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# Conceptualizing Complicity in Alien Tort Cases

CHIMÈNE I. KEITNER\*

## INTRODUCTION

Judges, litigants, and scholars increasingly confront challenges raised by cases involving multiple and overlapping legal orders. Claims brought under the Alien Tort Statute<sup>1</sup> (“ATS”) exemplify these challenges, because they call on U.S. courts to provide domestic remedies for international wrongs. The ATS provides federal courts<sup>2</sup> with subject matter jurisdiction over aliens’ claims for certain international law violations that sound in tort.<sup>3</sup> Although ATS cases have become

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\* Associate Professor of Law, University of California, Hastings College of the Law. My sincere thanks to those who have offered feedback on this project, including William Aceves, Susan Benesch, Meg DeGuzman, William Dodge, David Gold, Kevin Jon Heller, Elizabeth Hillman, Evan Lee, Richard Marcus, Kenneth Randall, Naomi Roht-Arriaza, Jonathan Schmidt, Marco Simons, Sonja Starr, Cora True-Frost, and Jenia Iontcheva Turner. Thanks also to participants in the Hastings Faculty Workshop, the JILSA 2008 Annual Conference, and the Law & Society Association 2008 Annual Meeting. Of course, these individuals are exempt from any attribution of responsibility for, or endorsement of, my analysis.

1. 28 U.S.C. § 1350 (2006). In this Article, I follow the United States Supreme Court in using the term Alien Tort Statute (“ATS”) instead of Alien Tort Claims Act (“ATCA”). *See, e.g., Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004). Both terms refer to the same provision.

2. I am concerned here only with claims brought under the ATS’s grant of federal jurisdiction, although many ATS plaintiffs bring pendent state law claims and many also file cases in state court. *See, e.g., THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN STATE COURTS: AN OVERVIEW AND RECOMMENDATIONS FOR LEGAL ADVOCACY I* (forthcoming Dec. 2008) (on file with The Hastings Law Journal) (referring to the use of arguments based on international human rights law in state courts as an “underutilized opportunity”); *cf. Chimène I. Keitner & Kenneth C. Randall, The Seventh Circuit Again Finds Jurisdiction for Private Remedies for Violations of Article 36 of the Vienna Convention on Consular Relations*, ASIL INSIGHTS, May 16, 2007, <http://asil.org/insights/2007/05/insights070514.html> (“[A]s federal case law progressively circumscribes the available causes of action under the ATS, plaintiffs may seek to file international law claims in state courts as claims for municipal torts—the very ‘torts’ that the First Congress sought to bring within federal jurisdiction because of their potential implications for international affairs.”). On the relationship between state and federal court interpretations of customary international law in the ATS context see, for example, Ernest A. Young, *Federal Suits and General Laws: A Comment on Judge Fletcher’s Reading of Sosa v. Alvarez-Machain*, 93 VA. L. REV. IN BRIEF 33, 36–37 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/young.pdf>.

3. 28 U.S.C. § 1350 (“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.”).

increasingly familiar to U.S. judges, fundamental questions persist about what law applies to various aspects of ATS claims.<sup>4</sup> How U.S. judges analyze these questions, and what conclusions they reach, will affect the continued availability of civil remedies in U.S. courts for certain international law violations. These choices also carry broader implications for the role of international law in U.S. courts, and for the role of U.S. courts in enforcing international law.

A central unresolved question in ATS litigation is what standards govern the liability of accomplices to international law violations, rather than direct perpetrators of those violations. Judges and scholars have reached, and continue to reach, divergent conclusions about how to identify the applicable standards in ATS cases, leading to confusion in the lower courts and persistent uncertainty for litigants.<sup>5</sup> Although the United States Supreme Court reviewed the history and application of the ATS in the 2004 case *Sosa v. Alvarez-Machain*, that case did not involve accomplice liability.<sup>6</sup> The doctrinal question of what standards govern accomplice liability continues to perplex courts,<sup>7</sup> and has received insufficient attention from scholars.<sup>8</sup>

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4. For example, a recent article by Doug Cassel, published as this Article was in its final stages, “concludes with a call for clarification” of the law applicable to claims of corporate aiding and abetting liability brought under the ATS. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT’L HUM. RTS. 304, 304 (2008); see also *In re Sinaltrinal Litig.*, 474 F. Supp. 2d 1273, 1302 (S.D. Fla. 2006) (stating that “there is a pressing need for clarification of these issues”).

5. For example, corporate litigation partner Jonathan Drimmer recently characterized aiding and abetting liability under the ATS as “a confused regime defined by substantial uncertainty for companies, their counsel, and their executive officers.” Jonathan Drimmer, *The Aiding and Abetting Conundrum Under the Alien Tort Claims Act*, LEXISNEXIS EXPERT COMMENTARY, June 2008, at 1.

6. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). For the record, I coauthored an amicus brief in *Sosa*. Brief for the World Jewish Congress and the American Jewish Committee as Amicus Curiae in Support of Respondents, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485).

7. At the time of writing, the United States Supreme Court had been procedurally compelled to deny review of a divided Second Circuit opinion involving accomplice liability. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff’d sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (affirming under 28 U.S.C. § 2109, with no precedential effect). Two other cases raising this issue were awaiting oral argument on appeal. *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), *appeal docketed*, No. 07-0016-cv (2d Cir. Jan. 3, 2007); *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *appeals docketed*, Nos. 06-4800, 06-4876 (2d Cir. Oct. 18, 2006; 2d Cir. Oct. 23, 2006).

8. Exceptions include Cassel, *supra* note 4, at 317 (canvassing international law precedents but not reaching a conclusion on the choice of law issue); Tarek F. Maasarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT’L L. & POL. 39 (2006) (canvassing alternative theories of liability to aiding and abetting); Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT’L L. 871, 897 (2008) (advocating a “global tort law” approach to the ATS in which federal courts identify the best rule from among a range of domestic and foreign sources); Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 810 (2005) (advocating the application of the *Restatement (Second) of Torts* § 876); Philip A. Scarborough,

The problem of accomplice liability most often arises in ATS cases brought against corporations for their alleged complicity in international law violations perpetrated by foreign governments, because corporations rarely engage in conduct such as torture, rape, and summary execution directly. As John Ruggie, the Special Representative of the U.N. Secretary-General on the issue of human rights and transnational corporations and other business enterprises, reports: “Few legitimate firms may ever directly commit acts that amount to international crimes. But there is greater risk of their facing allegations of ‘complicity’ in such crimes.”<sup>9</sup> The dilemma of articulating standards for accomplice liability is bound to persist as plaintiffs continue to file ATS cases against corporate defendants, and some of these proceed to trial.<sup>10</sup>

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Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 462 (2007) (advocating a federal common law approach that looks to well-developed state law).

9. Human Rights Council, Report of the Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 30, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (prepared by John Ruggie) [hereinafter *Business and Human Rights*]; see also *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997) (stating that “the question is whether the ATCA makes a private actor liable in tort for conspiring with state actors to violate the law of nations”). An unusual allegation of direct corporate responsibility is the complaint in *Estate of Himoud Saed Atban v. Blackwater USA*, No. 1:07-cv-01831 (D.D.C. filed Oct. 11, 2007), which alleges direct liability for extrajudicial killing and war crimes. See also Complaint at 2, *Ramchandra Adhikari v. Daoud & Partners*, No. 2:08-cv-05626 (C.D. Cal. filed Aug. 27, 2008) (alleging torts including human trafficking in violation of international law). Earlier cases establishing the accomplice liability of individuals, rather than corporations, include *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158–59 (11th Cir. 2005), *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148–49 (E.D. Cal. 2004), and *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002).

10. As of the time of writing, ATS cases against corporations included *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *appeals docketed*, Nos. 02-56256, 02-56390 (9th Cir. July 26, 2002; 9th Cir. Aug. 15, 2002) (argued to en banc court on Oct. 11, 2007), *Corrie v. Caterpillar*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *appeal docketed*, No. 05-36210 (9th Cir. Dec. 23, 2005) (dismissed Sept. 17, 2007; plaintiffs-appellants petitioned for rehearing en banc), and *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134 (C.D. Cal. 2005), *appeals docketed*, Nos. 05-56056, 05-56175, 05-56178 (9th Cir. July 21, 2005; 9th Cir. Aug 8, 2005; 9th Cir. Aug 8, 2005) (argued Apr. 19, 2007 and subsequently withdrawn Aug. 23, 2007). The Second Circuit Court of Appeals recently decided two corporate ATS cases. *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007). As indicated above, two corporate ATS appeals were pending before the Second Circuit at the time of writing. See *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), *appeal docketed*, No. 07-0016-cv (2d Cir. Jan. 3, 2007); *Kiobel v. Royal Dutch Petroleum*, 456 F. Supp. 2d 457 (S.D.N.Y. 2006), *appeals docketed*, Nos. 06-4800, 06-4876 (2d Cir. Oct. 18, 2006; 2d Cir. Oct. 23, 2006). The first corporate ATS case to go to trial was *Estate of Rodriguez v. Drummond*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003). A jury found the defendant not liable on July 26, 2007. See Jay Reeves, *Labor Undeterred by Drummond Verdict*, ASSOCIATED PRESS, July 27, 2007, available at <http://www.abcmoney.co.uk/news/272007110323.htm>. An appeal is currently pending before the Eleventh Circuit Court of Appeals. See *Estate of Rodriguez*, 256 F. Supp. 2d 1250, *appeal docketed*, No. 07-14090-V (11th Cir. Sep. 4, 2007). Shortly thereafter, another international corporate case went to trial and is still ongoing. See *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2008 U.S. Dist. LEXIS 63832 (N.D. Cal. July 23, 2008). A trial date of February 9, 2009 has been set in a pair of associated cases in the Southern District of New York. See Minute Entry, *Wiwa v. Royal Dutch Petroleum Co.*, No. 1:96-cv-08386-

ATS cases against corporate defendants involve high stakes on both sides. For victims, these cases offer an unusual chance to receive monetary compensation for human rights violations,<sup>11</sup> in addition to providing symbolic vindication and deterring corporate involvement in internationally wrongful conduct. For corporations, ATS cases carry the potential exposure to enforceable money judgments in U.S. courts that, they argue, can deter legitimate business activity by creating intolerable levels of uncertainty for investors and shareholders. More generally, corporate ATS litigation has become a battleground in broader struggles over the role of tort litigation in regulating corporate behavior, and the role of U.S. courts in disputes that may implicate foreign affairs.

Against this backdrop, this Article seeks to resolve the core doctrinal puzzle of what body of law governs accomplice liability under the ATS, and to provide an analytic roadmap for courts confronting this question. In Part I, I sketch the framework established in *Sosa*, emphasizing the most salient points for determining what body of law applies to allegations of accomplice liability. In Part II, I present contending approaches to the question of accomplice liability, and conclude that the most coherent approach conceptualizes accomplice

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KMW-HPB (S.D.N.Y. Oct. 7, 2008) (consolidating *Wiwa v. Royal Dutch Petroleum Co.*, No. 1:96-cv-08386-KMW-HPB, and *Wiwa v. Anderson*, No. 1:01-cv-01909-KMW-HPB). Another case is set to go to trial for alleged violations of state law, even though the ATS claim was dismissed from the case. See *Doe v. Exxon Mobil Corp.*, No. 01cv01357, 2008 WL 3914902 (D.D.C. Aug. 27, 2008); see also *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005). Similarly, *Ibrahim v. Titan Corp.* and *Saleh v. Titan Corp.*, Nos. 04-1248, 05-1165 (summary judgment motions argued Oct. 3, 2007), are likely to go to trial despite dismissal of the ATS claim from the case. See *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007), *petitions for appeal granted sub nom. In re CACI Premier Tech., Inc.*, No. 08-8001, 2008 U.S. App. LEXIS 6649 (D.C. Cir. Mar. 17, 2008). Two recently filed cases were terminated early in the litigation. *Mohamed v. Jeppesen Dataplan Inc.*, 539 F. Supp. 2d 1128 (N.D. Cal. 2008) (dismissed on state secrets grounds Feb. 13, 2008); *Wang Xiaoning v. Yahoo! Inc.*, No. 07-2151 (N.D. Cal. filed Apr. 18, 2007) (settled Nov. 13, 2007). ATS claims against Chiquita Brands International have recently been consolidated with other claims against Chiquita in multi-district litigation (MDL) in the Southern District of Florida. *In re Chiquita Brands Int'l, Inc., Alien Tort Statute & S'holders Derivative Litig.*, 536 F. Supp. 2d 1371 (J.P.M.L. 2008).

11. ATS judgments against individual defendants provide invaluable symbolic vindication for plaintiffs and can deter human rights abusers from entering or remaining in the United States, but money judgments against these defendants are notoriously difficult, if not impossible, to collect. Defendants might not have significant assets in the United States, and U.S. judgments can be difficult to enforce abroad. See, e.g., Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting 1350 Judgments Abroad*, 107 YALE L.J. 2177 (1998) (discussing strategies for seeking foreign recognition and enforcement of ATS judgments). One noteworthy exception is the ATS suit brought by the Center for Justice and Accountability against former Haitian military commander Carl Dorélien. Dorélien's presence in the United States became widely known when he won the Florida lottery in 1997, and attorneys for plaintiffs were able to recover some of the remaining lottery funds in satisfaction of a 2007 ATS judgment against Dorélien. See Center for Justice and Accountability, Haiti: Carl Dorélien, <http://www.cja.org/cases/dorelien.shtml> (last visited Nov. 13, 2008) (describing the proceedings and outcome). For the record, I have collaborated with CJA on several briefs in other cases.

liability as a conduct-regulating rule defined by international law, rather than an ancillary question governed by domestic law. I then examine international law doctrine on accomplice liability, and conclude that the Second Circuit's articulation of a "purposefulness" standard in cases involving alleged corporate complicity in the crime of apartheid misstates the applicable law, which prohibits knowingly providing assistance that has a substantial effect on the commission of the wrongful act. In Part III, I describe the implications of this doctrinal analysis for broader concerns about the indeterminacy of international law, the delegation of law-making power to international institutions, and notions of international comity. I emphasize that by interpreting and applying international law, rather than interposing domestic law, U.S. courts can provide domestic remedies for international wrongs while avoiding criticisms of illegitimately applying U.S. substantive law outside U.S. territory.<sup>12</sup>

### I. THE *SOSA* FRAMEWORK

Confusion about the legal standards governing ATS cases stems, in part, from the terse phrasing of the statute itself. The ATS, which was enacted by the first Congress as part of the Judiciary Act of 1789, states that "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."<sup>13</sup> The choice of law question arises both at the stage of establishing federal subject matter jurisdiction over the claim, and in adjudicating the merits of the claim. While the Supreme Court in *Sosa* characterized this statute as "in terms only jurisdictional," it nonetheless found that the statute provides a "limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789."<sup>14</sup> Treaty claims aside,<sup>15</sup> violations of the "law of

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12. The District Court for the Southern District of Indiana recently underscored this point in refusing to apply Indiana tort law to allegations of child labor in Liberia, stating: "The case proceeds in this court because the Alien Tort Statute authorizes certain claims under international law, but the statute does not provide an invitation to apply substantive domestic United States law to activity throughout the world." *Roe I v. Bridgestone Corp.*, No. 1:06-cv-0627-DFH-JMS, 2008 U.S. Dist. LEXIS 53248, at \*7-8 (S.D. Ind. July 11, 2008). *But see Doe I v. Exxon Mobil Corp.*, No. 01-1357 (LFO), 2006 U.S. Dist. LEXIS 11732, at \*6 (D.D.C. Mar. 2, 2006) (applying U.S. rather than Indonesian law to allegations of human rights abuses by Indonesian soldiers protecting defendant's pipeline in Indonesia because "the United States, the leader of the free world, has an overarching, vital interest in the safety, prosperity, and consequences of the behavior of its citizens, particularly its super-corporations conducting business in one or more foreign countries").

13. 28 U.S.C. § 1350 (2006). *See generally* Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 31 n.128, 39 n.171 (1985) (noting that the comma after "only," and the word "committed," were inserted into the text in the 1948 recodification of the statute).

14. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

15. I do not examine the treaty prong of the ATS here. Several courts have recently addressed the question of whether treaty violations can give rise to civil actions in U.S. courts under either the

nations” that support federal subject matter jurisdiction include present and future claims that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms”<sup>16</sup> of violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>17</sup>

*Sosa* has received close scrutiny in part because of its affirmation that the ATS, although “in terms only jurisdictional,” enables plaintiffs to sue without congressional enactment of a specific cause of action. This is because the First Congress viewed international law as part of the common law, which could itself be implemented directly by U.S. courts.<sup>18</sup> The *Sosa* majority resisted the conclusion that the ATS itself provides a cause of action, but it did not allow positivist notions of law as the command of a particular sovereign to override the will of the First Congress. Instead, the *Sosa* majority held that the ATS provides “authority to recognize [a] right of action”<sup>19</sup> in federal courts. These rights of action are based on a particular category of international law

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ATS or 42 U.S.C. § 1983 and have reached different results. *Compare* *De Los Santos Mora v. New York*, 524 F.3d 183, 209 (2d Cir. 2008) (amended May 12, 2008) (holding no right to sue), *Gandara v. Bennett*, 528 F.3d 823, 829 (11th Cir. 2008) (holding no right to sue), *and* *Cornejo v. San Diego*, 504 F.3d 853, 864 (9th Cir. 2007) (holding no right to sue), *with* *Jogi v. Voges*, 480 F.3d 822, 836 (7th Cir. 2007) (holding right to sue under § 1983). For commentary, see Chimène I. Keitner & Kenneth C. Randall, *Introductory Note to Cornejo v. San Diego*, 46 I.L.M. 1158 (2007), and Keitner & Randall, *supra* note 2.

16. *Sosa*, 542 U.S. at 725; *see also id.* at 732 (articulating this standard).

17. *Sosa* thus reaffirmed that international law is part of U.S. law for the purpose of establishing federal jurisdiction over certain violations of international law. *Id.* at 729–30; *see* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (affirming that “[i]nternational [sic] law is part of our law”). My colleague William Dodge has characterized the *Sosa* majority’s opinion as adopting a “particularized approach” to the integration of customary international law into federal common law. *See* William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87, 96–97 (2004); *see also* Keitner & Randall, *supra* note 2, n.21 (citing judicial statements comparing scope of federal jurisdiction for international law violations under § 1350 and § 1331).

18. *See, e.g.*, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 234 (1996) (emphasizing that “the Founding Generation understood that the law of nations was part of American common law and that a tort violating that law would be cognizable at common law just as any other tort would be”).

19. *Sosa*, 542 U.S. at 712; *see also id.* at 729 (emphasizing that “post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way”). The Supreme Court’s affirmation in *Sosa* that international law norms actionable under the ATS constitute one such enclave has not quieted academic debate over the status of customary international law as federal common law, a debate I do not engage here. For recent contributions, *see* Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924–29 (2007), and responses by William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/dodge.pdf>, and Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 33 (2007), <http://www.harvardlawreview.org/forum/issues/120/feb07/young.pdf>.

rules that “bind[] individuals for the benefit of other individuals” and that “overlap[] with the norms of state relationships.”<sup>20</sup> Such rules must “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth-century paradigms” that the First Congress had in mind in order to provide subject matter jurisdiction in federal courts.<sup>21</sup>

*Sosa* thus affirmed that international law encompasses more than just rules governing the conduct of states; international law also includes “rules binding individuals for the benefit of other individuals” that can be enforced in domestic courts.<sup>22</sup> ATS cases implement this conception of international law. For example, in *Filártiga v. Pena-Irala*, Joelito Filártiga’s father and sister sued a former Paraguayan Inspector General of Police, who had allegedly tortured Joelito to death in Paraguay before moving to Brooklyn.<sup>23</sup> This case resulted in a landmark ATS decision by the Second Circuit upholding federal jurisdiction over Pena-Irala’s violation of international law.<sup>24</sup> In *Doe v. Unocal Corp.*, which is often viewed as the paradigm corporate ATS case, plaintiffs alleged that the Myanmar (Burmese) military committed forced labor, rape, torture, and murder in the course of providing security for an oil pipeline construction project in rural Myanmar that was partially owned and overseen by Unocal, and they sought to hold Unocal liable for these international law violations.<sup>25</sup> The parties settled this case in March 2005, on the eve of a jury trial in California on parallel state law claims and an en banc rehearing of a Ninth Circuit panel decision favorable to the plaintiffs on their ATS claims.<sup>26</sup>

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20. *Sosa*, 542 U.S. at 715.

21. *Id.* at 725.

22. *Id.* at 715; *see also id.* at 724 (referring to international law violations “with a potential for personal liability”).

23. *Filártiga v. Pena-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

24. *Id.* at 880. On remand to the district court, the defendant defaulted, and the court entered a judgment for the plaintiffs totaling over \$10 million. *Filártiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

25. *See Doe v. Unocal Corp.*, 395 F.3d 932, 937–40 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003). Myanmar itself, like all foreign states that are not designated “state sponsors of terrorism,” is immune from suit in U.S. courts unless the claim against it comes within an exception to the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1330, 1602–1611.

26. *Doe v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005). In the context of growing awareness of corporate exposure under the ATS, Senator Dianne Feinstein introduced an amendment to 28 U.S.C. § 1350 that would have limited ATS suits to those “asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort.” S. 1874, 109th Cong. (1995) (introduced Oct. 17, 2005). Senator Feinstein withdrew the proposed amendment on October 25, 2005. Letter from Dianne Feinstein, U.S. Senator, to Arlen Specter, U.S. Senator (Oct. 25, 2005), *available at* <http://www.earthrights.org/files/Documents/feinsteinatca.pdf>. In April 2008, United States State Department Legal Adviser John Bellinger gave a policy address indicating the current Executive’s position that “there are good

Although the precedents for holding both individuals and corporations liable for international law violations in certain circumstances are well established, their contours remain contested. I will briefly address two threshold jurisdictional issues, before moving on to what I believe is the more important, and less analyzed, question of what law governs allegations of accomplice liability brought under the ATS. This Part is aimed primarily at those unfamiliar with the treatment of subject matter jurisdiction and the ability to sue non-state actors under the ATS. The law on these questions is relatively settled and informs which ATS suits can proceed.

#### A. ESTABLISHING SUBJECT MATTER JURISDICTION

Although the ATS was intended to provide a federal forum for adjudicating alleged violations of international law, its jurisdictional grant is not unlimited.<sup>27</sup> Plaintiffs must allege a well-accepted and specifically defined violation of international law in order to survive a motion to dismiss for lack of subject matter jurisdiction.<sup>28</sup> Prior to *Sosa*,

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reasons for limits on the scope of the ATS—through courts exercising restraint, or if necessary, through legislation.” John B. Bellinger III, U.S. State Dep’t Legal Advisor, Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches, Address at the 2008 Jonathan I. Charney Lecture in International Law (Apr. 11, 2008) (transcript available at <http://www.state.gov/s/lrls/103506.htm>). At time of writing, no further legislative action had been taken with respect to the ATS.

27. Some commentators question the constitutionality of federal jurisdiction over suits brought by alien plaintiffs against alien defendants for any international law violation absent some other basis for Article III jurisdiction, a debate I do not engage in here. See, e.g., Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 590–92 (2002) (arguing that the ATS was originally meant to implement Article III alienage jurisdiction, and that the law of nations is not part of the federal common law that would support Article III “arising under” jurisdiction); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 835–40 (2006) (questioning the *Sosa* Court’s assumption that there was a constitutional basis for federal jurisdiction in the case before it). But see, e.g., *Filártiga*, 630 F.2d at 885 (finding that “[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law”); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 711–12 (2002) (arguing that the Framers intended Article III’s reference to cases arising under “the Laws of the United States” to include cases arising under the law of nations); William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. IN BRIEF 1, 8 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/fletcher.pdf> (observing that “the Court’s decision [in *Sosa*] necessarily implies that the federal common law of customary international law is jurisdiction-conferring”).

28. See *supra* note 21 and accompanying text. Courts cannot properly entertain motions to dismiss for failure to state a claim before establishing that they have jurisdiction. See *Bell v. Hood*, 327 U.S. 678, 682 (1946). Nevertheless, defendants in ATS cases have filed 12(b)(1) and 12(b)(6) motions concurrently, and courts have not consistently differentiated between these types of motions. Compare *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1004–06 (S.D. Ind. 2007) (where defendants filed a motion to dismiss under 12(b)(1) and 12(b)(6), emphasizing the distinction between standards for subject matter jurisdiction and sufficient pleading of claims on the merits), with *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273, 1284–85 (S.D. Fla. 2006) (noting the Eleventh Circuit’s blurred analysis of 12(b)(1) and 12(b)(6) criteria in ATS cases).

federal courts required plaintiffs to allege the violation of a “specific, universal, and obligatory” international law norm.<sup>29</sup> As indicated above, the *Sosa* Court articulated its own standard: “[A]ccept[ance] by the civilized world” plus “defin[ition] with a specificity comparable” to the three eighteenth-century paradigms of violation of safe conducts, infringement of the rights of ambassadors, and piracy.<sup>30</sup> Even though *Sosa* used new terminology, the majority cited pre-*Sosa* cases with approval on the question of how to identify a sufficiently specific and universal international law norm.<sup>31</sup> The *Sosa* standard thus appears to be functionally equivalent to the previously articulated standard.<sup>32</sup>

The jurisdictional threshold under the ATS has acted as a barrier to certain corporate cases. For example, the Second Circuit recently dismissed a high-profile case against the manufacturers of Agent Orange on the grounds that the spraying of herbicide to destroy crops, when not intentionally used to injure human populations, did not violate a universally accepted international law norm at the time of the Vietnam War.<sup>33</sup> The court did not address the accomplice liability issue (the defendants’ manufacturing), because it found that the underlying violation (the U.S. government’s spraying) did not meet the *Sosa* jurisdictional standard.<sup>34</sup>

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29. *Hilao v. Marcos (Estate II)*, 25 F.3d 1467, 1475 (9th Cir. 1994). For example, in the pre-*Sosa* case *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 254–55 (2d Cir. 2003), the Second Circuit found that the “right to life” and “right to health” were not defined with the requisite degree of specificity, and that there was no identifiable customary international law norm prohibiting “intranational” pollution. The case was therefore dismissed for lack of jurisdiction and for failure to state a claim. *Id.* at 266. In my view, it is appropriate to characterize *Flores* as an application of the criteria articulated in *Filártiga*, rather than a retreat from those criteria. *But cf.* Bradley et al., *supra* note 19, at 890–91 (taking the opposite view).

30. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

31. *Id.* at 732 n.20 (comparing Judge Edwards’ finding in *Tel-Oren v. Libyan Arab Republic* that there was “insufficient consensus in 1984 that torture by private actors violates international law” with the Second Circuit’s finding in *Kadic v. Karadzic* that there was “sufficient consensus in 1995 that genocide by private actors violates international law” (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984) (Edwards, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 239–41 (2d Cir. 1995))).

32. *But see* *Aldana v. Fresh Del Monte Produce, Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (refusing to follow pre-*Sosa* cases recognizing an ATS claim for cruel, inhuman and degrading treatment or punishment, on the grounds that the International Covenant on Civil and Political Rights does not create obligations enforceable in U.S. courts under the *Sosa* standard).

33. *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008) (granting Fed. R. Civ. P. 12(b)(6) motion for failure to state a claim). The Second Circuit discussed the *Sosa* opinion at some length, but it also relied on its own pre-*Sosa* jurisprudence in defining the appropriate criteria for identifying an actionable violation of international law. *Id.* at 116–17.

34. For other dismissals based on the underlying violation’s failure to meet the *Sosa* standard, see, for example, *Taveras v. Taveraz*, 477 F.3d 767, 776 (6th Cir. 2007), dismissing case alleging “cross-border ‘parental child abduction’ by an individual with full guardianship (or custody)” for lack of subject matter jurisdiction, and *Abdullahi v. Pfizer, Inc.*, No. 01 Civ. 8118(WHP), 2005 U.S. Dist.

*Sosa* affirmed that “the door is still ajar” to “further independent judicial recognition of actionable international norms”<sup>35</sup>—in other words, that, over time, international condemnation of additional forms of conduct could become sufficiently universal to satisfy the jurisdictional threshold for an ATS suit. However, the Court emphasized that, in Justice Souter’s unique phrase, such recognition remains “subject to vigilant doorkeeping.”<sup>36</sup> Federal courts perform this “doorkeeping” function in the first instance by examining the alleged underlying violation to ensure that it meets the threshold criteria of acceptance and specificity articulated in *Sosa* and applied in prior cases. Plaintiffs who do not allege an underlying violation that satisfies this initial hurdle cannot bring their claims in federal court. I argue below that, provided the underlying violation meets the *Sosa* standard, claims for aiding and abetting that violation also give rise to federal subject matter jurisdiction because aiding and abetting liability is sufficiently well established under international law.<sup>37</sup>

#### B. SUING NON-STATE ACTORS

Some private defendants argue that, because they are not state actors, they should not be subject to the international law-based jurisdiction of U.S. federal courts. This argument relies on a strict conception of international law as law among states, and ignores the *Sosa* Court’s affirmation that certain international law rules “bind[] individuals for the benefit of other individuals.”<sup>38</sup> All of the eighteenth-century paradigms cited in *Sosa* can be committed by private actors and give rise to ATS jurisdiction.<sup>39</sup> Although many wrongs committed by private actors do not rise to the level of international law violations, private actors are not exempt from the reach of international law or ATS jurisdiction.

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LEXIS 16126, at \*41 (S.D.N.Y. Aug. 9, 2005), dismissing case alleging nonconsensual medical experimentation for lack of subject matter jurisdiction.

35. *Sosa*, 542 U.S. at 729.

36. *Id.*

37. Conceptually, there are at least two ways to think about what it means to be “sufficiently” well established. One could either apply the *Sosa* standard to aiding and abetting liability, or view aiding and abetting liability through the lens of customary international law. Although aiding and abetting liability satisfies both of these approaches, it may be more elegant doctrinally to apply *Sosa* to the underlying violation for the purposes of establishing subject matter jurisdiction, and then apply a customary international law analysis to define the defendant’s mode of liability for contributing to the underlying violation. This is the approach I take in Part II.B.3, *infra*.

38. *Sosa*, 542 U.S. at 715.

39. My thanks to William Dodge for highlighting this point. See Dodge, *supra* note 18, at 226 (noting that each of the offenses against the law of nations identified by Blackstone “would typically have been committed by individuals”).

In *Kadic v. Karadzic*, which remains a foundational case on the possibility of international law violations by non-state actors, Bosnian Serb leader Radovan Karadzic argued unsuccessfully that international law norms by their very nature “bind only states and persons acting under color of a state’s law, not private individuals.”<sup>40</sup> The Second Circuit appropriately rejected this position,<sup>41</sup> as had the Nuremberg Tribunal after World War II.<sup>42</sup> Today, international law violations that do not require state action include genocide, certain war crimes, piracy, slavery, forced labor, aircraft hijacking, and acts committed in furtherance of those violations.<sup>43</sup>

Corporate defendants additionally argue that they should not be subject to ATS jurisdiction because corporations, they claim, are not themselves subjects of international law.<sup>44</sup> This argument misconstrues the absence of international criminal jurisdiction over corporations as evidence that international law does not prohibit certain forms of

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40. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

41. *See id.* at 240 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987)) (enumerating international law violations that can be committed by private actors, including “piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism”). Certain crimes against humanity could appropriately be added to this list. *See Bowoto v. Chevron Corp.*, No. C99-02506SI, 2006 U.S. Dist. LEXIS 63209, at \*11 (N.D. Cal., Aug. 22, 2006) (citing cases in support of the finding that crimes against humanity may be committed by private actors). *But cf. Wiwa v. Royal Dutch Petroleum Co.*, No. 1:96-cv-08386-KMW-HPB, 2002 U.S. Dist. LEXIS 3293, at \*39 (S.D.N.Y., Feb. 22, 2002) (finding that crimes against humanity of summary execution, arbitrary imprisonment, and persecution of a group based on political grounds require a showing of state action).

42. *See Kadic*, 70 F.3d at 243; *see also* Brief of the International Human Rights Law Group et al., as Amici Curiae Submitted in Opposition to Defendant’s Motion, *Doe v. Karadzic*, 866 F. Supp. 734 (S.D.N.Y. 1994) (No. Civ-93-0878), at 9–10, (cited in Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT’L L. 325, 401 nn.351–52 (1998)). This brief cited the following cases: *United States v. Flick* (The Flick Case), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 11 (1952) [hereinafter NUERNBERG TRIALS], available at [http://www.loc.gov/frd/Military\\_Law/NTs\\_war-criminals.html](http://www.loc.gov/frd/Military_Law/NTs_war-criminals.html) (setting forth the indictment of steel magnate and five principal associates); *United States v. Krupp* (The Krupp Case), 9 NUERNBERG TRIALS, *supra*, at 7 (indicting private industrialist and eleven top aides); *United States v. Carl Krauch* (The Farben Case), 7 NUERNBERG TRIALS, *supra*, at 10 (indicting twenty-four directors and officers of I.G. Farben-Industrie A.G.); *United States v. von Weizsaecker* (The Ministries Case), 12 NUERNBERG TRIALS, *supra*, at 13, 18 (indicting prominent ministers, including Karl Rasche, chairman of the Dresden Bank for his actions as a private banker).

43. *See SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 48 (2004).

44. *See* Brief of Professor Christopher Greenwood as Amicus Curiae in Support of Defendant-Appellee, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir. 2007) at 10–19 (on file with The Hastings Law Journal); Brief of Professor James Crawford as Amicus Curiae in Support of Defendant-Appellee, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 07-0016 (2d Cir. 2007) at 3–7 (on file with The Hastings Law Journal). *But cf. INT’L PEACE ACAD. & FAFO, BUSINESS AND INTERNATIONAL CRIMES: ASSESSING THE LIABILITY OF BUSINESS ENTITIES FOR GRAVE VIOLATIONS OF INTERNATIONAL LAW* 19–22 (2004), available at [http://www.ipacademy.org/asset/file/76/Businessand\\_IntCrime.pdf](http://www.ipacademy.org/asset/file/76/Businessand_IntCrime.pdf) (indicating that international law does bind corporations, even though no international forum currently has jurisdiction to prosecute corporate defendants).

corporate misconduct. Although this argument has not enjoyed success in ATS cases to date, it continues to be advanced by some commentators.<sup>45</sup> Proponents of this position tend to rely on the *Sosa* majority's statement that "[a] related consideration" for whether a norm is sufficiently definite to support a cause of action "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor *such as a corporation or individual.*"<sup>46</sup> Viewed in context, however, this sentence actually supports the possibility of corporate liability under the ATS. The *Sosa* majority was concerned with whether a private actor, as opposed to a state actor, can violate international law, not with whether a corporation, as opposed to an individual, can do so.<sup>47</sup> By grouping "corporations and individuals" together as private actors, the statement can be read as affirming the potential liability of corporations alongside private individuals under the ATS.<sup>48</sup>

Although *Sosa* did not involve a corporate defendant, the majority in that case seems to have taken the possibility of corporate ATS liability for granted. This is because, in appropriate circumstances, a U.S. court could properly assert both personal and subject-matter jurisdiction over a corporation for certain international law violations. If the Court revisits this issue in a future case, the most coherent approach would look to U.S. law on the question of personal jurisdiction, including the type of entity against which a claim can be asserted. As I argue below, international law would supply the substantive, conduct-regulating rules that apply to private actors.<sup>49</sup> Looking to domestic law on personal jurisdiction would

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45. See, e.g., Julian Ku, *Keeping the Courthouse Door Open for International Law Claims Against Corporations: Rethinking Sosa*, 9 ENGAGE 81, 83 (2008), available at [http://www.fed-soc.org/publications/pubID.689/pub\\_detail.asp](http://www.fed-soc.org/publications/pubID.689/pub_detail.asp) (arguing in a Federalist Society publication that the concept of corporate liability for international law violations is not sufficiently specific, universal, or obligatory to support ATS jurisdiction).

46. Bradley et al., *supra* note 19, at 928 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004)) (emphasis added).

47. In the text of the *Sosa* opinion, the quotation is followed by an invitation to compare Judge Edwards's finding in *Tel-Oren v. Libyan Arab Republic* that there was "insufficient consensus in 1984 that torture by private actors violates international law" with the Second Circuit's finding in *Kadic v. Karadzic* that there was "sufficient consensus in 1995 that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring); *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995)).

48. Consistent with this interpretation, Justice Breyer paraphrased the majority's opinion in his concurrence as requiring that an actionable norm "extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue." *Sosa*, 542 U.S. at 760 (Breyer, J., concurring) (citing *id.* at 732 n.20 (majority opinion)). This further suggests that the distinction at issue in *Sosa* footnote twenty is that between state actors and private actors, and that private actors in this context include both individuals and corporations. See *id.* at 732 n.20 (majority opinion).

49. As Doug Cassel points out, the potential individual criminal liability of corporate executives

be consistent with the *Karadzic* court's acceptance of tag jurisdiction as an appropriate means of securing personal jurisdiction over the defendant under U.S. law, even though international law disfavors tag jurisdiction.<sup>50</sup> The challenge, to which I now turn, is identifying the circumstances in which a defendant corporation subject to U.S. jurisdiction can be held civilly liable under the ATS for contributing to an international law violation by a state.

## II. ACCOMPLICE LIABILITY UNDER THE ALIEN TORT STATUTE

The problem of what law to apply in ATS cases arises at two junctures: first, at the stage of establishing federal subject matter jurisdiction over the claim, and second, in adjudicating the merits of the claim.<sup>51</sup> In the absence of Supreme Court guidance, lower courts have approached allegations of corporate accomplice liability in one of two ways.

I call the first approach the “ancillary question” approach, because it characterizes the standards for the accomplice defendant's liability as “ancillary” to the underlying tort committed by the state. Judge Reinhardt adopted this position in his concurrence in *Unocal*.<sup>52</sup> Under this approach, a U.S. court must first establish that it has subject matter

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themselves as accessories to international crimes “has long been clear.” See Cassel, *supra* note 4, at 304.

50. Compare *Karadzic*, 70 F.3d at 247 (applying the Federal Rules of Civil Procedure and U.S. standards for asserting personal jurisdiction consistent with due process), with RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 cmt. e (1987) (indicating that “‘Tag’ jurisdiction, i.e., jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law”).

51. Judge Bork anticipated this separate choice of law question in his concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 804 n.10 (D.C. Cir. 1984) (Bork, J., concurring). Judge Kaufman made a similar observation in *Filártiga*, stating that “the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations,” should not be confused “with the issue of the choice of law to be applied . . . . The two issues are distinct.” *Filártiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980). The *Tel-Oren* court did not have to consider the choice of law question, because it did not find subject matter jurisdiction over the alleged violation. *Tel-Oren*, 726 F.2d at 798. The *Filártiga* court did find jurisdiction and, on remand, the district court reasoned that “[i]f the ‘tort’ to which the statute refers is the violation of international law, the court must look to that body of law to determine what substantive principles to apply” to define the norm in question. *Filártiga v. Pena-Irala*, 577 F. Supp. 860, 862 (E.D.N.Y. 1984). After having looked to international law to establish the applicable standard prohibiting torture, the district court found that the ATS provided it with authority to “choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law,” and, accordingly, to award punitive damages not available under Paraguayan law. *Id.* at 863–64. The district court in *Filártiga* recognized that international law could not govern all aspects of an ATS claim because international law does not contain detailed rules on questions such as remedies. *Id.* Some aspects of ATS claims, then, must necessarily be governed by domestic law, whether that of the forum or the place of injury. However, as I argue below, the standard for accomplice liability is not one of these aspects.

52. *Doe v. Unocal Corp.*, 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003).

jurisdiction over the underlying international law violation committed by the state, whether or not it has personal jurisdiction over that state.<sup>53</sup> The court can then adjudicate the corporate defendant's liability for contributing to that violation by applying a different body of law—U.S. federal common law.

I call the second approach the “conduct-regulating rules” approach,<sup>54</sup> because it treats the defendant accomplice's participation as an integral part of the alleged violation. This approach applies international law to the conduct of the accomplice (here, the company), as well as to the conduct of the principal (here, the state). Judge Katzmman articulated this position in his recent concurrence in *Khulumani*,<sup>55</sup> although he misidentified the international law standard for accomplice liability, as I describe below. Under this approach, international law defines both the jurisdiction-creating norm violated by the principal and the degree of participation required by the accomplice in order to support liability under the ATS.

The conduct-regulating rules approach is the only approach that makes sense, because the ATS grants federal courts jurisdiction to adjudicate alleged violations of international law (adjudicative jurisdiction) and to enforce international law by providing penalties for those violations (enforcement jurisdiction). U.S. domestic law governs many important aspects of ATS cases, such as the personal jurisdiction of U.S. courts and matters of practice and procedure.<sup>56</sup> International law standards on accomplice liability govern whether a defendant is liable for wrongful conduct. As I explore further in Part III below, the conduct-regulating rules approach not only has the advantage of doctrinal coherence and consistency with the ATS's original jurisdictional grant, but it also avoids criticism of applying U.S. law to defendants' conduct in an international system that generally disfavors the extraterritorial application of domestic substantive law.<sup>57</sup>

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53. It is worth noting that the principal state's absence from the litigation does not preclude adjudication of the defendant's accomplice liability. This is consistent with the principle set forth in *Aldinger v. Howard*, which my colleague Richard Marcus helpfully brought to my attention—that federal litigation could proceed against county officials for the petitioner's alleged improper discharge even though there was no pendent federal jurisdiction over the petitioner's state law claims against the county itself. See *Aldinger v. Howard*, 427 U.S. 1, 2–3 (1976).

54. As indicated below, I borrow the term “conduct-regulating” from William Casto. See William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 695 (2006).

55. *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 280–82 (2d Cir. 2007) (Katzmann, J., concurring).

56. Cf. *Hanna v. Plumer*, 380 U.S. 460, 471–74 (1965) (discussing importance of differentiating between rules that modify substantive rights and those that affect the administration of remedies in the context of choice of law in federal diversity cases).

57. The ATS was originally enacted at least in part to provide a federal forum for suits that did not meet the requirements of alienage jurisdiction, whether the challenged conduct took place

### A. WHY ACCOMPLICE LIABILITY IS NOT AN “ANCILLARY QUESTION”

Although I disagree with the “ancillary question” approach, it is worth considering, particularly given judges’ presumed and understandable preference for applying domestic law. The ancillary question approach makes sense for matters of practice and procedure, but not for accomplice liability standards. Treating accomplice liability as an ancillary question means that, as Judge Reinhardt recognized in his *Unocal* concurrence, “if Unocal is held liable, it will . . . not [be] because Unocal itself engaged in acts transgressing international law”<sup>58</sup> but because “the Myanmar military committed the illegal acts and Unocal is determined to be legally responsible for that governmental conduct under a [U.S.] theory of third-party liability.”<sup>59</sup> This does not make sense.

Proponents of the ancillary question approach separate the state’s underlying violation, which is governed by international law, from the defendant’s mode of participation in that violation, which they argue should be governed by U.S. domestic law.<sup>60</sup> However, they fail to offer a principled explanation of why the defendant’s mode of participation is properly characterized as an “ancillary question” in this context. Without such an account, this approach remains unpersuasive.

Judge Reinhardt proposed the “ancillary question” approach in his concurring opinion in *Doe v. Unocal*, a pre-*Sosa* case involving Unocal’s alleged complicity in forced labor, rape, and murder committed by the Burmese military.<sup>61</sup> His opinion separates the underlying tort of summary

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overseas or on U.S. soil. See, e.g., Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 480 (1989); Dodge, *supra* note 18, at 236 & n.106. However, in practice, the vast majority of ATS cases involve conduct that took place overseas. *But cf.* *Jama v. INS*, 343 F. Supp. 2d 338, 386 (D.N.J. 2004) (denying private contractor’s summary judgment motion on ATS claim for gross mistreatment of non-criminal detainees awaiting decisions on their asylum applications).

58. *Doe v. Unocal Corp.*, 395 F.3d 932, 964 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003) (emphasis added).

59. *Id.*

60. For example, Paul Hoffman and Daniel Zaheer have categorized “the rules governing accomplice liability, statutes of limitations, determination of damages, standing to sue, and the other rules necessary to litigate a civil case” as “nuts and bolts questions” not governed by international law. Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 52 (2003). In their view, these questions should be governed by “apply[ing] the uniform rules of federal common law derived from international and federal law.” *Id.* at 66. However, Hoffman and Zaheer do not provide a principled basis for categorizing “the rules governing accomplice liability” as ancillary questions akin to standing and statutes of limitations, as opposed to conduct-regulating rules defined by international law.

61. The *Unocal* majority did not endorse the “ancillary question” approach, although it reached the same result as Judge Reinhardt. Judge Pregerson’s opinion, written on behalf of himself and Judge Tashima, looked largely to the decisions of international criminal tribunals to determine the scope of accomplice liability, while remaining open to the possibility that federal common law principles could

execution by the Burmese (Myanmar) military from what he calls the “ancillary legal question” of Unocal’s liability as an accessory or accomplice to this violation.<sup>62</sup> Judge Reinhardt agrees that the underlying tort must violate an international norm that meets what is now the *Sosa* standard. According to Judge Reinhardt, however, once this jurisdictional threshold is met, a company’s liability for a state’s tortious conduct can be evaluated “by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard.”<sup>63</sup> Although Judge Reinhardt acknowledges that international law governs the “substantive component”<sup>64</sup> of the ATS, he limits this “substantive component” to the jurisdiction-creating tort committed by the state actor, and he applies U.S. federal common law to the defendant corporation’s conduct.<sup>65</sup>

Judge Hall also looked to federal common law to define the elements of aiding and abetting liability in the more recent *Khulumani* case, which involves claims against corporations for complicity in international law violations in apartheid South Africa.<sup>66</sup> Although Judge Hall does not rule out the possibility of looking to international law to define modes of participation in international law violations,<sup>67</sup> he treats the resort to federal common law as a default position: “Lacking the benefit of clear guidance, I presume a federal court should resort to its traditional source, the federal common law, when deriving a standard” of aiding and abetting liability.<sup>68</sup> Moreover, in Judge Hall’s view:

[W]hen international law and domestic law speak on the same doctrine, domestic courts should choose the latter. . . . Here, customary international law and the federal common law both include standards of aiding and abetting. In a situation such as this, I opt for the standard articulated by the federal common law.<sup>69</sup>

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also furnish “viable” grounds for liability. *Unocal*, 395 F.3d at 947 n.20. Judge Pregerson downplayed the choice between federal common law and international law, because he concluded that the international criminal law standard for aiding and abetting is similar to the domestic tort law standard found in section 876(b) of the *Restatement (Second) of Torts*. *Id.* at 948 n.23; see also *id.* at 951 (setting forth the *Restatement* standard).

62. See *id.* at 963 (Reinhardt, J., concurring). Judge Reinhardt refers to Unocal’s liability as “third-party tort liability,” *id.*, but as my colleague Richard Marcus helpfully pointed out to me, it seems more accurate to characterize the company as an accessory or accomplice, rather than a “third party.”

63. *Id.*

64. *Id.* at 966.

65. *Id.* at 966–67.

66. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring).

67. *Id.* at 286 n.4.

68. *Id.* at 286.

69. *Id.* at 287.

Judge Reinhardt opined that applying international law to the question of accomplice liability would involve impermissibly “*substitut[ing]* international law principles for established federal common law or other domestic law principles.”<sup>70</sup> However, neither Judge Hall nor Judge Reinhardt provides adequate conceptual or doctrinal support for the notion that applying domestic law constitutes the appropriate default position in alien tort litigation. To the contrary, given that ATS was intended to provide a federal forum for adjudicating international law violations, one should not “substitute” domestic law standards for well-established international law standards on accomplice liability, which is what the ancillary question approach does.

The choice of law problem is a distinctly modern one. The First Congress enacted the ATS to provide a federal forum for violations of international law that were already cognizable at common law.<sup>71</sup> The division between domestic and international law was not consequential in this context, because both normative regimes were seen as based on natural law.<sup>72</sup> Today, by contrast, positivist understandings of law as the command of a particular sovereign, rather than the product of universal reason, present judges with a choice. While applying domestic law to defendants’ conduct might have some practical appeal, it lacks conceptual and doctrinal coherence in the ATS framework. It also raises the specter of illegitimately applying U.S. law to the extraterritorial conduct of non-U.S. defendants, exceeding the limits of domestic prescriptive jurisdiction based on territory or nationality.<sup>73</sup> Applying international law avoids potential due process concerns based on the extraterritorial application of U.S. law. It also comports with an understanding of the ATS as enabling U.S. courts to act as enforcers of international law.<sup>74</sup>

In opting to apply domestic (rather than international) law to Unocal’s conduct, Judge Reinhardt expressed distrust of the jurisprudence of the ad hoc international criminal tribunals established by the United Nations Security Council in the 1990s, including the

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70. *Unocal*, 395 F.3d at 966 (Reinhardt, J., concurring).

71. See Dodge, *supra* note 18, at 237.

72. See *id.* at 225.

73. Of course, some of the wrongful conduct at issue might appropriately be subject to the exercise of a state’s universal jurisdiction to prescribe and punish certain egregious conduct in violation of international law by imposing criminal or civil penalties on wrongdoers. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

74. For an elaboration of this view of the ATS as fulfilling the United States’ national obligation to enforce international law, see Burley, *supra* note 57, at 478, who explains that the First Congress enacted the ATS “in the knowledge that the federal judiciary could be counted on to enforce the law of nations as a national obligation.”

International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>75</sup> The *Unocal* majority relied heavily on the ad hoc tribunals' jurisprudence as evidence of the elements of aiding and abetting liability under international law.<sup>76</sup> Judge Reinhardt characterized this jurisprudence as "a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal."<sup>77</sup> This characterization misapplies a common law understanding of judicial opinions as binding precedents to the jurisprudence of international criminal tribunals, which is heavily influenced by the civil law tradition.<sup>78</sup>

The ICTY has jurisdiction over serious violations of international humanitarian law committed on the territory of the former Socialist Federal Republic of Yugoslavia on or after January 1, 1991.<sup>79</sup> The Secretary-General of the United Nations has emphasized that the legality principle, under which individuals can only be punished for violating criminal laws that were in force at the time they committed the allegedly wrongful acts, dictates that "the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law."<sup>80</sup> Accordingly, the ICTY has taken pains to establish the customary international law foundation of the substantive law it applies, including the elements of aiding and abetting liability.<sup>81</sup> As set forth in Part III.B.1 below, the judgments of international tribunals can appropriately be viewed as evidence of the existing customary international law, but are not themselves binding precedents.<sup>82</sup> Their "nascent" character does not detract from their evidentiary value in attempting to identify customary international law standards, particularly given their heavy reliance on the historically significant jurisprudence of

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75. *Doe v. Unocal Corp.*, 395 F.3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003).

76. *Id.* at 949–51 (majority opinion).

77. *Id.* at 965 (Reinhardt, J., concurring).

78. My thanks to Sonja Starr for raising this point.

79. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993).

80. The Secretary General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 34, U.N. Doc. S/25704 (May 3, 1993). The International Criminal Tribunal for Rwanda applies customary international law and treaties applicable to Rwanda at the time of the Rwandan genocide, which also have customary international law status. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 617 (Sept. 2, 1998).

81. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 191 (Dec. 10, 1998) (indicating that "the Trial Chamber must examine customary international law in order to establish the content" of aiding and abetting liability); see also *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 666 (May 7, 1997) ("The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act also has a basis in customary international law.").

82. See discussion *infra*, Part III.B.1.

the post–World War II Nuremberg trials and trials conducted under Control Council Law No. 10.<sup>83</sup>

Plaintiffs have also expressed reluctance to embrace whole-heartedly an international law approach to accomplice liability.<sup>84</sup> This can be explained at least in part as an effort to protect themselves against corporations’ jurisdictional argument that *no* theories of accessorial or accomplice liability are sufficiently specific and universally accepted to support federal subject matter jurisdiction under the ATS. However, even if the defendant’s mode of liability is subject to the *Sosa* standard—something that *Sosa* did not address—aiding and abetting liability meets this threshold, as I detail below. In ATS cases against both direct perpetrators and accomplices, U.S. courts can identify and enforce international law standards without wrapping them in the mantle of federal common law.

Because aiding and abetting an international law violation itself violates international law, there is also no need to look to judge-made federal common law as an interstitial gap-filler to define the elements of accomplice liability.<sup>85</sup> Turning Judge Reinhardt’s statement on its head, if a defendant company is held liable under the ATS for aiding and abetting an international law violation, it *will* be because the company itself engaged in acts transgressing international law, for which U.S. law

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83. See *Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶¶ 193–225, 237–240 (surveying post–World War II cases on accomplice liability); see also *Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶¶ 667–668, 674–680, 682–687 (same). Interestingly, Judge Reinhardt leaves room for applying international law in the form of federal common law. *Doe v. Unocal Corp.*, 395 F.3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003). If identifying international law standards were truly an unworkable or unreliable endeavor, it seems that selectively incorporating them as federal common law would exacerbate, rather than solve, the problem of excessive judicial selectivity that Judge Reinhardt identifies as a fatal flaw of the international law approach. See *id.* at 970 n.9.

84. For example, Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman, and Michael Ratner endorse the federal common law approach in the second edition of their extremely valuable treatise, although they concede that the question remains unsettled. See BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 319 (2d ed. 2008).

85. Beth Stephens, whose work Judge Hall cites in support of the “ancillary question” approach, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 286–87 (2d Cir. 2007) (Hall, J., concurring), has suggested looking first to international law, and then to federal common law as a “gap-filler” where international law is silent or ambiguous:

The standard practice of federal courts enforcing federal common law claims provides guidance for resolution of the countless issues that arise in federal court litigation. Where federal law does not provide a clear rule, the courts borrow from analogous federal or even state rules, as appropriate, to answer ancillary issues. Here, a court might ask first whether international law provides a clear answer, then look to federal vicarious liability standards as necessary to fill any gaps.

Beth Stephens, Comment, *Sosa v. Alvarez-Machain: “The Door Is Still Ajar” for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 560 (2004) (footnote omitted).

provides a remedy in the form of a civil action for damages.<sup>86</sup> Given that the ATS provides U.S. courts with jurisdiction to adjudicate and enforce international law, this is as it should be.

B. WHY THE “CONDUCT-REGULATING RULES” APPROACH POINTS TO INTERNATIONAL LAW

The ancillary question approach fails because it does not offer a principled account of why a defendant’s mode of liability should be treated differently from the state’s underlying violation for choice of law purposes. Determining whether or not the norm in question regulates conduct offers a principled method for differentiating between substantive and ancillary matters. Defining ancillary questions as those that do not regulate conduct provides a coherent basis for distinguishing issues that are governed by international law from those that are governed by federal common law.<sup>87</sup> Because the prohibition on aiding and abetting wrongdoing regulates conduct, it is governed by international law under the ATS framework.<sup>88</sup>

Criminal and tort law systems routinely attribute responsibility for wrongdoing to parties beyond the principal wrongdoer. While variations exist both within and between national legal systems,<sup>89</sup> it is

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86. *Cf. Unocal*, 395 F.3d at 964 (Reinhardt, J., concurring).

87. To the extent that individuals modify their behavior based on expectations about potential liability, any rules that tend to make it easier or more difficult to bring successful legal claims can be characterized as “regulating” conduct in a broad sense. Here, however, I use the term much more narrowly to designate rules specifically intended to differentiate unlawful conduct from lawful conduct. This is true whether or not the rule creates a separate substantive offense. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) (“The International Criminal Tribunal for the former Yugoslavia (ICTY), drawing on the Nuremberg precedents, has adopted a ‘joint criminal enterprise’ theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own.”). As Markus Dubber points out with respect to criminal law generally, “[c]omplicity doctrine is simply one way of satisfying the conduct element of the offence.” Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT’L CRIM. JUST. 977, 978–79 (2007); *cf. Roger S. Clark, Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT’L L. 49, 79 (1988) (indicating that, in the Geneva Conventions, “[c]ommitting’ as a general term is probably broad enough to include those who aid and abet”).

88. Even though the *Sosa* opinion reconciles the language of the ATS with positivist jurisprudence by stating that the common law provides plaintiffs with a right to sue, this does not, in my view, compel the application of domestic law (here in the form of federal common law) to the mode of defendant’s liability at either the jurisdictional or merits stage of the litigation. *But see* Bellinger, *supra* note 26 (“[T]he Supreme Court held in *Sosa* that the law to be applied under the ATS is U.S. federal common law.”); STEPHENS ET AL., *supra* note 84, at 36–37 (arguing that *Sosa* does address the choice of law question, and that it compels the application of federal common law to “non-substantive issues” including the defendant’s mode of liability). This unlikely agreement between individuals on opposite sides of many ATS debates invites pause, but does not ultimately persuade me of the soundness of categorizing the mode of liability as an ancillary question.

89. *See, e.g.,* Dubber, *supra* note 87, at 989–92 (examining models for accomplice liability in German and American criminal law).

uncontroversial that assisting the commission of a wrongful act can itself be a wrongful act that warrants the imposition of civil or criminal penalties, whether or not the principal is also penalized. Borrowing William Casto's terminology, the prohibition on knowingly assisting a wrongful act can be characterized as a "conduct-regulating norm."<sup>90</sup> Professor Casto writes:

All tort plaintiffs must prove that the defendant has violated some substantive norm that regulates the defendant's conduct. . . . *Sosa* held that in ATS litigation the norm regulating conduct must be found by the federal courts in international law. Other rules of decision that are not conduct-regulating norms are to be legislated by the courts as ordinary federal common law.<sup>91</sup>

This distinction between "conduct-regulating norms" and "other rules of decision" categorizes legal standards according to their functions. In this framework, standards that govern behavior are part of what Judge Reinhardt would call the "substantive component" of the ATS.<sup>92</sup> International law provides these substantive standards, including the standards for accomplice liability. Federal common law supplies other rules, such as rules relating to personal jurisdiction and matters of practice and procedure, which Judge Reinhardt would characterize as "ancillary."<sup>93</sup>

Because other statutes that make international law violations actionable in U.S. courts create causes of action themselves, it follows that these claims (unlike claims under the ATS) are properly grounded in domestic law, except where Congress provides otherwise. The Torture Victim Protection Act of 1991<sup>94</sup> ("TVPA"), the Foreign Sovereign Immunities Act of 1976 ("FSIA") exception for state sponsors of terrorism,<sup>95</sup> and the Anti-Terrorism Act of 1987,<sup>96</sup> are all, to quote Beth Stephens, "clearly creatures of U.S. law,"<sup>97</sup> and a U.S. court would

90. See Casto, *supra* note 54.

91. *Id.* (footnote omitted); see also William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 643 (2006) (indicating that, while rules governing procedural issues and the availability of damages come from domestic law, "the norm for which a remedy is provided in ATS litigation is clearly governed by international law"). Interestingly, Stephens et al. cite Casto in support of the ancillary question approach because they do not view the mode of liability as a conduct-regulating rule. See STEPHENS ET AL., *supra* note 84, at 37.

92. See *Doe v. Unocal Corp.*, 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003).

93. See *id.* at 964.

94. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as 28 U.S.C. § 1350 nt. (2006)).

95. 28 U.S.C. § 1605(a)(7)(A) (2006).

96. 18 U.S.C. § 2333 (2006).

97. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 10 (2002). Stephens also indicates that "[t]he legal regime governing the ATCA differs significantly" from these three statutes. *Id.*

therefore look to domestic law to define the elements of accomplice liability unless otherwise provided by Congress.<sup>98</sup> Currently, the international law of aiding and abetting closely resembles the domestic tort law standard found in section 876(b) of the *Restatement (Second) of Torts*, rendering this a distinction without a difference.<sup>99</sup> However, if international and domestic law evolve in different directions, it is possible that the standard for accomplice liability under the ATS will be different from that applied under these other statutes. This is the inevitable result of the difference between a statute that provides federal jurisdiction for certain international law violations, on the one hand, and statutes that themselves create federal causes of action, on the other.<sup>100</sup>

Despite this possible future divergence in applicable standards under the ATS compared to other domestic statutes, it is preferable to anchor choice of law decisions in the ATS context in a principled distinction between rules regulating behavior and rules regulating other aspects of the legal process. Defining what conduct amounts to culpable assistance to an international wrong belongs to the former category, and is thus appropriately determined with reference to international law. Notably, from the perspective of international tribunals, the prohibition on aiding and abetting is a substantive, conduct-regulating norm governed by customary international law.<sup>101</sup> The task, of course, is to identify the governing international law standard correctly in the absence of a system of binding international precedent.

In ATS cases, the choice comes down to a standard that imposes accomplice liability only on those who provide assistance with the specific intent of facilitating the underlying violation (which defendants argue represents the applicable international law standard), versus a standard that imposes accomplice liability on those who provide assistance knowing that the principal intends to violate international law and whose assistance has a substantial effect on the commission of the violation (which plaintiffs argue represents the applicable domestic law

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98. For example, the FSIA expropriation exception explicitly invokes international law by permitting actions against sovereigns for cases involving “rights in property taken in violation of international law.” See 28 U.S.C. § 1605(a)(3) (2006).

99. See, e.g., *Doe v. Unocal Corp.*, 395 F.3d 932, 948 n.23 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003) (concluding that the international criminal law standard for aiding and abetting is similar to the domestic tort law standard found in § 876(b) of the *Restatement (Second) of Torts*).

100. See also *Sebok*, *supra* note 8, at 892–93 (identifying an “alignment problem” created by using municipal tort law to address international atrocities).

101. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 191 (Dec. 10, 1998); *Prosecutor v. Tadic*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 666 (May 7, 1997). Nonsubstantive norms, derived from the “inherent power” of the court, include, for example, the power to hold individuals in contempt. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 14 (Jan. 31, 2000) (finding the power to hold individuals in contempt even though “[t]here is no specific customary international law directly applicable to this issue”).

standard or, in the alternative, the applicable international law standard). In the South African apartheid cases, two out of three judges found it appropriate to look to international law on the question of accomplice liability at the motion to dismiss stage, although they disagreed about how to frame this inquiry. Although both Judge Katzmann and Judge Korman indicated that they were attempting to identify the contemporary customary international law standard for accomplice liability,<sup>102</sup> they relied primarily on the decision with respect to one defendant in the post–World War II *Ministries* case and on Article 25 of the Rome Statute for the International Criminal Court,<sup>103</sup> rather than on other authoritative international law sources. Broadly speaking, the two judges who looked to international law to define the elements of accomplice liability looked in the right direction, but they did so with distorted lenses, leading to the incorrect conclusion that an accomplice to an international law violation must provide assistance for the “purpose” of facilitating that violation.<sup>104</sup> The Second Circuit’s decision in the apartheid cases thus failed to provide an accurate guide for judges grappling with allegations of accomplice liability in ATS cases.

Below, I attempt to provide more accurate guidance. First, I briefly discuss the methodology for identifying applicable international rules. I then examine the debate between the purpose and knowledge standards and conclude that the knowledge standard most accurately reflects the current state of customary international law, and should therefore be applied in ATS cases.

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102. *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring) (“[T]he recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules ‘that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.’” (citation omitted)); *id.* at 333 (Korman, J., concurring in part and dissenting in part) (agreeing with Judge Katzmann that the Rome Statute “reflects an international consensus on the issue of the appropriate standard for determining liability for aiding-and-abetting”).

103. *Id.* at 275–76 (Katzmann, J., concurring); *id.* at 333 (Korman, J., concurring in part and dissenting in part). It is worth noting that both of these judges rejected the argument that there is *no* identifiable standard for accessorial liability in customary international law. *Id.* at 270 (Katzmann, J., concurring); *id.* at 333 (Korman, J., concurring in part and dissenting in part). All three judges proceeded on the assumption that aiding and abetting an international law violation can give rise to liability under the ATS in at least some circumstances, although Judge Korman would construe this possibility quite narrowly. *Compare id.* at 327–28 (Korman, J., concurring in part and dissenting in part), *with id.* at 288 n.5 (Hall, J., concurring). They therefore rejected the blanket assertion that the ATS’s “refer[ence] to torts ‘committed’ in violation of international law” itself precludes liability for aiding and abetting in any circumstances. *See Bradley et al.*, *supra* note 19, at 926 (arguing this point).

104. Kevin Jon Heller made a similar point shortly after the decision was issued. *See* Posting of Kevin Jon Heller to Opinio Juris, The Second Circuit’s Incorrect Interpretation of Customary International Law, <http://opiniojuris.org/2007/10/25/the-second-circuits-incorrect-interpretation-of-customary-international-law-updated/> (Oct. 25, 2007, 21:30 EDT).

### *I. Identifying International Rules*

Ascertaining the content of international legal rules often begins with reference to Article 38 of the Statute for the International Court of Justice, which enumerates the sources of law that the ICJ uses in adjudicating disputes between states: (a) international conventions recognized by the contesting states; (b) “international custom, as evidence of a general practice accepted as law”; (c) “general principles of law recognized by civilized nations”; and (d) as a subsidiary source, “judicial decisions and the teachings of the most highly qualified publicists of the various nations.”<sup>105</sup> Treaty rules (Art. 38(a)) are contractual obligations among states parties.<sup>106</sup> Customary rules (Art. 38(b)), although they might overlap with treaty obligations, are binding rules that develop through the accumulation of state behavior, including the articulation of beliefs about the legal status of that behavior.<sup>107</sup>

Civil actions for violations of the “law of nations” prong of the ATS are generally understood as actions for violations of customary international law. In addition to surveying state practice directly, judges can look to judicial decisions and scholarly writings as useful reference guides to customary international law, as envisioned by Article 38(d). Although Article 38(d) specifically enumerates national judicial decisions, domestic and international judges can also draw from a growing body of decisions by international tribunals in a variety of areas as evidence of customary international law.<sup>108</sup> International decisions include judgments rendered in international criminal trials, including those conducted by the International Military Tribunal at Nuremberg under the London Charter, the allied tribunals operating under Control Council Law No. 10, the ICTY, and the International Criminal Tribunal for Rwanda (ICTR).<sup>109</sup>

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105. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055.

106. *Id.* art. 38(a); *see, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (1987) (defining “international agreement” as “an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law”).

107. Statute of the International Court of Justice art. 38(b); *see, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2)-(3) (defining customary international law and its relationship to treaty law).

108. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103(2)(a) & cmt. b (“[T]o the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is.”).

109. *See* Charter of the International Military Tribunal art. 1, Oct. 6, 1945, 59 Stat. 1546, 82 U.N.T.S. 279; Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. III, Dec. 20, 1945; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994). For a recent analysis of role of the Nuremberg Trials in ATS litigation, *see*

The same sources that help judges identify customary international law violations can help judges identify what modes of participation give rise to liability for those violations. For example, following the Nuremberg Trials, the International Law Commission, which is charged with developing and codifying international law, formulated a list of so-called “Nuremberg Principles,” which were endorsed by the U.N. General Assembly.<sup>110</sup> The Nuremberg Principles identify crimes that, according to the Nuremberg Charter and judgment, give rise to “responsibility under international law.”<sup>111</sup> Principle VII explicitly states: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law.”<sup>112</sup> As elaborated below, this principle is now firmly entrenched in international criminal law, which can appropriately be invoked by U.S. judges seeking to identify applicable international law standards under the ATS.

The United States, in an amicus brief to the Second Circuit in the apartheid cases, agreed that “the concept of *criminal* aiding and abetting liability is well established” in international law.<sup>113</sup> However, in this brief, the United States attempted to resurrect the position rejected by *Sosa* that the ATS cannot recognize a violation of the law of nations where international law itself does not provide a “specific private right to redress” for an international wrong.<sup>114</sup> This attempt to prevent principles

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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).

110. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946) [hereinafter Affirmation of the Principles].

111. *Report of the International Law Commission, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, 5 GAOR Supp. (No. 12) ¶¶ 126–127, U.N. Doc. A/1316 (1950), reprinted in [1950] 2 Y.B. Int'l L. Comm'n 377–78 [hereinafter Nürnberg Principles]; Affirmation of the Principles, *supra* note 110.

112. Nürnberg Principles, *supra* note 111. Although the prosecutor can bring a specific charge of “complicity in genocide” before the ad hoc international criminal tribunals, the term “complicity” refers more generally to criminal participation as an accomplice, rather than a principal. *See, e.g.*, Prosecutor v. Musema, Case No. ICTR-96-13-A, Trial Chamber Judgment, ¶¶ 176–177 (Jan. 27, 2000) (noting that, in most Civil Law systems, complicity includes “complicity by instigation, complicity by aiding and abetting, and complicity by procuring means,” and that in Common Law systems, complicity includes “aiding and abetting, counselling and procuring” (citation omitted)).

113. Brief of the United States of America as Amicus Curiae Supporting Defendant-Appellees at 21, *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) Nos. 05-2141-cv, 05-2326-cv.

114. *Id.* It is worth noting that the United States has criminalized torture, 18 U.S.C. § 2340 (2006), war crimes, 18 U.S.C. § 2441 (2006), and genocide, 18 U.S.C. § 1091 (2006 & Supp. 1 2007), as well as complicity in those acts, 18 U.S.C. § 2 (2006). On June 24, 2008, the U.S. Senate Judiciary Subcommittee on Human Rights and the Law held a hearing on “From Nuremberg to Darfur: Accountability for Crimes Against Humanity” to address criminalizing crimes against humanity under U.S. law. *From Nuremberg to Darfur: Accountability for Crimes Against Humanity: Hearing before Subcomm. on Human Rights and the Law*, 110th Cong. (2008), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3432>.

of aiding and abetting liability elaborated in the context of international criminal law from having any value as evidence of customary international law in the ATS context ignores the legal framework of the ATS.

International criminal trials constitute an important source of evidence of what behavior is considered internationally wrongful, not only for the purpose of international criminal prosecutions, but also for domestic proceedings designed to impose either criminal or civil penalties for international wrongs.<sup>115</sup> The sharp distinction between civil and criminal proceedings and penalties is a feature identified with modern common law systems, not the international system as a whole.<sup>116</sup> Even within common law systems, torts were historically considered the civil counterparts of crimes.<sup>117</sup> The early common law did not view torts and crimes as different kinds of wrongful acts, but instead distinguished torts from crimes based on the victim's choice to pursue "compensation over vengeance."<sup>118</sup> The First Congress appears to have shared this understanding since, as William Dodge emphasizes, "[t]here were two ways to redress offenses against the law of nations: punishing the wrongdoer and making the injured party whole."<sup>119</sup> Sections 9 and 11 of the 1789 Judiciary Act gave the federal courts jurisdiction over common-law crimes, including crimes in violation of the law of nations, and the ATS gave the district courts jurisdiction "over suits for damages based on the same violations."<sup>120</sup> Anne-Marie Slaughter has also pointed out that, in the ATS context, "[a] tort is the civil analogue to a crime."<sup>121</sup> The

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115. Judge Katzmman endorsed this approach, observing that "our case law . . . has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the ATCA." *Khulumani*, 504 F.3d at 270 n.5 (Katzmann, J., concurring) (rejecting distinction between civil and criminal aiding and abetting liability emphasized in United States amicus brief).

116. Justice Breyer highlighted this general point in his concurrence in *Sosa*, citing an amicus curiae brief submitted by the European Commission. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762–63 (2004) (Breyer, J., concurring) ("[T]he criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." (citation omitted)).

117. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 44 (1881) ("[T]he general principles of criminal and civil liability are the same."); JAMES FITZJAMES STEPHEN, *GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND* 2 (1863) (stating that nearly every crime is not only a crime, but is also an individual wrong or tort).

118. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 60 (1996); see also *id.* at 59 ("In most instances, the same wrong could be prosecuted either as a crime or as a tort."); *id.* at 83 ("Crime and tort were different ways for a victim to pursue justice for the same wrongful act.").

119. Dodge, *supra* note 18, at 228.

120. *Id.* at 231; see also Burley, *supra* note 57, at 478 ("Although the federal judiciary soon lost this power with respect to crimes, its authority with respect to torts remained unchallenged.").

121. Burley, *supra* note 57, at 479; see also *id.* ("Eighteenth-century lawyers understood ['tort'] to mean a delictual rather than a contractual wrong.").

fact that international criminal trials impose criminal rather than civil sanctions for internationally wrongful conduct does not undermine their importance as evidence of the current state of customary international law. If anything, one might expect a criminal standard for aiding and abetting to be defined more narrowly than a civil standard, because the penalties are viewed as more severe.<sup>122</sup>

## 2. *The Purposefulness Test*

In his concurring opinion in *Khulumani*, Judge Katzmann sets out to determine “whether there is a discernable core definition [of accessorial liability] that commands the same level of consensus as the eighteenth-century crimes identified by the Supreme Court in *Sosa*.”<sup>123</sup> He therefore accepts what *Sosa* does not decide: that federal courts do not have subject matter jurisdiction over claims for accomplice liability unless acting as an accomplice itself violates international law. He states, “I believe that we most effectively maintain the appropriate scope of [ATS] jurisdiction by requiring that the specific conduct allegedly committed by the defendants sued represents a violation of international law.”<sup>124</sup> However, in surveying the available international evidence, Judge Katzmann chooses to adopt the restrictive standard of purposeful assistance, rather than the customary international law standard of knowing assistance with a substantial effect.

Judge Katzmann begins with the premise that “just doing business” in a country governed by an oppressive regime does not by itself incur legal consequences.<sup>125</sup> He cites the *Furundzija* opinion from the ICTY, which surveys international judicial decisions on the standard for accomplice liability in order to identify the applicable customary international law standard.<sup>126</sup> He acknowledges that “the recognition of aiding and abetting liability in the ICTY Statute is particularly significant because the ‘Individual Criminal Responsibility’ section of that statute

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122. The higher mens rea for criminal aiding and abetting liability appears, for example, in U.S. federal law, even though criminal defendants generally enjoy greater protections than civil defendants. See *Cent. Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994) (identifying federal criminal aiding and abetting liability as requiring providing assistance “with the intent to facilitate the crime,” and federal civil aiding and abetting liability as requiring providing assistance “know[ing] that the other’s conduct constitutes a breach of duty” (citing RESTATEMENT (SECOND) OF TORTS § 876(b) (1965))).

123. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 277 n.12 (2d Cir. 2007) (Katzmann, J., concurring).

124. *Id.* at 269.

125. Accordingly, certain plaintiffs in the apartheid cases sought leave to amend their complaints to show that “their ATCA claims were not based upon the corporations ‘merely doing business’ in South Africa.” *Id.* at 259 n.5.

126. *Id.* at 273 (citing *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶¶ 195–225, 236–240 (Dec. 10, 1998)).

was intended to codify existing norms of customary international law.”<sup>127</sup> However, instead of relying on ICTY jurisprudence and the weight of authority from cases decided under the London Charter and Control Council Law No. 10, Judge Katzmann and his colleague Judge Korman rely instead on the Rome Statute, an international treaty creating the first permanent International Criminal Court (ICC).<sup>128</sup> Judge Katzmann acknowledges that the Rome Statute “has yet to be construed by the International Criminal Court; its precise contours and the extent to which it may differ from customary international law thus remain somewhat uncertain.”<sup>129</sup> Nevertheless, he adopts the Rome Statute’s articulation of the *mens rea* for aiding and abetting instead of the ICTY’s, although he adopts the ICTY’s *actus reus* of providing “substantial assistance” because the Rome Statute is silent on the *actus reus* requirement.<sup>130</sup>

According to Article 25 of the Rome Statute, a person “shall be criminally responsible and liable for punishment for a crime” if that person “[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.”<sup>131</sup> Article 10 in Part II of the Rome Statute on Jurisdiction, Admissibility and Applicable Law cautions that its provisions should not be read to limit customary international law: “Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”<sup>132</sup> This principle should also inform reference to other provisions in the Statute, including Article 25, which appears in Part III on General Principles of Criminal Law. Although the Rome Statute, along with its interpretation and its

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127. *Id.* at 274; *see also id.* at 274–75 (noting that “the provision of aiding and abetting liability in the ICTY statute reflects a determination by both the Secretary-General and the Security Council, which approved the Secretary-General’s report when it enacted the statute, that such liability is firmly established in customary international law” and that “[t]he inclusion of substantively identical language in the statute creating the ICTR presumably reflects a similar determination”).

128. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The International Criminal Court (ICC), unlike the *ad hoc* tribunals, is the product of multilateral treaty negotiations concluded at Rome in 1998. *See* United Nations Conference on the Establishment of an International Criminal Court, <http://www.un.org/icc/index.htm> (last visited Nov. 13, 2008). The ICC officially came into existence on July 1, 2002, after 60 states had ratified the statute. *See* International Criminal Court: Establishment of the Court, <http://www.icc-cpi.int/about/ataglance/establishment.html> (last visited Nov. 13, 2008). Although several cases are currently pending before the ICC, none has been tried to completion, meaning that there is not yet a body of jurisprudence from the ICC authoritatively interpreting and applying the provisions of the Rome Statute.

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

130. *Id.* at 277.

131. Rome Statute, *supra* note 128, art. 25(3)(c).

132. *Id.* art. 10.

application by the ICC, will constitute important evidence of state practice and *opinio juris* for the purpose of identifying customary international law norms, they are not dispositive and do not override the cumulative weight of other evidentiary sources.

States parties voluntarily subject themselves to the jurisdiction of the ICC which, unlike national courts, does not recognize a defense of official immunity.<sup>133</sup> The lack of an immunity defense suggests that, in negotiating the substantive terms of the Rome Statute, states might have set the bar to criminal liability higher than the current state of customary international law, which the Rome Statute does not purport to reflect. In addition, the definition of purposeful assistance in Article 25 remains somewhat ambiguous. States apparently failed to agree on the language of Article 25 until the final drafting conference for the Rome Statute, and the precise meaning of the “purpose” language has yet to be construed by the ICC itself.<sup>134</sup> It remains unclear whether “purpose” means sole purpose, primary purpose, or simply purpose as inferred from knowledge of likely consequences.<sup>135</sup> Thus, although the Rome Statute has been ratified by 108 states,<sup>136</sup> it cannot yet be said to reflect a meaningful or well-defined consensus on the contours of accomplice liability, in contrast to the greater weight of existing international criminal jurisprudence on this question.

As both Judge Katzmman and Judge Korman recognize, Article 25 also provides for individual criminal responsibility for a person who “[i]n any other way contributes to the commission or attempted commission” of a crime “by a group of persons acting with a common purpose,” where the person acts intentionally and has either the “aim of furthering” the criminal purpose of the group or “knowledge of the intention of the group to commit the crime.”<sup>137</sup> But they implicitly assume that the violations at issue in ATS cases do not fall within this provision, because they reject the knowledge standard. Instead, they find support in Article 25 for the proposition that, notwithstanding decades of international case

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133. *Id.* art. 27. The availability of official immunity in national court proceedings, including ATS cases, is beyond the scope of this Article.

134. See Cassel, *supra* note 4, at 310.

135. See *id.* at 312.

136. International Criminal Court: The States Parties to the Rome Statute, <http://www.icc-cpi.int/statesparties.html> (last visited Nov. 13, 2008).

137. See *Khulumani v. Barclay Nat'l Bank, Ltd.*, 504 F.3d 254, 275 (2d Cir. 2007) (Katzmann, J., concurring) (quoting Rome Statute, *supra* note 128, art. 25(3)(d)); *id.* at 332 (Korman, J., concurring in part and dissenting in part) (quoting Rome Statute, *supra* note 128, art. 25(3)(d)); see also Andrea Reggio, *Aiding and Abetting in International Criminal Law: The Responsibility of Corporate Agents and Businessmen for “Trading with the Enemy” of Mankind*, 5 INT'L CRIM. L. REV. 623, 647 (2005) (“[U]nder the ICC Statute, while intent is required to aid and abet a crime committed by a single person (or a plurality of persons not forming a joint criminal enterprise), knowledge is sufficient to aid and abet a joint criminal enterprise.”).

law to the contrary, accomplice liability requires action “for the purpose of facilitating” the crime.<sup>138</sup> They buttress this interpretation by emphasizing the one post–World War II case that found a banker’s knowledge of a borrower’s intention to use the borrowed funds to violate international law insufficient to hold the banker liable for complicity in the violations.<sup>139</sup>

Identifying customary international law requires weighing trends in state practice and *opinio juris* alongside practices and *opinio juris* that appear to deviate from these trends.<sup>140</sup> However, it is a mistake to equate customary international law—and even the *Sosa* standard—with prohibiting the recognition of any rule that exceeds a lowest common denominator of agreement in all circumstances, including a treaty in which states parties have explicitly foregone an immunity defense for their own officials. In adopting an excessively cautious approach to identifying international law standards for accomplice liability, Judge Katzmman and Judge Korman enable corporations to argue that they should not be found civilly liable for providing substantial assistance to an international law violation because they did not intend to facilitate any crime, but only to increase their profits. This is not the appropriate conclusion to draw from the available evidence, which I describe more fully below.

### 3. *The Knowledge Plus Substantial Effect Test*

The most legally sound opinion on the question of accomplice liability has yet to be written: one that identifies international law as the appropriate source for defining accomplice liability under the ATS, and that correctly defines aiding and abetting as providing assistance that had a substantial effect on the commission of the underlying violation, with knowledge that these acts assist or facilitate the commission of the violation. This standard flows from post–World War II and contemporary international criminal jurisprudence, which I examine below. Although Judge Katzmman referred to the Rome Statute as “international legislation,”<sup>141</sup> law-making processes in the international system are polycentric, with the United Nations Security Council having the final word in principle if not always in practice. Treaties such as the Rome Statute provide evidence of voluntary undertakings that states

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138. *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

139. *Id.* at 276 (quoting *United States v. von Weizsaecker*, 14 NUERNBERG TRIALS, *supra* note 42, at 308, 622); *id.* at 333 (Korman, J., concurring in part and dissenting in part) (citing *von Weizsaecker*, 14 NUERNBERG TRIALS, *supra* note 42, at 622).

140. *See, e.g.*, *Filártiga v. Pena-Irala*, 630 F.2d 876, 884 n.15 (2d Cir. 1980) (“The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law.”).

141. *Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring).

parties to the treaty agree will be legally binding amongst themselves. Identifying international law standards thus involves consulting multiple sources, as Article 38 of the ICJ Statute provides.

Because international jurisprudence is not itself jurisgenerative, judges relying on international judicial decisions as evidence of customary international law should remain aware of critiques of those decisions and take other evidence of state practice and *opinio juris* into account. Where collecting such evidence first-hand proves unwieldy, expert affidavits, as well as international law scholarship, can be helpful, although not determinative. Although this process might seem imperfect, it is not unworkable. In this section, I examine several key international decisions in some detail to illustrate the solid foundations of the knowledge plus substantial assistance standard for accomplice liability.

The weight of post-World War II jurisprudence confirms that the accepted mens rea for accomplice liability in international crimes is one of knowledge of the perpetrator's criminal intent, not shared purpose.<sup>142</sup> For example, the *Zyklon B* case tried by a British Military Court at Hamburg in 1946 provides useful evidence of postwar definitions of the mens rea and actus reus required to establish accomplice liability for international crimes. Three defendants were accused of knowingly supplying poison gas that was used to execute allied nationals detained in concentration camps: Bruno Tesch, the sole owner of the firm Tesch and Stabenow; Karl Weinbacher, Tesch's "procurist," who was authorized to act on behalf of the firm and administered the firm in Tesch's absence; and Joachim Drosihn, the firm's lead gassing technician, who did not have any management responsibilities.<sup>143</sup> Tesch and Stabenow accepted and processed orders for Zyklon B, which were then shipped directly from the manufacturers to the customers—the SS concentration camps.<sup>144</sup> The prosecution argued, and the court agreed, that "knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime."<sup>145</sup> Although other employees of the firm became aware of how Zyklon B was being used, only the three senior members of the firm were tried as war criminals.<sup>146</sup> The court convicted Tesch and Weinbacher and sentenced them to death by hanging.<sup>147</sup> Drosihn was acquitted.<sup>148</sup> The

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142. See, e.g., Reggio, *supra* note 137, at 631 (citing the Flick, I.G. Farben, Krupp, Zyklon B, and Roehling cases).

143. See The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93–107 (1997) (Brit. Mil. Ct., 1946).

144. *Id.* at 94.

145. *Id.* at 102.

146. *Id.* at 93, 95.

147. *Id.* at 102.

148. *Id.*

convictions were based on the defendants' knowledge of the intended use of Zyklon B for the criminal purpose of mass extermination, and their provision of assistance that had a substantial effect on the commission of the crime.<sup>149</sup>

An acknowledged exception to the knowledge standard in post-World War II case law arose in *United States v. von Weizsaecker*, the so-called *Ministries Case*.<sup>150</sup> There, Karl Rasche, the Chairman of Dresdner Bank, was acquitted of complicity in forced labor for loaning money to SS enterprises, even though he knew these enterprises used the labor of concentration camp inmates.<sup>151</sup> (He was convicted on other charges.<sup>152</sup>) It is difficult to reconcile this result with the concurrent verdict in the trial of banker Emil Puhl, which is more consistent with other postwar cases. Puhl, deputy to the president of the German Reichsbank, knowingly took part in disposing of gold (including gold teeth and crowns) and other valuables looted from Holocaust victims.<sup>153</sup> He was sentenced to five years' imprisonment for his accessorial role in crimes against humanity,<sup>154</sup> even though he apparently did not share the intent of the Nazi perpetrators and in all likelihood found their actions "repugnant."<sup>155</sup> It would be wrong to cite *The Ministries Case* in support of a blanket "purpose" requirement for accomplice liability in international law. But it is clear that, in the *Rasche* case, the judges found that holding a banker liable for lending money to illegal businesses would be casting the net too wide. Perhaps the different results in the *Rasche* and *Puhl* cases reflect the judges' view that banks routinely lend money, whereas they presumably do not routinely launder gold teeth, making the latter conduct seem more egregious and worthy of criminal punishment.<sup>156</sup> Although further investigation would be required to substantiate this hypothesis, it is possible that the mixed verdict in the *Rasche* case also reflects the challenges of branding too many prominent members of

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149. *Id.* at 94, 100.

150. *United States v. von Weizsaecker*, 14 NUERNBERG TRIALS, *supra* note 42, at 308.

151. *Id.* at 622, 854; *see also* Ramasastry, *supra* note 42, at 414-17 (discussing *Rasche* verdict).

152. Ramasastry, *supra* note 42, at 414-15 (discussing *Rasche* verdict).

153. *Von Weizsaecker*, 14 NUERNBERG TRIALS, *supra* note 42, at 620-21.

154. *Id.* at 868.

155. *Id.* at 620-21; *see also* Ramasastry, *supra* note 42, at 417-18 (discussing *Puhl* verdict).

156. *Compare von Weizsaecker*, 14 NUERNBERG TRIALS, *supra* note 42, at 622 (reasoning with respect to *Rasche* that "[a] bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit"), *with id.* at 621 (reasoning with respect to *Puhl* that "[i]t would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing of the loot must be exonerated and held not guilty as a participant in the murder plan").

society as war criminals in the midst of efforts at postwar reconstruction and attempts to legitimize a transitional regime in the eyes of the public.

Building on the post–World War II cases, the ad hoc international criminal tribunals have found that an aider and abettor must have knowledge of the perpetrator’s criminal intent, but need not share that intent.<sup>157</sup> Unlike the Special Court for Sierra Leone (as mandated by statute)<sup>158</sup> and the International Criminal Court (in practice if not by statute), the ad hoc tribunals are not mandated only to try those with the greatest responsibility for international crimes.<sup>159</sup> Recognizing that “system crimes,” as international crimes are often called, require the participation of numerous individuals, the ad hoc tribunals have followed post–World War II case law in attributing responsibility on all points along the spectrum of operational control and personal culpability. The various modes of participation in international crimes all incur individual criminal responsibility, although they may attract different degrees of opprobrium.<sup>160</sup>

Article 7(1) of the ICTY Statute, which is identical to Article 6(1) of the ICTR Statute, provides: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the

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157. See, e.g., *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 245–249 (Dec. 10, 1998) (identifying mens rea requirement of knowledge); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber Judgment, ¶ 32 (June 7, 2001) (identifying mens rea requirement of knowledge); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 538 (Sept. 2, 1998) (indicating that, with respect to the crime of complicity in genocide, the accomplice must have acted knowingly). *But cf. id.* at ¶ 485 (suggesting that aiding and abetting genocide, rather than complicity in genocide, require that the aider and abettor share the principal’s specific genocidal intent); *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 262 (Nov. 2, 2001) (indicating that, because persecution is a “special intent” crime, the aider and abettor “must also be aware that the crimes being assisted or supported are committed with a discriminatory intent” but “does not need to share the discriminatory intent”).

158. Statute of the Special Court for Sierra Leone, art. 1(1), S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000), available at <http://www.sc-sl.org/Documents/scsl-statute.html> (last visited Nov. 13, 2008).

159. For example, the ICTY’s first verdict was against defendant Drazen Erdemovic, a young soldier in the Bosnian Serb army who pleaded guilty to obeying an order to execute hundreds of Muslims. *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996).

160. See, e.g., *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Appeals Chamber Judgment, ¶ 92 (Feb. 28, 2005) (“Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.”). This differs from U.S. criminal law, which treats accomplices as if they had actually perpetrated the crime. See, e.g., 18 U.S.C. § 2(a) (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 92 n.3 (1985) (“Crimes are defined as if the accomplice actually committed the acts that constitute the offense.”).

crime.”<sup>161</sup> The requirements for liability for committing a crime as a principal, and liability as an aider and abettor, can be charted as follows:

	ACTUS REUS	MENS REA
COMMITTING/ PERPETRATING	Participating directly in the material elements of the offense through positive acts or omissions. <sup>162</sup>	Acting in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of one’s conduct. <sup>163</sup>
AIDING AND ABETTING	Providing practical assistance, encouragement, or moral support that has a substantial effect on the perpetration of the offense. <sup>164</sup>	Knowing that the acts assist or facilitate the commission of the offense. <sup>165</sup>

The ICTY Trial Chamber’s opinion in *Prosecutor v. Furundzija* considers the elements of aiding and abetting liability under customary international law at some length and merits attention here.<sup>166</sup> U.S. judges in ATS cases, including Judge Pregerson for the majority in *Unocal*,<sup>167</sup> have relied on this opinion as evidence of the content of customary international law. It is worth reviewing the details of the *Furundzija* case because the possibility that “moral support” could constitute the actus

161. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, Annex art. 7(1), U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994). A separate article, Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute, defines the elements of command responsibility, which is separate from accomplice liability and is generally not at issue in corporate ATS cases. The international law doctrine of command responsibility, which has been applied in ATS cases, holds commanders and superiors liable for violating an independent duty to prevent or punish violations. See STEPHENS ET AL., *supra* note 84, at 257 (“U.S. decisions look to case law of international tribunals to define the scope of command responsibility.”).

162. See, e.g., *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Trial Chamber Judgment, ¶ 251 (Nov. 2, 2001).

163. *Id.*

164. *Id.* ¶ 253.

165. *Id.* ¶¶ 253, 255 (“[T]he aider or abettor must have intended to assist or facilitate, or at least have accepted that such a commission of a crime would be a possible and foreseeable consequence of his conduct.”).

166. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Opinion and Judgment (Dec. 10, 1998).

167. *Doe v. Unocal Corp.*, 395 F.3d 932, 950–51 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003). Judge Pregerson’s opinion also analogizes *Unocal* to the defendants in post-World War II Nuremberg trials. *Id.* at 948 n.22 (“*Unocal* thus resembles the defendants in [*United States v.*] *Krupp*, who ‘well knew that any expansion [of their business] would require the employment of forced labor,’ and the defendants in *United States v. Flick*, who sought to increase their production quota and thus their forced labor allocation.” (citations omitted)).

reus for accomplice liability represented a major sticking point for Judge Reinhardt in the choice between international law and federal common law under the ATS.<sup>168</sup>

The ICTY's discussion centers on Furundzija's presence during the sexual assault and rape of a detained civilian, referred to in the opinion as "Witness A."<sup>169</sup> Furundzija was a local commander of a special unit of the military police known as the Jokers.<sup>170</sup> While Furundzija interrogated Witness A, another soldier forced Witness A to undress and rubbed his knife along her inner thigh and lower stomach, threatening to put his knife in her vagina if she did not tell the truth.<sup>171</sup> Later, while Furundzija interrogated Witness A and another victim, the same soldier beat the victims on their feet with a baton and then forced Witness A to have oral and vaginal intercourse with him.<sup>172</sup> The trial chamber examined customary international law to establish "both whether the accused's alleged presence in the locations where Witness A was assaulted would be sufficient to constitute the actus reus of aiding and abetting, and also the relevant mens rea required to accompany this action for responsibility to ensue."<sup>173</sup>

Because of the facts presented by this case, it was important for the tribunal to establish first whether assistance must be "tangible" in order to satisfy the actus reus of aiding and abetting.<sup>174</sup> The tribunal found, based on a survey of post-World War II case law, that "in certain circumstances, aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals in their commission of the crime."<sup>175</sup> For example, the tribunal cited the *Synagogue* case, which was heard under Control Council Law No. 10, for the proposition that "an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity."<sup>176</sup> The tribunal concluded that "presence, when combined with authority, can constitute assistance in the form of moral support, that is, the actus reus of the offence."<sup>177</sup> The emphasis on presence and authority was central to the

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168. *See id.* at 969–70 (Reinhardt, J., concurring).

169. *Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Opinion and Judgment, ¶ 39.

170. *Id.* ¶¶ 39–40.

171. *Id.* ¶ 40.

172. *Id.* ¶ 41.

173. *Id.* ¶ 191.

174. *Id.* ¶ 199.

175. *Id.*

176. *Id.* ¶ 207 (citing Strafsenat. Urteil vom 10. Aug. 1948 gegen K. und A. StS 18/48, 1 ENTSCHEIDUNGEN IN STRAFSACHEN 53, 56 (1949)).

177. *Id.* ¶ 209.

tribunal's holding that moral support can, in some circumstances, satisfy the actus reus requirement of aiding and abetting.<sup>178</sup>

The tribunal also made clear that the defendant's acts or omissions must have a "substantial effect on the commission of the offence."<sup>179</sup> This does not amount to a requirement of "but for" causation. But it does tend to exonerate those whose contributions, although instrumental and made with knowledge of the principal's criminal intent, do not play a sufficiently large enabling role in the principal's offense.<sup>180</sup>

Given the ICTY's numerous qualifying statements in the *Furundzija* opinion, it is somewhat surprising to see that, in *Unocal*, Judge Reinhardt rejected ICTY and ICTR jurisprudence as authoritative guides to accomplice liability standards under the ATS in no small part because of the possibility that "moral support" might satisfy the actus reus requirement for aiding and abetting.<sup>181</sup> Judge Pregerson, who looked to international law to supply the elements of aiding and abetting liability, found the *Furundzija* court's review of post-World War II case law persuasive in identifying customary international law norms.<sup>182</sup> He adopted the *Furundzija* court's approach to aiding and abetting liability, but he stopped short of endorsing "moral support" as a possibly sufficient actus reus.<sup>183</sup> Judge Pregerson stated: "[W]e may impose aiding and abetting liability for knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime, leaving the question whether such liability should also be imposed for moral support which has the required substantial effect to another day."<sup>184</sup>

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178. See *id.* (finding that "[t]he supporter must be of a certain status for" assistance in the form of moral support "to be sufficient for criminal responsibility"). As the *Furundzija* court pointed out, the ICTR reached a similar conclusion in the trial of Jean-Paul Akayesu. *Id.* (citing Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 692 (Sept. 2, 1998)).

179. *Furundzija*, Case No. IT-95-17/1-T, Trial Chamber Opinion and Judgment, ¶ 221.

180. *Id.* ¶¶ 222-223 (distinguishing the guilty verdicts in the British *Zyklon B* case against the owner and second-in-command of the firm that produced poison gas used in concentration camps from the acquittal of a senior gassing technician employed by the firm). The *Furundzija* court's discussion of the mens rea requirement for aiding and abetting is more cursory and less helpful than its discussion of the actus reus requirement. The court ultimately found that, despite individual post-World War II cases requiring a greater or lesser mens rea, the majority of cases indicate that knowledge suffices to convict an aider and abettor. *Id.* ¶ 245. In particular, the court cited the numerous convictions of individuals who drove victims and perpetrators to the site of an execution with knowledge of the criminal purpose of the executioners, but without the shared intention of killing. *Id.*

181. See *Doe v. Unocal Corp.*, 395 F.3d 932, 969-70 (9th Cir. 2002) (Reinhardt, J., concurring), *vacated*, 395 F.3d 978 (9th Cir. 2003).

182. *Id.* at 950-51 (majority opinion).

183. *Id.* at 951.

184. *Id.*

Judge Reinhardt, who looked instead to federal common law to provide the elements of aiding and abetting liability, made much of this apparent prevarication.<sup>185</sup> Judge Reinhardt chided:

[T]he majority disclaims an integral portion of the international law standard it adopts, purporting to leave “to another day” the question whether moral support alone (whatever that may mean) is sufficient to give rise to third-party liability. However, by *substituting* international law standards for federal common law, rather than following federal common law and incorporating those portions of international law that attract sufficient legal support, the majority has lost whatever opportunity it had to pick and choose the aspects of international law that it finds appealing.<sup>186</sup>

This back-and-forth over the “moral support” requirement was largely avoidable, and should not be the basis for choosing federal common law over international law. Contrary to Judge Reinhardt’s suggestion, one need not adopt a “take it or leave it” approach to international judicial decisions as evidence of customary international law, provided that one has a principled basis for picking and choosing.

Judge Pregerson should have emphasized that, in order to constitute aiding and abetting, “moral support” must be given by an approving spectator with high status or authority, in addition to having the required substantial effect on the commission of the crime. He could then either have adopted the *Furundzija* court’s articulation of the applicable customary international law standard without modifying it,<sup>187</sup> or he could have found the contextual requirements of the “moral support” standard inapplicable in the context of corporate complicity, and declined to invoke the “moral support” prong of accomplice liability on that basis. Had he chosen either of these paths, his opinion would have more faithfully and forcefully articulated the international law definition of accomplice liability, and provided a clearer road map for future ATS cases.

### III. CHALLENGES

The doctrinal muddle surrounding ATS claims has proven particularly acute in cases alleging corporate complicity in international law violations by states. The *Khulumani*<sup>188</sup> decision only compounded this confusion. It remains to be seen whether appellate decisions in pending

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185. *Id.* at 970 (Reinhardt, J., concurring).

186. *Id.* at n.9 (citation omitted).

187. *See id.* at 951 (finding that “application of a slightly modified *Furundzija* standard is appropriate in the present case”).

188. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007).

corporate ATS cases<sup>189</sup> evaluate complicity claims with any greater degree of doctrinal coherence or consensus than their predecessors.

The above analysis provides a guide for evaluating complicity claims in pending and future ATS cases. First, federal subject matter jurisdiction over an alleged international law violation, including accomplice liability for such a violation, must be decided with reference to international law. This is because a defendant's mode of participation in an international law violation can best be conceptualized as a conduct-regulating rule that is part of the substantive violation, not an ancillary question.

Second, there is a well-accepted and specific definition of accomplice liability in international law that supports federal subject matter jurisdiction under the ATS. This standard defines an accomplice as one who provides assistance that has a substantial effect on the commission of the underlying violation, with knowledge that these acts assist or facilitate the commission of the violation. Federal courts have subject matter jurisdiction over ATS complaints that allege accomplice liability, and defendants' conduct can properly be adjudicated under this well-established international law standard.

Any doctrinal conclusion carries policy implications. In this Part, I briefly identify and examine some of these implications, which are bound to inform reactions to my conclusions.

#### A. INDETERMINACY

Prevailing understandings of common law as judge-made law make contemporary jurists uncomfortable with vesting too much discretion in federal judges to develop law in new areas.<sup>190</sup> This anxiety is even more acute when foreign and international law sources are involved.<sup>191</sup> The *Sosa* court recognized this discomfort, which animated in part its conclusion that actionable international law norms must reach a certain level of "acceptance among civilized nations," and that their content must be no "less definite" than the historical paradigms familiar at the time the ATS was enacted.<sup>192</sup> The reluctance to vest too much discretion in federal judges seems particularly acute when, as here, judges are asked to identify and apply customary international law. As Judge Edwards

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189. See cases cited *supra* note 10.

190. See, e.g., Jose A. Cabranes, *International Law by Consent of the Governed*, 42 VAL. U. L. REV. 119, 134–35 (2007) (discussing the problems involved in identifying customary international law and the difficulty of separating "empirical" from "theoretical and policy-driven" international law scholarship to assist in this endeavor).

191. For an overview of related debates in the area of constitutional interpretation, see CHIMÈNE I. KEITNER, INTERNATIONAL AND FOREIGN LAW SOURCES: SIREN SONG FOR U.S. JUDGES? (Am. Const. Soc'y for Law and Policy, 2007), available at <http://www.acslaw.org/files/Keitner%20ACS%20issue%20brief.pdf>.

192. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004).

remarked: “While [the *Filártiga*] approach is consistent with the language of section 1350, it places an awesome duty on federal district courts to derive from an amorphous entity—i.e., the ‘law of nations’—standards of liability applicable in concrete situations.”<sup>193</sup>

The proliferation of international criminal law jurisprudence assists in this endeavor, but it does not negate domestic judges’ “awesome duty.” That said, it is not clear that the burden of interpreting and applying federal common law would be any less “awesome.” For example, in *Khulumani*, Judge Korman pointed out that using the American Law Institute’s *Restatement of Torts* as a touchstone for standards of accomplice liability does not constrain judicial discretion any more than invoking international law.<sup>194</sup> Although looking to a single source such as the *Restatement* is practically easier than canvassing a variety of international law sources, the flexibility of the federal common law approach makes it no less indeterminate than the international law approach. Moreover, as the *Sosa* court emphasized, Congress can act to override international law for ATS purposes if it so chooses.<sup>195</sup>

The indeterminacy concern can also be framed as a concern about accuracy, rather than discretion. Simply put, U.S. courts might not correctly identify customary international law standards. This concern cannot be avoided entirely. Although identifying applicable international law standards is a matter of law and not of fact, parties often submit expert affidavits to establish the existence or absence of particular customary international law norms.<sup>196</sup> This compensates to a certain extent for the general lack of international law training among U.S. judges, but the potential for error inevitably exists. Again, however, it is also possible that a U.S. district court judge will incorrectly identify federal common law standards. The argument that the indeterminacy of international law should preclude its application by U.S. courts is

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193. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

194. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 328 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). Judge Cabranes articulates a similarly skeptical view of the Restatements as a source of law. See Cabranes, *supra* note 190, at 137 (characterizing the American Law Institute’s approach to identifying the “better rule” as “by definition, a political enterprise, in which competing perspectives, personalities, and factions vie for the favorable final verdict of a self-selected elite”).

195. *Sosa*, 542 U.S. at 731 (“Congress may [shut the door to the law of nations] at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”).

196. This practice is specifically referenced in section 113(2) of the *Restatement (Third) of Foreign Relations Law*. For a commentary on the implications of the use of expert witnesses to prove the content of customary international law, see Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT’L & COMP. L. 205 (1996).

unpersuasive. At most, it confirms the continued need to train U.S. lawyers and judges in comparative and international law principles and research methods so that they are better equipped to handle transnational cases across a variety of contexts.

#### B. DELEGATION

The preference for applying domestic over international law may also reflect concerns about the institutional constraints under which international tribunals are operating, and the appropriateness of relying excessively on those tribunals to identify customary international law standards. For example, the third category of “joint criminal enterprise” (JCE) liability identified by the ad hoc tribunals has been criticized for implicating individuals as principals for acts committed by co-principals beyond the object of the criminal enterprise, much like the U.S. *Pinkerton*<sup>197</sup> doctrine of conspiracy.<sup>198</sup> It might seem easier to put the “brakes” on the incorporation of theories such as the third category of JCE into ATS jurisprudence if one views modes of liability as a matter of federal common law, rather than international law. However, the critique of the third category of JCE itself indicates that, by reviewing both scholarship and jurisprudence that collects evidence of state practice and *opinio juris*, U.S. judges can evaluate their foreign and international counterparts’ identification of customary international law standards and reach their own conclusions.

Applying international law can also raise concerns about delegating the future development of conduct-regulating norms outside of the United States. The *Sosa* majority seems to have contemplated such a delegation when it left the door ajar to recognizing future customary international law norms, subject to “vigilant doorkeeping.”<sup>199</sup> Although U.S. courts are the “doorkeepers,” and although the United States plays

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197. *Pinkerton v. United States*, 328 U.S. 640 (1946) (affirming that a defendant may be held criminally liable for reasonably foreseeable acts of co-conspirators).

198. See, e.g., Steven Powles, *Joint Criminal Enterprise—Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT’L CRIM. JUST. 606, 615 (2004) (“A closer inspection of the authorities and practice cited in *Tadic* as giving rise to a customary norm of international law in relation to the third category of joint criminal enterprise, the extended form, reveals that the acceptance of such liability was limited.”). Recently, Darryl Robinson has highlighted the internal contradictions in the ad hoc tribunals’ standard for JCE, which is easier to establish than aiding and abetting, but which carries greater culpability. See Darryl Robinson, *The Identity Crisis of International Criminal Law* 25 n.87 (May 5, 2008) (unpublished manuscript available at <http://ssrn.com/abstract=1127851>). More generally, Robinson’s analysis underscores the need to distinguish the law-identifying functions of the tribunals from their law-generating pretensions. This exercise is necessarily imperfect but, as suggested above, this imperfection does not in itself require abandoning the attempt to identify binding international law standards. See discussion *supra* Part III.A.

199. *Sosa*, 542 U.S. at 729.

an important role in creating customary international law through its own state practice and expressions of *opinio juris*, resort to international law does delegate some law-making power outside of the United States. That said, the First Congress enacted the ATS in order to give federal courts jurisdiction to adjudicate claims for certain international law violations. It would be highly ironic if these cases were disfavored on the grounds that they require U.S. judges to apply international law.

Even though the ATS recognizes the international community's jurisdiction to prescribe internationally unlawful conduct, ATS jurisprudence has itself become an important source for the identification of international law standards. For example, U.N. Special Representative John Ruggie cites ATS jurisprudence in documenting the emergence of international law constraints on corporations, and characterizes decisions in ATS cases as the "largest body of domestic jurisprudence regarding corporate responsibility for international crimes."<sup>200</sup> This process exemplifies the transnational judicial dialogue envisioned, for example, in Article 38(d) of the ICJ Statute, which identifies national judicial decisions and scholarly writings as subsidiary means for determining the content of customary international law. In this perspective, delegation concerns can best be addressed through the continued engagement of U.S. courts in the process of identifying customary international law, which also ultimately contributes to the law's progressive development.

### C. COMITY

Debates over the reasonableness of one country's exercise of prescriptive, adjudicative, or enforcement jurisdiction over activities occurring in another country persist in multiple contexts, and ATS cases are no exception. In his concurring opinion in *Sosa*, Justice Breyer addressed this issue under the heading of "comity." He stated that U.S. federal courts should, on a case-by-case basis, "ask whether the exercise of jurisdiction under the ATS 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."<sup>201</sup> Looking to international law rather than federal common law helps alleviate this concern.<sup>202</sup> Because accomplice liability is itself an international law norm, U.S. courts can find defendant corporations liable without imposing U.S. conduct-regulating rules on extraterritorial activities. Those who seek to limit the extraterritorial reach of U.S. prescriptive

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200. See *Business and Human Rights*, *supra* note 9, ¶ 30.

201. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

202. My thanks to Bill Dodge for emphasizing this point.

jurisdiction should favor this result, since it grounds ATS actions for accomplice liability in international, rather than domestic, law.<sup>203</sup>

Objections to perceived overreaching by U.S. courts in ATS and other cases arguably have more to do with U.S. assertion of personal jurisdiction over foreign corporations in a variety of contexts.<sup>204</sup> This should not deter U.S. judges from implementing their legislative mandate to enforce international law standards in ATS cases, absent other discretionary grounds for declining to exercise jurisdiction in specific cases.<sup>205</sup>

Corporate defendants facing allegations of complicity in international law violations under the ATS also argue that plaintiffs are trying to make an impermissible end-run around the FSIA, which is the exclusive source of U.S. adjudicative jurisdiction over foreign states. While the spirit of the “end-run” argument seems plausible, the language of the FSIA specifically limits its reach to “agencies and instrumentalities” of foreign states, which does not encompass independent corporate accomplices.<sup>206</sup> To the extent that ATS complaints seek redress for the conduct of the defendant accomplices, rather than the sovereign principals, a strong case can be made that these civil actions do not impermissibly infringe on the absent principal’s sovereignty.

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203. To the extent that the underlying conduct also violates the domestic law of the country in which it occurred, that country would have concurrent jurisdiction based on the territoriality principle. Under the ATS, a defendant’s alleged conduct is actionable because it violates international law, whether or not it also violates domestic law. Some defendants argue that the ATS carries an implicit requirement of exhaustion of local remedies, because the much more recently enacted TVPA has an explicit exhaustion requirement. The exhaustion debate lies beyond the scope of this paper, although it is worth noting that in many ATS cases, there are few if any local remedies available to exhaust. *See, e.g., Sarei v. Rio Tinto*, 487 F.3d 1193, 1217–19 (9th Cir. 2007) (declining to find an exhaustion requirement in the ATS), *appeals docketed*, Nos. 02-56256, 02-56390 (argued to en banc court on Oct. 11, 2007).

204. For example, Andrew Wilson suggests that “much of the criticism of the Act’s ‘overreaching’ would be more properly directed at the forms of personal jurisdiction that are used in conjunction with it, notably ‘tag’ (based on the—often ephemeral—presence of defendant in the United States) and ‘doing business’ jurisdiction, especially in its ‘general’ form.” Andrew J. Wilson, *Beyond Unocal: Conceptual Problems in Using International Norms to Hold Transnational Corporations Liable Under the Alien Tort Claims Act*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 43, 44 n.4 (Olivier De Schutter ed., 2006).

205. For example, in *Khulumani*, Judge Katzmman and Judge Hall agreed that prudential considerations could indeed warrant dismissal, but they found that this was for the district court judge to address in the first instance. *Khulumani v. Barclay Nat’l Bank, Ltd.*, 504 F.3d 254, 261 n.8 (2d Cir. 2007). *But see id.* at 308 (Korman, J., concurring in part and dissenting in part) (“The issue [of deference to the Executive] here should be treated as one going to subject matter jurisdiction—which we must resolve—even if it would not necessarily be so treated in other contexts.”).

206. *See* 28 U.S.C. §§ 1330, 1602–1611 (2006).

Although accomplice liability does in some sense depend upon wrongdoing by the principal, it can be adjudicated independent of the principal's liability.<sup>207</sup> The conduct being adjudicated is the defendant's, not the principal's. The U.S. government's position in its amicus brief in *Khulumani* does not sufficiently appreciate this distinction. In that brief, the U.S. government combined the extraterritoriality argument addressed above with a comity argument framed in terms of vicarious liability:

It would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances to regulate [the] conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government of South Africa.<sup>208</sup>

A private actor serving as a government agent would benefit from immunity under the FSIA. However, where there is no agency relationship, there is no basis for depriving a U.S. court of subject matter jurisdiction over an accessory's wrongful acts merely because the court does not have jurisdiction over the principal.<sup>209</sup> Moreover, precisely because the principal's acts are non-justiciable in U.S. courts,<sup>210</sup> the foreign state should not be considered an indispensable party, in part because there is little risk of a duplicative action reaching a contrary result.

Comity and related concerns are best addressed by invoking familiar abstention doctrines, where applicable, rather than by further muddling the jurisdictional analysis. Although it might be tempting to dismiss a pending ATS case at the earliest opportunity, judges should refrain from blurring the distinction between dismissal for lack of subject matter jurisdiction, and dismissal based on a refusal to exercise jurisdiction on prudential grounds.<sup>211</sup> Improper dismissals for lack of subject matter jurisdiction prevent U.S. courts from fulfilling their role as domestic

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207. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 531 (Sept. 2, 1998) ("As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.").

208. Brief of the United States of America Amicus Curiae Supporting Defendant-Appellees, at 21, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007) Nos. 05-2141-cv, 05-2326-cv.

209. The FSIA defines an "agency or instrumentality of a foreign state" as an "organ of a foreign state or political subdivision thereof" or an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2) (2006).

210. See 28 U.S.C. § 1604 (providing that, subject to enumerated exceptions, "a foreign state shall be immune from the jurisdiction of the courts of the United States").

211. Cf. *Corrie v. Caterpillar*, 503 F.3d 974, 979, 984 (9th Cir. 2007) (improperly treating the political question doctrine as jurisdictional rather than prudential, and affirming dismissal for lack of subject matter jurisdiction because suit involved a political question).

enforcers of certain well-established international law norms, a role prescribed by the First Congress and recognized by the Supreme Court in *Sosa*.

#### CONCLUSION

ATS litigation provides a rich laboratory for examining the interaction of international and domestic law in U.S. courts. The elusiveness of judicial agreement on standards for adjudicating accomplice liability in ATS cases reflects persistent confusion about the appropriate doctrinal framework, as well as normative disagreement about the desirability of applying international law in U.S. courts. My doctrinal analysis indicates that international law, not federal common law, governs the standards for accomplice liability at both the jurisdictional and merits stages. The ATS gives federal courts jurisdiction to hear claims for accomplice liability, which are appropriately adjudicated by applying international law to the defendant's conduct. Defendant accomplices may appropriately be found liable under international law if they knowingly provide assistance that has a substantial effect on the commission of the underlying violation. From a normative perspective, this approach also seems most compatible with limiting the extraterritorial reach of domestic prescriptive jurisdiction in the ATS context while at the same time enabling domestic courts to adjudicate and enforce international law.

U.S. judges can invoke a variety of prudential doctrines to abstain from exercising jurisdiction under the ATS, where appropriate. By abstaining too frequently, however, U.S. judges will deprive plaintiffs of an opportunity to seek redress for international law violations in federal court, a result contrary to the purpose of the First Congress. They will also forfeit their own ability to participate meaningfully in the development and enforcement of international law standards that are designed to protect individuals, not just govern the interactions of states.

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