

A MODEST PROPOSAL TO AMEND THE ALIEN TORT STATUTE TO
PROVIDE GUIDANCE TO TRANSNATIONAL CORPORATIONS

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I.	INTRODUCTION	120
II.	THE ALIEN TORT STATUTE.....	123
III.	THE U.S. SUPREME COURT’S OPINION IN <i>SOSA V. ALVAREZ- MACHAIN</i>	124
	A. Factual and Legal Background	124
	B. The U.S. Supreme Court Opinion.....	126
IV.	A MODEST PROPOSAL TO AMEND THE ATS.....	132
	A. Identification of Defendants to ATS Actions	132
	B. Identification of Actionable Claims.....	141
	1. International Norms Actionable Pursuant to the ATS	141
	a. Extrajudicial Killing	141
	b. Torture	143
	c. Genocide.....	147
	d. Slavery and Slave Trading.....	152
	2. International Norms Not Actionable Pursuant to the ATS	156
	a. Enforced Disappearance.....	157
	b. Arbitrary Detention	158
	c. Race Discrimination	159
	d. War Crimes and Crimes Against Humanity	162
	e. Forced Labor	163
V.	CONCLUSION	166
	APPENDIX A	168

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*The consequences of leaving [the] door open...were not only to make the task of the lower federal courts immeasurably more difficult, but also to invite the kind of judicial creativity that has caused the disparity of results and differences of opinion that preceded the decision in Sosa.*¹

I. INTRODUCTION

On June 29, 2004, the United States Supreme Court issued its long-awaited decision in *Sosa v. Alvarez Machain*.² The Court's opinion addressed for the first time in substantive detail Section 1350 of Title 28 of the U.S. Code. The so-called "Alien Tort Statute" ("ATS") provides "[t]he 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."³ Largely dormant from the time of its inclusion by the U.S. Congress in the Judiciary Act of 1789, the ATS has proven contentious since its reinvigoration as a tool by which alien plaintiffs sought to hold foreign government officials liable in the United States for human rights violations.⁴ Its more recent utilization against transnational corporations⁵ for complicity in abuses associated with their foreign investment activities has proven equally controversial.⁶

¹ *In re South African Apartheid Litigation*, 346 F. Supp.2d 538, 547 (S.D.N.Y. 2004) (quoting district court judge John E. Sprizzo commenting on Justice David Souter's majority opinion in *Sosa v. Alvarez-Machain*).

² 542 U.S. 692 (2004).

³ 28 U.S.C. § 1350 (2000).

⁴ *See, e.g.*, *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hilao v. Estate of Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litigation)*, 25 F.3d 1467 (9th Cir. 1994); *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

⁵ For purposes of this article, a "transnational corporation" is defined as "an economic entity operating in two or more countries—whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively." Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, ¶ 20, U.N. Sub-Commission on the Promotion and Protection of Human Rights, U.N. ESCOR, 55th Sess., 22d mtg. at 52, U.N. Doc. E/CN.4/Sub.2/2003/L.11, at 52 (Aug. 13, 2003).

⁶ *See, e.g.*, *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005), *aff'g* 305 F. Supp.2d 1285 (S.D. Fla. 2003) (claims of torture, cruel, inhuman and degrading treatment or punishment, arbitrary detention and crimes against humanity arising from abduction of union officials by paramilitaries at a banana plantation operated by Bandegua, a wholly-owned subsidiary of Del Monte, in Morales, Guatemala); *Flores v. S. Peru Copper*

Corp., 343 F.3d 140 (2d Cir. 2003), *aff'g* 253 F. Supp.2d 510 (S.D.N.Y. 2002) (claims of violations of the rights to life, health and sustainable development arising from the operation of a copper mine and refinery by Southern Peru Copper Corporation in Ilo, Peru); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (claim of environmental degradation resulting from operation of oil pipeline in Ecuador); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 101 (2d Cir. 2000) (claims by political activists alleging imprisonment, torture and execution by the Nigerian government at the instigation of Royal Dutch Petroleum Company, Shell Transport and Trading Company and their wholly owned subsidiary Shell Petroleum Development Company of Nigeria); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (claims of environmental degradation and cultural genocide by the leader of the Lambaga Adat Suki Amungme tribe arising from the operation of an open pit copper, gold and silver mine by Freeport-McMoran, Inc. and Freeport-McMoran Copper & Gold, Inc. in the Indonesian province of Irian Jaya); Carmichael v. United Technologies Corp., 835 F.2d 109 (5th Cir. 1988) (claims of arbitrary detention and torture in Saudi Arabia as a result of the plaintiff's inability to pay debts accrued by his employer); Bauman v. DaimlerChrysler, No. C-04-00194, 2005 U.S. Dist. LEXIS 31929 (N.D. Cal. Nov. 22, 2005) (claims alleging corporate complicity in human rights violations directed at labor activists after the assumption of political control by the military in Argentina in 1976); Doe v. Exxon Mobil Corp., 393 F. Supp.2d 20 (D.D.C. 2005) (claims by villagers of extrajudicial killing, torture and crimes against humanity arising from the utilization of the Indonesian military to provide security for ExxonMobil's natural gas facility in Aceh, Indonesia); Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 30, 2005), *modifying* 374 F. Supp.2d 331 (S.D.N.Y. 2005), *modifying* 244 F. Supp.2d 289 (S.D.N.Y. 2003) (claims by current and former non-Muslim residents of southern Sudan alleging that Talisman collaborated with the Sudanese government in committing extrajudicial killings, forcible displacement, war crimes, confiscation and destruction of property, kidnapping and rape stemming from its oil exploration activities); Ibrahim v. Titan Corp., 391 F. Supp.2d 10 (D.D.C. 2005) (claims alleging extrajudicial killing, torture and cruel, inhuman and degrading treatment arising from the detention of Iraqi nationals at the Abu Ghraib prison); Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1134, 1144-54 (C.D. Cal. 2005) (claims alleging extrajudicial killing, torture, crimes against humanity, cruel, inhuman and degrading treatment and war crimes arising from aerial bombing of Santo Domingo, Colombia by Occidental Petroleum's private security contractor); *In re* South African Apartheid Litigation, 346 F. Supp.2d 538 (S.D.N.Y. 2004) (claims alleging corporate complicity in the maintenance of apartheid in South Africa); Bowoto v. ChevronTexaco Corp., 312 F. Supp.2d 1229 (N.D. Cal. 2004) (claims by Nigerian villagers alleging that ChevronTexaco, by and through ChevronTexaco Overseas Petroleum, Inc. and Chevron Nigeria Limited, collaborated with the Nigerian government in the commission of extrajudicial killing, crimes against humanity, torture, cruel, inhuman or degrading treatment and violations of the rights to life, liberty and security during attacks upon villages in the Ogoni region of Nigeria); Sinaltrainal v. Coca-Cola Co., 256 F. Supp.2d 1345 (S.D. Fla. 2003) (claims of war crimes and extrajudicial killing as a result of the murder of a union official by paramilitaries at the Coca-Cola Company bottling facility in Carepa, Colombia); Estate of Rodriquez v. Drummond Co., 256 F. Supp.2d 1250 (N.D. Ala. 2003) (claims of genocide, war crimes, extrajudicial killings and denial of the rights to associate and organize as a result of the murder of union officials by paramilitaries at Drummond Company's coal mine in Colombia); Abdullahi v. Pfizer, Inc., No. 01 Civ. 8118, 2002 U.S. Dist. LEXIS 17436 (S.D.N.Y. Sept. 17, 2002) *vacated*, 77 Fed. Appx. 418 (2d Cir. 2003) *enforced*, 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y. Aug. 9, 2005) (claims alleging injuries suffered by children as a result of negligence in the testing of the antibiotic Trovaflozacin Mesylate (Trovan) in Kano, Nigeria); Sarei v. Rio

In an opinion authored by Justice Souter, the Court unanimously rejected Alvarez-Machain's claim that his arrest and overnight detention by Mexican nationals acting at the request of the U.S. Drug Enforcement Administration was a tort in violation of the law of nations within the purview of the ATS. However, the Court refused to adopt Sosa's contention that the ATS was inoperative without further congressional implementation.⁷ Rather, the Court inferred that Congress intended the ATS provide jurisdiction for "a relatively modest set of actions alleging violations of the law of nations."⁸ Modern federal courts could recognize additional torts based on the law of nations as long as they rested on "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of [these] 18th-century paradigms."⁹ The door to "further independent judicial recognition of actionable international norms" was thus "still ajar subject to vigilant doorkeeping."¹⁰

Although it did not address the issue of the liability of transnational corporations for human rights abuses, the opinion in *Sosa v. Alvarez-Machain* will be crucial to the determination of such liability in pending and future cases.¹¹ *Sosa* unfortunately did not eliminate the uncertainty faced by transnational corporations arising from these cases.

Tinto, 221 F. Supp.2d 1116, 1188-91 (C.D. Cal. 2002) (claims of war crimes, genocide, racial discrimination, violations of the rights to life, health and sustainable development and environmental degradation arising from the operation of a gold and copper mine by Rio Tinto on the island of Bougainville in Papua New Guinea); *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp.2d 1160 (N.D. Cal. 2001) (claims of forced labor, war crimes and crimes against humanity arising from forcible conscription of Chinese and Korean nationals to provide uncompensated labor on behalf of Japanese corporations during World War II); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D. N.J. 1999) (claims of forced labor allegedly perpetrated by Ford's German subsidiary during World War II); *Bigio v. Coca-Cola Co.*, No. 97 Civ. 2858, 1998 U.S. Dist. LEXIS 8295 (S.D.N.Y. June 5, 1998) *rev'd on other grounds*, 239 F.3d 440 (2d Cir. 2000) *dismissed on other grounds*, 2005 U.S. Dist. LEXIS 1587 (S.D.N.Y. Feb. 3, 2005) ((claim that Coca-Cola Company unlawfully occupied a factory located on the plaintiffs' property in Helipolis, Egypt, which was confiscated in 1962 by the government of President Gamal Abdel-Nasser because the plaintiffs were Jewish); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997) (claim of arbitrary detention and extortion in Bolivia as a result of a commercial dispute); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) *modified*, 110 F. Supp.2d 1294 (C.D. Cal. 2000) (claims of forced labor, extrajudicial killings and torture in the construction of a natural gas pipeline in which Unocal Corporation maintained an investment in Myanmar).

⁷ *Sosa*, 542 U.S. at 719.

⁸ *Id.* at 720.

⁹ *Id.* at 725.

¹⁰ *Id.* at 729.

¹¹ It has been noted that "[e]very other [ATS] litigation forever is going to be referring to the analysis in this case." Stacey Harms & Samira Puskar, *The Court Opens the Door to International Human Rights Cases*, MEDILL NEWS SERV. (June 2004) (quoting Paul Hoffman, lead counsel for Alvarez-Machain).

This article proposes an amendment to the ATS focusing on the identification of potential defendants and actionable claims. The article commences with an overview of the ATS and a summary of litigation involving transnational corporations prior to the Supreme Court's opinion in *Sosa*. The article then reviews the holding in *Sosa* and subsequent ATS litigation involving transnational corporations. The article then sets forth specific proposals designed to address uncertainties relating to the ATS in its present form. The article concludes that only through congressional intervention will the lingering uncertainty surrounding the application of the ATS to transnational corporations be resolved in a timely and cost-conscious manner.

II. THE ALIEN TORT STATUTE

Although a comprehensive history of the ATS is beyond the scope of this article, a brief review of its historical background is necessary to place the Supreme Court's opinion in *Sosa* and the amendment proposed herein in proper perspective. Judicial interpretation of the ATS has been complicated by the complete absence of legislative history. The ATS is not mentioned in the debates surrounding the adoption of the first Judiciary Act,¹² and there is no evidence of what its drafters intended by its inclusion.¹³ This lack of formal legislative history served as a significant source of frustration for courts called upon to interpret its provisions in a contemporary context.¹⁴ As a result, the oft-quoted characterization of the ATS as "a kind of legal Lohengrin" which, despite its ancient standing, "no one seems to know whence it came" remained relevant to modern courts.¹⁵

¹² See Annals of Cong. 782-833 (J. Gales ed. 1789).

¹³ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring) (wherein Judge Bork noted "[t]he debates over the Judiciary Act in the House—the Senate debates were not recorded—nowhere mention the provision, not even, so far as we are aware, indirectly").

¹⁴ See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 n.10 (2d Cir. 2000) (noting "[t]he original purpose of the [ATS] remains the subject of some controversy . . . [as] [t]he Act has no formal legislative history" and the intent of the drafters was "a matter forever hidden from our view by the scarcity of relevant evidence"); *Trajanov v. Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) (noting "[t]he debates that led to the Act's passage contain no reference to the [ATS], and there is no direct evidence of what the First Congress intended to accomplish"); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp.2d 289, 304 (S.D.N.Y. 2003) (noting "[d]espite the fact that the [ATS] has existed for over two hundred years, little is known of the framers' intentions in adopting it—the legislative history of the Judiciary Act does not refer to Section 1350").

¹⁵ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). According to German legend, Lohengrin appears from nowhere to rescue a maiden and, upon inquiry into his origins, just as mysteriously vanishes. See ROBERT JAFFRAY, *THE TWO KNIGHTS OF THE SWAN: LOHENGRIN AND HELYAS* 11 (1910).

Equally missing as a source of modern interpretation was an established body of judicial precedent. The ATS was an infrequent subject of judicial opinions prior to the 1980s. The first recorded judicial reference occurred in 1795 when a federal court in South Carolina concluded the ATS granted jurisdiction with respect to a dispute concerning title to slaves seized on a captured enemy vessel.¹⁶ Subsequent reference did not occur until 1908 when the U.S. Supreme Court suggested in passing that the ATS may be applicable to a claim that a U.S. officer illegally seized alien property in a foreign state.¹⁷ Later judicial references came in 1961¹⁸ and in 1975.¹⁹ In addition to these judicial opinions, the ATS has been the subject of two opinions of the U.S. Attorney General dating from 1795 and 1907 respectively.²⁰ However, other sources of interpretation were absent prior to the watershed opinions of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Peña-Irala*²¹ and *Kadic v. Karadzic*.²²

III. THE U.S. SUPREME COURT'S OPINION IN *SOSA V. ALVAREZ-MACHAIN*

A. *Factual and Legal Background*

A brief description of the factual and legal background to *Sosa v. Alvarez Machain* is warranted in order to place the opinion in context.²³ The

¹⁶ *Bolchos v. Darrel*, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607).

¹⁷ *O'Reilly de Camara v. Brooke*, 209 U.S. 45, 51 (1908).

¹⁸ *Adra v. Clift*, 195 F. Supp. 857, 863-64 (D. Md. 1961) (concluding that the wrongful withholding of child custody in a dispute between two aliens was an actionable tort and the misuse of a passport to gain entry into the United States was a violation of international law).

¹⁹ *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194 (9th Cir. 1975) (noting that injuries resulting from the evacuation of children from South Vietnam by the U.S. Immigration and Naturalization Service could be addressed using the ATS).

²⁰ See 26 Op. Att'y Gen. 250, 253 (1907) (wherein the attorney general concluded the ATS "provides a forum and a right of action" to Mexican nationals injured as a result of the diversion of the Rio Grande by a U.S. irrigation company if such act was deemed to be a tort in violation of the law of nations). See also 1 Op. Att'y Gen. 57, 59 (1795) (wherein the attorney general concluded the ATS provided a remedy for aliens injured as a result of the participation of U.S. citizens in the plundering of British property off the coast of Sierra Leone by French naval forces in violation of principles of neutrality).

²¹ 630 F.2d 876 (2d Cir. 1980) (holding torture perpetrated by a Paraguayan police official upon a private citizen of Paraguay violated the law of nations and was actionable by the victim's survivors pursuant to the ATS).

²² 70 F.3d 232 (2d Cir. 1995) (holding genocide, war crimes, torture and extrajudicial killing perpetrated by a private individual against other private individuals violate the law of nations, are actionable pursuant to the ATS and do not present nonjusticiable issues).

²³ The following statement of facts is derived from the opinion of Circuit Judge M. Margaret McKeown of the U.S. Court of Appeals for the Ninth Circuit in *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003).

plaintiff Humberto Alvarez-Machain (“Alvarez”) was a citizen of Mexico. Alvarez was indicted by a federal grand jury in Los Angeles, California in 1990 for alleged complicity in the kidnapping, torture and murder of U.S. Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar and his Mexican pilot Alfredo Zavala-Avelar in Guadalajara, Mexico in February 1985.²⁴ The U.S. District Court for the Central District of California issued a warrant for Alvarez’s arrest after his indictment.

Although the United States negotiated with Mexican officials to obtain custody of Alvarez, no formal request for extradition was made. Rather, DEA officials approved a plan to use Mexican nationals not affiliated with the governments of the United States or Mexico to arrest Alvarez and bring him to the United States for trial. Hector Berellez, the DEA agent in charge of the Camarena murder investigation, retained Antonio Garate-Bustamante (Garate), a Mexican citizen and DEA operative, to contact Mexican nationals willing to participate in the arrest. Through operatives, Garate retained Jose Francisco Sosa, a former Mexican police officer, to participate in Alvarez’s arrest.²⁵ This operation occurred on April 2, 1990, when Sosa and others abducted Alvarez from his office in Guadalajara, held him overnight in a motel and subsequently transported him to El Paso, Texas where he was arrested by U.S. federal agents. Alvarez was arraigned and transported to Los Angeles, California for trial. A subsequent attempt to dismiss the indictment proved unsuccessful.²⁶

Alvarez was tried for Camarena’s kidnapping, torture and murder in 1992. After the presentation of the government’s case, the district court judge granted Alvarez’s motion for judgment of acquittal on the ground of insufficient evidence to support a guilty verdict. The district court specifically concluded the government’s case was based on “suspicion and... hunches but... no proof,” and the theory of the prosecution’s case was “whole cloth, the wildest speculation.”²⁷ As a result, Alvarez was repatriated to Mexico.

In 1993, Alvarez initiated a civil action in the United States District Court for the Central District of California alleging numerous constitutional and tort claims arising from his abduction, detention and trial.²⁸ Sosa,

²⁴ Alvarez was charged with committing and conspiracy to commit violent acts in furtherance of racketeering activity (18 U.S.C. §§ 371, 1959 (2000)); kidnapping and conspiracy to kidnap a federal agent (18 U.S.C. § 1201(a)(5)); and felony murder of a federal agent (18 U.S.C. §§ 1111(a), 1114).

²⁵ Sosa was allegedly promised a recommendation for employment with the Mexican Attorney-General’s office if the arrest operation was successful. *Alvarez-Machain*, 331 F.3d at 609.

²⁶ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²⁷ *Alvarez-Machain v. United States*, 331 F.3d 604, 610 (9th Cir. 2003).

²⁸ Alvarez’s complaint alleged claims sounding in: (1) kidnapping; (2) torture; (3) cruel,

Garate, five unnamed Mexican nationals, the United States and four DEA agents were listed as defendants.²⁹ After resolving numerous procedural issues,³⁰ the district court granted Alvarez's motion for summary judgment with respect to his claim of kidnapping as "'specific, universal and obligatory' norms of international law prohibit state-sponsored transborder abductions" and are "sufficiently established and articulated to support a cause of action under the [ATS]."³¹ The court also accepted Alvarez's claim that the defendants' conduct constituted prolonged arbitrary detention due to the absence of lawful authority for the arrest from Mexican authorities which continued until such time as Alvarez entered U.S. custody.³² The district court entered judgment against Sosa in the amount of \$25,000 for his participation in these actions.³³ However, the court was not sympathetic to Alvarez's claims of cruel, inhuman and degrading treatment and concluded there was no "universal consensus regarding the content of [this] tort at the time of the events in this case."³⁴ The U.S. Court of Appeals for the Ninth Circuit affirmed Sosa's liability on appeal.³⁵

B. The U.S. Supreme Court Opinion

The U.S. Supreme Court granted certiorari on December 1, 2003 to

inhuman and degrading treatment or punishment; (4) arbitrary detention; (5) assault and battery; (6) false imprisonment; (7) intentional infliction of emotional distress; (8) false arrest; (9) negligent employment; (10) negligent infliction of emotional distress; and (11) violations of the Fourth, Fifth and Eighth Amendments to the U.S. Constitution. *Alvarez-Machain*, 331 F.3d at 610 n.1.

²⁹ *Id.* at 610.

³⁰ The district court substituted the United States for the DEA agents, except Sosa and Garate, on all non-constitutional claims. *Id.* The United States was substituted for Garate by later stipulation of the parties. *Id.* Sosa's interlocutory appeal of the district court's substitution order was subsequently dismissed by the U.S. Court of Appeals for the Ninth Circuit for lack of appellate jurisdiction. *Alvarez-Machain v. United States*, 107 F.3d 696, 700 n.2 (9th Cir. 1997). The Ninth Circuit Court of Appeals also affirmed the district court's dismissal of the constitutional claims arising from Alvarez's kidnapping and detention in Mexico and its denial of the defenses based on qualified immunity and the statute of limitations with respect to claims asserted pursuant to the Federal Tort Claims Act. *Id.* at 703-04. However, the Ninth Circuit reversed the district court's dismissal of Alvarez's claim asserted pursuant to the Torture Victim Protection Act. *Id.* at 704.

³¹ *Alvarez-Machain v. United States*, 1999 U.S. Dist. LEXIS 23304, at *64-65 (C.D. Cal. Mar. 18, 1999).

³² *Id.* at *69-70, *71 ns.36-37 (citing *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987)).

³³ *Id.* at *78.

³⁴ *Id.* at *68. The court specifically noted that the U.S. Senate did not ratify the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment until October 1990. *Id.* at *68 n.34.

³⁵ *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003).

determine the issue of whether Alvarez was entitled to remedy pursuant to the ATS.³⁶ In an opinion authored by Justice Souter, the Court unanimously agreed that Alvarez could not pursue an ATS remedy. However, Justice Souter refused to interpret the ATS in such a manner as to deny relief to all victims of human rights abuses.

The Court initially addressed Alvarez's contention that the ATS was not merely a jurisdictional statute but rather acted as authority for the creation of a new cause of action for torts in violation of international law. The Court dismissed this interpretation as "implausible" given the placement of the ATS in the Judiciary Act, "a statute otherwise exclusively concerned with federal-court jurisdiction."³⁷ This placement led to the conclusion the ATS was a jurisdictional statute intended to address the power of federal courts to "entertain cases concerned with a certain topic."³⁸

However, this interpretation did not lead to the conclusion that the ATS was inoperative until such time as Congress created a list of actionable torts. Instead, the Court endorsed the conclusion that federal courts were entitled to entertain claims for torts in violation of the law of nations as recognized by common law existing at the time of the adoption of the ATS.³⁹ The Court particularly noted that the United States received the law of nations as it existed upon its independence.⁴⁰ This law of nations consisted of "general norms governing the behavior of national states with each other" and "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."⁴¹ These bodies of law overlapped where violations of the law of nations gave rise to a judicial remedy as well as threatened serious consequences for the United States in the conduct of international affairs.⁴² This overlap was limited to violation of safe conduct, infringement of the rights of ambassadors and piracy.⁴³ The Court concluded that "this narrow set of violations... was probably on the minds of the men who drafted the [ATS] with its reference to tort."⁴⁴

Justice Souter readily conceded there was no legislative record that expressly supported this conclusion.⁴⁵ Nevertheless, he concluded the ATS

³⁶ See *Sosa v. Alvarez-Machain*, 540 U.S. 1045 (2003) (order granting petition for certiorari).

³⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

³⁸ *Id.* at 714.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 715.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Justice Souter admitted that "despite considerable scholarly attention, it is fair to say

was intended to have practical effect upon its adoption rather than await future implementing legislation.⁴⁶ The Court specifically noted the principal draftsman of the ATS, Oliver Ellsworth of Connecticut, served in the Continental Congress that, in 1781, adopted a resolution calling upon state legislatures to “provide expeditious, exemplary and adequate punishment” for “the violation of safe conducts or passports... of hostility against such as are in amity... with the United States... infractions of the immunities of ambassadors and other public ministers... [and] infractions of treaties and conventions to which the United States are a party.”⁴⁷ Furthermore, the First Congress recognized the importance of the law of nations in legislation to punish certain offenses in violation thereof as criminal offenses.⁴⁸ Based upon this background, the Court concluded “[i]t would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action.”⁴⁹ The historical record existing immediately after the adoption of the ATS also supported this conclusion.⁵⁰ As a result, the Court held “[t]here is too much in the historical record to believe that Congress would have enacted the [ATS] only to leave it lying fallow indefinitely.”⁵¹

that a consensus understanding of what Congress intended has proven elusive.” *Id.* at 718-19.

⁴⁶ In reaching this conclusion, Justice Souter specifically noted:

[T]here is every reason to suppose that the First Congress did not pass the [ATS] as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.

Id. at 719.

⁴⁷ *Id.* at 716 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (G. Hunt, ed. 1912)).

⁴⁸ See An Act for the Punishment of Certain Crimes Against the United States §§ 8, 28, 1 Stat. 113-14, 118 (1790) (recognizing as criminal offenses murder, robbery or other capital crimes committed on the high seas, violations of safe conduct and assaults against ambassadors).

⁴⁹ *Sosa*, 542 U.S. at 719.

⁵⁰ Early federal cases and opinions addressing the ATS gave no intimation that further implementing legislation was necessary. See, e.g., *Bolchos v. Darrel*, 3 F. Cas. 810 (C.C.D.S.C. 1795) (No. 1607) (holding the ATS served as the basis for the exercise of admiralty jurisdiction over a claim brought by a French privateer against the mortgagee of a British slave trading vessel); 1 Op. Att’y Gen, *supra* note 26, at 59 (wherein the attorney general concluded the ATS provided a remedy for aliens injured as a result of the participation of U.S. citizens in the plundering of British property off the coast of Sierra Leone by French naval forces in violation of principles of neutrality).

⁵¹ *Sosa*, 542 U.S. at 719.

This history also led the Court to conclude the ATS conferred jurisdiction upon federal courts for “a relatively modest set of actions alleging violations of the law of nations.”⁵² This “modest set of actions” included torts corresponding to the three previously-listed offenses. The Court found no basis to suspect Congress intended to include other offenses within the ATS. However, the Court also found no congressional developments in the intervening 191 years from the adoption of the ATS to its modern expression in *Filartiga v. Peña-Irala* to preclude courts from recognizing a claim under the law of nations.⁵³

Nevertheless, this did not lead Justice Souter to adopt an unrestrained view of the causes of action over which courts could exercise jurisdiction. Rather, claims based upon the present-day law of nations were required to “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court has] recognized.”⁵⁴ Justice Souter concluded “judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”⁵⁵ The legitimacy of limited recognition of international norms by federal courts had been assumed since the U.S. Court of Appeals for the Second Circuit’s decision in *Filartiga*. The Court noted this legitimacy had not been contravened by the U.S. Congress, which instead supplemented judicial determinations in this field through the adoption of the Torture Victim Protection Act (“TVPA”).⁵⁶ Absent further congressional guidance, there was no evidence Congress had “shut the door to [consideration of] the law of nations entirely” in federal courts.⁵⁷

The Court determined the decision to create private rights of action was best left to the legislative branch in the absence of an express provision

⁵² *Id.* at 720.

⁵³ *Id.* at 724-25. In his concurring opinion, Justice Scalia objected to the perceived expansion of federal jurisdiction to include violations of customary international law beyond those within the contemplation of the First Congress. According to Justice Scalia, the Framers would be “quite terrified” by the expansion of federal jurisdiction beyond piracy, violations of safe conduct, interference with ambassadors and foreign sovereign immunity. *Id.* at 749. Rather, Justice Scalia concluded:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.

Id. at 749-50 (Scalia, J. concurring) (emphasis in original).

⁵⁴ *Id.* at 725.

⁵⁵ *Id.* at 729.

⁵⁶ *Id.* at 731.

⁵⁷ *Id.*

within existing statutes.⁵⁸ This deference to the U.S. Congress was prudent due to the “possible collateral consequences of making international rules privately actionable.”⁵⁹ These consequences included potential implications for U.S. foreign relations, which served to make courts particularly wary of impingement upon the discretion of the executive and legislative branches to manage foreign affairs.⁶⁰ Judicial recognition of causes of action and the fashioning of remedies to address violations should proceed, if at all, with “great caution.”⁶¹ Finally, there was no congressional mandate to U.S. courts to define new violations of international law actionable pursuant to the ATS. Although the TVPA provided such a mandate through the establishment of “an unambiguous and modern basis for federal claims of torture and extrajudicial killing,”⁶² the mandate was limited to this narrow range of claims. More common was the expression by Congress of its intent to limit judicial interpretation of human rights norms through declarations that ratified instruments were not self-executing.⁶³

As a result, Justice Souter placed limitations on claims recognizable pursuant to the ATS. The Court concluded international law norms were not recognizable if they had “less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”⁶⁴ The Court cited piracy and torture as two of “a handful of heinous actions” consisting of definite conduct and having acceptance among civilized nations and thus actionable pursuant to the ATS.⁶⁵ Claims

⁵⁸ *Id.* at 727 (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001); *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 728. In his concurring opinion, Justice Scalia acknowledged the potential adverse consequences arising from the exercise of federal jurisdiction over claims arising under customary norms of international law. In Justice Scalia’s view, such consequences were not reasons for courts to exercise “great caution” in adjudicating such claims. Rather, such consequences were reasons why courts were not granted nor could be thought to possess federal common-law-making powers with respect to the recognition of private causes of action arising from the violation of customary international law. *Id.* at 747. In so doing, Justice Scalia accused the majority of “countenance[ing] judicial occupation of a domain that belongs to the people’s representatives.” *Id.* This endorsement would lead to further confrontations with the political branches, which began with the opinions in *Filartiga v. Peña-Irala* and *Kadic v. Karadzic*.

⁶² H.R. Rep. No. 102-367, at 3 (1991).

⁶³ *See, e.g.*, Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1092 (2000) (providing U.S. ratification of the Convention on the Prevention and Punishment of the Crime of Genocide does not create a substantive or procedural right of private enforcement); 138 CONG. REC. 8071 (1992) (declaring the substantive provisions of the International Covenant on Civil and Political Rights are not self-executing).

⁶⁴ *Sosa*, 542 U.S. at 732.

⁶⁵ *Id.* (citing *United States v. Smith*, 5 Wheat. 153, 163-80 (1820) (piracy); *Filartiga v.*

of violation of such norms were to be gauged against the current state of international law utilizing sources recognized by the Court dating back to the decision in *Paquete Habana*.⁶⁶

The Court then examined two human rights instruments by which Alvarez claimed the existence of an international norm prohibiting arbitrary arrest. The Court dismissed the first of these instruments, the Universal Declaration of Human Rights, on the basis that it was a statement of aspirations only and did not impose binding obligations upon national governments by its own force and effect.⁶⁷ More importantly, the Court rejected the creation of such a norm on the basis of a prohibition contained within the International Covenant on Civil and Political Rights. Although binding as a matter of international law, the Covenant was ratified in the United States on the express understanding that it was not self-executing.⁶⁸ Alvarez thus could not claim that arbitrary detention rose to the level of a binding norm of international law on the basis of these instruments.

The Court thus concluded there was no obligatory international norm sanctioning arbitrary detention occurring entirely within the borders of one state. The Court described the implications of Alvarez's claim as "breathtaking" in that it would "support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment."⁶⁹ Such a result

Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (torture)).

⁶⁶ 175 U.S. 677, 700 (1900) (providing "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators ... for trustworthy evidence of what the law really is"). In his concurring opinion, Justice Scalia expressed doubt that federal courts would limit themselves in such a manner as suggested in the majority opinion. Justice Scalia noted "[f]or over two decades now, unelected federal judges have been usurping [Congress and the Executive's] lawmaking power by converting what they regard as norms of international law into American law." *Sosa*, 542 U.S. at 750 (Scalia, J., concurring). The majority's failure to condemn this trend was evidence that the Court was "incapable of admitting that some matters - any matters - are none of its business." *Id.* (emphasis in original). According to Justice Scalia, the majority's opinion was an example of "Never Say Never Jurisprudence" in which the Court "ignores its own conclusion that the [ATS] provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again." *Id.* (emphasis in original).

⁶⁷ *Sosa*, 542 U.S. at 734-35. The Court specifically noted Eleanor Roosevelt, one of the primary forces behind the adoption of the Universal Declaration, characterized it as "a statement of principles . . . setting up a common standard of achievement for all peoples and all nations . . . [and] not a treaty or international agreement . . . impos[ing] legal obligations." EVAN LUARD, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 39, 50 (1967).

⁶⁸ *Sosa*, 542 U.S. at 735.

⁶⁹ *Id.* at 736.

was inconsistent with applicable statutory and case law.⁷⁰ The inability to demonstrate Sosa was acting on behalf of the U.S. government at the time of Alvarez's detention required a further broadening of these principles to include conduct by private parties.⁷¹

In addition, Alvarez's claim lacked the necessary "state policy" and "prolonged" nature to qualify as an enforceable norm.⁷² Although the exact meaning of these terms remained an open question, the Court held that they clearly required "a factual basis beyond relatively brief detention in excess of positive authority."⁷³ Even assuming Alvarez's detention was "prolonged" and the result of "state policy," it remained impossible to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of the offenses of piracy, interference with ambassadors and violation of safe conduct.⁷⁴ As such, the Court concluded the principle advanced by Alvarez in his claim remained, "in the present, imperfect world... an aspiration that exceeds any binding customary rule having the specificity [the Court] requires."⁷⁵

IV. A MODEST PROPOSAL TO AMEND THE ATS

A. Identification of Defendants to ATS Actions

Any clarification of the ATS for the benefit of transnational corporations must start with identification of those entities that may properly be designated as a defendant. The applicability of the ATS to transnational corporations was not addressed in *Sosa*. In any event, subsequent opinions of lower federal courts have accepted such applicability without serious question.⁷⁶ Assuming such applicability is established law, it is hardly radical to accept the notion that an entity directly participating in egregious human rights violations may be properly designated as a defendant in resulting ATS litigation. However, this circumstance does not represent the reality of modern foreign investment practices. Rather, transnational corporations operate through a web of subsidiaries over which they exercise

⁷⁰ *Id.* at 736-37 (citing 42 U.S.C. § 1983 (2000); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (creating damages remedies in federal courts for activities of law enforcement personnel in violation of the Fourth Amendment)).

⁷¹ *Id.* at 737.

⁷² *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 738.

⁷⁶ *See, e.g.,* *Bano v. Union Carbide Corp.*, 361 F.3d 696, 717 (2d Cir. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp.2d 331, 335 (S.D.N.Y. 2005).

widely varying degrees of control. Responsible for daily on-the-ground operations of the foreign investment, these subsidiaries may commit human rights violations without the prior knowledge of those transnational corporations ultimately sought to be held accountable in subsequently filed ATS litigation. It is thus imperative to clarify those circumstances under which the actions of such subsidiaries may be attributed to their transnational parents for purposes of the ATS.

It is first necessary, however, to clarify those circumstances where direct liability may be imposed upon transnational corporations. As an initial starting point, it cannot seriously be disputed that transnational corporations should be held accountable for human rights violations they actually commit. This would include the commission of abuses by employees with the specific knowledge of their transnational employer.⁷⁷ Specific intent by the transnational corporation to commit violations should accompany such acts.⁷⁸ Liability under such circumstances is justified given the reprehensible nature of such actions should they be proven and the consequent rare circumstances in which such behavior would occur.

Closely related to actual commission of abuses is the instance where the transnational corporation is a joint actor with a foreign sovereign in the commission of human rights abuses. Liability in this circumstance flows from the transnational corporation's participation with a foreign sovereign or its agents in the commission of the abuses.⁷⁹ However, liability may not be imposed on the basis that the transnational corporation and the foreign sovereign were joint participants in a common enterprise in which human rights abuses happened to occur.⁸⁰ Joint action also does not exist as a result of shared goals of successful completion and profitable operation of a foreign investment project in which human rights violations occurred.⁸¹

Rather, plaintiffs must establish three separate elements in order to successfully utilize this theory. First, plaintiffs must demonstrate the existence of an agreement or understanding with the foreign sovereign to deprive plaintiffs of their human rights.⁸² Second, plaintiffs must establish that employees of the transnational corporation directly participated in the

⁷⁷ See S. 1874, § 2, 109th Cong. (2005) (imposing ATS liability upon those transnational corporations who are direct participants in human rights violations). See also *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp.2d 1229, 1240 (N.D. Cal. 2004).

⁷⁸ See S. 1874, § 2(a), (c) (imposing direct liability only under those circumstances where the defendant acted with "specific intent" to commit human rights violations).

⁷⁹ *In re South African Apartheid Litigation*, 346 F. Supp.2d 538, 548 (S.D.N.Y. 2004).

⁸⁰ *Doe v. Exxon Mobil Corp.*, 393 F. Supp.2d 20, 27 (D.D.C. 2005).

⁸¹ *Id.* See also *In re South African Apartheid Litigation*, 346 F. Supp.2d at 548 (concluding that "indirect economic benefit from unlawful state action is not sufficient").

⁸² *Doe*, 393 F. Supp.2d at 26. See also *Parker v. Grand Hyatt Hotel*, 124 F. Supp.2d 79, 88 (D.D.C. 2000).

human rights abuses.⁸³ Such participation is not limited to actual participation in abuses, but also includes joint planning, providing support and facilitating activities constituting violations.⁸⁴ Finally, plaintiffs must demonstrate that the transnational corporation undertook its actions knowingly and with the specific intent to violate a plaintiff's human rights.⁸⁵ Knowledge and intent are crucial to the imposition of liability on the basis of joint action as a foreign sovereign may commit abuses in furtherance of a common enterprise with a transnational corporation without its knowledge or consent. Additionally, a transnational corporation may be unaware that its actions or those of its sovereign host are violating the human rights of others. Similar to actual commission of abuses, liability for under such circumstances is justified given the reprehensible nature of intentional participation in an agreement to violate human rights and the rare circumstances in which such behavior would occur.

Given these three requirements, ATS liability must be rejected in those circumstances where the violation occurs entirely as a result of acts of a foreign state.⁸⁶ Liability under such circumstances is beyond the expectations of any transnational corporation seeking foreign investment opportunities. Such liability also greatly increases the risk associated with foreign investment activities by creating the potential for a wide variety of claims. This increase in risk, in turn, could serve to significantly curtail future foreign investments as well as commercial activity. The imposition of liability for abuses committed exclusively by foreign states also fails to recognize national sovereignty and the state's ultimate responsibility for actions occurring within its borders. Instead, transnational corporations would be required to exercise control over such sovereigns or otherwise suffer the consequences. The imposition of liability upon a private party for abuses committed exclusively by a foreign sovereign entirely beyond its control lacks even the slightest degree of fairness.

The imposition of liability in this circumstance would designate transnational corporations as the guarantors of the human rights credentials of their sovereign hosts. Judicial caution in interpreting the ATS mandated by *Sosa* would be replaced by a doctrine imposing strict liability in the absence of intent, knowledge or action on the part of the transnational corporation. Additionally, such corporations would be accountable regardless of whether the abuses committed by the foreign state were

⁸³ *Doe*, 393 F. Supp.2d at 27.

⁸⁴ *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399, at *18 (S.D.N.Y. Aug. 30, 2005).

⁸⁵ *Id.*

⁸⁶ *See* S. 1874, 109th Cong., § 2(a) (2005) (depriving federal courts of jurisdiction "if a foreign state is responsible for committing the tort in question within its sovereign territory").

foreseeable. The imposition of liability in such circumstances would drive a battering ram through Justice Souter's vigilantly guarded door.

This does not excuse transnational corporations from conducting due diligence prior to undertaking foreign investment. Corporations failing to undertake adequate inquiry prior to engaging in such investment activities may be in breach of their duties of profit maximization and protection of their shareholders' investments. Accountability to shareholders in such circumstances may occur through resolutions, derivative suits and litigation in the host state. Corporations may also suffer in the court of public opinion through damage to business reputation, adverse publicity and consumer backlash. The rejection of liability in the absence of conduct by the transnational corporation merely deprives plaintiffs of a single remedy pursuant to the ATS.

A different set of issues arises from efforts to hold transnational corporations indirectly liable for human rights violations committed by their subsidiaries. Discussion of these issues must occur against a legal backdrop discouraging the imposition of liability upon parent corporations for the actions of their subsidiaries.⁸⁷ On its face, there is nothing objectionable about a corporate structure that seeks to isolate liability of related entities.⁸⁸ "Mere ownership" by one corporation of another is insufficient in and of itself to impose liability.⁸⁹ Furthermore, parent corporations are free to supervise the acts of their subsidiaries, monitor their performance, receive reports, oversee financial management and create policies and procedures applicable to such entities without risk of indirect liability.⁹⁰ Parent corporations and their subsidiaries also may share directors and officers without creating liability for one another through attribution of individual actions taken on behalf of one entity to the other.⁹¹

Rather, indirect liability will only be imposed upon a parent corporation for the actions of its subsidiary in "unusual circumstances" such as are necessary to prevent injustice to an innocent third party.⁹² The party seeking to ignore the separateness of the entities bears the burden of demonstrating

⁸⁷ U.S. v. Bestfoods, 524 U.S. 51, 68 (2003) (holding that "[i]t is a general principle of corporate law deeply ingrained in our legal system that a corporation is not liable for the acts of its subsidiaries").

⁸⁸ Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993). See also Bowoto v. Chevron Texaco Corp., 312 F. Supp.2d 1229, 1234 (N.D. Cal. 2004).

⁸⁹ Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (3d Cir. 2001).

⁹⁰ Bestfoods, 524 U.S. at 69. See also Bowoto, 312 F. Supp.2d at 1235.

⁹¹ Bestfoods, 524 U.S. at 69. See also Pearson, 247 F.3d at 483; Bowoto, 312 F. Supp.2d at 1235.

⁹² Bestfoods, 524 U.S. at 68. See also Fidelity & Deposit Co. of Maryland v. Usaform Hail Pool, Inc., 523 F.2d 744, 758 (5th Cir. 1975); Bowoto, 312 F. Supp.2d at 1234-35.

good cause for such disregard.⁹³ The presumptions militating against such disregard should be particularly emphasized in ATS litigation given Justice Souter's "vigilant doorkeeping" instruction and corollary admonition against creative interpretations of the ATS.⁹⁴ The issue is under what narrow circumstances the separateness of parent corporations and their subsidiaries may be disregarded for purposes of imposing liability pursuant to the ATS.

Indirect liability may be imposed in the rare circumstance where the subsidiary is the alter ego of the parent corporation. The courts that have addressed indirect liability pursuant to the ATS using alter ego theory have utilized a two-part test. Initially, the plaintiff must establish a "unity of interest and ownership that the separate personalities [of the two entities] no longer exist."⁹⁵ This "unity of interest" may include lack of attention to corporate formalities, commingling of assets, intertwining of operations and other evidence that the two corporations functioned as a single entity.⁹⁶ The second part of this test requires the plaintiff to demonstrate that the failure to disregard the separate identities of the parent and subsidiary would result in fraud or injustice.⁹⁷ The mere inability to recover damages is not sufficient to justify disregard the corporate form of two otherwise separate entities.⁹⁸

This test provides a sufficiently stringent standard governing the determination of whether a subsidiary is the alter ego of its parent for purposes of the ATS. The imposition of liability in such circumstances is necessary in order to punish defendants that truly disregard corporate separateness. Failure to impose liability unjustly rewards defendants for engaging in behavior bordering on the fraudulent. Conversely, this standard is sufficiently stringent as to defeat the vast majority of efforts to impose liability on the basis of alter ego.

Any amendment to the ATS must reject other theories of indirect liability. One such theory is "single enterprise liability." Addressed in one ATS opinion to date, single or integrated enterprise liability is adapted from the employment law concept of single employer liability.⁹⁹ This theory focuses on economic realities rather than corporate formalities and adherence to stringent legal standards in determining whether related

⁹³ Mobil Oil Co. v. Linear Films, Inc., 718 F. Supp. 260, 273 (D. Del. 1989).

⁹⁴ Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

⁹⁵ Bauman v. DaimlerChrysler, No. C-04-00194, 2005 U.S. Dist. LEXIS 31929, at *33 (N.D. Cal. Nov. 22, 2005). See also *Bowoto*, 312 F. Supp.2d at 1246.

⁹⁶ *Bowoto*, 312 F. Supp.2d at 1237.

⁹⁷ *Bauman*, 2005 U.S. Dist. LEXIS, at *33. See also *Bowoto*, 312 F. Supp.2d at 1246.

⁹⁸ *Bowoto*, 312 F. Supp.2d at 1247. Conversely, the court noted that fraud perpetrated during the incorporation process may be sufficient to support disregard for the separate identity of a parent and its subsidiary. *Id.*

⁹⁹ *Id.* at 1235-38.

employers are liable for one another's actions.¹⁰⁰ The policy determination in cases applying this theory is "the fairness of imposing liability for labor infractions where two nominally independent entities do not act under an arm's length relationship."¹⁰¹

Utilization of this theory has been limited to disputes arising under a wide variety of federal labor and employment statutes.¹⁰² The *Bowoto* court was unable to locate a single opinion applying this theory in a context similar to that of the ATS.¹⁰³ Rather, the district court referred to a previous judicial characterization of the theory as "a sort of labor-specific veil-piercing test."¹⁰⁴ Furthermore, the focus of this "veil-piercing test" on economic realities made it a less stringent standard than traditional veil-piercing jurisprudence focusing on compliance with delineated legal standards.¹⁰⁵ This lack of rigor may be appropriate for utilization in enforcing labor and employment statutes given their significant remedial purposes but has no place in the interpretation of a jurisdictional statute such as the ATS.¹⁰⁶ The *Bowoto* court's refusal to apply single enterprise theory to ATS claims was correct, and any amendment to the ATS must prevent any future attempts to resurrect this theory outside of the labor law context for which it was expressly created.

Although any ATS amendment should adopt the *Bowoto* court's rejection of single enterprise liability in the context of the ATS, it must reject the court's imposition of indirect liability on the basis of aiding or abetting human rights violations. Aiding and abetting liability is far broader than direct liability imposed on a transnational corporation for commission of human rights violations independently or in conjunction with a foreign sovereign. Rather, aiding and abetting confers authority upon a subsidiary and imposes consequent liability on a parent corporation through "precedent authorization or a subsequent ratification."¹⁰⁷ The court defined ratification as the "knowing acceptance after the fact by the principal of an agent's actions."¹⁰⁸ Applying this theory to ChevronTexaco's operations in Nigeria

¹⁰⁰ *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 484, 486 (3d Cir. 2001). *See also Bowoto*, 312 F. Supp.2d at 1237.

¹⁰¹ *Pearson*, 247 F.3d at 486 (quoting *Murray v. Miner*, 74 F.3d 402, 403 (2d Cir. 1996)).

¹⁰² *Id.* (noting that the single or integrated enterprise theory of liability had been used in cases arising pursuant to the Labor Management Relations Act, Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Worker Adjustment and Retraining Notification Act and the Family and Medical Leave Act).

¹⁰³ *Bowoto*, 312 F. Supp.2d at 1237.

¹⁰⁴ *Id.* at 1238 (quoting *Pearson*, 247 F.3d at 485).

¹⁰⁵ *Id.* at 1237 (quoting *Pearson*, 247 F.3d at 486).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1247 (quoting *Rakestraw v. Rodrigues*, 500 P.2d 1401, 1404 (Cal. 1977)).

¹⁰⁸ *Id.*

through its wholly owned subsidiary ChevronTexaco Overseas Petroleum, Inc. and its subsidiary Chevron Nigeria Limited, the district court held that the parent corporations ratified the human rights abuses of their subsidiary by “dissembling” and making “contradictory statements” about the complicity of Chevron Nigeria Limited in the human rights abuses, “covering up” such misdeeds for the parent corporations’ benefit, and failing to disavow Chevron Nigeria’s actions.¹⁰⁹ From these acts and omissions, the court concluded that there was sufficient evidence from which a reasonable jury could infer ratification of Chevron Nigeria’s participation in human rights violations.¹¹⁰

Imposition of indirect liability on the basis of aiding and abetting is not proper in the context of the ATS and must be disregarded in any subsequent amendment. Despite *Bowoto’s* holding, aiding and abetting human rights violations is not universally accepted as a legal obligation by the international community.¹¹¹ As noted by the district court in *In re South African Apartheid Litigation*, the international sources for aiding and abetting liability do not establish “a clearly defined norm for [ATS] purposes.”¹¹² The international criminal tribunals dating back to Nuremberg and including those created for the former Yugoslavia and Rwanda are not binding sources of international law and, in any event, concern criminal matters rather than civil liability imposed pursuant to a domestic statute.¹¹³ Application of the Apartheid Convention suffers from the same focus on criminal law. Its application is further complicated by the absence of ratification by several important international powers, including Canada, France, Germany, Japan, the United Kingdom and the United States.¹¹⁴ The absence of ratification by these “major world powers” defeats any attempt to

¹⁰⁹ *Id.* at 1247-48 (citing *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1388 (9th Cir. 1987) and *Shultz Steel Co. v. Rowan-Wilson, Inc.*, 231 Cal. Rptr. 715, 717 (Cal. Ct. App. 1986)). The behavior deemed by the court to constitute ratification was conflicting statements made by the parent corporations to the media regarding Chevron Nigeria’s ownership of the helicopters and boats used to transport Nigerian military personnel to the site of the attacks upon civilians. *Id.* at 1248.

¹¹⁰ *Id.* at 1248.

¹¹¹ *In re South African Apartheid Litigation*, 346 F. Supp.2d 538, 549-50 (S.D.N.Y. 2004).

¹¹² *Id.* at 550 (citing International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

¹¹³ *Id.*

¹¹⁴ *Id.*

characterize the Convention's prohibitions as a source of binding international law.¹¹⁵

The district court also correctly noted that civil liability for aiding and abetting is dubious pursuant to applicable U.S. law. Most important in this regard is the opinion in *Central Bank of Denver v. First Interstate Bank of Denver* wherein the Supreme Court concluded that civil liability for aiding and abetting was "at best uncertain" and thus should not be added to a statute in the absence of explicit provision by Congress.¹¹⁶ Applying this admonition, the district court abstained from writing such liability into the ATS.¹¹⁷ The court's refusal to append indirect liability on the basis of aiding and abetting to the ATS is consistent with Justice Souter's instruction of "vigilant doorkeeping" and should be rejected as an alternative ground for imposing liability in any amendment.¹¹⁸

A far more difficult issue is posed by the application of principles of agency law. Unlike liability for aiding and abetting in the civil context, agency theory between related corporate entities has long been accepted.¹¹⁹ In the ATS context, agency theory has been examined in detail on only one occasion. In *Bowoto*, the district court addressed the issue of whether ChevronTexaco and ChevronTexaco Overseas Petroleum, Inc. could be deemed indirectly liable for Chevron Nigeria Limited's alleged participation in human rights abuses using agency theory. The court set forth a four-part test to determine when liability may be imposed upon a parent corporation for the actions of its subsidiary using agency theory. First, there must be a manifestation by the principal that the agent act on his behalf.¹²⁰ The second and third factors are that the agent must accept the undertaking but that there must be an agreement that the principal is in control.¹²¹ The fourth factor is the injury that the subsidiary allegedly inflicted must be within the

¹¹⁵ *Id.*

¹¹⁶ 511 U.S. 164, 181-82, 189-90 (1994).

¹¹⁷ *In re South African Apartheid Litigation*, 346 F. Supp.2d at 550. The court specifically deferred to Congress with respect to "innovative interpretations" of the ATS. *Id.*

¹¹⁸ *Id.* (noting that including liability for aiding and abetting within the ATS in the absence of a congressional mandate "in an area that is so ripe for non-meritorious and blunderbuss suits would be an abdication of this Court's duty to engage in 'vigilant doorkeeping'"). *Accord* Doe v. Exxon Mobil Corp., 393 F. Supp.2d 20, 24 (D.D.C. 2005).

¹¹⁹ *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 14M (1994) (providing, in part, that "a corporation may become an agent of an individual or of another corporation, as it does when it makes a contract on the other's account. Thus a subsidiary may become an agent for the corporation which controls it, or the corporation may become the agent of the subsidiary").

¹²⁰ *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp.2d 1229, 1239 (N.D. Cal. 2004) (citing *Rubin Bros. Footwear, Inc. v. Chem. Bank*, 119 B.R. 416, 422 (S.D.N.Y. 1990)).

¹²¹ *Id.* The court specifically noted that the absence of control of the undertaking by the principal is fatal to any claim of agency. *Id.* (citing *Morgan Guar. Trust Co. v. Republic of Palau*, 657 F. Supp. 1475, 1481 n.2 (S.D.N.Y. 1987)).

scope of the subsidiary's authority as agent.¹²²

Applying these factors, the court concluded that an agency relationship existed between the three companies. First, the court examined the volume of communications between all parties before, during, and after the incidents at issue. Second, the court considered the degree of monitoring of the subsidiary's daily activities by the parent corporations.¹²³ Third, the court attached limited significance to shared management between the entities.¹²⁴ Finally, the court examined the importance of the subsidiary's operations to the parent corporations, including its contribution to the parents' profitability and the effect of unrest in Nigeria on such profitability. After examining these factors, the court concluded an agreement was established on the basis of the high volume of communications, the daily monitoring of Chevron Nigeria's activities, the "revolving door" of managers and directors between the entities, and the importance of Nigerian oil production as a percentage of the parent corporations' overall revenues.¹²⁵ When combined with the coordination of security issues by the parent corporations on behalf of Chevron Nigeria, the court held a reasonable jury could conclude an agency relationship existed. Therefore, Chevron Nigeria's actions were within the scope of such an agreement.¹²⁶

Prudent amendment to the ATS will exclude indirect liability of a parent corporation for actions of its subsidiary on the basis of agency theory. The absence of widespread adoption of the four factor test set forth in *Bowoto* should cause Congress to hesitate in adding such a theory to the ATS. The four factor test is also ungainly and very complicated to apply. Additionally, as demonstrated in *Bowoto*, application of the agency test will require significant inquiry into the relationship between the parent and subsidiary as well as the relationship between both entities and their sovereign host. This inquiry will intrude upon communications, policy setting, shared management and finances to determine the importance of the subsidiary to the parent corporation's profitability. *Bowoto* provides no guidance in assessing these factors other than to label shared management as least important. This list is not comprehensive, and it is possible that other courts faced with different circumstances would expand the number of inquiries beyond those surveyed in *Bowoto*. The complications associated with application of the agency theory and the detailed inquiry required to properly apply such theory are in direct conflict with the purpose of any

¹²² *Id.* In this regard, the court held that the agency relationship "must be relevant to the plaintiff's claim of wrongdoing." *Id.* at 1240.

¹²³ *Id.* at 1243-44.

¹²⁴ *Id.* at 1244.

¹²⁵ *Id.* at 1246.

¹²⁶ *Id.*

ATS amendment. The purpose of any amendment should be to provide discernible standards for transnational corporations.

Rejection of agency theory may be criticized on the basis that it allows parent corporations to escape liability for actions undertaken by their subsidiaries despite, perhaps, complete control of the subsidiaries' operations. However, exclusion of this theory from any ATS amendment does not excuse parents and subsidiaries from all liability. As previously discussed, transnational corporations would remain liable for those human rights abuses they actually commit. Even if the parent corporation may escape liability, the subsidiary that committed the violations would remain liable. Furthermore, parent corporations and their subsidiaries may be liable if they were joint actors in the commission of human rights violations with their sovereign hosts. Finally, courts may impose liability on both parties by applying the alter ego theory. Rather than excuse transnational corporations from liability for human rights violations, the proposed amendment clarifies those circumstances where liability may be imposed, it eliminates exotic, complicated, or unsupported theories, and it punishes flagrant corporate transgressors.

B. Identification of Actionable Claims

1. International Norms Actionable Pursuant to the ATS

The heart of any clarification of the ATS for the benefit of transnational corporations lies with the identification of actionable human rights violations. Of the eighteen separate human rights violations analyzed in opinions issued before and after *Sosa*, only five should be deemed actionable in any amendment of the ATS. Two of these violations, extrajudicial killing and torture, are already recognized as actionable by federal statute. The other three violations, specifically genocide, slavery, and slave trading, may not serve as the basis for ATS litigation at the present time based upon federal statutes or the application of Justice Souter's opinion in *Sosa*. The ATS must be amended to accommodate these claims.

a. Extrajudicial Killing

The prohibition upon extrajudicial killing is well-established in human rights law.¹²⁷ However, the international instruments upon which this

¹²⁷ See American Convention on Human Rights, art. 4(1), July 18, 1978, OAS Treaty Series No. 36, at 1, OAS Off. Rec. OEA/Ser4v/II 23; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) art. 3(1)(a), Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6(1), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (Dec. 16,

prohibition is based suffer from deficiencies that prevent their direct implementation through the ATS. The prohibition upon arbitrary deprivation of life contained in Article 6(1) of the International Civil and Political Rights Covenant lacks the requisite degree of specificity, and the United States designated the treaty as non-self-executing at the time of its ratification in 1992.¹²⁸ A similar prohibition in Article 4 of the American Convention suffers the same lack of specificity and, furthermore, is not universal or obligatory.¹²⁹ Despite its universal acceptance and specific definition of extrajudicial killing, there is no indication that the United States intended Geneva Convention IV to be self-executing at the time of its ratification.¹³⁰ The Principles on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Execution suffer from a lack of definition of proscribed conduct and obligatory nature given their status as a resolution of the U.N. Economic and Social Council.

However, unlike many other human rights suffering these same deficiencies, the prohibition upon extrajudicial killing has been identified as part of the customary international law of human rights. Section 702 of the *Restatement of Foreign Relations* provides, in part, that a state violates international law if, “as a matter of state policy, it practices, encourages or condones... the murder... of individuals.”¹³¹ State-sponsored murder of individuals is prohibited to the extent it occurs “other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances.”¹³²

More importantly, extrajudicial killings are actionable pursuant to U.S. law. The TVPA imposes civil liability on a person who “under actual or

1966); Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. Res. 65, arts. 1-13, U.N. ESCOR Supp. No. 1, at 52, U.N. Doc. E/1989/89 (1989).

¹²⁸ U.S. Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01, art. III(1) (daily ed. Apr. 2, 1992).

¹²⁹ The American Convention on Human Rights is not universal to the extent that it has only been ratified by twenty-five of the thirty-four states in the Inter-American human rights system and has not been ratified by Canada or the United States. See ORGANIZATION OF AMERICAN STATES, STATUS OF RATIFICATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS 1-2 (2005).

¹³⁰ See, e.g., RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72 §§ 111(a-c), 703 cmt. c (providing an international agreement is non-self-executing “if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or if implementing legislation is constitutionally required” and that affected individuals do not have direct remedies against human rights violators except where expressly provided by international agreement).

¹³¹ *Id.* § 702(c).

¹³² *Id.* § 702 cmt. f.

apparent authority, or color of law, of any foreign nation subjects an individual to extrajudicial killing.”¹³³ This statute empowers U.S. courts to adjudicate such claims by U.S. citizens and aliens.¹³⁴ Extrajudicial killing is defined as “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹³⁵ Although the definitions of “regularly constituted court” and “indispensable judicial guarantees” may be subject to interpretation, the definition of “extrajudicial killing” in the TVPA is identical to the internationally-accepted definition.¹³⁶ The recognition of a federal cause of action for extrajudicial killing gives this human rights violation an obligatory nature absent from other human rights protections. The prohibition upon extrajudicial killings is specific, universal, and obligatory, and it should remain actionable in any amendment to the ATS.

b. Torture

The prohibition against torture is also well-established in human rights law.¹³⁷ However, in a manner similar to extrajudicial killing, the

¹³³ 28 U.S.C. § 1350 (2000).

¹³⁴ H.R. Rep. No. 102-367, at 3 (1991) (noting that the Torture Victim Protection Act has created “an unambiguous and modern basis for federal claims of . . . extrajudicial killing”).

¹³⁵ 28 U.S.C. § 1350.

¹³⁶ See, e.g., Geneva Convention IV, *supra* note 127, art. 3(1)(d) (defining extrajudicial killing as “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized people”); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702 cmt. f.

¹³⁷ See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, art. 4(d), 33 I.L.M. 1534; Inter-American Convention to Prevent and Punish Torture, Feb. 28, 1987, art. 6, O.A.S.T.S.; Protocol Additional to the Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, art. 4(2)(a)(e), 1125 U.N.T.S. 609; American Convention on Human Rights, *supra* note 127, art. 5(2); Geneva Convention IV, *supra* note 127, art. 3(1)(a); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, art. 3(h), U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (Dec. 20, 1993); Declaration on the Protection of All Persons from Enforced Disappearances, G.A. Res. 47/133, art. 1(2), U.N. GAOR, 47th Sess., Supp. No. 49, at 207, U.N. Doc. A/47/49 (Dec. 18, 1992); United Nations Convention on the Rights of the Child, G.A. Res. 44/25, art. 37(a), U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/25 (Nov. 20, 1989); Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, arts. 2-4, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/1034 (Dec. 9, 1975); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, G.A. Res. 3318, arts. 4-5, U.N. GAOR, 29th Sess., Supp. No. 31, at 146, U.N. Doc. A/9631 (Dec. 14, 1974); International Covenant on Civil and Political Rights, *supra* note 127, art. 7; Universal Declaration of Human Rights, G.A.

international instruments upon which this prohibition is based suffer from deficiencies that prevent their direct implementation through the ATS. These deficiencies include a lack of universal acceptance, specificity, and obligatory or self-executing nature.¹³⁸

The most widely recognized human rights convention relating to torture is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. The Convention sets forth a detailed definition of torture similar to that contained in the U.N. Torture Declaration.¹³⁹ States are required to undertake “effective legislative, administrative, judicial or other measures to

Res. 217A, at 71, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹³⁸ See Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *supra* note 137 (lack of specificity and universal acceptance and absence of U.S. ratification); Inter-American Convention to Prevent and Punish Torture, *supra* note 137 (lack of universal acceptance and absence of U.S. ratification); Geneva Convention Protocol II, *supra* note 137 (lack of specificity and absence of U.S. ratification); American Convention on Human Rights, *supra* note 127 (lack of specificity and universal acceptance and absence of U.S. ratification); Geneva Convention IV, *supra* note 127 (lack of specificity and non-self-executing); Declaration on the Elimination of Violence Against Women, *supra* note 137 (lack of specificity and obligatory nature); Declaration on the Protection of All Persons from Enforced Disappearances, *supra* note 137 (lack of specificity and obligatory nature); United Nations Convention on the Rights of the Child, *supra* note 137 (lack of specificity and absence of U.S. ratification); Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 137 (lack of obligatory nature); Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *supra* note 137 (lack of specificity and obligatory nature); International Covenant on Civil and Political Rights, *supra* note 127 (lack of specificity and non-self-executing); Universal Declaration of Human Rights, *supra* note 137 (lack of specificity and obligatory nature).

¹³⁹ Torture is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, art. 1, 108 Stat. 463, 23 I.L.M. 1027; Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 137, art. 1(1) (The Torture Declaration defines torture as the infliction of severe physical or mental pain or suffering intentionally inflicted by or at the instigation of a public official for purposes of obtaining information, confession to a crime or as a form of punishment or intimidation.)

prevent acts of torture in any territory under [their] jurisdiction.”¹⁴⁰ Each state is to ensure torture is an offense punishable pursuant to its criminal laws.¹⁴¹ National laws must further provide for civil redress for torture victims, including “an enforceable right to fair and adequate compensation” and “means for as full rehabilitation as possible.”¹⁴² No exceptions to these prohibitions are permitted.¹⁴³

It may be concluded from this language that the Torture Convention is specific, universal, and obligatory. However, the Convention is rendered nonobligatory as a result of its ratification by the United States. Although the U.S. ratification was effective in October 1994, Congress declared the substantive provisions of the Convention as non-self-executing.¹⁴⁴ As such, the Torture Convention on its face is not actionable pursuant to the ATS.

However, in a manner similar to extrajudicial killing, the prohibition upon torture has been identified as part of the customary international law of human rights pursuant to Section 702 of the *Restatement of Foreign Relations*.¹⁴⁵ Torture as a norm of customary international law as defined by the *Restatement* is identical to the U.N. General Assembly’s Torture Declaration.¹⁴⁶ More importantly, torture is actionable pursuant to U.S. law. The TVPA imposes civil liability on a person who subjects an individual to torture.¹⁴⁷ Torture is defined as the intentional infliction of severe pain or suffering, whether physical or mental, against a person in the offender’s custody or physical control for the purpose of obtaining information or a confession from the victim or a third person; inflicting punishment for an act committed or allegedly committed by the victim or third person; or intimidating or coercing the victim or a third person or for any discriminatory reason not otherwise provided.¹⁴⁸ “Mental pain or suffering” is defined in the TVPA as prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain

¹⁴⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 139, art. 2(1).

¹⁴¹ *Id.* art. 4(1).

¹⁴² *Id.* art. 14(1).

¹⁴³ *Id.* art. 2(3) (prohibiting exceptions for war or the threat thereof, political instability or other public emergency).

¹⁴⁴ U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01, art. III(1) (daily ed. Oct. 27, 1990).

¹⁴⁵ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702(d) (providing “[a] state violates international law if, as a matter of state policy, it practices, encourages or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment”).

¹⁴⁶ *Id.* § 702 cmt. g.

¹⁴⁷ 28 U.S.C. § 1350 (2000).

¹⁴⁸ *Id.*

or suffering, the administration or application or threatened administration or application of mind-altering substances or other procedures calculated to profoundly disrupt the senses or personality, or threats of imminent death or similar threats directed at a third person.¹⁴⁹ Although the meaning of some terms within the TVPA, such as “severe” and “prolonged” pain and suffering, are subject to reasonable disagreement, the definition of “torture” in the TVPA is identical to the definition contained within the U.S. reservations, declarations, and understandings with respect to the Torture Convention.¹⁵⁰ The recognition of a federal cause of action for torture gives this human rights violation an obligatory nature absent from other protections. The right to be free from torture is specific, universal, and obligatory and should remain actionable in any amendment to the ATS.¹⁵¹

¹⁴⁹ *Id.*

¹⁵⁰ The U.S. Reservations, Declarations and Understandings with respect to the Torture Convention define “torture” as an act:

specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

U.S. Reservations, Declarations and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 144, art. II(1)(a). This definition is qualified by the requirement that the acts be directed against persons in the offender’s custody or physical control. *Id.* art. II(1)(b).

¹⁵¹ In its statement of Reservations, Declarations and Understandings with respect to the Torture Convention, the United States noted cruel, inhuman or degrading treatment or punishment as utilized in the Convention means such punishment as is prohibited by the Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. *Id.* art. I(1). As a result, although offending conduct is subject to reasonable disagreement, its meaning is nevertheless ascertainable from judicial opinions defining cruel, unusual, and inhumane treatment pursuant to the U.S. Constitution. Given the equivalence between these definitions, it is tempting to conclude instances of cruel, inhuman or degrading treatment or punishment are actionable pursuant to Title 42 of the U.S. Code, which provides for civil liability for every person who, under color of law, deprives any U.S. citizen or other person within the jurisdiction of any rights, privileges or immunities secured by the Constitution. 42 U.S.C. § 1983 (2000). However, plaintiffs are limited by Title 42 to U.S. citizens or other persons within the jurisdiction of the United States. Aliens outside the reach of U.S. courts are excluded from this group of potential plaintiffs. This lack of an express statutory basis for claims available to all persons differentiates cruel, inhuman or degrading treatment or punishment from torture.

c. Genocide

Two human rights instruments prohibit genocide. Article 6 of the elements of crimes as established by the International Criminal Court (“ICC”) defines genocide as consisting of killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, imposing measures to prevent births and forcibly transferring children.¹⁵² These acts must be perpetrated against a member of a particular national, ethnic, racial or religious group with the intent to “destroy, in whole or in part” a particular group.¹⁵³ Furthermore, these acts must occur in the context of “a manifest pattern of similar conduct directed against that group or that could itself effect such destruction.”¹⁵⁴

Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide, whether occurring in time of peace or war, is a crime under international law.¹⁵⁵ Conduct associated with genocide is also punishable as a crime, including conspiracy or direct and public incitement to commit genocide and attempts to commit or complicity in committing genocide.¹⁵⁶ The Convention requires the perpetrator to engage in killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction of a particular group of people, measures designed to prevent births, and the forcible transfer of children directed at “a national, ethnical, racial or religious group” committed with the “intent to destroy, in whole or in part” the particular group.¹⁵⁷ Persons committing such acts are subject to punishment regardless of their status as “constitutionally responsible rulers, public officials or private individuals.”¹⁵⁸ States are required to adopt necessary legislation to implement the Convention with specific emphasis upon providing “effective penalties” for persons found guilty of genocide or genocide-related conduct.¹⁵⁹ A domestic or international tribunal may assess these penalties.¹⁶⁰ In addition, genocide is part of the customary international law of human rights.¹⁶¹ These obligatory norms are called *jus*

¹⁵² International Criminal Court, Elements of Crimes, art. 6(a-e), U.N. Doc. PCNICC/2000/1/Add.2 (2000).

¹⁵³ *Id.* art. 6(a)(-24), 6(b)(2-4), 6(c)(2-3, 5), 6(d)(2-3, 5), 6(e)(2-3, 7).

¹⁵⁴ *Id.*

¹⁵⁵ Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Jan. 12, 1951, 102 Stat. 3045, 78 U.N.T.S. 277.

¹⁵⁶ *Id.* art. 3(a-e).

¹⁵⁷ *Id.* art. 2.

¹⁵⁸ *Id.* art. 4.

¹⁵⁹ *Id.* art. 5.

¹⁶⁰ *Id.* art. 6.

¹⁶¹ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702(a) (providing state

cogens.¹⁶²

However, unlike extrajudicial killing and torture, there is no recognized private cause of action for genocide under U.S. law. Furthermore, the documents establishing the ICC and the Genocide Convention standing alone are insufficient to develop a cause of action for genocide under the ATS. With respect to the ICC, the universal and obligatory nature of its founding documents is questionable. At the time of publication of this Article, the Rome Statute, the instrument establishing the ICC, had been ratified by only 104 states, which is approximately one half of the international community.¹⁶³ Even assuming the Rome Statute and ICC have been universally recognized, the Rome Statute is not obligatory on the United States due to the absence of ratification.¹⁶⁴

Unlike the Rome Statute, the Genocide Convention is universal given its ratification or accession by 140 states at the time of the preparation of this article, including the United States, which ratified it in November 1988.¹⁶⁵ However, the express language of the Genocide Convention only requires states to adopt legislation defining genocide and genocide-related acts and procedures by which perpetrators may be charged, tried, and punished. The Genocide Convention does not require states to provide for civil liability.¹⁶⁶ The definitions of genocide contained in the Convention have their origin in criminal law. This includes the terms “conspiracy,” “incitement,” “attempt”

violates international law if, “as a matter of state policy, it practices, encourages or condones genocide”).

¹⁶² *Id.* cmt. n. See CLAIRE DE THAN, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 9 (2003) (noting *jus cogens* or compelling law are principles deemed binding on states regardless of their consent and which they are not permitted to ignore). See Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 8 I.L.M. 679 (defining *jus cogens* as norm “accepted and recognized by the international community of states as a whole. . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”). Norms identified as *jus cogens* enjoy “a higher rank in the international hierarchy” than treaties or customary rules. See Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Decision on Former Yugoslavia Trial Chamber, (Dec. 10, 1998).

¹⁶³ UNITED NATIONS, RATIFICATION OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1 (2004). The Rome Statute of the International Criminal Court was adopted on July 17, 1998 by the U.N. Diplomatic Conference on the Establishment of an International Criminal Court. *Id.* at 1; see also World Signatures and Ratifications, available at <http://www.iccnw.org/?mod=romesignatures> (last visited March 25, 2007).

¹⁶⁴ *Id.* at 6. The United States signed the Rome Statute on December 31, 2000 but has not ratified its obligations or acceded to its terms.

¹⁶⁵ See INT’L COMM. OF THE RED CROSS, Convention on the Prevention and Punishment of the Crime of Genocide 1, 5 (2004). <http://www.icrc.org/ihl.nsf> (last visited Mar. 25, 2007).

¹⁶⁶ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 155, art. 5.

and “complicity.”¹⁶⁷ Other phraseology of the Convention is criminal in its intent, with utilization of such terms as “charges” and procedures for assessing and punishing persons adjudicated “guilty” of genocide.¹⁶⁸

The United States recognized this distinction in its legislation implementing the Genocide Convention. The Genocide Convention Implementation Act (“Implementation Act”) is part of Title 18, relating to federal criminal offenses.¹⁶⁹ The legislation describes genocide, attempts to commit genocide, and direct and public incitement to commit genocide as “basic offenses.”¹⁷⁰ These basic offenses are subject to criminal punishment, including imprisonment and fines.¹⁷¹ Jurisdiction of U.S.

¹⁶⁷ *Id.* art. 3(a-e).

¹⁶⁸ *Id.* arts. 5, 6.

¹⁶⁹ 18 U.S.C. §§ 1091-1093 (2000).

¹⁷⁰ Genocide and attempt to commit genocide are defined as:

Whoever, whether in time of peace or in time of war . . . with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent births within the group;
- (6) transfers by force children of the group to another group;

or attempts to do so, shall be punished.

Id. § 1091(a)(1-6).

The term “national group” is defined as “a set of individuals whose identity as such is distinctive in terms of nationality or national origins.” *Id.* § 1093(5). “Ethnic groups” are defined as “a set of individuals whose identity as such is distinctive in terms of common cultural traditions or heritage.” *Id.* § 1093(2). “Racial groups” and “religious groups” are similarly defined to include sets of individuals distinctive in terms of “physical characteristics or biological descent” in the case of race and “common religious creed, beliefs, doctrines, practices or rituals” in the case of religion. *Id.* § 1093(6), (7). “Substantial part” is defined as “a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part.” *Id.* § 1093(8). Incitement is defined as “urg[ing] another to engage imminently in conduct in circumstances under which there is a substantial likelihood of imminently causing such conduct.” *Id.* § 1093(3).

¹⁷¹ Punishment for an act of genocide involving the killing of members of a group is death or imprisonment for life and a fine of not more than \$1 million or both. *Id.* § 1091(b)(1). All

courts is limited to “offenses” committed within the United States or in instances when the “alleged offender” is a U.S. national.¹⁷² Most importantly, the Implementation Act’s provisions are not to “be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.”¹⁷³ This language implies that the scope of the Implementation Act is limited to the Genocide Convention’s express requirements of the criminalization of genocide and genocide-related conduct and its effective prosecution and punishment.

Genocide is an offense that states possess universal jurisdiction to define and punish.¹⁷⁴ Other offenses included on this list are aircraft hijacking, slave trading, war crimes and, most importantly, piracy.¹⁷⁵ Because Justice Souter deemed piracy to be one of the offenses originally intended to be within the scope of the ATS, it is tempting to conclude its equation to genocide as an offense of universal concern confers the same status on genocide. This leap of logic fails, however, because despite its universal status, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. Courts have traditionally exercised universal jurisdiction in the form of criminal prosecution.¹⁷⁶ Although universal jurisdiction and its traditional exercise do not preclude the application of civil law, the state must nonetheless “provide a remedy in tort or restitution for victims.”¹⁷⁷ With its provisions limited to the definition, prosecution, and punishment of the criminal offenses of genocide and genocide-related acts, the Implementation Act does not provide such a civil remedy for victims.

The ATS must be amended if a private cause of action for genocide is to be found in U.S. law. Given its universal condemnation and heinous nature, the omission of genocide as a human rights violation for which no civil action presently exists in the United States should be rectified in such an amendment. Fortunately, this task is not difficult as the U.S. Congress has two sources of drafting guidance from which to choose.

Congress should reject utilization of the elements of crimes as

other offenses except incitement are punishable by a fine of not more than \$1 million or imprisonment for twenty years or both. *Id.* § 1091(b)(2). By contrast, incitement is punishable by a fine of no more than \$500,000 or imprisonment for no more than five years or both. *Id.* § 1091(c).

¹⁷² *Id.* § 1091(d)(1-2).

¹⁷³ *Id.* § 1092.

¹⁷⁴ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 404 (providing that “[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern”).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 404 cmt. b.

¹⁷⁷ *Id.*

established by the ICC due to its previously noted lack of universal acceptance and the absence of U.S. ratification. Rather, Congress should rely upon the definition set forth in the Genocide Convention, an international agreement that has gained universal acceptance and has been ratified by the United States. An additional reason for adoption of this definition is that it is already utilized in U.S. law through its identical recitation in the Implementation Act. Although certain terminology set forth in both the Convention and the Implementation Act, such as “serious bodily injury,” “permanent impairment of the mental faculties,” and the ever-difficult question of intent, may be subject to interpretation, Congress deemed the definitions adequate to serve as the basis for criminal prosecution.

Such a definition should be imported wholesale into any amendment of the ATS for four reasons. First, the consistent language for the definition of “genocide” in the Implementation Act and the accepted definition in international law would ensure that jurisdiction exercised, and possible civil liability imposed, for genocide under the ATS would be consistent with its requirement of “a violation of the law of nations.” Second, utilization of the Implementation Act’s definition would ensure consistency between criminal prosecutions pursuant to Title 18 and civil litigation instituted pursuant to the ATS. Transnational corporations, or any other actor, would be aware that acts constituting genocide may lead to criminal punishment as well as civil sanctions.

As previously noted, without amendment, genocide may not serve as the basis for exercise of jurisdiction pursuant to the ATS. The question of whether genocide is properly included in the “relatively modest set of actions” encompassed by the ATS will thus fall to the courts. These courts are most likely to continue to issue inconsistent opinions. A simple amendment extending the ATS to include genocide can eliminate potential contradictions.

Finally, the need to include genocide in the ATS without further uncertainty is greater than ever before. In the eighteen years since adoption of the Implementation Act, the world has witnessed practically nonstop slaughter on the bases of nationality, ethnicity, race and religion, extending from the Balkans to Rwanda to modern atrocities in Darfur. These episodes cry out for an incontestable civil remedy in the United States to the extent perpetrators are found in this country. The likelihood of commission or participation by transnational corporations in genocide is unlikely. Nevertheless, the punishment, including utilization of the ATS, should be severe in the event transnational corporations undertake such actions.

d. Slavery and Slave Trading

Prohibitions upon slavery and slave trading are set forth in numerous human rights instruments.¹⁷⁸ However, the international instruments containing these prohibitions suffer from deficiencies that prevent their direct implementation through the ATS. These deficiencies include lack of universal acceptance, specificity, obligatory or self-executing nature, and a lack of a requirement to provide a civil remedy or U.S. ratification.¹⁷⁹

The oldest and most comprehensive of these instruments is the Slavery Convention. Effective in 1927, the Slavery Convention urges states to undertake to “prevent and suppress the slave trade [and]... bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms.”¹⁸⁰ The Slavery Convention defines the slave “trade” as all activities relating to the capture, transport, acquisition, and disposal of a person with the intent to reduce such person to slavery.¹⁸¹ Slavery is defined

¹⁷⁸ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, arts. 1, 6(1), 7(1), Nov. 19, 2000, 38 I.L.M. 1207; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 6(1), Nov. 17, 1988, O.A.S.T.S. No. 69; Geneva Convention Protocol II, *supra* note 137, art. 4(2)(f); American Convention on Human Rights, *supra* note 127, art. 6(1); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Apr. 30, 1957, 226 U.N.T.S. 3; Slavery Convention, art. 2(a-b), Mar. 9, 1927, 60 L.N.T.S. 253; Declaration on Social Progress and Development, G.A. Res. 2542, art. 6, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (Dec. 11, 1969); International Covenant on Civil and Political Rights, *supra* note 127, art. 8; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), arts. 2(1), 4, 6(1), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966); American Declaration on the Rights and Duties of Man, art. XIV, Apr. 1948, O.A.S. Res. XXX, OEA/Ser.L.V/II.82, at 17; Universal Declaration of Human Rights, *supra* note 137, art. 4.

¹⁷⁹ Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, *supra* note 178, arts. 1, 6(1), 7(1)177 (lack of civil remedy and non-self-executing); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 178, art. 6(1)177 (lack of specificity and universal acceptance and absence of U.S. ratification); Geneva Convention Protocol II, *supra* note 157, art. 4(2)(a)(e)(noting absence of U.S. ratification); American Convention on Human Rights, *supra* note, 178 art. 7(3)127 (explaining lack of universal acceptance and absence of U.S. ratification); Slavery Convention, *supra* note 178, art. 2(ab-b)177 (noting lack of civil remedy and non-self-executing); Declaration on Social Progress and Development, *supra* note 178, art. 6 (lack of specificity and obligatory nature); International Covenant on Civil and Political Rights, *supra* note 178, art. 12127 (non-self-executing); International Covenant on Economic, Social and Cultural Rights, *supra* note 178, arts. 2(1), 4, 6(1)177 (noting lack of specificity and absence of U.S. ratification); American Declaration on the Rights and Duties of Man, *supra* note 178, art. XIV (noting lack of specificity and obligatory nature); Universal Declaration of Human Rights, *supra* note 137, art. 13(1)137 (noting lack of obligatory nature).

¹⁸⁰ Slavery Convention, *supra* note 178, art. 2(a-b).

¹⁸¹ *Id.* art. 1(2).

as the status or condition by which one person is subjected to the exercise of the right of ownership by another person.¹⁸² This condition includes debt bondage, serfdom, and certain practices relating to married women.¹⁸³

These definitions render the Slavery Convention specific for human rights purposes. Any relationship resembling ownership of a person may constitute slavery. Similarly, all aspects of reducing a person to slavery are within the prohibitions of the slave trade. These definitions remove any doubt as to whether a particular relationship or activity falls within the Convention's prohibitions. Furthermore, the universal nature of the prohibition upon slavery is clear, given the ratification of the Slavery Convention by 88 states and ratification of the Supplementary Convention by 123 states, as well as slavery's abolition in the constitutions or laws of virtually every state in the world.¹⁸⁴

However, in a manner similar to genocide, these Conventions are not obligatory and may not serve as a basis for the initiation of civil litigation pursuant to the ATS. The Slavery Convention does not require states to empower private parties to initiate civil litigation against their alleged oppressors, especially when both the victim and the oppressor are otherwise alien to the forum. Rather, the Slavery Convention only requires states to undertake steps to "prevent," "suppress," and "abolish" slavery and the slave

¹⁸² *Id.* art. 1(1).

¹⁸³ Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, *supra* note 178, art. 2(a-b)177. The Supplementary Convention defines debt bondage as:

the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Id. art. 1(a).

Serfdom is defined as "the condition or status of a tenant who is by law, custom or agreement bound to live and labor on land belonging to another person and render some determinate service to such other person, whether for reward or not, and is not free to change his status."

Id. art. 1(b). Prohibited practices relating to marriage include arranged marriages of women without the right to refuse in exchange for payment of consideration, the transfer of a married woman to another by her husband or his family in exchange for consideration and the transfer by inheritance of a woman upon the death of her husband. *Id.* art. 1(c)(i-iii). The definitions of the slave trade and slavery are identical to those set forth in the Slavery Convention. *Id.* art. 3(1)(a), (c).

¹⁸⁴ UNITED NATIONS, RATIFICATION OF THE SLAVERY CONVENTION 1-6 (2004). *See also* UNITED NATIONS, RATIFICATION OF THE SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY 1-8 (2004); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702 rptr. n. 4.

trade.¹⁸⁵ The clear implication of these terms is that states are to prohibit, prosecute, and punish slavery and the slave trade through applicable criminal procedures.

The United States recognized this distinction in legislation relating to slavery and the slave trade. First, the Slavery Convention is non-self-executing, and the United States has not adopted implementing legislation. Rather, U.S. law has addressed slavery and the slave trade in two distinct ways. First, federal criminal law prohibits participation in the slave trade and any act causing the enslavement of others.¹⁸⁶ Second, the President is empowered to sanction those states that fail to undertake significant efforts to comply with prohibitions upon slavery, including the withholding of non-humanitarian, non-trade related assistance.¹⁸⁷ The President is also authorized to sanction those deemed to be “significant traffickers” of persons as well as those providing material assistance, financial or technological support, or otherwise acting on behalf of such traffickers.¹⁸⁸ These statutes do not recognize a private cause of action for slavery or engaging in the slave trade. Neither does such recognition exist in more general civil rights laws. For example, Title 42 of the U.S. Code, which provides for civil liability for every person who, under color of law, deprives another of any rights, privileges, or immunities secured by the Constitution, is limited to U.S. citizens or other persons within the jurisdiction of the United States.¹⁸⁹

Complicating the issue is the status of slavery and the prohibition on the slave trade as *jus cogens* norms.¹⁹⁰ Engaging in the slave trade is an offense that states possess universal jurisdiction to define and punish.¹⁹¹ As previously noted, universal jurisdiction has been traditionally exercised in the form of criminal prosecution. Although this does not preclude the application of civil law to such offenses, the state must nonetheless provide for such a remedy in national law. With its provisions limited to the

¹⁸⁵ Slavery Convention, *supra* note 178, art. 2(a-b).

¹⁸⁶ 18 U.S.C. §§ 1581-94 (2000) (prohibiting acts relating to utilizing vessels for slave trade, enticing persons into slavery, seizures, detentions, transportation and sales of slaves, possession of slaves and trafficking in slaves).

¹⁸⁷ 22 U.S.C. § 7107(d)(1)(A-B) (2000).

¹⁸⁸ *Id.* § 7108(a)(1)(A-C). Penalties include investigation and regulation of or prohibition upon foreign exchange transactions, transfers of credits and payments or the importation or exportation of currency or securities as well as actions directed at property within the jurisdiction of the United States in which such trafficker may maintain an interest. 50 U.S.C. § 1702(a)(1)(A-B) (2000). Violations of such restrictions are punishable by fines ranging from \$10,000 to \$50,000 and ten years imprisonment for willful violations. *Id.* § 1705.

¹⁸⁹ 42 U.S.C. § 1983 (2000).

¹⁹⁰ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702(a) cmt. n.

¹⁹¹ *Id.* at § 404.

sanctioning of those engaging in the slave trade and slavery, U.S. law does not provide such a civil remedy. The Slavery Convention is thus not obligatory upon the United States in such a manner as to provide a basis for a private cause of action pursuant to the ATS.

The ATS must be amended if a private cause of action for slavery and slave trading is to be found in U.S. law. Given its universal condemnation, the omission of these offenses as human rights violations for which no civil action presently exists should be rectified in such an amendment. Unfortunately, this task is difficult given the multiplicity of definitions relating to slavery. Specifically, such amendment may be limited to circumstances where one person is subjected to the exercise of the right of ownership by another person. However, this definition could also be expanded to include debt bondage, serfdom, and practices relating to married women. An additional question arises from identification of those actions constituting slave trading.

With respect to slavery, Congress should adopt the definition set forth in the Slavery Convention, specifically, the status or condition by which one person is subjected to the exercise of the right of ownership by another person. This definition should be expanded to include additional practices identified in the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. These additional practices include debt bondage and serfdom as defined therein. However, the definition of slavery for purposes of the ATS should not be expanded to include practices relating to marriage as defined in the Supplementary Convention.

There are several rationales for defining slavery in such a manner. First, defining slavery in the identical form in which it is defined in the Slavery Convention would ensure that jurisdiction exercised and possible civil liability imposed for slavery utilizing the ATS would be consistent with its requirement of “a violation of the law of nations.” Second, inclusion of debt bondage and serfdom would recognize equally reprehensible alternative forms of slavery. Such recognition is further consistent with U.S. accession to the Supplementary Convention in 1967. This accession signifies U.S. approval of the Supplementary Convention’s expanded definition of slavery. This recognition is also consistent with existing provisions of the United States Code, which prohibit serfdom and debt bondage.¹⁹² Exclusion of practices relating to the rights of married women is prudent to relieve courts

¹⁹² See 19 U.S.C. § 2467(6)(A) (2000) (including slavery and practices similar to slavery, such as debt bondage and serfdom, in definition of “worst forms of child labor”); 22 U.S.C. § 7102(4) (2000) (defining debt bondage for purposes of sexual trafficking of persons). The definition of debt bondage contained in Title 22 is identical to that contained in the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

of the burden of attempting to assess civil liability with respect to a relationship created and existing exclusively within a state on the basis of their interpretation of such state's marriage laws and customs.

The definition of slave trading is a far easier question. U.S. law identifies several different behaviors that constitute slave trading. These behaviors include seizure, detention, transportation, possession, and sale of slaves.¹⁹³ These numerous prohibitions are consistent with the identical definitions of slave trading contained in the Slavery and Supplementary Conventions, specifically, the capture, transport, acquisition, and disposal of a person with the intent to reduce such person to slavery. Adoption of this definition would ensure consistency between criminal prosecutions pursuant to Title 18 and civil litigation instituted pursuant to the ATS. Transnational corporations would be aware that identical acts constituting slave trading may lead to criminal punishment as well as civil sanctions.

As noted with respect to genocide, the question of whether slavery and slave trading are properly included in the "relatively modest set of actions" encompassed by the ATS will be determined by courts in the absence of congressional action. These courts may issue inconsistent or contradictory opinions that leave affected parties without proper guidance. Although the likelihood of commission of slavery or participation in the slave trade by transnational corporations is remote, an effort must be made to provide parameters of prohibited behavior and severely punish those whose behavior transgresses such boundaries.

2. International Norms Not Actionable Pursuant to the ATS

The human rights violations analyzed in opinions prior to and after *Sosa* and not identified in the previous section are not presently actionable pursuant to the ATS. These violations should not be made actionable in any future amendment. The human rights include violations of the rights to security, life, health, liberty, assembly, and association as well as the rights to be free from enforced disappearance, arbitrary detention, forced labor and discrimination on the basis of race or religion. In addition, war crimes and crimes against humanity should be excluded from any ATS amendment. There are many reasons for continuing the non-recognition of these rights in the ATS. These reasons include lack of specificity or universal acceptance, recognition in instruments that do not require the creation of a civil action for their remediation and recognition in instruments that have not been ratified by the United States or are non-self-executing pursuant to applicable U.S. law.¹⁹⁴ Discussion of the status of these rights pursuant to international

¹⁹³ See 18 U.S.C. §§ 1585-87 (2000).

¹⁹⁴ Human rights that should be excluded from any amendment to the ATS on these

and U.S. law is beyond the scope of this article. However, several of these rights are prominent in international human rights law. The grounds for excluding such rights from any future amendment to the ATS are discussed below.

a. Enforced Disappearance

Violation of the prohibition upon enforced disappearance should not be included as an actionable tort in any amendment to the ATS for two reasons. First, despite its status as customary international law, the instruments primarily associated with the creation of this prohibition do not create legal obligations binding on the United States.¹⁹⁵ The Declaration on the Protection of All Persons from Enforced Disappearance adopted by the U.N. General Assembly in 1992 contains several specific provisions with respect to enforced disappearance.¹⁹⁶ Nevertheless, the Declaration fails to define the term “enforced disappearance” and is nonobligatory as a General Assembly resolution. The Inter-American Convention on Forced Disappearance of Persons¹⁹⁷ lacks universal support as evidenced by its

grounds are the rights to security, life, health, liberty, assembly, and association and discrimination on the basis of religion.

¹⁹⁵ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702(c) (providing state violates international law if, “as a matter of state policy, it practices, encourages or condones ... the disappearance of individuals”).

¹⁹⁶ Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 137, arts. 3-7, 10-11, 19 (requiring states to adopt “effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance” through criminalization of acts of enforced disappearance and providing civil liability for perpetrators and state authorities on whose behalf they have acted; prohibiting public authorities and their agents from ordering disappearances under any circumstances, including war or the threat thereof, political instability or other public emergency, requiring detainees to be held at an “officially recognized place of detention,” requiring states to maintain accurate information on their location, including reliable means by which their release may be verified and providing victims of detentions failing to conform to these requirements and their families right to obtain adequate compensation for all losses proximately resulting from the detention).

¹⁹⁷ Inter-American Convention on Forced Disappearance of Persons arts. 1, 8, 10, June 9, 1994, 33 I.L.M. 1429 (requiring states to “undertake not to practice, permit or tolerate the forced disappearance of persons” under any circumstances, provide for the punishment of such acts in their national criminal codes, hold detainees in an “officially recognized place of detention” and account for all such persons to family). Unlike the Declaration, the Convention provides a context within which these rights and duties attach by defining enforced disappearances. A “forced disappearance” is defined as:

the act of depriving a person or persons of their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her

ratification by less than half of the members of the Inter-American human rights system and is not obligatory given the absence of ratification by the United States.¹⁹⁸

Second, the prohibition upon enforced disappearance is different from those protections that should be included in any amendment of the ATS. Unlike extrajudicial killing and torture, there is no recognized cause of action in the United States for enforced disappearance. The most similar proceeding to enforced disappearance is habeas corpus in which an individual challenges his or her detention.¹⁹⁹ However, habeas corpus only determines the lawfulness of the detention. The very filing of the habeas corpus petition belies the element of enforced disappearance by requiring the refusal to provide information to the detainee. The filing of such a petition also prevents the occurrence of the required element of injury, specifically, the impediment of recourse to applicable procedural protections and legal remedies. Additionally, unlike the prohibitions upon genocide, slavery, and slave trading, there is no recognized definition of enforced disappearance in U.S. law. The detailed definition set forth in the Inter-American Convention on Forced Disappearance of Persons is not recognized by the United States due to the absence of ratification. As a result, recognition of enforced disappearance as an actionable claim would require the creation of an entirely new tort based upon a definition that is not recognized in U.S. law. Such creation is inconsistent with Justice Souter's admonition for "vigilant doorkeeping."

b. Arbitrary Detention

The prohibition upon arbitrary detention should not be included in any amendment to the ATS for three reasons. First, many of the international instruments upon which this right is based suffer from deficiencies that prevent their direct implementation through the ATS. These deficiencies include lack of universal acceptance, specificity, obligatory or self-executing nature, and explicit reference to arbitrary detention or U.S. ratification.²⁰⁰

recourse to the applicable legal remedies and procedural guarantees.

Id. art. 2.

¹⁹⁸ ORGANIZATION OF AMERICAN STATES, STATUS OF RATIFICATION OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS 1-2 (2004), available at <http://www.oas.org/juridico/English/signs/a-60.htm> (last visited March 31, 2007). At the time of preparation of this article, the Inter-American Convention on Forced Disappearance had been ratified by Argentina, Bolivia, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. *Id.*

¹⁹⁹ See 28 U.S.C. §§ 2241-2255 (2000).

²⁰⁰ United Nations Convention on the Rights of the Child, *supra* note 137 (illustrating lack of specificity and absence of U.S. ratification); American Convention on Human Rights, *supra*

Second, in a manner similar to enforced disappearance, there is no recognized cause of action in the United States for arbitrary detention.²⁰¹ Third, unlike genocide, slavery, and slave trading, there is no recognized definition of arbitrary detention in U.S. law. Those instruments that define arbitrary detention, specifically, the American Convention on Human Rights and the Civil and Political Rights Covenant, are not legally enforceable given the absence of U.S. ratification and lack of obligatory nature.

Arbitrary detention violates customary international law, assuming it is prolonged and practiced as state policy.²⁰² However, Justice Souter refused to recognize Alvarez's detention as an actionable violation of international human rights law despite this status.²⁰³ Justice Souter distinguished Alvarez's detention on the basis it was not "prolonged." However, he also held that it remained impossible for the Court to determine if and when such detention achieved the degree of certainty necessary to violate international law characteristic of offenses traditionally within the meaning of the ATS.²⁰⁴ As a result, Justice Souter refused to create a private cause of action for the violation of a norm considered universal by the international community. Given this holding and the absence of recognition of such claims in U.S. law, arbitrary detention should not be included in any amendment of the ATS.

c. Race Discrimination

The right to be free from race discrimination should not be included in any amendment to the ATS for two reasons. First, many of the international instruments upon which this right is based suffer from deficiencies that prevent their direct implementation through the ATS, such as lack of specificity, obligatory or self-executing nature or U.S. ratification.²⁰⁵ This

note 127 (illustrating lack of universal acceptance and U.S. ratification); International Covenant on Civil and Political Rights, *supra* note 127 (illustrating non-self-executing nature); American Declaration on the Rights and Duties of Man, *supra* note 178 (illustrating lack of obligatory nature); Universal Declaration of Human Rights, *supra* note 137 (illustrating lack of specificity and obligatory nature).

²⁰¹ U.S. law does not recognize a cause of action specifically enumerated as arbitrary detention. See 28 U.S.C. § 2680(h) (2006) (lifting tort immunity for federal investigative or law enforcement officers only if the detention constitutes false imprisonment).

²⁰² RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702 cmt. h (providing state violates international law if, "as a matter of state policy, it practices, encourages or condones . . . prolonged arbitrary detention").

²⁰³ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 736-38 (2004).

²⁰⁴ *Id.* at 737.

²⁰⁵ United Nations Convention on the Rights of the Child, *supra* note 137 (illustrating lack of specificity and absence of U.S. ratification); Declaration on the Rights of Persons Belonging to National, Ethnic, Religious or Linguistic Minorities, G.A. Res. 47/135, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49 (Dec. 18, 1992) (illustrating lack of obligatory nature);

includes the International Convention on the Elimination of All Forms of Racial Discrimination, the most widely recognized human rights convention relating to race discrimination. This Convention has been ratified or acceded to by 177 states, including the United States, which deemed it to be non-self-executing.²⁰⁶ The right to be free from racial discrimination is part of the customary international law of human rights pursuant to Section 702 of the *Restatement of Foreign Relations Law*.²⁰⁷

Second, unlike torture and extrajudicial killing, U.S. statutes do not grant aliens an absolute right to initiate racial discrimination litigation in federal courts. Most civil rights claims alleging discrimination on the basis of race pursuant to Title 42 of the United States Code are limited to citizens of the United States or those individuals within its jurisdiction.²⁰⁸ There are some rights upon which race cannot be used as a discriminatory factor and which are actionable by persons outside the jurisdiction of the United States.

International Covenant on Civil and Political Rights, *supra* note 48 (illustrating lack of obligatory nature and non-self-executing); International Covenant on Economic, Social and Cultural Rights, *supra* note 178 (noting lack of obligatory nature and non-self-executing); Declaration on Social Progress and Development, *supra* note 178 (showing lack of specificity and obligatory nature); Declaration on the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) (showing lack of obligatory nature); American Declaration on the Rights and Duties of Man, *supra* note 178 (showing lack of obligatory nature); Universal Declaration of Human Rights, *supra* note 137 (showing lack of obligatory nature).

²⁰⁶ International Convention on the Elimination of All Forms of Racial Discrimination, Sept. 28, 1966, 660 U.N.T.S. 195. Although the United States ratified the Convention on Racial Discrimination effective November 1994, the substantive provisions of the Convention were declared to be non-self-executing. U.S. Reservations, Declarations and Understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 CONG. REC. S7634-02, art. III (daily ed. June 24, 1994). The Convention defines “racial discrimination” as:

any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

International Convention on the Elimination of All Forms of Racial Discrimination, *supra* art. 1(1).

²⁰⁷ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 72, § 702(f) (providing “[a] state violates international law if, as a matter of state policy, it practices, encourages or condones . . . systematic racial discrimination”).

²⁰⁸ See, e.g., 42 U.S.C. § 1982 (2000) (restricting protections with respect to inheritance, purchase, lease, sale, holding, and conveyance of property rights to citizens of United States); *Id.* § 1983 (providing persons protected from deprivations of rights, privileges and immunities secured by Constitution are restricted to U.S. citizens or other persons within jurisdiction of United States); *Id.* § 2000d (limiting eligibility for federal benefits to U.S. citizens or other persons within the jurisdiction of the United States).

For example, the right to “full and equal enjoyment” of goods, services, facilities, and places of public accommodation regardless of race, color or national origin is extended to “all persons” regardless of their citizenship or the presence of U.S. jurisdiction.²⁰⁹ District courts possess subject matter jurisdiction with respect to claims alleging violation of these rights.²¹⁰ The same conclusion may be applicable to the prohibition upon unlawful employment practices.²¹¹ Persons for purposes of the employment provisions of Title 42 are defined to include individuals without reference to citizenship or their presence within the jurisdiction of the United States.²¹² Although subsequent sections exempt the employment of aliens under certain circumstances,²¹³ the prohibitions of discrimination on the basis of race, color, and national origin, remain with respect to the operation of business entities incorporated in a foreign state but controlled by a U.S. employer.²¹⁴ Thus, to the extent federal statutory law protects the rights of non-citizens, aliens may utilize U.S. courts to assert their right to be free from race-based discrimination.

Inclusion of race discrimination within an amendment to the ATS would provide aliens with an unlimited right to initiate litigation in U.S. courts. This right would be inconsistent with Congress’s intent to limit availability of U.S. courts to aliens as expressed in current statutory law. Furthermore, the creation of such an unlimited right would serve to make the International Convention on the Elimination of All Forms of Racial

²⁰⁹ *Id.* § 2000a. This section provides that:

[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color . . . or national origin.

Id.

²¹⁰ *Id.* at § 2000a-6.

²¹¹ Unlawful employment practices include refusals to hire, discharges and discrimination with respect to compensation, terms, conditions or privileges of employment on the basis of race, color or national origin. *Id.* § 2000e-2(a)(1). The limitation, segregation or classification of employees on such basis is unlawful to the extent it deprives persons of employment opportunities or adversely affects their status as an employee. *Id.* § 2000e-2(a)(2).

²¹² *Id.* § 2000e(a).

²¹³ *Id.* § 2000e-1(a) (providing “[t]his subchapter shall not apply to an employer with respect to the employment of aliens outside any State”). *See also* § 2000e-1(b) (exempting compliance with equal employment opportunity practices in the event such compliance would violate the laws of the foreign jurisdiction where the employment services are rendered); § 2000e-1(c)(2) (exempting compliance with equal employment opportunity practices with respect to the foreign operations of an employer that is not a foreign person controlled by a U.S. employer).

²¹⁴ *Id.* § 2000e-1(c)(1) (requiring compliance with equal employment opportunity practices by employers incorporated pursuant to foreign law but controlled by a U.S. employer).

Discrimination self-executing with respect to claims asserted by aliens. This would contradict the U.S. Senate's expressed intent that the Convention be non-self-executing.

d. War Crimes and Crimes Against Humanity

Prohibitions upon the commission of war crimes and crimes against humanity are set forth in the greatest detail in one human rights instrument.²¹⁵ The Elements of Crimes as established by the ICC contains the most definitive description of war crimes ever enunciated by an international body. War crimes are defined to include willful killing, torture, and cruel treatment, the infliction of great suffering, mutilation, rape and other sexual violence, forced pregnancy, enforced prostitution and sterilization, biological, medical and scientific experimentation, destruction, pillaging and appropriation of property, compelling military service in hostile forces, denial of due process, deportation and displacement of civilians, confinement, hostage taking, attacks upon civilian populations, improper uses of flags and insignia, attacking protected objects and the use of poison and poisonous weapons.²¹⁶ Crimes against humanity are defined in similar detail.²¹⁷ Each of these definitions establishes the three elements fundamental to any offense, specifically (1) the prohibited act (2) the identity of the victim and (3) the requisite intent of the perpetrator.²¹⁸

Nevertheless, as previously discussed with respect to the prohibition upon genocide, the universal and obligatory nature of the documents establishing the ICC are subject to question. Approximately half of the international community has ratified or acceded to the Rome Statute. Although significant, this history raises serious questions with respect to the

²¹⁵ Although war crimes and crimes against humanity are defined and subject to prosecution and punishment by other human rights instruments, these documents are limited to specific conflicts. *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda, *supra* note 112; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *supra* note 112.

²¹⁶ International Criminal Court, Elements of Crimes, *supra* note 152, art. 8(2)(a-e).

²¹⁷ *Id.* art. 7(1)(a-k) (defining "crimes against humanity" as murder, extermination, enslavement, forcible transfer of civilian populations, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, sexual violence, persecution, enforced disappearance, apartheid and other inhumane acts).

²¹⁸ For example, the war crime of willful killing is defined as the killing of one or more persons, the membership of such persons in a protected class as established by the Geneva Conventions and awareness on the part of the perpetrator of the factual circumstances establishing the victim's protected status. *Id.* art. 8(2)(a)(i). By contrast, willful killing is defined as a crime against humanity if the perpetrator killed one or more persons as part of "a widespread or systematic attack directed against a civilian population" and the perpetrator knew or intended the conduct to be part of such an attack. *Id.* art. 7(1)(a).

universal recognition of the ICC as well as the principles for which it stands, including the definition of war crimes and crimes against humanity. Even assuming the Rome Statute and ICC are universally recognized, the statute is not obligatory on the United States due to the absence of ratification. Furthermore, assuming the universality of the Rome Statute and the definitions set forth and their acceptance by the United States, there is no reason to believe the U.S. Senate would manifest an intention for the Rome Statute to serve as the basis for civil litigation. This is especially true given the Rome Statute's limitations on the definition, prosecution, and punishment of war crimes.

War crimes are also offenses that states possess universal jurisdiction to define and punish. However, there must still be a basis for the initiation and prosecution of a private civil action through appropriate provisions within national law. U.S. law provides no such civil remedy for victims of war crime or crimes against humanity.²¹⁹

War crimes and crimes against humanity are thus different from the prohibitions upon extrajudicial killing and torture. Additionally, unlike the prohibitions upon genocide, slavery, and slave trading, there is no recognized definition of war crimes or crimes against humanity in U.S. law due to the absence of U.S. ratification of the principles underlying the ICC. The creation of a civil remedy for war crimes and crimes against humanity is inconsistent with Justice Souter's admonition for "vigilant doorkeeping."

e. Forced Labor

The prohibition against forced labor should not be included as an actionable tort in any ATS amendment. Many of the international instruments upon which this prohibition is based suffer from deficiencies that prevent their direct implementation through the ATS, including lack of universal acceptance, specificity, self-executing nature, explicit reference to forced labor or U.S. ratification.²²⁰ The most comprehensive of these

²¹⁹ U.S. law only provides for criminal liability for perpetrators of war crimes. 18 U.S.C. § 2441(a) (2000) (providing for fine, imprisonment, and potential death sentence for persons convicted of committing war crimes inside or outside of United States).

²²⁰ See Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, *supra* note 178 (lack of civil remedy and non-self-executing); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *supra* note 178 (lack of universal acceptance and absence of U.S. ratification); American Convention on Human Rights, *supra* note 127 (lack of universal acceptance, specificity and absence of U.S. ratification); Slavery Convention, *supra* note 178 (lack of specificity and non-self-executing); Declaration on Social Progress and Development, *supra* note 178 (lack of specificity and obligatory nature); International Covenant on Civil and Political Rights, *supra* note 127 (lack of specificity and non-self-executing); International Covenant on Economic, Social and Cultural Rights, *supra* note 178

instruments are the Convention Concerning Forced or Compulsory Labor²²¹ and the Abolition of Forced Labor Convention.²²² These conventions are not specific for ATS purposes. Although forced or compulsory labor is defined, and states are instructed to eliminate these practices as quickly as possible, the Forced or Compulsory Labor Convention exempts compulsory military service, work performed as part of “normal civic obligations” or imposed by public authorities as a consequence of conviction of a criminal offense, in emergency circumstances or constituting “minor communal service.”²²³ Military service and work imposed as a consequence of conviction of a criminal offense and under emergency circumstances are defined.²²⁴ However, “normal civic obligations” are completely undefined. “Minor communal services” are equally vague to the extent they are to be of “direct interest to the community” and are considered to be within the scope of “normal civic obligations.”

The standards to be met by states prior to the utilization of forced or compulsory labor are also vague. States must determine the work to be performed is of “important direct interest to the community,” of “present or imminent necessity,” obtaining voluntary labor is impossible and the work will not “lay too heavy a burden upon the present population.”²²⁵ These standards are not discussed in any detail other than with respect to the impossibility of obtaining volunteer labor.²²⁶ The meaning of these terms is so uncertain as to render them capable of any interpretation states may choose and thus incapable of enforcement through the ATS. Furthermore, although the Forced or Compulsory Labor Convention is universal given its adoption by 163 states, it is not obligatory given the absence of ratification

(lack of specificity and explicit reference to forced labor and absence of U.S. ratification); American Declaration on the Rights and Duties of Man, *supra* note 178 (lack of specificity and obligatory nature); Universal Declaration of Human Rights, *supra* note 137 (lack of specificity and obligatory nature).

²²¹ Convention Concerning Forced or Compulsory Labor, arts. 1, 2, 4, 5, 11, 39, May 1, 1932, U.N.T.S. 55.

²²² Abolition of Forced Labor Convention, arts. 1-2, 320, Jan. 17, 1959, U.N.T.S. 291.

²²³ Convention Concerning Forced or Compulsory Labor, *supra* note 221, at art. 2(2)(a-e).

²²⁴ “Compulsory military service” is defined as work of “a purely military character.” *Id.* art. 2(2)(a). Work to be performed as a consequence of conviction of a criminal offense must be supervised and controlled by a public authority. *Id.* art. 2(2)(c). Emergency work or service may be required in the event of “war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population.” *Id.* art. 2(2)(d).

²²⁵ *Id.* art. 9(a-d).

²²⁶ The impossibility of obtaining voluntary labor is established if such labor is not available upon the offering of wages and conditions of labor not less favorable than those prevailing in the area for similar work or service. *Id.* at art. 9(c).

by the United States.²²⁷

Additionally, neither convention requires states to empower private parties to initiate civil litigation. The Forced or Compulsory Labor Convention requires states to punish violations as criminal offenses and impose “adequate” and “strictly enforced” penalties.²²⁸ The Abolition of Forced Labor Convention similarly requires “immediate and complete abolition” of forced labor under the circumstances described therein.²²⁹ U.S. law has addressed forced or compulsory labor as criminal offenses.²³⁰

However, in a manner similar to extrajudicial killing and torture, the U.S. Code creates a private cause of action for victims of forced labor. Specifically, section 1595 of Title 18 provides that any individual who is a victim of forced labor practices “may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorneys’ fees.”²³¹ The absence of distinction between citizens and aliens implies that such a civil action is available to aliens assuming that a U.S. court may exercise jurisdiction over the alleged perpetrators. Forced labor is defined as knowingly providing or obtaining labor or services of a person by threats of serious harm to, or physical restraint against, the victim or another person.²³² This definition also includes schemes, plans or patterns intended to cause one to believe such threats or actual or threatened abuse of the legal process.²³³ However, the statute conditions maintenance of a civil action upon the initiation of a criminal prosecution by federal law enforcement authorities. Initiation of a

²²⁷ ILO, RATIFICATION OF THE CONVENTION CONCERNING FORCED OR COMPULSORY LABOR 1-6 (2004). By contrast, the Abolition of Forced Labor is universal and obligatory to the extent it has been ratified by 161 states, including the United States. *See id.*

²²⁸ Convention Concerning Forced or Compulsory Labor, *supra* note 221, art. 25.

²²⁹ Abolition of Forced Labor Convention, *supra* note 222, art. 2.

²³⁰ *See, e.g.*, 18 U.S.C. § 1589(1-3) (2000) (punishing crime of knowingly providing or obtaining labor through utilization of threats of serious harm or physical restraint directed at one or more people or by abuse or threatened abuse of law by not more than twenty years imprisonment unless offense results in death or includes kidnapping, attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse or an attempted killing in which event penalty increases to life imprisonment). *See also* 18 U.S.C. § 1590 (punishing crime of harboring, transporting or otherwise trafficking in human beings for purposes associated with forced labor by not more than twenty years imprisonment unless offense results in death or includes kidnapping, attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse or an attempted killing in which event penalty increases to life imprisonment); 18 U.S.C. § 1592(a)(1-3) (punishing crime of destroying or confiscating immigration documentation in course of obtaining forced labor or harboring, transporting or trafficking in human beings for purposes associated with forced labor by no more than five years imprisonment).

²³¹ 18 U.S.C. § 1595(a).

²³² 18 U.S.C. § 1589(1).

²³³ 18 U.S.C. § 1589(2-3).

civil action is stayed during the pendency of such criminal prosecution, which includes investigation, prosecution, and final adjudication.²³⁴

Based upon this statute, it is tempting to conclude that any amendment of the ATS must include forced labor in order to bring all potential causes of action by aliens against human rights violators under the aegis of one comprehensive federal statute. The inclusion of forced labor in an amendment to the ATS might eliminate inconsistent or contradictory judicial opinions attempting to determine whether the creation of a civil action for forced labor within Title 18 is similar to a civil action alleging forced labor pursuant to the ATS and, if not, whether the Title 18 action was intended to encompass claims by aliens as well as U.S. citizens.

This temptation must be resisted for three reasons. First, the incorporation of forced labor into the ATS eliminates a precondition to subsequent civil litigation deemed vital by Congress, specifically, the initiation and completion of criminal prosecution by U.S. law enforcement authorities. Second, incorporation of forced labor into the ATS would treat citizens and aliens differently. In fact, incorporation of forced labor into the ATS would discriminate against citizens claiming to be victims of forced labor by staying their claims during the pendency of criminal prosecution while permitting aliens to initiate forced labor claims pursuant to the ATS without awaiting the completion or even the initiation of criminal prosecution. Finally, the disparity between international definitions of forced labor and the definition adopted by the U.S. Code should discourage congressional action. Unlike torture, genocide, and slavery, the U.S. Code adopts but a small portion of the international definitions. The absence of wholesale adoption of international definitions and the numerous and vague exceptions to these definitions should discourage Congress from including forced labor in the list of torts actionable pursuant to the ATS.

V. CONCLUSION

It is time for Congress to address the circumstances in which liability may be imposed on transnational corporations pursuant to the ATS. Congressional action is particularly necessary given the Supreme Court's failure to provide greater clarification in *Sosa v. Alvarez-Machain*. To their credit, lower federal courts have adopted a circumspect approach to identifying Justice Souter's "relatively modest set of actions alleging violations of the law of nations."²³⁵ The courts have proceeded carefully in full awareness of the potential impact of their rulings on affected plaintiffs, transnational corporations, the governments of the states in which the parties

²³⁴ 18 U.S.C. § 1595(b)(1-2).

²³⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

reside and conduct business, and U.S. foreign relations. Courts have recognized that not every violation of international law is a tort for purposes of the ATS. This recognition has resulted in the annunciation of a handful of actionable violations of the law of nations.

Nevertheless, there are limits to continued reliance upon judicial interpretation. The wisdom of imposing human rights obligations upon private enterprises, what duties should be imposed, and to what degree parent corporations should be held accountable for the actions of their subsidiaries are issues that should be debated in Congress. These issues should not be subject to further determination by courts attempting to breathe life into a 217-year-old statute utilizing a murky historical record and uneven record of precedents. However, courts are not free “to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute.”²³⁶ Thus, absent congressional clarification, a development that has not been forthcoming in the twenty-six years since *Filartiga*, federal courts will be required to continue to apply the ATS utilizing the vague outline sketched by *Sosa* to a variety of circumstances, including those involving transnational corporations. Despite the best efforts of federal courts at “vigilant doorkeeping,” the potential for conflicting results remains.

Any amendment should not eliminate the ATS as a source of potential future liability as favored by many in the international business community. Rather, the amendment should recognize the need to subject increasingly independent transnational corporations to domestic constraints and punish transgressors for violation of norms prohibiting the most heinous behavior. The debate in Congress should address the fundamental issue of the corporation as a legal and economic institution. One universal principle in this debate is that “[w]hether the corporation is a creature created by law, one arising out of a web of individual contractual agreements, or a distinct legal being, it is subject to state regulation.”²³⁷

When viewed in this context, corporate liability for human rights violations is another form of state regulation. The imposition of this liability is also a method by which to bring transnational corporations within the precepts of the international legal system from which they derive benefits on a worldwide basis.²³⁸ Regulation and moderation of their behavior pursuant to the ATS recognizes that corporations are “right-and-duty-bearing unit[s]”

²³⁶ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984) (Edwards, J., concurring) (declining to adopt Judge Bork’s rejection of interpretation of ATS set forth in *Filartiga v. Peña-Irala*).

²³⁷ Beth Stephens, *The Amoralty of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 61 (2002).

²³⁸ Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT’L & COMP. L. REV. 285, 290 (2001).

pursuant to national and international law.²³⁹ The application of the ATS to the activities of private entities is reflective of obligations society deems advisable to impose upon corporations.²⁴⁰ This ascription of the obligation to promote and respect international human rights is of particular importance with respect to transnational corporations based in the United States due to their unique role as de facto ambassadors and propagators of American economic, political, and cultural values.²⁴¹ The amendment proposed in this Article recognizes shared private and state responsibility for abstaining from complicity in the most nefarious and indefensible practices of extrajudicial killing, torture, genocide, slavery and slave trading. At the same time, the amendment properly preserves exclusive State responsibility for the ultimate achievement of the vast majority of goals most nobly set forth in modern international human rights instruments.

APPENDIX A

TEXT OF PROPOSED AMENDMENT TO THE ALIEN TORT STATUTE

(a) The district courts shall have original jurisdiction of any civil action brought by an alien against a defendant stating a claim of extrajudicial killing, torture, genocide, slavery or slave trading.

(b) Definitions

(1) Defendant - The term "defendant" means any person subject to the jurisdiction of the district courts of the United States who with specific intent:

(A) actually commits any act of extrajudicial killing, torture, genocide, slavery or slave trading;

(B) directly participates in any act of extrajudicial killing, torture, genocide, slavery or slave trading with a foreign state pursuant to an agreement between the person and the foreign state; or

(C) actually commits or directly participates in any act

²³⁹ John Dewey, *The Historic Background of the Corporate Legal Personality*, 35 YALE L.J. 655, 656 (1926).

²⁴⁰ *Id.* See also Stephens, *supra* note 237, at 61-62.

²⁴¹ Logan M. Breed, *Regulating Our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L L. 1006, 1012 (2002).

2007]

A Modest Proposal to Amend the Alien Tort Statute

169

of extrajudicial killing, torture, genocide, slavery or slave trading through that person's alter ego.

(2) Person - The term "person" means any individual, corporation, company, association, firm, partnership, society or joint stock company.

(3) Foreign State - The term "foreign state" means:

(A) a political subdivision of a foreign state; or

(B) an agency or instrumentality of a foreign state consisting of any entity:

(i) which is a separate legal person, corporate or otherwise; and

(ii) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and

(iii) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of Title 28 of the United States Code, nor created under the laws of any third country.

(4) Extrajudicial Killing - The term "extrajudicial killing" means:

(A) a deliberated killing of an individual;

(B) carried out by another individual acting under actual or apparent authority or color of law of any foreign state

(C) not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(5) Torture - The term "torture" means an act:

(A) carried out by an individual acting under actual or apparent authority, or color of law, of any foreign state;

(B) directed against another individual in the offender's custody or physical control;

(C) specifically intended to inflict severe physical or mental pain or suffering;

(D) for the purposes of obtaining information or a

confession from that individual or a third person, inflicting punishment for an act committed or allegedly committed by that individual or third person, intimidating or coercing that individual or a third person or for any discriminatory reason of any kind.

(E) “Mental pain and suffering” means prolonged mental harm caused by or resulting from:

(i) the intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) the threat of imminent death;

(iv) the threat that another individual will be subjected to imminent death, severe physical pain or suffering or the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality.

(6) Genocide - The term “genocide” means any act or attempt to carry out an act directed at a national, ethnic, racial or religious group and committed with the specific intent to destroy, in whole or in substantial part, such group, which:

(A) kills members of that group;

(B) causes serious bodily injury to members of that group;

(C) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;

(D) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in substantial part;

(E) imposes measures intended to prevent births within the group; or

(F) transfers by force children of the group to another group.

2007]

A Modest Proposal to Amend the Alien Tort Statute

171

(G) The terms “national group,” “ethnic group,” “racial group,” “religious group” and “substantial part” have the meanings given those terms in section 1093 of Title 18 of the United States Code.

(7) Slavery - The term “slavery” means the status or condition by which an individual is subjected to the exercise of the right of ownership by another person, including debt bondage and serfdom.

(A) “Debt bondage” means the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

(B) “Serfdom” means the status or condition of an individual who is by law, custom or agreement involuntarily bound to live and labor on real property belonging to another person, whether for reward or not, is subject to transfer along with such real property to a third person and is not free to change his status.

(8) Slave trading - The term “slave trading” means all activities relating to the enticement, seizure, capture, detention, transport, possession, sale, trade, acquisition or other disposal of an individual with the intent to reduce such individual to slavery.