

FOUR COUNTS OF CORPORATE COMPLICITY:
ALTERNATIVE FORMS OF ACCOMPLICE
LIABILITY UNDER THE ALIEN
TORT CLAIMS ACT

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I. INTRODUCTION

The charge of aiding and abetting, as upheld by the Ninth Circuit in *Doe v. Unocal*, is the preferred approach for establishing accomplice liability for corporate human rights abuses under the Alien Tort Claims Act (ATCA).¹ Despite the Supreme Court's recent affirmation of the ATCA in *Sosa v. Alvarez*,² aiding and abetting liability is threatened by a number of doctrinal and political challenges that counsel for a ready alternative. In response, this Article explores alternative forms of complicity—primarily joint criminal enterprise, but also conspiracy, instigation, and procurement—arising from the influential and growing jurisprudence of the international criminal tribunals and comments briefly on their implications for ATCA litigation against corporations such as Unocal. As it remains unclear whether the ATCA relies predominantly on international or federal law standards, this Article will also remark on the stance of federal standards towards these theories and will reconcile any possible differences.³

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1. See *John Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd*, 395 F.3d 932 (9th Cir. 2002), *reh'g* ordered by, 395 F.3d 978 (9th Cir. 2003) (en banc). Perhaps since the en banc review never proceeded to the merits, courts have nonetheless still cited the 2002 Ninth Circuit opinion.

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

3. In the *Unocal* litigation, for example, three federal judges looked at international aiding and abetting standards, while one focused on federal common law. The plaintiffs' approach was thus to show that the two actually converge into the same standard. *Cf. infra* note 46.

II. SETTING THE STAGE: *DOE V. UNOCAL*

*I came to this country in 1978 hoping simply to confront the killer of my brother. I got so much more. With the help of American law I was able to fight back and win. Truth overcame terror. Respect for human rights triumphed over torture. What better purpose can be served by a system of justice.*⁴

Forced relocation and labor; rape, torture, and murder: these were the charges that Burmese peasants brought against U.S. oil company Union Oil of California (Unocal) in 1996.⁵ Burma's Yadana gas field, located in the Andaman Sea about sixty kilometers off Burma's southwest coast, was developed in 1992 under a conventional production-sharing contract between Unocal, the project operator (TotalFinaElf), and the state-owned oil companies of Thailand (PTT-EP), and Burma (MOGE).⁶ The human rights abuses discussed here occurred along a 65km onshore Burmese section of a US\$1 billion pipeline constructed to carry the gas 649 kilometers into Thailand.⁷ The peasants filed suit in U.S. federal district court under the ATCA after allegedly suffering abuses at the hands of Burmese army units who were hired by the consortium to secure the Yadana pipeline route.⁸

In 1997, a California federal district court ruled, for the first time in U.S. legal history, that a corporation and its executive officers could be held liable under the ATCA for violations of international human rights in foreign countries and that U.S. courts have the authority to adjudicate such claims.⁹ On appeal, a Ninth Circuit panel held that:

Unocal knew that the military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to

4. See Dolly Filartiga, OP-ED, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, http://www.nosafehaven.org/state_filartiga.html.

5. See Complaint for Plaintiffs, John Doe I v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (No. CV 96-6959-RAP (BQRx)).

6. See EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES 12-38 (2000).

7. Complaint, *supra* note 5.

8. *Id.*

9. *Unocal*, 963 F. Supp. at 880.

relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortuous acts.¹⁰

In December 2004, on the eve of an en banc hearing before the Ninth Circuit, the parties reached an out-of-court settlement.

Since that ground-breaking 1997 judgment of the California district court, the ATCA has offered the hope of legal recourse to foreign victims of grave human rights abuses committed abroad at the hands of their government and its corporate partners.¹¹ Over thirty other claims against corporate actors under ATCA and state tort law have followed suit; approximately half of them have survived motions to dismiss and are pending further litigation.¹² Nonetheless, aside from *Unocal*, no corporate ATCA case has survived summary judgment.¹³ The recent settlement of *Doe v. Unocal*, announced in March of 2005,¹⁴ is a historic memento of ATCA's legal potential and marks the third corporate ATCA claim to come to closure.¹⁵ Nonetheless, because it was settled out of court, the fundamental viability of *Unocal's* underlying legal theory of liability, and hence the potential for ATCA-based claims, remains unclear.

10. See *Unocal*, 395 F.3d at 956.

11. *Unocal*, 963 F. Supp. at 880.

12. EARTHRIGHTS INTERNATIONAL, IN OUR COURT: ATCA, SOSA AND THE TRIUMPH OF HUMAN RIGHTS 70-71 (2004).

13. See *id.* at 59-66.

14. Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, L.A. TIMES, Mar. 22, 2005, at C1 ("A deal ends a landmark case brought by villagers who said soldiers committed atrocities.").

15. EARTHRIGHTS, *supra* note 12, at 70-71. All three cases—*Unocal*, 395 F.3d 932, *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997), and *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000)—ended in settlement; not a single corporate ATCA claim has yet made it through to a judgment on the merits.

III. ATCA AND CORPORATE AIDING AND ABETTING LIABILITY

*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.*¹⁶

Originally inspired by “violation of safe conducts, infringement of the rights of ambassadors, and piracy,”¹⁷ the Alien Tort Statute lay dormant for over two centuries after its enactment in 1789. In 1980, the landmark Second Circuit decision in *Filartiga v. Pena-Irala* revived the ATCA, finding the alleged torture of Joelita Filartiga by Paraguayan officer Americo Pena-Irala to be a tort in violation of the law of nations.¹⁸ *Filartiga* paved the way for contemporary human rights litigation by establishing that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”¹⁹ Since then, courts have recognized various violations of sufficiently “universal, definable, and obligatory” norms of international law actionable under the ATCA,²⁰ including genocide,²¹ war crimes and crimes against humanity,²² summary executions,²³ disappearance,²⁴ cruel, inhuman, and degrading treatment,²⁵ and forced labor.²⁶

16. 28 U.S.C. § 1350 (2000). In its original, unmodified form, the Judiciary Act of 1789 read “[the new federal district courts] shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations” Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat 28.

17. *Sosa*, 542 U.S. at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

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

19. *Id.* at 881. This was affirmed by the recent Supreme Court review of the ATCA in *Sosa*, 542 U.S. at 725 (requiring “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”).

20. *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988); *aff’d sub nom.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692.

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

22. *Id.*

23. *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992).

24. *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996).

25. *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

26. *Unocal*, 963 F. Supp. at 891.

While the defendants in *Filartiga* and some two dozen subsequent cases were state officials²⁷—states being the traditional focus of international law—ATCA case law has increasingly ceded a degree of “international legal personality”²⁸ to private individuals²⁹ and corporations.³⁰ Starting in the late 1990s, a wave of litigation against corporations and their executive officers began to challenge a long history of impunity for overseas corporate human rights abuses. This litigation challenged, for example, corporate assistance to the South African apartheid and Nazi regimes, and complicity in the displacement, environmental devastation, and abuse by security forces of local communities in Ecuador, Nigeria, and Indonesia.³¹ Judicial deliberation on the substantive issues of ATCA liability went furthest in *Unocal*, and since then, it has become clear that courts can impose aiding and abetting liability on corporations, the crime defined as “knowing and practical assistance or encouragement that has a substantial effect on the pepe-

27. EARTHRIGHTS, *supra* note 12, at 70-71. These include government of officials who perpetrated the crime and military officials who exercised command responsibility over those who did. *See* Hilao, 103 F.3d at 789, 792.

28. INT’L COUNCIL ON HUMAN RIGHTS POL’Y, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNAL LEGAL OBLIGATION OF COMPANIES 55-58 (2002), <http://www.ichrp.org/107/1.pdf>.

29. In a 1995 case involving Radovan Karadzic, self-proclaimed leader of the Bosnian Serb army and President of the unrecognized Republic Srpska, the Second Circuit Court of Appeals concluded that private individuals can be held directly liable for a certain class of violations stemming from the seminal post-bellum Nuremberg Trials: genocide, war crimes, and crimes against humanity. *Kadic*, 70 F.3d at 239. The Court further recognized that private individuals may be held liable for international law violations falling outside of this class if they are committed in concert with a state actor. *Id.* at 245.

30. *See e.g.*, *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 372-73 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999) (noting that for cases of genocide, which enjoys universal jurisdiction, a corporation may be held liable standing alone).

31. *See* *Brown v. Amdahl Corp.*, 238 F. Supp. 2d 1379 (S.D.N.Y. 2002); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *Iwanowa v. Ford Motor Co.* 67 F. Supp. 2d 424 (D.N.J. 1999); *Bodner*, 114 F. Supp. 2d at 117; *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Wiwa v. Royal Dutch Petroleum Co.*, 1998 U.S. Dist. LEXIS 23065 (S.D.N.Y. 1998); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Beanal v. Freeport-McMoRan, Inc.*, 197 F.3d 161 (5th Cir. 1999).

tration of the crime.”³² Indeed, an aiding and abetting standard of liability for non-state actors has gained international traction; it is explicitly incorporated into the foundational statutes of the International Criminal Court and the international tribunals for Rwanda and the former Yugoslavia.³³

Notably, aiding and abetting liability allows plaintiffs to hold a corporation directly liable as an accomplice in crime, not just vicariously liable through a principle-agent relationship with the tortfeasor.³⁴ While corporations are rarely the

32. *Unocal*, 395 F.3d at 947. See also *Bowoto*, 312 F. Supp. 2d at 1247-48 (N.D. Cal. 2004) (allowing plaintiffs’ claims against an oil company for aiding and abetting military killings in Nigeria to proceed); *Presbyterian Church of the Sudan v. Talisman*, 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003) (holding actionable allegations that a Canadian oil company aided and abetted war crimes and other gross human rights violations); *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (holding that allegations of aiding and abetting by various entities in furtherance of the September 11 attacks stated a claim); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002) (holding liable a former Serb soldier for aiding and abetting war crimes and other human rights violations in Bosnia-Herzegovina); *Cabello Barrueto v. Fernandez Larios*, 205 F.Supp.2d 1325, 1333 (S.D. Fla. 2002) (holding a Chilean liable for conspiring in or aiding and abetting the alleged extrajudicial killings, torture, crimes against humanity, and cruel, inhuman, or degrading punishment of other Chilean officials); *Bodner*, 114 F. Supp. 2d at 128 (holding actionable under the ATCA claims that banks aided and abetted the Vichy and Nazi regimes in plundering plaintiffs’ assets); *Hilao*, 103 F.3d at 792 (9th Cir. 1996) (affirming a jury instruction that permits a foreign leader to be held liable upon a finding that she “directed, ordered, conspired with, or aided the military in torture, summary execution, and ‘disappearance’”). Aiding and abetting liability, similar to “l’aide et l’assistance” in French civil law, is also familiar to many other legal traditions.

33. Rome Statue of the International Criminal Court, art. 25, ¶ 3(c), July 17, 1988, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute]; Statue of the International Tribunal for Rwanda, art. 6, ¶ 1, Nov. 8, 1994, U.N. Doc. S/RES/955 [hereinafter ICTR Statute]; Statute of the International Tribunal for the Former Yugoslavia, art. 7, ¶ 1, May 25, 1993, U.N. Doc. S/RES/827 [hereinafter ICTY Statute].

34. Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 336-37 (1985).

[T]he doctrine of complicity (sometimes referred to as the law of aiding and abetting, or accessorial liability) emerges to define the circumstances in which one person (to whom I will refer to as the secondary party or actor, accomplice, or accessory) becomes liable for the crime of another The nature of complicity liability follows from the considerations that called it forth. The secondary party’s liability is derivative, which is to say, it is incurred by virtue

ones “pulling the trigger,” acknowledging them as tortfeasors is essential to holding them sufficiently accountable. It is the same as being culpable of knowingly “supplying the killer with a gun,” as these companies are providing the funds, equipment, directives, logistics, and motivation to carry out rape, murder, forced labor, and other abuses. To illustrate the reach of these disturbing claims, consider *Talisman*, where the defendant company purportedly allowed military forces to use its facilities to stage operations directed against civilians.³⁵ Similarly, in *Aceh*, ExxonMobil is alleged to have provided logistical assistance and equipment to Indonesian forces that tortured and killed locals.³⁶

of a violation of law by the primary party to which the secondary party contributed. It is not direct [liability] One who “aids and abets” [the primary party] to do these acts, in the traditional language of the common law, can be liable for doing so, but not because she has thereby caused the actions of the principal or because the actions of the principal are her acts. Her liability must rest on the violation of law by the principal, the legal consequences of which she incurs because of her own actions. It is important not to misconstrue derivative liability as imparting vicarious liability. Accomplice liability does not involve imposing liability on one party for the wrongs of another solely because of the relationship between the parties. Liability requires action by the secondary actor . . . that makes it appropriate to blame him for what the primary actor does. The term “derivative” as used here merely means that her liability is dependent on the principal violating the law.

Id.

35. *Talisman*, 244 F. Supp. 2d at 289.

36. Supplemental Statement of Interest of the U.S., John Doe et al. v. ExxonMobil, No.1-01-CV-1357-LFO (D.D.C. July 14, 2003); see also Beanal v. Freepport-McMoRan, Inc., 197 F.3d 161 (5th Cir. 1999) (involving Indonesian citizens who sued a U.S. mining corporation for physical abuse by security forces); *Villeda Aldana v. Fresh Del Monte Produce Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (alleging that the defendant corporation hired and coordinated security forces, who committed torture, kidnapping, unlawful detention, and crimes against humanity); *Sinaltrainal v. Coca Cola, Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2001) (involving suit by Colombian trade union and estate against a corporation for complicity in the murder of the union leader.); *In re S. Africa Apartheid Litig.*, 346 F. Supp. 2d 538, 544-45 (S.D.N.Y. 2004) (seeking to hold accountable those businesses that aided and abetted the apartheid regime and its extrajudicial killings, torture, forced labor and arbitrary detentions by designing and implementing apartheid policies, providing computers to enforce apartheid, supplying armored vehicles, violating embargoes, and providing funding that permitted expansion of apartheid apparatus); *Sarei v. Rio Tinto PLC.*, 221 F. Supp. 2d

The continued support for the notion of corporate aiding and abetting liability under ATCA, however, is neither assured nor unanimous. Exemplary of judicial resistance is a New York district court's holding in the South African Apartheid cases: aiding and abetting violations fail to be sufficiently "universal, definable, and obligatory" to be recognized under international law.³⁷ Furthermore, as aiding and abetting belongs to domestic and international criminal law, the district court found "the applicability of that concept [to tort claims] dubious at best."³⁸ More conspicuously, the Bush Administration

1116 (C.D. Cal. 2002) (alleging the mining corporations incited a civil war in Bougainville); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 U.S. Dist. Lexis 3293 (S.D.N.Y. 2002) (involving Nigerian plaintiffs who claimed the defendant corporation tacitly collaborated with Nigerian military government who arbitrarily detained, shot, beat and hung their relatives); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1138 (C.D. Cal. 2005) (blaming defendant corporation operating in Columbia for conspiring with the Air Force to drop a bomb that killed plaintiff's family); *Estate of Rodriguez v. Drummond Co., Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003) (charging defendant corporation with retaining and authorizing paramilitaries to target union leaders for murder and with providing these death squads with financial and material support in order to rid the plant of the union.); *Al Rawi v. Titan* (filed S.D. Cal. 2004) (claiming that defendant security corporations and their agents collaborated with U.S. officials in the torture, humiliation, and abuse of Abu Ghraib prisoners); *Bowoto*, 312 F. Supp. 2d at 1233 (N.D. Cal. 2004) (alleging that Chevron, acting in concert with the Nigerian government, committed systematic violations of human rights, including summary execution, torture, as well as cruel, inhuman, and degrading treatment, in order to suppress peaceful protests about Chevron's environmental practices). Although British Petroleum (BP) has been granted approval recently to begin a gas pipeline project in West Papua on the island of New Guinea, there is growing concern that this project will also result in corporate complicity in the human rights violations of the Indonesian military. See George Monbiot, *In Bed With the Killers*, THE GUARDIAN, May 3, 2005, at 17.

37. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 549-50 ("[T]his Court declines the invitation to follow the lead of *Presbyterian Church* in finding that aider and abettor liability is recognized under the ATCA.")

38. *Id.* at 550 (referring to the Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994)). But 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). Here, Hoffman and Zaheer present the

proper methodology by which federal courts should determine the circumstances under which defendants may be found liable for international human rights violations. It argues that federal courts must fashion federal common law based on federal jurisprudence and international authority to determine rules for [aiding and abet-

and the domestic business community have increasingly leveraged the courts and legislature to eviscerate the ATCA of its jurisdiction over human rights claims and corporate defendants.³⁹ Aside from legal assertions that the ATCA is strictly a jurisdictional statute, the government has contended that the ATCA interferes with foreign policy and the “war on terrorism” and—echoing the business community—harms the U.S. economy. Following the recent Supreme Court holding in *Sosa*—which affirmed that the ATCA is more than a jurisdictional statute, exercising practical effect over a modest number of causes of action recognized under “the law of na-

ting] complicity liability and other ancillary standards in ATCA litigation. Federal common law, however, should not be constructed based on the whims of judges, but rather should be based on established federal and international legal precedent. This method furthers the federal and international values of uniformity, predictability, and consistency. It also honors the policies of the international system and the historical development of federal common law in the domestic jurisprudence of the United States.

Id.

39. See generally Letter from William H. Taft, IV, Legal Advisor, July 29, 2002, <http://www.laborrights.org/projects/corporate/exxon/stateexxonmobil.pdf>; Supplemental Statement of Interest of the United States, *Doe v. ExxonMobil*, No. 1-01-CV-1357-LFO (D.D.C. July 14, 2003) (No.1-01-CV-1357-LFO); Brief for the U.S. as Amicus Curiae, 542 U.S. 692 (No. 03-339), http://www.nosafehaven.org/_legal/atca_con_USsupportingSosa.pdf (“There is no basis to conclude that [ATCA] establishes a roaming cause of action that permits aliens to come to United States courts and recover money damages for violations of international law anywhere around the globe.”); see also EARTHRIGHTS, *supra* note 12, at 29-43. At the same time, the corporate lobby has decried the ATCA for opening the floodgates to litigation. See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789 (Institute for International Economics) (2003) (considering also the National Foreign Trade Council’s (NFTC) one page op-ed advertisement in the *New York Times*); Nat’l Foreign Trade Council, *The Business of Human Rights*, N.Y. TIMES, Apr. 5, 2004, at A19; EARTHRIGHTS’ Rebuttal, *supra* note 12, at 57-58; Brief for the National Foreign Trade Council, et al. as Amici Curiae in Support of Petitioner at 5, 542 U.S. 692 (No. 03-339) (“[ATCA is] a serious impediment to companies engaged in international trade, investment, and operations . . .”). Indeed the NFTC, along with the U.S. Council on International Business (USCIB) have been among the most vocal and active business proponents of the government’s stance against the ATCA, boasting such members as ExxonMobil, Occidental Petroleum Co., Halliburton, Caterpillar, Dow Chemical, and Unocal. For more members, see the website of USCIB at <http://www.uscib.org/index.asp?documentID=1846>.

tions”—the Department of Justice proceeded to directly challenge the aiding and abetting standard.⁴⁰ In the amicus brief for the United States, legal advisor William Howard Taft, IV argued that, beyond a number of political considerations, imposing aiding and abetting liability was not sufficiently established and well-defined in a legal sense.⁴¹

IV. ALTERNATIVES TO AIDING AND ABETTING

In anticipation of future challenges to aiding and abetting liability, and also in an endeavor to diversify the litigator's toolkit for ATCA claims, this Part considers alternative theories of corporate accomplice liability. Taking a cue from *Unocal's* Ninth Circuit panel holding, which tended “to favor international criminal tribunals as the principal source of international law as regards when third parties are liable for another's acts,”⁴² the discussion will draw primarily from the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR). Indeed, the steadfast work of these international tribunals provides fecund ground for the rapid development of international law on questions of individual responsibility.⁴³ At the same time, international law—as a source of these legal standards—is increasingly gaining attention from the American federal judiciary,⁴⁴ especially

40. Brief for United States et. al. as Amici Curiae Supporting Respondent, *Doe v. Unocal*, 963 F. Supp. 800 (2004) (Nos. 00-56603, 00-56628).

41. *Id.* at 17-28.

42. VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* § 14:14 (updated August 2004).

43. Marisa Anne Pagnattaro, *Enforcing International Labor Standards: The Potential of the Alien Tort Claims Act*, 37 VAND. J. TRANSNAT'L L. 203, 228-29 (2004).

44. To be sure, “[it is] well settled that the law of nations is part of federal common law.” *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 502 (1992) (citing *The Paquete Habana*, 175 U.S. 677 (1900)). Notable are three recent U.S. Supreme Court cases that looked to international law: *Lawrence v. Texas*, 539 U.S. 558, 571-75 (2003) (relying on a judgment from the European Court of Human Rights); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (“The court's observations that race-conscious programs ‘must have a logical end point’ . . . accords with the international understanding of the office of affirmative action.”); *Roper v. Simmons*, 543 U.S. 551, 604 (2005) (O’Conner, J., dissenting) (noting that in Eighth Amendment jurisprudence, “the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.”).

when international law gives content to the thin shell of emerging ATCA jurisprudence.⁴⁵ In sum, these developments counsel for a domestic litigation approach informed by international law and the legal theories of its pioneering criminal tribunals.

To be sure, there remains considerable discrepancy in the application of international criminal, humanitarian, and human rights law to a federal torts statute,⁴⁶ as well as debate about the precise choice-of-law rules governing the ATCA.⁴⁷ It

45. See, e.g., *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1357 (N.D. Ga. 2002) (relying on *Furundzija*, *infra* note 54, to establish the proper aiding and abetting standard); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) (looking to the Yugoslavia war crimes for the purposes of defining command responsibility under the Torture Victim Protection Act of 1991); *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325, 1333 (S.D.Fla. 2002) (citing *Prosecutor v. Tadic*, Case No. IT-94-I-A, Judgment (Int'l Trib. for Cases Regarding the Former Yugoslavia, Appeals Chamber, July, 1999)). Moreover, where there is no statutory guidance as to choice-of-law, the Restatements advise courts to consider "the needs of the interstate and international systems." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1969). Even the Department of Justice has conceded that when construing a federal statute, there is a strong presumption against projecting U.S. law to resolve disputes that arise in foreign nations. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

46. Consider, for example, Judge Reinhardt's concurring opinion in *Unocal*, arguing that civil tort principles under federal common law should control, rather than currently undeveloped principles derived from international criminal cases. *Unocal*, 395 F.3d at 965. The majority in *Unocal*, nonetheless, relied on the judgments of the ICTY. Consider also that:

[a] company that knowingly and deliberately assists a government to commit abuses could be directly liable under common law tort principles for intentionally inflicting harm (e.g. assault and battery) if a sufficient causal link can be shown between the company's act and the harm. In the absence of deliberate intention to inflict harm (or, at least in the US, substantial certainty that harm would occur), a company could nevertheless be liable for negligently inflicting harm if it owed a duty of care towards the victim. If a company gains economically from the victims and has a "right of control" over the government authorities involved (for example, through some contractual arrangement), it may be liable for failing to take reasonable steps to prevent the injury.

International Council on Human Rights, *supra* note 28, at 126.

47. Tracy Bishop Holton offers the following series of inconsistent ATCA cases: *Unocal*, 395 F.3d at 949-50 (relying on Rwandan and Bosnian war crime standards for culpability to determine the liability of a private party U.S. corporation); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475-76 (9th Cir. 1994) (applying federal law to decide survival of claim is-

has been noted that the most thoughtful examination of the ATCA choice of laws, offered by the *Tachiona* court, endorses a case-by-case approach making use of “federal common law, the forum state, the foreign jurisdiction most affected, international law or a combination of these sources.”⁴⁸ Acknowledging this proviso, the focus of this Article on international jurisprudence will be supplemented by relevant federal standards as they relate to ATCA claims. While a detailed analysis is outside the scope of this paper, federal common law continues to be an important aspect of ATCA litigation⁴⁹ and the application of alternative legal theories.⁵⁰

sue with no choice of law of analysis); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 503 (9th Cir. 1992) (relying on domestic law of a foreign jurisdiction to adjudicate the parties’ ATS claims); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (pronouncing that a traditional choice of law analysis weighted in favor of the municipal law of the jurisdiction where the wrongful act occurred should provide the substantive law to be applied in ATS actions); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (applying federal law (the TVPA), international law, and the municipal law of the forum in which the law of nations offenses occurred); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (suing mining corporations alleging incitement of a civil war); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 368 (E.D. La. 1997), *aff’d*, 197 F.3d 161 (5th Cir. 1999) (applying domestic federal and state law by analogy and with no choice of law analysis); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (applying choice of law analysis but rejecting application of domestic municipal law as inadequate, and instead, applying international law and federal law). See Tracy Bishop Holton, *Cause of Action to Recover Civil Damages Pursuant to the Law of Nations and/or Customary International Law*, in 21 CAUSES OF ACTION 2D 327 (Clark Kimball et al. eds., 2003).

48. See *Tachiona*, 234 F. Supp. 401. Nonetheless, *Tachiona* further held that

were the federal courts obliged to give unremitting recognition and deference to the substantive laws and defenses compelled by municipal law under a choice of law analysis, in some instances such application of foreign law could frustrate the right of action the ACTA was designed to confer upon the victims of international lawlessness.

Id. at 415.

49. For a forceful argument that ATCA does not require a theory of derivative liability, or any other such subsidiary legal concepts, to be “specific, universal and obligatory” and that therefore aiding and abetting should be interpreted according to federal common law, see Paul L. Hoffman & Daniel A. Zaheer, *supra* note 38, at 69-70.

50. Again, to quote Judge Reinhardt, “the ancillary legal question of Unocal’s third-party tort liability should be resolved by applying general fed-

A. *Joint Criminal Enterprise*

*[The accused were] cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs.*⁵¹

The Yugoslav Statute establishes individual criminal responsibility by providing the ICTY with jurisdiction over any “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of one of the enumerated crimes.⁵² Additionally, the court’s Appeals Chamber has read an implied doctrine of common purpose⁵³ into the statute:

[A]ll those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or exe-

eral common law tort principles, such as agency, joint venture, or reckless disregard.” *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring).

51. Prosecutor in U.S. v. Goebell et al. (the *Burkum Island* case), U.S. Army War Crimes Trials (Mar. 21, 1946). See Charge Sheet, p. 1118, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal’s Library).

52. ICTY Statute, *supra* note 33, art. 7, ¶ 1.

53. The doctrine of common purpose is alternatively referred to as common design and joint enterprise liability. See Prosecutor v. Milutinovic (the *Kosovo* case), Case No. IT-99-37-AR72, Judgment, ¶ 36 (May 21, 2003) [hereinafter *Ojdanic*] (“[T]he phrases ‘common purpose’ doctrine on the one hand, and ‘joint criminal enterprise’ on the other, have been used interchangeably and they refer to one and the same thing. The latter term—joint criminal enterprise—is preferred, but it refers to the same form of liability as that known as the common purpose doctrine or liability; whereas co-perpetration has acquired a less stable definition.). Compare Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶¶ 276, 287 (Nov. 2, 2001) (distinguishing co-perpetration by the greater degree of participation required within the criminal enterprise) [hereinafter *Kvočka*], with the Prosecutor v. Tadic (the *Prijedor* case), Case No. IT-94-1-A, Judgment, ¶ 220 (July 15, 1999) [hereinafter *Tadic*] (referring to co-perpetration as a subset of JCE) and *infra* text accompanying note 57.

cution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable⁵⁴

Tadic forged a new form of joint criminal enterprise (JCE) accomplice liability that was based on the understanding that criminal liability limited to the material perpetrator improperly denies criminal liability of the co-perpetrator, while accomplice liability still “understate[s] the degree of their criminal responsibility.”⁵⁵ The Appeals Chamber went on to demonstrate that JCE is in fact well-established and distinct from aiding and abetting under international law⁵⁶ and proceeded to distinguish three categories of collective criminality.⁵⁷

The first category of collective liability “is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the

54. *Tadic*, *supra* note 53, at ¶ 190. This has been affirmed by later ICTY judgments. See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1, Judgment, ¶ 249 (Dec. 10, 1998) [hereinafter *Furundzija*]; *Ojdanic*, *supra* note 53, at ¶ 30; *Kvočka*, *supra* note 53 at ¶ 310; Prosecutor v. Simic, Case No. IT-95-9-T, Judgment, ¶ 142 (Oct. 17, 2003) [hereinafter *Simic*].

55. *Tadic*, *supra* note 53, at ¶ 192. See also *Ojdanic*, *supra* note 53, at ¶ 7.

56. *Tadic*, *supra* note 53, at ¶ 223. Along with a host of international case law, *infra*, an *opinio juris* to this effect is reflected by the incorporation of JCE in two major treaties: the International Convention for the Suppression of Terrorist Bombing, Dec. 15, 1997, art. 2, ¶ 3(c), 37 I.L.M. 249, and the Rome Statute, *supra* note 33, at art. 25, ¶ 3(d). The Tribunal’s “recent and exhaustive analysis” also finds common purpose to have an underpinning in many national legal systems, such as those of Germany and the Netherlands, though this practice is not widespread enough to translate into binding international customary law. *Tadic*, *supra* note 53, at ¶ 224. The ICTR, animated by a nearly identical provision, see ICTR Statute, *supra* note 33, art. 6, ¶ 1, has concurred with *Tadic*’s interpretation and likewise adopted JCE. See, e.g., *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44 AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise, ¶ 10 (Oct. 22, 2004).

57. *Tadic*, *supra* note 53, at ¶ 192.

formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.”⁵⁸ Flowing analytically from the first “basic” category, the second encompasses the “so-called ‘concentration camp’ cases [where] the offences charged were alleged to have been committed by members of military or administrative units,” treated as co-perpetrators by virtue of their positions of authority.⁵⁹ The final class “concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose,” as when murder predictably results from the forced and reckless military transfer of a population.⁶⁰ This theory is especially helpful in cases of mob violence where it is impossible to ascertain causal links to the diverse offenders who brought on the lynching by “simply striking a blow or inciting the masses.”⁶¹

Further drawing from international legal precedents, the Appeals Chamber outlined the objective (*actus rea*) and objec-

58. *Id.* at ¶¶ 196-200 (citing several post World War II war crimes cases).

59. *Tadic*, *supra* note 53, ¶¶ 202-03 (citing Trial of Martin Gottfried Weiss and thirty-nine others (the *Dachau Concentration Camp* case), General Military Government Court of the United States Zone, UNWCC, vol. XI, 5 (Dec. 13, 1945); Trial of Josef Kramer and forty-four others (the *Belsen* case), British Military Court, UNWCC, vol. II, 1 (Nov. 17, 1945)).

60. *Tadic*, *supra* note 53, at ¶¶ 204, 205-19 (citing Trial of Erich Heyer and six others (the *Essen Lynching* case), British Military Court for the Trial of War Criminals, UNWCC, vol. I, 88, 91 (Dec. 22, 1945); U.S. v. Kurt Goebell et al. (the *Burkum Island* case), U.S. Army War Crimes Trials (Mar. 21, 1946); Giustizia penale, Part II, cols. 696-97 (1950); Cour de Cassation (Mar. 15, 1948), *Peveri* case, in Archivio penale 1948, 431-432; Cour de Cassation (July 20, 1949), *Mannelli* case, in Giustizia penale, 1948, Part II, col. 906, no. 599; Cour de Cassation (Oct. 27, 1949), P.M. v. Minafò, in Giustizia penale, 1950, Part II, col. 252, no. 202; Cour de Cassation (Feb. 24, 1950), *Montagnino* case, in Giustizia penale, 1950, col. 821; Cour de Cassation (Apr. 19, 1950), *Solesio et al.* case, in Giustizia penale, 1950, col. 822).

61. See *Tadic*, *supra* note 53, at ¶¶ 205, 209. While adopting the former strands of JCE, many civil and common law systems—including France, Italy, England, Wales, Canada, the United States, and Australia—have circumscribed the liability of defendants for the foreseeable, but unintended, crimes of their co-perpetrators. *Id.* at ¶ 224.

tive (*mens rea*) elements for each JCE category.⁶² Common to all categories, the Chamber structured the actus rea as follows:

A plurality of persons. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.

The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime [(such as] murder, extermination, torture, rape, etc.), but may take the form of [voluntary] assistance in, or contribution to, the execution of the common plan or purpose.⁶³

Particular to each category, the mens rea element requires:

For the “co-perpetration” class, shared intent to perpetrate the alleged crime, or a common state of mind.⁶⁴

For the “concentration camp” class, personal knowledge of the system of ill-treatment . . . (whether proved by express testimony or [as] a matter of reasonable inference from the accused’s position of authority), as well as the intent to further this common concerted system of ill-treatment.⁶⁵

For the “unintended crime” class, the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the com-

62. *Id.* at ¶ 194.

63. *Id.* at ¶ 227.

64. *Id.* at ¶¶ 220, 228.

65. *Tadic*, *supra* note 53, at ¶ 220.

mission of a crime by the group [granted that] under the circumstances of the case, (i) it was *foreseeable* [by everyone in the group] that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.⁶⁶

Falling into this latter “extended” class, *Tadic* dealt with a member of an armed group whose common aim was to forcefully “rid the Prijedor region of the non-Serbian population,” though not necessarily by killing them. When—as a reasonably foreseeable consequence of this shared intention—non-Serbs were killed by his fellow militiamen, the Tribunal nonetheless held the appellant directly culpable, finding that he was “aware that the actions of the group . . . were likely to lead to such killings, but . . . nevertheless willingly took that risk.”⁶⁷

Tadic involved complicity of an armed group, and if this can be translated to corporate human rights abusers, it presents a viable theory of individual responsibility with two distinct advantages over aiding and abetting for potential ATCA plaintiffs. First, the defendant need not be an accessory to the crime.⁶⁸ In other words, he or she need not procure for, counsel, or command the principal before the fact, present and assist him or her during the act, or knowingly receive benefits or relief, or comfort or assist him or her after the fact.⁶⁹ Second, while these acts of the aider and abetter must have a “substantial effect” upon the perpetration of a specific crime, the performance of an accomplice pursuant to a JCE need only be directed “in some way” to the realization of the common plan.⁷⁰

However, there are also significant drawbacks. JCE requires proof of a “common concerted plan” or agreement,

66. *Id.* (“It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called “advertent recklessness” in some national legal systems).”).

67. *Id.* at ¶¶ 231-32.

68. *Id.* at ¶ 229.

69. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 34-39.

70. *Tadic*, *supra* note 53, at ¶ 229.

which is inapposite for aiding and abetting. Indeed, for the latter:

[T]he principal may not even know about the accomplice's contribution [Furthermore], in the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, [in JCE] more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed). . . .⁷¹

The *Simic* court, which convicted the president of the Serbian Democratic Party for involvement in a campaign of persecutions against non-Serbian populations in the municipalities of Bosanski Samac and Odzak, elaborated on the requisite mens rea showing for JCE, holding that “each person charged must have had a common state of mind,” which—in the form of “an understanding or arrangement amounting to an agreement between two or more persons” to commit the crime—must be proven.”⁷² This notwithstanding, the common plan or design may take the form of an unspoken understanding and need not be arranged in advance.⁷³ That a JCE materializes “extemporaneously [can] be inferred from the [circumstances, notably the] fact that a plurality of persons acts in unison to put into effect the plan.”⁷⁴

Clarifying the actus reus requirements, *Kvočka*—wherein a deputy commander was found guilty of crimes against humanity and war crimes committed at the Omarska camp—held that the extent of participation must be sufficiently significant to make an enterprise “efficient or effective.” Hence:

It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. The level of participation attributed to the accused

71. *Id.*

72. *Simic*, *supra* note 54, at ¶ 158.

73. *Id.*

74. *Id.*

and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed.⁷⁵

In *Unocal*, and similar ATCA cases,⁷⁶ it would seem that applying this reasoning to the third “extended” class of JCE accomplices may prove fruitful. To return to the *Unocal* example, per the subjective test, one may be able to show that—whether as a tacit or a penned agreement—the corporation shared with the host government a common plan to illegally resettle villagers or suppress local resistance. Then, if the corporation demonstrably contributed to the furtherance of the agreement by providing for material or logistical support, it may be held liable for any forced labor, torture, and other potential actionable violations that foreseeably arose as a consequence. Where the corporation and host government collusion can be framed as a criminal system, mere silence may even be enough to satisfy “participation” in the common design.

Indeed, in *Hamdan v. Rumsfeld*, a plurality of the Supreme Court justices cited ICTY’s JCE theory of liability with approval.⁷⁷ Earlier, a 2002 opinion from the Southern District of Florida endorsed JCE, “agree[ing] that principles of . . . accomplice liability are well established in customary international law.”⁷⁸ Furthermore, ATCA litigation invoking the common purpose doctrine may benefit from JCE enactments in several states, including Maine, Minnesota, Iowa, Kansas, and Wisconsin.⁷⁹ Similar accessory liability has also emerged in

75. *Kvočka*, *supra* note 53, at ¶¶ 309-11.

76. *See, e.g., Talisman*, 244 F. Supp. 2d at 289.

77. *See* 548 U.S. ___, 126 S.Ct. 2749 n. 40 (2006).

78. *Cabello*, 205 F. Supp. 2d at 1333.

79. *See* 17 Maine Criminal Code § 57 (1997); Minnesota Statutes § 609.05 (1998); Iowa Code § 703.2 (1997); Kansas Statutes § 21-3205 (1997); Wisconsin Statutes § 939.05 (West 1995)

federal common law through the Pinkerton doctrine.⁸⁰ In *Pinkerton*, two brothers were indicted for violating the Internal Revenue Code and for conspiracy to do so.⁸¹ As there was only enough evidence to implicate one of the brothers in conspiracy, but not in the substantive crime, the question of whether he was nonetheless liable was brought to the Supreme Court.⁸² Deploying a JCE-style analysis, the Court sustained accessorial liability for actions carried out in furtherance of the conspiracy (i.e. common criminal purpose), whether they were explicitly planned or not, provided that such actions were a reasonably foreseeable outcome of the criminal enterprise.⁸³

B. Conspiracy

*[T]he Appeals Chamber had clearly distinguished [JCE] liability from other forms of liability such as conspiracy and membership of criminal organisation.*⁸⁴

What sets JCE apart from the discrete crime of conspiracy is the additional showing of actual activities—the actus reus element—in furtherance of the common purpose required for conspiracy.⁸⁵ Under both the ICTY and the ICTR Statutes, conspiracy is only actionable when contemplating genocide is at issue.⁸⁶ Yet, conspiracy has been recognized in other inter-

80. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 684-86 (2001).

81. *Pinkerton v. United States*, 328 U.S. 640 (1946).

82. *Id.*

83. *Id.* at 647 (“An overt act is an essential ingredient of the crime of conspiracy under §37 of the Criminal Code, 18 U.S.C.A. §88 [now §371]. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.”). See also *Nye & Nissen v. United States*, 336 U.S. 613 (1949) (“The Court thus recognizes that the Pinkerton doctrine is available only if (1) there is a connection between the conduct of the conspiracy and the commission of the substantive offenses, and (2) the jury has been instructed that evidence establishing guilt of conspiracy cannot be used as a basis for conviction upon the substantive counts unless it has found the necessary connection to exist.”).

84. *Odjanic*, *supra* note 53, at ¶ 3.

85. *Odjanic*, *supra* note 53, at ¶ 23. See also Law Reports of Trials of War Criminals, XV United Nations War Crimes Commission Digest, at 95.

86. “Conspiracy to commit genocide.” ICTY Statute, *supra* note 33, art. 4, ¶ 3(b); ICTR Statute, *supra* note 33, art. 2, ¶ 3(b).

national instruments⁸⁷ and has been upheld as a well-established principle of international customary law by at least two U.S. District Courts.⁸⁸ Indeed, in denying a motion to dismiss for failure to state a claim, the court in *Cabello* held that the defendant could “be liable under ATCA for conspiring in . . . the actions taken by other Chilean military officials, contrary to international law, with respect to Plaintiffs’ decedent.”⁸⁹

More recently, the Supreme Court in *Hamdan* considered whether a U.S. military commission could try a Yemeni national charged with conspiracy to attack civilians and civilian objects, to murder, and to engage in terrorism.⁹⁰ In the plurality opinion, Justice Stevens dismissed the military trials in part because conspiracy was not amongst the laws of war—the offenses over which U.S. military commissions have jurisdiction at times of military necessity.⁹¹ While conspiracy may fall outside the laws of war, the *Hamdan* plurality did not address the role of conspiracy under the “law of nations” more gener-

87. *Furundzija*, *supra* note 54, at ¶ 217 (“Leaders, organisers, 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 persons in execution of such plan.”) (quoting Charter Annexed to the London Agreement Establishing the International Military Tribunal at Nuremberg, art. 6, Aug. 8, 1945).

88. *Cabello*, 205 F. Supp. 2d at 1333; *Talisman*, 244 F. Supp. 2d at 321 (holding that “ATCA suits [may] proceed based on theories of conspiracy and aiding and abetting”); *see also* *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir.1988) (assuming, without deciding, that the ATCA confers jurisdiction over private parties who conspire in state acts of torture); *Eastman Kodak*, 978 F. Supp. at 1078 (“[T]he Court believes that it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power.”).

89. *Eastman Kodak*, 978 F. Supp. at 1078.

90. 548 U.S. at 4-5.

91. *Id.* at 48. In his dissent, Justice Thomas disagrees with the plurality. Citing Colonel William Winthrop, called “the Blackstone of Military Law” in *Reid v. Covert*, 354 U. S. 1, 19, n.38 (1957), Justice Thomas writes “[T]he experience of our wars . . . is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission.” *Id.* at 21 (Thomas, J., dissenting). In his concurring opinion, Justice Kennedy saw “no need to address the validity of the conspiracy charge against Hamdan.” *Id.* at 20 (Kennedy, J., concurring).

ally.⁹² This subtle distinction preserves the possibility of invoking conspiracy as an international theory of liability.

Furthermore, section 876 of the Restatement (Second) of Torts—frequently referenced by federal judges—provides analogous civil liability under domestic law for “a tortuous act [done] in concert with [another] or pursuant to a common design”⁹³ Without the requisite showing of action towards a common design, conspiracy may thus offer a lower evidentiary threshold for ATCA litigation arising from both international and domestic standards.

Drawing from the fact pattern discussed above, a tacit agreement between a corporation and the host government to employ forced labor or forcefully resettle local populations (all in derogation of international law) would constitute a potential cause of action, even if the agreement did not implement logistical or financial efforts towards the common plan. Yet, despite *Cabello* and the Restatements, the jury is still out in other jurisdictions as to the status of conspiracy under international law. Moreover, as an “inchoate crime . . . reaching preparatory conduct before it has matured into commission of a substantive offense,”⁹⁴ it may prove difficult to portray it with the “universal, definable, and obligatory” character necessary for a viable ATCA claim.

C. *Instigation*

*An accomplice shall mean [a] person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations or artifice, directly incite(s) to commit such action or order(s) that such action be committed.*⁹⁵

92. *But see* Justice Stevens citing T. TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 550 (1992) (observing that Francis Biddle, who as Attorney General prosecuted the defendants in *Quirin*, thought the French judge had made a “persuasive argument that conspiracy in the truest sense is not known to international law”).

93. *See, e.g., Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983).

94. Model Penal Code § 5.03 cmt. at 387 (1985).

95. Unofficial translation of Article 91 of the Rwanda Penal Code, FILIP REYNTJENS & JAN GORUS, CODES ET LOIS DU RWANDA 395 (Université Nationale du Rwanda, 2d ed. 1995) (1978). “Incitation” in the context of gifts, promises, threats, and abuse, more accurately translates to English as “instigation.” Nonetheless, incitement when in furtherance of genocide is action-

Defined with reference to Rwandan law, the *Akayesu* court held a defendant—though not a participant in the crime—liable for instigation: with the direct or specific intent to do so, he or she prompts another to commit an offence, which is then committed “through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice,”⁹⁶ as well as omissions when there exists a clear duty to act.⁹⁷ Though the plaintiff must show that the instigation was a “clear contributing factor” to the perpetration of the crime, it need not be the *conditio sine qua non*⁹⁸ “such that the crime would not have occurred without the accused’s involvement.”⁹⁹

Unfortunately, international case law is thin on reasoned applications of the theory of instigation. Extant cases where it is evoked, separate from other forms of accomplice liability, are limited largely to the Rwanda Tribunal.¹⁰⁰ Generally, these cases deal with vocal incitement to genocide and instigation of crowds to violence. In contrast, a typical ATCA claim, such as *Unocal*, would sooner entertain instigation in the more covert form of undue influence, with inducements and veiled

able under the ICTR Statute, *supra* note 33, art. 2, ¶ 3(c) and the ICTY Statute, *supra* note 33, art. 4, ¶ 3(c). For example, in the first case by an international tribunal to hand down a judgment of genocide, Jean-Paul Akayesu was found guilty of inciting genocide “by leading and addressing a public gathering . . . during which he urged the population to unite and in order to eliminate what he referred to as the sole enemy: the accomplices of the ‘Inkotanyi’—a derogatory reference to Tutsis which was understood to be a call to kill the Tutsis in general.” Press Release, *Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial*, AFR/94 L/2895 (Sept. 2, 1998).

96. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 482, 536 (Sept. 2, 1998) [hereinafter *Akayesu*]; see also Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 280 (Mar. 3, 2000) [hereinafter *Blaskic*]; Prosecutor v. Kordic, Case No. IT-95-14/2-T, Judgment, ¶ 387 (Feb. 26, 2001).

97. *Blaskic*, *supra* note 92, at ¶ 280.

98. *Id.* at ¶ 270.

99. Prosecutor v. Galic, Case No. IT-98-29-T, Judgment and Opinion, ¶ 168 (Dec. 5, 2003).

100. See, e.g., Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Trial Chamber Judgment and Sentence Summary, ¶ 85 (Dec. 3, 2003) (“The Chamber finds Hassan Ngeze, as founder, owner and editor of Kangura, a publication that instigated the killing of Tutsi civilians . . . guilty of genocide, pursuant to Article 6(1) of its Statute.”); Prosecutor v. Nindabahizi, Case No. ICTR-2001-71-I, Trial Chamber Judgment and Sentence, ¶ 464 (July 15, 2004); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 488, (May 15, 2003).

threats on the part of corporations in exchange for aggressive host government action towards local villagers.

Federal criminal law acknowledges instigation, but is loath to distinguish it from conventional modes of aiding and abetting. The Federal Code digests instigation into a broader rule of accomplice liability, stating that “any person commits an offense against the United States or aids, abets, counsels, commands, *induces* or procures its commission, is punishable as a principal.”¹⁰¹ As reflected in the Restatement (Second) of Torts, liability for instigation is also contemplated by U.S. tort law.¹⁰² Notwithstanding a host of national and international

101. 18 U.S.C. § 2 (1951) (emphasis added); *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); *see also* *United States v. Corona-Sanchez*, 291 F.3d 1201, 1208 (9th Cir. 2002) (holding that aiding and abetting liability is quite broad, extending even to promotion and instigation under California law); *Failla v. City of Passaic*, 146 F.3d 149, 157 (3rd Cir. 1998) (“The words aid and abet, namely as meaning respectively to assist, support or supplement the efforts of another, and to encourage, counsel, incite or instigate the commission of a crime, should be applied in the civil context”) (citations omitted); *State v. Salazar*, 431 P.2d 62, 64 (N.M. 1967) (“[E]vidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider’s support or approval.”) (quoting *State v. Ochoa*, 72 P.2d 609, 615 (N.M. 1937)). According to the Model Penal Code, a person is an accomplice of another person in the commission of the offense if: “(a) with the purpose of promoting or facilitating the commission of the offense, he (i) *solicits* such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it” Model Penal Code § 2.06(3) (Official Draft and Revised Comments 1962) (emphasis added).

102. “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or *encouragement* to the other so to conduct himself [or if he] *induces* the conduct, if he knows or should know of circumstances that would make the conduct tortious if it were his own” RESTATEMENT (SECOND) OF TORTS §§ 876-77 (1979) (emphasis added); *See* *Hudgens v. Chamberlain*, 161 Cal. 710 (1911); *Mead Corp. v. Mason Realty*, 191 So.2d 592 (Fla. Dis. Ct. App. 1966); *Fleming v. Dane*, 22 N.E.2d 609 (Mass. 1939); *Wickersham v. Johnson*, 51 Mo. 313 (Sup. Ct. 1873); *Van Horn v. Van Horn*, 52 N.J.L. 284 (N.J. Sup. Ct. 1890); *Newton Co. v. Erickson*, 126 N.Y.S. 949 (N.Y. Sup. Ct. 1911); *Hutton v. Waters*, 179 S.W. 134 (Tenn. 1915); *Martin v. Ebert*, 13 N.W.2d 907 (Wis. 1944); *White v. White*, 111 N.W. 1116 (Wis. 1907); *Koehring v. E. D. Etnyre & Co.*, 254 F. Supp. 334 (N.D. Ill. 1966); *Locicero v. Interpace Corp.*, 266 N.W.2d 423 (Wis. 1978).

precedent to the contrary, instigation thus remains a plausible, albeit underdeveloped, *specific theory* of accomplice liability.

D. Procurement

*If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor.*¹⁰³

The provision of “weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes” is commonly known as procurement.¹⁰⁴ As Justice Devlin’s above quoted passage suggests, complicity by procurement is typically considered a form of aiding and abetting; therefore, presumably, it is not listed amongst the modes of individual responsibility in the ICTY and ICTR Statutes.¹⁰⁵ Nonetheless, the latter’s adjudication of genocide reflects the partition of complicity into instigation, procurement, and aiding and abetting in the Rwandan Penal Code.¹⁰⁶ This interpretation identifies material procurement as a possible separate cause of action under the ATCA, wherein aiding and abetting refers only to the “practical assistance, encouragement, or moral support” of criminal acts, although the distinction is certainly contestable.¹⁰⁷ Similarly, under U.S. jurisprudence, procurement may be upheld as a *specific theory* of accomplice liability.¹⁰⁸ This could be brought to bear on the *Unocal*, as well as the *Talisman* and *ExxonMobil* proceedings mentioned above,¹⁰⁹ cases where

103. Akayesu, Case No. ICTR-96-4-T at ¶ 539 (citing Justice Devlin in *Nat’l Coal Board v. Gamble*, (1959) 1 Q.B. 11).

104. *Id.* at ¶ 536.

105. *See, e.g., supra* note 51 and accompanying text.

106. *Tadic, supra* note 53; *See also Akayesu*, Case No. ICTR-96-4-T at ¶ 537.

107. *Furundzija, supra* note 54, at ¶ 235.

108. *Cf. supra* note 96 and accompanying text (describing editor of newspaper which instigated violence as being convicted of genocide). In the context of tort law, consider the Restatements: “For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . permits the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously” RESTATEMENT (SECOND) OF TORTS § 877 (1979).

109. *Supra* note 35-36 and the accompanying text.

the corporation provided the host government with funding, facilities, or equipment to secure its operations, all the while fully cognizant of the fact that it would go towards human rights abuses such as forced labor, torture, and extrajudicial killing.

V. CONCLUSION AND RECOMMENDATIONS

In sum, JCE, conspiracy, instigation, and procurement are potential avenues for establishing direct accomplice liability in ATCA claims against corporations—cases characterized by direct and material corporate complicity in the rampant abuses of state and military actors. While aiding and abetting remains the primary theory of individual responsibility, it behooves litigators to consider other less explored legal terrain, in case this theory is ever foreclosed. Moreover, the jurisprudence of the international tribunal from which these alternative theories of accomplice liability are drawn is an increasingly important point of reference for the federal courts.

Indeed, JCE, a theory well-developed by the ICTY, already enjoys appeal to federal judges and is approximated by federal common law. It offers the distinct advantages that the defendant need not be an accessory to the crime, nor have a “substantial effect” upon the perpetration of a specific crime. The third strand of JCE even imputes liability for crimes that were unintended but arose as a natural and foreseeable consequence of the joint plan. The acid test of JCE is whether plaintiffs can demonstrate a common criminal design and may be satisfied in the ATCA context by pointing towards tacit and overt agreements to carry out illegal resettlement and/or violent repression of local populations.

Conspiracy, instigation, and procurement, on the other hand, are considerably less mature as independent and viable theories of international criminal jurisprudence. Conspiracy, which would provide a relaxed actus rea showing from that of JCE, lacks recognition under the ICTY and ICTR law. It is nevertheless recognized by a few U.S. jurisdictions as customary international law and as actionable under the ATCA. Instigation and procurement both have federal law analogs under the banner of accomplice liability. Demonstrating their separate,

legal identities, and treatment by international criminal tribunals, however limited, opens the door for new causes of action distinct from aiding and abetting.

