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## Three Obstacles to the Promotion of Corporate Social Responsibility by Means of the Alien Tort Claims Act: The Sosa Court's Incoherent Conception of the Law of Nations, the "Purposive" Action Requirement for Aiding and Abetting, and the State Action Requirement for Primary Liability

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**THREE OBSTACLES TO THE PROMOTION OF  
CORPORATE SOCIAL RESPONSIBILITY BY MEANS OF  
THE ALIEN TORT CLAIMS ACT: THE SOSA COURT’S  
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I. INTRODUCTION

Plaintiffs have recently unearthed the 1789 Alien Tort Claims Act (“ATCA”) in order to sue corporations for torts committed against aliens that violate “the law of nations or a treaty of the United States.”<sup>1</sup> Most recent scholarship under the ATCA has focused on positively delineating the contours of possible claims in light of history and the norms of international law.<sup>2</sup> In this Article, we take a different, more normative approach—one that analyzes the doctrine in light of emerging principles of corporate social responsibility.

The ATCA is a potentially powerful tool for foreign plaintiffs to challenge the conduct of large, mostly U.S.-based corporations in

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1. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006).

2. A great deal of the scholarship is devoted either to the inquiry into what claims are or are not permissible under the Supreme Court’s decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), *see, e.g.*, Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231 (2008), or to the historical question of the original understanding or meaning of the ATCA, *see, e.g.*, Jordan J. Paust, *The History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT’L L. 249 (2004).

federal court. Such alleged conduct ranges from torture to genocide to unauthorized medical experimentation to wholesale environmental destruction.<sup>3</sup> In response, corporate defendants and some scholars have argued for strictly limiting actionable claims, while other scholars have argued for a nearly universal jurisdiction, with fewer procedural safeguards, to try human rights and environmental abuses in U.S. courts.<sup>4</sup>

However, when seen in light of principles of corporate social responsibility, or CSR, neither of these extreme positions appears tenable. CSR involves both substantive pledges to ethical behavior as well as procedural calls for greater corporate transparency.<sup>5</sup> As to the substantive issues, a too-narrow interpretation of the ATCA undermines CSR in several ways. Suits under the Act can generate publicity regarding corporate activities that are contrary to the corporation's public commitments. The imposition of liability by settlement or judgment, even if it happens in only relatively few cases, may also provide a strong financial incentive for corporations to prevent future liability. As to the procedural issues, ATCA suits may also lead to the discovery of new information not publicly known, effectively policing corporate pledges to transparency.

Equally important is the danger that a too-broad interpretation of the ATCA might itself undermine CSR. If, as some critics claim, plaintiffs may bring ATCA suits for essentially routine natural resource extraction operations in a foreign nation, then the ATCA will not provide any incentive for corporations to meet their stated CSR goals. From a CSR perspective, the ideal ATCA legal framework would—via both the imposition of adverse publicity and

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3. See *infra* notes 40-47 and accompanying text.

4. The sharply divergent positions on the ATCA track differences in views as to the role of international law and especially customary international law in the federal common law. Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 831-34 (1997) (arguing for no role for customary international law), with Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1999).

5. See *infra* Part II.2.

liability and their non-imposition—reward relatively “good” corporate actors and punish relatively “bad” ones.<sup>6</sup>

In light of these concerns, we explore three obstacles to using the ATCA to encourage CSR, each of which relates to a very active legal debate. The first obstacle relates to what kinds of wrongdoing the ATCA makes actionable. The Supreme Court of the United States has held that wrongful acts under the ATCA are not limited to what would have been a violation of the law of nations in the late eighteenth-century.<sup>7</sup> However, the Court also warned courts to be cautious when extending the reach of new claims, and held that any new claims would have to be defined with a “specificity comparable to” the “features” of the eighteenth-century paradigms.<sup>8</sup> The difficulty, from a CSR perspective, is that this ahistorical and incoherent formulation stifles the development of the “law of nations” in U.S. courts by giving those courts virtually unfettered discretion to decline jurisdiction. This is especially true in environmental cases, where courts have been extremely reluctant to allow ATCA suits to proceed.<sup>9</sup>

Even if such suits could proceed in theory, there are additional obstacles to actually holding corporations liable. Corporations often act in concert or in some coordination with local government actors, and often it is the local government actor that is directly involved in the alleged wrongdoing. In such cases, U.S. courts are split over when the corporation may be held liable for aiding and abetting.<sup>10</sup> Some require purposive action and planned wrongdoing. Others

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6. An analogous argument has been made in favor of requiring some wrongful intent as a precondition for the imposition of corporate criminal liability under federal environmental laws, rather than employing an essentially strict liability standard even in the criminal context, as some commentators advocate and as some courts appear to accept. See Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407 (1995) (arguing for the integration of traditional criminal mens rea requirements with federal environmental law).

7. *Sosa*, 542 U.S. at 724-25.

8. *Id.* at 724.

9. For discussions of the treatment of environmental claims under the ATCA, see Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003); Pamela Stephens, *Applying Human Rights Norms to Climate Change: An Elusive Remedy*, 21 COLO. J. INT'L ENVTL. L. & POL'Y 49 (2010).

10. See *infra* Part IV.

require a lesser showing of corporate knowledge. And some prominent commentators and business groups argue that the ATCA does not allow for any aiding and abetting liability at all.<sup>11</sup>

We argue that the courts have broad discretion in fashioning an aiding and abetting standard, and that the historical and normative arguments against any aiding and abetting liability at all are weak. From a CSR perspective, a purposive action or planned wrongdoing requirement has considerable appeal. That standard would allow a range of cases of alleged wrongdoing to proceed to the discovery stage, while distinguishing between relatively “good” and relatively “bad” corporate behavior.

The third obstacle relates to the state action requirement for ATCA liability. According to some courts, any ATCA claim *must* involve alleged wrongdoing by foreign state actors unless the alleged wrongdoing fits into a very narrow category of behavior (most notably, genocide).<sup>12</sup> Some courts, too, require that the foreign state actors themselves acted knowingly or purposively.<sup>13</sup> This requirement has the potential to prevent the ultimate imposition of liability upon any corporate actors who benefitted from state action, because proof of what the state actors knew or intended is often impossible to obtain.<sup>14</sup>

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11. Indeed, some go even further and argue that the ATCA creates no liability for corporations or no liability for anyone for acts committed outside the United States. *See, e.g.*, Brief for Washington Legal Foundation and Allied Educational Foundation as Amici Curiae Support of Petitioner, Pfizer, Inc. v. Abdullahi, 130 S.Ct. 534 (2009).

12. *See infra* Part IV.1.

13. *See infra* Part IV.1.

14. Federal law—including the rules of procedure—make it possible to subpoena records and witnesses located within the United States. FED. R. CIV. P. 45. Successfully executing a subpoena in a foreign country, by contrast, depends on the legal agreements between the United States and the foreign country and the foreign country’s substantive law, and is notoriously difficult, even regarding those foreign countries that have laws and a legal system that are relatively similar to that of the United States. *See* FED. R. CIV. P. 4(f); THE UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL Title 9 §279, *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00279.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00279.htm); U.S. Dep’t of State, Service of Legal Documents Abroad, [http://travel.state.gov/law/info/judicial/judicial\\_680.html](http://travel.state.gov/law/info/judicial/judicial_680.html) (last visited Apr. 14, 2010).

Endorsing the approach recently embraced by the Second Circuit, we argue that the state action requirement should be construed in a modest fashion, allowing suits to proceed where state actors had only passive or no involvement in the alleged wrongdoing.<sup>15</sup> This approach not only is desirable from a CSR perspective but also heeds the U.S. Supreme Court's warning that ATCA liability should not unduly implicate the U.S. courts in issues of foreign relations and international politics.<sup>16</sup>

In sum, we argue that, from a CSR perspective, it would be helpful for the substantive scope of wrongdoing under the ATCA to include at least the most extreme forms of endangerment of human health and the environment through environmental contamination or degradation. In addition, it would be helpful for a low, but significant, threshold to be broadly recognized for corporate aiding and abetting liability, and for the state action requirement to be minimized or de facto discarded. The ATCA is often regarded as a "human rights statute."<sup>17</sup> While there may not be a robust internationally recognized right to a healthy environment as such,<sup>18</sup> international conventions and basic intuition suggest that death and devastation from environmental degradation are matters of basic human rights. Establishing a legal framework under which such actions may lead to liability would go a long way toward promoting international corporate CSR.

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15. See *infra* Part IV.3.

16. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004).

17. See, e.g., Martha Lovejoy, Note, *From Aiding Pirates to Aiding Human Rights Abusers: Translating the Eighteenth-Century Paradigm of the Law of Nations for the Alien Tort Statute*, 12 YALE HUM. RTS. & DEV. L.J. 241, 245 (2009).

18. A general right to a healthy environment is, however, enshrined in such documents as the Organization of African Unity: Banjul Charter on Human and Peoples' Rights art. 24, June 27, 1981, 21 I.L.M. 58, and The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11(1), Nov. 14, 1998, 28 I.L.M. 161. It also appears in the Stockholm Declaration, June 16, 1972, 11 I.L.M. 1416, and the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, 31 I.L.M. 874.

## II. A NORMATIVE PERSPECTIVE ON THE ATCA

### 1. *History and Contours of the Statute*

The ATCA is a deceptively simple statute. It reads in its entirety: “[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.”<sup>19</sup> As the Supreme Court observed in *Sosa v. Alvarez-Machain*, the ATCA is a “legal Lohengrin,” and “no one seems to know whence it came.”<sup>20</sup> Indeed, “[t]here is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section.”<sup>21</sup> Even today, “despite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended has proven elusive.”<sup>22</sup>

Bereft of legislative history or much interpretive case law, the ATCA lay largely dormant until 1980, when in *Filartiga v. Pena-Irala*, the Second Circuit upheld federal jurisdiction over a claim that Americo Norberto Pena-Irala tortured and killed 17-year old Joelito Filartiga in retaliation for Filartiga’s father’s political activities.<sup>23</sup> The fact that both perpetrator and victim were citizens of Paraguay, and the alleged torture occurred in Paraguay, did not dissuade the Second Circuit from asserting jurisdiction under the ATCA.<sup>24</sup> The Court held that:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of

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19. 28 U.S.C. § 1350 (2006).

20. 542 U.S. at 712 (quoting *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975)).

21. *Id.* at 718.

22. *Id.* at 718-19.

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

24. *Id.* at 885.

the international law of human rights, and hence the law of nations.<sup>25</sup>

The Court noted that “[t]he law of nations ‘may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.’”<sup>26</sup> Citing numerous documents such as the United Nations Charter and the Declaration on the Protection of All Persons from Being Subjected to Torture, the Court had no trouble concluding that torture violated the law of nations.<sup>27</sup>

The question, after *Filartiga*, has been the extent to which other “established norms” of international law rise to the level of the “law of nations” sufficient to confer federal jurisdiction under the ATCA. For years, Courts were divided as to whether evolving norms of customary international law could count, or whether the “law of nations” should be interpreted as including only those international law offenses cognizable at the time of the statute’s passage—most notably those offenses described in Blackstone’s *Commentaries* (violation of safe conduct, infringement of the rights of ambassadors, and piracy).<sup>28</sup> In *Tel-Oren v. Libyan Arab Republic*, for example, Judge Edwards argued that “it seems clear beyond cavil that violations of the ‘law of nations’ under section 1350 are not limited to Blackstone’s enumerated offenses,”<sup>29</sup> while Judge Bork argued just the opposite: that Congress, in referring to the “law of nations,” had in mind only the offenses described in Blackstone.<sup>30</sup>

In *Sosa*, the Supreme Court endorsed a cautious, and muddled, middle-ground. At the same time as the Court held that the ATCA was “a jurisdictional statute creating no new causes of action,” it also

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25. *Id.* at 880.

26. *Id.* (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

27. *Id.* at 881-82.

28. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 732 (2004); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 789 (D.C. Cir. 1984).

29. *Tel-Oren*, 726 F.2d at 789.

30. *Id.* at 813-14. For a response to Judge Bork’s “originalist” interpretation, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 238 (1996) (“Not only did the members of the First Congress understand that the law of nations had evolved, they expected that evolution to continue – indeed, they specifically provided for it.”).



held that “the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”<sup>31</sup> These international law violations would not be limited to the three primary offenses described by Blackstone, but those offenses would provide some limit to what was actionable.<sup>32</sup> According to the *Sosa* court, “courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” of violation of safe conduct, infringement of the rights of ambassadors, and piracy.”<sup>33</sup> In other words, while evolving norms of international law could constitute the “law of nations” for ATCA purposes, such norms would have to be “defined with a specificity comparable to” the three paradigm cases described by Blackstone.<sup>34</sup>

What exactly this compromise standard requires is less-than-clear, and its ambiguity has allowed scholars and commentators to offer widely divergent views on which norms are actionable and which are not.<sup>35</sup> The contour of this debate as it relates to environmental claims is taken up in Part II. 2. This debate has largely taken the form of a positive, doctrinal discussion concerning what offenses do or do not violate the “law of nations” based on the degree of specificity and universality of the norm at issue. What is missing from this analysis is any normative focus. What *should* the “law of nations” look like? The current ambiguity and fluidity of the doctrine makes this a prime moment to ask—and begin to answer—this question.

## 2. *The Corporate Focus*

The myopic focus on positively delineating the contours of the doctrine has led many scholars to ignore how the ATCA is actually used. Much of the current focus of ATCA litigation is on multinational corporations’ activities in developing countries. ATCA claims have been brought over allegations that corporations aided and abetted genocide by hiring and supervising members of the army to

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31. See *Sosa*, 542 U.S. at 724.

32. *Id.*

33. *Id.* at 724-25.

34. *Id.* at 732.

35. See Nemeroff, *supra* note 2; Paust, *supra* note 2.

protect a natural gas pipeline,<sup>36</sup> aided and abetted human rights abuses in the course of constructing an oil pipeline,<sup>37</sup> conducted unauthorized medical experimentations on children, leading to numerous deaths,<sup>38</sup> and aided and abetted human rights abuses by the Government of the Sudan related to the development of oil concessions.<sup>39</sup>

Such ATCA litigation directly implicates corporate behavior in regimes—such as developing countries—where local restraints on such behavior are both minimal and easily malleable.<sup>40</sup> In Nigeria, for example, the Petroleum Act—the primary law governing Nigeria’s oil industry—contains vague requirements that oil companies’ actions must be conducted in accordance with “good oil field practice.”<sup>41</sup> It is perhaps no surprise to find well-documented environmental and human rights abuses in connection with Nigerian oil development.<sup>42</sup> Even when there are more stringent standards, Nigerian state agencies have failed to adhere to them, and “[d]espite the glaring presence of oil pollution, there is yet to be any enforcement action by any of the regulatory agencies.”<sup>43</sup>

What litigation under the ATCA often seeks to do, in other words, is to enforce legal norms of behavior above and beyond the enforced law of the host country. It should come as no surprise that corporate actors—the prime beneficiaries of lax local laws—have been among the most vociferous opponents of broad ATCA jurisdiction, or that some commentators have referred to ATCA litigation as “judicial imperialism.”<sup>44</sup> Corporations have traditionally sought maximum

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36. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007).

37. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *dismissed per stipulation*, 403 F.3d 708.

38. *Abdullahi v. Pfizer*, 77 F. App’x 48 (2d Cir. 2003).

39. *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244 (2d Cir. 2008).

40. *See, e.g., Presbyterian*, 582 F.3d 244, *Doe*, 473 F.3d 345; *Abdullahi*, 77 F. App’x 48; *Doe I*, 395 F.3d 932.

41. *See Engobo Emeseh et al., Corporations, CSR and Self-Regulation: What Lessons from the Global Financial Crisis?* 11 GERMAN L.J. 230, 244 (2010).

42. HUMAN RIGHTS WATCH, THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES (1999), *available at* <http://www.hrw.org/en/reports/1999/02/23/price-oil>.

43. *See Emeseh et al., supra* note 41, at 245.

44. *See, e.g., GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 45 (2003); *see also Robert Bork, “Judicial Imperialism,” WALL ST. J.*, June 17, 2003, at A16.

freedom to pursue profits, unencumbered by legal rules. This is simply a result of corporate attempts to reduce the costs of production in order to compete in the global market. As Herman Daly has put it: “[c]osts to the firm are reduced by low pollution control standards, low worker safety standards, low wages and standard of living for workers, and, among others, low health care standards.”<sup>45</sup>

At the same time, however, many major corporations have begun to adopt voluntary codes of conduct under the rubric of “Corporate Social Responsibility,” or “CSR,” in order to demonstrate a commitment to values beyond profit. In fact, many of the same corporations that are defendants in major ATCA cases alleging human rights or other abuses are self-professed leaders in CSR. Chevron, for example, the successor to Unocal after a merger, states that “corporate responsibility is more than just an objective” but is “central to everything we are and is embedded in everything we do.”<sup>46</sup> Chevron’s 2008 Corporate Responsibility Report details numerous global initiatives to mitigate the environmental harm of its projects and improve the lives of indigenous peoples.<sup>47</sup> In terms of human rights, Chevron published a “Human Rights Statement” in which it declared its support for human rights, acknowledges that companies “can play a positive role” in contributing to human rights, and pledges to “work actively to conduct our global operations in a manner consistent with human rights principles applicable to business.”<sup>48</sup> This includes recognizing and respecting the relevant ideals expressed in the Universal Declaration of Human Rights.<sup>49</sup> ExxonMobil, too, has declared its support of human rights, environmental protection, biodiversity, and standards of business conduct that are “consistent with the spirit and intent of the United

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45. See Herman E. Daly, *Problems with Free Trade: Neoclassical and Steady-State Perspectives*, in *TRADE AND THE ENVIRONMENT: LAW, ECONOMICS AND POLICY* 147-48 (Durwood Zaelke et al. eds., 1993).

46. CHEVRON CORP., *DEVELOPING PARTNERSHIPS: 2008 CORPORATE RESPONSIBILITY REPORT* (2009), available at [http://www.chevron.com/globalissues/corporateresponsibility/2008/documents/Chevron\\_CR\\_Report\\_2008.pdf](http://www.chevron.com/globalissues/corporateresponsibility/2008/documents/Chevron_CR_Report_2008.pdf).

47. *Id.*

48. See CHEVRON CORP., *HUMAN RIGHTS STATEMENT*, <http://www.chevron.com/documents/pdf/chevronhumanrightsstatement.pdf> (last visited Apr. 12, 2010).

49. *Id.*

Nations *Universal Declaration of Human Rights*.<sup>50</sup> Royal Dutch Shell, sued for alleged human rights abuses in Nigeria, incorporates human rights and social responsibility “as an integral part of its corporate governance” including “the establishment of a Social Responsibility Committee that reports directly to the board.”<sup>51</sup>

In addition to these commitments to substantive values such as human rights and environmental protection, corporations at the heart of ATCA litigation have made pledges to implement more procedural CSR goals, such as promoting transparency in the way they conduct business. Shell, for example, has become part of the Extractive Industries Transparency Initiative and has supported the Transparency International Business Principles on Countering Bribery and the Principles for Countering Bribery.<sup>52</sup> In its 2008 Report on Revenue Transparency of Oil and Gas Companies, Transparency International labeled Shell a “high” performer in terms of revenue transparency (while ExxonMobil was a “low” performer).<sup>53</sup>

Given these avowed corporate commitments to many of the very norms at stake in ATCA litigation, one might ask why corporations have fought so hard against recognition of these norms as legally binding rules. “[W]hile there appears to be some consensus about the concept, with companies themselves adopting voluntary codes espousing their commitment to the core principles of CSR, there has, however, been a strong resistance to a binding regulatory code for the

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50. See EXXONMOBIL, 2008 CORPORATE CITIZENSHIP REPORT: HIGHLIGHTS 14 (2008), available at [http://www.exxonmobil.com/Corporate/Files/community\\_ccr08\\_highlights.pdf](http://www.exxonmobil.com/Corporate/Files/community_ccr08_highlights.pdf).

51. See Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility*, 38 LAW & SOC'Y REV. 635, 657 (2004).

52. See Article 13, *Shell: Integrating Transparency and Anti-corruption Throughout its Business in Nigeria*, available at <http://www.article13.com/UNGC/Shell%20anti-corruption%20case%20study.pdf> (last visited Apr. 12, 2010).

53. See TRANSPARENCY INTERNATIONAL, 2008 REPORT ON REVENUE TRANSPARENCY OF OIL AND GAS COMPANIES 15 (2008), available at <http://www.transparency.org/content/download/31529/481007>. Revenue transparency refers to public disclosure of payments to governments, of financial information pertaining to operations (such as production costs) and the existence of anti-corruption programs. *Id.* at 10.

activities of [multi-national corporations].”<sup>54</sup> Of course, the corporate commitments may simply be for public relations purposes alone. Some vociferous critics of CSR “charge that CSR is mere ‘window-dressing,’ or empty rhetoric that exists mainly for public relations or marketing purposes, allowing companies to reap the rewards and some business benefits of having a good CSR reputation without keeping CSR promises or bearing the investment costs of doing so.”<sup>55</sup>

But even if CSR reflects sincerely held policies, corporations might nonetheless be averse to facing damages risks whenever such policies have been breached. This aversion may be heightened by the fact that only corporations subject to personal jurisdiction in the United States are subject to the ATCA.<sup>56</sup> Thus, U.S.-based corporations may fear a competitive disadvantage if they are made liable for actions that companies with no U.S. presence, devoid of such legal strictures, remain free to take.<sup>57</sup> In addition, corporations may be wary of the evolution of legally binding norms beyond their current commitments to CSR—an evolution that would be largely outside their control. Customary international law is not a static field.<sup>58</sup> Today’s legitimate business decision may be tomorrow’s human rights abuse.

Despite these fears, numerous scholars have called for far broader federal court jurisdiction to try human rights and environmental

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54. See Emeseh et al., *supra* note 41, at 237.

55. See Joe W. Pitts III, *Corporate Social Responsibility: Current Status and Future Evolution*, 6 RUTGERS J. OF L. & PUB. POL’Y 334, nn. 145-46 (2009).

56. Stephen Kass & Jean McCarroll, *After ‘Sosa’: Claims Under the Alien Tort Claims Act — Part 2*, N.Y.L.J., Oct. 26, 2004 at 5.

57. On the other hand, other nations have already incorporated various Customary international law principles into their national law. Australia, for example, recently passed laws allowing for criminal prosecutions for international law violations such as genocide. See Joanna Kyriakakis, *Australian Prosecution of Corporations for International Crimes*, 5 J. INT’L CRIM. JUST. 809, 810 (2007).

58. See *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (citing H.R. Rep. No. 102-367 at 4 (1991), *reprinted* in 1992 U.S.C.C.A.N. 84, 86) (noting that the ATCA “should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 702 cmt. a (1987) (noting that § 702’s list of the customary international law of human rights “is not necessarily complete, and is not closed”).

abuses.<sup>59</sup> One of the key questions has been the extent to which environmental claims are cognizable as violations of customary international law. The consensus appears to be that environmental claims are cognizable violations, although significant barriers preclude many such claims.<sup>60</sup> The task of some scholars has been to overcome such barriers by developing a notion of environmental “rights” that may either fit into existing customary international law norms or become developed into their own norms of universal application.<sup>61</sup>

Again, whether these scholars are correct as a matter of positive law is not the focus of this paper. Instead, we take a more normative view, using corporate CSR commitments as our starting point to ask what sort of ATCA regime would foster improved CSR—and hence improved environmental and human rights measures “on the ground” in developing countries. As some scholars have put it, “one of the challenges of using the concept of CSR in effectively promoting corporate accountability so far has been the absence of a binding regulatory framework.”<sup>62</sup>

While many corporations favor voluntary CSR commitments alone, a legal regime with some binding rules would certainly be an improvement. For one thing, legally binding rules might reveal whether companies are serious about CSR or simply using it as a public relations ploy. Even if companies are honestly committed to CSR, legally binding rules may work to overcome the classic collective action problem that arises when no individual corporation

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59. See Richard Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 565-66 (2000).

60. See *id.* at 551 (“Although customary international law as applied through ATCA is sufficiently broad to permit some suits for environmental harms, plaintiffs face many obstacles.”); Russell Unger, Note, *Brandishing the Precautionary Principle Through the Alien Tort Claims Act*, 9 N.Y.U. ENVTL. L.J. 638, 647 (2001) (“[D]istrict courts that have heard environmental claims under the ATCA agree that the statute may apply to international environmental torts.”).

61. See, e.g., Sarah M. Morris, *The Intersection of Equal and Environmental Protection: A New Direction for Environmental Alien Tort Claims After Sarei and Sosa*, 41 COLUM. HUM. RTS. L. REV. 275, 279 (2009); Neil A. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 515 (1996).

62. See Emeseh et al., *supra* note 41, at 237.

has an incentive to bind itself to a given norm if other corporations are free to ignore it. Thus, legally binding rules may “push” companies to adopt more robust commitments—and to add commitments not previously adopted. This would have the effect, according to some scholars, of “restor[ing] what is presently an unequal bargaining power in which [multi-national corporations] enjoy substantially more leverage over the environmental policies of developing countries.”<sup>63</sup>

But the effects would likely go far beyond such “fairness” rationales. A more robust ATCA would also “level the playing field” so that corporations—at least those subject to U.S. jurisdiction—are not forced to compete on the basis of lax human rights and environmental protections. Even though, as noted *supra*,<sup>64</sup> the ATCA would not apply to all corporations—limited as it is by U.S. personal jurisdiction—and thus would not preclude at least some corporations from skirting the rules, U.S. personal jurisdiction is at least expansive enough to capture many if not most of the largest multi-national corporations in the natural resource extraction industries that lie at the heart of the associated environmental problems in developing nations.<sup>65</sup> Even beyond the natural resource extraction industries, “there are over 37,000 [multi-national corporations] worldwide, almost all of which are based in or do business in the United States, thus subjecting themselves to the jurisdiction of U.S. federal courts.”<sup>66</sup> Thus, legally binding rules in the U.S. would likely promote economic efficiency by forcing corporations to lower costs through efficiency improvements rather than through externalizing

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63. See James Boeving, *Half Full . . . Or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain* 18 GEO. INT’L ENVTL. L. REV. 109, 114 (2005).

64. See *supra* text accompanying note 57.

65. While many of the largest oil companies in the world (measured in terms of production) are state-owned entities, the *multi*-nationals operating in developing countries are almost all subject to U.S. jurisdiction. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004). Moreover, to the extent that firms subject to U.S. jurisdiction might hesitate before investing in countries where human rights and environmental abuses are unavoidable, this only provides an added incentive to those countries to improve their human rights and environmental practices. Even if companies not subject to U.S. jurisdiction do step in, the resulting financial benefit to the host country will likely be lower due to reduced competition stemming from the absence of firms that are subject to U.S. jurisdiction.

66. See Boeving, *supra* note 63, at 146.

costs—such as environmental and human health costs—onto others in the form of lax standards.<sup>67</sup> Even among those companies with the strongest voluntary CSR commitments, binding rules—and the concomitant ability to conduct discovery—may lead to more effective monitoring and enforcement of whether those commitments are actually being carried out.

One potential criticism would be that efforts to strengthen legally binding rules would simply push companies to funnel their local operations through local subsidiaries—ones beyond the purview of the U.S. courts—even if such local entities do not yet exist. However, such fears are easy to overstate and are often not empirically born-out. For example:

[C]ontrary to the predictions of academics and industry observers, major oil companies have not systematically contracted out the shipping of their oil [in response to heightened levels of liability]. In fact, these companies have moved in the opposite direction, now transporting more crude oil in U.S. waters (both as a percentage and in absolute terms) than they did before the heightened liability imposed in the wake of the Exxon Valdez accident.<sup>68</sup>

Even if corporations do try to contract out their operations, U.S. courts may “pierce the corporate veil” in appropriate situations.<sup>69</sup> This is especially salient because, while local subsidiaries already

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67. See Daly, *supra* note 45, at 156-57 (“Competition can reduce prices in two ways: by increasing efficiency, or by lowering standards. The lower standards refer to the failure to internalize social and environmental costs.”). While this efficiency rationale appears most salient in cases where location is easily changed (e.g., manufacturing), it also certainly plays a role in natural resource extraction, where the location of the operation is tied to the location of the particular resource. Unless the resource is scarce, firms often have a choice of locating in either high-standards or low-standards jurisdictions. The oil extraction industry is a good example. Oil-extraction leases in the United States often go unexploited, in part because of the high cost of extraction relative to developing countries.

68. See Richard R.W. Brooks, *Liability and Organizational Choice*, 45 J. OF LAW & ECON. 91, 93 (2002).

69. See *Fletcher v. Atex Inc.*, 68 F.3d 1451 (2d Cir. 1995).



operate in many developing countries, the real decision-making is often centralized in the parent company.<sup>70</sup>

Thus, it seems undeniable that a more robust ATCA regime will have *some* effect on multi-national corporations (i.e., that corporations will not be able to contract around the law), and that, from a CSR perspective, there would at least be some improvement if there were at least marginal strengthening of legally binding norms. A narrow regime—one that leads to the least amount of liability, minimizing binding rules in favor of purely voluntary efforts—has its obvious flaws. At the very least, minimizing liability minimizes the financial incentive for corporations to adopt robust CSR commitments, exacerbates environmental and human health externalities, and minimizes the ability of private parties to police corporate pledges.

There is, therefore, a strong case that at least *some* enhancement and expansion of the legally binding norms under the ATCA would foster improved CSR.<sup>71</sup> As a doctrinal matter, courts could either incorporate procedural CSR considerations such as transparency—for example, by stripping away any legal sanction gotten by means of bribery, or by making bribery itself actionable if it causes harm—or enforce substantive rules against major environmental harm. Courts could enforce a basic right to life, which could be violated through environmental harm just as it could be violated through direct action such as murder.<sup>72</sup> Courts could even go further, enshrining some

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70. See Emeseh et al., *supra* note 41, at 235-236.

71. The relationship between CSR-improvement and rule-strengthening, however, is likely not purely linear. As discussed more fully in Part IV.1, *infra*, it is likely *not* the case that the strongest legal rules (i.e., the set of legal rules that would lead to the most corporate liability) would lead to the greatest improvement in CSR. Under a maximally robust ATCA regime, corporations may view ATCA liability simply as an unavoidable cost of doing business. If such cost is truly unavoidable, corporations may reduce their precautions—believing they will suffer adverse publicity no matter what they do—which may undermine the incentives to adopt and meet their stated CSR goals.

72. See Case Concerning the Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 91-92 (Sept. 25) (separate opinion of Vice-President Weeramantry) (“The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”); see also Port Hope Environmental Group v. Canada, Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, U.N. Communication

limited right to a healthy environment based on international legal principles that ban extreme environmental abuses such as widespread, long-term, and severe environmental damage.<sup>73</sup> Other principles such as the prohibition against genocide and the prohibition against racial discrimination might also include environmental elements.<sup>74</sup> Eventually, general international environmental norms such as the precautionary principle or sustainable development may develop a set of more concrete rules.<sup>75</sup> As one scholar has put it:

[I]nternational environmental law remains in its infancy and lacks similar opportunities and motivating forces for substantive development [as human rights law]. Human rights law was not only fueled by the horrors of World War I and II and had substantial time to develop internationally before being substantially integrated into U.S. litigation, but it was also free of the positivist limitations [discussed in cases such as *Sosa*].<sup>76</sup>

Thus, while international environmental law, in its current incarnation, exists largely as a set of nascent principles, there is much room for it to grow and expand over time, if given the chance.

The lack of any clear statutory “plain meaning” or unambiguous legislative history behind the ATCA means that efforts to expand the “law of nations” to encompass evolving norms of international

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CCPR/C/17/D/67/1980 (Oct. 27, 1982), available at <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/fd1dce90b1957160c1256abe003484d9?OpenDocument> (recognizing environmental harm as a violation of the right to life contained in Article 6(1) of the International Covenant on Civil and Political Rights, but dismissing petition for failure to exhaust domestic remedies). For a normative view concerning states’ duties to safeguard against environmental hazards, see THE RIGHT TO LIFE IN INTERNATIONAL LAW 310-11 (B.G. Ramcharan ed., 1985).

73. See Herz, *supra* note 59, at 591-592 (2000).

74. *Id.* at 600-615.

75. See Russell Unger, Student Article, *Brandishing the Precautionary Principle Through the Alien Tort Claims Act*, 9 N.Y.U. ENVTL.L.J. 638 (2001) (arguing that the precautionary principle can provide the basis of a claim under the ATCA).

76. See Boevig, *supra* note 63, at 143.

environmental law—and many of the procedural and substantive elements of CSR—would not automatically be beyond the power of the courts. The precise contours of how the ATCA should evolve in this respect are beyond the scope of this paper—and will likely be the subject of years of litigation, assuming courts allow it to happen. Given the normative justifications for at least some marginal expansion of the doctrine, we argue that courts ought to allow some more robust set of environmental claims to be actionable under the ATCA. In other words, they ought to allow the “law of nations” under the ATCA to evolve with—and in turn shape—evolving norms of international environmental law. This will only serve to strengthen CSR commitments “on the ground” in developing countries, especially among the natural resource extraction industries, where CSR is inextricably bound up with environmental protection.<sup>77</sup>

There are, however, numerous obstacles to the evolution of the ATCA in ways that would promote CSR. These obstacles—three of which we explore in this paper—serve to undermine the extent to which corporations may be held liable—or at least face the threat of serious litigation—under the law. Before the ATCA may lead to improved CSR—either by providing incentives to avoid international law violations or by actually incorporating CSR tenets into international law—these obstacles must be addressed.

### III. OBSTACLE 1: AN AHISTORICAL AND INCOHERENT “LAW OF NATIONS”

The first obstacle relates to what kinds of wrongdoing the ATCA makes actionable. As described *supra*,<sup>78</sup> the Supreme Court in *Sosa* has held that wrongful acts under the ATCA are not limited to what would have been a violation of the law of nations in the late eighteenth century.<sup>79</sup> However it also warned courts to be cautious when extending the reach of new claims.<sup>80</sup> This has left the federal courts hopelessly confused—in some cases allowing ATCA actions

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77. See, e.g., Exxon Mobil, Environment Policy, [http://www.exxonmobil.com/corporate/about\\_operations\\_sbc\\_environ.aspx](http://www.exxonmobil.com/corporate/about_operations_sbc_environ.aspx) (last visited Apr. 12, 2010).

78. See *supra* Part II.2.

79. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004).

80. *Id.* at 725.

to proceed on the basis of alleged wrongdoing that clearly would not have been regarded as problematic by Congress in the late 1700s, while in other cases rejecting such expansion. Most saliently for our purposes, the question of whether substantive CSR principles such as avoiding environmental harm—or procedural principles such as transparency—may give rise to a “law of nations” violation remains highly tenuous and uncertain. At least some of the difficulty with extending the “law of nations” to CSR principles resides in the Supreme Court’s formulation of the “law of nations” as being bound to the eighteenth century paradigms at the same time it is not bound.<sup>81</sup> Courts are left with the unenviable—and in some cases impossible—task of deciding whether norms are “defined with a specificity comparable to the features of the 18th-century paradigms.”<sup>82</sup>

It is not even clear what this formulation requires on its face. For example, what exactly are the “features” of the eighteenth century paradigms to which a court must compare the “features” of a modern norm? The Supreme Court in *Sosa* announced that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.”<sup>83</sup> There seem to be two issues that arise from this formulation: one of acceptance and one of content. The “universal acceptance” feature is akin to that described by Blackstone, who wrote that the “law of nations” was considered to be “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”<sup>84</sup> Of course what constituted “universal acceptance” among “civilized” nations was much narrower in the eighteenth century than it is today. Yet today, as then, such universal acceptance is evidenced by treaties, court decisions, custom, and the works of scholars.<sup>85</sup>

At that level of generality, the requirement of universal acceptance is fairly uncontroversial. However the *Sosa* Court, when applying

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81. *See id.* at 694.

82. *Id.* at 725.

83. *See id.* at 732.

84. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES \*66.

85. *Sosa*, 542 U.S. at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

this requirement, essentially collapsed it into the second requirement: that of definiteness or specificity.<sup>86</sup> In *Sosa* itself, the plaintiff, Alvarez, had provided a survey of national constitutions and other authorities for the proposition that “arbitrary” detention violated the law of nations.<sup>87</sup> The Supreme Court dismissed these authorities by stating that the “survey does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality.”<sup>88</sup> While the Court noted that some extremely prolonged arbitrary detentions might violate the law of nations, “it may be harder to say which policies cross that line with the certainty afforded by Blackstone’s three common law offenses.”<sup>89</sup> In sum, the court held that “[w]hatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.”<sup>90</sup>

The general mode of analysis here is clear: until a modern norm reaches some level of certainty or specificity “comparable” to the eighteenth century paradigms, no cause of action will lie. What this assumes, however, is that the law of nations in the eighteenth century was itself specific and certain. This assumption is of course not logically required. A mere requirement of “comparable” specificity does not by itself imply anything about the degree of specificity of the things being compared. Instead it derives from how the Supreme Court formulated the inquiry, essentially conflating the need for “specificity” with the need for a high degree of “certainty.” The Supreme Court’s analysis clearly suggested that there was a high degree of “certainty” afforded by Blackstone’s description of the law of nations, and that until a modern norm reached a similar level of certainty, there could be no modern violation.<sup>91</sup>

This assumption, however, is misplaced. Blackstone himself suggested that while the law of nations was in a general sense immutable, it was as a practical matter neither fixed nor certain and

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86. *Id.* at 725.

87. *See id.* at 736 n.27.

88. *Id.*

89. *Id.* at 737.

90. *Id.* at 738.

91. *Sosa*, 542 U.S. at 737-38.

could be modified according to the necessities of the case.<sup>92</sup> In Blackstone's words, all criminal offenses, of which offenses against the law of nations was part:

[S]hould be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: *though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern.*<sup>93</sup>

In other words, the “features” of the eighteenth century paradigms were meant to be universal, derived from natural law, but not necessarily static over time or uniformly applied across nations. The “law of nations” was thus part of the English common law tradition, under which judges molded general principles to the particular circumstances of the case.<sup>94</sup> It was not reducible to something akin to statutory codes. In the words of Justice Story in *U.S. v. Smith*, a case cited by the *Sosa* majority, “[o]ffences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognised by the common consent of nations.”<sup>95</sup>

In other words, while the Supreme Court in *Sosa* acknowledged that customary international law might evolve over time, it tried to anchor that evolution in a false sense of the “certainty” of the “law of nations” as it had been recognized under the eighteenth century

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92. BLACKSTONE, *supra* note 84, at \*3-4.

93. *Id.* at \*3 (emphasis added).

94. Blackstone himself is explicit that the “law of nations” was part of the common law. BLACKSTONE, *supra* note 84, at \*67 (noting “[i]n arbitrary states this law [of nations], wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any questions arises which is properly the object of it's jurisdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land.”).

95. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820) (holding that the crime of piracy is defined by the law of nations with reasonable certainty).

natural law tradition. Contrary to the Court's assumption, the "law of nations" was meant to be somewhat fluid and evolving from the very beginning. As one scholar has pointed out:

The Founding Generation also expected the law of nations to evolve through decisions by common-law courts as cases were brought before them. The Continental Congress recognized this when it recommended "to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on offences against the law of nations, not contained in the foregoing enumeration."<sup>96</sup>

In the context of the ATCA, the hunt for certainty is no doubt driven by the sheer multiplicity of possible sources of the "law of nations," and a concern that "activist" judges might use the general principles espoused in those sources to hold corporations liable for actions that the corporations did not expect would lead to liability, because those actions were never specifically enumerated as offenses. In other words, the more specifically the offense must be defined, the less power the judiciary has to "create" new offenses. The Supreme Court acknowledged as much when it warned that the rule Alvarez sought in that case would "create an action in federal court . . . for the violation of any limit that the law of any country might place on the authority of its own officers to arrest."<sup>97</sup> But apart from the specifics of the claim before the Court, as a general matter the natural law tradition that gave birth to the ATCA was one in which judges *did* have power—not to "create" new offenses but, as Blackstone makes clear, to "declare" how the offenses were to be applied in a given case.<sup>98</sup>

There is of course an argument that making rulings pursuant to this conception of natural law, as reflected in federal common law, has been unavailable to the federal courts since *Erie Railroad Co. v.*

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96. Dodge, *supra* note 30, at 242 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789 1137 (Gaillard Hunt ed., 1912)). Moreover, "[n]ot only did the members of the First Congress understand that the law of nations had evolved, they expected that evolution to continue -- indeed, they specifically provided for it." *Id.* at 238.

97. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004).

98. Dodge, *supra* note 30, at 242-43.

*Tompkins*.<sup>99</sup> The Supreme Court itself cautioned that “a more expansive common law power” related to the ATCA “might not be” consistent with *Erie*.<sup>100</sup> At the same time, however, the Supreme Court acknowledged that *some* common law power does remain in the federal judiciary: “We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”<sup>101</sup> Where precisely is the line between a common law power consistent with *Erie* and a common law power inconsistent with that case is left largely to the imagination. Certainly *Erie* itself did not announce any principle by which courts could develop some limited set of common law norms.<sup>102</sup> Courts are left to grapple with the fact that the “law of nations” (and its modern incarnation in customary international law) incontrovertibly belongs to the common law tradition,<sup>103</sup> yet at the same time, courts are cautioned that the common law development of the “law of nations” remains beyond the purview of U.S. courts unless and until some arbitrary threshold of “specificity” is crossed.<sup>104</sup>

The arbitrary nature of the specificity inquiry is only highlighted by the essentially standard-less task it sets out for the courts. What level of “specificity” is “comparable” to, for example, the offence of piracy, which Blackstone claims “consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there”?<sup>105</sup> As an analytical exercise, this question seems impossible to answer in any remotely objective way. For example, some scholars have attempted

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99. See Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 122 (2004).

100. *Sosa*, 542 U.S. at 731 n.19.

101. *Id.* at 730.

102. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding famously that “[t]here is no federal general common law.”).

103. Eric Engle, *Alvarez-Machain v. United States and Alvarez-Machain v. Sosa: The Brooding Omnipresence of Natural Law*, 13 WILLAMETTE J. INT’L L. & DISPUTE RES. 149, 161 (2005) (“This is still true today: International customary law is a part of the common law.”).

104. *Sosa*, 542 U.S. at 725.

105. BLACKSTONE, *supra* note 84, at \*72.



to delineate the salient features of piracy, setting forth the features that seemed to animate the *Sosa* court.<sup>106</sup> Along these lines, such scholars argue that *Sosa*'s historical test may put most if not all modern human rights offenses beyond the purview of the courts.<sup>107</sup> Yet the *Sosa* court itself, at least rhetorically, would not go this far.<sup>108</sup> What, then, does *Sosa* require? It appears that what the *Sosa* standard accomplishes—akin to the “political question” and other doctrines discussed *infra*—is to give courts a free-wheeling basis to deny jurisdiction: to give courts virtually unchecked discretionary power to *decline* to hear a case. Whether such discretionary powers are consistent with the Constitution is not the focus of this paper. Our point is simply that the fundamentally incoherent nature of the “law of nations” inquiry—one where courts must anchor the “law of nations” in certain eighteenth century paradigms while simultaneously ignoring the way those paradigms were understood at the time—has become a serious impediment to using the ATCA to strengthen corporate environmental CSR.

This is not to say that judges should be free to adopt whatever positive legal standards they wish, so long as it arguably comports with some sweet-sounding general principle such as “precaution” or “sustainable development.” Between the specificity straightjacket and the tempting promiscuity of judicial whim lies a middle-ground that has long been occupied by courts: that of the gradual accretion of norms and standards that develop through ever more-contextualized interpretations to guide future courts. Such a task is certainly more daunting in the international context, but it is by no means impossible. Our claim in this paper is simply that such a process should not be thwarted or made overly onerous by imposing incoherent standards that allow courts to decline jurisdiction in virtually any case.

Indeed, court decisions thus far have born-out the fear that the “law of nations” test that was crystallized by the *Sosa* court may leave precious little room for the sort of evolution contemplated by the

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106. See Kontorovich, *supra* note 99, at 136-53.

107. *Id.*

108. 542 U.S. at 729 (“the 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.”).

drafters of the statute.<sup>109</sup> Certainly in the environmental context, courts have declined jurisdiction in many cases by adopting a quite narrow view of how specific the “law of nations” must be before an action will lie.<sup>110</sup> In *Amlon Metals, Inc. v. FMC Corp.*, for example, which was “the first case to squarely address international environmental law in the context of the ATS,”<sup>111</sup> the district court held that the plaintiffs, suing over an international shipment of hazardous waste under the Stockholm Principles, did not “set forth any specific proscriptions, but rather refer[red] only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders.”<sup>112</sup>

Later cases have largely followed this pattern. In *Beanal v. Freeport-McMoran*, the Fifth Circuit, in response to a claim of environmental damage that included hollowing mountains, stripping forests, and polluting rivers, held that the “sources of international law cited by Beanal and the *amici* merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”<sup>113</sup> In *Sarei v. Rio Tinto PLC*, the Central District of California, in response to claims of widespread environmental damage, including deaths, from the defendant’s mining operations, held that despite numerous multinational agreements and treaties describing a right to life and health, “the court cannot conclude that the rights are sufficiently ‘specific’ that their alleged violation states a claim under the ATCA, or that nations universally recognize they can be violated by perpetrating environmental harm.”<sup>114</sup> The court also held that the principle of sustainable development was insufficiently specific to give rise to a legal obligation.<sup>115</sup> While the court did hold that plaintiffs could plead a violation of the United Nations

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109. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991).

110. *Id.* at 671.

111. See Boeving, *supra* note 63, at 118.

112. *Amlon Metals*, 775 F. Supp. at 671.

113. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

114. *Sarei v. Rio Tinto, PLC*, 221 F. Supp. 2d 1116, 1158, 1124-26 (C.D. Cal. 2002), *aff’d in part, rev’d in part*, 487 F.3d 1193 (9th Cir. 2007).

115. *Id.* at 1160-61.

Convention on the Law of the Sea,<sup>116</sup> it then dismissed this claim under the act of state doctrine—a dismissal that was reversed by a Ninth Circuit panel,<sup>117</sup> whose opinion was then reheard *en banc*<sup>118</sup> for a resolution of the issue of whether exhaustion of local remedies should be demanded.<sup>119</sup> All in all, even in the Ninth Circuit, there has hardly been any judicial attempt to recognize—let alone develop—international environmental law under the ATCA.

Scholars have also taken note that the narrow way in which the “law of nations” is defined will have a profound impact on developing international environmental law under the ATCA.<sup>120</sup> “Although *Sosa* did not altogether prohibit federal courts from generating new federal law based on evolving international norms, plaintiffs face a very heavy burden in trying to sue corporations under the ATS for violations of environmental norms or treaties.”<sup>121</sup> This “heavy burden”—combined with the doctrinal vagueness imposed by *Sosa*—erects a significant barrier to encouraging greater CSR through the ATCA.

#### IV. OBSTACLES 2 AND 3: UNSETTLED AIDING AND ABETTING AND STATE ACTION RULES

##### A. *The Doctrinal Debate*

Apart from what counts as a violation of the “law of nations” under *Sosa*, the federal courts have struggled with two related questions that have a profound impact on CSR. The first question is: where the bulk or core of the allegedly wrongful conduct was committed by a private (usually corporate) actor, how much, if any, associated state action is required for an action to proceed against the private actor?

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116. *Id.* at 1161-62.

117. *See Sarei v. Rio Tinto, PLC*, 487 F.3d at 1197.

118. *See Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008).

119. *See id.*

120. *See, e.g.*, Pauline Abadie, Comment, *A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations*, 34 GOLDEN GATE U.L. REV. 745, 761-68 (2004).

121. James Donnelly-Saalfeld, Student Article, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria Have Not Been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 371, 397-98 (2009).

The second question is: where the bulk or core of the allegedly wrongful conduct was committed by a (foreign) state actor, how much, if any, associated private corporate action is required for an action to proceed against the private corporate actor? The first question is typically subsumed under the label of a “state action” requirement for an ATCA claim. The second question is typically subsumed under the question of whether and when the ATCA allows for aiding and abetting liability.

Figures One and Two map two possible visions of the different alternatives in terms of the possible legal regimes and their effect in promoting corporate social responsibility. At the far left side of both figures is a regime where the ATCA is understood to not allow any corporate liability, and hence would have no bearing on CSR. In both visions, the least CSR-friendly legal regimes (no corporate liability, no aiding and abetting liability) are the same; the differences, as discussed below, relate to the ordering of the two, most CSR-friendly legal regimes. High threshold is used as a rough or crude way of expressing a legal threshold that would exclude some but not all potential plaintiffs, whereas a low threshold would allow most, if not all, potential plaintiffs to pursue claims.

**FIGURE ONE**

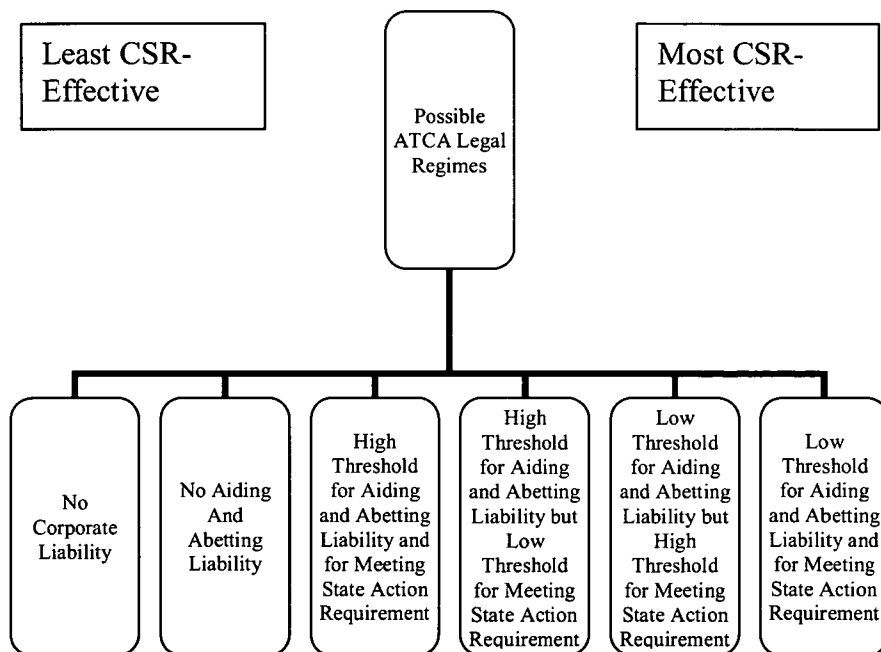
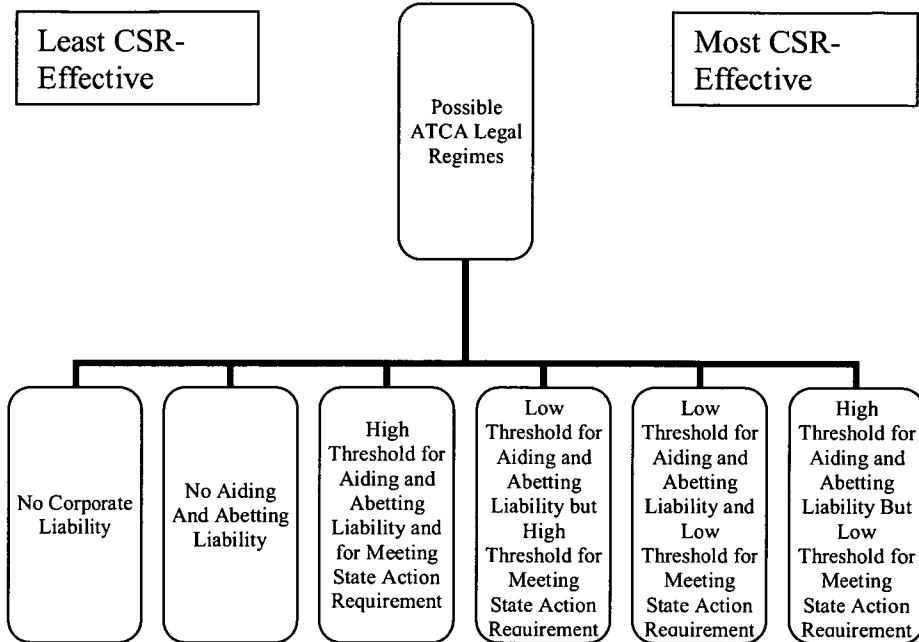


FIGURE TWO



The position that the ATCA should not apply at all to corporations—the far left position on both Figures One and Two—builds on a *Sosa*-like notion that corporations generally have not been the subject of international law. In terms of actual judicial decisions, it is Judge Korman’s dissent in *Khulumani v. Barclay International Bank* that most clearly adopts this view:

There is a significant basis for distinguishing between personal and corporate liability. Where the private actor is an individual, he is held liable for acts which he has committed and for which he bears moral responsibility. On the other hand, “legal entities, as legal abstractions can neither think nor act as human beings, and what is legally ascribed to them is the resulting harm produced by individual conduct performed in the name or for the benefit

of those participating in them or sharing in their benefits.”<sup>122</sup>

However, even Judge Korman acknowledged that post-apartheid international law (and law generally) extended responsibility to corporations as well as individuals, and rejected the distinction as largely artificial and antiquated for purposes of the imposition of liability.<sup>123</sup> Judge Korman’s primary point appears to be that corporate liability should not be retroactively applied to the era of apartheid’s founding, even though it may be applied now. In his words, “the issue here is not whether policy considerations favor (or disfavor) corporate responsibility for violations of international law. . . . Instead, it involves a determination of what the law was during the relevant period.”<sup>124</sup>

*Sosa* specifically left open the question of corporate liability under the ATCA,<sup>125</sup> but the argument has not been embraced by any court, and for good reason. There simply is no principled basis for distinguishing between private non-corporate actors and private corporate actors for purposes of the ATCA. Civil liability—and that is what the ATCA about—is uncontroversially applied to corporate actors by the U.S. courts on much the same terms it is applied to non-corporate actors.<sup>126</sup> Moreover, it is clear that, from its enactment, the ATCA was intended to apply and was applied to some private actors such as pirates.<sup>127</sup> It is of course true that corporations act through individuals, but these individuals often are not subject to the personal jurisdiction of American courts and/or lack the resources to compensate victims;<sup>128</sup> thus, limiting ATCA suits to ones against the individual corporate employees or officers responsible for corporate wrongs in effect would render the ATCA a statute that creates rights

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122. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 321 (2d Cir. 2007) (Korman, J., dissenting) (citation omitted).

123. *See generally id.* at 292-337.

124. *See id.* at 325 (citation omitted).

125. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

126. Audrey Koecher, Note, *Corporate Accountability for Environmental Human Rights Abuse in Developing Nations: Making the Case for Punitive Damages under the Alien Tort Claims Act*, 17 J. TRANSNAT’L L. & POL’Y 151, 156 (2007).

127. For a good historical discussion of the ATCA that makes this point at length, see Lovejoy, *supra* note 17.

128. *Id.* at 246-47.

to redress but no effective means of achieving redress. Such a statutory reading would be directly contrary to the maxim that legislatures should be assumed to intend that statutory language have real meaning. Indeed, U.S. law treats corporations like other private persons even where doing so seems to entail an extreme anthropomorphization of the corporate “person,” as in *Citizens United v. FEC*, where the United States Supreme Court conferred on corporations as great, or perhaps greater, rights to speech and political association via the making of campaign contributions as private individuals.<sup>129</sup>

The second box from the left in both Figures One and Two reflects an arguably more cogent view than the one that there is no corporate liability under the ATCA—that is, the view that there is no aiding and abetting liability for any private actor, corporate or otherwise, under the statute. In practice, this view would exclude liability for the large number of cases where there is substantial involvement of some kind by state or quasi-state actors or non-corporate private actors in the alleged wrongdoing. No Court of Appeals has squarely embraced the no-aiding-and-abetting-liability position, but several prominent academics, relying in substantial part on the United States Supreme Court decision in *Central Bank of Denver v. First Interstate Bank of Denver*, have done so.<sup>130</sup> In *Central Bank*, a divided Court held that the federal securities laws do not implicitly create private aiding and abetting liability for securities fraud, even though there is criminal aiding and abetting liability.<sup>131</sup> Jack Goldsmith, Curtis Bradley, and David Moore have argued that the *Central Bank* plus *Sosa* framework does and should operate to exclude liability for aiding and abetting primary violations of the ATCA.<sup>132</sup> They argue that:

As an initial matter, it is important to recall that the text of the ATS refers to torts “committed” in violation of international law. There is no suggestion in this language

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129. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010).

130. See, e.g., Curtis A. Bradley et al., *Sosa, Customary International Law & the Continuing Relevance of Erie*, 120 HARV. L. REV 869, 926-27 (2007).

131. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 180-85 (1994).

132. Bradley et al., *supra* note 130.

of third-party liability for those who facilitate the commission of such torts. . . . The analysis in *Sosa* suggests a number of reasons why aiding and abetting liability should not be read into the ATS. The Court repeatedly emphasized that, consistent with the limited nature of the ATS and the separation of powers constraints on the federal courts, only a “modest number” of claims could be brought under the ATS without further congressional authorization. The Court further counseled the lower courts to exercise “great caution” in recognizing new claims. And the Court emphasized that “innovative” interpretations should be left to Congress. As we noted earlier, however, allowing corporate aiding and abetting liability would significantly expand ATS litigation. It would also require courts to exercise significant policy judgment normally reserved to the legislature, such as fashioning the precise standards for what constitutes aiding and abetting.

For similar reasons, the Supreme Court declined to imply aiding and abetting liability in civil cases brought under the securities fraud statute. In *Central Bank of Denver v. First Interstate Bank of Denver*, the Court reasoned that allowing aiding and abetting liability for securities fraud would expand litigation in a way that would implicate policy tradeoffs best resolved by Congress. The Court also reasoned that Congress’s authorization of aiding and abetting liability in the criminal context did not suggest a general acceptance of that type of liability in the civil context. Finally, the Court noted the substantial uncertainties associated with the standard for aiding and abetting.<sup>133</sup>

As we argue above, the *Sosa* case and hence *Sosa* framework is essentially incoherent.<sup>134</sup> *Sosa* may teach us that there should not be “too many” ATCA claims allowed, but it is possible to translate that vague teaching into the position that generally aiding and abetting claims should be allowed if the primary violations are well-founded

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133. *Id.* at 926-27 (citations omitted).

134. *See supra* Part III.



in international law *or* the position that there should be a reasonably high threshold for what constitutes aiding and abetting under the ATCA *or* the position that Clark, Goldsmith, and Moore endorse<sup>135</sup>—that there should be no aiding and abetting liability under the ATCA.

With respect to *Central Bank*, a key point is that, normatively, the decision may well be “wrong”: it was a 5-4 decision that overruled a large body of lower court precedent and went against the prevailing recommendations of expert regulators and that has been subject to trenchant criticisms by commentators, particularly in the wake of Enron and now Lehman Brothers and other failures of financial institutions that arguably were aided and abetted by key private actors.<sup>136</sup> Moreover, the very brevity of the ATCA—the fact that it is a single sentence—suggests that Congress intended the courts to work out the shape of ATCA liability in a common law fashion, rather than relying on direct legislative direction (as we argue *supra*).<sup>137</sup> That, plus a historical context in which aiding and abetting liability generally was recognized and specifically discussed with respect to the ATCA,<sup>138</sup>—distinguish *Central Bank*, even assuming *Central Bank* was correctly decided. As Judge Hall explained in his concurrence in *Khulumani*:

In *Central Bank*, the Supreme Court held that the Securities Acts of 1933 and 1934 did not encompass aiding and abetting liability. Noting that the Acts provided for some forms of “indirect” liability, the Supreme Court reasoned that “Congress knew how to impose aiding and abetting liability when it chose to do so.” This same reasoning cannot apply to the ATCA, whose textual brevity and dearth of legislative history leave us with inconclusive evidence of Congress’s intent to include or exclude aiding and abetting liability. It would appear, however, that the

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135. Bradley et al., *supra* note 130 at 926-27.

136. See Celia R. Taylor, *Reconsidering Central Bank of Denver after Enron and Sarbanes-Oxley*, 71 MO. L. REV. 367 (2006); George Cohen et al., *Have US Regulators Been Soft on Banks Over Structured Products? Yes*, INT’L FIN. L. REV., July 2006, at 13, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1523712](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1523712).

137. See *supra* Part III.

138. *Khulumani v. Barclay Nat’l Bank., Ltd.*, 504 F.3d 254, 288 n.5 (2d Cir. 2007) (Hall, J., concurring).

Founding Generation nevertheless understood the ATCA encompassed aiding and abetting liability. For example, in Attorney General Bradford's 1795 opinion, *Breach of Neutrality*, he opined that the ATCA allowed civil suits for damages for those who had "taken part" in violating international law. In fact, Bradford's opinion specifically covered those American citizens who "voluntarily joined, conducted, *aided and abetted*" the French fleet in their attack on a British settlement. Attorney General Bradford furthermore referred to an April 1793 Proclamation issued by George Washington which declared that "all those who should render themselves liable to punishment under the laws of nations, by committing, aiding or abetting hostilities" against the merchants of foreign nations at peace with the United States would not receive the protection of the United States. Cases from that era, moreover, indicate that secondary liability was recognized as an established part of the federal common law.<sup>139</sup>

Moving from left to right, the next box on both Figures One and Two reflects what might be thought of as a near no-win-ever position for plaintiffs seeking to sue corporations under the ATCA. There is a kind of "catch-22" inherent in any legal regime that sets a high or demanding threshold for meeting *both* the state action and aiding and abetting requirements. If the bar is set high for state action, and that high threshold is met in a particular case by implication, then, by implication, private actors will have had a relatively modest or attenuated role in the allegedly wrongful conduct. Thus, it will be between difficult and impossible for plaintiffs to meet a high or demanding threshold for aiding and abetting liability. Conversely, if the bar is set high for aiding and abetting then, by implication, private actors will have had a very substantial and perhaps central role in the allegedly wrongful conduct. Thus, it will be very difficult for a plaintiff to meet a high or demanding threshold for state action. Where the private corporate and state actors operate absolutely in tandem, sharing equally in the wrongful conduct, this catch-22 would be avoided; indeed, in such a case, both the private and state actors

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139. *Id.* (Hall, J., concurring) (citations omitted).

could be considered primary violators of the ATCA, so aiding and abetting as a legal category would be irrelevant. But such cases presumably are and will be rare, if there are any such cases at all.

When we move to the two boxes farthest to the right side of Figures One and Two, there are differences in ordering. Figure One offers what we would take to be the most intuitive ordering—one in which the “best” or “friendliest” position from a CSR perspective would be one in which there is both a low threshold for aiding and abetting and for state action, as the barriers to suits against corporations would be minimized. Figure Two reflects what we believe to be the correct ordering, if not the immediately intuitive one—that is, one in which the most CSR-effective regime marries a high threshold for aiding and abetting liability with a low threshold for meeting the state action requirement. In the sections below, we explain why a low threshold for the state action requirement is always desirable, and why it is at least arguable that, counterintuitively, a high threshold for aiding and abetting liability best advances the goals of CSR.

### *B. The Case for a Purposive Action Requirement for Aiding and Abetting Liability*

The courts have articulated at least two distinct versions of the aiding and abetting requirement for ATCA liability. In the first version, which we call the “knowledge test,” a corporate party may be deemed to have aided and abetted a violation of the ATCA if it knowingly provided substantial assistance to the violator.<sup>140</sup> In the second version, which we call the purpose test, a corporate party may be deemed to have aided and abetted a violation of the ATCA if it provided substantial assistance to the violator with the intent or purpose of furthering the committing of the violation itself.<sup>141</sup> In the framework of Figures One and Two, the knowledge test is the low threshold for aiding and abetting liability, and the purpose test is the high threshold for aiding and abetting liability.

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140. *See, e.g.,* *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1356 (N.D. Ga. 2002).

141. *See, e.g.,* *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 259 (2d Cir. 2008).

The knowledge test has been formulated as “[i] knowing [ii] encouragement [iii] that facilitated the substantive violation.”<sup>142</sup> The purpose test has been formulated as providing that:

[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.<sup>143</sup>

While it would certainly be semantically plausible to conflate the tests and argue that someone who does something knowing it will help a certain action takes places thereby acts with the purpose of facilitating the action, the knowledge/purpose dichotomy captures a real, intuitive difference: the difference between a corporation that does not specifically intend to assist, for example, mass poisoning or torture as such, but knows that it is financially assisting a state actor that may in fact decide to commit the mass poisoning or torture, and the corporation that specifically intends—specifically *wants*—the state actor to use the assistance to commit mass poisoning or torture.

Various court opinions suggest that, as a doctrinal matter, the choice between the knowledge and purpose tests depends on the choice of the source of law to be used for the determination of what constitutes the threshold for aiding and abetting liability. Two notable opinions in this regard are Judge Hall’s and Judge Katzmann’s concurrences in *Khulumani*.<sup>144</sup> The crux of the consolidated lawsuits at issue in *Khulumani* was that fifty U.S. and foreign corporations had aided and abetted atrocities committed by the South African government during apartheid (from 1948 until 1991) by providing oil, technology and capital to the South African government, which then used the resources in part to further its policies of oppression and persecution of the African majority.<sup>145</sup> The Second Circuit reversed the district court’s dismissal of the

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142. *Id.* at 258 (citations omitted).

143. *Id.* at 259.

144. *See Khulumani*, 504 F.3d at 264-292.

145. *See In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 545 (S.D.N.Y. 2004).

aiding and abetting claims, but the two judges voting for the reversal differed as to the source of law the judge believed to be the source of the applicable aiding and abetting standard.<sup>146</sup> Judge Katzmann argued that international law provides the basis for any aiding and abetting standards, and that international law dictated a purpose test, not a knowledge test.<sup>147</sup> By contrast, Judge Hall argued that domestic law—in effect, federal common law—determined the standard for aiding and abetting liability and that, under section 876 of the Restatement (Second) of Torts, the knowledge test was the correct tests for the aiding and abetting of alleged ATCA violations.<sup>148</sup> Similarly, when the Second Circuit subsequently established the purpose test as the definitive test within the Circuit, the Court tied its decision to its choice of international law as the appropriate source for the standard for the aiding and abetting of ATCA violations.<sup>149</sup>

It would not seem to make much sense, however, to tie the choice of aiding and abetting standard to the choice of the source of law. For one thing, both the federal common law and international law—and especially customary international law—are amorphous enough that one probably could find a range of standards dictated by either of them; ask any law student or lawyer and they will surely tell you that they cannot describe the content of either with any specificity. Moreover, to make matters even more confusing, one could plausibly argue that international law is a legitimate source for a court to look to in making a decision under federal common law.

From a normative perspective, one might want to choose between the knowledge and the purpose test by asking which test would better advance CSR goals. Assuming that is the relevant normative framework (as we do here), it might at first seem that the knowledge test would be better than the purpose test. Under a knowledge test, more corporations in more settings would be exposed to possible liability (and the disclosures attendant litigation) than would be the case under the more demanding purpose test. Even in a knowledge test regime, corporations of course could go out of their way not to

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146. *Khulumani*, 504 F.3d at 260.

147. *Id.* at 277 (Katzmann, J., concurring).

148. *Id.* at 287-89 (Hall, J., concurring).

149. *Presbyterian Church of Sudan v. Talisman*, 582 F.3d 244, 259 (2d Cir. 2008) (“[A]pplying international law, we hold that the *mens rea* standard for aiding and abetting liability for ATS actions is purpose rather than knowledge alone.”).

know what state and other actors do, but it might be difficult for them to deny knowledge, and courts might well treat intentional refusal to learn of certain activities by the relevant state or non-corporate actor as equivalent to knowledge. In effect, a knowledge test means that a corporation cannot stay out of court by simply saying it was just doing business and did not want, for example, government agents to dump waste, burn villages, or kill environmental activists but simply wanted to peacefully proceed with its oil field development.

The knowledge test, however, may be less effective in promoting CSR precisely because it would make ATCA suits too easy to file and pursue. It would be too potent. A wide range of corporations doing business in certain countries where human rights and environmental abuses are commonplace would be exposed to possible suit. Indeed, in many cases, corporations may feel that there would be no way they could do business in certain countries without exposing themselves to ATCA claims. As a result, they may feel that there is no advantage in taking actions to avoid ATCA liability—actions such as encouraging state and non-state actors with whom they work to engage in more humane and/or environmentally sound practices than they otherwise might choose.

The large number of suits that a knowledge test might well make possible also may have the effect of dampening the strength of the signal an ATCA suit can send to the constituencies upon which the CSR movement relies for its impact—namely shareholders, investors in social responsibility funds, and consumers. Where the standard for aiding and abetting liability is so broad that it does not exclude corporations that (relatively speaking) try to discourage abusive behavior by affiliated state or other actors and throws such companies into the same cauldron of shame as companies that happily accept or actively encourage the most horrendous behavior, then the fact of an ATCA suit and litigation might not communicate that much information to the relevant CSR constituencies about any given corporation in particular. The impact of ATCA litigation would thus be lessened, and in turn, the *ex ante* incentives of corporations to take measures to avoid possible ATCA litigation and liability would be further reduced.

The facts in the Second Circuit case of *Presbyterian Church* illustrate this point well. In that case, the core allegations were that an oil company aided and abetted human rights abuses by the government of Sudan, including abuses associated with the forced

clearing of the population near areas of oil exploration and development.<sup>150</sup> The corporation emphasized that it had repeatedly urged the Sudanese military not to engage in human rights abuses.<sup>151</sup> As the Second Circuit suggested, the corporation's efforts actually worsened their legal position under a knowledge test while aiding their legal position under a purpose test:

The reports that plaintiffs rely upon to prove knowledge also show that Greater Nile security personnel and GNPOC workers were upset by the Government's actions and possible attacks on civilians. For example, several reports address the company's efforts to relieve the plight of internally displaced persons, which included stockpiling tons of relief supplies and distributing food, water, medicine, and mosquito nets.<sup>152</sup>

There is of course a risk that under a purpose test regime, corporations will try to ATCA-proof themselves by making minimal efforts to protest or mitigate wrongdoing by state actors or non-state actors with whom they are affiliated in a foreign country. But minimal efforts may be better than no efforts—which could well be the product of a knowledge regime—and plaintiffs could allege and seek to prove that the protest or mitigation efforts were simply a sham and that the corporation intended to aid the wrongdoing. It might well be hard for plaintiffs to make such a showing as an evidentiary matter, but as long as they had some basis for alleging the corporation acted with the requisite (bad) purpose, the plaintiffs would at least have the opportunity to seek discovery and possibly bring the corporation's true motivations to light.

The final problem with the knowledge test relates to an important constituency—the federal courts themselves. The federal courts have a range of ways of avoiding ATCA suits that have nothing to do with the standard for an actionable violation under *Sosa*, the standard for aiding and abetting, or the state action requirement: these include invocation of the political question doctrine, a stringent application of personal jurisdiction requirements, and perhaps, above all, the

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150. *Id.* at 250.

151. *Id.*

152. *Id.* at 264.

flexible doctrine of *forum non conveniens*.<sup>153</sup> A test that makes aiding and abetting cases too easy to plead adequately under the ATCA may produce an indiscriminate backlash on the part of the courts, in which the courts simply shut the doors to ATCA litigation using the range of tools available to them to do so.

*C. The Case for No State Action Requirement or a Low-Threshold State Action Requirement*

The aiding and abetting threshold for ATCA liability and the state action requirement, while clearly related, are not quite mirror images of each other. First, the courts sometimes do not require any state action at all in order to find private parties liable under the ATCA.<sup>154</sup> Second, even within non-CSR normative considerations, there is a very good case that state action never should be a pre-condition for the imposition of liability. Finally, from a CSR perspective, the state action requirement that would be most effective is no requirement at all, or at least a low threshold requirement (i.e., that the foreign state actors in question merely knew or constructively should be charged with knowledge of the allegedly wrongful conduct committed by the private corporate defendant). For these reasons, we embrace the position adopted by the Second Circuit in *Abdullahi v. Pfizer, Inc.*, which seems to be that where a private corporate actor violates an international norm through a corporate activity (such as medical

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153. See Jeffrey E. Baldwin, *International Human Rights Plaintiffs and the Doctrine of Forum Non Conveniens*, 40 CORNELL INT'L L.J. 749 (2007). There is, of course, the danger that plaintiffs will simply allege the defendant corporation acted purposefully even when there is no direct or even strong indirect evidence known to them that this is true or even where they suspect or know that not to be true. And the filing of a lawsuit, by itself, can be costly for a defendant corporation. But the federal district courts, particularly in light of the recent tightening of pleading standards by the United States Supreme Court, should be able to manage the dismissal of these cases.

154. See, e.g., *Presbyterian Church of Sudan*, 582 F.3d at 255 (“[C]laims for genocide and war crimes against individuals [can] proceed without state action.” (citing *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995))); *Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2008) (“Under the Alien Tort Statute, state actors are the main objects of the law of nations, but individuals may be liable, under the law of nations, for some conduct, such as war crimes, regardless of whether they acted under color of law of a foreign nation.”).



testing without the permission of the test subjects), either no state action or only minimal state action is required for the ATCA suit to proceed to proceed against the private corporate actor.<sup>155</sup>

It is not straightforward to explain what the current state of federal law is regarding the state action requirement for ATCA claims. There seems to be reasonably broad consensus that certain kinds of conduct trigger ATCA liability even in the absence of any significant state action or at least any significant, knowing or purposeful state action. Thus, even the Chamber of Commerce, a strong critic of ATCA litigation, seems to recognize that the ATCA applies to purely private action with respect to “war crimes, genocide, the slave trade, airplane hijacking, and piracy.”<sup>156</sup> The Second Circuit in *Pfizer*, drawing upon Section 1983’s expansive “under of color of law” test and jurisprudence, does not seem to require that the state actor knew what was wrongful and hence illegal about the private corporation’s conduct before it happened.<sup>157</sup> By contrast, “the Eleventh Circuit

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155. See *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

156. Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner at 6, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (No. 09-34) (citing *Bigio v. Coca-Cola*, 239 F.3d 440, 447-48 (2d Cir. 2000)).

157. This is the reading urged by Pfizer and supporting amici in seeking certiorari. See Brief for the Petitioner, *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009) (No. 09-34); Brief for the Chamber of Commerce, *supra* note 156 at 9-10. However, the Second Circuit’s discussion of the requirement for state action, if any, was not entirely clear as to what mens rea for the state actor, if any, is required:

The Appellants have alleged that the Nigerian government was involved in all stages of the Kano test and participated in the conduct that violated international law. They allege that the Nigerian government provided a letter of request to the FDA to authorize the export of Trovan, arranged for Pfizer’s accommodations in Kano, and facilitated the nonconsensual testing in Nigeria’s IDH in Kano. Despite overcrowding due to concurrent epidemics, the Nigerian government extended the exclusive use of two hospital wards to Pfizer, providing Pfizer with control over scarce public resources and the use of the hospital’s staff and facilities to conduct the Kano test, to the exclusion of MSF. The unlawful conduct is alleged to have occurred in a Nigerian facility with the assistance of the Nigerian government and government officials and/or employees from the IDH and Aminu Kano Teaching Hospital. Pfizer’s research team in Kano was comprised of three American physicians, Dr. Abdulhami (a physician in the Aminu Kano Teaching Hospital), and three other Nigerian doctors.

requires that the foreign government know of the specific wrongful conduct alleged to violate international law, and the Ninth Circuit requires a state plan or policy to commit that conduct.”<sup>158</sup>

There is no clear normative case for requiring knowing or intentional state assistance or a state policy in support of private wrongdoing in order for liability to be imposed on private corporations. It may well be true that, historically, international law has mostly been applied to states, but it has not always so applied and, moreover, international law has and presumably should evolve.<sup>159</sup> Moreover, a number of the powerful normative considerations that argue in favor of the *Sosa* position of caution in extending the scope of jurisdiction of the ATCA are largely inapplicable where almost all the relevant conduct was that of a

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The American and Nigerian members of Pfizer’s team allegedly jointly administered the Kano test.

*Abdullahi*, 562 F.3d at 188.

158. Reply Brief for Petitioner at 6, *Abdullahi v. Pfizer, Inc.*, 562 U.S. 163 (2d Cir 2009) (No. 09-34). As the Chamber of Commerce explained in its brief:

In *Pfizer*, the Second Circuit brought petitioner within the ATS’s ambit on the basis of Nigeria’s alleged assistance in helping set up the experiments, with no requirement that plaintiff allege that the government knew of or participated in the specific wrongful acts - medical trials without proper consent. See Pet. App. 50a-52a. *Aldana*, by contrast, required much more. It rejected a state action link based on allegations that the state tolerated and failed to prevent torture, and required plaintiffs to allege that state officials “knew of and purposefully turned a blind eye” to the specific acts that formed the basis of the international law claim. *Aldana*, 416 F.3d at 1248. *Aldana* allowed only one claim to proceed, and then only because plaintiffs alleged that a state actor (the mayor) had actually participated in the alleged acts of torture that violated international law - a different and far more demanding state action standard than the one applied by the majority opinion below. Similarly, in *Abagninin v. Amvac Chemical Corp.*, 545 F.3d 733, 741-42 (9th Cir. 2008), the court required, as a prerequisite to a crimes against humanity claim by a worker in Ivory Coast against a chemical corporation, that the state knowingly participate in the corporation’s wrongful acts. It also noted that plaintiff had not alleged a state plan or policy to commit the wrongful acts.

Brief for Chamber of Commerce *supra* note 156, at 9-10.

159. Such evolution is also consistent with the notion that the ATCA covers the “law of nations” (not simply international law), which grew out of a natural law/common law tradition. See *supra* Part III and note 156.

private corporation.<sup>160</sup> The more a state actor is involved in a given case, and the more it is involved as a purposeful actor, the more a court's exercise of jurisdiction would seem to raise possibly difficult questions of international comity and deference to the Executive as the branch of government with principal responsibility over foreign affairs. Conversely, the less a state actor is involved in a given case, and the less its involvement, if any, was purposeful vis-à-vis the alleged wrongdoing, the less a court's exercise of jurisdiction would seem to raise possibly difficult questions of international comity and deference to the Executive as the branch of government with principal responsibility over foreign affairs.

From the vantage of CSR, no state action or a minimal state action requirement would also seem to be normatively correct. A corporation that undertakes wrongdoing without any participation of state actors or passive participation at best would seem to be more culpable than a corporation that has a modest and grudging role in committing wrongs in concert with state actors who intentionally, insistently undertake the wrongdoing. Certainly the key CSR stakeholders of consumers, shareholders and socially-responsible funds would be just as interested—and, one would think, more interested—in learning about the former situations than the latter, and ATCA litigation would be one means by which they could become informed. Indeed, it is precisely where there is no or minimal state involvement that the choice made by corporate actors—the very thing the CSR “movement” seeks to influence—might make a difference in terms of whether abuses to human rights and the environment happen or not. Finally, unlike a minimal aiding and abetting standard, a minimal state action standard is very unlikely to result in an onslaught of cases (nor result in the downside of such an onslaught, as discussed *supra*),<sup>161</sup> because, in most of the developing countries at issue, private corporate actors usually cannot engage in the kinds of conduct the ATCA is likely to make actionable without at least some knowing cooperation and involvement of state actors. State action is now—and likely to continue to be—less often a possible

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160. *Supra* Part IV.3. See generally Mark W. Wilson, *Why Private Remedies for Environmental Torts under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of Jus Cogens and Exhaustion*, 39 ENVTL. L. 451 (2009).

161. See *supra* Part IV.2.

issue of contest in ATCA litigation, simply because the scenario of state actors being deeply involved in alleged wrongdoing is more common than the scenario where state actors are minimally involved, if at all.<sup>162</sup>

## V. CONCLUSION

In sum, we conclude that the ATCA could be a powerful tool to promote corporate CSR, especially in developing countries where local legal restraints are weak. But despite the good normative reasons why the ATCA should be used in this way, serious obstacles remain. The Supreme Court's ahistorical and incoherent formulation of the "law of nations" fails to promote the development of the ATCA in ways that would cover even serious environmental harm. Also, the federal courts' confused jurisprudence concerning aiding and abetting and state action creates too many loopholes through which egregious corporate behavior may slip unpunished. In order to overcome these obstacles, we argue that the "law of nations" should not be read so restrictively, that a "purposive" aiding and abetting standard should be adopted, and that the requirement of state action be minimized or eliminated altogether. These steps would go a long way toward promoting the very CSR considerations that many corporations involved in ATCA litigation have already espoused.<sup>163</sup>

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162. This appears to be part of the argument of the Respondents in opposition to the grant of certiorari in *Abdullahi*. See Brief in Opposition at 20-21, *Abdullahi v. Pfizer, Inc.*, 562 U.S. 163 (2d Cir 2009) (No. 09-34).

163. We are not asserting that the ATCA is necessarily the only or even the best means of promoting adherence to CSR by multinational corporations operating in countries with undeveloped or unreliable systems of tort compensation. It may well be that an international treaty among nations with the creation of reporting and compensation requirements could be better tailored to the objectives of encouraging responsible investment and due consideration to the wide range of differences among countries and populations. But there are no such treaties on the horizon and the development of ATCA liability for environmental harms, even if only in the most catastrophic cases, is more likely to encourage multinational corporations to support the development of treaty law than would the absence of any realistic threat of ATCA liability.

