HOW FAR IS THE 'DOOR AJAR'? WHETHER RAPE AS TORTURE IS ACTIONABLE UNDER THE ALIEN TORT STATUTE AFTER *SOSA*

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INTRODUCTION

In 1980, the Second Circuit's decision in *Filartiga v. Pena-Irala*[1] gave human rights attorneys a new legal tool to combat human rights violations abroad. The Alien Tort Statute (ATS)[2] is a product of the first Congress;[3] however, the ATS lay dormant for two centuries. After *Filartiga,* human rights attorneys brought lawsuits on behalf of foreign nationals using the ATS to remedy human rights abuses abroad, such as summary execution, disappearance, rape, genocide, war crimes, and crimes against humanity.[4]

Rape is a human rights abuse which many activists and attorneys would like to see fall under the jurisdiction of the ATS. Too often perpetrators of torture use systematic rape and abuse to torture their victims. These victims often do not have the ability to bring civil suits (or criminal for that matter) against their torturers in the courts of their home country. The ATS provides them with the opportunity to bring their abusers to justice and to receive compensation for their pain. This note looks at rape and rape as torture and how remedies available to victims of these abuses changed in light of *Sosa v. Alvarez-Machain.*[5] Finally, in order to suggest how United States federal courts should respond to ATS claims in the aftermath of the *Sosa* decision, this note will look at *Doe v. Unocal,*[6] which recently settled before en banc arguments could be heard before the Ninth Circuit.

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[1] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[2] Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1994)). Throughout the course of this note the Alien Tort Statute will be referred to as either ATS or ATCA (Alien Tort Claims Act). Courts have used both terms interchangeably.

[3] *See supra* note 2.

[4] *See* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (overturned the district court, holding that the President of the self-proclaimed Bosnian-Serb republic may be found liable for war crimes, genocide, and crimes against humanity); In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1993) (families of victims of torture, summary execution, and disappearance could bring an action under ATS against the former President of the Philippines); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (Guatemalan official could be held liable for summary execution, rape, torture, disappearance, arbitrary detention, cruel, inhuman or degrading treatment).

[5] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[6] Doe v. Unocal, 2002 U.S. App. LEXIS 19263 (2002).

I. A BRIEF HISTORY OF THE ALIEN TORT STATUTE AND ITS USE IN HUMAN RIGHTS ACTIONS

The Alien Tort Statute was enacted by the First Congress in the Judiciary Act of 1789.[7] The language of the statute has changed little over the last two centuries. The Alien Tort Statute currently states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[8] For two hundred years, the statute was rarely used in federal courts, but the attorneys for Dr. Joel Filartiga and his daughter Dolly Filartiga, succeeded in using the act to gain access to federal courts.[9]

A. The Landmark Human Rights Case of Filartiga v. Pena-Irala

The Filartigas brought a wrongful death action against Pena-Irala for torturing their relative Joelito Filartiga.[10] Since jurisdiction is proper if a defendant's conduct violates the law of nations, the threshold question before the Second Circuit was whether Pena-Irala's conduct violated the law of nations.[11] The Supreme Court had decided on two occasions how United States federal courts are to determine what constitutes the "law of nations." In *United States v. Smith,* the Supreme Court held that one determines the law of nations "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recogni[z]ing and enforcing that law."[12]

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[7] *See supra* note 2.

[8] *See id.* The statute in its original form stated that the federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79.

[9] The Ninth Circuit in *Filartiga* found two other instances where the ATS was used as a basis for jurisdiction.

> [A] child custody suit between aliens in Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), with a falsified passport supplying the requisite international law violation. In Bolchos v. Darrell, 3 Fed. Cas. 810 (D.S.C. 1795), the Alien Tort Statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas.

Filartiga, 630 F.2d at 887 n.21.

[10] The Filartigas were citizens of Paraguay, where Dr. Filartiga was an outspoken and politically active opponent to the Paraguayan government of President Alfredo Stroessner. Dr. Filartiga's son, Joelito, was kidnapped, tortured and killed in 1976 by Pena-Irala, then the Inspector General of Police in Paraguay. In 1979, Dolly Filartiga, who at the time was living in Washington D.C., learned that Pena-Irala had moved to New York and had overstayed his visa. Dolly alerted the Immigration and Naturalization Service which promptly arrested Pena-Irala and ordered his deportation following a hearing. Dolly immediately served Pena-Irala with a summons and civil complaint. The district court dismissed the complaint on jurisdictional grounds. *Filartiga*, 630 F.2d at 878-80.

[11] *Filartiga*, 630 F.2d at 880.

[12] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (footnotes omitted). This case involved a piracy on the high seas. The case goes into great detail in supporting the notion that piracy is a violation of the law of nations. It is this case that the Supreme Court in *Sosa* used as the template for the standards that a tort must hold up to in order to be considered a violation of the law of nations. The Court cited *Smith* as "illustrating the specificity with which the law of nations defined piracy." *Sosa*, 542 U.S. at 730.

In *The Paquete Habana*,[13] the Court held that, in the absence of a treaty, executive or legislative act, or judicial decision, federal courts look to the "customs and usages of civilized nations" using works of legal scholars and experts as evidence.[14] The Second Circuit pointed out that in *The Paquete Habana*, the Supreme Court found that a rule of international comity became a rule of nations through customary international law. Interpreting *The Paquete Habana*, the Second Circuit concluded that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[15]

The Second Circuit determined that torture violates the law of nations by consulting United Nations declarations and covenants as well as international treaties and accords.[16] The court also noted that the stated policy of the United States government is that "international law confers fundamental rights on all people *vis-à-vis* their own governments."[17] The Second Circuit concluded that torture has come under the auspices of the law of nations. As such, victims of torture and abuse abroad can bring civil suits against the perpetrators of their abuse in the federal courts of the United States.

*B. Important Post-*Filartiga *Alien Tort Statute Decisions*

After *Filartiga*, several important ATS cases were brought in front of United States federal courts. The decisions in these cases developed ATS jurisprudence as it currently stands. This section outlines some of the more important decisions that led the Supreme Court to examine the issue of ATS litigation in *Sosa*.

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[13] The Paquete Habana, 175 U.S. 677 (1900). In this case, two fishing boats flying under the Spanish flag were seized by the United States Navy during the Spanish American War. The owners of the boat argued that as a matter of customary law, small fishing boats were exempt from blockades during times of war. The Court unanimously agreed that international law does apply in the United States. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700 (footnotes omitted). The Court split 4-3 as to whether the exemption for small boats rose to the level of customary international law with the majority holding that it did and that the United States seized the boats in violation of international law. *Id.* at 714.

[14] *Filartiga*, 630 F.2d at 880 (quoting *The Paquete Habana*, 175 U.S. at 700).

[15] *Id.* at 881.

[16] The Second Circuit used the Universal Declaration of Human Rights, G.A. Res. 217 (III)(A) (Dec. 10, 1948) (The declaration states that "no one shall be subjected to torture."); the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR, Supp. 34 at 91; U.N.Doc. A/1034 (1975) (Expressly prohibits torture by any state. The declaration defines torture as being "inflicted by or at the instigation of a public official."); American Convention on Human Rights, Art. 5, OAS Treaty Series No. 36 at 1; OAS Off. Rec. OEA/SER 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment."); International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N. Doc. A/6316; European Convention for the Protection of Human Rights and Fundamental Freedoms, May 2, 1968; Council of Europe, art. 3, European Treaty Series No. 5 (1968); 213 U.N.T.S. 211 (semble). *Filartiga,* 630 F. 2d at 882-84.

[17] *Filartiga*, 630 F.2d at 885. The Second Circuit notes two statutes in particular: 22 U.S.C.§ 2304(a)(2) ("Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."); 22 U.S.C. § 2151(a) ("The Congress declares that the individual liberties, economic prosperity, and security of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms.").

1. *Kadic v. Karadzic*

The case of *Kadic v. Karadzic* expanded the use of the ATS in holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[18] This decision expands the earlier ATS decision of the Second Circuit in *Filartiga.* In *Kadic*, the Second Circuit asserted that while they ruled in *Filartiga* that "*official* torture is now prohibited by the law of nations,"[19] they did not have any reason in that case to deal with whether violations of the law of nations other then torture are actionable against private individuals.[20] The court grouped the alleged atrocities into three categories: "(a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment."[21] The court looked at each separately to determine whether they are violations of the law of nations and actionable against private individuals under the ATS.

The court found genocide has been a violation of the law of nations since World War II. "In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are '*private individuals*, public officials or statesman.'"[22] The court also looked to The Convention on the Prevention and Punishment of the Crime of Genocide ("Convention on Genocide") for both its definition of genocide and its enforcement clause.[23] Article IV of the Convention on Genocide clearly states that those who commit genocide "'shall be punished, *whether they are constitutionally responsible rulers, public officials or private*

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[18] *Kadic*, 70 F.3d at 239. In this case, victims of human rights atrocities committed under the regime of Radovan Karadzic brought suit against him in United States federal court using the Alien Tort Statute. Karadzic is the President of the "self-proclaimed" Bosnian-Serb republic known as "Srpska" within the borders of Bosnia-Herzegovina. As President, Karadzic presided over the Bosnian-Serb military forces. The military forces during the course of the Bosnian civil war committed vast human rights atrocities at the direction of Karadzic including, but not limited to, rape, forced prostitution, forced impregnation, torture, genocide, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. *Kadic*, 70 F.3d at 237.

[19] *Kadic*, 70 F.3d at 240 (quoting *Filartiga*, 630 F.2d at 884).

[20] *Kadic*, 70 F.3d at 240. The Second Circuit discusses the decision of the D.C. Circuit in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). Judge Edwards in his concurring opinion concludes that while there are "a handful of crimes to which the law of nations attributes individual responsibility," torture is not one of them. *Tel-Oren*, 726 F.2d at 795.

[21] *Kadic*, 70 F.3d at 241.

[22] *Id.* (quoting G.A. Res. 96(I), U.N.GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946)) (emphasis added).

[23] 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, for the United States, Feb. 23, 1989. The Convention defined genocide to mean:

> Any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births with the group;
> (e) Forcibly transferring children of the group to another group.

Id. at Article II.

individuals.'"[24] Clearly, if the allegations against Karadzic are proven to be true, he would be guilty of violating the law of nations against genocide regardless of whether he acted as a private individual or public official.[25]

For the allegation of war crimes the court looked at the four Geneva Conventions for guidance. The court found that under the Geneva Conventions "all 'parties' to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war."[26] The Geneva Conventions make no distinction between "recognized nations and hordes of insurgents."[27] The court thus found that "liability of private individuals for war crimes . . . remains today an important aspect of international law."[28]

The court had a harder time trying to show that there can be actions against private individuals under ATS for torture. In *Filartiga*, the Torture Victim Protection Act, the Declaration on Torture, and in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture is defined as being done under the auspices of some type of government official.[29] The court believed, however, that many of the atrocities committed were done in connection with the genocide and war crimes allegations. Thus, the court held that "the alleged atrocities are actionable under the Alien Tort Act, without regard to

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[24] *Kadic*, 70 F.3d at 241 (quoting Convention on Genocide, Article IV).

[25] It is alleged that Karadzic "personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats." *Kadic*, 70 F.3d at 242.

[26] *Kadic*, 70 F.3d at 243. These fundamental requirements are clearly stipulated in the First Geneva Convention.

> Persons taking no action in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited . . . with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .

Geneva Convention I, Aug. 12, 1949, art. 3 (1).

[27] *Kadic*, 70 F.3d at 243.

[28] *Id.*

[29] *Id.* at 243-44. The Torture Victim Protection Act of 1991 (TVPA) codified the holding of the *Filartiga* decision as well international human rights agreements and conventions in the United States thereby creating a cause of action for torture. It expands the holding in *Filartiga* to include plaintiffs who are United States citizens. *See infra* Part IVa.

The TVPA:

> creates a federal cause of action for torture or summary execution committed by an individual acting under color of law of a foreign nation. The legislative history makes clear that the TVPA was designed to strengthen and expand the ATS, lessening the danger that the judiciary might reject the *Filartiga* court's interpretation of the ATS and extending coverage to claims by U.S. citizens.

Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L.J. 143, 151 (1994).

state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadzic to the extent that he is shown to be a state actor."[30]

2. *Presbyterian Church of Sudan v. Talisman Energy*

In recent years, United States federal courts have begun to hear Alien Tort claims cases against corporations for human rights abuses abroad in which the corporations allegedly participated. These claims have tended to revolve around corporations who have collaborated with governments who are committing human rights violations.[31] This line of cases has created a jurisprudence finding that corporations can be sued under the Alien Tort Statute for aiding and abetting governments in their violations of the law of nations.

The Southern District of New York dealt with the issue of aiding and abetting liability for multinational corporations under the ATS in the case of *Presbyterian Church of Sudan v. Talisman Energy*.[32] In that case, former and current residents of the Republic of Sudan ("Sudan") brought a class action lawsuit against Talisman Energy, Inc. ("Talisman"), a Canadian oil company. Sudan alleged that Talisman "collaborated to commit gross human rights violations, including extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement."[33] The Plaintiffs brought the suit under the ATS and the Defendants moved to dismiss.[34]

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

[31] *See, e.g., Unocal*, 2002 U.S. App. LEXIS 19263 (Burmese villagers filed an ATS action against California-based oil company Unocal for human rights violations resulting from their cooperation with the Myanmar military on the construction of an oil pipeline.); Wiwa v. Royal Dutch Petroleum Co., 2002 U.S. Dist. LEXIS (S.D.N.Y. 2002) (Nigerian citizens brought suit against Royal Dutch Petroleum and Shell Oil alleging that the defendants aided the Nigerian government in violating the rights of the plaintiffs.).

[32] Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). After this decision, the case went forward in the Southern District of New York where the Defendants filed a motion for judgment on the pleadings. The Defendants claimed that the original decision was erroneous in the wake of the *Sosa* decision. Judge Denise Cote denied the motion and interpreted *Sosa* to allow for these types of ATS actions. *See* Presbyterian Church of Sudan v. Talisman Energy, 2005 U.S. Dist. LEXIS 11368 (S.D.N.Y. June 13, 2005).

[33] *Presbyterian Church*, 244 F.Supp.2d, at 296. The history of the conflict in the Sudan is well documented and its documentation is essential for putting the allegations in context. Before Egypt conquered Sudan in 1820-21, the country consisted of small independent kingdoms. While Egypt laid claim to all of the Sudan, it only maintained control of the northern region thereby laying the groundwork for the nearly two centuries of war between the north and south. In 1898, the British arrived and jointly administered the country with Egypt until 1956 when Sudan achieved its independence. The new Arab-controlled government backed out of its agreement to create a federal system, sparking a 17 year long civil war. In 1972, the Addis Ababa Agreement led to a temporary cease fire. In 1983, President Nimieri began his crusade to transform Sudan into a Muslim Arab state which reignited the conflict. In 1989, a military regime came into power and intensified the religious and ethnic persecution of non-Muslim Sudanese. The present government, the National Islamic Front, has engaged in what former United States Secretary of State Colin Powell described as genocide, resulting in the death of two million people and the displacement of four million more people. Colin Powell, Secretary of State, The Crisis in Darfur: Written Remarks Before the Senate Foreign Relations Committee (Sept. 9, 2004) (*available at* http://www.state.gov/secretary/rm/36032.htm).

In his opinion, Judge Schwartz followed the line of reasoning from *Filartiga* and *Kadic* but went further by finding that aiding and abetting by a multi-national corporation is actionable under the ATS. Schwartz asserted that the Second Circuit in *Kadic*, "made clear that the ATCA contemplated liability for private defendants who have 'acted in concert' with a state to commit torture and other gross human rights violations."[35] A federal court, according to Judge Schwartz, must "look to international law to determine whether a corporation can conspire to commit, or aid and abet the commission of, genocide or war crimes."[36] In his review of relevant international law, Judge Schwartz examined the Statute of the International Military Tribunal (the body that tried Nazi war criminals at Nuremburg), the Statute of the International Criminal Tribunal for the former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda, and the Statute for the International Criminal Court. Each of these make it clear that "the concept of complicit liability for conspiracy or aiding and abetting is well-developed in international law, especially in the specific context of genocide, war crimes, and the like."[37]

Presbyterian Church also reaffirms the ruling in *Kadic* that rape is a form of torture. Talisman maintained that the Plaintiffs failed to allege the act of torture in their complaint. Their argument was based on the fact that the word torture only appeared once in the complaint and that the complaint failed to allege that Talisman engaged in the act.[38] The court looked at the definitions for torture under the Torture Convention and the Torture Victims Protection Act of 1991[39] and found that torture includes acts that cause pain and suffering that are intentionally

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> The Plaintiffs alleged that the conflict was in large part based on the vast and extremely valuable oil deposits in the southern part of Sudan. Those deposits are heavy in nature and required complicated extraction methods that forced Sudan to grant oil concessions to Western oil companies. The fact that the oil deposits were located predominately in the southern regions where the government did not have power because of the civil war, meant that for any oil company to operate, military action would be necessary to secure the area. The Plaintiffs alleged that the Government agreed to clear the local population out of the area of the oil fields. In exchange, Talisman agreed to invest in the local infrastructure, which the Government would then use to support their military campaign against the south.

Presbyterian Church, 244 F. Supp. 2d at 296-300.

[34] Defendants moved to dismiss the action based on several reasons: "lack of subject matter jurisdiction, lack of personal jurisdiction, lack of plaintiffs' standing, *forum non conveniens*, international comity, act of state doctrine, political question doctrine, failure to join necessary and indispensable parties, and because equity does not require a useless act." *Presbyterian Church*, 244 F. Supp. 2d at 296.

[35] *Id.* at 320 (quoting *Kadic*, 70 F.3d at 244-45).

[36] *Id.* at 320.

[37] *Id.* at 322.

[38] *Id.* at 326.

[39] *See Infra* Parts III(a), III(c)(i).

inflicted for a reason based on discrimination.[40] "It can be inferred that military bombing raids, *rapes*, forced displacement, and extrajudicial killings caused 'severe pain and suffering.' Consequently, the Amended Complaint alleges torture."[41]

II. THE SUPREME COURT DECISION IN *SOSA*

After nearly twenty-five years of human rights litigation based on the ATS, its application came before the Supreme Court in the case of *Sosa* in March of 2004.[42] The case presented the first opportunity for the Court to judge the ATS on its merits and to decide to what extent it could be used to bring claims in United States federal courts. Instead of finding that the ATS merely "vest[s] federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action," as the United States petitioned the Court to do in its brief as Respondent Supporting Petitioner,[43] the Court held that while ATS did not "recognize the right asserted by Alvarez" it did allow federal courts "to hear claims in a very limited category defined by the law of nations and recognized at common law."[44]

Some commentators who supported Sosa and the United States government praised the decision as putting an end to human rights litigation based on the ATS.[45] However, the Court chose to limit, not eliminate, the types of cases brought under the ATS. Justice Souter makes it clear that the ATS may still be

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[40] *Presbyterian*, 244 F. Supp. 2d, at 326.

[41] *Id.* (emphasis added).

[42] *Sosa*, 542 U.S. 692.

[43] Brief for the United States as Respondent Supporting Petitioner, Sosa v. Alvarez-Machain, 2004 WL 182581 (U.S.). The United States was also sued in this action by Alvarez-Machain under the Federal Tort Claims Act (FTCA). The FTCA was "'designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exception, to render the Government liable in tort as a private individual would be under like circumstances.'" *Sosa,* 542 U.S. at 696 (quoting from Richards v. United States, 369 U.S. 1, 6 (1962)). The Act permits law suits in federal court against the United States as if it were a private party for negligent acts of its employees. The Act also provides for limits to the waiver of sovereign immunity. 28 U.S.C. § 2680.

[44] *Sosa,* 542 U.S. at 711.

[45] Anthony J. Caso, general counsel for the Pacific Legal Foundation, who filed an amicus brief in the case in support of Mr. Sosa, stated: "I think the significance of this case is that it puts a halt on the lawsuits we've been seeing recently that are based on a fuzzy notion of customary international law." David L. Hudson Jr., *'Door Ajar' For Foreigners' Human Rights Suits: Ruling on Ancient Tort Law May Allow for Prison Torture Claims*, 26 A.B.A. J. EREPORT 3 (July, 2 2004). Richard A. Samp of the Washington Legal Foundation said: "Those who seem to think that this going to allow business as usual with suits under the Alien Tort Statute are simply wrong. People who point to a few words here and there in the decision to try to put a silver lining on the case are whistling in the dark." *Id.* Human rights advocates had a dramatically different take on the decision that makes it quite clear that the 'silver lining' is a lot brighter then Mr. Samp would have one believe. Sandra Coliver, executive director of the Center for Justice and Accountability, who filed an amicus brief in support of Dr. Alvarez-Machain, countered by saying that:

> This is a great victory that the Supreme Court has affirmed that the Bush administration, corporations, commanders and all other persons must respect international human rights law and that the victims are able to bring lawsuits in U.S. courts so long as the tort is a violation of an internationally recognized human rights law.

Id.

used in certain cases of human rights abuses: "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."[46]

A. Procedural History and Background Facts of Sosa

In 1985, a Drug Enforcement Administration (DEA) agent on assignment in Mexico was captured, tortured over a two-day period, then murdered.[47] DEA officials believed that Dr. Humberto Alvarez-Machain was present during the interrogation and acted to extend the agent's life to subject him to more torture.[48]

In 1990, a federal grand jury indicted Dr. Alvarez-Machain and issued a warrant for his arrest.[49] After failed negotiations with the Mexican Government, the DEA hired Mexican nationals to seize Alvarez-Machain and bring him to the United States for trial.[50] Sosa participated in abducting Alvarez from his home, holding him in motel, and then flying him to Texas where Alvarez-Machain was arrested by federal officers.[51]

The initial criminal case against Dr. Alvarez-Machain was eventually heard by the Supreme Court of United States where the Court reversed the District Court and the Ninth Circuit and held that the jurisdiction of a federal court was not affected by the forcible seizure of Alvarez-Machain.[52] In 1993, Alvarez-Machain began a civil suit seeking damages from the United States under the Federal Tort Claims Act (FTCA) for false arrest and from Sosa under ATS for a violation of the law of nations.[53] The Government's motion to dismiss the FTCA claim was granted by the district court and the court granted summary judgment on the ATS claim and $25,000 in damages.[54] The Ninth Circuit affirmed the ATS decision but reversed the dismissal of the FTCA claim and held for Alvarez-Machain, deciding that the DEA did not have authority to arrest Alvarez-Machain in Mexico and was liable under California law for false arrest.[55] The Supreme Court granted certiorari to "clarify the scope of both the FTCA and the ATS."[56]

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[46] *Sosa*, 542 U.S. at 748.

[47] *Id.* at 697.

[48] *Id.*

[49] *Id.*

[50] *Id.*

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

[52] *Id.* The first time that this case went before the Supreme Court was the case of United States v. Alvarez-Machain, 504 U.S. 655 (1992).

[53] *Sosa*, 542 U.S. at 733.

[54] *Id.*

[55] *Id.* (citing to the Ninth Circuit decision, 331 F.3d 604, 640-641 (9th Cir. 2003)).

[56] *Sosa*, 542 U.S. at 733. This note does not focus on the Court's decision regarding the FTCA claims. The Court reversed the decision of the Ninth Circuit regarding the FTCA claims against the United States. The Court decided that the liability asserted by Dr. Alvarez-Machain fell under one of the exceptions in the FTCA to waiver of sovereign immunity. "We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortuous act or omission occurred." *Sosa*, 542 U.S. at 741.

B. The Supreme Court's Analysis of the Alien Torts Statute

The Court looked in great detail at the legislative history of the ATS as well as definitions of "law of nations" and "common law" at the time the statute was enacted.[57] In response to the Petitioner's assertion that the ATS "does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action,"[58] the Court surmised that it would not have been logical for the first Congress to:

> vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens' alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.[59]

While the ATS is a jurisdictional statute that does not create new causes of action, it had "practical effect the moment it became law" and did not require further Congressional action.[60] "[T]he First Congress would recognize private causes of action for certain torts in violation of the law of nations . . . violation of safe conducts, infringement of the rights of ambassadors, and piracy."[61] The Court believed that federal courts should exercise judicial restraint in finding new causes of action. These new causes of action must be of an "international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms we have recognized."[62]

The Court had several reasons to call for judicial restraint. First, legal understanding of the common law changed dramatically since the First Congress.[63] Second, the role of the federal courts in making common law changed since *Erie R. Co. v. Tompkins*.[64] Third, the decision to create a new private cause of action should be left to the legislature.[65] Fourth, courts should exercise restraint as there could be consequences in the foreign relations of the United States if agents of foreign governments are found liable for crimes in United States federal courts for

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[57] The three main violations which the Court believes the first Congress was addressing with the ATS were:

> [V]iolation of safe conducts, infringement of the rights of ambassadors, and piracy . . . . It was this narrow set of violations of the law of nations, admitting of judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

Sosa, 542 U.S. at 743. *See also supra* section II for a discussion of the relevant legislative history of ATS.

[58] *Id.* at 741.

[59] *Id.* at 746.

[60] *Id.* at 748.

[61] *Id.*

[62] *Sosa*, 542 U.S. at 749.

[63] *Id.*

[64] Erie R. Co. v. Tompkins, 304 U.S. 63 (1938).

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

which they could not be tried in the courts of their own countries.[66] Finally, there was no mandate from Congress to define new causes of action.[67]

C. The Standard for Federal Courts to Determine Whether a Private Right of Action Exists

The Court insisted that federal courts do not recognize federal claims "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted."[68] *The Paquete Habana* standard for determining international customary law still governs.[69] "Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators."[70] While the Court does not support Alvarez-Machain's claim that his arrest violated international law, the Court does make clear that federal courts can and should look at various international conventions, treaties and declarations when deciding whether an act is a violation of international law.[71]

III. RAPE AS TORTURE UNDER THE ALIEN TORTS STATUTE AND AS PART OF THE "LAW OF NATIONS"

Rape is a form of torture and should be considered a violation of the law of nations. Throughout the history of humankind rape has been used as a means of torture and genocide in both times of war and peace.[72] Militaries and governments have consistently used rape as a tool of war and as a means to genocide. With the creation of the International Criminal Tribunal in the Former Yugoslavia ("ICTY") by the United Nations Security Council in 1993, the international community continued its move towards acknowledging that rape should be considered a violation of the law of nations.

A. Rape as a Means of Torture

With the enactment of the Torture Victims Protection Act of 1991 (TVPA), the United States Congress codified a cause of action for torture under the ATS.[73]

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[66] *Id.* at 727.

[67] *Id.*

[68] *Id.* at 730.

[69] *The Paquete Habana*, 175 U.S. 677 (1900). *See supra* note 10 for a description of the case.

[70] *Sosa*, 542 U.S. at 732-733 (quoting *The Paquete Habana*, 175 US at 700.)

[71] *Id.* at 733. Alvarez-Machain supported his position by arguing that his situation fell under that of the "arbitrary arrest" under the Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948). He also used as support article nine of the International Covenant on Civil and Political Rights (Covenant), G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966).

[72] *See* Beth Stephens, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?*, 3 HOFSTRA L. & POL'Y SYMP. 87, 88 (1999); *See also* Frances T. Pilch, *The Crime of Rape in International Humanitarian Law*, 9 USAFA J. LEG. STUD. 99, 100-01 (1998/1999).

[73] Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992).

The act provided a definition of torture and provided that actions which fall under this definition are actionable by United States citizens or aliens.[74] It is essential for United States federal courts to include rape as falling within the act's definition of torture. Numerous articles by respected scholars show that rape is a form of torture and federal courts in the United States have accepted this notion. Customary international law also prohibits rape as a form of torture and thus rape should be considered a violation of the law of nations.

Both customary international law and United States jurisprudence have held that rape is a means of torture. The Ninth Circuit Court of Appeals recently made an important statement on the issue: "Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity."[75] This holding is extremely important for those who would use ATS to bring suits for rape occurring abroad. The Ninth Circuit is the highest court to date that has taken a position on whether United States courts should consider rape to be a form of torture. In Judge McKee's opinion, the Ninth Circuit looks at the psychological effects of both rape and torture and finds that the same degree of severe mental and physical pain results from each.[76] United States federal courts, when addressing rape claims

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[74] Section 3(b) defines torture under the TVPA.

> 1. the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain of suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
> 2. mental pain or suffering refers to prolonged mental harm caused by or resulting from—
>   a. the intentional infliction or threatened infliction of severe physical pain or suffering;
>   b. the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
>   c. the threat of imminent death; or
>   d. the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substance or other procedures calculated to disrupt profoundly the senses or personality.

[75] Zubeda v. Ashcroft, 333 F.3d 463, 472 (3rd Cir. 2003). This case dealt with a Board of Immigration Appeals (BIA) ruling vacating an Immigration Judge's ruling granting relief from an order of removal. The Third Circuit found that the BIA had erroneously failed to recognize that the rape that Zubeda experienced in the Congo should be considered torture. Zubeda sought protection in the United States under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Under United States law the Convention has been codified and requires that "[n]o state . . . expel, return or extradite a person to another state where there are substantial grounds for believing the person would be in danger of being subjected to torture." 8 U.S.C. § 1231.

[76] In reaching their conclusion, the Third Circuit focused on the article *Torture by Means of Rape* written by Evelyn Mary Aswad. In her article she argues eloquently and persuasively that rapes "perpetrated both with government involvement and for political purposes should be classified as torture rather than ill-treatment under international law." Evelyn Mary Aswad, *Torture by Means of Rape*, 84 GEO. L.J. 1913, 1915 (1996). Aswad asserts that the suffering caused by rape is comparable to

under ATS, should consider the rape (assuming it is done either by a government official or for a political purpose) to be a means of torture and thus actionable.

B. Rape as Torture is a Violation of United States Law and the Law of Nations

The United States Congress defines torture to include rape. In the Torture Victims Relief Act of 1998, Congress defined torture as including "*the use of rape and other forms of sexual violence* by a person acting under the color of law upon another person under his custody or physical control."[77] This definition is a clear indication of legislative intent to include rape as a form of torture. Federal courts should allow rape claims to be actionable under the ATS because as the courts have accepted torture as an act in violation of the law of nations, then rape as a type of torture should similarly be included.

In determining whether rape violates the law of nations it is also necessary to look at international agreements and conventions regarding torture and sexual assault, as well as judicial determinations from international criminal tribunals. These various agreements and decisions indicate that the international community views rape as torture to be a violation of international law "of a norm that is specific, universal, and obligatory."[78]

1. Universal Declaration of Human Rights

One of the first accomplishments of the newly formed United Nations was the creation of the Universal Declaration of Human Rights in 1948.[79] The document was intended to be a statement of human rights principles toward which the nations of the world would aspire. Even Eleanor Roosevelt, considered by many to be the driving force behind the declaration, placed limitations on the legal scope of the Declaration:

> It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of basic principles of law or legal obligation. It is a declaration of basic principles of human rights and freedoms . . . to serve as a common standard of achievement for all peoples of all nations.[80]

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that experienced by torture victims. She examines the various medical studies of rape and torture survivors which show that the "psychological aftermath of rape is strikingly similar in intensity and duration to that experienced by other torture survivors." *Id.* at 1916.

[77] Torture Victims Relief Act of 1998, Pub. L. No. 105-320 § 3, 112 Stat. 3016 (1998) (emphasis added).

[78] *Marcos*, 25 F.3d at 1475.

[79] G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[80] Eleanor Roosevelt, *Adoption of the Declaration of Human Rights*, *in* HUMAN RIGHTS AND GENOCIDE: SELECTED STATEMENTS; UNITED NATIONS RESOLUTION DECLARATION AND CONVENTIONS (1949), *available at* http://www.udhr.org/history/ergeas48.htm (last visited Oct. 19, 2005).

While the Declaration is not binding on governments and has been rejected by the Supreme Court as nonbinding on the United States government,[81] it does represent the United Nations first condemnation of torture and can be viewed as, at the very least, evidence of customary international law.[82] The Fifth Article of the Declaration clearly sets out the United Nation's position on torture. It states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[83]

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The United Nations first presented a definition for torture in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly in 1975.[84] The Declaration defines torture in Article I:

> [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.[85]

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is one of the core international human rights instruments adopted by the United Nations.[86] The Convention has been widely accepted as international law as signified by the one hundred and thirty-nine parties and seventy-four signatories to the Convention.[87] The United States ratified the Convention on October 12, 1994.[88] The definition of torture in these documents

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[81] *Sosa*, 542 U.S. at 734. The Court points out that "the Declaration does not of its own force impose obligations as a matter of international law." *Id.*

[82] The Second Circuit in *Filartiga* addresses the significance of the Universal Declaration of Human Rights and discusses its effect on customary international law. *See Filartiga*, 630 F. 2d at 883.

[83] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

[84] Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), Dec. 9, 1975, *available at* http://www.unhchr.ch/html/menu3/b/h_comp38.htm.

[85] *Id.*

[86] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 of Dec. 10, 1984, *entered into force* June 26, 1987, 23 I.L.M. 1027 (1984), *available at* http://www.ohchr.org/english/law/cat.htm.

[87] *Available at* http://www.ohchr.org/english/countries/ratification/9.htm

[88] 34 I.L.M. 590 (1995). The United States in its reservation defined torture:

> In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe

indicates that rape is torture when done by a state official as a form of intimidation.[89] Similar definitions for torture have been agreed to in various international conventions.[90]

3. International Criminal Tribunals in the former Yugoslavia and Rwanda

Since the Nuremburg Trials at the aftermath of World War II, the international community has used criminal tribunals to bring human rights abusers to justice. Each tribunal developed its own standards from a comprehensive analysis of international law. The standards are the result of "an exhaustive analysis of international case law and international instruments."[91] United States federal courts can and should look to the decisions of these tribunals in a civil ATS suit because "[i]nternational human rights law has been developed largely in the context of criminal prosecutions rather then civil proceedings . . . . Accordingly, District Courts are increasingly turning to the decisions by international *criminal* tribunals for instructions regarding the standards of international human rights law under our *civil* AT[S]."[92]

The ICTY provided a thorough analysis of the crime of rape as torture in the case of *Prosecutor v. Kunarac*.[93] The three defendants were part of the Bosnia Serb forces and were brought to trial for their participation in the systematic mistreatment and torture of Muslim women in the area of Foca.[94] The defendants appealed the trial chambers ruling and specifically objected to the trial chamber's finding that their actions fell under the definition of the crime of torture. The definition included three elements:

1. The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
2. The act or omission must be intentional.
3. The act or omission must aim at obtaining information or a confession, or at punishing intimidating or coercing the

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physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality. Reservation II(1)(a).

89 *See* Aswad, *supra* note 76.

90 The Second Circuit cites to the following conventions: American Convention on Human Rights, Art. 5, OAS *884 Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (semble). *See Filartiga*, 630 F.2d at 883-84.

91 *Unocal*, 395 F.3d at 950.

92 *Id.* at 949. The Ninth Circuit found that "recent decisions by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda especially helpful for ascertaining the current standard for aiding and abetting under international law as it pertains to ATCA." *Id.* at 950.

93 Prosecutor v. Kunarac, IT-96-23 & IT-96-23/1-A (June 12, 2002).

94 *See id.* at ¶ 2-3.

> victim or a third person, or at discriminating, on any ground, against the victim or a third person.[95]

The appellants believed that the rape committed did not constitute an act which could inflict severe physical or mental pain or suffering.[96] The appellants further alleged that they did not intend to inflict pain but "their aims were purely sexual in nature."[97] Finally, they denied that they had "pursued any of the prohibited purposes listed in the definition . . . in particular, the discriminatory purpose."[98]

In dealing with these issues, the Appeals Chamber made several observations about rape as torture in international law. The chamber first clarified "the nature of the definition of torture in customary international law as it appears in the Torture Convention."[99] The court looked specifically at the requirement of participation by a public official or someone acting in a non-private capacity as a "limitation of the engagement of States; they need [to] prosecute acts of torture only when those acts are committed by 'a public official . . . or any other person acting in a non-private capacity.'"[100] But the court found that the Torture Convention reflects customary international law in its definition of torture "as far as the obligation of States is concerned, [which] must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally."[101] Thus, the public official requirement is not in fact a requirement under customary international law "in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention."[102]

In looking at the requirement of pain and suffering in the definition of torture, the Appeals Chamber found that, "some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act . . . . Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture."[103] The requirement of severe pain is established once the rape has been proven, "since the act of rape necessarily implies such pain or suffering."[104]

Similarly, the court was not persuaded by the appellants' argument that their intention was of a sexual nature. The court found a distinction between "intent" and "motivation." It stated that, "even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an

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[95] *Id.* at ¶ 142.
[96] *See id.* at ¶ 135-36.
[97] *Id.* at ¶ 137.
[98] *Kunarac*, IT-96-23 & IT-96-23/1-A, at ¶ 138.
[99] *Id.* at ¶ 145.
[100] *Id.* at ¶ 146.
[101] *Id.* at ¶ 147.
[102] *Id.* at ¶ 148.
[103] *Kunarac*, IT-96-23 & IT-96-23/1-A, at ¶ 150.
[104] *Id.* at ¶ 151.

act of torture."[105] The argument that the purpose of sexual gratification is not listed in the definition of torture was rejected because, "acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose . . . is immaterial."[106] The Appeals Chamber also rejected appellants' contention that their actions were not done with a discriminatory intent. The court found that they committed these acts "with the intent of discriminating against their victims because they were Muslim."[107]

The Appeals Chamber also brought to light several other sources of customary international law that hold both that rape is a form of torture and is a violation of international law. The Inter-American Commission, in the case of *Mejia v. Peru*, found that a Peruvian soldier's rape of Raquel Mejia constituted torture.[108] Similarly, the European Court of Human Rights in the case of *Aydin v. Turkey*, found that "the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the [Torture] Convention."[109] Finally, the Appeals Chambers looked to the 1992 Report to the Commission on Human Rights. In the introduction to his report, the United Nations Special Rapporteur on Torture stated, "[s]ince it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of their inherent dignity and to right to physical integrity of the human being, they accordingly constituted an act of torture."[110]

The ICTR came to a similar conclusion as the ICTY regarding rape and its connection to torture. In the case of *Prosecutor v. Akayesu*, the tribunal stated, '[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity."[111] The tribunal in this case only dealt with rapes committed by public officials. The Tribunal concluded that "rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[112]

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[105] *Id.* at ¶ 153.

[106] *Id.* at ¶ 155.

[107] *Id.* at ¶ 154.

[108] Mejia v. Peru, Case 10.970, Inter-Am C.H.R., Report No. 5/96, Inter-American, OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996) p. 1120.

[109] Aydin v. Turkey, VI Eur. Ct. H.R. at 86 (1997). In this case, a woman was raped in a police station.

[110] Commission on Human Rights, 48th Sess., Summary Record of the 21st Meeting, Feb. 11, 1992, Doc. E/CN.4/1992/SR.21, Feb. 21, 1992, P. 35.

[111] Prosecutor v. Akayesu, No. ICTR-96-4-T, at ¶ 687 (Sept. 2, 1998).

[112] *Id.*

C. Is Rape Actionable Under the ATS as a Violation of the Law of Nations after Sosa*?*

The Supreme Court in their decision in *Sosa* accomplished two important goals in crafting what future ATS litigation will encompass. First, the Court debunked the oft-asserted argument of defendants in ATS cases, that "the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action," is not an acceptable understanding of ATS.[113] Second, the Court laid down the framework for federal courts to consider a cause of action under the ATS. A cause of action must both "rest on a norm of international character accepted by the civilized world" and be defined "with a specificity comparable" to the original causes of action attributed to the ATS.[114]

Rape as torture fits into both requirements laid out by the Court. As presented above, domestic and international case law, international treaties, international criminal tribunals,[115] and the "works of jurists and commentators"[116] show that rape as torture violates a norm accepted by civilized nations and is defined with adequate specificity. In the wake of the *Sosa* decision, nothing has changed that would diminish the right of a victim of rape as a means of torture to bring a suit under ATS against their torturers in United States federal courts.[117] In fact, the Court seems to support the notion that torture and, by implication rape, are actionable.[118] The Court asserted that through the Torture Victim Protection Act Congress enacted "legislation supplementing the judicial determination [made in *Filartiga*] in some detail."[119] The Court also found that the limits imposed upon federal courts in recognizing causes of action under ATS are "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached [the] Court."[120] In particular, the Court noted with approval the *Filartiga* court's holding that "the torturer has become—like the pirate and slave trader before him —*hostis humani generic*, an enemy of all mankind."[121] Furthermore, at no point in their decision does the Court condemn any previous decisions regarding causes of actions under ATS. Had the Court wanted to criticize the past decisions, Justice Scalia would have written the majority opinion;[122] the decision not to do so indicates an approval of these causes of action.

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[113] *Sosa*, 542 U.S. at 729.

[114] *Id.* at 2761.

[115] *See supra* Parts II, III.

[116] *See* Aswad, *supra* note 76.

[117] *Sosa*, 542 U.S. at 692.

[118] *Id.*

[119] *Id.* at 730.

[120] *Id.* at 730-731.

[121] *Filartiga*, 630 F.2d at 890.

[122] Justice Scalia's biting concurrence, with whom he was joined by Chief Justice Rehnquist and Justice Thomas, focuses its venom on the majority's "reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms." *Sosa*, 542 U.S. 737-738 (Scalia, J., concurring). Scalia also has no reservations about attacking specific decisions

One argument proffered by those opposed to the ATS, and to abiding by international law in United States federal courts in general, is that the ATS "enforces unratified or non-self-executing treaties and non-binding resolutions of international organizations."[123] This position is asserted by the Justice Department and is fundamentally flawed. It represents a misguided understanding of the scope of the ATS and the meaning of customary international law, or the law of nations. The truth is that ATS "does not enforce unratified or non-self-executing treaties. Nor does it convert non-binding resolutions of the United Nations into law."[124] Federal courts are not supposed to limit themselves to simply examining the text of treaties and conventions and whether they have been ratified. The ATS,

> does require the courts to determine the content of the law of nations . . . customary international law arises out of a general obligation (*opinion juris*). The evidence of both the objective element and the subjective element can take many forms, so long as it reflects states' practice and the sense of obligation.[125]

Essentially, the ATS requires courts to look beyond the specific ratified treaties and to focus on the overall opinion of the international legal community on the offense at issue. To unjustifiably limit the scope of ATS actions to causes of action created in self-executing treaties which the United States has both signed and ratified, would "delete the 'law of nations' wing of the ATCA, and only Congress, not [the] court[s] and certainly not the Justice Department, can rewrite the statute in such a fundamental way."[126] In the two hundred and fifteen years since its enactment, and twenty-five years since the *Filartiga* decision, the United States Congress has declined to amend the ATS to fit into the interpretation asserted by the Justice Department.

IV. *DOE V. UNOCAL*: ITS IMPLICATIONS ON ATS AND THE SIGNIFICANCE OF THE SETTLEMENT

On December 13, 2004, the day that an *en banc* panel of the Ninth Circuit was scheduled to hear arguments on a motion to dismiss, the parties in the case of *Doe v. Unocal*[127] announced that they had reached a settlement.[128] The decision in

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that he believes were poorly decided. He specifically targets *Kadic* putting the judiciary "directly into confrontation with the political branches." *Id.* at 748.

123 Brief Amici Curiae of International Law Scholars and Human Rights Organizations in Support of Plaintiffs, *Presbyterian Church*, 244 F.Supp. 2d 289.

124 *Id.*

125 *Id.*

126 *Id.* at 16.

127 Courts have published several opinions in the case of *Unocal*. The decisions on the initial motions to dismiss are published at 963 F. Supp. 880 (C.D. Cal. 1997) and 27 F. Supp. 2d 1174 (C.D. Cal. 1998). The district court's decision to grant summary judgment for Unocal on plaintiff ATS's claims is published at 110 F. Supp. 2d 1294 (C.D. Cal. 2000). The Ninth Circuit Panel's decision overturning this summary judgment is unpublished but can be found at 395 F.3d 932 (9th Cir. 2002). The decision granting a rehearing *en banc* can be found at 395 F.3d 978 (9th Cir. 2003).

128 Susan Beck, *Multinational Exposure; An Obscure 1789 Law Continues to Offer Plaintiffs Counsel International Litigation Leverage*, THE AMERICAN LAWYER, Feb. 1, 2005.

the case represents an important opinion on the scope of ATS litigation and the decision by Unocal to come to a settlement agreement has vast implications on future actions against multi-national corporations for there actions abroad.

A. Background History

Burma has been under the rule of a military government, known as the State Law and Order Restoration ("SLORC"), since 1988. The government renamed the country Myanmar and created a company, Myanmar Oil and Gas Enterprise ("Myanmar Oil") to produce and sell oil. Myanmar Oil provided Total S.A., a French oil company, with a license to produce, transport and sell gas from the Yadana Field in Myanmar ("the Project").[129] Total created two companies, one to extract the natural gas and another to construct and operate and pipeline to transport the gas to Thailand.[130] In 1992, Union Oil of California ("Unocal"), the defendant-appellant, purchased a 28% interest in the Project from Total. During the execution of the Project, SLORC provided security and other services.[131] These services included the construction of helipads and clearing roads along the proposed pipeline route.[132]

The plaintiffs-appellees were villagers from Myanmar who were subjected to human rights abuses by SLORC in their efforts to assist with the Project. The plaintiffs' alleged that SLORC used forced labor practices on the villagers living along the route of the pipeline.[133] The Plaintiffs' further alleged that they were subjected to acts of murder, rape, and torture by SLORC as means to force the villagers to work on the pipeline. Unocal, according to the Plaintiffs, knew of the human rights violations that were taking place at the hands of SLORC whom they directly employed.[134]

The case originated in September of 1996 when four villagers, the Federation of Trade Unions in Burma and the National Coalition Government of the Union of Burma, brought an action under ATS against Unocal and the project, alleging human rights violations against the law of nations.[135] In October of 1996, fourteen other villagers brought another ATS action as a class, representing all the residents of the region surrounding the pipeline, alleging more specific forms of torture.[136]

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[129] *Unocal*, 935 F.3d at 937.

[130] *Id.*

[131] *Id.* at 938.

[132] *Id.*

[133] *Id.* at 939.

[134] *Unocal*, 395 F.3d at 940. "Even before Unocal was made aware—by its own consultants and by its partners in the Project—of this record and that the Myanmar Military might also employ forced labor and commit of human rights violations in connection with the Project. And after Unocal invested in the project, Unocal was made aware—by its own consultants and employees, its partners in the Project, and human rights organizations—of allegations that the Myanmar Military was actually committing such violation in connection with the Project." *Id.*

[135] Doe v. Unocal, 395 F.3d 932, 942-943 (9th Cir. 2002) (per curiam); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997).

[136] *Unocal*, 395 F.3d at 943 (citing Doe I. v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997)). The plaintiffs alleged that "the Defendants' conduct in connection with the project had caused them to suffer

The motions to dismiss these claims in each case were granted in part and denied in part and the plaintiff amended their complaints.[137] On August 31, 2000, the District Court granted Unocal's consolidated motion for summary judgment for all remaining claims from both cases.[138] The plaintiffs appealed.

B. The Ninth Circuit's Pivotal Decision

The Ninth Circuit's decision to reverse the District Court's grant of summary judgment is monumental in ATS jurisprudence. The Ninth Circuit found that there are two threshold questions that must be answered in any ATS case. The first question is "whether the alleged tort is a violation of the law of nations."[139] The court held that "torture, murder, and slavery are *jus cogens* violations of the law of nations."[140] Furthermore, the court asserted that "[r]ape can be a form of torture."[141] The second threshold question is "whether the alleged tort requires the private party to engage in state action for [ATS] liability to attach, and if so, whether the private party in fact engaged in state action."[142] The court choose to follow the reasoning of *Kadic* to hold that "even crimes like rape, torture, and summary execution, which by themselves require state action for [ATS] liability to attach, do *not*, require state action when committed in furtherance of other crimes like slave trading, genocide or war crimes, which by themselves do not require state action for [ATS] liability to attach."[143]

The court then asserted that forced labor is "a modern variant of slavery,"[144] and thus falls under the small category of crimes which Judge Edwards found to attribute individual liability and do not require state action. Since forced labor does not require state action, under the reasoning of *Kadic* then, any actions committed in furtherance or in pursuit of forced labor, such as murder, rape and torture, do not require state action to be actionable under ATS.[145]

Perhaps more importantly, the Ninth Circuit takes a nuanced and meticulous approach to liability for aiding and abetting under ATS. The court holds that "the standard for aiding and abetting under the ATCA is . . . knowing practical

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death of family members, assault, rape and other torture, forced labor, and the loss of their homes and property." *Unocal*, 395 F.3d at 943.

137 *See* Doe I v. Unocal Corp., 67 F. Supp. 2d 1140 (C.D. Cal. 1999); Doe I v. Unocal Corp., 27 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd* 248 F.3d 915 (9th Cir. 2001). *See also Nat'l Coalition Gov't*, 176 F.R.D. 329.

138 *Unocal*, 395 F.3d at 943-44.

139 *Id.* at 945.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Unocal*, 395 F.3d at 946. The court pays particular attention to Judge Edwards' concurrence in *Tel-Oren*, 726 F.2d 774. "Judge Edwards observed that while most crimes require state action for ATCA liability to attach, there are a 'handful of crimes,' including slave trading, 'to which the law of nations attributes *individual liability*,' such that state action is not required." *Unocal*, 395 F.3d at 945 (quoting *Tel-Oren*, 726 F.2d at 794-95).

144 *Unocal*, 395 F.3d at 946.

145 *See id.*

assistance or encouragement that has a substantial effect on the perpetration of the crime."[146] The court looks to international law and the decisions of international criminal tribunals to ascertain the substantive law on aiding and abetting. The court asserts that even though the case before them is civil in nature while the tribunals are criminal, the distinction is not determinative since the standard in international criminal law is similar to the standard for aiding and abetting in domestic tort law.[147] The court looks in particular detail at the decisions from both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda to formulate the proper *actus reus* and *mens rea* for aiding and abetting under international law.[148] Using these standards, the court finds that "there are genuine issues of material fact whether Unocal's conduct met the *actus reus* and *mens rea* requirements for liability under the ATCA for aiding and abetting forced labor."[149]

Since this decision, several suits against multinational corporations have been allowed to move forward under the ATS for the aiding and abetting of human rights violations abroad.[150] The decision and the cases since put multi-national corporations on notice that they can be held accountable in United States federal courts for their actions abroad.

C. Procedural History Since the Ninth Circuit's Decision

Subsequent to the 2002 *Unocal* decision the Plaintiffs appealed for a rehearing and on February 14, 2003, the Ninth Circuit voted to have a rehearing *en*

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146 *Id.* at 954.

147 *See id.* at 949.

148 The *actus reus* of aiding and abetting according to the ICTY in Prosecutor v. Furundzija, IT-95-17/1-T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999), "requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime." *Unocal*, 935 F.3d at 950 (quoting *Furundzija*, IT-95-17/1-T at P 235). The ICTR in Prosecutor v. Musema, ICTR-96-13-T (Jan. 27, 2000), describes the *actus reus* as "all acts of assistance in the form of either physical or moral support" that "substantially contribute to the commission of the crime." *Id.* (quoting *Musema*, ICTR-96-13-T at P 126). In terms of the requisite *mens rea* according to the ICTY is "actual or constructive . . . 'knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime.'" *Id.* (quoting *Furundzija*, IT-95-17/1-T at P 245). The ICTR *mens rea* requirement was "that 'the accomplice knew of the assistance he was providing in the commission of the principal offence.' The accomplice does not have to have had the intent to commit the principal offense." *Id.* at 951 (quoting *Musema*, ICTR-96-13-T at P 180).

149 *Unocal*, 395 F.3d at 953.

150 *See, e.g., Presbyterian Church*, 244 F. Supp. 2d 289 (Abdullahi v. Pfizer, 77 Fed.Appx. 48, 2003 WL 22317923 (2d Cir. 2003); Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y. 2002). *See also In re* South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). While the district court granted the defendants' motion to dismiss, this case is considered by many human rights advocates to be the next step in using the ATS against multi-national corporations. Judge Sprizzo dismissed the claims of the Plaintiffs, victims of the South African apartheid government, against various multi-national corporations who did business with the apartheid regime. His decision is fraught with errors and seems to rely more on Justice Scalia's concurrence than on the majority opinion in *Sosa*. His fundamental misunderstanding of the ATS and customary international law opens the case up to appeal which could be an important step for human rights advocacy. Where *Unocal* failed to set case precedent, human rights advocates are hoping that this case will set viable precedent to move the ATS forward. Oral arguments in the appeal of this case were heard in the Second Circuit on January 24, 2006. At publication, the Second Circuit has not handed down its decision.

banc.[151] In their petition for rehearing, the Plaintiffs faulted the Ninth Circuit for its failure to address their claims regarding crimes against humanity, cruel, inhuman, or degrading treatment, arbitrary arrest, and detention.[152] The rehearing *en banc* represented an important step in ATS litigation.[153] It was the first major ATS case before an appellate court since the *Sosa* decision. Attorneys for both human rights organizations and multi-national corporations were focused on the outcome of the case, as the Ninth Circuit's decision would have tremendous ramifications for future ATS actions.[154]

D. The Significance of the Settlement

On December 13, 2004, the Plaintiffs and Defendants in *Unocal* released a joint press statement announcing that they had reached a settlement. While the terms of the settlement remain confidential,

> the settlement in principle will compensate plaintiffs and provide funds enabling plaintiffs and their representatives to develop programs to improve living conditions, health care and education and protect the rights of people from the pipeline region. These initiatives will provide substantial assistance to people who may have suffered hardships in the region. Unocal reaffirms its principle that the company respects human rights in all of its activities and commits to enhance its educational programs to further this principle.[155]

The fact that Unocal chose to settle this case rather then proceed to trial at the Ninth Circuit has considerable implications for future ATS actions, although these may not necessarily be legal in nature. The decision to settle has been hailed as a "milestone in human rights advocates' struggle to use U.S. courts to force American multinationals to protect their workers against abuse by repressive regimes,"[156] as well as, "a serious setback for Big Oil and the wider corporate world."[157] Human rights advocates see this as a warning to multi-national

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[151] *Unocal.*, 2002 U.S. App. LEXIS 2716.

[152] *See* Appellant's Petition for Rehearing Brief, *Unocal*, 2002 U.S. App. LEXIS 19263.

[153] The United States of America had filed a brief as amicus curiae. The Government argued that United States federal courts should be very careful before they make judgments against foreign nations for actions done to their nationals. The decision that the Ninth Circuit would make should it allow for aiding and abetting liability for ATS claims, would be a policy decision that should be left to the legislature. Finally, the United States asserted that should the court deal with these questions, it does not believe that aiding and abetting satisfies the requirements in *Sosa* that the international law norm must be both firmly established and well defined. Supplemental Brief for the United States of America as Amicus Curiae, *Unocal*, 2002 U.S. App. LEXIS 19263 (No. 00-56603).

[154] *See* Beck, *supra* note 128. *See also* Jonathan Birchall, *The Limits of Human Rights Legislation: ALIEN TORT STATUTE: Jonathan Birchall on How Two Cases have Tested the Scope of Law Allowing US Companies to be Sued for Wrongs Committed Overseas*, FINANCIAL TIMES, Jan. 20, 2005; *Unocal Settlement: A Setback for Big Oil,* INTERNATIONAL PETROLEUM FINANCE, Jan. 11, 2005 [hereinafter *Unocal Settlement*].

[155] *Settlement Reached in Human Rights Lawsuit, available at*: http://www.unocal.com/uclnews/2004news/121304.htm (last visited Oct. 14, 2005).

[156] Paul Magnusson, *The Corporation: Legal Settlements*, BUSINESS WEEK, Jan. 24, 2005.

[157] *Unocal Settlement*, *supra* note 154.

corporations to not take the prospect of ATS litigation lightly. Corporations now realize that these suits can lead to real settlements that will affect the way that they do business. "Unocal's settlement in principle also increases pressure on several other energy companies facing similar cases that have survived motions to dismiss—including Chevron, Texaco, Shell and Talisman Oil."[158] Corporations will know that they can be held accountable in United States federal courts for their human rights transgressions abroad.

On the other hand, the settlement is not nearly as helpful to human rights advocates as a binding decision in their favor would have been. A written and citable opinion in their favor would have given advocates a tremendous advantage going forward with other ATS claims against multinational corporations.

CONCLUSION

After lying dormant for nearly two centuries, the Alien Tort Statute has been reinvigorated in the last twenty-five years and is now one of the strongest tools for human rights attorneys to deal with fundamental human rights abuses abroad. The applicability of the statute in human rights cases was tested for the first time by the Supreme Court in *Sosa*. The Court had the opportunity to follow the lead of Justice Scalia and essentially put an end to human rights litigation. Instead, the Court chose to limit the extent and scope of the ATS. The Court did not eliminate it nor did it limit the need under the ATS to look at customary international law when deciding on the applicability of the ATS.

Rape as torture is a crime that is universally condemned by customary international law. It is a crime that fits into the requirements for ATS actions laid out by the Supreme Court in the *Sosa* decision. International courts, tribunals, conventions, and respected jurists have agreed that rape can be, and often is, a means of torture and it is illegal under international law. The Court laid the groundwork to allow future actions to be brought under ATS for rape as torture. This, combined with the settlement in *Unocal*, has properly put multi-national corporations on notice that they can be sued in United States federal courts for aiding and abetting perpetrators of these crimes abroad.

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[158] Birchall, *supra* note 154.