HOLDING HUMAN RIGHTS VIOLATORS ACCOUNTABLE BY USING INTERNATIONAL LAW IN U.S. COURTS: ADVOCACY EFFORTS AND COMPLEMENTARY STRATEGIES

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INTRODUCTION

In the last twenty-five years, U.S. human rights advocates have increasingly turned to international law to hold human rights violators accountable in U.S. courts. In particular, civil suits based on the Alien Tort Statute ("ATS")\(^1\) and the Torture Victim Protection Act ("TVPA")\(^2\) against human rights violators who live in, visit, or, in the case of corporations, do business in, the United States, have been one of the most effective means of enforcing international law in U.S. courts.

This Article is designed as a broad survey of the variety of ways in which advocates in the United States have attempted to employ international law arguments. It begins with an overview of the ATS, the TVPA, and the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*.\(^3\)

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The authors have been engaged in the types of litigation discussed in this Article for many years. Additional information about these cases and issues may be found at www.cja.org, www.ccr-ny.org, and www.sdshh.com. The ACLU also publishes an annual International Civil Liberties Report, which may be found on its website: www.aclu.org. The authors express their appreciation to the JEHT Foundation for its early support of this writing project, and would also like to thank CJA Litigation Director Matthew Eisenbrandt, CCR President Michael Ratner and law students Collin Seals, UCLA, Elizabeth Wheeler, Santa Clara, Kelly McAnnay, Northeastern, and Andre Segura, NYU, for their assistance.

\(^1\) The ATS has often been called the Alien Tort Claims Act ("ATCA"). We use the term Alien Tort Statute in this Article because the Supreme Court referred to the statute as such in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).


\(^3\) *Sosa*, 124 S. Ct. at 2739.
It then discusses and assesses the impact of efforts to date to hold accountable (a) foreign individuals and governments; (b) the U.S. government and agencies, officials, and contractors working with the government; and (c) multinational corporations. The last Part discusses some of the opportunities and challenges facing advocates in this area in the future.

I. OVERVIEW OF THE ATS, TVPA, AND U.S. SUPREME COURT DECISION IN SOSA

The ATS, adopted by Congress in 1789 as part of the first Judiciary Act, provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Since 1980, with the Second Circuit's landmark decision in the case of Filartiga v. Pena-Irala, the federal courts, including the Second, Ninth, and Eleventh Circuits, have interpreted the ATS to allow suits by "aliens" against defendants found in the United States who are alleged to have committed serious human rights violations (e.g., torture, extra-judicial execution, and disappearance).

Since Filartiga, human rights lawyers have built an impressive body of human rights jurisprudence in ATS cases and have won some very large judgments. Throughout this period, the question of whether the U.S. Supreme Court would endorse the use of the ATS in human rights cases has remained. This uncertainty appears to have been resolved largely by the Supreme Court's June 2004 decision in Sosa v. Alvarez-Machain.5

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4 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
5 A comprehensive analysis of the Sosa decision is beyond the scope of this Article. For more in depth analyses of the decision see, e.g., Ralph Steinhardt, Laying One Bankrupt Critique To Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts, 57 VAND. L. REV. 2241
In *Sosa*, the Supreme Court affirmed the *Filartiga* line of cases, holding that ATS claims must "rest on a norm of international character accepted by the civilized world and defined with the specificity comparable to the features of the 18th-century paradigms we have recognized." Significantly, the Court cited with approval cases, including *Filartiga*, which permitted ATS claims for violations of international norms that are "specific, universal and obligatory."\(^6\)

Although the Court denied the particular arbitrary arrest claim advanced by Dr. Alvarez, it did so in a manner that does not appear to undermine the prior case law in which claims of genocide, war crimes, crimes against humanity, slavery-like practices, torture, disappearance, summary execution, and prolonged arbitrary detention were found actionable under the ATS.

The Court did not resolve numerous issues that will take years to work their way through the courts, including which "law of nations" violations can be remedied under the ATS, exhaustion of remedies, *forum non conveniens*, applicable immunities, the application of the political question and act of state doctrines, and the choice of law—international, federal, state, or the law of the forum where the tort occurred—to be applied to ancillary issues such as third party complicity, aiding and abetting liability, capacity to sue, and the measure of damages. ATS litigators will be engaged in an intensive effort to preserve the broad remedial scope the ATS recognized in pre-*Sosa* cases in pending and future litigation across the country. The

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\(^6\) *Sosa*, 124 S. Ct. at 2766, citing *Filartiga*, 630 F.2d 876; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J.); and In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994). The eighteenth century paradigms were piracy, attacks on ambassadors, and violations of safe conducts. *Sosa*, 124 S. Ct. at 2761.
success of these efforts is crucial to the continuing effectiveness of this innovative remedy.

The ATS is not the only statutory basis for international human rights litigation in U.S. courts. In 1991, the U.S. Congress adopted the Torture Victim Protection Act, which President George H.W. Bush signed into law in 1992. The TVPA provides that “an individual who under actual or apparent authority, or color of law, of any foreign nation” subjects another to torture or extrajudicial killing is liable for damages in a civil action. The TVPA provides a remedy to “aliens” and U.S. citizens. The TVPA’s legislative history demonstrates that it did not supersede the ATS, which continued to have “other important uses.” This view of the TVPA appears to have been recognized by the Supreme Court in the Sosa case.

The TVPA is narrower than the ATS in that it (a) only applies to torture and extrajudicial killing, and (b) may be used only against “individuals” who act under “actual or apparent authority of any foreign nation.” It is broader in one respect in that it provides a remedy to U.S. citizens, namely, for torture and summary execution that occurs under color of foreign law. The TVPA does not appear to authorize suits against individuals acting under the authority of, or in concert with, the U.S. government, although it is possible to conceive of scenarios in which the TVPA could be applied against U.S. citizens working under the “actual or apparent authority” of a foreign government.

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9 Sosa, 124 S. Ct. at 2763.
II. CASES AGAINST FOREIGN INDIVIDUALS

A. Assessment of Impact to Date of ATS/TVPA Cases

Since 1980, at least sixteen human rights perpetrators (including Pena-Irala, the defendant in the landmark Filartiga case) have been sued successfully. One of those was a current high-ranking government official: the Bosnian Serb leader Radovan Karadzic. Seven were former high-ranking civilian or military officials who continued to exercise considerable influence in their countries. All were found to have had substantial responsibility for egregious

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human rights violations, to be subject to the personal jurisdiction of the court, and not to be entitled to immunity from suit (sovereign, diplomatic, or otherwise). In all cases, the plaintiffs satisfied the requirements of standing and the statute of limitations, and demonstrated that they had exhausted any available and effective remedies in their home countries. In several cases the courts expressly found that the cases did not pose a significant interference to U.S. foreign policy or that the act of state doctrine applied.\textsuperscript{11}

Though the cases have sometimes been criticized as being "political,"\textsuperscript{12} in our view the ATS litigation of the past twenty years has accomplished a number of important objectives and has laid the foundation for further development of this civil anti-impunity tool for human rights victims in the United States and possibly in other countries. As we see it, these lawsuits have contributed to the worldwide movement against impunity by (1) helping to ensure that the United States does not remain a safe haven for such perpetrators, (2) holding individual perpetrators accountable for human rights abuses, (3) providing the victims with some sense of official acknowledgment and reparation, (4) contributing to the development of international human rights law, and (5) building a constituency in the United States that supports the application of international law in such cases and an awareness about human rights violations in countries in all regions of the world. It also appears that these cases, when taken together with other anti-impunity efforts around the

\textsuperscript{11} It should be noted that many of the cases brought to redress Holocaust-era human rights violations were also based, in part, on the ATS. Many billions of dollars have been recovered in these cases through settlements. We do not address these cases in this Article. See generally Michael Bazyler, Holocaust Justice: The Battle for Restitution in America’s Courts (2004); Michael Bazyler & Scholz, Holocaust Restitution in the U.S. and Other Claims for Historical Wrongs, ACLU INT’L CIVIL LIBERTIES REPORT, at 101-17 (2003). With the settlement in the Unocal cases, see infra Part IV, there is also the possibility of substantial recoveries for human rights victims in the corporate complicity cases.

world, are also helping to (6) create a climate of deterrence and (7) catalyze efforts in several countries to prosecute their own human rights abusers.

1. Ensuring that the U.S. Does Not Remain a Safe Haven for Human Rights Abusers

The Center for Justice and Accountability ("CJA") estimates that several hundred human rights abusers now live in the United States with substantial responsibility for heinous atrocities, and that several dozen high-level perpetrators visit every year. These figures are supported by estimates from the U.S. Bureau of Immigration and Customs Enforcement (ICE). They have come from more than seventy countries, including Bosnia, Cambodia, Chile, El Salvador, Ethiopia, Guatemala, Haiti, Honduras, India, Liberia, Pakistan, Peru, Rwanda, Sierra Leone, Somalia, Sri Lanka, and Vietnam. Only a few dozen human rights abusers have been deported, in addition to the approximately ninety who were denaturalized, deported, or extradited for Nazi-era crimes. Most of the non-Nazis have been deported since 2000. Most of them are low-level abusers and nearly half are Haitian. The majority of them are identified in the asylum process when they declare that their fear of persecution is based on the fact that they were part of a unit that participated in human rights atrocities. No human rights abuser has been criminally prosecuted for torture in the United States, despite the fact that Congress

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adopted a law in 1994 that gives U.S. courts jurisdiction to prosecute such crimes.\textsuperscript{15}

The ATS cases have resulted in the removal or departure of numerous human rights abusers who were either high level or directly involved in committing atrocities. Of the sixteen individuals who have been successfully sued using the ATS, one was deported based on information uncovered by the plaintiffs, one was extradited, one died, and ten left the country never to return (as far as we know), including five who had moved to the United States to settle.\textsuperscript{16} Only three of the sixteen remain in the United States\textsuperscript{17} and, of those, one has been denaturalized and is in detention while he awaits deportation; the other two are subject to deportation investigations based in large part on evidence uncovered during the course of the ATS cases.

These sixteen cases appear to have deterred numerous human rights perpetrators from coming to the United States. Following the ATS case against Paraguayan police chief Pena-Irala, the U.S. consulate in Paraguay reported a decrease in visas to visit the United States requested by Paraguayan officials and military officers.\textsuperscript{18} The Shah of Iran was the last major human rights abuser to seek medical treatment openly in the United States.\textsuperscript{19} Although

\textsuperscript{15} 18 U.S.C. § 2340A. See Part II B, infra, for further discussion of these points.

\textsuperscript{16} Pena Irala was deported; Suarez Mason was extradited; Ferdinand Marcos died. Five defendants were successfully sued who were on visits to the United States, all of whom left shortly after the lawsuit was filed: Karadzic (Bosnian Serb), Gramajo (Guatemalan), Kavlin (Bolivian), Assasie-Gyimah (Ghanaian), Liu Qi (Chinese). Five defendants who were resident in the United States (in the United States more than six months or manifested clear intent to stay) left following the filing of the lawsuit: Imee Marcos-Manotoc (Filipina), Barayagwiza (Rwandan), Panjaitan (Indonesian), Avril (Haitian), and Vukovic (Bosnian Serb).

\textsuperscript{17} Negewo (Ethiopian) (denaturalized in 2001 and arrested and served with a deportation order in 2005, see Teresa Borden, \textit{Deportation in Motion for Torturer}, ATLANTA J. CONST., Jan. 5, 2005, at A1 (Fernandez-Larios (Chilean), and Saravia (Salvadoran)).


\textsuperscript{19} Although Imelda Marcos has come to the United States for treatment, she has always first obtained an order from the judge in the Marcos human rights cases
Baby Doc Duvalier of Haiti came to Miami in 1986 after he was forced into exile, he quickly left for France. Salvadorans who have been watching for the entry of Salvadoran military officers who used to travel regularly to Miami and southern California report that they are no longer coming here. Immigration agents have confirmed that certain named human rights abusers from Central America stopped coming to the States after mid-2002, after two Salvadoran former defense ministers were found liable by a Florida jury and ordered to pay $54 million to the plaintiffs.

2. Holding Perpetrators Accountable

ATS cases hold individuals accountable, a component of both justice and deterrence. Although the punishment does not fit the severity of the crimes, these civil cases are generally the only remedies available to survivors. The cases expose what the perpetrators have done and cause embarrassment to the perpetrators. In some cases, being sued under the ATS or TVPA may limit the careers of foreign officials if their advancement depends on their ability to travel to the United States without controversy. The lawsuits prevent foreign human rights violators from visiting or resettling in the United States with impunity. This can be a substantial penalty, especially for persons from countries with close relations with the United States or whose citizens often travel or retire to the United States, permitting her to come.

20 See Romagoza-Arce v. Garcia, 400 F.3d 1340 (11th Cir. 2005).
21 Criminal prosecution would, of course, be a more fitting punishment. However, as explained Part II.B, infra, the U.S. government, including the Department of State, lacks the political will to prosecute many abusers, and in any event, the legislative mandate to prosecute is limited. Moreover, given concerns about the motivations of the current Administration, especially regarding non-U.S. citizens, human rights organizations have been hesitant to urge prosecutions or to support legislation that would increase the government's prosecutorial powers. Civil cases offer some benefits beyond criminal prosecution, in particular, the victims and witnesses generally play a much more significant role in civil cases.
such as Indonesia, and several countries in Latin America. In addition, lawyers continue to pursue the collection of assets in past judgments and increasingly are pursuing defendants with assets that may be reachable by U.S. courts.

Hector Gramajo, a Guatemalan ex-general, was one of those who fled the United States after being served with an ATS complaint in 1991. He had been grooming himself to run for the presidency of his country and had come to the United States to obtain a degree from the Kennedy School at Harvard. On his graduation day, he was served with the lawsuit. He immediately returned to Guatemala, his U.S. visa was revoked, and his party decided not to choose him as its presidential candidate. His inability to travel to the United States without embarrassment was a liability. Gramajo's political ambitions were harmed by the lawsuit and the public exposure surrounding it.

The career of Johny Lumintang, one of Indonesia's highest-ranking generals, was impaired by an ATS suit. In 2001, a U.S. court held him responsible for atrocities committed by troops in East Timor in connection with the 1999 independence referendum and entered a default judgment for $66 million. Lumintang moved to set aside the default judgment, demonstrating great concern about the judgment's impact. The issue is still pending in the court, but the case has already had an impact. Before the lawsuit, Lumintang visited the United States regularly and had important contacts with the U.S. government. Since the lawsuit, he has not visited the United States.

Kelbessa Negewo, held responsible by a federal court in Atlanta for acts of torture during the "Red Terror" in Ethiopia, lost several jobs as a result of the civil judgment

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and was denaturalized largely based on evidence produced at the civil trial. There have been other cases in which non-monetary consequences have occurred, including an unreported case in 1987 which caused a Chilean torturer to avoid competing in the Pan-American games in Indiana that year for fear of having his horse attached in an ATS case.

The collection of ATS monetary judgments, however, has been difficult. It is believed that there has been money collected in only three of the individual defendant cases: a little more than $1 million from the estate of Philippine President Ferdinand Marcos, and approximately $1,000 each from General Suarez-Mason and Kelbessa Negewo. In 2003, $270,000 was collected from one of the defendants in the Romagoza case.

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24 Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996). Federal officials also conducted additional investigation in Ethiopia and took the denaturalization proceeding very seriously. Similar efforts in conjunction with other ATS cases would enhance the effectiveness of the ATS.

25 Bernard Fernandez, Retired Colonel Retreats to Chile Ahead of Suit, PHILA. NEWS, Aug. 18, 1987, at 76 (Gonzalez, scheduled to compete on Chile's equestrian team, abruptly left the United States after being accused of torture in a civil suit).

26 A $150 million settlement was approved in the Marcos case but the Philippine courts blocked the transfer of Marcos's assets after the Philippine government intervened to claim the assets for itself. As a result, the settlement was never funded. Of course, all of the Holocaust Assets cases included ATS claims and billions of dollars in settlements have been achieved in those cases. Lawyers involved in these suits, including Professor Burt Neuborne, have credited the foundation of ATS jurisprudence as being crucial in their efforts to obtain justice for victims of the Holocaust. See, e.g., Burt Neuborne, Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts, 80 WASH.U. L.Q. 795, notes 29-30 (2002).

27 See Romagoza-Arce v. Garcia, 400 F.3d 1340 (11th Cir. 2005). However, unless the reversal of this judgment is overturned, the funds collected will have to be returned. CJA has put special focus on collecting the assets of the individual defendants it sues and on taking cases where such collection is possible. For example, CJA pursued a Haitian perpetrator who had won $3.2 million in the Florida state lottery in a recent case and obtained an order from a state judge to transfer more than $1 million of those assets to the state court pending further court order. See Jean v. Dorelien, No. 04-CA-001524 (Fla. Cir. Ct. Sept. 10, 2004) (Order Transferring Money to Court's Account), at http://www.cja.org/cases/doreliendocs.shtml. It is likely that other human rights perpetrators have assets that may be
Despite the difficulties, collection efforts continue, even for earlier default judgments. For example, the Filartiga family has continued in their efforts to enforce the landmark *Filartiga v. Pena-Irala*, in which their family was ultimately awarded $10.4 million. The family has filed a claim to extend the time to enforce the twenty-year judgment, and has also involved the courts of Paraguay, where defendant Americo Pena-Irala now resides.

3. Official Acknowledgment and Reparation for the Human Rights Victims and Survivors

These cases often help survivors experience a sense of justice, a sense of meaning in their survival, and tremendous satisfaction in knowing that they have brought dignity to the memories of those who were killed or tortured. The cases are a way of setting the historical record straight—not just about what happened but also about who was responsible. As such, the cases can serve as a kind of mini-truth commission. Plaintiffs and community leaders have been eloquent in describing the impact of the cases on their own healing processes and on repairing their community's sense of loss.

For instance, Juan Romagoza, a Salvadoran torture survivor, stated:

> When I testified, a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind. I felt that if I looked back, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn, bleeding. So, I didn't look back, but I felt their support, their strength, their energy. Being involved in this case, confronting the
generals with these terrible facts—that’s the best possible therapy a torture survivor could have.\textsuperscript{28}

Similarly, Maria Julia Hernandez, Director of the Legal Aid Office of the Archdiocese of El Salvador, stated:

I have worked for 20 years to achieve justice for the victims of the war in El Salvador. The process and the verdict in this case [against the generals] is an accomplishment in a long and most difficult fight, the fight against impunity . . . . It is a case in which all the victims of El Salvador who have not been able to be plaintiffs emerged and were represented by these brothers and this sister. When I attended the first days of the trial I felt that for the first time a real trial was happening. Such administration of justice is what we have always hoped to realize in El Salvador. Now each of us has been touched in a way that inspires us to continue on this road, guided by our brothers and sister who suffered, survivors of torture, to be able to carry that hope for justice to all of the other victims.\textsuperscript{29}

Therapists have confirmed the broad remedial impact of the ATS/TVPA cases. As stated by Dr. Mary Fabri, Director of the Center for Victims of Torture in Minneapolis:

This legal recourse presents the opportunity for torture survivors living in the United States to seek justice and confront impunity. The few who are able to take

\textsuperscript{28} Statement of Juan Romagoza, posted at http://www.cja.org/forSurvivors/reflect.doc.

\textsuperscript{29} See also Statement of plaintiff Zita Cabello, at http://www.cja.org/forSurvivors/ZitaforSurvivors.shtml (“I brought this lawsuit to honor the men and women who have had the moral courage to challenge the inevitability of injustice; all of those who have come to the realization that peace based on accommodation rather than on accountability necessarily leads to the repetition of past tragedies; to those who have chosen to work in favor of human dignity, peace, solidarity and justice.” See www.nosafehaven.org for additional testimony by plaintiffs and a brief submitted to the Supreme Court about the impact of ATS cases on survivors.)
their cases to court create a collective voice for all torture victims, bringing the issue of human rights atrocities into the public eye. This opportunity also presents a means for psychological healing of torture’s wounds by breaking the silence, confronting perpetrators and refuting impunity.  

4. Contributing to the Development of Human Rights Law

These cases have created a foundation for the further use of international law to obtain justice for victims against a variety of human rights violators, including government officials in the United States and corporations complicit in human rights violations in connection with their activities abroad. Cases against individual perpetrators have established, in holdings that will likely withstand post-Sosa scrutiny, that claims for torture, summary execution, prolonged arbitrary detention, war crimes, disappearances, genocide, crimes against humanity, and slavery-like practices constitute torts in violation of the law of nations. Many pre-Sosa decisions have also recognized that liability can be assessed against not only the person who wielded the torture instrument but also against commanders, co-conspirators, and aiders and abettors. At least three post-Sosa judgments have affirmed these holdings.

32 See, e.g., Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002) (command responsibility); Hilao, supra note 10, 103 F.3d at 776-78 (conspiracy and accomplice liability); Mehinovic, 198 F. Supp. 2d 1322 (aiding and abetting).
33 Mehinovic, 198 F. Supp. 2d 1322 (affirming judgment for crimes against
ATS decisions have developed the use of customary international law in a manner that will surely have an impact in non-ATS cases. With the Supreme Court increasingly considering international law in its decisions, in such cases as *Atkins v. Virginia*, *Lawrence v. Texas*, and *Roper v. Simmons*, this expanding body of international jurisprudence is likely to be influential in many other areas.

ATS cases are now an essential part of international human rights curricula at law schools, are taught in international relations courses, and are regularly addressed at judicial education seminars on international law. ATS cases have demonstrated relevance not only to learning about international law but also to a host of subsidiary issues that are crucial to the decisions of human rights cases, including the act of state and political question doctrines, immunities, *forum non conveniens*, exhaustion of domestic remedies, equitable tolling of the statutes of limitations, standing to sue, and theories of liability (command responsibility, aiding and abetting, conspiracy, vicarious liability, direct liability).

5. Building a Human Rights Constituency in the United States

ATS cases filed on behalf of often very sympathetic plaintiffs against specific perpetrators "put a human face" on human rights violations and have attracted considerable media coverage that highlights the need for the ATS and the need to fight against impunity generally. These cases, and survivors' testimony, compellingly illustrate that the ATS provides survivors of human rights violations not only an important, but for most the only, means for redress in the United States.

6. Deterrence

When taken together with other anti-impunity efforts around the world, ATS cases make an important contribution to a climate of deterrence. The fact that ATS cases have caused some human rights violators to leave the United States and have deterred others from entering is, to be sure, only a modest form of deterrence. However, when viewed together with developments in other countries, the combined impact has been to restrict substantially the number of countries to which human rights violators can travel. In particular, there is a history of such violators enjoying retirement, health care, education of their children, or vacations in the United States, a reality now made difficult by the threat of ATS and TVPA litigation. Such considerations may deter some foreign officials from


39 This argument was made by CJA, National Consortium of Torture Treatment Programs, and individual ATS plaintiffs in their amici curiae brief in support of Respondent before the Supreme Court in Sosa v. Alvarez-Machain, at http://www.nosafehaven.org/_legal/atca_pro_cntrJustAcctNCTTP.pdf.
engaging in human rights violations which may limit such options.

7. Contributing to Transitional Justice

ATS cases can serve as a catalyst for the process of transitional justice in the home country. They can bring hope to activists who have labored long without significant successes and to survivors who feel solidarity with the plaintiffs. By demonstrating that impunity can be challenged, ATS cases can stimulate discussion about the crimes of the past and build support for bringing perpetrators to justice in their own domestic courts. For instance, the Abebe-Jira case had an effect on public opinion in Ethiopia and on the commitment of the Ethiopian government to move forward with trials of former officials of the Dergue.\(^{40}\)

Similarly, the $54 million jury verdict in July 2002 against two Salvadoran former Ministers of Defense was seen by leading human rights figures as strengthening the foundation of the rule of law in El Salvador,\(^{41}\) fueled debate in El Salvador regarding repeal of that country’s amnesty law, and caused consternation among Salvador’s top military officers.\(^{42}\)

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\(^{40}\) Plaintiffs’ counsel was invited to give a nationally televised address during a visit to Ethiopia after the trial in March 1994. The case received substantial publicity within Ethiopia and within Ethiopian communities outside the country.

\(^{41}\) Fr. José Tojeira, President of UCA, the Jesuit university in San Salvador commented: “It is important to pursue international alternatives as a means to pressure the Salvadoran justice system. These Salvadorans brought their case in the United States... to help construct an El Salvador that is based on the truth. To fail to pursue the commanders endangers the rule of law and the foundation of our society.” Even if the reversal of this judgment stands, some of the benefits of the judgment will remain. The Court of Appeals did not repudiate the underlying substantive judgment by the jury that the defendants had violated the plaintiffs’ rights; it merely found that the case was filed too late. 400 F.3d at 1351-52.

\(^{42}\) Statement to CJA lawyer by Benjamin Cuellar, Director of the Human Rights Center at UCA (Sept. 19, 2002).
The Romagoza case also stimulated witnesses to come forward with evidence against two more Salvadoran perpetrators who have lived in the United States for more than fifteen years: one of the organizers of the 1980 assassination of Archbishop Oscar Romero and Colonel Carranza, Head of the Hacienda (Treasury) Police, who was forced out of the military in 1985 as a result of his responsibility for atrocities which endangered the continuation of U.S. military aid to El Salvador. Following the issuance of the verdict in the Romero case in September 2004, key representatives of the Catholic Church in El Salvador for the first time called for revisions to the amnesty law and a reopening of the criminal investigation into the assassination. The Archbishop of San Salvador stated that the verdict should help to establish Archbishop Romero's martyrdom, by having proved who was involved in the assassination plot.

B. Criminal Prosecution, Deportation, and Visa Bans

In 1994, Congress passed legislation to implement some of the obligations the U.S. government accepted when it ratified the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The law enables criminal prosecution of persons who committed torture outside of the United States so long as the perpetrator is either a national of the United States or physically present in the United States. The current U.S. Attorneys' Manual provides that prosecutions under this law must be initiated by the Department of Justice ("DOJ") and cannot be initiated by U.S. Attorneys in the field. To date, the DOJ has not filed any indictments using this

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44 Fernando Saenz Lacalle, Archbishop of San Salvador, quoted in a Reuters report, Sept 7, 2004 ("Saravia's conviction could help with the process of Romero's beatification, a possibility studied by the Vatican since 1994.").
45 18 U.S.C. § 2340A.
authority, although it did temporarily detain a suspect in 2000 whom it then had to release when the State Department decided he had diplomatic immunity.46

The DOJ also has the capacity to prosecute human rights abusers for fraud or misrepresentation in obtaining entry to the United States.47 These crimes carry a penalty of up to five years’ imprisonment (and more if the offense was committed to facilitate terrorism). Foreigners who seek to gain entry into, or permanent residency in, the United States must complete certain immigration forms, depending on the nature of the visa or status they seek. A few of these forms require the applicant to swear that he or she had not “participated in the persecution of any person.” It is likely that hundreds of human rights abusers now in the United States have committed perjury in completing these forms. Until 2002, not one had been prosecuted for perjury.48 The immigration service has stated that a handful of investigations are currently underway.

C. Cases Against Foreign Governments

One of the biggest gaps in human rights enforcement in the United States is the inability to sue foreign sovereigns and their instrumentalities in U.S. courts because of sovereign immunity. Foreign sovereigns may be sued in the

46 In March 2000, FBI agents stopped for questioning Major Anderson Kohatsu, one of Peru’s most notorious suspected torturers. However, the State Department intervened, claiming that he had diplomatic immunity, a claim that was disputed by independent experts as well as some State Department officials. State Department Helped Peruvian Accused of Torture Avoid Arrest, N.Y. TIMES, Mar. 11, 2000, at A7.


48 In 2001, the DOJ brought charges against Eriberto Mederos, a Cuban nurse, who had entered the United States in 1984 and had become a U.S. citizen in 1993, despite well-documented reports of his violent past. On August 2, 2002, a jury found that he had administered electric shocks and other forms of torture to political opponents of the Castro regime, and accordingly found him guilty of false statements on his visa and citizenship applications. He also was found guilty for having sworn falsely that he had never been a member of the Communist Party. He died before his appeal could be completed and his citizenship revoked.
United States only under the Foreign Sovereign Immunities Act ("FSIA") which provides only limited exceptions to the general principle that foreign sovereigns are immune from suit. The FSIA was not designed to address human rights claims and most human rights claims arising outside the territory of the United States will not be covered under the FSIA despite the best efforts of human rights lawyers to expand the scope of the FSIA. Only the Siderman v. Republic of Argentina case was able to prevail and secure a large settlement based on torture and deprivation of property claims arising in Argentina during the “Dirty War.” However, this was mainly because the Argentina junta took actions within the United States against the plaintiff that caused U.S. courts to find that Argentina had waived its immunity. No human rights case since Siderman appears to have taken advantage of the same exception.

Plaintiffs have had more success in FSIA cases when foreign governments have orchestrated human rights violations within U.S. territory because the FSIA allows tort suits against foreign sovereign when the torts occur in the United States. The first and most famous of these cases is Letelier v. Republic of Chile, arising out of the

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49 28 U.S.C. §§ 1330 and 1601 et seq. The exceptions to the general principle of sovereign immunity are contained in § 1605 of the FSIA. Under § 1605(a)(7), it is possible to bring cases against state sponsors of terrorism. There have been a number of such cases.

50 965 F.2d 699 (9th Cir. 1992).

51 The individual settlement in Siderman in September 1996 appears to be the largest settlement for an individual plaintiff in an international human rights case—other than against a state considered to be a state-sponsor of terrorism—in U.S. history. The Los Angeles Times reported the settlement to be $6 million. A Long Battle for Vindication Pays Off, L.A. TIMES, Sept. 16, 1996, at _. Regarding the collection of multi-million dollar judgments in terrorism cases from the governments of Iran, Iraq and Libya, see, e.g. Michael Martinez & Stuart Newberger, Combating State-Sponsored Terrorism With Civil Lawsuits: Anderson v. Islamic Republic of Iran and Other Cases, 3 VICTIM ADVOCATE: THE JOURNAL OF THE NATIONAL CRIME VICTIM BAR ASSOCIATION 5-8, Spring/Summer 2002.

assassinations of Orlando Letelier and Ronni Moffit in Washington, D.C. by Chilean agents. There also have been successful cases brought against the Philippines for the murder of two trade union activists in Seattle during the Marcos regime and against the Republic of China (Taiwan) for the murder of journalist Henry Liu in San Francisco. These judgments have been collected, at least in part, and these cases should help deter such attacks within the United States.

III. CASES AGAINST U.S. OFFICIALS

This section considers the use of the ATS and TVPA against U.S. officials, federal and state and local officials. It also places ATS cases in the larger context of international law claims brought against U.S. officials generally. For example, over the past few years, the Supreme Court has increasingly referred to international law in deciding domestic cases. This has included cases

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53 Domingo v. Republic of the Philippines, 808 F.2d 1349 (9th Cir. 1987); Jerry Large, A Life of Justice, SEATTLE TIMES, Aug. 24, 1995 (settlement of $3 million after a $14 million verdict).


55 Numerous cases have been filed against foreign sovereigns and their instrumentalities under the FSIA as a result of the September 11, 2001 attacks. These cases have been consolidated as In re Terrorist Attacks of September 11, 2001, 03 MDL 1570 (RCC).

56 The central focus of this article is litigation in the U.S. courts. However, in many cases human rights advocates have brought claims not only in U.S. courts but in international fora in order to pursue all possible remedies and to bring the maximum publicity and pressure to bear on behalf of their clients. For example, death penalty claims have been brought in U.S. federal and state courts, the Inter-American system, and the International Court of Justice. Claims of violations of the rights of immigrants and detainees after September 11, 2001 have been brought in U.S. federal court, the Inter-American Commission on Human Rights, in the United Nations human rights system, and claims against U.S. officials in Germany for abuses at U.S. detention facilities in Iraq were filed. We discuss some of these efforts in this article but a full consideration of such strategies is beyond the scope of the Article.
involving legal questions such as the death penalty for the mentally retarded, affirmative action, “sodomy” laws applied to homosexual conduct, and, most recently, juvenile execution. Thus, it seems likely that international law will become increasingly relevant in a wider range of cases challenging the actions of domestic officials.

A. Historical Overview

Since the end of World War II there have been many attempts to use international human rights law in U.S. courts on behalf of human rights victims. Some of these attempts concerned government action within the United States, such as challenges to racial discrimination and nuclear testing, and some concerned attempts to restrain U.S. official action abroad, such as challenges to the deployment of U.S. weapons abroad and the U.S. support for the contras in Nicaragua.

62 See, e.g., Antolok v. United States, 277 F.2d 156, 157 (D.C. Cir. 1958) (plaintiffs could not challenge nuclear testing in the Marshall Islands because the challenge was a “political question”).
63 See, e.g., State v. McCann, No. 2857-7-86CnCr (D.Ct. Vt 1987) (protestor at plant producing rapid-fire cannon in rapid attacks against civilian populations in El Salvador was allowed to present evidence at trial that his actions were privileged under international law as developed at Nuremberg tribunals); State v. Marley, 509 P.2d 1095, 1107-10 (Haw. 1973) (rejection of argument by nonviolent protestors to Honeywell’s supply of weapons for Vietnam War that their actions were protected by the justification defense of prevention or termination of a crime); Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1338 (S.D.N.Y. 1984), aff’d, 755 F.2d 34 (2d Cir. 1985) (dismissing as a non-justifiable political question action seeking injunction against deployment of U.S. cruise missiles).
64 See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d 202, 205 (D.C. Cir. 1985) (affirming dismissal of claims against U.S. President and federal agencies based on alleged support of armed insurgents in Nicaragua on various grounds, including
One early case that recognized the standing of U.S. citizens to sue because of a violation of international law was *Diggs v. Shultz*,

which held that U.S. citizens denied entry to Rhodesia because of their race or who had suffered economic harm as a result of the government's racist policies were intended beneficiaries of a Security Council resolution directing all U.N. members to impose an embargo on trade with Rhodesia. The Court therefore held that the U.S. citizens had standing to sue to enforce that resolution pursuant to Article 25 of the U.N. Charter. However, despite this ruling, the court dismissed the case on "political question" grounds, ruling that it was the role of other branches of government besides the Judiciary to deal with Security Council resolutions. The Court ruled that Congress could choose to abrogate the treaty if it chose by passing legislation allowing trade with Rhodesia.

These cases were of value in familiarizing U.S. courts with international law and in sometimes obtaining favorable rulings on the rule of international law (as in some immigration cases and the Rhodesia case). The cases were also critical in supporting grass roots movements for changes in U.S. policy and, in some of them, the arguments about international law appear to have contributed to a successful ruling on constitutional grounds. However, before the 1990s, in only in a handful of immigrant detention cases did international law appear...
to be a source of actual relief for the plaintiffs in cases against U.S. officials.69

B. Claims Under the Alien Tort Statute

As the language of the ATS makes clear, the statute permits lawsuits for torts in violation of the law of nations and for torts in violation of "a treaty of the United States."70 As discussed above, Filartiga and its progeny have been almost exclusively based on violations of the "law of nations" or customary international law. However, claims have also been brought under treaties, in particular the Vienna Convention on Consular Relations ("VCCR") and the Geneva Conventions.71

1. A Brief Explanation of Treaty Claims

There have been two treaties which have been found to allow claims in U.S. courts. The first, pioneered in death penalty litigation, was the Vienna Convention on Consular Relations—that non-U.S. citizens on death row were not

69 See, e.g., Rodriguez-Fernandez v. Wilkinson, 645 F.2d 1382 (10th Cir. 1981) (rejecting indefinite detention of Mariel Cubans). Subsequent efforts to obtain similar relief for Mariel Cubans based on indefinite detention claims were not successful. See Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir. 1986).
71 Efforts to bring claims under Article VI of the Constitution (the Supremacy Clause) have not been successful because the United States has ratified few human rights treaties. When it has ratified treaties, it has attached eviscerating "reservations, understandings and declarations," almost always including a blanket statement that the treaties are not "self-executing," meaning that a claim can not be brought in U.S. courts absent other U.S. legislation. The end result has been that the treaties have been largely unavailable as a source of rights in U.S. courts. See, e.g., Hawkins v. Comparet-Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999) (challenge to the use of stun guns in a Long Beach, California Municipal Court). In Hawkins, the district judge rejected all of the international law arguments presented by counsel and by Amnesty International, an amicus curiae, but then proceeded to issue a preliminary injunction on constitutional grounds. However, the international issues were prominently discussed in the public attention given to the issue.
informed and/or deprived of their right to contact officials of their countries. Such claims recently resulted in a successful ruling in the International Court of Justice, and one state court judge ruled in defendants' favor.

On December 10, 2004, the Supreme Court granted certiorari in Medellin v. Dretke to consider whether U.S. courts should give effect to the judgments by the International Court of Justice ("ICJ") in LaGrand and now in Avena and Other Mexican Nationals ("Avena"). These two judgments established that the United States is legally bound to provide judicial remedies for its violations of individual rights conferred under the VCCR. In particular, Article 36 of the Vienna Convention establishes a regime of rights that enables individuals detained in foreign countries to seek the protection of their consular officials. Prior to the March 2005 argument in the case, the Bush Administration decided to implement the ICJ decisions by means of Executive Order, while indicating its intention not to be bound by the provisions of the VCCR concerning ICJ review. Oral argument was heard in April 2005. The Supreme Court has not ruled in the case as of this writing.

In Turkmen v. Ashcroft, a class action lawsuit on behalf of Muslims and persons believed to be Muslims detained after September 11, 2001, plaintiffs included claims based on their denial of access to officials of their consulates. A motion to dismiss on those claims is pending. That ruling may also be influenced by the court's ruling in Medellin.

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The second category of treaty claims which may be brought in U.S. courts is the Geneva Conventions for humanitarian law violations. While early attempts to bring claims under the Geneva Conventions were rejected, claims for violations of the Geneva Conventions are now pending in a number of cases on behalf of detainees in Guantanamo Bay, Cuba, former Guantanamo detainees, in cases against U.S. contractors in the detention facilities in Iraq such as Abu-Ghraib, and in a recent series of cases brought against four high-level U.S. officials for war crimes in Afghanistan and Iraq.

77 In an earlier attempt to bring claims under the laws of war (both treaty law and customary international law) in Linder v. Calero, the court ruled that the family of Benjamin Linder, a U.S. engineer building hydroelectric dams for the Sandinista government, could sue Nicaraguan "Contra" officials for Mr. Linder's killing as the tort of wrongful death in which the tort standard was a violation of the customary laws of war. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 336-37 n.39 (1996).


79 Rasul v. Rumsfeld, No. 1:04 CV 01864 (RMU) (D.D.C. Oct. 27, 2004), available at http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=1VskOO GX7D&Content=455. On October 27, 2004, four British detainees released from Guantanamo Bay sued Secretary of Defense Donald Rumsfeld, the Chairman of the Joint Chiefs of Staff, and senior officers responsible for the treatment of detainees at Guantanamo in their individual capacities. The four plaintiffs charged that they were subject to repeated beatings, sleep deprivation, forced nakedness, death threats, threats with unmuzzled dogs, and racial and religious harassment. As of this writing, defendants have filed a motion to dismiss and plaintiffs filed their opposition on May 6, 2005.


The primary obstacle to treaty-based claims other than the Geneva Conventions and the Vienna Convention on Consular Relations, whether free-standing or under the treaty clause of the ATS, is the non-self-executing treaty doctrine which allows courts to find that the treaty provisions in question were not intended to have immediate effect in the courts without further implementing legislation.\footnote{See, e.g., Edye v. Robertson, 112 U.S. 580, 598-99 (1884) (defines self-executing doctrine: treaty must expressly or impliedly provide a private right of action). Courts have followed this doctrine, although it has been widely criticized. See, e.g., Harold H. Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2360-61 (1991); Stephen Reisenfeld, The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?, 74 AM. J. INT’L L. 892, 895 (1980).}

2. Suits Against Federal Officials

ATS cases against U.S. defendants have had mixed results. Efforts by British peace activists to sue the U.S. government to prevent deployment of cruise missiles on British soil were dismissed under the political question doctrine.\footnote{Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1338 (S.D.N.Y. 1984).} One early attempt to sue U.S. government officials for human rights violations committed in Nicaragua by the U.S.-supported contras was defeated. The D.C. Court of Appeals found that sovereign immunity protects U.S. officials from ATS suits alleging human rights abuses.\footnote{Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206-07 (D.C. Cir. 1985).} The D.C. Circuit did not, however, consider whether federal officials would lose their immunity for actions taken outside the scope of the official’s authority.\footnote{STEPHENS & RATNER, supra note 77, at 104 n.54.}

In Jama v. INS, an initial ruling allowed refugees in federal detention facilities to sue U.S. officials and their private contractors for the conditions of their treatment—
finding that the continued mistreatment was a violation of the international prohibition against cruel, inhuman, or degrading treatment.\(^8\) However, recently the claims against government officials were dismissed, based in part on the settlement agreement reached in October 2001 with the INS.\(^8\)

The *Sosa* case is the most extensive litigation under the ATS of these issues to date. The case initially made ATS claims against a number of federal officials. However, all of these claims were dismissed under the Westfall Act which allows the United States to substitute itself as a defendant under the Federal Tort Claims Act ("FTCA") unless the plaintiff is making a claim under the U.S. Constitution or a federal statute.\(^8\) Only the ATS claims against the Mexican national who kidnapped Dr. Alvarez were allowed to proceed. The Ninth Circuit decided in *Alvarez-Machain v. United States* that individual federal officials could not be sued under the ATS because the ATS was not the kind of statute that provided for an exception to substitution under the Westfall Act.\(^9\)

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\(^8\) 22 F. Supp. 2d 353 (D.N.J. 1998) (totality of treatment asylum seekers subjected to would violate international customary law).

\(^7\) 343 F. Supp. 2d 338 (D.N.J. 2004). However, the court rejected arguments by private contractor and their officers were "employees" of the U.S. government and thus entitled to dismissal, and allowed the claims against these defendants to proceed. *Id.*

\(^8\) Another possible challenge is that the act is inapplicable because certain acts should be considered beyond the scope of any federal official's scope of authority (e.g., torture) and such claims should be exempt from substitution under the Westfall Act. That issue has not yet been fully litigated, although it has been raised by plaintiffs in *Harbury v. Deutch*, 244 F.3d 956 (D.C. Cir. 2001), and *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004) appeal docketed, No. 04-5199 (D.C. Cir. June 3, 2004), argued March 11, 2005; decision pending.

\(^9\) 266 F.3d 1045, 1053-54 (9th Cir. 2003)(en banc). In addition, in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2747-54 (2004), the Supreme Court eliminated the "headquarters doctrine" that allowed FTCA cases in which the actions of U.S. officials within the United States caused torts outside the territory of the United States. This aspect of Alvarez is likely to limit the availability of the FTCA to redress human rights violations abroad.
The issue of whether claims can be brought against U.S. officials under the ATS is pending in *Turkmen v. Ashcroft*. In *Turkmen*, plaintiffs have claimed violations of the customary international prohibitions against arbitrary detention and cruel, inhuman or degrading treatment and the right to contact members of their foreign consulate, in addition to a separate treaty claim on the right to consular relations arising out of the mass arrests and detentions of non-citizens after the September 11, 2001 attacks. The district court has not yet decided whether to apply the same analysis as the Ninth Circuit. The same issue is pending in *Rasul v. Rumsfeld*, the first action for damages brought against U.S. officials on behalf of detainees who were released from Guantanamo after suffering both prolonged arbitrary detention and torture and other cruel, inhuman or degrading treatment or punishment.

In 2002, the initial cases were brought challenging the U.S. detention of foreign citizens without charges and virtual *incommunicado* detention at Guantanamo. The District Court dismissed the case. The District of Columbia Court of Appeals upheld the dismissal, with a blistering concurring opinion on why petitioners should not be able to sue under the ATS. On June 28, 2004, the Supreme Court ruled 6-3 in favor of the petitioners and declared that the Guantanamo detainees have access to U.S. courts to challenge their detention, and specifically held that the ATS provided an additional basis for them to do so.

The claims were remanded to the District Court and more than seventy detainees have brought cases challenging their continued imprisonment. The challenges, which have included claims under the Geneva Conventions and

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customary international law (prohibitions of torture, cruel, inhuman or degrading treatment, and prolonged arbitrary detention), have resulted in two major rulings on the rights under this statute. The first dismissed all petitioners' claims. The second, on January 31, 2005, found violations under the Third Geneva Convention for some of the petitioners, but cursorily rejected the ATS claims in one phrase that there was "sovereign immunity." Both cases are now before the Court of Appeals for the District of Columbia Circuit. On February 11, 2005, attorneys filed Doe v. Bush, a petition for habeas corpus, which included ATS claims, in the U.S. District Court for the District of Columbia on behalf of the hundreds of unrepresented people who remain detained by the U.S. Government at Guantánamo Bay.

The attempts to extend broad immunity for U.S. actions can also be seen in recent cases against private contractors in Iraq. Saleh v. Titan and Ibrahim v. Titan charge two U.S. corporations with complicity in the rape and other torture and abuse of persons detained in Iraq, including in the infamous Abu-Ghraib prison. These suits were brought against Titan Corporation of San Diego, California and CACI International of Arlington, Virginia and its subsidiaries, and, in Saleh v. Titan, three individuals who work for the companies. The complaints allege that the companies engaged in a wide range of egregious and illegal acts in order to demonstrate their abilities to obtain intelligence from detainees, and thereby obtain more

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96 Case No. 04-CV-1143 R (NLS).
contracts from the government including in the infamous Abu-Ghraib prison. CACI and Titan have filed separate motions to dismiss. Although the central theories in the case are that these corporations are liable, prominent in their defense is the argument that, as government contractors, they cannot be held liable for acts undertaken for the military. A further reason for their immunity is that their actions occurred in the context of a war.

3. **State and Local Officials**

One largely unexplored and important area for further cases is ATS cases against state and local officials or against private parties where international law applies to non-state actors. Significantly, the sovereign immunity argument presented by the Westfall Act would not apply in these cases. The *Martinez v. City of Los Angeles* case brought against Los Angeles Police Department ("LAPD") officers is an example of this type of case. In *Martinez*, the Ninth Circuit accepted the application of the ATS to LAPD officers but, as in *Sosa*, took a narrow view of the scope of the arbitrary arrest norm.

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99 Id. at 20.
100 See, e.g., Defendant Titan’s Motion to Dismiss at 3, Saleh v. Titan (Case No. 04-CV-1143) and Plaintiffs’ Response, available at www.ccr-ny.org.
101 Id.
102 141 F.3d 1373 (9th Cir. 1998).
103 *Sosa*, 124 S. Ct. at 2767-70. Another possibility is for the incorporation of principles of customary international law through U.S. civil rights law. In a case challenging “Supermax” prisons, in which prisoners deemed to be security risks were detained in solitary confinement for twenty-three hours per day, the plaintiffs argued that U.S. civil rights law 42 U.S.C. §1983 incorporated international human rights standards. While the court never addressed the issue, the judge permitted testimony on the international human rights violation of cruel, inhuman or degrading treatment, and such testimony was considered to have influenced the judge. In 2002, the Court ordered major improvements in prison conditions and plaintiffs settled part of the case, which resulted in improved medical and mental health care and physical facilities in the prison. The defendants appealed the Court’s ruling on the prisoners’ due process rights, but that ruling was upheld in a strong ruling by the Sixth Circuit that prisoners cannot be placed or indefinitely
C. Torture Victim Protection Act

The TVPA presents more limited opportunities for lawsuits against U.S. officials because of the statutory requirement that claims can be brought only if they are committed under color of foreign law. However, especially in the context of the "war on terrorism," such cases are possible. One recent example is Arar v. Ashcroft,\(^{104}\) in which a man holding a Canadian passport and residing in Canada was stopped at a New York airport on his way back to Canada. Because Maher Arar was born in Syria, he was deported to Syria by way of Jordan, where he was detained and physically and psychologically tortured for nearly a year. The claim brought against U.S. officials charged them with conspiring and/or aiding and abetting Mr. Arar’s torture in Jordan and Syria; the complaint’s allegations included that U.S. government officials made the decision to deport Mr. Arar to Syria with the full knowledge of state-sponsored torture in that country.

The lawsuit followed a campaign of advocacy on Mr. Arar’s behalf, including letters to the U.S. Attorney General and the Solicitor-General of Canada. Following the filing of the complaint in January 2004, the Canadian government announced that it would conduct a full public inquiry in Canada into that government’s involvement in one of its own citizens being sent to Syria despite his request that he be returned to Canada. That same month the Office of the Inspector General of the Department of Homeland Security announced that it would carry out an investigation into the circumstances surrounding Mr. Arar’s removal from the United States.

As of this writing, the Arar case was in the motion to

dismiss stage and the government was taking the position that the case could not go forward without revealing state secrets and should also be dismissed on that basis without reaching the merits of plaintiff's TVPA or other claims.  

D. Customary International Law Claims Outside the ATS or TVPA

Other cases have tried to invoke the famous statement in the U.S. Supreme Court's ruling in *The Paquete Habana* that international law is the law of the land, "our law," and, thus, individuals may bring claims based on customary international law. The best known cases in this area are the cases arising out of the Mariel boatlift in the 1980s and address the issue of whether detention of Mariel Cubans beyond their criminal sentences with no specific release date constitutes indefinite detention in violation of international law. In general, these cases have been unsuccessful because the courts have found that customary law was trumped by "controlling" Executive, Legislative, or Judicial acts.  

Still other cases have tried to use international law to interpret U.S. law relying on a principle of statutory interpretation often referred to as the *Charming Betsy* principle, stating that U.S. laws must be interpreted consistent with international law unless the law expressly states an intent to contradict international law. Such international law arguments made in cases such as *Ma v. Reno* and *Zadvydas v. Davis* appear to have contributed

106 175 U.S. 677, 700 (1900).
107 See, e.g., Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984) (controlling Executive actions overcome customary law norms prohibiting indefinite detention).
109 533 U.S. 678 (2001) (rejecting indefinite detention of removable alien who could not be returned to home country).
to the successful result on constitutional grounds in the Zadvydas case in the Supreme Court.\textsuperscript{110} Outside of ATS cases, we believe that invoking international human rights law in appropriate cases as a principle for the interpretation of U.S. statutes is likely to be the most successful strategy for the further incorporation of international law into U.S. jurisprudence.

Another variation on this theme has been the attempts to use international law and international opinion in the context of constitutional analysis under the Constitution's Eighth Amendment to demonstrate what "evolving standards of decency" require. Although such efforts were thwarted in the context of juvenile execution in the Stanford v. Kentucky\textsuperscript{111} case in 1989,\textsuperscript{111} by 2002 the Supreme Court reversed itself on the issue of executing mentally retarded offenders in Atkins v. Virginia.\textsuperscript{112} In Roper v. Simmons,\textsuperscript{113} the Supreme Court applied the same reasoning in invalidating the execution of a juvenile offender. Justices O'Connor and Kennedy appear to be open to considering international opinion and possibly international law in deciding at least some constitutional cases.

In cases like Atkins and Roper there are opportunities for lawyers to reap the benefits of grass roots advocacy to advance constitutional arguments. Eighth Amendment analysis focuses in part on the actions of state legislatures and if international human rights advocates are able to use international law as a reason for legislative action (e.g., state law prohibitions on juvenile execution), these state by state victories can contribute to Supreme Court victories that can change national standards. Cases like Atkins and


\textsuperscript{111} 492 U.S. 361, 377-78 (1989).


\textsuperscript{113} 125 S. Ct. 1183 (2005).
Roper suggest that there will be more opportunities for such collaborative efforts in the future.

E. Related Actions: Coordinating With Allies Overseas and Actions in the International Human Rights System

As we stated at the beginning of this article, ATS and TVPA claims are only a small part of an effective strategy for the promotion and protection of human rights. The wide range of activity after the September 11, 2001 attack on the World Trade Center is only one example of organizations around the world turning to a wide range of international fora to challenge the violations of international human rights and humanitarian law committed in the name of the “war on terrorism.” These efforts have complemented and strengthened one another.

Since September 11, 2001, organizations across the world have mobilized. Actions have been taken in the human rights system established by the United Nations and the regional body to which the United States is a member, the Organization of American States.

1. Inter-American Human Rights System

A week after bringing the initial claims on behalf of the Guantanamo detainees in U.S. courts, attorneys representing the detainees filed a request with the Inter-American Commission on Human Rights for “precautionary measures” on behalf of all the Guantanamo detainees. Less than a month later, the Commission ordered the United States to take steps to immediately determine the legal status of the detainees before an independent and impartial tribunal. This was an important political action and generated additional political pressure on the United States. In Observations to the Precautionary Measures, U.S. attorneys have continued to submit information
updating the Commission on the situation of the detainees, and the U.S. government has continued to engage in the process, but at the same time has rejected the jurisdiction and competence of the Commission to issue binding decisions. On July 29, 2004, the Inter-American Commission on Human Rights/Organization of American States (the "Commission") sent out a letter suggesting that the United States had contradicted its previous statements that all measures would be taken to prevent the torture or other cruel, inhuman, or degrading treatment of detainees at Guantanamo; and after further briefing, the Commission held a hearing on March 3, 2005.\textsuperscript{114}

A coalition of human rights groups also challenged the U.S. detention of immigrants, who were detained after being ordered deported from the United States, in a proceeding that complemented the U.S. case \textit{Turkmen v. Ashcroft}. In February 2003, a request for precautionary measures was filed with the Commission on behalf of persons arbitrarily detained, tortured, or "rendered" by the United States.\textsuperscript{115}

2. \textit{United Nations}

A number of human rights bodies at the United Nations have also taken up the question of the human rights violations committed by U.S. and other government officials, including the Commission on Human Rights and specific officials and bodies under its mandate: the Special Rapporteur on Arbitrary Detention and the Working Group on Arbitrary Detention, the Special Rapporteur on Involuntary and Enforced Disappearances, and the Special Rapporteur on Torture.


American attorneys assisted English and Canadian attorneys in an attempt to compel their respective governments to take action on behalf of their citizens held at Guantánamo Bay. Litigated under human rights legislation in the two countries, the cases sought to advance a right to diplomatic representation under international law. A ruling in the Canadian case is still pending before federal court in Edmonton, Alberta. Although the English Court of Appeal dismissed the case for lack of jurisdiction, the justices harshly criticized the United States for creating a “legal black hole” and a “clear breach of fundamental human rights.” One hundred and sixteen U.S. groups also submitted a report to the Foreign Affairs Committee of the British Parliament, which was relied upon in the Parliament’s final report.

4. Fighting Extradition in England and Administrative Detention in Canada

U.S. counsel have presented expert testimony on the use of torture by the United States in the interrogation of detainees at Guantánamo and Afghanistan to assist individuals fighting their extradition from England to the United States and to challenge prolonged detention of a Canadian immigrant pursuant to “security certificates.” In both cases evidence used to extradite and to detain two individuals has been obtained from persons held and interrogated by U.S. officials in Afghanistan and Guantánamo. Attorneys in England and Canada are using the testimony on torture to demonstrate that evidence used in these cases is inherently unreliable.
5. German Prosecutions

On November 30, 2004, U.S. and German counsel filed a criminal complaint with the German Federal Prosecutor’s Office at the Karlsruhe Court in Karlsruhe, Germany to seek an investigation of U.S. officials for their involvement in the torture of Iraqis at Abu-Ghraib and other facilities. The U.S. officials charged include Secretary of Defense Donald Rumsfeld, former CIA Director George Tenet, Undersecretary of Defense for Intelligence Dr. Stephen Cambone, Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski, Major General Geoffrey Millar, Brigadier General Janis L. Karpinski, Lieutenant Colonel Jerry L. Phillabuam, Colonel Thomas Pappas, and Lieutenant Colonel Stephen L. Jordan. The complaint was brought under the German Code of Crimes against International Law (CCIL) and charges “war crimes against persons” (including torture). Three of the defendants are based in Germany (Sanchez, Wodjakoski and Pappas), but the claim is based on the German law of universal jurisdiction. Specifically, the code states that it applies to “serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.”

On February 10, 2005, the German prosecutor issued a decision not to take the case. He dismissed the complaint on the ground that he believed that the United States, which has primary jurisdiction, would investigate the matter. On March 10, 2005, a petition for reconsideration of the decision to dismiss the case was filed, including a request for the Prosecutor to refer the case to the German Supreme Court. An appeal to the regional high court was also filed.

\[116\] **German Code of Crimes Against International Law**, art. 1, pt. 1.
IV. HOLDING MULTINATIONAL CORPORATIONS ACCOUNTABLE

The vast majority of claims based on international law against corporations have been brought under the ATS and thus we focus, in this Part, on those cases. This Part briefly addresses the TVPA, RICO, and state law claims, the availability in other countries of international human rights remedies against corporations, the efficacy of combining ATS cases with other campaigns, and the relationship between ATS litigation, voluntary codes of conduct, and international regulation. 117

There have been very few reported decisions in corporate complicity cases since Sosa. There is very little in the Sosa decision itself which specifically concerned the corporate cases. The main reference to a corporate case was in footnote 21 of the Sosa decision, in which the Court noted that, in light of the submissions by the South African government and the U.S. State Department, the corporate cases seeking redress for complicity in Apartheid crimes might be a suitable candidate for “case-specific deference.” 118 Nothing in the Sosa decision demands more of plaintiffs seeking to hold corporations accountable for human rights violations than the strict evidentiary requirements imposed generally by the Court in Sosa. There are many corporate cases in which a wide range of post-Sosa issues are being litigated and it seems likely that there will be several important appellate decisions within the next couple of years. The Unocal cases were expected to be the first, but a December 2004 settlement of all of the pending human rights cases against Unocal deprived ATS litigators of an en banc decision from the Ninth Circuit on many of these issues, especially on the standards for aiding and abetting and vicarious liability.

117 This Part is based in part on a paper prepared by Paul Hoffman for the International Peace Academy which will appear shortly in an IPA publication.
A. ATS Cases

As described above, throughout the 1980s, the cases brought under ATS were against officials of recognized governments. A landmark case that paved the way for subsequent corporate litigation under the ATS was *Kadic v. Karadzic*. The *Kadic* case expanded the contemporary reach of the ATS to private parties for at least certain international human rights claims. The Second Circuit found that certain norms (genocide and war crimes, and summary execution, rape, and other forms of torture committed in pursuit of these crimes) apply to private (i.e., non-state) actors under international law and could be the basis of an ATS claim. Further, the court held that Bosnian Serb leader Radovan Karadzic might be liable for human rights violations such as torture and summary execution which required “state action” by their international law definition because of his relationship with the regime of Slobodan Milosevic (which was a recognized state actor).

The first corporate accountability lawsuits under the ATS were the *Doe v. Unocal* and *Roe v. Unocal* cases, filed in 1996. The plaintiffs are Burmese villagers who lived near the route of a gas pipeline, planned to cut across the Tennasserim region, who allege that they were subjected to murder, forced labor, rape, and other forms of torture in connection with the construction of the pipeline. The plaintiffs allege that Unocal, together with its joint venture partners, Total and the Burmese state-owned Moattama Oil and Gas Enterprise (MOGE), hired the Burmese military to

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120 Id. at 239. In doing so, the Second Circuit specifically rejected the claim that the TVPA limited the reach of the ATS.
121 Id. at 245. The court notes that limiting the concept of “state actor” to officially recognized states—states which often are unrecognized precisely because of their human rights abuses—would have the “perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.” Id.
provide security and other logistical support for the pipeline, knowing that the military had a long record of violent human rights abuses.\textsuperscript{122} The facts of the \textit{Unocal} case are typical of this generation of ATS cases, in which the corporation enters into a business arrangement with a repressive regime or its instrumentalities, in this case the MOGE, to facilitate natural resource extraction.\textsuperscript{123} Similar suits have been filed arising out of human rights abuses in many other countries, including Nigeria, Sudan, Colombia, and Indonesia.\textsuperscript{124}

Among the ATS cases involving corporations, one can distinguish between, on the one hand, claims based on corporations' direct involvement in human rights violations such as destructive environmental practices, abusive sweatshop conditions in the garment industry,\textsuperscript{125} or the production of dangerous products, and on the other hand, claims based on allegations of corporate complicity in the actions of government officials or soldiers who actually commit the human rights violations. The first category of

\begin{itemize}
\item \textsuperscript{122} Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997); National Coalition Gov't of Burma v. Unocal, 176 F.R.D. 329 (C.D. Cal. 1997). Both \textit{Doe} and \textit{Roe} were filed in federal court and made similar claims. In 2000, the \textit{Doe} and \textit{Roe} plaintiffs also filed complaints in California courts raising similar state tort claims. The lawsuits are referred to herein as \textit{Doe v. Unocal}.
\item \textsuperscript{123} Corporate ATS cases have been filed in other situations too, including claims of historical injustice. Claims have been made against corporations that utilized forced labor during World War II. See, e.g., Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999). Others involve banks that aided and abetted the Holocaust or apartheid either by facilitating the seizure of stolen assets or by financing the abusive practices. See, e.g., Badner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). See supra note 14.
\item \textsuperscript{125} See www.sweatshopwatch.org or www.aclu.org (Litigation update) for a description of a series of cases against manufacturers and retailers in Saipan. These cases ultimately settled successfully against the vast majority of defendants.
\end{itemize}
cases is the most common, and the most frequent context concerns projects involving the extraction of natural resources in developing countries.

1. Direct liability

Several ATS cases seek to hold corporations and their officers liable directly for their participation in human rights violations. *Wiwa v. Royal Dutch Petroleum*\(^{126}\) arises out of the internationally condemned execution of Ken Saro-Wiwa and other leaders of the Movement for the Survival of the Ogoni People who led protests against the environmental degradation of Ogoni lands by Shell and other multinational oil companies. Plaintiffs, the survivors of the victims, alleged that Shell officials bribed members of the military and security forces and participated in a public campaign against Ken Saro-Wiwa which led to his execution.\(^ {127}\)

Another category of cases includes those for environmental injuries that are a direct result of the corporate defendant’s business operations.\(^ {128}\) In all of these cases, plaintiffs are trying to expand the definition of the “law of nations” beyond the most commonly recognized human rights crimes to apply to other developing international norms, especially concerning the

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\(^{126}\) 392 F.3d 812 (5th Cir. 2004) (overturning dismissal of case on forum non conveniens and jurisdiction grounds).

\(^{127}\) In *Bowoto v. Chevron*, similar claims are being made by residents of the Niger Delta against Chevron for its complicity in killings and other human rights violations committed by the Nigerian military against those protesting environmental degradation caused by Chevron’s oil operations. On March 23, 2004, the district judge in *Bowoto* denied Chevron’s motion for summary judgment and allowed plaintiffs to proceed on agency, aiding and abetting, and ratification theories. 312 F. Supp. 2d 1229 (N.D. Cal. 2004).

\(^{128}\) The corporate human rights cases contain what may be termed direct liability theories (e.g., aiding and abetting). The distinction here is between cases in which a corporation’s employees directly commit the violations and cases in which the claim is that the corporation was complicit in human rights violations committed directly by government officers, employees, or soldiers.
environment. So far, the courts have resisted these claims, either dismissing them on jurisdictional grounds, or finding that the alleged harms do not violate "specific, universal, and obligatory" norms of international law. The Supreme Court's decision in *Sosa* will not make the litigation of these claims any more inviting for plaintiffs.

An interesting exception is *Aguinda v. Texaco*, in which Ecuadorian and Peruvian citizens attempted to recover for injuries suffered as a result of Texaco's alleged pollution of rainforests in Ecuador and Peru. The case, although dismissed on *forum non conveniens* grounds, premised its judgment on the assumption that Ecuadorian courts must provide an adequate alternative forum for environmental tort actions, while also noting that any foreign judgment on the matter could be enforced against Texaco in the United States. Thus, actions in U.S. courts led to opening up the Ecuadorian courts to these claims and a coalition of victims and activists have used the case to put pressure on the company and government to redress the problems caused by oil exploration in the region.

Another variation of the developing use of the ATS against corporate entities may be found in *Abdullahi v. Pfizer*. There, children in Nigeria claimed that Pfizer, a U.S. pharmaceutical corporation, failed to seek informed consent from parents before including the children in a trial

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129 *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2775 (2004). Even before Sosa, the lower courts were rejecting ATS claims in such cases. *See, e.g.*, *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

130 303 F.3d 470, 476-77 (2d Cir. 2002).

131 Proceedings on the plaintiffs' claims are being considered in an Ecuadorian court. Information about these proceedings is available from Amazon Watch, available at www.amazonwatch.com. The *forum non conveniens* doctrine is based on the idea that it would be more appropriate to have a certain case heard in another jurisdiction based on a consideration of relevant factors (e.g., access to evidence, convenience of witnesses, etc.). *See generally Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1982).

of a new drug that the company knew caused serious joint and liver damage. The plaintiffs also argued that the Nigerian government had participated in the harms by authorizing Pfizer to conduct the study. *Abdullahi* may signify a new trend in ATS cases in which courts will entertain product liabilities—like causes of actions. It remains to be seen whether such cases will survive after *Sosa*.

2. *Indirect liability*

In the majority of corporate cases, plaintiffs are asking courts to find the corporations liable for the actions of third parties, either government or private, because the corporations are alleged to have caused the plaintiffs' injuries in some way or are vicariously liable because of their structural connection (e.g., joint venture) to the project. For example, some of the claims in *Wiwa v. Royal Dutch Petroleum* and *Bowoto v. Chevron* concern the violent repression of peaceful protestors against the actions of the oil companies in Nigeria. Plaintiffs alleged that the oil companies conspired or aided and abetted the Nigerian military in these human rights violations. Similarly, a cluster of cases involve allegations that U.S. corporations operating in Colombia, among them the mining company Drummond, have hired private paramilitary groups who violently suppressed labor union activity.

Meanwhile, the governments maintain a financial and military interest in controlling the natural resources, which

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133 226 F.3d 88 (2d Cir. 2000).
134 312 F. Supp. 2d 1229 (N.D. Cal. 2004).
many of them pursue through violent suppression of civilian populations. Corporations, in turn, are accused of facilitating government repression. In Presbyterian Church of Sudan v. Talisman Energy Inc., for instance, the plaintiffs alleged that Talisman, a Canadian oil company, participated in the Sudanese government’s war against the separatist movement in southern Sudan by constructing an oil pipeline in that region, knowing that the government was engaged in ethnic cleansing and enslavement of local populations in order to protect the pipeline. Talisman was also alleged to have provided the government with logistical support for the war by supplying the Sudanese air force with fuel and granting it access to the company’s airstrip.

Similarly, in April 2003, Luis Alberto Galvis Mujica, a Colombian now in exile in the United States, announced the filing of a complaint in a federal court against Los Angeles-based Occidental Petroleum Corporation and its security contractors in Colombia for their role in a 1998 bombing raid of his village, Santo Domingo, that took the lives of eighteen civilians, including his mother, sister, and cousin. The Colombian air force dropped at least one cluster bomb on Santo Domingo, which is located not far from Occidental’s oil pipeline. Plaintiffs allege that the air force was directed to Santo Domingo by Air Scan, a private U.S. security company hired by Occidental, and that the raid was planned in Occidental’s Colombian facilities.

ATS cases often arise in the context of armed conflict—a context that has a variety of legal ramifications in terms of the available claims and defenses—and pose both legal and practical challenges for the litigants and the courts. As discussed below, the determination of when civil liability

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137 Id. at 299.
attaches to these activities is usually the central issue in corporate ATS cases. That is, the central issue is usually how much knowledge and involvement in the violation must be shown to find a corporation legally responsible.

3. Corporate Complicity: Aiding and Abetting Standards Under the ATS

Most plaintiffs disavow the argument that merely investing in or establishing operations in a country in which human rights violations are common will subject a corporation to ATS liability. In most of the cases, the claims are rather that the corporation’s activities contribute to specific human rights violations in connection with specific projects for which corporations should be held accountable. The federal courts have been called upon to apply international law and domestic standards of aiding and abetting, accomplice and vicarious liability.

As the corporate complicity case farthest along in the judicial process, Unocal provides a good illustration of these

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139 Several pending class action cases brought against over 100 businesses operating in South Africa during apartheid have been criticized for making the argument that companies that merely did business in South Africa are liable under ATS. The plaintiffs in these cases deny that this is their theory of liability but a district judge has treated their complaints as though they are, in fact, making such broad claims. In re South Africa Apartheid Lit. v. Citigroup, Inc., 346 F. Supp. 2d 538, 551 (S.D.N.Y. 2004). The Second Circuit will soon have to resolve this conflict.

These cases also brought protests from the government of South Africa, with the support of the U.S. State Department. These protests were noted by the U.S. Supreme Court in Sosa. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004). The Court suggested that these cases might call for the exercise of “case-specific deference” to the Executive Branch’s position. The issue of whether the courts should defer in this or other circumstances where the Executive Branch opposes pending litigation has been raised in several ATS cases and remains unresolved. The issue is of great importance because it is becoming clear that the Bush Administration will seek the dismissal of every ATS case on these grounds because of its ideological opposition to the ATS in general.

140 For a discussion of criminal and civil standards of liability, from direct participation to acceptance of benefits, for corporations complicit in human rights abuses, see ICHRP, Beyond Voluntarism, at 121-41.
issues. While Unocal claims not to have actively pursued forced labor or participated directly in specific human rights violations, the courts have found that there was evidence that Unocal had extensive notice that such abuses would occur and were occurring in connection with the project and that Unocal benefited from those abuses. The judicial battleground has concerned whether Unocal's financial and other involvement in the project, given its knowledge of human rights violations and its corresponding benefits, are sufficient to make it responsible to the human rights victims as an aider and abettor.\footnote{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's ATCA 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, but a decision was deferred pending the Supreme Court's decision in Sosa. In December 2004, days before the rescheduled en banc argument, after extensive post-Sosa briefing, the parties reached a confidential settlement of all the cases against Unocal. This question is also raised in an analysis of a potential liability of the South African diamond company De Beers under the ATS for its trade in so-called conflict diamonds in West Africa. See Lucinda Saunders, Rich and Rare Are the Gems They War: Holding De Beers Accountable for Trading Conflict Diamonds, 4 FORDHAM INT'L L.J. 1402-76 (2001).

In another often-cited case, Presbyterian Church of the Sudan v. Talisman, the court stated a virtually identical standard to that applied in Unocal—that a company could be held liable for acts such as slave labor if it "knowingly provided substantial assistance" in the commission of human rights violations. 2003 U.S. Dist. Lexis 4083 (S.D.N.Y. 2003).}

In September 2002, the Ninth Circuit summarized the standard for a corporation's potential liability: defendants could be held liable if they provide "knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime which requires actual or constructive knowledge."\footnote{In another often-cited case, Presbyterian Church of the Sudan v. Talisman, the court stated a virtually identical standard to that applied in Unocal—that a company could be held liable for acts such as slave labor if it "knowingly provided substantial assistance" in the commission of human rights violations. 2003 U.S. Dist. Lexis 4083 (S.D.N.Y. 2003).} After the Sosa ruling, the U.S. government submitted a brief to the Ninth Circuit stating, inter alia, that Unocal could not be held liable because there is no agreed upon standard under international law
on aiding and abetting. Plaintiffs challenged the government's argument that this was even a requirement under the Sosa ruling and further argued that even if it was, aiding and abetting is an established principle in international law. Before these competing positions could be resolved by the Circuit, the parties settled all of the Unocal cases in December 2004.

4. Claims the U.S. courts have allowed under ATS

U.S. courts have allowed claims to proceed against corporations for slavery and forced labor (Unocal, Talisman), genocide (Talisman), crimes against humanity (Talisman, Wiwa), summary execution (Wiwa, Bowoto), torture (Unocal, Wiwa, Chevron), cruel, inhuman or degrading treatment (Wiwa), forced exile (Wiwa), arbitrary detention (Unocal, Wiwa, Chevron), freedom of association and the right to life (Wiwa).

Defendants in the corporate cases and the U.S. government have used the Supreme Court ruling in Sosa aggressively to attempt to revisit some of these rulings. However, the Sosa ruling endorsed the rulings in the key ATS cases, and it seems unlikely that these basic rulings will be successfully challenged. As the Supreme Court emphasized in Sosa: “The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided Filartiga v. Pena-Irala.”

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143 The post-Sosa briefing in the Unocal cases may be found at www.sdshh.com.
144 It is only a matter of time before this issue will be resolved by the appellate courts. Judge Sprizzo decided in the Apartheid cases that there was no aiding and abetting liability under the ATS or TVPA. 346 F. Supp. 2d at 549-51. However, in Cabello, the Eleventh Circuit decided, in a traditional Filartiga-type case, that aiding and abetting liability is available. Cite. For an argument that issues such as aiding and abetting liability should be resolved by reference to federal common law principles informed by international law, see Paul Hoffman & Daniel Zaheer, The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act, 26 LOYOLA L.A. INT'L & COMP. L. REV. 47 (2003).
It is likely that the courts will look very carefully at violations which have not been previously recognized. Those which include physical violence are on the strongest footing. In terms of expansion into workers rights, the violations that have been recognized and which will remain include slavery, forced labor, and the violations of the rights of association causing physical harm, such as the assassination of trade union activists.\(^ {146} \)

5. Corporate defenses

At the heart of the defense in a number of the pending corporate cases is the claim that the real corporate culprit, if any, is a foreign subsidiary based in the country of the project or another country wherein it would be practically impossible for plaintiffs to bring an action. In Doe v. Unocal and Wiwa v. Royal Dutch Petroleum, for example, there are several layers of corporate structure that the companies claim shield the parent company from liability for human rights violations suffered by plaintiffs. So far, these issues have not been the subject of published opinions in ATS cases and are still being hotly contested in a number of pending cases.\(^ {147} \) Other issues include debates over whether there is a requirement of action by governments to hold corporations accountable ("state action") and what

\(^ {146} \) See also Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995) (rape as a form of torture); and Farmer v. Brennan, 511 U.S. 825, 852 ("[I]t is no answer to the complaints of the brutalized inmate that the resources are unavailable to protect him from what [rape] ... is nothing less than torture."). At least one pre-Sosa case has stated that violations which did not involve physical violence did not constitute a violation that met the ATS standard. Manzanarez v. C&Y Sportswear, Nien Hsing Textile Co. Ltd. and Chentex, C.D. Cal (unpublished decision). The case successfully settled and is summarized at http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp.

\(^ {147} \) In January 2004, the state court judge in Doe v. Unocal refused to pierce the corporate veil of Unocal's subsidiaries, using traditional alter ego principles, but in August 2004, the judge allowed other theories of liability, such as aiding and abetting. These opinions are available at www.ccr-ny.org.
legal standards are to be applied in analyzing the relationship between the corporation and the government (e.g., does the corporation need to "control" the government actions?).

There will be continuing challenges to ATS claims based on doctrines that assert that the case interferes with U.S. foreign policy, such as the "act of state" doctrine or "international comity." The political question doctrine is a similar judge-made prudential doctrine under which federal courts may refuse to hear cases otherwise properly before them, if the dispute requires the court to pass judgment on matters reserved for the political branches of government. There is a strong argument that such doctrines do not apply to acts which violate long-established human rights norms.

ATS cases involving foreign plaintiffs suing foreign defendants for harms occurring in a foreign country have the highest risk of being dismissed based on the *forum non conveniens* doctrine. A court applies a *forum non conveniens* analysis to decide whether there is an adequate alternative forum in another jurisdiction or country and, if so, which forum best serves public and private interests. In ATS corporate cases, especially those against foreign corporations, *forum non conveniens* arguments and arguments that U.S. courts lack personal jurisdiction are standard fare.

**B. Torture Victim Protection Act**

The TVPA has been successfully applied to private actors, including corporations and their officials. Two district courts, each in the context of cases arising out of repression of union activities in Colombia, have decided this issue, finding that the TVPA was intended to encompass corporate complicity in torture or extrajudicial killings.\(^{148}\)

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\(^{148}\) Sinaltral v. Coca Cola, 256 F. Supp. 2d 1345, 1358-59 (S.D. Fla. 2003); Estate
In both cases, the defendants attempted to argue that the use of the word "individual" in the TVPA's statutory language was meant to refer only to natural persons. The courts rejected the argument based on a decision of the Supreme Court that found "individual" to be synonymous with the legal definition of "person" and thereby applicable to corporate entities. Further, courts found that there was no legislative history indicating any intent to exempt corporations from the reach of the statute. These cases effectively reject the suggestion that the TVPA does not apply to corporations. It is expected that this issue will be hotly litigated by corporations until the issue is resolved by appellate courts.

C. RICO

The Racketeer Influenced Corrupt Organizations Act ("RICO") provides a civil remedy to persons injured by other persons or organizations that commit any action or threat—more than once and in a way that affects interstate commerce—involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in an obscene matter, or dealing in a controlled substance. An organization or person can be charged with violating RICO for conspiring to commit any of these acts. Plaintiffs bringing ATS claims against corporations often also bring RICO claims, though it is unclear whether courts will apply RICO in this context. In Doe v. Unocal, the court rejected the RICO claims; in Wiwa and Bowoto, RICO claims have survived initial motions to dismiss and motions for summary judgment.


Sinaltral, 256 F. Supp. 2d at 1358. Drummond, 256 F. Supp. 2d at 1267 (citing to the Sinaltral decision to determine that "individual" and "person" are synonymous, and that the term "person" "often has a broader meaning in the law than in ordinary usage.").


Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (S.D.N.Y. 2002) (reversing the
D. State Claims

At the state level, California's Business and Professions Code provides civil remedies to persons injured by a corporation's use of unfair business practices in the context of a claim that include human rights violations or that a company falsely advertised its allegedly positive human rights record. One of the first claims that alleged slave labor as an unfair business practice was *Buweerong v. Uvawas*, a case brought against the employers of dozens of Thai women forced to work in slave labor conditions in California. Similar claims are currently pending in *Bowoto v. Chevron*.

Similarly, many ATS plaintiffs also make claims based on state tort law such as wrongful death and intentional and negligent infliction of emotional distress. The *Doe v. Unocal* state court action, before the December 2004 settlement, was the most advanced of these actions in that the first phase of the trial has been completed and a trial on the merits was scheduled for May 2005. Corporate defendants have argued that attempts to use state tort law to remedy human rights violations committed abroad are preempted by federal law. This argument was rejected in *Doe v. Unocal* but pre-emption arguments are certain to be pressed by defendants in all of the state court corporate complicity cases.

Yet another possibility is to sue companies under state laws against negligence and strict liability. One such claim was a suit against a manufacturer of tear gas for the wrongful death of Palestinians in the West Bank and Gaza. The case was successfully settled in state court after a federal court dismissed the case under that rationale that Palestinians were "stateless persons" and had no right to bring cases in U.S. federal court. If the courts reject or limit the use of the ATS in corporate cases, it is certain that many of these cases will instead be filed in state courts alleging state law claims.

E. Availability of International Human Rights Remedies in Other Countries

Most states that actively participate in foreign business ventures with corporations have enacted regulatory legislation and are parties to international agreements for the purpose of regulating corporate activities within and outside their borders. However, there appear to be few available judicial remedies in most municipal law regimes for torts committed by business organizations or their agents outside their borders. Rather, most mechanisms for corporate accountability are limited to subjects other than human rights (e.g., taxation, transfer pricing, or competition).  

Courts in a few countries have applied existing municipal remedies in ways analogous to the ATS. Other states

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155 The possibilities of bringing tort claims in various international and comparative contexts are explored in depth, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed., 2001). See also SARAH JOSEPH, CORPORATION AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004).

have also applied domestic tort law to the extraterritorial
court of their corporations. In Canada, an action was
filed against Cambior, a mining company, based on
environmental damages from the collapse of a dam in
Guyana. Similar litigation reached settlement in Australia,
based on a dam collapse in Papua New Guinea. In
England, a major suit was filed by South African miners
who claimed that Cape, a U.K.-based mining company, was
responsible for asbestos-related illnesses. In France,
plaintiffs have begun seeking legal action against Total,
Unocal's partner in the controversial Burmese oil project,
following the dismissal of a case against Total in U.S. courts
on jurisdictional grounds. A criminal case against Total is
also being pursued in Belgium.

As with ATS cases, in these cases a number of legal
restrictions, especially forum non conveniens, remain
substantial hurdles to plaintiffs' recovery. The Canadian
courts ultimately dismissed the Cambior case based on the
finding that Guyana was a superior forum. Other
extraterritorial tort claims are discouraged because the
legal system will not recognize a tort unless it would be
recognized in the courts of the jurisdiction where it
occurred. Although there are relatively few international
examples, the use of international law in domestic court

157 See Halina Ward, Securing Transnational Corporate Accountability Through
National Courts: Implications and Policy Options, 24 HASTINGS INT'L & COMP. L.
REV. 451, 456 (2001); see also Richard Meeran, Accountability of Transnationals for
158 Ward, supra note 157, at 457-58.
159 The House of Lords refused to dismiss the case in favor of litigation in South
Africa because South African law would not provide them relief. Lubbe v. Cape PLC
(No. 2), 1 E.L.R. 1545 (H.L. 2000).
160 Doe v. Unocal, 248 F.3d 915 (9th Cir. 2001).
161 Activists Keep Up Pressure on Myanmar Investors, ENERGY COMPASS, May 10,
2002.
162 Ward, supra note 157, at 460-61.
163 Id. at 457.
164 Stephens, supra note 156, at 32.
appears to be on the rise and it can be expected that future international litigation initiatives will occur.

F. Relationship with Voluntary Codes and International Regulation

The ATS corporate human rights cases should be seen in the context of broader international efforts to regulate the behavior of corporate actors in repressive or war-torn countries and to eliminate what amounts to corporate impunity for the human rights violations that too often accompany these projects. These cases have generated considerable public attention because of the financial stakes involved and because of the concerted response of corporations that challenge the use of the ATS as a means to hold them accountable for complicity in human rights violations. Though it is difficult to establish a direct connection between the ATS cases and the recent development of other international regulatory efforts, the litigation appears to have contributed to the growing debate over the need for international regulation of the activities of corporations in repressive states and zones of conflict. Indeed, ATS litigation may be seen as filling the prevailing accountability vacuum created by the absence of comprehensive international regulation and may yet serve as a catalyst for future reform efforts.

Over the past decade such codes have included the Compact for the New Century, sponsored by U.N. Secretary General Kofi Annan, the United Nations Human Rights

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166 See Jeff Gerth, U.S. and Oil Companies Revised Effort on Disclosure, N.Y. TIMES, Sept. 19, 2003, at W1.
Commission, the European Parliament, and the U.S. government on codes for apparel industry and mining and petroleum industries.¹⁶⁷

CONCLUSION

The Sosa decision presents tremendous opportunities and challenges for the foreseeable future in human rights litigation in U.S. courts. For twenty-five years, human rights litigators have developed a firm foundation of ATS jurisprudence and in the process brought international human rights law into U.S. courts in an unprecedented way. The Supreme Court accepted the core of this foundation in its Sosa decision but this acceptance was accompanied by a number of caveats and uncertainties about the scope of the ATS post-Sosa. Thus, almost every aspect of ATS litigation will be contested by ATS defendants, especially corporate defendants, in the next few years.

The next round of significant decisions will come in the corporate cases over issues such as the norms which are actionable; whether aiding and abetting liability is authorized under the ATS and Sosa; and the extent to which political issues will trump the rule of law in ATS cases. The corporate cases are important because they involve defendants with great power and very little accountability and present opportunities to obtain concrete results in many cases. The deterrent effect of large judgments and settlements on the ways big corporations conduct business is also likely to be substantial.

Ensuring that the jurisprudence previously established in the pre-Sosa era remains will also depend on rulings in the more traditional individual perpetrator cases (Filartiga;

Marcos) in which the courts have had little trouble agreeing to using international standards (e.g., command responsibility) to effectuate the remedial purposes of the ATS. This genre of ATS cases has been responsible for most of the successes and reported decisions. The cases are sympathetic and have had a huge impact on the judges involved in them, even where the judges were not initially sympathetic. It seems likely that maintaining a steady stream of victories in these kinds of cases will help solidify the pre-Sosa case law and maintain the core coverage of the ATS in the face of efforts to dismantle it, judicial or legislative.

Another crucial next frontier will be bringing ATS cases against domestic defendants like state and local officials and private parties where authorized. There will be opportunities to bring actions in certain instances of police abuse, prison and jail mistreatment, sweatshop labor, workplace safety, and perhaps in some instances of gender discrimination, violence, and trafficking. In this area, there will be challenges dealing with the intersection of international law and domestic civil rights law and probably reluctance to apply international law within the United States on the part of many judges. For this reason it will be critical to pick the right cases in which there are strong international norms, sympathetic clients and fact patterns, judges open to these issues, and well-mobilized domestic constituencies so that these cases foster further advocacy and education efforts.

In the last two years, the Supreme Court has decided several important cases that alter the playing field for the use of international human rights law in U.S. courts. The Court has reaffirmed the availability of the ATS as a vehicle to remedy egregious human rights violations. It has opened the door to judicial review in the Guantanamo cases. The Court has also reestablished the relevance of international law and opinion in cases like Atkins,
Lawrence, and Roper in the domestic constitutional law context.

These decisions raise the likelihood that cases will be presented to the Court to further elaborate and build upon these small steps forward. It is imperative that the new opportunities be addressed in the most proficient, coherent, and coordinated manner possible, recognizing that it is not entirely possible to coordinate the litigation activities of disparate lawyers and public interest entities.

International human rights litigation has been shown to be an effective vehicle for mobilizing and focusing efforts of a range of human rights activists and organizations on common issues in the United States and around the world. While we do not underestimate the challenges still facing international human rights litigation in U.S. courts, we do believe that the future holds even more promise for such combined efforts if cases are chosen with these opportunities in mind.
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