS).

[29] *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (referring to 28 U.S.C. § 1350 as a "legal Lohengrin"); Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 123 n.15 (2007) (elaborating on the meaning of the term "Lohengrin").

[30] *See Sosa*, 542 U.S. at 712 (noting that 28 U.S.C § 1350 was successfully applied in only one instance in its first 170 years); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 588 (2002) (noting two successful cases of ATS jurisdiction before 1980, in 1795 and then in 1961); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4 n.15 (1985) (finding and documenting twenty-one cases in which plaintiffs sought ATS jurisdiction before 1980).

[31] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 284 (2d Cir. 2007) (Hall, J., concurring) (noting that the ATS was rarely used before *Filartiga*); Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that torture carried out "under color of official authority" is a violation of 28 U.S.C. § 1350, whatever the citizenship of the litigants); Bradley, *supra* note 30, at 589 (noting that *Filartiga* made it possible to litigate worldwide human rights issues in American federal courts); Fox & Goze, *supra* note 12, at 45 (noting the "floodgate" of human rights lawsuits unleashed by *Filartiga*); Joe Lodico, Note, *Corporate Aiding and Abetting Liability Under the Alien Tort Statute*, 30 J.L. & COM. 117, 121 (2012) (commenting that *Filartiga* revived the ATS from "dormancy").

[32] *Filartiga*, 630 F.2d at 878–79.

[33] *Id.* at 878.

[34] *Id.* at 880. "The law of nations," also known as "international law," consists of rules agreed to by the "community" of nations. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. L. INST. 1987). It can be found in written agreements. *Id.* But international law also consists of "general

preme Court precedents, *Filartiga* held that the "law of nations" could be uncovered by observing the writings of jurists, practices prevalent in the international community, and court opinions.[35] Upon examining the United Nations (U.N.) Charter and declarations, international treaties and agreements, and the works of various legal commentators, the court concluded that the law of nations forbids torture.[36] The court ultimately found all of the ingredients of the ATS—(1) a civil lawsuit by a noncitizen, (2) for a tort related to a breach of international law—were present.[37] Accordingly, the court reversed the district court's finding that it had no subject matter jurisdiction.[38] Following remand, the district court granted a default judgment for $10.3 million to the plaintiffs.[39]

Filartiga initiated a culture of foreign human rights lawsuits in American federal courts.[40] At least thirty lawsuits were brought under the ATS between 1980 and 1997, with a number of them resulting in victories for plaintiffs.[41] A majority of these cases initially involved foreign plaintiffs charging foreign government officers with foreign human rights atrocities—facts similar to those in *Filartiga*.[42] Subsequently, starting in the mid-1990s, plaintiffs began to sue corporations under theories of accessory liability for their involvements with various foreign governments in committing human rights atrocities.[43] For example, in 2010 in *Doe v. Nestle*, citizens of Mali brought suit against Nestle

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and consistent" practices of nations. *Id.* Such practices can be inferred through decisions of international courts, works of legal commentators, U.N. resolutions, and more. *Id.* § 103.

[35] *Filartiga*, 630 F.2d at 880–81; *see* The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that the "law of nations" is part of U.S. law and that such law may be determined from the writings of jurists and scholars writing on common practices of various nations); United States v. Smith, 18 U.S. (1 Wheat.)153, 160–61 (1820) (outlining the sources of international law).

[36] *Filartiga*, 630 F.2d at 881–84.

[37] *Id.* at 887.

[38] *Id.* at 878.

[39] Filartiga v. Pena-Irala, 577 F. Supp. 860, 861–62 (E.D.N.Y. 1984).

[40] Bradley, *supra* note 30, at 589 (commenting on *Filartiga*'s impact on human rights litigation); Fox & Goze, *supra* note 12, at 45 (noting the "floodgates" of human rights lawsuits after *Filartiga*); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (comparing *Filartiga* to *Brown v. Board of Education*, 347 U.S. 483 (1954), in the context of global human rights enforcement in American courts).

[41] Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1487 (2014) (finding thirty-two lawsuits under the ATS during the relevant time).

[42] Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011) (remarking on the similarity of early ATS cases with the facts of *Filartiga*—foreign plaintiffs suing foreign governments for human rights atrocities that occurred outside the United States); Fox & Goze, *supra* note 12, at 45 (describing the fact patterns of early cases brought under the ATS after *Filartiga*).

[43] Bradley, *supra* note 30, at 589 (noting the recent increase in ATS lawsuits against corporations); Drimmer & Lamoree, *supra* note 42, at 460 (noting that corporations have been defendants in at least 155 cases under the ATS since the mid-90s with six to ten such cases filed yearly); Fox & Goze, *supra* note 12, at 45 (commenting on the popularity of the "second generation" of ATS claims brought against corporate defendants).

in the U.S. District Court for the Central District of California for aiding and abetting, among other things, slavery and child labor on cocoa fields in Côte d'Ivoire.[44] This type of litigation became popular because corporations, unlike government officers, are more likely to have deep pockets and are more likely to have agents in the United States who can be served with process.[45] Although many of the early lawsuits failed, some led to incredibly large money judgments, which plaintiffs were unable to recover because of absentee defendants.[46] Some commentators have remarked, however, that "intangible justice" was the real victory in those cases.[47]

Almost twenty years after *Filartiga*, in 2004, the U.S. Supreme Court finally provided guidance on the ATS in *Sosa v. Alvarez-Machain*.[48] By this time, *Filartiga* had received mixed reactions from commentators and federal judges.[49] At a high level of abstraction, the facts of *Sosa* are similar to those in *Filartiga*: a foreign plaintiff suing a foreign defendant for foreign conduct.[50] Here, the alleged conduct was false arrest.[51] One of the chief issues before the court was the petitioner's argument that the ATS is a jurisdictional statute that cannot provide substantive relief without Congress making specific international law violations cognizable.[52]

In *Sosa*, the Court partly agreed with the petitioner's argument, emphasizing the "jurisdictional nature" of 28 U.S.C § 1350 as evidenced by its place-

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[44] Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1064 (C.D. Cal. 2010).

[45] Fox & Goze, *supra* note 12, at 45.

[46] *See* Drimmer & Lamoree, *supra* note 42, at 460 (commenting on the success of early ATS litigation); Stephens, *supra* note 41, at 1487–90 (noting the successes and failures and the inability of successful ATS litigants to "collect judgments").

[47] *See* Drimmer & Lamoree, *supra* note 42, at 460 (commenting on importance of wins for ATS plaintiffs notwithstanding their inability to recover money judgments); Stephens, *supra* note 41, at 1489–90 (noting that many plaintiffs felt "vindicated" because their ATS wins "created a record of what they had endured").

[48] *See Sosa*, 542 U.S. at 712–31 (interpreting the meaning of 28 U.S.C. § 1350 in light of historical evidence); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 361 (2011) (noting *Sosa*'s role in determining the "future of the ATS").

[49] *See Tel-Oren*, 726 F.2d at 822 (Bork, J., concurring) (critiquing *Filartiga*'s interpretation of the ATS because of its tension with Articles I and II of the Constitution, which grant both the federal legislature and the executive responsibility over "foreign relations"); Ku, *supra* note 48, at 359–60 (documenting the various criticisms of *Filartiga* from scholars and judges based on "federalism" and "separation of powers" concerns).

[50] *See Sosa*, 542 U.S. at 697–99 (highlighting the facts of the case).

[51] *Id.* at 698. In *Sosa*, the plaintiff alleged that he had been arbitrarily detained overnight by the defendant, who captured the plaintiff from his home and delivered him to U.S. authorities. *Id.* The defendant had been recruited by the Drug Enforcement Agency (DEA) for this operation after a grand jury indictment against the plaintiff for his involvement in the "torture and murder" of a DEA agent in Mexico. *Id.* at 697–98. The plaintiff brought a civil lawsuit with claims arising from the ATS, among other causes of action, after his "acquittal" and subsequent return to Mexico. *Id.* at 698–99.

[52] *Id.* at 713–14 (summarizing the petitioner's emphasis on the "jurisdictional nature" of the ATS, arguing that the statute does not let courts create new causes of action).

ment by the First Congress within a jurisdictional statute.[53] Drawing inferences from a very limited historical context, the Court held that the First Congress did not think of the ATS as a "shelf" provision to which a future legislature would provide substantive remedies under the statute's jurisdictional mandate.[54] *Sosa* held instead that the First Congress understood the statute to provide jurisdiction for a very limited number of acts, specifically those international law violations already cognizable under the common law at the time.[55] The Court specifically referred to conducts mentioned in Blackstone's Commentaries: (1) "offenses against ambassadors"; (2) "violations of safe conduct"; and (3) "piracy."[56]

In spite of the First Congress' narrow understanding of the scope of the ATS, the Court noted no case or statute since the ATS' birth actually prohibits federal courts from acknowledging new ATS causes of action based on contemporary international law.[57] The Court noted, nonetheless, the need to be careful in light of changing norms around the common law, the potential friction with Congress and the President on issues related to foreign relations, and the limited authority of Article III courts.[58] Hence, the Court held that new causes of action alleging contemporary international law violations must be "accepted by the civilized world" and "defined with a specificity," like the eighteenth century counterparts that the Court mentioned.[59] The Court then endorsed *Filartiga*'s approach of finding credible, authoritative sources of international law.[60] Finally, based on the standard articulated, the Court found

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[53] *Id.* at 713 (remarking that the Judiciary Act of 1789 dealt only with Article III court jurisdiction and that the architects of the ATS would have likely paid attention to this fact).

[54] *Id.* at 714–19 (citing Congress's fears about the federal government's inability to enforce the violations of the "law of nations"); *see Company*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "shelf company" as one which is created without any current goals but with the anticipation of future needs). In particular, the Court noted that the Continental Congress was worried that it could not enforce its treaties or provide remedies for "offenses against ambassadors" to the point of urging state legislatures to adopt legislation to make such conduct actionable. *Sosa*, 542 U.S. at 716. The advice was heeded only by the Connecticut legislature. *Id.* The Court made much of the fact that Oliver Ellsworth, one of the main drafters of the ATS, was a member of that very legislature. *Id.* at 719.

[55] *Sosa*, 542 U.S. at 720 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68 and early references to the ATS for this conclusion); *see* BLACKSTONE, *supra* (discussing the "law of nations"). Blackstone's *Commentaries on the Laws of England* is the "most authoritative treatise" on the English common law. Randy J. Holland, *Anglo-American Templars: Common Law Crusaders*, 8 DEL. L. REV. 137, 144–45 (2006).

[56] *Sosa*, 542 U.S. at 720.

[57] *Id.* at 724–25.

[58] *See id.* at 725–28 (citing—among other reasons—the legal community's shifting views on the common law, the Erie doctrine, and Supreme Court case law to support the view that courts should exercise restraint).

[59] *Id.* at 725; *see supra* note 56 and accompanying text (listing the eighteenth century counterparts).

[60] *See Sosa*, 542 U.S. at 733–34 (incorporating the Court's guidance in *The Paquete Habana*, 175 U.S. at 700, for appropriate sources for uncovering the "law of nations"); *see also Filartiga*, 630 F.2d

that respondent's claims of "arbitrary arrest" was not a principle of international law sufficiently "defined" or "accepted" to warrant acknowledging a new cause of action.[61]

The Supreme Court's holding in *Sosa* was widely debated in the years following the decision.[62] Ostensibly, *Sosa* stands for the narrowing of the types of claims that can be brought under the ATS.[63] The demanding acceptance and specificity requirements as laid out and applied by *Sosa* for determining actionable breaches international law stand in contrast with previous courts' approaches.[64] On the other hand, *Sosa* spoke very favorably of, and claimed to be consistent with, those prior decisions that had utilized approaches contrary to the one adopted by the *Sosa* court.[65]

Almost a decade later, in 2013, the U.S. Supreme Court weighed in on the ATS once again in its controversial decision in *Kiobel v. Royal Dutch Petroleum Co. (Kiobel II)*.[66] In that case, Nigerian citizens living in the United States brought suit against foreign oil companies for aiding and abetting Nigeria's human rights breaches.[67] Plaintiffs alleged that the defendant corporations provided logistical support to the Nigerian security forces as they engaged in, among other things, unlawful executions, atrocities, and torture, while re-

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at 880–81 (citing *The Paquete Habana* for the same); *supra* notes 34–37 and accompanying text (discussing sources of international law).

[61] *Sosa*, 542 U.S. at 734–38.

[62] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 464–65 (2011) (noting the disagreements and uncertainty among district courts and academics about the guidance provided by *Sosa*); Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 897 (2007) (remarking that *Sosa*'s holding left uncertainties with the "sources and scope" of remedies available); Fox & Goze, *supra* note 12, at 45 (noting the uncertainties left behind by Sosa, including the limits of corporate liability); Pamela J. Stephens, *Spinning* Sosa*: Federal Common Law, the Alien Tort Statute, and Judicial Restraint*, 25 B.U. INT'L L.J. 1, 22–31 (2007) (documenting some of the divergent readings of *Sosa* by different scholars).

[63] *See Sosa*, 542 U.S. at 725 (advising restraint in recognizing cognizable claims under international law); Lucien J. Dhooge, *Lohengrin Revealed: The Implications of* Sosa v. Alvarez-Machain *for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT'L & COMP. L. REV. 393, 493–94 (2006) (predicting that under *Sosa* only claims of "summary and extrajudicial execution," "torture," and "racial discrimination" will be recognized).

[64] *See Sosa*, 542 U.S. at 736 n.27 (finding the result of a scholar's survey about the international community's rejection of "arbitrary detention" too general); Bradley et al., *supra* note 62, at 897 (remarking that before *Sosa*, lower courts did not scrutinize the source of international law, which changed after the Court's landmark decision).

[65] *See Sosa*, 542 U.S. at 731 (declaring that the Court's decision was in line with what courts had been doing for decades since *Filartiga* was decided); Bradley et al., *supra* note 62, at 901 (noting *Sosa*'s endorsement of previous decisions by the courts below).

[66] *See Kiobel II*, 569 U.S. at 124; Fox & Goze, *supra* note 12, at 46 (noting that academics have criticized the rule of statutory interpretation invoked in *Kiobel*); Louise Weinberg, *What We Don't Talk About When We Talk About Extraterritoriality:* Kiobel *and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1486–87 (2014) (criticizing the Supreme Court's backward views for failing to recognize the interconnectedness among nation states).

[67] *Kiobel II*, 569 U.S. at 111–12.

sponding to environmental protests on Nigerian oil fields.[68] The Court initially granted certiorari on the issue of corporate liability after the Second Circuit in *Kiobel* ("*Kiobel I*") held that corporate liability as a principle of international law lacks the acceptance and specificity required by *Sosa*.[69] Avoiding this question altogether, the Court subsequently directed its attention to the issue of when, if at all, the ATS permits claims arising from conduct outside the United States.[70]

To understand the ATS's reach outside U.S. borders, the Court relied on a rule of statutory construction known as the "presumption against extraterritorial application."[71] As its name suggests, the rule holds that a statute is not applicable outside U.S. territory if it does not explicitly say so.[72] Referencing its own case law indicating that the presumption is meant for "merit questions" and not jurisdictional ones, the Court nonetheless extended the rule to analyze the ATS.[73] To support this extension of the law, the Court cited the presumption's underlying concern: Article III judges interfering in the sphere of foreign relations.[74] Accordingly, the Court held that ATS claims need to "touch and concern" the United States with "sufficient force" to rebut the presumption.[75] Turning to the facts of the case, the Court found that the alleged conduct had occurred outside U.S. borders and that the corporate defendants' presence in

[68] *Id.* at 113–14. Specifically, the plaintiffs alleged that military and police battered, sexually assaulted, murdered, and detained protestors and pillaged their property. *Id.* According to the plaintiffs, the defendant corporations shared culpability because they solicited the Nigerian government's help in quelling the protests; supplied food, vehicles, and money; and gave the military access to their property to coordinate operations. *Id.*

[69] *Id.* at 114; *Kiobel I*, 621 F.3d at 120 (finding that corporate liability is not a valid principle of international law).

[70] *Kiobel II*, 569 U.S. at 114. Corporate liability under ATS claims remains unresolved. *Compare Kiobel I*, 621 F.3d at 145 (finding the lack of a widely accepted international norm imposing corporate liability), *with Doe VIII*, 654 F.3d at 57 (rejecting Exxon's claim that corporations are not subject to ATS suits and finding *Kiobel I* to be an outlier in ATS jurisprudence).

[71] *Kiobel II*, 569 U.S. at 116–17. The cannon is rooted in the belief that American law does not regulate sovereign territories outside of its boundaries. *Id.* at 115. The presumption helps avoid conflict between American laws and the laws of foreign countries. *Id.* It is normally used to figure out if congressional legislation has any force outside the United States. *Id.*

[72] *Id.*; *see also* David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 80 (2013) (noting that the presumption helps check on judicial activism).

[73] *Kiobel II*, 569 U.S. at 116 (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 252–53 (2010)) (noting that the Court usually utilizes the principle to examine if congressional legislation that regulates conduct has force outside the United States).

[74] *Id. But see id.* at 129 (Breyer, J., concurring) (noting that the presumption, which ordinarily prevents judicial interference in the sphere of Congress's authority, is inappropriate in the context of the ATS as it was explicitly adopted by Congress to deal with "foreign matters").

[75] *Id.* at 124–25 (majority opinion).

the United States alone was not enough to rebut the presumption.[76] Accordingly, the Court affirmed the Second Circuit's judgment on alternative grounds.[77]

The *Kiobel II* decision changed ATS litigation drastically by creating a radical shift from *Filartiga* and its progeny and causing suits involving foreign litigants over foreign conduct to become suspect.[78] *Kiobel II*'s guidance is not clear, however, and there is still a lot of room for uncertainty.[79] Commentators have been eager to speculate on what is left for human rights litigation under the ATS after the *Kiobel II* decision.[80] Some commentators have made much of the Breyer and Kennedy concurrences, which respectively suggest that jurisdiction is proper when "American interests" are at stake, and that there might be cases untouched by *Kiobel*'s holding.[81] Others have tried to distinguish *Kiobel*'s holding, emphasizing the distinction between "F-cubed" fact patterns—involving foreign plaintiffs, foreign defendants, and foreign conduct—and "F-squared" fact patterns—where one of these foreign elements is replaced with a domestic one.[82] Some have even suggested moving human rights litigation towards state courts, where long-established tort actions might be available.[83]

The most recent blow to human rights litigation under ATS has come from the U.S. Supreme Court's decision in *Jesner v. Arab Bank, PLC* in 2018.[84] In

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[76] *Id.*

[77] *See id.*

[78] *See* Roger P. Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1097 (2014) (remarking on *Kiobel II*'s determinative impact on ATS litigation); Fox & Goze, *supra* note 12, at 46 (noting that cases like *Filartiga*, which involve foreign plaintiffs suing foreign government officers for foreign conduct, probably do not meet *Kiobel II*'s "touch and concern" requirement); Weinberg, *supra* note 66, at 1496 (noting that the *Kiobel II* court might have ended *Filartiga*'s legacy).

[79] *See Kiobel II*, 569 U.S. at 125 (Kennedy, J., concurring) (commenting that the *Kiobel II* majority was scrupulous to save important questions about the overall scope of the ATS for later); Alford, *supra* note 78, at 1098 (observing that *Kiobel II* does not inform district courts how to apply the touch and concern requirement); Weinberg, *supra* note 66, at 1505 (noting the Ninth Circuit's "narrow reading" of *Kiobel II*).

[80] *See* Weinberg, *supra* note 66, at 1505–07 (speculating on what types of cases similar to *Filartiga* might be distinguishable from *Kiobel II*); Matteo M. Winkler, *What Remains of the Alien Tort Statute After* Kiobel*?*, 39 N.C. J. INT'L L. & COM. REG. 171, 186–89 (2013) (noting several avenues left for ATS plaintiffs after *Kiobel II*).

[81] *See, e.g.*, Edna Chinyele Udobong, *Post-*Kiobel*: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations*?, 11 LIBERTY U.L. REV. 559, 580–81 (2016) (finding some room for optimism in *Kiobel II*'s concurring opinions).

[82] *See* Weinberg, *supra* note 66, at 1505–07 (conjuring up hypothetical scenarios—such as Iranian secret agents torturing an Iranian immigrant in the United States—distinguishable from the facts of *Kiobel II*); Winkler, *supra* note 80, at 187–89 (noting "F-squared" scenarios and other fact patterns that might survive *Kiobel II*).

[83] *See* Alford, *supra* note 78, at 1099 (remarking that actions underlying human rights abuses are always covered in one form or another by tort law); Fox & Goze, *supra* note 12, at 46 (noting state remedies as viable alternative to human rights litigation under ATS and that there are "parallel" tort law remedies for most human rights breaches).

[84] *See Jesner*, 138 S. Ct. at 1408 (holding that non-U.S. corporations cannot be liable under the ATS).

that case, foreign citizens sued a Jordanian bank with offices worldwide for helping terrorist organizations by letting them maintain bank accounts.[85] The Second Circuit affirmed the district court's dismissal of the suit based on *Kiobel I*'s ending of ATS corporate liability, holding that *Kiobel I* was still good law despite the Supreme Court's affirmance on alternative grounds in *Kiobel II*.[86] The Supreme Court once again granted certiorari on the question of corporate liability.[87]

A five-member majority agreed that non-U.S. corporate defendants are not subject to ATS liability.[88] The justices, however, could not agree on the underlying rationale.[89] Justice Kennedy's plurality opinion employed *Sosa*'s two-prong analysis.[90] On the first prong, the plurality noted that the lack of the requisite "specific, universal, and obligatory" international principle regarding corporate liability.[91] The Court cited a number of international courts whose jurisdictions did not extend beyond "natural persons."[92] On the second prong, the plurality found that letting the lawsuit go forward would not be within the court's sound discretion given the foreign policy and "separation-of-powers" problems hiding behind the case.[93] At the other extreme, Justice Gorsuch, concurring in judgment, remarked that *Sosa* was a mistake and that Congress, not Article III courts, should decide what is cognizable under ATS.[94]

B. Circuit Split: Appropriate Mens Rea for Aiding and Abetting

While the scope of ATS litigation has been steadily declining, an important question remains: what should be the correct mens rea for aiding and

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[85] *Id.* at 1394. One of the allegations, for instance, was that Arab Bank had allowed an account which was used by Hamas to compensate the relatives of suicide bombers. *Id.*

[86] *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144, 151–58 (2d Cir. 2015) (discussing at length the impact of *Kiobel II* on *Kiobel I*'s holding).

[87] Jesner v. Arab Bank, PLC, 137 S. Ct. 1432 (2017) (mem) (granting certiorari).

[88] *Jesner*, 138 S. Ct. at 1393, 1407 (announcing the judgment of the five-member majority).

[89] *See infra* notes 90–94 and accompanying text.

[90] *Jesner*, 138 S. Ct. at 1399. The first prong in assessing whether an action is cognizable under the ATS requires asking if the allegation involves a breach of a "specific, universal, and obligatory" international norm. *Id.* Second, a court must ask whether letting the case move forward is within the court's sound discretion or whether the court must exercise restraint absent congressional action. *Id.*

[91] *Id.* at 1399–1402. The plurality cited footnote twenty from *Sosa* to conclude that the first prong applies equally to the questions of who can be liable. *Id.* (citing *Sosa*, 542 U.S. at 732 n.20).

[92] *Id.* The Court cited the Charter for the Nuremberg Tribunal, the statutes for the international criminal tribunals for Rwanda and the former Yugoslavia, among others, to show that the jurisdiction of these bodies extend to "natural persons" only, not corporations. *Id.*

[93] *Id.* at 1402–07 (noting the recent diplomatic tensions between the United States and sovereign nations as a result of ATS litigation).

[94] *Id.* at 1412–14 (Gorsuch, J., concurring) (taking a radical stance and calling for an end to "ATS exceptionalism").

abetting liability under the statute?[95] This question is significant because most ATS lawsuits against corporate actors rely on accessory liability.[96] Section A provided a historical overview of the ATS.[97] This Section addresses the mens rea circuit split that will drive the rest of this Note.[98] Before delving into the subject, however, this Section will summarize the doctrinal aspects of aiding and abetting liability.[99]

1. Aiding and Abetting: The Doctrine

Aiding and abetting liability is a well-established principle in criminal law.[100] The doctrine extends criminality beyond those who actually commit punishable offenses to their accomplices.[101] It is a basic rule of criminal law that criminal intentions alone, without any criminal actions, are not punishable.[102] Similarly, while bad acts alone are sometimes punishable, that is generally not the case absent the "guilty mind."[103] Therefore, any offense must consist of a mental element ("mens rea") and an accompanying act ("actus reus").[104] Keeping in line with these doctrinal principles, aiding and abetting liability generally requires an actor to act to advance a crime—by ordering, persuading, helping—with some level of culpability—knowingly, purposefully, or otherwise.[105] While aiding and abetting has its roots in criminal law, tort law also recognizes this

[95] *Compare* Abecassis v. Wyatt, 704 F. Supp. 2d 623, 654 (S.D. Tex. 2010) (adopting the purpose standard), *and Nestle*, 748 F. Supp. 2d at 1087–88 (same), *with* Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002) (adopting the knowledge standard).

[96] Fox & Goze, *supra* note 12, at 45 (explaining how ATS suits are typically brought against corporate defendants).

[97] *See supra* notes 25–83 and accompanying text.

[98] *See infra* notes 109–136 and accompanying text.

[99] *See infra* notes 100–108 and accompanying text.

[100] *See* Rosemond v. United States, 572 U.S. 65, 72 (2014) (noting the common-law recognition of aiding and abetting); Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994) (noting aiding and abetting's "ancient" roots); *see also* 18 U.S.C. § 2 (2012) (making it illegal to help, assist, recommend, order, or encourage someone to commit a crime).

[101] *See* MODEL PENAL CODE § 2.06 (AM. L. INST., Official Draft and Explanatory Notes 1985) (prescribing the standard of liability for the actions of a third party); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW §§ 31–33 (15th ed. 2017) (describing principles of accessory liability including aiding and abetting).

[102] *See* MODEL PENAL CODE § 2.01 (requiring "voluntary act" or "omission" for criminal liability); 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.1 (3d ed. 2017) (noting that negative intentions are not crimes in and of themselves, and that an action or lack thereof in the face of legal obligation is necessary); TORCIA, *supra* note 101, § 25 (remarking that having bad intentions is not a crime unless "the evil thinker becomes an evil doer").

[103] *See* MODEL PENAL CODE § 2.02 (outlining the various standard of mental culpability); LAFAVE *supra* note 102, § 5.1 (mentioning strict liability crimes); TORCIA, *supra* note 101, § 27 (noting the mens rea requirement); *see also Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014) (using mens rea synonymously with the "guilty mind").

[104] *See supra* notes 102–103 and accompanying text.

[105] LAFAVE, *supra* note 102, § 13.2 (discussing the various formulations of actus reus and mens rea required for "accomplice liability").

theory of liability.[106] And although this doctrine evolved from the common law, federal and international law both recognize it.[107] ATS aiding and abetting is complex because it involves a federal tort remedy for breaches of international human rights principles, which generally involve criminal law.[108]

2. The Circuit Split

As indicated in Section A of this Part, the more recent movement in ATS litigation has involved victims of human rights breaches bringing suits against corporate actors.[109] Often, such lawsuits use accessory liability to argue that corporate actors aided and abetted foreign governments in committing atrocities.[110] Courts have unanimously indicated that international law supports aiding and abetting liability under the ATS.[111] Even so, there has been notable disagreement regarding the legal standards that should apply in assessing such liability.[112]

In 2002, the Ninth Circuit first tackled the issue in *Doe I v. Unocal Corporation*.[113] In that case, Burmese residents sued Unocal, a California corporation, for its entanglement in coerced labor, sexual assault, torture, and killing when Unocal set up a gas pipeline in Myanmar.[114] As a preliminary matter, the court held that international law ought to provide guidance not only on the

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[106] RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. L. INST. 1979) (extending tort liability for third party conduct for knowingly helping someone violate their duty).

[107] *See* 18 U.S.C. § 2 (extending accessory liability for federal crimes); *Khulumani*, 504 F.3d at 272–75 (Katzmann, J., concurring) (documenting aiding and abetting in international law, including decisions from Nuremberg and various international tribunals).

[108] *See* 28 U.S.C. § 1350 (providing federal jurisdiction in civil lawsuits for tortious conduct in breach of international law); *Doe I*, 395 F.3d at 968 (noting the extent to which human rights principles have been created in the criminal law domain).

[109] Bradley, *supra* note 30, at 589 (observing the increase in lawsuits involving corporations); Drimmer & Lamoree, *supra* note 42, at 460 (noting the rise in ATS litigation against corporate actors).

[110] *See infra* notes 113–136 and accompanying text.

[111] *See Doe VIII*, 654 F.3d at 19 (remarking that practically all courts that have looked into the question have said that aiding and abetting is a valid theory under international law); *see also Presbyterian Church*, 582 F.3d at 259 (recognizing ATS aiding and abetting liability); *Khulumani*, 504 F.3d at 260 (approving ATS aiding and abetting liability).

[112] *See infra* notes 113–136 and accompanying text.

[113] *Doe I*, 395 F.3d at 947. The decision was subsequently vacated after a settlement was reached. *See* Doe I v. Unocal Corp., 403 F.3d 708, 708 (9th Cir. 2005) (vacating the judgment); Ryan S. Lincoln, Note, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 612 (2010) (noting the lack of clarity on ATS aiding and abetting liability in the Ninth Circuit due to the settlement).

[114] *Doe I*, 395 F.3d at 936. The plaintiffs claimed that Myanmar's armed forces had made them perform labor against their will on a gas pipeline plan that Unocal was involved in. *Id.* at 939–40. Testimony suggested that the armed forces had also engaged in sexual assault, torture, and killing. *Id.* Evidence suggested that Unocal had hired and paid the armed forces to get security for its project. *Id.* at 952.

presence of federal jurisdiction but also on the substantive standard of liability.[115] The court turned to case law from the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") for guidance.[116] Ultimately, the court held that ATS aiding and abetting liability required a mens rea of knowledge and an actus reus of "practical assistance or encouragement."[117] Interestingly, in his concurring opinion, Judge Reinhardt disagreed with the majority that international law governs accessory liability under the ATS.[118] The judge noted that while the ATS clearly points to international law to ascertain actionable torts, it does not say anything about "ancillary issues" like accessory liability for those torts.[119] He stated that courts ought to look at federal common law ideas like agency.[120]

The Second Circuit similarly addressed ATS aiding and abetting liability in 2007 in *Khulumani v. Barclay National Bank Ltd*.[121] In *Khulumani*, South African plaintiffs sued several dozen corporations for helping the South African government enforce apartheid.[122] In a unanimous decision, the court reversed the district court's judgment that international law does not support aiding and abetting liability under the ATS, without clarifying the actual standard to be applied.[123] In their concurring opinions, two of the judges sharply disagreed over the standard.[124] Looking towards international law—specifically the

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[115] *Id.* at 949.

[116] *Id.* at 949–51. The court synthesized the standard of liability based on *Prosecutor v. Furundzija* and *Prosecutor v. Musema*, both of which applied knowledge as the appropriate standard of mens rea. *Id.*; *see* Prosecutor v. Musema, ICTR–96–13–T (Jan. 27, 2000); Prosecutor v. Furundzija, IT–95–17/1 T (Dec. 10, 1998).

[117] *Doe I*, 395 F.3d at 951.

[118] *Id.* at 963 (Reinhardt, J., concurring) (siding in favor of the federal common law approach). Judge Reinhardt noted that federal common law was a better way to answer "ancillary legal questions" related to congressional legislation. *Id.* at 963, 965–66.

[119] *Id.* at 965.

[120] *Id.* at 969.

[121] *Khulumani*, 504 F.3d at 260.

[122] *Id.* at 258. Plaintiffs consisted of a South African non-profit that helped those affected by apartheid, and almost one hundred representatives and actual sufferers of murder, torture, sexual violence, shootings, and captivity. *Id.* at 258 n.1. The defendants included about fifty named and about one hundred unnamed corporate actors. *Id.* at 258.

[123] *Id.* at 260 (reversing the district court's decision); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (rejecting ATS aiding and abetting liability finding it "dubious at best"). The district court refused to follow the decisions of various international courts—the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), Nuremberg, and others—as well as the International Convention on the Suppression and Punishment of the Crime of Apartheid, finding that the decisions of tribunals were not binding and that the Convention had not been adopted by the powerful industrial nations. *In re* S. African Apartheid Litig., 346 F. Supp. 2d at 549–50. The Second Circuit reversed the decision without much explanation. *Khulumani*, 504 F.3d at 260. One of the concurring judges, however, explicitly rejected the district court's analysis citing those same sources of international law that the district court had dismissed. *Id.* at 271–75 (Katzmann, J., concurring).

[124] *See infra* notes 125–127 and accompanying text.

Rome Statute of the International Criminal Court—Judge Katzmann found purpose was the appropriate mens rea.[125] Judge Hall disagreed with this approach, finding that federal common law should guide the court.[126] Citing Judge Reinhardt's analysis in *Doe I*, he examined Supreme Court case law incorporating knowledge as the appropriate mens rea for civil aiding and abetting, as articulated in the *Restatement (Second) of Torts*.[127]

Subsequent circuit court decisions have produced conflicting results on the mens rea issue.[128] The Second Circuit in 2009 in *Presbyterian Church of Sudan v. Talisman Energy, Inc*. and the Fourth Circuit in 2011 in *Aziz v. Alcolac, Inc.* held purpose to be the appropriate standard.[129] The D.C. Circuit in 2011 in *Doe VIII v. Exxon Mobil Corp.*, however, found knowledge to be sufficient.[130] In light of the wide variety of conclusions and rationales that appellate opinions have produced, it is not at all surprising that district courts have also failed to reach an agreement.[131] For instance, in 2010 in *Doe v. Nestle, S.A.*, the District Court for the Central District of California held purpose to be the accurate mens rea, finding that while the knowledge mens rea appears in some bodies of international law, it does not meet *Sosa*'s high bar for acceptance.[132] Similarly, the same year in *Abecassis v. Wyatt*, the District Court for the Southern District of Texas reached the same conclusion, finding the Second Circuit's logic in *Presbyterian Church Of Sudan* to be convincing.[133] In contrast, eight years earlier, the District Court for the Northern District of Georgia in *Mehinovic v. Vuckovic* found that knowledge was the appropriate mens rea stand-

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[125] *Khulumani*, 504 F.3d at 275–77 (Katzmann, J., concurring) (finding third party liability for giving practical help that has "substantial effect" on that crime being committed).

[126] *Id.* at 284 (Hall, J., concurring) (suggesting that Article III courts should look toward their own common law).

[127] *Id.* at 287–88 (citing RESTATEMENT (SECOND) OF TORTS § 876 (b) and finding knowledge to be the appropriate mens rea).

[128] *See infra* notes 129–130 and accompanying text.

[129] *Aziz*, 658 F.3d at 401(finding purpose as the appropriate mens rea); *Presbyterian Church*, 582 F.3d at 259 (finding purpose to be the correct standard).

[130] *Doe VIII*, 654 F.3d at 39 (holding knowledge to be the appropriate mens rea).

[131] *Compare Abecassis*, 704 F. Supp. 2d at 654 (adopting the purpose standard), *and Nestle*, 748 F. Supp. 2d at 1087–88 (same), *with Mehinovic*, 198 F. Supp. 2d at 1356 (adopting the knowledge standard).

[132] *Nestle*, 748 F. Supp. 2d at 1087. Plaintiffs alleged that Nestle supported breaches of human rights including coerced labor by very young children on cocoa fields in the Ivory Coast, which reduced the cost of labor for the defendants. *Id.* at 1064. They further claimed that Nestle had primary knowledge of these acts as well as the "economic leverage" to stop these acts from happening. *Id.* at 1066.

[133] *Abecassis*, 704 F. Supp. 2d at 654. In *Abecassis*, plaintiffs comprised victims or relatives of victims of terrorist bombings that happened in Israel. *Id.* at 626–27. Plaintiffs claimed that defendant corporations bought petroleum products from Saddam Hussein, paying bribes to him by transferring money into his Jordanian bank account, which he used to compensate the relatives of those involved in the terrorist bombings. *Id.* at 627.

ard.[134] In reaching this conclusion, the court relied on case law from the ICTY.[135] The Supreme Court, unfortunately, has not provided any roadmap.[136]

II. COMPETING SOURCES FOR STANDARD OF LIABILITY

Part of the reason why courts are split on the mens rea for ATS aiding and abetting is because of the disagreement amongst judges regarding whether to look at federal common law or international law for the appropriate standard.[137] Even when there is agreement on the choice-of-law issue, there are contradicting authorities within a given body of law.[138] Section A of this Part explores the choice-of-law problem.[139] Section B discusses the appropriate mens rea for aiding and abetting liability under the federal common law approach.[140] Section C defines the "law of nations" and explores various sources that point to differing standards of mens rea.[141]

A. Choice of Law Problem

The choice of law for ATS aiding and abetting liability has largely been resolved in favor of international law.[142] But in the early days after the Second Circuit Court of Appeals decided *Filartiga v. Pena-Irala* in 1980, courts disagreed on whether American tort law, tort law of the country where the tort occurred, or international law should provide the standards governing ATS litigation.[143] Circuit courts that have looked at this issue after the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain* in 2004 agree that courts should look at international law to find the appropriate standard for ATS aiding and

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[134] *Mehinovic*, 198 F. Supp. 2d at 1356. In *Mehinovic*, plaintiffs were asylum seekers from Bosnia and Herzegovina who alleged that defendant, Vuckovic, a "Bosnian Serb" army man, performed heinous acts as part of the "ethnic cleansing" of non-Serbs. *Id.* at 1329.

[135] *Id.* at 1356 (noting the more lenient mens rea requirement under ICTY precedents).

[136] *See* Udobong, *supra* note 81, at 602 (noting the Supreme Court's silence on the relevant issue); Angela Walker, Note, *The Hidden Flaw in* Kiobel*: Under the Alien Tort Statute the Mens Rea Standard for Corporate Aiding and Abetting Is Knowledge*, 10 NW. U. J. INT'L HUM. RTS. 119, 144 (2011) (noting that aiding and abetting could be an upcoming focus for the Supreme Court).

[137] *See infra* notes 142–154 and accompanying text.

[138] *See infra* notes 163–214 and accompanying text.

[139] *See infra* notes 142–154 and accompanying text.

[140] *See infra* notes 155–162 and accompanying text.

[141] *See infra* notes 163–214 and accompanying text.

[142] *See infra* notes 143–149 and accompanying text.

[143] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000) (noting the confusion among courts on the "choice-of-law question"). In *Filartiga v. Pena-Irala*, the Second Circuit after reversing the district court, suggested that the district court might have to conduct a choice-of-law analysis. *See* 630 F.2d 876, 889 (2d Cir. 1980). This led to a wide disagreement among courts. *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 499, 503 (9th Cir. 1992) (upholding the district court's decision to apply Philippine law); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 782 (D.C. Cir. 1984) (advocating for common law torts approach); Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995) (proposing international law as the solution).

abetting liability.[144] This theory was advanced by Judge Katzmann in 2007 in *Khulumani v. Barclay National Bank Ltd.* in the Second Circuit Court of Appeals where he pointed to a footnote in *Sosa* to find support for that proposition.[145] The footnote suggests that the law of nations governs the breadth of ATS liability, as in whether non-state actors can be sued.[146] Judge Katzmann inferred from this footnote that the law of nations should also govern the issue of who can be sued for the bad acts of another.[147] At least two circuit judges have dismissed *Sosa*'s supposed resolution of the choice-of-law question as dicta.[148] That view, however, is the minority in circuit courts.[149]

For those whom the issue remains unresolved, tension exists between whether federal common law or the international law should guide ATS liability for aiding and abetting.[150] Circuit judges disagreeing on this question have looked towards the *Restatement (Second) of Conflict of Laws* for resolution but have come to opposite conclusions.[151] The *Restatement* urges courts to consider a number of factors: (1) the community of state and nations' best interests; (2) the forum's stance; (3) concerned states' stance on the specific issue; (4) reasonable expectations of litigants; (5) the goals of the area of the law at issue; (6) foreseeability and consistency of outcomes; and (7) the simplicity with which the controlling law can be ascertained.[152] The limits placed on federal

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[144] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see* Aziz v. Alcolac, Inc., 658 F.3d 388, 398 (4th Cir. 2011) (holding that *Sosa* points to international law for ascertaining aiding and abetting requirements); Doe v. Exxon Mobil Corp. (*Doe VIII*), 654 F.3d 11, 33 (D.C. Cir. 2011) (pointing to *Sosa* for the same conclusion); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (holding the same).

[145] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring) (resolving the choice of law question in favor of international law because the result comports with a footnote of *Sosa*); *see also Sosa*, 542 U.S. at 732 n.20 (noting that international law might be relevant to the question of who can be sued under the ATS); Teddy Nemeroff, Note, *Untying the* Khulumani *Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After* Sosa, 40 COLUM. HUM. RTS. L. REV. 231, 245–50 (2008) (discussing "footnote twenty").

[146] *Sosa*, 542 U.S. at 732 n.20.

[147] *See Khulumani*, 504 F.3d at 269 (Katzmann, J., concurring) (explaining the import of the *Sosa* footnote for the choice-of-law inquiry); *Sosa*, 542 U.S. at 732 n.20.

[148] *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 770–71 (9th Cir. 2011) (Reinhardt, J., concurring) (siding with Judge Hall's view in *Khulumani*); *Khulumani*, 504 F.3d at 286 (Hall, J., concurring) (noting that *Sosa*'s take on this issue is simply dicta).

[149] *See supra* note 144 and accompanying text.

[150] *See Sarei*, 671 F.3d at 771 (Reinhardt, J., concurring) (favoring federal common law); *Khulumani*, 504 F.3d at 286 (Hall, J., concurring) (favoring federal common law); Doe v. Unocal Corp. (*Doe I*), 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (favoring federal common law); *supra* note 144 and accompanying text.

[151] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971). *Compare Doe I*, 395 F.3d at 949 (finding that the *Restatement* points towards the international law), *with id.* at 967–68 (Reinhardt, J., concurring) (finding that the *Restatement* favors federal common law).

[152] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (listing choice-of-law considerations in the absence of a clear "statutory directive").

courts from creating common law is an important background consideration.[153] On the other hand, the Supreme Court has authorized the creation of federal common law under special situations, such as filling in the blanks in laws created by Congress, especially when the United States' relations with other nations are at issue.[154]

B. Federal Common Law

Circuit judges that look to federal common law to assess ATS aiding and abetting liability agree that knowledge is the appropriate mens rea, citing Supreme Court case law.[155] In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the Supreme Court referred to the D.C. Circuit Court of Appeals' opinion in *Halberstam v. Welch* as a "comprehensive" authority on aiding and abetting liability in the civil context.[156] *Halberstam* involved an appeal from a finding of joint and several liability against a woman whose partner killed the plaintiff's husband while robbing his home.[157] She was found responsible for her involvement in her partner's theft operation.[158] In affirming the district court's decision based on aiding and abetting, the D.C. Circuit heavily relied on the *Restatement (Second) of Torts*.[159] Section 876(b) of the *Restatement* extends civil liability for the tort of a third party to those who knowingly provide significant help to the third party in violating their duty.[160] *Halberstam* acknowledged that aiding and abetting has not seen wide recognition in the civil context in Article III courts, and *Central Bank of Denver* added

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[153] *See Doe I*, 395 F.3d at 965 (Reinhardt, J., concurring) (noting that *Erie* circumscribes Article III courts' ability to create federal common law). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (imposing limits on the creation of federal common law).

[154] See *Doe I*, 395 F.3d at 965 (Reinhardt, J., concurring) (pointing out *Erie* exceptions to federal common law); *see also* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (noting that federal courts can only create common law on a small number of issues such as when the "rights and obligations" of the U.S. are involved, or when there is disagreement between states); United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979) (finding Article III courts can make law to address congressional silence).

[155] *Sarei*, 671 F.3d at 771 (Reinhardt, J., concurring) (finding knowledge mens rea); *Khulumani*, 504 F.3d at 286–89 (Hall, J., concurring) (same); *see also Doe VIII*, 654 F.3d at 35 (favoring international law in the choice-of-law inquiry but agreeing that knowledge is the standard under federal common law).

[156] Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994). *See generally* Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983) (discussing federal civil aiding and abetting liability).

[157] *Halberstam*, 705 F.2d at 474.

[158] *Id.* at 475–76. The defendant's partner made millions stealing and selling valuables. *See id*. She helped her partner run a stolen gold and silver smelting business, which he ran out of their garage. *See id.* at 475. She kept stock and did other clerical work which implicated her. *Id.*

[159] *See id.* at 477, 478, 481–85, 487–88 (discussing RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. L. INST. 1979) generally and citing cases that relied on the provision in ascertaining the appropriate standard for liability).

[160] RESTATEMENT (SECOND) OF TORTS § 876(b).

that the national legislature has not enacted a catch-all provision for that purpose.[161] Nonetheless *Halberstam* has persuaded at least some circuit court judges that the mens rea for ATS aiding and abetting should be knowledge.[162]

C. The Law of Nations

The law of nations, or "international law," consists of principles subscribed to by a "community" of nations.[163] While sometimes officially written down as agreements, such laws also include unspoken rules—"customary law"—that are followed on a regular basis by many countries because they feel legally bound.[164] Such laws have to be subscribed to by many countries, but not necessarily followed by all, to become customary law.[165] In the ATS context, however, following the decision in *Sosa*, a very high degree of acceptance is required.[166] Courts often take into account decisions of international courts as well as publications of legal scholars to determine if a legal principle qualifies as customary law.[167] In the context of aiding and abetting liability under the ATS, circuit courts have specifically focused on the sources listed in the following Subsections to determine the appropriate standard of mens rea.[168] Courts look at these sources because they demonstrate an agreement among countries around the world, which customary international law requires.[169]

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[161] *Cent. Bank of Denver*, 511 U.S. at 181 (citing *Halberstam*, 705 F.2d at 489) (noting that civil aiding and abetting has seen very limited application in federal law); *Halberstam*, 705 F.2d at 489 (noting the limited precedent for the doctrine's application in the civil context).

[162] *Sarei*, 671 F.3d at 771 (Reinhardt, J., concurring); *Doe VIII*, 654 F.3d at 34–35; *Khulumani*, 504 F.3d at 287–89 (Hall, J., concurring).

[163] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(1) (AM. L. INST. 1987).

[164] *See id.* § 102 cmt. b, c (noting that "customary law" comprises norms adhered to by countries due to the belief that it is legally binding); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 458 (2015) (noting that "customary international law" comes in to being through the actions of countries that arise from the belief that they are legally required to take those actions); *see also Sosa*, 542 U.S. at 733–34 (citing *The Paquete Habana*, 175 U.S. 677, 708 (1900) for evidentiary guidance on customary law); *The Paquete Habana*, 175 U.S. at 708 (citing "general consent" among "civilized nations"); *Filartiga*, 630 F.2d at 880 (finding torture is against international law because of a "universal" rejection of torture by countries).

[165] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. b.

[166] *Sosa*, 542 U.S. at 732 (requiring international norms to be widely accepted to be cognizable under the ATS).

[167] *See The Paquete Habana*, 175 U.S. at 700 (holding that customary international law can be uncovered through the views of reliable scholars); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 103 (listing authorities of international law); *see also Sosa*, 542 U.S. at 733–34 (citing *The Paquete Habana*, 175 U.S. at 700 for appropriate sources of customary law).

[168] *See infra* notes 170–214 and accompanying text.

[169] *See infra* notes 170–214 and accompanying text.

1. Nuremberg Precedents Under Control Council Law No. 10

Control Council Law No. 10 ("Law No. 10") is a key source of "customary international law" for good reason.[170] The global recognition of the related Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Charter") instated after World War II has been acknowledged and approved by courts, legal scholars, and the U.N.[171] The London Charter authorized the International Military Tribunal at Nuremberg which prosecuted the upper echelons of the Nazis, convicting nineteen defendants in its sole trial.[172] A few months after the London Charter, the American forces adopted Law No. 10 to try less-influential Nazi defendants.[173] Under Law No. 10, the Americans prosecuted 177 individuals including judges, medics, and state officials.[174] Law No. 10's objective was to "give effect" to the London Charter—it shared a common origin with its predecessor, and incorporated very similar definitions for offenses that could be punished.[175] To quote the D.C. Circuit, the London Charter provided the "pattern" for the latter.[176] For these reasons, circuit courts have consulted Law No. 10 for customary law.[177]

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[170] *See infra* notes 171–177 and accompanying text.

[171] *See Khulumani*, 504 F.3d at 271 (remarking on the wide notice of the Charter and the tribunals formed under it); United States v. Yousef, 327 F.3d 56, 105 n.39 (2d Cir. 2003) (referencing the Charter for the meaning of "war crimes"); Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003) (citing the Charter for customary law); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992) (noting that trials conducted by the tribunals under the authority of the Charter received great applaud because the governing laws were recognized throughout the world); Affirmation of the Principles of Int'l Law Recognized in the Charter of the Nurnberg Tribunal, G.A. Res. 95 (I), at 188 (Dec. 11, 1946) (acknowledging the London Charter); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 559 (2006) (noting a broad consensus behind Nuremberg laws).

[172] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 22, Aug. 8, 1945, 59 Stat. 1544, 1551 [hereinafter London Charter] (requiring the initial proceeding to commence at Nuremberg and granting discretion as to the location of subsequent proceedings); Meron, *supra* note 171, at 562 (remarking on the single Nuremberg trial held before the International Military Tribunal).

[173] *See* TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIAL UNDER CONTROL COUNCIL LAW NO. 10, 6, 250 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_final-report.pdf [https://perma.cc/AMA4-MBAE] (appending Control Council Law No. 10 ("Law No. 10")); Meron, *supra* note 171, at 562 (distinguishing the International Military Tribunal from those under Law No. 10).

[174] Meron, *supra* note 171, at 562.

[175] TAYLOR, *supra* note 173, at 6–8 (noting and elaborating on objectives of Law No. 10 and commenting on comparisons with the London Charter).

[176] *See* Flick v. Johnson, 174 F.2d 983, 985–86 (D.C. Cir. 1949) (noting similarities between the documents). *But see* TAYLOR, *supra* note 173, at 8–10 (noting the minor differences).

[177] *See Khulumani*, 504 F.3d at 273 (citing *Flores*, 414 F.3d at 244 n.18) (noting that the court recognizes Law No. 10's value in unearthing customary law); *Flores*, 414 F.3d at 244 n.18. (citing a discussion of Law No. 10 to establish the proposition that customary law can be applied to non-state actors).

Both the London Charter and Law No. 10 have provisions for aiding and abetting liability without explicitly discussing mens rea.[178] The Charter makes it a crime to steer, plan, initiate, or assist other crimes listed in the Charter.[179] Law No. 10 similarly lists the various bases for criminal liability, explicitly referencing aiding and abetting as a viable theory.[180]

The cases tried under Law No. 10 support a knowledge mens rea for aiding and abetting, although there is an argument for a purpose standard.[181] Specifically, in 1949 in *United States v. von Weizsaecker* ("*The Ministries Case*"), the tribunal refused to find a banker, Karl Rasche, guilty of war crimes although he issued large loans to Nazi paramilitary organizations while knowing that the money would be used it to commit atrocities.[182] The tribunal implicitly reasoned—at least according to the Second Circuit's analysis in *Khulumani*—that the requisite purpose was missing.[183] In the same case, however, the tribunal ruled against a second defendant, Emil Puhl, a senior banker who knowingly oversaw a deal with Nazis to receive and hold valuable personal belongings taken from those killed in Nazi death camps.[184] The tribunal convicted Puhl for war crimes even while concluding that he likely found the acts associated with his dealings "repugnant."[185] The tribunal implicitly accepted that Puhl did not oversee the dealings with the purpose to cause the underlying atrocities.[186]

Other cases clearly point to a knowledge mens rea for aiding and abetting under Law No. 10.[187] In 1947 in *United States v. Flick*, the tribunal held the offenders criminally liable for helping Nazi paramilitary forces financially while knowing about what the money would be used for.[188] Similarly, in 1948

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[178] *See infra* notes 179–180 and accompanying text.

[179] London Charter art. 6, *supra* note 172, at 1547; *see also Khulumani*, 504 F.3d at 272 (noting the Charter's expansive reach to defendants that indirectly violate the substantive law defined by it).

[180] TAYLOR, *supra* note 173, at 251 (criminalizing aid and abetting of other offenses).

[181] *See infra* notes 182–186 and accompanying text.

[182] *See* United States v. von Weizsaecker (*The Ministries Case*), Case No. 11, 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 621–22 (Nuernberg Mil. Trib. 1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf [https://perma.cc/7CT8-JMPE] [hereinafter 14 TRIALS UNDER CCL NO. 10]. In *The Ministries Case*, twenty-one individuals were tried under eight counts for offenses recognized by Law No. 10, including "war crimes," "crimes against humanity," and "conspiracy to commit crimes against peace." *Id.* at 1, 314.

[183] *See Khulumani*, 504 F.3d at 276 (inferring that the court's judgment in favor of defendant Rasche was because the requisite mens rea was absent).

[184] *See The Ministries Case*, 14 TRIALS UNDER CCL NO. 10, *supra* note 182, at 609, 620–21. The defendant deposited items worth "millions of reichsmarks," such as "gold teeth and fillings, spectacle frames, rings, jewelry, and watches." *Id.* at 609.

[185] *See id.* at 620–21. The tribunal did note that Puhl was more than "a mere messenger," and that he went out of his way to maintain secrecy. *Id.*

[186] *See id.*

[187] *See infra* notes 188–190 and accompanying text.

[188] United States v. Flick, in 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1216–1217, 1222–23 (1949). The tribunal

in *United States v. Ohlendorf*, in the trial of Kingelhoefer, the tribunal noted that the defendant would be criminally liable for the underlying offenses even assuming, as he contended, that his only role in a Nazi death squad was that of an interpreter.[189] Handing names of people to the death squad with knowledge that they would be killed was sufficient to find him criminally liable.[190]

2. The Rome Statute

The Rome Statute of the International Criminal Court ("Rome Statute") was promulgated in 1998 through an agreement between 120 nations.[191] It created the International Criminal Court ("ICC"), an international tribunal that prosecutes those suspected of perpetrating egregious offenses that affect the community of nations collectively.[192] The ICC has jurisdiction over offenses defined by the Rome Statute in the territory of a signatory country or by a signatory country's citizen.[193] The Rome Statute has been noticed by circuit courts as evidence of customary law.[194]

The Rome Statute unfortunately does not provide clear guidance on the mens rea for aiding and abetting.[195] Article 25(3)(c) makes it a crime for an individual to help in carrying out an offense with the purpose of helping the offense.[196] The very next provision, however, also makes it a crime to provide support to criminal conduct, actual or attempted, of a group motivated by shared "purpose" if that support is "intentional" and the individual has "knowledge" about the others' desire to perpetrate the offense.[197] Furthermore,

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made this finding after noting the offenders didn't subscribe to Nazi "ideologies" and were not "pronouncedly anti-Jewish." *Id.* at 1222.

[189] United States v. Ohlendorf, in 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 568–70 (1949).

[190] *Id.* In looking at the mens rea of the defendant, the tribunal also found it relevant that he had said that he wanted "Hitler to win the war," even if it meant millions of deaths and the destruction of Europe. *Id.*

[191] Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90, 105 [hereinafter Rome Statute]; *Understanding the International Criminal Court*, INT'L CRIM. CT., at 1, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf [https://perma.cc/J3NQ-VC47].

[192] *Id.* at 3 (providing a summary overview of the Rome Statute and the International Criminal Court ("ICC")). The ICC is based in The Hague. *Id.* at 4. It is unlike international tribunals like the ICTR and the ICTY in that it is a permanent entity that operates outside the constraints of the U.N. system. *Id.* It is also unlike the International Court of Justice, which is a U.N. body that mediates disagreement among nations. *Id.*

[193] *Id.*

[194] *Aziz*, 658 F.3d at 399–400 (noting the significance of the Rome Statute due to its wide acceptance internationally); *Khulumani*, 504 F.3d at 275–77 (noting that the 139 nations have endorsed this agreement and most of those countries, including the biggest proponents of freedom, have ratified it.). *But see Doe VIII*, 654 F.3d at 35 (rejecting the Rome Statute as evidence of customary law because it is a "treaty").

[195] *See infra* notes 196–199 and accompanying text.

[196] Rome Statute, *supra* note 191, art. 30.

[197] *Id.*

Article 30, the Rome Statute's general mens rea provision refers to "intent" and "knowledge"—an individual possesses intent when the individual has the purpose to participate in an act and has a grasp on the likely outcome.[198] Similarly, an individual has knowledge when the person is alert to a situation or its outcome."[199] The Rome Statute is therefore not clear on whether knowledge or purpose is the correct mens rea for aiding and abetting.[200]

3. International Criminal Tribunals for Rwanda and Former Yugoslavia

The ICTR was authorized in 1994 by the UN Security Council to try offenders for genocide and war crimes that occurred in Rwanda in 1994.[201] It finished its goal in 2015 after convicting sixty-six of the ninety-three defendants charged.[202] The ICTY was similarly authorized by the U.N. Security Council with the objective of prosecuting those involved in mass atrocities in the former Yugoslavia.[203] Following Nuremberg precedents, the tribunal convicted ninety defendants for all kinds of human rights abuses, ending its "mandate" in December 2017.[204] Circuit courts have upheld the ICTY and ICTR statutes and judgments as important guides on customary law.[205]

The statutes of ICTY and ICTR both support criminal liability for aiding and abetting.[206] While the statutes are silent on mens rea, judgments of both

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[198] *Id.*

[199] *Id.*

[200] *See Doe VIII*, 654 F.3d at 37–38 (citing Rome Statute for purpose mens rea); *Presbyterian Church*, 582 F.3d at 259 (citing Rome Statute for knowledge mens rea); *supra* notes 196–199 and accompanying text.

[201] S.C. Res. 955, ¶ 1 (Nov. 8, 1994). The Security Council Resolution noted "grave concern" various accounts of genocide and methodical, pervasive human rights violations had been recorded. *Id.* at 1.

[202] Rep. from the President of the Int'l Criminal Tribunal for Rwanda (2015), transmitted by Letter Dated 17 November 2015 from the President of the Int'l Criminal Tribunal for Rwanda Addressed to the President of the Sec. Council, ¶¶ 3, 9, 10, U.N. Doc. S/2015/884 (Nov. 17, 2015).

[203] S.C. Res. 827, ¶ 2 (May 25, 1993).

[204] Final Report of Serge Brammertz, Prosecutor of the Int'l Tribunal for the Former Yugoslavia, provided to the Sec. Council under Paragraph 6 of Sec. Council Resolution 1534 (2004), transmitted by Letter Dated 29 November 2017 to the Sec. Council Pursuant to Paragraph 6 of Sec. Council Resolution 1534 (2004) Concerning the Int'l Tribunal for the Former Yugoslavia Addressed to the President of the Sec. Council, ¶¶ 1–2, 172, 174, 176, U.N. Doc. S/2017/1001 (Nov. 29, 2017) [hereinafter ICTY Final Report].

[205] *See Doe VIII*, 654 F.3d at 33 (noticing the weight that ICTY and ICTR carry in this area of law); *Khulumani*, 504 F.3d at 274–75 (Katzmann, J., concurring) (noting that the ICTY and ICTR statutes were meant to incorporate only those principles widely accepted by the international community); *Doe I*, 395 F.3d at 950 (citing judgments of ICTY and ICTR for ATS aiding and abetting mens rea).

[206] Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955 (Nov. 8, 1994); Updated Statute of the International Tribunal for the Former Yugoslavia, art. 7 (Sept. 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [https://perma.cc/7ESY-RWUC].

tribunals point to a knowledge standard.[207] Specifically, in 1998 in *Prosecutor v. Frunzidila*, the ICTY trial court ascertained the meaning of aiding and abetting liability under the ICTY Statute after conducting a meticulous investigation of case law from tribunals around the world.[208] On mens rea, the trial court held that a helper does not need to have the "positive intention" for the underlying offense to occur but simply needs "knowledge" that his or her conduct will help the principal to commit the offense.[209] Similarly, six years later in *Prosecutor v. Vasiljevic*, the ICTY's appeals court confirmed that criminal liability for aiding and abetting based on Article 7 of the ICTY statute requires a defendant to know that his actions helped the principal to perpetrate the offense.[210] Other decisions of the ICTY are consistent with the appeals court's conclusion in *Vasiljevic*.[211] The judgments of the ICTR also seem to be in line with the ICTY with regards to the mens rea for aiding and abetting liability.[212] In 2004 in *Prosecutor v. Ntakirutimana*, the ICTR's appeals court held that Article 6 of the ICTR statute does not require "specific intent."[213] Following the ICTY's precedent in *Kristic*, the appeals court held that knowledge was the adequate standard.[214]

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[207] *See infra* notes 208–214 and accompanying text.

[208] Prosecutor v. Furundzija, Case No. IT–95–17/1, Trial Chamber Judgment, ¶¶ 190–191 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). In this case, the prosecution alleged that Furundzija, a small-time leader in the armed forces, stood by as one of his subordinates beat and raped victims. *Id.* ¶¶ 39–41.

[209] *Id.* ¶¶ 236–245. The trial chamber even noted that the individual aiding and abetting an offense need not know about the specific offense if the individual knows that one of several offenses will likely be perpetrated, and the offense is actually perpetrated. *Id.* ¶ 247. The trial chamber only found one case in its survey that required the "high standard" of purpose. *Id.* ¶ 248.

[210] Prosecutor v. Vasiljevic, Case No. IT–98–32–A, Appeals Judgment ¶ 102 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004). The issue of aiding and abetting liability was not before the appeals chamber, but the court articulated the standard to distinguish it from "joint criminal enterprise" liability. *See id.* ¶¶ 94–102.

[211] *See* Prosecutor v. Krstic, Case No. IT–98–33–A, Appeals Judgment, ¶¶ 139–141 (Apr. 19, 2004) (concluding that knowledge is the mens rea for aiding and abetting under Article 7(1) of the ICTY statute); Prosecutor v. Delalic, Case No. IT–96–21–I, Trial Chamber Judgment, ¶¶ 325–329 (Nov. 16, 1998) (requiring conduct to have taken place while knowing that the conduct will help the other party to perpetrate the offense); Prosecutor v. Tadic, Case No. IT–94–1–T, Trial Chamber Judgment, ¶¶ 673–692 (May 7, 1997) (finding knowledge mens rea after investigating international law). *See generally Prosecutor v. Vasiljevic*, Case No. IT–98–32–A, Appeals Judgment ¶ 102.

[212] *See infra* notes 213–214 and accompanying text.

[213] Prosecutor v. Ntakirutimana, Case No. ICTR–96–13–I, Appeals Judgment, ¶¶ 494, 501 (Dec. 13, 2004). The appeals chamber dismissed the view that defendant needed "genocidal intent" to attach liability. *Id.* In coming to this conclusion, the appeals chamber relied on *Kristic*. *Id.* ¶ 500; *see also Krstic*, Case No. IT–98–33–A, ¶¶ 139–141 (discussing the mens rea issue).

[214] *Ntakirutimana*, Case No. ICTR–96–13–I, ¶ 500; *see also Krstic*, Case No. IT–98–33–A, at ¶¶ 139–141 (concluding knowledge to be the appropriate mens rea).

III. The Correct Mens Rea Is Knowledge

Part II of this Note explained the various sources of law that courts have looked at to determine the mens rea for ATS aiding and abetting.[215] Part III synthesizes those sources.[216] It further argues that the correct standard is knowledge.[217] All of the sources discussed instruct that knowledge is the correct standard.[218] Section A discusses the Nuremberg Precedents under Control Council Law No. 10 for this proposition.[219] Section B discusses ICTY and ICTR Case Law.[220] Section C explains that the Rome Statute is not clear on the issue, but there is a strong argument that it also supports a knowledge mens rea.[221] Finally, Section D argues that federal common law, to the degree it might be relevant, bolsters the overall conclusion.[222]

A. Nuremberg Precedents Under Control Council Law No. 10

Nuremberg case law under Law No. 10 supports a knowledge mens rea for aiding and abetting liability.[223] The only support to the contrary comes from *The Ministries Case*.[224] There, the tribunal refused to find a banker criminally liable for issuing a loan to Nazi paramilitary forces while knowing that the money would be used for atrocities.[225] It is not actually clear from that opinion, contrary to the Second Circuit Court of Appeals assertion in 2007 in *Khulumani v. Barclay Nat'l Bank Ltd.*, that the tribunal pardoned Rasche because he did not act purposefully.[226] The tribunal simply excused Rasche without making explicit whether knowingly supporting the Nazis was not enough for liability or whether the accompanying act of lending money did not satisfy the requisite actus reus.[227] The latter explanation is more credible.[228] After all,

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[215] *See supra* notes 137–214 and accompanying text.
[216] *See infra* notes 223–259 and accompanying text.
[217] *See infra* notes 223–259 and accompanying text.
[218] *See infra* notes 223–254 and accompanying text.
[219] *See infra* notes 223–230 and accompanying text.
[220] *See infra* notes 231–238 and accompanying text.
[221] *See infra* notes 239–254 and accompanying text.
[222] *See infra* notes 255–259 and accompanying text.
[223] *See supra* notes 170–190 and accompanying text.
[224] *The Ministries Case*, 14 Trials under CCL No. 10, *supra* note 182, at 622.
[225] *Id.*
[226] *See id.* at 622 (noting that lending money to evil people or business is probably ethically reprehensible but not illegal, hence implicitly emphasizing the actus reus). *But see* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (citing *The Ministries Case*, 14 Trials under CCL No. 10 for a higher purpose mens rea); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 276 (2d Cir. 2007) (Katzmann, J., concurring) (surmising that the *Ministries Case* tribunal did not find the requisite purpose).
[227] *See The Ministries Case*, 14 Trials under CCL No. 10, *supra* note 182, at 622 (not clarifying whether it was the lack of purpose or the mere act of lending that made defendant's conduct permissible).

the tribunal clearly found a knowledge mens rea enough against another defendant, Puhl, in the same case.[229] Furthermore, the tribunal's judgment of Puhl is consistent with other cases tried under Law No. 10.[230]

B. ICTY & ICTR Case Law

Similarly, the judgments of the ICTY and ICTR align with Nuremberg case law to suggest that the mens rea for ATS aiding and abetting liability should be knowledge.[231] Some judges have raised concerns nonetheless as to the value of these cases for ATS litigation purposes.[232] For instance, some judges have lamented that the ICTY and ICTR were not permanent courts but rather "ad hoc" bodies applying recently enacted legislation.[233] Concerns have also been raised that these bodies sometimes expound innovative legal theories in dicta, which might accidentally deceive other courts.[234] These concerns, however, are not persuasive.[235] First, according to the U.N. Secretary General when the ICTY was announced, the relevant statutes of the tribunals sought to codify customary law rather than make new law.[236] Second, the tribunals are bound by their mandates to use customary law only and seem to be aware of this duty.[237] Finally, the specific standard of liability for aiding and abetting

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[228] *See* Doe v. Exxon Mobil Corp. (*Doe VIII*), 654 F.3d 11, 38 (D.C. Cir. 2011) (finding that *The Ministries Case* turned on the lack of requisite actus reus); Sabine Michalowski, *The Mens Rea Standard for Corporate Aiding and Abetting Liability—Conclusions from International Criminal Law*, 18 UCLA J. INT'L L. & FOREIGN AFF. 237, 247 (2014) (noting the strong likelihood that the Rasche lacked the actus reus).

[229] *See The Ministries Case*, 14 TRIALS UNDER CCL NO. 10, *supra* note 182, at 620–21 (finding a high-level banker who oversaw a deal with Nazis to hold valuables stolen from holocaust victims with full knowledge to be guilty of war crimes); *see also Doe VIII*, 654 F.3d at 38 (noting the discrepancy between the Second Circuit's take on *The Ministries Case* and how the tribunal ruled against defendant Puhl).

[230] *See supra* notes 187–190 and accompanying text.

[231] *See supra* notes 201–214 and accompanying text.

[232] *See infra* notes 233–234 and accompanying text.

[233] Doe v. Unocal Corp. (*Doe I*), 395 F.3d 932, 965 (9th Cir. 2002) (Reinhardt, J., concurring) (preferring federal common law over "evolving standards of international law . . . adopted by an ad hoc international criminal tribunal").

[234] *See Khulumani*, 504 F.3d at 278 (Katzmann, J., concurring) (registering concern that ICTY decisions may not always reflect customary international law).

[235] *See infra* notes 236–238 and accompanying text.

[236] *See Khulumani*, 504 F.3d at 274 (Katzmann, J., concurring) (discussing the U.N. Secretary General's assurance); *Report of the Secretary–General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993). In this report, the U.N. Secretary General notes that the ICTY statute is not making new law and that it is instead meant to codify existing customary law. *See id.* He explains further that international law permits tribunals to only use legal principles that are "beyond any doubt" customary international law. *Id.* ¶ 34. While his statements only apply to the ICTY, his conclusions apply equally to the ICTR because the statutes of the two tribunals are fairly similar. *Khulumani*, 504 F.3d at 274–75 (Katzmann, J., concurring).

[237] *See Khulumani*, 504 F.3d at 275 (citing ICTY cases for this very proposition); Prosecutor v. Tadic, Case No. IT–94–1–T, Trial Chamber Opinion and Judgment, ¶ 662 (May 7, 1997) (acknowl-

applied by these tribunals cannot be dismissed as innovative legal theories or dicta when tribunal decisions have undertaken comprehensive surveys of international authorities and case law and applied their conclusions to find defendants liable.[238]

C. Rome Statute

Under the Rome Statute, arguments can be made for both knowledge and purpose standards for aiding and abetting.[239] The knowledge standard is a better reading of the statute, however, because it is highly credible and consonant with the other sources of law mentioned above.[240] Even so, there is support for a purpose standard.[241] Article 25(3)(c) specifically makes it a crime for an individual to help in carrying out an offense with the purpose of helping the offense.[242] More than a hundred nations have endorsed the statute and ratified it, which suggests approval from the international community.[243] Perhaps because it appears neatly in codified form as opposed to amorphous case law, some judges have preferred it over the other sources.[244]

Still, the Rome Statute's authority on the issue is not clear.[245] First, it is unclear if the statute is even customary law, given that it is better understood as a treaty.[246] The ATS distinguishes between treaties and customary law.[247] The

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edging that ICTY has the authority to use only those legal principles that are "beyond any doubt customary law"); *see also* ICTY Final Report, *supra* note 204, ¶ 174 (noting that the ICTY relied on Nuremberg principles and put into effect customary law in its decisions).

[238] *See, e.g.*, Prosecutor v. Furundzija, Case No. IT–95–17/1, Trial Chamber Judgment, ¶¶ 236–245 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (undertaking a meticulous study of case law from around the world before determining a knowledge mens rea); *see also supra* notes 206–214 and accompanying text (citing cases where the tribunals' applications of knowledge mens rea were not dicta).

[239] *See infra* notes 241–244 and accompanying text.

[240] *See supra* notes 223–238 and accompanying text.

[241] *See* Aziz v. Alcolac, Inc., 658 F.3d 388, 400–01 (4th Cir. 2011) (adopting purpose mens rea from the Rome Statute); *Presbyterian Church*, 582 F.3d at 259 (relying heavily on the Rome Statute on the mens rea issue).

[242] *See* Rome Statute, *supra* note 191, art. 25.

[243] *Khulumani*, 504 F.3d at 275–76 (Katzmann, J., concurring).

[244] *See Aziz*, 658 F.3d at 400 (favoring the Rome Statute's supposed clarity on the mens rea standard to other sources due to customary law's "elusive" nature); *Presbyterian Church*, 582 F.3d at 258–59 (generally incorporating Judge Katzmann's take on the issue in *Khulumani*); *Khulumani*, 504 F.3d at 275–76 (Katzmann, J., concurring) (finding the Rome Statute's guidance on the issue "particularly significant" since it clearly defines the mens rea, while conceding that the statute has not actually been applied by the ICC).

[245] *See infra* notes 246–249 and accompanying text.

[246] *See* Rome Statute, *supra* note 191, art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). The D.C. Circuit in *Doe VIII* cited this language from Article 10 of the Rome Statute to support the proposition that it should be read as a "treaty." *Doe VIII*, 654 F.3d at 35.

[247] *See* 28 U.S.C. § 1350 (2012) (providing jurisdiction for breaches of the "law of nations" or "a treaty of the United States").

D.C. Circuit Court of Appeals in *Doe VIII v. Exxon Mobil* questioned the Rome Statute's value for ATS purposes for this reason in 2011.[248] The court also noted that the United States is yet to ratify the Statute, which means that it cannot fit the "treaty of the United States" prong of the ATS either.[249] The Fourth Circuit has rejected this view, holding that while the Statue may not reflect customary law, the fact that it has been endorsed by so many nations makes it probative on the issue.[250]

That aside, while Article 25(3)(c) the Rome Statute refers to a purpose mens rea, other provisions support a knowledge standard.[251] For instance, Article 25(3)(d) makes it a crime to provide support to criminal conduct, actual or attempted, of a group motivated by shared "purpose" if that support is "intentional" and the individual has "knowledge" about the others' desire to perpetrate the offense.[252] Similarly, the general mens rea provision in Article 30 refers to "knowledge" and "intent," defining intent as when the individual has the purpose to participate in an act and has a grasp on the likely outcome.[253] This reading of the Rome Statute seems to be consistent with the ICTY's interpretation in *Prosecutor v. Furundzija* in 1998 and certainly persuaded the D.C. Circuit that the Statute attaches liability for knowingly aiding and abetting.[254]

D. Federal Common Law and the Choice of Law Question

The choice-of-law question in deriving the ATS standard for aiding and abetting seems to have been decided to favor international law following the U.S. Supreme Court's pronouncements in a footnote in *Sosa v. Alvarex-Machain* in 2004.[255] Assuming, however, that this issue is still relevant—and there is definitely some dissent among circuit judges—the *Restatement* (Second) of Conflict of Laws provides a test that seems to favor federal common

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[248] *Doe VIII*, 654 F.3d at 35–37 (citing law review articles and amicus briefs for a discussion of how to classify the Rome Statute).

[249] *See id.*; *see also* 28 U.S.C § 1350 (making U.S. agreements enforceable through civil suits in federal court).

[250] *See Aziz*, 658 F.3d at 399–400 (considering and rejecting the D.C. Circuit's analysis in *Doe VIII* by pointing to the large number of signatories to the Rome Statute).

[251] *See* Rome Statute, *supra* note 191, art. 25; *infra* notes 252–254 and accompanying text.

[252] Rome Statute, *supra* note 191, art. 25.

[253] *Id.*

[254] *See Doe VIII*, 654 F.3d at 37–38 (construing the Rome Statute to prefer a knowledge mens rea); *Furundzija*, Case No. IT–95–17/1, ¶ 244 n.266 (citing Article 30 of the Rome Statute for its knowledge proposition).

[255] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see Aziz*, 658 F.3d at 398 (citing *Sosa*, 542 U.S. 692); *Doe VIII*, 654 F.3d at 33 (favoring international law, finding it to be "consistent with *Sosa*"); *Presbyterian Church*, 582 F.3d at 259 (citing *Sosa* for the same); *supra* note 144 and accompanying text.

law.[256] Unfortunately, the *Restatement* factors are very vague, and judges have used them to come to opposite conclusions.[257] In this case, however, given that the standard of liability under the federal common law—knowledge—is the same as that under international law, the choice of law question is irrelevant.[258] There is no need for a choice-of-law inquiry when there is no disagreement.[259]

CONCLUSION

The ATS is an important instrument for non-citizens looking to champion human rights in American courts. One of the ways in which litigants can do so is by holding corporations accountable for indirectly helping tyrannical governments. Aiding and abetting liability is therefore crucial, making it important for courts to resolve the level of culpability required before finding corporations liable for the actions of other governments. That question has not been resolved.

This Note argues that the mental state or mens rea required for ATS aiding and abetting liability should be knowledge. First, the knowledge standard is supported by highly-regarded authorities of customary international law, as evident from the case law of the Nuremberg tribunals applying Law No. 10, the ICTR, and the ICTY. There is also considerable support for the knowledge standard in the Rome Statute despite some ambiguities. Finally, the knowledge standard is well established under federal common law.

SRISH KHAKUREL

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[256] *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736, 770–71 (9th Cir. 2011) (Reinhardt, J., concurring) (favoring federal common law); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (AM. L. INST. 1971) (listing choice-of-law analysis points).

[257] *Compare Doe I*, 395 F.3d at 949 (finding the *Restatement* points to law of nations), *with id.*, 395 F.3d at 967 (Reinhardt, J., concurring) (remarking that the *Restatement* points to federal common law). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (noting vague factors to consider, such as the community of state and nations' best interests, the forum's stance, concerned states' stance on the specific issue, and reasonable expectations of litigants.).

[258] *See Doe VIII*, 654 F.3d at 35 (noting the same result under both approaches).

[259] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 816 (1985) (conducting a preliminary inquiry about whether the applicable laws actually disagree to assess if a choice of law analysis is warranted).