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## Corporate Liability and Foreign Acts of Torture: *Aziz v. Alcolac, Inc.*

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**CORPORATE LIABILITY AND FOREIGN ACTS OF TORTURE:  
AZIZ V. ALCOLAC, INC.**

During the 1980s war between the Republic of Iraq and Iran, Saddam Hussein ordered the use of mustard gas and other chemical weapons against his own people—specifically the Kurds, an ethnic minority located primarily in northern Iraq whom Hussein accused of conspiring with Iran.<sup>1</sup> These attacks caused horrific damage to the Kurdish people, killing thousands and injuring or psychologically affecting countless others.<sup>2</sup> A coalition of governments known as the Australia Group<sup>3</sup> responded to these attacks by placing export restrictions on the raw materials used to create these weapons.<sup>4</sup> Despite the restrictions and repeated warnings by the U.S. Customs Service and State Department, Alcolac, a U.S. chemical company, continued manufacturing and selling thiodiglycol (TDG) under the trade name Kromfax to customers all over the world.<sup>5</sup> TDG has many lawful and harmless uses; however, it is also a potential ingredient for the manufacture of mustard gas.<sup>6</sup>

In the late 1980s, Alcolac made several sales of suspiciously large size to European and American companies with whom they had never previously conducted business.<sup>7</sup> Not surprisingly, these companies were merely shell corporations designed to purchase huge amounts of TDG that eventually found their way to Iran and Iraq.<sup>8</sup> Indeed, in early 1989 Alcolac pled guilty to violating the Export Administration Act for illegal sale of TDG.<sup>9</sup>

Seeking recompense for the attacks against their people, a number of individuals of Kurdish descent sued the Republic of Iraq, Alcolac, and others in the District of Maryland.<sup>10</sup> The class was broken into two groups: Class A were American citizens who sued under the Torture Victim Protection Act (TVPA); Class B, however, were foreign nationals that sued under the Alien Tort Statute (ATS).<sup>11</sup> The trial court dismissed the action against Alcolac for failure to state a claim upon which relief could be granted, holding that corporations are not subject to liability under the TVPA, and that the plaintiffs had failed to allege purposeful facilitation of Iraq's attacks against the Kurds under the ATS.<sup>12</sup>

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1. Aziz v. Alcolac, 658 F.3d 388, 390 (4th Cir. 2011).
  2. *Id.* at 391.
  3. The Australia Group consisted of the United States, Australia, France, Germany, Italy, Japan, South Korea, the Netherlands, New Zealand, Norway, Romania, the United Kingdom, and Switzerland. *Id.* at 390 n.2.
  4. *Id.* at 390.
  5. *See id.* at 390–91.
  6. *Id.* at 390.
  7. *Id.* at 390–91.
  8. *See id.* at 391.
  9. *Id.* (citing 50 U.S.C. app. § 2410(a) (2006)).
  10. Class Action Complaint, Aziz v. Republic of Iraq, No. 09CV00869 (D. Md. Apr. 7, 2009), 2009 WL 1009908.
  11. Aziz, 658 F.3d at 389, 391.
  12. *Id.* at 390.

The Fourth Circuit addressed both claims in turn. To defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), plaintiffs must allege factual allegations to show a right to legal relief that “[cross] the line from conceivable to plausible.”<sup>13</sup> All of the plaintiffs’ allegations must be taken as true, but “bare legal conclusions” need not.<sup>14</sup>

## I. CORPORATE LIABILITY UNDER THE TVPA

The primary question when determining whether the TVPA will apply against a corporate defendant is what meaning to give the term “individual.”<sup>15</sup> When interpreting congressional statutes, the court’s main objective is to “ascertain and implement the intent of Congress.”<sup>16</sup> However, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”<sup>17</sup> Moreover, if a term is not defined within a statute itself, it is to be afforded its “plain and ordinary meaning”;<sup>18</sup> that is, how the term is understood in everyday vernacular. “Individual” is generally defined as a “single human being.”<sup>19</sup>

The plaintiffs understandably urged the court to take the term “individual” at face value when referring to the victims, but to impose a broader reading of the word regarding the perpetrator.<sup>20</sup> Unfortunately for the plaintiffs, the court employed “the standard rule of statutory construction urging that identical words

13. *Id.* at 391 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)) (internal quotation marks omitted).

14. *Id.* (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)).

15. *See id.* at 392. The TVPA states:

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note (2010) (Torture Victim Protection § 2).

16. *Aziz*, 658 F.3d at 392 (quoting *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010), *cert. denied*, 131 S. Ct. 2969 (2011)) (internal quotation marks omitted).

17. *Id.* (quoting *Crespo v. Holder*, 631 F.3d 130, 136 (4th Cir. 2011)) (internal quotation marks omitted).

18. *Id.* at 392 (quoting *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996)) (internal quotation marks omitted).

19. *Id.* at 393 (quoting *RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY* 974 (2d ed. 2001)). Moreover, the Dictionary Act, a tool to guide courts in the interpretation of statutory language, instructs that the term “person” is to include both corporations and individuals. *Id.* (citing 1 U.S.C. § 1 (2006)). This is strong evidence that Congress views the word “person” broader than individual and has specifically segregated “individuals” and corporations. *See id.*

20. *Id.* (quoting *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010)).

used in different parts of a statute be given the same meaning,”<sup>21</sup> as done by the Ninth Circuit in *Bowoto v. Chevron Corp.*,<sup>22</sup> and the D.C. Circuit in *Mohamad v. Rajoub*.<sup>23</sup> Ultimately, the Fourth Circuit held in *Aziz* that the TVPA does not extend liability to corporations and upheld the dismissal of that portion of the suit.<sup>24</sup>

This question has been granted certiorari by the United States Supreme Court, who will review the *Mohamad* case decided by the D.C. Circuit.<sup>25</sup> The Supreme Court will likely apply the same analysis and reach the same conclusion as the Fourth Circuit, and with good reason. There seems to be little ambiguity in the language used in the statute. Indeed, Congress even makes a point of using the term “person” elsewhere in the Act itself.<sup>26</sup> While it is certainly possible that this is nothing more than careless drafting, a court is nevertheless generally bound to assume that Congress means what it says and apply the law as written.<sup>27</sup> Even the Eleventh Circuit, the only circuit to hold that corporations are liable under the TVPA, did so without any analysis for the

21. *Id.* (citing *Comm’r v. Lundy*, 516 U.S. 235, 250 (1996)).

22. 621 F.3d 1116 (9th Cir. 2010). In *Bowoto*, Nigerian and American citizens brought claims against Chevron under both the TVPA and ATS for injuries sustained when an allegedly peaceful protest of a Chevron offshore oil platform ended in gunfire from the Nigerian government. *Id.* at 1120–21. Using essentially the same reasoning above, the Ninth Circuit held that “individual” under the TVPA did not include corporations. *See id.* at 1126–27 (quoting 1 U.S.C. § 1 (2006)).

23. 634 F.3d 604 (D.C. Cir. 2011), *cert. granted*, 132 S. Ct. 454 (2011). In *Mohamad*, Palestinian-born American citizen Azzam Rahim was forced into an unmarked car by men describing themselves as security police. *Id.* at 605. He was tortured and eventually killed at the hands of the Palestinian Authority. *Id.* at 606. His suit against the Palestinian Authority and the Palestinian Liberation Organization, not technically corporations but still organizations rather than natural persons, was dismissed because the term “individual” was held not to encompass the defendants. *Id.* at 609.

24. *Aziz*, 658 F.3d at 394. Note that because the court reached the conclusion that the TVPA did not apply to *Alcolac*, it did not reach the merits of whether selling the TDG to Iraq would subject it to liability as an aider and abettor of one acting “under actual or apparent authority, or under color of law” as is required by the Act. 28 U.S.C. § 1350 note (2010) (Torture Victim Protection § 2(a)(1)). Indeed, the circuits that have addressed the issue are largely split. *Compare* *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008) (allowing vicarious liability) *with* *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 58 (D.C. Cir. 2011) (finding no basis in the statute for permitting vicarious corporate liability); *Bowoto*, 621 F.3d at 1128 (declining vicarious liability). Other circuits have skirted the issue. *See, e.g., Mohamad*, 634 F.3d at 608 (citing *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1181 (D.C. Cir. 2000)) (declining to decide the question since it was first raised on appeal).

25. *Mohamad v. Rajoub*, 132 S. Ct. 454 (2011) (granting cert).

26. 28 U.S.C. § 1350 note (2010) (Torture Victim Protection § 2(a)(2)) (“[An individual who] subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any *person* who may be a claimant in an action for wrongful death.” (emphasis added)).

27. *See supra* note 17 and accompanying text.

Supreme Court to rely on for its upcoming decision.<sup>28</sup> Thus, if a court is to strictly apply the law as handed down by Congress, then this question should be easily resolved by the Supreme Court.

However, the question is not as easy as a surface-level reading would indicate. The last few paragraphs of the Fourth Circuit's analysis sheds light on a potentially problematic issue for a court seeking to "ascertain and implement the *intent* of Congress."<sup>29</sup> The Fourth Circuit discusses and discards *Clinton v. City of New York*,<sup>30</sup> wherein the Supreme Court did read "individual" in a broader light, one encompassing corporations. The Court in *Clinton* held that though "individual" generally refers to a natural person, the statute at issue—the Line Item Veto Act<sup>31</sup>—"would produce an absurd and unjust result which Congress could not have intended" if it opened certain avenues to human complainants without extending the same privilege to corporations.<sup>32</sup> The Fourth Circuit rejected this argument, however, claiming that a failure to extend liability to corporations under the TVPA was not an absurd result.<sup>33</sup> Strangely, in the preceding paragraph, the court had just discussed the possibility of juridical persons, such as a deceased's estate, being claimants under the Act because of its use of the word "person."<sup>34</sup>

The Fourth and D.C. Circuits' attempts to show that the term "individual" cannot be extended to encompass corporations because of the use of the broader term "person" in the statute, actually proves to be the argument's undoing. While a cursory reading of this analysis makes sense—Congress could not have intended "individual" to have a broad reading because it actually used the correct, broader term "person" in juxtaposition—it completely fails to realize that Congress's use of "person" as a potential claimant leads to, if one follows the strict reading and interpretation the Fourth Circuit demands, the conclusion that corporations could be *plaintiffs* under the TVPA but not *defendants*. This incongruity is precisely the kind of absurd result the Supreme Court refused to uphold in *Clinton* and demonstrates that the statute, as written, simply cannot express the true intent of Congress. No congressperson, regardless of how "pro-business," could possibly favor allowing corporations to sue persons for

28. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero*, 552 F.3d at 1315 (citing *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1245, 1250 (11th Cir. 2005)); see also *Bowoto*, 621 F.3d at 1126 (recognizing the lack of analysis in the Eleventh Circuit cases).

29. *Aziz*, 658 F.3d at 392 (emphasis added) (quoting *Broughman v. Carver*, 624 F.3d 670, 674 (4th Cir. 2010), *cert denied*, 131 S. Ct. 2969 (2011)) (internal quotation marks omitted).

30. 524 U.S. 417 (1998).

31. Line Item Veto Act of 1996, Pub. L. No. 104–130, 110 Stat. 1200, *invalidated by Clinton v. City of New York*, 524 U.S. 417 (1998).

32. *Clinton*, 524 U.S. at 429 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)) (internal quotation marks omitted).

33. See *Aziz*, 658 F.3d at 394.

34. *Id.* at 393 (citing *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011), *cert. granted*, 132 S. Ct. 454 (2011)).

committing heinous acts of torture<sup>35</sup> while simultaneously enjoying immunity from such claims themselves.

## II. VICARIOUS “AIDING AND ABETTING” LIABILITY UNDER THE ATS

The court next turned to the claim under the Alien Tort Statute. Alcolac proffered two theories to deny recovery by the plaintiffs. First, the company argued that since it did not personally attack the plaintiffs with mustard gas, it should not be held liable because international law does not recognize aiding and abetting liability.<sup>36</sup> Alternatively, if aiding and abetting liability does exist, Alcolac argued the plaintiffs did not show that the company acted with the “purpose of facilitating” the attacks on the Kurdish people.<sup>37</sup> Though the earliest

35. In fairness, a corporation acting as a claimant in a wrongful death action, the context in which “person” is used, would be unusual. Still, it is not an impossibility. *See, e.g.*, *Boyle v. Texasgulf Aviation, Inc.*, 696 F. Supp. 951, 953, 957 (S.D.N.Y. 1988), *aff’d*, 875 F.2d 307 (2d Cir. 1989) (holding that employer corporation could not intervene as a plaintiff to recover workers compensation costs from defendant only because the time limits for filing had elapsed). Conceivably, a United States citizen could be employed overseas and be killed by an act of torture. The employer corporation could pay out a workers’ compensation claim but later intervene as a plaintiff if a subsequent TVPA claim arises against the killer. The aforementioned example is not likely, but it is possible and an unacceptable double standard is created.

36. *Aziz*, 658 F.3d at 394.

37. *Id.* Alcolac attempted to argue that the ATS does not apply to corporations, but this argument was first raised on appeal so the court refused to address it and proceeded under the assumption that Alcolac could be subject to suit under the statute. *Id.* at n.6. The United States Supreme Court has recently granted certiorari to a case from the Second Circuit, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011), to decide that very issue. In *Kiobel*, several Nigerian citizens brought an action against Dutch, British, and Nigerian oil companies who allegedly aided and abetted the Nigerian government in committing illegal and tortuous acts against civilians. *Id.* at 117. The Second Circuit dismissed the action against Royal Dutch Petroleum by holding that the ATS does not grant jurisdiction over corporate defendants. *Id.* at 149. The court correctly recognized that the ATS is only a jurisdictional statute that does not create any causes of action by itself, rather it grants subject matter jurisdiction for violations of international law. *Id.* at 125 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004)). The court opined that if the causes of action are determined by international law then the actors subject to suit under it must also be determined by international law. *Id.* at 126 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Pt. 2, at 70 introductory note (1987)). The Second Circuit, therefore, held that when looking at customary international law, the “international law of human rights does not impose any form of liability on corporations.” *Id.* at 147. Thus, according to the court, applying the principles of international law (which the ATS demands) necessitates a “universal recognition and acceptance as a norm” for corporate liability against human rights violations must be established before corporations can be held liable under the statute. *Id.* at 149. One judge on the panel dissented due to the very real possibility that per se rejecting corporate liability under the ATS would essentially shield corporations from potentially committing heinous and universally condemned atrocities against civilians on par with the actions committed by private German companies during the Holocaust. *Id.* at 155–56 & n.7 (Leval, J., concurring only in the judgment). Calling this decision an “unprecedented concept of international law that exempts juridical persons from compliance with its rules,” Judge Leval disagreed with his colleagues’ holding a break “with two centuries of federal precedent on the ATS.” *Id.* at 196.

form of the ATS dates as far back as the Judiciary Act of 1789, centuries of confusion about its scope persisted until the Supreme Court's decision in *Sosa v. Alvarez-Machain*<sup>38</sup> wherein the Court held that the ATS was a jurisdictional statute that while not creating any causes of action itself vested courts with the power to "hear claims in a very limited category defined by the law of nations."<sup>39</sup> The Court explained that claims should be based on "norm[s] of international character, accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized," and cautioned a "restrained" approach to recognizing claims and causes of action.<sup>40</sup> The first question, then, is whether international law recognizes liability for aiders and abettors.

The Fourth Circuit court recognized some initial confusion on the subject, but quickly pointed out that "[v]irtually every court to address the issue, before and after *Sosa*, has so held . . . [that] secondary liability for violations of international law [has existed] since the founding of the Republic."<sup>41</sup> The Fourth Circuit thus followed suit with its sister circuits and held that vicarious aiding and abetting liability does exist under international law.<sup>42</sup>

The court then determined what standard should be applied as the necessary mens rea for an aiding and abetting claim under the ATS. *Alcolac* argued the standard should be the one applied by the Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*<sup>43</sup> In that case, current and former Sudanese civilians sued Talisman Energy, a Canadian corporation, under the ATS for alleged actions perpetrated against them and others during operations for oil extraction.<sup>44</sup> Talisman was a partial owner of Greater Nile Petroleum Operating Company (GNPOC).<sup>45</sup> The Sudanese government contracted with GNPOC to protect the drilling sites.<sup>46</sup> The government, under the advisement and instruction of GNPOC security personnel, devised and enacted a "buffer zone" strategy whereby civilian populations living near the extraction sites would be forcibly displaced.<sup>47</sup> The plaintiffs alleged that they were physically assaulted and had their homes and churches destroyed by this plan, and that Talisman was fully aware of the impending actions when it bought a share of the company.<sup>48</sup> The Second Circuit held that a conspiracy claim for aiding and abetting under

38. 542 U.S. 692 (2004).

39. *Id.* at 712.

40. *Id.* at 725.

41. *Aziz v. Alcolac*, 658 F.3d 388, 396 (4th Cir. 2011) (first alteration in original) (quoting *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 14 (D.C. Cir. 2011)) (internal quotation marks omitted).

42. *See id.* (quoting *Doe VIII*, 654 F.3d at 15).

43. *Aziz*, 658 F.3d at 396 (citing *Talisman*, 582 F.3d 244, 258 (2d Cir. 2009)).

44. *Talisman*, 582 F.3d at 247.

45. *See id.* at 248, 249.

46. *Id.* at 249.

47. *Id.* at 249–50.

48. *Id.* at 251.

the ATS requires the company to act with the specific purpose of advancing the human rights violations.<sup>49</sup> GNPOC provided funding and expertise for the governmental security provided by Sudan.<sup>50</sup> Nonetheless, Talisman, a minority stakeholder in the company with no managerial authority, was merely complicit in the formation of a buffer zone with no evidence of acting toward or assisting with violations of international law.<sup>51</sup>

To establish this mens rea standard, the court in *Talisman* relied on Judge Katzmann's concurrence in *Khulumani v. Barclay National Bank, Ltd.*<sup>52</sup> which used the Rome Statute, the mechanism which created the International Criminal Court.<sup>53</sup> That treaty imposes secondary liability for one "who aids and abets the commission of a crime only if he does so '[f]or the purpose of facilitating the commission of such a crime.'"<sup>54</sup>

The Rome Statute, as an international agreement signed by 139 countries,<sup>55</sup> is one of several potential sources for determining international law.<sup>56</sup> Though the Rome Statute is an example of an identifiable source of international law, since the United States is not a signatory to the Rome Statute,<sup>57</sup> it is not automatically binding on our courts.<sup>58</sup> Indeed, for this reason the D.C. Circuit in *Doe VIII v. Exxon Mobil Corp.* rejected the application of the Rome Statute and its "purpose" mens rea standard in ATS cases.<sup>59</sup>

49. *Id.* at 260.

50. *See id.* at 262.

51. *Id.* at 263. The court noted that use of the land around the drilling sites, and restricting access to it, is merely an administrative role of government and not illegal under international law. *See id.* It is the alleged acts of genocide and war crimes, those "universally condemned behavior[s]" and violations of international law that merit enforcement in U.S. courts. *Id.* at 256 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J. concurring)) (internal quotation marks omitted).

52. 504 F.3d 254 (2d. Cir. 2007) (Katzmann, J., concurring).

53. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

54. *Aziz v. Alcolac*, 658 F.3d 388, 397 (4th Cir. 2011) (quoting *Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring)).

55. *Id.* (quoting *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring)).

56. The Statute of the International Court of Justice's famous Article 38 states that the three primary sources of international law are: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations . . ." Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(1) (1987) ("A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.").

57. *Aziz*, 658 F.3d at 400 (quoting *Khulumani*, 504 F.3d at 276 n.9 (Katzmann, J., concurring)).

58. *Id.* (citing *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 35–36 (D.C. Cir. 2011)).

59. *See Doe VIII*, 654 F.3d at 39.

In *Doe VIII*, Exxon Mobil operated under a contract with the Indonesian government to extract natural gas.<sup>60</sup> Several villagers from the Aceh region of the country where the operation was located—then embroiled in a rebellion against the government—alleged that Exxon’s security forces, essentially members of the Indonesian military trained by private mercenaries,<sup>61</sup> committed acts of “murder, torture, sexual assault, battery, and false imprisonment.”<sup>62</sup> The court there held that aiding and abetting liability under the ATS is “clearly established,” as is aiding and abetting under international law generally.<sup>63</sup> Furthermore, looking largely at decisions by the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the D.C. Circuit held that customary international law has established a “knowledge” mens rea for aiding and abetting liability.<sup>64</sup> It specifically rejected the purpose standard espoused by the Second Circuit in *Talisman*.<sup>65</sup> Finally, the court noted that actus reus for ATS violations is met by acts that have a “substantial effect in bringing about the violation [of international law].”<sup>66</sup>

The Fourth Circuit elected to follow the analysis of the Second Circuit and implement a purpose mens rea standard for ATS claims.<sup>67</sup> The court conceded that the Rome Statute is not customary international law.<sup>68</sup> Even so, it held that as an international agreement, the Rome Statute was still an authoritative source of international law and better promoted the mandate of *Sosa* that “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Supreme Court has] recognized.”<sup>69</sup> Moreover, the court here noted that customary international law is amorphous and elusive, revealed over time from a myriad of tribunal decisions and state practices, while the Rome Statute sets forth a clear standard and gives courts guidance in moving forward with ATS claims.<sup>70</sup> Because Aziz and the other plaintiffs had not pled facts to indicate that Alcolac had acted with

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60. *Id.* at 14.

61. *See Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

62. *Doe VIII*, 654 F.3d at 15.

63. *See id.* at 30–32 (citations omitted).

64. *Id.* at 39. The court articulated the standard as a “knowing assistance that has a substantial effect on the commission of the human rights violation.” *Id.* at 32.

65. *See id.* at 39.

66. *Id.*

67. *See Aziz v. Alcolac*, 658 F.3d 388, 401 (4th Cir. 2011) (quoting *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 259 (2d Cir. 2009)).

68. *Id.* at 399.

69. *Id.* at 399, 400–01 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004)) (internal quotation marks omitted).

70. *See id.* at 400 (quoting *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1015 (7th Cir. 2011)).

the purpose of furthering Iraq's goals of genocide, the Fourth Circuit affirmed the dismissal of the ATS claims.<sup>71</sup>

As an aside, although the court agreed with the D.C. Circuit that the Rome Statute was not customary international law, this conclusion may not give the Rome Statute enough credit. Customary international law is "a general and consistent practice of states followed by them from a sense of legal obligation."<sup>72</sup> This sense of obligation—*opinio juris*—is a psychological element that demonstrates "the conviction of states that a particular practice is obligatory, or accepted as law."<sup>73</sup> Thus, simply because a treaty has not been signed or ratified by the United States does not mean it may not be binding as customary international law if enough "civilized nations" have ratified the treaty and act on its terms out of a sense of legal obligation. For instance, the United States has never ratified the famous Vienna Convention on the Law of Treaties.<sup>74</sup> Nonetheless, as it has been ratified and followed by 111 nations,<sup>75</sup> this country follows its rules as excepted customary international law.<sup>76</sup> Therefore, if the Rome Statute, which "has been signed by 139 countries and ratified by 105, including most of the mature democracies of the world,"<sup>77</sup> is generally understood to be a recognition of what the majority of nations identify as the proper standard for aiding and abetting liability,<sup>78</sup> then the Rome Statute very well could be valid evidence of customary international law. Regardless of whether the Rome Statute is evidence of customary international law or merely an international agreement that sets forth definite standards for aiding and abetting liability under international law, because it is clearer and acknowledged

71. *Id.* at 401.

72. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* *The Paquete Habana*, 175 U.S. 677, 700 (1900) (noting that courts must look to "the customs and usages of civilized nations").

73. Jo Lynn Slama, Note, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U.L. REV. 603, 605 (1990) (citing 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 25 (H. Lauterpacht ed., 8th ed. 1955)).

74. Vienna Convention on the Law of Treaties, May 5, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

75. *Status: Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Mar. 14, 2012).

76. *See, e.g., Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 433 (2d Cir. 2001) ("[T]he United States 'recognizes the Vienna Convention as a codification of customary international law.'" (quoting *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2d Cir. 2000))).

77. *Aziz v. Alcolac*, 658 F.3d 388, 400 (4th Cir. 2011) (quoting *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 276 (2d Cir. 2007) (Katzmann, J., concurring)).

78. Which is certainly possible given the amicus brief filed by David J. Scheffer, the head of the U.S. delegation for negotiating the Rome Statute. Mr. Scheffer noted that the purpose standard for aiding and abetting liability was not a recognition of previously established customary standards. *See id.* at 400 n.12. It was, however, the product of years of negotiations from over one hundred signatory nations. *See id.* The proper inquiry, then, is not whether the standard was a codification of preexisting standards, but whether the countries have acknowledged and followed this standard since deciding among themselves that it was the proper one.

by over a hundred nations as the proper mens rea requirement, the Fourth Circuit correctly followed it and applied the proper purpose standard to ATS claims.

### III. CONCLUSION

No one, the Fourth Circuit concluded, wishes to pretend that the attacks against the Kurdish people were anything less than “horrific.”<sup>79</sup> It is, nevertheless, the role of the judiciary to interpret and apply the law. The Fourth Circuit properly did so when it adopted and promulgated a purpose mens rea requirement for aiders and abettors under the ATS.<sup>80</sup> However, because not allowing corporations to be sued under the TVPA would produce an absurd result that Congress simply could not have intended, this court should reevaluate its holding on that question. Nevertheless, with this very issue coming before the United States Supreme Court,<sup>81</sup> the question will soon be settled. The Court should apply its reasoning in *Clinton* and not allow corporations to act as plaintiffs under the Act while sheltering them from being called as defendants. Justice Scalia noted in *Clinton* that “Congress treats individuals more favorably than corporations and other associations *all the time*.”<sup>82</sup> It would be a mighty sea change in our legal tradition, indeed, for the Court to enact the opposite.

*C. Alexander Cable*

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79. *Aziz*, 658 F.3d at 401.

80. Because the *Kiobel* case slated for argument before the United States Supreme Court only addresses the question of whether corporations may be sued under the ATS, the proper mens rea standard for secondary liability under those suits may well go undecided. The Court should, if it finds corporations may be liable, not eschew moving on to deciding this question so that the Second Circuit may have guidance on remand. In the alternative, the Court could join this case, *Aziz v. Alcolac*, with the others being argued because it addresses and analyzes all of the substantive questions the Court should address apart from the liability issue presented by *Kiobel*.

81. *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011), *cert. granted*, 132 S. Ct. 454 (2011).

82. *Clinton v. City of New York*, 524 U.S. 417, 454 (1998) (Scalia, J., concurring in part and dissenting in part).