



2006

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Recommended Citation

Deye, Kelsy (2006) "Can Corporations Be Held Liable Under the Alien Tort Claims Act?," *Kentucky Law Journal*: Vol. 94 : Iss. 4 , Article 3.

Available at: <https://uknowledge.uky.edu/klj/vol94/iss4/3>

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Can Corporations Be Held Liable Under the Alien Tort Claims Act?

Kelsy Deye¹

THE Alien Tort Claims Act (ATCA) was a statute passed in 1789² that few attorneys knew much about and even fewer argued in suits prior to 1980.³ The first Congress passed the ATCA as a jurisdictional statute to open federal courts to tort claims by aliens of the United States.⁴ The courts had invoked the ATCA only twice since its passage as part of the Judiciary Act of 1789 until 1980.⁵ With the Second Circuit's groundbreaking opinion in *Filartiga v. Pena-Irala*,⁶ the scope, use, and interpretation of the Alien Tort Claims Act changed.⁷ Later cases showed that this shift had the strongest impact on the hot-button international issue of human right violations.⁸ Leaders of insurgent groups, terrorist groups, and government officials were all subject to litigation under the ATCA for actions in foreign countries.⁹ Lack of official capacity was not even a requirement, so an individual could be held liable for his personal actions in committing human rights violations like genocide, rape, and murder.¹⁰ The U.S. court system opened an avenue for non-citizens to sue for events happening completely outside the boundaries of the United States.¹¹ People with no practical recourse in their native country's courts had an alternate forum to submit

1 J.D. expected 2007, University of Kentucky College of Law.

2 28 U.S.C. § 1350 (2000).

3 See Gary Clyde Hufbauer, *The Supreme Court Meets International Law: What's the Sequel to Sosa v. Alvarez-Machain?*, 12 TULSA J. COMP. & INT'L L. 77, 77 (2004); see also M. Christie Helmer et al., *Litigation Claims Under the Alien Tort Statute After Sosa v. Alvarez-Machain*, 721 PLLI/LIT 121, 123 (March 2005).

4 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719–20 (2004).

5 Hufbauer, *supra* note 3, at 77.

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

7 See William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 687 (2002).

8 See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

9 *Id.*

10 See *Kadic*, 70 F.3d at 244.

11 *Filartiga*, 630 F.2d at 885.

grievances.¹² Since *Filartiga*, courts have been wrestling with the outside boundary of the ATCA, such as who may be held liable and how closely an actor must be associated with the foreign government to incur liability for a human rights violation.

Until recently, the ATCA has been limited to official and unofficial actors of foreign governments.¹³ Several suits filed in the last five years sought to extend the ATCA to cover actions by multinational corporations in foreign countries.¹⁴ These suits have led to a new host of problems for courts in interpreting the ATCA. Prior to the Supreme Court ruling in *Sosa v. Alvarez-Machain*, lower courts had no guidance as to which interpretations of the ATCA were constitutionally valid.¹⁵ While the Supreme Court cleared up some basic ideas regarding the interpretation of the ATCA, questions regarding corporations remain unanswered due to the facts of the case. With the guidance provided in *Sosa*, courts continue to grapple with evolving standards of customary international law and the subsequent effects on suits against corporations for violations of human rights on foreign soil.

This Note evaluates whether private actors can be held liable under the ATCA for human rights violations. The passage of the Act, the history of litigation under it, and the international law violations defined by it indicate that individual liability exists. Next, the Note discusses *Sosa v. Alvarez-Machain* and its effect on the modern interpretation of the ATCA. Finally, the Note examines litigation against U.S. corporations and the possible liability of these multinational corporations for activities occurring in foreign locations where the corporations do business.

I. THE ORIGIN OF THE ALIEN TORT CLAIMS ACT

Congress passed the ATCA as part of the Judiciary Act of 1789. The debates in Congress at that time indicate that the legislative body intended personal liability to arise under the act.¹⁶ Additionally, events occurring in Philadelphia at the time confirm that Congress sought to make individuals liable under the ATCA.¹⁷

James Madison worried that a crisis was emerging for the United States in international affairs because the country had failed to provide punish-

¹² *Id.* at 879-880, 885.

¹³ See Hufbauer, *supra* note 3, at 77.

¹⁴ See *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), *republished at* 414 F.3d 233 (2d Cir. 2003); *Doe I v. Unocal Corp.* 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc*, 395 F.3d 978 (2003); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

¹⁵ *Tel-Oren*, 726 F.2d at 775.

¹⁶ *Sosa*, 542 U.S. at 724-25.

¹⁷ Dodge, *supra* note 7, at 694.

ments for violations of the law of nations.¹⁸ The law of nations, also referred to as *jus cogens* or customary international law, is a group of principles of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties.¹⁹ Under the legal system of the time, there was little redress for foreign nationals injured while in America. While an alien could sue in state court, this was frequently the home state of the perpetrator, and prior incidents had shown this to be an unfavorable forum.²⁰ There was no recourse for aliens injured by other aliens in the civil system.²¹ Foreign nations demanded stronger protection for their citizens on American soil.²² Many founders were probably fearful that the United States would lose its tenuous place on the international stage.²³ Slipping off the international map would have had disastrous consequences for the new nation, so the founders brought this issue to Congress's attention to avoid the predicted crisis.²⁴

The situation that most likely sparked concern and interest in the situation was the Marbois affair in Pennsylvania in 1784.²⁵ Marbois, the French Consul General, was assaulted by another Frenchman, DeLongchamps, while walking on a Philadelphia street.²⁶ Although Marbois complained to the Continental Congress at the time, there was little they could do under the Articles of Confederation. It was left to the state of Pennsylvania to prosecute the action in the criminal sense.²⁷ There was no civil action by Marbois and it is questionable whether there was a forum to hear the case if the action had been filed.²⁸ The entire affair caused outrage among the foreign representatives in the country at the time. The Dutch ambassador was incensed and threatened to leave unless the United States took responsive action.²⁹ While Pennsylvania did convict De Longchamps of an "offense

18 Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 643 (2002).

19 Samuel A. Khalil, Note, *The Alien Tort Claims Act and Section 1983: The Improper Use of Domestic Laws to "Create" and "Define" International Liability for Multi-National Corporations*, 31 HOFSTRA L. REV. 207, 216 (2002).

20 Dodge, *supra* note 7, at 697 (quoting Oliver Ellsworth) ("Juries were too apt to be biased [against] them, in favor of their own citizens & acquaintances: it was therefore necessary to have general Courts for causes in which foreigners were parties or citizens of different States").

21 Dodge, *supra* note 7, at 694-95.

22 *Id.* at 694.

23 See Daniel Diskin, Note, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 813-14 (2005).

24 Bradley, *supra* note 18, at 643.

25 Dodge, *supra* note 7, at 694.

26 *Id.*

27 *Id.*

28 *Id.* at 694-95.

29 *Id.*

against the law of nations, which [is] part of the law of this state [Pennsylvania],”³⁰ it was doubtful whether other states had the capacity to declare the violation of the law of nations a crime.³¹ Prior to this point, only Connecticut had passed a statute that provided criminal and civil liability for a violation of the law of nations.³² Additionally, few states provided punishments for acts against ambassadors.³³ These considerations undoubtedly lingered in the founders’ minds when drafting Article III of the United States Constitution³⁴ and they were even more acutely aware of these shortcomings in drafting the Judiciary Act of 1789.³⁵

In light of this history, Congress must have intended the ATCA to apply equally to individuals and state actors. The language of the statute makes no distinction between the two groups. The statute allows for jurisdiction over “*any* suit by an alien for a tort only.”³⁶ There is no requirement that the tort be committed by a government entity or an official organization in order for a cause of action to arise. The origin of the statute strongly indicates that the drafters intended to allow suits for torts committed by individual actors.

II. HISTORY OF THE USE OF THE ALIEN TORT CLAIMS ACT IN LITIGATION

The law of nations was traditionally very narrow, as was discussed in the Supreme Court’s opinion in *Sosa*. Justice Souter (citing Blackstone) found three violations of the law of nations in English criminal law, namely, “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”³⁷ The reference to piracy as a law of nations violation clearly answers the question of whether individual liability could arise under the ATCA. While violations of safe conducts and infringements on the rights of ambassadors can easily be limited to those acts perpetrated by a nation or governmental entity, piracy was commonly regarded as an individual’s crime against society.³⁸

Legal commentators from the earliest times defined pirates as “enemies of the human race” and stated that “piracy is justly regarded as a

³⁰ *Id.*

³¹ Dodge, *supra* note 7, at 695–96.

³² *Id.* at 693.

³³ *Id.* at 695.

³⁴ *Id.*

³⁵ *Id.*

³⁶ 28 U.S.C. § 1350 (2000) (emphasis added).

³⁷ *Sosa*, 542 U.S. at 715.

³⁸ *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820). (“[P]iracy is justly regarded as a crime against the universal laws of society”).

crime against the universal laws of society . . .”³⁹ The U.S. courts further discussed piracy as the act of an individual against all nations, meaning any nation might punish a pirate “whether native or foreigner” for his crimes.⁴⁰ The common law found piracy to be “an offence against the universal law of society, a pirate being deemed an enemy of the human race.”⁴¹ As one of the earliest recognized violations of the law of nations, piracy was a crime often committed in an individual capacity. The United States actively pursued individuals for the crime, as did most other countries.⁴² Because piracy was an individual crime, it is clear that the law of nations could be violated by an individual. The wording of the ATCA must allow for the possibility that individuals could be held civilly liable for violations of the law of nations.

III. DECISIONS FROM THE SECOND CIRCUIT

Since 1980, the Alien Tort Claims Act has been interpreted as applying to individuals for human rights violations in limited circumstances. The Second Circuit has been the most instrumental in this area, deciding both *Filartiga v. Pena-Irala* in 1980 and *Kadic v. Karadzic* in 1995. *Filartiga* arose from events occurring in Paraguay. All of the parties involved were Paraguayan citizens. The plaintiffs sued the defendant for his actions in connection with the torture and death of a close family member of the plaintiffs.⁴³ The defendant had been the Inspector General of Police and had ordered one plaintiff’s son to be tortured and executed because of the plaintiff’s political opposition to the party in power.⁴⁴ While the trial court dismissed for lack of subject matter jurisdiction, the Court of Appeals reversed, finding jurisdiction under the Alien Tort Claims Act.⁴⁵ In its decision, the court held that “an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”⁴⁶ The defendant claimed he was acting in his official capacity as a member of the Paraguayan government (chief inspector of police), and therefore the Act of State doctrine barred

39 *Id.* at 163.

40 *Sosa*, 542 U.S. at 762 (citing *Smith*, 18 U.S. at 153 and referring to the “general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons”).

41 *Id.* at 732 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980)).

42 *See Smith*, 18 U.S. at 153.

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

44 *Id.*

45 *Id.*

46 *Id.* at 880.

the action.⁴⁷ The Second Circuit found this argument was not properly raised for appeal. However, the court stated that when a state official is acting contrary to the laws of the state, he could not avail himself of the Act of State doctrine because it is assumed that he did not have the support of the government in performing his acts of torture and murder.⁴⁸

Fifteen years later, the Second Circuit decided *Kadic*, which was a suit for human rights violations in Bosnia under the insurgent Bosnian-Serb leader, Radovan Karadzic. The trial court again dismissed for lack of subject matter jurisdiction.⁴⁹ The Second Circuit reversed, stating, "Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor."⁵⁰ The court discussed the requirements for a violation of the law of nations when it also found that the law of nations is not confined to state actors.⁵¹ Citing authority from early Supreme Court opinions and attorney general opinions, the Second Circuit determined that private individuals were subject to liability under the Alien Tort Claims Act for human rights violations under international law.⁵²

Although the Second Circuit found the possibility for private liability under the ATCA, it did not extend that possibility to all human rights violations.⁵³ As stated in *Kadic*, an individual will only incur liability for individual actions if he or she commits extreme human rights violations.⁵⁴ More precisely, private parties incur liability when they "commit atrocities in the pursuit of genocide or war crimes."⁵⁵ The Court intimated that torture without the color of authority present in *Filartiga* would not rise to the level of a violation of the law of nations.⁵⁶

All of the defendants in the Second Circuit cases were directly involved in the human rights violations. Each either committed the tort personally (as in *Filartiga*) or had direct control over the persons who committed the atrocity (as in *Kadic*). Therefore, the Circuit Court did not address the liability of actors who were only tangentially involved in the two aforementioned decisions.

47 *Id.* at 889.

48 *Id.*

49 *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

50 *Id.*

51 *Id.* at 239.

52 *Id.* at 239-40.

53 *Id.* at 244.

54 *Id.*

55 *Id.*

56 *Id.* at 240, 245.

IV. DECISIONS FROM THE D.C. CIRCUIT

The D.C. Court of Appeals decided *Tel-Oren v. Libyan Arab Republic*⁵⁷ in the midst of the ATCA decisions coming out of the Second Circuit. *Tel-Oren* contains an especially interesting and extensive discussion of the history of the ATCA and the policies underlying its extension to private actors. Judges Robb, Bork, and Edwards each wrote separately discussing the applicability of the ATCA to private individuals.

In *Tel-Oren*, a group of plaintiffs who were victims of a bus bombing in Israel sued the Palestinian Liberation Organization (PLO) under the ATCA for human rights violations in connection with bombing.⁵⁸ While the D.C. Circuit upheld the District Court's dismissal for lack of jurisdiction, each judge arrived at that conclusion by a different analysis.⁵⁹

Judge Edwards accepted the Second Circuit's reasoning in *Filartiga* and established the court's role in defining the law of nations on the evolving basis of what customary international law is today.⁶⁰ While accepting that litigation brought under the ATCA must be evaluated according to modern standards of international law, Edwards was reluctant to extend liability to individuals. Drawing from the *Filartiga* court's opinion that "official" torture was a violation of international law, Edwards decided that there was scant evidence that torture by an individual not acting under color of law was a violation of international law.⁶¹ He also rejected the claim that terrorism was a crime against the law of nations:

While this nation unequivocally condemns all terrorist acts, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus... Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.⁶²

Because of these findings, Edwards affirmed the lower court's dismissal for lack of subject matter jurisdiction.⁶³

Judge Bork voted to affirm the dismissal for different reasons. First, he questioned whether a cause of action even exists under the Alien Tort Claims Act.⁶⁴ Recognizing that the Second Circuit assumed one existed, Judge Bork rejected this assumption and stated that "it is essential that

57 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

58 *Id.* at 776.

59 *See generally Tel-Oren*, 726 F.2d at 774.

60 *Id.* at 789.

61 *Id.* at 791.

62 *Id.* at 795.

63 *Id.* at 798.

64 *Id.* at 801.

there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal."⁶⁵ He subsequently searched through a variety of sources to determine whether an express cause of action existed and found none.⁶⁶ Because there was no cause of action, Judge Bork voted to affirm the decision of the district court to dismiss the suit for lack of subject matter jurisdiction.⁶⁷

Senior Circuit Judge Robb wrote the final opinion for the D.C. Court of Appeals in the *Tel-Oren* case. He dismissed the case based on the political question doctrine.⁶⁸ Finding that issues of terrorism were within the "exclusive domain of the executive and legislative branches," Judge Robb said the case against the PLO for the Israeli bus bombing was nonjusticiable.⁶⁹ Judge Robb voted to affirm the lower court's dismissal for lack of subject matter jurisdiction without the need to define either the scope or the applicability of the ATCA.

V. CONGRESS'S RESPONSE

At least partially in response to the fractured *Tel-Oren* opinion, Congress enacted the Torture Victim Protection Act (TVPA).⁷⁰ The TVPA created a private right of action for individuals injured by torture and extrajudicial killings.⁷¹ This act's passage was motivated by criticism that the ATCA provided no such cause of action. The TVPA was codified in 28 U.S.C. § 1350, as an additional provision of the ATCA.⁷²

The TVPA has significant limitations that make the ATCA remain important to international tort litigation.⁷³ The TVPA only applies to defendants who act under the color of law or official authority.⁷⁴ Additionally, it only applies to torture and murder.⁷⁵ While the TVPA settles some of the ambiguity surrounding the ATCA, many questions about the ATCA remain for federal courts.

The TVPA provides no real comfort for multinational corporations sued for violations of customary international law. While a plaintiff can only sue a

65 *Id.*

66 *Id.* at 808.

67 *Id.*

68 *Id.* at 823.

69 *Id.* at 825.

70 28 U.S.C. § 1350 (2000); see also Justin Lu, Note, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531, 539 (1997).

71 Lu, *supra* note 70, at 539.

72 28 U.S.C. § 1350.

73 Lu, *supra* note 70, at 540.

74 *Id.*

75 28 U.S.C. § 1350.

corporation for torture committed under the color of law, this principle was already established in *Kadic* and the TVPA serves as no additional protection. In addition, there are a number of law of nations violations that the TVPA does not seem to reach by its text.⁷⁶ These violations are still open to court interpretation.⁷⁷ Whether or not these violations will eventually incur private liability will be of incredible importance to future corporate tort litigation.

The more recent developments in customary international law can be divided into two categories: (1) those where liability will be imposed upon individual actors; and (2) those where liability will be imposed only upon official actors. Crimes of genocide, human rights, and war crimes can carry liability for individual actors.⁷⁸ The Second Circuit decided that torture could be actionable only if performed in an official capacity or under the color of state authority.⁷⁹ Classification has not yet occurred for other deeds.⁸⁰ Rape seems to fall under the latter category logically, but the Ninth Circuit has indicated that it fell in the first category if it occurred in connection with any “official” violations of human rights.⁸¹ Forced labor may qualify under the former category, but no court has yet ruled on ATCA applicability to forced labor incidents. This issue will be of particular interest to multinational corporations. Forced labor has been recognized as a human rights violation.⁸² If an act must be committed under the color of law to be a violation of the ATCA, corporations cannot be liable if they do not control those committing the act of forced labor, even if the government of the foreign country engages in forced labor.

76 See *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995). The TVPA requires state action in order for liability to arise under the statute. Any torts committed by private individuals are not covered. Additionally, torts like genocide and war crimes, which the Second Circuit has held to violate the law of nations are not mentioned in the statute. See also *Lu*, *supra* note 70, at 540. The crimes of rape, forced labor, and degradation have been mentioned in litigation under the ATCA but are not mentioned in the TVPA.

77 *Lu*, *supra* note 70, at 548.

78 *Kadic*, 70 F.3d at 241, 243.

79 *Id.* at 245.

80 Courts have generally classified the action currently under litigation. Other crimes that have not brought the level of scrutiny, such as forced labor in *Unocal* or the environmental violations in *Flores*, have not received the classification discussion in the court system. There may be other crimes not currently at the level of international accord to be considered violations of the law of nations, but will receive the consensus in the near future that are not currently classified.

81 *Doe I v. Unocal Corp.*, 395 F.3d 932, 953-955 (9th Cir. 2002), *vacated and reh'g en banc*, 395 F.3d 978 (2003).

82 *Id.* at 946.

VI. THE *Sosa* OPINION AND THE SUPREME COURT'S INTERPRETATION
OF THE ALIEN TORT CLAIMS ACT

Sosa v. Alvarez-Machain arose out of the death of a Drug Enforcement Administration (DEA) agent in Mexico.⁸³ Officials of the DEA in the United States received information implicating Alvarez in the murder. The United States sought and received an indictment against Alvarez for the murder of the DEA agent, and the District Court for the Central District of California issued a warrant for his arrest.⁸⁴ After discussions with the Mexican government to extradite Alvarez to the United States failed, the DEA devised a plan to have Mexican citizens abduct Alvarez and transport him to El Paso, Texas, where the DEA would take him into custody. Sosa was a member of the group that performed the abduction.⁸⁵ Alvarez originally attacked the validity of the indictment based upon the government's conduct in his seizure,⁸⁶ but the Supreme Court ruled that his capture did not affect the legitimacy of the district court's jurisdiction over the case. After the United States presented its case, Alvarez was acquitted and returned to Mexico.⁸⁷ Once in Mexico, Alvarez instituted a suit under the ATCA and the Federal Tort Claims Act (FTCA) against those involved in his kidnapping.⁸⁸

The Supreme Court cited *Filartiga* with approval⁸⁹ and officially declared that the ATCA should be interpreted under "modern" customary international law.⁹⁰ Therefore, courts must determine whether jurisdiction exists based on the modern understanding of international law and the evolving law regarding human rights issues.⁹¹ This put to rest all claims that the ATCA only applied to causes of action that existed under the statute when it passed in 1789. This interpretation of the ATCA also opens the door for litigation based on behavior that has not yet risen to the status of customary international law but that could rise to that level eventually.⁹² For example, while the Second Circuit has ruled that pollution is not violative of customary international law at this point in time, it is possible that a cause of action under the ATCA for damage caused by pollution could arise at a later date.

The *Sosa* defendants claimed partially that the ATCA was merely a jurisdictional statute granting federal district courts the power to hear cases

83 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

84 *Id.* at 697-98.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at 731-32.

90 *Id.* at 725.

91 *Id.*

92 *Id.* at 746. (Scalia, J., concurring).

brought by aliens for tortious actions committed against them. The defendant further claimed that without action by Congress declaring what causes of action existed under the ATCA, no cases could be brought under the statute.⁹³ This argument is very similar to the argument advanced by Judge Bork in his *Tel-Oren* opinion.⁹⁴ The Supreme Court rejected both the defendant's argument and the reasoning of Judge Bork, instead determining that the ATCA was not merely a jurisdictional statute and that the history of the act indicated that causes of action need not be explicitly created by Congress.⁹⁵ Piracy and attacks against ambassadors were causes of action that existed at the time the ATCA was passed. These causes of action were founded in the common law and were not created by Congressional action.⁹⁶ Therefore, liability could arise in additional contexts according to evolving customary international law without Congress declaring such actions to exist under the statute.

The Court also used the decision by the D.C. Court of Appeals in *Tel-Oren* to limit the ATCA and caution the lower courts about expanding its interpretation.⁹⁷ While rejecting Judge Bork's contention that no cause of action existed under the ATCA without an express grant by Congress, the Court found his warning against interpreting the ATCA too broadly to be persuasive.⁹⁸ The Court reiterated Judge Bork's opinion that broad interpretation would lead to uncertain and expansive litigation.⁹⁹

The Court dictated the instances when a new cause of action shall be deemed to have arisen to minimize the uncertainty associated with new causes of action.¹⁰⁰ Customary international law does not encompass conduct unless almost all nations agreed that the behavior at issue was wrongful and deserving of punishment.¹⁰¹ While there need not be unanimous consent among the nations of the world, a majority is not sufficient to make an expansion of international law.¹⁰² The Supreme Court discussed factors to consider in determining whether the behavior in question was a violation of modern international law.¹⁰³ However, the court did not assign weight to

93 *Id.* at 712.

94 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984).

95 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

96 *Id.* at 720–21.

97 *Id.* at 727–28.

98 *Tel-Oren*, 726 F.2d at 813.

99 *Sosa*, 542 U.S. at 727.

100 *Id.* at 732.

101 *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

102 While little is said about the actual number of countries needed to make an action a violation of the law of nations, a reasonable assumption that can be made from Justice Souter's opinion is that some form of "super majority" will be required before an action will rise to a violation of customary international law.

103 *Sosa*, 542 U.S. at 732–33.

the factors or adopt a bright line number of factors that must be present to qualify the conduct as violating international law.¹⁰⁴ Justice Souter said that international agreements provide some indication of a country's willingness to abide by certain standards, but such agreements are not dispositive in establishing whether the conduct violates international law.¹⁰⁵

The ATCA originally covered limited actions that modern international entities all viewed with distaste. For example, piracy was a personal crime all nations punished regardless of the nationality of the pirate. The Court said that new causes of action under the ATCA must have an equivalent consensus among the international community that piracy garnered in 1789.¹⁰⁶ This statement sets a high bar; in *U.S. v. Smith*, decided in 1820, Justice Story said, "There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature."¹⁰⁷

VII. THE COURT'S SILENCE ON INDIVIDUAL LIABILITY UNDER THE ATCA

While the Court in *Sosa* mentioned the consideration of individual liability under the ATCA, it made no definitive ruling with regard to whether it exists.¹⁰⁸ The Supreme Court does not address the scope of the ATCA with regard to non-state actors. The DEA agents in *Sosa* were clearly government actors and were subject to liability under the statute. *Sosa*, one of the Mexican citizens who participated in the kidnapping, derived his power to abduct Alvarez from the DEA, and so can also be considered a state actor.¹⁰⁹ The DEA did authorize *Sosa* to perform the kidnapping.¹¹⁰ The Court mentions private actor liability only once, in footnote 20, without passing judgment on whether private actors would be considered under the "scope of liability" of international law.¹¹¹ The Supreme Court cites both *Tel-Oren* and *Kadic*, where the D.C. Circuit and the Second Circuit reached opposing results in whether private liability exists, making the determination even more difficult for lower courts when trying to interpret the applicability of *Sosa* to cases involving private actors.¹¹² However, since private actors have been held liable on the international stage at least since World War II, it would seem odd if the Supreme Court did not find suffi-

104 *Id.*

105 *Id.* at 735.

106 *Id.* at 732.

107 *U.S. v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820).

108 *Sosa*, 542 U.S. at 732, n.21.

109 Hufbauer, *supra* note 3, at 80.

110 *Sosa*, 542 U.S. at 698.

111 *Id.* at 733, n.20.

112 *Id.*

cient international accord to extend liability to multinational corporations in most settings.¹¹³

VIII. OTHER ISSUES NOT ADDRESSED IN *SOSA* AND STILL OPEN FOR INTERPRETATION

Because of the facts of *Sosa*, the Supreme Court did not have the opportunity to address a few aspects of the ATCA that are very important to corporate liability under it. For instance, because in *Sosa* the DEA agents and the Mexican nationals were directly involved in Alvarez's kidnapping, there is no discussion of whether defendants under the ATCA can be vicariously liable.¹¹⁴ Vicarious liability as a theory is of central importance in corporate cases.¹¹⁵ The Supreme Court similarly did not address issues such as the statute of limitations under the ATCA and exhaustion of remedies.¹¹⁶ Justice Souter acknowledged that the exhaustion of remedies analysis was currently undecided and could be the source of future litigation, but did not address it in the *Sosa* opinion, as the facts did not require the discussion.¹¹⁷

IX. THE SCOPE OF CORPORATE LIABILITY UNDER THE ATCA

It has been argued that courts should use the ATCA to exercise jurisdiction over the activities of multinational corporations in an effort to halt the rising exploitation of foreign laws for the benefit of corporations.¹¹⁸ In practice, courts have been reluctant to adopt this expansive view of the ATCA.¹¹⁹ Without substantial supporting information in international accords, courts will not find a cause of action arising under the ATCA.

While the Second Circuit has taken a moderate approach to interpreting the ATCA in cases involving human rights violations, other circuits have developed different rules of law of when individual liability applies.¹²⁰ For

113 David D. Christensen, Note, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After Sosa v. Alvarez-Machain*, 62 WASH. & LEE L. REV. 1219, 1222–23 (2005).

114 Hufbauer, *supra* note 3, at 81.

115 *Id.*

116 *Id.* at 79–80.

117 *Id.* at 81.

118 Lorelle Londs, Comment, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 208 (2005).

119 *Id.* at 142–43.

120 Marc Rosen, Note, *The Alien Tort Claims Act and The Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT'L & COMP. L. 461, 476–77 (1998).

example, The D.C. Court of Appeals interpreted the statute more narrowly in *Tel-Oren*.¹²¹ This could have a significant impact on corporations and their potential liability for human rights violations where they operate. There have been a few cases since 1980 that have sought to hold corporations liable for human rights violations.¹²²

While most cases on this issue have been decided by the Second Circuit, the Southern District of New York addressed it in the South African Apartheid cases.¹²³ In 2004, the district court sought to apply the decisions of the Second Circuit in ATCA litigation to a case involving several multinational corporations. Plaintiffs sought to hold multinational corporations liable for human rights violations that occurred in South Africa during apartheid.¹²⁴ The court held that the plaintiffs had not presented facts sufficient to show the corporations acted under color of law or engaged in joint action with the apartheid regime.¹²⁵ More specifically, the court found that although the corporations had benefited from the apartheid system (because of access to cheaper labor and power), their actions were not recognized as international law violations, and therefore there was no jurisdiction under the Alien Tort Claims Act.¹²⁶

Bigio v. Coca-Cola Co. stated similar rules.¹²⁷ The Bigios were deprived of their property by the Egyptian government because of their ethnicity.¹²⁸ After the Bigios had been divested of their property, the Egyptian government sold the land to the Coca-Cola Company.¹²⁹ The Second Circuit ruled that an indirect economic benefit is not enough to show a corporation has violated international law.¹³⁰ There was no evidence that Coca-Cola was involved in the property taking or persuaded the government to seize the Bigios' property for the corporation's benefit.¹³¹ The Second Circuit concluded that the plaintiffs failed to plead a law of nations violation under the ATCA.¹³²

121 *Id.* at 477-78.

122 See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc*, 395 F.3d 978 (2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

123 *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

124 *Id.* at 542.

125 *Id.* at 548.

126 *Id.* at 545.

127 *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000).

128 *Id.* at 444.

129 *Id.*

130 *Id.* at 449.

131 *Id.* at 447.

132 *Id.* at 449.

The other Second Circuit decision in this area was *Flores v. Southern Peru Copper Corp.*¹³³ The plaintiffs sued for lung damage suffered because of the corporation's actions in Peru.¹³⁴ The court held that rights to health and life were insufficiently definite to be binding rules of customary international law to form a basis for subject matter jurisdiction under the ATCA.¹³⁵ Judge Cabranes employed language similar to that of Justice Souter in the later *Sosa* opinion when discussing when new causes of action arise under the ATCA.¹³⁶ Judge Cabranes held that the existence of a rule of customary international law against intranational pollution was not established to provide a basis for jurisdiction under the ATCA.¹³⁷

The most recent case on corporate liability under the ATCA is a case recently settled in the Ninth Circuit. In *Doe v. Unocal Corp.*,¹³⁸ Myanmar¹³⁹ citizens sued an American corporation for human rights violations that occurred in connection with the construction of a natural gas pipeline through the Tenasserim region.¹⁴⁰ Unocal is a California corporation that owns twenty-eight percent of the French company involved in the pipeline's construction.¹⁴¹ The Myanmar military was responsible for the security of the construction and provided a variety of other services in connection with this responsibility.¹⁴² The plaintiffs in the lawsuit alleged that the Myanmar military forced them to serve as laborers for the pipeline, threatening them with violence if they refused.¹⁴³ They further testified that the Myanmar military used rape, torture, and murder to ensure compliance with the forced labor program.¹⁴⁴ The plaintiffs complained that Unocal knew of these activities, had the power to prevent them in their control of the military working on the project, and yet did nothing to stop the human rights violations from occurring.¹⁴⁵

The District Court for the Central District of California dismissed or resolved all claims in favor of the defendant corporation.¹⁴⁶ On appeal, the Ninth Circuit reversed in part, and affirmed in part, and remanded the is-

133 *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003), *republished at* 414 F.3d 233 (2d Cir. 2003).

134 *Id.* at 143.

135 *Id.* at 160.

136 *Id.* at 161; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731-33 (2004).

137 *Flores*, 343 F.3d at 161.

138 *Unocal*, 395 F.3d at 932.

139 Myanmar is the current name for the country formerly called Burma.

140 *Id.* at 936.

141 *Id.* at 937.

142 *Id.*

143 *Id.* at 939.

144 *Id.*

145 *Id.* at 939, 956.

146 *Id.* at 943-44.

sue for further proceedings.¹⁴⁷ The Ninth Circuit held that Unocal could be held personally liable for the actions of the Myanmar military under the ATCA if Unocal was found to have “aided or abetted” the military in subjecting Myanmar citizens to forced labor.¹⁴⁸ Since there was evidence that Unocal at least knew of the military’s actions in building the oil pipeline, the Ninth Circuit remanded for further proceedings to establish liability under the ATCA for forced labor, murder, and rape.¹⁴⁹ In December 2004, Unocal announced that the parties in the litigation had reached a settlement. The terms of the settlement were confidential.¹⁵⁰

The Ninth Circuit has gone a step further in the analysis by stating that actual knowledge is not required for a finding of liability under the ATCA.¹⁵¹ If reasonable proof existed that the corporation “should have known” its actions would encourage a state actor to commit a violation of customary international law, it can be charged with constructive knowledge of the event.¹⁵² Lawyers for future plaintiffs may find this constructive knowledge rule easy to apply to a number of situations.¹⁵³ If a court finds a corporation should have known of the influence its actions would have on other state actors, such a finding would go far in establishing that a corporation “aided or abetted” the foreign government in its tortious acts.

It is unclear what level of involvement by Unocal would be required to make the company liable for human rights violations. All previous litigation under the ATCA has been against actors directly involved in the violations. Most defendants were in a position to advance the perpetration of crimes that violated international law. Karadzic was the leader of an insurgent faction that had taken control of a region in Bosnia and declared it the Republic of Srpska.¹⁵⁴ Pena-Irala was the Inspector General of Police.¹⁵⁵ The defendants in *Sosa* were the U.S. Drug Enforcement Agency officers who authorized the kidnapping, as well as the Mexican nationals who physically carried out the kidnapping, of a Mexican citizen who was accused of being connected to the murder of a DEA agent in Mexico.¹⁵⁶ The plaintiffs in *Unocal* premised their claim on Unocal’s position of authority over the pipeline construction.¹⁵⁷

147 *Id.* at 962–63.

148 *Id.* at 947–53.

149 *Id.* at 962–63.

150 Armin Rosencranz & David Louk, *Doe v. Unocal: Holding Corporations Liable for Human Rights Abuses on Their Watch*, 8 *CHAP. L. REV.* 135, 148 (2005).

151 *Unocal*, 395 F.3d at 953.

152 *Id.*

153 Hufbauer, *supra* note 3, at 79.

154 *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995).

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

156 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

157 *Doe I v. Unocal Corp.*, 395 F.3d 932, 936 (9th Cir. 2002), *vacated and reh’g en banc*, 395

The Second Circuit determined that there is no affirmative duty on corporations to prevent human rights violations committed by a foreign government independent of the corporation's actions in the country.¹⁵⁸ In the *Unocal* case, the violations were not divorced from the corporation's presence in the country. In fact, the forced labor came about as a direct result of Unocal's desire to build a natural gas pipeline through the region. The plaintiffs in the case argued that the military, which was present to protect the building of the pipeline, introduced forced labor into the construction.¹⁵⁹ The link between Unocal's presence and the military's actions cannot be severed, according to the plaintiffs.¹⁶⁰

The Ninth Circuit ruled that such interrelation of the activities could impose liability.¹⁶¹ The court did not discuss whether this was in furtherance of the Second Circuit's ruling in *Bigio* or in opposition to it. If the Ninth Circuit chooses to reject the Second Circuit's findings in *Bigio v. Coca-Cola Corp.*, it will set up a conflict between circuits that will likely last until the Supreme Court has the opportunity to define further the scope of the ATCA. Until a Supreme Court decision, the Ninth Circuit could find itself overwhelmed by litigation because it has a more favorable stance toward plaintiffs in cases arising under the ATCA.

It is not yet clear whether mere knowledge of the atrocities is enough to impose liability. If so, the *Unocal* opinion will have harmful effects on multinational corporations and could severely impede global trade and international dealings.¹⁶² Corporations would have to develop divisions of their operations to deal with research and evaluation of a foreign government's history of human rights violations¹⁶³ and would be discouraged from investing in countries with histories of human rights violations.¹⁶⁴ Past actions may be enough to impute knowledge of future violations. This could disrupt corporate development in nations such as China, Saudi Arabia, and various developing countries now entering the global market.¹⁶⁵ Such a result is incompatible with the current global economy. It would be impossible for companies to cut off activities in these countries or refrain from developing business ties with the governments of these countries. However, with the Ninth Circuit's indication that Unocal could have been liable for "aiding and abetting" the Myanmar government in its violations of human rights

F.3d 978 (2003).

158 *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000).

159 *Unocal*, 395 F.3d at 939.

160 *Id.* at 940.

161 *Id.* at 938-42.

162 Hufbauer, *supra* note 3, at 84-85.

163 *Id.* at 85.

164 *Id.* at 84.

165 *Id.* at 85.

by having had knowledge of the violations and refusing to act to minimize or eliminate the violations, corporations will be reluctant to enter countries such as Myanmar for fear of overwhelming liability. As a practical matter, it is unlikely that corporations could exert such influence to stop foreign governments from committing human rights violations.¹⁶⁶

XII. CONCLUSION

Lawsuits against corporations in connection with human rights violations in foreign countries are a recent phenomenon. Practically speaking, courts in only two circuits have had the opportunity to address the issue, the Second Circuit in the Northeast and the Ninth Circuit in the West. The different conclusions reached by these courts will likely increase civil actions against corporations in the future. The New York District Court ruled that corporate actions during the South African Apartheid system were not enough for liability to arise under the ATCA.¹⁶⁷ The Ninth Circuit held that "aiding and abetting" a government in violating human rights could violate international law.¹⁶⁸ The factual inquiry of how much involvement is "too much" will prove too debilitating for lower courts to establish liability guidelines.

The Supreme Court has not yet addressed the issue, only recently defining the scope of the ATCA in *Sosa v. Alvarez-Machain*.¹⁶⁹ In order to assist the Circuits in applying a uniform interpretation of the law of nations to corporations, the Supreme Court will need to address the liability of corporations doing business in countries that commit human rights violations but do not violate the law themselves.

Additionally, the Circuits need to focus on the cautionary language in the *Sosa* opinion to maintain a consistent application of the law across different districts until the Supreme Court can more fully define causes of action that can arise under the ATCA.¹⁷⁰ There is a danger of vastly different decisions arising among the circuits. This will lead to confusion on the part of multinational corporations as to which law they need to follow. Where corporations can be subject to any court's jurisdiction, it will be nearly impossible to comply properly with all the tests if there is no uniform interpretation of when the ATCA will apply. Plaintiffs will undoubtedly use this

166 *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000).

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

168 *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002), *vacated and reh'g en banc*, 395 F.3d 978 (2003).

169 Hufbauer, *supra* note 3, at 79.

170 Christensen, *supra* note 113, at 1268-70.

to their advantage by suing in circuits that have interpreted the statute to its broadest terms.

The ATCA exists to give a forum to aliens for torts committed against them by people who can be found in the United States. The Supreme Court has not given any definite guidance on the issue of a private individual's liability under the ATCA. In this light, Courts should resist the urge to graft moral ideals onto the ATCA in order to exert jurisdiction over certain claims. Courts should restrain themselves to causes of action that arise from violations of laws that a majority of nations declare as violations of international law. Only in doing this can courts remain true to the original intent of the statute and allow the global economy to develop to its fullest potential.

