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FROM RIGHTS TO REMEDIES: THE ALIEN TORT CLAIMS ACT, *SOSA V. ALVAREZ-MACHAIN* AND THE STATE ACTION REQUIREMENT*

*Michael Giuseppe Congiu***

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INTRODUCTION

First enacted in 1789 as part of the Federal Judiciary Act,[1] the Alien Tort Claims Act (ATCA) provides original jurisdiction to the federal district courts for any civil action (1) brought by an alien, (2) claiming damages sounding only in tort, (3) resulting from a violation of international law.[2] This peculiar statute lay dormant until twenty years ago when two Paraguayan nationals successfully utilized it to sue a former Paraguayan official for the torture and extrajudicial killing of their son in Paraguay.[3]

Since that time, other similar cases have been brought against foreign officials alleging war crimes such

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[1] Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
[2] Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1996).
[3] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

as genocide, murder, and other crimes against humanity with varying success.[4] The increased use of the ATCA, however, has not come without controversy. Specifically, there has been much debate as to whether the statute provides for a federal private right of action, or whether the statute merely grants jurisdiction.[5] As a corollary, it has also been debated that if the ATCA does provide for a private right of action, it does so only for those actions contemplated at the time of the statute's promulgation. This would limit the statute's application to piracy, offenses against foreign ambassadors, and violations of safe conducts.[6]

In June 2004, the United States Supreme Court in *Sosa v. Alvarez-Machain* held that the ATCA does provide a statutory right of action for aliens beyond those originally contemplated in 1789.[7] Specifically, the Court held that actionable violations under the ATCA must "rest on a norm of international character accepted by the civilized world," and must be "defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[8] In other words, to state a claim under the ATCA after *Sosa*, such a claim must be consistent with the

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[4] *See Kadic*, 70 F.3d 232; Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984); Flores v. S. Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003).

[5] *See Tel-Oren*, 726 F.2d at 780 ("Judge Bork . . . reasons as follows: (a) international law grants plaintiffs no express right to sue in a municipal court; (b) for numerous reasons, primarily related to separation of powers, it would be inappropriate to imply one; (c) since Section 1350 requires that international law give plaintiffs a cause of action, and it does not, we cannot find jurisdiction . . . In [Judge Edwards] view, the first two steps in the analysis are irrelevant and the third step is erroneous.")

[6] *See infra* notes 56-58 and accompanying text.

[7] *Sosa*, 542 U.S. at 724.

[8] *Id.*

content and international recognition of eighteenth century norms prohibiting piracy.[9] Significantly, the *Sosa* Court expressly left open the question of private liability under the ATCA.[10]

Hence, the issue of private liability, and thus corporate liability, remains almost completely unresolved. In most cases, a litigant may use the ATCA only when implicating some measure of state conduct.[11] However, certain acts, such as genocide, war crimes, slavery, and forced labor, may be alleged against private actors because their commission provokes a "universal concern" regardless of the perpetrator.[12] Such conduct has been held actionable under the ATCA absent state action because it violates a set of international law standards known as *jus cogens* norms.[13] These norms are defined as: "[a] mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted."[14] Thus, the *jus cogens* norms contemplate the existence of certain human rights that transcend state sovereignty and supersede positive law instruments.[15]

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[9] *Id.*

[10] *Id.* at 733 n.20.

[11] *See Tel-Oren,* 726 F.2d at 795.

[12] *See Kadic,* 70 F.3d at 239-41.

[13] *See* Doe I v. Unocal Corp., 395 F.3d 932, 954 (9th Cir. 2002), *reh'g granted,* 395 F.3d 978 (9th Cir. 2003), *vacated,* 403 F.3d 708 (9th Cir. 2005) (vacating district court opinion after granting parties' stipulated motion to dismiss); *Kadic,* 70 F.3d at 239.

[14] BLACK'S LAW DICTIONARY (8th ed. 2004).

[15] *See* 1 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 40 (2d ed. 1999) ("a *jus cogens* norm holds the highest hierarchical position among all other norms and principles. As a consequence of that standing, *jus cogens* norms are deemed to be 'peremptory' and 'non-derogable.' ").

Under the state action requirement, claims brought under the ATCA against private individuals, like corporations, have been subject to an even higher standard of scrutiny than those brought against state actors.[16] However, absent a showing that a private actor has violated a *jus cogens* norm, the state action requirement can be circumvented by a showing that a lesser violation occurred in furtherance of genocide, war crimes, or forced labor.[17] For example, in 2002, the Ninth Circuit Court of Appeals held that state action was not required to implicate oil giant Unocal for torture, rape and murder, because these events occurred in furtherance of a forced labor program in connection with a Unocal-built pipeline.[18] Although the state action requirement has been somewhat emasculated by the Ninth Circuit's approach, it continues to be a significant hurdle to stating an ATCA claim. As will be discussed further below, the state action requirement does not serve any legitimate function in ATCA jurisprudence or under international law. Moreover, the requirement enables corporate entities to act outside of international legal norms without incurring any liability.

Part I of this Note addresses the background and development of ATCA jurisprudence leading up to the Supreme Court's decision in *Sosa*. Part I also briefly outlines the history of customary international law from 1789 to the present day in an effort to flesh out the shift in international law from a state's responsibilities to other

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[16] *Kadic*, 70 F.3d at 239-41; *Tel-Oren*, 726 F.2d at 795.

[17] *See Kadic*, 70 F.3d at 243-44; *Doe*, 395 F.3d at 946 (reasoning that forced labor is "a modern variant of slavery," therefore not requiring state action to create ATCA liability).

[18] *Doe*, 396 F.3d at 946 (holding that although there were genuine issues of material fact with respect to Unocal's aiding and abetting acts of murder and rape, the record did not "contain sufficient evidence to support Plaintiffs' claims of torture").

states, to responsibilities on actors public and private to maintain and promote individual human rights. Part II focuses exclusively on the *Sosa* decision, and Part III examines the validity of the state action requirement in light of the Supreme Court's silence on the issue in *Sosa*. Specifically, Part III addresses whether the state action requirement occupies a legitimate place in ATCA jurisprudence and international law given the current emphasis on individual human rights in customary international law. The requirement, which does not originate from the language of the ATCA but rather from federal common law, has been significantly eroded by Ninth and Second Circuit decisions allowing ATCA jurisdiction for violations committed by purely private actors.

This Note also addresses the similarities between modern-day private liability under the ATCA and the paradigm ATCA offense of piracy and concludes by discussing the implications of removing the state action requirement from ATCA jurisprudence. Thus, this Note attacks the validity of the state action requirement in ATCA jurisprudence and, by doing so, argues that the ATCA should have a greater role in policing transnational corporate conduct that infringes on human rights established under international law.

I. BACKGROUND OF THE ALIEN TORT CLAIMS ACT

In 1789, the first Congress of the United States passed the Federal Judiciary Act granting jurisdictional power to the newly created federal district courts.[19] What has come to be known as the Alien Tort Claims Act began as a portion of the Federal Judiciary Act stating that federal district courts "shall also have cognizance, concurrent with

[19] *Sosa*, 542 U.S. at 712.

the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[20]

The ATCA was drafted in part to address the Continental Congress' incapacity to handle incidents affecting diplomatic relationships.[21] The Framers contemplated that America's newfound independence brought with it the responsibility to embrace and enforce international legal norms as part of the American legal system.[22] Recognizing this duty, the first Congress understood that federal courts must be empowered to hear cases involving the violation of such international legal norms even where the victims were not American citizens.[23] The ATCA was intended to allow aliens access to federal courts to prevent any cause of action, if mishandled in state court, from developing into an international crisis.[24] The underlying presumption, of course, was that state courts might deny justice to aliens

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[20] 28 U.S.C. § 1350 (2000).

[21] *Sosa*, 542 U.S. at 715-16, ("The Continental Congress was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished'") (quoting J. MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed., 1893)).

[22] *Id.* at 714. ("'When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.'") (quoting Ware v. Hylton, 3 Dall. 199, 281 (1796)).

[23] *Id.* at 715. ("The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.").

[24] *Tel-Oren*, 726 F.2d at 783 (noting that under international law, "states are obliged to make civil courts of justice accessible for claims made by foreign subjects against individuals within the states territory" in order to avoid an "international confrontation").

thus necessitating the jurisdiction of the federal courts to hear such disputes regardless of the amount in controversy.[25]

According to William Blackstone, whose writings had a deep influence on the jurisprudential thought of the era, a very small subset of international legal norms existed that, when violated, provoked the diplomatic responsibilities of a nation-state to provide judicial recourse.[26] Those violations, as contemplated by the principle drafter of the ATCA, were violations "of safe conducts and passports," infractions upon the immunity of ambassadors and piracy.[27] In its current state, the ATCA reads in full: "[t]he district courts shall have 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."[28]

A. A Brief History of Customary International Law

The phrase "customary international law" simply refers to international law that arises from non-treaty sources.[29] The origins and original purpose of the ATCA reflect the statist nature of customary international law in 1789.[30] At that time, responsibilities under international

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[25] *Id.*

[26] *Sosa*, 542 U.S. at 715 (noting that there was a "sphere in which... rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships").

[27] *Id.* at 719. The *Sosa* Court realized that the apparent principle drafter of the ATCA, Oliver Ellsworth, "was attentive enough to the law of nations to recognize" Blackstone's three principle offenses.

[28] 28 U.S.C. § 1350.

[29] *Flores*, 343 F.3d at 143 (stating that the 'law of nations' is commonly referred to as international law and when limited to non-treaty law, is referred to as customary international law).

[30] *See generally* Louis B. Sohn, *The New International Law:*

law were principally based on a nation's relationship with other nations. During the era when the ATCA was drafted, nation-states were responsible under international law, in large part, for the conduct of their own citizens on the high seas, for providing equitable treatment for foreign citizens in their judicial system, and for providing reparations to foreign citizens harmed within their borders.[31] If citizen was harmed by a foreign government, the enforcement of his claim was within the complete control of his respective government.[32] In other words, individuals had no legal personality under international law.

In the wake of World War II and the punishment of war criminals in Nuremburg and Tokyo, the role of the individual under international law began to shift.[33] In an effort to ensure that the atrocities committed by Nazi Germany were not repeated, the international community began to codify rights and responsibilities under international law for both state and private actors.[34] Initially, the work of the Nuremburg International Military

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Protection of the Rights of Individuals Rather than States, 32 AM. U. L. REV. 1 (1982) (arguing that "individuals are no longer mere objects, mere pawns in the hands of the state").

[31] *Id.* at 2-5.

[32] *Id. See also* Ian Brownlie, *The Place of the Individual in International Law*, 50 VA.L.REV. 435, 436 (1964) (noting that the individual's place under international law at the end of the eighteenth century was one of "subjection").

[33] *Id.* at 9. *See also* Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 89 (1999) (stating "[a] prodigious body of customary human rights norms dating back several centuries reached a certain critical mass after World War II").

[34] *Id.* S*ee also Brownlie, supra* note 32, at 437 ("World War I, the spread of national aspirations, the Russian revolution, the crisis of fascism, and the planned destruction of four and a half million Jews gave impetus, each in its own way, to attempts to give increased protection to both individuals and oppressed communities").

Tribunal, which held individuals responsible for the state-sponsored holocaust, had a tremendous impact on the notion of private liability under international law.[35] Similarly, the U.N. Charter, which was drafted during this period, codified a set of natural law rights inalienable to all humans.[36] The U.N. Charter, as part of this "first generation of human rights," recognized the duty of the United Nations to preserve and promote certain fundamental freedoms consistent with our Constitution's guarantees to life and liberty.[37] The Covenant on Civil and Political Rights, also drafted in the wake of World War II, was designed to protect individuals from arbitrary actions committed on behalf of governmental and private entities.[38] Although the U.N. Charter, Covenant of Civil and Political Rights, and similar documents have been criticized as aspirational guidelines lacking enforcement mechanisms,[39] these documents and their progeny illustrate a significant shift in international law by providing international protection for individual human rights. These documents demonstrate an international consensus that certain

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[35] H. Knox Thames, *Forced Labor and Private Liability in U.S. Courts*, 9 MSU-DCL J. INT'L. L. 153, 188 (2000) (quoting Edward M. Wise, THE SIGNIFICANCE OF NUREMBURG, IN WAR CRIMES 59 (Belinda Cooper ed., TV Books 1999)) (noting the profound affect the Nuremburg Tribunals had on international law).

[36] *See generally* U.N. CHARTER.

[37] Sohn, *supra* note 30, at 17.

[38] *Id.* at 22.

[39] *Id.* at 12 (noting that the U.N. Charter, Universal Declaration of Human Rights, International Covenant on Economic, Civil and Political Rights, and the Covenant of Economic, Social, and Cultural Rights have been criticized as "soft-law" with no binding or practical effect). *See also* Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and American Multinational Enterprise*, 20 W. INT'L L. J 89 (2001) (discussing specifically the lack of successful enforcement mechanisms regulating the conduct of multinational corporations).

inalienable rights should have equal footing with rights created by positive law.[40]

This initial recognition of the significance of protecting individual human rights led to an even greater expansion of the rights recognized under international law.[41] In the last sixty years, the United Nations and other intergovernmental bodies have recognized economic, social, and cultural rights and imposed obligations on private actors to ensure and promote those rights.[42] More recently, the newest generation of human rights has centered on the collective rights of self-determination, peace, and development.[43] Thus, there exists an emerging international consensus that individuals should have the right to determine the direction and identity of their own states through their collective will. This newest generation indicates yet another expansion from the initial fundamental freedoms recognized by the U.N. Charter.[44] More importantly, this latest generation of rights places

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[40] Sohn, *supra* note 30, at 18. *See also* Jordan J. Paust, *The Other Side of Right: Private Duties under International Law*, 5 HARV. HUM. RTS. J. 51 (1992) (reasoning that various instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, recognize the rights and duties of private individuals under international law).

[41] *See generally* Sohn, *supra* note 30.

[42] The importance of the global preservation of human rights on the health of global peace and democracy was stressed in President Roosevelt's Four Freedoms Speech during a time that these rights were beginning to be recognized under international law. President Roosevelt emphasized that individual citizens' ability to determine their own cultural, political and economic destinies was vital to world peace and democracy. *See* Sohn, *supra* not 30, at 33 (referencing Franklin D. Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (1966)).

[43] *See* Sohn, *supra* note 30, at 48.

[44] *See infra* note 45.

individuals, through their shared will, at the very center of the rights and responsibilities recognized under international law.[45]

Although violations of many of the human rights now recognized under international law will not provoke the ATCA's jurisdiction, the shift in international law from the protection of state rights to individual rights places the ATCA's unearthing in its proper context. The *Filartiga* decision, described below, reflects this shift by referencing international law under the ATCA not as it existed in 1789, but rather as it has evolved and currently exists.[46] This recognition, although potentially undermined by the *Sosa* decision, strongly suggests that ATCA jurisprudence should follow the trend in international law of erasing the distinction between state and private actors.

B. The Unearthing of the ATCA

Often referred to as a "legal Lohengrin," much of the ATCA's elusive history is owed to the fact that the provision was utilized only once in the 170 years after its enactment.[47] As such, the ATCA's original purpose and applicability have not been assessed outside of the rather sparse amount of legislative and political history detailed above.

However, in 1979, a Paraguayan national brought suit in the Second Circuit under the ATCA seeking redress

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[45] Much scholarship concerning the right to self-determination has centered on the wake resulting from the dissolution of the former Republic of Yugoslavia. *See e.g.*, Antonio Cassese, *Self Determination of Peoples and the Recent Break-Up of USSR and Yugoslavia, in* ESSAYS IN HONOR OF WANG TIEYA 131 (Nijhoff, 1994).

[46] *Filartiga*, 630 F.2d at 881.

[47] *Sosa*, 542 U.S. at 712 ("for over 170 years after its enactment it provided jurisdiction in only one case").

for the torture and extrajudicial killing of his son in Paraguay.[48] In *Filartiga v. Pena-Irala,* a Paraguayan doctor and his wife living in the United States under political asylum brought suit against a high-ranking Paraguayan police inspector alleging that their son, Joelito, was kidnapped, tortured, and killed by Paraguayan officials in retaliation for his father's political activities.[49] Using the relevant sources of international law as defined by the Supreme Court,[50] the Second Circuit held that torture, perpetrated by a state actor, violated generally held norms of international law, thus warranting the exercise of federal jurisdiction under the ATCA.[51]

The success of the plaintiffs in *Filartiga* ignited a dispute in the federal judiciary as to whether the ATCA created a private right of action under "the law of nations," or rather, whether the statute merely provided jurisdiction to hear such disputes.[52] This dispute, although resolved by the Supreme Court in *Sosa,* is set out by the dialogue between Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic.*[53] In *Tel-Oren,* the survivors and representatives of persons murdered during a Palestine

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[48] *See Filartiga,* 630 F.2d 876.

[49] *Id.* at 878.

[50] *Id.* at 880 (noting that that the "law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by general usage and practice of nations; or by the judicial decisions recognizing and enforcing that law[,]") (quoting United States v. Smith, 18 U.S. 153, 160-61 (1820)).

[51] *Id.* at 885 ("[it is] clear that international law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject continuing refinement and elaboration, we hold that the right to be free from torture is now among them.")

[52] Courtney Shaw, *Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act,* 54 STAN. L. REV. 1359, 1365-1367 (2002). *See generally Tel-Oren,* 726 F.2d 774.

[53] *See Tel-Oren,* 726 F.2d at 780.

Liberation Organization ("PLO") attack on an Israeli bus brought suit in the District Court for the District of Columbia under the ATCA.[54] On appeal, the court of appeals, sitting as a three-judge panel, unanimously agreed that given the legitimacy that some acts of terrorism have under the laws of certain states,[55] terrorism cannot be considered to violate a universally accepted norm of international law. However, according to Judge Bork, who concurred in the decision, the issue of whether terrorism amounted to a violation of the law of nations was a needless analysis.[56] Instead, Judge Bork reasoned that the ATCA did not grant aliens the right to sue except for claims originally contemplated by Blackstone and the first Congress.[57] Judge Bork stated that absent legislative or executive guidance in the form of legislative history, modern treaty, or executive order, the judiciary should be powerless to hear disputes which implicate diplomatic relationships with foreign governments.[58]

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[54] *Id.* at 776.

[55] *Id.* at 795 (reasoning that U.N. documents reveal that "to some states acts of terrorism, in particular those with political motive, are legitimate acts of aggression and therefore immune from condemnation.").

[56] *Id.* at 801 ("[j]udge Edwards contends, and the Second Circuit in *Filartiga* assumed, that Congress' grant of jurisdiction also created a cause of action. That seems to me fundamentally wrong and certain to produce pernicious results. For reasons I will develop, it is essential that there be an explicit grant of a cause of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

[57] *Id.* at 813-14.

[58] *Id.* at 816 (reasoning that "unless a modern statute, treaty, or executive agreement provided a private cause of action for violations of new international norms which do not themselves contemplate private enforcement. Then, at least, we would have a current political judgment about the role appropriate for courts in an area of considerable international sensitivity.") .

According to Judge Edwards, who was writing for the majority, the legislative history, although sparse, indicated that the ATCA provided for a federal private right of action.[59] According to Edwards, the "law of nations" should not be considered as it existed in 1789, but rather as it exists in the modern context.[60] Using *Filartiga,* Judge Edwards reasoned that the ATCA provides for a private right of action for violations of internationally held norms that are definable, obligatory, and universal.[61]

C. The State Action Requirement

The *Tel-Oren* court was also the first court to address the liability of a non-state actor under the ATCA.[62] As such, the state action requirement originated in the *Tel-Oren* decision.[63] The court began its analysis by holding that private, rather than state, liability was at issue because the PLO was not recognized by the United States as a

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[59] *See Tel-Oren*, 726 F.2d at 782 (stating "[t]here is evidence . . . that the intent of the [ATCA] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.").

[60] *Id.* at 781(stating that persons maybe liable under the ATCA if they commit "*either* a crime traditionally warranting universal jurisdiction *or* an offense that comparably violates current norms of international law").

[61] *Id.* ("The point is simply that commentators have begun to identify a handful of heinous actions—each of which violates definable, universal and obligatory norms (citations omitted)—and in the process are defining the limits of section 1350's reach.").

[62] Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms* 15 HARV. HUM. RTS. J. 183, 198 (2002) (reasoning that although the state action requirement originated in *Filartiga*, the doctrine was not developed until *Tel-Oren* because "the court in *Filartiga* was not presented with the need to develop an ATCA-specific state action analysis because the defendant was a former agent of the government of Paraguay, and was unquestionably a state actor").

[63] *See generally id.*

sovereign state.[64] Although the court noted that the language of the ATCA did not distinguish between state and private actors, the court refused to endorse individual responsibility for torture under the ATCA because "established international law" suggested that states, rather than private actors, had historically incurred responsibility under international law.[65] Although the *Tel-Oren* court recognized that the liability of private actors under international law was hardly settled,[66] the court still saw fit to distinguish *Filartiga* because the torture at issue in that case was perpetrated by a state actor.[67] This distinction drawn by the *Tel-Oren* court created the common law requirement of state action that continues to preclude a significant number of ATCA cases because, in the estimation of Judge Edwards, the relevant scholarship failed to indicate an entrenched consensus allowing for individual responsibility under international law.[68] This inauspicious inception of the state action requirement is significant given that this requirement finds absolutely no basis in the statutory text of the ATCA.[69]

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[64] *Tel-Oren*, 726 F.2d at 791.

[65] *Id.* at 792, n.22 (noting that "classical international law was predominantly statist" and thus that "[n]on-state actors could assert their rights against another state only to the extent that their own state adopted their claims") (quoting J. BRIERLY, THE LAW OF NATIONS 1 (6th ed. 1963)) (emphasis added).

[66] *Id.* at 794 (noting, significantly, that the status of individual liability under international law has been "in flux" since the ATCA was drafted and that there was not a current scholarly consensus on the issue).

[67] *Id.* at 795 (reasoning that torture is not one of the "handful of crimes to which the law of nations attributes individual responsibility.").

[68] *Id.* at 794 (noting "that for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go").

[69] 28 U.S.C. § 1350. It is also significant to note that Judge

In 1996, the Second Circuit Court of Appeals expanded the scope of actionable violations for non-state actors under the ATCA.[70] In *Kadic v. Karadzic*,[71] Croat and Muslim citizens of Bosnia-Herzegovina brought claims under the ATCA and the Torture Victim Protection Act alleging that they were subject to violations of international law including genocide, war crimes, torture, and summary execution committed by the former president of a self-proclaimed and unrecognized Bosnian-Serb Republic.[72] Unlike *Tel-Oren*, the *Kadic* court reasoned that a foreign state need not be formally recognized by other states to be liable under the ATCA provided that the entity had the capacity to deal diplomatically with other states.[73] The *Kadic* court further refined the state action requirement by recognizing that private parties acting in concert with foreign states also incur legal responsibility under the ATCA.[74] Although the court ultimately held that the violations at issue met the state action requirement, the *Kadic* court explicitly noted that the law of nations embraces non-state actors.[75] Accordingly, the court held

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Edwards in *Tel-Oren* concluded by stating that "the trend in international law is toward a more expansive allocation of rights and obligations to entities other than states." *Tel-Oren*, 726 F.2d at 795.

[70] *See Kadic*, 70 F.3d 232.

[71] *Id.*

[72] *Id.* at 236-37.

[73] *Id.* at 245. ("It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of an unrecognized regime from liability for those norms that apply only to state actors.").

[74] A significant and uncertain component of ATCA litigation surrounds the use of 42 U.S.C. § 1983 to construe "color of law" in terms of the domestic rubrics of actual or apparent agency. *See* Collingsworth, *supra* note 62, at 198.

[75] *Kadic*, 70 F.3d at 239. ("We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of

that the commission of genocide, slavery, war crimes, and piracy all provoke the jurisdiction of the ATCA regardless of the actor.[76]

D. ATCA Suits Against Corporate Defendants and the State Action Requirement

Consistent with the current state of international law, in recent years, the ATCA has become a tool used by human rights and environmental groups to police the activities of multinational corporations.[77] For example, in

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nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

[76] *Id.* at 240. The *Kadic* decision also recognized and dealt with the issue of the justiciability of disputes under the ATCA. The *Kadic* court acknowledged that the adjudication of suits implicates a greater question of the judiciary's role in judging the conduct of foreign nations that may lead to diplomatic difficulties. The court rejected that any case involving foreign relations was nonjusticiable and instead reasoned that if the state action at issue could not be characterized under the American legal rubrics of "political question" or "act of state," the conduct may properly provide for a justiciable dispute under the ATCA. The inherent diplomatic consequences that flow from ATCA cases continues to be a great source of political and legal dispute. *Id.* at 248-251. *See infra*, notes 207-209 and accompanying text.

[77] In addition to the cases discussed in the text, several other ATCA cases involving corporate defendants are worth mentioning. For example, in *Aquinda v. Texaco Inc.*, 303 F.3d 470 (2d Cir. 2002), 30,000 Ecuadorians and 25,000 Peruvians filed suit against Texaco alleging that the corporation's oil activities in their respective countries polluted rain forests and rivers. The Second Circuit Court of Appeals dismissed the suit based on *forum non conveniens*. *See also* Abdullahi v. Pfizer, 2003 U.S.App.Lexis 20704 (2d Cir., Oct 8, 2003) (unpublished) (vacating a dismissal of a suit brought by plaintiffs alleging that Pfizer conducted an unethical pharmaceutical trial on Nigerian Children and remanding to district court to ascertain whether Nigerian courts can provide a sufficiently trustworthy alternate forum). Also, in *Estate of Rodriguez v. Drummond Oil Co. Inc.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003), the court held that the plaintiffs' suit

Wiwa v. Royal Dutch Shell Petroleum Co.,[78] Nigerian émigrés brought suit against two foreign holding companies alleging that they participated in human rights abuses against the plaintiffs as reprisal for their opposition to the company's oil exploration in Nigeria.[79] The plaintiffs alleged that the defendant companies recruited, planned, instigated, and funded Nigerian military attacks on local villages and the torture of the plaintiffs because of their opposition to the defendants' activities on their land.[80] Currently, the defendants' liability for summary execution, crimes against humanity, torture, and other crimes is still pending after having survived a motion to dismiss in federal district court.[81] However, in reviewing that motion, the court carefully noted that the plaintiffs had to demonstrate that the foregoing claims arose from state action before proceeding under the ATCA.[82]

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alleging that Columbian paramilitaries acting at the behest of an Alabama mining corporation killed their union leaders sufficiently stated an ATCA claim for extrajudicial killing as well as for "the denial of the fundamental rights to associate and organize." *See also* Sinaltrainal v. Coca-Cola, No. 01-3208 (S.D. Fla., filed July 20, 2001) (allowing ATCA claims against a Columbian Coca-Cola bottling company for anti-union murder and torture committed by Columbian paramilitaries). Finally, in *Doe v. Gap, Inc.*, Civ. No. 99-329 (filed C.D. Cal. Jan. 13, 1999), Saipan residents and garment workers unsuccessfully alleged ATCA claims for debt peonage and slavery against The Gap and other retailers. The foregoing is merely a taste of the ATCA cases filed against corporate defendants in recent years.

[78] Wiwa v. Royal Dutch Petroleum Co. and Shell Transp. and Trading Co., PLC, No. 96 CIV. 8386 (KMW), 2002 WL 319887 *2 (S.D.N.Y. 2002).

[79] *Wiwa*, 2002 WL 319887.

[80] *Id.* at *2.

[81] *Id.* at *12.

[82] *Id.* at *12-13. An earlier disposition of the *Wiwa* case serves to illustrate the related issue of *forum non conveniens* in ATCA litigation. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). Some courts have expressed a preference to adjudicate

Corporate defendants have also been implicated for environmental pollution.[83] In *Flores v. Southern Peru Mining Corporation*, Peruvian residents brought claims under the ATCA against an American mining company alleging that the company's operations caused them serious ailments.[84] In so doing, the plaintiffs alleged that the defendant mining company had violated their internationally recognized rights to health, life, and sustainable development, thus warranting the jurisdiction of American courts under the ATCA.[85] The *Flores* court, using the *Filartiga* decision as well as other sources of international law, decided that the rights to life and health were insufficiently definite to constitute a violation of customary international law.[86] With specific respect to the plaintiffs' allegations that pollution constituted an actionable claim under the ATCA, the court held that because the pollution at issue was confined to Peru, and thus not international in scope, such pollution did not embody an actionable claim because relevant sources of international law did not indicate that intranational pollution constituted a violation of the law of nations.[87]

ATCA cases in American courts. *See* Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1175 (C.D. Cal. 2002). In contrast, the doctrine has been successfully invoked when a claim is based on wholly foreign conduct committed by aliens and where the defendant shows that relevant *forum non conveniens* factors weigh strongly in favor of the foreign forum. *Wiwa*, 226 F.3d at 106.

[83] *Flores*, 343 F.3d 140.

[84] *Id.* at 143.

[85] *Id.*

[86] *Id.* at 161 (reasoning that the principles inherent to the right to life, health and sustainable development are "boundless and indeterminate").

[87] *Id.* at 161-62 ("Although customary international law does not protect a right to life or right to health, plaintiffs' complaint may be construed to assert a claim under a more narrowly-defined customary international law rule against *intra* national pollution. However, the voluminous documents and affidavits of international law scholars

Accordingly, the *Flores* court never reached the issue of state action.

To date, the most pervasive and significant case involving the extent of corporate liability for human rights abuses under the ATCA is *John Doe I v. Unocal Corp.*[88] In that case, Myanmar villagers brought suit against oil giant and California corporation Unocal for its alleged complicity and involvement in human rights abuses occurring in the vicinity of a Unocal-owned pipeline project in Myanmar.[89] The villagers brought suit under the ATCA, as well as the Racketeer Influenced and Corrupt Organizations Act ("RICO"), alleging that a Unocal subsidiary hired and directed the Myanmar military and complied with its use of forced labor, murder, rape, and torture in connection with Unocal's pipeline project.[90]

The threshold issue in *Doe*, as in any case brought under the ATCA, was whether the plaintiffs had sufficiently alleged a violation of the law of nations.[91] The Ninth Circuit Court of Appeals held that the claim of forced labor, as a modern variant of slavery, was a violation that warranted liability under the ATCA regardless of the existence of state action.[92] In addition to recognizing a new violation of international law not subject to the state action requirement, the *Doe* court held that the plaintiffs'

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submitted by plaintiffs fail to demonstrate the existence of any such norm under international law.").

[88] *See Doe*, 395 F.3d 932.

[89] *Id.* at 936.

[90] *Id.*

[91] *Id.* at 945.

[92] *Id.* at 946, (quoting *Tel-Oren*, 726 F.2d at 794-95 (reasoning that because courts have traditionally included forced labor within the definition of slavery, "forced labor, like traditional variants of slave trading, is among the 'handful of crimes... to which the law of nations attributes individual liability.'")

allegations of torture, rape, and murder were actionable under the ATCA without the requirement of state action because they occurred "in furtherance of" a forced labor program.[93] Accordingly, the Ninth Circuit Court of Appeals held that genuine issues of material fact existed with respect to the plaintiffs' allegations of forced labor, murder, and rape, and the case was remanded to the district court.[94]

The *Doe* court also saw fit to prescribe a standard for the district court to assess Unocal's conduct.[95] Unocal's conduct, like most corporate involvement in human rights abuses, was indirect and of a third-party nature. Thus, the Ninth Circuit was required to determine whether the district court should evaluate Unocal's conduct on remand under the recently created International Criminal Court standard of "aiding and abetting," or employ a domestic third-party liability standard such as joint enterprise or agency liability.[96] Using the Second Restatement of the Conflict of Laws, the *Doe* court adopted the international criminal law standard of "aiding and abetting" because of the proceeding's international scope and the existence of a

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[93] *Id.* at 954 (The *Doe* court cited *Kadic* for the proposition that "like other crimes, [murder, rape and torture] are 'proscribed by international law only when committed by state actors or under color of law' to the extent that they were committed in isolation.") (quoting Kadic, 70 F.3d at 243-44).

[94] *Doe*, 395 F.3d at 962-63. The court held that the "record did not contain sufficient evidence to support the Plaintiffs' claims of torture." *Id.* at 956

[95] *Id.* at 946.

[96] *Id.* There is currently a circuit split with regard to this second issue. Some courts, like the Ninth Circuit Court of Appeals, have utilized various international law standards while others have employed domestic substantive tort law. *See* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 105 n.12 (2d Cir. 2000). *See Doe*, 395 F.3d at 963-978 (Reinhardt, S., concurring) (discussing the relative benefits of using a domestic tort law standard).

similar standard dating back to the Nuremburg trials.[97] Accordingly, the Ninth Circuit endorsed the following standard: "aiding and abetting liability for knowing, practical assistance or encouragement which has a substantial effect on the perpetuation of a crime."[98] Although the standard on which corporate actors will be judged is especially significant to their ultimate liability and the issues of this Note, a full discussion is well beyond its scope. Significantly, although *Doe* was approved for rehearing[99] in light of the United States Supreme Court decision in *Sosa v. Alvarez-Machain*, discussed below, the parties privately settled prior to the case's rehearing.

II. THE SOSA V. ALVAREZ-MACHAIN DECISION

A. The Facts

In 1985, an agent of the Drug Enforcement Agency ("DEA") was captured, detained, tortured, and ultimately murdered while on assignment in Mexico.[100] The DEA, acting on eyewitness testimony, hired Mexican nationals to abduct Mexican doctor Humberto Alvarez-Machain ("Machain") who was thought to have prolonged the life of the DEA agent so as to extend his interrogation and torture.[101] Machain was abducted, held overnight, and

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[97] *Doe*, 395 F.3d.at 949. The court reasoned that applying an international law was favorable for three reasons: (1) using the Restatement (Second) of Conflict of Laws § 6 (1969), the court reasoned that an international standard better "served the needs of an international system; (2) international law must be considered to correctly ascertain the relevant policies of the forum; and (3) using the international law standard created a greater sense of predictability and certainty. *Id.*

[98] *Id.* at 951.

[99] *Id* at 978.

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

[101] *Id.*

subsequently brought by private plane to El Paso, Texas, where he was arrested by federal officers.[102] After being acquitted in federal district court, Machain filed a civil claim against the United States under the Federal Tort Claims Act and against Mexican national Jose Francisco Sosa under the ATCA.[103] The district court granted summary judgment in favor of Machain on his ATCA claims, reasoning that arbitrary arrest and detention were violations of clear and universally recognized norms of international law.[104] The Ninth Circuit Court of Appeals affirmed, and the Supreme Court granted certiorari to clarify the scope of the ATCA.[105]

B. The Supreme Court's Analysis

The Supreme Court began by exploring the scant legislative history surrounding the ATCA.[106] In so doing, the Court concluded that the first Congress did not intend for the ATCA to exist as a mere jurisdictional convenience for future legislatures to create private rights of action under its jurisdictional grant.[107] Although the statute is jurisdictional in nature, the Court opined that the ATCA was intended to be given practical effect the moment it was enacted and concluded that the statute provided for a private right of action.[108] However, the Court could not

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[102] *Id.* at 698.

[103] *Id.* Machain also initially filed civil claims against a DEA operative, four DEA agents, and five unnamed Mexican civilians. *Id.*

[104] *Id.* at 699.

[105] *Id.*

[106] *Sosa*, 542 U.S. at 714-19.

[107] *Id.* at 720 (noting that although the ATCA's legislative history is unclear, such history does support that the statute was intended to provide a right of action "for a relatively modest set" of claims).

[108] *Id.* at 719 (stating "[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience

find any historical indication that Congress contemplated causes of action beyond Blackstone's three primary offenses: violation of safe conducts, infringements on the rights of ambassadors, and piracy.[109] The Court also implicitly adopted the reasoning of *Filartiga* and its progeny by interpreting the "law of nations" in the modern context but qualified the endorsement by requiring any claim arising from modern international law to be consistent with the universality and specificity of the paradigms that characterized eighteenth-century ATCA claims.[110] Specifically, in order to state a claim under the ATCA after *Sosa*, such a claim "must have content as definite as, and an acceptance as widespread as, those characterized by the 18th century norms prohibiting piracy." [111] Applying this standard, the Court agreed that the illegal custody of Machain, which lasted less than one day, did not violate any universally accepted norms of international law.[112]

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to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.").

[109] *Id.* at 724.

[110] *Id.* at 725.

[111] *Id.* at 760. Justice Breyer continued his summation of the majority's holding as follows: "the norm must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue ... Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field ... The Court also suggests that principles of exhaustion might apply and that courts should give 'serious weight' to the Executive Branch's view of the impact on foreign policy that the ATS suit will likely have in a given case or type of case."

[112] *Sosa*, 542 U.S. at 738. ("It is enough to hold that a single illegal detention of less than a day followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation

The Court had several reasons for qualifying what constituted a cause of action under the ATCA.[113] First, the Court stated that because the creation of claims under the ATCA will result in the creation of new, uniquely federal common law, such decisions should be made with caution considering the manner in which the understanding and role of federal common law has changed since 1789.[114] Second, the Court also noted that its decision seemingly derogated Court precedent emphasizing Congress' role in the creation of new causes of action.[115] Third, responding to concerns expressed by Justice Scalia in his concurring opinion, the *Sosa* Court instructed lower courts to be wary of the potential foreign policy ramifications underlying their decision to create new causes of action under the ATCA.[116] The Court was also careful to indicate the consequences

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of a federal remedy.").

[113] *Id.* at 725-31.

[114] *Id.* at 725. (The Court noted that when the ATCA was drafted, the common law was seen as a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute") (quoting Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928)) (Holmes, J., dissenting). The Court reasoned that the modern conception that the common law is made, rather than found or discovered, militated towards exercising restraint in creating new causes of action under the ATCA. *Id.* The Court also stated that the changing conception of the role of the federal courts in making common law also justified caution with respect to creating causes action under the ATCA. *Id.* at 726 (citing Eerie R. Co v. Tompkins, 304 U.S. 64 (1938)).

[115] *Id.* at 727 ("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.")

[116] *Id* ("It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.").

that its decision would have on foreign relations, as well as the relationship between the judiciary and the other branches of government.[117] As a whole, the *Sosa* Court used the statute's history and current role in modern jurisprudence to justify giving teeth to the ATCA and attempted to narrow the potential adverse consequences of their decision by narrowly drawing the ATCA's scope.[118]

Significantly, the *Sosa* decision left open the question of private liability. The Ninth Circuit held that private individuals, acting in conjunction with United States officials, could have incurred ATCA liability for submitting Machain to arbitrary arrest and detention.[119] However, the Supreme Court failed to address that part of the lower court's opinion. Instead, in a footnote, the *Sosa* Court indicated that the spectrum of the debate currently existed with *Tel-Oren* at one end and *Kadic* at the other.[120] As noted above, the *Tel-Oren* court decided in 1984 that insufficient consensus within customary international law prohibited a private actor's liability for torture.[121] However, in 1995, the *Kadic* court held that there was

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[117] *See id.*

[118] *Sosa*, 542 U.S. 692 ("[w]hereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.")

[119] Alvarez-Machain v. Sosa, 331 F.3d 604, 621 (9th Cir. 2003) (holding that norms prohibiting arbitrary arrest and detention are "codified in every major comprehensive human rights instrument and . . . reflected in at least 119 national constitutions.")

[120] *Sosa*, 542 U.S. at 732 n.20 ("[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.")

[121] *Tel-Oren*, 726 F.2d at 791-95.

sufficient consensus to hold both private and state actors liable for acts of genocide or war crimes under the ATCA.[122] Consequently, the issue of private liability, and thus corporate liability, remains unanswered.

III. THE VALIDITY OF THE STATE ACTION REQUIREMENT IN ATCA JURISPRUDENCE AFTER *SOSA*

Having resolved the issue of whether the ATCA creates a private right of action, the *Sosa* decision left lower courts to deal with two separate, equally complex issues.[123] First, as a threshold issue, courts must decide whether the plaintiff has alleged a violation of a universally accepted norm of international law. Second, assuming that the plaintiff has alleged a violation committed by a non-state actor, the question arises as to whether the state action requirement precludes jurisdiction under the ATCA. The Supreme Court's silence on this issue gives occasion to discuss the legitimacy of the state action requirement. As will be discussed further below, the state action requirement lacks legitimacy when analyzed in ATCA jurisprudence and in the greater context of international law. This analysis begins by addressing the language of the ATCA as well as other statutes with extraterritorial application, and continues by discussing the requirement's erosion at common law. Further, because modern international law emphasizes the rights and duties of private parties, the state action requirement appears curious and outdated. Finally, this Note draws parallels between multinational corporate conduct and the paradigm ATCA

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[122] *Kadic*, 70 F.3d at 239-41.

[123] These two issues are, of course, notwithstanding other related issues discussed in above notes including political question and act of state, addressed in *Kadic*, *supra* note 76; *forum non conveniens* addressed in *Wiwa*, *supra* note 82; and the correct third party standard of liability addressed in *Doe*, *supra* note 97.

offense of piracy, and argues against some of the negative consequences that may result from expanding the ATCA's scope. There is no principled reason for continuing to insulate private entities under the language of the ATCA or international law. Removing the state action requirement would properly empower the statute to more comprehensively regulate transnational corporate conduct.

A. The Language of the ATCA and Similar Statutes

The language of the ATCA does not distinguish between state and private actors.[124] As stated above, the state action requirement is the product of federal common law arising from the *Filartiga* and *Tel-Oren* decisions.[125] Additionally, ATCA jurisprudence has adopted the "color of law" analysis developed to address violations of civil rights under 28 U.S.C. §1983 in order to assess whether non-state actors acted at the behest of, or in concert with, foreign governments.[126] The presumption that the ATCA is meant only to address state action is belied by the fact that Congress adopted §1983 to protect individual rights arising under Constitutional provisions addressing solely official conduct.

Likewise, other federal statutes with extraterritorial application do not require a state action trigger.[127] For example, RICO, which has been utilized in conjunction

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[124] 28 U.S.C. §1350. Although the Torture Victims Protection Act, added to original language of the ATCA, requires official action, the provision was added by Congress as an endorsement of the *Filartiga* decision and has been explicitly held inapplicable to the language of the ATCA. *Kadic*, 70 F.3d at 241.

[125] *See Filartiga*, 630 F.2d 876; *Tel-Oren*, 726 F.2d 774; Collingsworth, *supra* note 62 and accompanying text.

[126] *Kadic*, 70 F.3d at 245.

[127] *See infra* notes 129-130 and accompanying text.

with the ATCA on occassion,[128] applies extraterritorially and does not limit its enforcement solely to state actors.[129] Additionally, Title VII of the Civil Rights Act of 1964 applies to discrimination suffered by U.S. citizens committed by domestic and foreign corporations abroad.[130] Further, limiting the ATCA solely to official conduct seemingly derogates the well-settled purpose of the Foreign Sovereign Immunities Act as "the 'sole basis' of obtaining jurisdiction over a foreign sovereign in the United States."[131]

The Trafficking Victims Protection Act ("TVPA") offers the clearest and most analogous example of a statute with extraterritorial application that is not limited to state action. Approximately 900,000 people, the vast majority women and children, are trafficked across international borders for the purposes of sexual exploitation, involuntary servitude, peonage, or slavery.[132] Although trafficking has existed for some time, identifying and remedying the problem has only recently risen to the forefront of the political, legal, and diplomatic consciousness of the international community.[133] In 2000, Congress passed the

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[128] *See Doe*, 395 F.3d 932.

[129] 18 U.S.C. §1962 (2000).

[130] The 42 U.S.C. § 2000e(f) (2000) ("The term 'employee' means an individual employed by an employer ... [w]ith respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.")

[131] Republic of Argentina v. Weltover, 504 U.S. 607, 611 (1992) (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-439 (1989)); *See* 28 U.S.C. § 1602 (2000).

[132] U.S. Dept. of State, Trafficking Victims Protection Act of 2000: Trafficking in Persons Report at 7 (2003).

[133] *See generally* Therese Barone, *The Trafficking Victims Protection Act of 2000: Defining the Problem and Creating a Solution*, 17 TEMP. INT'L & COMP.L. J. 579 (2003) (discussing the punishment, protection and prevention aspects of the TVPA); Elizabeth F. Defeis, *Protocol to Prevent, Suppress and Punish Trafficking in Persons—A*

TVPA, which provides a comprehensive approach designed to protect victims of trafficking in the United States and prosecute individuals involved in trafficking.[134] The TVPA was also drafted to prevent trafficking by imposing sanctions upon governments who refuse to comply with the act's "minimum standards for the elimination of trafficking."[135] Notably, the ability to sanction governments failing to follow the statute's mandates makes the TVPA unique and unprecedented among human rights statutes, thus indicating how serious the United States Government has become about stamping out this pervasive and reticulated international problem.[136]

In addition to sanctioning sovereign states for their failure to comply with the act's "minimum standards for the elimination of trafficking,"[137] the TVPA specifically empowers the executive branch to punish private individuals engaged in severe forms of trafficking in persons.[138] The U.N. has recognized and attempted to

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New Approach, 10 ILSA J. INT'L & COMP. L. 485, 491 (2004) (noting that "trafficking in persons has finally gained the attention of the world community").

[134] *See* 22 U.S.C. § 7101 (2000 & Supp. III 2003); Trafficking in Persons Report, *supra* note 132 at 16.

[135] 22 U.S.C. § 7106 (2000 & Supp. III 2003) (setting out the "minimum standards for the elimination of trafficking").

[136] Speaker, Conference of Combating Trafficking in the US, Canada and Mexico at the Chicago-Kent College of Law (Oct. 14, 2004).

[137] 22 U.S.C. § 7107(a) (2000)(amended 2003) ("It is the policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that—(1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards").

[138] "The President may exercise the authorities set forth in section 1702 of Title 50 without regard to section 1701 of Title 50 in the case of any of the following persons:

address the problem of trafficking since 1951.[139] Most recently, the U.N. Convention Against Transnational Organized Crime drafted a protocol against trafficking in 2000.[140] Although the TVPA only addresses "severe forms of trafficking," the Palermo Protocol, as it is often referred to, defines trafficking with the requirement that it be carried out with the use of threat, fraud, or coercion.[141] "out" was deleted b/c the protocol does define trafficking specifically referring to threat, fraud and coercion

The international crime of trafficking, which is cognizable under international law when undertaken or facilitated by sovereign states[142] and private individuals,[143] is closely analogous to ATCA claims alleging forced labor and debt bondage. Although trafficking, like forced labor, may embody a violation of a *jus cogens* norm that circumvents the reach of the state action requirement, the law in this area is anything but settled. The TVPA, which

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(A) Any foreign person that plays a significant role in a severe form of trafficking in persons, directly or indirectly in the United States.
(B) Foreign persons that materially assist in, or provide financial or technological support for or to, or provide goods or services in support of, activities of a significant foreign trafficker in persons identified pursuant to subparagraph (A).
(C) Foreign persons that are owned, controlled, or directed by, or acting for or on behalf of, a significant foreign trafficker identified pursuant to subparagraph (A)." 22 USC § 7108(a)(1)(2000).

[139] Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, July 25, 1951, 96 U.N.T.S. 271.

[140] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, November 15, 2000, 40 I.L.M. 377.

[141] *Id.* at 378 (stating that trafficking may be undertaken by the use of "deception . . . abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person").

[142] 22 U.S.C. § 7107(a).

[143] 22 U.S.C. § 7108 (a).

addresses individual human rights abuses like the ATCA, is free of any common law vagaries like the state action requirement.[144] Given the international scope and application of the TVPA, as well as the extensive diplomatic implications that would result when foreign states refuse to comply with its mandates, the TVPA should be viewed as a congressional recognition of the United States' important role in international law to defend and promote individual human rights regardless of state action. When viewed in this light, and given international law's current emphasis on individual human rights, requiring state action under the ATCA appears iniquitous when the statute fails to distinguish between state and private actors

A. The Erosion of the State Action Requirement at Common Law

Although the state action requirement finds no basis in the language of the ATCA, the requirement continues to be a large hurdle in bringing actions under the ATCA when private actors commit or are complicit in committing actions violating the law of nations. However, recent approaches taken by the *Doe* and *Kadic* courts seriously undermine the significance of the requirement at common law and further highlight the requirement's illegitimacy.[145]

ATCA defendants have argued that the statute provides recourse for claims only against governments and not private parties.[146] However, the current approach is that a limited number of claims are actionable whether they allege conduct on behalf of a private or governmental

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[144] *See* 22 U.S.C. 7101.

[145] *See Doe*, 395 F.3d 932; *Kadic*, 70 F.3d 232. .

[146] *Kadic*, 70 F.3d at 242; *See also Tel-Oren*, 726 F.2d at 775 (Edwards, concurring).

party.[147] The violations of these *jus cogens* norms have included slavery, forced labor, genocide, and war crimes.[148] The *Doe* and *Kadic* cases provide a way to strip private actors of their insulation under the state action requirement. For example, as noted above, the Ninth Circuit Court of Appeals in *Doe* held that allegations of torture, rape, and murder could also be actionable under the ATCA without the requirement of state action because they occurred "in furtherance of" a forced labor program.[149] In the *Kadic* case, the Second Circuit held that claims of torture and summary execution were actionable against a private actor because they were committed "in pursuit of genocide and war crimes."[150] Thus, if a plaintiff can allege one cognizable or recognized as being so egregious so as to obviate the need for state action such as slavery, forced labor, genocide, or war crimes, a plaintiff may also bring other, less universally accepted claims so long as the violations alleged occurred in furtherance of one *jus cogens* violation.[151] Therefore, a private actor may lose the protection of state action from liability for lesser violations of international law.

Moreover, the *Kadic* and *Doe* courts go beyond the standard prescribed under §1983. To illustrate, in order to satisfy the "color of law" standard, a private party must act in concert with, or with the significant aid of, an official government.[152] Under the "in furtherance of" standard, a

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[147] *Doe*, 395 F.3d at 945-46 (quoting *Tel-Oren*, 726 F.2d at 794-795).

[148] *Doe*, 395 F.3d at 946.

[149] *Id.* at 954.

[150] *Kadic*, 70 F.3d at 244.

[151] *See generally* Doe, 395 F.3d 932; *Kadic*, 70 F.3d 232.

[152] *Kadic*, 70 F.3d at 245 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 937 (1982) (noting that "[a]ppellants also sufficiently alleged that Karadžić acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia . . . [a] private

private party may act without the aid of an official actor provided that his conduct at some point furthers the violation of a *jus cogens* norm.[153] In other words, the "in furtherance of" standard allows private and state parties to act independently of one another so long as the private party's independent conduct at some point furthers a violation of a *jus cogens* norm committed, at least in part, by a state actor.[154] Thus, the state action requirement has been whittled down to the point where a private actor may incur ATCA liability by independent actions not in violation of a *jus cogens* norm so long as their conduct furthers a state-sponsored activity that does violate a *jus cogens* norm.[155] The requirement's erosion demonstrates its inappropriate place in ATCA jurisprudence.

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individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid").

[153] *See Doe*, 395 F.3d 932; *Kadic*, 70 F.3d 232.

[154] *See also* Craig Forcese, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Ac,t* 26 YALE. J. INT'L. L. 487, 510 (2001) (noting that "like much of the domestic color of law jurisprudence . . . state responsibility at international law is a doctrine linking states to wrongful actions by private parties, rather than private parties to states" and reasoning that because the vast majority of ATCA litigation embodies the latter situation, it thus may be intuitively troublesome to apply a color of law analysis in those cases).

[155] Some commentators have gone so far as to reason that a private party's "mere presence in a country, coupled with complicity through silence or inaction" will trigger ATCA liability. Claudia T. Salazar, *Applying International Human Rights Norms in the United States: Holding Multinational Corporations Accountable in the United States for International Human Rights Violations under the Alien Tort Claims Act,* 19 ST. JOHN'S J. LEGAL COMMENT. 111, 139-140 (2004) (quoting Anita Ramasastry, *Corporate Complicity: From Nuremburg to Rangoon. An Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations,* 20 BERKELEY J. INT'L L 91, 101 (2002)).

B. The Current State of International Law does not Indicate the Need for a State Action Requirement

As described above, international law has undergone a radical transformation in the last fifty years, moving from a focus on the responsibilities of states to being primarily concerned with the rights and duties of individuals under international law.[156] This shift, and the current emphasis on the role of the individual in international law, indicates the outdated nature of a state action requirement in a statute utilized to protect individual human rights. The *Tel-Oren* court recognized this issue but instead chose to require state action because legal scholarship at that time failed to overwhelmingly demonstrate that purely private actors could be implicated under international law.[157]

Although it is not a great logical leap to view a state action requirement as somewhat antiquated and inappropriate in light of the current state of international law, *Sosa's* holding, which suggests that a state action requirement occupies a valid place in ATCA jurisprudence.[158] *Sosa* requires courts to look back upon the paradigms that existed in 1789 and determine whether a claim is consistent with those eighteenth century norms prohibiting piracy.[159] Thus, because rights and duties under international law in 1789 were primarily statist,[160] it might be said that the state action requirement has merit. At the time the ATCA was drafted, international law was

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[156] *See supra* notes 29-46 and accompanying text.

[157] *Tel-Oren*, 726 F.2d at 794 (noting that "for each article sounding the arrival of individual rights and duties under the law of nations, another surveys the terrain and concludes that there is a long distance to go.").

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

[159] *Id.*

[160] *See supra* notes 29-32 and accompanying text.

primarily comprised of a state's responsibilities for its citizens on the high seas and the provision of judicial recourse for foreign citizens harmed within its borders.[161] In 1789, individuals could not vindicate their rights under international law without being represented by their respective government.[162] As such, it may be argued that fully exposing private actors under international law contravenes *Sosa's* instruction that courts assess ATCA claims with eighteenth century paradigms in mind.[163]

However, although the *Sosa* test is historical, the paradigms that existed in 1789 included private actors.[164] For example, William Blackstone noted that international law offenders included official actors, private actors, and those who had ventured beyond the public/private dichotomy into the "savage state of nature," like pirates.[165] Significantly, English common law, which was a dominant component of the paradigms existing at the time of the ATCA's drafting, exercised jurisdiction only over private actors and actors within the 'savage state of nature.'[166] Therefore, private liability was part of the paradigms existent in 1789.

Moreover, although the *Sosa* test requires a historical analysis, it is not apparent that the *Sosa* holding requires consistency with respect to the offenders historically implicated under common law. To illustrate, *Sosa* requires that the *claim*, not the *offender*, be consistent

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[161] *Id.*

[162] *See supra* note 32 and accompanying text.

[163] *See Sosa,* 542 U.S. at 733 n.20 (comparing the differences between the *Tel-Oren* and *Kadic* decisions).

[164] *See infra* notes 166-67 and accompanying text.

[165] 4 WILLIAM BLACKSTONE COMMENTARIES 71.

[166] Eugene Kotorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute,* 80 NOTRE DAME L. REV. 111, 148 (2004).

with the norms prohibiting piracy in the eighteenth century.[167] Thus, *Sosa's* historical analysis does not require that the offenders implicated match those implicated under common law in 1789. Therefore, given that the paradigms existent in 1789 included private actors, the current emphasis of international law on private rights and duties further suggests the state action requirement's inappropriateness under international law.

C. The Similarities Between Private Liability and the Paradigm ATCA Offense of Piracy

The paradigm offense under international law as contemplated by William Blackstone and the *Sosa* Court was piracy.[168] In fact, any claim after *Sosa* must be consistent with the paradigms and circumstances that characterized a piracy claim in 1789.[169] Thus, an examination of those archetypes sheds light on the circumstances that must characterize claims after *Sosa.*

Pirates were private actors.[170] Their conduct, by its very nature, rejected state sponsorship as well as the protection of state citizenship under international law.[171]

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

[168] *Id.* at 760; *see* 4 WILLIAM BLACKSTONE COMMENTARIES 68; Bolchos v. Darrel, 3 F.Cas. 810 (D.S.C. 1795) (interpreting the original version of the ATCA to provide jurisdiction to adjudicate a claim involving stolen slaves on the high seas). The Second Circuit, in *Kadic*, stated: "[a]n early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy." 70 F.3d at 239 (citing United States v. Smith, 18 U.S. 153, 161 (1820); United States v. Furlong, 18 U.S. 184, 196-197 (1820); The Brig Malek Adhel, 43 U.S. 210, 232 (1844)).

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

[170] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 236 (5th ed. 1998) (noting that acts of piracy, by definition, are carried out for purely private ends).

[171] Kontorovich, *supra* note 166, at 149 n.166 (quoting 4

Accordingly, a pirate's criminal activity placed him in Blackstone's third category of international law offenders that had entered into the "savage state of nature."[172] Thus, because a pirate's conduct was anathema to the diplomatic responsibilities of civilized nation-states under international law in 1789, prosecuting a pirate resulted in little more than diplomatic indifference.[173] This unique status of pirates under international law in 1789 suggests that the ATCA's drafters contemplated that violations of the law of nations included torts solely committed by private parties.

The fact that the paradigm offense under the ATCA involves a uniquely stateless private party begs the conclusion that private parties under modern international law should be held similarly liable. After *Sosa*, only certain international crimes that have an acceptance as widespread as those prohibiting piracy will be actionable under the ATCA.[174] Thus, given that prohibiting piracy in 1789 required the prosecution of private parties, private actors should also be held liable in modern ATCA jurisprudence.

Currently, the state action requirement exists for some, but not all, violations of international law under the ATCA.[175] However, the *Sosa* Court specifically limited the number of international crimes under the ATCA to those

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Blackstone Commentaries at 71) (explaining that "pirates were universally punishable because 'they renounced all the benefits of society and government'").

[172] *Id.*

[173] *Id.* at 146 (noting that prosecuting pirates "reduced the chances that prosecution would cause interstate hostilities" whereas punishing a foreign official was "perceived as a grave insult by his government, and an interference with his nation's sovereignty").

[174] *See Sosa*, 542 U.S. at 760 (Breyer, J., concurring).

[175] *See Doe*, 395 F.3d 932.

which violate norms that are universal and obligatory.[176] Like pirates, modern-day international criminals, whether they take the form of traffickers, slaveholders, terrorists, or rapists, surrender the protection of their sovereign citizenship by virtue of their criminal activity in violation of a norm under international law.[177] As such, no principled reason exists to insulate private parties under the ATCA when they commit an international crime that meets the *Sosa* test.

The issue of private liability under the ATCA cannot be addressed without discussing corporate liability. Scholars have argued that unlike pirates, corporations operate under the protection and to the benefit of nations in which they do business;[178] however, corporations do have some of the same distinctive characteristics as pirates. Although they may operate to the economic benefit of nation-states, they often do so at the expense of individual human rights in countries that lack the legal infrastructure to hold them accountable for their actions.[179] Corporations have legal personalities that transcend national boundaries and can assume the benefits and protections of a particular nation's laws in a uniquely self-interested way.[180] In that

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[176] *Sosa*, 542 U.S. at 732.

[177] This is best exemplified by the TVPA's authority to sanction foreign persons engaged in the international crime of trafficking discussed above. *See supra* notes 133-145 and accompanying text.

[178] Kontorovich, *supra* note 166, at 158 (arguing that ATCA litigation differs from piracy because corporations "have not foresworn the protection of their home states[,]" and their litigation in American courts would cause great concern to the home governments).

[179] *See* Salazar, *supra* note 155, at 153 (arguing that although multinationals' investment into underdeveloped countries does increase gross domestic product, "it is illogical to argue that the simple creation of an economic right negates respecting an individual's human rights").

[180] Baker, *supra* note 39, at 95 (arguing that, in the last fifty years, multinational corporations "forced the liberalization of trade

sense, corporations have, at least in part, both stateless and lawless qualities.[181] Although corporations operate with the help of, or in concert with, the governments of host countries, this connection is often difficult to prove.[182]

Moreover, the power of multinational corporations, or the pervasive effect they have on the nation-states in which they operate, cannot be understated.[183] The largest multinational corporations have revenues greater than most countries' gross domestic products.[184] Corporate entities, because of their wealth and the economic benefits their operations bring to host countries, are often able to politically control nation-states starved for their business.[185]

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structures," moved production to the underdeveloped world to cut costs and have consolidated internationally to form "massive entities in spite of antitrust regulations").

[181] Brad J. Kieserman, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881, 931 (1999) ("'[A] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it.'") (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 636 (1819)).

[182] *See Doe*, 395 F.3d 932 (illustrating the practical difficulties in tracing the connection between state action and corporate conduct).

[183] Logan Michael Breed, *Regulating Our 21st Century Ambassadors: A New Approach to Corporate Liability for Human Rights Violations Abroad*, 42 VA. J. INT'L. L. 1005, 1007-1008 (2002) (noting that American multinational corporations have acquired an enormous amount of international economic and political power); Kieserman, *supra* note 181, at 931 (noting that multinational corporations are "transcending and transforming the nations that spawned them")

[184] Breed, *supra* note 183, at 1007 (citing Glen Kelley, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, 506 (2001)).

[185] Baker, *supra* note 39, at 94.

Corporations use their wealth as a "bargaining chip" to pit nations, including the United States, against one another in competition for their business.[186] This race to the bottom[187] often results ultimately in the corporate exploitation of underdeveloped countries' natural resources and labor.[188]

Multinational corporations, in addition to transcending the boundaries of the nation-states in which they operate, have greater political and economic power than many sovereign states.[189] This power has allowed multinationals to operate without regard to the cultural, economic, and political rights of the populations of the countries in which they do business.[190] Without any valid mechanism to restrain their conduct, corporations function purely as economic self-serving entities concerned only with their bottom line.[191] This reality is illustrated by ATCA litigation as well as by the evils more generally associated with economic globalization.[192] Specifically, some argue that the lack of effective mechanisms seriously endangers the environment, undermines employee health and safety standards, and leads to a greater polarization of

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[186] *Id.* at 95-96 (arguing that multinational corporations' international influence also increases their domestic power and stating: "[multinational corporations] may have the upper hand in coaxing their own States to lessen its restrictions to attract [multinational corporations'] business").

[187] The author uses the phrase "race to the bottom" to refer to a common term of art used in context of globalization where corporations force countries, through bidding wars for their business, to lower their labor standards or acquiesce to disregard local labor laws.

[188] Baker, *supra* note 39, at 95-96.

[189] *See supra* note 186 and accompanying text.

[190] Baker, *supra* note 39, at 95 (noting the multinational corporations' wealth allows them to "dominate not just economic but also political structures of individualized nations and transnational organizations").

[191] *See generally id.*

[192] *Id.*

wealth between the developed and undeveloped world.[193] Commentators have urged that holding multinationals liable under international law would curb many of the negative ramifications of economic globalization.[194] Indeed, it must be acknowledged that corporations, as profit-seeking entities, would respond to the costs and consequences of litigation.

In sum, multinational corporations, like pirates, operate independently of the nation-states that they purport to represent and often outside international legal norms.[195] Corporations exhibit the piratical instincts of self-serving economic gain while having the benefit of political and economic power that rivals sovereign states. This dangerous combination has led to a great mass of ATCA litigation involving plaintiffs alleging human rights violations at the hands of multinational corporations.[196] One of the most significant hurdles of this litigation has centered on the plaintiffs' inability to circumvent the state action requirement.[197] As such, the continued validity of the state action requirement will be a key component of corporate liability in future ATCA litigation. The purpose

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[193] *Id* at 97-106.

[194] Salazar, *supra* note 155, at 155-156 (arguing that holding multinational corporations "accountable under the ATCA will aid in furthering the goals of international law, particularly human rights norms"); *See generally* Baker, *supra* note 39; Breed, *supra* note 183, at 1006.

[195] *See* NAOMI KLEIN, NO LOGO: TAKING AIM AT THE BRAND BULLIES 340 (Picador 2000) ("[w]e have read (or heard about) how a handful of powerful CEOs are writing the new rules for the global economy, . . . citizens must go after corporations not because we don't like their products, but because corporations have become the ruling political bodies of our era, setting the agenda of globalization. We must confront them, in other words, because that is where the power is"); *see also supra* note 187-188 and accompanying text.

[196] *See supra* note 77 and accompanying text.

[197] *See generally* Collingsworth, *supra* note 62, at 197-200.

of this Note is to flesh out the relatively weak reasons that private parties, and thus corporations, are currently protected under the ATCA. With the uniquely pervasive and immense power of multinationals in mind, this Note will conclude by examining the potential negative implications of removing the state action requirement from the ATCA.

D. The Implications of Removing the State Action Requirement from ATCA Litigation

Removing the barrier to private liability under the ATCA may arguably have negative implications. Echoing the concerns of Judge Bork in *Tel-Oren*, it has been said that widening the ATCA's application to private defendants would further intrude on the executive branch's role as the arbiter of foreign relations.[198] Indeed, the Bush administration vigorously contends that ATCA cases threaten U.S. foreign policy and that such cases must be dismissed pursuant to the act of state or political question doctrines.[199] Although the judiciary's decisions in cases involving human rights abuses committed by multinational corporations may affect foreign policy, this argument forgets that the ATCA specifically grants the federal judiciary power to hear cases that by definition are international in scope.[200] This argument similarly overlooks that Congress has also provided the federal

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[198] "The crucial element of the doctrine of separation of powers in this case is the principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative ... '" *Tel-Oren*, 726 F.2d at 801 (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).

[199] Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation* 17 HARV. HUM. RTS. J. 169, 184 (2004) (outlining the Bush Administration's reasons for limiting ATCA litigation).

[200] 28 U.S.C. § 1350.

judiciary the power to hear cases under a myriad of statutes that have similar potential to create negative foreign policy ramifications.[201] For example, the judiciary is empowered under the Torture Victims Protection Act to hear cases against foreign governments, or their agents, for the international law violations of torture and extrajudicial killing.[202] Moreover, in *Sosa* the Supreme Court specifically acknowledged and rejected the argument that the potential for negative foreign policy implications evinced the conclusion that the ATCA should not provide for a federal private right of action.[203]

Thus, removing the state action requirement to make way for private liability is consistent with the Supreme Court's expansion of the ATCA's power in spite of separation of powers objections. Clearly, the separation of powers objections originally raised by Judge Bork in *Tel-Oren*[204] and revisited by the *Sosa* Court, were primarily concerned with the conduct of sovereign states and not private parties.[205] In other words, the Court was concerned with the diplomatic consequences of defining the limits of another sovereign's conduct, not with defining the responsibilities of a private party under international law.[206] Seemingly, defining the rights of a private corporation

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[201] *See infra* note 202.

[202] 28 U.S.C. § 1350; Stephens, *supra* note 198, at 184-85. Statutes like Title VII of The Civil Rights Act of 1964 and RICO, because of their extraterritorial application, are also examples of Congress granting the Judiciary the right to hear cases that implicate foreign policy. 28 U.S.C. §1962; 42 U.S.C. § 702(b) (2000); 42 U.S.C. § 702(b) (2000).

[203] *Sosa, 542* U.S. at 727 (reasoning that modern international law "is very much concerned" with questions regarding the conduct of foreign governments).

[204] *Tel-Oren*, 70 F.2d at 801.

[205] *See supra* notes 113-18 and accompanying text.

[206] *Sosa*, 542 U.S. at 727.

under international law would, in most cases, be less constitutionally offensive than defining the responsibilities of other sovereigns.[207] Although both may provoke diplomatic responses, the latter strikes at the heart of the political question and act of state doctrines.[208] Thus, the argument that removing the state action requirement would create a new, more offensive inroad into the Executive Branch's role as the arbiter of foreign relations is misplaced.[209]

Additionally, some may argue that removing the state action requirement would dangerously expand the ATCA's power. As a corollary, endorsing private liability under the ATCA might chill foreign investment or otherwise create negative economic consequences. However, although removing the state action requirement might empower courts to hear a greater number of ATCA cases, it is unclear whether removing the state action requirement will have a dramatic effect. To illustrate, removing the state action requirement does nothing to expand the types of claims actionable under the ATCA.[210] Rather, removing the requirement would simply expand the

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[207] *See Tel-Oren*, 70 F.2d at 805. *Judge* Bork acknowledged that a non-state actor may "diminish" any potential interference with foreign relations but argued that the case could be dismissed pursuant to the doctrines of political question or act of state because the "PLO bears significantly upon the foreign relations of the United States." *Id.*

[208] *Id.* at 803-804; *see also Kadic*, 70 F.3d at 250 ("it would be a rare case in which the act of state doctrine precluded suit under [the ATCA]").

[209] *Kadic*, 70.F3d at 249 (reasoning that "[n]ot every case 'touching foreign relations' is nonjusticiable," and that judges should be allowed the flexibility "to weigh carefully the relevant considerations on a case-by-case basis" thus allowing the judiciary to "act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.")

[210] *See generally Sosa*, 542 U.S. 692.

types of defendants who may be sued.[211] Plaintiffs will still have to plead a violation of "the law of nations."[212] This difficult threshold, as well as the fact that the Supreme Court in *Sosa* drew the scope of actionable claims under the ATCA so narrowly, seriously tempers any argument that the removal of the state action requirement will result in a flood of ATCA cases.[213] Moreover, as argued above, the current erosion of the state action requirement at common law[214] suggests that the "floodgates" of private liability may have already have been opened.[215]

Notwithstanding those arguments, it remains that any negative economic impact resulting from the removal of the state action requirement should be swallowed as a matter of necessity. Multinational corporations maintain a uniquely pervasive and powerful place in global society.[216] These corporations use their economic and political capital to increase their profit margins at the expense of local environments and fundamental human rights.[217] Valid effective mechanisms for regulating corporate conduct do not currently exist.[218] Furthermore, no effective and comprehensive code of corporate conduct exists.[219]

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[211] *See supra* notes 170-73 and accompanying text.

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

[213] *Id.*

[214] *See supra* notes 146-156 and accompanying text.

[215] *See* Baker, *supra* note 39, at 110 (reasoning that in light of the *Doe* decision "the floodgates have opened for private individuals . . to be held tortiously liable under the ATCA for human rights abuses").

[216] *See* notes 184-194 and accompanying text.

[217] Kieserman, *supra* note 181, at 882.

[218] *Id.* at 881-883. For a broad overview of the failed attempts to curb corporate malfeasance, *see Baker*, *supra* note 39.

[219] Keiserman, *supra* note 181, at 883 (*citing* Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 159 (1997)).

Domestic sanctions and regional efforts have been similarly unsuccessful.[220] As such, multinational corporations "have grown beyond the control of national governments and operate in a legal and moral vacuum."[221] Corporate power, as well as unregulated relationships between corporations and foreign governments, strongly suggests that there is a need for valid enforcement mechanisms.[222] Removing the state action requirement would allow the ATCA to regulate corporate conduct more comprehensively. As such, the potential for negative economic consequences to multinational corporations should not undermine the ATCA's potential to serve as a mechanism for corporate regulation. The creation of economic consequences may be the only way to significantly change the conduct of corporate entities concerned solely with their own economic well-being.

CONCLUSION

A considerable amount of recent human rights scholarship has focused on the need to have valid enforcement mechanisms for human rights established under international covenants such as the U.N. Charter and the Covenant on Economic, Civil and Political Rights.[223] Although much scholarship has focused on expanding corporate liability under the ATCA,[224] very little has been

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[220] *Id* at 884.

[221] *Id.* at 883 (quoting Robert J. Fowler, *International Environmental Standards for Transnational Corporations* 25 ENVT'L. L. 1, 2 (1995)).

[222] *See generally* Collingsworth, *supra* note 62.

[223] *See e.g., id.*

[224] *See* Salazar, *supra* note 155; Collingsworth, *supra* note 62; Baker, *supra* note 39; Kieserman, *supra* note 181; Shaw, *supra* note 52; Forcese, *supra* note 154. The foregoing articles are a small part of the scholarship insisting that the ATCA have greater power to regulate corporate activity.

said about removing the state action requirement from ATCA jurisprudence. The ATCA has failed thus far to provide adequately for the remedial protection of rights recognized under international law.[225] Although the state action requirement cannot be blamed for this failure, taking down this illegitimate barrier between public and private liability would allow the ATCA to regulate more expansively transnational corporate conduct. Doing so would conform with the language of the ATCA and similar statutes. It would also be consistent with the current state of international law and the paradigm offense of piracy as it was understood by the first Congress. The ATCA has, by rather inadvertent means, grown into a potentially powerful statutory tool. It is time that courts acknowledge the relatively weak reasons that private actors continue to be insulated and allow the ATCA to impose responsibilities on multinational corporations commensurate with their economic and political power.

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[225] *See* Terry Collingsworth, *Separating Fact from Fiction in the Debate over the Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations*, 37 U.S. F. L. REV. 563, 566 (2003) (reasoning that only corporations that are knowing participants in state-sponsored and egregious human rights violations may face liability under the ATCA).