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WHEN IN ROME: AIDING AND ABETTING IN *WANG XIAONING v. YAHOO*

INTRODUCTION

In April 2007, Wang Xiaoning, a Chinese dissident, filed suit against Yahoo! Inc. and certain subsidiaries (“Yahoo”) under the Alien Tort Claims Act (“ATCA”).¹ The suit alleged that Yahoo aided and abetted the Chinese government in the torture, cruel and degrading treatment, arbitrary arrest, and prolonged detention of Wang.² Through a Yahoo group that permitted him to post anonymously, Wang posted several articles online criticizing the Chinese government and calling for democratic reform in China.³ After Yahoo provided information to the Chinese government on the Yahoo account used to publish the articles, the government was able to identify Wang as the author of the postings.⁴ Wang was subsequently sentenced to ten years in prison for inciting subversion, and he claims that he has since been repeatedly beaten and tortured in the labor camp where he is currently held.⁵ Wang sued Yahoo for damages and an injunction to prevent Yahoo from providing identifying information in the future on accounts being used to call for democratic reform in China.⁶ When questioned, spokespersons for Yahoo maintained that as a condition of doing business, it is bound to comply with the local laws where it operates.⁷ In November 2007, however, Yahoo settled with Wang for an undisclosed amount.⁸

This Note examines the ATCA claims filed against Yahoo and evaluates Wang’s likelihood of success had the case proceeded to trial, in light of several standards the federal courts have articulated to determine aiding and abetting liability for multinational corporations. In particular, federal courts have taken notice of the international criminal aiding and

1. “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

2. Second Amended Complaint para. 10, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW (N.D. Cal. July 30, 2007) (Justia), <http://casedocs.justia.com/california/candce/4:2007cv02151/191339/51/0.pdf> [hereinafter Complaint].

3. Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 19, 2007, at C4.

4. Ariana Eunjung Cha & Sam Diaz, *Advocates Sue Yahoo in Chinese Torture Case*, WASH. POST, Apr. 19, 2007, at D1.

5. Eunjung Cha & Diaz, *supra* note 4.

6. Helft, *supra* note 3.

7. *Id.*

8. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASH. POST, Nov. 14, 2007, at D4.

abetting standard articulated by international military tribunals during the war crimes trials at Nuremberg.⁹ These trials may provide the courts with guidance on how to analyze ATCA aiding and abetting claims.¹⁰

Part I of this Note provides background on Yahoo's involvement in China, the U.S. government's response to the involvement of Internet companies in China, and Wang Xiaoning's suit against Yahoo. Part II briefly outlines the development of ATCA claims in general and against multinational corporations in particular, with a focus on civil aiding and abetting claims. Part III discusses the aiding and abetting criminal liability standard that was prominently established during the trials at Nuremberg and further developed by the tribunals in the former Yugoslavia and Rwanda. Part IV evaluates Wang's likelihood of success had the case gone to trial. Part V concludes that a court would have found Yahoo liable for aiding and abetting if the court applied the Nuremberg standard for criminal liability for aiding and abetting as it has developed over the last twenty years, and Wang could have proven that Yahoo turned over the identifying details on Wang's account knowing the government was looking to prosecute a dissident.

I. BACKGROUND

A. Yahoo

It is not difficult to understand why multinational Internet corporations are anxious to establish business operations in China. The China Internet Network Information Center estimates that there are 253 million Internet users in China, recently surpassing the United States.¹¹ Several major corporations involved in providing services related to the Internet are already doing business in China, among them Google, Cisco, Microsoft, and Yahoo.¹² But the Chinese government imposes a number of condi-

9. See, e.g., *Khulumani v. Barclay Nat'l Bank Ltd*, 504 F.3d 254, 271 (2d Cir. 2007) (per curiam), *aff'd due to lack of a quorum sub. nom.*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (recognizing that the principles established by the International Military Tribunal are significant due to their "broad acceptance" and because they "were viewed as reflecting and crystallizing preexisting customary international law").

10. See, e.g., *Doe I v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005) (finding the ICTY and the ICTR "especially helpful" in considering the standard to use for civil aiding and abetting liability).

11. David Barboza, *China Surpasses U.S. in Number of Internet Users*, N.Y. TIMES, July 28, 2008, at C3.

12. Nicholas D. Kristof, Op-Ed., *China's Cyberdissidents and the Yahoos at Yahoo*, N.Y. TIMES, Feb. 19, 2006, at D13. Unlike Yahoo and Microsoft, which both provide email and blogging accounts, Google decided that it would only offer a search engine to

tions on these companies before it will allow them to establish business in the country. By agreement, corporations are required to censor content that “damages the honor or interests of the state” or “disturbs the public order or destroys public stability.”¹³ The government, however, does not provide a list of what must be censored and intentionally leaves the wording of this agreement unclear so that the corporations themselves are required to interpret what must be censored.¹⁴

In 1999, Yahoo was the first multinational Internet corporation to enter the market in China when it established a Beijing office and started the Chinese equivalent of its search engine.¹⁵ Yahoo voluntarily signed a “self-discipline” pledge in 2002, promising to follow the vague censorship laws in China.¹⁶ The pledge requires its signatories to “refrain[] from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity.”¹⁷ In a letter in response to inquiries from Human Rights Watch, an international human rights group, Yahoo stated, “The pledge involved all major Internet companies in China and was a reiteration of what was already the case—all Internet companies in China are subject to Chinese law, including with respect to filtering and information disclosure.”¹⁸ Human Rights Watch noted that while this statement was accurate at the time Yahoo was asked to sign, neither Microsoft nor Google has since signed the pledge.¹⁹

Chinese residents when it entered the market, precisely because it did not want to be put in a position where it might have to censor its bloggers’ writings or turn over identifying information to the Chinese police that could lead to their imprisonment. Google also notifies users when certain results have been omitted due to Chinese law, so that they are at least made aware that the censorship has occurred. See Clive Thompson, *Google’s China Problem (and China’s Google Problem)*, N.Y. TIMES, Apr. 23, 2006, § 6 (Magazine), at 64.

13. Thompson, *supra* note 12.

14. *Id.*

15. *Id.*

16. HUM. RTS. WATCH, RACE TO THE BOTTOM: CORPORATE COMPLICITY IN CHINESE INTERNET CENSORSHIP, Aug. 9, 2006, at 30, <http://www.hrw.org/reports/2006/china0806/china0806web.pdf> [hereinafter RACE TO THE BOTTOM].

17. Internet Society of China, Public Pledge of Self-Regulation and Professional Ethics for China Internet Industry, <http://www.isc.org.cn/20020417/ca102762.htm> (last visited Oct. 5, 2008).

18. RACE TO THE BOTTOM, *supra* note 16, at 125.

19. *Id.* at 31.

B. Response of the U.S. Government

Concern about the consequences of suppression of speech in China roused both the U.S. Congress and the executive branch to gather information about the business of multinational Internet corporations with operations in China and headquarters in the United States. In February 2006, the State Department announced the establishment of the Global Internet Freedom Task Force.²⁰ The purpose of the Task Force is to “maximize freedom of expression and the free flow of information and ideas, to minimize the success of repressive regimes in censoring and silencing legitimate debate, and to promote access to information and ideas over the Internet.”²¹

Congress has also held several hearings on the matter. On February 15, 2006, representatives of Google, Microsoft, Cisco, and Yahoo appeared before the House Subcommittee on Africa, Global Human Rights and International Operations.²² The House Subcommittee was particularly concerned about the plight of journalist Shi Tao,²³ who was imprisoned for sending notice overseas that the Chinese government warned journalists against any coverage of the anniversary of the Tiananmen Square massacre.²⁴ Yahoo provided the Chinese government with information showing that Shi had used his email account at his place of business to

20. Press Release, U.S. Dep't of State, Secretary of State Establishes New Global Internet Freedom Task Force (Feb. 14, 2006).

21. Fact Sheet, U.S. Dep't of State, Global Internet Freedom Task Force (GIFT) Strategy: A Blueprint for Action (Dec. 28, 2006), <http://www.state.gov/g/drl/rls/78340.htm>.

22. Tom Zeller Jr., *Online Firms Facing Questions about Censoring Internet Searches in China*, N.Y. TIMES, Feb. 15, 2006, at C3.

23. In May 2007, Shi Tao joined Wang Xiaoning's suit against Yahoo as a plaintiff. Nate Anderson, *Second Chinese Dissident Joins Lawsuit Against Yahoo*, ARS TECHNICA, May 30, 2007, <http://arstechnica.com/news.ars/post/20070530-second-chinese-dissident-joins-lawsuit-against-yahoo.html>. While this Note does not review the specific facts surrounding his online advocacy for democratic reform and subsequent imprisonment, his case is substantially similar to Wang Xiaoning's, in that he was a journalist who criticized the Chinese government and was later imprisoned after Yahoo provided information tying him to an anonymous email sent overseas. For further details on the imprisonment of Shi Tao, see Complaint, *supra* note 2, paras. 52–68.

24. *The Internet in China: A Tool for Freedom or Suppression?: Joint Hearing Before the Subcomm. on Africa, Global Human Rights and International Operations and the Subcomm. on Asia and the Pacific of the H. Comm. on International Relations*, 109th Cong. 38 (2006) [hereinafter *Hearing*] (prepared statement of James R. Keith, Senior Advisor for China and Mongolia, Bureau of East Asian and Pacific Affairs, U.S. Department of State).

notify others of the warning.²⁵ Representative Chris Smith, the Chairman of the Subcommittee, began the hearing by referencing the Holocaust, where multinational corporations offered technology to the Third Reich that enabled human rights abuses.²⁶ Representative Tom Lantos, himself a Holocaust survivor, demanded to know whether the companies were “ashamed” of their contributions to censorship and, in Yahoo’s case, to the imprisonment of Chinese dissidents.²⁷ The companies generally responded by noting that while they were “deeply concerned”²⁸ by the strictures in China, the country has become a “more open societ[y]” since it has gained access to the Internet.²⁹ Additionally, they emphasized that China would become more tightly controlled if non-Chinese companies were forced to leave.³⁰ Finally, they pointed out that the censorship filters do not always block all the content that the Chinese government does not want its citizens to see.³¹

Following the House Subcommittee hearing, Representative Smith introduced a bill called the Global Online Freedom Act of 2006, the pur-

25. James Heffernan, *An American in Beijing: An Attorney’s Ethical Considerations Abroad with a Client Doing Business with a Repressive Government*, 19 GEO. J. LEGAL ETHICS 721, 721 (2006).

26. *Hearing, supra* note 24, at 2 (statement of Rep. Christopher H. Smith, Chairman, Subcomm. on Africa, Global Human Rights and International Operations).

27. Joe Nocera, *Enough Shame to Go Around on China*, N.Y. TIMES, Feb. 18, 2006, at C1.

28. *Hearing, supra* note 24, at 60 (testimony of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corp.).

29. *Id.* at 56 (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Advocates for multinational Internet corporations are not the only ones to argue that regardless of the efforts it makes to stifle dissent, the Chinese government will be unable to slow the forces of democratic change now that the Internet is readily available to its citizens. Even when it shuts down the blog of one prominent dissident, there are now so many citizens using the Web to post their writings that the Internet in China has become a “censor’s nightmare.” Howard W. French, *Despite Web Crackdown, Prevailing Winds are Free*, N.Y. TIMES, Feb. 9, 2006, at A4. Of course, this argument ignores the consequences of imprisonment and torture for those individuals unfortunate enough to be identified and prosecuted by the government for voicing their dissent. Also, the idea that China has become freer through the investment of foreign corporations is not a given: “[b]ecause China is too lucrative a market to resist, American and European businessmen have ended up endorsing the party line through their silence—or worse. They are not molding China; China is molding them.” Tina Rosenberg, *Building the Great Firewall of China, with Foreign Help*, N.Y. TIMES, Sept. 15, 2005, at D11.

30. *Hearing, supra* note 24, at 78 (testimony of Mark Chandler, Vice President and General Counsel, Cisco Systems, Inc.).

31. *Id.* at 63 (prepared statement of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corporation).

pose of which was to “promote freedom of expression on the Internet” and “protect [U.S.] businesses from coercion to participate in repression by authoritarian foreign governments.”³² The bill did not move beyond the Subcommittee vote before the 109th Session of Congress ended,³³ and Representative Smith reintroduced the bill as the Global Online Freedom Act of 2007 in the 110th Session of Congress.³⁴ In October 2007, the House’s Committee on Foreign Affairs recommended that the entire House consider the bill,³⁵ but the Energy and Commerce Committee must still consider the bill.³⁶ The bill is unlikely to gain enough support to pass given the significance of China to U.S. trade.³⁷

In August 2007, Representative Lantos, Chairman of the House Committee on Foreign Affairs, announced that he would conduct an investigation to find out whether Yahoo misled Congress when it testified before Congress in February 2006.³⁸ Yahoo had testified that it had no information about the reason for the investigation of journalist Shi Tao when it was asked to provide identifying information on his Yahoo account.³⁹ But the Dui Hua Foundation, which advocates for Chinese detainees in the United States and Hong Kong, uncovered a document establishing that the Chinese government provided Yahoo with a request for evidence in a case against Shi for “illegally providing state secrets to foreign enti-

32. Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. (2006).

33. Press Release, Representative Christopher H. Smith, House of Representatives, Smith Reintroduces the Global Online Freedom Act (Jan. 8, 2007). In the press release, Representative Smith stated, “American companies should not be working hand-in-glove with dictators. By blocking access to information and providing secret police with the technology to monitor dissidents, American IT companies are knowingly—and willingly—enabling the oppression of millions of people.” *Id.*

34. Global Online Freedom Act of 2007, H.R. 275, 110th Cong. (2007).

35. Press Release, Representative Christopher H. Smith, House of Representatives, Global Online Freedom Act Passes Committee in Wake of Congressional Investigation of Yahoo (Oct. 23, 2007).

36. Brett Murphy, *US House Committee Approves Personal Online Data Protection Bill*, JURIST, Oct. 24, 2007, <http://jurist.law.pitt.edu/paperchase/2007/10/us-house-committee-approves-online.php>.

37. “Congress could certainly pass a law forbidding technology companies from doing business in China just as it once prohibited trade with South Africa, and still ban commerce with countries like Cuba and Burma. But it won’t. Ever since the Nixon administration, the government has consistently believed that engaging with China was better than not” Nocera, *supra* note 27.

38. Press Release, House Comm. on Foreign Affairs, Congressional Committee to Investigate Disparity Between Documents and Hearing Testimony by Yahoo (Aug. 3, 2007).

39. *Hearing, supra* note 24, at 56 (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.).

ties.”⁴⁰ Yahoo’s Chief Executive Officer Jerry Yang and Senior Vice President and General Counsel Michael Callahan were requested to testify at a hearing on November 6, 2007.⁴¹ At the hearing, Callahan admitted that, while he was unaware of it at the time of his initial testimony, the order for information about Shi Tao did contain a reference to an investigation for disclosure of “state secrets.”⁴² “State secrets” is a term commonly understood to refer to investigations of political dissidents.⁴³

Meanwhile, multinational Internet companies continue to press the U.S. government to pursue legislative and diplomatic solutions that encourage freedom of expression on the Internet worldwide. At yet another hearing before Congress, Michael Samway, the Vice President and Deputy General Counsel of Yahoo, noted that Yahoo has requested that the government use its “trade relationships, bilateral and multilateral forums, and other diplomatic means” among repressive regimes to discourage censorship on the Internet and otherwise.⁴⁴ But the Internet

40. Congressional Committee to Investigate Disparity Between Documents and Hearing Testimony by Yahoo, *supra* note 38.

41. Press Release, House Comm. on Foreign Affairs, Committee Asks Yahoo! Executives to Testify About False Information Given to Congress in China Human Rights Case (Oct. 16, 2007).

42. *Yahoo’s Provision of False Information to Congress: Hearing Before the Comm. on Foreign Affairs*, 110th Cong. 26 (2007) (prepared statement of Michael J. Callahan, General Counsel, Yahoo! Inc.) [hereinafter *Yahoo Hearing*]. Wang Xiaoning and Shi Tao settled their suit against Yahoo only one week after this Congressional hearing. Morton Sklar, the executive director of World Organization for Human Rights USA and lawyer for Wang and Shi in the lawsuit against Yahoo, stated, “The pressures by Congress on [Yahoo chief executive officer] Jerry Yang were of tremendous importance to making this settlement happen.” Rampell, *supra* note 8. For further description of the Shi Tao case, see *supra* note 23.

43. *Yahoo Hearing*, *supra* note 42, at 2 (statement of Rep. Tom Lantos, Chairman, House Comm. on Foreign Affairs).

44. *Global Internet Freedom: Corporate Responsibility & the Rule of Law: Hearing Before the Subcomm. on Human Rights & the Law*, 110th Cong. (2008) (opening statement of Michael Samway, Vice President & Deputy General Counsel, Yahoo! Inc.). Samway noted that Yahoo CEO Jerry Yang met with State Department officials and wrote a letter to Secretary of State Condoleezza Rice, urging diplomatic efforts to encourage the release of Chinese political prisoners. *Id.* At the same hearing, Google Inc. Deputy General Counsel Nicole Wong laid out several suggestions to “promote online freedom of expression.” *Id.* (testimony of Nicole Wong, Deputy General Counsel, Google Inc.). Among other things, Google suggested that the U.S. government “renew diplomatic efforts to encourage [approximately thirty countries] to ratify the [International Covenant on Civil and Political Rights]”; “[s]trengthen and enhance the State Department’s Global Internet Freedom Taskforce”; “[s]trengthen individuals’ ability to file complaints under the International Covenant”; and “[p]romote free expression as part of foreign aid.” *Id.* For a historical view that the self-interest of corporations in the marketplace may pave the way to the creation of enforceable human rights legal standards, see Ralph G. Steinhardt,

companies have also begun to respond at least in part to the criticism that has been directed towards them for doing business with the Chinese government. In October 2008, companies, including Yahoo, Microsoft, and Google, several human rights organizations, scholars, and socially responsible investors reached an agreement on a voluntary code of conduct for use in countries like China to protect user privacy and encourage freedom of expression.⁴⁵

Due to its secrecy, it is difficult to get a true sense of the number of Chinese citizens significantly affected by the Chinese government's actions in cases like Wang's and Shi's. The government shows no signs of abating its suppression of dissent. In fall 2007, it announced that it would continue to attack vigorously what it called "false news reports, unauthorized publications and bogus journalists," and it promised to punish journalists and media organizations that were "intentionally fabricat[ing] news" and "tarnish[ing] the nation's image."⁴⁶ Human Rights Watch reported that in August 2007, the government ordered all search sites in the country, including the Chinese versions of the Google and Yahoo search sites, to take down any "illegal and unhealthy content" within a week, without providing substance on what this phrase might mean and without providing the consequences of failure to comply.⁴⁷

Soft Law, Hard Markets: Competitive Self-Interest and the Emergence of Human Rights Responsibilities for Multinational Corporations, 33 BROOK. J. INT'L L. 933 (2008).

45. Miguel Helft & John Markoff, *Big Tech Companies Back Global Plan to Shield Online Speech*, N.Y. TIMES, Oct. 28, 2008, at B8. According to the final draft of documents obtained by the *Times*, the companies promise to "avoid or minimize the impact of government restrictions on freedom of expression." *Id.*

46. Keith Bradsher, *China Cracks Down on News Media as Party Congress Nears*, N.Y. TIMES, Aug. 16, 2007, at A3. This "crackdown" coincided with growing worldwide concern about the quality controls around consumer products made in China as well as the nearing of the Chinese Community Party Congress, when the new party leadership was announced. *See, e.g.*, David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N.Y. TIMES, Aug. 14, 2007, at C2. The message from the government did not concern dissent journalism directly, but due to the Chinese government's increased focus on the image of the country around the world, journalists arguing for democratic reform are likely to feel the trickle-down effects of the ever-tightening controls around what journalists may publish.

47. Press Release, Human Rights Watch, *China: Media Freedom Attacks Continue Despite Pledges* (Sept. 7, 2007). And despite the government's assurances to the contrary, international media arriving in Beijing for the Olympics found that several websites were censored by the country's firewall. After organizers of the Olympics met with senior members of the International Olympic Committee, some of the bans were lifted. Andrew Jacobs, *Restrictions on Net Access in China Seem Relaxed*, N.Y. TIMES, Aug. 1, 2008, at A7.

C. Wang Xiaoning

According to his complaint, Wang was the editor of and occasional contributor to two online journals that advocated for democratic reform in China.⁴⁸ In 2000 and 2001, Wang posted his writings to a Yahoo Group, where users who subscribed could receive emails sent by other members of the group.⁴⁹ After administrators came across the forbidden content in Wang's writings, his ability to send new posts to the group was revoked; however, Wang continued to send his journal entries anonymously to particular email addresses.⁵⁰

In September 2002, Chinese police allegedly arbitrarily detained Wang without informing him of the charges against him and seized evidence of his writings, including his computer and his notes.⁵¹ A year later, the Beijing Municipal First Intermediary People's Court convicted Wang of "'incitement to subvert state power,' advocating the establishment of an alternative political party, and communicating with an overseas organization the Chinese government considers 'hostile.'"⁵² The government sentenced him to ten years in prison.⁵³ According to the complaint, the court stated that it was able to connect Wang to his writings due to the essential information that Yahoo Hong Kong provided to the Chinese police.⁵⁴ Specifically, Yahoo Hong Kong told the police that an email address based in China had been used to set up the Yahoo Group, and that the postings sent to the Yahoo Group were from an account in China that was owned by Wang Xiaoning.⁵⁵ The court also included some of Wang's statements from his Internet postings. In one posting, Wang

48. Complaint, *supra* note 2, para. 32.

49. *Id.* para. 33.

50. *Id.* paras. 34–35. The complaint does not identify whether the administrators who revoked Wang's posting privileges were members of the Chinese government or employees of Yahoo. *Id.*

51. *Id.* para. 37.

52. *Id.* para. 40.

53. *Id.* para. 41.

54. *Id.* para. 42. Yahoo would have probably contested this point. In his prepared statement, Michael Callahan, General Counsel of Yahoo, emphatically denied that Yahoo Hong Kong had provided any information to the Chinese police about Shi Tao, another imprisoned Chinese dissident, and that Yahoo China alone would respond to a request from a law enforcement agency. *Hearing, supra* note 24, at 59 (prepared statement of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Also, Yahoo has been anxious to clarify that in October 2005, Yahoo China merged with Alibaba.com (a Chinese company), and Alibaba.com now owns the Yahoo China business. While Yahoo holds one of the four board seats on Alibaba.com and is a "large equity investor," it does not maintain control over the day-to-day operations of Yahoo China. *Id.* at 58.

55. Complaint, *supra* note 2, para. 42.

stated, "Without the multi-party system, free elections and separation of powers, all types of political reform will come to nothing."⁵⁶ In another, he wrote, "We should never forget that China is still a totalitarian and despotic country."⁵⁷ Wang appealed the judgment, but the Supreme People's Court rejected the application for appeal in December 2004 and again in July 2006.⁵⁸

Wang has been held at the Detention Center of Beijing State Security Bureau as well as Beijing Prison No. 2.⁵⁹ His complaint alleged that he has been subject to severe beatings and psychological torture to provoke him to confess to engaging in activities against the State,⁶⁰ and that at times he has been malnourished and denied regular exercise and sunlight for weeks or months on end.⁶¹ He is allowed to see his wife for one half-hour every month, and prison administration monitors his written communications directed outside the prison.⁶²

In April 2007, Wang Xiaoning filed suit against Yahoo! Inc. and Yahoo! Hong Kong, Ltd. under the ATCA, among other laws and treaties.⁶³ The specific violations of the law of nations alleged include knowingly aiding and abetting acts of torture⁶⁴; cruel, inhuman, or degrading punishment or treatment⁶⁵; and arbitrary arrest and prolonged detention.⁶⁶ The lawyer for the plaintiffs, Morton Sklar, is the executive director of World Organization for Human Rights USA.⁶⁷ Had Wang's suit not settled, it would have been considered a test case, because the Supreme Court has not yet directly ruled on the applicability of the ATCA to multinational corporations for aiding and abetting violations of international law.⁶⁸

56. *Id.* para. 43.

57. *Id.*

58. *Id.* para. 44.

59. *Id.* paras. 39, 44.

60. *Id.* para. 39.

61. *Id.* para. 45.

62. *Id.*

63. The suit also alleged violations of the Torture Victim Protection Act; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; Universal Declaration of Human Rights; Charter of the United Nations; International Labor Organization Convention No. 29 Concerning Forced or Compulsory Labor; the Electronic Communications Privacy Act; and certain statutes and common law of the state of California. *See id.* para. 69.

64. *Id.* para. 74.

65. *Id.* para. 81.

66. *Id.* para. 88.

67. Helft, *supra* note 3.

68. In a discussion on how to judge whether a norm is "sufficiently definite" to be considered a violation of international law, Justice Souter, in the only Supreme Court

II. CLAIMS UNDER THE ATCA

A. Introduction

The ATCA was enacted as part of the Judiciary Act of 1789.⁶⁹ There is intense disagreement over its original purpose and current appropriate application, in part due to the scant record left by Congress when the statute was drafted.⁷⁰ In *Tel-Oren v. Libyan Arab Republic*, Judge Bork contended that the drafters of the ATCA had in mind only the violations of the law of nations existing at that time, including such torts as the violation of safe conduct, infringement of the rights of ambassadors, and piracy.⁷¹ Bork concluded that the judiciary should not legislate from the bench on the meaning of the ATCA when Congressional intent is so unclear:

[We] have, at the moment, no evidence what the intention of Congress was. When courts lack such evidence, to ‘construe’ is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then be only accidental. Section 1350 can probably be adequately understood only in the context of the premises and assumptions of a legal culture that no longer exists.⁷²

Others argue that the ATCA should receive a broad interpretation. The ATCA was drafted amidst Congressional concern that the U.S. government, still in its very early stages, had no national law with which to enforce the country’s obligations under international law, such as the obli-

opinion to directly address the ATCA, unfortunately provided little guidance on the applicability of the ATCA to private corporations: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004). See *infra* note 99 and accompanying text.

69. *Sosa*, 542 U.S. at 712–13.

70. *Id.* at 718–19.

71. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813–14 (D.C. Cir. 1984) (Bork, J., concurring). See also JAMES BISER WHISKER, *THE SUPREMACY OF THE STATE IN INTERNATIONAL LAW* 128 (2003) (arguing that at the time it was enacted, the ATCA would have only allowed “an extremely limited number of highly specialized cases usually in regard to unusual offenses”). Others interpret the purpose of the ATCA even more narrowly. See, e.g., Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006) (arguing that the ATCA was intended to cover violations of safe conduct only and that the ATCA should provide relief for torts committed by private individuals only if U.S. sovereign responsibility is implicated).

72. *Tel-Oren*, 726 F.2d at 815.

gation to protect ambassadors.⁷³ When the first Congress enacted the Judiciary Act in 1789, it modeled the drafting on a 1781 resolution by the Continental Congress that was never passed.⁷⁴ The 1781 resolution exhorted states to pass laws that would punish the “most obvious” violations of the law of nations, which Judge Bork referenced in *Tel-Oren*.⁷⁵ But it also asked states to grant courts jurisdiction “to decide on offenses against the law of nations, not . . . enumerat[ed]” and resolved that tort suits be authorized “for damages by the party injured.”⁷⁶ Those who argue for a broad interpretation of the ATCA note that the drafters specifically chose to grant jurisdiction to all district courts as opposed to the Supreme Court alone, and that jurisdiction was granted for “all causes” rather than limited to specific violations of international law, such as infringement of the rights of ambassadors.⁷⁷

Filartiga v. Pena-Irala,⁷⁸ a Second Circuit decision, brought the ATCA back to life after lying near dormant for close to two hundred years.⁷⁹ This decision has been called the *Brown v. Board of Education* for transnational public law litigants.⁸⁰ *Filartiga* held that the ATCA provides jurisdiction for violations of “universally accepted norms of the international law of human rights, regardless of the nationality of the par-

73. Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 443–44 (2003) [hereinafter Stephens, *Historical Context*]. Stephens further argues that the First Congress, in enacting laws enabling both criminal and civil liability for violations of international law, allowed for a “mixed approach” that provided for “criminal prosecution of the perpetrator and compensation to those injured through a civil suit.” *Id.* at 444.

74. William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 119, 142 (Ralph G. Steinhardt & Anthony D’Amato eds., 1999). The First Congress drafted legislation on the issue of the violation of the law of nations some time after an infamous incident in 1784 involving an assault by a Frenchman, de Longchamps, upon the Secretary of the French Legion on American soil. Since states alone held the lawmaking power at the time, the Continental Congress had no power that would allow for a federal remedy. Thus, the delegates at the Constitutional Convention and subsequently the First Congress were well aware of the need to provide legislation around violations of international law. *Id.* at 139–40.

75. *Id.* at 138 (citing 21 J. CONT. CONG. 1137 (1781)).

76. *Id.*

77. *Id.* at 146 (citing Judiciary Act § 9).

78. 630 F.2d 876 (2d Cir. 1980).

79. See Frank Christian Olah, *MNC Liability for International Human Rights Violations under the Alien Tort Claims Act: A Review & Analysis of the Fundamental Jurisprudence and a Look at Aiding & Abetting Liability under the Act*, 25 QLR 751, 755 & n.19 (2007).

80. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

ties.”⁸¹ As long as there is “[1] an action by an alien, [2] for a tort only, [3] committed in violation of the law of nations,” a suit may be properly brought in district court.⁸² The Second Circuit further explained that the courts must carefully define the law of nations. If they failed to do so, “the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”⁸³

Since *Filartiga*, suits under the ATCA generally follow one of two routes: they are filed against either a State recognized by the United States (or persons acting in an official capacity for the State)⁸⁴ or, as is more recently the case, persons acting in an individual capacity.⁸⁵ Because courts had generally only applied international law to States,⁸⁶ it was not clear that, when faced with the issue, courts would find private actors liable as well under the ATCA. *Kadic v. Karadzic*, decided in 1995, was one of the first cases to address whether a person acting in an individual capacity, not as a functionary of the State, could be held responsible for violations of the law of nations. Here, the Second Circuit found that the ATCA is applicable to private actors.⁸⁷ Karadzic argued that only States and persons acting under color of law could be held liable for violations of international law, and that because he was a private individual, not a

81. *Filartiga*, 630 F.2d at 878.

82. *Id.* at 887 (explaining the elements for making out a tort violation under the ATCA).

83. *Id.* at 881.

84. Under the language of the statute, States are not exempt from suits under the ATCA. But generally, they have not been successfully named as defendants as a result of States' general sovereign immunity to suits. See Beth Stephens, *Judicial Deference and the Unreasonable Views of the Executive Branch*, 33 BROOK. J. INT'L L. 773, 812 (2008) [hereinafter Stephens, *Unreasonable Views*]. Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (2006), States and their instrumentalities are, subject to certain exceptions, immune from the jurisdiction of the court. And even when States are not immune to the court's jurisdiction under the exceptions enumerated in the Foreign Sovereign Immunities Act, the act of state doctrine may cause the court to decline to review the legality of the State's actions due to concerns about encroaching on the executive branch's ability to set foreign policy. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Indeed, in a footnote in *Sosa v. Alvarez-Machain*, the court remarked that there was a “strong argument that federal courts should give serious weight to the [e]xecutive [b]ranch's view of the case's impact on foreign policy.” 542 U.S. 692, 733 n.21 (2004). Another prudential doctrine that courts have indicated may limit their ability to adjudicate claims is when they are presented with a nonjusticiable political question. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

85. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 4–5 (2003).

86. Olah, *supra* note 79, at 775.

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

state actor, he could not be sued under the ATCA.⁸⁸ The court rejected this argument, asserting 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.”⁸⁹ That is, there are certain universal norms that bind all entities, regardless of whether they are private individuals or state actors. For support, the court cited both the Restatement (Third) of the Foreign Relations Law of the United States,⁹⁰ which provides for private actor liability for violations of certain universal norms, as well as offered historical examples of private actions that were considered violations of international law, such as piracy, the slave trade, and certain war crimes.⁹¹

In 2004, the Supreme Court finally spoke on the ATCA in *Sosa v. Alvarez-Machain*.⁹² One of the issues before the Court was whether the ATCA was a jurisdictional statute only and thus “stillborn.”⁹³ If it were solely jurisdictional, the statute would only enable litigants to bring claims once Congress provided a further private right of action through additional legislation, such as the Torture Victim Protection Act.⁹⁴ The *Sosa* decision, however, did not interpret the statute to require further legislation. The Court recognized a private right of action for ATCA claims, but it defined the types of claims that can be brought under the ATCA relatively narrowly. First, the violation must be “definite” and “accept[ed] among civilized nations.”⁹⁵ The Court cited to a concurring opinion in *Tel-Oren v. Libyan Arab Republic*, in which Judge Edwards found that the ATCA only reaches “a handful of heinous actions—each of which violates definable, universal and obligatory norms.”⁹⁶ And when laws or treaties do not clearly define a “violation of international law,” the Court stated that we should “look[] to those sources we have long, albeit cautiously, recognized,”⁹⁷ including:

88. *Id.* at 239.

89. *Id.*

90. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1987) (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.”); *id.* § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . .”).

91. *Karadzic*, 70 F.3d at 239.

92. 542 U.S. 692 (2004).

93. *Sosa*, 542 U.S. at 714.

94. Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992) (codified as a note to the ATCA, 28 U.S.C. § 1350 (2006)).

95. *Sosa*, 542 U.S. at 732.

96. *Id.*

97. *Id.* at 733.

customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁹⁸

As to claims against multinational corporations, *Sosa* was almost silent. In a footnote that left many wondering in what direction the Court would turn if faced with another ATCA claim, Justice Souter, writing for the majority, stated, “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁹⁹ He went on to cite disagreement amongst the circuits: in *Tel-Oren v. Libyan Arab Republic*, the D.C. Circuit found that there was “insufficient consensus” in 1984 that private individuals could commit violations of international law; in *Kadic v. Karadzic*, the Second Circuit found that “sufficient consensus” existed in 1995.¹⁰⁰ The Court took a misstep in not indicating at least in dicta whether ATCA claims against corporations are actionable, especially since this is one of the issues that has brought the most attention to the use of the ATCA in district courts.¹⁰¹

By 2004, the decisions of most courts reflected a belief that, just like States, individuals and corporations could be held liable for grave violations of international law.¹⁰² Certainly the high profile of the International Criminal Tribunal for Rwanda (“ICTR”) and the International Tribunal for the Former Yugoslavia (“ICTY”) contributed to this view, but holding individuals responsible for violations of international law is not an innovation of the last twenty years. Under Article I, Section 8, of the Constitution, Congress is granted the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”¹⁰³ Later, the trials at Nuremberg provided strong justi-

98. *Id.* at 734 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Additionally, the Restatement (Third) of Foreign Relations Law states that a rule of international law can be found derivatively by examining “general principles common to the major legal systems of the world.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987). Such principles “may be invoked as supplementary rules of international law where appropriate.” *Id.*

99. *Id.* at 732 n.20.

100. *Id.*

101. “Approximately one third of the post-*Sosa* cases involve corporate defendants.” Stephens, *Unreasonable Views*, *supra* note 84.

102. See *infra* note 125.

103. “Pirates, the very exemplar of intended defendants under Section 1350, were not always or necessarily considered ‘state actors,’ and there was never any question that

fication for applying international law to private actors as well as States. The United States Military Tribunal at Nuremberg convicted forty-three individual German citizens for crimes against humanity, including forced labor and enslavement in the individuals' factories and mines.¹⁰⁴

While *Sosa* did not exactly throw the gates open for litigation under the ATCA, it certainly did not deny the power of the ATCA to permit plaintiffs an opportunity to be heard in instances of grave violations of international law. And because it did not speak one way or another to the relatively straightforward question of whether individuals and multinational corporations can be held accountable for these violations, ATCA suits against multinational corporations proceed.

B. Claims Against Multinational Corporations

Courts have generally identified three ways that multinational corporations may be found liable under the ATCA.¹⁰⁵ First, a corporation's action may be deemed "state action" if the corporation is working so closely with a government that its actions in certain areas are indistinguishable from the actions of the government, or if the corporation assumes roles traditionally associated with government.¹⁰⁶ Second, even if a corporation does not have an established relationship with a State, it may still be liable under the ATCA for violations of universally accepted norms.¹⁰⁷ For example, a private corporation that commits acts of genocide would be held directly liable for genocide because genocide is universally con-

their depredations were in violation of the law of nations and actionable under the ATCA." Ralph G. Steinhardt, *The Internationalization of Domestic Law*, in *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY*, *supra* note 74, at 3, 11. *See also supra* notes 69–77 and accompanying text.

104. These individuals were specifically found to have acted independently of the German government. Steinhardt, *supra* note 103, at 9.

105. There are important policy reasons for holding corporations liable for violations of international law. When a corporation knowingly supplies assistance to a State that permits the State to commit violations of international law it would not have otherwise been able to commit, the corporation is culpable. It significantly assisted the State in its perpetration of the harms. Also, because the work of a corporation often involves the decisions of many individuals, it can be much simpler to apportion blame to a corporation than a group of individuals. Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon*, 20 *BERKELEY J. INT'L L.* 91, 97, 105 (2002). However, some would argue that a corporation should not be expected to play the role of policymaker by encouraging States to comply with universal human rights standards, and that placing this expectation upon corporations may chill foreign investment. *See, e.g.*, Lucien J. Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, 13 *U.C. DAVIS J. INT'L L. & POL'Y* 119, 134 (2007).

106. *See infra* notes 111–13 and accompanying text.

107. *See infra* notes 114–18 and accompanying text.

sidered an international crime. Finally, and most controversially, some courts have based third-party liability for private actors on differing understandings of civil liability for aiding and abetting violations of international law.¹⁰⁸

Many of the ATCA suits against corporations can be traced back to the 1997 case, *Doe I v. Unocal*, where for the first time a district court found that a corporation could be held liable under the ATCA, both for certain violations of international law such as torture and forced labor, and for working in concert or as a joint venturer with the State.¹⁰⁹ Since that decision, fifty-two suits have been filed in federal courts against corporate defendants as of spring 2008; three were settled, thirty-three dismissed, and fifteen were pending.¹¹⁰

A corporation will be considered a *de facto* state actor, and thus liable under the ATCA for violations of international law, when it takes action in areas typically performed only by a State.¹¹¹ Additionally, even when the corporation has not taken over functions traditionally acted on by the State, it can be liable when it holds such a close relationship with the state that it is acting under color of law.¹¹² Generally, a corporation can be said to be acting under “color of law” when it “maintain[s] an interdependent or symbiotic relationship with the public party; when the state requires, encourages, or is significantly involved in nominally private conduct; when the private party exercises functions traditionally performed by the state; or when the private parties conspire with state officials.”¹¹³

108. See *infra* note 125.

109. *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 891–92 (C.D. Cal. 1997).

110. Stephens, *Unreasonable Views*, *supra* note 84, at 814.

111. Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 389 (1999).

112. See, e.g., *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1148 (C.D. Cal. 2002), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *opinion withdrawn and superseded in part on reh'g*, 487 F.3d 1193 (9th Cir. 2006), *reh'g en banc granted* 499 F.3d 923 (9th Cir. 2007) (holding that the actions of the State of Papua New Guinea were “fairly attributable” to Rio Tinto given their joint action).

113. BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 97–98 (1996). An understanding of the term “color of law” in U.S. courts as applied to private actors comes from the courts’ interpretation of the U.S. civil rights statute, 42 U.S.C. § 1983 (2000). See Stephens, *Historical Context*, *supra* note 73, at 437 (stating that courts that applied the principles of violations under color of law to U.S. civil rights statutes “paved the way for litigation against corporations”). The Supreme Court has applied this definition of action under color of law to determine when a private entity can be considered a state actor and thus liable under § 1983. See Tzeutschler, *supra*

Corporations have also been found liable under the ATCA for certain specific violations of international law. There is a set of carefully defined universal norms that bind both States and private actors.¹¹⁴ As the court in *Karadzic* noted, “[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”¹¹⁵ Under treaties and customary international law, these norms are considered of such importance that to violate them is to violate international law, regardless of the identity of the transgressor.¹¹⁶ Blackstone defines the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”¹¹⁷ These norms may not be imprecise or vague. An often-cited definition provides that the laws are “universal, definable, and obligatory international norms.”¹¹⁸

This is not to say that it is a simple task to determine what these norms are at any particular time. The *Sosa* Court provided that we should look to the works of jurists and commentators for evidence.¹¹⁹ The composition of these norms is not static. Laws that reach international consensus, and views among experts and legal commentators on these laws shift and develop over time. By the end of the nineteenth century and up until the twentieth, violations of international law included piracy, slave trading, and slavery.¹²⁰ Today the list has significantly expanded.¹²¹ The Restate-

note 111, at 390–92 (describing the application of the four tests of state action to private entities).

114. See *supra* notes 95–98 and accompanying text.

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

116. Steinhardt, *supra* note 103, at 8.

117. Stephens, *Historical Context*, *supra* note 73, at 446 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67 (Wayne Morrison ed., 2001) (1753)).

118. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

119. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

120. Tzeutschler, *supra* note 111, at 393.

121. For a discussion of which torts constitute violations of international law, see, for example, Joel Slawotsky, *Doing Business Around the World: Corporate Liability under the Alien Tort Claims Act*, 2005 MICH. ST. L. REV. 1065, 1088–98 (2005) (concluding that violations actionable under the ATCA include crimes against humanity, racial discrimination, slave/forced labor, torture, war crimes, and possibly cruel, inhuman, and/or degrading conduct, and extrajudicial killing). Slawotsky states that *Sosa* rejected arbitrary detention as a basis for an ATCA suit. *Id.* at 1088. This conclusion is questionable given that the *Sosa* Court was insistent that the particular facts presented did not prove a case of arbitrary detention: “[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” *Sosa*, 542 U.S. at 738. For a different understanding of what torts are actionable under the ATCA, see Lucien J. Dhooge, *Lohengrin Revealed: The Implica-*

ment (Third) of Foreign Relations Law sets forth a list of violations of international law by states¹²² to include, among other violations, “torture or other cruel, inhuman and degrading treatment” and “prolonged arbitrary detention.”¹²³

The final and most controversial mode for finding corporations liable for violations of international law is through third-party aiding and abetting liability. Given that most corporations do not intentionally violate international norms, for example, by directly committing acts of genocide, and that generally corporations are unlikely to have such in-

tions of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act, 28 LOY. L.A. INT’L & COMP. L. REV. 393, 493 (2006) (“The only claims asserted against transnational corporations surviving *Sosa* are those alleging summary and extrajudicial execution, torture, and perhaps racial discrimination.”).

122. The Restatement makes clear that in addition to States, individuals and corporations may be held liable for certain violations of international law:

[I]ndividuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures. For example, international law and numerous international agreements now recognize human rights of individuals and sometimes give individuals remedies before international bodies Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. pt. II, introductory note (1987) (footnotes omitted).

123. *Id.* § 702. In full, § 702 asserts:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

Comment (a) to § 702 notes, “The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.” It is also noteworthy that this list was considered current as of 1987; certainly additional agreed-upon norms might have arisen in the last twenty years.

tertwined relationships with state governments as to be found acting under color of law, aiding and abetting liability has received the most attention, both by legal commentators and the general business community. Liability for aiding and abetting under the ATCA is still a relatively new concept in the courts. Because *Sosa* declined to speak to whether individuals and corporations can be liable under the ATCA,¹²⁴ the courts have been left to decide, as a threshold matter, whether aiding and abetting liability under the ATCA exists at all¹²⁵ and, if so, to select the standard by which to analyze aiding and abetting liability.

Those arguing against corporate aiding and abetting liability¹²⁶ are likely to point to the Supreme Court decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, in which the Court found, “[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”¹²⁷ However, in *Khulumani v. Barclay National Bank*, Judge Katzmann stated in a concurring opinion that the holding in *Central Bank* is “inapposite” to ATCA claims, because the “relevant norm is provided not by domestic statute but by the law of

124. See *supra* notes 99–100 and accompanying text.

125. Post-*Sosa*, most courts appear to accept the notion that aiding and abetting liability exists for individuals and corporations under the ATCA. William Paul Simmons, *Liability of Secondary Actors Under the Alien Tort Statute*, 10 YALE HUM. RTS. & DEV. L.J. 88, 111 (2007). See, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 51–54 (E.D.N.Y. 2005), *aff’d*, 517 F.3d 104 (2d Cir. 2008). For examples of decisions in which the courts have declined to find aiding and abetting liability under the ATCA, see *In re S. Afr. Apartheid Litig.*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004), *aff’d in part & vacated in part sub nom.*, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam) (vacating the district court’s decision, *aff’d due to lack of a quorum sub nom.*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008)). The district court’s decision in *In re S. Afr. Apartheid Litig.* to disallow ATCA claims under a theory of aiding and abetting liability was vacated by the Second Circuit in 2007. For the reasons described in *In re S. Afr. Apartheid Litig.*, the court in *Doe v. Exxon Mobil Corp.* declined to find aiding and abetting liability under the ATCA. 393 F. Supp. 2d 20, 24 (D.D.C. 2005), *aff’d*, 473 F.3d 345 (D.C. Cir. 2007). Now that the Second Circuit has overturned this ruling, the D.C. District Court decision may have less value as precedent.

126. See, e.g., Curtis A. Bradley, Jack L. Goldsmith, & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924–29 (2007).

127. 511 U.S. 164, 182 (1994). The Court continued that the doctrine of civil aiding and abetting liability has been “at best uncertain in application.” *Id.* at 181. For an interesting analysis on how the aiding and abetting standard might be evaluated in light of *Central Bank*, see Simmons, *supra* note 125, at 111–14.

nations, and that law extends responsibility for violations of its norms to aiders and abettors.”¹²⁸

In *In re “Agent Orange” Product Liability Litigation*, Judge Weinstein also rejected reliance on *Central Bank* in determining whether aiding and abetting liability exists.¹²⁹ Judge Weinstein referenced an amicus brief at length that included a cite to a 1795 opinion from the Attorney General stating that individuals would be liable under the ATCA for “committing, aiding, or abetting” violations of the laws of war.¹³⁰ The brief also cited *Talbot v. Jansen*,¹³¹ a 1795 case in which Talbot, a French citizen, was found liable for the unlawful capture of a ship in violation of international law, due to his actions in “aiding Ballard[, a U.S. citizen,] to arm and outfit” the ship and in “cooperating with him on the high seas.”¹³² Since aiding and abetting liability for violations of international law was proved to be in existence for over two hundred years, Judge Weinstein had no trouble dismissing the *Central Bank* argument.

A majority of courts have found that aiding and abetting liability does exist under the ATCA, although the courts do not agree on the applicable legal standard.¹³³ Both the federal district court and the Ninth Circuit in *Doe I v. Unocal*¹³⁴ as well as the Second Circuit in *Khulumani v. Barclay National Bank*¹³⁵ have articulated the standards applied by various courts

128. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d at 282 (Katzmann, J., concurring).

129. *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d at 7.

130. *Id.* at 53–54 (citing *Breach of Neutrality*, 1 Op. Att’y Gen. 57, 59 (1795)). The individuals contemplated had “act[ed] in concert with” but did not “control” French naval ships. *Id.*

131. 3 U.S. 133 (1795).

132. *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d at 54.

133. *See supra* note 125.

134. *Doe I v. Unocal* was the first case to hold that a multinational corporation could be found liable under the ATCA for violations of international law. Olah, *supra* note 79, at 774. The plaintiffs in *Unocal* essentially accused the defendants of aiding and abetting the military of Myanmar, a well-known human rights violator, in the forced labor of the plaintiffs. *Doe I v. Unocal*, 395 F.3d 932, 947 (9th Cir. 2002). *Unocal* had a complicated procedural history. In 2000, the federal district court granted summary judgment for Unocal. In 2002, the Ninth Circuit affirmed that decision in part and reversed it in part. The Ninth Circuit decided to rehear the case in 2003; however, in 2005, the case was settled before a decision was handed down, thus preventing the chance for the Supreme Court to speak on the correct standard to apply when analyzing aiding and abetting claims under the ATCA (assuming, of course, that aiding and abetting claims are cognizable in the first place). *See Doe I v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d in pt., rev’d in pt.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *appeal dismissed*, 403 F.3d 708 (9th Cir. 2005).

135. 504 F.3d 254 (2d Cir. 2007) (per curiam), *aff’d due to lack of a quorum sub nom.*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

in ATCA cases. In particular, courts have alternatively employed the international criminal aiding and abetting liability standards as applied at Nuremberg—more recently as developed in the ICTY and the ICTR¹³⁶—and, perhaps more infrequently, looked to federal common law tort principles.¹³⁷

The district court in *Doe I v. Unocal* used what has been called an “active participation” standard to judge aiding and abetting liability.¹³⁸ The court examined several U.S. Military Tribunal decisions at Nuremberg¹³⁹ and found that because Unocal had not actively participated in forced labor, it could not be held liable, regardless of the fact that it was aware of and benefited from the military’s use of forced labor.¹⁴⁰ According to the district court, “[L]iability requires participation or cooperation in the forced labor practices.”¹⁴¹

The Ninth Circuit agreed with the district court that international law should be applied as set forth in international tribunal cases such as those at Nuremberg; however, it rejected the “active participation” standard.¹⁴² The court’s decision to apply international law rather than domestic law or the law of the country where the underlying claim took place was based on several factors. First, because the violation in question was a *jus cogens* violation, the law of every state regarding the *jus cogens* violation must be identical to the international law standard anyway, or it is *per se* invalid.¹⁴³ Second, the Restatement (Second) of Conflict of Laws states that if there is no statute in the jurisdiction that governs what law to apply, the court should take into account “the needs of the interstate and international systems,” “certainty, predictability and uniformity of re-

136. See *infra* notes 138–49 and accompanying text.

137. See *infra* notes 150–53 and accompanying text.

138. Simmons, *supra* note 125, at 108.

139. See *Unocal*, 110 F. Supp. 2d at 1309–10. For further discussion of several U.S. Military Tribunal cases against German industrialists, see *infra* Part III.

140. *Unocal*, 110 F. Supp. 2d at 1310.

141. *Id.* The court continued, “The Tribunal’s guilty verdict rested not on the defendants’ knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful conduct.” *Id.* The district court characterized the plaintiff’s position as arguing that “knowledge and approval of acts is sufficient for a finding of liability.” *Id.* at 1309. In retrospect, it was probably a mistake for the plaintiffs to argue for such a broad rule, given that ATCA litigation in the area of holding multinational corporations liable for aiding and abetting was so new to the courts at the time.

142. The Ninth Circuit majority states that the “active participation” standard was only employed in the Nuremberg trials in order to rebut the “necessity defense” invoked by the defendants. The court goes on to say that the necessity defense is inapplicable in *Unocal*, so the active participation standard is also inapplicable. *Doe I v. Unocal*, 395 F.3d 932, 947–48 (9th Cir. 2002).

143. *Id.* at 948.

sult,” and “ease in the determination and application of the law to be applied,”¹⁴⁴ all of which point to the desirability of applying international law. Finally, the court stated that by applying international law, the underlying policy goal of the statute—“provid[ing] tort remedies for violations of international law”¹⁴⁵—is served.

Interestingly, the court did not find it problematic to apply international criminal law standards to international civil law claims, in part because international human rights law “has been developed largely in the context of criminal prosecutions rather than civil proceedings,”¹⁴⁶ thus making criminal law standards the most applicable in ATCA cases. The court also noted that a separation of criminal and tort claims is often artificial:

[W]hat is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law. Moreover, . . . the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context. Accordingly, District Courts are increasingly turning to the decisions by

144. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). *See also Unocal*, 395 F.3d at 948. It is not necessarily true, however, that applying international law to aiding and abetting civil claims will lead to certainty and predictability. As this section demonstrates, there is no settled standard for international aiding and abetting claims. Bradley, Goldsmith, and Moore point out that the Rome Statute of the International Criminal Court may have set forth a “more demanding” standard than the ICTY. *See* Bradley, Goldsmith, & Moore, *supra* note 126, at 927. While the ICTY developed a standard of “knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of the crime,” *see infra* note 148, the Rome Statute’s General Principles state that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission” Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1999, 2187 U.N.T.S. 90 (emphasis added). Some support for using the Rome Statute to define aiding and abetting liability may be emerging. In his concurrence in *Khulumani*, Judge Katzmann points to the Rome Statute as “particularly significant,” because it “articulates the *mens rea* required for aiding and abetting liability.” *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 275 (2d Cir. 2007) (Katzmann, J., concurring). But some scholars reject using the Rome Statute as a useful source for the definition because it “fails to incorporate any requirements for finding causation” and fails to “reflect[or] declare[] customary international law.” Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT’L L. 871, 884–85 (2008).

145. *Unocal*, 395 F.3d at 949. The court, however, does not make clear why providing a tort remedy for violations of international law by applying domestic law would not serve the policy goals of the ATCA. *Id.*

146. *Id.*

international *criminal* tribunals for instructions regarding the standards of international human rights law under our *civil* ATCA.¹⁴⁷

Analyzing ICTR and ICTY cases, the court found that the correct standard to apply is one of “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”¹⁴⁸ The *actus reus* requires showing “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”; the *mens rea* requires showing “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.”¹⁴⁹

In his concurring opinion in *Unocal*, Judge Reinhardt suggested instead that “federal common law tort principles, such as agency, joint venture, or reckless disregard” should be applied.¹⁵⁰ He rejected applying international law standards out of hand, stating that they are “recently-promulgated”¹⁵¹ and “permit[] imposition of liability for the lending of

147. *Id.* (citations omitted). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762–63 (2004) (Breyer, J., concurring) (stating that there is no reason to fail to extend adjudication to a particular nation’s court of a claim concerning alien civil conduct in violation of international law, given the fact that there is universal consensus to allow any nation’s court to adjudicate alien criminal conduct that violates international law).

148. *Unocal*, 395 F.3d at 947, 950–51. The Human Rights Council, tasked with setting forth human rights standards of corporate responsibility and accountability, incorporated essentially the same standard used by the majority in the Ninth Circuit decision, with the exception that the Council also included “moral support,” which the majority in *Unocal* did not address. See *infra* note 152. Citing two cases from the ICTY, the Council stated, “The international tribunals have developed a fairly clear standard for individual criminal aiding and abetting liability: knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of the crime.” Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, para. 31, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007). The Council noted, however, that it is “unknown” whether the International Criminal Court will adopt the same standard. *Id.* para. 31 n.28.

149. *Unocal*, 395 F.3d at 952–53.

150. *Id.* at 963 (Reinhardt, J., concurring).

151. *Id.* Certainly the decisions of the ICTY and the ICTR occurred relatively recently, but the tribunals’ conclusions about the standard for aiding and abetting liability came from what the majority called an “exhaustive analysis of international case law and international instruments,” primarily from those that arose after World War II. See *id.* at 950 n.26. And as explained above, aiding and abetting liability for violations of international law dates back to the adoption of the ATCA. See *supra* notes 130–31 and accompanying text. This “new” standard, then, is actually a synthesis of courts’ understanding of criminal aiding and abetting developed over many years.

moral support.”¹⁵² Similarly, in *Khulumani*, Judge Hall declared that the courts should review federal common law when examining a claim of accessory liability.¹⁵³ But this view has not captured the support of a majority in the federal courts, perhaps in part because the Supreme Court may have implied that applying international law is appropriate in these cases.¹⁵⁴

III. AIDING AND ABETTING LIABILITY AT NUREMBERG

A. Introduction

While no one definitive standard of aiding and abetting liability under the ATCA has arisen in the courts, courts and commentators in the United States have been moving toward applying an international standard of civil liability rather than a federal common law standard.¹⁵⁵ Because aiding and abetting liability for violations of international law is not governed by treaty, it is especially important to examine the rule of law as developed in international legal decisions.¹⁵⁶ In particular, the aiding and abetting standard developed in the trials at Nuremberg is worthy of notice.

The war crimes trials at Nuremberg were an early and important attempt by an international body to hold individuals responsible for complicity in breaches of international law. The United Nations validated this effort when the General Assembly endorsed the establishment of the International Military Tribunal and generally affirmed the principles of international law as recognized in the Charter of the Nuremberg Tribunal.¹⁵⁷

152. *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring). As the majority points out, the “moral support” element from the ICTY aiding and abetting standard is not incorporated in the standard the Ninth Circuit adopts. *See id.* at 949 n.24. Nor was it necessary to even determine whether “moral support” is settled international law or if it has parallels in domestic law, since it was found that Unocal could be liable for having knowingly provided practical assistance and encouragement to the Myanmar military. *Id.* at 951.

153. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 284 (2d Cir. 2007) (Hall, J., concurring). Specifically, Judge Hall looked to § 876(b) of the Restatement (Second) of Torts. *Id.* at 287.

154. *See, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 183 (D. Mass. 1995) (explaining that municipal tort law is an “inadequate placeholder” to address international human rights violations).

155. “[The Supreme Court’s decision in *Sosa*] . . . seem[s] to suggest that whatever liability standard is appropriate for a given norm should be derived from international law rather than domestic law.” Olah, *supra* note 79, at 771. *See also Khulumani*, 504 F.3d at 269 (Katzmann, J., concurring) (“We have repeatedly emphasized that the scope of the ATCA’s jurisdictional grant should be determined by reference to international law.”).

156. *See supra* note 98.

157. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), U.N. Doc. A/64/Add.1, at 188 (1946).

The Nuremberg Charter authorized the Tribunal to prosecute not only individuals, but also legal persons, so corporations could be found criminally liable.¹⁵⁸ Under the Charter, the Tribunal could declare that groups and organizations were “criminal organizations” at trial.¹⁵⁹

After the Allied Powers defeated Germany, the United States, Great Britain, France, and the U.S.S.R. formed a Control Council to institute uniform procedures for the trials of war criminals.¹⁶⁰ The crimes to be prosecuted were set forth in Article 6 of the Nuremberg Charter and included crimes against peace, war crimes, and crimes against humanity.¹⁶¹ The Control Council passed Law No. 10, which specifically provided:

158. Beth Stephens, *Sosa v. Alvarez-Machain: “The Door is Still Ajar” For Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 557 & n.115 (2005). See also Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 913 (2008) (stating that holding corporations criminally liable is a “relatively recent phenomenon” that came about in response to the rise of corporations during the industrial revolution).

159. “At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.” Charter of the International Military Tribunal art. 9, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter].

160. Ramasastry, *supra* note 105, at 105. Tribunals held by the other Allied Powers also demonstrate the existence of aiding and abetting liability for violations of international law. See, e.g., *In re Tesch, “The Zyklon B Case,”* 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1946) (finding business owner and second-in-command guilty for knowingly supplying poison gas to the Nazis for use in the concentration camps).

161. “Crimes against peace” were defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.” IMT Charter, *supra* note 159, art. 6. “War crimes” were defined as “violations of the laws or customs of war.” *Id.*

Such violations [of the laws or customs of war] shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Id. Finally, “crimes against humanity” were defined as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.

Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission¹⁶²

Thus, the law unambiguously provided for liability for third-party actors. The United States itself set up six military tribunals to try these crimes.¹⁶³

Trials of certain German industrialists under these U.S. Military Tribunals demonstrate how this aiding and abetting standard was applied to individuals whose businesses profited from gross violations of international law. Businesses could not avert prosecution solely because a dictator conceived of the plan to violate international law and the businesses played no role in the initial planning:

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.¹⁶⁴

These trials at Nuremberg shed light on how courts today might apply an aiding and abetting standard of liability to multinational corporations.

B. The Flick Case

Frederick Flick, a prominent businessman in the coal and steel industry in Germany, and five of his business associates were each charged with participation in the Nazi slave labor program.¹⁶⁵ Neither Flick nor his associates arranged or organized the slave labor used in his plants. As the tribunal noted, “[T]he slave-labor program had its origin in Reich governmental circles and was a governmental program, and . . . the defendants had no part in creating or launching the program. . . . [T]he defendants had no actual control of the administration of such program even

Id.

162. Control Council Law No. 10, in TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 app. D, at 251 (1949).

163. Ramasastry, *supra* note 160, at 105.

164. United States v. Goering, Nuremberg Tribunal, 6 F.R.D. 69, 112 (1947).

165. United States v. Friedrich Flick, “The Flick Case,” 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1190 (1952).

when it affected their own plants.”¹⁶⁶ The businessmen argued the affirmative defense of necessity to the charge.¹⁶⁷ The court accepted this defense for four of the six defendants. The defendants were “conscious of the fact that it was both futile and dangerous to object” to the use of slave labor.¹⁶⁸ However, because Bernhard Weiss, one of the defendants, had taken “active steps” to procure further slave labor for production with the “knowledge and approval” of Flick, both Flick and Weiss were found guilty.¹⁶⁹

C. *The Krupp Case*

The defendants in the Krupp case were businessmen in the coal and steel industry as well; their company, Fried. Krupp, A.G., produced large amounts of artillery and naval units for the Nazi regime.¹⁷⁰ Like the defendants in the Flick case, they were accused of employing slave labor, and they also pled the defense of necessity.¹⁷¹ The court rejected this defense, because it found that the company “manifested not only its willingness but its ardent desire to employ forced labor.”¹⁷² As evidence, the court cited numerous pieces of correspondence in which Fried. Krupp, A.G. expressed its desire for new slave laborers.¹⁷³ This result is not necessarily incompatible with the result in the Flick case, because the court presented the proactive steps taken by the company to procure slave labor rather than what seems to be characterized in the Flick case as a passive acceptance of the labor.¹⁷⁴

166. *Id.* at 1196.

167. The court described “necessity” as “a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.” *Id.* at 1200 (citing 1 WHARTON’S CRIMINAL LAW para. 126).

168. *Id.* at 1197.

169. *Id.* at 1202.

170. United States v. Alfried Felix Alwyn Krupp von Bohlen und Halbach, “The Krupp Case,” 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 7–11 (1950).

171. *Id.* at 1435.

172. *Id.* at 1440. See also United States v. Carl Krauch, “The Farben Case,” 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1179 (1952) (finding certain members of I.G. Farben, a chemical and pharmaceutical company, guilty for using slave labor and rejecting their defense of necessity because they were “to a very substantial degree, responsible for broadening the scope of that reprehensible system”).

173. The Krupp Case, *supra* note 170, at 1439–42.

174. The tribunal in *Krupp*, however, did not look at whether each individual defendant had taken proactive steps to procure slave labor. The tribunal in *Flick*, on the other hand, examined whether each individual defendant had taken steps to procure slave labor,

D. The Einsatzgruppe Case

Waldemar Klingelhoefter was accused of various war crimes and crimes against humanity.¹⁷⁵ He maintained that his only role within the “Einsatzgruppe,” or special task force, was limited to interpreting.¹⁷⁶ The court stated that even if this were true, “it would not exonerate him from guilt”¹⁷⁷ During trial, Klingelhoefter admitted to turning over lists of Communists to his department, and to knowing that, by turning over the lists, those persons would be executed. “In this function,” said the court, “he served as an accessory to the crime.”¹⁷⁸ Klingelhoefter, then, could not escape criminal responsibility for having played a substantial role in the deaths of these individuals, even if he did not participate or was not present as a witness when they were killed.

E. Conclusion

The standard emerging for aiding and abetting liability in both civil ATCA trials and criminal international tribunal cases is derived directly from Nuremberg.¹⁷⁹ The trials at Nuremberg established that an individual is liable when he or she provides assistance that substantially affects the perpetration of the violation of international law, and knows that such assistance will assist in the violation. This “knowledge and substantial assistance” standard does not require that the aider and abettor desired or wanted the particular crime or breach of international law to occur (though an individual may be excused if under compulsion or coercion).¹⁸⁰ At Nuremberg, being a willing participant in a violation of international law was enough for liability. The steel, coal, chemical, and armament companies may have regarded the assistance they provided as simply a business opportunity, and they may or may not have looked upon what the Nazis did with horror and distaste, but because they provided significant assistance to the Nazis in carrying out their enslavement plans, and they had knowledge of the enslavement, they deserved punishment.

as Weiss had, or supervised and approved the actions of those who procured the labor, as Flick had. See *The Flick Case*, *supra* note 165, at 1197–202.

175. *United States v. Otto Ohlendorf*, “The Einsatzgruppe Case,” 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 13–22 (1950).

176. *Id.* at 569.

177. *Id.*

178. *Id.*

179. Nuremberg was the first international effort to delineate *jus cogens* norms. See *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992).

The Nuremberg standard of aiding and abetting liability continues to be developed in courts today, most notably in the international tribunals in the former Yugoslavia and Rwanda.¹⁸⁰ By finding aiding and abetting liability, the Nuremberg tribunals, the ICTR and the ICTY, and many federal courts have implicitly rejected assertions such as the following, which was made by a corporate executive and cited by the Ninth Circuit in *Doe I v. Unocal*:

By stating that I could not *guarantee* that the army is not using forced labour, I certainly imply that they might, (and they might) but I am saying that we do not have to monitor army's behavior: we have our responsibilities; they have their responsibilities; and we refuse to be pushed into assuming more than what we can really guarantee. About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and [its subcontractor corporation] Total that we might be in a grey zone.¹⁸¹

When a corporation knows that a serious violation of international law is occurring, and it provides practical assistance that substantially affects that violation, the corporation should be held liable under the ATCA.¹⁸²

IV. WANG'S LIKELIHOOD OF SUCCESS

Wang accused Yahoo of aiding and abetting torture, cruel, inhuman, and degrading treatment, and prolonged arbitrary detention, certainly in

180. See, e.g., Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment and Sentence (Jan. 27, 2000); Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998). Many U.S. federal courts have acknowledged the influence of international tribunals in determining the definition and scope of the most serious violations of international law. See, e.g., *Doe I v. Unocal*, 395 F.3d 932, 950 (9th Cir. 2002) (finding the ICTR and the ICTY "especially helpful" in considering the standard to use for civil aiding and abetting liability). For an overview of the critiques of the use of Nuremberg precedent in ATCA litigation (and responses to these critiques), see Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 353–66 (2008).

181. *Unocal*, 395 F.3d at 942. Certainly Unocal could not direct the military's actions in employing forced labor, but the company knew that grave human rights violations were occurring in Myanmar and was eventually informed that these violations were also occurring in connection with the Unocal project. See *id.* at 939–42. The Nuremberg standard would impose liability where the company is aware of the serious violations and provides substantive assistance for their accomplishment.

182. The principles of law set forth by the Nuremberg tribunals are "significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law." *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 271 (2d Cir. 2007) (Katzmann, J., concurring).

part because by international consensus these violations are considered so serious that they apply to individuals and corporations as well as States.¹⁸³ If the court had applied the same aiding and abetting standard established at Nuremberg and developed by the ICTY and the ICTR,¹⁸⁴ Wang would have needed to show first that Yahoo provided practical assistance or encouragement to the Chinese government that substantially affected the torture, cruel treatment, and arbitrary detention Wang experienced at the hands of the government. Wang would have also needed to show that Yahoo had actual or reasonable knowledge that its actions would assist the Chinese government in committing these violations.

The practical assistance prong of the aiding and abetting analysis would have been less difficult to demonstrate for Wang; unless Yahoo could have shown that the government retrieved or could have retrieved the information on Wang's identity elsewhere, it is likely that Yahoo's provision of such information on request would have been considered practical assistance with a substantial effect on the violations of international law. Imputing knowledge to Yahoo might have proven more difficult. In *Doe I v. Unocal*, the Ninth Circuit provided a useful list of the types of evidence that could have been used to impute actual or reasonable knowledge to Yahoo: a risk assessment provided by an outside consulting group to the corporation, evaluating the practices of the government in connection with the company's project; a statement from a corporate executive that the government might go outside the boundaries of international law; warnings and confirmations from human rights groups that the government was violating international law in connection with the corporation's business in the country; information received from a consultant confirming the "egregious" violations; and receipt of documents generally circulated from the State Department on the country's violations of international law.¹⁸⁵

Yahoo would have probably argued that the *Unocal* case was distinguishable from Wang's. International human rights groups and even the consultants it had hired told Unocal that the Myanmar military was making use of forced labor on Unocal's project while the project was still ongoing.¹⁸⁶ Yahoo, on the other hand, was not made aware that turning over Wang's name would result in Wang's imprisonment, torture, and humiliating treatment. Yahoo also might have argued that businesses

183. See *supra* notes 121–23 and accompanying text.

184. For an overview of the similarities and differences between modern international tribunals and the tribunals set up at Nuremberg, see Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551 (2006).

185. *Unocal*, 395 F.3d at 940–42.

186. *Id.* at 941–42.

cannot control the actions of a repressive government. Some courts may be sympathetic to an argument that a chilling effect on business investments outside the United States could occur if a claim like this is allowed to proceed¹⁸⁷; however, courts would probably not be sympathetic to an argument that Yahoo's only motive in doing business in China was profit, and that it had no malevolent intent. The Nuremberg tribunals found such motive no excuse.¹⁸⁸

The liability of Yahoo would have most likely turned on how narrowly the court defined the "knowledge" prong of the aiding and abetting analysis. If knowledge could have been imputed from information known to the general public, for example, that China's government represses dissidents, and that in doing business in China, Yahoo might have been required to turn over some information on its customers (for known or unknown purposes), then Yahoo would have certainly been liable. However, if the court had required Yahoo to know specifically that by turning over Wang's identifying information, he would be jailed, tortured, and subjected to cruel and degrading treatment, Yahoo's liability would have been unlikely. A middle-of-the-road "knowledge" standard would require Yahoo to know specifically that it had turned over Wang's account information due to his dissemination of "state secrets," but not that giving the information would result in Wang's torture and imprisonment.

CONCLUSION AND A PROPOSAL FOR THE AIDING AND ABETTING CIVIL LIABILITY STANDARD FOR MULTINATIONAL CORPORATIONS

If the court had employed this middle standard, it is likely that the court would have ruled in Wang's favor. Critically, the General Counsel of Yahoo informed Congress that the request for Wang's identification from the Chinese government contained reference to "state secrets," a term widely known to mean a search for information on dissidents. Yahoo apparently complied without a second thought. Additionally, the fact that

187. Indeed, the Bush administration has argued in amicus briefs filed in ten different ATCA cases that ATCA litigation interferes with foreign policy. *See* Stephens, *Unreasonable Views*, *supra* note 84, at 773–74. The Bush administration has strenuously objected to the existence of aiding and abetting liability under the ATCA and argues that if aiding and abetting liability were to be found, investments by both U.S. and non-U.S. businesses in developing countries would decrease, undermining political and economical stability in those countries, with harm resulting to the United States. *Id.* at 792–93. Stephens argues that the administration's position should be rejected because it fails to prove a correlation between the acts at issue in the lawsuit and the "dangers predicted." *Id.* at 800–01. Stephens continues that the arguments upon which the administration relies are "patently absurd." *Id.* at 802.

188. *See, e.g.*, The Flick Case, *supra* note 165.

the suit was filed in a district court in California, where appeals eventually go to the same circuit court that decided *Unocal*, might have made a decision in Wang's favor more likely. But *Unocal* was decided before the *Sosa* decision, so whether the court would have applied a different aiding and abetting standard is unclear, given that *Sosa* did not address the aiding and abetting issue specifically. Finally, for a corporation as large and sophisticated as Yahoo, it is likely that the discovery process would have revealed that Yahoo understood the implications its actions posed for one similarly situated to Wang. Yahoo likely employed many consultants to assess the risks before venturing into business in China. It is hard to imagine that Yahoo would not have been aware that it might be required to turn over identifying information to the Chinese government as a condition of doing business there.¹⁸⁹ Prominent human rights organizations have also been active in putting companies and States on notice about the practices of the Chinese government that violate established standards of international law.¹⁹⁰

While liability for Yahoo would not have been clear-cut, and it is not even necessarily clear that the court would have used the internationally developed standard for criminal aiding and abetting, it was probably wise that Yahoo settled, given the negative attention from Congress, the media, and human rights groups. It will be interesting to find out how the settlement of the case informs how Yahoo decides to handle requests from the Chinese government in the future. Yahoo without question now has knowledge of what could happen to its customers when the company turns over information on individuals accused of disseminating "state secrets."

Since *Karadzic* and *Unocal* were decided, most courts facing the issue have found that corporations may be held liable under the ATCA for aiding and abetting. It might be fair to say that for a majority of courts and commentators, the question is no longer *whether* corporations should be held liable for aiding and abetting. Rather, the question is *when* should corporations be held liable for aiding and abetting. The practical consequences of the resolution of this question are far-reaching, so it is important that, in setting the standard, courts consider not only the relevance of international law—after all, international law is a part of the federal common law—but also that corporations should not be held accountable

189. Indeed, Google was so concerned about this possibility that it declined to provide email services when commencing business in China. See Thompson, *supra* note 12.

190. See, e.g., Amnesty International, Reports, News Articles, and Campaigns on Human Rights in China, <http://www.amnesty.org/en/region/china> (last visited Nov. 10, 2008); Human Rights Watch, Press Releases, Letters, Reports, and Commentary on Human Rights in China and Tibet, www.hrw.org/asia/china.php (last visited Nov. 10, 2008).

for the sins of their business partners in every instance in which the partners breach established standards of international law. Repressive governments are not necessarily predictable, much less stable, and corporations that want to do business globally should not be expected to forecast suppression of dissent by means that are illegal under international norms. A “knowledge” standard for aiding and abetting, then, should not be so narrowly defined that it would impute knowledge to a corporation for merely knowing, without more, that a government with whom it works has repressive tendencies. But if a corporation provides substantial assistance to a State that allows the State to more easily carry out oppression against its citizens in breach of international law, with knowledge that this oppression would likely follow from its assistance, that corporation should be on notice that it may be held liable in U.S. courts for violations under the ATCA. Finding corporations responsible for substantial assistance to governments that seriously violate international law upholds the legacy of the war crimes trials at Nuremberg.

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