THE ALIEN TORT STATUTE: AN INTRODUCTION FOR CIVIL RIGHTS LAWYERS

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I. INTRODUCTION

There is a growing interest in integrating international human rights law into U.S. domestic practice.[1] Over the years, the United States has ratified several of the major international human rights treaties, including the Convention Against Torture and the International Covenant on Civil and Political Rights,[2] and recent decisions of the U.S. Supreme Court suggest that at least some of the Justices have become more receptive to international law arguments.[3]

This interest is not new. Civil rights lawyers attempted to use the United Nations Charter and the Universal Declaration of Human Rights in the late 1940s and 1950s, but did so unsuccessfully and were met with fierce resistance in the legal and larger communities.[4]

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1. *See* BRINGING HUMAN RIGHTS HOME 78-82 (Cynthia Soohoo et al. eds., 2007). This interest has also been reflected institutionally within domestic civil rights organizations. For example, the American Civil Liberties Union established an international human rights program with full-time staff in recent years. *See* American Civil Liberties Union, *About the ACLU's Human Rights Program*, http://www.aclu.org/human-rights/about-aclus-human-rights-program (last visited Mar. 9, 2010); *see also* William J. Aceves, *American Civil Liberties Union*, *in* ENCYCLOPEDIA OF HUMAN RIGHTS 47 (David Forsythe ed., 2009).

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. The United States has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

3. *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) (noting the "overwhelming weight of international opinion against the juvenile death penalty" in holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed); Lawrence v. Texas, 539 U.S. 558 (2003) (relying on foreign authority invalidating laws that prohibited consensual homosexual conduct in order to challenge the international consensus conclusions drawn by Justice Burger in *Bowers v. Hardwick*, 478 U.S. 186 (1986)). *See also* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Justice Ginsburg, in her concurring opinion, relied on the International Convention on the Elimination of All Forms of Racial Discrimination to articulate the standard she would adopt for affirmative action programs).

4. *See* Bert Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946–1955*, 69 IOWA L. REV. 901 (1984). After the Second World War, lawyers began employing the UN Charter and the Universal Declaration of Human Rights as tools to dismantle discrimination here at home. These efforts led to a significant–though short-lived–victory for Japanese citizens in the case of *Fujii v. California*, 217 P.2d 481 (1950). The California Court of Appeals held that California's Alien Land Law, which prohibited Japanese citizens from owning land in California, was inconsistent with the UN Charter and UDHR and, therefore, was superseded by the Supremacy Clause of the U.S. Constitution. *Id*. at 488. However, on review, the California Supreme Court found that the UN Charter and the UDHR were non-self executing and, thus, unenforceable in U.S. courts. Fujii v. California, 38 Cal. 2d 718, 724-25 (1952). Instead, the court invalidated the Alien Land Law under the Equal Protection Clause of the Fourteenth Amendment. *Id*. at 738.

This generation's attempts to use international human rights law to advance domestic civil liberties have also been met with fierce resistance,[5] and have often been entangled in larger national, political, and ideological debates.

This essay concerns the Alien Tort Statute (ATS),[6] which has offered an innovative mechanism for addressing human rights abuses since 1980.[7] The ATS provides that: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[8]

After the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*,[9] it is clear that the federal courts have the authority, at least in some circumstances, to fashion a federal common law cause of action when a non-citizen[10] brings an action for a "tort" committed in violation of either the "law of nations" or a treaty of the United States.[11] Given the rapid developments in international human rights law since the end of World War II, civil rights lawyers should not ignore the possibility of using the ATS to vindicate civil rights in the

5. *See* Stanford v. Kentucky, 492 U.S. 361, 369-70, n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.") (emphasis in original). *See also* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 149 (2005) (arguing that by shifting the focus from the domestic to the international for purposes of determining a "consensus" in Eighth Amendment cases, courts are able to find a "consensus" based on the practices of other countries in situations where a domestic consensus is lacking).

6. 28 U.S.C.§ 1350 (2006).

7. For an account of the history of the ATS, *see* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), 2004 WL 419425.

8. 28 U.S.C.§ 1350 (2006).

9. 542 U.S. 692 (2004).

10. Only non-citizens of the United States may bring ATS claims. Successful claims have also been litigated by representatives of the estate of a deceased victim and beneficiaries in a wrongful death action. *See, e.g.*, Todd v. Panjaitan, No. CV-92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994). In determining whether a plaintiff has standing to sue, courts in ATS cases look to federal choice of law principles and apply the rules governing the Torture Victim Protection Act. *See* Xuncax v. Gramajo, 886 F. Supp. 162, 191 (D. Mass. 1995).

11. The ATS has rarely been used to enforce treaty provisions. The best example of an ATS case invoking rights under an international treaty is Jogi v. Voges, 425 F.3d 367 (7th Cir. 2005), in which the Seventh Circuit allowed a claim under the Vienna Convention on Consular Relations based on the ATS. *Id*. at 380-85. However, the *Jogi* Court later rescinded its ATS opinion and reached the same result under 42 U.S.C. § 1983. Jogi v. Voges, 480 F.3d 822, 824-25 (7th Cir. 2007). Other circuits have rejected Vienna Convention claims under either §1983 or the ATS. *See* Mora v. New York, 524 F.3d 183, 209 (2d Cir. 2008); Cornejo v. County of San Diego, 504 F.3d 853, 863-64 (9th Cir. 2007).

federal courts.[12] International human rights law is constantly developing and these developments may open new opportunities to vindicate the human rights of non-citizens in U.S. courts through the ATS.[13]

The purpose of this essay is to provide an introduction to the ATS, so that civil rights lawyers will have a basic understanding of the circumstances in which the ATS might be helpful in human rights cases in the United States, and to suggest areas of international law where non-citizens may, in certain circumstances, bring ATS claims for civil rights violations that occur in the United States.[14] The essay begins with a brief history of the ATS from the Second Circuit's landmark decision in *Filártiga v. Peña-Irala*[15] to the United States Supreme Court's decision in *Sosa v. Alvarez-Machain*. Next, we set forth the *Sosa* framework, under which all ATS claims are now analyzed. Building off of this framework, we examine areas of opportunity for civil rights litigators under the ATS and provide examples of the types of civil rights violations that may also give rise to liability under international law. We then briefly examine suits against public and private officials and the unique issues that arise in these contexts. We end with a summary of some of the most prominent and controversial issues in ATS cases today, including issues surrounding choice of law and theories of liability.

As a final introductory note, we do not advocate adding ATS

12. There is a mountain of scholarship concerning the ATS and international human rights law that civil rights lawyers can consult in analyzing potential ATS claims. For a general background of international human rights law, *see* DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION (2007). We suggest that any civil rights lawyer considering bringing an ATS claim in a domestic case consult with the human rights lawyers and law professors who have expertise in this area.

13. While this article will focus on the ATS, plaintiffs in several cases have successfully litigated their claims under the Torture Victim Protection Act, 28 U.S.C. § 1350 (note 1) ("TVPA"). The TVPA was enacted in 1992 and provides a federal cause of action for torture and extrajudicial killings committed under color of foreign law against anyone, including U.S. citizens. The legislative history of the TVPA makes clear that it was not intended to replace the ATS, but to provide a modern cause of action for these two violations and extend the right to sue to U.S. citizens. *See* H.R. Rep. No. 102-367 (1991); S. Rep. No. 102-249 (1991). Civil rights lawyers should be aware of the applicability of this statute to claims of torture and extrajudicial killing. The requirement that the violations take place under the color of foreign law, however, limits the domestic application of the TVPA. *See* Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009)(en banc).

14. For additional information, *see* RALPH STEINHARDT, PAUL HOFFMAN & CHRISTOPHER CAMPONOVO, *Litigating Human Rights in Domestic Courts*, *in* INTERNATIONAL HUMAN RIGHTS: CASES AND MATERIALS (2008).

15. 630 F.2d 876 (2d Cir. 1980).

claims routinely. To do so would only invite negative decisions from the federal courts, which, for the most part, are unfamiliar with the intricacies of international law.[16] There will, however, be circumstances where the egregious nature of the defendant's conduct calls for the assertion of serious human rights charges. There may also be situations where international human rights law fills a gap in the protections of domestic civil rights law. As international human rights norms continue to develop and domestic protections contract, this may increasingly become the case. As is true in all cases, the exercise of good judgment, in deciding whether to bring ATS claims, will be crucial to the further development of this tool.

II. BRIEF HISTORY OF THE ATS

The Alien Tort Statute, sometimes referred to as the Alien Tort Claims Act, was enacted as part of the First Judiciary Act of 1789. Providing district courts with jurisdiction for claims brought by "alien[s]" for "tort[s] only, committed in violation of the law of nations," the statute was rarely invoked prior to the Second Circuit's landmark decision in *Filártiga v. Peña-Irala*.[17] That case arose when Joel Filártiga and his daughter Dolly sought out a way to take legal action against Americo Norberto Peña-Irala, a Paraguayan police officer who had tortured and killed their son and brother, Joelito Filártiga, in Paraguay, and who was at the time living in New York City.

The Center for Constitutional Rights, a New York-based civil rights NGO, filed suit against Peña-Irala on the Filártigas' behalf, relying on ATS jurisdiction and alleging that torture by a government official constituted a tort in violation of the law of nations. The district court dismissed the claim, holding that the law of nations did not apply to a government's treatment of its own citizens.[18] On review, the Second Circuit reversed, stating that torture violated universally accepted norms of international human rights law and that the ATS provided jurisdiction "when the alleged torturer is found and served with process by an alien within our borders[.]"[19]

16. *See* Serra v. Lappin, 2010 WL 1407795 (9th Cir. Apr. 9, 2010) (an example of an ill-advised attempt to use the ATS in domestic prison litigation).

17. *See generally* WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PEÑA-IRALA (2007).

18. *See Filártiga*, 630 F.2d at 880.

19. *Id*. at 878.

The Second Circuit acknowledged that its holding was "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence,"[20] and in doing so, it paved the way for others to seek remedy for the most egregious human rights violations in U.S. courts.

Most of the ATS cases immediately following *Filártiga* involved suits against former foreign government officials who resided in or visited the United States. Among the most prominent of these cases were cases brought against Argentine General Carlos Suárez-Mason, accused of mass killings and disappearances in Argentina's Dirty War,[21] and former Philippines President Ferdinand Marcos, accused of command responsibility for widespread torture, disappearances, summary execution, and arbitrary detention during his fourteen-year dictatorship.[22]

Then in 1995, in another key development, the Second Circuit held in *Kadic v. Karadzic*[23] that the ATS provides jurisdiction over claims against private actors who either commit international law violations that do not require state action or who act in concert with state officials.[24] *Kadic* involved claims brought by Croat and Muslim citizens of Bosnia-Herzegovina against the president of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina for atrocities carried out by the military forces under his command. The

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20. *Id*. at 890.

21. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1536 (N.D. Cal. 1987); Forti v. Suarez-Mason, 694 F. Supp. 707, 708 (N.D. Cal. 1988) (on reconsideration).

22. Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996); Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); Trajano v. Marcos, 978 F.2d 493 (9th Cir. 1992), *cert. denied*, 508 U.S. 972 (1993).

23. 70 F.3d 232 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996).

24. *Id*. at 241-42, 245. Previously, the D.C. Circuit Court rejected ATS claims made against non-state actors in the context of a terrorist attack in Israel in *Tel-Oren v. Libyan Arab Republic*, 426 F.2d 774 (2d Cir. 1984). In recent years, the international norms against terrorist acts have grown to the point where the ATS has become available to litigate such claims in U.S. courts. *See, e.g.*, Linde v. Arab Bank, *PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005); Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 23 (D.D.C. 1998). Plaintiffs in *In re Chiquita Brands International, Inc.*, Alien Tort Statute and Shareholder Derivative Litigation have also alleged terrorism claims against Chiquita for providing support to a Colombian paramilitary group accused of committing violent attacks on civilians. 536 F. Supp. 2d 1371 (J.P.M.L. 2008) (consolidating cases). Such claims would be equally available for terrorist acts committed against aliens within U.S. territory. In *In re Terrorist Attacks on September 11, 2001*, 348 F. Supp. 2d 765, 826 (S.D.N.Y. 2005), those who suffered losses in the September 11, 2001, terrorist attacks brought tort claims against foreign governments, Muslim charitable entities, and individuals alleged to have provided financial and logistical support to al Qaeda. The district court ruled that claims based on aircraft hijacking triggered ATS jurisdiction. *Id*. at 565.

court's recognition in *Kadic* that private actors could be held liable for violations of international human rights law paved the way for suits against corporations for their complicity in human rights violations.

The first and most prominent of these cases to analyze the question of corporate liability for human rights abuses was *Doe v. Unocal*,[25] a case charging the California-based oil company Unocal with complicity in forced labor, rape and other torture, and other human rights abuses that arose during the construction of a gas pipeline in Burma. Since *Kadic* and *Unocal*, plaintiffs have brought numerous other cases against private actors and corporations under the ATS.[26]

For more than two decades after *Filártiga*, the U.S. Supreme Court did not have occasion to rule on the scope and application of the ATS. Then, in 2003, the Supreme Court granted certiorari in the case of *Sosa v. Alvarez-Machain*. Humberto Alvarez-Machain, a Mexican physician, was accused of helping to keep a Drug Enforcement Agent, Enrique Camarena-Salazar, alive during his torture by drug traffickers so that he could be interrogated further. The DEA was unable to extradite Dr. Alvarez to the United States and so they hired a group of Mexicans to kidnap him. They held Dr. Alvarez captive overnight in Mexico, and flew him to the United States where he faced prosecution in California. The district court granted Dr. Alvarez's motion for acquittal after the government presented its case, ending the criminal prosecution.[27] Dr. Alvarez filed a civil suit for damages alleging, *inter alia*, that his kidnapping by former Mexican police officers at the behest of the DEA violated the law of nations because it was an arbitrary arrest and because it violated Mexican sovereignty.[28] Dr. Alvarez sought to use the ATS

25. 963 F. Supp. 880, 883-84, 892 (C.D. Cal. 1997) (denying motion to dismiss); Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (granting defendants' motion for summary judgment), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002) (reversing summary judgment and remanding for trial), *reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003) (vacating the panel decision). Prior to the *en banc* oral argument, the parties reached a confidential settlement agreement and all claims were dismissed. Although the district court decision and the appellate panel's decision were both vacated, the appellate opinion is often cited for its persuasive power. *See, e.g.*, In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 83 (E.D.N.Y. 2005).

26. *See, e.g.*, Wiwa v. Royal Dutch Petroleum, 226 F. 3d 88 (2d Cir. 2000); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

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

28. There are numerous accounts of the *Sosa* case and analyses of the decision. *See, e.g.*, Ralph Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the*

to hold U.S. government officials accountable under international human rights law for their role in his international kidnapping and arbitrary detention. In 2004, the Court handed down its landmark decision. Though the Court rejected Dr. Alvarez's claim, the Court preserved the ability of human rights victims to bring suit against their perpetrators in U.S. federal courts, in certain circumstances, under the ATS.[29] By the time the Supreme Court decided *Sosa*, the U.S. officials had been dropped from the case because of the operation of the Westfall Act[30] and only one Mexican national kidnapper was left as a defendant.

III. THE *SOSA* FRAMEWORK

Since the Supreme Court decided *Sosa*, all ATS cases must now fit within the *Sosa* framework.[31] This framework prescribes that a plaintiff must rely on an international human rights norm accepted by the civilized world and defined with a specificity comparable to the historical examples that the Founders must have had in mind at the time the ATS was enacted: attacks on ambassadors, violation of safe conducts, and piracy.[32] The *Sosa* Court indicated that most of the ATS decisions prior to *Sosa* were consistent with the rules it was establishing in its decision.[33]

The Court noted that the international norm in an ATS case had to be defined with a certain degree of specificity before a Court should fashion a federal common law cause of action under the

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Future of International Human Rights Litigation in U.S. Courts, 57 VAND. L. REV. 2241 (2004); Beth Stephens, *"The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK L. REV. 533 (2004-05).

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

30. See *infra*, Part V.A.

31. For the most comprehensive post-*Sosa* analysis of the ATS case law, *see* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

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

33. *Id*. at 732 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.") (citing Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980), Tel-Oren v. Libyan Arab Republic , 726 F.2d 774,781 (D.C. Cir. 1984) (Edwards, J., concurring), and In re Estate of Marcos Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994)). The Court's citation to Judge Edward's concurring opinion in *Tel-Oren* is significant because of its rejection of Judge Bork's view that an ATS plaintiff must find support in international law for a cause of action for damages. After *Sosa*, though, plaintiffs will find that ATS defendants will attempt to resurrect Judge Bork's views in other arguments designed to restrict the modern use of the ATS to vindicate human rights.

ATS.[34] Thus, the Court held that Dr. Alvarez' claim—which as the Court understood it, was that the norm against arbitrary arrest was violated because he was seized in Mexico pursuant to a U.S. arrest warrant that had no effect in Mexico—was not supported by international authorities that specifically indicated a violation of the law of nations in those circumstances.[35] The Court agreed that there were general international norms prohibiting arbitrary arrest, but that these norms did not clearly apply to an arrest without formal authority for such a short detention without any finding of physical abuse. This specificity requirement is the ATS equivalent to the defense of qualified immunity in domestic civil rights litigation, in that *Sosa* requires that the international norm relied upon be defined specifically enough so that it may fairly be said to apply to the particular factual circumstances before the court.[36]

The Court also held that the "practical consequences" of recognizing the claim that Dr. Alvarez advanced were staggering because it would mean that any arrest in the world pursuant to a defective warrant would potentially be the basis for ATS claims in U.S. courts.[37] The court encouraged lower courts to consider the practical consequences of adopting new ATS norms in future decisions. However, courts applying widely accepted, clearly defined norms would have no cause to analyze the practical consequences of adjudicating a claim brought under the core definition of widely accepted human rights norms.

Thus, the basic *Sosa* framework involves an analysis of the evidence supporting the existence of the international human rights norm the ATS plaintiff seeks to advance; a determination of whether the contours of the norm are specific enough to apply to the particular circumstances of the case; and a consideration of the practical consequences of recognizing a particular norm. These and other issues raised by the *Sosa* decision remain hotly contested.

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34. *Sosa*, 542 U.S. at 725, 738.

35. *Id*. at 738.

36. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

37. *Id*. at 732-33. After *Sosa*, defendants have attempted to enlarge the scope of this "practical consequences" analysis to include foreign policy concerns ordinarily examined under the political question doctrine. *See, e.g.*, Defendant-Petitioners' Petition for Writ of Certiorari, *In re* S. African Apartheid Litig., 2008 WL 140514 at 8 (Jan. 10, 2008). For a recent "practical consequences" analysis, *see* Mujica v. Occidental Petroleum, 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

Courts since *Sosa* have found little difficulty in recognizing most of the norms that had been recognized as actionable before *Sosa* including torture,[38] extra-judicial executions,[39] prolonged arbitrary detention,[40] genocide,[41] crimes against humanity,[42] and war crimes.[43] Courts have been split on the actionability of cruel, inhuman, and degrading treatment or punishment (CIDT).[44] It seems likely that some CIDT claims will be recognized by the courts especially those falling close to torture on the torture-CIDT continuum. Interestingly, the United States has taken the position that the most prominent reason for the ATS was to redress law of nations violations occurring within U.S. territory and that the ATS does not apply extraterritorially.[45] Thus, using the ATS to vindicate the human rights of aliens occurring within U.S. territory fits the paradigm the Bush Administration has articulated in recent submissions urging the courts to restrict the application and scope of the ATS to claims arising within the jurisdiction of the United States. These arguments seem inconsistent with *Sosa*,[46] but nevertheless may be useful for

38. *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005); Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005). *See also Filártiga*, 630 F.2d 876; *In re* Estate of Marcos, 25 F.3d at 1475.

39. *See, e.g.*, *Cabello*, 402 F.3d 1148; *See also In re Estate of Marcos*, 25 F.3d 1467; Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

40. *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 466 (S.D.N.Y. 2006); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1326 (N.D. Cal. 2004). *See also* Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).

41. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005), dismissed on other grounds, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), dismissal affirmed, 582 F.3d 244 (2d Cir. 2009). *See also* Kadic v. Karadzic, 70 F.3d 232, 242 (2d Cir. 1995); *Mehinovic*, 198 F. Supp. 2d at 1355.

42. *See, e.g.*, *Cabello*, 402 F.3d at 1161; *Kiobel*, 456 F. Supp. 2d at 467; Doe v. Saravia, 348 F. Supp. 2d 1112, 1156-57 (E.D. Cal. 2004). *See also Mehinovic*, 198 F. Supp. 2d 1322.

43. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 256 (2d Cir. 2009); *See also Kadic*, 70 F.3d at 242-43; Doe v. Islamic Salvation Front, 993 F. Supp. 3, 8 (D.D.C. 1998), *rev'd on other grounds*, 257 F. Supp. 2d 115 (D.D.C. 2003); *Mehinovic*, 198 F. Supp. 2d at 1350-51.

44. *Compare In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 253 (S.D.N.Y. 2009) (finding that plaintiffs' claims were sufficient to state a claim for CIDT); *Mujica v. Occidental Petroleum Corp*., 381 F. Supp. 2d 1164, 1181 (C.D. Cal. 2005) (finding CIDT claims actionable under the ATS); *Liu Qi*, 349 F. Supp. 2d at 1321 (same) *with* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242 (11th Cir. 2005) (holding that CIDT claims were not actionable under the ATS); *Forti*, 672 F. Supp. at 1543 (same).

45. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc, at 11-12, Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 2007 WL 1079901, Civ. Nos. 02-56256, 02-56390 (9th Cir. Apr. 12, 2007).

46. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004) (stating that "modern international

civil rights plaintiffs seeking to apply the ATS to human rights violation occurring within the United States against non-citizens.

IV. AREAS OF OPPORTUNITY FOR CIVIL RIGHTS LITIGATORS UNDER THE ATS

There are a number of reasons why civil rights lawyers might consider using the ATS in their work. At least some international human rights norms (*e.g.*, cruel, inhuman and degrading treatment) are broader than their U.S. constitutional counterparts and may be the equivalent of some progressive state civil rights statutes in states where these statutes do not exist. There may also be cases in which defining the wrong as an international human rights violation (*e.g.*, as torture instead of excessive force) may be a more accurate description of the harm suffered by the plaintiff and may be of greater value in underscoring the severity of the claim before a judge or jury.

The ATS has a ten-year statute of limitations, which may extend the life of a claim in some circumstances.[47] Additionally, there is no doctrine of qualified immunity in international law, nor is there any limit on suits against municipalities, as is the case in domestic civil rights litigation. International human rights law also evolves over time and the scope of the ATS is likely to evolve with it. Thus, the ATS is likely to expand in scope over the years as the international community reaches consensus on new norms and existing norms are applied in a wider variety of circumstances.

So far, the post-*Sosa* cases have come to the same conclusions about actionable norms as pre-*Sosa* cases. As discussed above, norms like torture, extra-judicial execution, genocide, crimes against humanity, and war crimes have been found actionable under the *Sosa* test.[48] The same division of opinion about cruel inhuman and degrading treatment exists in the case law.[49] Very few "new" norms have been recognized. However, medical experimentation without consent[50] and denationalization[51] have been found to be actionable

law is very much concerned with" limits on foreign government's treatment of their own citizens).

47. *See* discussion, *infra* Part VI.C; Papa v. U.S., 281 F.3d 1004 (9th Cir. 2002).

48. *See supra*, notes 40-45 and accompanying text.

49. *See supra*, note 46 and accompanying text.

50. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (finding that the prohibition on nonconsensual medical experimentation on human beings constituted a universally accepted norm

post-*Sosa*.

Under *Sosa*, evidence supporting the existence of a norm can be derived from customary international law[52] or relevant international treaties.[53] In analyzing these issues, the courts have rejected arguments that certain international documents like non-self-executing treaties or the Universal Declaration of Human Rights are illegitimate sources of customary international law.[54] However, courts have resisted attempts to have certain new norms accepted as actionable under the ATS by citing to a host of international documents where the evidence that the claimed norms have become part of customary international law is speculative.[55]

The following are some areas where the ATS may be useful in addressing issues confronting U.S. civil rights plaintiffs. The evidence supporting these norms is strong. It will be important, though, for advocates to document evidence indicating that these norms satisfy the historical paradigm test. To do so, it is almost always necessary to consult with international law scholars and to obtain detailed declarations from them demonstrating that the evidence supporting these norms is sufficient under *Sosa*.[56]

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of customary international law within the jurisdiction of the ATS), *petition for cert. filed*, 78 U.S.L.W. 3049 (U.S. July 8, 2009). Recently, the court asked the United States for its views on the pending cert petition. Pfizer, Inc. v. Abdullahi, 130 S.Ct. 534, 78 U.S.L.W. 3251 (U.S. Nov. 2, 2009) (mem).

51. *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 253 (S.D.N.Y. 2009).

52. Customary international law results "from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). "In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states." *Id.* at § 103(2).

53. Although non-binding and non-self-executing treaties do not themselves establish rules applicable in ATS cases, such sources may demonstrate both the universal nature of the norm and state practice. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995) (citing the Genocide Convention and the Convention Against Torture as evidence of customary international law prohibitions).

54. The Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights are illegitimate sources of customary international law. *See, e.g.*, Abdullahi v. Pfizer, Inc., 562 F.3d 163, 180 (2d Cir. 2009); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1345 (N.D. Ga. 2002).

55. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 254-64 (2d Cir. 2003) (environmental claims).

56. Declarations from international law scholars have been a part of the ATS landscape since the *Filártiga* case. Filártiga v. Peña-Irala, 630 F.2d 876, 879-80 (2d. Cir. 1980). In *Forti v.*

A. Slavery, Forced Labor and Trafficking

The prohibition against slavery is among the oldest violations of the law of nations and has become a part of the customary international law of human rights.[57] While slavery in the United States is often thought to be a problem of the past, allegations of present-day slavery continue to arise. In 2007, a couple was arrested in New York on federal charges that they kept two Indonesian women as slaves in their Long Island home for five years, beating them and forcing them to work for virtually no pay.[58] Allegations such as these would most certainly give rise to a claim under the ATS.[59]

Modern variants of slavery such as forced labor and human trafficking may also be the basis for a claim under the ATS.[60] In many cases, nationals of other countries are trafficked to the United States and forced to labor without pay or to work as sex slaves. Forced labor is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[61] Numerous ATS cases

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Suarez-Mason, 694 F. Supp. 707, 709-11(N.D. Cal. 1988), Judge Jensen reconsidered his initial decision that disappearance was not a "specific, universal and obligatory" norm actionable under the ATS after several international scholars submitted declarations attesting to the status of this norm in customary international law. An example of such a declaration is available from the authors. For criticism of some declarations of this kind, *see Flores*, 414 F.3d at 264-65. It is crucial to obtain detailed declaration from scholars who specialize in the area to document what the customary law is, rather than what it ought to be.

57. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 52, at § 702(b).

58. Alfonso Serrano, *Millionaire Couple Charged with Slavery*, CBSNews.COM, http://www.cbsnews.com/stories/2007/05/23/national/main2841898.shtml (last visited Mar. 3, 2010).

59. Some international human rights norms (*e.g.*, the prohibition against torture) require a showing that the defendant acted under the color of official authority and other norms (*e.g.*, slavery) can be committed directly by non-state actors. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733, n. 20. Courts have looked to section 1983 jurisprudence to determine whether there is a sufficient connection to state action to satisfy this requirement where it applies. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 245 (2d Cir. 1995).

60. In *Doe v. Unocal Corp*., plaintiffs alleged in the district court that they were forced to work on a pipeline under the threat of violence and that those who refused to work were subjected to murder, rape, and torture. 963 F. Supp. 891 (C.D. Cal. 1997). On appeal, the Ninth Circuit held that forced labor was a modern variant of slavery that violated the law of nations and gave rise to a claim under the ATS. 395 F.3d 932, 946 (9th Cir. 2002).

61. Convention Concerning Forced or Compulsory Labor art. 2, May 4, 1932, 39 U.N.T.S. 55. There is a rich body of law regarding labor and related issues under the auspices of the International Labor Organization ("ILO"). Other ATS cases have also relied on ILO standards. *See* Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007).

involve claims brought by workers who claim that they were forced to labor under imprisonment or threats of physical and psychological harm.[62] Though such claims often arise in an international context, the ATS may also be useful in attacking sweatshops in the United States. Depending on the circumstances, the conditions in sweatshops may constitute slavery-like conditions and may also involve human trafficking.[63] Cases such as *Bureerong v. Uvawas*,[64] a case in which Thai immigrant garment workers were imprisoned in a complex in California and employed in a system of involuntary servitude, would likely give rise to claims of slavery and/or forced labor under the ATS. Though the *Bureerong* litigation was successful, it was settled before there was a final decision on the merits. An ATS claim may not only have strengthened the legal case, it would also have been a fitting way to describe the egregious nature of the claims. Claims involving the forced labor of children are also actionable under the ATS.[65]

Claims of human trafficking also give rise to a cause of action under the ATS[66] and often go hand in hand with claims of forced labor. According to CIA estimates, as many as 50,000 men, women and children are trafficked into the United States each year.[67] Cases like those of "Thonglim,"[68] who was trafficked from Thailand and spent years in domestic servitude, or "Carlita,"[69] who was smuggled

62. *See, e.g.*, Doe v. Reddy, No. C 02-05570, 2003 WL 23893010, at *8 (N.D. Cal. Aug. 4, 2003); *In re* World War II Era Japanese Forced Labor Litig., 164 F. Supp. 2d 1153, 1159 (N.D. Cal. 2001); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 440 (D.N.J. 1999).

63. *See, e.g.*, Bureerong v. Uvawas, 959 F. Supp. 1231 (C.D. Cal. 1997). The Los Angeles-based Asian Pacific American Legal Center of Southern California has successfully litigated several garment worker exploitation and sweatshop cases, including *Bureerong*. *See* American Pacific Legal Center of Southern California, http://www.apalc.org/index.php (last visited Mar. 2, 2010).

64. *Bureerong*, 959 F. Supp. 1231.

65. *See Bridgestone Corp.*, 492 F. Supp. 2d at 1020-22.

66. In addition to the ATS claims, plaintiffs bringing suit based on claims of trafficking should bring a parallel claim under recently enacted legislation which provides a private right of action for victims of human trafficking. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003). The civil remedy is codified at 18 U.S.C. § 1595(a) (2008).

67. Coalition to Abolish Slavery and Trafficking, Key Stats, A Serious Problem – Around the Globe and in the USA, http://www.castla.org/key-stats (last visited Mar. 2, 2010).

68. Coalition to Abolish Slavery and Trafficking, Survivor Stories, Thonglim, http://www.castla.org/thonglim (last visited Mar. 2, 2010).

69. Alex Trevino, *Inside the Slave Trade*, KRGV Channel Five News, Nov. 20, 2009, http://www.krgv.com/news/local/story/Inside-The-Slave-Trade/IrqrR9s7aUaxqLLcG7f7gw.cspx (last visited Apr. 9, 2010).

into the U.S. from Honduras and sold to captives who allegedly raped her and other sex-slaves repeatedly over a three-month period before she was able to escape, are typical accounts of human trafficking victims who have been trafficked to the United States to serve as unpaid employees and/or sex-slaves. Claims such as "Thonglim's" or "Carlita's" are most likely sufficient to state a claim under the ATS.

Courts that have considered the issue have consistently concluded that human trafficking is one of the norms that gives rise to a claim under the ATS. In *Doe v. Reddy*,[70] eleven plaintiffs brought suit, *inter alia*, under the ATS against extended family members and their related business entities claiming that "defendants fraudulently induced them to come to the United States from India on false promises that they would be provided an education and employment opportunities, but then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physically beat them."[71] The court concluded that these allegations were "sufficient to state a claim for forced labor, debt bondage, and trafficking under the ATCA."[72]

More recently, the court in *Akhikari v. Daoud & Partners*[73] held that forced labor and trafficking gave rise to an ATS claim. In that case, Nepalese citizens brought suit claiming that they had been deceived and coerced into traveling to Iraq, that they had been forced to labor under dangerous conditions, and that several plaintiffs were killed after being kidnapped while being transported in Iraq. The district court relied, in part, on the declaration of Professor William J. Aceves, describing "the overwhelming consensus regarding the status of forced labor and trafficking in international crimes," in holding that "trafficking and forced labor qualify as international norms under *Sosa*."[74]

B. Cruel, Inhuman, or Degrading Treatment

International law prohibits both torture and cruel, inhuman, and

70. No. C 02-05570, 2003 WL 23893010 (N.D. Cal. Aug. 4 2003).

71. *Id*. at *1.

72. *Id*. at *9.

73. 2010 WL 744237 (S.D. Tex. 2009).

74. *Id*. at *16.

degrading treatment or punishment (CIDT).[75] Any act of torture is certainly covered by domestic civil rights law, by statutes such as 42 U.S.C. § 1983.[76] CIDT may be broader than domestic law and, thus, offer greater coverage than domestic law in at least some cases.[77] "Cruel, inhuman, or degrading treatment includes acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of 'torture' or do not have the same purposes as 'torture.'"[78] While several U.S. courts have recognized cruel, inhuman, or degrading treatment as a discrete and well-recognized violation of customary international law, giving rise to a claim under the ATS,[79] others have disagreed finding the

75. *See, e.g.*, Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1344-45,1348 (D. Ga. 2002). *See also* Convention Against Torture, *supra* note 2, at art. 16, *available at* http://www.hrweb.org/legal/cat.html (prohibiting "other acts of cruel, inhuman or degrading treatment or punishment that do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official").

76. The Convention Against Torture defines torture as "any act by which pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture, *supra* note 2, at art. 1. Many domestic lawyers will be familiar with the Convention Against Torture because of the application of Article 3 of the Convention in asylum cases. *See, e.g.*, Zubeda v. Ashcroft, 333 F.3d 463, 471 (3d Cir. 2003)

77. For this reason, the United States made a reservation to the definition of CIDT when it ratified the Convention Against Torture. U.S. Resvs., Decls., & Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 Cong. Rec . S17486-01 (daily ed. Oct. 27, 1990) ("That the United States considers itself bound by the obligation under Article 16 to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States."). Such reservations do not affect the scope of customary international law and efforts to circumscribe ATS claims because of limitations placed on U.S. ratification of human rights treaties have so far been unsuccessful.

78. *Mehinovic*, 198 F. Supp. 2d at 1348 (citing Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. No. 34, at 91, art. 1 U.N. Doc A/10034 (1975) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.")); *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 52, at § 702, Reporters' Note 5 (stating that the difference between torture and cruel, inhuman or degrading treatment or punishment "derives principally from a difference in the intensity of the suffering inflicted.").

79. *See e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844, 847 (11th Cir. 1996); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004); *Mehinovic*, 198 F. Supp. 2d 1322 at 1347-49; Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887, *7-9 (S.D.N.Y. Feb. 8, 2002); Tachiona v. Mugabe, 234 F. Supp. 2d 401, 437-38 (S.D.N.Y. 2002); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1361 (S.D. Fla. 2001); Xuncax v. Gramajo, 886 F.

violation not sufficiently well-defined to meet the *Sosa* standard.[80] Though the outer limits of what constitutes CIDT may not be specifically defined, there remains a core norm of CIDT that is sufficiently defined and that provides a basis for liability under the ATS.[81] Under this core norm of CIDT, civil rights litigators may consider employing the ATS to vindicate claims involving conditions of confinement or sexual violence committed by a government official.

Suits involving detention conditions may be candidates for the use of the ATS.[82] In its report, *Conditions of Confinement in Immigration Detention Facilities*, the American Civil Liberties Union documented several instances of cruel, inhuman and degrading treatment that would likely give rise to a claim under the ATS.[83] For instance, in Passaic County Jail in Patterson, New Jersey, guards used dogs to intimidate and attack detainees for three years, and guards beat a detainee while he was handcuffed.[84] At least one court has held that conditions of confinement can give rise to a claim for CIDT when the plaintiffs are non-criminal detainees. In *Jama v.*

Supp. 162, 186 (D. Mass. 1995). The Restatement (Third) of Foreign Relations Law also lists the prohibition against cruel, inhuman and degrading treatment as a violation of customary international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 52, at § 702(d) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . torture or other cruel, inhuman, or degrading treatment or punishment.").

80. *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005).

81. In *Sosa*, the Supreme Court cited *United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820), to demonstrate the level of specificity with which the law of nations defined piracy – one of the "historical paradigms familiar when § 1350 was enacted." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004). In *Smith*, the Court expressly acknowledged the diversity of definitions of piracy, but held that despite that diversity, there existed certain core aspects of piracy that everyone could agree upon, for instance, that robbery or forcible depredations upon the sea constituted piracy. *See Smith*, 18 U.S. (5 Wheat) at 160-62. This approach is fully consistent with modern ATS authority which attempts to determine whether the conduct at issue is clearly within that norm, not whether every peripheral aspect of that norm is fully defined and agreed upon. *See Xuncax*, 886 F. Supp. at 187 ("It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law. . . ."); *see also Liu Qi*, 349 F. Supp. 2d at 1322 (affirming the *Xuncax* approach and finding it to be "entirely consistent with *Sosa*").

82. Of course, the interplay between the ATS and other legislation like the Prison Reform Litigation Act ("PRLA") would have to be considered. Thus far, there are no cases on this issue.

83. SUNITA PATEL & TOM JAWETZ, AMERICAN CIVIL LIBERTIES UNION, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES (2007), *available at* http://www.aclu.org/pdfs/prison/unsr_briefing_materials.pdf.

84. *Id*. at 10-11.

I.N.S.,[85] the court upheld ATS claims against a corporation that ran a prison and its officials for the "gross mistreatment, not of criminals or persons accused of a crime, but rather of persons who have committed no crime but are awaiting a decision on their applications for asylum."[86] In doing so, the court in *Jama* stated, "The law of nations as evidenced in the various conventions, treaties, declarations and other sources cited by the *Jama* plaintiffs can be said to have reached a consensus that the inhumane treatment of a huge number of persons accused of no crime and held in confinement is a violation of the law of nations."[87] Though the court in *Jama* stated that the norm at issue involved the mistreatment of persons accused of no crime, international law prohibits cruel, inhuman, and degrading treatment for all detainees.[88]

In addition to physical violence, claims of sexual violence often arise during an individual's detention. Although the estimated rates of sexual abuse at women's prisons vary, at the worst facilities, one in four prisoners is victimized.[89] One in five male inmates faces sexual assault while in detention.[90] In its report, *No Escape: Male Rape in U.S. Prisons*,[91] Human Rights Watch documents the prevalence of sexual assault and violent attempted rape against men in U.S. detention facilities. Civil rights lawyers should consider bringing claims based on the international law prohibition against CIDT in advocating for clients with particularly egregious prison abuse claims.

C. Rape and Other Sexual Violence

The only court to address the claims of violence against women and sexual violence as independent claims under the ATS rejected

85. 343 F. Supp. 2d 338 (D.N.J. 2004). Portions of the *Jama* case were settled. Certain non-ATS claims went to trial.

86. *Id*. at 361

87. *Id*.

88. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 52, at § 702.

89. STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES, A SHADOW REPORT TO THE U.N. COMMITTEE AGAINST TORTURE, 3 (2006), *available at* http://www.spr.org/pdf/in_the_shadows.pdf.

90. *Id*.

91. *See also* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), *available at* http://www.hrw.org/legacy/reports/2001/prison/.

these claims without analysis.[92] This conclusion seems unlikely to be the last word on this issue. However, such claims may trigger ATS litigation when pled as a form of torture or cruel, inhuman and degrading treatment.[93] In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[94] the court concluded that rape constitutes torture when "plaintiffs can show that these acts were committed for any reason based on discrimination and with the consent or the acquiescence of a public official or other person acting in an official capacity."[95] Numerous courts have also recognized rape as a form of torture.[96]

Other courts have concluded that sexual violence may also give rise to claims for cruel, inhuman or degrading treatment, with at least one court squarely considering whether sexual abuse other than rape is actionable under the ATS as a form of CIDT. In *Doe v. Liu Qi*,[97] the plaintiff alleged that a police officer attempted to force his hand into her vagina while other officers pinned her down.[98] Citing a report from the Committee Against Torture that specifically lists sexual abuse as a cruel act, the court held that plaintiff's allegations constituted cruel, inhuman and degrading treatment.[99]

Similarly, in *Jama v. INS*,[100] the court allowed ATS claims for cruel, inhuman and degrading treatment to proceed against the owner

92. Doe v. Exxon Mobile Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (holding that plaintiffs could not bring a claim for sexual violence because "it is not sufficiently recognized under international law"). Plaintiffs attempting to allege sexual violence as an independent human rights violation should continue to monitor the development of human rights norms dealing with this issue and submit expert declarations in support of their claim.

93. It is well-recognized that rape and other instances of sexual assault also give rise to a claim under the ATS when alleged as one of the elements of other well-established violations such as genocide, crimes against humanity, and war crimes. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 244 (2d Cir. 1995) (claim for genocide, war crimes); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (claiming for crimes against humanity).

94. 244 F. Supp. 2d 289, 326 n.34 (S.D.N.Y. 2003), dismissed on other grounds, 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *aff'd*, 582 F. 3d 244 (2d Cir. 2009).

95. *Id*. (The U.S. Supreme Court has also recognized that rape is torture.) *See* United States v. Bailey, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting) (rape in prisons is "the equivalent of torture, and is offensive to any modern standard of human dignity").

96. *See, e.g., Kadic*, 70 F.3d 232, 242 (2d Cir. 1995) (recognizing rape as torture). *See generally* Jennifer M. Green, *Litigating International Human Rights Claims of Sexual Violence in the U.S. Courts: A Brief Overview of the Cases Brought Under the Alien Tort Statute and Torture Victim Protection Act, in* VIOLENCE AND GENDER IN A GLOBALIZED WORLD: THE INTIMATE AND THE EXTIMATE (Sanja Bahun-Radunovic and V.G. Julie Rajan eds) (2008).

97. 349 F. Supp. 2d 1258, 1325 (N.D. Cal. 2004).

98. *Id*.

99. *Id*.

100. 343 F. Supp. 2d 338 (D.N.J. 2004)

of the prison and its officers for conditions of confinement, including sexual harassment such as guards watching women take showers, sexually assaulting a woman in the laundry room, touching a male inmate's penis,[101] and ridiculing an inmate's genitals.[102]

D. Other Potential Claims

The above are a sampling of some of the specific claims that civil rights litigators may consider in alleging ATS claims alongside their civil rights claims. The list, however, is by no means exhaustive. In deciding whether to allege ATS claims, plaintiffs should consider the human rights counterpart to the claims they are alleging and determine whether or not there is a well-established parallel prohibition under international law. Plaintiffs may find parallels in a number of areas, including racial discrimination,[103] and freedom of association.[104] Bearing in mind that international human rights law is rapidly evolving, plaintiffs should continue to monitor recent developments in these and other areas of international law to determine whether the violations satisfy the standard for actionable norms articulated by the *Sosa* Court.

V. SUITS AGAINST PUBLIC AND PRIVATE ACTORS

A. Claims Against Federal, State and Local Officials

Civil rights lawyers will naturally wonder whether the ATS is available to bring human rights actions against U.S., state or local officials for human rights violations. ATS actions against U.S.

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101. *Id*. at 353. While the vast majority of sexual violence claims have been against women, sexual violence is not a gender-specific norm. *See Mehinovic*, 198 F. Supp. 2d at 1345 (N.D. Ga. 2002) (stating that torture of the male plaintiffs included beating on genitals).

102. *Jama*, 343 F. Supp. at 353, 361. However, that same court dismissed some of the claims against individual guards, including claims that a guard's finger had penetrated the plaintiff through her clothing and that she was subjected to intrusive and embarrassing pat down searches. The court found that the allegations did not rise to the level required by *Sosa. Id*. at 360-61. The court's conclusion did not properly analyze the internationally accepted definition of what constitutes rape or sexual assault, i.e., "penetration, however slight." *See, e.g.*, Prosecutor v. Kunarac, Kovac, and Vuckovic, Judgement in the Trial Chamber, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgement, ¶¶ 447-456 (Feb. 22, 2001); *aff'd*, Case Nos. IT-96-23 & IT-96-23/1-A, Appeals Chamber Judgement, ¶ 127, (June 12, 2002), *available at* http://www.icty.org/case/kunarac/4#acjug.

103. *See, e.g.*, *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 448 (2d Cir. 2000); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992).

104. *See* Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 467 (S.D.N.Y. 2006).

officials have run into the combination of the Federal Tort Claims Act (FTCA)[105] and the Westfall Act.[106] Damage actions against U.S. officials ordinarily must be filed under the FTCA. The FTCA supplies a limited waiver of sovereign immunity. Unless an action is authorized by the FTCA or expressly excluded from sovereign immunity, the federal government is immune from suit.[107] The Westfall Act instructs the Attorney General to substitute the U.S. government in place of employees sued for claims of personal injury or death, upon certification "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose[.]"[108] There are exceptions to this for constitutional torts and for statutory causes of action.[109] However, so far, the courts have uniformly held the ATS not to be a statutory cause of action under the Westfall Act.[110] Thus, at least to date, attempts to use the ATS to supplement claims brought under the FTCA or alleged as *Bivens* claims[111] in cases against U.S. officials have not been successful.[112]

These impediments do not exist in connection with cases brought against state or local officials.[113] There are very few reported

105. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2006). There are numerous cases making FTCA and international law claims arising out the treatment of detainees in connection with the war on terror. *See e.g.*, Turkmen v. Ashcroft, No. 02CV2307(JG), 2006 WL 1662663 (E.D.N.Y. June 14, 2006) (Settlement reached). Consideration of these cases is beyond the scope of this essay.

106. Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679. (2006) (also known as the Westfall Act). *See also* Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003) (en banc), *rev'd on other grounds sub nom*; Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

107. For a comprehensive discussion of the FTCA, see CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (TRIAL PRACTICE SERIES) (Publisher's Editorial Staff 2003-2008).

108. 28 U.S.C. § 2679(d)(1) (2006).

109. 28 U.S.C. § 2679(b)(2) (2006) (substitution "does not extend or apply to a civil action against an employee of the Government – (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized."); *See also* Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

110. *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d at 631; Schneider v. Kissinger, 310 F. Supp. 2d 251, 266 (D.D.C. 2004).

111. *Bivens*, 403 U.S. 388 (1971), recognized a claim for constitutional violations. In *Carlson v. Green*, 446 U.S. 14, 23-24 (1980), the Supreme Court held that the existence of the FTCA did not preclude a *Bivens* action brought by a prisoner for Eighth Amendment violations.

112. *See Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

113. There is virtually no case law concerning the interaction of the ATS with various defenses and immunities found in domestic civil rights law. Civil rights lawyers should assume

ATS cases against state or local officials. In *Martinez v. City of Los Angeles*,[114] the Ninth Circuit rejected an arbitrary arrest and detention ATS claim brought by a Mexican national who had been imprisoned in Mexico because of actions taken by Los Angeles Police Department detectives.[115] The Court did so, however, based on its analysis that no international law violation had occurred because the plaintiff had access to courts during his two-month detention.[116] The propriety of using the ATS against local police officers was not questioned.

In *Hawkins v. Comparet-Cassani*,[117] a district court rejected torture and CIDT claims made by a detainee who was subjected to an electric shock from a stun belt he was required to wear during a court appearance at which he was representing himself. However, because Hawkins was a U.S. citizen, he was forced to argue that the court should find an implicit cause of action arising out of customary international law, a claim the court rejected.[118] Had Hawkins been an alien he would have had viable claims under the ATS. Thus, a systematic challenge to practices that violate the human rights to detainees in prisons, jails or other institutions could be brought under the ATS based on international human rights norms for alien detainees perhaps as a companion case to challenges brought on behalf of all detainees based on more traditional bases.

Because there have been so few cases it is impossible to determine the way in which courts will handle the intersection between domestic civil rights jurisprudence, especially under 42 USC § 1983, and ATS claims. Unlike 42 USC § 1983, there should be no qualified immunity issue in ATS cases because *Sosa* requires that the international norm relied upon be defined specifically enough so that it may fairly be said to apply to the particular factual circumstances before the court. It is not clear how other immunity issues (e.g., for prosecutors) would be handled in ATS cases. Such issues would likely be determined under established international law

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that these defenses and immunities will be asserted and will need to develop international law arguments for circumventing them.

114. 141 F.3d 1373 (9th Cir. 1998).

115. *Id*. at 1384.

116. *Id*.

117. 33 F. Supp. 2d 1244 (C.D. Cal. 1999).

118. *Id*. at 1256. *See also* Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal 1985) (refusing to imply a cause of action for damages from customary international law).

norms.

B. Claims Against Corporations

There is no limitation in the language of the ATS concerning appropriate defendants.[119]In recent years a major ATS battleground has been lawsuits against corporations alleging their complicity in human rights violations outside the United States.[120] There are many such cases. Recently, corporate defendants have argued that they are not amenable to suit under the ATS because international law does not provide for lawsuits against corporations. The primary case in which this argument has been advanced has been the *Talisman* case.[121]

In *Talisman* the district court rejected Talisman's argument that the ATS did not apply to corporations in a lengthy, well-reasoned opinion.[122] On appeal, Talisman renewed this argument and it was the focus of considerable inquiry at the oral argument in January 2009.[123] In October 2009, the Second Circuit affirmed the district court's dismissal of the case in all respects.[124] On the question of whether the ATS allows for claims against corporations, the panel included a footnote indicating that they were leaving this issue open for another day, creating some uncertainty about corporate liability in

119. There have been ATS cases in which some defendants have been found immune from suit based on international law principles. *See, e.g.*, Lafontant v. Aristide, 844 F. Supp. 128, 135-37 (E.D.N.Y. 1994) (finding that the Foreign Sovereign Immunities Act has no application to a head of state). *But see* Hilao v. Estate of Marcos (*In re* Estate of Marcos Human Rights Litig.), 25 F.3d 1467, 1472 (9th Cir. 1994) (finding that former head of state President Marcos's "acts of torture, execution, and disappearance were clearly acts outside of his authority as President"). *See also* Aidi v. Yaron, 672 F. Supp. 516 (D.D.C. 1987) (finding diplomat immune from civil prosecution for war crimes).

120. *See, e.g.*, Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1239 (C.D. Cal. 2004) (discussing Chevron in Nigeria); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (discussing Occidental in Colombia); Doe v. Exxon Mobile Corp., 393 F. Supp. 2d 20 (D.D.C. 2005) (discussing Exxon Mobile in Indonesia).

121. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

122. *Id*. at 308-19. "[A] considerable body of United States and international precedent indicates that corporations may be liable for violations of international law, particularly when their actions constitute *jus cogens* violations." *Id*. at 308. Both sides submitted expert opinions on this issue. On appeal, the Second Circuit requested post-argument briefing on this issue and explicitly reserved the issue for future decision. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261, n.12 (2d Cir. 2009). This issue is now pending before the Second Circuit in *Balintulo v. Daimler, AG*, Case No. CV-09-2778, (argued January 12, 2010).

123. Paul Hoffman argued the *Talisman* case for the Plaintiffs in the Second Circuit.

124. *Talisman*, 582 F.3d 244 (2d Cir. 2009).

the Second Circuit notwithstanding the existence of numerous ATS cases in the Circuit involving corporate defendants.[125]

It seems unlikely that the courts will find immunity for corporate defendants in ATS cases, but given the *Talisman* footnote, the issue remains a live one in ATS cases for the time being. The resolution of this issue depends to a large degree on the continuing battle over the scope of the ATS that has occurred since the *Filártiga* decision. Those who wish to restrict the scope of the ATS insist that international law must supply every detail of an ATS action and that international law has to have achieved a level of specificity and universality that is hard to find in international law. This view is inconsistent with the Founders' original intent, affirmed in the *Sosa* case,[126] that the ATS be available to enforce law of nations' violations immediately without further action by Congress.

VI. OTHER ISSUES ARISING UNDER THE ATS

The issues arising in ATS litigation are too numerous to cover comprehensively in a short essay. The following issues, though, are prominent in many ATS cases and civil rights lawyers should be aware of them.

A. Choice of Law Issues

One of the questions arising in every ATS case is the law to be applied to the various issues in the case. ATS decisions have applied international law, federal common law or foreign law based on traditional choice of law principles to different issues arising in these cases. It is clear that the courts look to international law to determine whether there is a "violation of the law of nations" sufficient to support the recognition of a federal common law cause of action.[127]

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125. *Id*. at 261, n.12. However, in *In re South African Apartheid Litigation*, the court found that the corporate defendants could be held liable under the ATS, stating "the Second Circuit has addressed ATCA cases against corporations without ever hinting-much less holding-that such cases are barred." 617 F. Supp. 2d 228, 254-55 (S.D.N.Y. 2009) (citing Abdullahi v. Pfizer, Inc., 562 F.3d 163, 174-75 (2d Cir. 2009); Vietnam Ass'n for Victims of Agent Orange, 517 F.3d 104, 108 (2d Cir. 2008); Khulumani, v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 282 (2d Cir. 2007)(Katzmann, J., concurring); Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 (2d Cir. 2003); Bano v. Union Carbide Corp., 361 F.3d 696 (2d Cir. 2004); Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Bigio v. Coca-Cola Co., 239 F.3d 440, 447; Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 (2d Cir. 2000); Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir.1998).

126. Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004).

127. *See id.* at 732-33; *see also* Abagninin v. AMVAC Chemical Corp., 545 F.3d 733, 737-38 (9th Cir. 2008) (holding that plaintiff failed to state a cause of action "under prevailing norms of

There has been more controversy over whether other theories of liability are governed by federal common law or international law.[128] The *Sosa* decision seems to suggest that federal common law principles govern the contours of the claim for relief in ATS cases but this remains an open question likely to be contested in every ATS case until the Supreme Court decides these issues.

B. Theories of Liability

Aiding and Abetting - Numerous courts, both before and after *Sosa*, have held that defendants in ATS cases could be held liable for aiding and abetting human rights violations.[129] The vast majority of these cases concluded that a defendant could be held liable when he provided "knowing, practical assistance or encouragement that had a substantial effect on the perpetration of the crime."[130] This standard is the same in both international law[131] and federal common law.[132] A handful of district courts have required a more stringent *mens rea* in aiding and abetting cases–requiring that a defendant act with the purpose, rather that with the knowledge, that his actions will provide practical assistance or encouragement to the perpetration of the crime[133]– and the Second Circuit in *Talisman* recently adopted this approach.[134] This *mens rea* requirement is inconsistent with the international aiding and abetting cases from Nuremberg to the present.[135] It remains to be seen whether other circuits will follow

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international law").

128. For a recent comprehensive discussion of these issues, *see* Chimene Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61 (2008). For a summary of the arguments in favor of a federal common law approach, see Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. Rev. 47 (2003).

129. *See, e.g., Burnett*, 274 F. Supp. 2d at 99-100; *Mehinovic*, 198 F. Supp. 2d at 1355-56; Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247-48 (11th Cir. 2005); *Cabello*, 402 F.3d 1148, 158 (11th Cir. 2005).

130. *See, e.g, Mehinovic*, 198 F. Supp. 2d at 1356.

131. *See* Prosecutor v. Furundjiza, Case No. IT-95-17/1-T, Trial Chamber Judgment, ¶¶ 192-249 (Dec. 10, 1998).

132. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

133. *See, e.g.*, Corrie v. Caterpillar, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005).

134. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

135. *See, e.g., In re* Tesch (The Zyklon B Case), 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946) (two top officials of the firm that supplied Zyklon B gas for Nazi gas chambers *knowing* it would be used to kill concentration camp prisoners were convicted for their assistance). *See also Error! Main Document Only.In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 119-120

suit, or whether the U.S. Supreme Court will grant certiorari to decide the issue.[136]

Conspiracy - Courts have routinely concluded that a defendant could be held liable based on conspiracy liability,[137] a theory of liability that dates back to Nuremberg.[138] Although this theory is well-established in international law,[139] the court in *Cabello v. Fernandez-Larios* applied the federal common law elements of conspiracy, holding that a defendant could be liable based on a theory of conspiracy liability if (1) two or more persons agreed to commit a wrongful act; (2) the defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it; and (3) one or more of the violations were committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.[140] In *Talisman*, the appellate court explained as a "question of first impression" that international law does not recognize a doctrine of conspiratorial liability that would extend to activity covered by the Pinkerton doctrine.[141] The court rightly distinguished between the inchoate crime of conspiracy and conspiracy as a theory of liability, and held that the analogy to the latter in international law was joint criminal enterprise.[142] As discussed below, the court did not reach the issue of whether joint criminal enterprise is a viable theory of liability under the ATS.

Joint Criminal Enterprise - Joint criminal enterprise is a variation of conspiracy found in international law. The ICTY in

(E.D.N.Y. 2005).

136. Presbyterian Church of Sudan v. Talisman Energy, Inc., Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit (April 15, 2010).

137. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1267 (11th Cir. 2005); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091-92 (S.D. Fla. 1997).

138. *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279 (stating that "leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such a plan").

139. *See, e.g.*, *Aldana*, 416 F.3d at 1242; *Eastman Kodak Co.*, 978 F. Supp. at 1078; Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal, *supra* note 146.

140. Cabello v. Fernandez-Larios, 402 F.3d 1148, 1159 (11th Cir. 2005).

141. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 260 (2d Cir. 2009). The Pinkerton Doctrine makes any conspirator liable for any reasonably foreseeable crime that falls within the scope of the conspiracy, even if he himself did not commit it. Pinkerton v. United States, 328 U.S. 640, 647 (1946).

142. *Talisman*, 582 F.3d at 260.

Prosecutor v. Tadic[143] explained that joint criminal enterprise was a well-established theory of liability dating back to Nuremberg.[144] Joint criminal enterprise provides for liability where "(1) the crime charged was a natural and foreseeable consequence of the execution of that enterprise, and (2) the accused was aware that such a crime was a possible consequence of the execution of the enterprise and, with that awareness, participated in the enterprise."[145] In *Talisman*, the Second Circuit recently declined to reach the question of whether JCE was a viable theory of liability under the ATS.[146] The court explained that all forms of such liability required a showing of criminal intent and, since plaintiffs had not established that the defendants had acted with the purpose of committing human rights violations, a separate analysis of joint criminal enterprise was unnecessary.[147]

General Tort Theories of Liability - As noted above, in *Doe v. Unocal*, a Ninth Circuit panel split on the issue of whether to apply international principles of aiding and abetting liability or traditional tort theories of liability such as agency and joint venture liability.[148] As set forth below, courts have allowed claims against defendants in ATS cases to proceed on various theories of tort liability.

Agency - A number of ATS cases have been brought on an agency theory of liability.[149] Plaintiffs alleging an agency theory of liability must establish the following: "(1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking."[150] The main inquiry in agency cases centers on whether the perpetrator had the right to control the agent.

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143. Case No. IT-94-1-A, Appeals Chamber Judgment (July 15, 1999).

144. *Id*. ¶¶ 204-07.

145. Prosecutor v. Bradjanin, Case No. IT-99-36-T, Trial Chamber Judgment, ¶ 265 (Sept. 1, 2004).

146. *See Talisman*, 582 F.3d at 260.

147. *Id*.

148. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002). *Compare id.* at 948 (holding that international law supplied the standard for aiding and abetting liability) *with id.* at 963 (Reinhardt, J., concurring) (urging the application of federal common law principles to resolve the issue of Unocal's liability)).

149. *See* Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1238-39 (C.D. Cal. 2004); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1174-75 (C.D. Cal. 2005).

150. *Bowoto*, 312 F. Supp. 2d at 1239.

In *Sinaltrainal v. Coca-Cola Co.*,[151] the court declined to hold that Coca-Cola U.S.A. and Coca-Cola Colombia could be held liable for the human rights violations committed by the Colombian bottling plant manager because Coca-Cola did not control the labor practices at the bottling plant.[152]

Joint Venture - ATS cases have been brought on a joint venture theory of liability against defendants who have entered into contracts with governments to undertake resource extraction.[153] Generally, the human rights violations occur in connection with the parties' attempt to protect the joint venture. For instance, in *Mujica v. Occidental Petroleum*, the court held that plaintiffs alleged that the corporate defendants entered into a joint venture with the Columbian military, which lead to the raiding and bombing of the plaintiffs' town and resulted in the deaths of plaintiff's family members.[154] In order to establish joint venture liability, plaintiffs must establish that the parties (1) intended to form a joint venture; (2) share a common interest in the subject matter of the joint venture; (3) share the profits and the losses of the joint venture; and (4) have joint control or the joint right of control over the venture.[155] The joint venture can include public actors, private actors or a combination of public and private actors.[156]

C. Statute of Limitations

The longer statute of limitations for ATS claims may be particularly helpful in circumventing civil rights claims that are time-barred under domestic law. The ATS does not contain an express statute of limitations. Though the early ATS cases adopted the statute of limitations for domestic civil rights actions under 42 U.S.C. § 1983,[157] following the passage of the Torture Victim Protection Act (TVPA)[158] in 1992, courts began to adopt the ten-year statute of limitations contained in the TVPA based on the similarities

151. 256 F. Supp. 2d 1345 (S.D. Fla. 2003).

152. *Id*. at 1354.

153. *See, e.g.*, *Mujica*, 381 F. Supp. 2d 1164.

154. *Id*. at 1172.

155. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 72 (5th ed. 1984).

156. *Id*.

157. *See* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1547-48 (N.D. Cal. 1987).

158. Torture Victim Protection Act of 1991, 28 U.S.C. 1350 (note 1).

of the two statutes.[159] Courts since have consistently concluded that the TVPA's ten-year statute of limitations applies in ATS cases.[160] This statute of limitations, however, may be subject to equitable tolling provisions if "extraordinary circumstances" exist.[161]

VII. CONCLUSION

Civil rights lawyers have tended to avoid international law in pursuing their objectives for a variety of reasons. It is often difficult enough to convince judges to grant relief under domestic law, so adding the complexity of international law analysis seems too great a burden to assume.

However, there is a growing body of precedent established under the ATS using international human rights law in U.S. courts, and this jurisprudence may assist civil rights clients at least in some circumstances. We have identified several areas where the ATS may be useful in bringing human rights claims in U.S. courts for non-citizens. There are undoubtedly other areas where international human rights law offers greater protections than U.S. law.

Advocates should not assume that bringing such claims will be easy. Although ATS cases rest on a grant of congressional jurisdiction, there continues to be resistance to the application of international law in U.S. courts. This resistance means that lawyers should only bring claims that rest upon a solid international law foundation and these claims should be supported by the considered views of international law scholars.

Judicious use of the ATS in bringing human rights claims in domestic human rights cases may offer the promise of expanding the scope of civil rights and civil liberties not only for non-citizens but for everyone subjected to these abuses in the United States.

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159. *See* Papa v. United States, 281 F.3d 1004, 1011-13 (9th Cir. 2002) (discussing the factors supporting application of the TVPA's statute of limitations to ATS claims).

160. *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1264 (11th Cir. 2006); Cabello v. Fernández-Larios, 402 F.3d 1148, 1153 (11th Cir. 2005); Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 118-119 (D.D.C. 2003).

161. *See* Jean v. Dorelien, 431 F.3d 776, 780 (11th Cir. 2005) (allowing suit against a Haitian military official to proceed because the statute was tolled while the defendant was in power); *Arce*, 434 F.3d at 1264-65 (finding that the statute of limitations could be tolled for "extraordinary circumstances" until the conclusion of the El Salvadoran civil war because the plaintiffs feared retribution against family and friends should they file an ATS claim, as the regime to which defendants belonged remained in power and had intimidated witnesses).