Note

Holding Corporations Liable in the United States for Aiding and Abetting Human Rights Violations Abroad: A Statutory Solution

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Introduction

Imagine that a natural gas pipeline is being constructed in a developing country in Southeast Asia. The country's military-dominated government has contracted with a foreign multinational corporation to construct the pipeline in order to attract foreign investment and fund the project. The pipeline is hailed as an opportunity to bring much-needed revenue into the struggling economy. However, along with this hope comes a darker reality. The security forces for the project, provided by the country's military regime, are subjecting local villagers to forced labor, rape, torture, and extrajudicial killings. The government turns a blind eye to these human rights violations, not wanting to disrupt the progress and promise of the pipeline. The corporation working with the government on the project may or may not know about the atrocities being committed, but it does nothing. Without any local redress, some of the villagers are lucky enough to escape

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the country and gain entry into the United States. What are their options to obtain legal redress for the wrongs committed against them?[1]

Unfortunately, in a number of circumstances, the answer to the above question is: none. The villagers may be unable to vindicate their rights or obtain any compensation for the atrocities they have suffered. It is possible that the victims will be unable to obtain any adequate remedy in the local courts, depending on the state of the judicial system and the level of corruption in the victims' countries of origin.[2] The victims of such human rights violations will also be unable to bring suit against the foreign government involved because the government will likely avail itself of foreign sovereign immunity.[3]

Therefore, if these victims want to vindicate their rights, they will be forced to bring suit against the corporations complicit in these violations under the Alien Tort Statute ("ATS").[4] In order to find subject-matter jurisdiction in a case brought under the ATS, three requirements must be met: (1) the plaintiff must be an alien, (2) the claim must be a tort, and (3) the tort must be in violation of the "law of nations."[5] Once a court has found subject-matter jurisdiction under

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1 This scenario is largely based upon the facts of *Doe I v. Unocal Corp.*, 395 F.3d 932, 937–42 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003). *See infra* Part III.

2 *See, e.g.*, CHITTHARANJAN FELIX AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 182 (2d ed. 2004); Paula Rivka Schochet, *A New Role for an Old Rule: Local Remedies and Expanding Human Rights Jurisdiction Under the Torture Victim Protection Act*, 19 COLUM. HUM. RTS. L. REV. 223, 230 (1987). Whether the victims of human rights abuses have a duty to attempt to exhaust any possible local remedies before bringing suit in the United States is a prudential consideration for the U.S. court to determine. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 824 (9th Cir. 2008).

3 The victims will most likely be foreclosed from bringing suit against the foreign government due to a lack of subject-matter jurisdiction in the federal courts under the relevant provisions of the Foreign Sovereign Immunities Act ("FSIA"). *See* 28 U.S.C. §§ 1330, 1604–1607 (2006); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 431 (1989). In *Amerada Hess*, the plaintiffs brought suit against Argentina under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2006), but the Supreme Court held that the FSIA was the sole basis for obtaining jurisdiction over a foreign nation in U.S. federal courts. *See Amerada Hess*, 488 U.S. at 434. Although there are exceptions to foreign sovereign immunity in certain circumstances, victims of human rights abuses centered in their state of origin would not satisfy any of these exceptions, and the government could avail itself of foreign sovereign immunity. *Id.* at 439–43.

4 28 U.S.C. § 1350. The ATS is also commonly referred to as the Alien Tort Claims Act ("ATCA"). *See, e.g.*, *Unocal*, 395 F.3d at 944. For the purposes of this Note, § 1350 is uniformly referred to as the ATS.

5 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980); Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542, 548 (D.D.C. 1981), *aff'd sub nom.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). The full text of the ATS reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The phrase "law of

the ATS, the court can infer a cause of action for certain violations of the law of nations.[6]

This presents problems for plaintiffs bringing suit against a corporation, because usually only state actors can violate the law of nations, with some exceptions for certain very serious violations such as genocide and war crimes.[7] Normally, however, a plaintiff must prove a nexus between the defendant corporation and the foreign government to establish a violation of the law of nations and grant the court subject-matter jurisdiction.[8] Under the current legal regime, there is no uniform standard by which to judge whether there is sufficient state action to constitute a violation of the law of nations and grant subject-matter jurisdiction under the ATS to hold a private corporation liable.[9]

Under the current regime, victims of human rights violations abroad have no assurance that the abuses they have suffered will be redressed. As a world leader in the protection of human rights, the United States should ensure that victims of human rights abuses can gain redress. Furthermore, corporations are currently unable to accurately assess the risks of participating in projects in conjunction with governments abroad because of the uncertainty inherent in the resolution of lawsuits under the ATS. To remedy these problems, Congress should enact a statute that creates a cause of action available to victims of human rights abuses abroad that would allow the imposition of

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nations" as used in the ATS is synonymous with the phrase "customary international law," which refers to a body of international law distinct from international treaty law, created by general state practice out of a sense of legal obligation. *See Tel-Oren*, 726 F.2d at 778 n.2 (Edwards, J., concurring); THOMAS M. FRANCK ET. AL., FOREIGN RELATIONS AND NATIONAL SECURITY LAW 117 (3d ed. 2008).

6 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).

7 *See* Kadic v. Karadžić, 70 F.3d 232, 241–44 (2d Cir. 1995) (holding that a private actor could violate the law of nations and be held liable for acts of genocide and war crimes, but that state action was required for acts of torture and summary execution to violate the law of nations). Aside from genocide and war crimes, private actors can also violate the law of nations and be held liable for acts of slavery and piracy. *See id.* at 239.

8 *See Unocal*, 395 F.3d at 945.

9 *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007). There, a panel of the Second Circuit vacated the dismissal below and found subject-matter jurisdiction under the ATS, but the judges used different sources of law to determine the standards of complicity liability. *Id.* One member in the majority looked to the international standards of complicity liability in order to imply a cause of action and find that a corporation could be held liable for a violation of the law of nations. *Id.* at 270 (Katzmann, J., concurring). The other member in the majority came to the same conclusion, but did so by looking to the federal common law standards of complicity liability. *Id.* at 284 (Hall, J., concurring). For additional discussion of these judges' opinions, see *infra* Part III.

liability against corporations for human rights violations committed by governments abroad.

Part I of this Note discusses the law of nations, including the history of the ATS and the reasons for its enactment. Part II examines the emergence of the ATS as a tool to enforce human rights violations and then considers the statute's limitations. Part III identifies and explores the problems with holding corporations accountable for human rights violations under the current legal regime of the ATS. Finally, Part IV proposes a legislative solution to the current problem and identifies possible counterarguments to this solution.

I. The Law of Nations and the Enactment of the ATS

A. The Law of Nations

The law of nations is a body of international law created by the general and consistent practice of states borne from a sense of legal obligation.[10] Thus, a norm of the law of nations is created when almost all states engage in a uniform practice because they feel they are legally obligated to do so, not for reasons of courtesy or diplomacy.[11] Because the law of nations is created by the practice of states, it gradually evolves over time to reflect the changing international environment and norms.[12] For example, the boundary of a nation's territorial sea gradually expanded from three miles to twelve miles from the nation's coastline not by treaty, but because nations began doing so after World War II with the acquiescence and recognition of other nations.[13]

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10 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The law of nations can be contrasted with international law created by treaties. *See* Statute of the International Court of Justice art. 38(1)(a)–(b), June 26, 1945, 59 Stat. 1055. The law of nations is created implicitly by the consistent actions and inactions of states, but treaties create international law explicitly through bilateral or multilateral agreements. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmts. b, f (1987).

11 The difference between a legal obligation and courtesy or diplomacy can be blurry, but it is the determinative question in ascertaining whether state actions contribute to the law of nations. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

12 *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 818 (1997) (referring to the law of nations as "amorphous" yet binding).

13 *See* Damir Arnaut, *Stormy Waters on the Way to the High Seas: The Case of the Territorial Sea Delimitation Between Croatia and Slovenia*, 8 OCEAN & COASTAL L.J. 21, 28 (2002); Carol Elizabeth Remy, Note, *U.S. Territorial Sea Extension: Jurisdiction and International Environmental Protection*, 16 FORDHAM INT'L L.J. 1208, 1214 (1993).

Although traditionally the law of nations governed almost exclusively the relations between states, more recently courts have determined that the law of nations also may govern the relations between states and private actors and the relations between two private actors.[14] Still, the nature of the acts that the law of nations prohibits means that only state actors can violate the majority of such norms.[15] For example, norms such as the prohibitions of torture and extrajudicial killings can only be violated by states, even though private actors can also engage in such behaviors.[16] Even so, certain violations of the law of nations, such as slavery, genocide and war crimes, can be violated by private actors without any state action.[17]

In the United States, as in many other countries of the world, international law (including the law of nations) is treated as a body of law completely separate from the domestic legal system.[18] However, the Framers contemplated that the law of nations would be incorporated into U.S. domestic law,[19] and in practice, U.S. courts have consistently incorporated the law of nations for over 200 years.[20] The law of nations can also be incorporated into the domestic law of the United States by federal statute.[21] For example, in the ATS, Congress has used the law of nations as a threshold matter to determine whether the district courts will have jurisdiction to hear a case.[22] Under the ATS, the court must determine that the tort alleged by the plaintiff is a violation of the law of nations in order to have subject-

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14 *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 714–15, 724 (2004).

15 *See id.* at 715.

16 *See* Kadic v. Karadžić, 70 F.3d 232, 244 (2d Cir. 1995).

17 *See id.* at 241–43; *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him . . . an enemy of all mankind."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1986) ("*Individuals* may be held liable for offenses against international law, such as piracy, war crimes, or genocide." (emphasis added)).

18 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. I, ch. 2, introductory note (1986) ("International law and the domestic law of the United States are two different and discrete bodies of law, but often they impinge on the same conduct, relations, and interests.").

19 *See generally* THE FEDERALIST NO. 80 (Alexander Hamilton) (arguing that the federal courts should apply the law of nations).

20 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."); *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law . . . ."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

21 *See* U.S. CONST. art. I, § 8, cl. 10 ("The Congress shall have Power . . . To define and punish . . . Offences against the Law of Nations.").

22 *See Filartiga*, 630 F.2d at 880; *see also infra* Part I.B.

matter jurisdiction over the case.[23] Because of the various ways that the law of nations is incorporated, the law of nations will often have important legal implications in the domestic law of the United States, and the laws of the United States can be used as a tool for enforcing the law of nations.

B. The Enactment of the ATS

The ATS was adopted in the First Judiciary Act of 1789.[24] The reasons behind its passage are hotly debated, with no clear consensus as to the original underlying motivation of its drafters. Indeed, it is almost impossible to discern with certainty the driving forces behind the ATS, due largely to a lack of legislative history and historical commentary on the statute.[25]

However, some argue that the motivations behind the ATS can be fairly traced to concerns over the inability of the United States to enforce the law of nations in protecting foreign diplomats.[26] The fear about the inability of the United States to effectively enforce the law of nations was largely due to the infamous Marbois incident in 1784, where a French diplomat was assaulted in Philadelphia and redress for the diplomat was not immediately provided.[27] This incident served as

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23 *See supra* note 5 and accompanying text.

24 Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (codified at 28 U.S.C. § 1350 (2006)).

25 *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 n.10 (2d Cir. 2000) (stating that the ATS has "no formal legislative history" and that the intent of the original legislators "is forever hidden from our view by the scarcity of relevant evidence"); *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 498 (9th Cir. 1992) (stating that the debates leading to the passage of the First Judiciary Act did not refer to the ATS and that "there is no direct evidence of what the First Congress intended it to accomplish"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) (stating that "the legislative history offers no hint of congressional intent in passing the [ATS]"); Farooq Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13, 18 (1981) (stating that "nothing meaningful is known of [the ATS's] origin"); *see also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (referring to the ATS as an "old but little used section" and "a kind of legal Lohengrin; although it has been with us since the First Judiciary Act, no one seems to know whence it came" (citations omitted)). The term "Lohengrin" is a reference to the opera of the same name, composed by Richard Wagner. There, Lohengrin is a hero who mysteriously appears on the banks of a river and agrees to save the day, on the condition that he is never asked who he is or where he has come from. *See* RICHARD WAGNER, LOHENGRIN (1850).

26 *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489–95 (1986).

27 *See id.* Marbois's assailant was eventually prosecuted in the state courts of Pennsylvania, but only after a French diplomat lodged a formal protest and the Continental Congress responded by urging state action. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 717 n.11 (2004). The Marbois incident gave rise to fears that the United States would be unable to enforce the

an example to the international community that the newly independent United States might be unable to protect foreign diplomats or uphold the law of nations within its borders.[28] Proponents of this interpretation of the reasoning behind the enactment of the ATS would argue that the ATS served as a way for the United States to guarantee that foreign diplomats would have access to the federal courts to enforce their rights under the law of nations.[29]

Current uncertainty over the purposes behind enactment of the ATS is further frustrated by the fact that the statute sat basically unused for almost 200 years.[30] The ATS served as a grant of jurisdiction in only two cases between its enactment in 1789 and 1980, neither of which was very controversial at the time or considered to be very important for purposes of enforcing the law of nations in U.S. courts.[31] However, in 1980, the ATS became much more prominent as a tool to enforce human rights and the law of nations in U.S. courts.

II. The ATS as Currently Applied in the Federal Courts

A. Filartiga *and Its Aftermath*

Filartiga v. Pena-Irala,[32] the first major decision involving the ATS, left many questions as to the scope of the ATS unanswered. In 1980, the ATS was involved for the first time in a high-profile case with important implications for human rights and the enforcement of the law of nations in U.S. courts. In April 1979, Joel and Dolly Filartiga, citizens of Paraguay,[33] brought a suit against Americo Norberto Pena-Irala ("Pena"), also a citizen of Paraguay, who was in the United States on an expired visitor's visa.[34] The suit alleged that Pena, a for-

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law of nations and that this would weaken its stance in the eyes of the international community. *See id.* at 717.

28 *See* Casto, *supra* note 26, at 493.

29 *See id.* at 492–94; Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 464–66 (2007).

30 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

31 In one case involving the seizure and auction of slaves, the court found subject-matter jurisdiction under admiralty law, but the court indicated that the ATS provided an alternative means of jurisdiction. *See* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795). In the other case, the ATS provided jurisdiction over a child-custody dispute because one of the parents falsified information in obtaining a passport, which violated the law of nations. *See* Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 864–65 (D. Md. 1961).

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

33 Dolly was living in the United States at the time under a visitor's visa and had applied for permanent political asylum. *See id.* at 878.

34 *See id.* Dolly had learned of Pena's presence in the United States and reported him to the Immigration and Naturalization Service for being in the country on an expired visa; she

mer police official in Paraguay, had tortured and murdered Joelito Filartiga (Joel's son and Dolly's brother) back in Paraguay in March 1976 because Joel Filartiga was a vocal opponent of the government of President Alfredo Stroessner.[35] The complaint against Pena claimed subject-matter jurisdiction under the ATS.[36]

The Second Circuit, relying on a number of sources of international law, held that an act of torture committed by a state official against a person held in detention was a violation of a clear norm of the law of nations.[37] The court declined to hold that the ATS created an independent cause of action in U.S. courts for aliens, instead holding that it gave jurisdiction to federal courts to adjudge those rights of the aliens that already existed according to the law of nations.[38] Thus, the Second Circuit treated the ATS as only a jurisdictional statute and inferred a cause of action under the law of nations.

This decision by the Second Circuit established that an alien could bring suit in the United States under the ATS if the alien had been tortured by a state official. The holding was limited, however, and specifically noted other situations in which the ATS would not provide jurisdiction, such as fraud, forced sale of property, and denial of free access to the ports of another nation.[39] After *Filartiga*, numerous suits were brought by aliens in U.S. federal courts under the ATS for alleged violations of human rights, primarily against state officials and heads of state.[40] However, there was pervasive disagreement about the scope and application of the ATS, including whether it created a cause of action and whether state action was required to find jurisdiction.[41]

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served him the complaint in the case under the ATS while he was being detained pending deportation. *See id.* at 878–79.

35 *See id.* at 878.

36 *Id.* at 879.

37 *See id.* at 884–85. The court consulted the United Nations Charter, the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and other international agreements. *See id.* at 881–84. Although these instruments were not legally binding in U.S. courts, the Second Circuit held that they provided ample evidence that torture was a violation of a clear norm of the law of nations. *See id.* at 884–85.

38 *See id.* at 887.

39 *See id.* at 888 n.23.

40 *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989); Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995); *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

41 *See Tel-Oren*, 726 F.2d 774. In that case, three judges on a panel of the D.C. Circuit affirmed the dismissal of a suit brought by Israeli citizens against Libya, the Palestinian Libera-

B. Sosa*: The Supreme Court Weighs in*

The Supreme Court gave its first, and to date only, opinion on the ATS in 2004. In *Sosa v. Alvarez-Machain*,[42] the Supreme Court held that the ATS could provide a vehicle for aliens subject to human rights violations to seek redress in U.S. courts if the norms which were violated were sufficiently specific and widely accepted.[43] In 1993, Humberto Alvarez-Machain ("Alvarez"), a citizen of Mexico, brought suit under the ATS against Jose Francisco Sosa, also a citizen of Mexico, as well as a group of five other Mexican citizens, the United States, and four Drug Enforcement Agency ("DEA") agents.[44] The suit alleged that Sosa and the other Mexican nationals were hired by the DEA to forcibly kidnap Alvarez and transport him from Mexico to the United States, where he would stand trial for his suspected role in the torture and murder of Enrique Camarena-Salazar ("Camarena"), who was himself a DEA agent.[45] The complaint further alleged that in April 1990 Alvarez was kidnapped from his office in Mexico and flown to El Paso, Texas, where he was arrested by DEA officials.[46] Alvarez claimed the district court had subject-matter

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tion Organization, and other organizations, but the three wrote separately because they did not agree on the reasoning. Judge Edwards read *Filartiga* to hold that the ATS not only granted jurisdiction in cases of state torture, but also created a cause of action for aliens. *Id.* at 777–82. However, he distinguished *Filartiga* because, whereas Pena was a police official when he tortured Joelito, none of the defendants were state officials, and thus their acts of torture did not violate the law of nations because they did not meet the state-action requirement. *See id.* at 791 (Edwards, J., concurring). Judge Bork argued that the ATS was a bare grant of jurisdiction which would require a later federal statute creating a cause of action before an alien could bring suit in U.S. courts. *See id.* at 801 (Bork, J., concurring). Judge Robb argued that the case presented a nonjusticiable political question. *See id.* at 823 (Robb, J., concurring).

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

43 *See id.* at 724–25.

44 *See id.* at 698. This case is also commonly referred to as *Alvarez-Machain II*, as compared to Alvarez-Machain's prior criminal trial (sometimes referred to as *Alvarez-Machain I*), which made it before the Supreme Court in 1992. *See* United States v. Alvarez-Machain, 504 U.S. 655 (1992). For purposes of this Note, *Alvarez-Machain II* is uniformly referred to as "*Sosa*."

45 *See Sosa*, 542 U.S. at 697–98. In 1985, Camarena was captured on assignment in Mexico and taken to a house where he was tortured and interrogated for two days. *Id.* at 697. The DEA, based upon eyewitness testimony, suspected that Alvarez, a practicing physician in Mexico, had administered medical care to prolong Camarena's life and allow for further interrogation. *See id.* The United States negotiated with Mexico in an attempt to have Alvarez extradited to the United States to stand trial, but when these negotiations failed, the DEA approved a plan to kidnap Alvarez in Mexico and bring him to the United States to stand trial. *See id.* at 698.

46 *See Alvarez-Machain*, 504 U.S. at 657. This case, the criminal prosecution of Alvarez, went to the Supreme Court to resolve the issue of whether Alvarez's abduction was a violation of an extradition treaty between the United States and Mexico. *Id.* at 657, 659. Ultimately, the Supreme Court ruled that Alvarez's abduction was not unlawful and his criminal prosecution

jurisdiction under the ATS because his kidnapping and arbitrary detention violated the law of nations.[47]

The Supreme Court issued two key holdings concerning the ATS.[48] First, the Supreme Court held that the ATS does not create a cause of action, but instead is merely a grant of jurisdiction to the federal courts.[49] Second, the Court held that federal courts could infer from the ATS a cause of action from violations of certain norms of the law of nations.[50] However, in order to infer a cause of action, the violated norm in question must be defined with a degree of specificity equal to the three particular norms of the law of nations that were widely recognized at the time the ATS was enacted and that Congress intended to enforce through the original enactment of the ATS in 1789: (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and (3) piracy.[51] Therefore, a court could have jurisdiction over a case under the ATS but still be unable to infer a cause of action, leaving the plaintiff with no remedy. This is exactly what the Supreme Court held with respect to Alvarez. The Court reasoned that the abduction and arbitrary detention of Alvarez did not give rise to a cause of action because there was no existing norm of the law of nations against such abduction and detention as specific and widely recognized as the three eighteenth-century norms.[52] In short, Alvarez lost his case, but the Supreme Court held that the ATS could be used by aliens to enforce human rights abroad if the norms which were violated were sufficiently specific and widely accepted.

The Supreme Court's decision in *Sosa* did not provide clear standards about which norms of the law of nations, if violated, could give rise to a claim under the ATS.[53] Aside from this problem, the Court

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could proceed. *Id.* at 670. Alvarez was acquitted of all charges in 1992. *See Sosa*, 542 U.S. at 698.

47 *See Sosa*, 542 U.S. at 698.

48 *See id.* at 714.

49 *See id.* at 724. This was consistent with the Second Circuit's interpretation of the ATS in *Filartiga*. *See supra* Part II.A.

50 *See Sosa*, 542 U.S. at 724–25.

51 *See id.* The Court reasoned that these three norms were widely accepted and considered to be primary offenses of the law of nations, and so Congress enacted the ATS to allow aliens to enforce these norms in the federal courts. *See id.*

52 *See id.* at 738.

53 *See* Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 462 (S.D.N.Y. 2006) (stating that "the *Sosa* opinion provides little guidance concerning which acts give rise to an ATS claim"); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004) (observing that "the *Sosa* decision did not deliver the definitive guidance in this area that some had come to expect"), *rev'd on other grounds sub nom.* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007).

expressly avoided discussion of the state-action requirement of violations of the law of nations.[54] These issues would prove to be troublesome when dealing with suits brought against corporations for their role in human rights abuses abroad.

III. The Special Problem of Bringing Suit Against Corporations Under the ATS

The ATS has been insufficient in enforcing human rights against corporations in U.S. courts. Even before *Sosa* was decided, alien victims of human rights abuses had begun to seek redress against corporations that were involved in violations of the law of nations by bringing suit against the corporations under the ATS.[55] *Doe I v. Unocal Corp.*[56] was the first such case to successfully survive motions to dismiss and for summary judgment and set to be heard by a jury, as the court found subject-matter jurisdiction under the ATS for alleged violations of the law of nations.[57] In that case, Burmese villagers brought charges of forced labor, murder, rape, and torture against Unocal, a corporation that worked with the government of Burma on the construction of a natural gas pipeline.[58]

A panel of the Ninth Circuit held that there was subject-matter jurisdiction over the plaintiffs' ATS claims.[59] The court held that a reasonable factfinder could find Unocal liable for forced labor under two separate theories. First, Unocal could be held liable as a private individual because forced labor was a form of slavery, one of the norms of the law of nations that could be violated by a private individual.[60] Second, Unocal could be held liable for aiding and abetting the Burmese government in subjecting villagers to forced labor under the standard of "knowing practical assistance or encouragement that has a

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54 *See Sosa*, 542 U.S. at 732 n.20 (stating, without further discussion, that whether the law of nations extended liability for a certain violation to private actors was a "related consideration").

55 *See, e.g.*, Flores v. S. Peru Copper Corp., 343 F.3d 140, 143 (2d Cir. 2003); Doe I v. Unocal Corp., 395 F.3d 932, 942–43 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93–94 (2d Cir. 2000).

56 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

57 *See id*. at 943; Rachel Chambers, *The* Unocal *Settlement: Implications for the Developing Law on Corporate Complicity in Human Rights Abuses*, HUM. RTS. BRIEF, Fall 2005, at 14, *available at* http://www.wcl.american.edu/hrbrief/13/unocal.pdf?rd=1.

58 *See Unocal*, 395 F.3d at 936.

59 *See id.* at 945–47.

60 *See id.* at 946–47.

substantial effect on the perpetration of the crime."[61] The Ninth Circuit then vacated the decision for rehearing en banc,[62] but the parties settled the day before the case was to be reheard.[63]

Following *Sosa*, suits against corporations under the ATS have continued,[64] but clear standards have yet to emerge that define the circumstances under which a corporation can be held liable under the ATS for its role in human rights abuses. Corporations can be held liable as private individuals for violations of those particular norms of the law of nations that can be violated by individuals, such as slavery, genocide, and war crimes.[65] In these instances, the state-action requirement is inapplicable, and therefore the courts do not have to define the nature of the relationship between the government and the corporation in question.[66]

However, determining aiding-and-abetting liability of corporations for violations of the law of nations that do require state action has been more problematic. A major cause of inconsistency has been the sources of law that courts have looked to in determining aiding-and-abetting liability under the ATS. Some courts look to the federal common law, some look to the law of nations itself, and others analogize to the state-action requirements of other U.S. federal statutes, such as the Civil Rights Act of 1964.[67] Even when two courts consult

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61 *Id.* at 947. Concerning the other allegations, the court held that a reasonable factfinder could find Unocal liable as a private individual for the allegations of murder, rape, and torture because they were committed in furtherance of forced labor, which would allow for private liability. *See id.* at 953–54. The court further held that Unocal could be held liable for aiding and abetting the Burmese government in subjecting villagers to murder and rape, but that the evidence did not support sufficient knowing or practical assistance from Unocal to support aiding-and-abetting liability for torture. *See id.* at 954–56.

62 *See id.* at 978–79.

63 *See* Chambers, *supra* note 57, at 16.

64 *See, e.g.*, Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006); Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

65 *See Unocal*, 395 F.3d at 946–47 (holding that Unocal could be held liable as a private individual for forced labor, which was a form of slavery); *supra* text accompanying note 60.

66 *See Unocal*, 395 F.3d at 945–47.

67 *Compare* Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007) (looking to the federal common law in applying the ATS and noting that there are well-settled theories of vicarious liability under the federal common law), *rev'd on other grounds*, 550 F.3d 822 (9th Cir. 2008), *with Talisman Energy*, 374 F. Supp. 2d at 337–41 (looking to the law of nations and finding that the law of nations contains well-established rules for secondary liability), *and In re* Sinaltrainal Litig., 474 F. Supp. 2d 1273, 1283 (S.D. Fla. 2006) (looking "to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983 [the part of the Civil Rights Act that deals with the requirements of state action]" (quotations omitted)).

the same source to identify the standards for complicity liability for a corporation under the ATS, they can reach results that are irreconcilable with one another.[68]

Perhaps the best illustration of this inconsistency is the *In re South African Apartheid Litigation/Khulumani v. Barclay National Bank Ltd.* case.[69] There, several South African plaintiffs brought suit against multiple corporations for their role in the apartheid regime in South Africa.[70] The district court dismissed the complaint for lack of subject-matter jurisdiction under the ATS.[71] The court looked to both domestic federal statutes by analogy and the law of nations itself, reasoning that there was no showing that the defendants "act[ed] together with state officials or with significant state aid" (as would be necessary under 42 U.S.C. § 1983);[72] similarly, the court found that there was no showing that aiding and abetting a violation of the law of nations was itself a violation of the law of nations actionable under the ATS.[73] On appeal, a panel of the Second Circuit reversed and held that alleging that a corporation aided and abetted a violation of the law of nations could provide subject matter jurisdiction under the ATS.[74] However, the two concurring panel members voting to reverse (Judge Katzmann and Judge Hall) disagreed about what sources should be consulted in determining whether a corporation aiding and abetting violations of the law of nations could be actionable under the ATS.[75]

Judge Katzmann concluded that courts should look to the law of nations when determining if a private individual can be held liable for aiding and abetting violations of the law nations, and that there was sufficient evidence that the law of nations provided for such aiding-and-abetting liability.[76] In looking to the law of nations itself to define

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68 *Compare Talisman Energy*, 374 F. Supp. 2d at 337–41 (finding that the law of nations contains well-established rules for aiding-and-abetting liability), *with Exxon Mobil*, 393 F. Supp. 2d at 24–26 (finding that aiding and abetting a violation of the law of nations was not itself a violation of the law of nations).

69 *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004), *rev'd on other grounds sub nom.* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 286 (2d Cir. 2007).

70 *See id.* at 542–45.

71 *See id.* at 554, 557.

72 *See id.* at 548.

73 *See id.* at 548–50.

74 *See Khulumani*, 504 F.3d at 260.

75 *See id.*; *id.* at 267 (Katzmann, J., concurring); *id.* at 284 (Hall, J., concurring).

76 *See id.* at 270 (Katzmann, J., concurring). Specifically, Judge Katzmann consulted the London Charter, which established the International Military Tribunal at Nuremberg, the Rome Statute of the International Criminal Court, and the respective statutes creating the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for

the standards for aiding-and-abetting liability, Judge Katzmann concluded that an individual could be held liable for aiding and abetting a violation if that individual "(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."[77]

Judge Hall concluded that courts should look to the law of nations only when determining if the underlying conduct itself was a violation of the law of nations, but when determining whether there can be aiding-and-abetting liability under the ATS for that underlying conduct, courts should look to the federal common law.[78] In looking to the federal common law, Judge Hall concluded that aiding-and-abetting liability could be found under the ATS if the defendant furthered the violation of a clearly established law-of-nations norm in one of three ways: (1) "knowingly and substantially assisting [the] principal tortfeasor" in violating the norm; (2) "encouraging, advising, contracting with, or otherwise soliciting [the] principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a . . . norm in the process of completing that act"; or (3) facilitating the violation "by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services . . . could be[ ] used in connection with that purpose."[79]

In his dissent, Judge Korman argued that a private party should only be held liable under the ATS if it has violated a norm of the law of nations under color of law.[80] This analysis was guided by analogy to case law analyzing the state-action requirement of the Civil Rights Act,[81] similar to that used by the district court below.[82]

The three separate opinions in *Khulumani* are illustrative of the inconsistencies that currently plague the application of the ATS to corporations for their roles in aiding and abetting violations of the law of nations in human rights abuses around the world. The current state of the law does not provide clear standards for how courts should go

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Rwanda as evidence of the law of nations, all of which provided for aiding-and-abetting liability. *See id.* at 270–71.

77 *See id.* at 277.

78 *See id.* at 284 (Hall, J., concurring).

79 *Id.* at 288–89.

80 *See id.* at 316–17 (Korman, J., dissenting).

81 42 U.S.C. § 1983 (2006).

82 *See id.* at 317.

about determining aiding-and-abetting liability under the ATS.[83] This means that victims of human rights abuses abroad have no guarantee of redress to compensate them for the offenses committed against them, even where corporations have aided and abetted violations of the law of nations. Furthermore, the corporations themselves face uncertainty in assessing their risk of exposure to litigation.[84] These complex and pressing issues should be clarified by a federal statute.

IV. A Federal Statutory Solution

In order to address these issues, Congress should enact a new federal statute that (1) creates a cause of action for victims of human rights abuses abroad and (2) establishes a knowledge-plus-benefit standard for holding corporations liable for aiding-and-abetting violations. A federal statute that creates a cause of action and establishes a uniform standard for aiding-and-abetting liability would not only guarantee that victims of human rights abuses would be more likely to vindicate their rights and obtain redress in U.S. courts, but it would also provide much needed guidance to judges struggling with the current legal regime and give clarity to corporations attempting to assess risk in doing business abroad.

A. Creation of a Cause of Action

The explicit creation of a cause of action would ensure that human rights are adequately enforced and vindicated in U.S. courts. As a world leader in the protection of human rights, the United States must ensure that it will provide victims of human rights abuses abroad a remedy to compensate them whenever possible. A statute which explicitly creates a cause of action would eliminate the current problem under *Sosa* of defining those norms of the law of nations whose violation would allow the court to infer a cause of action under the ATS. In *Sosa*, the Supreme Court explicitly stated that congressional

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83 *See id.* at 286 (Hall, J., concurring) (stating that "*Sosa* at best lends Delphian guidance on the question of . . . the proper source from which to derive a standard of aiding and abetting liability under the [ATS]"). The phrase "Delphian guidance" is likely a reference to Greek mythology and the oracle at Delphi, who, as the story goes, advised people in the form of puzzles, which needed to be solved. *See* JOSEPH FONTENROSE, THE DELPHIC ORACLE: ITS RESPONSES AND OPERATIONS 79–83 (1978).

84 *See generally* Jonathan Drimmer, *The Aiding and Abetting Conundrum Under the Alien Tort Claims Act*, LEXISNEXIS EXPERT COMMENTARIES, June 2008, *available at* http://www.steptoe.com/assets/attachments/3492.pdf (noting that it is still unclear whether aiding-and-abetting liability is even cognizable under the ATS and that it is also unclear which sources will be looked to in determining the standards for liability).

guidance on defining actionable norms under the ATS would be welcomed.[85]

Under *Sosa*, the alleged violation of a norm of the law of nations in a particular case gives rise to a cause of action under the ATS if that particular norm is defined as specifically as three eighteenth-century norms were in 1789 when the ATS was passed.[86] Asking a court to compare the specificity of current norms of the law of nations with the specificity of three norms as defined in 1789 is untenable and unworkable, as several lower courts have already noted.[87] As a result, courts tend to find that particular alleged violations of the law of nations are not sufficiently specific and dismiss the case.[88] Expressly providing for a cause of action by statute would remove the guesswork from the courts and clearly declare which types of offenses would give not only subject-matter jurisdiction but also the underlying cause of action necessary to allow the court to grant relief.

In determining the types of conduct that will give rise to a cause of action, the proposed statute should mirror the language of the *Restatement (Third) of the Foreign Relations Law of the United States* in listing violations of the law of nations concerning human rights.[89] Therefore, the statute should create a cause of action for acts of genocide, slavery, murder, disappearance, torture and other cruel and inhuman treatment, prolonged arbitrary detention, and systematic racial discrimination.[90] Creating a cause of action to enforce these norms would provide adequate protection for those human rights that are most important and are the most deserving of protection and vindication in U.S. courts. It would also eliminate the guessing game judges currently play under *Sosa* when trying to decipher whether a particular norm is as specific and widely accepted as three norms were back in 1789.

In order to reflect the dynamic nature of the law of nations and the way it is modified by state practice over time, the statute should

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85 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) ("[W]e would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations.").

86 *See id.* at 724–25; *supra* text accompanying note 51.

87 *See* Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 462 (S.D.N.Y. 2006); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 547 (S.D.N.Y. 2004), *rev'd on other grounds sub nom.* Khulumani v. Barclay Nat'l Bank Ltd., 504 F. 3d 254 (2d Cir. 2007); *supra* text accompanying note 53.

88 *See, e.g.*, *Apartheid Litig.*, 346 F. Supp. 2d at 547–48.

89 *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

90 *See id.*

also contain an escalator clause that provides that new violations of the law of nations outside of those specifically listed can give rise to a cause of action under the statute. This clause should be structured like section 702(g) of the *Restatement*, which states that a state violates the law of nations if it practices, encourages, or condones "a consistent pattern of gross violations of internationally recognized human rights."[91] This would create a cause of action for norms other than those that are specifically listed in the statute if those norms have gained international recognition.

In order to avoid the current problems under *Sosa* of assessing the level of international recognition of a norm, the statute should define "internationally recognized" to include those norms that are evidenced by widely accepted multilateral treaties and UN Resolutions. Courts could then gauge international recognition in the same way the Second Circuit did in *Filartiga*:[92] by consulting legal sources that courts are familiar with, instead of trying to compare the specificity and acceptance of a present-day norm with that of one from 1789. In addition, the statute could be amended to explicitly include any additional norms if Congress believes those norms have become accepted to the degree that they deserve enforcement in U.S. courts. This flexibility would allow courts to confidently and competently enforce human rights in U.S. courts if those rights have been violated abroad.

B. Knowledge-Plus-Benefit Standard

In addition, the statute should define the standard of aiding-and-abetting liability for corporations in human rights violations as a knowledge-plus-benefit standard. Such a standard would ensure judicial uniformity and better inform corporations, allowing them to weigh decisions about what to do when governments abroad commit human rights abuses with which the corporation may be involved. It would also strike the proper balance of the equities and prevent corporations from being unfairly exposed to liability.

The statute should define "knowledge" as "actual or constructive knowledge of the presence of one of the human rights abuses listed in the statute at a project site with which the corporation is involved." The statute should provide that the knowledge element is satisfied if an officer of the corporation knows or has reason to know of the

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91 *See id.* § 702(g).

92 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 884–85 (2d Cir. 1980); *supra* text accompanying note 37.

human rights abuses. Having reason to know should be based upon whether a reasonable person in the position of the officer would have known about the abuses. Providing for constructive as well as actual knowledge will eliminate any incentive for the corporation to willfully ignore possible abuses occurring at the site.

The application of this standard can be illustrated by examining a few hypothetical situations. Obviously, if a corporate officer witnesses or learns of a human rights abuse, then the corporation can be charged with actual knowledge. A corporation could be charged with constructive knowledge of human rights abuses if labor costs are exceedingly low or drop sharply (implying forced or coerced labor), or if the number of workers fluctuates irregularly (implying murder, disappearance, or forced labor). However, a corporation could not be charged with actual or constructive knowledge merely because the government meets deadlines early or production costs are low but similar to average production costs in that area of the world. The knowledge prong of the standard would ensure that unknowing corporations that have still done their due diligence with respect to the project will not be subjected to liability under the statute.

The statute should define "benefit" as "any direct benefit that the corporation receives as a result of aiding and abetting the human rights abuse." Benefits can include decreased costs, increased profits, promises of future projects from the government, or gifts from the government, among other things. Whether the benefit is a direct result of the human rights abuse should be determined by considerations of proximate causation.

Again, the application of this standard can be illustrated through a few typical hypothetical situations. If the production costs of the project are significantly reduced as a direct result of the government subjecting people to torture or forced labor, then the corporation should be charged with receiving a benefit. However, if the government tortures local citizens to repress political dissent, the corporation would receive no direct benefit from the human rights abuse and would not be held liable under the statute. Even if the corporation would somehow receive an indirect benefit from this repression (such as the absence of public criticism of the corporation's project), this would likely be too attenuated from the abuse itself to satisfy any proximate causation test.

1. Providing Guidance for Judges

A statute that adopts a knowledge-plus-benefit standard would provide much needed guidance and simplicity to the judges currently wrestling with aiding-and-abetting liability for corporations under the ATS. Currently, judges struggle first to identify the proper source of law for determining the standards of aiding-and-abetting liability and next to analyze that source of law to find discernible standards.[93] Adopting a statute with a clear standard would remove any doubt from the minds of judges considering which sources to consult to determine the proper standard for aiding-and-abetting liability.[94] No longer would judges be forced to look to any one of a number of sources of law and then interpret the standards for aiding-and-abetting liability within that source of law.[95] Instead, the judges would merely engage in a two-part inquiry as to whether the evidence supports a finding that the defendant corporation (1) had knowledge or constructive knowledge of the alleged violations of the law of nations and (2) derived a direct benefit from those violations. With this clearer standard, judges would get some much needed guidance and simplicity when determining whether a corporation can be held liable for aiding and abetting violations of the law of nations.

2. Allowing Corporations to Better Assess Risk

A statute explicitly creating a cause of action and adopting a knowledge-plus-benefit standard would allow corporations to better assess their risk of exposure to costly litigation when conducting business abroad. Currently, corporations face uncertainty as to whether

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93 *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007). In *Khulumani*, all three members of the panel of the Second Circuit looked to different sources of law in determining the standards of complicity liability: the law of nations, federal common law, and caselaw involving the color-of-law requirement of the Civil Rights Act of 1964. *See id.* at 270 (Katzmann, J., concurring); *id.* at 286 (Hall, J., concurring); *id.* at 317 (Korman, J., concurring in part and dissenting in part).

94 *See supra* note 85 and accompanying text. Although the Supreme Court was specifically discussing the utility of congressional guidance in the context of underlying substantive violations of the law of nations, their reasoning also extends to possible congressional guidance on aiding-and-abetting liability.

95 *See, e.g.*, *Khulumani*, 504 F.3d 254. Judge Katzmann first concluded that the law of nations is the proper source for determining aiding-and-abetting liability under the ATS and then consulted several treaties and international tribunals. *See id.* at 270 (Katzmann, J., concurring); *supra* text accompanying note 76. Judge Hall, however, first concluded that federal common law is the proper source of law in determining aiding-and-abetting liability and then analyzed U.S. case law. *See Khulumani*, 504 F.3d at 284 (Hall, J., concurring); *supra* text accompanying note 78.

their actions in relation to projects being carried out in connection with a foreign government could lead to potentially huge liability in a case brought under the ATS in the United States.[96] The source of law that the judge will look to in determining aiding-and-abetting liability under the ATS could prove to be dispositive of whether the corporation will be granted summary judgment or a motion to dismiss.[97] However, it is almost impossible to predict which source of law will be consulted in determining aiding-and-abetting liability under the current regime.[98]

Under the proposed statute, the directors of the corporations would have clear guidance on whether their actions abroad could lead to liability in U.S. courts. Making corporations better informed of their risks before they enter into deals with foreign governments would make their actions in dealing with those governments more efficient. For instance, in negotiating deals with foreign governments, corporations could begin to bargain over provisions that would allow for termination of the deal if human rights abuses are discovered. This would not only protect corporations from liability under the proposed statute by removing their benefit, but it would also provide incentives for the foreign government to observe human rights.

In the absence of such a provision, a corporation would still be better informed regarding its options if it were to discover a human rights violation by a foreign government. Under the current regime, if a corporation learns that a government is committing human rights abuses, the corporation's options are to breach the contract and terminate the deal or to risk liability under the ATS. However, the corporations cannot adequately assess their risk under the current regime due to the amount of uncertainty. They simply cannot predict whether they might be held liable for their abuses under the ATS, or at least driven to settle with the plaintiffs. This provides the corporation with a perverse incentive to continue their performance under the contract and maintain their relationship with the foreign government.

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96 *See* Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 U.C. DAVIS J. INT'L L. & POL'Y 119, 123 (2007) (noting that a federal statute is needed to resolve uncertainty surrounding the application of the ATS in a "timely and cost-conscious manner"); Drimmer, *supra* note 84 ("In light of the . . . lack of judicial predictability, multi-national corporations must . . . closely mind their [ATS] vulnerabilities abroad.").

97 *See* Dhooge, *supra* note 96, at 123.

98 *See, e.g.*, *Khulumani*, 504 F.3d 254 (where the three judges on the panel each looked to a different source of law: the law of nations, federal common law, and analogy to federal statutes).

Under the proposed statute, the corporation could assess whether it was deriving a benefit from the abuses and then know whether it would face liability. If the corporation would face liability under the statute, the statute will have created a stronger incentive to breach the contract. Although this still seems like a harsh result for the corporation, it is no harsher than the consequences of the current legal regime; it is only clearer.

If the corporation decides to breach the contract, the foreign government would be forced to bring a breach of contract claim, find another corporation to perform, or abandon the project. None of these options is ideal for the foreign government. Bringing a breach of contract claim against the corporation will likely shed light on the human rights abuses which caused the corporation to breach in the first place. Finding another corporation to perform will increase transaction costs and could lead to problems. Abandoning the project would obviously be costly and undesirable for the government. Therefore, the statute would eventually provide an indirect incentive for foreign governments to uphold human rights to avoid being put in such a situation by the corporations. Over time, the statute would provide incentives for both parties to enforce human rights in connection with projects.

Conclusion

The current legal regime for enforcing human rights under the law of nations against corporations is ineffective and inconsistent. The current application of the ATS in these cases does not adequately ensure the protection of human rights abroad, because of the unworkable standards provided by *Sosa*. The ATS jurisprudence also suffers from a lack of guidance for judges in applying aiding-and-abetting liability to corporations. Furthermore, corporations face troubling uncertainty in assessing their risk of exposure to liability. Congress should enact a federal statute which creates a cause of action for defined offenses and adopts a knowledge-plus-benefit standard for aiding-and-abetting liability to properly balance all of these interests and ensure that human rights are protected abroad.