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The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act

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When California-based oil giant Unocal entered into a joint venture with the French oil company Total and the Burmese military dictatorship in 1992, Unocal's security consulting company, Control Risks, warned that the project would give rise to human rights violations in the pipeline region:

Throughout Burma the government habitually makes use of forced labour to construct roads. . . . The local community is already terrorized: it will regard outsiders apparently backed by the army with extreme suspicion. . . . [T]he potential profits will need to be unusually high to justify the high political risks involved in expanding the company's operations. . . ."¹

Despite these precautions, Unocal entered into a joint venture to develop the gas pipeline from the Andaman Sea, across the Tannarasim region of Burma, to Thailand. Unocal relied upon the Burmese military for security and support services. Tragically, the military, consistent with its reputation, engaged in a reign of terror involving forced labor, rape, and murder. Unocal knew the military was engaging in these activities, but did nothing to stop them, and instead, profited from their commission. These allegations form the heart of the plaintiffs' claims in

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1. The allegations in *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1297 (C.D. Cal. 2000), vacated by Nos. 00-56603, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263, at *14 (9th Cir. Sept. 18, 2002) and rehearing en banc granted by Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2003 U.S. App. LEXIS 2716 (9th Cir. Feb. 14, 2003) form the context for the discussion of federal common law methodology in this Article. Many of the statements about the case are, of course, contested by the parties and will only be resolved upon trial of the case.

Doe v. Unocal,² one of the first cases to attempt to establish liability under the Alien Tort Claims Act (ATCA) for corporate complicity in international human rights violations.³

Since globalization brought multinational corporations into closer relationships with repressive military authorities in developing nations, many similar ATCA claims have been filed in U.S. courts based on events that occurred in every region of the world. Federal courts in the United States are being asked to resolve the civil claims of individuals harmed by Unocal and other multinational corporations who have participated in similar abuses.⁴ In addition to *Unocal*, filed by Burmese villagers, other actions have been filed by foreign citizens against major oil companies for complicity in crimes against humanity and other international law violations, inter alia, in Nigeria, Sudan, Colombia, and Indonesia.⁵ In these cases, courts must determine the scope of liability for these companies' cooperation with, participation in, or incitement of the violent consequences of their investments. Although several courts have taken up the issue thus far and have found that private actors can be held liable as accomplices to international law violations,⁶ no court

2. Courts have published several opinions in the human rights cases against Unocal. The decisions on the initial motions to dismiss are published at 963 F. Supp. 880 (C.D. Cal. 1997) and 27 F. Supp. 2d 1174 (C.D. Cal. 1998). The district court's decision to grant summary judgment for Unocal on plaintiff ATCA's claims is published at 110 F. Supp. 2d 1294. The Ninth Circuit Panel's decision overturning this summary judgment is unpublished but can be found at 2002 U.S. App. LEXIS 19263. The federal appeal was argued *en banc* on June 17, 2003, and is awaiting decision.

3. Alien Tort Claims Act, 28 U.S.C. § 1350 (2001).

4. For another example of an ATCA case relating to corporate complicity in human rights violations, see *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS (S.D.N.Y. 2002) (alleging Shell Oil's participation in murder and torture in Nigeria).

5. See First Amended Complaint, *Mujica v. Occidental Petroleum*, No. 03-CV-2860 (C.D. Cal. 2003), available at http://sdshh.com/pdfs/Mujica_Amended.pdf (alleging violations by Occidental in Colombia); *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (alleging violations by Talisman in Sudan); Fourth Amended Complaint, *Bowoto v. Chevron Corp.*, (N.D. Cal. 2002) No. C99-2506, available at <http://www.earthrights.org/chevron/4thamendedcomplaint.doc> (alleging violations by Chevron in Niger Delta); Complaint, *Doe v. Exxon Mobil Corp.*, (D.D.C. June 20, 2001) No. 01-CV-1357, available at <http://www.laborrights.org/projects/corporate/exxon/exxoncomplaint.pdf> (alleging violations by Exxon Mobil in Indonesia); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d. Cir. 2000) (alleging violations by Shell in Nigeria).

6. See *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, at *3536, *vacated by* 2003 U.S. App. LEXIS 2716; *Burnett v. Al Bar Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003), 2003 U.S. Dist. LEXIS 12730, at *31 (D.D.C. 2003); *Talisman*, 244 F. Supp. 2d at 321 (holding that "ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting"); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355 (N.D. Ga. 2002) (declaring that "United States courts have recognized that principles of accomplice liability apply under the ATCA to those who assist others in the commission of torts that violate customary international law");

has settled on particular rules for aiding and abetting liability. Courts have also failed to clearly define the process by which that question should be answered.

This Article suggests the proper methodology by which federal courts should determine the circumstances under which defendants may be found liable for international human rights violations. It argues that federal courts must fashion federal common law based on federal jurisprudence and international authority to determine rules for complicity liability and other ancillary standards in ATCA litigation. Federal common law, however, should not be constructed based on the whims of judges, but rather should be based on established federal and international legal precedent. This method furthers the federal and international values of uniformity, predictability, and consistency. It also honors the policies of the international system and the historical development of federal common law in the domestic jurisprudence of the United States.

Part I discusses the development of the ATCA to date, and specific questions courts have encountered in enforcing the ATCA. Part II looks to the U.S. Supreme Court's instructions regarding the necessity and propriety of federal courts' engagement in the exercise of making federal common law when foreign affairs are implicated and when congressional intent requires it. Part III applies this understanding to the availability and scope of aiding and abetting liability in ATCA cases.

I. THE ALIEN TORT CLAIMS ACT

The Alien Tort Claims Act, passed as part of the original Judiciary Act in 1789, currently provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁷ Except for its invocation in a handful of cases,⁸ the Act

Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091–92 (S.D. Fla. 1997); *see also Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113–14 (5th Cir. 1998) (assuming without deciding that ATCA confers jurisdiction over private parties who aid, abet, or conspire in human rights violations).

7. 28 U.S.C. § 1350. The original text of the Alien Tort Claims Act stated that the district courts shall "have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

8. *See Adra v. Clift*, 195 F. Supp. 857, 859 (D. Md. 1961) (deciding an alien child custody suit); *Bolchos v. Darrel*, 3 Fed. Cas. 810, 811 (D.S.C. 1795) (deciding a title action for slaves taken from an enemy vessel on the high seas); *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793); *M'Grath v. Candalero*, 16 F. Cas. 128, 128 (D.S.C. 1794) (denying jurisdiction in an

remained unused for nearly two centuries until the landmark 1980 decision, *Filartiga v. Pena-Irala*.⁹ *Filartiga* established that the statute provides the basis for U.S. federal courts to try cases arising from violations of international human rights norms. Since *Filartiga*, victims of atrocities in dozens of nations have filed cases against perpetrators of human rights violations in U.S. courts. It was not until 2004 that the U.S. Supreme Court rendered its first decision on the statute. The Court substantially affirmed the *Filartiga* principles that the ATCA provides a federal forum to hear complaints arising from violations of international human rights law.¹⁰

Over the last quarter century, a near-unanimous consensus among federal courts has emerged regarding the basic elements of ATCA litigation. In order to establish jurisdiction under the ATCA, the plaintiff must be an alien bringing a tort claim that involves a violation of the "law of nations," which is referred to as customary international law in modern terms.¹¹ Thus, U.S. citizens may not bring an ATCA claim,¹² and plaintiffs may bring only tort claims.¹³

It is also now settled that the ATCA creates a cause of action and that no enabling legislation is required to be invoked for any particular case.¹⁴ Although defendants have attempted to argue that the statute only creates jurisdiction and does not, by itself, create a private right of action,¹⁵ this argument has never captured a majority of any panel

action for attachment); *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794) (deciding title of ship seized on the high seas). The ATCA was also discussed in 1795 by Attorney General Bradford. See 1 Op. Att'y Gen. 57, 59 (1795).

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

10. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). An addendum discussing the Alvarez decision is provided at the end of this article.

11. *Filartiga*, 630 F.2d at 877-78.

12. Citizens of the United States who are victims of torture or extrajudicial execution committed under the color of foreign authority may bring claims under the Torture Victim Protection Act, Pub. L. No. 102-256, § 2, 106 Stat. 73 (1992) (TVPA). The TVPA has also been used by plaintiffs to sue corporate entities for abuses committed abroad. The two courts that dealt with the issue of whether or not TVPA may be applied against corporations found it may, due to the statute's use of the word "individual." See *Sinaltrainal v. Coca Cola*, 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003); *Locarno v. Drummond Co.*, 256 F. Supp. 2d 1250, 1266 (N.D. Ala. 2003).

13. See *Iwanowa v. Ford Motor*, 67 F. Supp. 2d 424, 462 n.44 (D.N.J. 1999) (dismissing a claim for restitution under ATCA because the court found that it sounded in quantum meruit rather than tort).

14. E.g., *Abebe-Jira v. Negewo*, 7 F.3d 844, 847-48 (11th Cir. 1996).

15. See, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc cert. granted 124 S. Ct. 807); *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996); *Talisman Energy*, 244 F. Supp. 2d at 306 n.18; *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1263 (N.D. Ala. 2003). *Filartiga*, 630 F.2d at 881 (declaring that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon

deciding the issue.¹⁶ As a general rule, courts have agreed that not all violations of international law will suffice to establish subject matter jurisdiction under the ATCA; rather, they require that plaintiffs demonstrate a violation of a “specific, universal and obligatory norm of international law.”¹⁷ Courts have established that claims of torture, summary execution, disappearance, prolonged arbitrary detention, genocide, some war crimes, crimes against humanity, and slavery meet this rigorous standard and thereby create jurisdiction under the ATCA.¹⁸

them all is a stringent one”) (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)); *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *15. *Cf.* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring) (petition to the Supreme Court arguing that ATCA should not be applied unless a treaty, statute, or customary international law provides a cause of action). Judge Bork’s lone dissent on this point has since been rendered moot by Congress, which, in passing the TVPA, codified *Filartiga*’s incorporation of international human rights law into U.S. domestic law. *Wiwa*, 226 F.3d at 104 (heard by the Supreme Court). Nonetheless, defendants—and more recently the Department of Justice—have repeatedly attempted to resurrect the Bork analysis. *E.g.*, Brief for the United States as Respondent Supporting Petitioner at 24–39, *Sosa v. Alvarez-Machain*, 124 S. Ct. 807 (2003), available at <http://www.sdshh.com/Alvarez/briefs.html>. Notwithstanding these attempts to relitigate *Filartiga*, courts have consistently held that the ATCA provides a cause of action. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Trajano v. Marcos*, 978 F.2d 493, 497 (9th Cir. 1992).

16. In fact only two judges have ever endorsed the position. *See Al Odah v. United States*, 321 F.3d 1134, 1145–49 (D.C. Cir. 2003) (Randolph, J., concurring); *Tel-Oren*, 726 F.2d 774 (Bork, J., concurring), *cert. denied*, 470 U.S. 103 (1985). Judge Bork’s concurrence in *Tel-Oren* has been criticized by numerous other courts. *E.g.*, *Iwanowa*, 67 F. Supp. 2d at 442 n.20 (declining to follow Bork’s “highly criticized” opinion because its “reasoning is flawed”); *Forti v. Suarez Mason* (Forti I), 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (declining to follow Judge Bork’s opinion because *Filartiga* and Judge Edward’s opinion are “better reasoned and more consistent with principles of international law”). Judge Randolph’s expression of similar sentiments nineteen years later did not capture the support of other members of the *Al Odah* panel. *See Al Odah*, 321 F.3d 1134.

17. *Alvarez-Machain*, 331 F.3d at 612; *Hilao*, 103 F.3d at 794; *Talisman Energy*, 244 F. Supp. 2d at 306 n.18; *Estate of Rodriguez*, 256 F. Supp. at 1263 (N.D. Ala. 2003). *See Filartiga*, 630 F.2d at 881 (declaring that “[t]he requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one”) (quoting *The Paquete Habana*, 175 U.S. at 694); *Wiwa*, 2002 U.S. Dist. LEXIS 3293, at *15.

18. *Talisman Energy*, 244 F. Supp. 2d at 289 (S.D.N.Y. 2003) (involving slavery, genocide, extrajudicial killing, torture); *Karadzic v. Kadic*, 70 F.3d 244 (1995) (involving genocide, war crimes, crimes against humanity); *Forti v. Suarez Mason* (Forti II), 694 F. Supp. 707 (N.D. Cal. 1988) (involving disappearance); *Forti I*, 672 F. Supp. 1531 (involving prolonged arbitrary detention, summary execution); *Filartiga*, 630 F.2d at 884 (involving torture). The specific, universal, and obligatory requirement, however, creates some disagreement regarding whether the international prohibition against cruel, inhuman, and degrading treatment is enforceable under the ATCA. *Cf. Forti II*, 694 F. Supp. 707, 709, with *Hilao*, 103 F.3d at 794–95. There are other cases in which the courts have found that the particular allegations do not fall within established international human rights norms. *See, e.g., Martinez*, 141 F.3d at 1384 (finding that plaintiff’s claims of arrest or detention not arbitrary as a matter of law.).

This standard has resulted in the dismissal of cases that allege environmental injuries wherein courts found that even egregious environmental degradation resulting in severe injuries to individuals and their surroundings did not constitute a violation of a universally accepted norm.¹⁹ Overall, it is clear that the specific, universal, and obligatory requirement has been successful in giving ATCA jurisdiction a relatively “narrow scope”²⁰ such that judicial review is limited “to those areas of international law that have achieved sufficient consensus to merit application by” courts in the United States.²¹

Despite the widespread agreement on what showing is necessary to state a claim and establish jurisdiction under the ATCA, there is disagreement regarding the rules governing the ancillary standards necessary to litigate ATCA cases, including the rules governing accomplice liability, statutes of limitations, determination of damages, standing to sue, and the other rules necessary to litigate a civil case.²² Of course, there will not always, or even frequently, be universal international consensus on the specific rules that govern such nuts and bolts questions. Such rules, however, have increasingly become the subject of international human rights litigation in various forums, especially in international criminal tribunals. This is true, in part, because customary international law is generally silent regarding domestic enforcement,²³ leaving international and domestic courts to determine rules of decision in order to give it effect. This fact has long been recognized internationally and by U.S. courts.²⁴ Indeed, the Supreme Court held not long after the passage of the ATCA that “[o]ffences . . . against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations.”²⁵

19. See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999). Courts have also rejected ATCA claims based on fraud, breach of fiduciary duty, and misappropriation theories because those claims find no basis in the law of nations. *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1418 (9th Cir. 1994).

20. *Alvarez-Machain*, 331 F.3d at 612.

21. *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)); see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

22. See *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 411 (S.D.N.Y. 2002) (noting “significant conceptual division and divergent practices among the courts that have addressed the question”).

23. *Filartiga II*, 577 F. Supp. at 863 (noting that “[t]he international law described by the Court of Appeals does not ordain detailed remedies but sets forth norms. But plainly international ‘law’ does not consist of mere benevolent yearnings never to be given effect”).

24. See *infra* notes 105-108.

25. *Smith*, 18 U.S. (5 Wheat.) at 159.

If courts were to require that the rules of decision be equally specific, universal, and obligatory as the international law norm they implement, no rule of international law would meet such a standard.²⁶ If courts were to adopt such universal rules, then the “policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations”²⁷ would be wholly defeated. This is true because every rule of law requires subsidiary rules in order to be applied to a particular fact situation. As courts become more involved in the analysis of a particular case, however, subsidiary rules will also develop their own subsidiaries, and so on. Thus, in order for all levels of subsidiary rules to gain universal acceptance, every case would have to be identical.

Such a result is not required. It is the court’s duty under both international and U.S. law to determine which subsidiary rules of decision are most appropriate for the enforcement of the international norms effectuated by the use of the ATCA. U.S. courts have reached varied results in conducting this choice of law analysis.²⁸ Some courts have applied domestic municipal law,²⁹ while others have used the law of the foreign jurisdiction where the tort occurred.³⁰ Alternatively, others have applied federal common law, either derived from domestic federal law or from international law.³¹

26. See *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995) (realizing that “[w]hile it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles”); *Tachiona*, 234 F. Supp. 2d at 410 (citing *Xunax*, 886 F. Supp. at 180.).

27. *Alvarez-Machain*, 331 F.3d at 635.

28. See *Tachiona*, 234 F. Supp. 2d at 420.

29. *Trajano*, 978 F.2d at 503 (affirming district court’s application of foreign wrongful death statutes); *Tel-Oren*, 726 F.2d at 777, 782 (Edwards, J., concurring) (suggesting that tort laws of the forum state should provide the substantive cause of action); *Adra*, 192 F. Supp. at 862-65 (defining tort of child abduction according to Lebanese law and the Restatement of Torts).

30. *In re Estate of Marcos Human Rights Litig.*, 978 F.2d at 503 (approving of district court’s use of applying the law of the Philippines); *Xuncax*, 866 F. Supp. at 191-92 (applying Guatemala law to decide the right of a sibling to sue under the ATCA); *Filartiga II*, 577 F.Supp. at 863 (looking to laws of Paraguay to provide liability standard on torture, but also finding that punitive damages, which did not exist under Paraguayan law, should nonetheless be applied because that would further the goals of the ATCA and the international norm proscribing torture).

31. *Alvarez-Machain*, 331 F.3d at 635-36 (concluding that federal common law should govern issue of compensatory damages); *Doe I v. Unocal Corp.* 2002 U.S. App. LEXIS 19263, at *11 (looking to international jurisprudence to define third-party liability standard); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d at 1358-59 (finding international law to support an award of both compensatory and punitive damages); *Hilao*, 25 F.3d at 1475-76 (applying federal law to decide survival claim); *Filartiga II*, 577 F.Supp. at 863 (“By enacting Section 1350 Congress entrusted

This dispute may be resolved by looking at how federal courts have filled the gaps of federal statutes in the past, and to the various federal interests at stake in any ATCA case. This inquiry points to the application of federal common law, of which international law is a component. This approach provides for a uniform application of international law in the United States and protects the uniquely federal foreign relations interests implicated by the ATCA. Fundamentally, the question to be answered may be stated as follows: what law should federal judges use to apply international norms in cases before U.S. federal courts? The answer is that federal law, not state or foreign law, is appropriate because the exercise of choosing and crafting standards to apply the ATCA is an exercise of federal common lawmaking.

II. FEDERAL COMMON LAW AND THE ATCA

A. Federal Courts and Federal Common Lawmaking

The application of a federal common law analysis to enforce international law standards in ATCA litigation is grounded in the history of federal common law jurisprudence. Although courts sometimes borrow state law rules to fill out federal statutes, the Supreme Court has instructed that state laws are “unsatisfactory vehicles for the enforcement of federal law”³² when Congress has not “directly or impliedly direct[ed] courts” to apply it.³³ At the same time, the Court has not specified a particular methodology for determining when federal common law should or should not be developed.³⁴ Professor Erwin Chemerinsky notes that federal common law has developed in two general circumstances.³⁵ First, the Supreme Court has created common law in “particular federal enclaves”³⁶ where federal rules are “necessary to protect uniquely federal interests.”³⁷ Second, the

[the task of enforcing international law] to the federal courts, and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into U.S. common law.”).

32. *Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 161 (1983).

33. *Id.* at 160.

34. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 6.1, at 358 (4th ed. 2003).

35. *See id.*; *see also* RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 696-98 (5th ed. 2003) [hereinafter *HART & WECHSLER*] (recounting various commentators' views regarding the scope of federal common lawmaking).

36. *Id.* at 696.

37. *See* CHERMERINSKY, *supra* note 34, § 6.1 (citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 426; *see also* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional*

Court has created federal common law where it was necessary to effectuate congressional intent.³⁸ The ATCA fits within both categories, and therefore presents an extremely strong case for creating and using federal common law.

1. Protection of Uniquely Federal Interests

Despite the well-known decree in *Erie Railroad v. Tompkins* that “[t]here is no federal *general* common law,”³⁹ federal courts have continued to construct a “new” federal common law⁴⁰ in a few particularized categories. In *Banco Nacional de Cuba v. Sabbatino*,⁴¹ the Court declared that cases affecting international relations constituted an area in which courts should develop federal common law. The Court stated that “the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”⁴² The Court found that both the Constitution and federal statutes indirectly support the notion that “matters of international significance [should be determined by] federal institutions.”⁴³ Later, in *Texas Industries v. Radcliffe Materials*,⁴⁴ the Court summed up the specific categories of cases in which federal common law governed. The Court included “interstate and international disputes implicating conflicting rights of States or our relations with foreign nations”⁴⁵

More recently, the Court has articulated a more generalized test for situations that require courts to use federal common law. The relevant test has been framed as a two-part analysis, first focusing on whether

Preemption, 67 COLUM. L. REV. 1024, 1025 (1967) (arguing that the Constitution authorizes federal common lawmaking in four areas, one of which is international relations).

38. CHEMERINSKY, *supra* note 34, § 6.1; *see also* Thomas Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 330-31 (1992) (arguing for a narrowly-defined province of federal common lawmaking limited to where “Congress has enacted law delegating lawmaking power to courts, or that it is necessary to replace state with federal law in order to preserve a provision of enacted law”).

39. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

40. *See generally* Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964) (discussing post-*Erie* federal common law as uniform and standing on a firm constitutional foundation).

41. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398.

42. *Id.* at 425.

43. *Id.* at 427 (citing U.S. CONST., Art. I, § 8, cls. 3, 10, Art. III, § 2; 28 U.S.C. §§ 1251 (a)(2), (b)(1), (b)(3), 1332 (a)(2), 1333, 1350-51).

44. 451 U.S. 630 (1981).

45. *Id.* at 641 (citations omitted); *see also* *Atherton*, 519 U.S. at 225-26 (citing cases where “relationships with other countries” is one of the “few and restricted” instances when federal courts should create federal common law); *Sabbatino*, 376 U.S. at 398.

the particular federal interest is strong enough to “displace[] state law” and second on whether the creation of federal common law is necessary to avoid “a significant conflict . . . between an identifiable federal policy or interest and the operation of state law.”⁴⁶ In the context of ATCA litigation, both of these prongs are easily satisfied by the federal interests in providing for a uniform application of international law and maintaining federal control over foreign relations.

The idea that international affairs is an area of uniquely federal interest requiring uniform federal rules goes back to this nation’s founding, when Alexander Hamilton wrote that the United States’ obligations under international law should be looked after by the federal judiciary, whose power would extend to cases implicating “the peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves.”⁴⁷ John Jay underscored the importance of a uniform interpretation of the law of nations, arguing that adjudications of such issues by the thirteen states “will not always accord or be consistent.”⁴⁸ He commended “[t]he wisdom of the Convention, in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government. . . .”⁴⁹ During the drafting of the Constitution and the first judiciary act that contained the ATCA, the Founders viewed the settlement of claims by aliens as a national security interest. They feared that state courts might treat cases brought by foreign citizens unjustly, jeopardizing the new Nation’s relations with foreign powers, and perhaps leading to the rekindling of armed conflict.⁵⁰ These sentiments were echoed after the *Erie* decision, when the Court adopted the view of then-future justice of the International Court of Justice, Philip C. Jessup. Jessup’s view was that “rules of international law should not be left to divergent and perhaps parochial

46. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (internal quotation omitted) (citing *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

47. THE FEDERALIST NO. 80, at 439 (Alexander Hamilton) (Colonial Press 1901). See generally Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. REV. 229, 292 (discussing the Founders’ view of international law).

48. THE FEDERALIST NO. 3, at 11-12 (John Jay) (Colonial Press 1901).

49. *Id.*

50. See Anthony D’Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT’L L. 62, 63-65 (1988) (describing the national security role of the Alien Tort Statute in 1789); see also THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 47, at 536 (“As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”).

state interpretations.”⁵¹ Since then, both state and federal courts have treated the interpretation and application of customary international law as a matter of federal law.⁵²

These examples demonstrate both a pre-*Erie* and post-*Erie* assignment of issues implicating international law norms to the federal judiciary. Courts have not ignored these historical roots when applying the ATCA. Rather, a number of courts have reviewed this and other historical evidence closely, finding that it supports a reading of the ATCA in the context of the federal system created by the Constitution, and the role of federal common law in effectuating federal interests.⁵³

Moreover, the underlying policies embodied in the historical record remain relevant to this day. The proliferation of new international human rights norms over the last half century has given birth to a body of international law that more often regulates individual conduct than did the historical law of nations, and thus relies more heavily on judicial decisionmaking, rather than state interaction, for its interpretation and enforcement. Foreign and U.S. courts must uniformly apply international human rights law to give individuals, governments and other legally cognizable entities notice of their responsibilities. Leaving the application of the law of nations to fifty divergent applications within the United States, based on each state's own historical legal preferences and developments would undermine the interest in uniformity.⁵⁴ The application of federal rather than state law

51. *Sabbatino*, 376 U.S. at 425. See generally Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 741 (1939).

52. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818–19 (1993) (Scalia, J., dissenting) (arguing that international law should limit the application of a federal statute); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (applying “principles . . . common to both international law and federal common law”); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing federal statute in light of customary international law); *Fiocconi v. Attorney General*, 462 F.2d 475, 479–80 (2d Cir. 1972) (treating rules of extradition as federal law); *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 259 (1969) (interpreting customary international law according to federal standards). See generally Harold Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998) (discussing the status of international law as federal common law).

53. E.g., *In re Estate of Marcos Human Rights Litig.*, 978 F.2d at 502–03; *Tel-Oren*, 726 F.2d at 783–86 (Edwards, J., concurring). See generally William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 701–11 (2002) (conducting a historical analysis of the ATCA and its relationship to federal common law); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) (describing the events leading to the passage of the ATCA); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349 (1988).

54. If the ATCA is inapplicable to human rights litigation against corporations then plaintiffs will turn to state court damage actions to vindicate their claims, as the Unocal plaintiffs

does not implicate any concerns about “displacing state law,”⁵⁵ since “[f]ederal judicial determination of most questions of customary international law transpires in [an] area in which the Tenth Amendment has reserved little or no power to the states.”⁵⁶ Historically, the United States has stood as a major contributor to, and developer of, international human rights standards. Therefore, the United States should apply those norms with due respect for their international character and the consequential need for reliance on international rather than provincial authority.

There are similarly compelling reasons to reject the usage of the law of the foreign jurisdiction in which the tort occurred. First, ATCA cases involve violations of the laws of nations by governments within their own borders. Therefore, the litigation of such cases in U.S. courts is ordinarily a result of a domestic legal system's failure to provide redress. If courts were to apply domestic legal precedent in ATCA cases, then the law would be turned on its head because “the law of any particular state is either identical to the [firmly established norms] of international law, or it is invalid.”⁵⁷ That is, the ATCA’s sole purpose appears to be to effectuate the law of nations in the adjudication of individual tort claims. Thus, limitations imposed by foreign legal systems should not stand as a barrier to recovery.⁵⁸

A second reason to reject foreign law is that it would force judges to make decisions based on legal systems which they cannot understand without extensive knowledge of another nation’s history and culture, which provide essential contextual foundation to the law. This analysis would be unlike the application of state law under *Erie*. While federal judges may be qualified to act as scholars of American law (of which each state’s law is only a minor deviation), they are not well-situated to act as scholars of foreign law, especially since most ATCA cases would implicate the application of the law of a failed or repressive state. That reality would mean judges would be placed in the uncomfortable position of determining how political instabilities alter and, at times,

have done. There is no reason why state courts could not entertain such traditional transitory tort claims. The development of uniform standards under ATCA would be more desirable for all parties, however.

55. *Boyle v. United Techs. Corp.*, 487 U.S. at 507.

56. Koh, *supra* note 52, at 1831–32.

57. *Doe v. Unocal Corp.*, 2002 U.S. App. LEXIS 19263, at *40.

58. *See Tel-Oren*, 726 F.2d at 790 (Edwards, J., concurring) (“As best we can tell, the aim of section 1350 was to place in federal court actions potentially implicating foreign affairs. The intent was not to provide a forum that otherwise would not exist . . . but to provide an *alternative* forum to state courts.”).

cancel out historical foreign legal precedent. In other situations, defendants may request the law of a foreign jurisdiction to apply—law that may encourage or allow gross human rights abuses.⁵⁹

A final reason to reject the law of the foreign jurisdiction is that doing so would provide little notice to corporations who wish to invest in nations with unstable governments. In areas in which the entire legal order can change overnight, corporations could be subject to varying laws over time and therefore would not be able to predict with any certainty the scope of their responsibilities to domestic citizens. A better rule would define uniform standards over place and time, thus providing certainty for investment purposes, and furthering the interests of international law. Therefore, the ATCA satisfies the requirement of a “distinct need for nationwide legal standards,” required for the application of federal common law.⁶⁰

2. Effectuating Congressional Intent

A wholly separate area in which the Supreme Court has ruled that federal common law may be developed is where Congress creates a broad statutory mandate in expectation that the courts will develop specific standards through a series of decisions.⁶¹ Because Congress could never write a statute that provides for every possible situation that it will cover,⁶² it is necessary for the federal courts to craft standards for a law’s application, in order to effectuate congressional intent.⁶³ If courts were restrained from doing so, then many statutes would be rendered ineffectual.⁶⁴ The Supreme Court made note of this necessity in remarking that “the inevitable incompleteness presented by all

59. See Lisa Girion, *California Law to Govern Unocal Human Rights Case, Judge Rules*, L.A. TIMES, Aug. 1, 2003, at C2. This precise situation occurred in the state action in *Unocal* in which defendants asked a California judge to follow provisions of Burmese law that permitted the temporary enslavement of the Burmese plaintiffs. The court rejected defendants’ request and chose instead to apply California law. *Id.*

60. *Alvarez-Machain*, 331 F.3d at 635 (finding that the choice of law analysis under the ATCA constitutes one of the few areas in which courts can “extend” federal common law, because it “invokes international law principles of universal concern,” and therefore “holds a unique place among federal statutory tort causes of action”).

61. CHEMERINSKY, *supra* note 34, §§ 6.1, 6.3; *Radcliff Materials*, 451 U.S. at 642.

62. CHEMERINSKY, *supra* note 34, § 6.3, at 377.

63. See *Alvarez-Machain*, 331 F.3d at 635 (noting that the “policy of the United States, as expressed in the ATCA, [is] to provide a remedy for violations of the law of nations”).

64. See *D’Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (“Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”).

legislation means that interstitial federal lawmaking is a basic responsibility of the federal courts.”⁶⁵ Exhaustive historical research has proven that the first Congress’s intent in drafting the ATCA was to provide aliens with a remedy for tortious violations of the law of nations without any further Congressional action.⁶⁶ To effectuate this intent, courts should utilize federal common law, as they have done with other unelaborated statutes.

Like the ATCA, Section 301(a) of the Labor Management Relations Act provides for federal court jurisdiction over a particular subject matter area—labor disputes affecting interstate commerce—without providing subsidiary rules of decision.⁶⁷ Based on that grant, the Court in *Textile Workers Union of America v. Lincoln Mills of Alabama* found that the statute “authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements.”⁶⁸ A number of federal courts have sensibly followed this precedent in finding that the ATCA similarly acts as more than a jurisdictional statute, allowing courts to use federal common law as a basis for its substantive application.⁶⁹

Federal tort statutes, like the ATCA, constitute a central area in which courts have traditionally crafted federal common law standards.⁷⁰ The Supreme Court, for instance, fashioned federal common law when

65. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973); *see also Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943) (“In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”).

66. *See, e.g., Dodge, supra* note 53 (describing the ATCA’s historical roots).

67. *See* 29 U.S.C. § 185(a) (2000). The Act provides, in part, that “[s]uits for violation of contracts between an employer and a labor organization . . . in an industry affecting commerce . . . may be brought in any District Court of the United States.” *Id.*

68. 353 U.S. 448, 451 (1957).

69. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. at 1469 (“Because Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treaties dealing with the protection of human rights.”) (citing *Lincoln Mills*, 353 U.S. at 457); *Abebe-Jira v. Negewo*, 72 F. 3d at 848 (“Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to the courts the task of fashioning remedies that give effect to the federal policies underlying the statute.”) (citing *Lincoln Mills*, 353 U.S. at 448); *Xuncax*, 886 F. Supp. at 182 (finding that the ATCA creates a substantive cause of action based on international law, and noting that the exercise of fashioning a remedy from that “amorphous” body of law is similar to the challenge presented in *Lincoln Mills*).

70. *Int’l Bhd. of Elec. Workers, Local 340 v. Sacramento Valley Chapter of the Nat’l Elec. Contractors Ass’n*, 1990 U.S. Dist. LEXIS 10634, at *9–10 (E.D. Cal. 1990).

it created statutes of limitation where Congress had not specified one,⁷¹ when it held that tort agency principles are applicable to a private right of action under the Sherman Antitrust Act in order to satisfy Congressional intent,⁷² and in allowing third party indemnification for the government for its tort liability to an employee under the Federal Tort Claims Act and the Federal Employees' Compensation Act (FECA).⁷³

Federal courts have also found it necessary to apply or create federal common law for statutes, such as the ATCA,⁷⁴ where sparse legislative history leads to dubious congressional intent as to application of the statute in particular cases.⁷⁵ For example, in the area of civil rights legislation, courts have found it necessary to fashion federal common law standards for some statutes when neither the text nor the legislative history directly spoke to the issue of damages.⁷⁶

The courts' approach to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)⁷⁷ offers a second example of the use of common law in the absence of instructive legislative history. There, courts followed the approach that, "[t]he meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement [CERCLA]."⁷⁸ Another example of the use of federal common law in the absence of legislative history is found in the context of Employee Retirement Income Security Act (ERISA) suits.⁷⁹ ERISA provides that "employee

71. *E.g., Del Costello*, 462 U.S. at 163 (applying federal statute of limitations to labor dispute arising under federal law); *see also* *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225-26 (1958) (applying federal statute of limitations to personal injury litigation under the Jones Act and general maritime law).

72. *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 569-71 (1982).

73. *See Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 199 (1982).

74. *See Wiwa*, 2002 U.S. Dist. LEXIS 3239, at *58-59.

75. *Louisiana-Pac. Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1262 (9th Cir. 1990) (applying federal common law to fill in supplementary rules for the Comprehensive Environmental Response, Compensation, and Liability Act of 1980).

76. *Louisiana ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 301 (5th Cir. 2000) (applying, in the absence of instructive legislative history, federal common law in requiring a showing of constitutional damage in order to award punitive damages under the Federal Fair Housing Act). Courts determining damages rules under the ATCA have also conducted a federal common law analysis. *Alvarez-Machain*, 331 F.3d at 635-36; *Filartiga*, 577 F. Supp. at 863.

77. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-75 (2000).

78. *United States v. Smith*, 18 U.S. (5 Wheat.) at 159.

79. *See, e.g., Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1499 (9th Cir. 1984) ("Congress realized that the bare terms . . . would not be sufficient . . . [and] empowered the courts to develop . . . a body of federal common law governing employee benefit plans. . . . First, it supplements the statutory scheme interstitially. Second and more generally, it serves to ramify

benefit plans may sue or be sued under [ERISA] . . . as an entity,"⁸⁰ yet does not provide any guidance in the text of the statute or in the legislative history regarding what causes of action will give rise to such a suit.⁸¹ Consequently, the Supreme Court determined that Congress's expectation was that "a federal common law of rights and obligations under ERISA-regulated plans would develop."⁸² The Court further stated that the statute's provisions "would make little sense if the remedies available to ERISA participants and beneficiaries . . . could be supplemented or supplanted by varying state laws."⁸³

Congress likely harbored a similar expectation that courts would craft subsidiary standards for applying the law of nations when they wrote the ATCA because of the commonly held belief that the "law of nations" was part of the common law.⁸⁴ In fact, the Supreme Court held in the nineteenth century that Congress did not need to define offenses against the law of nations by giving an "express enumeration of all the particulars" of such an offense.⁸⁵ Rather, the Court explained, the crimes against the law of nations could be "ascertained by judicial interpretation,"⁸⁶ which involved consulting international authorities⁸⁷ and common law.⁸⁸

In reviewing these cases, it becomes clear that the filling of interstitial gaps of federal laws may be viewed either as judicial

and develop the standards that the statute sets out in only general terms.") (citations omitted); *Kentucky Laborers Dist. Council Health & Welfare Fund v. Hope*, 861 F.2d 1003, 1005-06 (6th Cir. 1988) (holding that employer's state law restitution claims are preempted by federal common law).

80. 29 U.S.C. § 1132(d)(1) (1988).

81. See Brent D. Hitson, Comment, *Alabama's Lonely Battle: An Attempt to Exert State Jurisdiction and Award Punitive Damages for Exclusively Federal ERISA Claims in Weems v. Jefferson-Pilot Life Insurance Co., Inc.*, 26 CUMB. L. REV. 591, 602 (1996) ("[T]here is little mention of this provision in the legislative history. This is another example of where the courts have had to create federal common law to address the gaps left in ERISA's statutory scheme for civil enforcement.").

82. *Pilot Life Ins. v. Dedeaux*, 481 U.S. 41, 56 (1987), cited in *Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1970 (2003) (reiterating Congress's expectation that ERISA be effectuated through the development of federal common law); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (stating that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'" (quoting *Dedeaux*, 481 U.S. at 56).

83. *Dedeaux*, 481 U.S. at 56 (1987).

84. See *Filartiga*, 630 F.2d at 886 ("During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law.") (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 263-64).

85. *Smith*, 18 U.S. (5 Wheat.) at 159.

86. *Id.* at 157.

87. *Id.* at 159-160.

88. *Id.* at 160.

legislation or ordinary statutory interpretation.⁸⁹ In fact, the Court has recently recognized that federal common law may be defined both in the loose sense of “simpl[e] . . . interpretation of a federal statute” and in the strict sense of “judicial ‘creation’ of a special federal rule of decision.”⁹⁰ Because gap filling is inescapable in the case of the ATCA, judicial application of the statute must lie somewhere between these two extremes. Notably, the federal courts have created common law based on statutory text much more vague than the words “law of nations,” which reference an externally discoverable area of positive law and therefore provide courts with substantial guidance. For example, in the area of antitrust law, federal courts have crafted volumes of federal common law based on the Sherman Act’s unelaborated denouncement of “[e]very contract, combination . . . or conspiracy, in restraint of trade. . . .”⁹¹ However, even if the operation of the ATCA involves the creation of federal rules in the strictest sense, it would still qualify as one of the “few and restricted”⁹² areas where such federal judicial rulemaking is necessary because it involves a dispute of an “international nature.”⁹³

Thus, federal common law must be developed under the ATCA because doing so is necessary to protect the exclusively federal interest of uniformity in the area of foreign affairs, and because the statute requires specific rules of decision in order for courts to effectuate congressional intent.

B. Federal Common Law and International Law

After establishing that federal common law stands as the most appropriate source for the ATCA’s rules of decision, it becomes necessary to determine the methodology by which those standards will be developed. The decision to use federal common law forecloses the option of using foreign law or domestic state law, leaving courts to look to either prior federal and international precedent, or to craft new standards. Even when courts craft new standards, however, the process of federal common lawmaking is not one which is ad hoc. Rather,

89. See CHEMERINSKY, *supra* note 34, § 6.1.

90. See *Atherton v. FDIC*, 519 U.S. 213, 218 (1991).

91. 15 U.S.C. § 1 (2004). See, e.g., Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. 545, 608 n.160 (2002) (“Judges have interpreted this language as extending to courts an organic mandate to develop a federal common law of antitrust.”).

92. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

93. *Radcliff Materials*, 451 U.S. at 641.

courts ordinarily draw upon sources of authority and create new rules which are best suited to protect important federal interests and to effectuate Congressional intent. For example, in *Sabbatino*, the Court looked to state conduct and various sources of international law in order to apply the act of state doctrine.⁹⁴ The Court also looked to its own prior decisions on the subject.⁹⁵ In *Clearfield Trust v. United States*,⁹⁶ the Court similarly looked to federal precedent in deciding that a drawee's right to recover on commercial paper accrues when the payment is made.⁹⁷ Federal courts also, when interpreting terms in a federal statute, do not create new definitions or refer to state law for the definition, but rather look to existing federal precedent.⁹⁸

Courts, then, should look to federal and international precedent, where available, in determining the rules of decision for international law norms under the ATCA. These two sources of authority may, in actuality, be viewed as constituents of the federal common law of international affairs.⁹⁹ This is true because “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.”¹⁰⁰ As mentioned before, the

94. *Sabbatino*, 376 U.S. at 427–32.

95. *Id.* at 430–31.

96. *Clearfield Trust Co.*, 318 U.S. 363.

97. *Id.* at 368–69; *see also* *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821–22 (9th Cir. 1992) (looking to federal precedent from other circuits to determine the unavailability of the defense of equitable estoppel in ERISA claims).

98. *Drye v. United States*, 528 U.S. 49, 52 (1999) (holding that, as a matter of federal tax law, the terms “property” and “rights to property” are determined according to federal law); *Jerome v. United States*, 318 U.S. 101, 104 (1943) (holding that, where a federal criminal statute used the term “felony” the definition of that term should be governed by federal rather than state law).

99. *See generally* Koh, *supra* note 52 (arguing that the practice of treating international law as federal law is lawful and sensible, and should be left undisturbed by both the political and judicial branches); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997) (arguing that customary international law, including universally recognized human rights, is federal common law, and reflects the considered judgment of the three political branches); F. Giba-Matthews, Note, *Customary International Law Acts as Federal Common Law in U.S. Courts*, 20 FORDHAM INT'L L.J. 1839 (1997) (discussing how international common law should act as federal common law in U.S. courts); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997) (arguing that the determination of the content of customary international law, and of whether or not it applies in a given situation is a federal question, which triggers federal jurisdiction and on which federal court decisions are binding on states).

100. *The Paquete Habana*, 175 U.S. at 700; *see also* *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“International law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice.”); *Murray v. Schooner Charming Betsey*, 6 U.S. (2 Cranch) 102, 118 (1804) (“[A]n act of congress ought never to be construed to

Framers, who drafted the ATCA, also deemed international law to be part of the common law.¹⁰¹ Based on this precedent, the *Filartiga* court stated, “[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”¹⁰² As the Supreme Court clarified in *Sabbatino*, this portion of the federal common law survived *Erie* because it concerned the uniquely federal interest in a uniform approach to the conduct of this nation’s interactions with the international community.¹⁰³ Consequently, courts that engage in the ascertainment of federal common law rules of decision for the application of international law in ATCA cases may choose from either customary international law or prior federal common law.

This methodology satisfies the important federal interests of creating uniformity in the application of international law. The use of international and prior federal common law also fulfills congressional intent. As noted earlier, the Congressional intent behind the passage of the ATCA was to provide a federal forum and remedy for aliens suing based on violations of the law of nations.¹⁰⁴ The application of foreign or state law would radically undermine that intent by expunging the legal standards intrinsic in the federal forum and the law of nations. That is, it would be wholly inappropriate and inconsistent to require a plaintiff to plead at the outset a violation of universally recognized norms, and then to apply the parochial laws of the foreign jurisdiction where the tort was suffered, or of the state in which the case was brought.¹⁰⁵

The more logical approach, and the approach which would best effectuate congressional intent and the interests of the international

violate the law of nations.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS §111(1) (1987) (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”).

101. *Filartiga*, 630 F.2d at 886. See generally JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 1-9, 169-88 (1996) (discussing the perceived nature of international law and the actual use of human rights precepts in various historical contexts, including the views of the Framers); 4 WILLIAM BLACKSTONE, COMMENTARIES §§ 67, 53 (Wayne Morrison, ed. 2001). The incorporation of international law as the law of the United States has become an accepted part of American jurisprudence. Edwin D. Dickinson, *The Law of Nations As Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 35-36 (1952).

102. *Filartiga*, 630 F.2d at 886.

103. *Sabbatino*, 376 U.S. at 421-26.

104. See *supra* text accompanying note 53.

105. *Alvarez-Machain*, 331 F.3d at 634 (“In a claim based on a universal, international standard, it may seem presumptuous to choose the law of one country over another.”).

system, would be to apply the uniform rules of federal common law derived from international and federal law.¹⁰⁶

C. Methodology for Deriving Rules of Decision for International Law Norms

An analysis of how domestic and international courts have applied international law norms in the past underscores the necessity of applying international or widely-held common law principles. For example, in discussing the judiciary's exercise of its authority to ascertain standards of international law, the Supreme Court held over a century ago:

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.¹⁰⁷

International law provides that courts attempting to fill gaps in international norms should look to general principles of law shared by major legal systems and endorsed by courts and other respected legal commentators. The Statute of the International Court of Justice, in defining the proper sources of international law, instructs the court to apply treaty law, customary international law, "the general principles of law recognized by civilized nations," and "judicial decisions and the teachings of the most highly qualified publicists for the various nations, as subsidiary means for the determination of rules of law."¹⁰⁸ Similarly, the Restatement of Foreign Relations Law of the United States also states that "general principles common to the major legal systems, even if not incorporated or reflected in customary law or international

106. For an example applying this approach to a corporate veil-piercing case with international overtones, see *First Nat'l City Bank*, 462 U.S. at 623 (applying "principles . . . common to both international law and federal common law").

107. *Hilton*, 159 U.S. at 163.

108. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031 (entered into force Oct. 24, 1945), available at www.icj-cij.org.

agreement, may be invoked as supplementary rules of international law where appropriate.”¹⁰⁹

When federal common law, derived from international and federal precedent, is used to apply international norms under the ATCA, it conforms to these instructions for correctly deriving and applying international law. Both the ICJ Statute and the Restatement direct courts to look at the law of the world’s major legal systems in order to derive supplementary rules of application. Because the United States is a major legal system, use of legal rules crafted in this country is appropriate, and may even deserve greater weight than rules from other major legal systems. Meanwhile, the Restatement and ICJ Statute also clearly afford appropriate weight to rules derived from international treaties and decisional law. International tribunals applying international norms have utilized this strategy, both looking to commonly adopted legal principles and international principles.¹¹⁰

In *United States v. Flick*,¹¹¹ the International Military Tribunal (IMT) presiding over the Nuremberg trials referred to the common law in finding the particular rules for applying the necessity defense.¹¹² While the IMT found that international law provided a basis for mitigation of punishment in the case of a crime coerced by violence,¹¹³ it looked to a treatise reflecting the common law to determine the standards for applying that principle.¹¹⁴ The court further found that the doctrine of necessity, as applied in civil cases in the common law, provided the appropriate operational standard for use in a criminal case against civilian defendants.¹¹⁵

109. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

110. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, July 21, 2000, 38 I.L.M. 317, 362 (1999) (citing LG Hechingen, KIs 23/47 (Jun. 6, 1947) and OLG Tubingen, Ss 54/47 (Jan. 1, 1948), in *Justiz und NS-Verbrechen* 469 (Ger.) (recounting the “Hechingen Deportation” case to stand for the proposition that “in the event there should not be any express rules in Control Council Law No. 10, they have to be supplemented from the object and purpose of the statute and taking into consideration generally recognised principles of criminal law . . .”).

111. *United States v. Flick*, 6 *Trials of War Criminals Before the Nuremberg Military Trib. Under Control Council Law No. 10* (1952).

112. See *id.* at 1200.

113. *Id.* (citing Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, Article II, ¶ 4(b), *reprinted in* 6 *Trials of War Criminals Before the Nuremberg Military Trib. Under Control Council Law No. 10* (1952)).

114. *Id.* at 1200-01 (citing Wharton’s *Criminal Law*, Vol. I, §§ 126, 384 (applying standards of “no other adequate means of escape,” proportionality, lack of intent, and clear and present danger)).

115. *Id.*

In *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) derived the standard for aiding and abetting liability by looking to precedent from military courts that had tried individuals for violations of the laws of war.¹¹⁶ Those courts, in turn, relied on the common law, although in some situations they diverged from that law where it was appropriate based on the international nature of the crimes.¹¹⁷ The *Furundzija* court also found authority instructing that the acquisition of legal rules from international law must begin with international authority, such as Control Council Law No. 10 for "rules of the general part," and that rules addressing more specific situations, such as mitigating circumstances, must come from the same source.¹¹⁸ The court, however, stated, "in the event there should not be any express rules in Control Council Law No. 10, they have to be supplemented from the object and purpose of the statute and take into consideration generally recognized principles of criminal law (e.g. in relation to the so-called duress)."¹¹⁹

These international authorities, read together with cases applying international law in U.S. courts, suggest a common and clear methodology for applying international law in American courts. Courts must look first to international and federal positive law addressing the particular subject.¹²⁰ If that inquiry does not yield appropriate rules of decision, as will be the situation in the majority of cases, then the court should next look to customary international law as reflected by the writings of jurists, international decisional law, treaties, and the conduct of nations. In filling the gaps, courts may also look to generally accepted legal principles found in the federal common law. At each phase of this analysis, though, it will be important for U.S. courts to be cognizant of "the needs of the interstate and international systems,"¹²¹ as well as "the policy of the United States, as expressed in the ATCA, to provide a remedy for violations of the law of nations."¹²²

116. *Furundzija*, 38 I.L.M. at 356-67.

117. *Id.* at 358 (discussing a military court's departure from English law in finding ex post facto assistance to be punishable as an international crime).

118. *See id.* at 362 (citing LG Hechingen, Kls 23/47 (Jun. 6, 1947) and OLG Tubingen, Ss 54/47 (Jan. 1, 1948), in 1 Justiz und NS-Verbrechen 469 (Ger.)).

119. *Id.*

120. *Smith*, 18 U.S. (5 Wheat.) at 162.

121. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(a) (1969).

122. *Alvarez-Machain*, 331 F.3d at 635 cert. granted 124 S. Ct. 807; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6(2) (instructing courts to look to "the relevant policies of the forum," "the basic policies underlying the particular field of law," "certainty, predictability

This result also represents a logical policy choice. Since the application of the ATCA is based on international norms, where available, courts should use standards grounded in international precedent. Deriving ancillary international standards for the ATCA would further the goals of the international system.¹²³ Moreover, to require defendants to act in accordance with international norms for jurisdictional purposes, yet apply a different liability standard once that threshold is passed would be inconsistent.¹²⁴ The above-described process also comports with the plain language of the statute. On its face, the ATCA requires only a tort in “violation” of the law of nations. The violation is required for jurisdiction, but the tort supplies the basis for a claim for relief.

Thus, courts can and should follow the methodology outlined above for filling in the gaps of the ATCA and international law. It is simultaneously an exercise in federal common lawmaking and adjudication of rights based international law. The methodology satisfies the necessities of both courses of judicial action, while also providing more predictability and determinacy in ATCA litigation.

In the next Part, this methodology is applied in the context of aiding and abetting liability.

III. ATCA JURISDICTION AND AIDING AND ABETTING

It is clear that the application of the ATCA must proceed in phases. First, a plaintiff must demonstrate a violation of a “specific, universal and obligatory” norm of international law to establish subject matter jurisdiction and a claim for relief under the ATCA. If such jurisdiction is established, a court must then utilize federal common law to effectuate the international norm in practice. In engaging in federal common law analysis, courts should look to international law and domestic federal common law. If the court finds that these sources are not the same, it should look to the underlying policies reflected by the ATCA and the international norm in choosing which source of law furnishes the most appropriate rule of decision.

and uniformity of result,” and “ease in determination and application of the law to be applied” in conducting choice of law analysis).

123. *See id.* § 6 (“Where there is no [statutory directive on choice of laws], the factors relevant to the choice of the applicable rule of law include. . .the needs of the interstate and international systems.”).

124. *Alvarez-Machain*, 331 F.3d at 634. (“In a claim based on a universal, international standard, it may seem presumptuous to choose the law of one country over another.”).

Assuming a case involving aiding and abetting liability where a plaintiff has pled the requisite international law violation to establish jurisdiction and a claim for relief, a court would next look to international and federal law to determine the appropriate standard for aiding and abetting. As already mentioned, a "specific, universal and obligatory" norm is not necessary for proscribing an aiding and abetting violation of international law. The existence of such a norm is not only logically and linguistically awkward, but is not required because it falls within the rubric of the ancillary rules of the particular norm. For example, the international legal proscription of torture represents a norm forbidding the act of torture. In a case alleging the defendant aided and abetted torture, the court would first determine whether torture is proscribed under international law derived from state practice, *opinio juris*, international jurisprudence, the commentary of international scholars, and international conventions on torture. The subsequent issue of whether a defendant's complicity in torture results in liability, like the question of defenses in *Flick*, is a matter of ancillary rules to be determined by the federal common law analysis.

Therefore, a court resolving the issue of aiding and abetting must look to federal and international principles to determine the rules of decision in a particular case.

A. Aiding and Abetting Principles in International Law

Aiding and abetting liability has long been recognized by international tribunals enforcing international norms. After World War II, the Allied Powers passed Control Council Law No. 10. This law governed the trials of Nazi war criminals who had committed crimes against peace, war crimes, and crimes against humanity. The statute specifically provided for accomplice liability stating:

[A] person is deemed to have committed a crime if he was (a) a principal; (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission¹²⁵

125. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Dec. 20, 1945 reprinted in 6 Trials of War Criminals Before the Nuremberg Military Trib. Under Control Council Law No. 10 XVIII (1952). An identical provision was contained in article 5 of the Charter of the International Military Tribunal for the Far East.

Under that mandate, the IMT in Nuremberg tried and convicted numerous individuals for aiding and abetting the Nazi regime's atrocities.¹²⁶ Similarly, the British War Crimes Court in Hong Kong, which presided over cases involving war crimes committed in Asia during World War II, also convicted individuals who were complicit in violations of international law.¹²⁷ In one series of cases, called the Kinkaseki Mine Prosecutions, the British War Crimes Court found a private Japanese mining company guilty for using forced labor from POWs, even though the mining company claimed that the laborers were the army's responsibility.¹²⁸ The court found the supervisors of the mine to be culpable, although the court noted that the supervisors had not directly participated in the poor treatment of the POWs.¹²⁹

In the modern era of international human rights tribunals, aiding and abetting is accepted as a settled theory of culpability. The respective statutes of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) each provide for punishment of those who "planned, instigated, ordered, committed or otherwise aided or abetted in the planning preparation or execution" of conduct that violates specific human rights norms.¹³⁰ The Rome Statute of the International Criminal Court also punishes those who "aid, abet or otherwise assist" in the commission of an international crime.¹³¹

Under the rules of international law, aiding and abetting requires both an *actus reus* and a *mens rea*. Actual or constructive knowledge that one's acts will constitute aiding and abetting a violation is the *mens rea* standard for culpability. "[P]ractical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the

126. *United States v. Krauch*, 8 Trials of War Criminals Before the Nuremberg Tribunals under Control Council Law No. 10 (1952); *Flick*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10; *United States v. Krupp*, 9 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1950).

127. See Anita Ramasatry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 113-18 (2002) (providing a detailed account of the prosecutions).

128. See *id.* at 113-17.

129. *Id.* at 117.

130. *Statute of the International Criminal Tribunal for the Former Rwanda*, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994). *Statute of the International Tribunal for the Former Yugoslavia*, S.C. Res 827, U.N. SCOR, 48th Sess., 3217th mtg. at 5, Annex, U.N. Doc. S/RES/827 (1993), amended by S.C. Res. 1166, U.N. SCOR, 53d Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998).

131. *Rome Statute of the International Criminal Court*, July 17, 1998, at 25, U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 I.L.M. 999 (1998).

crime” is the actus reas standard for aiding and abetting liability.¹³² Although these standards do not need to be specific, universal and obligatory, the tribunals applying them have a long history of consistently applying these standards.

1. Actus Reus

In the ICTY case of *Prosecutor v. Furundzija*, the tribunal reviewed cases from U.S. military commissions, British military courts, the German Supreme Court, the UN War Crimes Commission, and other ICTY tribunals to determine the international law standard for aiding and abetting.¹³³ In *Furundzija*, the ICTY convicted a special police force commander for violating laws of war and prohibitions against torture. The defendant did not engage in any of the acts of rape or torture that were the subject of the case, but instead interrogated the victims before, during, and after other soldiers committed the acts.¹³⁴ The court concluded that the defendant encouraged the crimes and substantially contributed to their commission by being present during the rapes and torture, and by interrogating witnesses in conjunction with the crimes.¹³⁵

The *Furundzija* court provided the formal test for aiding and abetting liability while also giving examples of cases where liability had and had not been found. Referring to a case from the German Supreme Court in the British Occupied Zone, the court noted that mere “silent approval” of a crime against humanity was not a convictable offense.¹³⁶ The court refused to convict an individual who had followed a parade in which members of the political opposition were “exposed to public humiliation.”¹³⁷ The defendant had watched the atrocity but did not take any central part in the offense. The court reasoned that because the individual was a civilian, his mere presence could not encourage the offense in a way giving rise to culpability.¹³⁸ The court distinguished this case from another case in which the court found a military commander liable for his “silent approval” of his subordinates’

132. *Furundzija*, 38 I.L.M. at 317.

133. *Id.* at 357-67.

134. *Id.* at 370-71.

135. *Id.* at 371.

136. *Id.* at 359 (citing The Pig-cart parade case, Strafsenat. Urteil vom 10. August 1948 gegen L.u.a. StS 37/48 (Entscheidungen, Vol. I at 229 & 234)).

137. *Id.*

138. *Furundzija*, 38 I.L.M. ¶ 208.

destruction of a synagogue.¹³⁹ The court concluded that a spectator encourages the perpetrators in their conduct when he occupies some position of authority.¹⁴⁰

Application of the actus reus standard for aiding and abetting is limited to assistance that has a substantial effect on the commission of the crime. For example, in *Furundzija*, the ICTY cited an IMT case in which a Nazi interpreter participated in the “locating, evaluating and turning over lists of Communist party functionaries” to the Party, knowing that they would be executed. In that case, the court found that the interpreter’s participation constituted aiding and abetting because it substantially effected the commission of the crime.¹⁴¹ In contrast to the interpreter’s case, the court referred to a case where the defendant was found not guilty of war crimes and crimes against humanity because he was not in a position to “control, prevent, or modify” the commission of the crimes.¹⁴² The court there held that to create responsibility for aiding and abetting, the act must have “made some difference to the course of events.”¹⁴³ It is not enough, however, to show that one’s role in the commission of the violation would have been filled by someone else, because “the culpability of an aider and abettor is not negated by the fact that his assistance could easily have been obtained from another.”¹⁴⁴

Judges and commentators have expressed concerns that the international standard of aiding and abetting includes so-called “moral support.”¹⁴⁵ They fear that individuals or corporations who only participate in some de minimus way, perhaps unwittingly, in a violation of international law will be tried and held liable for atrocities. Such a broad reading of the standard would give courts unfettered discretion and clash with American judicial values of due process.

139. *Id.*

140. *Id.* at 359.

141. *Id.* at 361 (citing Trial of Otto Ohlendorf and Others (Einsatzgruppen), 4 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10).

142. *Id.* at 361.

143. *Furundzija*, 38 I.L.M. at 362. Notably, the standard does not limit culpability to those accomplices that can control whether or not the crime is committed. Rather, the ability simply to be able to “modify” the way in which the act was committed is significant enough to give rise to culpability. This point bears mentioning because of defendants’ repeated attempts in ATCA cases to mischaracterize the international standard for aiding and abetting as requiring some element of control.

144. *Id.* at 362.

145. *E.g.*, *Doe v. Unocal*, 2002 U.S. App. LEXIS 19263, at *96. (Reinhardt, J., concurring) (criticizing moral support standard).

This broad understanding of the "moral support" standard, however, is not supported by the cases applying it. As used by the ICTY, moral or intangible support did not extend to insignificant participation or a mere pat on the back. Rather, the court referred to a defendant who gives "additional confidence to his companions" that "facilitates the commission of the crime."¹⁴⁶ In *Furundzija*, the court used the example of a lookout who plays a "substantial role" in the commission of the crime, even though the assistance given is "intangible."¹⁴⁷ In addition to "additional confidence" that "facilitates the commission of a crime," the ICTY also found that assistance *ex post facto* was sufficient for criminal responsibility because it could constitute a form of substantial moral support. For example, in another case cited in *Furundzija* the court held that the cremator who disposes of bodies for a killer plays a substantial role in the killer's ability to commit the crime by giving him comfort that evidence of the crime will be destroyed.¹⁴⁸ Thus, it is obvious that the definition of "moral support" under international law would not condemn a mere bystander. Plaintiff must show some participation in and effect on the perpetration of the crime.¹⁴⁹

2. Mens Rea

A defendant's culpability for aiding and abetting an international law offense will attach only if the defendant knew that his or her actions would aid the offense.¹⁵⁰ The accomplice does not need to share the mens rea of the principal.¹⁵¹

To support the standard, the *Furundzija* court cited a British case in which defendants acted as drivers for codefendants who murdered three Allied airmen.¹⁵² The drivers were acquitted of charges of complicity because the court found that they had not known of the principal's intentions.¹⁵³

146. *Furundzija*, 38 I.L.M. at 358.

147. *Id.*

148. *Id.*

149. *See id.* On the other hand, when the supporter occupies a role of authority over the perpetrator, there is basis for criminal culpability under international law. *Id.* at 359. In this situation, though, it is obvious that the supporter's authority renders his or her support culpable; participation in the act affects its perpetration. *See id.* Another notable facet of the standard is that the participation need not be the but-for cause of the commission of the forbidden act. *Id.*

150. *Furundzija*, 38 I.L.M. at 366.

151. *Id.*

152. *Id.* at 365.

153. *Id.*

Conversely, defendants who are aware of the consequences of their actions may be found to have a culpable mental state. In the British Military Court's *Zyklon B Case*, the prosecution established that the defendants sold poison gas to the Nazi regime knowing it would be used to commit mass murder.¹⁵⁴ The defendants, though, sold the gas only in pursuit of profit, and did not have any specific intent for the murders to be committed.¹⁵⁵ Nonetheless, the tribunal found the defendants culpable, because knowledge without intent was sufficient to create culpability in that situation.¹⁵⁶ *Zyklon B's* knowledge standard for aiding and abetting was followed in the more recent decisions of *Furundzija*¹⁵⁷ and *Musema*¹⁵⁸ in the ICTY and ICTR, respectively.

B. Rules of Decision of Aiding and Abetting Under U.S. Federal Common Law

1. Federal Standards Utilized in the Context of International Law

The law of aiding and abetting violations of international law is so developed in the United States that both the judiciary and the executive branch have had the opportunity to offer their opinions as to the standard. Relevant case law and executive directives form a special class of federal common law in which courts and the executive have developed federal rules to apply norms of international law. This authority, therefore, is particularly relevant to ATCA federal common law analysis.

The concept of responsibility under international law for those who aided and abetted violations of international law has been recognized by U.S. courts since the very beginnings of the Republic. In *Talbot v. Janson*,¹⁵⁹ a case decided under the law of nations¹⁶⁰ in which

154. Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 LAW REPORTS OF TRIALS OF WAR CRIM. 93, 101 (1947) (Brit. Military Ct., Hamburg, March 1-8, 1946).

155. The Prosecutor never argued that the defendants had the specific intent for the mass murders, but instead based its case on the defendants' knowledge of the atrocities. See *id.* at 94.

156. *Id.* at 101-02.

157. *Furundzija*, 38 I.L.M. at 365.

158. Prosecutor v. Musema, Case No. ICTR-96-13-T, Judgment, ¶¶ 180-81 (Int'l Crim. Trib. for Rwanda Trial Chamber I Jan. 27, 2000), www.itcr.org/ENGLISH/cases/Musema/judgment/index.html.

159. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795).

160. *Id.* at 157 (noting that the principles the Court applied were "deducible from the law of nations"). The case was a prize case, which was determined under the law of nations. See *Bradford R. Clark, Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1334-41 (1996) (discussing the Prize cases as a subset of the law of nations).

the district court had found the ATCA to be one of several sources of jurisdiction,¹⁶¹ the U.S. Supreme Court found that Talbot, a French citizen, who assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship, acted in contravention of the law of nations and was liable for the value of the captured assets.¹⁶² The Court found Talbot liable though his actions would have been lawful if he had acted on his own.¹⁶³ Justice Paterson wrote¹⁶⁴ that Talbot's liability sprang from his actions in "aiding him to arm and outfit, in co-operating with him on the high seas, and using him as the instrument and means of capturing vessels."¹⁶⁵ Under the law of nations, Justice Paterson continued, French citizens under lawful commission could capture Dutch ships because the nations were at war. The law, however, prohibited French citizens from "seducing the citizens of neutral nations from their duty, and assisting them in committing depredations upon friendly powers . . . [and from] abet[ting] the predatory schemes of an illegal cruiser on the high seas."¹⁶⁶

In finding the defendant liable, Justice Paterson applied a standard that closely resembles the substantial participation rule embodied in modern international jurisprudence. Justice Paterson found that the defendant surrendered his protection under international law when he supplied his accomplice's ship with guns and used him "as the instrument and means of capturing vessels."¹⁶⁷ This defendant, Justice Paterson wrote, "consorted and acted with [Ballard his accomplice], and

161. *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358 (D.S.C. 1794).

162. *Talbot*, 3 U.S. (3 Dall.) at 167-68 (Iredell, J., concurring) ("It is impossible that Ballard can be guilty of a crime, and Talbot, who associated with him, in the wilful commission of it, can be wholly innocent of it.").

163. *Id.*

164. The Justices of the unanimous Court delivered their opinions seriatim, *Id.* at 152, but all opinions accepted that Talbot was liable for restitution, *see id.* at 169, thereby endorsing Paterson's theory of aiding and abetting liability. *Id.* at 167-68 (Iredell, J., concurring) ("This claim . . . would undoubtedly be good, if [Talbot] was not a confederate with Ballard. But it is clear that he was, that he cruized before and after, in company with him He abetted Ballard's authority It is impossible that Ballard can be guilty of a crime, and Talbot, who associated with him . . . can be wholly innocent of it. . . ."). "[E]ven supposing that Talbot was, bona fide, a French citizen, the other circumstances of the case are sufficient to render the capture void." *Id.* at 169. (Rutledge, J., concurring) (awarding restitution and stating that "[t]he capture. . . was a violation of the law of nations, and of the treaty with Holland"). Justice Wilson, the final member of the Court, did not participate in the judgment because he had decided the case in the circuit court. *Id.* at 168.

165. *Talbot*, 3 U.S. (3 Dall.) at 156 (Paterson, J., concurring).

166. *Id.*

167. *Id.*

was a *participant* in the iniquity of fraud.”¹⁶⁸ Judge Iredell, writing in concurrence, agreed, finding that Talbot abetted Ballard when he “cruized before and after, in company with him [and] put guns on board of [Ballard’s] vessel”¹⁶⁹

The justices in *Talbot* also found that the proper mens rea standard was the defendant’s knowledge of the principal’s intended actions. Justice Paterson wrote that the defendant was guilty because he “knew that [his accomplice] had no commission, and he also knew the precise case and situation of the *Ami de la Liberte*: to whom she belonged, where fitted out, and for what purpose.”¹⁷⁰ Judge Iredell provided even more detail as to the standard, stating that “if Talbot had come up, ignorant of Ballard’s authority, and inadvertently put men on board the prize in conjunction with Ballard” he would not be liable.¹⁷¹ Iredell explained, however, that “willful ignorance is never excusable; when there is time to enquire, enquiry ought to be made.” Thus, this early Supreme Court case demonstrates the longstanding basis for both actual and constructive knowledge serving as a basis for culpability under the standard for aiding and abetting liability in cases involving the law of nations.

Talbot was not the only early American legal commentary to find secondary liability for violations of the laws of nations. Other authorities discussing the conduct of individuals in the time of war demonstrated that international law created penalties for those who assisted in acts that disturbed peaceful relations between nations or those who aided enemy forces. In *Heinfield’s Case*,¹⁷² a case predating the ATCA and the Constitution, future Chief Justice John Jay wrote that “whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture.”¹⁷³ Similarly, in 1795 U.S. Attorney General William Bradford wrote, with reference to American citizens who had aided and abetted a French Fleet in plundering ships off the African coast, “there can be no doubt that the company or individuals who have been injured by these acts of hostility have a

168. *Id.* at 157 (emphasis added). See also *id.* at 167 (Iredell, J., concurring) (agreeing that the defendant’s actions in putting guns on the vessel supported a finding of liability).

169. *Id.* at 167 (Iredell, J., concurring).

170. *Talbot*, 3 U.S. (3 Dall.) at 157.

171. *Id.* at 167 (Iredell, J., concurring).

172. *Heinfield’s Case*, 11 F. Cas. 1099 (C.C. Pa. 1793).

173. *Id.* at 1103.

remedy by a civil suit” under the ATCA.¹⁷⁴ Later, in litigation resulting from the civil war, the Supreme Court held that “those who act with, or aid or abet and give comfort to enemies” are enemies in war under the law of nations, and are subject to seizure of property for such acts.¹⁷⁵

Liability for third party complicity in violations of international law continues to be recognized today in this country. The legislative and executive branches have endorsed the principle that aiding and abetting violations of international law is punishable under international norms. The Department of Defense (DOD), in its instructions to military commissions trying individuals for violations of international law, has found that the crime of “aiding the enemy” exists as a punishable offense.¹⁷⁶ The DOD also instructs the commissions that “[a] person is criminally liable as a principal for a completed substantive offense if that person commits the offense . . . aids or abets the commission of the offense, solicits commission of the offense, or is otherwise responsible due to command responsibility.”¹⁷⁷ Congress also endorsed this view of international law when it wrote the Torture Victim Protection Act. There, the Senate reported: “Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.”¹⁷⁸

The DOD’s instructions also track international authority by defining aiding and abetting as “assisting, encouraging, advising, instigating, counseling, commanding, or procuring another to commit a substantive offense . . . [or] in any other way facilitating the commission of a substantive offense.”¹⁷⁹ The instructions, again following the lead of international courts, also state that “inaction may render one liable as an aider or abettor.”¹⁸⁰ The DOD, then, also gives support to the use of the substantial participation standard used by international and foreign tribunals.

174. 1 Op. Att’y Gen. 57, 58-59 (1795); *see also Kadie*, 70 F.3d at 239 (citing Bradford’s opinion).

175. *Miller v. United States*, 78 U.S. (11 Wall.) 268, 312 (1870).

176. Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6(b)(5) (2004).

177. *Id.* § 11.6(c).

178. SENATE COMM. ON THE JUDICIARY, THE TORTURE VICTIM PROTECTION ACT OF 1991, S. REP. NO. 102-249, 102d, at 8-9 (1991).

179. Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6(c)(2)(A) (2004).

180. *See id.* § 11.6(c)(2)(B).

2. Federal Standards in the Context of Domestic Federal Statutes

The domestic federal common law standard for aiding and abetting used in ordinary tort suits is identical to the international rule. The rule is set forth in the Restatement (Second) of Torts, and states:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . . .¹⁸¹

Courts applying this standard have recognized that "liability for aiding and abetting often turns on how much encouragement or assistance is substantial enough."¹⁸² That question is answered by the four factors listed in the Restatement test to be considered by courts: (1) the nature of the act encouraged, (2) the amount of assistance given by the defendant, (3) his presence or absence at the time of the tort, (4) his relation to the other [tortfeasor] and his state of mind.¹⁸³

In *Halberstam v. Welch*,¹⁸⁴ the D.C. Circuit applied the knowing participation standard to find a burglar's assistant civilly liable for a murder the burglar committed.¹⁸⁵ The defendant, the burglar's girlfriend, assisted the principal by providing money and other support for his nonviolent criminal activities.¹⁸⁶ The court, after extensive analysis of the civil aiding and abetting standard under both federal and state precedent, found the defendant liable.¹⁸⁷ The murders, the court explained, were a foreseeable outcome of the principal's criminal activities.¹⁸⁸ Thus, the defendant's participation in the venture made her liable for the outcome.¹⁸⁹

The federal standard for aiding and abetting has also been applied in RICO cases, where defendants may be found liable for substantially

181. RESTATEMENT (SECOND) OF TORTS § 876(b); see also WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971) ("[T]he original meaning of 'joint tort' was that of vicarious liability for concerted action. All persons who acted in concert to commit a trespass, in pursuance of a common design, were held liable for the entire result."); I THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefore.")

182. *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983).

183. RESTATEMENT (SECOND) OF TORTS § 876(b), cmt. d.

184. *Halberstam*, 705 F.2d at 472.

185. *Id.* at 488.

186. *Id.* at 475-76.

187. *Id.* at 481-87.

188. *Id.* at 488.

189. *Halberstam*, 705 F.2d at 488.

participating in predicate acts.¹⁹⁰ Congress has also formally codified the standard in provisions of ERISA. Under the ERISA's civil enforcement provision, Congress has provided:

In the case of . . . any knowing participation in [a breach of fiduciary responsibility under 29 USC §§1101 et seq.] by any other person, the Secretary shall assess a civil penalty against such . . . other person in an amount equal to 20 percent of the applicable recovery amount.¹⁹¹

As under international precedent, the federal aiding and abetting standard also denies liability for passive bystanders. In *EEOC v. Illinois*,¹⁹² the Seventh Circuit applied the knowing participation standard to an age discrimination claim. The court found that a state was not liable for failing to inform a school district of a change in the law with respect to mandatory retirement.¹⁹³ The court noted that the district's retention of its own legal counsel relieved the state of its obligation to minimize the district's inadvertent violations of the law.¹⁹⁴

Thus, the standard for aiding and abetting under domestic federal common law and international law are the same in all substantive respects. This convergence of rules under ATCA aiding and abetting should make the overall federal common law analysis a relatively easy pursuit. Courts need not look to congressional intent or the needs of the international system in order to select between the standards. Indeed, the fact that both sources of authority point to the same result, and because of the abundance of precedent regarding particular cases that each source offers, courts should be comfortable that they are not applying a poorly defined or untested rule. Rather, it is clear that the knowing participation standard is an appropriate and effective means for enforcing international norms under the ATCA.

IV. CRITIQUES OF THE KNOWING PARTICIPATION STANDARD

Critics of the federal and international aiding and abetting standard described herein argue that over-deterrence results from the vagueness

190. *E.g.*, *United States v. Pungitore*, 910 F.2d 1084, 1132 (3d Cir. 1990); *United States v. Cauble*, 706 F.2d 1322, 1339-40 (5th Cir. 1983); *Wardlaw v. Whitney Nat'l Bank*, No. 94-2026, 1994 U.S. Dist. LEXIS 15215, at *16-20 (E.D. La. 1994) (holding that civil aiding and abetting liability is still valid after the Supreme Court's ruling in *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)). The *Cent. Bank of Denver* case is discussed *infra* text accompanying notes 196-97.

191. 29 U.S.C. § 1132(1)(1)(B) (2000).

192. *EEOC v. Illinois*, 69 F.3d 167 (7th Cir. 1995).

193. *Id.* at 169-70.

194. *Id.*

of the principle. Further, even if the standard is not overly vague, foreign investment is deterred by application of the standard. Additionally, critics argue that the principle is too vague to give corporations ample notice of the culpability or nonculpability of their conduct. These arguments are unconvincing for at least two reasons.

First, assuming that the standard would deter investment that does not encourage the violation of international norms, courts could, given their ability to generate federal common law rules to conform to federal and international interests, craft a more precise rule. If, as is most likely, courts could not articulate such a standard, they would be faced with two choices: (1) either under-deterrence, necessarily resulting in more investment that encourages human rights violations, or (2) over-deterrence, which discourages businesses from making investments that pose a risk of resulting in their participation in atrocities, even if some of those investments would not actually encourage abuses. The gravity of offenses in any case in which courts find ATCA jurisdiction is a strong argument for over-deterrence. The knowing participation standard fulfills the interests in uniformity that are necessary considerations of any exercise of federal common lawmaking. Because the standard already exists in both international and domestic law, following it would create greater consistency and not necessitate any exercise of judicial lawmaking.

Second, the standard does not cause over-deterrence through vagueness. Empirically, the standard has been proven not to be so vague as to disrupt markets or result in economic inefficiency. This is true because the knowing participation standard was used to prosecute aiders and abettors of Securities Act violations for over twenty-six years.¹⁹⁵ During this time, individuals and corporations were not overly deterred from investing in, selling, and trading securities despite the knowing participation standard. Thus, it is untenable to argue that this standard cannot be applied to areas that affect corporate conduct. Critics, however, may refute this argument by citing the Supreme Court's elimination of civil aiding and abetting for Securities Act violations.

In 1994, the Supreme Court in the case of *Central Bank v. First Interstate Bank*,¹⁹⁶ brought an end to the era of civil aiding and abetting liability under §10(b) of the Securities Exchange Act. The Court,

195. See David J. Baum, Comment, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability under Section 10(b) and Rule 10b-5*, 44 AM. U. L. REV. 1817, 1818-19 (1995) (reviewing civil aiding and abetting liability under the Securities Act since 1968).

196. *Cent. Bank of Denver*, 511 U.S. at 164.

however, did not make the broad statement that federal civil statutes could never contain aiding and abetting liability, or that the aiding and abetting standard courts had used was inappropriate or ineffective. Rather, the Court determined that as a matter of statutory interpretation, courts had erred in finding that Congress intended for § 10(b) to contain an aiding and abetting component. The Court stated:

From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action . . . Here, it would be just as anomalous to impute to Congress an intention in effect to expand the defendant class for 10b-5 actions beyond the bounds delineated for comparable express causes of action.¹⁹⁷

Applying the Court's reasoning to the ATCA does not yield the conclusion that the ATCA does not create aiding and abetting liability. As an initial matter, courts have widely held that the "law of nations" under the ATCA should not be interpreted as it was understood in 1789; rather it should be interpreted as it stands today.¹⁹⁸ Even if one were to apply the original intent model of interpretation to the ATCA, however, it would be clear that its drafters understood the term "law of nations" to include aiding and abetting liability. As is clear by the *Talbot* decision, the Bradley opinion, and various other sources of early authority, aiding and abetting liability was applicable to torts committed in violation of the law of nations in 1789 when the ATCA was passed.

If there is a lack of predictability, then it occurs at the margins—that is, at the level of the courts' choice of a specific standard to effectuate international law under the ATCA. This lack of predictability is something that the founders accepted as a necessary part of the ATCA when they drafted it in such general terms. In fact, the founders were likely accustomed to trusting the courts to apply general norms to particular cases because at the time, common law was a prevalent legal force. Moreover, just as the Founders trusted courts to apply justice in the application of domestic common law to an individual case, they similarly found the judiciary the proper branch to apply justice in an individual case concerning international law.¹⁹⁹

197. *Id.* at 179-80.

198. *Filartiga*, 630 F.2d at 881.

199. *See supra* text accompanying notes 84-88.

V. CONCLUSION

This Article has proceeded in two phases. First, it resolved the question of how to effectuate international norms that find their way into U.S. courts via the ATCA. The federal common law methodology, that federal precedent demonstrates is appropriate in this circumstance, in turn directs courts to rely on federal and international precedent. In its second step, this Article applied that methodology to aiding and abetting liability in ATCA cases, finding that both sources of precedent necessitate the same result. Defendants should be found liable where they have knowingly participated in a violation of an international norm.

Under this standard, plaintiffs in corporate ATCA cases such as *Unocal* will have to show that a corporation's participation rose to the level of substantial assistance or encouragement of a government that committed human rights abuses. It is unlikely that merely doing business in a nation with a poor human rights record will give rise to liability. This is because such conduct is akin to the "silent approval" of watching the perpetration of an international offense without any other encouragement or support of the principal. It still remains, however, that businesses that choose to work in cooperation with offending governments in any way that encourages, instigates, or supports some international offense, thereby promoting commission of crimes that they know or should know will occur, should be found liable. Under this rubric, *Unocal's* actions provided more than an adequate basis for liability under the ATCA. It formed a partnership with the government of Myanmar, hired Myanmar's military to provide security and logistical support for the pipeline, and failed to stop atrocities of which it was aware.

Critics of ATCA suits have long complained that courts have used the statute to make decisions based more on personal preference than legal principle. This critique has been fueled by most American lawyers' lack of familiarity with international law and by courts' failure to produce a clear methodology for adjudicating ATCA cases. An increased understanding of the mechanics of international law and federal common law demonstrates that courts can and should define a specific methodology for deciding issues of international law in U.S. courts. Far from betraying important Constitutional values, the federal common law analysis proposed here satisfies the important federal interests of creating uniformity in the adjudication of matters impacting foreign affairs. Also, it provides a forum for the settlement of disputes involving foreigners. The application of the federal common law

methodology reveals that federal and international law does not diverge as often as one might expect.

All of this demonstrates that ATCA litigation need not consist of the application of amorphous standards and judicial fiat. Instead, the litigation of international norms in U.S. courts can be grounded in well-established legal doctrine.

VI. ADDENDUM

On June 29, 2004, the Supreme Court rendered its decision in *Sosa v. Alvarez-Machain*.²⁰⁰ Although the Court denied Dr. Alvarez's particular claim, the Court, in a well-reasoned historical analysis of the ATCA's passage and its relationship to common law, ratified the substance of the *Filartiga* doctrine that the ATCA opens the doors of the federal courts to victims of violations of at least some widely-accepted norms of international law.

In *Alvarez*, the Court, over Justice Scalia's vehement dissent, endorsed the approach of dozens of federal courts—including the Ninth Circuit's analysis of *In re Estate of Marcos Human Rights Litigation*,²⁰¹ and the *Filartiga* decision, that plaintiffs may pursue claims for violations of international norms that are "specific, universal, and obligatory."²⁰² Indeed, the Court repudiated virtually all of the arguments about the scope and meaning of the ATCA asserted by *Sosa* and by the United States as *amicus curiae*.²⁰³ The Supreme Court did not criticize a single case in which an international human rights norm had been recognized as meeting this standard, other than the arbitrary arrest claim considered in *Alvarez* itself.

Justice Souter, joined by six Justices, wrote the opinion for the Court accepting the government's view that the ATCA creates only jurisdiction.²⁰⁴ For the Court, however, this was not the end of the analysis.

The Court recognized that the Founders had intended to enforce the "law of nations" when the First Congress enacted the ATCA in

200. 124 S. Ct. 2739 (2004). This summary of the *Alvarez* decision does not begin to address the many issues raised by the decision, many of which are already being hotly debated and litigated across the country. For a more comprehensive initial analysis of the decision see Ralph Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 58 VAND. L. REV. (forthcoming 2004).

201. 25 F.3d 1467 (9th Cir. 1994). The Court's citation to *Filartiga* and *Marcos* suggests that norms like torture, extrajudicial execution, disappearances, prolonged arbitrary detention, genocide, slavery, war crimes, and crimes against humanity are clearly actionable under the ATCA.

202. 124 S. Ct. at 2766. Justice Souter also cited to Judge Edwards concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 554, 781 (D.C. Cir. 1984) (Edwards, J., concurring).

203. 124 S. Ct. at 2755. The most important argument was that the ATCA was merely a "jurisdictional" statute and that federal courts were not authorized to hear and decide "law of nations" claims without additional implementing legislation by Congress. Even then, the government argued that ATCA actions infringed on the Executive's inherent constitutional authority to conduct foreign affairs and protect national security.

204. *Id.* at 2761.

1789. The Court was persuaded by historical evidence that Congress did not believe it was necessary to enact separate implementing legislation before the federal courts could hear and decide such claims.

Having accepted that premise, the issue for the Court was translating this intent from the eighteenth century world in which only a handful of "law of nations" violations were actionable.²⁰⁵ "[T]he reasonable inference is that the [ATCA] statute was intended to have practical effect the moment it became law."²⁰⁶ Although the Court determined that nothing in the intervening 215 years since the passage of the First Judiciary Act precluded federal courts from recognizing such common law claims, the Court decided that the federal courts should require such claims 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 we have recognized."²⁰⁷

In so doing, the Court acknowledged, quite explicitly, that the residual discretion a court exercises under the ATCA in recognizing a claim under the law of nations falls within the rubric of federal common lawmaking.²⁰⁸ According to the Court, this process involves looking to the "current state of international law"²⁰⁹—a process long defined by *The Paquete Habana*.

Because the Court found that Dr. Alvarez's arbitrary arrest did not breach the principles of well-established international law, it did not reach the issue of what methodology is appropriate for determining the rules of decision in ATCA cases after a court decides that the plaintiff has made a "law of nations" claim based on an international norm satisfying the *Alvarez* Court's standard. However, the Court's historical discussion of the ATCA, and its determination that some "residual common law discretion"²¹⁰ remains, is instructive.

205. The handful would have included piracy, attacks on ambassadors, and violations of safe conduct. *Id.*

206. *Id.*

207. *Id.*

208. 124 S. Ct. at 2761. ("The jurisdictional grant is best read as having been enacted on the understanding 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.") *See also id.* ("We think it correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations...."). *Id.* at 2765 (calling the application of international law under the ATCA the recognition of "private claims under federal common law").

209. *Id.* at 2766.

210. *Id.* at 2769.

First, the explication of the ATCA's common law roots, and its current common law character, clarifies that the law to be applied in ATCA cases does not involve a traditional choice-of-law analysis in which the court selects from several already-established positive law sources. Second, the Court echoed our assumption that the common law analysis is not based on "the whims of judges,"²¹¹ but instead is subject to "judicial caution"²¹² and "vigilant doorkeeping."²¹³

Thus, the Court's opinion finishes where our article began, with the following question: when a court finds that an international law norm passes scrutiny such that it may be the subject of an action in federal court, what is the most appropriate manner for the court to derive rules of decision to apply established norms of international law? The answer, now informed by the Court's decision, seems to be the same. The common-law analysis that is central at the outset of ATCA actions must follow through in the determination of rules of decision. The most appropriate method of conducting that analysis remains an evaluation that looks to both international and federal common law, tempered by a discretionary analysis of how such rules will affect the policies underlying the international norm.²¹⁴

As this article went to press, supplemental briefing requested by the Ninth Circuit in the *Doe v. Unocal* case was being completed.²¹⁵ The *en banc* decision in *Doe v. Unocal* is likely to be the first major appellate decision to elucidate the meaning of the *Alvarez* decision. The United States, as *amicus curiae*, has asked the Court not to recognize aiding and abetting liability under the ATCA arguing that this is a legislative decision and that international law does not provide a "specific, universal and obligatory" definition of aiding and abetting, especially in civil cases.

The United States's view that subsidiary rules of decision must meet the "specific, universal and obligatory" test would seriously undermine the ability of courts to fashion remedies for the serious human rights norms falling within ATCA jurisdiction.

As we have already argued,²¹⁶ such an approach ignores the methodology international tribunals have used since Nuremburg in

211. See *supra*, Introduction.

212. 124 S. Ct. at 2762.

213. *Id.* at 2764.

214. See *supra*, Part II.C.

215. All of the supplemental briefs filed by the parties and the United States as *amicus curiae* may be found at www.sdshh.com.

216. See Part III, *supra*.

applying international norms to particular cases. To require a court to find a "specific, universal and obligatory" prohibition against aiding and abetting is as nonsensical as requiring such a finding with respect to defenses, damages, statutes of limitations, and numerous other ancillary rules that are essential elements of any civil case. Moreover, the *Alvarez* decision does not support the government's approach. Also, the Court's discussion of federal common law suggests that the federal courts have broader federal common law decision-making regarding such subsidiary rules once a plaintiff brings a "law of nations" claim satisfying the *Alvarez* test.

The Court's decision in *Alvarez* brought much needed clarity to ATCA litigation, pointedly underscored by the dramatic statement that victims of human rights abuses will find the courtroom door "still ajar."²¹⁷ However, the lower courts will continue to wrestle with the architecture those plaintiffs will find within. In this article we have suggested that courts proceed as the Justices did in *Alvarez*, with due respect for the history and the policies that underlie the ATCA.

217. 124 S. Ct. at 2764.