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Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain

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I. Introduction

Human rights advocates have long sought greater accountability for violations of international human rights law.[1] The primary obstacle has been the lack of effective enforcement mechanisms; despite numerous treaties and customary international human rights norms, human rights abuses are still commonplace in many countries.[2] Further, no international tribunal typically has jurisdiction over human rights claims.[3] In 1980, the federal courts began using the Alien Tort Statute[4] (ATS) to hold perpetrators of egregious human rights offenses liable in civil suits, thus opening a new avenue for victims to seek redress and expose their wrongdoers.[5] The ATS states that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United

1. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 3–4 (1996) (noting that activists have sought for U.S. courts to recognize international human rights norms).

2. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 458 (2001) (discussing human rights abuses).

3. *See id.* (addressing the current state of human rights litigation).

4. The Alien Tort Statute can also be referred to as the Alien Tort Claims Act.

5. *See* Beth Stephens, *Remarks, in The Alien Tort Claims Act Under Attack*, 98 AM. SOC'Y INT'L L. PROC. 49, 51 (2004) (noting that the landmark *Filartiga v. Pena-Irala* decision in 1980 offered the victims of egregious human rights abuses the opportunity to hold perpetrators liable).

States."[6] Although the early post-1980 cases involved mostly official state actors (government ministers and police chiefs for example), plaintiffs have increasingly filed ATS suits against multinational corporations (MNCs).[7] The shift in focus to corporate defendants arises from the reality that MNCs have the deep pockets to pay damages.[8] A plaintiff, however, has yet to receive judgment against a corporation.[9] The lower federal courts have routinely upheld jurisdiction over corporations, but plaintiffs continue to fail to defeat motions to dismiss or for summary judgment. Suits typically fail to allege sufficiently the requisite state action or an actionable violation of international law.[10] Most federal courts have required an actionable violation to be universal, specific, and obligatory.[11] Despite the lack of successful ATS suits against MNCs, the business community has cried foul, asserting that the ATS is judicial imperialism run amok that poses dramatic risks to international commerce.[12] MNCs fear they could be held liable simply for doing business in, paying taxes to, or investing in a country with a poor human rights record.[13] The State Department has also expressed concern that

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6. 28 U.S.C. § 1350 (2000).

7. *See* Emeka Duruigbo, *The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789*, 14 MINN J. GLOBAL TRADE 1, 7 (2004) (noting that since the mid-1990s ATS jurisprudence has been dominated by cases against MNCs).

8. *See* Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 437 (2002) ("The number of cases filed increased rapidly once it became possible to sue corporations, in part because such defendants are far more likely than individual foreigners to have assets to pay a judgment.").

9. *See* Stephens, *supra* note 5, at 52 (discussing plaintiffs' lack of success against corporations).

10. *See, e.g.*, Flores v. S. Peru Copper Corp., 343 F.3d 140, 172 (2d Cir. 2003) (dismissing claim for failure to submit sufficient evidence that intranational pollution violates customary international law); Ge v. Peng, 201 F. Supp. 2d 14, 22 (D.D.C. 2000) (dismissing ATS claim for failure to allege substantial degree of cooperation between defendant corporation and Chinese government to establish state action).

11. *See, e.g.*, *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994) (setting forth these requirements).

12. *See* GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, INST. FOR INT'L ECON., AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, at 9 (2003) ("Unless checked, the ATS could lead U.S. courts to become judicial instruments of imperial overstretch . . . ."); *id.* at 7 (stating that ATS litigation threatens to spin out of control with suits targeting more than 50 MNCs for over $200 billion in damages).

13. *See* Francisco Rivera, *A Response to the Corporate Campaign Against the Alien Tort Claims Act*, 14 IND. INT'L & COMP. L. REV. 251, 259 (2003) (discussing the concerns expressed by the U.S. Chamber of Commerce that ATS litigation may discourage overseas investment).

pursuing claims involving foreign governments may hamper the war on terrorism.[14]

The Supreme Court, in 2004, addressed the scope of the ATS for the first time in *Sosa v. Alvarez-Machain*.[15] The *Sosa* case, however, involved an alleged human rights violation committed by an official state actor, not an MNC.[16] The Court failed to lay out specific guidelines for what constitutes an actionable international norm under the ATS. The Court required that any violations must be as universally accepted and defined as the eighteenth century international norms that the First Congress likely intended the ATS to address.[17] Unfortunately, the Court did not engage in any analysis of the scope of these eighteenth century offenses or how the lower courts might practically compare international norms separated by over two hundred years. In addition to its transhistorical test, the Court admonished lower courts to exercise caution in granting new causes of action under the ATS. The Court gave two main reasons for this caution: (1) the role of the federal judiciary in creating new common law has shifted dramatically in the last century, and the courts have demonstrated great restraint in finding new causes of action without congressional direction; and (2) there is concern that the ATS enables the judiciary to encroach upon the foreign policy powers of the legislative and executive branches.[18]

The *Sosa* decision did not directly answer the most pertinent questions when addressing the liability of corporations under the ATS: (1) Are corporations legitimate defendants?; (2) If so, what international norms are actionable?; and (3) Under what standards will liability be determined? This Note attempts to offer the practical guidance to the lower federal courts that the Supreme Court failed to give. MNCs should be liable to the extent that they violate an actionable international norm. As juridical persons, it appears illogical to exempt them from liability for offenses that they have the capacity

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14. *See id.* at 256–57 (noting that the State Department has expressed its desire to see litigation involving Indonesia dismissed for fear that adjudication would threaten the struggle against terrorism).

15. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2769 (2004) (holding that plaintiff's ATS claim of arbitrary arrest did not allege a sufficient violation of international law); *infra* Part III for a discussion of the *Sosa* case.

16. *See id.* at 2746 (stating that the Drug Enforcement Agency (DEA) hired Sosa, among others, to abduct Alvarez-Machain and hand him over to DEA officials).

17. *See id.* at 2765 ("[F]ederal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance . . . than the historical paradigms familiar when § 1350 was enacted.").

18. *See id.* at 2762–64 (discussing the reasons for judicial caution when considering ATS claims).

to commit. Moreover, since World War II, international law has clearly recognized the liability of nonstate actors. Although corporations, like private individuals, do not have equal status with states on the international plane, they still have international duties and responsibilities.[19] The immense wealth and power of MNCs give them the ability to influence the actions and policies of developing countries. With this influence also comes the ability to commit serious human rights violations. The *Sosa* decision cautioned against interfering with the foreign policy prerogatives of the political branches that can certainly arise in the context of U.S. MNCs doing business with foreign nations. Federal courts, however, have several doctrines to dismiss inappropriate cases.[20] That foreign policy concerns may arise should not lead to a blanket immunity for corporations.

In light of the Court's strict requirements and its pleas for caution, this Note advocates that actionable norms should be limited to *jus cogens*[21] violations of human rights law. By limiting violations to *jus cogens* norms, the federal courts greatly reduce the risk of incurring foreign policy concerns, as *jus cogens* norms are by definition universal, obligatory, and nonderogable. This Note argues that the Court's transhistorical test is generally vague and unworkable, particularly in light of the Court's failure to offer practical guidance. *Jus cogens* norms offer lower courts a workable test that also addresses the Court's concern for the universal acceptance and definiteness of any actionable norm. The *jus cogens* norms that lower courts should recognize include genocide, war crimes, crimes against humanity, slavery, piracy, torture, and extrajudicial killing—norms that lower courts have almost unanimously agreed to uphold. Furthermore, this Note asserts that the standards for assessing ATS liability, in addition to agency law and under-color-of-law jurisprudence, should arise from federal tort law and not from international standards such as aiding and abetting. The aiding and abetting standard is relatively new and has not obtained the level of assent required by the Court's opinion. Moreover, the ATS does not require that the ancillary issues surrounding an applicable violation of international law also be drawn from international law. Federal courts have a broad and well-developed body of law addressing tort liability that is applicable to human rights offenses.

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19. *See* Stephens, *supra* note 8, at 445 (discussing individual rights and duties under international law).

20. *See* discussion, *infra* notes 130–32 (discussing these doctrines).

21. For a definition of *jus cogens* and its place in international law, see the discussion below in Part II.A.

II. Historical and Conceptual Framework of the Alien Tort Statute (ATS)

A. Relevant Concepts and Terminology of International Law

Substantive public international law[22] derives from two principal sources: (1) customary international law, and (2) agreements entered into between states, such as treaties.[23] Customary international law is the modern term for "the law of nations," which the ATS refers to as the nontreaty source of international law.[24] Customary international laws are binding norms that arise from the "general and consistent practice of states followed by them from a sense of legal obligation [*opinio juris*]."[25] Thus, practices adopted for moral or political reasons, without a corresponding legal duty, do not give rise to norms of customary international law.[26] Although no set duration exists for a norm to develop into customary international law, the last half century has seen a shift that now accepts development of customary international law within a relatively brief period.[27] Within customary international law, an "elite" subset exists, classified as *jus cogens* norms.[28] *Jus cogens* norms differ from ordinary

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22. Public international law consists of the rules and norms that regulate the interactions between states and other entities that are accorded international legal personality. *See* REBECCA M.M. WALLACE, INTERNATIONAL LAW 1 (4th ed. 2002) (defining international law). Private international law, also known as conflict of laws, is a system of law that is a part of a state's domestic law; it is used to determine how conflicts of laws and jurisdiction are to be resolved. *See id.* at 1 n.1 (distinguishing private international law). All references to international law in this Note, unless otherwise stated, will refer to public international law.

23. *See id.* at 3 (identifying sources of international law). This Note focuses on customary international law as opposed to treaties as a source of actionable claims under the ATS, and thus will not address the nature and scope of treaty law.

24. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 153–54 (2d Cir. 2003) (noting that "the law of nations" in the ATS refers to the body of law known as customary international law).

25. *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 23 (2004) (alteration in original) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)); *see also* Statute of the International Court of Justice, U.N. CHARTER, art. 38, para. 1 (stating that "international custom, as evidence of a general practice accepted as law" is included in the body of law addressed by the International Court of Justice).

26. *See Flores*, 343 F.3d at 154 (discussing the development of customary international law).

27. *See* WALLACE, *supra* note 22, at 10 (noting that a brief period of state practice does not bar a norm from customary status if the other requirements are met); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 838–39 (1997) (noting that the traditional conception of customary international law required the passage of a substantial time period before a practice became legally binding).

28. *See* Siderman de Blake v. Republic of Arg., 965 F.2d 699, 715 (9th Cir. 1992) (describing *jus cogens* as an elite subset of the norms considered as customary international

customary international law in that they are nonderogable, and thus any treaty or law that conflicts with them is invalid.[29] These norms comprise the most universal and egregious violations of customary international law such as genocide, war crimes, torture, slavery, crimes against humanity, and extrajudicial killing.[30]

B. Brief History of the ATS

Originally passed by the First Congress as a part of the Judiciary Act of 1789,[31] the current version of the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[32] Despite considerable attention, legal historians and the Supreme Court have failed to reach a definitive conclusion on the intended purpose and scope of the ATS.[33] For nearly 200 years after its passage in 1789, the ATS essentially lay dormant as only two suits successfully obtained jurisdiction under § 1350, one in 1795 and the other in 1961.[34] This all changed in 1980 with the birth of the modern ATS human rights case in *Filartiga v. Pena-Irala*.[35]

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law).

29. *See* WALLACE, *supra* note 22, at 33 (discussing *jus cogens*).

30. *See infra* note 176 (citing to various sources that list *jus cogens* offenses).

31. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2755 (2004) (discussing the history of the ATS).

32. 28 U.S.C. § 1350 (2000).

33. *See Sosa*, 124 S. Ct. at 2758 (concluding "that despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive"); Flores v. S. Peru Copper Corp., 343 F.3d 140, 148 (2d Cir. 2003) (noting that the ATS does not have a legislative history that could provide insight into the First Congress's intent).

34. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 n.21 (D.C. Cir. 1984) (Bork, J., concurring) (citing these cases).

35. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (holding that deliberate torture perpetrated under color of official authority violates customary international law and that 28 U.S.C. § 1350 provides federal jurisdiction over an alleged torturer found within the United States's borders). In *Filartiga*, the appellants were Paraguayan citizens who sued Pena-Irala, an Inspector General of Police, under the ATS for the alleged kidnapping, torture, and murder of their son and brother in 1976. *Id.* The central issue in *Filartiga* was whether official torture constituted a violation of the law of nations that, if it did, would establish federal jurisdiction under 28 U.S.C. § 1350. *Id.* at 880. The *Filartiga* court found that courts must interpret international law as it has evolved and currently exists among modern nations and not as it was in 1789 when the ATS was passed. *Id.* at 881. The *Filartiga* court relied upon numerous international agreements, including the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, and the International

The *Filartiga* decision was significant in that a United States court recognized how the modern view of international law has dramatically shifted from a view that once held insignificant the role of individuals (or any nonstate entities) as actors under the law of nations.[36] Prior to the twentieth century, the idea that individuals could make claims based upon international law was heretical.[37] But the *Filartiga* court asserted that this view no longer holds; how a state treats its own citizens is now a matter of international concern.[38] This rationale reflects the trend in the twentieth century, particularly since World War II, of multinational efforts to build a law of human rights and to provide remedies for breaches of that law.[39] Even more significant than elevating the role of the individual in international law, the *Filartiga* decision opened the gates for foreign nationals to pursue human rights claims in U.S. courts.[40] *Filartiga* not only held that customary international law must be interpreted and applied in its current state,[41] but also that customary international law is a part of federal common law, which gave the ATS a constitutional foundation.[42] The combination of these two holdings invited litigants from around the world to use the federal courts to redefine the scope of human rights claims within

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Covenant on Civil and Political Rights, to determine that officially sanctioned torture violates established international human rights norms, and thus the law of nations. *Id.* at 882–84. The *Filartiga* court construed the ATS "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Id.* at 887.

36. *See* Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 49, 59 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (noting that a growing positivization of international law in the nineteenth century and an emphasis on state sovereignty essentially removed individuals from any role under the law of nations).

37. *See id.* at 60 (noting that under the classical system of international law those who violate a fellow citizen's human rights are answerable only to the state and not to the international legal order).

38. *See Filartiga*, 630 F.2d at 881 (citing the United Nations Charter (a treaty of the United States) for the idea that human rights and fundamental freedoms are of universal concern); *see also id.* at 884 (overruling precedent that suggested that international law is not violated when the aggrieved parties are nationals of the acting state, declaring that such a proposition is "clearly out of tune with the current . . . practice of international law").

39. *See* Blum & Steinhardt, *supra* note 36, at 61–62 (discussing this trend).

40. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 461 (1989) (noting that *Filartiga* lent weight to President Carter's human rights policy and opened a new avenue for human rights litigation).

41. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (stating that international law must be applied as it exists today).

42. *See id.* at 885 (holding that the ATS's constitutional basis is that the law of nations has always been a part of federal common law).

customary international law.[43] Over the past twenty-five years, aliens have asserted a wide array of claims under the ATS.[44]

The central holdings of *Filartiga* and its progeny—that the ATS is constitutional, that it creates a cause of action, that international law is interpreted contemporaneously and not historically, and that it applies to acts committed outside the United States—have been widely followed by several circuits, including most prominently the Second and Ninth Circuits,[45] but also by the Fifth[46] and Eleventh[47] Circuits. The District of Columbia Circuit in several concurring opinions, however, has criticized the modern interpretation of the ATS.[48] While the predominant position of the lower courts has been to

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43. *See id.* at 884–85 (noting that the treaties cited demonstrate that international law confers fundamental rights upon all people from their governments and that while the exact scope of those rights has yet to be determined, the right to be free from torture is now among them); *see also* Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 116 (2004) (stating that Filartiga created a far-reaching tool for foreigners asserting a variety of human rights abuses).

44. *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999) (alleging environmental damage from mining activities); Hamid v. Price Waterhouse, 51 F.3d 1411, 1414 (9th Cir. 1995) (suing for fraud, breach of fiduciary duty, and misappropriation of funds); Carmichael v. United Techs. Corp., 835 F.2d 109, 111 (5th Cir. 1988) (claiming defendants aided and abetted torture in foreign prison); Cohen v. Hartman, 634 F.2d 318, 319 (5th Cir. 1981) (per curiam) (alleging tortious conversion of property); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 431 (D.N.J. 1999) (alleging forced labor); Doe I v. Islamic Salvation Front, 993 F. Supp. 3, 5 (D.D.C. 1998) (suing for violations of crimes against humanity, war crimes, hijacking, and sexual slavery).

45. *See* JOSEPH, *supra* note 25, at 58 (noting that since *Filartiga*, the Second Circuit and Ninth Circuit in numerous cases, as well as the Eleventh and Fifth Circuits have followed the central holdings of *Filartiga*).

46. *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999) (citing *Filartiga* for the notion that international law must be applied in its current state and not as it was defined in 1789 for ATS purposes).

47. *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (holding that the ATS "establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law").

48. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801, 811–12 (D.C. Cir. 1984) (Bork, J., concurring) (finding that the ATS does not provide for a private right of action nor does international law supply one under federal common law and criticizing notions that the phrase "law of nations" in the ATS must be read as incorporating all the modern rules of international law); *see also* Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003) (Randolph, J., concurring) (questioning the constitutionality of *Filartiga*'s theory that federal common law incorporates customary international law), *rev'd sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004); *Tel-Oren*, 726 F.2d at 826 n.5 (Robb, J., concurring) (deciding that the *Filartiga* decision "appears . . . to be fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure").

follow the *Filartiga* line of cases,[49] the decision nevertheless provoked considerable controversy and scholarship, concerning whether the ATS merely grants jurisdiction over offenses defined elsewhere or whether it also provides a cause of action on the basis of customary international law.[50] As discussed below in Part III, the *Sosa* decision endorsed aspects of both sides of the debate and created as much confusion as certainty.[51] In many ways, the *Sosa* Court punted the ATS back to the lower federal courts with limited guidance. This Note intends to respond to and fill some of the gaping holes left in *Sosa*'s wake.

III. The Sosa *Decision: Looking to the Eighteenth Century*

A. Factual and Procedural History

In 1985, Enrique Camarena-Salazar, an agent of the Drug Enforcement Administration (DEA), was captured while operating in Mexico.[52] His capturers tortured him during a two day interrogation and then murdered him.[53] DEA officials believed Humberto Alvarez-Machain, a Mexican physician, participated in the torture by keeping the agent alive during the interrogations.[54] A federal grand jury indicted Alvarez in 1990 for his role in the torture and murder of Camarena-Salazar, but the Mexican government refused to assist the DEA in bringing Alvarez to the United States for trial.[55] The DEA subsequently employed Mexican nationals, including petitioner Jose Fernando Sosa, to abduct Alvarez and fly him to El Paso, Texas, where federal officers arrested him.[56]

The U.S. District Court for the Central District of California granted Alvarez's motion to dismiss the indictment because it violated the extradition

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49. *See* STEPHENS & RATNER, *supra* note 1, at 11 (stating that the core principles of *Filartiga* have been adopted with only minor deviations).

50. *See* Kontorovich, *supra* note 43, at 117–18 (noting the considerable controversy post-*Filartiga* that debates whether the ATS is a source of substantive law or whether it is better seen as solely jurisdictional); *see also* Bradley & Goldsmith, *supra* note 26, at 817 (rejecting the "modern" position that customary international law is a part of federal common law).

51. *See* Kontorovich, *supra* note 43, at 118 (stating that "[l]ike Santa Claus, the [*Sosa*] opinion brought something for everyone," partially endorsing the differing scholarly interpretations of the ATS).

52. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

treaty between the United States and Mexico; the Ninth Circuit affirmed, but the Supreme Court reversed.[57] At trial in 1992, the District Court granted Alvarez's motion for a judgment of acquittal.[58] In 1993, Alvarez filed a civil action against Sosa under the ATS and against the United States under the Federal Tort Claims Act (FTCA).[59] The District Court awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim, and the Ninth Circuit affirmed.[60]

B. Interpreting the ATS: The Sosa *Opinion*

1. A Transhistorical Standard

The Supreme Court rejected Alvarez's argument that the ATS granted authority to create new causes of action for torts violating international law in addition to its jurisdictional grant.[61] Despite holding that the ATS is solely jurisdictional, the Court did not agree with Sosa that the statute was "stillborn" and thus required subsequent legislation to provide a cause of action.[62] Further, based upon the historical record, the Court found "that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"[63] and that the common law would provide the requisite cause of action for those violations "with a potential for personal liability at the time."[64] The Court found that the First Congress in 1789 likely intended those violations to include safe conducts, infringements of the rights of ambassadors, and piracy—and found no basis to suspect that the First Congress contemplated any torts beyond these three offenses (Blackstone's offenses).[65]

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57. *See id.* (noting that the Court held that "the fact of Alvarez's forcible seizure did not affect the jurisdiction of a federal court"). For the Court's opinion in the criminal proceedings, see United States v. Alvarez-Machain, 504 U.S. 655 (1992).

58. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).

59. *See id.* at 2747 (noting that Alvarez alleged false arrest against the United States and a violation of the law of nations against Sosa).

60. *Id.* The FTCA claim is beyond the scope of this Note. The District Court dismissed the FTCA claim, which the Ninth Circuit reversed; the Supreme Court affirmed the District Court's dismissal. *Id.*

61. *See id.* at 2755 (stating that Alvarez's reading of the ATS is "implausible").

62. *Id.* "There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely." *Id.* at 2758–59.

63. *Id.* at 2759.

64. *Id.* at 2761.

65. *Id.* at 2759–61. The Court drew upon Blackstone's eighteenth century *Commentaries*

To this point, the Court's opinion was relatively straightforward. The ATS is solely jurisdictional and Congress intended Blackstone's offenses to supply the causes of action through the common law. But then the Court took a large step forward and invited federal courts to create new causes of action based upon modern international law. The Court required any claim "to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[66] Despite its invitation, the Court gave five reasons for federal courts to exercise caution before recognizing new claims. First, the conception of the common law has changed dramatically in the last two centuries from naturalistic to positivistic; modern law is not considered found or discovered but rather created or made.[67] The second reason followed closely from this conceptional change in the common law: Federal courts have generally looked to the legislature for guidance before "exercising innovative authority over substantive law."[68] Third, the Court has repeatedly held that, in the absence of express congressional intent to create a private right of action, the Court is reluctant to create such a right.[69] Even though Congress's failure to provide a private right of action under an international norm is more equivocal than its failure to create such a right under a domestic statute, the potential consequences of making international law actionable by individuals supports judicial caution.[70] The fourth reason concerned the potential impact on United States foreign policy, which is primarily the domain of the executive and legislative branches.[71] American courts sitting in judgment of foreign governments or their agents risk jeopardizing the foreign policy of the political branches.[72] Finally, in light of the previous four reasons, the Court emphasized

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as the primary source to define these "specific offenses against the law of nations addressed by the criminal law of England." *Id.* at 2756. They will hereinafter be referred to as Blackstone's offenses.

66. *Id.* at 2761–62.

67. *See id.* at 2762 (noting that when Congress enacted the ATS, the common law was seen as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute") (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

68. *See id.* (declaring that "[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries").

69. *Id.* at 2763.

70. *Id.*

71. *Id.*

72. *See id.* (stating that because of the potential foreign policy risks, remedies for international norm violations "should be undertaken, *if at all*, with great caution") (emphasis added).

that Congress has given the judiciary no mandate to seek out and define new and debatable violations of international law.[73]

The Court gave limited guidance to lower courts on how to apply its opinion. The Court itself did not even recognize a final standard: "*Whatever the ultimate criteria* for accepting a cause of action . . . federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when Section 1350 was enacted."[74] The *Sosa* Court supplied a transhistorical test with some modern caveats attached. By not establishing ultimate criteria, the Court implied that meeting the eighteenth century paradigm may not be sufficient to create a new cause of action. Even more, the Court did not offer a single example of a modern norm that would meet this transhistorical test. Further, the Court required a consideration of the practical consequences of creating a cause of action litigable in federal courts.[75] For example, the Court asserted that one limiting factor may be the need to defer to the political branches on a case-specific basis.[76] Several pending suits seek damages under the ATS from corporations alleged to have aided or abetted the apartheid regime that formerly controlled South Africa.[77] The current South African government insisted that these suits interfered with its Truth and Reconciliation Commission's goal to avoid "victors' justice"; the United States State Department agreed with South Africa.[78] In such circumstances, the Court found that a strong argument existed for the federal judiciary to give significant weight to the executive branch's views on a suit's foreign policy impact.[79]

By generally endorsing the reasoning of several lower courts, the Court offered some indication how the historical standard might be applied. The common factors mandate that any international norm must be specific, universal, and obligatory.[80] For example, the Court endorsed *Filartiga*'s

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73. *See id.* (noting that this reason is important in light of the second reason that the judiciary's general role is not to create substantive law).

74. *Id.* at 2765 (emphasis added).

75. *Id.* at 2766.

76. *Id.* at 2766 n.21.

77. *Id.* (citing *In re* S. African Apartheid Litig., 238 F. Supp. 2d 1379 (J.P.M.L. 2002)). The South African apartheid cases have since been dismissed by the U.S. District Court for the Southern District of New York. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 557 (S.D.N.Y. 2004) (dismissing plaintiffs' cases for lack of subject matter jurisdiction under the ATS). See the discussion of this important post-*Sosa* case in Part V below.

78. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004).

79. *Id.*

80. *Id.* at 2765–66 (citing approvingly *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th

statement regarding universality that "for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[81]

The *Sosa* Court's apparent endorsement of the *hostis humani generis* concept is ironic considering the Court's transhistorical standard. The term *hostis humani generis* originated within the common law tradition in the mid-seventeenth century.[82] Seventeenth century writers applied the term to pirates who indiscriminately attacked the ships of all nations, and not to those who targeted ships with the flags of particular nations.[83] The term's origins, therefore, do not contemplate the egregiousness of the substantive offense—robbing ships on the high seas—but rather its indiscriminate manner. The fact that robbery on the high seas was condoned when a privateer had a letter of marque further evidences this conclusion.[84] Certainly, no modern day torturer or slave trader would be excused based upon state approval or discrimination as to the victims. Modern courts, as evidenced by *Filartiga*, have transformed the term's core meaning to one of moral repugnance which surely describes incidents of genocide, war crimes, crimes against humanity, torture, and other violations. The irony of the *Sosa* opinion, however, is that it endorsed a faulty comparison of modern human rights law to eighteenth century piracy—just the type of transhistorical comparison the Court has asked lower courts to undertake. Furthermore, the Court's lack of any transhistorical analysis may be a harbinger of how lower courts will interpret and apply the *Sosa* decision. Indeed, the Southern District of New York failed to apply any transhistorical analysis to the *In re South African Apartheid Litigation*[85] case, a major corporate ATS suit decided only five months after *Sosa*.

Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.") and Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that the limits of the ATS be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms")).

81. *See id.* at 2766 (quoting with approval Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

82. *See* ALFRED P. RUBIN, THE LAW OF PIRACY 92 (2d ed. 1998) (noting that *hostis humani generis* first appeared in England in 1644).

83. *See id.* at 93–94 (noting that *hostis humani generis* applied to those who "robbed the merchants of all nations without discrimination by flag" and not to those who only attacked the ships of one or two nations).

84. *See* Kontorovich, *supra* note 43, at 145–46 (noting that a "letter of marque authorized its bearer to attack and seize civilian ships on the high seas—essentially the same conduct that constituted piracy . . . [y]et the privateer . . . was not guilty of any crime").

85. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2004) (noting *Sosa*'s transhistorical standard yet not engaging in any such analysis and instead

It is worth noting that the facts of Alvarez's claim do not represent the typical ATS claim. Alvarez alleged an arbitrary arrest that lasted for less than one day, after which he was transferred to the custody of lawful authorities and promptly arraigned.[86] ATS cases tend to involve more egregious and heinous violations of human rights, such as severe torture, extrajudicial killing,[87] genocide,[88] ethnic cleansing,[89] crimes against humanity, and war crimes.[90] The arbitrary arrest in *Sosa* was not a borderline case and thus did not provide the

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applying the Second Circuit's standard for norms that are universally accepted and followed out of legal obligation). In *Apartheid Litigation*, the plaintiffs were South African citizens who brought suit under the ATS against a group of multinational corporations who conducted business in apartheid South Africa. *Id.* at 542. The plaintiffs alleged that the defendant corporations supplied resources, including technology, money, and oil, to the apartheid South African government or to entities controlled by the government. *Id.* at 544–45. The plaintiffs alleged that the defendants were liable for international law violations committed by the government, such as genocide, torture, forced labor, racial discrimination, and extrajudicial killings. *Id.* at 548. The plaintiffs attempted to link defendants to the violations in three ways: (1) that defendants were state actors while committing the violations; (2) that defendants aided and abetted the government in committing the violations; and (3) that defendants' business activities were sufficient to constitute an actionable norm under the ATS. *Id.* at 548. The defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. *Id.* at 542. The court found that the defendant corporations were not state actors under the color of law jurisprudence and stated that "[a]t most . . . defendants benefited from the unlawful state action of the apartheid government." *Id.* at 548–49. As to aiding and abetting, the court rejected assertions that the findings of the International Criminal Tribunals for the former Yugoslavia and Rwanda or the Nuremberg trials established a universally accepted and well-defined norm for ATS purposes. *Id.* at 549–50. Finally, the court found that a proscription on conducting business with an apartheid regime was not an international norm followed by states out of legal obligation. *Id.* at 552–53. Finding no legal connection between defendants actions and the alleged violations, the court dismissed the case for lack of subject matter jurisdiction. *Id.* at 554.

86. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2769 (2004).

87. *See, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932, 936 (9th Cir. 2002) (noting that plaintiffs allege that defendants directly or indirectly subjected Myanmarese villagers to forced labor, murder, rape, and torture), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003); Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980) (noting that plaintiffs alleged that a police official tortured and killed their relative for opposing Paraguay's president); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1254 (N.D. Ala. 2003) (alleging company allowed paramilitaries to commit extrajudicial killings of union organizers).

88. *See* Kadic v. Karadzic, 70 F.3d 232, 236–37 (2d Cir. 1995) (alleging that former Bosnian-Serb president committed acts of genocide, rape, forced prostitution, and torture).

89. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 01 CIV. 9882, 2004 U.S. Dist. LEXIS 17030, at *1 (S.D.N.Y. Nov. 29, 2004) (mem.) (alleging company's complicity in government's brutal ethnic cleansing campaign in connection with extraction of Sudanese oil).

90. *See* Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 117–18 (D.D.C. 2003) (alleging Algerian paramilitary groups committed crimes against humanity and war crimes including extrajudicial killings and an airline hijacking), *appeal dismissed*, No. 03-7072, 2003 U.S. App. LEXIS 13908 (D.C. Cir. July 9, 2003).

Court an opportunity to explore the boundaries of ATS claims. The Court tacitly approved the reasoning in several cases that involved the more egregious and heinous violations,[91] but it did not give an opinion regarding whether these violations are actionable. Lower courts are left to speculate where the Court would draw the line based on its analysis of the *Sosa* facts.

2. *Evaluating the Alleged Violation in* Sosa

The limited guidance the Court offered can be seen in its analysis of Alvarez's arbitrary detention claim. Although the analysis did not further elucidate the transhistorical test, the Court discussed some aspects of a clearly invalid claim. The Court evaluated Alvarez's ATS claim under the current state of international law and not any historically bound version of it, even though historical principles may inform the analysis.[92] A key element to ascertaining current international law is determining its positivistic element—what states actually practice, as opposed to the normative element (what individuals think the law should be).[93] Alvarez cited two international agreements, the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (I.C.C.P.R.), to establish the applicable international law regarding arbitrary arrest.[94] Both agreements failed the *Sosa* test's need for an obligatory norm.

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91. *See Sosa*, 124 S. Ct. at 2765–66 (stating that the Court's standard is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court").

92. *See id.* at 2766 (noting that the arbitrary arrest claim "must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized").

93. *See id.* at 2766–67 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900), for the proposition that international law must be determined by the customary use of states and not what some think the law ought to be). In *The Paquete Habana*, the Court laid out the framework for determining the current state of international law:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

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

94. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (noting that Alvarez alleged his abduction was an arbitrary arrest within the meaning of the Universal Declaration of Human Rights and traced the rule to the International Covenant on Civil and Political Rights to which the United States is a party).

The Universal Declaration imposes no legal obligations upon its signatory states—rather, it is a statement of principles.[95] Although the I.C.C.P.R. binds the United States as a matter of international law, the United States ratified the treaty with the express understanding that it did not create enforceable rights in federal courts.[96] The lack of a congressionally enacted private right of action does not foreclose the norms embodied in a treaty from being actionable; however, the lack of congressional action prevents the treaty itself from establishing the applicable international norm.[97] The Court's rejection of these two treaties demonstrates that no matter the lofty moral authority of an alleged source of international law, without a corresponding legal obligation the source fails to create an actionable offense under the ATS.

Alvarez also attempted to establish that the prohibition against arbitrary arrest has become binding customary international law.[98] But the Court found little authority to support his broad definition of prohibited arbitrary detention: "[O]fficially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances."[99] To support that definition would allow aliens to sue in federal court for any arrest, in any country, that exceeded the authority of the arresting individual.[100] No norm of customary international law is sufficiently specific to support an action for unlawful detention of less than one day that was followed by transfer to lawful authorities and a prompt arraignment.[101]

3. Unanswered Questions on Corporate Defendants

The Court referred to corporate liability only briefly, in a footnote. While discussing the need for any actionable norm to be sufficiently definite, the Court noted that a related consideration was whether liability for international law offenses extends to private actors such as corporations.[102] Thus, to explore the scope of corporate liability under the ATS first requires an analysis of

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95. *See id.* (discussing the Universal Declaration).

96. *See id.* (discussing the I.C.C.P.R.).

97. *See id.* (finding that the plaintiff cannot say that the Universal Declaration and the I.C.C.P.R. themselves establish the relevant international norm, and thus he must show the alleged norm to have obtained customary international law status).

98. *See id.* at 2767–68 (discussing Alvarez's invocation of a general prohibition).

99. *Id.* at 2768.

100. *See id.* (discussing the implications of Alvarez's proposed rule).

101. *See id.* at 2769 (rejecting Alvarez's claim).

102. *See id.* at 2766 n.20 (comparing the differing views of the D.C. Circuit and the Second Circuit on the subject of private actor liability).

whether corporations are valid defendants in ATS suits, followed by an examination of the violations of customary international law that will pass the *Sosa* test, and finally, a determination of the appropriate standard of liability. The *Sosa* decision further requires an examination of the practical consequences of opening the federal courts to corporate ATS suits and whether or not specific cases will justify dismissing a suit even if a plaintiff pleads an actionable claim.

IV. Can a Corporation Be Liable Under the ATS?

Beginning in the nineteenth century, the theory of positivism began to dominate international law.[103] The bedrock of the positivistic view of international law is state sovereignty; states can only be legally bound by those obligations to which states voluntarily consent.[104] This fundamentally statist view of the classical system of international law asserted the absolute equality and independence of states "and the exclusion of nonstate actors from the international legal plane."[105] The ATS would be inapplicable to private actors under the classical approach, which asserts that nonstate actors have neither rights nor obligations under international law. Since World War II, however, there has been a dramatic shift in the nature of customary international law.[106] The Nuremberg Trials applied the concept that individuals, not merely states, are significant subjects of international law.[107] The International Court of Justice has noted that "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights,"[108] thus recognizing the reality that individuals have rights and duties under international law even though their status is not equal to that of states.[109] The

103. *See* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW xxxi–xxxii (2001) (discussing the rise of positivism to replace natural law as the predominant theory of international law).

104. *See id.* at xxxii (noting that positivism recognizes no international obligations other than those to which a state has voluntarily agreed).

105. *See* Blum & Steinhardt, *supra* note 36, at 59–60 (asserting that the "fundamental principles of the classical system are the absolute equality and independence of nation-states, and the exclusion of nonstate actors from the international legal plane").

106. *See* Bradley & Goldsmith, *supra* note 27, at 839 (discussing this shift).

107. *Id.*

108. Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 178 (Apr. 11).

109. Stephens, *supra* note 8, at 445; *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003) (noting that "a considerable body of United States and international precedent indicates that corporations may be liable for violations

idea of *jus cogens* illustrates this conceptual shift in international law, as *jus cogens* posits that some norms are binding on states regardless of their consent.[110] Moreover, *jus cogens* norms primarily contemplate the protection of individual rights as opposed to states' rights. Indeed, the essence of prohibitions on such offenses as genocide, crimes against humanity, and torture is to limit how individuals are treated, not states, and to punish individual wrongdoing in such cases. When considering the liability of individuals under international law, it is important to distinguish between two distinct types of individual liability. That individuals can be liable when they act as agents of a state or under color of state law is well established under international law.[111] Individual liability for those acting independent of any state authority or direction is more controversial.[112] Liability for MNCs under the ATS involves consideration of both forms of individual liability and the presence of state action.

A. State Action Requirement and Private Actors

The initial wave of post-*Filartiga* suits involved victims suing individuals acting in their official capacity,[113] and thus endorsed the widely accepted view of individual liability—liability for those acting under color of law. Congress applied this standard of liability when it passed the Torture Victims Protection Act of 1991 (TVPA). The TVPA states that an "individual" who acts "under actual or apparent authority, or color of law, of any foreign nation" shall be liable for acts of torture and extrajudicial killing.[114] One federal district court found that under the TVPA the term "individual" did not include

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of international law, particularly when their actions constitute *jus cogens* violations").

110. *See id.* (noting that modern doctrine of *jus cogens* is an example of the drift away from the consensual basis of customary international law).

111. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 793 (D.C. Cir. 1984) (Edwards, J., concurring) (noting that liability for individuals acting under color of state law, arising initially from the Nuremberg Trials, is well implanted in international law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II introductory note (1987) (stating that "[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide").

112. *See Tel-Oren*, 726 F.2d at 793 (discussing the meaning of individual liability).

113. *See* Duruigbo, *supra* note 7, at 6 (noting that until the mid-1990s, the ATS remained limited to suits against state agents abusing the power of government to oppress people).

114. Torture Victims Protection Act of 1991, 28 U.S.C. § 1350 historical and statutory notes § 2(a) (2000) [hereinafter TVPA]. Note that the TVPA is codified in the note section of the ATS.

corporations,[115] but the Fifth Circuit affirmed the decision to dismiss the case on other grounds and declined to decide if corporations can be liable under the TVPA.[116] Two more recent district court opinions have upheld the applicability of the TVPA to corporations.[117] The legislative history specifies that the term "individual" was used to foreclose suits against foreign governments or their entities,[118] but does not make any mention of an exemption for private corporations.[119] Additionally, the Supreme Court has recently found the term "individual" to be synonymous with "person" and that "person" has a broader meaning in a legal context than in ordinary usage.[120] Considering that a corporation is a juridical person that has no particular immunity under domestic law[121] and possesses the ability to sue and be sued,[122] and that a corporation is generally viewed as a person in other areas of the law,[123] a statutory reference to "individual" or "person" should not exclude corporations unless it is Congress's clear intent to do so.

Given that it is reasonable to conclude that the TVPA, which addresses the *jus cogens* norms of torture and extrajudicial killing, applies to corporations acting under color of state law, it would be anomalous to find that the ATS is limited to individual persons. Immunizing corporations would be especially anomalous considering the purpose of *jus cogens* human rights norms. These are not norms established for the protection of states themselves, but rather for

115. *See* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 382–83 (E.D. La. 1997) (finding that the TVPA does not extend to corporations).

116. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 169 (5th Cir. 1999) (finding that plaintiffs failed to provide sufficient underlying facts to support claims and thus not reaching the issue of corporate liability under the TVPA).

117. *See* Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) (finding TVPA suit should not be dismissed based upon defendant's corporate status); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) (finding that the TVPA applies to corporations).

118. *See* STEPHENS & RATNER, *supra* note 1, at 95–96 (citing H.R. REP. NO. 102-367 (1992), *reprinted* in 1992 U.S.C.C.A.N. 84, 87).

119. *See Sinaltrainal*, 256 F. Supp. 2d at 1358 (noting that the Senate Judiciary Committee Report does not mention any exemption for corporations under the TVPA).

120. *See* Clinton v. New York, 524 U.S. 417, 428 n.13 (1998) (finding that in the Line Item Veto Act Congress intended "individual" to be synonymous with "person" and that "person" includes corporations).

121. *See* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 803 (2002) (discussing trends in human rights liability of private corporations).

122. *See* MODEL BUS. CORP. ACT ANN. § 3.02(1) (1997) (stating that a corporation has the same power as individuals to sue and be sued).

123. Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003).

the protection of human beings to be free from brutality in its various forms.[124] Indeed, "[m]ost [human rights] are documented in terms of the right of persons and not in terms of participation in or protection from the state. They are, in the words of the International Court of Justice, *obligatio erga omnes* (owing by and to all humankind)."[125] To exempt corporations who act under color of state law would defeat the purpose of these universal norms protecting certain human rights. Foreign states and their subdivisions and instrumentalities generally have immunity from suit under the Foreign Sovereign Immunity Act (FSIA),[126] but it is highly unlikely for a private corporation to qualify as an agency or instrumentality of a foreign state. To qualify, a corporation would have to be majority owned by the foreign state and be "neither a citizen of a State of the United States . . . nor created under the laws of any third country."[127] Moreover, the FSIA does not provide immunity to individuals acting under color of state law.[128] As discussed earlier in this Part, corporations are legal persons with the ability to sue and be sued who have no special immunity from legal liability. Corporations acting under color of state law should not be granted blanket immunity from suit absent clear intent from Congress. Under *Sosa*, it is quite possible that in a particular case, an ATS suit with valid subject matter jurisdiction over a corporation will be properly dismissed. The dismissal will not result from any broad-based immunity granted to corporations, but rather from deference to the political branches when a case raises significant foreign policy concerns or from other collateral consequences.[129] Federal courts have several common law doctrines at their

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124. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (stating that genocide, slavery, state-sanctioned murder, torture, prolonged arbitrary detention, and systematic racial discrimination are all *jus cogens* violations of international human rights law). By definition, these rights aim to primarily protect humans, not states.

125. LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 215 (1989).

126. *See* STEPHENS & RATNER, *supra* note 1, at 126 (noting that tort suits against foreign states rarely fall within one of the exceptions to the FSIA and that several cases have rejected the argument that the FSIA does not apply to violations of fundamental international law norms).

127. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603(b) (2000).

128. *See* 28 U.S.C. § 1603(b) (stating that an agency or instrumentality of a foreign state is an entity "which is a separate legal person, corporate or otherwise . . . and which is an organ of a foreign state or political subdivision thereof"); *see also* STEPHENS & RATNER, *supra* note 1, at 126 (noting that the FSIA does not provide immunity to individuals acting under color of official authority).

129. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004) (noting a possible limitation to an ATS suit would be deference to the political branches regarding a foreign policy concern and citing the South African apartheid litigation cases as such a situation).

disposal to dismiss appropriate cases, including forum non coveniens,[130] the act of state doctrine,[131] and the political question doctrine.[132] These doctrines provide federal courts the opportunity to decline or dismiss inappropriate cases, without removing corporations altogether from jurisdiction under the ATS—a result that would unjustly withhold accountability from a major participant in the international arena. The *Sosa* decision dealt primarily with the question of which violations of international law are actionable under the ATS, not who can be sued under the ATS. Notably, in *Apartheid Litigation*, the Southern District of New York applied the state action requirement to corporations without suggesting that corporations are illegitimate defendants under the ATS.[133] Until Congress or the Supreme Court speaks more directly to the issue, the lower courts should continue to exercise jurisdiction over corporations.

B. Private Liability in the Absence of State Action: The Kadic *Standard*

Certain actions by private individuals have long been actionable under customary international law.[134] In *Kadic v. Karadzic*,[135] the Second Circuit

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130. Forum non conveniens is a common law doctrine that allows courts to dismiss a case in favor of trial in a foreign forum. JOSEPH, *supra* note 25, at 87. If an adequate foreign forum exists, then a court weighs the respective public and private interests to decide the most convenient forum for the litigation. *Id.* at 88.

131. The act of state doctrine permits courts to refrain from exercising jurisdiction when a case involves claims relating to a state's official acts within its territory. *Id.* at 40. "The purpose of the doctrine is to maintain the constitutional separation of powers, so that the preeminence of the political branches of government over the judiciary is maintained in the realm of foreign relations." *Id.* The greater the codification or consensus on an issue of international law, the more appropriate it is for courts to exercise jurisdiction. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). Thus, if ATS claims are limited to *jus cogens* norms, defendants will be unlikely to succeed on the act of state doctrine. *See* Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) (finding that it would be rare for act of state doctrine to preclude an otherwise valid ATS suit).

132. The political question doctrine prevents jurisdiction over a case if the case requires adjudicating political issues that would intrude too far into the realm of the executive and legislative branches, especially as concerns matters of foreign policy. JOSEPH, *supra* note 25, at 44. However, that a case arises in a politically charged environment does not transform the relevant issues into nonjusticiable political questions—"[t]he doctrine is one of political questions, not one of political cases." *Kadic*, 70 F.3d at 249 (internal quotations omitted).

133. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 548–49 (S.D.N.Y. 2004) (engaging in a color of law analysis as opposed to merely dismissing the case because corporations were the defendants).

134. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (Edwards, J., concurring) (finding that private liability exists for acts of piracy and slave trading); DAMROSCH, *supra* note 103, at 397 (noting that piracy and slave trading were two early examples of private responsibility for customary international law violations).

135. *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) (holding that certain actions violate the law of nations regardless of whether the actors are acting under state authority or as private individuals). In *Kadic*, the plaintiffs were citizens of Bosnia-Herzegovina who sued Karadzic, the President of the self-proclaimed

incorporated this theme into the ATS by holding that private actors can be liable for war crimes and genocide without state action, but not for acts of torture or summary execution, unless such acts are committed in furtherance of war crimes or genocide.[136] Regarding genocide, the *Kadic* court cited to the Convention on the Prevention and Punishment of the Crime of Genocide which states that "persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[137] The rules of the Convention, moreover, are considered *jus cogens*, and thus permit no derogation.[138] Similarly the *Kadic* court cited to the Geneva Conventions for the assertion that "all parties" to a conflict are obligated to adhere to the laws of war.[139] Furthermore, the international community has recognized the liability of private parties for war crimes since World War I, which was confirmed at the Nuremberg Trials after World War II.[140] The Ninth Circuit has endorsed this limited extension of offenses that apply to purely private actors,[141] but also added forced labor to the list by arguing that forced labor is a modern variant of slavery.[142] Several federal district

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Bosnian-Serb republic within Bosnia-Herzegovina. *Id.* at 236–37. The plaintiffs asserted claims under the Alien Tort Act and the Torture Victim Protection Act for acts of genocide, rape, forced prostitution, torture, and summary execution allegedly carried out by Bosnian-Serb military forces during the Bosnian civil war. *Id.* at 237. The *Kadic* court followed *Filartiga* by interpreting international law as it exists in its current state. *Id.* at 238. Citing the early examples of piracy and slave trading and the modern example of aircraft hijacking, the court held that individuals can be liable for certain offenses against international law. *Id.* 240. The court held that war crimes and genocide were included among these offenses not requiring state action, but that torture and summary execution are proscribed by international law only when committed by state officials or under color of state law. *Id.* at 241–44.

136. *See id.* (discussing which violations of international law can lead to claims against individuals under the ATS).

137. *Id.* at 241 (citing to the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 102 Stat. 3045, 3045, 78 U.N.T.S. 277, 280); *see* Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091(a) (2000) (criminalizing genocidal acts regardless of whether defendant acted under color of law).

138. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 98 (2003) (stating that the rules of the Genocide Conventions form a part of the *jus cogens* body of norms).

139. *Kadic*, 70 F.3d at 243.

140. *Id.*; *see* CASSESE, *supra* note 138, at 48 (noting that war crimes can be perpetrated by civilians and not just military personnel).

141. *See* Doe I v. Unocal Corp., 395 F.3d 932, 946 (9th Cir. 2002) (agreeing with the *Kadic* court that crimes like rape, torture, and summary execution require state action for liability to attach under the ATS unless they are committed in furtherance of crimes like genocide and war crimes), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

142. *See id.* at 946–47 (finding that forced labor falls within slavery for purposes of private liability). It is important to note that in *Unocal*, the Ninth Circuit relied exclusively upon U.S. law to determine that forced labor qualifies as a private liability offense. For a critique of the

courts, outside of the Second and Ninth Circuits' jurisdictions, have accepted the *Kadic* rationale as well.[143] Given the broad consensus that the *jus cogens* norms of piracy, slavery, war crimes, and genocide apply to purely private conduct, the *Sosa* decision should not be interpreted to foreclose such liability. Furthermore, all of these norms fall within the *Sosa* standard for being universal and definite, as discussed below in Part V. Other *jus cogens* norms, however, still require state action and under *Sosa*'s cautious standard, should not be extended into the purely private category of actionable norms. Torture, extrajudicial killing, and crimes against humanity would be the most obvious examples of *jus cogens* norms still requiring state action. In the TVPA, Congress explicitly limited claims for torture and extrajudicial killing to acts committed "under actual or apparent authority, or color of state law, of any foreign nation."[144] This reflects the international consensus on torture as well.[145] As to crimes against humanity, there does not appear to be a broad acceptance of liability for purely private acts.[146] Without state action, plaintiffs seeking to hold MNCs liable under the ATS need to assert a claim under one of the small number of offenses where private liability attaches.

The corporate ATS suits almost exclusively involve situations where plaintiffs have accused MNCs of committing or contributing to human rights

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court's decision to classify forced labor as slavery, see Tawny Aine Bridgeford, Note & Comment, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1038–48 (2003).

143. *See* Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1261 (N.D. Ala. 2003) (finding that since plaintiffs sufficiently alleged violations of law of war, the court did not need to address the issue of whether defendants acted under color of state law); Ge v. Peng, 201 F. Supp. 2d 14, 22 n.5 (D.D.C. 2000) (accepting the Second Circuit's conclusion that the ATS extends to private parties for acts of genocide and war crimes).

144. TVPA, 28 U.S.C. § 1350 historical and statutory notes § 2(a) (2000).

145. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1, 108 Stat. 463, 463, 1465 U.N.T.S. 85, 115 (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity").

146. *See* CASSESE, *supra* note 138, at 83 (noting that the case law indicates that crimes against humanity can be perpetrated "by individuals acting in their private capacity, provided they act in unison . . . with a general state policy"); CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 95 (2003) (finding that "[i]t is not unforeseeable that some private organised groups may have their own criminal agenda, in the absence of some government policy" and commit crimes against humanity). Al-Qaeda would be a prime example of such an organization.

violations in connection with official state activity. Cases alleging corporate liability without state involvement are rare because their success would depend on alleging an offense which entails private liability. Claims of genocide and war crimes, for example, require broad, systematic activity that is typically carried on by official actors. Scenarios where a corporation would be involved in these violations without state activity are difficult, although not impossible, to imagine.[147]

*V. Actionable Norms Post-*Sosa

A. Looking to Piracy for Historical Guidance (or Lack Thereof)

Attempting to derive actionable norms of customary international law based upon eighteenth century international law may prove to be a difficult task. The Court's requirement that a modern-day norm be accepted by the international community of states and defined with a specificity comparable to the eighteenth century Blackstone offenses offers little practical guidance on how to perform such an analysis.[148] The Court itself did not analyze the degree of acceptance or specificity of the Blackstone offenses. When stating its transhistorical standard, the Court merely cited to an early nineteenth century Supreme Court case that illustrated the specificity with which the law of nations defined piracy.[149] But engaging in a comparison of norms separated by more than two centuries and emanating from markedly different substantive law will likely be an arduous endeavor, one in which the lower courts may not care to fully partake.[150]

Regardless, the Supreme Court did emphasize the importance of looking to the eighteenth century for guidance. Of the three Blackstone offenses, piracy is most closely analogous to the modern human rights claims under the ATS.[151]

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147. *See* Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1301 (S.D. Fla. 2003) (noting that in most ATS cases against corporations, the corporation is sued for complicity in what are "clearly actions taken by state entities").

148. *See* Leading Case, *Alien Tort Statute*, 118 HARV. L. REV. 446, 454 (2004) (noting that both of the *Sosa* Court's historical standards are vague, and that the Court offers few practical clues to guide a lower court's inquiry).

149. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004) (citing to United States v. Smith, 18 U.S. (5 Wheat.) 153, 163–80 (1820)).

150. *See* Leading Case, *supra* note 148, at 454–55 (remarking that it is hard to imagine how to compare the specificity of one rule to another rule from a completely different substantive area, as it existed two centuries ago; noting that lower courts are unlikely to perform such a rule-to-rule comparison in the abstract).

151. *See* Kontorovich, *supra* note 43, at 132 (finding that, of the Blackstone offenses,

As Justice Breyer pointed out in his concurrence in *Sosa*, international comity concerns[152] do not arise when the conduct in question occurs in the forum state, such as when an American assaults a foreign diplomat who in turn sues in a United States court.[153] On the contrary, like piracy, alleged human rights violations by MNCs usually arise outside of the most traditional basis of jurisdiction: territoriality.[154] Most alleged human rights offenses by MNCs occur on foreign soil with little connection to the United States other than that the MNC is perhaps incorporated or headquartered in the United States. According to Blackstone, violations involving ambassadors or safe conducts were punished only by the state "where the offense occurred, whereas every community hath a right . . . to inflict . . . punishment upon pirates," thus granting universal jurisdiction to combat piracy.[155] The *Sosa* Court specifically cited to piracy and not the other offenses to illustrate the specificity of the Blackstone offenses.[156] Justice Breyer's concurrence supported the majority's apparent focus on piracy when he read the Court to require an actionable international norm to be as definite in its content as the eighteenth century norm of piracy.[157] Furthermore, after the Court stated its historical test, it approvingly cited to *Filartiga*'s characterization of the pirate as "*hostis humani generis*, an enemy of all mankind."[158]

As to the specificity of the eighteenth century international norm against piracy, the Supreme Court in 1820 found that: "There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions . . . all

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piracy is the closest analogue to modern human rights offenses).

152. The doctrine of international comity encourages forbearance when a sovereign state that has a legitimate jurisdictional claim recognizes that another sovereign state also has a legitimate jurisdictional claim under international law. *See* DAMROSCH, *supra* note 102, at 1104 (noting that comity is more an aspiration than a fixed rule, and more a matter of grace than obligation).

153. *Sosa*, 124 S. Ct. at 2782 (Breyer, J., concurring).

154. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. b (1987) (stating that territoriality is considered the normal basis of jurisdiction, whereas nationality is more of an exception, but that both are subject to the limits of § 403).

155. Kontorovich, *supra* note 43, at 135 & n.103 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 71).

156. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004) (discussing the standards for finding a cause of action that falls within § 1350).

157. *Id.* at 2782 (Breyer, J., concurring).

158. *See id.* at 2765–66 (finding that the Court's historical limit upon actionable norms is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court") (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

writers concur . . . that robbery, or forcible depredations upon the sea, *amino furandi*, is piracy."[159] It is important to note here that the Court acknowledged some "diversity of definitions."[160] The Court found the requisite specificity by looking to a core definition, even if some writers differed to varying degrees on the scope of piracy. The Court also found that writers on the common law, the civil law, and the maritime (admiralty) law all universally treated piracy "as an offence [sic] against the law of nations", and that its definition under such law is "robbery upon the sea."[161] Blackstone likewise defined piracy as robbery on the high seas without state permission.[162] There do not appear to have been any states who dissented from this core definition.[163] The universal acceptance of the eighteenth century piracy offense must be tempered with the reality that the scope of "all nations"[164] in the eighteenth century is dramatically different from what would be required for modern day universal acceptance. When, for example, the Supreme Court declared that piracy was universally accepted by all nations, the Court only cited to sources from the European or Western traditions[165]—not a surprising reliance considering the year was 1820. Today, universal acceptance requires a much greater swath of the international community. This further exemplifies the difficulties that arise when comparing international norms from vastly different historical periods.

B. Jus Cogens *as an Organizing Principle for ATS Norms*

Given the *Sosa* Court's demand for a high degree of acceptance and specificity, the *jus cogens* offenses within customary international law should

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159. United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820). *Amino furandi* essentially refers to the element of piracy requiring that it be committed without the sanction of any state. Harmony v. United States, 43 U.S. (2 How.) 210, 232 (1844). *United States v. Smith* is the case the *Sosa* Court cited to illustrate the specificity of eighteenth century piracy within the law of nations. *Sosa*, 124 S. Ct. at 2765.

160. *Smith*, 18 U.S. at 161.

161. *Id.* at 161–62; *see* Kontorovich, *supra* note 43, at 139 ("The universal condemnation of piracy was not just embodied in the law of nations norm against it—piracy was also a serious crime under the municipal laws of every nation.").

162. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES 71–72 (declaring piracy to be "robbery and depredation upon the high seas, which, if committed upon land, would have amounted to a felony there").

163. *See* Kontorovich, *supra* note 43, at 140 (noting that "all nations concurred as to the definition" of piracy).

164. *See id.* (same).

165. *See Smith*, 18 U.S. (5 Wheat.) at 163 n.8 (citing to various English, Roman, French, and Spanish sources on piracy).

determine the minimum threshold for actionable norms under the ATS. While the Court did not specifically address the concept of *jus cogens* offenses, it referred to the limits of *Restatement (Third) of the Foreign Relations Law of the United States* Section 702 as "only the beginning of the enquiry."[166] *Restatement* Section 702 lists six peremptory (*jus cogens*) norms of the customary international law of human rights: genocide, slavery (or slave trade), murder or causing the disappearance of individuals, torture, prolonged arbitrary detention, and systematic racial discrimination.[167] The Court found that even if "some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses."[168] Here, the Court implied that even some *jus cogens* offenses may not be sufficient to meet the historical test. Additionally, the Court has announced a standard that is based not upon the level of egregiousness of the conduct, but rather upon how certain and well accepted the underlying offenses are. This is a critical distinction to be made in the context of alleged human rights offenses. Human rights activists, for many well-intentioned reasons, want to expand the number of actionable norms, but their arguments tend to be normative in substance and infused with moralistic language.[169] Even the Second Circuit, which opened the doors to human rights suits under the ATS, has refused to look to any morally based standard. The Second Circuit rejected a plaintiff's proposal that a "shockingly egregious" standard be used to determine torts that violate customary international law.[170] The adoption of a "shockingly egregious" standard would replace the consent of nations as the source of customary international law with the subjective standards of individual courts and judges.[171]

Despite the Court's admonition to conduct a stringent transhistorical analysis, the lower courts may choose not to engage in such a rule-to-rule

166. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2769 (2004).

167. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (noting that "[n]ot all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) . . . are").

168. *Sosa*, 124 S. Ct. at 2769.

169. *See* Bradley, *supra* note 2, at 468 (finding that academic experts are typically expressing their own normative beliefs regarding the content of international law).

170. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 159 (2d Cir. 2003) (finding the plaintiffs' standard entirely inconsistent with the court's understanding of customary international law).

171. *See id.* at 159–60 (finding that the "egregiousness standard would divert[] attention from universally accepted standards to concepts . . . that are easily subject to differing interpretations by the courts of different nations") (internal quotations omitted).

comparison. As mentioned above in Part III, the *Sosa* Court did not provide any practical guidance on how to conduct such a comparison, nor did it conduct such an analysis itself. The vagaries of the Court's test may well lead to unpredictable and conflicting results in the lower courts, an outcome predicted by Justice Scalia in his concurrence. Scalia wrote, "[T]he Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again."[172] Predicting the outcome of this invitation, Scalia warned that the lower federal courts will be the primary source of recognizing actionable ATS norms, as the Court reviews few of their decisions, of which "no one thinks that all of them are eminently reasonable."[173] The majority asserted that the "door [to recognizing new actionable norms] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[174] The uncertainty of the Court's guidance, however, may undermine this "vigilant doorkeeping." Considering that the facts surrounding the *Sosa* case were fairly modest in comparison to more serious human rights offenses, the *Sosa* decision is not very helpful in deciphering which international norms are actionable. Moreover, the Court does not identify a single norm that would qualify, yet the Court does refer to a "narrow class of international norms" that are actionable.[175] The Court essentially punted the issue to the lower courts. To fill the gap left by the *Sosa* decision, the lower courts should only permit claims based upon *jus cogens* norms. The *jus cogens* principle provides the lower federal courts with the most logical organizing principle to meet the *Sosa* standard. The stringent requirements for *jus cogens* status naturally limit this select set of norms to the most universally recognized principles in international law.

No official international agreement codifies a list of *jus cogens* norms, but there is a general consensus which includes genocide, crimes against humanity, war crimes, piracy, torture, slavery, prolonged arbitrary detention, and extrajudicial murder.[176] Perhaps the most frustrating part of the *Sosa* opinion is

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172. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2776 (2004) (Scalia, J., concurring). Justice Scalia argued that the majority essentially endorsed the Ninth Circuit's standard that any norm be universal, specific, and obligatory, even though that standard led to a result the majority reversed. *Id.* at 2774–75.

173. *See id.* at 2776 (Scalia, J., concurring) (finding the recognition of new ATS norms an "illegitimate lawmaking endeavor").

174. *Id.* at 2764.

175. *Id.*

176. *See* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (stating that genocide, slavery (or slave trade), murder or causing the disappearance of

its lack of clarity on how to evaluate these universal, obligatory, and specific violations under the ATS. Definitiveness, not egregiousness, must be the guiding standard.[177] But how are lower courts to distinguish one from the other? In *Apartheid Litigation*, the Southern District for New York lamented the Supreme Court's lack of clarity, declaring that "it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule."[178] Lower courts are unlikely to undertake the transhistorical analysis, and inconsistent outcomes will result from those courts that do attempt such an inquiry. More likely, the lower courts will draw a line near the *jus cogens* offenses, especially those that have been, for the most part, universally accepted as actionable norms under the lower courts' ATS jurisprudence. A *jus cogens* norm may not necessarily meet the specificity standard established by the *Sosa* decision.[179] However, given the Court's heavy emphasis on caution and broad international acceptance, lower courts will feel more comfortable allowing suits to move forward on those offenses deemed so serious that the community of states allows no derogation.

The offenses of genocide, war crimes, crimes against humanity, slavery, extrajudicial killing, and torture have been universally upheld as actionable by

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individuals, torture, prolonged arbitrary detention, and systematic racial discrimination are peremptory (*jus cogens*) norms); DE THAN & SHORTS, *supra* note 146, at 10 (listing genocide, crimes against humanity, war crimes, piracy, slavery, torture, and aggression as generally agreed upon *jus cogens* crimes); *see also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d. 289, 339 (S.D.N.Y. 2003) (noting that allegations of genocide, war crimes, torture, and enslavement are universally condemned *jus cogens* violations of international law); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 498 (1992) (discussing crimes against humanity as a *jus cogens* norm).

177. *See Sosa*, 124 S. Ct. at 2769 (finding that the enemy of the human race rationale is not sufficient in the context of prolonged arbitrary detention).

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

179. Even those offenses which are traditionally considered universally accepted and binding, such as war crimes, crimes against humanity, and torture, have uncertain definitions to varying degrees. Currently, no international convention exists that outlines the scope of crimes against humanity; the absence of such a convention has left states to define the scope of the crime. *See* DE THAN & SHORTS, *supra* note 146, at 89 (noting that the lack of a treaty has left states "to their own devices when considering under what circumstances perpetrators of this crime should be prosecuted"). The Rome Conference, which established the International Criminal Court, ran into this problem when attempting to construct a definition for crimes against humanity since no written formulation of the crime existed in any treaty. *Id.* at 114. As to war crimes, "[n]o authoritative and legally binding list of war crimes exists in customary law . . . [A]n enumeration can only be found in the Statute of the [International Criminal Court], under Article 8, which is not, however, intended to codify customary law." CASSESE, *supra* note 138, at 54. Torture, despite its *jus cogens* status, does not have a universal definition. *See* DE THAN & SHORTS, *supra* note 146, at 189 (noting that there is no universal definition for torture and that many treaties do not provide a definition of torture but merely state that torture is prohibited).

the lower federal courts that recognize the modern norms.[180] In the absence of further direction from Congress or the Supreme Court, the lower courts should continue to uphold this narrow class of offenses, all with *jus cogens* status. This Note does not attempt to define and specify every norm that may or not qualify as *jus cogens*. Given the fluctuating nature of international law, the list may change over time, a result dictated by the *Sosa* opinion which called for gauging claims against the current state of international law.[181] Moreover, because the class of *jus cogens* norms is not definitively established, courts can reasonably differ over borderline *jus cogens* offenses. This may appear to inject confusion similar to that of the *Sosa* decision, but a standard limited to *jus cogens* drastically reduces the uncertainty of the *Sosa* test. Any reasonable test will involve debates on the fringes, but the *jus cogens* test narrows the debate to the most universal norms.

C. *Misapplying* Sosa*: Lessons from* In re South African Apartheid Litigation

As mentioned above in Part III, the Southern District of New York, in *In re South African Apartheid Litigation*,[182] did not engage in any historical comparison between the eighteenth century offenses and the alleged violations, which included genocide, torture, extrajudicial killings, and war crimes.[183] The district court even acknowledged that "the *Sosa* decision did not deliver the

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180. *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (affirming a judgment against defendants for torture under the ATS); Kadic v. Karadzic, 70 F.3d 232, 241–45 (2d Cir. 1995) (finding genocide, war crimes, torture, and summary execution to be actionable ATS offenses); *In re* Estate of Marcos, 25 F.3d 1467, 1473 (9th Cir. 1994) (upholding torture as actionable under ATS); Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980) (upholding official torture under the ATS); Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1299–1300 (S.D. Fla. 2003) (recognizing crimes against humanity as actionable under ATS); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1261–62 (N.D. Ala. 2003) (finding extrajudicial killings and war crimes actionable under ATS); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 349 (S.D.N.Y. 2003) (finding genocide, war crimes, enslavement, and extrajudicial killings fall within scope of ATS); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1344 (N.D. Ga. 2002) (upholding ATS suit under claims of torture, war crimes, and crimes against humanity).

181. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 (2004).

182. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004) (holding that none of plaintiffs' claims against numerous MNCs for international law violations connected with the apartheid government support jurisdiction under the ATS).

183. *See id.* at 546 (noting that the *Sosa* decision required ATS claims to be "well-accepted and clearly-defined offenses under international law such as piracy and offenses involving ambassadors," yet not conducting any study of the nature of the eighteenth century offenses).

definitive guidance in this area that some had come to expect."[184] In dismissing the plaintiffs' claims for international law violations by MNCs who did business in apartheid South Africa, the court erroneously interpreted the *Sosa* decision and the nature of international law. The court found that there can be no liability based upon violations of genocide norms, as embodied in the Convention on the Prevention and Punishment of the Crime of Genocide.[185] While acknowledging that treaties are valid sources of international norms, the court found that the Genocide Convention suffered from defects that preclude its use as evidence of applicable customary law.[186] The defects were that the treaty is criminal in nature and is not self-executing.[187]

The court misinterpreted *Sosa* by focusing on whether the treaty is criminal as opposed to civil in nature. In *Sosa*, Sosa argued that because Blackstone's offenses were described in terms of criminal liabilities that they were inapplicable to the ATS which required a "tort."[188] The *Sosa* Court rejected this argument, finding, for example, that the criminal sanctions for offenses against ambassadors were closely linked with comparable civil reparations.[189] Furthermore, the Court interpreted the ATS to "provide a cause of action for the modest number of international law violations with a *potential for personal liability* at the time."[190] The *Sosa* Court did not limit ATS norms to those expressly defined in civil liability terms, but rather to those with a potential for such. The *Apartheid Litigation* court misapplied international law by suggesting that because the Genocide Convention was not self-executing, the norm against genocide was inapplicable to the ATS. Genocide is clearly a *jus cogens* norm[191] and as such is a part of customary international law. Moreover, the substantive provisions of the Genocide Convention themselves have reached the status of *jus cogens* and customary international law.[192] Thus, the fact that the Genocide Convention is not self-executing is irrelevant. If the norms embodied in the treaty did not have customary international law or *jus*

184. *Id.* at 547.

185. *See id.* at 552 (finding that "no liability based upon any alleged violation of these norms [torture and genocide] can form an adequate predicate for jurisdiction under the ATCA").

186. *Id.*

187. *Id.*

188. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2760 (2004).

189. *See id.* at 2761 (noting that the criminal sanction for offenses against ambassadors was explicitly linked "with the requirement that the state, at the expense of the delinquent, give full satisfaction to the sovereign who has been offended") (internal quotations omitted).

190. *Id.* (emphasis added).

191. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) (including genocide in the *jus cogens* category).

192. *See* CASSESE, *supra* note 138, at 98 (discussing genocide).

cogens status, then the treaty's lack of self-execution would prevent it from providing actionable ATS norms.[193] That a treaty norm is not self-executing does not nullify its force under the ATS.[194] Justice Scalia strongly opposed this rationale in his concurrence to *Sosa*,[195] but the *Apartheid Litigation* court should not have placed great weight on Scalia's criticism. Although Scalia concurred in the judgment, he was strongly at odds with the majority's reasoning.[196] The *Apartheid Litigation* decision can better be viewed as decided on the foreign policy considerations that the *Sosa* court addressed. Indeed, the *Sosa* Court specifically mentioned the South African apartheid-related cases as a prime example of when the judicial branch should show great deference to the political branches.[197] Even if the *Apartheid Litigation* court had found an actionable norm under the ATS, it likely would have dismissed the case because of the foreign policy considerations involved. But the lessons from the *Apartheid Litigation* decision are that the criminal context of a norm does not prevent it from meeting the *Sosa* test and that a treaty cannot invalidate a *jus cogens* norm for ATS purposes.

D. Environmental, Political, and Economic Norms Inactionable Under Sosa

Even if *jus cogens* is not established as a bright line test for ATS norms, there are several actions particularly relevant to MNCs that will fail to meet the *Sosa* standard. The two main areas that *Sosa* would appear to foreclose, at least as international law currently exists, are environmental abuses and social,

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193. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 516 (1991) (stating that non-self-executing treaties "require implementing action by the political branches of government or . . . are otherwise unsuitable for judicial application").

194. *See* Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) (finding that even though the Genocide Convention Implementation Act did not provide a private right of action, it would be improper to construe this as repealing the ATS by implication). "[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest." Rodriguez v. United States, 480 U.S. 522, 524 (1987) (internal quotations omitted). "[M]utual exclusivity [is] necessary to impute to Congress the clear, affirmative intent to repeal." United States v. Cook, 922 F.2d 1026, 1034 (2d Cir. 1991) (internal quotations omitted).

195. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2775 (2004) (Scalia, J., concurring) (criticizing the *Kadic* court's reasoning that the decision not to create a new private cause of action cannot be construed as repealing by implication the cause of action supplied by the ATS).

196. *See id.* at 2772–73 (Scalia, J., concurring) (arguing that the majority has turned federal common law jurisprudence on its head).

197. *See id.* at 2766 n.21 (noting that the United States State Department and the South African government had both objected to the apartheid cases).

political, and economic rights violations. The pre-*Sosa* jurisprudence universally rejected environmentally based ATS claims.[198] Coupled with the Court's cautiously high standard, this rejection will likely stand. Environmental abuses may be actionable, however, under the theory that they were committed in furtherance of genocide, war crimes, or crimes against humanity. Additionally, it is possible that international environmental norms will ripen into universal, binding, and clearly defined obligations. Several ATS suits have been brought alleging a violation of a right to organize unions.[199] Plaintiffs in these cases have argued that the Universal Declaration and the I.C.C.P.R. provide a basis for such claims.[200] The *Sosa* Court directly addressed the status of these two international agreements. As to the Universal Declaration, the Court found it to be aspirational and not to impose any obligations as a matter of international law.[201] The I.C.C.P.R. does bind the United States as a matter of international law, but as a non-self-executing treaty, it does not create actions enforceable in the federal courts,[202] and thus the social, economic, and political rights enumerated in the treaty require independent sources validating them as customary international law. These rights have yet to reach that status.

VI. Standards of Liability

Assuming that MNCs can be liable under the ATS, as discussed above in Part V, either as purely private actors or as actors under the color of law, the basic principles of agency law and respondeat superior will guide the standard of liability. Because the corporation is a legal fiction, it only acts through its

198. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 172 (2d Cir. 2003) (finding that numerous international treaties do not provide any evidence that intranational environmental pollution violates customary international law); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999) (finding that cited treaties do not provide articulable standards to identify international environmental torts); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1160 (C.D. Cal. 2002) (finding that violations of plaintiffs' right to life, health, and security of the person via environmental harm do not involve specific, universal, and obligatory international norms).

199. *See, e.g.*, Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1296 (S.D. Fla. 2003) (alleging deprivation of "fundamental rights to associate and organize"); Estate of Rodriguez v. Drummond Co., 256 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003) (finding that fundamental rights to associate and organize may be actionable norms under the ATS).

200. *See Aldana*, 305 F. Supp. 2d at 1297 (citing to these sources); *Estate of Rodriguez*, 256 F. Supp. 2d at 1262 (same).

201. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2767 (2004) (finding the Universal Declaration to be more a statement of principles than a source of legal obligations).

202. *Id.*

agents who have either actual or apparent authority.[203] Under respondeat superior, when an employer (principal) employs an employee (agent) to perform services and controls or has the right to control how the agent performs the services, then the principal is liable for the torts of the agent assuming the agent is acting within the scope of his employment.[204] This is true even in cases of intentional torts.[205] Thus, an MNC will be liable for acts committed by its employee-agents that violate actionable ATS norms when the MNC acts under color of state law or when it violates norms that do not require state action (piracy, slavery, genocide, and war crimes). But under agency law, an employer generally is not liable for the torts of independent contractor agents, who are defined as those whom the employer generally cannot control as to the manner in which the work is to be done.[206] There are, however, exceptions to this general rule including that employers may be liable for negligently selecting a contractor, giving improper instructions or equipment, or in failing to stop any unnecessarily dangerous practices that come to their attention.[207] These exceptions are particularly relevant to MNCs doing business in third world countries. If, for example, an MNC hires a firm to provide security for a large scale project, and that firm has been regularly known to use torture and extrajudicial killings, then the MNC should be held liable for hiring such an agent.

One district court wrote: "[I]t would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power."[208] In addition to corporations being liable for the tortious acts of their agents under the ATS, a more controversial question arises: What sort of third party liability can an MNC have under the ATS? Can an MNC that is found not to be acting under color of law or involved in private party offenses be liable for acts committed by a state actor or another private actor under some type of joint liability or

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203. *See* RESTATEMENT (SECOND) OF AGENCY § 7 (1958) (defining authority as "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him"); *id.* at § 8 (defining apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons").

204. *Id.* at § 219(1).

205. *See* PROSSER, WADE AND SCHWARTZ'S TORTS 663 n.4 (Victor E. Schwartz et al. eds., 2000) (noting that "an employer may be held liable for the intentional torts of his employee when they are reasonably connected with the employment and so within its scope").

206. *Id.* at 666 n.1.

207. *Id.* at 668 n.2.

208. Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997).

aiding and abetting theory? The pre-*Sosa* case law regarding the applicability of third party liability standards for MNCs under the ATS is rather limited.

A. Determining Who Is a State Actor: 42 U.S.C. § 1983

Before looking at third party liability standards, it is important to understand how the courts determine who is a state actor and how this relates to liability. In *Kadic*, the Second Circuit used the 42 U.S.C. § 1983 "under color of law" jurisprudence to determine if a defendant engaged in state action for purposes of ATS jurisdiction.[209] The Supreme Court has established four different tests for the state action requirement: (1) the public function test;[210] (2) the symbiotic relationship test;[211] (3) the nexus test;[212] and (4) the joint action test.[213] The joint action and nexus tests are similar in scope, with perhaps the main difference being that a nexus implies a continuing relationship, whereas joint action can relate to a single event.[214] In the *Kadic*

209. *See* Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (finding that the "color of law jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATS]"). The "under color of law" jurisprudence originates from suits attempting to hold private actors liable for civil rights violations, which are normally only enforceable against state actors. *See* JOSEPH, *supra* note 25, at 33 (discussing the requirements of state action).

210. The public function test applies when a private actor performs a function that is "traditionally the exclusive prerogative of the State." Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974). This test is quite narrow and rarely satisfied, as the function must be one normally reserved exclusively to the state. HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 75 (2d ed. 2004). The test generally has been limited to such activities as conducting an election, running a town, providing fire protection, or operating a municipal park. *Id.* at 75–76.

211. A symbiotic relationship exists when the state "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

212. The nexus test "requires evidence that the state has coerced or significantly encouraged the private party to engage in [the relevant] conduct." LEWIS & NORMAN, *supra* note 210, at 78. State funding, approval or acquiescence, or regulation, without more, will not satisfy the test. Gregory G.A. Tzeutschler, Note, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 390 (1999).

213. The *Kadic* court appeared to apply the joint action test, defining it to be whether "[a private individual] acts together with state officials or with significant state aid." Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995). The test has also been described as whether "there is a 'substantial degree of cooperative action' between the state and private officials." Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1453 (10th Cir. 1995) (internal quotations omitted).

214. *See* JOSEPH, *supra* note 25, at 34 (stating that the "nexus test arises where there is such

case, the Second Circuit applied a variant of the joint action test, probably the test most widely used in ATS cases, stating that "[a] private individual acts under color of law within the meaning of [S]ection 1983 when he acts together with state officials or with significant state aid."[215] Other elements of the joint action test attach state action when there is a substantial degree of cooperation[216] or a conspiracy[217] between state and private actors. The public function test will rarely be successful against MNCs given its narrow scope.[218] Perhaps if an MNC controlled an area that had all the attributes of a local town, this test would be applicable in an ATS case. An important aspect of § 1983 jurisprudence for ATS purposes is that defendants who abuse the power or position they receive from the state are still acting under color of law.[219]

The application of the "color of law" standard of § 1983 has its critics. Part of this stems from the reality that the Supreme Court's jurisprudence on § 1983 has "not been a model of consistency."[220] Further, some critics argue that the proper role for § 1983 in the ATS analysis is to determine who is a state actor, but not to determine the liability standard for a private actor.[221] Under this view, the § 1983 analysis improperly narrows the ATS's scope and allows private actors who violate customary international law to escape liability

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a connection between the private actor and the State that it is fair to treat the action of one as that of the other" and that "[j]oint action liability arises when private actors and governments are willful participants in a partnership, so that both are liable for abuses perpetrated by one party in performance of partnership tasks").

215. *See Kadic*, 70 F.3d at 245 (ruling that "plaintiffs are entitled to prove their allegations that [defendant] Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid").

216. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 328 (S.D.N.Y. 2003) (finding that a substantial degree of cooperation existed when Talisman allegedly paid Sudan for protection knowing that it would lead to unlawful attacks on civilians, permitted the Sudanese military to use its facilities to launch some of the unlawful attacks, and helped plan a strategy that involved "ethnic cleansing").

217. *See* Aldana v. Del Monte Fresh Produce Co., 305 F. Supp. 2d 1285, 1304 (S.D. Fla. 2003) (stating that a conspiracy or a willful participation between a private and state actor normally will satisfy the joint action test).

218. *See* Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 380 (E.D. La. 1997) (finding that defendant corporation's control over large area of land (26,400 square kilometers) that was policed by corporate security with draconian measures did not establish state action under public function test).

219. West v. Atkins, 487 U.S. 42, 49–50 (1988).

220. Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) (internal quotations omitted).

221. *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183, 199 (2002) (arguing that the ATS should impose liability on a private party who aided and abetted a state actor, and that § 1983 should be used merely to determine who is the state actor).

solely because they cannot be deemed de facto state actors.[222] One of the concerns with using § 1983 jurisprudence in ATS cases is that the § 1983 "under color of law" tests mainly apply to actions by private entities and not the state.[223] But the ATS cases against MNCs usually allege actions by state entities for which plaintiffs seek to hold MNCs liable.[224] "Applying § 1983 in these cases, therefore, requires an inversion of the usual relationships found in color of state law cases."[225] This inversion, however, does not negate the § 1983 tests. The Supreme Court has held private parties liable for the actions of state actors.[226] Despite this apparent flexibility of § 1983, the *Kadic* court incorporated § 1983 jurisprudence as a "relevant *guide* to whether a defendant has engaged in official action."[227] Limiting MNC liability under the ATS to situations where plaintiffs satisfy one of the § 1983 tests is overly restrictive. Unless a plaintiff alleges slavery, piracy, genocide, or war crimes, customary international law requires the presence of state action.[228] But the proper role of § 1983 should be to determine who the state actor is and not to decide all questions of liability.[229] If an MNC violates an actionable norm and also can be deemed a state actor under § 1983, then § 1983 will decide the liability question. When a state actor who is not an MNC commits the relevant offense, the question should not only be whether the MNC has acted under color of law, but also whether the conduct of the state actor can be imputed to the MNC for tort liability purposes. This question can be answered by well-established tort and agency law principles; after all, it is the Alien *Tort* Statute.

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222. *See id.* at 200 (asserting that if the aiding and abetting standard is not employed in the ATS analysis, then companies will be free to do business with "rogue governments" and provide support for activities violating human rights while avoiding liability).

223. *See* Courtney Shaw, Note, *Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1378 (2002) (finding that the § 1983 doctrines appear "to deal with action by the private entity, and not the state").

224. *See id.* (noting that the law seems to contemplate actions committed by private actors who bear some imprimatur of state action, whereas ATS suits against MNCs involve actions committed by a state actor who bears some imprimatur of the private actor).

225. *Id.*

226. *See* Dennis v. Sparks, 449 U.S. 24, 28–29 (1980) (holding that private parties who conspired with a judge who illegally issued injunctions were acting under color of state law and are thus liable for damages).

227. Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995) (emphasis added).

228. *See supra* Part IV.B (discussing the jurisprudence that some customary international law violations do not require state action under the ATS).

229. *See* Collingsworth, *supra* note 221, at 199 (arguing that the role of § 1983 is to identify who is a state actor, not to resolve the issue of liability).

The *Sosa* decision did not address any of these issues because Sosa, as a DEA operative, was a state actor and committed the alleged ATS violation.[230] The *Sosa* Court decided how causes of action under the ATS were to be recognized, not the issues of state action or standards of tort liability. Concerns of the federal judiciary overstepping its authority by creating new causes of action should not arise if the lower courts look past § 1983 to federal tort law. By applying federal tort law, the lower courts will be fulfilling their duty to resolve ancillary issues of congressional legislation.[231] Looking to federal tort law has the potential to expand liability under the ATS, and thus could implicate the Court's concerns regarding foreign affairs.[232] But the *Sosa* Court clearly recognized that there were some violations that are actionable under the ATS,[233] and therefore it is reasonable to address that limited class of international norms with the appropriate liability standards. Finding the appropriate liability standard will be particularly important if cases arise where no state actor exists and the relevant violation does not require a state actor (genocide, war crimes, piracy, and slavery). Agency law alone may not be sufficient in such scenarios and "under color of law" jurisprudence will be irrelevant since state action is not required. Imagine a scenario in which two freight corporations entered into a joint venture, and one corporation allowed its shipping instrumentalities to transport sex slaves with the other corporation's knowledge or assistance. Should the second corporation be free from liability, assuming the transport of slaves is actionable under the norm against slavery?

B. Aiding and Abetting as an International Standard of Liability

Several recent ATS cases have addressed what liability standards should connect a private corporation to state actors' international law violations. None of these was more closely watched than the Ninth Circuit case of *Doe I v.*

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230. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004) (noting that Sosa, who was hired by the DEA to seize Alvarez, held Alvarez overnight in a hotel).

231. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979) (noting that when Congress has not spoken to an issue substantially related to established government programs, the federal courts are authorized to fill the interstices of federal legislation by their own standards).

232. *See Sosa*, 124 S. Ct. at 2763 (discussing foreign policy implications of § 1350 (citing Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that § 1350 should not be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens"))).

233. *See id.* at 2764 (noting that "the door is still ajar subject to vigilant doorkeeping, and thus open to a *narrow class* of international norms today") (emphasis added).

Unocal Corp.[234] Of the several dozens of ATS cases filed against corporations, none has gone to trial on the merits, but the *Unocal* case moved further along in the federal courts than any other.[235] Like *Filartiga*, the *Unocal* case was a watershed event for ATS suits, as it "opened the floodgates" to human rights claims against MNCs, primarily because the case enunciated the principle that federal courts can exercise subject matter jurisdiction over human rights abuses involving MNCs that enter into joint ventures with foreign governments.[236] Even though the case has recently been settled while awaiting an en banc rehearing,[237] the Ninth Circuit's advocacy in *Unocal* for the aiding and abetting standard provides a detailed discussion of the scope of the appropriate standard of liability.[238]

The plaintiffs in *Doe I v. Unocal Corp.*[239] were villagers in the Tenasserim region of Myanmar (formerly Burma) who alleged that Unocal Corporation directly or indirectly subjected them to forced labor, murder, rape, and torture when the company constructed a local natural gas pipeline.[240] In 1988, the Myanmar military took over the country and established Myanmar Oil, a state-owned oil and gas company.[241] Myanmar Oil later licensed a gas pipeline construction project to Total S.A., a French oil company, of which Unocal acquired a twenty-eight percent interest.[242] Unocal allegedly knew that the Myanmar military provided security and other services for the pipeline project.[243] Sufficient evidence also existed to raise a genuine issue of material

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234. *See* Doe I v. Unocal Corp., 395 F.3d 932, 947 (9th Cir. 2002) (holding that Unocal may be held liable for aiding and abetting under the ATS for subjecting plaintiffs to forced labor), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003). For a full discussion of *Unocal*, see below in this subpart. *See also* Lisa Girion, *Unocal to Settle Rights Claims*, L.A. TIMES, Dec. 14, 2004, at A1 (noting that the Unocal litigation "was seen as a key test for human rights activists who want to hold multinationals responsible . . . for atrocities committed in other countries").

235. Girion, *supra* note 234, at A1. There has not yet been a judgment against a corporation in an ATS suit. Daphne Eviatar, *Judgment Day: Will an Obscure Law Bring Down the Global Economy?*, BOSTON GLOBE, Dec. 28, 2003, at D1.

236. Duruigbo, *supra* note 7, at 7.

237. Susan Beck, *Multinational Exposure: An Obscure 1789 Law Continues to Offer Plaintiffs Counsel International Litigation Leverage*, AM. LAW., Feb. 2005, at 26, 26.

238. *See* Rivera, *supra* note 13, at 274 (stating that the Ninth Circuit's decision "probably has the best discussion of third-party liability in a corporate ATCA case thus far").

239. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) is a consolidated appeal of several actions filed by Myanmar villages against Unocal Corporation. *Id.* at 944.

240. *Id.* at 936.

241. *Id.* at 936–37.

242. *See id.* at 937 (noting that Myanmar licensed the pipeline and gas extraction project to a French company from which Unocal acquired its interest in the project).

243. *Id.* at 937–38.

fact as to whether the pipeline project actually hired the Myanmar military to provide and even direct to some degree these services and whether Unocal knew about this.[244] The villagers alleged that the Myanmar military forced them, under threat of violence, to work on the pipeline project, and that in furtherance of this forced labor program, the military subjected them to murder, rape, and torture.[245] The villagers based their claims against Unocal on the ATS for violations of the law of nations.[246]

The *Unocal* court found that forced labor is a modern variant of slavery, which places it within the handful of crimes that do not require state action.[247] By classifying forced labor as such, the Ninth Circuit reasoned from *Kadic* that the villagers' claims of murder, torture, and rape, which occurred in furtherance of forced labor, likewise do not require a claim of state action.[248] Even though the court dispensed with the state action requirement, it still needed to evaluate whether Unocal should be held liable for the Myanmar military's actions, and if so, under what standard.[249] The court found that because forced labor is a *jus cogens* violation, an international standard of liability is preferable to a domestic one.[250] The court reasoned that an international standard was appropriate because "the law of any particular state is either identical to the *jus cogens* norms of international law, or it is invalid."[251] Whatever the merits of this assertion, it does not necessarily follow that the aiding and abetting of forced labor is the appropriate standard of liability. That a particular norm is *jus cogens* does not also define the scope of liability under that norm. The court continued, arguing that "reading § 1350 as essentially a jurisdictional grant only and then looking to [foreign or] domestic tort law to provide the cause of action mutes the grave international law aspect of the tort."[252] The Ninth Circuit, having already held that the ATS creates a cause of action in addition to its jurisdictional grant,[253] implied that because the substantive

244. *Id.* at 938–39.

245. *Id.* at 939.

246. *Id.* at 943.

247. *Id.* at 946.

248. *Id.* at 953–54.

249. *See* Collingsworth, *supra* note 221, at 200 (noting that "[m]anagers and other decision-makers for MNC defendants will almost never pull the trigger or wield the machete themselves").

250. *See* Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (noting that where only *jus cogens* violations are alleged, it may be preferable to apply international law rather than the law of any particular state), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

251. *Id.*

252. *Id.* (citing Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995)).

253. *Id.* at 948–49.

violation originates from the law of nations, the standard of liability should as well.[254] This argument, however, has been dealt a significant blow by *Sosa*, which held that the ATS is solely jurisdictional and that the federal common law supplies the cause of action, based upon the law of nations, in limited cases.[255] Federal common law should also supply the standard of liability. Whether this standard derives as well from the law of nations remains to be seen.

Favoring an international standard, the Ninth Circuit held that the international criminal standard of aiding and abetting applied to determine Unocal's liability under the ATS.[256] To determine the scope of aiding and abetting for ATS purposes, the court looked to the recent decisions by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[257] Realizing that it might be controversial to apply a criminal standard to a civil proceeding, the court reasoned that "what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law."[258] Moreover, the court found that the international criminal standard for aiding and abetting is similar to the domestic tort law standard, thus making the distinction less relevant in the ATS context.[259] The fear among MNCs is that the use of the aiding and abetting

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254. *Id.* at 949.

255. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (finding the ATS is a jurisdictional statute and that the common law will provide the cause of action for a limited number of international law violations).

256. *See* Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002) (holding that Unocal may be liable under the ATS for aiding and abetting the Myanmar military), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

257. *Id.* at 949–50.

258. *See id.* at 949 (noting that international human rights law has developed mostly in the criminal context).

259. *Id.* As to the actus reus of the offense, the court held that aiding and abetting applied to "practical assistance or encouragement which has a substantial effect on the perpetration of the crime." *Id.* at 951. Citing to the ICTY, the court did not find that assistance must constitute an indispensable element, but rather that the actions "make a significant difference to the commission of the criminal act by the principal." *Id.* (internal quotations omitted). Under the international standard, moral support is an option along with practical assistance and encouragement, and even though the court decided not to adopt this part of the standard, it did suggest moral support may be used to establish liability. *Id.* at 951 n.28. As to the mens rea, the court held that the defendant must have "actual or constructive (i.e., reasonable) knowledge that the accomplice's actions will assist the perpetrator in the commission of the crime." *Id.* at 956. Thus, the accomplice does not need to share the perpetrator's mens rea; the accomplice need not even know "the precise crime the principal intends to commit." *Id.* at 950.

standard facilitates more tenuous claims by lowering the liability standard,[260] and thereby creates more uncertainty as to when MNCs are engaged in a situation that could give rise to liability.

In his concurrence to *Unocal*, Judge Reinhardt disagreed with the majority's use of the aiding and abetting standard; he argued that no international standards should be used to determine third-party liability under the ATS.[261] In rejecting the use of an international standard, Reinhardt asserted that federal common law applies when courts must implement the policies underlying a federal statute, particularly when the statute has left legal issues unaddressed.[262] Additionally, Reinhardt found that assessing third-party liability "is a straightforward legal matter that federal courts routinely resolve using common law principles."[263] That some of the underlying acts occurred in another country should not change this.[264] Reinhardt distinguished applying international law to the substantive violation from applying such law to ancillary questions such as third-party liability, which are best left to the federal common law.[265] Reinhardt indicated that his aversion to using the international standard stems, in part, from the belief that the aiding and abetting principle is relatively undeveloped and has only been promulgated by recent "ad hoc international tribunal[s]" (ICTY and ICTR).[266] He reasoned that "certainty,

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260. *See* Collingsworth, *supra* note 221, at 200 (finding it crucial to adopt the aiding and abetting principle for ATS cases because otherwise "companies will be free to enter into business relationships with rogue governments and provide support to activities that violate human rights while avoiding liability"); JOSEPH, *supra* note 25, at 49 (stating that the aiding and abetting test imposes higher liability than the "active participation" test, which the district court applied).

261. *See* Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (disagreeing that the "recently-promulgated" aiding and abetting standard should be applied to assess Unocal's liability and finding that no international law test should be used to determine such liability), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

262. *See id.* at 965–66 (Reinhardt, J., concurring) (discussing the role of federal common law in implementing statutes (citing Illinois v. City of Milwaukee, 406 U.S. 91, 100–04 (1972))).

263. *Id.* at 966 (Reinhardt, J., concurring).

264. *See id.* (Reinhardt, J., concurring) (noting that transnational matters increasingly are being litigated in federal courts using federal legal standards); *see also id.* at 968 (Reinhardt, J., concurring) (asserting that the issue of establishing third-party liability is not at all unique to human rights litigation and thus finding no reason to look to international law when a substantial amount of federal common law already exists addressing third-party liability).

265. *See id.* at 966 (Reinhardt, J., concurring) (finding that there is no "reason to apply international law to the question of third party liability simply because international law applies to the substantive violation").

266. *See id.* at 967 (Reinhardt, J., concurring) (arguing that the benefits of the experience of the federal common law are lost when such a wide body of reasoning and authority is abandoned for "an undeveloped principle of international law").

predictability and uniformity of result are more likely to be achieved when there exists extensive precedent upon which to draw, and the state of the law does not depend on the future decisions of some as-yet unformed international tribunal established to deal with other unique regional conflicts."[267]

Although the *Sosa* decision did not address liability issues, the Supreme Court required a high standard for any international norm to be actionable under the ATS, and clearly not every customary international norm will qualify.[268] The majority's discussion in *Unocal*, however, did not establish that aiding and abetting has achieved even customary international law status.[269] The *Unocal* court found that the ICTY and ICTR were but one source of relevant international law, rather than a primary source.[270] The court did not address what the other sources were or whether those sources demonstrated that aiding and abetting has received the general consent of states and is followed out of a sense of legal obligation. Under the *Sosa* standard, courts should not apply a liability standard that has not been established as customary international law, and even then, courts may find the standard less widely accepted and well defined than *Sosa* demands. The *Sosa* standard is too cautious and narrow to permit uncertain norms of international law to guide the analysis in an ATS suit. The *Sosa* decision further demonstrated that even if an international norm has been accepted as a part of federal common law, it does not necessarily follow that such a norm is applicable to the ATS.[271] The en banc panel that reheard the *Unocal* case even suggested that the aiding and abetting standard has not reached federal common law status.[272]

The *Apartheid Litigation* court explicitly rejected the aiding and abetting standard, finding little evidence that it is universally accepted as a legal

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267. *See id.* at 967 (suggesting that in contrast to the aiding and abetting principle, the federal common law principles of joint liability, agency, and reckless disregard are well known).

268. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2761 (2004) (finding that the common law will "provide a cause of action for the modest number of international law violations").

269. *See* Doe I v. Unocal Corp., 395 F.3d 932, 951 n.28 (9th Cir. 2002) (noting that the court's opinion has not found the criminal tribunals' standard to be the controlling international law and further stating that the tribunals are "helpful for ascertaining the current standard for aiding and abetting"), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

270. *Id.*

271. *See Sosa*, 124 S. Ct. at 2765 n.19 (finding that the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining *some* common law claims derived from the law of nations") (emphasis added).

272. *See* Jill Meyers, *Ninth Circuit Grants En Banc Rehearing in* Doe v. Unocal, 31 ECOLOGY L.Q. 757, 764 (2004) (noting that "[a]t least half of the panelists at the en banc hearing expressed discomfort in applying the international aiding and abetting standard until federal common law status is achieved").

obligation.[273] The court disagreed that the ICTY, ICTR, or Nuremberg tribunals established a clearly defined norm for ATS purposes under the *Sosa* standard.[274] The *Apartheid Litigation* court declined to follow a recent case in the Southern District of New York which did find the aiding and abetting standard to be actionable in ATS cases.[275] The earlier case, however, was decided prior to the *Sosa* decision, and like *Unocal*, was based upon the ATS providing a cause of action under international law.[276] The *Sosa* Court not only rejected that the ATS provides a cause of action, but also limited the actionable norms to a narrow class.[277] Thus, it is not obvious, as the Southern District argued,[278] that international law will guide the courts in the liability analysis. The federal common law instead should provide the appropriate guidance.[279] As discussed above in this Part, using federal common law does not foreclose the application of international standards, but international standards must first reach the *Sosa* Court's universal acceptance and specificity standards before application under the ATS is appropriate.

Furthermore, the Supreme Court has directly addressed the importation of the criminal standard of aiding and abetting into civil liability cases. In a suit involving claims under the Securities Exchange Act of 1934, the Court found that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors."[280] Moreover, even though aiding and abetting exists in

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273. *See In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2004) (finding that plaintiffs failed to establish aiding and abetting international law violations to be a universally accepted legal obligation).

274. *Id.* at 549–50.

275. *See id.* at 550 (declining to follow the decision in Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003), which upheld aiding and abetting under the ATS).

276. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) (rejecting Talisman's argument that aiding and abetting is not actionable, in part because the ATS provides a cause of action for breaches of international law).

277. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2764 (2004) (finding that the ATS is "open to a narrow class of international norms today").

278. *See Presbyterian Church*, 244 F. Supp. 2d, at 320 (finding that because courts look to international law to find an ATS cause of action, the same applies in determining whether aiding and abetting is recognized under the ATS).

279. *See* Sosa, 124 S. Ct. at 2754 (finding that the ATS was intended to enable "federal courts to hear claims in a very limited category defined by the law of nations *and recognized at common law*") (emphasis added).

280. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994).

criminal law, a civil standard does not necessarily follow.[281] Although the *Sosa* Court did not find the criminal/civil distinction dispositive for determining appropriate causes of action,[282] it is unlikely, given the Court's narrow standard, that it intended a complete blurring of civil and criminal legal standards. Congress has enacted legislation that applies the aiding and abetting standards to all federal crimes,[283] but no such statute has been enacted applicable to civil litigation.[284] Some have argued that importing criminal standards into the ATS poses few problems because the standard used in criminal cases is much stricter than the one applied in civil cases.[285] This argument appears to confuse the relevant standards being compared. Certainly the burden of proof in criminal cases (beyond a reasonable doubt) is much higher than in civil cases (preponderance of the evidence), but that is different from the applicable standards of liability. A broad standard of liability, such as aiding and abetting, may be more appropriate in criminal cases because the burden of proof is much higher. Importing a broad criminal standard into civil litigation, without congressional guidance, may unjustly expand the scope of liability, especially considering the lower burden of proof in civil cases. It is unwarranted to assume that any criminal standard is equally applicable in civil suits. The Supreme Court has recognized aspects of the concert of action tort principle as roughly equivalent to criminal aiding and abetting,[286] but the Court also found this doctrine to be uncertain in application at best.[287] Given that the *Sosa* decision emphasized deference to congressional guidance when generating federal common law, the lower courts should not apply either the aiding and abetting standard or its civil equivalent. Neither is well established

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281. *See id.* at 190 (noting also that the Court has been reluctant to infer a private right of action from a criminal prohibition alone).

282. *See Sosa*, 124 S. Ct. at 2760–61 (finding that even though Blackstone's offenses were described in criminal terms, this did not prevent appropriate civil sanctions).

283. *See* 18 U.S.C. § 2 (2000) (providing that whoever aids or abets the commission of a criminal offense is liable as a principal).

284. *Cent. Bank of Denver*, 511 U.S. at 182.

285. *See, e.g.*, Shaw, *supra* note 223, at 1385 (noting that if a party can be convicted under a criminal standard, "it would seem paradoxical not to hold that same party responsible for the same actions under the less rigorous civil standard").

286. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994). Under concert of action, "[a]n actor is liable for harm resulting to a third person from the tortious conduct of another if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (1977)) (internal quotations omitted).

287. *Id.* The Court also noted that some states do not even recognize liability as set forth under the *Restatement (Second) of Torts* Section 876(b). *See id.* at 182–83 (noting several states that do not recognize the aiding and abetting tort).

in federal common law, and to apply such standards would impose an expansive interpretation upon the ATS when *Sosa* demands a narrow one.

C. Standard Tort Principles

The *Sosa* decision did not infer any sort of deferential stance towards international law. Importing international standards, beyond the narrow class of violations suggested by *Sosa*, risks turning "the federal courts into international tribunals that happen to be located within the United States."[288] Such an expansion of the federal judiciary is questionable in the absence of congressional intent, especially considering the potential negative foreign policy consequences that such an expansion may entail.[289] Federal courts must look to international law when determining what norms are actionable under the ATS, as § 1350 permits jurisdiction over torts committed in violation of the law of nations.[290] No such gap, however, exists with standards of tort liability.[291] As Judge Reinhardt concluded in *Unocal*, there is little "reason to look to international criminal law doctrines for a civil liability standard when a substantial body of federal common law already exists regarding third-party liability."[292] Lower courts should therefore follow the model advocated by Judge Reinhardt when extending liability under the ATS and apply traditional federal common law tort principles. Such an approach eradicates any chance of violating *Sosa*'s high standard for incorporating international law into ATS jurisprudence. Moreover, there is no need to incorporate international liability standards into the ATS. Although the *Unocal* majority viewed applying ordinary tort law as muting "the grave *international law* aspect of the tort,"[293] the *Sosa* Court clarified that the gravity of the breach is not the dispositive factor in applying international law.[294] The international standards of liability,

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288. Shaw, *supra* note 223, at 1379.

289. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2763 (2004) (stating that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution").

290. *See* Shaw, *supra* note 223, at 1379 (noting that "the United States does not seem to have a pre-existing definition of what constitutes a justiciable international violation").

291. *See id.* (finding that there is no gap in United States law regarding doctrines of responsibility).

292. Doe I v. Unocal Corp., 395 F.3d 932, 968 (9th Cir. 2002) (Reinhardt, J., concurring), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003).

293. *Unocal*, 395 F.3d at 948 (quoting Xuncax v. Gramajo, 886 F. Supp. 162, 183 (D. Mass. 1995)).

294. *See Sosa*, 124 S. Ct., at 2769 (finding that those who by their actions "become

as previously discussed in this Part, have developed in the context of criminal tribunals. Section 1350, by its language, calls for tort liability. International law for *jus cogens* violations has developed in the criminal context on a relatively ad hoc basis, whereas common law tort principles have been developing steadily and regularly for over two hundred years in the United States. Moreover, no comparable system of tort law exists in international law.

As discussed above in this Part, agency law should be applied when analyzing corporate liability under the ATS, but its scope is limited to direct violations by an MNC. Common law tort principles such as joint venture liability and reckless disregard are appropriate in determining the third-party liability of MNCs who do not themselves (through their agents), commit actionable *jus cogens* violations.

A joint venture contains four elements as described by the *Restatement (Second) of Torts*:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.[295]

An MNC can be liable for the *jus cogens* violations of any of its coventurers if a plaintiff can prove all four of the above criteria. MNCs have been very concerned about liability under the ATS for simply doing business with those who commit violations or merely by investing in a country whose government is committing violations.[296] If MNCs could, in fact, be liable under the ATS for such tenuous connections to human rights perpetrators, such concerns would be justified, as this could have drastic consequences for the flow of international commerce. Under joint venture liability, however, MNCs will not incur liability solely based upon with whom and where they transact business. Joint venture liability is similar to partnership law which holds partners liable for the wrongful acts of other partners acting within the ordinary course of the partnership.[297] Just as a partner is an agent of the partnership,[298] a joint

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enemies of the human race" do not necessarily violate an actionable ATS norm).

295. RESTATEMENT (SECOND) OF TORTS § 491 cmt. c (1965).

296. Rivera, *supra* note 13, at 259.

297. *See* UNIF. P'SHIP ACT § 305(a) (1994) (stating that "[a] partnership is liable for loss or injury caused to a person . . . as a result of a wrongful act or omission, or other actionable conduct, or a partner acting in the ordinary course of business of the partnership"); *see also* RESTATEMENT (SECOND) OF TORTS § 491 cmts. b, d (1965) (noting that a partnership is a joint enterprise, but that joint enterprise is a broader term than partnership).

298. *See* UNIF. P'SHIP ACT § 301(1) (1994) (stating that "each partner is an agent of the

venturer is an agent of the joint venture.[299] Following the principles of agency law, a joint venturer will be liable only for those torts that are committed within the scope of the joint venture's common purpose.[300] This limiting principle combined with the fourth element of joint ventures, the equal right of control in the direction of the venture, insures that MNCs will not be liable for violations beyond their control or for those to which an MNC is only connected through a common transaction. *Jus cogens* human rights violations tend to occur in underdeveloped countries run by dictatorial governments. Under such conditions, MNCs may not often have an equal voice in the scope or direction of a particular project even though they are benefiting economically. But when MNCs do possess equal control over the venture, they should be held liable for *jus cogens* violations.

The tort principle of reckless disregard applies when an actor acts or, if there is a duty to act, intentionally fails to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known."[301] Agency law, as discussed above in this Part, ascribes strict liability to employers for their employee-agents' torts only when the employer controls the method of the agents' performance within the scope of the employment,[302] whereas independent contractors are ordinarily responsible for their own torts.[303] Reckless disregard will expand this scope of liability. This expansion could be common for MNCs in the context of who they hire and how those agents are monitored. An MNC can be liable for an employee's torts that are outside the scope of employment and for the torts of an independent contractor if the MNC recklessly hires a person or entity that it knows or should know is likely to commit *jus cogens* violations of international law.[304] Likewise, if an

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partnership for the purpose of its business").

299. *See* PROSSER, WADE AND SCHWARTZ'S TORTS, *supra* note 205, at 674 (declaring that "each member of a joint enterprise is held to be an agent of the other; each may therefore be held liable for the acts of the other").

300. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating that a master is liable for his agents' torts committed in the scope of the employment).

301. Farmer v. Brennan, 511 U.S. 825, 836–37 (1994); *see* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining reckless disregard of safety).

302. *See* RESTATEMENT (SECOND) OF AGENCY §§ 219–220 (1958) (stating that masters (employers) are liable for the torts of their servants (employees) when the master controls the physical conduct in the performance of the services).

303. *See* RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958) (distinguishing between servants (employees) and independent contractors).

304. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958) (stating that a master can be liable for the torts of employees outside of scope of employment if the master is reckless); *see also* RESTATEMENT (SECOND) OF TORTS § 500 (1965) (describing standard for reckless disregard).

MNC recklessly fails to monitor or oversee those agents that it knows or should know are committing *jus cogens* violations, the MNC can and should be held liable. MNCs cannot hide behind willful blindness.

These common law tort principles are not intended to be an exhaustive list of the possible liability standards applicable in ATS suits. Others such as action in concert[305] and directing the conduct of another[306] may be valid principles to hold MNCs liable in connection with *jus cogens* offenses. The conclusion, rather, is that well-established common law tort standards are more appropriate than less certain international or criminal doctrines of liability as those doctrines are applied in the area of civil liability. When determining which common law tort principles to apply, lower courts should be guided by the legitimate concerns of MNCs—that they not be held liable for merely investing or doing business in a particular country or for transacting with a particular entity. While human rights advocates may wish to go this far, this kind of liability will likely lead to the negative foreign policy consequences that the *Sosa* Court sought to avoid. Such liability could severely curtail the economic development of some countries where MNCs find it too risky to do business. Although this limits accountability, the *Sosa* decision, with its concern for collateral foreign policy issues, has implied that it is not the role of the federal judiciary to impose this level of accountability, but rather that of the political branches of the government.

VII. Conclusion

Human rights advocates want more accountability. MNCs want less liability or at least clearer guidance on when they can or cannot be liable under the ATS. Both sides claim victory in the wake of *Sosa*.[307] What has *Sosa* delivered? The *Sosa* decision, while addressing some core issues, has left many questions unanswered. The Court delineated a standard for choosing actionable norms, but it did not provide the lower courts with much practical guidance in applying this standard. In light of the Court's demand for universal acceptance and relative specificity, the modern international law concept of *jus cogens* provides the best organizing principle for actionable ATS norms. The

305. *See generally* RESTATEMENT (SECOND) OF TORTS § 876 (1979).

306. *See generally id.* § 877.

307. *See* Jonathan Birchall, *The Questions over Aiding and Abetting: Alien Tort Statute: An Oil Company's Fight with the Human Rights Lobby Tests an 18th Century Law*, FIN. TIMES, Aug. 2, 2004, at 9 (noting that Amnesty International feels that the Court in *Sosa* upheld the ATS's core principles while representatives of Unocal, the subject of a current ATS suit, believe *Sosa* soundly rejected how the lower courts have expanded the reading of the ATS).

norms against genocide, war crimes, crimes against humanity, piracy, slavery, torture, and extrajudicial killings all are universally prohibited and have core definitions to which the international community has agreed. By limiting the ATS to *jus cogens* norms, lower courts can ensure less encroachment upon Congress's right to permit and define private rights of action; *jus cogens* norms, because of their universal character, are less apt to engender controversy. Likewise, collateral effects upon foreign policy are less likely under a *jus cogens* cause of action. All international law contrary to *jus cogens* is, by definition, invalid.[308] Certainly, enforcing civil liability against those entities that choose to disregard binding international law may well engender international conflicts, but under *Sosa*, the lower courts have the authority and, indeed, a mandate to dismiss such cases that may run counter to the executive and legislative branches' foreign policy goals.

The *Sosa* opinion failed to address questions of who can be sued under the ATS, but the lower federal courts have regularly exercised subject matter jurisdiction over corporations. Unless the Court or Congress directs otherwise, the lower courts should continue to allow corporations to be sued for *jus cogens* violations. Although corporations, or any nonstate entity for that matter, do not have the same rights as states to make treaties and consent to the customary practice of international law, they still have certain rights and duties under international law.[309] To be free from brutality no matter the identity of the perpetrator is the essence of human rights law. International law has not progressed to the stage at which all violations are actionable against all individuals and entities. Within the realm of *jus cogens* norms, however, any individual or corporation should, under appropriate common law principles of agency or tort law, be held liable when the requisite state has also acted. Legally, neither domestic nor international law has granted corporations any general immunity from suit, as corporations have the same rights of individuals to sue and be sued.[310] Moreover, from a public policy standpoint, corporations have the power to bring dramatic changes to societies and cultures—both negative and positive. It would be a mistake to withhold liability from such a powerful section of society. Obviously, this power can generate foreign policy concerns that, as the *Sosa* Court found, deserve serious consideration on a case-

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308. *See* WALLACE, *supra* note 22, at 33 (noting that a treaty that conflicts with a *jus cogens* principle is void).

309. *See* Stephens, *supra* note 8, at 445 (discussing the role of individuals in international law enforcement).

310. *See* MODEL BUS. CORP. ACT ANN. § 3.02 (1997) (stating that "every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power . . . to sue and be sued").

by-case basis. The federal judiciary, however, has plenty of options with which to dismiss otherwise valid suits under the ATS, including forum non conveniens, the act of state doctrine, and the political question doctrine. These options provide the safety valve that *Sosa* suggested, so that the judiciary does not interfere with the foreign policy prerogatives of the political branches of government. Moreover, the ability to dismiss a case when appropriate gives the lower courts the freedom to develop an ATS jurisprudence related to corporations within the limited class of *jus cogens* violations. MNCs should therefore assess their liability risk around the *jus cogens* principle and their relation to a violation through standard agency and tort law principles. Predicting how and when lower courts will decide the relative weight of a particular foreign policy consideration is uncertain and risky at best. Ultimately, the best outcome would be for Congress to step in and clarify the scope of the ATS and definitively answer the following questions: What international law norms can be litigated and how are those norms to be defined? Who can be sued? How far does liability extend? But until Congress acts or the Supreme Court more definitively addresses the ATS, the lower courts will be left with the *Sosa* decision. If the lower federal courts follow the proposals in this Note, the ATS jurisprudence will develop more consistently, with increased fidelity to the principles laid out in *Sosa*.