DEVELOPMENTS

International Law in the American Courts – Khulumani v. Barclay National Bank Ltd.: The Decision Heard 'Round the Corporate World

By Kristen Hutchens[*]

A. Introduction

On June 30, 1980, the United States Court of Appeals for the Second Circuit issued *Filártiga v. Peña-Irala*.[1] In this landmark case, the Paraguayan plaintiffs sought to hold Americo Norbeto Peña-Irala, a high-ranking Paraguayan police officer, liable for torture that led to the death of Joel Filártiga in Paraguay.[2] They rested their main jurisdictional argument "upon the Alien Tort Statute, 28 U.S.C. § 1350, which provides: '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.'"[3] The Second Circuit held, "[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction."[4] It added that "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a *small but important step* in the fulfillment of the ageless dream to free all people from brutal violence."[5]

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[1] *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (involving an appeal from the United States District Court for the Eastern District of New York, where Judge Eugene Nickerson dismissed the action for want of subject matter jurisdiction).

[2] *See id.* at 878 (alleging that Joelito Filártiga was kidnapped and tortured to death by Peña-Irala, while the latter was an Inspector General of Police in Asunción, Paraguay).

[3] *Id.* at 880.

[4] *Id.* at 878.

[5] *See id.* at 890 (emphasis added).

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Seventeen years later, the Central California District Court "held for the first time that ATCA actions could lie against private corporations."[6] In the years since, foreign plaintiffs have used the Alien Tort Statute, also known as the Alien Tort Claims Act, to bring actions against various private corporations for directly committing illegal torts or for aiding and abetting the governments' abusive conduct.[7] For instance, human rights challenges have been against, inter alia, Rio Tinto,[8] Coca-Cola,[9] Talisman Energy,[10] Texaco,[11] Ford Motor Company,[12] and Barclays National Bank.[13]

Of these corporate Alien Tort cases, not one has resulted in a money judgment in favor of the plaintiffs.[14] Rather, some cases were settled,[15] while others were

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[6] *See* SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 22 (2004) (referencing Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997)).

[7] *See* Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 807, 810 (2005) (arguing that the standard to be used in ATS aiding and abetting and conspiracy cases is the Restatement (Second) of Torts, section 876, and noting that "Named defendants in these [aiding and abetting, ATS] lawsuits include the oil companies Chevron Texaco, Exxon Mobil, Occidental, Royal Dutch Shell, Talisman, and Unocal, and the mining companies Freeport-McMoran, Newmont, Rio Tinto, and the Southern Peru Copper Corporation.").

[8] *See* Sarei v. Rio Tinto *PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (alleging that private mining enterprise cooperated with the government of Papua New Guinea to displace villages, cause environmental damage, and commit other abuses and war crimes).

[9] *See* Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2001) (alleging that the defendants violated the law of nations by knowingly purchasing property illegally seized by the Egyptian government).

[10] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging that the defendant collaborated in torture, enslavement, war crimes, and genocide effectuated by the Sudanese government).

[11] *See* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (alleging that pollution caused by the defendants in Peru and Ecuador violated the law of nations).

[12] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (finding that the plaintiffs may plead a theory of aiding and abetting liability under the ATCA).

[13] *Id.* at 254.

[14] *See* Jonathan Drimmer, *Don't Be Dubbed a Human Rights Abuser: The Rise in Alien Tort Claims Act Lawsuits Serves as a Wake-Up Call for Companies With Overseas Operations*, LEGAL TIMES (SPECIAL REPORT), Oct. 22, 2007, at 39 (profiling the *Drummond* case as the first § 1350 case to end up before a jury).

[15] For a discussion of a case that was settled before the Ninth Circuit could issue a new opinion, see *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

dismissed in light of forum non conveniens,[16] the act of state doctrine[17] or the political question doctrine.[18] In fact, "Despite the number of corporate ATCA cases that have been filed since 1993, only one has survived dispositive motions and proceeded to trial: *Estate of Rodriquez v. Drummond Co.*"[19] While Drummond, the international mining company, won a "resounding victory" before an Alabama jury, "[t]hat trial, along with a growing wave of high-stakes ATCA lawsuits against multinational corporations and their executive officers, means that companies and their in-house counsel are going to have to focus on ATCA issues more than ever."[20]

I. A Brief History of § 1350 Before the United States Supreme Court

To date, only three Supreme Court cases even mention the Alien Tort Statute. Firstly, various Liberian corporations sued the Argentine Republic for destruction of an oil tanker on the high seas in violation of the international law in *Argentine Republic v. Amerada Hess Shipping Corp.*[21] Judge Carter in the Southern District of New York dismissed the complaint for want of jurisdiction.[22] The Second Circuit, however, held that federal courts had subject matter jurisdiction over this claim under the ATS, and the Foreign Sovereign Immunity Act (FSIA) did not preempt

[16] *See* Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 554 (S.D.N.Y. 2001) (involving Peruvian and Ecuadorian citizens, who sued an oil company under § 1350 for alleged property damage, personal injury, and risk of disease due to Texaco's negligent pipeline management).

[17] *See* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1193, 1198, 1201–06 (C.D. Cal. 2002) (dismissing the case in light of the act of state doctrine, political question doctrine, and international comity).

[18] *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 485 (D.N.J. 1999) (holding that "responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary").

[19] *See* Jonathan Drimmer, *supra* note 14, at 39 (discussing the *Drummond* case in which this international mining company won a "resounding victory" before a jury in a state, not federal, court in the state of Alabama) (italics added).

[20] *See id.* ("While the jury took just four hours to reject the plaintiffs' claims that Drummond had hired paramilitary forces to kill three labor leaders who worked at the company's coal mine in Colombia, the case represents the first corporate ATCA lawsuit to survive dismissal motions and proceed through trial.").

[21] *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 431 (1989) (explaining that the bombings of these Liberian tanks occurred when Great Britain and Argentina were at war over the Falkland Islands).

[22] *See id.* at 432–33 (referencing Amerada Hess Shipping Corp. v. Argentine Republic, 638 F. Supp. 73 (S.D.N.Y. 1986) and stating "[t]he District Court dismissed both complaints for lack of subject-matter jurisdiction, 638 F. Supp. 73 (1986), ruling that respondents' suits were barred by the FSIA.").

the jurisdictional grant.[23] The Supreme Court disagreed, deciding that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country, and that none of the enumerated exceptions to the Act apply to the facts of this case."[24]

The other two Alien Tort cases were not corporate matters. Rather, in *Rasul v. Bush*,[25] the petitioners were detainees being held in Guantanomo Bay, Cuba by the United States government pursuant to its global War on Terror.[26] The legal question presented was "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[27] While they claimed ATS jurisdiction before the lower courts, no such claim was made before the Supreme Court.[28] Nonetheless, the Supreme Court offered that "28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable 'tort . . . committed in violation of the law of nations or a treaty of the United States' on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial . . . ."[29]

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[23] *See id.* at 433 (referencing Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987) and Circuit Judge Kearse's dissenting opinion).

[24] *See id.* at 428, 439, 443 ("We hold that the District Court correctly dismissed the action, because the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1330 *et seq.*, does not authorize jurisdiction over a foreign state in this situation.").

[25] *See* Rasul v. Bush, 542 U.S. 466 (2004) (involving claims by various detainees at Guantanamo Bay, who were challenging the legality of their detention by the United States government).

[26] *See id.* at 472 ("The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. . . . Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. . . . They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court's jurisdiction under 28 U.S.C. §§ 1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706; the Alien Tort Statute, 28 U.S.C. § 1350; and the general federal habeas corpus statute, §§ 2241-2243. App. 19.").

[27] *Id.* at 475.

[28] *See id.* at 505 n.6 ("The Court grasps at two other bases for jurisdiction: the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and the federal-question statute, § 1331. The former is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument.").

[29] *Id.* at 485.

In contrast, the Supreme Court in *Sosa v. Alvarez-Machain*,[30] issued the day after *Rasul*, enjoyed an "opportunity, for the first time in twenty-four years since the Second Circuit decided *Filártiga v. Peña-Irala*, to take up the question of whether and to what extent the ATS authorizes international human rights litigation."[31] Writing for the 6–3 majority, Justice Souter conceded that the ATS is a purely jurisdictional statute.[32] Interestingly, the majority proceeded to argue that "'no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filártiga* . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.'"[33] "Since the majority understands federal courts to have discretion--under the rubric of a federal common law that persists, post-Erie, in 'havens of specialty' and 'interstitial areas' of particular federal interest--to create new customary international law-based causes of action that fall within ATS jurisdiction, the majority's concern was to guide the exercise of that discretion."[34]

The *Sosa* majority, with Chief Justice Rehnquist and Justices Thomas and Scalia dissenting, concluded that any "present-day" ATS claim should "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."[35] Various commentators have suggested that "*Sosa* was unusual for its hints of future holdings."[36] In particular, "[t]he Supreme Court left open the all-important question of whether and under what standard a corporation can aid and abet an alien tort."[37] Moreover, they have claimed that, in light of *Sosa*'s famous

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[30] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (deciding that the 1990 extraterritorial abduction and forcible transfer by the United States government of Mexican national, Humberto Alvarez-Machain, to the United States did not create a cause of action under the Alien Tort Statute).

[31] David D. Caron & Brad R. Roth, International Decision, Scope of the Alien Tort Statute--Arbitrary Arrest and Detention as Violation of Custom, 98 AM. J. INT'L LAW 798, 800 (2004).

[32] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) ("In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

[33] *See* Caron & Roth, *supra* note 31, at 801 (referencing *Sosa*, 124 S.Ct. at 2761).

[34] *See id.* (referencing *Sosa*, 124 S.Ct. at 2762–63); *cf.* Curtis Bradley, Jack Goldsmith, & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) (analyzing the Supreme Court's 2004 decision against the backdrop of the post-Erie federal common law).

[35] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[36] *See* Michael D. Goldhaber, *Not Dead . . . Yet: The Corporate Alien Tort Never Left Us, and It's Cued Up for Crucial Tests in the Supreme Court*, AM. LAW., Mar. 2008, at 77–79 (discussing three corporate, ATS cases that currently are cued for Supreme Court review) (italics added).

[37] *Id.*

footnote 21,[38] "alien tort has become a battleground in the Bush Administration's campaign to expand executive power."[39]

II. The Second Circuit Makes ATS History Again

In late 2007, the Second Circuit issued yet another ground-breaking § 1350 decision. Following in the footsteps of other courts, the Second Circuit held that "a plaintiff may plead a theory of aiding and abetting liability under the ATCA."[40] Commentators likely would agree that the Second Circuit's holding in *Khulumani v. Barclay National Bank Ltd.* was unexpected for multiple reasons.[41]

First, the size of the relief sought is unprecedented. Specifically, "The South African claims seek $400 billion on behalf of all historical apartheid victims from more than 50 Western multinationals that did business with apartheid South Africa."[42] While the Second Circuit was not assessing liability or damages, surely the judges were aware of the extremely high stakes involved. Secondly, the case involves "a who's who of the world's largest banks and manufacturers."[43] In particular, the defendants include, for example, Ford Motor Company, International Business Machines Corporations, Shell Oil Company, Exxon Mobil Corporation, General Electric Company, Xerox Corporation, Coca-Cola Company, and Hewlett-Packard Company.[44] Thirdly, the United States government and the South African government have opposed this litigation openly and vocally.[45]

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[38] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) ("This requirement of clear definition is not meant to be the only principle limited the availability of relief in the federal courts. . . . Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.").

[39] Michael Goldhaber, *supra* note 36, at 78.

[40] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007).

[41] *See* Georgene M. Vairo, *Human Rights Violations*, NAT'L L. J., Feb. 18, 2008, at 20 ("The case is important because it presents an important twist -- aiding and abetting liability -- that is beginning to occupy the attention of the federal courts."); *Cohen Milstein Invokes 200-Year-Old Law*, LAWYER, Nov. 26, 2007, at 13 ("Last month saw a US Court of Appeals decision that could have implications not only for a significant number of the world's leading multinationals, but also for the US itself. . . . At stake is a $400bn (#194.2bn) class action centred on the apartheid regime in South Africa between 1960 and 1993.").

[42] Michael Goldhaber, *supra* note 36, at 77.

[43] *Id.*

[44] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

[45] *See* Michael Goldhaber, *supra* note 36, at 77 ("South African president Thabo Mbeki publicly asked the plaintiffs to back off and respect South Africa's preference for the truth commission method of transitional justice. Not only did the U.S. Department of State echo this sentiment, but the Supreme Court all but agreed in advance, with its 2004 ruling in *Sosa v. Alvarez-Machain*.").

On January 10, 2008, the *Khulumani* defendants petitioned for a writ of certiorari from the United States Supreme Court. Therein, they wrote the following:

> The profoundly important question presented by the Second Circuit's holding - which will both encourage and confuse ATS litigation – has in recent years been the subject of substantial and burgeoning volume of litigation and considerable academic commentary. The question whether an aiding and abetting claim may be stated under the ATS is an important one in its own right.[46]

In this petition, the defendants correctly noted that in the past few years, "[C]laimants have filed a large and rapidly increasing number of lawsuits asserting ATS claims for aiding and abetting violations of international law."[47] Moreover, "[t]hese suits have brought confusion and uncertainty about the standards governing such claims."[48] While there is no circuit split on this specific issue, there is a split intra circuit, so to speak. The federal courts in the Ninth and Second Circuits are at odds about how to read and apply *Sosa*. Moreover, they disagree about whether plaintiffs may plead civil aiding and abetting liability against a corporate defendant under the ATS.

In this light, this paper first introduces the *Khulumani* case, which may expand significantly the potential liability for multinational companies in human rights abuse cases. This introduction provides an overview of the case history and analyses of the Per Curium opinion and the three separate opinions issued by Second Circuit Judges Katzmann, Hall and Korman. Secondly, this paper focuses on whether Judges Katzmann and Hall are correct in holding that plaintiffs may plead aiding and abetting liability against corporate defendants under the ATS. I argue that they are correct for at least two reasons: case precedent and the continued support for aiding and abetting liability in international criminal law.

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[46] Petition for a Writ of Certiorari, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, 2008 WL 140514 (Jan. 10, 2008).

[47] *See id.* at *23 n.3 (referencing Corrie Caterpiller, Inc., 503 F.3d 974 (9th Cir. 2007), which includes "allegations that Caterpillar aided and abetted international law violations by selling to Israeli military bulldozers used to demolish Palestinians' homes" and Mastafa v. Australian Wheat Bd. Ltd., No. 5:07–CV–02798, First Am. Compl. ¶¶ 29–45 (S.D.N.Y. Sept. 11, 2007), which includes "allegations that Australian entity and French bank aided and abetted human rights violations of Saddam Hussein's regime by making illicit fee payments to Iraq in connection with United Nations oil-for-food program").

[48] *See id.* at *23–24 (arguing that the Second Circuit has interpreted the *Sosa* holding improperly).

Finally, this essay argues that, if the Supreme Court were to review the *Khulumani* decision, the Justices should affirm that plaintiffs may plead aiding and abetting liability under § 1350 against corporate defendants. Then, the Justices should dismiss the case on prudential grounds.

B. *Khulumani v. Barclay National Bank Ltd.*

I. A Brief History of South African Apartheid as a Foundation for Understanding the Apartheid Litigation

To better understand *Khulumani v. Barclay National Bank Ltd.*, it is helpful to have some understanding of South African apartheid and its aftermath. Soon after World War II, the National Party took power in South Africa. Between 1948 and the early 1990s, the National Party ran an apartheid system.[49] Specifically, the ruling white population imposed a set of laws and rules, written or otherwise, that effectuated the disenfranchisement, state-sponsored discrimination, and repression of South Africa's black nationals.[50] During apartheid, approximately seventeen million black South Africans were arrested for being found in areas reserved for white South Africans, and around 3.5 million black nationals were dispossessed of their homes.[51] Eighty thousand black citizens were detained without trial, and up to 40,000 more were driven into foreign exile.[52] Many black South Africans were

[49] *See In re* South African Apartheid Litig., No. 1:01–CV–04712, Compl. ¶ 39 (S.D.N.Y. June 19, 2002) ("In 1948, the South African National Party was voted into power by the white electorate. It was after 1948 that apartheid policies and practices produced a system and economy based on separation, segregation, racism, domination, oppression, terror, torture, forced removals, forced labor and killing.").

[50] For a similar discussion on the history of South African apartheid, see Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., dissenting).

[51] *See* Christopher S. Wren, *The World; South Africa and Apartheid: No Apologies*, N.Y. TIMES, Feb. 24, 1991, at 42 (stating "[s]eventeen million arrests of blacks found in areas reserved for whites. The dispossession of 3.5 million people from their homes.").

[52] *See id.* at 42 (stating "[e]ighty thousand detentions without trial. Up to 40,000 South Africans driven into foreign exile.").

killed, including those during the Sharpeville Massacre of 1960[53] and the Soweto Massacre of 1976.[54]

In the late 1980s and early 1990s, the groundwork was laid for apartheid's end.[55] In September 1989, Frederik Willem de Klerk became the new President.[56] "Due to international pressure, increased violence, internal turmoil, and de Klerk's own opposition to his party's racist legislation, in 1990 he began to implement some sweeping changes."[57] In 1993, the South African Parliament passed the Interim Constitution, which abolished apartheid and provided possible amnesty for those individuals who had committed political crimes during the apartheid era.[58] On

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[53] *See In re* South African Apartheid Litig., No. 1:01–CV–04712, Compl. ¶ 63 (S.D.N.Y. June 19, 2002) (noting that on March 21, 1960, the police opened fire on a group of peaceful demonstrators who were protesting against the requirements that blacks carry "pass" documents at all times); RICHARD W. HULL, AMERICAN ENTERPRISE IN SOUTH AFRICA: HISTORICAL DIMENSIONS OF ENGAGEMENT AND DISENGAGEMENT 243–44 (1990) (discussing this massacre in which sixty-nine Africans were gunned down by the South African police).

[54] RICHARD W. HULL, AMERICAN ENTERPRISE IN SOUTH AFRICA: HISTORICAL DIMENSIONS OF ENGAGEMENT AND DISENGAGEMENT 297–98 (1990) ("A new era in black protect was launched on June 16, 1976, in Johannesburg's sprawling township of Soweto. What started out as a student demonstration over the imposition of Afrikaans as the medium of instruction ended in the death of over six hundred youths at the hands of the South African police. A wave of rioting, looking, arson, and general violence spread across the country.").

[55] *See id.* at 296–359 (1990) (discussing the ebbs and flows the anti-apartheid movement in the United States, which called for divestment of U.S. companies from South Africa).

[56] *See* Michael Wines, *South Africa's Decade of Freedom: In the 10 Years Since the End of Apartheid, South Africa Has Come a Long Way. But This Young Democracy Still Faces Many Challenges*, N.Y. TIMES (UPFRONT), Sept. 6, 2004, at 12 ("As demands for Mandela's release grew, F.W. de Klerk became South Africa's new President in September 1989, and quickly began work on a peaceful transition to black rule. De Klerk met with [Nelson] Mandela, then nearly 72, in December, and freed him from prison in February. Throughout 1990 and 1991, de Klerk dismantled most of apartheid's most odious regulations, lifted bans on black political organizations like the ANC, and began talks that led to a temporary government of national unity—and a commitment to democratic elections in April 1994.").

[57] *See* Cassandra F. Charles, *Truth v. Justice: Promoting the Rule of Law in Post-Apartheid South Africa*, 5 SCHOLAR 81, 90 (2002) (explaining how apartheid ended in South Africa).

[58] *See* ALEX BORAINE, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 38–40 (2000) (quoting the Constitution's postamble, which states, "This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence. . . . The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization.").

April 27, 1994, Nelson Mandela, the head of the African National Congress Party, was elected President in South Africa's first non-racial democratic elections since apartheid began.[59]

In 1995, the Parliament established the South African Truth and Reconciliation Commission, which began its work of bringing together a nation still wounded from decades of racial violence and discrimination.[60] The TRC's main goal was to "obtain a complete accounting of past transgressions in hopes that they would never be forgotten, and thus never repeated."[61] The objective, carried out by the TRC's seventeen commissioners, was understanding and reparation, not vengeance and retaliation.[62]

Principally, the TRC carried out its objective through two committees—the Human Rights Violations Committee (HRVC) and the Reparations and Rehabilitation Committee (RRC). The former was charged with inquiring into, recording, and then referring gross violations of human rights to the RRC.[63] The latter "possessed the power of recommending the basis and conditions upon which reparations would be granted, as well as when reparations would be reduced or discontinued."[64] "While earlier truth commissions operated behind closed doors to protect the privacy and safety of survivors and the integrity of their processes, the TRC held high-profile public 'victim hearings' . . . , organized by the HRVC, which gave voice to survivors and were widely covered by local and international media."[65]

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[59] *See* Cassandra F. Charles, *supra* note 57, at 90 (noting that twenty million votes were cast in the election).

[60] *See id.* at 92 (noting that the ANC sponsored two truth commissions in South Africa in 1992 and 1993).

[61] *Id.* at 84.

[62] *See* Audrey R. Chapman & Hugo Van Der Merwe, *Introduction*, *in* TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 9 (2008) ("The TRC was headed by seventeen commissioners, who were appointed by President Mandela after an open nomination process and public interviews of shortlisted candidates by a selection committee. The commissioners came from a variety of professional backgrounds . . . .").

[63] Cassandra F. Charles, *supra* note 57, at 93.

[64] *Id.*

[65] Audrey R. Chapman & Hugo Van Der Merwe, *supra* note 62, at 9.

Additionally, the TRC also ran an Amnesty Committee.[66] "The TRC's amnesty process was a unique innovation breaking with the international pattern of blanket amnesty through offering a limited and conditional amnesty if perpetrators participated in a public process and met specified conditions."[67] Specifically, this Committee handled applications from thousands of South African individuals (but not groups or organizations), who possibly faced prosecution for their illegal acts between 1960 and 1994.[68] To obtain amnesty, the applicant "had to show that the acts for which they requested amnesty were politically motivated and they had to provide full disclosure about the events."[69]

The entire TRC, but the Amnesty Committee especially, was controversial.[70] At apartheid's end, the new leadership had at least two options for addressing the organized torture, ill-treatment, disappearances and other human rights violations that transpired in South Africa.[71] Option one—establish a commission on truth and reconciliation. Option two—stage a "tribunal on apartheid, similar to that on the issue of war crimes in Bosnia-Herzegovina."[72] Proponents of the second option argued that exchanging amnesty for truth was inappropriate in light of the egregious crimes; moreover, truth-telling would "not awaken the conscience of the

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[66] *See id.* at 10 ("The TRC's amnesty process was a unique innovation breaking with the international pattern of blanket amnesty through offering a limited and conditional amnesty if perpetrators participated in a public process and met specified conditions.").

[67] *Id.*

[68] *See id.* at 11 ("Of the more than 7,000 applications that were received, most were rejected during an initial administrative review, seemingly on the basis that they were criminal cases without a clear political motive.").

[69] *See id.* at 10 (noting in a footnote that the "committee also considered criteria such as proportionality, but that the main concerns appear to have been political motivation and full disclosure."); Cassandra F. Charles, *supra* note 57, at 94 (citing § 20(1)(b) of Promotion of National Unity and Reconciliation Act; *South Africa Looks Back*, ECONOMIST, Apr. 20, 1996, at 13).

[70] *See* Audrey R. Chapman & Hugo Van Der Merwe, *supra* note 62, at 10 ("The Amnesty Committee of the commission provided a very controversial, but constitutionally mandated, function of reviewing applications for amnesty made by perpetrators of illegal actions (including human rights violations) that occurred during the period of 1960 to 1994.").

[71] *See Healing South Africa*, N.Y. TIMES, Sept. 10, 1995, at 16 ("Generations of South African political prisoners were tortured and murdered in police custody. Activists were hunted down on the streets of South Africa and neighboring countries by clandestine police and military units. Some of the victims of this deadly repression were well known, like the Black Consciousness Movement leader Steven Biko. Others were known only to their grieving friends and relatives.").

[72] *See* ALEX BORAINE, *supra* note 58, at 13 (referring to the International War Crimes Tribunal for the Former Yugoslavia).

guilty, compel their truthful disclosure, and thus result in forgiveness and reconciliation."[73]

For sure, the choice was not simple. As President Thabo Mbeki explained that "'[w]ithin the ANC the cry was 'to catch the bastards and hang them'."[74] Fearing a "blood bath of retribution against the apartheid-era leaders,"[75] the post-apartheid leaders *purposefully* selected a commission-format that would promote "restorative justice."[76] Indeed, "South Africa's apartheid regime [had] been dismantled, but not its legacy of suffering, particularly among survivors of the violent crimes committed in its name. Paying the debt of accountability and reparations owed to these South Africans [was] essential to building a peaceful nonracial democracy."[77]

II. Victims of South African Apartheid Rattled the Corporate World by Filing Class Action Suits in American Courts under the Alien Tort Statute

As the TRC's work ended, a group of apartheid victims filed a complaint on June 19, 2002 in the Southern District of New York.[78] People worldwide had mixed reactions.[79] Thandi Shezdi, a former anti-apartheid activist who was beaten and tortured in Johannesburg, expressed that "[t]he foreign companies helped apartheid when it was on the brink of collapse. Those companies need to pay, because they were helping people who were committing a crime against humanity."[80] Desmond Tutu, who was the first black Archbishop of Capetown, South Africa, the 1984 Nobel Peace Prize winner, and the most influential figure on the TRC,[81] voiced his

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[73] Cassandra F. Charles, *supra* note 57, at 93.

[74] *See* ALEX BORAINE, *supra* note 58, at 14 (citing his 24 February 1997 interview in the CAPE TIMES).

[75] *See* Stuart E. Eizenstat, *Reconciliation, Not Just Reconstruction*, N.Y. TIMES, July 4, 2003, at A21 ("Bringing the rule of law to Iraq is essential, as is the political and economic reconstruction of the country. Yet these tasks may fail unless the Bush Administration also provides justice for Iraqi victims of Saddam Hussein's terror.").

[76] *See* Hugo van der Merwe, *What Survivors Say About Justice: An Analysis of the TRC Victim Hearings*, *in* TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 26–27 (2008) (providing the definition of restorative justice included in the TRC's final report).

[77] *Healing South Africa*, *supra* note 71, at 16.

[78] *In re* South African Apartheid Litig., No. 1:01–CV–04712, Compl. ¶ 39 (S.D.N.Y. June 19, 2002).

[79] Samson Mulugeta, *Apartheid Suits Reach Overseas*, NEWSDAY (USA), Sept. 14, 2002, at A15.

[80] *Id.*

[81] *See* Audrey R. Chapman & Hugo Van Der Merwe, *supra* note 62, at 2 (2008) (explaining that Chairman Desmond Tutu saw the truth commissions as a "compromise between the Nuremberg trials at the end of World War II or the International Criminal Court and blanket amnesty or national amnesia.").

support.[82] "At the time, we called on the banks to give no more credit to the apartheid regime, but none of them listened to us."[83] Tutu and his fellow TRC Commissioners and Committee members also explained that "'[t]he objective of the TRC was to promote reconciliation and not to achieve it.' It was always contemplated that additional measures would be necessary, and as we explain herein, this litigation is one such additional measure."[84]

Other individuals and groups, however, criticized the apartheid litigation.[85] For instance, "South African president Thabo Mbeki publicly [has] asked the plaintiffs to back off and respect South Africa's preference for the truth commission method of transnational justice."[86] Thurgood Marshall Jr.,[87] an American lawyer, contended

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[82] Samson Mulugeta, *supra* note 79, at A15; *See Apartheid Reparations the Govt's Problem: Tutu*, S. AFR. PRESS ASS'N, June 28, 2002, 2002 WLNR 3378078 ("Compensating apartheid victims was the government's problem -- not that of the Truth of Reconciliation Commission, former TRC chairman Archbishop Desmond Tutu said on Friday.").

[83] Samson Mulugeta, *supra* note 79, at A15.

[84] Brief of Amici Curiae Commissioners and Committee Members of South Africa's Truth and Reconciliation Commission in Support of Appellants, Khulumani v. Barclay Nat'l Bank Ltd., No. 05-2141 (2d Cir. Aug. 31, 2005) (citing A Long Night's Journey Into Day: South Africa's Search for Truth & Reconciliation (California Newsreel 2000), *quoted in* Jeremy Sarkin and Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 COLUM. HUM. RTS. L. REV. 661, 675 (2004)), *available at* www.sdshh.com/Apartheid/pdfs/TRC_Amicus083005.pdf.

[85] *See* Robert Verkaik, *Ministers Attempt to Halt U.S. Human Rights Cases Against British Firms*, INDEPENDENT (UNITED KINGDOM), Feb. 11, 2004, at 2 ("The Government has made a formal intervention in the US justice process in an attempt to stop British companies being sued in America for alleged human rights violations committed around the world. The move follows months of lobbying from British businesses concerned that they might have to pay millions of pounds in compensation for alleged exploitation of Third World countries and their people."); Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21 ("The South African government has opposed these lawsuits on the ground that they interfere with its own post-apartheid approach to reconciliation and reconstruction, and the State Department has endorsed South Africa's view."); Thurgood Marshall Jr., *Let South Africa Decide: America's Courts and Lawyers Have No Business Sorting Out Blame or Punishment for Apartheid*, LEGAL TIMES, Sept. 15, 2003, at 82 ("The 1993 South African Constitution calls for understanding, not vengeance. It advises that the pursuit of national unity requires the reconstruction of society and reconciliation among the peoples of that country. Let that blueprint guide South Africans in their determined effort to end, once and forever, the horrors and economic injustices of apartheid. Imprudent outsiders should not be allowed to substitute their judgment of what is right for South Africa.").

[86] *See* Michael Goldhaber, *supra* note 36, at 77 (discussing *American Isuzu Motors, Inc. v. Ntsebeza*, *Exxon Mobil Corp. v. Doe*, and *Rinto Tinto PLC v. Sarei* as three ATS, corporate cases that could receive cert by the Supreme Court).

[87] *See* Thurgood Marshall Jr., *Let South Africa Decide: America's Courts and Lawyers Have No Business Sorting Out Blame or Punishment for Apartheid*, LEGAL TIMES, Sept. 15, 2003, at 82 ("Thurgood Marshall Jr. is a partner in the D.C. office of Swidler Berlin Shereff Friedman. He is researching the Alien Tort Claims

as follows:

> The New York lawsuit, and others like it around the country, is sorely misguided. At best, the litigation interferes with executive branch leadership in matters of American foreign policy and national security, disrupts the sovereignty of foreign governments, threatens much-needed foreign investment, and raises significant legal issues. Worse, the New York case seeks to redirect much-needed rebuilding resources and investments from those who need it most to a group of individuals bent on manipulating the American justice system to further their own self-interests.[88]

Since the apartheid litigation began, the plaintiffs have included, inter alia, Lungisile Ntzebesa, who was tortured and imprisoned from 1976 to 1981, and Themba Mequbela, who was confined, tortured and forced to flee in 1976.[89] They have identified themselves as plaintiffs "On Behalf of themselves and as Representative of All Other Victims of Apartheid Human Rights Violations and Crimes Against Humanity and Other Persons Similarly Situated."[90] Generally speaking, they alleged that dozens of multinational corporations, whose names are highly recognizable around the world, aided and abetted apartheid.[91] In other words, by doing business with the South African government, these international corporate giants allegedly enabled the government to carry out its apartheid-related goals. Indisputably, this lawsuit is monumental; never before in the history of Alien Tort litigation have plaintiffs pursued claims against so many high-profile

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Act for the National Foreign Trade Council, an association of more than 500 U.S. firms engaged in international trade and investment. Through its sponsorship of the U.S.-South Africa Business Council, the NFTC supports U.S. companies in the South African market and represents their interests to the U.S. and South African governments.").

[88] *Id.*

[89] *In re* South African Apartheid Litig., No. 1:01–CV–04712, Compl. (S.D.N.Y. June 19, 2002).

[90] *Id.*

[91] *See Id.* at ¶ 13 ("The financial institutions and companies that fueled and made possible the Apartheid reign of terror must account for their wrongful acts, crimes and profiteering, just as did the companies that fueled and made possible the reign of terror during the Holocaust.").

corporate defendants at once.[92]

III. The Southern District of New York Dismissed the Apartheid Victims Complaints on November 29, 2004

In the Southern District, the *Khulumani* plaintiffs alleged that the corporate "defendants violated international law" and were subject to suit in federal court under 28 U.S.C. § 1350.[93] The Southern District disagreed.[94] Granting the defendants' motion to dismiss, Judge Sprizzo explained that the plaintiffs' complaints failed to allege sufficiently that these corporate defendants violated international law.[95]

To determine whether aiding and abetting violations can form the basis for jurisdiction under § 1350, Judge Sprizzo employed the following analytical approach: First, he explained the ATS's history by citing to *Filártiga v. Peña-Irala*,[96] *Kadic v. Karadzic*,[97] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[98] and the

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[92] *See* Jenna Greene, *Use of 1789 Alien Tort Claims Act Against Businesses Growing*, MIAMI DAILY BUS. REV., July 29, 2003, at 9 (stating " But the case that has the corporate world most up in arms is *In re South African Apartheid Litigation*, now pending in the Southern District of New York.").

[93] *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2003).

[94] For a discussion of the cases procedural history, see *id.* In sum, Judge Sprizzo noted that originally, there were three groups of plaintiffs led by Lungisile Ntsebeza, Hermina Digwamaje, and the Khulumani Support Group. Each group had filed actions in various federal district courts against multinational corporations that did business in Apartheid South Africa. The Judicial Panel on Multidistrict Litigation transferred and consolidated the actions to the Southern District of New York.

[95] *See id.* at 543 ("Because the Court finds that the various Complaints do not sufficiently allege that defendants violated international law, this Court lacks subject matter jurisdiction under the ATCA and therefore defendants' motion is granted and plaintiffs' complaints are dismissed.").

[96] *See* Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) ("Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.").

[97] *See* Kadic v. Karadzic, 70 F.3d 232, 235 (2d Cir. 1995) (holding that claims may be brought against de facto, but unrecognized governments and private bodies under the ATCA; providing, "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.").

aforementioned Supreme Court case, *Sosa v. Alvarez-Machain*.[99] He said that § 1350, in light of *Sosa*, afforded the federal courts jurisdiction over "well-accepted and clearly-defined offenses under international law [in 1789] such as piracy and offenses involving ambassadors."[100] However, he remarked that "the Supreme Court left the door at least slightly ajar for the federal courts to apply that statute to a narrow and limited class of international law violations beyond those well-recognized at that time."[101] As such, "the *Sosa* decision did not deliver the definitive guidance" as to whether an ATCA plaintiff may plead a theory of aiding and abetting liability.[102]

In turn, Judge Sprizzo marched through the *Sosa* analytical framework.[103] Sprizzo understood *Sosa* as having five guiding principles for federal court judges. First, federal courts may only find new claims under the ATCA if those claims "'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.'"[104] Secondly, the courts, working in a post-*Erie*[105] context, should be wary of making new federal, general common law without an express

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[98] *See* Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289, 304 (S.D.N.Y. 2003) ("*Filartiga* proved to be a watershed opinion, catapulting a largely overlooked statute into the limelight as a means of vindicating rights under international law. Later decisions by both the Second Circuit and other courts have upheld and expanded the reasoning of the *Filartiga* court. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).").

[99] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.").

[100] *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2003).

[101] *See id.* (referencing *Sosa* at 723, 729).

[102] *Id.*

[103] *See* Mini Kaur, *Global Warming Litigation Under the Alien Tort Claims Act: What Sosa v. Alvarez-Machain and its Progeny Mean for Indigenous Artic Communities*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 155, 171 (2006) ("In deciding Sosa, the Supreme Court left many questions regarding the interpretation of ATCA unanswered. Subsequent lower court decisions have not filled the gaps that Sosa left in the ATCA analytical framework. In particular, two post-Sosa district court cases, In re South African Apartheid Litigation and Presbyterian Church of Sudan v. Talisman Energy, both suggest that Sosa did not clarify the scope of claims that properly allow for jurisdiction under the ATCA.").

[104] *See In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2003) (referencing *Sosa*, 124 S.Ct. at 2761–62).

[105] Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

congressional authorization to devise a new body of law.[106]

The third principle is that "the possible collateral consequences of making international rules privately actionable argue for judicial caution."[107] Fourthly, the foreign relations consequences of finding that certain conduct is encompassed by the ATCA must be considered by courts, which should be careful not to entertain lawsuits that "impinge on the discretion of the legislative and executive branches of this country as well as those of other nations."[108] Finally, where there is "'no congressional mandate to seek out and define new and debatable violations of the law of nations,'" courts should show caution.[109]

According to Judge Sprizzo, the apartheid victims alleged "a veritable cornucopia of international law violations, including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination."[110] Moreover, since the defendants did not engage in state actions, the plaintiffs must show that "aiding and abetting international law violations" is a violation "of the law of nations that are 'accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms' such as piracy and crimes against ambassadors."[111] Judge Sprizzo, however, argued that the plaintiffs provided little if anything on which the court could "conclude that aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation."[112] While the plaintiffs did reference the International Criminal Tribunals for the former Yugoslavia and Rwanda,[113] the Nuremberg trials,[114] the International

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[106] *See In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2003) (referencing *Sosa*, 124 S.Ct. at 2762).

[107] Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

[108] *See In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2003) (referencing *Sosa*, 542 U.S. at 727, 733 n.21).

[109] *See id.* at 548 (referencing *Sosa*, 542 U.S. at 728).

[110] *Id.*

[111] *See id.* at 549 (referencing *Sosa*, 542 U.S. at 725).

[112] *Id.*

[113] *See id.* ("Plaintiffs point to the International Criminal Tribunals for the former Yugoslavia, ICTY STAT. art. 7(1), and Rwanda, ICTR STAT. art 6(1)…").

[114] *See* Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321 (2008) ("This Article both traces the Nuremberg trials' tremendous influence on human rights litigation in the United States under the

Convention on the Suppression and Punishment of the Crime of Apartheid,[115] and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[116] Judge Sprizzo decided that "[n]one of these sources establishes a clearly-defined norm for ATCA purposes."[117] Judge Sprizzo also offered his understanding of the practical implications of this lawsuit. He stated:

> In a world where many countries may fall considerably short of ideal economic, political, and social conditions, this Court must be extremely cautious in permitting suits here based upon a corporation's doing business in countries with less than stellar human rights records, especially since the consequences of such an approach could have significant, if not disastrous, effects on international commerce.[118]

This comment alone suggests Judge Sprizzo views the ATS as an "awakening monster" that "could plausibly culminate in a nightmare, more than 200 years after it was enacted."[119] This monster, or rather the increased use thereof, would cause more corporate lawyers to advise multinational corporations to curtail investments in places like China and "other (mainly developing) countries with less than perfect observance of individual and labor rights and short-comings in the realm of political and environmental norms."[120]

IV. The Second Circuit on October 12, 2007 Vacated the District Court's Dismissal and Held that a Plaintiff May Plead a Theory of Aiding and Abetting Liability under the ATCA

ATS, which has culminated most recently in the area of corporate complicit liability, and argues that the use of the Nuremberg trials as precedent in modern domestic human rights litigation is appropriate.").

[115] *See In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 549 (S.D.N.Y. 2003) (citing the "Apartheid Convention" as November 30, 1973, art. I, 1015 U.N.T.S. 243, 245).

[116] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging the defendant collaborated in torture, enslavement, war crimes, and genocide effectuated by the Sudanese government).

[117] *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 549–50 (S.D.N.Y. 2003).

[118] *Id.* at 554.

[119] *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (2003) (providing an analysis of the evolving ATS jurisprudence, the scope of ATS litigation, the collateral damage from ATS suits, and a description of ATS-related judicial imperialism).

[120] *Id.* at 1.

On October 12, 2007, two of the three judges reversed the District Court's dismissal of the ATCA claims.[121] In doing so, Judges Katzmann and Hall agreed that aiding and abetting a violation of the law of nations is an actionable tort under the ATCA.[122] "Gossip is that the finding was a real shock too for the hot-shot lawyers employed by the group of companies, which includes BP, ExxonMobil, Citigroup, Deutsche Bank, UBS, IBM and General Motors, who apparently advised that the case did not stand a chance."[123] Notably, Katzmann and Hall disagreed on the appropriate test for determining when corporations are liable. They looked to different sources of law – the federal common law and international law – from which to derive the appropriate standard of civil aiding and abetting.[124]

1. An Examination of the Second Circuit's Per Curium *Opinion*

The *Per Curium* opinion contained six sections. Section I included the case's procedural history.[125] It described the *ex parte* declaration filed in the District Court by the former South African Minister of Justice.[126] This Minister asked for the proceedings to be dismissed, calling them an interference "'with a foreign sovereign's efforts to address matters in which it has the predominant interest.'"[127] The State Department's Statement of Interest asserted that "'continued

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[121] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); *See* Georgene M. Vairo, *Human Rights Violations*, NAT'L L. J., Feb. 18, 2008, at 20 (describing the majority and dissenting opinions).

[122] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

[123] Tim Cohen, *Apartheid Case Shock for Legal Eagles*, BUSINESS DAY (SOUTH AFRICA), Oct. 22, 2007, at 12.

[124] *See* Anthony Sebok, *The Second Circuit's Stunning Reversal, in Two Suits Involving the Alien Tort Claims Act: Part One in a Two-Part Series on the Decision*, found at http://writ.lp.findlaw.com/sebok/20071023.html. ("As Judge Korman slyly noted in his dissent, when Judge Sprizzo, on remand, applies the Rome Statute, it is very likely plaintiffs will not meet its comparatively demanding standard. Thus, the Second Circuit panel may have handed plaintiffs a paper victory, one that will not stand up on remand. Still, the remand does keep the case alive, providing a possible setting for a settlement.").

[125] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 259–60 (2d Cir. 2007) (per curiam) (including Section II, which affirms the dismissal of the complaints insofar as they seek to assert jurisdiction under the Torture Victim Protection Act and 28 U.S.C. § 1332(a)(3)).

[126] *See id.* at 259 ("Later that month, Penuell Mpapa Maduna, who was then the Minister of Justice and Constitutional Development for South Africa, submitted an ex parte declaration to the district court, stating that the South African government regarded these proceedings as interfering 'with a foreign sovereign's efforts to address matters in which it has the predominant interest' and asking that the proceedings be dismissed.").

[127] *Id.*

adjudication'" would risk "'potentially serious adverse consequences for significant interests of the United States.'"[128]

Section III, raising the eyebrows of corporations worldwide, explained that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the ATCA."[129] The Judges confirmed that the holding was not indicative of whether the plaintiffs had pled adequately a violation of international law and thus, had availed themselves of jurisdiction under the ATCA.[130] Rather, the Southern District would address the pleadings on remand after amendment thereof.[131]

In Section V, the Court declined "to address these case-specific prudential doctrines now and instead remand to the district court to allow it to engage in the first instance in the careful 'case-by-case' analysis that questions of this type require."[132] International comity[133] and the political question doctrine[134] were two prudential doctrines raised by the defendants. The Court expressed "no view" as to "what level of deference" should be given to the view of the State Department and South

[128] *See id.* ("The State Department responded by submitting a 'Statement of Interest' asserting that 'continued adjudication of the above-referenced matters risks potentially serious adverse consequences for significant interests of the United States.'").

[129] *Id.* at 260.

[130] *See id.* at 260–61 ("We therefore decline to determine whether the plaintiffs have adequately pled a violation of international law sufficient to avail themselves of jurisdiction under the ATCA and remand to the district court to allow it to address the pleadings after amendment as may be permitted has occurred.").

[131] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260–61 (2d Cir. 2007) (per curiam).

[132] *Id.* at 261.

[133] *See id.* at 261–62 (referencing Justice Breyer's *Sosa* concurrence in which he suggested that courts should consider "whether the exercise of jurisdiction under the [ATCA] is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.").

[134] *See id.* at 262 ("In dismissing the plaintiffs' complaints below, the district court explicitly refrained from addressing the defendants' arguments that the ATCA claim presented a non-justisciable political question.").

African government, for instance.[135] Finally, in part VI, the Court stated the holding in its entirety.[136]

2. An Analysis of Judge Katzmann's Concurring Opinion

Circuit Judge Katzmann first explained why the District Court erred. He argued that Judge Sprizzo conflated the jurisdictional and cause of action analyses required by the ATCA, and thus "mistakenly incorporated a discretionary analysis into the determination of whether it has jurisdiction under the ATCA."[137] Moreover, the District Court "erroneously held that aiding and abetting liability does not exist under international law."[138]

His analysis continued with a description of the ATCA, plus immediate attention to the Supreme Court's treatment thereof in *Sosa v. Alvarez-Machain.* Judge Katzmann affirmed his understanding that, under *Sosa*, "the ATCA is purely jurisdictional" and that "the common law provides the cause of action for claims brought under that jurisdiction."[139] The Judge also stated that "I do not read *Sosa* as requiring that a court individually analyze each of the five reasons it identifies as 'argu [ing] for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the . . . statute.'"[140] Interestingly, he mentioned a few times that, under *Sosa*, courts should consider the "practical consequences of making" a new cause of action available to litigants in federal courts.[141]

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[135] *See id.* at 263–64 ("At this stage in the litigation, we express no view as to what level of deference to their views is appropriate in this particular case. Instead, we remand to the district court so that it may carefully consider whether any of these doctrines require dismissal.").

[136] *See id.* at 264 (stating in part "[w]e vacate the district court's dismissal of the plaintiffs' ATCA claims, as well as the district court's denial of the Digwamaje and Ntsebeza Plaintiffs' motions to amend and REMAND for further proceedings consistent with this opinion.").

[137] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 264 (2d Cir. 2007) (Katzmann, J., concurring in part); *See* Georgene M. Vairo, *Human Rights Violations*, NAT'L L. J., Feb. 18, 2008, at 20 ("The *Sosa* decision quite plainly separates the two questions: First, the court must determine whether there is jurisdiction. Assuming this threshold is met, then, the court must determine whether a common law cause of action ought to be created to provide a remedy. At this point, it is appropriate for the court to limit its discretion.").

[138] *Id.*

[139] *Id.* at 266.

[140] *See id.* at 268 (referencing *Sosa*, 542 U.S. at 732–33).

[141] *See id.* (perhaps referencing judicial economy concerns).

Judge Katzmann then analyzed whether "'aiding and abetting international law violations is itself an international law violation that is universally accepted as a legal obligation.'"[142] He concluded that "a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."[143] He discussed the Rome Statute of the International Criminal Court and the statutes creating the International Criminal Tribunals for the Former Yugoslavia and Rwanda to support his conclusion.[144]

3. An Analysis of Judge Hall's Concurring Opinion

Like Judge Katzmann, Judge Hall illuminated Judge Sprizzo's errors. He argued that the District Court improperly assumed that the federal courts must rely on international law to "divine not only the applicable primary violation of international law cognizable under the ATCA, but also the standard for aiding and abetting liability."[145] "As *Sosa* makes clear, a federal court must turn to international law to derive standards of primary liability under the ATCA. To derive a standard of accessorial liability, however, a federal court should consult the federal common law."[146]

Hall cited to other courts for having recognized that "'[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.'"[147] Ninth Circuit Judge Reinhardt agreed, stating that "third-party tort

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[142] *See id.* (referencing *In re* South African Apartheid Litig., 346 F. Supp. 2d at 549); *See* Georgene M. Vairo, *Human Rights Violations*, NAT'L L. J., Feb. 18, 2008, at 20 ("Katzmann agreed that the district court was correct to look to international law as the source of the cause of action, but disagreed with its conclusion.").

[143] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring in part) (citing *Flores* v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d. Cir. 2003)).

[144] *See id.* at 269 (citing Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d. Cir. 2003)).

[145] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 278 (2d Cir. 2007) (Hall, J., concurring in part).

[146] *See id.* (specifically advocating for the adoption of the following test: "For harm resulting to a third person from the tortuous conduct of another, one is subject to liability if he …(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.").

[147] *See id.* (citing Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995)).

liability should be resolved by applying general federal common law tort principles."[148] Hall also called attention to various international legal scholars such as Lassa Oppenheim, who have noted that "when international law and domestic law speak on the same doctrine, domestic courts should choose the latter."[149]

Interestingly, Judge Hall may have responded directly to Judge Sprizzo's line regarding the nightmarish "effect on international commerce"[150] when he explained that "[a]ll members of this panel understand that corporations must transact business in a less than perfect world."[151] "I share Judge Katzmann's understanding, however, that private parties and corporate actors are subject to liability under the ATCA."[152] In sum, Judge Hall posited that "[u]ntil the Supreme Court provides us more explicit guidance regarding accessorial liability than it has to date, I remain convinced that our federal common law embodies a clearly extant standard of aiding and abetting liability."[153]

4. An Overview of Judge Korman's Opinion In Dissent

Judge Korman first recognized that Judge Katzmann's conclusion – "that a defendant's liability for aiding-and-abetting a crime against humanity must be determined by reference to customary international law" – "reflects an emerging consensus on the appropriate standard for holding a private party liabile for aiding-and-abetting."[154] Secondly, he characterized the plaintiffs' claims as "reparations cases, seeking at least $400 billion in reparations, rather than tort cases for damages."[155] Thirdly, he added that the claims should be dismissed because the Supreme Court has instructed that "this is the very sort of case in which jurisdiction should not be exercised."[156] He specifically acknowledged "the vigorous objections

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[148] *See* Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005).

[149] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring in part) (citing OPPENHEIM, 1 INTERNATIONAL LAW 44–46 (8th ed. 1955)).

[150] *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2003).

[151] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 289 (2d Cir. 2007) (Hall, J., concurring in part).

[152] *Id.*

[153] *See id.* (referencing Doe I v. Unocal Corp., 395 F.3d 932, 967 (9th Cir. 2002)).

[154] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., dissenting).

[155] *Id.* at 295.

[156] *Id.*

of the United States, its allies, and most notably, the Republic of South Africa, which is justifiability proud of the ability of its legal system to adjudicate legitimate human rights claims."[157]

Korman addressed in depth how further adjudication would be an affront to the Republic of South Africa[158] and thus, discordant with the doctrine of international comity.[159] He argued that a federal court's decision to provide a remedy for an alleged tort under the ATCA does not relate to the issue of whether a cause of action exists.[160] "After *Sosa*, 'a more searching preliminary review of the merits' necessarily includes determining whether the plaintiffs have adequately pled a violation of the law of nations over which it is appropriate for the district court to exercise subject matter jurisdiction."[161]

Even though Judge Korman thought dismissal was appropriate, he still provided a lengthy discussion of aiding and abetting liability for private parties.[162] "Judge Katzmann, who agrees with me that the issue of the scope of liability is governed by international law, draws no distinction between a corporation and an individual." [163] Korman, however, argued an "artificial entity" cannot be held vicariously liable for facilitating the commission of a crime against humanity because "the relevant norms of international law at issue plainly do not recognize such liability."[164] Discussing how the statutes for the ICTY and ICTR only confer jurisdiction over "natural persons",[165] he noted that "during negotiations for the Rome Statute . . . , France proposed bringing corporations and other juridical

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[157] *Id.* at 292.

[158] *Id.* at 298–99.

[159] *Id.*

[160] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 309 (2d Cir. 2007) (Korman, J., dissenting) (distinguishing his conclusions from those of Judge Katzmann).

[161] *See id.* at 310 ("Since subject matter jurisdiction under the ATCA depends on whether the defendants have violated an international law norm *which federal courts are prepared to recognize, accept and make available to litigants*, the application of the criteria for making that determination is one that by definition goes to the issue of subject matter jurisdiction.").

[162] *See id.* at 319–26 (discussing the aiding and abetting liability of private parties and the liability of corporations).

[163] *See id.* at 321.

[164] *Id.*

[165] *Id.* at 323.

persons (though not States) within the jurisdiction of the ICC."[166] Indeed, the Rome Statute today only provides for jurisdiction over "natural persons."[167]

Korman also raised the issue of retroactivity.[168] He discussed the topic as follows:

> But the only sources of customary international law that suggest some movement toward the recognition of corporate liability post-date the collapse of the apartheid regime, and because the established norm during the apartheid era was that corporations were not responsible legally for violations of norms proscribing crimes against humanity, the complaints are subject to dismissal on this ground alone.[169]

Only paragraphs later, Judge Korman explained that he concurs with Judge Katzmann's articulation of the customary international law standard for aiding and abetting based on the Rome Statute.[170] "I do so because it provides a clear standard, adopted by a majority of the panel, for Judge Sprizzo to apply, in deciding whether to grant the plaintiffs' motion to filed amended complaints."[171]

C. Are Judges Katzmann and Hall Correct that Plaintiffs May Plead Aiding and Abetting Liability Under the ATS?

This paper argues that, yes, Judges Katzmann and Hall are correct for at least two reasons: case precedent and the continued development of international criminal law.

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[166] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 322–23 (2d Cir. 2007) (Korman, J., dissenting).

[167] *Id.* at 323.

[168] *Id.* at 325–26; *Cf. In re* Agent Orange Product Liability Litig. 373 F. Supp. 2d 7, 53–54 (E.D.N.Y. 2005) ("The liability of private actors, as aiders and abettors, for violations of international law was understood at the time the ATS was enacted. In a 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for 'committing, aiding, or abetting' violations of the laws of war. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).").

[169] *Id.* at 326.

[170] *See id.* at 333 ("Nevertheless, I concur in section II.B of his opinion that articulates the customary international law standard for aiding-and-abetting based on the Rome Statute.").

[171] *Id.*

I. Case Precedent Establishes a Trend of U.S. Courts Permitting Aiding and Abetting Liability Under § 1350

The Second Circuit's *Khulumani* decision aligns with an emerging trend, which is traceable back to the *Unocal* litigation.[172] In 1992, the Myanmar Oil and Gas Enterprise contracted with Unocal Corporation to extract natural gas reserves from the Andaman Sea and build a gas pipeline to transport oil and gas to Thailand.[173] The Myanmar government assigned its military to provide security and labor for the building of said pipeline.[174] In carrying out its job, the military employed brutal tactics, often forcing civilians to relocate without compensation. [175]

Burmese plaintiffs eventually sued the Unocal Corporation, along with the Unocal CEO and President, raising the issue of "whether Unocal willingly participated with the state in permitting the military's role."[176] In *Unocal 2002*, the Ninth Circuit agreed that "Unocal may be liable under the ATCA for aiding and abetting the Myanmar Military in subjecting Plaintiffs to forced labor."[177] The case was litigated for years, eventually settled, and the Ninth Circuit's opinion was withdrawn.[178] Nonetheless, the Ninth Circuit's opinion "has continued to be influential in the area of aiding and ability liability under the ATS."[179]

A few years later, the Southern District of New York followed *Unocal*'s lead. In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, the court – with Judge Denise Cote writing – held that the current and former residents of the Republic of Sudan (the plaintiffs) failed to establish aider and abettor liability against the Canadian

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[172] *See* Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005) (stating that the plaintiffs might be able to plead aiding and abetting liability under § 1350).

[173] *See, e.g.*, BINDA PREET SAHNI, TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY 329–37 (2006) (providing an overview of the *Unocal* judgments and litigation).

[174] *Id.* at 330.

[175] *Id.* at 330.

[176] *See id.* at 330–31 (describing the corporate structure of Unocal and the named parties).

[177] Doe I v. Unocal Corp., 395 F.3d 932, 948 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *vacated*, 403 F.3d 708 (9th Cir. 2005).

[178] *See, e.g.*, Gwynne Skinner, *supra* note 114, at 349–50.

[179] *Id.* at 349.

energy company.[180] The plaintiffs alleged that Talisman Energy collaborated with the Sudanese government in a policy of ethnically cleansing various civilian populations to facilitate oil exploration activities.[181] Judge Cote explained that "[t]he application of aiding and abetting liability is not novel."[182] She noted that in 2003, the Southern District had acknowledged the *Unocal* litigation, when it recognized a "'settled, core notion of aider and abettor liability in international law' that requires plaintiffs to show 'knowing practical assistance or encouragement which has substantial effect on the perpetration of a crime.'"[183]

In 2006, the Southern District also recognized aiding and abetting liability under the ATS in *Kiobel v. Royal Dutch Petroleum Co.*[184] In this case, a group of Nigerian plaintiffs sued various oil companies for carrying out extrajudicial killings, arbitrary detention, torture and crimes against humanity.[185] Judge Kimba Wood explained aiding and abetting liability in light of the Supreme Court's treatment of the ATS in *Sosa v. Alvarez-Machain.*[186] She said:

> It is a close question whether, following Sosa, private individuals can be held liable under the ATS for aiding and abetting violations of international law. However, prior to Sosa, courts in this Circuit consistently allowed ATS suits rooted in theories of secondary liability. See Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F.Supp.2d 289, 320-21 (S.D.N.Y.2003) ("U.S. courts have consistently permitted [ATS] suits to proceed based on theories of

[180] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 670 (S.D.N.Y. 2006) ("While issues of knowledge and intent are exquisitely fact intensive inquiries, and not typically appropriate for resolution on summary judgment, it is nonetheless incumbent on a plaintiff to point to evidence from which a reasonable juror could infer those states of mind. The plaintiffs have pointed to no such evidence, circumstantial or otherwise. Talisman is entitled to summary judgment on the claim that Talisman aided and abetted genocide.").

[181] *See id.* at 655 ("As described above, they contend that Talisman joined a conspiracy to commit a crime against humanity, specifically, a widespread and systematic attack on a civilian population to displace it forcibly.").

[182] *Id.* at 667.

[183] *Id.* at 666.

[184] Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 463–64 (S.D.N.Y. 2006).

[185] *Id.* at 468.

[186] *Id.* at 463–64.

> conspiracy and aiding and abetting."). The Court thus concludes that where a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well.[187]

In 2007, judges from the Eastern District of New York declared the plaintiffs in *Almog v. Arab Bank* could plead aiding and abetting liability under the ATS.[188] The plaintiffs alleged, inter alia, that Arab Bank "aided and abetted, was complicit in, intentionally facilitated, and participated in a joint venture to engage in acts of genocide in violation of the law of nations by providing financial and other practical assistance, encouragement or moral support to HAMAS, the [Palestinian Islamic Jihad], the [Al Aqsa Martyrs' Brigade], and the [Popular Front for the Liberation of Palestine]."[189] The court explained that "[i]n a variety of ATS cases, courts have concluded that international law provides for the imposition of liability on a party that does not directly perform the underlying act. There is nothing novel or unusual under international law about imposing such liability."[190] Moreover, "[w]here a cause of action for violation of an international norm is viable under the ATS, claims for aiding and abetting that violation are viable as well."[191]

Finally, the Second Circuit has not retreated from the *Khulumani* holding. In February 2008, Second Circuit Judges Miner, Sack, and Hall issued their opinion in *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*[192] Appealing from Judge Weinstein's dismissal of the case in the Eastern District of New York, the plaintiffs included Vietnamese civilians, or their progeny, who were exposed directly to herbicidal agents during the Vietnam War.[193] In the lower court, Judge Weinstein specifically addressed the topic of civil aiding and abetting liability.[194] He cited to eleven federal cases, which have "confronted the question of whether

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[187] *Id.*

[188] *See* Almog v. Arab Bank, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) (discussing the South African apartheid litigation and noting that the Executive Branch has not protested the *Arab Bank* lawsuit).

[189] *Id.* at 259–65.

[190] *Id.* at 286–87.

[191] *Id.* at 263–64.

[192] Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104 (2d Cir. 2008).

[193] *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7, 32 (E.D.N.Y. 2005).

[194] *Id.* at 52–59.

the ATS encompasses the liability of private actions, including private corporations"[195] and "consistently [have] answer[ed] the question in the affirmative."[196] After marching through the variety of circumstances in which "U.S. courts have repeatedly determined that the ATS encompasses aiding and abetting liability,"[197] Judge Weinstein concluded that "[t]here is simply no question that the ATS provides for aiding and abetting liability."[198]

In that light, the Second Circuit explained that it would not review the defendants' claims, which were that civil aiding and abetting liability may not be imposed on corporate entities and that prudential concerns should preclude adjudication.[199] It

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[195] *See* Curtis Bradley, Jack Goldsmith, & David Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 927 (2007) (analyzing the Supreme Court's 2004 decision against the backdrop of the post-Erie federal common law and stating that "[w]hile the concept of aiding and abetting liability is recognized as a general matter in international criminal tribunals, it is applied in those tribunals only to natural persons, not corporations.").

[196] *See In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d 7, 52–53 (E.D.N.Y. 2005) ("*See, Kadic v. Karadzic,* 70 F.3d [232,] 239 [(2d Cir. 1995)] (the reach of international law is not limited to [ ]state actors); *Presbyterian Church of Sudan v. Talisman Energy, Inc.,* 244 F. Supp. 2d [289,] 321 [(S.D.N.Y. 2003)] (holding that "ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting"); *Abdullahi v. Pfizer, Inc.*, 77 Fed.Appx. 48 (2d Cir. 2003); *Wiwa v. Royal Dutch Petroleum Co.,* No. 96 Civ. 8386, 2002 WL 319887 (S.D.N.Y. Feb.28, 2002) (finding that private corporations could be held liable for "joint action" with state actors); *Bodner v. Banque Paribas,* 114 F. Supp. 2d 117, 127-28 (E.D.N.Y. 2000) (holding that subject matter jurisdiction existed under the ATCA, where plaintiffs alleged a French bank had been complicit with the Nazi regime); *Iwanowa [v. Ford Motor Co.],* 67 F. Supp. 2d [424,] 445 [(D.N.J. 1999)] ("No logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."); *see also Doe v. Unocal,* [395 F.3d 932, 975-78] (9th Cir. 2002)[,] *vacated* [*by*] 395 F.3d 978 [(9th Cir. 2003)]; *Burnett v. Al Bar[aka] Investment & Development Corp.,* 292 F. Supp. 2d 9 (D.D.C. 2003); *Mehinovic v. Vuckovic,* 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) ("United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law." (citing cases)); *Eastman Kodak Co. v. Kavlin,* 978 F. Supp. 1078, 1090–95 (S.D. Fla. 1997) (holding that subject matter jurisdiction existed in an ATCA action against a Bolivian corporation); *Carmichael v. United Technologies Corp.,* 835 F.2d 109, 113–114 (5th Cir. [1988]) (assuming without deciding that ATCA confers jurisdiction over private parties who aid, abet or conspire in human rights violations) . . . .").

[197] *See id.* at 53 (mentioning various corporate ATS cases such as Presbyterian Church of the Sudan, 244 F. Supp. 2d at 320–24, Burnett v. Al Baraka Investment, 274 F. Supp. 2d 86, 100 (D.D.C. 2003), Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004), and Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000), along with some non-corporate ATS cases like Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1355–1356 (N.D.Ga. 2002) and Hilao v. Estate of Marcos, 103 F.3d 767, 776 (9th Cir. 1996).

[198] *Id.*

[199] *See id.* at 123 ("Defendants have argued that 'civil aiding-and-abetting liability' may not be imposed on corporate entities for violations of the law of war and that, in any event, prudential considerations should preclude adjudication of Plaintiffs' claims. Because Plaintiffs' claims fail to assert a violation of

abstained from review thereof "[b]ecause Plaintiffs' claims fail[ed] to assert a violation of international law norms that are universally accepted and as specific as the paradigmatic norms identified in *Sosa*. . . . "[200] However, the Second Circuit added the following in a footnote:

> After the filing of briefs and oral argument in this appeal, this Court addressed in a different case whether a district court had subject matter jurisdiction over ATS claims alleging that domestic and foreign corporations aided and abetted the government of apartheid South Africa in committing various violations of customary international law. See Khulumani v. Barclay Nat'l Bank, 504 F.3d 254, 260 (2d Cir.2007) (per curiam) (holding that "in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS]").[201]

In other words, when offered an opportunity to declare *Khulumani* an aberration or otherwise alter the Second Circuit's position, the Second Circuit did not.

II. There Is No Retreat from International Law's Acceptance of Aiding and Abetting Liability

This paper also argues Judges Katzmann and Hall are correct because there is no retreat from international law's acceptance of aiding and abetting liability.[202] Since World War II, "[aiding and abetting liability] has been repeatedly recognized in numerous international treaties, most notably the Rome Statute of the International Criminal Court, and in the statutes creating the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for

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international law norms that are universally accepted and as specific as the paradigmatic norms identified in *Sosa,* thereby resulting in a failure to establish a cognizable cause of action that gives rise to jurisdiction under the ATS, we need not address these secondary arguments.").

[200] *Id.*

[201] Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co., 517 F.3d 104, 123 n.5 (2d Cir. 2008).

[202] *See* MARK DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 23 (2007) ("History teaches that there is something novel in pursuing justice – instead of vengeance – in the aftermath of atrocity. This is a new endeavor. It is bold, fresh, exciting, at times anxious, and certainly lacking in experience. International criminal lawyers have stepped into this experiential void.").

Rwanda ("ICTR")."[203] These statutes are cited routinely by U.S. federal judges, when they affirm that ATS plaintiffs may plead aiding and abetting liability against corporate defendants.[204] The statutes for the Iraqi Special Tribunal[205] and the Special Court of Sierra Leone[206] also could be cited.

For sure, none of these statutes include corporations as potential criminal defendants.[207] Additionally, the statutes do not codify international *civil* law on aiding and abetting liability.[208] On the latter point, the *Unocal* majority explained that "[h]uman rights law has largely been developed in the context of criminal prosecutions . . . what is a crime in one jurisdiction is often a tort in another jurisdiction . . . and the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law . . . ."[209] With regards to the corporate defendant, the aforementioned omissions are not fatal because "it is not such an imaginative leap to conceive of a corporation as the subject of international law."[210] It is notable that since the Nuremberg trials, no subsequent international tribunal has proceeded without the possibility of

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[203] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring in part).

[204] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633, 666 (S.D.N.Y. 2006) ("The ICTY, ICTR and ICC each impose liability on individual defendants for aiding and abetting the commission of a crime. ICTY Statute at 7(1); ICTR at 6(1); Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, art. 25(3), U.N. Doc. A/ CONF.183/9 (1998) ("Rome Statute").").

[205] Article 15(b)(3) provides a person can be held criminally responsible for aiding and abetting the commission of a crime.

[206] Article 6 for the Statute for the Special Court of Sierra Leona allows for any "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" to be held liable.

[207] *See* Celia Wells & Juanita Elias, *Corporate Complicity in Rights Violations*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 154 (ed. Philip Alston 2005) (citing to Article 25(1) of the Rome Statutes, which states that "The Court shall have jurisdiction over natural persons pursuant to this statute.").

[208] *See* Frank C. Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability Under the Act*, 25 QUINNIPIAC L. REV. 751, 787–88 (2007) (mentioning the *Unocal* majority's treatment of this issue).

[209] *See id.* (mentioning the *Unocal* majority's treatment of this issue) (citing *Unocal*, 395 F.3d at 949).

[210] *See* Celia Wells & Juanita Elias, *supra* note 207, at 155 ("As people become more accustomed to conceiving of collective entities as wrongdoers, the conceptual gulf may become much less wide.").

convicting individual wrongdoers for aiding and abetting crimes.[211]

Under these statutes, international tribunals time and again have held people accountable for aiding and abetting liability.[212] In *Prosecutor v. Krstic*, the ICTY convicted Krstic for his role as the General-Major of the Bosnian Serb Army, which systematically murdered approximately 40,000 Bosnian Muslims.[213] Among other crimes, the ICTY convicted him of aiding and abetting genocide.[214] The ICTY's Appeals Chamber also provided an extensive discussion of complicity in *The Prosecutor v. Tadic.*[215] In 1999, the ICTR held that "'aiding and abetting alone is sufficient to render the accused criminally liable. . . . aiding and abetting include all acts of assistance in either physical form or in the form of moral support . . . .'"[216]

It is notable that, while no international tribunal has prosecuted a corporation, several "industrialists," or businessmen, were prosecuted as individuals for aiding and abetting violations of modern international law at the Nuremberg trials.[217] People were prosecuted as principals or as accessories for crimes against the peace,

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[211] See Gwynne Skinner, *supra* note 114, at 324 ("Attempts to hold corporations liable for human rights violations are the most recent examples of the degree to which the Nuremberg trials have significantly affected human rights litigation in the United States under the Alien Tort Statute. It is also the most controversial because corporations were not prosecuted at Nuremberg, and there remains the unresolved question about whether corporations are, or should be, bound by international human rights norms.").

[212] For a brief discussion on the evolution of aiding and abetting liability in international law, see Richard Herz, *Text of Remarks: Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZAGA J. INT'L L. 76 (2006–2007) ("In international human rights law, this standard comes directly from Nuremberg. . . . These principles of aiding and abetting liability were directly incorporated into the jurisprudence of the International Criminal Tribunals for Rwanda and for the former Yugoslavia."). To date, no international tribunal has held an organization or corporation accountable for aiding and abetting liability.

[213] *See* Mark Drumbl, *ICTY Authenticates Genocide at Srebrenica and Convicts For Aiding and Abetting*, 5 MELBOURNE J. INT'L LAW 434, 437 (2004) (citing to Krstic Appeals Chamber, Case No. IT–38–33–A (19 April 2004) [7]).

[214] *See id.* (providing a summary of Prosecutor v. Krstic (Appeals Chamber Judgment), Case No. IT–98–33–A (19 April 2004)).

[215] INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 43 (2nd ed. 2000) (citing paragraphs 178–237 from The Prosecutor v. Tadic, ICTY-94-1-AR72 (15 July 1999)).

[216] *Id.* (citing at paragraph 43 from The Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3-T (6 Dec. 1999)).

[217] *See* Daniel Diskin, *supra* note 7, at 834–37 ("Dating back to the aftermath of World War II, corporations that aid and abet violations of modern international law have been found criminally culpable.").

war crimes, and crimes against humanity.[218] For instance, "[t]he United States prosecuted Friedrich Flick, a German owner of steel plants, for using slave labor. Flick was convicted because the Tribunal concluded that he was knowledgeable of, and approved of, his deputy's use of Russian slave labor to increase quota outputs."[219]

Furthermore, various international conventions have incorporated secondary liability. Article III of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide includes "complicity in genocide" as a punishable act.[220] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment references an "act by any person which constitutes complicity or participation in torture."[221] While holding corporations liable for aiding and abetting liability may remain controversial for social or economic reasons, many international scholars would agree that, for all the aforementioned reasons, aiding and abetting liability is well-established international law.

D. If the Supreme Court Were to Review the *Khulumani* Decision

The *Khulumani* defendants filed a petition for writ of certiorari.[222] They sought review of whether a private defendant may be sued under the ATS for allegedly aiding and abetting a violation of international law and, if so, what legal standard governs such claims.[223] Amicus curiae briefs have been filed. The National Foreign Trade Council has argued that "[the Second Circuit's] decision converts the foreign policies of the U.S. government into an afterthought, exposing companies to years of litigation and adverse publicity for engaging in the very trade upon which

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[218] *See id.* at 824–25 ("Control Council Law No. 10, implementing the 1946 agreement, included a provision expressly providing for aiding and abetting liability. The statute provides: '[A] person is deemed to have committed a crime if he was (a) a principal; (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission.'").

[219] *Id.* at 825 (referencing United States of America v. Friedrich Flick in 1950 before the Nuremberg Military Tribunals under Control Council Law No.10).

[220] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, Art. III, 78 U.N.T.S. 277, 280.

[221] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR (No 51), at 197, U.N. Doc. A/39/51 (1984), Arts. 1, 4 .

[222] Petition for a Writ of Certiorari, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, 2008 WL 140514 (Jan. 10, 2008).

[223] *Id.*

the Executive's policy of commercial engagement relies."[224] The United States in its amicus brief noted that "[i]n *Sosa*, the Court recognized the need for 'caution' and 'vigilant doorkeeping' in ensuring that the self-evident potential for ATS suits to interfere with foreign policy should not become a reality."[225]

"As *Unocal* showed, it's perilous to predict the timing of high noon. But sooner or later the question of aiding and abetting will reach the Supreme Court."[226] In that light, this paper examines how the Justices might approach the question of whether a plaintiff may plead aiding and abetting against a corporate defendant under the ATS.

I. Sosa v. Alvarez-Machain as the Starting Point

1. Justice Souter, Writing for the Court

Sosa v. Alvarez-Machain surely would provide the foundation upon which any Justice would analyze an aiding and abetting claim. In *Sosa*, Justice Souter delivered the opinion of the Court. First, after surveying the parties' analyses of § 1350's history, he explained that "although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law."[227] To the Government's dismay, Souter continued, stating that "[t]he jurisdiction grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."[228]

Justice Souter then presented several factors, which "argue for judicial caution" when federal courts consider "the kinds of individual claims that might implement the jurisdiction conferred by" the ATS.[229] To that end, it was somewhat unclear which conditions are mandatory, highly recommended, or optional factors for

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[224] Brief of the National Foreign Trade Council, USA Engage, U.S. Council for International Business, Organization for International Investment, and National Association of Manufacturers for Petitioners, American Isuzu Motors v. Ntsebeza, No. 07-919 (Feb. 11, 2008), 2008 WL 437020.

[225] Brief of the United States as Amicus Curiae in Support of Petitioners, American Isuzu Motors v. Ntsebeza, No. 07-919 (Feb. 11, 2008), 2008 WL 408389, *22.

[226] Michael Goldhaber, *The Death of Alien Tort*, CORPORATE LAWYER, Oct. 2006, at 117.

[227] Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

[228] *Id.*

[229] *Id.*

federal courts to consider. For instance, Souter announced that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[230] He later clarified that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[231] Ultimately, the majority decided that "[w]hatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require."[232]

2. Justice Scalia, along with former Chief Justice Rehnquist and Justice Thomas, Concur in Part and in Judgment

Since this holding, commentators have argued that there is a "tension, if not outright contradiction, in the Court's construction of the ATS as both purely jurisdictional and an authorization for creating causes of action."[233] Some Justices who concurred in *Sosa* addressed this obvious critique. For instance, Justice Scalia, who concurred in part and in judgment with then Chief Justice Rehnquist and Justice Thomas, illuminated this tension by focusing on the proper role of the federal courts.

Scalia conceded that the ATS acts as a jurisdictional grant.[234] However, he argued that "[b]y framing the issue as one of 'discretion,' the Court skips over the antecedent question of authority."[235] "The general rule . . . is that '[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.'"[236] The *Sosa* holding, thus, "turn[ed] our jurisprudence regarding federal common law on its head."[237]

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[230] *Id.* at 724–25.

[231] *Id.* at 732.

[232] *Id.* at 737.

[233] Curtis Bradley, Jack Goldsmith, & David Moore, *supra* note 195, at 896.

[234] Sosa v. Alvarez-Machain, 542 U.S. 692, 744 (2004).

[235] *Id.*

[236] *See id.* at 741–42 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981)).

[237] *Id.* at 744.

Furthermore, Scalia's concurrence framed Souter's judicial constraint factors as "reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law."[238] In other words, principles like case-by-case deference to the Executive Branch, exhaustion, and Congress' unquestioned authority to make federal common law appeared to mandate perhaps not individually, but at the very least collectively, that lower federal courts must not be empowered to take on "this illegitimate lawmaking endeavor."[239]

3. Justice Breyer, along with Justice Ginsburg, Concur in Part and in Judgment

Justice Breyer wrote a concurrence despite joining Justice Ginsburg's concurrence.[240] Referring to Justice Souter's conditions cautioning judicial constraint, he stated that "all of these conditions are important."[241] Breyer then addressed international comity, suggesting that federal courts must ask—Do countries agree that there is universal jurisdiction for this substantive claim?—before finding that a plaintiff may plead the claim under the ATS.[242] For Justice Breyer, the existence or "principle of universal civil jurisdiction" would act as "a safeguard of international comity."[243] Moreover, Breyer "reasoned that 'universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well' because many nations allow victims to attach claims for civil compensation to criminal prosecutions. As a result, universal civil jurisdiction 'would be no more threatening' than universal criminal jurisdiction."[244]

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[238] *Id.* at 747.

[239] *See id.* at 750 (referring to Justice Souter's opinion).

[240] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 751–60 (2004) (focusing not on the case's ATS aspect, but instead on the "last significant act or omission rule," arguing that "I would apply that rule here to hold that Alvarez's tort claim for false arrest under the FTCA is barred under the foreign-country exception.").

[241] *Id.* at 761.

[242] *See id.* at 761–63 ("Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior.").

[243] Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 148 (2006).

[244] *Id.*

II. Famous Footnote 21

Any Supreme Court Justice would have to reconcile their treatment of the issues in *American Isuzu Motors Inc., v. Ntsebeza* with *Sosa*'s famous footnote 21. In Justice Souter's opinion, he stated that "the determination [of] whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[245] He then dropped the following footnote:

> This requirement of clear definition is not meant to be the only principle limiting the available of relief in federal courts for violations of customary international law, though it disposes of this action. . . . Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. See *In re South African Apartheid Litigation*. . . . The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." . . . The United States has agreed. . . . In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy . . . .[246]

This footnote suggested that a court, in evaluating international comity and other prudential concerns, should consider strongly the official positions of the relevant governments. Souter, however, did not discuss whether courts should examine, for instance, the extent to which the South African government's official position

[245] Sosa v. Alvarez-Machain, 542 U.S. 692, 732–33 (2004).

[246] *Id.* at 733 n.21.

reflects the opinions of South Africans. As mentioned previously, Desmond Tutu, the TRC's chair, approved of the apartheid litigation.[247] Moreover, "[t]he [*Khulumani*] claims have been supported by TRC commissioners" and TRC documentation has been used to establish "the role of business during apartheid to substantiate the claims."[248]

Tutu perhaps recognizes that, while the "TRC had recommended a total payment of about R120,000 per victim (spread over six years) and the provision of a range of health, educational, and other services. . . . The prospect for further financial payments to survivors by [the South African] government seems unlikely in the context of the government's conservative fiscal policies."[249] In other words, an ATS judgment or settlement is the victims' best chance, at least in the short term, of recovering any damages or reparations after years of horrific treatment. In sum, while Justice Souter engaged the topics of international comity and case-specific deference, his discussion failed to illuminate the topics' underlying issues.

1. Sosa's Executive Deference Doctrine as Understood by Second Circuit Courts

Footnote 21, since being set forth, has served as a guide for lower courts. In *Presbyterian Church of Sudan v. Talisman Energy*, the Southern District of New York referred to footnote 21 when resolving the defendant's argument that the case should be dismissed "to avoid undue interference with executive and legislative discretion in managing foreign policy towards Sudan and Canada."[250] The Southern District explained that dismissal was inappropriate because Talisman was "at pains to identify United States foreign policies towards Sudan" with which the action interfered.[251] It felt Talisman was merely speculating about the effects that

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[247] Samson Mulugeta, *supra* note 79, at A15; *See Apartheid Reparations the Govt's Problem: Tutu*, S. AFR. PRESS ASS'N, June 28, 2002, 2002 WLNR 3378078 ("Compensating apartheid victims was the government's problem -- not that of the Truth of Reconciliation Commission, former TRC chairman Archbishop Desmond Tutu said on Friday.").

[248] *See* Audrey R. Chapman & Hugo Van Der Merwe, *Conclusion*, *in* TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 286 (2008) (discussing how the South African government largely has failed to implement the TRC recommendations on reparations).

[249] *Id.*

[250] Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 WL 2082846, *8 (S.D.N.Y. Aug. 30, 2005).

[251] *See id.* ("Talisman is therefore at pains to identify United States foreign policies towards Sudan with which this action interferes, other than to speculate more generally about its effects on efforts to promote peace in Sudan.").

the litigation would have on America's ability to promote peace in Sudan.[252] Not speculative, however, were the policy complications presented by the apartheid litigation.[253] Quoting the government of South Africa's declaration included in *Sosa*'s footnote 21, the Southern District noted that Talisman had not contended "that the United States has participated in, supported, or approved of, a political decision to address serious human rights violations in Sudan with an approach mirroring the South African Truth and Reconciliation Commission, or any other form of comprehensive amnesty or absolution."[254]

In *Almog v. Arab Bank*, the Eastern District of New York also referenced footnote 21, stating that "[a]nother possible limitation that we need not apply here is a policy of case-specific deference to the political branches."[255] It mentioned *In re South African Apartheid Litigation* and *Talisman*, noting the latter as an example of a court "upholding a claim even where the United States submitted a Statement of Interest expressing concerns regarding the impact of the litigation on U.S. foreign affairs and on Canada's foreign policies towards Sudan."[256] With regards to the former, the Eastern District noted that "the collateral consequences identified in *South African Apartheid Litig.* are not present here, nor have any adverse collateral consequences been identified by any governmental source in this case."[257]

Interestingly, the Second Circuit Judges Cabranes and Kearse, with Judge Straub dissenting, employed footnote 21 in *Whiteman v. Dorotheum GMBH & Co. KG* as they dismissed the case as nonjusticiable under the political question doctrine.[258] The Republic of Austria, the American Council for Equal Compensation of Nazi Victims from Austria, and the United States, as amici curiae, had requested dismissal because this case was blocking the implementation of a fund to

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[252] *See id.* ("This action, evidently, did not hinder the conclusion of the Peace Agreement.").

[253] *See* Mini Kaur, *supra* note 103, at 177 ("Although Apartheid Litigation and Talisman were issued by the same district court and addressed similar alleged offenses, the court reached opposite decisions on the issue of ATCA jurisdiction . . . .).

[254] *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 WL 2082846, *8 (S.D.N.Y. Aug. 30, 2005) ("This action, evidently, did not hinder the conclusion of the Peace Agreement.").

[255] *See* Almog v. Arab Bank, 471 F. Supp. 2d 257, 285 (E.D.N.Y. 2007) (noting that the Executive Branch, specifically the Department of Justice, did not protest the *Arab Bank* lawsuit).

[256] *Id.*

[257] *Id.* at 288.

[258] Whiteman v. Dorotheum GMBH & Co. KG, 431 F.3d 57 (2005).

compensate Austrian Jewish victims of the Nazi regimes for Holocaust-related property deprivations.[259] The Second Circuit held as follows:

> [W]e hold that deference to a statement of foreign policy interests of the United States urging dismissal of claims against a foreign sovereign is appropriate where, as here, (1) the Executive Branch has exercised its authority to enter into executive agreements respecting the resolution of those claims; (2) the United States Government (a) has established through an executive agreement an alternative international forum for considering the claims in question, and (b) has indicated that, as a matter of foreign policy, the alterative forum is superior to litigation; and (3) the United States foreign policy advanced by the executive agreement is substantially undermined by the continuing pendency of the claims.[260]

The dissenting Judge argued that *Sosa*'s executive deference doctrine "is distinct from the [political question] doctrine . . . . the majority's conflation of the two sets a dangerous precedent." [261] He defined the executive deference doctrine as "broad in its scope-potentially applying wherever the executive files a statement of interest counseling dismissal-but limited in its effect because it preserves judicial discretion and contemplates that other factors might override the Executive's interest." He continued, arguing that "[b]y joining the two doctrines here as a threshold basis for dismissing this case, the majority creates the potential for a strikingly broad doctrine mandating dismissal whenever the Executive argues that an issue presented to the court threatens to intrude on its foreign policy interests."[262] Judge Straub recommended "remand for a determination of whether circumstances permit and warrant discretionary deference to the executive foreign policy interests . . . . "[263]

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[259] *Id.* at 58–59.

[260] *Id.* at 59–60.

[261] *Id.* at 83.

[262] *Id.*

[263] *Id.* at 83 n.28.

III. American Isuzu Motors Inc. v. Ntsebeza*, Aiding and Abetting Liability and the Executive Deference Doctrine*

The South African plaintiffs have filed an Opposition to Petition for Writ of Certiorari in *American Isuzu Motors, Inc. v. Ntsebeza*.[264] They stated three reasons for the writ's denial. First, the issue of case specific deference is not ripe for review.[265] Secondly, the issue of aiding and abetting liability should not be decided on this record.[266] In particular, they noted that there is no circuit split on this narrow issue, and the Second Circuit's decision did not conflict with the Supreme Court's jurisprudence.[267] Finally, they argued that "[b]y declining to review these cases now, this Court will permit that salutary process to unfold, as the lower courts calibrate the appropriate scope of aiding and abetting liability in light of all of the considerations and concerns discussed in *Sosa*, 542 U.S. at 732–33, and the purposes the *Sosa* Court found the ATS to embody."[268]

If review is granted despite the plaintiffs' Opposition, the Supreme Court, in reconciling *Sosa* with the instant claims, should hold that the plaintiffs may plead aiding and abetting liability under the ATS. It should do so for at least two reasons: First, 'aiding and abetting liability' fulfills Sosa's requirements. *Sosa* requires that the international law norm to be pled is universally "accepted by the civilized world and defined with a specificity" comparable to the "historical paradigms familiar when [the ATS] was enacted."[269] As previously described in Section C, 2 of this paper, "the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like."[270]

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[264] Opposition to Petition for Writ of Certiorari, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, (Mar. 27, 2008), 2008 WL 877891.

[265] *Id.* at *11–17.

[266] *Id.* at *19–31.

[267] *Id.* at *27–31.

[268] *See id.* at *31 (citing to page 733, which includes *Sosa*'s famous footnote 21 with the Supreme Court's explicit reference to the *South African Apartheid Litigation*).

[269] Sosa v. Alvarez-Machain, 542 U.S. 692, 725, 732 (2004).

[270] Presbyterian Church of Sudan v. Talisman Energy Inc., 244 F. Supp. 2d 289, 322 (S.D.N.Y. 2003).

Secondly, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* is inapplicable.[271] In 1994, the *Central Bank* Court "reasoned that Congress's authorization of aiding and abetting liability in the criminal context did not suggest a general acceptance of that type of liability in the civil context."[272] *Central Bank*, however, is distinguishable from the instant case. Whereas *Central Bank* involved the 1934 Securities Act, *American Isuzu* necessarily involves the ATS and customary international law. Moreover, while Congress deliberately chose not to permit aiding and abetting liability in security cases,[273] "[t]here is no evidence of a similar intent in the context of the ATS."[274] Time and again, despite *Central Bank*, several American courts have found that plaintiffs may plead aiding and abetting under the ATS against corporate defendants.

Furthermore, if the Supreme Court grants review of *American Isuzu*, it should dismiss the case for prudential reasons. To be clear, the case should not be dismissed to protect "important interests of the American business community."[275] While it certainly is unfortunate that ATS litigation can be costly and damaging to a company's reputation, all companies, American or otherwise, "must consider several areas of international compliance" before transacting business abroad.[276] If American companies fail to complete adequate and routine due diligence, ATS litigation is but one of many consequences – liability under the Foreign Corrupt Practices Act or trade sanctions – that might result.[277]

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[271] *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994) (involving the 1934 Securities Act and a futile attempt to imply that aiding and abetting liability in the context of a complex regulatory scheme); *cf.* Petition for a Writ of Certiorari, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, 2008 WL 140514, * 29 (Jan. 10, 2008) ("Even as a matter of domestic law, where aiding and abetting is 'an ancient criminal law doctrine,' its application in civil law 'has been at best uncertain' and 'there is no general presumption that the plaintiff may also sue aiders and abettors.").

[272] *See* Curtis Bradley, Jack Goldsmith, & David Moore, *supra* note 195, at 926–97 (discussing future debates related to customary international law as federal common law).

[273] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184 (1994).

[274] *See* Opposition to Petition for Writ of Certiorari, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, (Mar. 27, 2008), 2008 WL 877891, *23 (noting that "the drafters of the ATS expected aiding and abetting liability to attach, as the early history of the statute confirms.").

[275] Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919, (Feb. 11, 2008), 2008 WL 437022, *14.

[276] Martin Weinstein, *The World of International Compliance: What Transactional Lawyers Need to Know to Perform Ethically and Responsibly*, 29 Hous. J. Int'l L. 311, 326 (2007).

[277] *Id.*

On the contrary, dismissal is appropriate because "[t]he South African people have fought and sacrificed beyond measure – through the ravages of colonialism and apartheid – for the freedom to chart their own future."[278] At apartheid's end, the nation, employing democratic values, chose to engage in a process of restorative justice. While much can be learned from the TRC's shortcomings, any country's "road to reconciliation" will be bumpy and most definitely, long.[279] While federal courts should not blindly defer to dismissal pleas made by foreign sovereigns, they should not ignore how ATS litigation might undermine a country's diligent, albeit imperfect, attempt to remedy a horrific past.

E. Conclusion

It is easy to sympathize with the *Khulumani* plaintiffs, many of whom have been victimized twice—first by the corporate and individual abusers and secondly, by the South African government, which has yet to pay reparations. Moreover, it is understandable that one would want human rights abusers, corporations or otherwise, held accountable for violating international law. This sympathy and desire for accountability, unfortunately, impact people's ability to admit that the *Khulumani* lawsuit, although well-intentioned and noble, is ultimately misguided. For sure, ATS litigation should remain a tool for human rights victims, but not *at all costs*. South Africa's plan of restorative justice cannot be accomplished overnight; it will take decades, if not centuries, for white and black South Africans to unite fully as one country. While in its infancy, the reconciliation plan should not be undermined.

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[278] Brief Amicus Curiae of Hayward D. Fisk, William Graham, Ernest T. Patrikis, Clifford B. Storms and Atlantic Legal Foundation in Support of Petitioners, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919 (Feb. 11, 2008), 2008 WL 437022, *14.

[279] *See* Audrey R. Chapman & Hugo Van Der Merwe, *supra* note 248, at 286 ("The challenge of reconciliation in South Africa is clearly not reducible to a process of reconciling victim and their perpetrators. Reconciliation in a context of hundreds of years of exploitation, dehumanization, and continued inequality and deprivation is a serious challenge that can not be magically dissolved through public rituals . . . .").

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