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Taking Tort Law Seriously in the Alien Tort Statute

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TAKING TORT LAW SERIOUSLY IN THE ALIEN TORT STATUTE

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INTRODUCTION: THE PROBLEM OF TOO MUCH LAW

Current legal argument over the application of the Alien Tort Statute ("ATS") presents an interesting irony. While one might have thought that the problem with ATS litigation—especially in cutting-edge areas such as corporate liability for aiding and abetting—is that there is no law at all and that courts are "making things up" as they go along,[1] a moment's reflection on the plaintiff's arguments in *Corrie v. Caterpillar*, recently decided by the Ninth Circuit, illustrates that in fact, when it comes to aiding and abetting, there seems to be *too much law*.[2]

In *Corrie*, the plaintiff's estate alleged that Caterpillar should be held liable under the ATS because Caterpillar violated the law of nations by selling modified bulldozers to the Israeli Defense Forces, who planned to use the bulldozers to violate certain rights protected by customary international law.[3] The specific claim against Caterpillar was that it was liable under the ATS because it had aided and abetted the Israeli Defense Forces.[4] The Ninth Circuit upheld the district court's dismissal of the suit on political questions ground,[5] rendering the legal validity of the underly-

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1. This is my phrase, although I think it captures the spirit of the "conservative" critique of modern ATS adjudication. *See* Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855 (1997) (noting that the customary international law by necessity has a "'soft, indeterminate character,'" and that "it makes no sense to say that judges 'discover' an objectively identifiable" law) (citations omitted). *See also* Julian Ku, *Keeping the Courthouse Door Open for International Law Claims Against Corporations: Rethinking* Sosa," 9 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 81, 82 (2008) (agreeing with Justice Scalia's prediction that judges would continue to engage in "unbridled federal court lawmaking").

2. Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).

3. *Id.* at 977.

4. *Id.* at 979.

5. *Id.* at 984.

ing human rights claim moot, unless the Ninth Circuit takes up the question *en banc* or the case is appealed to the U.S. Supreme Court. For purposes of this Article, that question is likewise moot; I want to simply note that the plaintiff's argument about Caterpillar's aiding and abetting liability illustrates the too-much-law irony that is at the heart of contemporary ATS litigation against corporations.

Caterpillar argued two reasons why it could not be held liable for aiding and abetting under the ATS even if the Israeli Defense Forces had used Caterpillar's bulldozers to violate the law of nations. First, citing *United States v. Blankenship*,[6] Caterpillar argued that a mere seller of a product can never be held liable for the wrongs committed by the buyer under aiding and abetting liability.[7] Second, citing *Sosa v. Alvarez-Machain*,[8] Caterpillar argued that the specific action they allegedly and admittedly performed—selling a legal product to Israel—did not constitute a violation of a "specific, universal, and obligatory" proscription as required by the Supreme Court's test for a cause of action under the ATS (even if Israel had used the product to violate international law).[9] The district court accepted these arguments and granted judgment in favor of Caterpillar.[10]

On appeal, the plaintiffs, not surprisingly, challenged these and other arguments made by Caterpillar. The plaintiff advanced a three-part argument that the aiding and abetting suit meets the *Sosa* test. First, the plaintiff argued that *Sosa* does not require that an allegation of aiding and abetting be rooted in a "specific, universal, and obligatory" norm in international law.[11] In other words, aiding and abetting liability is not a rule of international law, but a remedial rule based in federal common law. To satisfy the *Sosa* test, all that needs to be established is that a violation of the law of nations may have occurred.[12] Once the underlying violation is sufficiently alleged, derivative liability follows as a matter of domestic

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6. United States v. Blankenship, 970 F.2d 283 (7th Cir. 1992).

7. *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (D. Wash. 2005), *vacated*, 503 F.3d 974 (9th Cir. 2007).

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

9. *See* Reply in Support of Motion to Dismiss by Defendant Caterpillar Inc. Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim and Pursuant to the Political Question and Act of State Doctrines at 12–15, Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (D. Wash. 2005).

10. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1026–27 (D. Wash. 2005), *vacated*, 503 F.3d 974 (9th Cir. 2007).

11. Appellants' Opening Brief, Corrie v. Caterpillar, Inc., No. 05-36210, at 21–22 (9th Cir. Mar. 20, 2006).

12. *Sosa*, 542 U.S. at 698–99, 724.

tort law for anyone who aided and abetted that underlying violation.[13] Second, the plaintiff argued that even if the first argument fails, aiding and abetting is recognized under international law.[14] That is, selling industrial products[15] or providing a list of names to facilitate their sale[16] satisfies the *Sosa* test with regards to aiding and abetting the violations of international law alleged in the suit—war crimes, extrajudicial killing, and cruel, inhuman, and degrading treatment or punishment. Third, the plaintiff argued that the district court used an erroneous definition of aiding and abetting, and that the right definition would support the plaintiff's claim that a jury could find liability.[17] While the district court did not define aiding and abetting, it cited *Blankenship* for the proposition that, even assuming arguendo that the ATS provided for aiding and abetting liability at all, a mere seller could not be an aider and abettor under the ATS.[18] The plaintiffs argued instead that under *either* international law or domestic law, a seller could be held liable for aiding and abetting if it could be shown that, by selling a product, an actor provided "practical assistance that has substantial effect on the perpetuation of a crime" under international law, or "substantial assistance" under domestic law.[19]

This Article examines this irony of too much law in the imposition of aiding and abetting liability. Part I looks at aiding and abetting liability under both U.S. domestic law, illustrated in the *Restatement (Second) of Torts* and subsequent case law, and customary international law, derived from the Rome Statute of the International Criminal Court ("Rome Statute") and decisions rendered by special international tribunals. Part II then explores how this proliferation of sources of law has given jurists a wide variety of law from which to choose. After reviewing the current case law, this Part examines paradigmatic examples of this irony of too much law. This Article concludes that the source of law should be *transnational* (as opposed to domestic) common law tort.

A review of recent case law underscores the irony of too much law even further. In 2002, the Ninth Circuit agreed in *Doe I v. Unocal*[20] that

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13. *Sosa*, 542 U.S. at 724–25.

14. Appellants' Opening Brief, Corrie v. Caterpillar, Inc., *supra* note 11, at 23–25.

15. *See, e.g.*, *In re* Tesch (Zyklon B Case), 13 I.L.R. 250 (Brit. Mil. Ct. 1946).

16. *See, e.g.*, United States v. Ohlendorf (The Einsatzgruppen Case), *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1950).

17. Appellants' Opening Brief, Corrie v. Caterpillar, Inc., *supra* note 11, at 25–29.

18. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1027 (D. Wash. 2005), *vacated*, 503 F.3d 974 (9th Cir. 2007).

19. Appellants' Opening Brief, Corrie v. Caterpillar, Inc., *supra* note 11, at 23–25.

20. Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002), *vacated en banc*, 395 F.3d 978 (9th Cir. 2003). Although the Ninth Circuit was vacated en banc, it led to an important

the plaintiff could bring an aiding and abetting claim but disagreed over the definition and source of the law of aiding and abetting.[21] Given that the decision was pre-*Sosa*, the first argument raised by the *Corrie* plaintiff—that the an allegation of aiding and abetting need not be rooted in a "specific, universal, and obligatory" norm in international law—was assumed and not argued. However, the second and third issues were raised, and the court's answers did not follow in any predictable pattern. The majority, led by Judge Pregerson, found that the source of aiding and abetting law is international law, and that an actor is liable when he provides "knowing practical assistance" to a party who commits a crime in violation of international law.[22] The concurrence, written by Judge Reinhardt, located the exact same cause of action in domestic law.[23]

The friendly disagreement between these two nominally liberal judges went even further. Judge Pregerson took the position that, if domestic law provided the relevant test, it would be drawn from the doctrine of aiding and abetting as defined in the *Restatement (Second) of Torts* § 876.[24] In contrast, Judge Reinhardt took the view that a test based on domestic law should draw upon the doctrines of joint venture liability,[25] agency liability,[26] and reckless disregard[27]—three common law doctrines that are very different from the concept of aiding and abetting.

A similar dispute over the relevant sources of law arose between two judges who otherwise agreed with the basic proposition that aiding and abetting liability should be available under the ATS. In *Khulumani v.*

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settlement and remains one of the most learned discussions of aiding and abetting liability under the ATS.

21. *Id.* at 947–51.

22. *Id.* at 951.

23. *Id.* at 963–78 (Reinhardt, J., concurring). Reinhardt explained:

> In my view, courts should not *substitute* international law principles for established federal common law or other domestic law principles, as the majority does here, unless a statute mandates that substitution, or other exceptional circumstances exist. . . . [T]he benefits of the vast experience embodied in federal common law as well as any useful international law principles are obtained when we employ the traditional common law approach ordinarily followed by federal courts. Those benefits are lost, however, when we substitute for the wide body of federal authority and reasoning, as the majority does here, an undeveloped principle of international law promulgated by a recently-constituted ad hoc international tribunal.

Id. at 966–67.

24. *Id.* at 951.

25. *Id.* at 970–72.

26. *Unocal*, 395 F.3d at 972–74.

27. *Id.* at 974–76.

Barclay National Bank,[28] the South African ATS case recently decided by the Second Circuit, the two-judge majority split along exactly the same lines as Judges Pregerson and Reinhardt in *Unocal*. Judge Katzmann took the position that the plaintiff's claim for aiding and abetting should adopt the test set out in international law—most significantly, the Rome Statute[29]—while Judge Hall took the position that the plaintiffs' case could go forward on the basis of domestic law—namely the *Restatement (Second) of Torts* § 876.[30]

As the third judge on the panel, Judge Korman, slyly noted in his dissent, if on remand the federal district court were to apply the Rome Statute, the plaintiffs would likely fail to meet its comparatively demanding standard.[31] None of the pleadings so far indicates that the defendants purposely facilitated the violation of human rights by promoting the apartheid system. Instead, the plaintiffs alleged that at most the corporate defendants were substantially certain that their efforts to sell products to the South African government would have the effect of enabling apartheid to survive.[32] However, substantial certainty, while meeting the *Restatement (Second) of Torts* test, is insufficient under the Rome Statute's test.

There is good reason to believe that the judges in *Khulumani* misunderstood the significance of the difference between international and domestic law tests for aiding and abetting. While Judge Katzmann stated that "those who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the [International Criminal Tribunal for the Former Yugoslavia] and the [International Criminal Tribunal for Rwanda]," [33] this does not tell the whole story. As the next section will show, the applicability of the aiding and abetting doctrine to many corporate defendants in ATS litigation is *over*determined. That is, under either body of law, the corporate defendants could be found liable.

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28. Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007) (per curium), *aff'd due to lack of a quorum sub nom.*, American Isuzu Motors, Inc. v. Ntsebeza, 2008 WL 117862, 76 U.S.L.W. 3405 (May 12, 2008) (No. 07-919).

29. *Id.* at 274–76.

30. *Id.* at 284–87.

31. *Id.* at 332–33.

32. Second Consolidated and Amended Complaint ¶¶ 4–6, *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

33. *Khulumani*, 504 F.3d at 276.

I. THE INTERNATIONAL AND DOMESTIC CONTENT OF AIDING AND ABETTING LIABILITY

A. The Restatement (Second) of Torts *and* Halberstam*: The Underpinnings of Domestic Law*

Although the concept of assigning liability to those who enable or encourage tortious conduct has existed within the common law for centuries,[34] claims specifically in aiding and abetting have become increasingly common over the last two decades. The *Restatement (Second) of Torts* § 876 was codified in 1979 and allowed for the imposition of liability on persons acting in concert.[35] Section 876 attaches liability to an actor who knows that another's conduct constitutes a breach of duty but nevertheless provides substantial assistance or encouragement to that party.[36]

The scope of this doctrine was discussed thoroughly by the D.C. Circuit in *Halberstam v. Welch*.[37] The court in *Halberstam* noted that relatively few claims had been adjudicated under the theory of aiding and abetting, and posited that this phenomenon resulted from confusion in applying the doctrine.[38] To address the issue, the court analyzed a variety of aiding and abetting cases, element by element, to illustrate how the tort was correctly applied.[39] In particular, the court determined what constituted "substantial assistance" by balancing the five factors recommended in the *Restatement (Second) of Torts* § 876: (1) the nature of the act encouraged; (2) the amount (and kind) of assistance given; (3) the defendant's absence or presence at the time of the tort; (4) the defendant's relation to the tortuous actor; and (5) the defendant's state of mind.[40]

The court in *Halberstam* applied these factors to hold a woman liable for a murder her husband committed while burglarizing a home.[41] Specifically, the D.C. Circuit ruled that a defendant did not need to be present at the time of the tort in order for liability to attach and explained its

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34. *See, e.g.*, Talbot v. Janson, 3 U.S. (3 Dall.) 133 (1795) (holding defendant liable for aiding and abetting in piracy because he knowingly supplied guns). *See also* Henfield's Case, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (court recognized liability for committing aiding or abetting hostilities in violation of the law of nations).

35. RESTATEMENT (SECOND) OF TORTS § 876 (1976).

36. *Id.*

37. Halberstam v. Welch, 705 F.2d 472 (D.C. Cir. 1983).

38. *Id.* at 478.

39. *Id.* at 478–86.

40. *Id.* at 478.

41. *Id.* at 488–89.

ruling through the existence of other relevant factors from section 876.[42] Namely, the district court had found that the defendant knew of her husband's occupation as a professional thief and was also aware of her own role in assisting their criminal enterprise.[43] Analogizing the case to an illustration in the comments to section 876,[44] the D.C. Circuit concluded that the plaintiff's death was a reasonably foreseeable consequence of continued personal property crime, and thus found the defendant liable for aiding and abetting the murder.[45]

Although *Halberstam* and section 876 have been widely followed,[46] some courts have hesitated to apply the doctrine in difficult cases, and others still have not accepted its formulation. For example, in *Rice v. Paladin Enterprises*,[47] an aiding and abetting action was brought against the publisher of a "hit man" manual after a professional killer relied on the book's approach to carry out a murder.[48] The publisher conceded that when marketing the book, he intended to help criminals commit crimes.[49] A Maryland district court in the Fourth Circuit acknowledged that state

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42. *Id.* at 486–88.

43. *See Halberstam*, 705 F.2d at 488. These findings were based upon circumstantial evidence, and took into account that the defendant acted as her husband's bookkeeper and secretary for many years and also helped launder the items he had stolen. *Id.*

44. *See* RESTATEMENT (SECOND) OF TORTS § 876 cmt. d, illus. 10 (1976). The illustration explains:

> *A* and *B* conspire to burglarize *C*'s safe. *B*, who is the active burglar, after entering the house and without *A*'s knowledge of his intention to do so, burns the house in order to conceal the burglary. *A* is subject to liability to *C*, not only for the conversion of the contents of the safe, but also for the destruction of the house.

Id. See also Am. Family Mut. Ins. Co. v. Grim, 440 P.2d 621, 626 (Kan. 1968).

45. *Halberstam*, 705 F.2d at 483.

46. *Halberstam* has been followed in over 50 subsequent decisions and is accepted as good law in many federal circuits. *See Khulumani*, 504 F.3d at 288 ("In the almost quarter-century since *Halberstam* was decided, many state courts and Circuit Courts, including the Second Circuit, have adopted the *Restatement*'s aiding and abetting standard."). *See also* Hurley v. Atlantic City Police Dep't, 174 F.3d 95 (3d Cir. 1999) (*Halberstam* and the *Restatement* were followed in the Third Circuit); Temporomandibular Joint (TMJ) Implant Recipients v. Dow Chem. Co., 113 F.3d 1484 (8th Cir. 1997) (followed by Eighth Circuit); Kitson v. Bank of Edwardsville, 240 F.R.D. 610 (S.D. Ill. 2006) (followed in Seventh Circuit); Davis v. United States, 340 F. Supp. 2d 79, 92 (D. Mass. 2004); Crawford By & Through Crawford v. City of Kansas City, 952 F. Supp. 1467, 1477 (D. Kan. 1997).

47. On appeal, the Fourth Circuit reversed the judgment. Rice v. Paladin Enter., 128 F.3d 233 (4th Cir. 1997).

48. *Id.* at 239.

49. *Id.* at 241.

law recognized civil liability for aiding and abetting under section 876, but nonetheless declined to find the defendant liable.[50]

In the context of securities law, the Supreme Court cited *Halberstam* to suggest that aiding and abetting liability does not have a concrete basis at common law.[51] Its reliance on *Halberstam* for this proposition is surprising. Although the court in *Halberstam* conceded that many courts failed to apply the doctrine clearly, the court did not question its validity as a cause of action.[52] In fact, the court in *Halberstam* was optimistic about the extension of aiding and abetting and tort law generally to redress "newly emerging notions of economic justice."[53]

The *Restatement (Second) of Torts* formulation of aiding and abetting has not been unequivocally adopted in some jurisdictions.[54] Still, it is often the case that the cause of action is available when applied to a straightforward set of facts. For example, aiding and abetting has been applied to litigation involving fraud,[55] products liability,[56] terrorism,[57] and libel.[58] But given the breadth and novelty of wrongs that aiding and

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50. Rice v. Paladin Enter., 940 F. Supp. 836, 842, 849 (D. Md. 1996), *rev'd*, 128 F.3d 233 (4th Cir. 1997).

51. Cent. Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 181 (1994). The Court quoted *Halberstam*:

> The doctrine has been at best uncertain in application, however. As the Court of Appeals for the District of Columbia Circuit noted in a comprehensive opinion on the subject, the leading cases applying this doctrine are statutory securities cases, with the common-law precedents "largely confined to isolated acts of adolescents in rural society."

Id.

52. *Halberstam*, 705 F.2d at 478.

53. *Id.* at 489.

54. *See, e.g.*, Fed. Deposit Ins. Corp. v. S. Prawer & Co., 829 F. Supp. 453, 457 (D. Me. 1993) (in Maine, "it is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute"); *In re* Asbestos Sch. Litig., No. 83-0268, 1991 U.S. Dist. LEXIS 10471, at *34 (E.D. Pa. July 18, 1991) (cause of action under *Restatement* § 876 "has not yet been applied as a basis for liability" by Pennsylvania courts); Meadow Ltd. P'ship v. Heritage Sav. & Loan Ass'n, 639 F. Supp. 643, 653 (E.D. Va. 1986) (aiding and abetting tort based on *Restatement* § 876 "not expressly recognized by the state courts of the Commonwealth [of Virginia]").

55. *See, e.g.*, *In re* Enron Corp. Sec., Derivative & "ERISA" Litig., 511 F. Supp. 2d 742 (S.D. Tex. 2005).

56. *See, e.g.*, *In re* Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484 (8th Cir. 1997).

57. *See, e.g.*, Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 801–08 (D.C. Cir. 1984). However, it is worth noting that the plaintiff brought an action in conspiracy, not aiding and abetting. *Id.* at 798.

58. *See, e.g.*, Russell v. Marboro Books, 18 Misc. 2d 166 (N.Y. Sup. Ct. 1959).

abetting has been applied to redress, it is not surprising that these actions have been met with resistance, particularly within these contexts.

B. Customary International Law

Customary international law is a set of normative standards that have achieved a general degree of international consensus.[59] These standards are derived from international conventions, the judicial decisions from international tribunals, and general principles of law that are widely recognized within civilized nations.[60] Contemporary discussions on aiding and abetting law generally focus on interpretations of the Rome Statute of the International Criminal Court and the decisions rendered by special international tribunals involving Germany, Rwanda, and the former Yugoslavia. Generally, the divergence in opinion regarding these sources arises over what the sources stand for collectively, rather than what each says on its own. Still, interpretations do vary.[61]

Aiding and abetting was recognized as a basis for criminal liability by the Nürnberg Military Tribunal ("NMT"), an international court formed after World War II to punish violators of international law. Control Council Law No. 10, which established these courts, provided for the culpability of officers that did not directly carry out war crimes but were nonetheless responsible for assisting in their commission.[62] However,

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59. Customary international law is defined by the *Restatement (Third) of the Foreign Relations Law* as "law [that] results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

60. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933. *See also* Filártiga v. Peña-Irala, 630 F.2d 876 (1980).

61. *See, e.g.*, Philip A. Scarborough, Note, *Rules of Decisions for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 479–85 (2007); Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805 (2005); Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases (Apr. 3, 2008) (unpublished manuscript on file with Author).

62. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, Jan. 20, 1946, 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50. Article 2(2) explains:

> [A] person . . . 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 commission . . . .

Id. art. 2(2) (emphasis added).

there has been judicial disagreement over the mental state required to find a defendant culpable.[63]

This difficulty arose in part from a mens rea threshold in one trial that diverged from the generally applied standard. In *The Ministries Case*, the court acquitted Karl Rasche,[64] a German industrialist accused of knowingly providing loans to businesses that relied on forced labor.[65] Despite evidence indicating that Rasche was substantially certain his funding would facilitate criminal activity, the NMT acquitted the chairman.[66] It stated: "We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower."[67] Thus, this case has been cited for the proposition that the NMT required a purposeful mens rea to convict a party accused of enabling human rights violations.[68] In other words, culpability attaches only where there is evidence that a third-party defendant assisted the direct wrongdoer and intended primarily to facilitate an international crime.

The standard applied during the trial of Karl Rasche can be distinguished and dismissed as an outlying case. Scholars have pointed to other trials conducted by the NMT in which culpability attached to defendants for knowingly—but not purposefully—contributing to the commission of an international crime.[69]

For example, in *United States v. Flick*, a German industrialist was convicted of international crimes based on his knowledge and approval of decisions made by his deputy, Bernard Weiss, to use Russian prisoners of war as slave labor.[70] The evidence presented at trial indicated that Weiss, who was also convicted, actively pursued increasing production

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63. *See, e.g.*, *Khulumani*, 504 F.3d 254. *See also supra* notes 28–32 and accompanying text (detailing the disagreement between Judges Katzmann and Hall).

64. Karl Rasche was chairman of the Dresdner Bank. *See* United States v. Von Weizsaecker (The Ministries Case), *in* 12–14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 853 (1949).

65. *Id.* at 852.

66. *Id.* at 852–55.

67. *See id.* at 854.

68. *Khulumani*, 504 F.3d at 276.

69. *See, e.g.*, Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon—An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 113–17 (2002).

70. United States v. Flick (The Flick Case), *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (1949). *See generally* Ramasastry, *supra* note 69.

in light of the decreased cost of forced labor.[71] However, there were no facts to indicate that Weiss sought primarily to enslave Russian prisoners of war. Rather, Weiss' purpose in utilizing slave labor was presumably to make money.[72] Thus, *Flick* is often cited for the proposition that defendant's knowledge that his actions will incidentally result in an international crime is sufficient to establish aiding and abetting liability.[73]

Similarly, in *United States v. Krupp*, knowledge appears to have satisfied the mens rea requirement necessary to convict eleven of twelve employees of the Krupp firm charged with deportation, exploitation, and abuse of slave labor.[74]

Another trial, *U.S. v. Krauch*,[75] is particularly noteworthy because the successful criminal charges against Farben were followed by a civil action brought by forced laborers seeking redress for unpaid wages. In the private action, a German court held Farben liable for negligently failing to protect the plaintiff's life, body, and health.[76]

A concept of aiding and abetting similar to one set forth in Control Council No. 10 was implicitly applied in Hong Kong during the

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71. United States v. Flick (The Flick Case), *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3, 1198, 1202 (1949).

72. *Id.* at 1198.

73. *See* Edwin V. Woodsome, Jr. & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 89, 108 (2003) (discussing *Unocal*, 110 F. Supp. 2d at 1310).

74. United States v. Krupp (The Krupp Case), *in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1448–49 (1950). *See generally* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 229–49 (1995).

75. United States v. Krauch (The Farben Case), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1132 (1952). The NMT stated:

> Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character.

Id.

76. *See* Ramasastry, *supra* note 69, at 107–08 n.63 (citing the decision in *Wollheim v. I.G. Farben in Liquidation*, Frankfurt District Court, June 10, 1953, court file no. 2/3/040651). Farben and Wollheim eventually settled the claim.

Kinkaseki Mine trial.[77] Pursuant to that trial, a civil action was brought by prisoners of war against the Nippon Mining Company to obtain redress for their forced mine labor, during which the prisoners of war were allegedly given little food or medical care and were allegedly subjected to violence.[78]

Thus, although many of these tribunals did not explicitly set forth a standard for third-party liability, their conviction of those who indirectly perpetuated international crime suggests that purposeful intent was not a prerequisite to finding culpability. In *Zyklon B*,[79] however, a British military court offered more clarity regarding the mens rea standard it applied.[80] The defendants sold poison gas to the Nazi party knowing that it would be used to commit mass murder, but without any specific intent to harm those persons.[81] Nonetheless, the tribunal found the defendants culpable, explicitly holding that knowledge without purposeful intent was sufficient to create culpability in that situation.[82]

The *Einsatzgruppen* tribunal also presents a clear formulation on the mental state required in order to convict a third-party for assisting in the commission of a crime.[83] The NMT suggested that it would not exonerate a Nazi interpreter who turned over lists of Communist party members to his organization, knowing that the people listed would be executed when found.[84] The NMT held that in performing that function, the translator had "served as an accessory to the crime."[85]

More recently, the International Criminal Tribunal for Rwanda ("ICTR") and the International Criminal Tribunal for the Former Yugoslavia ("ICTY") have also recognized criminal liability under the theory

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77. *See* Ramasastry, *supra* note 69, at 113–18 (analyzing contemporaneous newspaper reports of the trial of employees of the Japanese Nippon Mining Company by the British War Crimes Court in Hong Kong in 1947). *See also* Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 71 (2003) (attributing conviction of corporate officers in the *Kinkaseki Mine* trial to language relating to aiding and abetting contained in the Charter of the International Military Tribunal for the Far East art. 5, Apr. 26, 1946, T.I.A.S. No. 1587).

78. For a discussion of this "overlooked" area of civil and criminal culpability for complicity and forced labor, see Ramasastry, *supra* note 69, at 113–17.

79. *In re* Tesch (Zyklon B Case), 13 I.L.R. 250 (Brit. Mil. Ct. 1946).

80. *See* Hoffman & Zaheer, *supra* note 77, at 75 (discussing *Zyklon B*).

81. *See In re* Tesch (Zyklon B Case), 13 I.L.R. 250.

82. *See* Hoffman & Zaheer, *supra* note 77, at 75.

83. United States v. Ohlendorf (The Einsatzgruppen Case), *in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3, 569 (1950).

84. *Id.*

85. *Id.*

of aiding and abetting. These tribunals looked to the NMT to determine the international law standards for aiding and abetting. Incorporating these sources, the tribunal in *Prosecutor v. Furundzija*[86] determined that a defendant's culpability for aiding and abetting turned on whether "the defendant knew that his or her actions would aid the offense,"[87] but did not require that an accomplice share a common purpose with the actual perpetrators of the crime.[88]

While most agree on the standards generally applied by tribunals in Rwanda and the former Yugoslavia, a number of scholars and judges have questioned whether these courts should be relied upon as a meaningful source of international law. In particular, they point out that these tribunals were formed ad hoc to address isolated catastrophes and applied a jurisprudence that had not necessarily been accepted or verified by the international community.[89] These commentators instead look to international treaties, such as the Rome Statute, as a more effective barometer of international norms.[90]

C. Why This is a False Conflict

Judge Katzmann relies on Article 25(3) of the Rome Statute, and correctly notes that it "makes clear that, other than assistance rendered to the commission of a crime by a group of persons acting with a common purpose, a defendant is guilty of aiding and abetting the commission of a crime only if he does so '[f]or the purpose of facilitating the commission of such a crime.'"[91] The Rome Statute established the ICC, a permanent international tribunal formed to punish those who committed serious international crimes.[92] Although the Rome Statute is arguably more ex-

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86. Prosecutor v. Furundzija, Case. No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

87. Hoffman & Zaheer, *supra* note 77, at 74 ("A defendant's culpability for aiding and abetting an international law offense will attach only if the defendant knew that his or her actions would aid the offense. The accomplice does not need to share the mens rea of the principal.").

88. *See* Prosecutor v. Furundzija, Case. No. IT-95-17/1-T, Judgment, ¶¶ 236–48 (Dec. 10, 1998); Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶¶ 180–81 (Jan. 27, 2000).

89. *See, e.g.*, Frank Christian Olah, *MNC Liability for International Human Rights Violations Under the Alien Tort Claims Act*, 25 QUINNIPIAC L. REV. 751, 797 (2007).

90. *But see* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 53 (2002) ("Narrow-minded analyses that only examine the ICC Treaty and ignore the supplemental documents can be greatly misleading and are simply erroneous.").

91. *Khulumani*, 504 F.3d at 275 (quoting article 25(3) of the Rome Statute).

92. Rome Statute of the International Criminal Court art. 25(3), July 17, 1997, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

plicit on aiding and abetting than either the Statute of the ICTY[93] or of the ICTR,[94] the Rome Statute is not a stable foundation for the interpretation of the ATS. Article 25(3) of the statute codifies aiding and abetting, but fails to incorporate any requirements for finding causation:

> In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> . . .
>
> (c) For 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;
>
> (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;[95]

Scholars disagree over the interpretation of "for the purpose of facilitating." Some scholars believe that it imposes an intent requirement, while others believe that it leaves the traditional knowledge requirement intact. Some critics have posited that the statute is also unclear on mens rea,[96] while others accept that article 25(3) requires a purposeful state of mind but also argue that the burden of meeting this threshold is too re-

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93. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7(1), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.").

94. Statute of the International Criminal Tribunal for Rwanda art. 6(1), S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.").

95. Rome Statute, *supra* note 92, art. 25(3)(c)–(d).

96. *See, e.g.*, Marko Milanović, *State Responsibility for Genocide: A Follow-Up*, 18 EUR. J. INT'L L. 669, 671 (2007).

strictive to be effective.[97] It does not matter, however, which position is correct—as Robert Cryer has pointed out, article 25(3) neither reflects nor declares customary international law.[98]

By his own admission, Judge Katzmann in *Khulumani* was trying to determine what definition of aiding and abetting was so "'well-established[] [and] universally recognized' to be considered customary international law for the purposes of the [ATS]."[99] That definition is the one articulated in *Furundzija* and the other cases cited above, not the definition provided by article 25(3). The Rome Statute thus should not have played a role—at least not a determinative one—in Judge Katzmann's analysis.[100] The test international law produces should look a lot like the test produced by domestic tort law.

II. WHY THE CONFLICT MATTERS

A. The Apparent Overinclusiveness of Tort Law in the ATS

The disagreement over the source of aiding and abetting liability for the purpose of ascertaining corporate susceptibility to suit for funding or supplying human rights violators under the ATS may be a false conflict,

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97. *See, e.g.*, Elizabeth T. Reichard, *Catching the Money Train: Using the Alien Tort Claims Act to Hold Private Banks Liable for Human Rights Abuses*, 36 CASE W. RES. J. INT'L L. 255, 271 (2004).

98. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 315–16 (2005). Cryer explains:

> [T]he Article also introduces a purposive, motive requirement that is not required by custom (under which knowledge suffices). The crime is thus not defined in accordance with customary international law, but in practice the addition of the purposive intent will render liability under the Rome Statute more narrowly than in custom . . . .

Id.

99. *Khulumani*, 504 F.3d at 277 (quoting Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995)).

100. Katzmann cited to cases that found aiding and abetting liability under the ATS but relied on sources of law other than the Rome Statute. *Khulumani*, 504 F.3d at 277. These included *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007), *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, 2006 WL 2455752 (N.D. Cal. Aug. 22, 2006), and *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005). *Khulumani*, 504 F.3d at 277. In particular, Katzmann noted that *Presbyterian* had found that "[a]iding and abetting liability is a specifically defined norm of international character that is properly applied as the law of nations for purposes of the [ATS]." *Khulumani*, 504 F.3d at 277 (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006)).

but what if it were not? To put it another way, when would a divergence between international law and domestic law affect the application of the ATS?

The truth is, this question has not been squarely addressed because of a very simple feature of the relationship between international law and domestic tort law: the latter is overinclusive of the former. This relationship between international law and domestic tort law was nicely illustrated in *Sosa*. The plaintiff, Alvarez, sued under the Federal Torts Claim Act and the ATS because he was kidnapped by bounty hunters hired by the U.S. government.[101] The surviving ATS claim was described by Justice Souter as a putative violation of the putative customary international law norm against arbitrary arrest.[102] Therefore, the ATS claim failed to meet the *Sosa* test for a violation of customary international law cognizable under the ATS. The Court found that the prohibition against arbitrary arrest was "a norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 [the ATS] was enacted" [103] because it was "a single illegal detention of less than one day."[104] However, had the Court found that the detention violated customary international law, there would have been no shortage of legal support for the claim that the detention violated domestic tort law. Common law recognizes false imprisonment as a tort that can be claimed by persons who have been detained without privilege for periods of less than twenty-four hours.[105]

In fact, a moment's reflection reveals that virtually every international law violation alleged under the ATS has a counterpart in American tort law. Genocide, torture, and rape are all incidents of battery, assault, intentional infliction of emotional distress, and where death results, wrongful death. Slave labor is a form of false imprisonment, as is excessive detention. Even in the earliest cases in which the Court found international law violations by relying on norms with "definite content and acceptance among civilized nations," these violations could be easily recast as common law torts. The attack upon the French diplomat in the "Marbois incident" was a battery.[106] Piracy was, among other things, trespass

101. *Sosa*, 542 U.S. at 697–98.

102. *Id.* at 736.

103. *Id.* at 732.

104. *Id*. at 738.

105. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 112 (1976); Grant v. Stop-N-Go Market of Texas, Inc., 994 S.W.2d 867 (Tex. App. 1999).

106. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784), *cited in Sosa*, 542 U.S. at 716–17. According to a recent argument by Thomas H. Lee, the historical purpose of the ATS was originally limited to the protection of the international law right of "safe

to chattel.[107] The "plunder" of a British colony in Sierra Leone must have implicated the torts of trespass to land and chattel, if not battery, assault, and false imprisonment.[108]

It is not true as a matter of theory or practice that every violation of international law cognizable under the ATS must be a tort under the common law.[109] According to Judge Katzmann, 28 U.S.C. § 1350 "confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues, (2) for a tort, (3) committed in violation of the law of nations."[110] Logically speaking, an alien could sue for a tort cognizable under the common law that is based on a wrong that is not a wrong in international law. This is arguably what happened in *Adra v. Clift*.[111] There, the tort alleged was the taking of a minor child from the custodial parent and the international law violation alleged was the falsification of a passport.[112] While taking a child from a parent *may* be a

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conduct" for ambassadors. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 860–66 (2006). While I agree with G. Edward White that this is an extremely narrow reading of the original purpose of the statute, for purposes of this Article, I do not need to rely on historical intent. *See* G. Edward White, *A Customary International Law of Torts* 22–26 (U. Virginia Pub. Law & Legal Theory Working Paper Series, Paper No. 34, 2005), *available at* http://law.bepress.com/uvalwps/uva_publiclaw/art34; Scarborough, *supra* note 61, at 467 ("[T]he historical evidence suggests that the ATS was originally enacted as a measure to provide a forum for aggrieved aliens who might face significant discrimination when seeking to enforce state-created rights in state courts.").

107. Bolchos v. Darrel, 3 F. Cas 810 (D.S.C. 1795) (No. 1607), *cited in Sosa,* 542 U.S. at 720; Moxon v. Fanny, 17 F. Cas 942 (D. Pa. 1793) (No. 9895), *cited in Sosa*, 542 U.S. at 720.

108. 1 Op. Att'y Gen. 57 (1795), *cited in Sosa*, 542 U.S. at 720–21 (discussing Attorney William Bradford's views on the availability of civil redress for British victims of a French attack in Sierra Leone in United States federal court).

109. This is a logical claim, and not an empirical claim, although as my discussion of *Adra v. Clift*, *infra*, will show, this is one time when an examination of the exception might help prove the rule. Furthermore, I take my claim here to be nothing more than the converse of the claim that the original purpose of the ATS was to provide a cause of action for wrongs *qua* violations of the law of nations, and not their state common law analogs. *See, e.g.*, William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490–91 (1986); Lee, *supra* note 106, at 888.

110. *Kuhlumani*, 504 F.3d at 267 (quoting Kadic v. Karadic, 70 F.3d 232, 238 (2d Cir. 1995)).

111. Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

112. *Id.* at 864–65. In *Adra*:

> [D]espite the fact that the child Najwa was a Lebanese national, not entitled to be admitted to the United States under an Iraqi passport, defendant concealed Najwa's name and nationality, caused her to be included in defendant's Iraqi

tort—although, as I will argue, this is not obvious—falsifying a passport is not a tort. Rather, it is a violation of the law of nations and a violation of the public laws of the United States.

Adra is doubly interesting because the tort alleged was not one, like battery or trespass to chattels, that could be located easily in the common law of every state. The tort of "the unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody"[113] is not universally recognized by the common law. The court cited to a comment in the *Restatement (Second) of Torts* to establish that there could be a claim for redress by one parent against another for the deprivation of a child's companionship, but the tort alleged was by no means well established or deeply rooted in U.S. common law.[114]

Adra, which was decided in 1961 and is one of the modern pre-*Filártiga* cases, is a literal application of Judge Katzmann's two-pronged jurisdictional test under the ATS.[115] Under this approach, the court first establishes jurisdiction and then identifies a tort that is causally related to the international law violation that created the jurisdiction. However, Judge Katzmann's model, which parallels *Adra*, is not without precedent. Judge Harry Edwards argued explicitly for the adoption of the *Adra* approach in *Tel-Oren v. Libyan Arab Republic*, an important post-*Filártiga* case: "The *Adra* formulation adopts a two-step jurisdictional test, requir-

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> passport, and succeeded in having her admitted to the United States thereby. *These were wrongful acts* not only against the United States, but *against the Lebanese Republic*, *which is entitled to control the issuance of passports to its nationals*.

Id. (citations omitted) (emphasis added).

113. *Id.* at 862.

114. *Id.* (citing WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (2d ed. 1955) and RESTATEMENT OF TORTS § 700 cmt. c (1939)).

115. In a case with very similar facts, an ATS claim was rejected, in part because the court rejected *Adra*'s two-step approach:

> Although Plaintiff characterizes *Adra v. Clift* as finding the mother's alleged abduction of the child to be a violation of a law of nations, the cases's approach to 28 U.S.C. § 1350 was more complex. In *Adra*, the court found jurisdiction using a two-step process. First it identified a municipal tort: "the unlawful taking or withholding of a minor child from the custody of the parent or parents entitled to such custody." Then, the court found the mother's misuse of her passport constituted a violation of the law of nations, emphasizing that use of passports must be taken seriously. The *Adra* court's two-step approach to § 1350 has not been widely adopted.

See Taveras v. Taveras, 397 F. Supp. 2d 908, 916 n.7 (D. Ohio 2005) (citations omitted).

ing what would appear to be a looser allegation of a law of nations offense, coupled with a municipal tort."[116]

This two-step approach, however, is not the same as the two-step approach espoused by *Sosa*.[117] *Sosa* requires first that the court satisfy jurisdiction based on an alleged violation of a treaty or customary international law.[118] If jurisdiction is based on the latter, the court must satisfy itself that "the common law . . . provide[s] a cause of action for the modest number of international law violations thought to carry personal liability at the time . . . ."[119] The Supreme Court did not adopt Judge Edwards' test from *Tel-Oren* and, by extension, it did not adopt the analysis offered by the court in *Adra*. In *Sosa*, the Court identified violations of international law, if any, that provided the grounds for liability under the ATS. That holding does not address the analytically distinct question of whether a claim for redress under the ATS may be based on a wrong that is not also a jurisdiction-granting violation of international law (i.e., a tort grounded purely in common law). Consequently, it remains a logical possibility that the Court's two-step approach in *Sosa* is compatible with the two-step approach in *Adra*. As I will argue in the next section, however, there are good reasons to believe that the ATS should be incompatible with the two-step test in *Adra*.

B. Why the "Tort" in the Alien Tort Statute is Not Municipal Tort Law

The temptation to look to domestic law—or "municipal law" in the parlance of some[120]—is easy to see. As Judge Edwards noted, the alternative view would impose on judges the "awesome duty . . . to derive from an amorphous entity—i.e., the 'law of nations'—the standards of liability applicable in concrete situations."[121] Even for a judge sympathetic to the cause of human rights, such as Judge Edwards, asking federal judges to discern concrete tort actions out of international law puts

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116. Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 787 (D.C. Cir. 1984) (Edwards, J., concurring). A very good analysis of the approach endorsed by Judges Katzmann and Reinhardt can be found in Keitner, *supra* note 61, at 28–30. Keitner labels the municipal law—or "two-step" approach—as the "ancillary question" approach. *Id.* at 29–38.

117. *See* William S. Dodge. *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L L. 87, 97–100 (2004) (on *Sosa*'s "two step" test).

118. Sosa v. Alvarez-Machain, 542 U.S. 692, 698–99 (2004).

119. *Id.* at 694.

120. *See, e.g.*, Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 32 (1985) ("[T]he [ATS] requires a municipal tort cognizable under American law *plus* a violation of the law of nations or a treaty.").

121. *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

the ATS in a precarious position. It makes too obvious what conservative critics of the ATS have been saying—that ATS litigation gives judges unbounded discretion to impose their own values on the disputes before them.[122]

The municipal law theory of the ATS can be seen as a preemptive strike on the argument that since the *Erie* revolution, there has been no federal common law of torts upon which to draw and therefore the ATS refers to an empty set of norms until Congress chooses to fill it with explicit rights of action.[123] This is the thrust of Justice Scalia's disagreement with Justice Souter in *Sosa*. Scalia concedes that at one time, it may have been possible for the ATS to direct the federal courts to a body of tort law from which to read off the causes of action triggered by a violation of international law or a treaty, but that was made impossible by the advent of *Erie v. Tompkins*.[124] *Erie* famously declared that there was no such thing as common law outside of the command of some sovereign, which means, argued Scalia, that absent a command of Congress, there could be no cause of action for a tort in violation of the law of nations.[125]

Scalia's point was about both content and authority. The authority point is simple: "Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it."[126] The content point is less obvious, but it has to do with the fact that the federal courts have made common law absent express delegation in a variety of contexts, ranging from admiralty law to constitutional torts.[127] Scalia argues that these episodes are "exceptions,"[128] a point which, although controversial, is not crucial to my current argument. What is crucial to my argument is that the fields of common-law-making occupied by the federal courts can be said to possess a relatively rich and easily discernible body of substantive rules of liability and remedy. This is certainly true of admiralty law, a body of law that developed through centuries and possesses clear doctrinal rules and principles.

If, like Judge Edwards, one was concerned that the ATS, if it were to survive, had to be tethered to a body of law that offered judges clear

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122. *See* Robert H. Bork, *Judicial Imperialism: There's One Way in Which America is as Bad as Belgium*, WALL ST. J., June 22, 2003, *available at* http://www.opinionjournal.com/extra/?id=110003659.

123. *See* Bradley & Goldsmith, *supra* note 1, at 824, 827.

124. *Sosa*, 542 U.S. at 740 (quoting Erie v. Tompkins, 304 U.S. 64 (1938)).

125. *Id.* at 741.

126. *Id.*

127. *Id.* at 742.

128. *Id.*

rules and principles just like admiralty law, then it is easy to see why one would be tempted by the idea that the torts triggered by international law violations simply be read off the U.S. municipal tort law. Tort law, at least for anyone who does not actually teach it or practice it, might appear to be quite stable and easy to locate. After all, there is the *Restatement (Second) of Torts* and Prosser's *Handbook of the Law of Torts*—how hard could it be to figure out what constitutes a tort in the United States?

I will not respond to Scalia's point about the federal court's lack of authority to make tort law through common law methods of reasoning under the ATS. Many scholars have responded to the Bradley & Goldsmith argument upon which it is based,[129] and there may be no better refutation of the argument than Souter's in *Sosa* itself.[130] In this Part, I argue that those who wish to resist Scalia gain no advantage by adopting the position that the ATS merely requires a federal judge to apply municipal tort law to the case before her. If this is an effort to throw the Scalias of the world a bone, it is a bad idea for two reasons.

First, the defender of the ATS who hopes to hold off a critic like Scalia by explaining that the ATS simply asks federal courts to look to the well defined body of tort law of a domestic jurisdiction sacrifices much of the ATS's importance in a futile quest to buy peace with an implacable critic. As the court noted in *Xuncax v. Gramajo*,[131] even if it were more

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129. *See, e.g.*, Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Ryan Goodman & Derek P. Jinks, Filártiga's *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

130. *Sosa*, 542 U.S. at 729–730. Souter explained:

> *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.

Id. I would note that, despite being one of the authors approvingly cited by Bradley & Goldsmith, I have never maintained that, in American jurisprudence, legal positivism is the same as legal realism, or any theory of law that requires adjudication to be based on an interpretation of a human sovereign. In fact, I have labored in my writings to say exactly the opposite. *See generally* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998).

131. Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

convenient, from a practical point of view, to answer the question of what torts are authorized under the ATS by a violation of international law, the court would convert a claim under the ATS from a claim concerning the violation of human rights into one concerning the violation of local private rights. Judge Woodlock's own words are exactly right:

> This . . . concerns the proper characterization of the *kind* of wrongs meant to be addressed under § 1350: those perpetrated by *hostis humani generis* ("enemies of all humankind") in contravention of *jus cogens* (peremptory norms of international law). In this light, municipal tort law is an inadequate placeholder for such values. . . . Given the seeming inadequacy of municipal law to address, meaningfully, such human rights violations as are at issue here—i.e., torture, summary execution, disappearances—there appears little warrant to look to municipal law exclusively for guidance in redressing these violations.[132]

Judge Woodlock's point is not that only international law can properly name the wrong for which plaintiffs have demanded redress under the ATS. He has no problem with, and in fact applies with gusto, plaintiffs' claims under the Torture Victim Protection Act of 1991 ("TVPA").[133] Conservative critics have never treated the TVPA with the same sort of skepticism that characterizes Scalia's reaction to the ATS in *Sosa* because the TVPA is a clear and unambiguous exercise of Congress's power. But that is not the only virtue of the TVPA; claims under the TVPA have the virtue of moral clarity and candor. As Judge Woodlock pointed out in a footnote, "I question the appropriateness of using a municipal wrongful death statute to address summary executions or 'disappearances.' Similarly, I doubt any municipal law is available to address the crime of genocide adequately."[134] The difference between a claim under the ATS for wrongful death versus genocide is the same as the difference between bringing a claim under the TVPA for battery or assault and torture.

Judge Woodlock's point goes to the very heart of why the ATS exists at all. As he noted, in *Adra* the legal wrong for which the plaintiff sought redress did not align with the "jurisdictional hook"—that is, the wrong in international law that brought the case within the ATS.[135] This alignment

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132. *Id.* at 183.

133. *Id.* at 176–78, *citing* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

134. *Id.* at 183 n.24.

135. *Id.* at 183 ("[A] case like *Adra* begs the question of how closely allied the alleged violations of international and municipal law must be. Could they be wholly unrelated,

problem can be seen in a variety of contexts, although the best analog is a case in which the plaintiff tried to bootstrap its burden to prove breach of duty by alleging that the defendant violated a municipal law that was not designed to protect the interest that was in fact injured.[136] The classic case from first-year torts, *Palsgraf v. Long Island Railroad Co.*, involved a claim by a party who suffered a personal injury (Mrs. Palsgraf) that arose from the breach of a duty by the defendant railroad not to negligently injure the property of a third party (who, incidentally, did not sue the railroad).[137] Tort law offers other examples, such as the limitation that, in order for a plaintiff to benefit from the doctrine of *per se* negligence, the plaintiff must show that "[t]he hazard out of which the accident ensued must have been the particular hazard or class of hazards that the statutory safeguard in the thought and purpose of the Legislature was intended to correct." [138] This problem is also illustrated in Holocaust litigation in which Jewish slave laborers worked to near death in German factories sued corporate defendants for unjust enrichment[139] based on a violation of their interest against racially- or religiously-motivated killing, e.g., genocide, and not a violation of their interest in being paid for their work or in receiving the full value of property that, from the perspective of the law of equity, had been placed in a constructive trust.[140]

Second, it simply is not true that recourse to municipal tort law makes the "awesome duty," as Judge Edwards put it, any easier, or the product more palatable to a skeptic like Scalia.[141]

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different in kind as well as degree?"). In my discussion below, I use the word "align" as a synonym for "ally."

136. *See, e.g.*, Victor v. Hedges, 91 Cal. Rptr. 2d 466 (Cal. Ct. App. 1999) (violation of vehicular statute that prohibited parking on a sidewalk not *per se* negligence where plaintiff was struck by a third party who spun out of control as a result of regular negligence on the roadway).

137. Palsgraf v. Long Island Railroad Co., 162 N.E. 99 (N.Y. 1928). *See also* JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 312–13 (2d ed. 2008). (discussing the "alignment problem" and *Palsgraf*).

138. De Haen v. Rockwood Sprinkler, 179 N.E.2d 764 (N.Y. 1932).

139. *See* Anthony J. Sebok, *A Brief History of Mass Restitution Litigation in the United States*, *in* CALLING POWER TO ACCOUNT 341 (David Dyzenhaus & Mayo Moran eds., 2005).

140. Others have made the same argument, using different terminology. Keitner, for example, labels the approach endorsed by Judges Pregerson, Hall, and Woodlock the "conduct-regulating rules" approach. *See* Keitner, *supra* note 61, at 38–60. She identifies the central virtue of this approach as follows: "[U]nder the ATS, international law provides and defines the right . . . and domestic law provides and defines the remedy." *Id.* at 40.

141. Tel-Oren v. Libyan Arab Rep., 726 F.2d 774, 780 (D.C. Cir. 1984).

Municipal law will not provide federal judges with a body of law authorized with any specificity unless the municipal law is the law of a municipality. While very few interpreters of the ATS have advanced this argument, it seems to be exactly what the Ninth Circuit meant in *Marcos Estate I*.[142] There, the court argued that the adoption of Judge Edwards's position meant that the applicable municipal tort law was the law of the Philippines.[143] This result is precise, but bizarre; under this logic, the substantive tort law in each ATS case would depend on the choice of law analysis of the federal judge.[144] This would turn Judge Friendly's argument defending federal common law on its head. In his famous article, *In Praise of* Erie*—and of the New Federal Common Law*, Friendly argued that the federal common law that remained after *Erie* would be of great value to litigants in federal court because it would be more uniform and far more predictable than the much broader federal common law that existed under *Swift v. Tyson*.[145]

It is unlikely that courts really intend to refer to the municipal law of *a* jurisdiction when they use the expression "municipal law." It is more likely that they intend to refer to federal common law in the spirit of the rule of substantive law that federal courts invoke when they interpret statutory torts created by Congress (such as the federal antitrust laws), [146] implied rights of action (such as rights under federal regulatory power[147] or constitutional torts),[148] or certain areas of law that have been explicitly reserved to the federal courts post-*Erie* (such as admiralty law).[149] But none of this law has a fixed meaning, as anyone who has written or practiced in this area understands. To take but one example, the U.S. Supreme Court did not simply read the law off of an existing municipal code when it considered whether to restrict the tort available to railway workers under the Federal Employer's Liability Act to the "zone of dan-

142. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992).

143. *Id.* at 503.

144. *Xuncax*, 886 F. Supp. at 182 n.22. As Judge Woodlock pointed out, it made little sense to say that the plaintiffs in *Xuncax*—Guatemalens who were tortured, killed, and raped in Guatemala—should be required to frame their claim for redress under the ATS according to the specific statutory and decisional law of Massachusetts' law of intentional torts and survivorship. *Id.* For a sophisticated effort to deal with this problem, see Scarborough, *supra* note 61.

145. Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964).

146. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

147. *See, e.g.*, Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916).

148. *See, e.g.*, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

149. *See, e.g.*, United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

ger rule" or to permit bystander liability for emotional distress.[150] Nor did the Court simply "make it up," as Scalia would characterize the process of post-*Erie* federal-common-law-making. Instead, the Court engaged in a searching review of the practices of the fifty states and the policies that lay behind them, and then made a choice between the two available rules.[151] One might disagree with the choice that was made, but that is not the point. The point is that common-law-making by federal courts is attractive not because of its predictability, but because of the quality of the reasoning that goes into the final result.

So far, nothing I have argued necessarily refutes the argument for using municipal law as the source of law for the "tort" in the "Alien Tort Act"—if municipal law includes "those sources properly used by federal courts to identify the plaintiffs' right to redress." There is an unspoken assumption that those sources are easy to identify—unspoken, I say, because, except for a handful of courts like *Marcos Estate I*, it is assumed that the sources are the same as those used by the federal courts when they interpret the tort law contained in a statute like the Federal Employer's Liability Act.[152]

But this assumption is false. The correct answer to the question, "What sources ought a federal court use to identify the plaintiff's right to redress?" depends on the allegedly violated interest. For example, when the plaintiff seeks redress for a violation of an interest protected by admiralty law, the sources of law are different than those that apply when the plaintiff seeks redress for a violation of an interest protected by federal regulations of the workplace or the U.S. Constitution.[153] In the admiralty case *Reliable Transfer Co.*, the question before the federal courts was whether to keep the archaic American rule of divided damages or to adopt the more modern rule of proportionate liability (or comparative fault).[154] The U.S. Supreme Court looked to a wide range of sources, including but not restricted to U.S. court decisions.[155] It also took note of the practices of

150. *See* Consol. Rail Corp. v. Gottshall, 512 U.S. 532 (1994).

151. *Id.* at 554–57 (choosing the zone of danger rule).

152. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493 (9th Cir. 1992).

153. *See* White, *supra* note 106, at 42–44 (using admiralty law to make the same point).

154. *Reliable Transfer Co.*, 421 U.S. at 404.

155. *Id.* Here I part ways with White, with whom I am in agreement on almost all other points. Citing *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999), he notes that when faced with the problem of adjudicating a tort issue in admiralty law, federal courts apply "general common law tort principles." White, *supra* note 106, at 66. *Wells* involved a defamation suit based on conduct that took place on a ship in international waters. *Wells*, 186 F.3d at 517. The Fifth Circuit correctly refused to apply the law of any American state, and noted: "[I]t appears that there is no well-developed body of general maritime law of

other nations and international compacts to which the United States was not a signatory, as well as theoretical concerns elucidated by scholars concerned with the question of which rule was best, all things considered.[156] This approach is not limited only to admiralty law. Judge Friendly, writing in defense of the "new" federal common law, noted that shortly after *Erie*, the Supreme Court decided that *Clearfield Trust Co. v. United States*, a case that involved an innocent error by a bank that deposited a check issued by the federal government, should be decided by the "federal law merchant."[157]

What are the sources of law appropriate to answer the question: What is the plaintiff's right to redress where there is an alleged violation of an interest not to be subjected to torture, slave labor, genocide, etc.? To quote *Sosa* in another context, it would be "passing strange"[158] if the appropriate sources of law would be exclusively the common law of the fifty states. This is for two reasons, both described in greater detail above. First, there is a lack of alignment between the interests protected by the rights to redress identified in the *Restatement (Second) of Torts*. Second, there is no more reason to restrict interpretation to purely domestic sources of law where the interests protected are grounded in the law of nations than there would be reason to restrict interpretation of admiralty law to purely domestic sources.

CONCLUSION

My argument ends at this point, although it obviously leaves important and urgent business unfinished. If we know that the sources of the law of redress under the ATS are not restricted by municipal or domestic law, how do we identify the proper set of sources? That obviously must be left for another day and another article. If my argument is correct, however, it should put federal courts and litigators on notice that there is no reason to assume that the law of torts in the ATS looks anything like the law of torts in the fifty states, or even in the federal common law of

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defamation. In such a situation, it is clear that the general maritime law may be supplemented by either state law or more general common law principles." *Id.* at 42. My point is that, while there is a structural similarity to the analysis performed by the court in *Wells* and cases involving the ATS, the content or substance of the law that "supplements" the "general transnational" tort law will be different. Whereas the *Wells* court may have been justified in limiting itself to the law of the fifty states, the *Restatement (Second) of Torts*, and scholarship published in the United States, a court adjudicating the ATS would not be justified in staying within domestic boundaries.

156. *Id.* at 404–05.

157. Clearfield Trust Co. v. United States, 318 U.S. 316, 367 (1943).

158. *See Sosa*, 542 U.S. at 719.

statutory torts, implied rights of action, and constitutional torts. Take, for example, how the Supreme Court approached the correct damages rule in admiralty law. It adopted the foreign proportional damages rule over the American rule of divided damages. It is important to recall that the proportionate liability rule was adopted not because it was foreign, i.e., commanded by a sovereign who happened to be foreign, but because the Court felt that it was the best interpretation or expression of the global law of admiralty, taking into account the arguments for and against the rule preferred by American courts as well as foreign courts. The federal courts, by the same token, should be free to adopt "foreign" damages rules in the context of ATS litigation. For example, punitive damages are flatly prohibited in the tort law of all civil law nations and many common law nations.[159] Following the logic of this Article to its conclusion, one might wonder why every court that has adjudicated ATS claims has assumed that punitive damages ought to be available to a plaintiff who successfully pleads and proves a tort in violation of the law of nations under the ATS.[160] One might think, to the contrary, that the burden is on the judge who wishes to import a damages rule that is clearly disfavored among legal systems around the globe into the global law of redress that is authorized by the ATS once jurisdiction is satisfied.

Once one understands that tort law in the ATS is global tort law, not the municipal tort law of the United States, then it becomes clear that judges and scholars have a great deal of work to do. The structure of the law of redress for wrongs—something that all civil and common law legal systems possess—is diverse. The package of principles that has come to characterize the majority approach in the *Restatement (Second) of Torts* is clearly not the only logical or sensible way to organize a tort system. No one system should have a privileged position in the ATS. The principles adopted—whatever they are, and whomever they benefit—should be chosen by federal courts on the basis of how well those principles fit the goals of the ATS, and not on the basis of whether they fit the

159. For a good review of the state of this doctrine globally, see John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2004).

160. If punitive damages were transparently procedural, this question would make little sense. It may be necessary to remind American readers that, although punitive damages are viewed as part of the procedural rules of the forum jurisdiction, they are viewed as a matter of substantive law (and highly controversial substantive law) outside of the common law world. *See* Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 195 (2005) ("Most judgments found to violate German public policy [e.g., punitive damages] are manifestly contrary to German substantive, as opposed to procedural, law.").

goals of the American Law Institute or the judges and legislators of any particular set of states.