PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 33 | Issue 2 | Article 7

1-20-2006

The Sosa Standard: What Does It Mean for Future ATS Litigation?

Virginia Monken Gomez

Follow this and additional works at: https://digitalcommons.pepperdine.edu/plr

Part of the International Law Commons, Jurisdiction Commons, and the Torts Commons

Recommended Citation

Virginia Monken Gomez *The Sosa Standard: What Does It Mean for Future ATS Litigation?*, 33 Pepp. L. Rev. Iss. 2 (2006)
Available at: https://digitalcommons.pepperdine.edu/plr/vol33/iss2/7

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The *Sosa* Standard: What Does It Mean for Future ATS Litigation?

I. INTRODUCTION
II. HISTORY OF ATS LITIGATION
  A. Filartiga v. Pena-Irala: *Establishing a Civil Remedy in U.S. Courts for Human Rights Violations Under the ATS*
  B. *The Torture Victim Protection Act ("TVPA"): A Congressional Endorsement of ATS Litigation*
  C. Kadic v. Karazdic: *Extending ATS Liability to Non-State Actors*
III. *SOSA V. ALVAREZ-MACHAIN*
  A. *Case Summary*
  B. *The* Sosa *Standard*
    1. Violation of Customary International Law
    2. Requisite Degree of Specificity
      i. *Offenses Against Ambassadors and Violations of Safe Passage*
      ii. *Piracy*
    3. Applying the Standard to Facts of *Sosa*
IV. IMPACT: APPLYING THE *SOSA* STANDARD IN FUTURE LITIGATION
  A. *Practical Challenges*
  B. *Case Study:* Sosa*'s Implications for Corporate Defendants*
    1. Background
    2. Forced Labor Claim
    3. Aiding and Abetting Claim
V. CONCLUSION: A CALL FOR GUIDANCE

I. INTRODUCTION

The United States has a vital national interest in the maintenance of international law and order. That interest is not incidental, it is not transitory or occasional; it is a fundamental interest which is the result of . . . living in a world with other nations. We have a right to protect that interest against law-breakers; and we have a duty to protect it. Being the strongest Power among the nations, . . . we can at least proclaim that, given certain conditions of a just peace, we

are prepared to take our part in maintaining the rule of law in the future.[1]

The Alien Tort Statute ("ATS") provides jurisdiction in United States district courts for an action by an alien, for a tort only, "committed in violation of the law of nations or a treaty of the United States."[2] The ATS is a thirty-three word statement included in the Judiciary Act of 1789 that lay dormant for 170 years, until the 1980 *Filartiga v. Pena-Irala* decision introduced it as a vehicle for non-nationals to hold human rights abusers civilly liable in U.S. courts.[3] This decision was monumental—it transformed the ATS from an obscure section in a centuries-old act to a highly controversial jurisdictional grant that has spawned the litigation of numerous human rights cases in U.S. federal courts.[4] Since *Filartiga*, a battle has waged between strict constructionists, who argue that the ATS was meant to be nothing more than a jurisdictional grant for the federal courts to hear those claims arising under international law that Congress has so identified, and the opposing camp, which believes that the ATS implicitly recognizes violations of international law as justiciable private causes of action.[5] And due to the "poverty of drafting history"[6] regarding the statute,

1. C. G. Fenwick, *International Law and Lawless Nations*, 33 AM. J. INT'L L. 743, 746 (1939) (quoting an editorial comment written in the wake of World War I).

2. 28 U.S.C. § 1350 (2000). Prior to the Supreme Court's decision in Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), this provision was commonly referred to as the "Alien Tort Claims Act" or "ATCA." *See, e.g.*, Papa v. United States, 281 F.3d 1004, 1007 (9th Cir. 2002). This article will follow the *Sosa* Court's lead, however, and refer to 28 U.S.C. § 1350 as the ATS. *See Sosa*, 124 S. Ct. at 2746.

3. *See* 630 F.2d 876, 877-78 (2d Cir. 1980); *see also* Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83 (2001) [hereinafter J. Ratner].

4. *See, e.g.*, Paul E. Hagen & Anthony L. Michaels, *The Alien Tort Claims Act: A Primer on Liability for Multinational Corporations*, ALI-ABA Course of Study, Course No. SJ059 Feb. 11-13, 2004, *available at* WL SJ059 ALI-ABA 319, at *322 (citing Flores v. S. Peru Copper Corp., 343 F.3d 140, 149 (2d Cir. 2003); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); *In re* Estate of Ferdinand Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 443 (D.N.J. 1999); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995)).

5. *Compare* 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):

> Both the text of the Alien Tort Statute and its historical context demonstrate that the First Congress did not mean to limit jurisdiction to suits against U.S. citizens or even to violations of the law of nations that were recognized at that time. Rather, they intended that the district courts 'have cognizance . . . of *all* causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.' The text of the Constitution also shows that 'Laws of the United States' in Article III is broader than 'Laws of the United States which shall be made in Pursuance [of the Constitution]' under Article VI, and history shows that Article III's phrase . . . may be fairly read today, as including the law of nations. To say this is, of course, not to resolve every aspect of the debate over the role of customary international law in the U.S. legal system, but it is to say that *Filartiga* was constitutional when it was decided.

neither side has been able to declare victory.[7] The United States Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* was thus long-awaited guidance on the scope and applicability of the ATS to modern day claims alleging violations of international law.[8]

In *Sosa*, the Supreme Court was tasked with determining whether the illegal detention of a Mexican national violated a norm of international law sufficient to create a cause of action in U.S. federal courts under the ATS.[9] For once and for all, lower courts, human rights advocates, and potential defendants alike would finally be instructed on how to ascertain an actionable claim under the ATS—or would they? The *Sosa* Court held that the ATS authorizes jurisdiction over tort suits, brought by aliens, *only* for claims that meet the following criteria: (1) the claim rests on a norm of international character accepted by the civilized world; and (2) the claim is defined with specificity comparable to those violations of international law that existed at the time the ATS was enacted.[10] With regard to the second prong, the *Sosa* Court noted that it considered only three offenses to have been recognized in the eighteenth-century as violations of the law of nations: offenses against ambassadors, violations of safe conduct, and "individual

---

with Elizabeth F. Defeis, *Litigating Human Rights Abuses in United States Courts: Recent Developments*, 10 ILSA J. INT'L & COMP. L. 319, 319 (2004) (explaining that "[s]ome scholars, judges, and the Bush administration" advocate narrowly construing the statute—"[t]hey argue that the [statute] was designed solely to address piracy or violations of diplomatic immunity and does not confer a private right of action"). *See also* Hagen & Michaels, *supra* note 4, at *322 (noting that the Second, Fifth, Ninth, and Eleventh Circuits have adopted *Filartiga*'s position that the ATS "not only provides subject matter jurisdiction, but also creates a private cause of action" for tort-like injuries sustained in violation of international law).

6. *Sosa*, 124 S. Ct. at 2758.

7. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (1975) (noting that the ATS is a "legal Lohengrin . . . no one seems to know whence it came"); *see also Sosa*, 124 S. Ct. at 2758 (discussing the scarce evidence of legislative intent regarding the ATS).

> There is no record of . . . discussion about private actions that might be subject to the jurisdictional provision . . . to create private remedies; there is no record even of debate on the section. Given the poverty of drafting history, modern commentators have necessarily concentrated on the text . . . [b]ut despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.

Id.; *see also* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (noting that neither the Senate nor the House debates regarding the Judiciary Act of 1789 mention the ATS provision); Defeis, *supra* note 5, at 319.

8. *See generally Sosa*, 124 S. Ct. at 2747 (granting certiorari, in part, to determine the scope of the ATS).

9. *Id.* at 2746.

10. *Id.* at 2761-62 ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

actions arising out of prize captures and piracy . . . ."[11] ATS watchers received their long-awaited guidance, but it did not solve the debate as either side may have hoped.[12] The Court merely shifted the debate to revolve around the question, what does the *Sosa* standard mean?

This article argues that the *Sosa* standard is as follows. First, the Court's requirement that the claim be based on a "norm of international character accepted by the civilized world" means that the claim must rest on a violation of customary international law.[13] Second, the Court's stipulation that the claim must be "defined with a specificity comparable to the features of the [recognized historical] paradigms" means that the violation of customary international law must mirror those qualities that made the historical offenses unique.[14] This article suggests that the historical paradigms were singled out as violations of international law because they were specific torts, committed by individuals, which had ramifications for international security—and as such, nations universally and obligatorily recognized them. To that end, Part II of this article provides a brief history of ATS litigation in U.S. courts.[15] Part III delves into the *Sosa* case itself. It summarizes the facts of the case and analyzes the standard set forth by the Supreme Court.[16] Part IV speculates on the impact that *Sosa* will have on future ATS litigation. It identifies the issues the *Sosa* Court failed to address, and applies the *Sosa* standard to the facts of the *Doe v. Unocal* case to illustrate *Sosa*'s implications for corporate defendants.[17] Finally, Part V concludes *Sosa* did leave the "door ajar" for modern-day human rights violations to be actionable under the ATS, but notes that the decision did

---

11. *Id.* at 2759 (referencing An Act for the Punishment of certain Crimes against the United States, ch. 9, §§ 8, 28, 1 Stat. 112, 113-14, 118 (1790)). Blackstone's Commentaries were written in the same period that the ATS was passed. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *68. The Court noted that Blackstone mentioned three specific offenses against the law of nations that criminal law in England acknowledged at the time: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 124 S. Ct. at 2756.

12. *See* David L. Hudson, Jr., *Foreign Turf: Human Rights Suits Against Corporations Hinge on How Open the Door Is*, A.B.A. J., Sept. 2004, at 20. Human rights advocates and anti-ATS groups alike are holding *Sosa* out as a victory for their side. *Id.* Human rights advocates emphasize that the Supreme Court left the "door . . . ajar" for claims to arise under the ATS and did not limit the statute merely to providing U.S. federal courts with jurisdiction to hear congressionally authorized causes of action. *Id.* (quoting *Sosa*, 124 S. Ct. at 2764). Anti-ATS groups, by contrast, focus on the *Sosa* Court's stipulation that claims must be comparable to the three designated eighteenth-century offenses, and construe that language to mean that only claims that are *analogous* to the historical paradigms are actionable. *Id.*

13. *Sosa*, 124 S. Ct. at 2761.

14. *Id.* at 2761-62.

15. *See infra* notes 19-47 and accompanying text.

16. *See infra* notes 48-118 and accompanying text.

17. *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005); *infra* notes 119-99 and accompanying text.

little to quell the controversy surrounding ATS litigation in the United States.[18]

II. HISTORY OF ATS LITIGATION

A. Filartiga v. Pena-Irala: *Establishing a Civil Remedy in U.S. Courts for Human Rights Violations Under the ATS*

Looking for a way to avenge the death of their son/brother Joelito, Dr. Joel Filartiga and his daughter Dolly invoked an all-but-forgotten statute from 1789 and filed suit in U.S. federal district court against defendant Americo Norberto Pena-Irala.[19] Pena-Irala was an ex-police officer from Paraguay whom they alleged was responsible for torturing and murdering Joelito in retaliation for Dr. Filartiga's outspoken political activity.[20] The district court dismissed the case for lack of subject matter jurisdiction, but the Second Circuit Court of Appeals reversed the lower court and held that (a) Pena-Irala could be tried for perpetuating torture under the color of authority, because such an act violated "well-established, universally recognized norms of international law;" and (b) the district court had the authority to hold the defendant civilly liable, regardless of the nationality of the parties and the fact that the tort occurred abroad, because it had jurisdiction to do so under the ATS.[21] The significance of this decision cannot be overstated. *Filartiga* took a statute that had basically no previous application and used it to establish a "civil remedy in [U.S.] federal court for severe human rights violations rising to the level of customary international law."[22] This paved the way for dozens of ATS claims to be filed in U.S. courts throughout the next twenty-five years.[23] Many of the claims filed were dismissed on doctrinal or procedural grounds (e.g., forum non conveniens), but federal courts from several circuits applied the *Filartiga* holding to recognize a small set of actionable violations in addition to

18. *See infra* notes 200-03 and accompanying text.

19. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

20. *Id.*

21. *Id.* at 887-89.

22. *See* J. Ratner, *supra* note 3, at 84.

23. *See, e.g.*, Defeis, *supra* note 5, at 320 (noting that since the *Filartiga* decision in 1980, plaintiffs seeking civil remedies in U.S. courts for injuries committed abroad (a) are from countries as diverse as "Argentina, Bosnia, Burma, Chile, China, El Salvador, Ethiopia, Guatemala, Haiti, Indonesia, Nigeria, Paraguay, and the Philippines;" and (b) allege violations of international law ranging from "arbitrary detention, forced disappearance, torture, extra judicial killing, genocide, war crimes, [to] crimes against humanity").

torture.[24] These included summary execution, disappearance, war crimes, crimes against humanity, and slavery.[25]

B. *The Torture Victim Protection Act ("TVPA"): A Congressional Endorsement of ATS Litigation*

A decade later, Congress weighed in on the ATS issue and passed the Torture Victim Protection Act ("TVPA").[26] The TVPA essentially codified the *Filartiga* decision, and expanded it to provide civil recourse for U.S. citizens, as well as aliens, who are victims of torture abroad.[27] The TVPA provides a substantive cause of action for civil liability against an individual guilty of committing torture or extrajudicial killing under the color of law of a foreign nation.[28] This is a significant step in the evolution of ATS litigation because it validated the federal courts' decision to use the ATS to recognize and adjudicate civil liability claims arising from violations of international law.[29] Due to the ATS's ambiguous roots, the courts previously had no way of knowing how Congress viewed the statute, and whether it was meant to be only a jurisdictional grant or if it authorized the courts to recognize customary international norms and substantive causes of action arising thereunder.[30] The TVPA House and Senate Reports clarified this issue.[31] The Reports validated the federal courts' interpretation of the ATS as it had been applied in *Filartiga* and subsequent cases, and indicated that the ATS could and should be used by courts to recognize additional claims arising under customary international law.[32] Committee reports are

24. *See* Beth Stephens, *"The Door Is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537 n.18 (citing Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); Abebe-Jira v. Negewo, 72 F.3d 844, 845-46 (1996); Kadic v. Karazdic, 70 F.3d 232 (2d Cir. 1995); and Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995)).

25. *See id.*

26. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)) [hereinafter TVPA].

27. *Id.*

28. *Id.*

29. See Stephens, *supra* note 24, for a sampling of those claims successfully brought under the ATS since *Filartiga*.

30. *See supra* note 7.

31. *See* H.R. REP. NO. 102-367, pt. 1 (1991); S. REP. NO. 102-249 (1991).

32. *See* Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249, 256 n.19 (2004) [hereinafter J. Paust—*Alien Tort Claims Act*] (explaining that the TVPA was not meant to supersede the ATS).

> Both the House and Senate Reports concerning enactment of the [TVPA] express a congressional resolve that the [ATS] "should remain intact to permit suits based on . . . norms [other than torture and extrajudicial killing] that already exist or may ripen in the future into rules of customary international law."

Id. (citing H.R. REP. NO. 102-367, pt. 1, at 4; S. REP. NO. 102-249, at 3); *see also* Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003) (quoting S. Rep. No. 102-249, at 4 (1991), which states that the TVPA was intended to "establish an unambiguous basis for a cause of action that has

not binding authority and do not of course grant federal courts the power to create substantive causes of action in violation of their Constitutional limitations. The legislative history surrounding the enactment of the TVPA nevertheless provides persuasive evidence that Congress supports a reading of the ATS that allows the courts to adjudicate claims arising from violations of established, customary international law.[33]

C. Kadic v. Karazdic: *Extending ATS Liability to Non-State Actors*

The next chapter in the ATS book was written when the Second Circuit Court of Appeals decided *Kadic v. Karazdic*.[34] *Filartiga* held that claims involving violations of international law committed by state officials or those acting under the color of law could be brought under the ATS.[35] *Kadic* expanded ATS liability to *private actors* for a limited group of universally condemned international law violations.[36] In *Kadic*, Croat and Muslim citizens of Bosnia-Herzegovina alleged that defendant Karazdic, the president of a self-proclaimed republic within Bosnia-Herzegovina, was responsible for carrying out atrocities against them, such as genocide, summary execution, and torture.[37] Karazdic responded that the plaintiffs failed to allege "violations of the norms of international law because such norms bind *only* states and persons acting under color of a state's law, not private individuals" . . . and that he was not a state actor.[38] The Second Circuit Court of Appeals rejected Karazdic's argument. The *Kadic* court determined that certain universally condemned violations, such as slave trading, war crimes, and genocide, violate customary international law regardless of whether state or private actors commit them.[39] Additionally, the court held that "lesser" tortious acts such as official torture and

---

been successfully maintained under [the ATS,] . . . which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations' . . . and noted that 'the *Filartiga* case has been met with general approval'").

33. *Flores*, 414 F.3d at 247.

34. 70 F.3d 232, 232 (2d Cir. 1995).

35. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 877 (2d Cir. 1980).

36. *Kadic*, 70 F.3d at 239 ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

37. *Id.* at 236-37. The "plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death" against Karazdic and the Bosnian-Serb military forces that he controlled. *Id.* at 237.

38. *Id.* at 239 (emphasis added).

39. *Id.*; *see also* Alan Frederick Enslen, Note, *Filartiga's Offspring: The Second Circuit Significantly Expands the Scope of the Alien Tort Claim Act with its Decision in Kadic v. Karazdic*, 48 ALA. L. REV. 695, 696 (1997).

"summary execution," which are typically violations of customary law only when they are undertaken by state actors or under the color of law, were actionable under the ATS "without regard to state action, to the extent that they were committed in pursuit of" one of the universally condemned violations (e.g., genocide or war crimes).[40] *Kadic* therefore opened the door for ATS litigation even wider: under *exceptional circumstances* involving a small group of universally condemned violations of international law, plaintiffs can file ATS claims against private, non-state actors in U.S. federal courts.[41]

The *Kadic* holding is particularly significant in the evolution of ATS litigation because it has provided the basis for those cases involving non-state entities, such as multinational corporations.[42] This development is largely responsible for fueling the fire surrounding the ATS, because pre-*Kadic*, the ATS's application was limited to a small set of generally judgment-proof individual tortfeasors.[43] Post-*Kadic*, however, the ATS can potentially be applied to corporate defendants, and as a result, "the days of symbolic judgments [have been left] behind."[44] The ATS now wields "true deterrent effect" by having the ability to "hit[] . . . a major player where it hurts, both financially and in terms of public relations."[45] This has caused alarm in corporate America and in the U.S. Administration, who fear that successful suits against corporate defendants under the ATS could discourage foreign investment, potentially bankrupt U.S. corporations, and interfere with international, political, and economic relationships.[46] In light

40. *Kadic*, 70 F.3d at 244; *see also* Gabriel D. Pinilla, Note & Comment, *Corporate Liability for Human Rights Violations on Foreign Soil: A Historical and Prospective Analysis of the Alien Tort Claims Controversy*, 16 ST. THOMAS L. REV. 687, 694 (2004).

41. *Kadic*, 70 F.3d at 244; *see also* Pinilla, *supra* note 40, at 695 (noting that "*Kadic* brought [ATS] jurisprudence to a new threshold by finding that state action was not required for actionability in certain exceptional circumstances.").

42. Pinilla, *supra* note 40, at 695 (suggesting that *Kadic*'s "line of thinking created the intellectual momentum for *Unocal* and its evolving progeny"); *see also* Hagen & Michaels, *supra* note 4 (providing examples of ATS cases involving corporate defendants); Stephens, *supra* note 24, at 537-38.

43. *See* Stephens, *supra* note 24, at 536-38 (discussing successfully-litigated ATS claims).

44. Pinilla, *supra* note 40, at 700.

45. *Id.* "With *Unocal* and subsequently affirmative cases finally able to compellingly grip at least some of the parties involved in theses nightmare violation scenarios, the ATCA seemed to suddenly gnash a mouthful of menacingly proscriptive teeth." *Id.* at 695; *see, e.g.*, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005) (holding parties may be liable under the ATCA for crimes committed).

46. *See, e.g.*, Gary Clyde Hufbauer, *The Supreme Court Meets International Law: What's the Sequel to* Sosa v. Alvarez-Machain*?*, 12 TULSA J. COMP. & INT'L L. 77, 85-86 (2004) (speculating that corporate liability under the ATS could lead to asbestos-like litigation and the discouragement of foreign investment); *see also* Reply Brief for the United States as Respondent Supporting Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004) (No. 03-339), 2004 WL 577654 (arguing that the ATS will "intrude on matters pertaining to the conduct of foreign affairs by the political branches").

of the growing debate regarding the scope and legitimacy of the ATS, the Supreme Court's decision to grant certiorari to hear the *Sosa* case could not have come sooner.[47]

III. *SOSA V. ALVAREZ-MACHAIN*

A. Case Summary

After informal extradition talks broke down, the U.S. Drug Enforcement Agency ("DEA") enlisted petitioner José Francisco Sosa and several other Mexican nationals to forcibly abduct respondent Humberto Alvarez-Machain from Mexico in 1990 and bring him to the U.S.[48] The DEA believed that Alvarez-Machain, a medical doctor allied with Mexican drug traffickers, participated in the interrogation, torture and murder of DEA agent Enrique Camarena-Salazar in 1985.[49] Alvarez-Machain challenged his criminal indictment in U.S. courts on the ground that he was kidnapped in violation of the Extradition Treaty between the United States and Mexico.[50] The case went all the way to the Supreme Court, and the Court concluded that Alvarez-Machain's forcible abduction did not prohibit a trial in the United States under its criminal laws.[51] The case was remanded to the district court for trial, where Alvarez-Machain was acquitted of the criminal charges.[52]

Still unsatisfied, Alvarez-Machain sued the United States for false arrest under the Federal Torts Claims Act ("FTCA") and DEA employee Sosa for violating the law of nations under the ATS.[53] The district court dismissed the FTCA claim, but found in favor of Alvarez-Machain on the ATS claim and awarded him damages.[54] The Ninth Circuit Court of Appeals affirmed the lower court's ATS judgment but reversed the FTCA holding.[55] The

47. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 247 (2d Cir. 2003) (noting that as of 2003, "[t]he Supreme Court [had] not yet addressed whether the [ATS] permits a cause of action for violations of customary international law as that body of law has evolved since 1789, or . . . whether *Filartiga*'s interpretation of the [ATS] is consistent with the Constitution.").

48. United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992).

49. *Id.* at 657 n.1.

50. *Id.* at 658.

51. *Id.* at 657.

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

53. *Id.* at 2747.

54. *Id.*

55. *Id.*

Supreme Court granted certiorari and heard the case on March 30, 2004.[56] The *Sosa* Court held that Alvarez-Machain could not recover (a) under the FTCA since the alleged transgressions occurred across the border, placing his case in the "foreign country" exception to the waiver of government immunity;[57] nor (b) under the ATS because a single detention of less than one day did not violate a norm of customary international law so well defined as to create a substantive cause of action.[58]

B. The Sosa *Standard*

In evaluating whether Alvarez-Machain brought a valid claim under the ATS, the *Sosa* Court articulated a long-awaited standard for ascertaining substantive claims under the ATS. Prior to *Sosa*, it was generally accepted that the ATS gave U.S. federal courts *jurisdiction* to hear claims brought forth "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[59] The controversy stemmed from a dispute over first, whether the ATS was more than a jurisdictional grant, i.e., did it empower federal courts to recognize substantive claims that Congress has not specifically identified as viable causes of action? And second, if the ATS does empower courts to recognize substantive claims in violation of international law, how does a court determine what constitutes a violation of international law?

The *Sosa* Court directly settled the first flashpoint in the ATS debate. The Court held that the ATS is indeed more than a jurisdictional grant, and that the statute authorizes U.S. federal courts to recognize substantive violations of a small number of well-settled violations of international law.[60] The Court concluded:

> [W]e agree that the [ATS] is in terms only jurisdictional, [but] we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law . . . .[61] [The ATS presumably allowed] federal courts [to] entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time [and] . . . [t]here is too much in the historical record

56. *Id.*

57. *Id.*

58. *Id.* at 2754. "We do not believe . . . that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by [Alvarez-Machain] here." *Id.*

59. 28 U.S.C. § 1350 (2000).

60. *Sosa*, 124 S. Ct. at 2754.

61. *Id.*

to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.[62]

The Court then turned its attention to the second hotly-debated issue in ATS litigation: what constitutes a violation of international law sufficient to give rise to a claim under the ATS? In answer to this question, the *Sosa* Court set forth the following two-fold standard. A claim rests on a tort in violation of international law and is actionable under the ATS where it: (1) rests on a norm of international character accepted by the civilized world; and (2) is defined with specificity comparable to those violations of international law that existed at the time the ATS was enacted.[63] With regard to the second prong, the *Sosa* Court noted that it considered only three offenses to have been recognized in the eighteenth-century as violations of the law of nations: offenses against ambassadors, violations of safe conduct, and individual actions arising out of prize captures and piracy.[64] The natural follow-up inquiry to the second component is: what qualities made these torts violations of international law and defined them with *Sosa*'s requisite specificity?

1. Violation of Customary International Law

Sosa's requirement that the claim be based on a "norm of international character accepted by the civilized world" arguably means that the claim must rest on a violation of customary international law.[65] There is no litmus test for determining what constitutes customary international law,[66] nor is

62. *Id.* at 2755, 2758-59. The *Sosa* Court rejected the notion that the "ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action." *Id.* at 2755.

63. *Id.* at 2761-62 ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

64. *See supra* note 11.

65. *See Sosa*, 124 S. Ct. at 2761.

66. This article does not attempt to define an international norm in the absolute sense or try to establish an exhaustive list of norms, but focuses on ascertaining *Sosa*'s calculus for making this determination. There has been extensive discussion and debate over how the "law of nations" should be defined or what constitutes an "international norm." In that there is no single source, set of participants, or institutional arrangement for the creation and management of international law, the "norms" that comprise international law are rather amorphous. *See* Jordan J. Paust, *The Significance and Determination of Customary International Human Rights Law: The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147 (1996) [hereinafter J. Paust—*Customary International Law*].

there an exhaustive list of recognized customary international norms.[67] The most common definition of a customary international norm, however, is the one adopted by the International Court of Justice.[68] It stipulates that to be customary international law, a norm must be: "reflected in consistent state practice," and "adhered to out of a sense of legal obligation (*opinio juris*)."[69]

The first component of the definition is known as the "practice prong;" i.e., the norm must be reflected in the pattern of practice among nations.[70] This is evidenced both by what states do, as well as what they say.[71] State practice can be ascertained by a state's commitment to adhere to international conventions, treaties, accords, and other binding instruments, its participation in international forums or regional bodies that discuss human rights issues, and its actual conduct.[72]

Second, to constitute customary international law, a norm must command a sense of *opinio juris*.[73] *Opinio juris* is the notion that nations not only subscribe to a customary international norm in practice, but that they do so out of a shared sense of *legal* obligation.[74] This does not mean that countries merely feel morally or politically obligated to respect the

---

67. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 18 (2d ed. 2001) (noting that "[l]egal authorities have formulated numerous approaches and theories to determine whether a norm has achieved the status of customary international law"). A generally accepted list of customary international norms includes genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and a consistent pattern of gross violations of internationally recognized human rights. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 702(a)-(g) (1987) [hereinafter RESTATEMENT].

68. *See* S. RATNER & ABRAMS, *supra* note 67, at 18.

69. *Id.*; *see also* RESTATEMENT, *supra* note 67, § 102; J. Paust—*Customary International Law*, *supra* note 66, at 148 (noting that "nearly all agree that customary human rights law has two primary components . . . (1) patterns of practice or behavior, and (2) patterns of legal expectation.").

70. J. Paust—*Customary International Law*, *supra* note 66, at 148.

71. *See* J. Ratner, *supra* note 3, at 117. "It is sometimes suggested that state practice consists only of what states do, not of what they say . . . the better view . . . appears to be that state practice consists *not only* of what states do, but also of what they say." *Id.* (quoting Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT 74 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000)) (emphasis added).

72. *Id.* at 116-19 (noting that in certain instances, "official state pronouncements [are] of [even] greater evidentiary significance than reports of contrary state practice . . . ").

73. *See* S. RATNER & ABRAMS, *supra* note 67, at 18; *see also* RESTATEMENT, *supra* note 67, § 102 (defining *opinio juris* and the role it plays in ascertaining customary international law).

> [A] practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it.

Id.

74. RESTATEMENT, *supra* note 67, § 102; *see also* GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 26 (Prof'l Books Ltd. 6th ed. 1976) (1947) ("It is not sufficient to show that States follow habitually a certain line of conduct, either in doing or not doing something. To prove the existence of a rule of international customary law, it is necessary to establish that States act in this way because they recognise a *legal* obligation to this effect.").

international norm, nor that that all states universally adhere to it; it means that all states are both legally expected and bound to adhere to the norm.[75] *Opinio juris* can be measured both by how widespread the expectation of adherence is, as well as how intensely held the norm is in the international community.[76] The best example of norms which possess requisite *opinio juris* may be those known as *jus cogens* norms. *Jus cogens* is Latin for "compelling law,"[77] and *jus cogens* norms are a subset of customary international law that command near universal adherence and respect.[78] "The Vienna Convention on the Law of Treaties defines *jus cogens* as '[norms] accepted and recognized by the international community . . . from which no derogation is permitted.'"[79] Although there is debate as to which norms constitute *jus cogens* norms—as there seems to be with regard to all attempts to define "international law"—the Restatement (Third) of the Foreign Relations provides the following examples of *jus cogens* violations: piracy, slave trade, genocide and war crimes.[80] This discussion is not undertaken to suggest that the *Sosa* Court limited actionable ATS claims to those based on violations of *jus cogens* norms. As peremptory and universally accepted international legal norms, *jus cogens* are simply an example of the types of "specific, universal, and obligatory" claims[81] which the *Sosa* Court would at a minimum hold to constitute actionable ATS violations. For its first prong, the Court only required that the "law of nations . . . rest on a norm of *international character accepted by the civilized world* and [be] defined with a specificity comparable to the features

75. *See* J. Paust—*Customary International Law*, *supra* note 66, at 151.

> Patterns of human practice need only be general, not uniform, and patterns of *opinio juris* need only be generally shared . . . a particular nation-state might disagree whether a particular human right is customary and its governmental elites might even violate such a norm, but it would still be bound if the norm is supported by patterns of *generally shared legal expectation* and generally conforming behavior extant in the community.

Id. (emphasis added).

76. *Id.*

77. BLACK'S LAW DICTIONARY 695 (8th ed. 2004).

78. *See* J. Paust—*Customary International Law*, *supra* note 66, at 153-55.

79. Tawny Aine Bridgeford, *Imputing Human Rights Obligations on Multinational Corporations: The Ninth Circuit Strikes Again in Judicial Activism*, 18 AM. U. INT'L L. REV. 1009, 1023 (2003) (citing the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332); *see also* RESTATEMENT, *supra* note 67, § 331 cmt. e (noting that *jus cogens* are "peremptory rules of international law that are of superior status and cannot be affected by treaty").

80. RESTATEMENT, *supra* note 67, § 404. This is not an exhaustive list but is meant to provide examples of the types of norms that qualify as *jus cogens*.

81. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 (2004) (citing *In re* Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994)).

of the 18th-century paradigms."[82] This analysis now turns to examining the eighteenth-century paradigms and those features which defined them with a requisite degree of specificity.

2. Requisite Degree of Specificity

> It was this narrow set of violations of the law of nations [offenses against ambassadors, violations of safe conducts, and piracy], admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.[83]

With regard to the *Sosa* standard's second stipulation, this article proposes that offenses against ambassadors, violations of safe conducts, and individual actions arising out of prize captures and piracy were singled out as violations of international law because they shared two features: they were narrowly defined; and each involved cases where an individual's conduct carried ramifications for international peace and security—and as such, nations universally and obligatorily recognized them.

i. Offenses Against Ambassadors and Violations of Safe Passage

In May of 1784, a French national verbally and physically assaulted the Secretary of the French Legion, who was visiting Philadelphia.[84] Seemingly innocuous by today's standards, the "Marbois incident" could have led to armed conflict between the fledgling United States and France.[85] At the time, attacking an ambassador was an affront not only against his person, but to his nation's sovereignty—and the U.S. government did not have a mechanism in place for an alien to seek recourse against his tortfeasor in U.S. courts.[86] Shaken by the incident, Congress decried its inability to "'cause infractions of treaties, or of the law of nations to be punished,'"[87] and called for state legislatures to provide retribution against those who committed such torts as the "violation of safe conducts or passports" or "infractions of the immunities of ambassadors and other public ministers."[88] Historical writings indicate that in an effort to avoid jeopardizing its

82. *Id.* at 2761-62 (emphasis added).

83. *Id.* at 2756.

84. *Id.* at 2757.

85. *Id.* at 2756.

86. *Id.* at 2757.

87. *Id.* at 2756 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893)).

88. *Id.*

relationships with states around the world, Congress incorporated the ATS into the Judiciary Act of 1789 in part to provide recourse for offenses against ambassadors and violations of safe conduct.[89]

ii. Piracy

Piracy is the historical tort most commonly referenced in human rights litigation.[90] Even *Sosa* cites with approval to the *Filartiga* court's conclusion that "for purposes of civil liability, the [human rights abuser] has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[91] Piracy has often been deemed a universally-recognized violation of international law on one of two grounds—either that it was so heinous and severe an offense that it is "universally cognizable,"[92] or that it is a violation of international law because the high seas are outside of any traditional jurisdictional category.[93] Piracy's purported heinousness and resulting subjection to "universal" jurisdiction seem to make it a clear candidate for a uniformly-accepted violation of international law, and as such, a good model for ascertaining modern actionable human rights claims under international law. The underlying bases for its special treatment, however, are flawed. First, in placing piracy in its proper historical context, one discovers that piracy was merely robbery and possibly murder at sea;[94] it was certainly not regarded with the same moral repugnance that genocide or war crimes are today.[95] Second, pirates did in fact fall within at least one

89. *See id.* at 2757.

90. *See* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 185 (2004) (noting that the piracy analogy was used in the Nazi War Crimes Tribunals, the trial of Nazi war criminal Adolf Eichmann, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the *Filartiga* decision).

91. *Sosa*, 124 S. Ct. at 2766 (citing Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)).

92. Kontorovich, *supra* note 90, at 185.

93. *Id.* at 190.

94. *See id.* at 186-87. In reality, pirates engaged in the same behavior as state-sponsored privateering: the armed robbery of civilian shipping. *Id.* (explaining that privateering only differed from piracy only in that a privateer operated under a license issued by a sovereign, with whom he split the proceeds—which implies that piracy could not have been altogether heinous if there was a way in which the same activity could be legally authorized).

95. *See id.* at 210-11.

> Torture and genocide evoke a visceral repugnance. The repugnance would not be diminished if the torture or genocide had the blessing of nations, generals, or religious authorities. Yet clearly this is not how piracy was regarded by the nations of the world, for a document signed by a third-tier official of a second-rate province could transform a universally punishable pirate into an innocent privateer. This disparate treatment is incompatible with the kind of deep revulsion that, according to the piracy analogy, has always motivated universal jurisdiction.

traditional basis of jurisdiction,[96] and were not "jurisdiction-less" because they operated on the international high seas.[97] For example, pirates who attacked ships that sailed under the flag of a particular sovereign nation would be subject to that nation's quasi-territorial jurisdiction.[98] Alternatively, because those on board were nationals of a sovereign state, the pirates who attacked them would have fallen within that country's passive personality jurisdiction.[99]

Arguably, then, piracy was not singled out as a violation of international law for its "heinous" nature, or even because it involved the commission of torts outside any nation's jurisdictional reach. It is more likely that piracy was distinguished as a violation of the law of nations for reasons similar to offenses against ambassadors and violation of safe conduct. Because it interfered with trade and commerce, and injured sovereign states' property and persons, piracy, like the other offenses, involved torts committed by individuals that carried ramifications for international peace and security.

Finally, in addition to the fact that all three of *Sosa*'s historical offenses shared the common feature of guarding against destabilizing international relations, there is proof that these offenses were widely, if not universally, regarded as violations of international law. The "violation of safe conducts, infringements on the rights of ambassadors, and piracy" were listed as specific offenses against the law of nations in England's criminal code at the time the ATS was passed.[100] This not only demonstrates that these torts were widely recognized, but also exemplifies their specific nature. Blackstone did not describe amorphous crimes such as "persecution" or "oppression" as violations of the law of nations—nor did he identify common crimes like "theft" or "murder" as offenses of international norms; he instead focused on narrowly-defined torts committed by individual actors, which had international consequences and were universally recognized.[101]

Id.

96. See S. RATNER & ABRAMS, *supra* note 67, at 160-62 for a discussion of the four traditional bases of jurisdiction: territory (right of a state to apply its laws over acts committed within its territorial boundaries); nationality (right of a state to exercise jurisdiction over an offender who is one of its nationals regardless of where the conduct occurred); protective (jurisdiction is exercised for cases in which extraterritorial conduct would have potentially harmful consequences for the interests of the state); and passive personality (where the victim of the offense is a national of the state seeking to exercise jurisdiction).

97. *See* Kontorovich, *supra* note 90, at 210-11. The notion that pirates were subject to universal jurisdiction is derived from the fact that any nation could try and summarily execute a pirate, regardless of the pirate's nationality or where he was apprehended, as long as it was on the high seas. *See id.* at 190.

98. *See id.* at 210.

99. *Id.* at 190.

100. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2756, 2759 (2004) (referencing WILLIAM BLACKSTONE, 4 COMMENTARIES *68).

101. *See id.* at 2760.

The *Sosa* Court's stipulation that an actionable claim must be "defined with a specificity comparable to the features of the 18th-century paradigms" can thus be construed to mean that a claim need not only be based on a customary international norm, but that it must be a narrowly tailored, specific guard against individual actions that bear consequences for international peace and security.[102]

3. Applying the Standard to Facts of *Sosa*

The *Sosa* Court began its inquiry into whether Alvarez-Machain's arbitrary detention claim was actionable under the ATS by undertaking the first component of the *Sosa* standard—a customary international law analysis. The Court explained that Alvarez-Machain's claim must be "gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized,"[103] and held that:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the *customs and usages of civilized nations*; and, as evidence of these, to the works of jurists . . . [which] are resorted to by judicial tribunals . . . for trustworthy evidence of what the law really is.[104]

To ascertain whether arbitrary detention constituted a violation of a customary international norm, the *Sosa* Court looked to Alvarez-Machain's evidence that such a norm is supported by state practice and *opinio juris*.[105] Alvarez-Machain cited the Universal Declaration of Human Rights ("Declaration"), the International Covenant on Civil and Political Rights ("ICCPR"), and a survey of several national constitutions in answer to this inquiry.[106] Alvarez-Machain asserted that his kidnapping was an "arbitrary arrest" within the meaning of the Declaration and the ICCPR, and that a survey of many nations shows that there is a generally recognized norm

102. *See id.* at 2761-62.

103. *Id.* at 2766.

104. *Id.* at 2766-67 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)) (emphasis added).

105. *See id.* at 2767.

106. *Id.* at 2767-68 (citing Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 19, 1966); M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 260-61 (1993)).

against arbitrary detention.[107] The *Sosa* Court found this evidence wholly inadequate to support Alvarez-Machain's claim.[108]

First, with regard to the state practice prong of the customary international law analysis, Alvarez-Machain cited valid sources of law—international conventions and state constitutions.[109] The Court noted, however, that the sources of law had "little utility under the standard set out in [its] opinion" because they were not directly on point, nor sufficiently concrete.[110] The national constitutions that Alvarez-Machain cited, for example, only refer to arbitrary detention at a "high level of generality."[111] In addition, there is even counter-evidence to Alvarez-Machain's position. The Court cited the Restatement (Third) of Foreign Relations, which states, with regard to customary international human rights law, that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . *prolonged* arbitrary detention."[112] The Court concluded: this implies that "[a]ny credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis *beyond relatively brief detention* in excess of positive authority."[113]

Second, and closely tied to the state practice issue, the Court stated that Alvarez-Machain's evidence does not demonstrate the requisite *opinio juris* with regard to the arbitrary detention.[114] The Court explained that the "[d]eclaration does not of its own force impose obligations . . . of international law," and that the "United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."[115] The Court clearly rejected Alvarez-Machain's assertion that nations feel a legal obligation to enforce international norms against arbitrary detention.[116]

Alvarez-Machain failed to prove that arbitrary detention is evidenced by either state practice or *opinio juris* sufficient to establish it as a customary international norm. His claim did not meet even the first component of the *Sosa* standard.

Turning to the standard's second prong—determining whether the norm is defined with the requisite degree of specificity—the Court not surprisingly

---

107. *Id.* at 2768.

108. *Id.* at 2767-69.

109. See *supra* note 72 and accompanying text for a discussion of the type of evidence that demonstrates state practice.

110. *Sosa*, 124 S. Ct. at 2767-68.

111. *Id.* at 2768 n.27.

112. *Id.* at 2768 (quoting RESTATEMENT, *supra* note 67, § 702) (emphasis added).

113. *Id.* at 2768-69 (emphasis added).

114. *Id.* at 2767.

115. *Id.*

116. *See id.* at 2769.

concluded that Alvarez-Machain's claim came up short on this count as well.[117] The Court did not belabor this point since it had already rejected Alvarez-Machain's claim on its failure to qualify as customary international norm. It noted, though, that even were the claim to pass muster as a customary norm, it still would have had to pass the more stringent standard of demonstrating the degree of certainty and specificity which characterized Blackstone's historical paradigms.[118]

IV. IMPACT: APPLYING THE *SOSA* STANDARD IN FUTURE LITIGATION

The *Sosa* decision will have varying implications for ATS cases depending on whether they are litigating "traditional" claims, such as torture or genocide, which have already passed judicial muster,[119] or whether they are breaking new ground, such as seeking to hold a corporation liable for cultural genocide stemming from the company's degradation of the environment.[120] A brief survey of the cases adjudicated post-*Sosa* supports this position. For example, on the one hand, Alvaro Rafael Saravia was held liable under the ATS using *Sosa*'s standard for extrajudicial killing and crimes against humanity for his role in the assassination of the El Salvadoran archbishop Oscar Romero and in carrying out other atrocities against the El Salvadoran people.[121] On the other hand, the Southern District of New York held that Nigerian nationals, who alleged serious injury from an experimental drug administered by the U.S. corporation Pfizer in violation of international law, failed to state an adequate claim under the ATS according to the *Sosa* standard.[122]

ATS watchers are arguably the most interested in *Sosa*'s impact on the latter set of "non-traditional" cases largely involving corporate defendants

---

117. *See id.* "Whatever may be said for the broad principle [Alvarez-Machain] advances . . . it expresses an aspiration that exceeds any binding customary rule having the specificity we require." *Id.*

118. *Id.*

> Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses.

Id.

119. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

120. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

121. *See* Doe v. Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

122. *See* Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118 (WHP), 2005 WL 1870811, slip op. at *18 (S.D.N.Y. Aug. 9, 2005).

and "new" substantive claims. This section of the article consequently focuses on the *Sosa* decision's implications for cases involving U.S. corporate defendants, by first identifying those issues the Supreme Court declined to address that could pose practical problems for lower courts trying to adjudicate novel ATS claims, and then by analyzing the facts of the most well-known corporate ATS case—*Doe I v. Unocal Corp.*—using the *Sosa* standard.[123]

In September of 2002, the Ninth Circuit Court of Appeals held in *Unocal* that plaintiffs' claims were actionable under the ATS.[124] A few months later in February of 2003, the Ninth Circuit granted an *en banc rehearing* of the case, but that decision was delayed pending the Supreme Court's decision in *Sosa*.[125] Then, post-*Sosa*, the *Unocal* case was dismissed upon the parties' motion and the *en banc* decision was never administered.[126] *Unocal* itself will therefore never be decided in the wake of *Sosa*; the case, however, represents a growing trend of suing corporate defendants under the ATS, such that the unresolved issues in the case are sure to be litigated down the road.[127] The *Unocal* case is consequently an appropriate case study to test the *Sosa* standard's practical effect.

A. *Practical Challenges*

The challenge in proving that modern-day human rights violations are actionable under the *Sosa* standard is two-fold. First, the *Sosa* Court identified several factors that may limit a court's ability to recognize an actionable claim under the ATS.[128] It held that courts hearing ATS claims should consider: (a) "the *practical consequences* of making [a particular] cause [of action] available to litigants in the federal courts;"[129] (b) "whether

123. *See* 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005); *see also* Pinilla, *supra* note 40, at 699.

124. *Unocal*, 395 F.3d at 956.

125. Doe I v. Unocal Corp., 395 F.3d 978, 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005).

126. Motion to dismiss by the parties granted by *Unocal*, 403 F.3d at 708.

127. Pinilla, *supra* note 40, at 700 (noting that the real ability to collect on large damage awards against U.S. corporations means that the ATS could become a true deterrent for individuals and entities that violate international norms—a possibility that has made them popular defendants under the statute).

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

129. *Id.* (emphasis added). This limitation factored heavily into the Supreme Court's reasoning in *Sosa*. In rejecting Alvarez-Machain's request to recognize arbitrary detention as a binding customary norm, the Court emphasized that the practical effects of such a move make it an implausible suggestion:

> [Alvarez-Machain] cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place . . . .

Id. at 2768.

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 [an] individual;"[130] (c) whether the claimant needs to "have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals;"[131] and (d) whether the case demands "deference to the political branches."[132] The Court, however, did not explain how a court should factor these into its decision-making calculus, which means that these issues are sure to be extensively litigated.[133]

Second, the Court held that ATS advocates must be prepared to make the argument that a particular violation is defined within *Sosa*'s heightened specificity requirement.[134] This means, as previously discussed, that an actionable violation must be narrowly tailored and have ramifications for international peace, stability, or security—like the eighteenth-century paradigms.[135] The case can be made that in today's global environment, egregious human rights violations in any part of the world threaten the stability of the international community. To name only a few, systematic human rights violations can give rise to such internationally destabilizing

130. *Id.* at 2766 n.20. The *Sosa* Court suggested that the jury is still out as to whether a private actor or entity can be liable for violating an international norm, and compared *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (C.A.D.C. 1984) (Edwards, J., concurring) with *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2d Cir. 1995). *Sosa*, 124 S. Ct. at 2766 n.20. Cases such as *Unocal* and *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005), have decidedly held that individuals and "corporations may be held liable under international law for violations of *jus cogens* norms." *Talisman*, 374 F. Supp. 2d at 333. The *Talisman* court further noted that "the Second Circuit had frequently confronted ATS cases involving corporate defendants and had never found itself to lack jurisdiction because corporations could not be liable under international law." *Id.* (*citing* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 313-15 (S.D.N.Y. 2003)); *see also* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000); Bigio v. Coca-Cola Co., 239 F.3d 440 (2d Cir. 2000); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

131. *Sosa*, 124 S. Ct. at 2766 n.21. There has already been a split in opinion among the lower courts as to whether a plaintiff is required to exhaust his remedies prior to bringing an ATS claim. *Compare* Doe v. Saravia, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004) ("Plaintiffs asserting claims under the [ATS] are not required to exhaust their remedies in the state in which the alleged violations of customary international law occurred."), *with* Enahoro v. Abubakar, 408 F.3d 877, 886 (7th Cir. 2005) (holding that it believes *Sosa* intended to make exhaustion of remedies a procedural requirement for pursuing an ATS claim).

132. *Sosa*, 124 S. Ct. at 2766 n.21.

133. *See Leading Case: B. Alien Tort Statute*, 118 HARV. L. REV. 446, 454-55 (2004) (noting that "the Court's analysis offers few practical cues to lower courts that must perform the inquiry"); see also *supra* notes 130-31 for a discussion of disparate court holdings regarding these issues.

134. *Sosa*, 124 S. Ct. at 2761-62.

135. See *supra* Part III.B.2 for a discussion of the *Sosa* standard "Requisite Degree of Specificity."

effects as displacing local populations to neighboring countries,[136] destroying natural resources that lead to economic and environmental devastation,[137] and fostering the political instability that cultivates breeding grounds for terrorism and armed conflict.[138] Defendants will certainly attempt to attenuate the role that any alleged underlying human rights abuses play in international stability. And plaintiffs must overcome U.S. courts' reticence to get involved with transgressions committed within another country's borders that do not have direct implications for U.S. security interests and foreign policy.[139]

B. Case Study: Sosa*'s Implications for Corporate Defendants*

The intricacies of these challenges and *Sosa*'s implications for corporate defendants are effectively illustrated in the *Unocal* case.[140] The issue in *Unocal* was whether the Unocal Corporation could be held liable for the human rights violations committed by the Myanmar military in the course of

---

136. *See* Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1138 (1998) (noting that the "return of Bosnian refugees and displaced persons [was] key to lasting stability in Bosnia [and that] [s]ecuring this right on behalf of refugees and displaced persons and recreating the multi-ethnic communities that characterized Bosnia before the war is important . . . for re-establishing political stability in the region.").

137. *See* Franz Xavier Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 ARIZ. J. INT'L & COMP. L. 515, 571-72 (1998).

> [Large development] projects of undemocratic governments involve not only enormous environmental impacts, but entail tremendous social changes, dislocation and uprooting of communities, destruction of minority cultures and civilizations, and individual human rights violations . . . produc[ing] environmental refugees all over the world . . . [which] in turn causes new tensions and contributes to the aggravation of already existing conflicts . . . despair and extremism, thereby, indirectly contributing to instability and tension.

Id.

138. *See* Jordan J. Paust, *Tolerance in the Age of Increased Interdependence*, 56 FLA. L. REV. 987, 1001 (2004).

> [L]oyalty, nationalism, and patriotism without tolerance and effective guarantees of human rights can foster impermissible acts of nonstate terrorism. Conversely, the promotion of tolerance and human rights can deflate or defeat various forms of social violence and terrorism. Impermissible terrorism necessarily violates human rights of both direct and indirect victims that are of international concern whether engaged in by state or nonstate actors. Thus, when human rights are protected, terrorism is set back.

Id.

139. *See Sosa*, 124 S. Ct. at 2776 (Scalia, J., concurring). Justice Scalia demonstrated this reticence when he stated, "[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates." *Id.* (Scalia, J., concurring) (*citing* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 831-37 (1997)).

140. Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005).

constructing a gas pipeline in the Myanmar Republic (formerly known as Burma).[141] There were two layers of analysis involved in determining *Unocal*'s justiciability under the ATS in light of *Sosa*: (a) whether the primary alleged tort—forced labor—is a violation of the law of nations; and (b) whether an actor who aids or abets those who commit human rights violations can be held liable via civil tort principles of agency liability, or whether aiding and abetting must qualify as an international law violation in and of itself, and, if so, whether aiding and abetting those who commit human rights violations indeed constitutes such a violation.[142]

1. Background

A new military government took over the country formerly known as Burma and renamed it Myanmar in 1988.[143] Shortly thereafter, the Myanmar Military launched a state-owned company called the Myanmar Oil and Gas Enterprise to manufacture and sell the country's oil and gas resources.[144] Consequently, in 1992, when the Unocal Corporation acquired a 28% interest in a large pipeline project ("Project"), whose purpose was to move natural gas from the coast of Myanmar to Thailand, Unocal's subsidiary company effectively teamed up with the Myanmar Military's company in a joint venture.[145] The current lawsuit is rooted in this context. Myanmar villagers who live along the pipeline route allege that the military committed human rights abuses ranging from forced labor to murder, rape, and torture in connection with the Project.[146] Purportedly, the military committed these atrocities while providing security and other support services for the Project (e.g., supervising the construction of helipads for oil executives to visit construction sites and clearing roads along the pipeline route).[147] Although the district court initially awarded summary judgment in favor of the defendant Unocal, the court of appeals reversed the lower court's summary judgment order with respect to the ATS claims based on forced labor, murder and rape.[148] The Ninth Circuit Court of Appeals

141. *Unocal*, 395 F.3d at 936.
142. *Id.* at 945-46.
143. *Id.* at 937.
144. *Id.*
145. *Id.*
146. *Id.* at 942-43 (citing plaintiff testimony alleging that villagers from the Tenasserim region, the rural area through which the pipeline was built, were forced to work on the construction of the pipeline and associated infrastructure or be subjected to murder, rape, and torture).
147. *Id.*
148. *Id.* at 962-63.

determined that the alleged torts were *jus cogens* violations and were, therefore, violations of the law of nations under the ATS.[149] The determination that the offenses constituted not only violations of customary international law but also *jus cogens* violations was particularly significant because in the wake of *Kadic*, non-state actors can be held liable for *jus cogens* violations.[150] The door was therefore open for Unocal, a private entity, to be held potentially liable for aiding and abetting the Myanmar Military responsible for carrying out those violations.[151]

2. Forced Labor Claim

Pre-*Sosa*, the Ninth Circuit Court of Appeals undertook an abbreviated analysis as to whether forced labor qualified as an actionable norm under the ATS and concluded that it was.[152] The court determined that "forced labor is so widely condemned" that it not only qualified as a violation of a customary international norm, but that "it has achieved the status of a *jus cogens* violation."[153] As such, the court had no trouble determining that forced labor constituted an actionable ATS claim.[154]

Post-*Sosa*, the court would be required to undertake a far more extensive analysis. In compliance with the first prong of the *Sosa* standard, the *Unocal* court would need to ascertain whether forced labor constitutes a violation of customary international law.[155] This means it would look to evidence of state practice and *opinio juris* that supports recognizing an international norm against forced labor.[156] To this end, the court could follow the Supreme Court's guidance in *United States v. Smith* and examine traditional sources of international law, such as:[157] the works of jurists, the general usage and practice of nations, and judicial decisions recognizing and enforcing that law.[158]

---

149. *Id.* at 945.

150. *See* Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995).

151. *See Unocal*, 395 F.3d at 939.

152. *See id.* at 945.

153. *Id.*

154. *Unocal*, 395 F.3d at 945. This conclusion has been subject to extensive criticism that the Ninth Circuit circumvented actually analyzing whether or not forced labor qualifies as a violation of the law of nations or rises to the level of *jus cogens* norm in and of itself. *See* Bridgeford, *supra* note 79, at 1039.

155. See *supra* Part III.B.1 for a discussion about determining customary international law through evidence of state practice and *opinio juris*.

156. *Id.*

157. 18 U.S. (5 Wheat.) 153 (1820).

158. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765-66 (2004) (citing *Smith*, 18 U.S. (5 Wheat.) at 160-61). In the same discussion, the *Sosa* Court explained an ATS "claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized." *Id.* at 2766; see also *supra* Part IV.B.3 and accompanying text for *Sosa*'s discussion of determining customary international norms.

The *Unocal* court would find that forced labor has been condemned under the Universal Declaration of Human Rights, the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, the Charter of the International Military Tribunal, and the International Labor Organization Convention Number Twenty-Nine, which the U.S Department of Labor recognizes as setting forth an internationally-accepted definition of "forced labor."[159]

In addition, U.S. courts hearing cases involving World War II-era Japanese forced labor claims equated forced labor with "slavery" for purposes of determining ATS liability—and as such, identified forced labor as a *jus cogens* violation.[160]

Based on this evidence, which includes international declarations and conventions as well as judicial decisions enforcing the laws that they embody, the court would probably conclude that it is the practice of most states to recognize a norm against forced labor, and that nations feel a sense of legal obligation to adhere to that norm. Forced labor, consequently, would meet the first prong of the *Sosa* standard.

The *Sosa* Court, however, mandated that any actionable ATS claim must satisfy an additional requirement.[161] It must be defined with the degree of "specificity comparable to the features of the 18th-century paradigms . . . ."[162] This means that the norm must be narrowly tailored and properly recognized as an international norm due to its ramifications for international peace and stability.[163] First, forced labor is indeed narrowly tailored; as the U.S. Department of Labor indicates, there are seven easily identifiable categories of behavior that constitute forced labor violations.[164] They are slavery and abductions, compulsory participation in public works projects,

159. *See* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 82 U.N.T.S. 280; *see also* International Labour Organisation ("ILO") Convention No. 29 (1930), *available at* United States Department of Labor, International Labor Standards: Forced Labor, http://www.dol.gov/ilab/webmils/intllaborstandards/forcedlabor.html [hereinafter U.S. Dep't of Labor—Forced Labor] (last visited Sept. 14, 2005) (setting forth the "international standard on forced labor").

160. *See* Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (citing *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1160 (N.D. Cal. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (concluding that "forced labor violates the law of nations")), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005).

161. *Sosa*, 124 S. Ct. at 2761-62.

162. *Id.* at 2759 (referencing WILLIAM BLACKSTONE, 4 COMMENTARIES *68).

163. See *supra* Part III.B.2 for a discussion of the *Sosa* standard's "requisite degree of specificity."

164. *See* U.S. Dep't of Labor—Forced Labor, *supra* note 159.

mandatory forced labor in remote areas, bonded labor, involuntary labor resulting from trafficking in persons, domestic workers in involuntary labor situations, and prison labor and rehabilitation through work.[165] Because it is specifically defined and limited to these applications, recognizing forced labor under the ATS would not give rise to the kind of far-reaching practical consequences that would accompany recognizing a broader more ambiguous claim, such as arbitrary detention.[166]

Second, a fair argument can be made that forced labor indeed carries implications for international relations and security concerns. For example, if a U.S. corporation, such as Unocal, is responsible for the oppression of another country's citizens, it could strain U.S. ties with that nation, as well as subject the U.S. to ridicule by the international community at large.[167] It is difficult to say with certainty what the Supreme Court considers "specificity" commensurate with that possessed by the eighteenth-century paradigms, but it would seem that forced labor would pass this prong of the test and join torture, extrajudicial killing, war crimes, and genocide as an actionable claim under the ATS.[168]

---

165. *Id.*

166. *See Sosa*, 124 S. Ct. at 2768 (noting that Alvarez-Machain's claim failed in part due to the practical implications of recognizing such a vague and wide-reaching standard as arbitrary detention).

167. *See* Erin L. Borg, *Sharing the Blame for September Eleventh: The Case for a New Law to Regulate the Activities of American Corporations Abroad*, 20 ARIZ. J. INT'L & COMP. L. 607, 609 (2003).

> General accusations by human rights organizations and watchdog groups accuse American multinational corporations (MNCs) operating abroad of engaging in unfair labor practices such as low wages and poor working conditions, employing child labor, destroying the environment, bribing foreign officials, and even supporting terrorists in order to permit smooth operation and increase profit margins. As the activities of American MNCs abroad have grown to great proportions, they have become the new *de facto* ambassadors for America in the twenty-first century. Their actions abroad reflect poorly on American culture and society. More importantly, their often extensive actions and involvement in foreign countries can prove detrimental to U.S. foreign policy interests.

Id.

168. This conclusion is reinforced by the fact that even the U.S. government, in the supplemental brief it filed *amicus curiae* in the *Unocal* case following the *Sosa* decision, implicitly conceded that forced labor is a viable claim under the ATS. *See* Supplemental Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp., Nos. 00-56603, 00-56628 (9th Cir. Aug. 25, 2004), *available at* http://www.earthrights.org/unocal/dojunocalbrief.pdf [hereinafter *Unocal* Supplemental Brief].

Furthermore, forced labor's analogous link to an accepted *jus cogens* violation—slavery—in combination with forced labor's "specific, universal and obligatory" nature in its own right, may indeed raise the violation to *jus cogens* status.[169] As such, forced labor would qualify as an offense for which state action is not required.[170] In the spirit of *Kadic* and subsequent cases such as *Talisman*,[171] Unocal could thus be held liable for forced labor violations under the ATS as a private entity.[172]

3. Aiding and Abetting Claim

The analysis of the *Unocal* case does not end with the forced labor determination. In *Unocal*, there is an added dimension to the pending claim—the plaintiffs did not allege that the defendant Unocal directly carried out human rights violations, including forced labor, but instead argued that Unocal should be held liable for aiding and abetting the actor responsible for the atrocities, which in this case was the Myanmar military.[173] The *Unocal* plaintiffs' aiding and abetting argument entered uncharted territory in ATS litigation in that it marked the first time plaintiffs filed a claim against a defendant other than the tortfeasor who was directly

169. See *supra* notes 77-81 and accompanying text for a discussion of *jus cogens* norms.

170. *Id.*

171. *See* Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 333 (S.D.N.Y. 2005); *see also* Pinilla, *supra* note 40, at 694. The court's rationale was that international law can apply to private actors for certain universally condemned violations, i.e., those rising to the level of *jus cogens* violations, which include offenses such as genocide, slavery and war crimes. *Id.* Note as well that the *Sosa* Court mentioned that the private actor liability issue has not yet been fully reconciled, and did not overturn *Kadic* or preclude a corporation from being held individually liable for international law violations. *Sosa*, 124 S. Ct. at 2766.

172. In the context of *Unocal*, this entire discussion may be moot, since Unocal allegedly acted via the Myanmar military—a state actor. *See* Doe I v. Unocal Corp., 395 F.3d 932, 937 (9th Cir. 2002), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005). There may be cases that arise down the road, however, wherein plaintiffs may seek to invoke non-state actor liability to hold corporations liable for forced labor violations. *See Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring). Ninth Circuit Judge Reinhardt, in his *Unocal* concurrence, proposed that the state-actor requirement and *jus cogens* debate is irrelevant to the facts of the case on the ground that the underlying tort, forced labor, is a violation of customary international law, the Myanmar military (a state actor) committed the tort, and Unocal is liable based on federal common law tort principles. *See id.* at 963-65. From Judge Reinhardt's standpoint, there is no need to get into private actor liability for the violation of a *jus cogens* norm at all. *Id.* at 963. Instead, the plaintiffs need only demonstrate that forced labor constitutes a violation of customary international law. *Id.* at 964.

173. *Id.* at 936, 947.

liable for their injury.[174] The aiding and abetting theory of liability was thus an issue of first impression for the Ninth Circuit Court of Appeals, and, not surprisingly, they declined to release their *en banc* decision regarding the *Unocal* case until after the Supreme Court decided *Sosa*.[175] Unfortunately, the *Sosa* decision provided little guidance on this issue, save to mention that private actor or entity liability under the ATS is subject to debate.[176] The *Sosa* Court furthermore did not address whether a theory of liability involved in an ATS claim can arise according to federal common law tort principles, or whether the theory of liability itself must meet the *Sosa* standard for determining an actionable violation of the law of nations.

On the one hand, the *Unocal* plaintiffs could take the Supreme Court's silence on the matter to mean that principles of tort law, such as aiding and abetting liability, could and should be used "to effectuate the jurisdiction granted in the ATS."[177] As Judge Reinhardt noted in his concurrence in the 2002 Ninth Circuit *Unocal* decision,[178] the *Unocal* plaintiffs could argue that the same standard of aiding and abetting liability set forth under U.S. federal law—"'when the defendant knowingly and substantially assisted tortious conduct'"—should apply to claims that arise under the ATS.[179] From this perspective, if forced labor is an actionable ATS claim, Unocal's liability is ascertainable under settled principles of civil liability in U.S. courts.

On the other hand, in light of *Sosa*'s cautious tone,[180] it is perhaps more reasonable to conclude that the Court intended for all causes of action, including the subsidiary rules of liability, to qualify as actionable norms under international law.[181] Should this be the case, aiding and abetting must qualify as a violation of international law under the *Sosa* standard as an independently actionable claim.

174. Pinilla, *supra* note 40, at 699-700 (noting that the *Unocal* case was the first case in which a corporation is being held responsible for human rights abuses committed abroad).

175. *See Unocal*, 395 F.3d at 978-79.

176. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.20 (2004).

177. *See* Appellants' Response to the United States Amicus Curiae Brief, Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628, 00-57195, 00-57197), *available at* http://www.earthrights.org/unocal/responsetodoj-9thcircuitbriefl.pdf [hereinafter *Unocal* Appellants' Response].

178. *See Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring).

179. *See Unocal* Appellants' Response, *supra* note 177, at 22 (quoting Brief for the United States as Amicus Curiae Supporting Affirmance, Boim v. Quranic Literacy Inst., Nos. 01-1969, 01-1970 (7th Cir. Nov. 14, 2001), *available at* http://pdfserver.amlaw.com/nlj/061702dow-amicus.pdf).

180. *See Sosa*, 124 S. Ct. at 2761 (noting that the Court endorses "a restrained conception of the discretion a federal court should exercise in considering a new cause of action [under the ATS]").

181. *See Unocal* Appellants' Response, *supra* note 177, at 21 (characterizing the government's position as being that "every legal principle in an ATS case, including subsidiary rules of liability, must have universal adherence in international law").

Returning then to the *Sosa* standard, the first question would be whether aiding and abetting qualifies as a customary international norm.[182] As the earlier analysis set forth, this means that the norm must be reflected in consistent state practice, as evidenced by the works of jurists, the general usage and practice of nations, and judicial decisions that recognize and enforce that law, and it must also invoke a shared sense of legal obligation among the international community to adhere to it.[183]

The most significant evidence that aiding and abetting would pass this test are the recent decisions made by the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").[184] Both the ICTY and the ICTR specifically defined aiding and abetting standards derived from the "exhaustive analysis" of post-World World II international law, and applied them in the course of their prosecutions.[185] In addition, the charters of the ICTY, the ICTR, the Nuremberg International Military Tribunal, and the International Criminal Court "embrace the concept of criminal aiding and abetting liability."[186] Furthermore, the United States is party to numerous multilateral treaties that criminalize the acts of those who aid or abet criminal acts under those treaties.[187] Finally, the U.S. government has recognized that aiding and abetting is defined under international law in forming its policy on terrorism.[188] This evidence suggests that even if the Court were to require

182. See *supra* Part III.B.1 for a discussion about determining customary international law through evidence of state practice and *opinio juris*.

183. *Id.*

184. Doe I v. Unocal Corp., 395 F.3d 932, 950 (9th Cir. 2002) ("We find recent decisions by the [ICTY] and the [ICTR] especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to the [ATS]."), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005); *see also Unocal* Supplemental Brief, *supra* note 168, at 18; *Unocal* Appellants' Response, *supra* note 177, at 12-13.

185. *Unocal* Appellants' Response, *supra* note 177, at 15; *see also Unocal*, 395 F.3d at 950. The ICTY held that "the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," but noted that "assistance need not have caused the act of the principal." *Id.* (quoting Prosecutor v. Furundzija, IT-95-17/1-T, ¶ 235 (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999)). The ICTR defined "the *actus reus* of aiding and abetting as 'all acts of assistance in the form of either physical or moral support' that 'substantially contribute to the commission of the crime.'" *Unocal*, 395 F.3d at 950 (quoting Prosecutor v. Musema, ICTR-96-13-T, ¶ 126 (Jan. 27, 2000), http://www.ictr.org).

186. *Unocal* Supplemental Brief, *supra* note 168, at 18.

187. *Id.* at 18 n.8.

188. *Id.*; *see also Unocal* Appellants' Response, *supra* note 177, at 12-13. The brief notes that "United States military commissions prosecute aiding-and-abetting . . . war crimes . . . [and] terrorism . . . before a military commission," and in so doing, they use a standard derived from the "law of armed conflict," i.e., international law. *Id.* (citing Military Commission Instruction No. 2, Art. 6(C)(1) (Apr. 30, 2003)).

that aiding and abetting meet the first element of the *Sosa* standard and qualify as a customary international norm, it would do so.[189] After all, the norm against aiding and abetting has been adhered to in international judicial decisions;[190] and its inclusion in the four most prominent chartered international tribunals to date evidences that it is common practice among nations to adhere to the norm.[191] In addition, with respect to the "*opinion juris* prong," the multilateral treaties and the U.S. policy on terrorism indicate that nations generally acknowledge an obligation to enforce the violation of aiding and abetting.[192] Aiding and abetting arguably qualifies as a customary international norm and satisfies *Sosa*'s first stipulation.

Secondly, however, aiding and abetting must also be defined with *Sosa*'s stringent degree of specificity in order to be actionable under the ATS.[193] As such, aiding and abetting must be an identifiably certain norm and carry ramifications for international peace and security.[194] Aiding and abetting passes this litmus test superficially, at best. Most problematically, aiding and abetting is a broad concept that may be defined differently under the common criminal codes of every nation, and there is no apparent consensus in the international community regarding the scope of aiding and abetting liability.[195] Furthermore, it is a stretch to argue that aiding and abetting poses a threat to state-to-state relations and international peace, in and of itself. Evaluated on its own, aiding and abetting would seem to meet the same fate as Alvarez-Machain's arbitrary detention claim: dismissal for failure to constitute a customary international norm with the *Sosa* Court's requisite degree of specificity.[196] In fact, a broad notion such as aiding and

---

189. See *supra* Part III.B.1 for a discussion about determining customary international law through evidence of state practice and *opinio juris*.

190. *Id.*; *see also* Doe I v. Unocal Corp., 395 F.3d 932, 950 (9th Cir. 2002) (discussing the ICTY and ICTR judicial decisions), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005).

191. *Unocal* Supplemental Brief, *supra* note 168, at 18 (referencing the following four tribunals during discussion regarding aiding and abetting: Nuremberg International Military Tribunal Control Council Order No. 10; Statute of the ICTY art. 7(1) (1993, updated 2004); Statute of the ICTR art. 6(1); and Rome Statute of the International Criminal Court (1998)).

192. *See id.* at 18 n.8; *Unocal* Appellants' Response, *supra* note 177, at 12-13.

193. See *supra* Part III.B.2 for a discussion on "Requisite Degree of Specificity."

194. *Id.*

195. *See Unocal* Supplemental Brief, *supra* note 168, at 18-19 (noting that "although there is a substantial international consensus on the general concept of extending aiding and abetting *criminal* liability to offenses punishable by international tribunals, this fact does not translate to an established principle of extending criminal aiding and abetting liability concepts to the civil context").

196. *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2769 (2004) (noting that Alvarez's request that the Court recognize a private cause of action for arbitrary detention did not have the specificity the Court requires; that "[c]reating a private cause of action to further that aspiration would go beyond any residual common law discretion [it thinks] appropriate to exercise;" and that it did not violate any "norm of customary international law so well defined as to support the creation of a federal remedy").

abetting would seem to be the very type of claim the Supreme Court seeks to invalidate by setting forth its stringent standard.

This demonstrates that *Sosa* standard's impact on pending ATS claims, such as *Unocal*, cannot be underestimated. In a pre-*Sosa* court room, aiding and abetting may have qualified as an actionable claim under a basic customary international law analysis.[197] Post-*Sosa*, however, it is apparent that a far greater degree of specificity will be required to support the creation of a federal remedy for a new claim—and this is a threshold that aiding and abetting would be unlikely to meet. The outcome of ATS cases involving corporate defendants may consequently hinge on whether the Court chooses to adopt Judge Reinhardt's view that only the underlying substantive claim should be scrutinized according to the *Sosa* standard, or whether aiding and abetting must qualify as an actionable norm itself.[198] The *Sosa* Court did not take a position on this issue.[199]

V. CONCLUSION: A CALL FOR GUIDANCE

In deciding *Sosa*, the Supreme Court had the opportunity to close the door completely on the United States' ability to provide a forum for holding human rights abusers civilly liable, but it did not. Instead, the Court affirmed the constitutionality of the ATS and set forth an analytical framework for ascertaining actionable norms under the statute.[200] However, the Court did not provide the comprehensive guidance for adjudicating ATS claims that lower courts, human rights advocates, and ATS defendants such as Unocal may have been waiting for.[201] For example, the Court raised, but did not address, issues regarding choice of law, the political question doctrine, *forum non conveniens*, judgment enforcement, and of course the potential liability of non-state actors such as corporate defendants.[202] In the end, the Supreme Court recognized in *Sosa* that the U.S. judiciary has a continued and pivotal role to play in holding violators of the law of nations

197. *See supra* note 41 and accompanying text.

198. *See Unocal* Appellants' Response, *supra* note 177, at 22. Instead of holding that aiding and abetting need constitute a separate violation of the law of nations, a court could elect to apply U.S. principles of civil liability, federal common law agency, joint venture, and recklessness. *Id.*

199. *See Sosa*, 124 S. Ct. at 2763-64.

200. *See id.* at 2761-62.

201. *See* Doe I v. Unocal Corp., 395 F.3d 932, 967 (9th Cir. 2002) (discussing the choice of law implications for the *Unocal* case), *reh'g granted*, 395 F.3d 978 (9th Cir. 2003), *mot. to dismiss granted*, 403 F.3d 708 (9th Cir. 2005); Pinilla, *supra* note 40; Beth Van Schaak, *International Law Weekend Proceedings: The Civil Enforcement of Human Rights Norms in Domestic Courts*, 6 ILSA J. INT'L & COMP. L. 295 (2000).

202. See *supra* Part IV.A for a discussion of "Practical Challenges."

accountable, concluding "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[203] Unless Congress takes additional action, however, the scope of this role under the auspices of the ATS is a narrow one.

Virginia Monken Gomez[204]

---

203. *Sosa*, 124 S. Ct. at 2764-65.

204. J.D. Candidate, Pepperdine University School of Law, May 2006; B.A., University of North Carolina at Chapel Hill. For their love, support and patience, I would like to thank Dario, Jon, Jeanne and Jonathon. I would also like to thank those individuals who have provided me with invaluable mentorship, instruction and support during my educational and professional careers: Barbara Hall, Eric Mlyn, Brad Roberts, Sunjin Choi, Julie Ward, and Peter Wendel.