KNOWLEDGE OR PURPOSE? THE KHULUMANI LITIGATION AND THE STANDARD FOR AIDING AND ABETTING LIABILITY UNDER THE ALIEN TORT CLAIMS ACT

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INTRODUCTION

Over the last three decades, the Alien Tort Claims Act[1] (ATCA) has become an arrow in the quiver of victims and human rights groups seeking justice against those who have committed human rights violations. The ATCA confers upon the federal district courts jurisdiction to hear claims by aliens alleging violations of international law.[2] Victims from around the world have been able to have their claims heard in U.S. courts for violations such as torture, genocide, summary executions, and arbitrary detention.[3]

Human rights groups have also used the ATCA to sue corporations who deal with regimes that have questionable human rights records in an effort to discourage corporations from transacting with such regimes—thereby promoting corporate responsibility—and to cut off sources of capital and resources for such regimes.[4] Since corporations do not usually engage in these violations directly, aiding and abetting liability is an important way to achieve the goals of corporate responsibility and isolation of unsavory regimes.[5] Suing corporations

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[1] 28 U.S.C. § 1350 (2007).

[2] *Id.*

[3] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, torture); Hilao v. Estate of Marcos, 103 F.3d 789 (9th Cir. 1996) (arbitrary detention, torture); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (torture, summary execution, arbitrary detention).

[4] *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F.Supp. 2d 289 (S.D.N.Y. 2003); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000); Bowoto v. Chevron Texaco Corp., 312 F. Supp. 2d 1229, 1233 (N.D. Cal. 2004).

[5] For a discussion of corporate liability for violations of human rights, see John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda*, 101 AM. J. INT'L L.

through a theory of aiding and abetting is thus an important component to human rights advocacy, as multinational corporations often have assets and operations in the United States, thereby giving them an interest in appearing before the court and defending themselves. By comparison, suits against the nation states and leaders that actually commit the human rights violations often result in merely symbolic judgments, as the leaders can sit securely at home and take default judgments entered against them without paying out any damages.

In 2002, three classes of plaintiffs (the Ntsebeza, Digwamaje, and Khulumani plaintiffs) filed suits in eight district courts against many multinational corporations that did business in South Africa.[6] The plaintiffs alleged a "veritable cornucopia" of international law violations stemming from the regrettable and indefensible apartheid regime—forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination.[7] The plaintiffs linked the defendants to these international law violations by alleging that the defendants engaged in state action by acting under color of law,[8] that the defendants aided and abetted the apartheid regime in the commission of the violations, and that the defendants' business activities alone were sufficient to establish a violation of international law.[9] The plaintiffs alleged that by transacting with the apartheid regime of South Africa, the defendants aided and abetted violations of international law by supplying the regime with goods and resources used in the oppression of black South Africans, thereby making the defendants subject to suit in United States federal district court under the ATCA.[10]

The actions were transferred to the Southern District of New York by the Judicial Panel on Multidistrict Litigation.[11] The plaintiffs sought injunctive relief, as well as compensatory and punitive damages in excess of $400 billion.[12] The defendants swiftly filed a motion to dismiss the claims. Judge Sprizzo granted the motion, dismissing all claims.[13] In so doing, Judge Sprizzo found that aiding and abetting an

819, 830-34 (2007). *See also* Beth Stephens, Sosa v. Alvarez-Machain: *"The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533 (2004).

[6] *In re* S. Afr. Apartheid Litig., 346 F.Supp. 2d 538, 542-46 (S.D.N.Y. 2004).

[7] *Id.* at 548.

[8] The Khulumani plaintiffs did not make this contention. *Id.* at 548 n.11. Discussion of this claim is beyond the scope of this Note.

[9] *Id.* at 548. The plaintiffs also alleged violations under the Torture Victims Protection Act (TVPA), 28 U.S.C. § 1350 note, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962. *Id.* at 555. This Note focuses on the aiding and abetting claims under the Alien Tort Claims Act and will not address the TVPA and RICO claims. The claim of direct violation of international law is also beyond the scope of this Note.

[10] *Id.* at 544-45.

[11] *Id.* at 542.

[12] *Id.* at 545-46.

[13] *Id.* at 557.

international law violation was not itself a violation of customary international law.[14]

On appeal, the Second Circuit affirmed the dismissal of the Torture Victims Protection Act (TVPA) claims, but it reversed the judgment regarding the ATCA claims, holding that a plaintiff may plead a theory of aiding and abetting liability under the ATCA.[15] The Court reversed the dismissal of the ATCA claims in a 2-1 decision.

However, with neither of the two majority judges agreeing on the proper standard for aiding and abetting, the case has posed more questions for the legal community than it has provided answers. Judge Katzmann looked to international law,[16] relying on the test set out in the Rome Statute of the International Criminal Court (Rome Statute).[17] The Rome Statute provides criminal liability for a person who aids, abets, or otherwise assists in the commission of a crime with the purpose of facilitating the commission of that crime.[18] Judge Hall looked to American common law, namely, the Restatement (Second) of Torts § 876(b).[19] The Restatement provides that one is subject to liability for harm to a third person from the tortious act of another if she knows the other's conduct is a breach of duty and gives substantial assistance or encouragement to the other.[20] The dissenting judge, Judge Korman, while finding that a cause of action for aiding and abetting does not lie under the ATCA, acknowledged that if such liability did exist, the standard should be set by international law as enunciated by the Rome Statute test.[21] While two judges agreed on the standard for aiding and abetting liability, one was in dissent; this leaves Judge Sprizzo

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[14] *Id.* at 549.

[15] Khulumani v. Barclay Int'l Bank Ltd., 504 F.3d 254, 259-61 (2d Cir. 2007).

[16] *Id.* at 264-84.

[17] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. The Rome Statute provides, in part, at article 25(3), that:

> a person shall be criminally responsible and liable for punishment under the jurisdiction of the of the [International] Criminal Court if that person:
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> > (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> >
> > (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> >
> > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> >
> > (ii) Be made in the knowledge of the intention of the group to commit the crime;

See infra note 149 for a brief background on the Rome Statute.

[18] *Id.* at art. 25(3)(c).

[19] *Khulumani*, 504 F.3d at 287-89.

[20] RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

[21] *Khulumani*, 504 F.3d at 330-32.

discretion to find the correct standard on remand.

Which standard is applied for aiding and abetting liability will have substantial ramifications in the realm of human rights litigation, as the difference between purpose and knowledge directly impacts the evidentiary burden on plaintiffs. The Rome Statute test, one of subjective intent, requires a mens rea of purpose,[22] while the Restatement test requires only knowledge.[23] The higher threshold of the Rome Statute would make it more difficult for plaintiffs to successfully bring an aiding and abetting claim under the ATCA, as specific intent is more difficult to prove than knowledge, potentially allowing human rights violators to evade justice. Further, a standard of knowledge is consistent with the ideal of achieving justice for human rights violations and also with promoting corporate responsibility, as multinational companies will be deterred from dealing with dubious governments if they will be on the hook for being aware that the goods and services they provide are being used to further human rights violations.

Of no less importance, the knowledge standard is consistent with the Supreme Court's latest interpretation of the ATCA in *Sosa v. Alavarez-Machain*.[24] The Court held that an ATCA claim based on customary international law should rest on an international norm accepted by the civilized world and defined with a specificity comparable to the international law violations that were recognized at the time of the enactment of the ATCA.[25] A knowledge standard satisfies the Court's requirement, as it has been recognized by valid sources of international law as the standard for aiding and abetting liability.

This Note argues that both the posited sources—international law by Judge Katzmann and domestic common law by Judge Hall—actually espouse the same knowledge-based standard for aiding and abetting liability under the ATCA.[26] Part I discusses the historical context of the enactment of the ATCA, modern litigation under the ATCA, and the progression of the *Khulumani* litigation. Part II analyzes possible standards for aiding and abetting liability under the ATCA as well as the concurring opinions of Judges Katzmann and Hall and their reasons for adopting their respective standards. Part III asserts that an examination of widely recognized sources of international law reveals that the Rome Statute is anomalous in requiring a mens rea of purpose

[22] *See supra* notes 17-18 and accompanying text.

[23] *See supra* notes 19-20 and accompanying text.

[24] 542 U.S. 692 (2004).

[25] *Id.* at 725.

[26] Discussion of whether the Second Circuit was incorrect in finding a cause of action for aiding and abetting a violation of international law under the ATCA is beyond the scope of this Note. Additionally, resolution of which source to turn to as a matter of legal form—international law or domestic law—is beyond the scope of this Note.

for aiding and abetting liability, and that customary international law adopts a standard of knowledge for aiding and abetting liability. Part IV synthesizes the analysis of the differing standards and proposes that a standard of knowledge is consistent with the guidance of ATCA precedent and also the goals of corporate responsibility and justice for human rights violations.

I. THE ATCA: HISTORICAL CONTEXT AND MODERN LITIGATION

The ATCA is notable for its brevity and for its rather recent history of litigation. It reads in full: "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."[27] Originally passed as part of the Judiciary Act of 1789, the substantive language of the statute remains largely unchanged.[28] The statute was dormant for much of its history, with the majority of litigation under its jurisdictional mandate coming after 1980 and current litigation being guided by the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.[29]

A. *Historical Context of the Enactment of the ATCA*

Although the origins and intent of the ATCA have been considered unclear,[30] scholarship[31] and historical documents have shed significant

27 28 U.S.C. § 1350 (2007).

28 As passed in 1789 by the first Congress, what is now known as the Alien Tort Claims Act stated that the district courts "shall also have cognizance, concurrent with the courts of the several States, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77. The current language was adopted by Congress in 1948. Act of June 25, 1948, ch. 85, § 1350, 62 Stat. 934.

29 In its most recent interpretation of the ATCA, the Supreme Court noted that "for over 170 years after its enactment it provided jurisdiction in only one case." *Sosa*, 542 U.S. at 712. In *Filartiga v. Pena-Irala*, the Second Circuit also noted that "the Alien Tort Statute has rarely been the basis for jurisdiction during its long history." 630 F.2d 876, 887 (2d Cir. 1980). The court found that the ATCA was the basis for jurisdiction in *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), a custody dispute between aliens, and that the ATCA was an alternative basis for jurisdiction in *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), a suit to determine title to slaves on board an enemy ship taken at sea. *Filartiga* at 887, n.21.

30 William R. Casto noted that Judge Friendly, in *IIT v. Vencamp, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) referred to the ATCA as "a kind of legal Lohengrin." The judge also observed that "no one seems to know whence it came." William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 467 n.3 (1986) [hereinafter *Law of Nations*] (quoting Judge Friendly). *See also Sosa*, 542 U.S. at 712 (quoting Judge Friendly).

31 *See Law of Nations*, *supra* note 30, at 488-510; *See generally* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J.

light on the statute. A pertinent starting point is the premise that the United States adopted its common law heritage from England, and in eighteenth century England the common law included the law of nations.[32]

The law of nations dealt mainly with relationships between states and thus applied principally to the legislative and executive realms,[33] leaving little room for adjudication of individual transgressions.[34] However, Blackstone observed that there was individual criminal liability for three specific offenses against the law of nations: "1. Violation of safe conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy."[35] Discussing the legislative intent in the enactment of the ATCA, the *Sosa* court stated that it was this narrow set of violations of the law of nations that was probably on the minds of the drafters of the ATCA.[36]

Those who shaped the legal and political framework of the young nation, such as the Continental Congress, were concerned with civil liability for violations of the law of nations. However, due to its lack of legislative power,[37] the Continental Congress was only able to pass a resolution asking the states to adopt legislation creating civil liability for certain international law violations.[38] Heeding the words of Blackstone, the Congress' resolution recommended that states punish "violations of 'safe conducts,' 'infractions of the immunities of ambassadors and other public ministers,' and 'infractions of treaties and conventions to which the United States are a party.'"[39] Apparently only one state,

INT'L L. 687 (2002).

[32] *Law of Nations*, *supra* note 30, at 489 (citing Triquet v. Bath, 97 Eng. Rep. 936 (K.B. 1764)).

[33] *Sosa*, 542 U.S. at 714 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *68 (1769)).

[34] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67-68 (1769) [hereinafter COMMENTARIES]. *See also Law of Nations*, *supra* note 30, at 489 (citing 4 COMMENTARIES at *67-68). Casto also notes that "[i]n view of Blackstone's general influence upon eighteenth century American attorneys, it would be surprising if the drafters of the Judiciary Act did not rely upon the [COMMENTARIES]." *Law of Nations*, *supra* note 30, at 489 n.117.

[35] 4 COMMENTARIES at *68. *See also Sosa*, 542 U.S. at 715 (citing COMMENTARIES at *68); *Law of Nations*, *supra* note 30, at 489 (quoting 4 COMMENTARIES at *68).

[36] The court stated, "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of men who drafted the [ATCA] with its reference to tort." *Sosa*, 542 U.S. at 715.

[37] *See Law of Nations*, *supra* note 30, at 490.

[38] 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37 (G. Hunt ed. 1912) [hereinafter JOURNALS OF THE CONTINENTAL CONGRESS]. *See also Sosa*, 542 U.S. at 716 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37); *Law of Nations*, *supra* note 30, at 490 (citing 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37).

[39] *Law of Nations*, *supra* note 30, at 490 (quoting 21 JOURNALS OF THE CONTINENTAL CONGRESS 1136-37). *See also Sosa*, 542 U.S. at 716. The resolution also urged states to "authorise suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.* (quoting

Connecticut, responded to the resolution.[40] Nonetheless, the Continental Congress, by way of this resolution, signaled its dedication to enforce the law of nations.[41]

The Marbois Affair, which took place in May 1784 in Philadelphia, highlighted the Continental Congress' inability to deal with the issue of individual liability for violations of the law of nations. The Chevalier de Longchamps, a French adventurer, verbally and physically assaulted Mr. Marbois, the Secretary of the French Legion.[42] Following de Longchamps' release on bail, the international community was outraged and demanded Congressional action.[43] However, the Continental Congress was "powerless to deal with the matter."[44]

At the Constitutional Convention in Philadelphia three short years after the Marbois Affair, the issue of enforcing the law of nations was "fresh on the minds" of the Framers.[45] In fact, during the ratification process following the Convention, another infringement upon the rights of a foreign ambassador reinforced the importance of the issue. A constable in New York City had entered the house of a Dutch Ambassador and arrested one of his servants.[46] Insulted and furious, the Ambassador immediately confronted John Jay, then Secretary of the United States Department of Foreign Affairs, with the incident.[47] Again, the national government was without authority to take any action.[48] With this powerlessness in mind, the Framers vested the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers, and Consuls,"[49] and the first Congress enacted the Alien Tort Claims Act as part of the Judiciary Act of 1789.

Noting the paucity of ATCA drafting history,[50] considering the common law conception of the law of nations,[51] and contemplating the

21 JOURNALS OF THE CONTINENTAL CONGRESS 1137). *See also Law of Nations*, *supra* note 30, at 491.

40 *Sosa*, 542 U.S. at 716.

41 *Id.*

42 *Sosa*, 542 U.S. at 716-17; *Law of Nations*, *supra* note 30, at 491.

43 *Law of Nations*, *supra* note 30, at 491.

44 *Id.* at 491-92. De Longchamps was eventually tried in state court, with the impotent Continental Congress only able to pass a resolution of approval. *Id.* at 492. For further discussion of the Marbois Affair see *id.* at 491-94.

45 *Id.* at 493.

46 *Id.* at 494.

47 *Id.*

48 *Id.* Casto writes that Jay, in reporting the incident to the Congress, said "[t]hat the federal Government . . . does not appear to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases . . . . ." *Id.* at 494 n.152 (quoting 34 JOURNALS OF THE CONTINENTAL CONGRESS 109, 111 (1788)).

49 Sosa v. Alvarez-Machain, 542 U.S. 692, 717 (2004) (quoting U.S. CONST., art. III, § 2).

50 *Id.* at 718

51 *See supra* text pp. 6-7.

ostensible concerns of the Founders and drafters of the ATCA,[52] the Supreme Court in *Sosa* construed the ATCA as granting jurisdiction for a limited set of common law actions alleging violations of the law of nations.[53]

B. *Modern Litigation under the ATCA and the Framework of* Sosa

While the jurisdictional trigger of the ATCA was unused for much of its history,[54] there has been considerable litigation under the ATCA since 1980, with the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[55] establishing an "analytical watershed"[56] for litigation under the ATCA. Modern litigation under the ATCA began in 1980 with *Filartiga v. Pena-Irala*,[57] in which the Second Circuit held that torture under color of official authority violates international law and thus falls within the jurisdictional mandate of the ATCA.[58] The court's basis for this finding was the international community's unambiguous consensus against torture.[59] While *Filartiga* opened the floodgates of ATCA litigation, all litigation under the statute, including the *Khulumani* case, must now follow the analytical framework set out in *Sosa*.

In *Sosa*, the federal government believed that Dr. Humberto Alvarez-Machain was involved in the torture and murder of an agent of the Drug Enforcement Agency (DEA).[60] Specifically, the government believed that the doctor acted to prolong the captured agent's life in order to lengthen the torture.[61] After extradition efforts failed, the DEA hired Mexican mercenaries, including petitioner Jose Francisco Sosa, to capture Alvarez-Machain and bring him to the United States for trial.[62] The mercenaries were able to do so, but Alavarez-Machain was subsequently acquitted of torture and murder at his criminal trial.[63]

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[52] *Id.*

[53] *Sosa*, 542 U.S. at 720.

[54] *See supra* note 29 and accompanying text.

[55] 542 U.S. 692 (2004).

[56] William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635, 635 (2006) [hereinafter Casto, *New Federal Common Law*].

[57] 630 F.2d 876 (1980). In *Filartiga*, the sister and father of the decedent, both Paraguayan citizens, filed a wrongful death action against Americo Noberto Pena-Irala, a Paraguayan citizen who worked for the government of Paraguay. The Filartigas alleged that Joelito Filartiga was tortured and killed in retaliation for his father's political beliefs. They asserted jurisdiction under the ATCA. *Id.* at 878-880.

[58] *Id.* at 876.

[59] *Id.* at 884-85.

[60] *Sosa*, 542 U.S. at 697.

[61] *Id.*

[62] *Id.* at 698.

[63] *Id.*

Dr. Alvarez-Machain then sued the United States and his captors under the Federal Tort Claims Act (FTCA) for false arrest, and under the ATCA for violations of the law of nations.[64] The case ultimately made it to the Supreme Court,[65] and the Court reversed the Ninth Circuit's affirmation of summary judgment for the plaintiff on the ATCA claim and also its reversal of a grant of a motion to dismiss the FTCA claim.[66] In reversing the ATCA claim, the Court held that "a single illegal detention of less than a day" was not a violation of a customary international law norm as to support jurisdiction under the ATCA.[67]

To properly understand the Court's analysis in *Sosa*, William R. Casto advises that one must keep in mind the distinction between rights and remedies.[68] A cause of action requires the plaintiff to establish that the defendant has violated a legal norm that protects the plaintiff and that the plaintiff is entitled to a remedy, which is usually damages in ATCA litigation.[69] In ATCA litigation the norm that is upheld comes from international law, and the remedy from federal common law.[70]

In reversing the ATCA claim and construing the statute, the Court held that the ATCA does not create a statutory cause of action.[71] Rather, the statute is a grant of jurisdiction for the District Courts to hear cases involving certain violations of international law.[72] This is consistent with prior constructions of the ATCA.[73] The Court emphasized that the decision to create a private right of action is usually better left in the hands of the legislature.[74] The *Sosa* court's finding that international law is part of the common law[75] implies that ATCA

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[64] *Id.*

[65] The District Court granted the government's motion to dismiss on the FTCA claim, but awarded summary judgment and damages to Alvarez-Machain on the ATCA claim. The Ninth Circuit affirmed the ATCA claim and reversed the FTCA claim. *Id.* at 699.

[66] Discussion of the Court's reasoning in reversing the FTCA claim is beyond the scope of this Note.

[67] *Sosa* 542 U.S. at 738.

[68] Casto, *New Federal Common Law*, *supra* note 56, at 638-39.

[69] *Id.* at 639.

[70] *Id.* Casto explains that this mixed federal cause of action is not unique to the ATCA and offers analogies such as § 1983 litigation. *Id.* at 639-40.

[71] *Sosa*, 542 U.S. at 713. When courts, specifically in the Second Circuit, had previously allowed cases alleging violations of international law to proceed under the ATCA, they had thought of the causes of action as being statutorily authorized. *See* Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); *see also* Flores v. S. Peru Pepper Corp., 414 F.3d 233, 245 (2003).

[72] *Sosa*, 542 U.S. at 713.

[73] In *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), the Second Circuit construed the ATCA "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law." *Id.* at 887.

[74] The Court in fact stated, "this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727.

[75] *Id.* at 714-716. *See also supra* note 32 and accompanying text.

litigation is based upon the common law, as it would require a court to determine whether given conduct is in "violation of the law of nations."[76] The Court urged restraint in the exercise of the judicial law making occasioned by the ATCA.[77]

Although it narrowly interpreted the scope of the ATCA, the Court concluded that Congress implicitly approved judicial recognition of actionable international norms.[78] While the ATCA does not create a statutory cause of action, Congress must have believed that common law provides private remedies for some violations of international law.[79] The Torture Victim Protection Act of 1991 (TVPA) is an example of Congressional approval.[80] Congress' enactment of the TVPA has been viewed as an endorsement, and perhaps codification, of the common law tort remedy recognized in *Filartiga*.[81]

While the Court urged caution in crafting tort remedies for violations of international law, it acknowledged that the norms to be enforced are not limited to the trinity outlined by Blackstone.[82] The Supreme Court has embraced this evolving view of international law before, notably in *The Paquete Habana*.[83] The *Habana* court found that the prohibition against seizure of an enemy's fishing vessels during wartime began as a practice of comity and developed over time by the "general assent of civilized nations, into a settled rule of international

[76] 28 U.S.C. § 1350 (2007).

[77] *Sosa*, 542 U.S. at 725-28 (discussing reasons for "judicial caution" in hearing ATCA claims). The Court also stated that the "door to [judicial recognition of actionable international norms] is still ajar subject to vigilant doorkeeping . . . ." *Id.* at 729.

[78] *Id.* at 729-31.

[79] Casto observes, "Congress must have assumed that the statute would serve some purpose," and "[t]he reasonable assumption is that Congress believed that the common law provides private remedies for some violations of international law." Casto, *New Federal Common Law*, *supra* note 56, at 637-38 (citing *Sosa*, 542 U.S. at 720-21, 730-31).

[80] *Sosa*, 542 U.S. at 731.

[81] *Id.* at 731. The Supreme Court is not alone in having this view. In *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), the Second Circuit noted that in passing the TVPA, "Congress expressly ratified our holding in *Filartiga* that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation . . . ." *Id.* at 104. Casto also states that Congress "approved, codified, and elaborated" upon the tort remedy recognized in *Filartiga*. Casto, *New Federal Common Law*, *supra* note 56, at 638.

[82] *Sosa*, 542 U.S. at 724-25. While the Court admitted that it had no basis to suspect that the First Congress, which enacted the ATCA as part of the Judiciary Act of 1789, had any international law violations in mind beyond those listed by Blackstone, it nonetheless embraced this broader view. *Id.* Perhaps the court implicitly recognized that the law of nations is not static but grows as practices and norms become custom, as the term "customary international law" indicates. The *Filartiga* court also embraced this "living" view of international law when it stated, "Thus it is clear 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." *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (citing The Paquete Habana, 175 U.S. 677 (1900)). Casto also observes that "if [ATCA] litigation were confined to these ancient wrongs, a tort remedy would be little more than an antiquarian oddity." Casto, *New Federal Common Law*, *supra* note 56, at 645.

[83] 175 U.S. 677 (1900).

law."[84] Additionally, Congressional approval for this broader view of international law can again be found in the enactment of the TVPA. The TVPA has been interpreted as congressional endorsement of the Second Circuit's finding in *Filartiga* that torture under color of official authority violates international law (an addition to Blackstone's original three actionable norms of the law of nations).[85]

The Court gave some crucial words of guidance in delineating the judicial restraint to be exercised in hearing ATCA claims. In determining which norms of international law merit the creation of a private tort remedy, a separate inquiry from the threshold question of jurisdiction under the ATCA, the Court advised that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms we have recognized."[86] The Court also noted that other principles serve to limit the availability of relief for violations of international law, including the international law doctrine that a claimant must exhaust all domestic remedies before resorting to a foreign forum, and the policy of deference to other political branches.[87]

Applying this rule, the Court held that an illegal detention of less than a day was not a violation of a customary international law norm.[88] The Court found insufficient Dr. Alvarez-Machain's argument that his detention was an arbitrary arrest, and as such was in violation of the law of nations.[89] The Court found that Dr. Alvarez-Machain's sources for asserting that the conduct was a violation of a customary international norm did not establish an applicable rule of international law.[90] Relying on the Restatement (Third) of Foreign Relations Law of the United States, the Court also found that Dr. Alvarez-Machain's claim did not meet the requirement that a detention must be "prolonged" and a

[84] *Id.* at 694.

[85] *See supra* note 81 and accompanying text.

[86] *Sosa*, 542 U.S. at 725.

[87] *Id.* at 733, n. 21. Discussion of these limitations is beyond the scope of this Note. It should be noted that the Court directly referenced the predecessor litigation to the *Khulumani* case in this footnote, *In re S. Afr. Apartheid Litig.*, 238 F.Supp. 2d 1379 (J.P.M.L. 2002) (granting a motion to transfer the cases to the Southern District of New York). The Court discussed the case in the context of deference to the political branches, citing briefs as *Amici Curiae* by the Governments of South Africa and the United States. The court stated, "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Sosa*, 542 U.S. at 733 n.21

[88] *Sosa*, 542 U.S. at 738.

[89] *Id.* at 734-38.

[90] *Id*. Specifically, the Court found that the Universal Declaration of Human Rights does not impose obligations of international law and that the International Covenant on Civil and Political Rights, though ratified by the U.S., does not create obligations enforceable in federal courts because it is not self-executing. *Id.*

"matter of state policy" to be a violation of international law.[91] In the Court's view, Dr. Alaverz-Machain's detention was brief.[92] In short, the rule of international law that he proposed was violated was not a binding and customary rule of sufficient specificity.[93]

C. *The Khulumani Litigation*

With the guidance of the Supreme Court in *Sosa* at hand, the Southern District of New York set out to rule on the defendants' motion to dismiss in *In re South African Apartheid Litigation*.[94] One of the plaintiffs' claims was that the corporate defendants aided and abetted international law violations, thereby bringing them within the jurisdictional reach of the ATCA.[95]

The plaintiffs' theory was that by transacting with the apartheid government of South Africa, the defendants aided and abetted human rights violations.[96] The plaintiffs alleged that the defendants supplied resources, such as technology, money, and oil to the apartheid regime, and that the government used those resources to further its policies of oppression and persecution of the African majority.[97] For example, South African police shot demonstrators from cars powered by Daimler-Benz engines, IBM computers were used to track black South Africans, the military maintained and powered its equipment with Shell oil, and the policies of apartheid were financed by loans from defendant banks.[98]

The Southern District of New York dismissed the aiding and abetting claim, holding that aiding and abetting international law violations is not itself an international law violation that is universally accepted as a legal obligation.[99] Relying on Second Circuit precedent, the court interpreted the standard for violations of customary international law set out by the *Sosa* court, describing customary international law as "those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[100] The court also stressed that the norm be a legal obligation and not acceded to for merely moral or political reasons.[101]

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[91] *Id.*
[92] *Id.*
[93] *Id.* at 738.
[94] *In re* S. Afr. Apartheid Litig., 346 F.Supp. 2d 538, 542-43 (S.D.N.Y. 2004).
[95] *Id.* at 548.
[96] *Id.* at 544-45.
[97] *Id.*
[98] *Id.* at 545.
[99] *Id.* at 549-50.
[100] *Id.* (quoting Flores v. S. Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003)).
[101] *Id.* (citing *Flores*, 343 F.3d at 154).

To support their position, the plaintiffs pointed to the International Criminal Tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR), as well as the Nuremburg Trials, to show that aiding and abetting violations of international law has been recognized as a violation in itself.[102] The court, with quizzically little substantiation, dismissed these sources as non-binding sources of international law.[103] The court also distinguished them as dealing with criminal, rather than civil, matters, and thus inapplicable to the case at bar.[104]

The plaintiffs also cited *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[105] as support for their theory of aiding and abetting liability. In that case, residents of Sudan sued Talisman Energy, a large Canadian energy company, alleging violations of international law, including collaborating with the government of Sudan in the commission of genocide of non-Muslim southern Sudanese.[106] In denying Talisman's motion to dismiss,[107] the Southern District of New York in fact recognized aiding and abetting liability under the ATCA, relying on international criminal law, including the ICTY and ICTR.[108] However, in the *Khulumani* case, the Southern District declined to follow its past holding.[109] It highlighted the fact that *Presbyterian Church* was decided before the *Sosa* case.[110]

The court was also concerned about the collateral consequences and foreign relations repercussions of recognizing aiding and abetting liability under the ATCA.[111] The court noted the threat to the flow of international commerce from recognizing such liability.[112] The court also cited the opinions of the governments of South Africa and the United States, and noted the Supreme Court's direct reference in *Sosa* to the *Khulumani* litigation in its discussion of limitations on judicial recognition of tort remedies for violations of international law.[113]

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[102] *Id.*

[103] *Id.* at 550. Oddly, the court did not explain itself in detail on this point, simply citing to *Flores*, 343 F.3d at 169-70. However, that portion of the *Flores* opinion dismissed decisions of the European Court of Human Rights (ECHR) and the International Court of Justice (ICJ), two sources not relied upon by the *Khulumani* plaintiffs, reasoning that the ECHR and ICJ did not have authority to create binding norms of customary international law. While that reasoning may apply to the ICTY, ICTR, and Nuremburg Tribunals, it omits the possibility that the decisions of those tribunals may reflect existing international law norms, rather than create them.

[104] *Id.*

[105] 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

[106] *Id.* at 296.

[107] *Id.*

[108] *Id.* at 320-25.

[109] *In re* S. Afr. Apartheid Litig., 346 F.Supp. at 550.

[110] *Id.* at 550 n.12.

[111] *Id.* at 551.

[112] *Id.* at 553.

[113] *Id.* *See supra* note 87 for discussion of the *Sosa* court's reference to the *Khulumani* litigation.

On appeal, the Second Circuit, in a *per curiam* opinion and 2-1 decision, reversed the Southern District of New York, holding that a plaintiff may plead an aiding and abetting theory of liability under the ATCA.[114] In so doing, the court also noted that it declined to affirm the dismissal on the basis of the prudential concerns, namely the political question doctrine and international comity, raised by the defendants.[115] It wanted the district court to address these issues on remand in the careful case-by-case approach that those matters require.[116]

The guidelines set out by the Supreme Court in *Sosa* shed light on the district court's errors. Based on the *Sosa* court's holdings that (1) the ATCA is a jurisdictional statute and (2) the common law provides the cause of action for claims brought under the ATCA, a federal court hearing an ATCA claim must undertake two distinct inquiries.[117]

The first and threshold question is whether there is jurisdiction under the ATCA.[118] By the words of the statue, federal subject-matter jurisdiction under the ATCA lies when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations.[119] This third condition will often serve as the limiting factor in granting jurisdiction under the ATCA, given the high bar set for recognition of an actionable international law norm.[120] The Second Circuit has previously expounded upon this high bar, in a case that was also cited by Judge Sprizzo in the lower court decision dismissing the claim,[121] stating that the law of nations "is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[122]

The second inquiry, assuming that jurisdiction does lie under the ATCA, is whether the court should recognize a common law cause of action to provide a remedy for the alleged violation of customary international law.[123] To answer this question, the court should look to the *Sosa* court's guidance that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms we have recognized."[124] This second inquiry is also the juncture at which the

[114] Khulumani v. Barclay Int'l Bank Ltd., 504 F.3d 254, 260 (2d Cir. 2007).
[115] *Id.* at 263-264.
[116] *Id.* at 264.
[117] *Id.* at 266.
[118] *Id.*
[119] *Id.* at 267 (quoting Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)).
[120] *See supra* notes 71-93 and accompanying text.
[121] *See supra* note 100 and accompanying text.
[122] *Khulumani*, 504 F.3d at 267 (quoting Flores v. S. Peru Copper Corp., 343 F.3d 140, 154 (2d Cir. 2003)).
[123] *Id.* at 266.
[124] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004). *See also Khulumani*, 504 F.3d at 268

court should consider prudential concerns consistent with *Sosa*.[125]

The district court erred in conflating these two distinct analyses and not undertaking them separately, thereby inserting judicial discretion (prudential concerns) into the jurisdictional inquiry.[126] In his concurrence, Judge Katzmann found that the greater error was in the district court's analysis of whether the plaintiffs had alleged a violation of international law within the meaning of the ATCA.[127] Accordingly, the Second Circuit reversed and found that the plaintiffs had alleged a violation of international law under the ATCA—aiding and abetting human rights violations.[128] However, as discussed above, the sticking point in *Khulumani*—and, indeed, this area of unsettled law—is the standard for aiding and abetting liability. This Note seeks to resolve some of this uncertainty.

II. POSSIBLE STANDARDS FOR AIDING AND ABETTING LIABILITY UNDER THE ATCA

While the *Khulumani* case establishes that a plaintiff may plead a theory of aiding and abetting liability under the ATCA, it also highlights the unresolved issue of what is the proper standard for such liability under the ATCA. The two judges in the majority disagreed on the standard. Judge Katzmann looked to international law for the proper standard,[129] while Judge Hall looked to the domestic common law of torts.[130]

A. *International Law: A Standard of Purpose?*

1. International Criminal Law and Civil Liability

Contrary to the finding of the district court in *Khulumani*,[131] it is not problematic to look to certain sources of international law, including the ICTY, ICTR, and the Nuremburg Tribunals, even though they dealt

(quoting *Sosa*, 542 U.S. at 725). Judge Hall seemed to agree with this point as well, noting that the question of subject matter jurisdiction is a distinct inquiry from prudential concerns and questions of justiciability. *Id.* at 291.

[125] *Khulumani*, 504 F.3d at 268.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 260.
[129] *Id.* at 268-70.
[130] *Id.* at 287-89.
[131] *See supra* notes 102-104 and accompanying text.

with criminal, and not civil, liability.[132] This distinction is inconsistent with previous case law in the Second Circuit, which has relied on criminal law norms in establishing customary international law under the ATCA. In *Kadic v. Karadzic*, the Second Circuit held that a defendant could be held liable under the ATCA for violating international criminal law norms prohibiting genocide and war crimes.[133]

Additionally, the commingling of criminal and civil law is not unusual in international law. International criminal tribunals have looked approvingly upon civil remedies for violations of international criminal law.[134] Furthermore, Justice Breyer observed in *Sosa* that criminal courts in many nations combine criminal and civil proceedings, allowing plaintiffs to collect damages in the criminal proceeding.[135] He reasoned that since there is a consensus as to universal jurisdiction for certain crimes, such as genocide and war crimes, and many nations combine criminal and civil proceedings, it is reasonable to conclude that universal criminal jurisdiction necessarily contemplates civil recovery as well.[136]

2. Sources of Customary International Law

The Second Circuit has interpreted customary international law as "composed of only those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern."[137] But the question remains: what are valid sources of those "rules?" Are the sources rejected by the district court in *Khulumani* valid sources of international law?

Article 38 of the Statute of the International Court of Justice (ICJ Statute) provides some guidance in answering these questions.[138] Article 38 of the ICJ Statute identifies the following sources of

[132] On appeal, Judge Katzmann found the rejection of these sources a principal error of the lower court. *Khulumani*, 504 F.3d at 270 n.5.

[133] Kadic v. Karadzic, 70 F.3d 232, 241-42 (2d Cir. 1995). While this is a pre-*Sosa* case, it is still applicable. *Kadic* recognized genocide and war crimes as violations of international law under the ATCA. In doing so, it highlighted the universal acceptance of condemning these activities going back as far as 1946. *Id.* at 241. Thus, while this Note does not set out to prove this point, war crimes and genocide probably meet the standard of specificity and wide acceptance required under *Sosa*. Nonetheless, *Sosa* does not undermine the legitimacy of looking to international criminal law in determining customary international law under the ATCA.

[134] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Dec. 10, 1998). The court noted that where a state has authorized torture, a torture victim may bring a civil suit in a foreign court.

[135] *Sosa*, 542 U.S. at 762-63

[136] *Id.*

[137] *See supra* note 122 and accompanying text.

[138] Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, 1060.

international law: (1) international conventions (treaties), specific or general, (2) international custom, as evidence of a general practice accepted as law, (3) general principles of law recognized by civilized nations, and (4) judicial decisions and teachings of highly regarded commentators of the various nations.[139] While tribunal decisions are not the first source on the ICJ's list, they have been recognized as a "most important factor" in the development of international law, as they tend to reflect custom and general principles of law recognized by civilized nations.[140] In light of Article 38 of the ICJ Statute, and also considering that international criminal law may be referred to for civil liability matters,[141] the sources rejected by the lower court in *Khulumani*, namely the Nuremburg Tribunals, ICTY, and ICTR are, on their face, valid sources of international law.

Accepting the validity of these sources in determining customary international law, it becomes clear that aiding and abetting liability has been widely recognized over the last half century. The Second Circuit, other U.S. courts, international bodies, and scholars have previously recognized the London Charter, which established the International Military Tribunal at Nuremburg, as a source of customary international law.[142] The London Charter in fact recognized accomplice liability for crimes triable by the Nuremburg Tribunal.[143]

Many international treaties, the first category in Article 38 of the ICJ Statute, also support the conclusion that criminal responsibility for aiding and abetting international law violations is widely accepted as customary international law.[144] These treaties, recognizing aiding and abetting liability, cover an array of human rights violations, such as apartheid, torture, slavery, and genocide.[145]

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[139] *Id.* Article 38 has been looked upon favorably as an enunciation of accepted sources of international law. *See* 1 OPPENHEIM'S INTERNATIONAL LAW 24 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) [hereinafter 1 OPPENHEIM].

[140] 1 OPPENHEIM, *supra* note 138, at 41.

[141] *See supra* Part II.A.i.

[142] Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 271 (2d Cir. 2007) (citing Flores v. S. Peru Pepper Corp., 414 F.3d 233, 244 n. 18 (2d Cir. 2003)); Princz v. Federal Republic of Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 559 (2006); Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), at 188, U.N. Doc. A/236 (Dec. 11, 1946)). Judge Katzmann pointed out in his concurrence that "shortly after the conclusion of the initial war crimes trials, the General Assembly of the United Nations unanimously approved a resolution affirming 'the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal.'" *Khulumani*, 504 F.3d at 271 (quoting Affirmation of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal, G.A. Res. 95(I), at 188, U.N. Doc. A/236 (December 11, 1946)).

[143] *Khulumani*, 504 F.3d at 272. Judge Katzmann equated accomplice liability with aiding and abetting liability. *Id.*

[144] *Id.*

[145] *Id.* at 273 (citing the International Convention on the Suppression and Punishment on the

While the Nuremburg Tribunal and international treaties show a history of recognizing aiding and abetting liability, modern tribunals, namely the ICTY and ICTR, evidence the continuing recognition and enforcement of aiding and abetting liability. The statutes that created both of the tribunals impose individual criminal liability on anyone "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of a crime.[146] Additionally, in a report to the Security Council regarding the creation of the ICTY, the Secretary-General of the United Nations stated that the Security Council would not be legislating new international law, but the ICTY would rather apply existing international law.[147] Thus, modern sources of international law continue to recognize aiding and abetting liability.

3. A Standard of Purpose?

In his concurrence, Judge Katzmann discussed the Rome Statute of the International Criminal Court (Rome Statute) as a source of international law that provided for criminal aiding and abetting liability.[148] The Rome Statute is of particular importance because it articulates the requisite mens rea for aiding and abetting liability.[149] Other than in the context of a person assisting a group acting with a common purpose, a person is criminally liable for aiding and abetting the commission of a crime under the Rome Statute only if she does so

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Crime of Apartheid art. III(b), Nov. 30, 1973, 1015 U.N.T.S. 243; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 1465 U.N.T.S. 85; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 6, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3; Convention on the Prevention and Punishment of the Crime of Genocide art. III(e), Dec. 9, 1948, 78 U.N.T.S. 277, 280).

[146] Statute for the International Tribunal for the Former Yugoslavia art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute for the International Criminal Tribunal for Rwanda art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). *See also Khulumani*, 504 F.3d at 275 (citing S.C. Res. 827 and S.C. Res. 955).

[147] The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 29, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Secretary-General Report]. *See also Khulumani*, 504 F.3d at 274 (quoting Secretary-General Report at ¶ 29).

[148] *Khulumani*, 504 F.3d at 275-77.

[149] Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90. *See supra* note 17 for the relevant language of the Rome Statute. The Rome Statute was ratified in 1998 by members of the United Nations Diplomatic Conference for Plenipotentiaries, established a permanent international criminal court, and was the first legal document in years to describe the prosecution of international crimes such as genocide and war crimes. It also codifies individual criminal liability, including aiding and abetting liability. *See* Remiguis Oraeke Chibueze, *The International Criminal Court: Bottlenecks to Individual Criminal Liability in the Rome Statute*. 12 ANN. SURV. INT'L & COMP. L. 185 (2006). *See id.* for further background on the Rome Statute.

"[f]or the purpose of facilitating the commission of such a crime . . . ."[150] While acknowledging that the Rome Statute has yet to be construed by the International Criminal Court (ICC) to substantiate its standing as a proper source of customary international law, Judge Katzmann observed that it has been ratified widely (by 105 countries), although not by the United States.[151]

Relying on the Rome Statute as a source of international law and its language as the proper mens rea for aiding and abetting liability in customary international law, Judge Katzmann found further support for this mens rea of purpose in the other sources he had concluded were proper sources of international law.[152] Turning to the Nuremburg Tribunals, Judge Katzmann discussed the *Ministries Case*.[153] In the *Ministries Case*, the tribunal did not impose criminal liability against a banker who knew or had reason to know that the loan he made would be used by the borrower to violate national or international law.[154] Addressing the ICTY and ICTR, but without citing any decisions of the ICTY and ICTR that articulate a mens rea of purpose, Judge Katzmann found that "those who assist in the commission of a crime with the purpose of facilitating that crime would be subject to aiding and abetting liability under the statutes governing the ICTY and ICTR."[155]

Judge Katzmann then addressed the actus reus component of criminal aiding and abetting liability under international law.[156] He found guidance in *Prosecutor v. Furundzija*.[157] *Furundzija* indicates that the actus reus of aiding and abetting a violation of international criminal law requires practical assistance which has a substantial effect on the crime.[158] Synthesizing his analysis of the state of the

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150 Rome Statute of the International Criminal Court at art. 25(3)(c).

151 *Khulumani*, 504 F.3d at 276. Judge Katzmann also explained that the United States did not ratify the Rome Statue for reasons unrelated to its definition of aiding and abetting. *Id.* at 276 n.9.

152 *Khulumani*, 504 F.3d at 276-77.

153 United States v. von Weizsaecker (The Ministries Case), *in* 12 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1 (1949) [hereinafter Ministries Case].

154 *Khulumani*, 504 F.3d at 276 (quoting the Ministries Case, *supra* note 153, *in* 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 622.)

155 *Id.* at 276. While this is true, it may be incomplete. Something less than purpose, namely knowledge, may be sufficient under the ICTY and ICTR statutes. *See infra* notes 208-227 and accompanying text. Also, oddly enough, Judge Katzmann did not cite to any decisions of the ICTY and ICTR specifically articulating a mens rea of purpose.

156 A criminal offense generally requires an actus reus (literally, guilty act), or wrongful conduct, and a certain mens rea (literally, guilty mind), or state of mind.

157 Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

158 Specifically, the Furundzija tribunal stated, "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." Furundzija, Case No. IT-95-17/1-T at ¶ 235.

international law on the actus reus and mens rea of criminal aiding and abetting, Judge Katzmann concluded, "[A] defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."[159] And consistent with the *per curiam* holding, he held that aiding and abetting liability is a sufficiently well-established norm to be considered customary international law for the purposes of the ATCA.[160]

B. *Domestic Tort Law: A Standard of Knowledge*

1. A Sticking Point: The *Central Bank of Denver* Issue

The Supreme Court's ruling in *Central Bank of Denver v. First Interstate Bank of Denver*[161] poses an issue as to civil liability for aiding and abetting. The lower court in the *Khulumani* litigation in fact turned to this case in rejecting an aiding and abetting claim under the ATCA.[162] In *Central Bank of Denver*, the Court confronted the issue of whether § 10(b) of the Securities Exchange Act of 1934 ('34 Act)[163] encompasses civil liability for aiding and abetting.[164] In holding that there was no aiding and abetting liability under the '34 Act, the Court relied heavily on Congressional intent. Since Congress had enacted a general aiding and abetting statute for federal offenses, and had specifically codified civil aiding and abetting liability in other instances such as the Internal Revenue Code, but had not done so expressly in the '34 Act, the Court held that aiding and abetting liability should not be inferred.[165]

The *Central Bank of Denver* holding should have little bearing on aiding and abetting liability under the ATCA. It dealt with a different statute (the '34 Act), body of law (securities law), and context. In limiting the scope of liability under the '34 Act, the *Central Bank of Denver* court emphasized its concern for the growing problems of

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159 *Khulumani*, 504 F.3d at 277.

160 *Id.*

161 511 U.S. 164 (1994).

162 *In re* S. African Apartheid Litig., 346 F.Supp. 2d 538, 550 (S.D.N.Y. 2004). The lower *Khulumani* court found that *Central Bank of Denver* applied with "special force" in this litigation, given the *Sosa* court's language of judicial restraint and deference to the legislature. *Id.* It also declined to follow *Presbyterian Church's* finding of aiding and abetting liability under the ATCA—in part because it felt that the court erred in not applying *Central Bank of Denver*. *Id.*

163 15 U.S.C. § 78a *et seq.* (2006).

164 Central Bank of Denver, 511 U.S. at 167.

165 *Id.* at 182-90.

vexatious litigation and strike suits in the context of securities litigation.[166] Strike suits should not be a major concern under the ATCA. This is evidenced by the fact that the statute lay dormant for so long. Additionally, the requirement that there be a violation of the law of nations, which in turn implicates a narrow set of well-settled violations as per the *Sosa* court,[167] serves as an additional hurdle to strike suits. Furthermore, the prudential doctrines of international comity and political question serve as an additional filter to frivolous litigation.

2. The Domestic Common Law of Torts

While joining the *per curiam* opinion, Judge Hall disagreed with Judge Katzmann on the standard for aiding and abetting liability for violations of international law. Judge Hall thought his colleague had erred in consulting international law for the standard. For the proper standard for aiding and abetting liability, Judge Hall thought that a court should consult domestic common law.[168]

The common law of torts provides a standard for aiding and abetting liability. This was addressed in *Halberstam v. Welch*,[169] which the Supreme Court has discussed approvingly as an authority on aiding and abetting.[170] The *Halberstam* court relied on the Restatement of Torts (Second) § 876(b) to determine the scope of aiding and abetting liability.[171] Section 876(b), which addresses liability for harm to a third party as a result of the tortious conduct of another, states that one is subject to such liability if she "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself . . . ."[172] It is clear from the language of § 876(b) that the Restatement espouses a standard of knowledge for aiding and abetting liability, as that language is directly used in the section.

Based on the Restatement, the *Halberstam* court found that there were three elements to aiding and abetting: (1) the party whom the defendant aids must perform a wrongful act that causes injury; (2) the

166 *Id.* at 189-90.
167 *See supra* notes 86-87 and accompanying text.
168 Khulumani v. Barclay Int'l Bank Ltd., 504 F.3d 254, 284 (2d Cir. 2007). *See also id.* at 286-87.
169 705 F.2d 472 (D.C. Cir. 1983).
170 Judge Hall points out that the Supreme Court described *Halberstam* as "a comprehensive opinion on the subject [of aiding and abetting]." *Khulumani*, 504 F.3d at 287 (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 181 (1994)) (internal quotation marks omitted).
171 *Id.* at 287.
172 RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

defendant must be aware of his role as part of an illegal or tortious activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation.[173]

Applying this interpretation of § 876 to civil aiding and abetting claims under the ATCA, Judge Hall found that there should be liability only where the defendant furthered the violation of an international law norm in one of three ways: (1) by "knowingly and substantially" assisting the principal, such as a government, in the commission of a violation of a clearly established norm of international law; (2) by "encouraging, advising, contracting with, or otherwise soliciting" the principal tortfeasor to commit the tortious act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established norm of international law; or (3) by "facilitating" the principal tortfeasor's violation of customary international law by providing the principal tortfeasor goods or services that aid in the commission of the violations with actual or constructive knowledge that those goods or services will be, or only could be, used toward that purpose.[174] Judge Hall also stated that while these standards of knowledge and substantial assistance may seem fuzzy or vague, one need only look at the vast domestic case law for clarification and application of these concepts.[175]

There are some reasons to consider looking to domestic common law for the aiding and abetting standard. Some scholarly work may suggest that where federal courts have discretion in determining federal common law, they should fill the gaps that often arise—in this case gaps left by international law[176]—by borrowing from the most analogous body of law; to Judge Hall, this is the domestic common law of torts.[177]

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[173] Halberstam, 705 F.2d at 477. *See also Khulumani*, 504 F.3d at 287-88.

[174] *Khulumani*, 504 F.3d. at 288-89. The judge stated that there should be aiding and abetting liability under the ATCA where:

> there is evidence that the defendant furthered the violation of a clearly established international norm in one of three ways: (1) by knowingly and substantially assisting a principal tortfeasor, such as a foreign government or its principal proxy, to commit an act that violates a clearly established international law norm; (2) by encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international norm in the process of completing that act; or (3) by facilitating the commission of human rights violations by providing the principal tortfeasor the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.

Id.

[175] *Id.* at 290.

[176] Judge Katzmann would probably argue that in this case, international law has left no gaps, as it sufficiently addresses the standard for aiding and abetting liability through proper sources of international law, including international treaties and tribunals. *See supra* notes 132-160 and accompanying text.

[177] *Khulumani*, 504 F.3d at 286-87 (quoting Beth Stephens, Sosa v. Alvarez-Machain: *"The*

Another reason for favoring domestic law is that when domestic and international law overlap as to the same doctrine, some scholarship indicates that domestic courts should choose the domestic law source.[178] There is also support for this in Supreme Court guidance that directed courts to apply federal common law in certain "narrow areas" including certain international disputes.[179]

One may also argue that the nature of common law makes it suitable to address the pragmatic issues that can arise in judicial recognition of norms of international law. Noting the "contextual nature and factual sensitivity" of rule-making at common law, Judge Hall reasoned that this flexibility is well-suited to addressing and avoiding the practical problems as they arise.[180]

While the plaintiffs in the *Khulumani* case were not adequately specific in their complaint, they did allege two out of the three possible ways Judge Hall recognized aiding and abetting liability under the ATCA. The plaintiffs alleged that the defendants knowingly and substantially aided the South African government in the commission of violations of customary international law[181] (case 1 of Judge Hall's trinity of possible aiding and abetting liability).[182] The plaintiffs also

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Door Is Still Ajar" for Human Rights Litigation in U.S. Courts, 70 BROOK. L. REV. 533, 558 (2004)). In asserting that accomplice liability has been sufficiently and widely recognized in international law, Stephens wrote:

> But even if international law left a gap in the definition of vicarious liability, federal common law could look to federal standards to supply an appropriate standard. *Sosa* does not require that every ancillary rule applied in an [ATCA] case meet the level of international consensus required for the definition of the underlying violation. As in any case in which the federal courts exercise discretion to recognize federal common law, the courts will fashion rules to fill gaps, borrowing from the most analogous body of law.

Stephens, *supra* note 5, at 558.

[178] 1 OPPENHEIM, *supra* note 139, at 82-86. *See also Khulumani*, 504 F.3d at 287 (citing OPPENHEIM (8th ed.)).

[179] *Id.* at 287. Judge Hall found this guidance in Judge Reinhardt's concurring opinion in *Doe I v. Unocal Corp.*, discussing what law applies to ancillary issues that arise under the ATCA. Doe I v. Unocal Corp., 395 F.3d 932, 965-66 (9th Cir. 2002) (citing United States v. Kimbell Foods, 440 U.S. 715, 727 (1979)). Judge Hall found further support in another case where the Supreme Court stated that courts should apply federal common law "in such narrow areas as those concerned with rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States [and] our relations with foreign nations." Texas Indus., Inc., v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981). However, the applicability of this Supreme Court guidance is questionable as the "rights and obligations" of the United States do not seem to be at issue; nor is this an interstate dispute in the sense that the Court seemingly means—one directly between the governments of nations. And while this is an international dispute, it is difficult to see how a standard for aiding and abetting liability would implicate foreign relations or the rights of states. It seems that these latter concerns are addressed in the doctrines of political question and international comity, which is a distinct issue from the standard of aiding and abetting liability in international law violations.

[180] *Khulumani*, 504 F.3d at 290.

[181] *Khulumani*, 504 F.3d at 290.

[182] *See supra* note 174 and accompanying text.

alleged that the defendants facilitated the South African government's violations of international law by providing the government with the instrumentalities and services to commit those violations with actual or constructive knowledge that those instrumentalities and services would be used toward that purpose (case 3 of Judge Hall's rule).[183]

Thus, while the two judges in the majority agreed that aiding and abetting a violation of international law was itself a sufficiently well-established norm of international law, thereby availing the plaintiffs of jurisdiction under the ATCA, they looked to different sources to determine the standard for aiding and abetting liability under the ATCA.

III. International Law: A Standard of Knowledge

The seeming dilemma facing Judge Sprizzo of the Southern District of New York on remand may in fact not be a dilemma at all. While the two judges in the majority looked to different sources for the standard for aiding and abetting liability, Judge Katzmann to international law and Judge Hall to domestic common law, the two sources seem to articulate the same standard. A closer examination of valid international law sources—indeed, the sources that Judge Katzmann looked to in finding a standard of purpose—reveals that criminal aiding and abetting liability is based on a standard of knowledge.

A. *The Nuremburg Military Tribunals*

Having established the London Charter, which created the International Military Tribunal at Nuremburg, as a valid source of customary international law,[184] Judge Katzmann looked to one of the cases brought thereunder, the *Ministries Case*,[185] to establish that the alleged aider and abettor's knowledge that his aid would further a violation of international law was not sufficient to create aiding and abetting liability.[186] However, one commentator has observed that the *Ministries Case* is "literally the *only* time" that a Nuremburg Military Tribunal held that knowledge was insufficient for aiding an abetting liability.[187] This commentator also notes that Tribunal's decision in the

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[183] *Id.*

[184] *See supra* notes 132-43 and accompanying text.

[185] Ministries Case, *supra* note 153.

[186] *See supra* notes 153-54 and accompanying text (discussing the Ministries Case).

[187] Kevin Jon Heller, *The Second Circuit's Incorrect Interpretation of Customary International Law (UPDATED)*, OpinioJuris, Oct. 25, 2007,

Ministries Case may also have had more to do with the Nuremburg Military Tribunals' overall reluctance to hold banks and bankers liable for their role in Nazi crimes.[188] So it seems that the *Ministries Case* is exceptional in finding knowledge inadequate to establish aiding and abetting liability.

Other Nuremburg Tribunal cases in fact hold that knowledge is sufficient to establish mens rea for aiding and abetting liability. One such example is the *Zyklon B* case.[189] In that case, Bruno Tesch was the sole owner of a company that distributed Zyklon B, a highly poisonous gas made of prussic acid that was used to disinfect public buildings.[190] His firm distributed the gas to Auschwitz and other concentration camps where it was used in the "wholesale extermination of human beings."[191] The prosecution's evidence showed that Tesch knew that Zyklon B had been used to kill at the concentration camps.[192] Tesch was subsequently found guilty of the war crime of "*knowingly* . . . supply[ing] a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals."[193]

The *Flick* case[194] is another instance in which a Nuremburg Tribunal held that knowledge is enough to establish aiding and abetting liability. In that case, Bernhard Weiss, an officer in the Flick Concern, increased the numbers of freight cars available to the company and the number of Russian POWs manufacturing the cars.[195] The Tribunal concluded that he was aware that his order would result in the use of slave labor and convicted him of aiding and abetting the Nazis' slave labor crimes.[196] Weiss' awareness—his knowledge—of the result of his actions was enough for an aiding and abetting conviction.

In the *Farben* case,[197] the defendants were found not guilty because the prosecution had not sufficiently established their knowledge of the Nazis' activities. In that case, certain defendants, Lautenschlager, Mann, and Hoerlein, worked for Farben, a pharmaceuticals

http://opiniojuris.org/2007/10/25/the-second-circuits-incorrect-interpretation-of-customary-international-law-updated/.

188 *Id.*

189 The Zyklon B Case (Trial of Bruno Tesch and Two Others), 1 Law Reports of Trials of War Criminals 93 (Brit. Mil. Ct. 1946) [hereinafter Zyklon B Case].

190 *Id.* at 94.

191 *Id.*

192 *Id.*

193 *Id.* at 94 (discussing the Prosecution's charge) (emphasis added); *Id*. at 102 (announcing the verdict).

194 United States v. Flick, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 1, 1187-23 (1949).

195 *Id.*

196 *Id.*

197 United States v. Krauch (Farben Case), 7 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1 (1952).

manufacturer.[198] Farben manufactured pharmaceuticals that the Nazis used in illegal medical experiments on human beings, including inmates in concentration camps.[199] The prosecutor alleged that Lautenschlager, Mann, and Hoerlein supplied pharmaceuticals and vaccines to the SS (Schutzstaffel, the Nazi Protective Squadron) knowing that they would be used in illegal medical experiments on inmates without their consent.[200] The SS infected inmates with typhus and then treated them with Farben drugs to see if the drugs had curative value.[201] The Tribunal found that the defendants were not guilty because the evidence did not establish that they knew the drugs were used for illegal experiments.[202] The *Farben* case shows that, by negative inference (the defendants were not guilty because the prosecution had not proven their knowledge of the reasons for which the drugs were used), the Nuremburg Tribunals used a standard of knowledge for aiding and abetting liability. The defendants were found not guilty not because of a lack of proof of purpose, but rather a lack of evidence of knowledge.

B. *The Rome Statute*

Judge Katzmann also relied heavily on the Rome Statute to establish purpose as the proper standard for aiding and abetting liability under the ATCA.[203] The Rome Statute articulates a mens rea of purpose for aiding and abetting liability under the jurisdiction of the International Criminal Court.[204] However, the purpose requirement of Article 25(3)(c) of the Rome Statute that Judge Katzmann drew upon for his conclusion has been viewed as a break from custom.[205] Scholarship suggests that the purpose requirement of Article 25 for aiding and abetting liability is not required by customary international law, and thus the crime is not defined in accordance with customary international law, under which knowledge is sufficient.[206] Thus, liability under the Rome Statute will, in practice, be narrower than in

[198] Farben Case, *in* 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 1081, 1169-72 (1952).

[199] *Id.*

[200] *Id.* at 1170.

[201] *Id.*

[202] *Id.* at 1172 (Tribunal uses the word "notice" for knowledge).

[203] *See supra* notes 148-151 and accompanying text.

[204] *Id.*

[205] ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 315-16 (Cambridge University Press, 2005).

[206] *Id.* *See also* William A. Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 842 INT'L REV. OF THE RED CROSS 439 (2001) (comparing standards for accomplice liability in the Rome Statute and other sources of international law).

custom.[207] Accordingly, it seems that the Rome Statute's standard is not of sufficient universal acceptance to meet the requirements of *Sosa*.

C. *Modern Tribunal Decisions*

Contrary to Judge Katzmann's assertions, the decisions of the ICTY and ICTR seem to indicate that the requisite mens rea for aiding and abetting liability is knowledge. Judge Katzmann observed that those who aid and abet with a purpose of furthering the crime would be subject to aiding and abetting liability under ICTR and ICTY.[208] While this is true, Judge Katzmann seems to have cast his net a bit wide in searching for a standard that is universally recognized under international law.[209]

1. ICTY Decisions

Article 7 of the Statute for the International Tribunal for the Former Yugoslavia (ICTY Statute), the agreement that forms the ICTY, creates aiding and abetting liability.[210] Judge Katzmann cited the *Furunzidja*[211] case to establish the actus reus requirement for criminal aiding and abetting liability.[212] However, that case also spoke on the mens rea requirement. The paragraph immediately following the one cited by Judge Katzmann contemplates whether the accomplice must share the principal's mens rea or if knowledge is sufficient.[213] The tribunal found that knowledge would suffice.[214]

Such a finding by the ICTY is not isolated. In *Prosecutor v. Vasiljevic*,[215] the defendant was found guilty as a co-perpetrator of the Milan Luki Serbian paramilitary unit, for his involvement in the Drina River incident, where the Milan Luki shot seven Muslims, killing five of them.[216] In discussing aiding and abetting liability, the tribunal found

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[207] *Id.*

[208] Khulumani v. Barclay Int'l Bank Ltd., 504 F.3d 254, 276 (2d Cir. 2007).

[209] Judge Katzmann does in fact concede that knowledge has been sufficient for aiding and abetting liability in the ICTY. But he seems to have chosen a narrower standard for purpose in an effort to comport with the universal acceptance requirements of *Sosa*. *Id.* at 277 n.12.

[210] Statute for the International Tribunal for the Former Yugoslavia art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

[211] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment (Dec. 10, 1998).

[212] *See supra* notes 156-58 and accompanying text.

[213] Furundzija, Case No. IT-95-17/1-T at ¶ 236.

[214] *Id.*

[215] Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgment of Appeals Chamber (Feb. 25, 2004) [hereinafter Vsilijevic].

[216] *Id.* at ¶ 1.

that the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the crime.[217]

In *Prosecutor v. Aleksovski*, the ICTY reached the same conclusion regarding aiding and abetting liability.[218] Aleksovski was found guilty of violations of laws of war by the Trial Chamber.[219] He was the commander of a prison facility that housed Bosnian Muslim prisoners who were subjected to physical and psychological harm, forced labor, and other inhumane treatment.[220] In discussing aiding and abetting liability, the Appeals Chamber found that it must be shown that the aider and abettor knew that his acts assisted in the commission of the crime by the principal.[221] So, in examining decisions of the ICTY, including the one cited by Judge Katzmann, it seems that the ICTY espoused a standard of knowledge for aiding and abetting liability.

2. ICTR decisions

The crime of aiding and abetting is stated in Article 6 of Statute for the International Criminal Tribunal for Rwanda (ICTR Statute).[222] The ICTR has generally attached a mens rea of knowledge to this crime. In *Prosecutor v. Bagilishema*, the Tribunal held that for aiding and abetting liability under Article 6 of the ICTR Statute, the accomplice must knowingly provide assistance to the principal.[223] The accomplice must know that her assistance will contribute to the criminal act.[224]

In *Prosecutor v. Akayesu*, the defendant was in charge of a local commune and under his watch, at least 2000 Tutsis were killed in acts of genocide.[225] Among many charges, he was charged with and found guilty of knowing that acts of sexual violence, beatings, and murders took place and facilitating their commission.[226] In defining complicity under the ICTR statute, the Tribunal attached a mens rea of knowledge to different forms of complicity—procuring, aiding and abetting, and

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[217] *Id.* at ¶ 102(ii) (contrasting *mens rea* for aiding and abetting liability with that of participation in a joint criminal enterprise, of which the defendant was found guilty).

[218] Prosecutor v. Aleksovski (Aleksovski Appeal), Case No. IT-95-14/1-A, Judgment of Appeals Chamber, ¶ 162(ii) (Mar. 24, 2000).

[219] Prosecutor v. Aleksovski, Case No. IT-95-14/1, Judgment of Trial Chamber, (May 7, 2000)

[220] *Id.*

[221] Aleksovski Appeal, Case No. IT-95-14/1-A at ¶ 162(ii).

[222] Statute for the International Criminal Tribunal for Rwanda art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

[223] Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, Judgment of Trial Chamber I, ¶ 32 (June 7, 2001).

[224] *Id.*

[225] Prosecutor v. Akayesu, Cae No. ICTR-96-4-T, Judgment of Trial Chamber I, ¶ 12 (Sept. 2, 1998).

[226] *Id.* at ¶ 12B. He was charged with direct as well as accomplice liability in acts of genocide.

instigation.[227] Thus, like the ICTY, the ICTR also applies a standard of knowledge to aiding and abetting liability.

IV. A STANDARD OF KNOWLEDGE IS CONSISTENT WITH *SOSA* AND THE GOAL OF ACHIEVING JUSTICE FOR HUMAN RIGHTS VIOLATIONS

International law, as viewed through tribunal decisions over the last half-century, seems to espouse a standard of knowledge for aiding and abetting liability. A standard of knowledge rather than purpose is consistent with the rule of *Sosa* that international law violations recognized under the ATCA ought to have the same specificity as those identified at the time of the statute's enactment.[228] Knowledge has been the prevalent standard recognized in international law from the post-World War II era to the more recent tribunals of the last decade, while the nascent Rome Statute seems to stand alone in its embrace of purpose. Indeed, a knowledge standard is also more consistent with the Second Circuit's interpretation of customary international law—that it comprises well-settled rules that are universally followed.[229] The Rome Statute, on the other hand, does not yet seem to be well-settled (it was adopted in 1998) or universally abided by, as it has yet to be interpreted by the International Criminal Court.[230]

The Rome Statute may be viewed as an effort by the international law community to create a paradigm shift in customary international law regarding criminal aiding and abetting liability.[231] Perhaps the drafters would like to see international law move toward a standard of purpose. However, the ATCA requires that the rule of international law that is allegedly violated be specific and well-settled, and knowledge is the well-settled standard.

A court's recognition of knowledge or purpose as the proper standard for aiding and abetting liability in international law has

[227] *Id.* at ¶ 537. The Tribunal also defined the different forms of complicity:

> Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured 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.

Id. at ¶ 536. In terms of the *Khulumani* litigation, it seems that the plaintiffs have alleged the ICTR's definitions of aiding and abetting, and procuring.

[228] *See supra* note 86 and accompanying text.

[229] *See supra* note 122 and accompanying text.

[230] *See supra* note 151 and accompanying text.

[231] Resolution of the issue of whether the Rome Statute marks a paradigm shift in international law regarding criminal aiding and abetting liability is beyond the scope of this Note. I raise this issue simply to point out that a purpose standard, even if it is the "new direction" of international law, is not yet sufficiently well-settled for ATCA purposes.

significant implications for human rights advocacy. If a goal of the international law community is to bring about justice for human rights violations, a standard of knowledge for aiding and abetting liability under the ATCA is favorable from a policy standpoint. Intent is more difficult to prove than knowledge,[232] so the higher bar of intent may allow some unsavory defendants (corporate or individual) to escape justice. A standard of knowledge will also further corporate responsibility. Multinational corporations will be more reluctant to deal with questionable regimes if they are aware that their knowledge of the use of their goods and services for human rights abuses will create liability.[233]

Additionally, if knowledge is a sufficient standard for criminal aiding and abetting liability at international law, then it should not be problematic for civil liability under the ATCA. Criminal conviction carries with it stigmatization and jail time. If the criminal standard is knowledge, then why should the civil liability standard, the consequences of which are usually just damages (and admittedly, also costly bad publicity for corporations), be any higher?

CONCLUSION

While Judges Katzmann and Hall looked to different sources for the standard for aiding and abetting liability under the ATCA, those sources essentially reach the same conclusions. Thus, Judge Sprizzo's dilemma on remand seems to be a mirage. While the Rome Statute attaches a purpose requirement to aiding and abetting, it has been viewed as a deviation from custom. In fact, other valid sources of customary international law, including the Nuremburg Tribunals and the ICTY and ICTR, indicate that knowledge is the prevalent mens rea for aiding and abetting liability in international law. This is consistent with the Supreme Court's guidance in *Sosa* as well as the Second Circuit's interpretation of customary international law. Knowledge is also the same standard embraced by the common law of torts. A standard of knowledge, a lower standard of proof than purpose, would further, rather than frustrate, the goals of corporate responsibility and justice for

[232] This Note does not seek to empirically prove this point, but presumably, a defendant's knowledge of a set of circumstances is easier to prove than her purpose in her conduct.

[233] *See generally* Willam A. Schabas, *supra* note 206. For an example for corporate weariness of such liability, see Maurice Nyberg, *At Risk for Complicity with Crime*, FINANCIAL TIMES, July 27, 1998. This article was published shortly after adoption of the Rome Statute, decrying corporate exposure for suit as a result of the Rome Statute. *See generally* Willam A. Schabas, *supra* note 206, for further discussion of this article. If there was corporate concern over the purpose standard of the Rome Statute, that concern would presumably be the same or greater with respect to a knowledge standard.

human rights violations.