

The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement

Richard L. Herz*

“The problem is that the good Lord didn’t see fit to always put
oil and gas resources where there are democratic governments.”

—Dick Cheney, then-CEO of Halliburton, 1996¹

“The meek shall inherit the Earth, but not the mineral rights.”

—J. Paul Getty²

I. INTRODUCTION

Does allowing U.S. corporations to evade liability when they help foreign governments commit serious human rights abuses ultimately promote democratic reform? Would complicity liability really undercut the U.S. foreign

* Senior Attorney, EarthRights International. The arguments in this article are a revised and substantially expanded version of a presentation entitled “The Alien Tort Statute and the Development Model of Democracy Promotion,” given by the author at the International Law Student Association’s Annual Fall Conference: CHALLENGES FACING DEVELOPING COUNTRIES, at the University of Colorado School of Law on Oct. 23, 2004, and of a portion of remarks on a panel entitled “The Liability of Non-State Actors for Violations of International Law” given by the author at Amnesty International USA Lawyer’s Conference: FULFILLING THE LEGACY: INTERNATIONAL JUSTICE 60 YEARS AFTER NUREMBERG at the University of Washington School of Law, Feb. 18, 2006. *Text of Remarks, Corporate Alien Tort Liability and the Legacy of Nuremberg*, 10 GONZAGA J.I.L. 76 (2006). Some of the arguments were also presented in abbreviated form in briefs amicus curiae filed in the U.S. Court of Appeals for the Second Circuit in *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2326-CV) and in the U.S. Court of Appeals for the Ninth Circuit in *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210) by career United States diplomats, for whom the author served as counsel. The author also served or serves as co-counsel to the plaintiffs in *Doe I v. Unocal*, *Bowoto v. Chevron*, and *Wiwa v. Royal Dutch Petroleum*, and as co-counsel to amicus curiae in *In re Agent Orange Product Liability Litigation* discussed below.

I wish to thank Stephanie Biedermann, Misti Duvall, and Meghan Morris for their outstanding research assistance, and Judith Chomsky, Lawton Hawkins, Steve Herz, Marco Simons and Beth Stephens for invaluable insights and comments. All errors are, of course, my own.

1. *Halliburton’s Cheney Sees Worldwide Opportunities, Blasts Sanctions*, PETROLEUM FIN. WEEK, Apr. 1, 1996.

2. SIMPSON’S CONTEMPORARY QUOTATIONS 2151 (James B. Simpson ed., 1988).

policy goal of increasing respect for human rights globally? In briefs recently filed in a number of federal courts including the U.S. Supreme Court, the Bush Administration has answered both questions affirmatively. According to the Executive, U.S. foreign policy concerns for advancing human rights require that corporations not be held liable for aiding and abetting even the most egregious violations of universally recognized human rights norms.

In the past ten years, a small number of high profile federal court cases have alleged that major multinational corporations, including some of the world's largest, were complicit in (and benefited from) human rights violations committed by agents of foreign governments. The kinds of abuses alleged are often severe and pervasive, including, for example, allegations that ExxonMobil abetted genocide and crimes against humanity by the Indonesian military during a conflict with Acehese rebels in order to protect its natural gas facilities,³ and that Talisman Energy assisted in genocide and ethnic cleansing committed by the Sudanese government to clear areas surrounding its oil concessions in Southern Sudan.⁴ These kinds of cases have typically been filed at least in part under the Alien Tort Statute (ATS),⁵ which permits suits in U.S. courts by aliens for violations of well-established and defined international law norms.⁶ In some of these cases, the Bush Administration has asserted that courts should not recognize aiding and abetting liability under the ATS because doing so limits the government's ability to use economic engagement as a tool for promoting human rights, and is therefore incompatible with U.S. foreign policy. Thus, according to the Administration, these cases should be dismissed regardless of whether the alleged victims can prove their claims. Needless to say, this position is highly controversial. In this article, I show that the Administration's argument is deeply misguided and fundamentally inconsistent with the assumptions underlying the constructive engagement policy it purports to defend.

The willingness of some U.S. multinational corporations to form partnerships with foreign governments that have poor human rights records has sparked a number of legal and foreign policy disputes. On the policy front, a debate has raged for decades among government officials, academics, international businesspeople and human rights advocates regarding the role Western investment can play in promoting democracy and human rights in

3. *Doe I v. ExxonMobil*, 393 F. Supp. 2d 20, 22 (D.D.C. 2005).

4. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 296 (S.D.N.Y. 2003).

5. 28 U.S.C § 1350 (1992) ("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 . . .").

6. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); see also Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" For Human Rights Litigation in U.S. Courts*, 70 BROOKLYN L. REV. 533, 535 (2005) (describing cases involving corporate complicity as "the most controversial current ATS cases").

countries with repressive regimes. Advocates of “constructive engagement” or the “development model”⁷ maintain that investment can be an effective means for catalyzing reform. Critics, by contrast, argue that investment may only serve to entrench dictatorship, and that in certain circumstances, applying sanctions can be more productive. That debate played out prominently with respect to U.S. foreign policy toward South Africa in the 1980s and later toward Cuba, Burma and China.

At the same time, there is a narrower but equally contentious legal debate over whether the ATS permits victims of grievous human rights abuses to sue corporations complicit in those atrocities. In arguing that ATS suits alleging corporate complicity interfere with U.S. foreign policy, the Administration has explicitly inserted the constructive engagement policy question into the legal discourse, rendering these two debates inextricably intertwined. The business community and individual corporate defendants have made similar arguments. Surprisingly, although constructive engagement and ATS corporate liability have each individually received substantial academic attention, the literature does not consider their relationship. This article seeks to fill that gap.

I seek to demonstrate that complicity liability furthers rather than undermines constructive engagement. The position of the Bush Administration and of the business community cannot withstand scrutiny. The starting point for my analysis is to assume for the sake of argument the validity of claims made by *proponents* of constructive engagement concerning how engagement promotes democracy and human rights. In so doing, this article remains largely agnostic about the efficacy of constructive engagement. Likewise, I do not argue that engagement coupled with a vigorous tort regime is the preferred policy option, or even a good one. Those questions are beyond the scope of the issues I consider. Instead, I seek to show that the Administration’s opposition to aiding and abetting liability is fundamentally inconsistent with how constructive engagement is thought by its proponents to achieve its aims. Because a vigorous tort regime actually supports the theorized mechanisms of constructive engagement, the Administration’s argument is both intellectually incoherent and counterproductive to its own stated policy.

Proponents of constructive engagement assume that U.S. companies will promote democracy and human rights in their interactions with foreign governments and citizens by conveying democratic values and pushing for respect for the rule of law. Corporate complicity in human rights abuses is antithetical to that model; an engagement policy is unlikely to work, or at least work well, if U.S. corporations engage in such behavior. Accordingly, I argue that a tort regime that encompasses aiding and abetting liability facilitates constructive engagement by ensuring that companies behave in

7. Ted C. Fishman, *The Joys of Global Investment*, HARPER’S Feb. 1997, at 35, 39.

the responsible manner that engagement theory requires. Without the threat of liability, companies face no consequences for being complicit in the very abuses that constructive engagement is designed to prevent. Assuming engagement works as a foreign policy tool at all, this suggests that an effective tort liability regime may be a necessary condition for a viable constructive engagement policy in at least some circumstances.

The Administration's argument ignores the fact that the engagement model requires corporations to behave responsibly. Instead, it assumes that U.S. corporations advance constructive engagement simply by operating in a country with a repressive regime, and that companies will refuse to invest in such countries if the Alien Tort Statute encompasses complicity liability. Neither assumption is ever supported in the Administration's briefs by any empirical evidence, and indeed, there is substantial reason to doubt their validity.

The relationship between complicity liability and constructive engagement is critical for at least two reasons. First, in the ATS context, the availability of complicity liability is perhaps the most important question not directly addressed by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*, which approved the use of the statute in certain human rights cases despite objections from the Bush Administration.⁸ For human rights advocates, corporations that aid and abet egregious abuses flout international law, undermine efforts to protect human rights, and sully the reputation of the United States. For corporations, these cases present the risk of large verdicts and serious harm to corporate reputation, and might force companies to alter the way they interact with repressive regimes or members of foreign militaries that provide corporate security.

Second, and more broadly, foreign policymakers will benefit from a more nuanced understanding of how complicity liability affects engagement. The analysis below sheds light on how the development model's theorized mechanisms for promoting democracy actually operate in the real world. Understanding this is fundamental for shaping an effective human rights policy because it provides insight into the circumstances in which constructive engagement might or might not encourage reform, and what kind of engagement is most likely to be successful and what counterproductive.

Part II of this article describes the ATS and its use in recent years against corporations allegedly complicit in abuses. Part III presents a brief overview of aiding and abetting liability in international law and its recognition in ATS jurisprudence. Part IV recounts the arguments made by the Administration and the business community that complicity liability will interfere with the government's ability to use constructive engagement as a foreign policy tool. Part V considers how corporate investment is said to promote democracy and human rights under the engagement model. Assuming ar-

8. *Sosa*, 542 U.S. at 692.

guendo the validity of that model, Part VI demonstrates that ATS complicity liability actually strengthens the mechanisms by which engagement is thought by its proponents to encourage reform. Part VII shows why the Administration's argument would not preclude complicity liability even if such liability did interfere with constructive engagement; among other reasons, it ignores the status of aiding and abetting in international law and the proper role of foreign policy considerations in applying the ATS.

II. BACKGROUND: THE ALIEN TORT STATUTE

The ATS was passed into law in 1789 as part of the First Judiciary Act. Rarely invoked for almost two hundred years, the statute rose to prominence as a vehicle for holding human rights abusers accountable in 1980, when the U.S. Court of Appeals for the Second Circuit decided *Filártiga v. Peña-Irala*.⁹ There, the family of Joelito Filártiga, a seventeen year old Paraguayan who was tortured to death in Paraguay, sued a Paraguayan police Inspector General, Americo Peña-Irala, who committed the murder.¹⁰ The district court dismissed the case, construing the grant of jurisdiction over torts committed in violation of "the law of nations" as excluding law governing a state's treatment of its own citizens.¹¹ The Second Circuit, however, reversed, holding that modern international law clearly prohibits state-sponsored torture.¹² Since the claim was therefore for a "tort . . . committed in violation of the law of nations," the Court held that the case could proceed.¹³

The use of the ATS against corporations began in earnest after the district court in *Doe I v. Unocal* denied the defendants' motion to dismiss in 1997.¹⁴ The plaintiffs alleged that Unocal was complicit in a pattern of gross human rights abuses, including forced labor, rape and other torture, committed by the Burmese military specifically on behalf of Unocal's natural gas pipeline project in southern Burma.¹⁵ The court held that: (1) plaintiffs' allegations that the military were agents, co-venturers and co-conspirators of Unocal adequately alleged state action for purposes of those claims such as torture that require state action; (2) plaintiffs' forced labor claims did not require any state action at all; and (3) plaintiffs' allegations that Unocal knew or should have known that the military would provide forced labor for the project and that Unocal was aware of and benefited from abuses committed on its behalf was sufficient to state a claim.¹⁶

9. 630 F.2d 876 (2d Cir. 1980).

10. *Id.* at 878.

11. *Id.* at 880.

12. *Id.* at 884.

13. *Id.* at 887.

14. *See Doe I v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

15. *Id.* at 883.

16. *Id.* at 891-92, 896.

Similar cases have subsequently been filed alleging that corporations aided and abetted or were otherwise complicit in serious human rights violations. For example, in addition to the *ExxonMobil* and *Talisman* cases described above, the plaintiffs in *Sarei v. Rio Tinto, PLC* allege that the Papua New Guinean army committed war crimes at the behest of the defendant mining company after the company sought the army's assistance to quell an uprising that closed its mine.¹⁷ Similarly, in *Bowoto v. ChevronTexaco*, plaintiffs allege that Chevron participated in violent attacks against peaceful protestors at a Chevron oil platform committed by Nigerian government security forces whom Chevron paid.¹⁸ In *Estate of Rodriguez v. Drummond Co.*, plaintiffs allege that Colombian paramilitaries operating on a coal company's behalf murdered three union leaders who represented employees in contract negotiations with the company.¹⁹

As detailed in the next section, courts have repeatedly held that aiding and abetting liability is actionable, or at least could proceed under proper facts. Not surprisingly, these successes have led to vigorous attacks against complicity liability by certain segments of the international business community and, more disturbingly, by the Bush Administration.

The U.S. Supreme Court addressed the ATS in *Sosa v. Alvarez-Machain* in 2004.²⁰ The Bush Administration argued that the ATS was purely jurisdictional and did not create or authorize courts to recognize a right of action without a further act of Congress.²¹ In its view, the unanimous line of cases dating back to *Filártiga* holding that the ATS allows suits for violations of established human rights norms was mistaken. The Supreme Court disagreed, concluding that because "torts in violation of the law of nations would have been recognized within the common law" when the ATS was passed, the law "is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."²² Accordingly, no further congressional action is required.²³

In determining whether a current international law norm is actionable, "courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."²⁴ Critically, however, the Court further observed that this limit is "generally consistent" with prior ATS cases, citing with ap-

17. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1198 (9th Cir. 2007), *vacated upon grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007).

18. Eighth Amended Complaint, *Bowoto v. ChevronTexaco* No. C 99-2506-SI (N.D. Cal. Sept. 21, 2006).

19. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1253-54 (N.D. Ala. 2003).

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

21. *Id.* at 712.

22. *Id.* at 714, 724.

23. *Id.* at 723-24.

24. *Id.* at 732.

proval *Filártiga* and the Ninth Circuit's holding in *In re Estate of Marcos Human Rights Litigation* that actionable norms are those that are "specific, universal and obligatory."²⁵ In so doing, the Court affirmed the *Filártiga* line of cases, including the specific (or definable), universal and obligatory standard consistently applied by lower courts prior to *Sosa*.

Sosa further held that "practical consequences" can be considered as part of "the determination whether a norm is sufficiently definite to support a cause of action."²⁶ The Court also suggested in dicta that one "possible limitation" is "case-specific deference to the political branches" such that courts applying the ATS should be careful on a case-by-case basis not to interfere with U.S. foreign policy.²⁷

III. AIDING AND ABETTING LIABILITY UNDER THE ATS

The Supreme Court in *Sosa* did not consider whether the ATS encompasses aiding and abetting liability. Other courts, however, have overwhelmingly held that it does, in cases against corporations and natural persons, both prior to and subsequent to *Sosa*.²⁸ While a detailed discussion of the legal debate surrounding aiding and abetting liability is beyond the scope of this article, a brief overview is warranted.

25. *Id.* at 732 (quoting *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (C.A.N.Y. 1980)); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994).

26. *Id.* at 732–33.

27. *Id.* at 733 n.21.

28. *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254 (2d Cir. 2007); *Villeda Aldana v. Fresh Del Monte Produce*, 416 F.3d 1242 (11th Cir. 2005); *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157–59 (11th Cir. 2005); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164, 1173 n.6 (C.D. Cal. 2005); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 112–21, 132–35 (E.D.N.Y. 2005); *Presbyterian Church v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337–41 (S.D.N.Y. June 13, 2005); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Bowoto v. ChevronTexaco*, 312 F. Supp. 2d 1229, 1247 (N.D. Cal. 2004); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1332 (N.D. Cal. 2004); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1148 (E.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320–24 (S.D.N.Y. 2003); *Burnett v. Al Baraka Investment*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000); *Abebe-Jiri v. Negewo*, 1993 WL 814304 *4 (N.D. Ga. 1993); *see also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 (9th Cir. 2007), *vacated upon grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007) (finding claim that ATS affords aiding and abetting liability to be "non-frivolous" and therefore sufficient to afford jurisdiction); *Hilao v. Estate of Marcos*, 103 F.3d 767, 776 (9th Cir. 1996) (affirming jury instruction allowing a foreign leader to be held liable upon finding that he "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance'"). Moreover, the majority opinion of a three judge panel of the U.S. Court of Appeals for the Ninth Circuit found aiding and abetting to be an actionable theory of liability in *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated upon grant of reh'g en banc* 395 F.3d 978 (9th Cir. 2003). The case settled before the en banc panel could rule. 395 F.3d 978 (9th Cir. 2003). Only two decisions have held that aiding and abetting liability is not actionable: *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538, 549–51 (S.D.N.Y. 2004), which was overturned in *Khulumani*, 504 F.3d 254, and *Doe I v. Exxon Mobil*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005), which relied almost entirely on *In re South Africa Apartheid Litigation*. For an in-depth discussion of aiding and abetting under the ATS, see Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47 (2003).

A vigorous dispute has arisen post-*Sosa* as to the proper body of law that should govern whether a defendant can be held liable for the commission of an international law violation. Opponents of aiding and abetting liability have asserted that such liability rules must themselves be universal, obligatory and definable norms of international law.²⁹ *Sosa*, however, established that ATS claims are “claims under federal common law.”³⁰ Thus, the better view, espoused by most human rights plaintiffs,³¹ is that courts may therefore apply federal common law liability rules.³² Indeed, requiring all ancillary rules to be universally recognized principles of international law would make little sense, since international law is often silent regarding many, if not most, issues likely to arise in an ATS (or any other) case.³³ Courts have not yet resolved this issue.³⁴

29. See, e.g., Brief for the United States of America as Amicus Curiae at 19–27, *Khulumani v. Barclay Nat. Bank*, 504 F.3d 254 (2nd Cir. 2007) (Nos. 05-2141-cv, 05-2326-cv); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 19–23, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210), 2006 WL 2952505.

30. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004); accord *id.* at 724 (“The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

31. See, e.g., Brief Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law, *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005) (Nos. MDL-381, 04-cv-0400).

32. *Hoffman & Zaheer*, *supra* note 28, at 63–66, 69–70; *Stephens*, *supra* note 6, at 558 (“*Sosa* does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation.”).

33. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180–81 (D. Mass. 1995); *Hoffman and Zaheer*, *supra* note 28, at 52–53.

34. In *Khulumani* for example, the panel split regarding the appropriate source of law. Compare 504 F.3d at 264–68 (Katzmann, J., concurring) with *id.* at 284 (Hall, J., concurring). *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) held that “[c]ourts applying the ATCA draw on federal common law,” *id.* at 1202, but that decision was vacated upon grant of rehearing en banc. 499 F.3d 923 (9th Cir. 2007). See also *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 59, quoting Brief Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law at 24–26 (“even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS . . . [because] an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.”). The dispute over whether international or federal common law rules apply was foreshadowed in the pre-*Sosa* Ninth Circuit decision in *Unocal*. There, a three-judge panel unanimously held that plaintiffs had presented sufficient evidence to proceed to trial but disagreed about the source of liability standards. *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002). The majority held that international law provides for aiding and abetting liability. *Id.* at 947–51. The concurring judge, however, argued that federal common law should govern whether a third party can be held liable, and concluded that agency, joint venture, and recklessness are actionable federal common law theories. *Id.* at 970–76 (Reinhardt, J., concurring). The Ninth Circuit took the case en banc to resolve the dispute. Order (April 9, 2003) (“At oral argument, the primary issue the parties should be prepared to address is whether, in order to determine if Unocal may be held liable for the acts of the government of [Burma], the federal courts should apply an international-law aiding and abetting standard, or whether Unocal’s liability should be resolved according to general federal common-law tort principles.”). A number of other courts adopted the federal common law approach prior to *Sosa*. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996); *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984); *Xuncax v. Gramajo*, 886 F. Supp. 162, 180 (D. Mass. 1995); *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 120 n.12 (D.D.C. 2003); *Eastman Kodak Co. v. Kavlin*, 978 F.

Under the federal common law approach, there is no requirement that aiding and abetting liability, or any other liability rule, be “specific, universal and obligatory” in order to be actionable.³⁵ Rather, that requirement only applies in determining whether the underlying abuse violates an international norm that is actionable under the ATS.³⁶ Since, however, international law is part of federal common law,³⁷ courts may look to international norms.³⁸

Nonetheless, aiding and abetting is properly actionable regardless of whether courts adopt the international law or the federal common law approach to determining liability rules.³⁹ Such liability should be recognized under the federal common law approach, because aiding and abetting is a well-established feature of the American common law of torts.⁴⁰ Aiding and abetting is also a universally recognized norm of customary international law that meets the *Sosa* test. Such liability for violations of international law was understood at the time the ATS was enacted.⁴¹ Moreover, it has been enshrined in international human rights law since Nuremberg. For example, in *United States v. Goering*, the Nuremberg Tribunals held:

When [businessmen], with knowledge of [Hitler’s] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing.⁴²

Similarly, in *U.S. v. Flick*, Steinbrinck, a German industrialist, was convicted “under settled legal principles” for “knowingly” contributing money to the S.S., an organization committing widespread abuses, even

Supp. 1078, 1094 (S.D. Fla. 1997) (finding ATCA liability where “under ordinary principles of tort law [the defendant] would be liable for the foreseeable effects of her actions”).

35. In *Hamdan v. Rumsfeld*, 548 U.S. 557, slip op. at 47–48 n.40 (2006) (Stevens, J., plurality opinion), four Justices noted that aiding and abetting is a theory of liability for a substantive offense.

36. *Kbulumani*, 504 F.3d at 284 (Hall, J., concurring); Hoffman & Zaheer, *supra* note 28, at 52–54, 63–66, 70.

37. *Sosa*, 542 U.S. at 729–30; *Kadic v. Karadzic*, 70 F.3d 232, 246 (2nd Cir. 1995).

38. Thus, Judge Reinhardt looked to international law as well as federal common law in concluding that agency, joint venture, and recklessness are actionable under the ATS in *Unocal*. 395 F.3d at 967, 971, 973 (Reinhardt, J., concurring); see also Hoffman & Zaheer, *supra* note 28, at 49, 54, 63–66.

39. Congress codified the principle of civil liability for aiding and abetting human rights abusers in the Torture Victim Protection Act of 1991 (“TVPA”), 28 U.S.C. § 1350 note. The Senate noted that the TVPA covered “lawsuits against persons who ordered, abetted, or assisted in the torture.” S. REP. NO. 102-249 (1991).

40. RESTATEMENT (SECOND) OF TORTS §876(b) (1979). U.S. tort law (like international law) requires only that one *knowingly* provide substantial assistance to a person committing a tort. *Id.*

41. *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1201 (9th Cir. 2007), *vacated upon grant of reh’g en banc*, 499 F.3d 923 (*citing Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795) and *Talbot v. Janson*, 3 U.S. (3 Dall.) 133 (1795)) (noting that law of nations has long encompassed aiding and abetting liability); *accord In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005).

42. The Nuremberg Trial, 6 F.R.D. 69, 112 (1946).

though it was “unthinkable” he would “willingly be a party” to atrocities.⁴³

The governing Statute of the International Criminal Tribunal for the Former Yugoslavia likewise provides for aiding and abetting liability.⁴⁴ Applying that Statute, and after conducting an exhaustive analysis of international law, including the caselaw of the post World-War II tribunals, the ICTY concluded that the “actus reus [of aiding and abetting] consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,” while the “mens rea required is the knowledge that these acts assist the commission of the offence.”⁴⁵ U.S. courts have held that this standard reflects international law and is actionable under the ATS.⁴⁶

Defendants have often attempted to mischaracterize aiding and abetting liability as liability simply for doing business in a country with a repressive regime. However, merely operating in a country whose government implements oppressive policies is not the basis of liability asserted by plaintiffs in any ATS case of which the author is aware.⁴⁷ No ATS decision has ever held that merely investing in a country that has an authoritarian regime is sufficient for liability.

Aiding and abetting is not the only form of liability that is or should be available to hold accountable corporations intimately involved in gross vio-

43. 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, 1217, 1222 (1952).

44. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, U.N. Doc S/RES/8271 993 (May 25, 1993), *reprinted* in 32 I.L.M. 1192 (1993).

45. *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ¶ 249 (Dec. 10, 1998), *reprinted* in 38 I.L.M. 317, 367 (1999). The Administration itself has occasionally recognized that aiding and abetting is specifically defined in international law. For example, it sought to impanel military commissions that would prosecute aiding and abetting a host of crimes, noting that the abetting standard, which is “in any . . . way facilitating the commission” of an offense with knowledge the act would aid or abet, “derives from the law of armed conflict,” *i.e.* international law, and is “declarative of existing law.” U.S. Dep’t of Def., Military Commission Instruction No. 2 art. 3(A), 6(A), 6(B), 6(C) (April 30, 2003), *available at* <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>; *but see* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that the military commissions lacked the power to proceed).

46. *See, e.g., Doe I v. Unocal*, 395 F.3d 932, 950–51 (9th Cir. 2002); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355–56 (N.D. Ga. 2002). In *Khulumani*, Judge Katzmman concluded under the international law approach that the aiding and abetting standard in the Rome Statute of the International Criminal Court should apply. 504 F.3d at 275 (Katzmann, J., concurring). He further noted that the Statute requires a mens rea of purpose, except where assistance is rendered to the commission of a crime by a group of persons acting with a common purpose, in which case the mens rea is knowledge. *Id.* The Statute by its own terms, however, was not intended to limit the scope of international law. Rome Statute of the International Criminal Court art. 22(3), July 17, 1998, 37 I.L.M. 999 (1998) (Statute’s definitions “shall not affect the characterization of any conduct as criminal under international law independently of this Statute”). Regardless, Judge Katzmman’s distinction should matter little in the context of the cases discussed herein, since the alleged abuses are almost always committed by a group acting with a common purpose.

47. Although the defendants in *In re South Africa Apartheid Litigation* characterized plaintiffs as raising this claim, and the district court understood the plaintiffs to be doing so, 346 F. Supp. 2d 538, 551 (S.D.N.Y. 2004), the plaintiffs have expressly argued they were not relying on this theory. *See* Brief for Plaintiffs-Appellants at 43, *Khulumani v. Barclay Nat. Bank*, 509 F.3d 148 (2d Cir. 2007) (05-2326) *available at* <http://www.sdsbb.com/Apartheid/index.html>.

lations of universally recognized human rights. For example, courts have also recognized conspiracy liability under the ATS.⁴⁸ Likewise other forms of complicity have been recognized in international jurisprudence and ought to be actionable.⁴⁹ In addition, ordinary common law tort theories such as joint venture, agency and recklessness should be available under federal common law.⁵⁰ My central thesis, that a vigorous tort regime promotes constructive engagement, applies as much to these theories of liability as it does to aiding and abetting. I focus on aiding and abetting, however, because that is the theory the Bush Administration has attacked using the constructive engagement argument detailed in the next Section.

IV. THE BUSH ADMINISTRATION AND BUSINESS COMMUNITY POSITION

The Bush Administration has vigorously opposed the recognition of aiding and abetting liability under the ATS, and has submitted briefs in a number of cases arguing that such liability should never be available. In part, the Administration has made the policy assertion that aiding and abetting liability interferes with the United States' ability to use constructive engagement in conducting foreign relations.⁵¹ This is not a case-spe-

48. See, e.g., *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157–59 (11th Cir. 2005); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 826 (S.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320–324 (S.D.N.Y. 2003); *Doe I v. Unocal*, 963 F. Supp. 880, 891, 896 (C.D. Cal. 1997); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1091–92 (S.D. Fla. 1997); see also *Hilao v. Estate of Marcos*, 103 F.3d 767, 776–77 (9th Cir. 1996) (affirming the District Court's jury instruction allowing liability upon finding that defendant "directed, ordered, conspired with, or aided the military in torture, summary execution, and 'disappearance'").

49. Tarek Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability under the Alien Tort Claims Act*, 38 N.Y.U. J. INT'L L & POL. 39 (2005); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, slip op. at 47–48 n.40 (2006) (Stevens, J., plurality opinion) (citing with approval "joint criminal enterprise" liability). As the two ICTY cases relied upon by the *Hamdan* plurality in footnote 40 make clear, joint criminal enterprise is a norm of customary international law. *Prosecutor v. Milutinovic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT-99-37-ar72, ¶¶ 28–30 (ICTY App. Chamber, May 21, 2003); *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-A, ¶ 226 (ICTY App. Chamber, July 15, 1999).

50. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007) *vacated upon grant of reb'g en banc*, 499 F.3d 923 (9th Cir. 2007); *Unocal*, 395 F.3d at 970–76 (Reinhardt, J., concurring); *Bowoto v. ChevronTexaco*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004) (recognizing agency and subsequent ratification theories of liability as actionable under the ATS in the context of determining whether a parent corporation can be held liable for the actions of its subsidiary); *Unocal*, 963 F. Supp. at 896 (allegation that Unocal knew or should have known of military's forced labor practices when it agreed that military would provide labor for its project sufficient to state a claim upon which relief could be granted).

51. See, e.g., Brief for the United States of America as Amicus Curiae Supporting Respondents at 4, *Khulumani v. Barclay Nat. Bank*, 509 F.3d 148 (2d Cir. 2007) (05-2141-CV, 05-2336-CV) ("[R]ecognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment."); Supplemental Brief of the United States of America as Amicus Curiae Supporting Respondents at 14, *Doe I v. Unocal*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628), available at <http://www.earthrights.org/files/Legal%20Docs/Unocal/dojunocalbrief.pdf> ("Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights prac-

cific argument against liability in a particular lawsuit; rather the Administration claims this argument should preclude recognition of aiding and abetting liability in all ATS cases.

The Administration's argument assumes that the potential for aiding and abetting liability will deter investment in countries with poor human rights records. For example, in *Sosa v. Alvarez-Machain*, in support of its argument that *no* claims are actionable under the ATS, the Government stated:

[t]he prospect of costly litigation under Section 1350 and potential liability in United States courts for operating in a country whose government implements oppressive policies—policies that the United States Government is seeking to change through diplomatic channels or political sanctions—may discourage U.S. and foreign corporations from investing in precisely the areas of the world where economic development may have the most positive impact on economic and political conditions. Economic measures, such as promoting investment or the threat of sanctions, are an important tool that the Executive uses in conducting the Nation's foreign policy.⁵²

Similarly, the Government argued in an amicus brief to the U.S. Court of Appeals for the Second Circuit in *Khulumani v. Barclay National Bank*:

One of the “practical consequences” of embracing “aiding and abetting” liability for ATS claims would be to create uncertainty that would in some instances interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty regarding private liability, which would surely deter many businesses from such economic engagement.⁵³

tics.”); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 16–18, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2006), (No. 05-36210), 2006 WL 2952505.

52. Brief for the United States as Respondent Supporting Petitioner at 44–45, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 99-56762, 99-56880), 2004 WL 182581 (citations omitted).

53. Brief for the United States of America as Amicus Curiae Supporting Respondents at 13, *Khulumani v. Barclay National Bank*, 509 F.3d 148 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2336-CV). The United States made this same argument almost verbatim in amicus briefs to the U.S. Court of Appeals for the Ninth Circuit both prior to and subsequent to its submission in *Khulumani*. Supplemental Brief of the United States of America as Amicus Curiae Supporting Respondents at 11, *Doe I v. Unocal*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); Brief for the United States of America as Amicus Curiae Supporting Affirmance at 23–24, *Mujica v. Occidental Petroleum* (No. 05-56175, 05-56178, 05-56056) (appeal pending).

Not surprisingly, some elements of the business community have presented similar views. Thus, for example, the National Foreign Trade Council and a number of other pro-business organizations argued in *Sosa* that:

With few exceptions, United States policy is to *increase* international trade, investment, and economic cooperation as a central means of promoting human rights . . . ATS lawsuits are often thinly veiled attempts to undercut these careful political decisions. . . . Even where the policy of the United States is to encourage investment in developing nations as a means of promoting human rights, businesses will hesitate to invest because of the growing threat of ATS liability—making this nation’s human rights policy all stick and no carrot.⁵⁴

In short, the Administration and the business community assume that aiding and abetting liability will deter investment, and argue that such liability therefore conflicts with constructive engagement.

V. HOW CONSTRUCTIVE ENGAGEMENT IS SAID TO PROMOTE HUMAN RIGHTS

Noticeably absent in the Administration and business community’s submissions is any support for their assumptions that the mere existence of aiding and abetting liability will deter investment in foreign countries and thereby hamper a constructive engagement approach. The relationship between aiding and abetting liability and the development model is not as simple as the Administration would have U.S. courts believe. To properly evaluate the connection, and thus the merits of the Administration’s position, one must first understand the mechanisms by which increased investment is said to promote democracy under the engagement model, and then consider what effect, if any, complicity liability has on those processes. Only then can one make informed suppositions about the effect of complicity liability on constructive engagement. Yet the Administration has made no effort to conduct this analysis. I do so below. This analysis demonstrates that ATS complicity liability supports, rather than undermines, implementation of the development model.

According to advocates of the development model, increased trade with or foreign investment in countries with repressive regimes promotes democracy and human rights in four primary ways. The first mechanism is educative. Western business officials and corporations, the argument posits, impart democratic values to government officials, private citizens and their own local employees through their interactions with those individuals;

54. Brief for the National Foreign Trade Council et al. as Amici Curiae in Support of Petitioner at 13–14, 16, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), 2004 WL 162760.

moreover, contact with Western business promotes greater integration of repressive regimes into the world community and thus increases the regime's exposure to those values.⁵⁵ Engagement proponents often claim that these benefits, and others described below, flow automatically from Western investment, without corporations doing anything other than conducting business as usual.⁵⁶ Others, however, note that this mechanism includes proactive steps. Unocal, for example, claims that "[o]ften, in the context of discussing our energy development activities with government officials, Unocal is able to raise concerns about human rights issues and privately present our views."⁵⁷ Indeed, some proponents of engagement argue that proactive opposition to abuses is required in order for engagement to be constructive.⁵⁸

Second, proponents claim that regimes with economic ties to Western governments will seek to protect those ties by improving their reputations,

55. Craig Forcese, *Globalizing Decency: Responsible Engagement in an Era of Economic Integration*, 5 YALE HUM. RTS & DEV. L.J. 1, 5–6 (2002) (noting arguments of constructive engagement proponents); USA*Engage, *Economic Engagement Promotes Freedom*, available at <http://archives.usaengage.org/archives/studies/engagement.html>; Mark B. Baker, *Flying Over the Judicial Hump: A Human Rights Drama Featuring Burma, the Commonwealth of Massachusetts, the WTO, and the Federal Courts*, 32 LAW & POL'Y INT'L BUS. 51, 81 (noting arguments of constructive engagement proponents); KARL SCHOENBERGER, LEVI'S CHILDREN: COMING TO TERMS WITH HUMAN RIGHTS IN THE GLOBAL MARKETPLACE 112 (2001); Secretary of State Colin Powell, Remarks at the National Association of Manufacturers Board of Directors Meeting (Oct. 31, 2001) ("By conducting your business in the way that Americans conduct their business, you send a powerful signal all over the world to how people interact in peaceful, prosperous and democratic societies.").

56. See, e.g., SCHOENBERGER, *supra* note 56, at 112 (describing the "passive" engagement position).

57. Unocal Corp., *Business and Human Rights*, available at <http://web.archive.org/web/19991004191244/http://www.unocal.com/responsibility/humanrights/hr4.htm>; see also SCHOENBERGER, *supra* note 55, at 194–95 (noting success of American businessman in China in intervening on behalf of political prisoners, claiming that government officials see businesspeople as allies, not enemies). There is, however, substantial reason to doubt claims that corporations will press governments to improve their human rights policies without strong incentives to do so. Indeed, Unocal has asserted that it has "a legal and ethical obligation to remain politically neutral." Unocal Corp., *Business and Human Rights*; see also SCHOENBERGER at 110–111, 114 (noting general opposition by business executives to notion of corporate accountability that includes acting out of concern for repression, describing hostile reaction by U.S. business in China to Secretary of State Warren Christopher's 1994 suggestion that U.S. businesses use their influence to convince China to increase respect for human rights, and noting fear of foreign executives of offending thin-skinned Chinese officials to the detriment of their business); *id.* at 115 (describing similar corporate response to 1999 plea by U.N. Secretary General Kofi Annan that corporations use their influence with governments to promote human rights); *id.* at 188–89 (noting that companies cite "passive" engagement argument to deflect suggestions that they should actively engage); Workshop Report, Jake Sherman, International Peace Academy, *Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses* (Apr. 19, 2001), at 7 (on file with the *Harvard Human Rights Journal*), available at <http://www.fafano.org/nsf/ipa-report> [hereinafter Sherman Report] ("[U]ndertaking [quiet] diplomacy [with local authorities], even in the name of universal human rights or international norms of peace and security, exposes corporations to accusations of unwanted interference and to the risk of retaliation by host governments."); Marina Ottaway, *Reluctant Missionaries*, FOREIGN POL'Y, July–Aug. 2001, at 44, 53 (noting that oil companies are finding ways to avoid burden of promoting reform). Absent such incentives, corporations may simply make matters worse. See Sherman Report, *supra*, at 7 ("Private sector diplomacy raises legitimate concerns about the potential for self-interested collusion between powerful multinationals and host governments.").

58. See *infra* notes 72–78 (describing the Sullivan Principles for engagement in South Africa during apartheid).

presumably through political liberalization. Moreover, Western governments can use the interactions with and leverage over repressive regimes that come with economic ties to press those regimes for reform.⁵⁹ Similarly, when Western multinationals go abroad, they bring with them the scrutiny of Western media and activists,⁶⁰ raising awareness of abuses that might otherwise go unnoticed in the West.

Third, investors purportedly will press for at least those forms of liberalization that improve the business environment. Thus, the argument posits that investors will demand respect for the rule of law so that disputes will be resolved fairly.⁶¹ Likewise, proponents of this approach believe that investors will demand access to information where governments keep it tightly controlled.⁶² Where these demands increase such access for the populace at large, the enhanced exposure to news and debate may prompt more citizens to challenge the status quo.⁶³

Fourth, proponents argue that investment will create a middle class empowered and presumably motivated to agitate for political freedom, and that repressive regimes will respond to and seek the support of this newly-minted bourgeoisie.⁶⁴

To be clear, I make no claim as to whether these mechanisms have succeeded in the past or can succeed in the future. There are, of course, serious objections to the constructive engagement model.⁶⁵ Whether engagement

59. See Baker, *supra* note 55, at 80–81, 85; see generally Wesley T. Milner, *Economic Globalization and Rights: An Empirical Analysis*, in GLOBALIZATION AND HUMAN RIGHTS 77, 80, 88 (Alison Brysk ed., 2002) (finding that incorporation into the international community has a positive effect on rights to physical integrity).

60. Debora Spar, *Foreign Investment and Human Rights*, CHALLENGE, Jan.–Feb. 1999, at 55, 75.

61. See, e.g., USA*Engage, *Economic Engagement Promotes Freedom*, *supra* note 55; David L. Richards et al., *Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries*, 45 INT'L STUD. Q. 219, 222, 235 (2001); Fishman, *supra* note 7, at 39. In a speech extolling the virtues of free trade and investment, Secretary of State Colin Powell suggested that investors so value the rule of law that they simply will not invest in economies that lack property and contract rights and neutral courts to enforce them. See Colin L. Powell, *supra* note 55. His point was that nations need to liberalize in order to attract investment. See *id.* If correct, Powell's argument would suggest that liberalization leads to investment more than investment leads to liberalization, and thus that the companies that do invest would be those least concerned about operating in a nation that respects the rule of law (and therefore perhaps least likely to push for reform) or those least averse to political risk.

62. See Fishman, *supra* note 7, at 39.

63. See Baker, *supra* note 55, at 82–83; see also Alan O. Sykes, *International Trade and Human Rights: An Economic Perspective* 3–4 (Univ. of Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 188, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=415802.

64. See, e.g., Forcese, *supra* note 55, at 6; USA*Engage, *Economic Engagement Promotes Freedom*, *supra* note 55; Baker, *supra* note 55, at 80–81, 84–85; Unocal Corp., *Business and Human Rights*, *supra* note 57; Richards et al., *supra* note 61, at 221; SCHOENBERGER, *supra* note 55, at 112.

65. See, e.g., Forcese, *supra* note 55, at 10–17 (concluding on basis of empirical studies that constructive engagement at least in some circumstances may prolong dictatorship and that investment can encourage abuses and increase the government's repressive capacity); Baker, *supra* note 55, at 81–88, 91 (observing that the greatest direct benefits of constructive engagement in Burma go to the military junta); Richards et al., *supra* note 61, at 223–25 (noting arguments of others that increased levels of foreign capital will lead to decreased respect for human rights); Bruce Bueno de Mesquita & George W. Downs, *Development and Democracy*, FOREIGN AFF., Sept.–Oct. 2005, at 77, 78–83 (rejecting claim that

promotes democracy and human rights is hotly contested,⁶⁶ and is probably best left to social scientists and foreign policy professionals. Moreover, any assessment of a past or proposed constructive engagement policy should be grounded in rigorous, country-specific analysis.⁶⁷ What might work within the unique social, political, economic, and cultural context of one nation may not be effective in another.⁶⁸ Even assuming *arguendo* that these mechanisms generally succeed, I show that ATS complicity liability should facilitate most, if not all, of them.

VI. THE RELATIONSHIP BETWEEN CONSTRUCTIVE ENGAGEMENT AND ACCOMPLICE LIABILITY

A. *Complicity Liability Penalizes Engagement That Is Not Constructive*

Constructive engagement theory is in large part predicated on the idea that corporations will encourage reform, but only when they engage in behavior that is responsible. Complicity in human rights abuses is not “constructive” in any sense contemplated by the development model. Thus, aiding and abetting liability simply does not challenge the kind of investment that might promote respect for human rights. This is so for three reasons. First, by definition, complicity in egregious violations of fundamental human rights norms supports the very abuses that a constructive engagement policy seeks to end.

Second, complicity in abuses sets a bad example and undermines any positive message that the U.S. or corporate citizens might try to send about

development of a middle class leads inevitably to democratization, noting that authoritarian regimes are getting so good at reaping the benefits of development while evading pressure to relax political control that economic growth now tends to increase their chances of survival; by carefully limiting public goods that are critical to political coordination but less important for economic cooperation, autocrats can weaken political opposition while creating a contented constituency of power brokers who benefit from growth and increasing resources to cope with political shocks); Spar, *supra* note 60, at 75 (noting argument of others that foreign investment impedes human rights progress); Milner, *supra* note 59, at 88, 91–92 (finding unexpectedly that economic freedom has a negative influence on rights to physical integrity, perhaps because it brings increased inequality, making governments less likely to guarantee basic human rights or leading to social conflict and reactionary repression). See generally AMY CHUA, *WORLD ON FIRE* 16 (2003) (arguing that in countries with pervasive poverty and a market-dominant ethnic minority, combined pursuit of laissez-faire free markets and democratization has catalyzed ethnic conflict, genocide and the subversion of markets and democracy).

66. See Richards et al., *supra* note 61, at 220, 231–32 (noting that recent empirical studies of the effect of foreign capital on governmental respect for human rights in the developing world have been mixed, and concluding based on authors’ own empirical study that foreign direct investment is associated with increased respect for political rights and civil liberties but has no statistically significant effect on physical integrity rights).

67. See Forcese, *supra* note 55, at 32; THANT MYINT-U, *THE RIVER OF LOST FOOTSTEPS* 41, 344–48 (2006) (criticizing current debate over Burma sanctions for ignoring Burmese history, and arguing that sanctions are counterproductive in the Burmese context since the military regime does not want to engage with the wider world and isolation allows the regime to push its agenda).

68. This further weakens the Administration’s policy argument for a blanket prohibition on aiding and abetting liability and suggests that *Sosa*’s requirement that any deference to the Executive’s foreign policy concerns must be case-specific makes good policy sense in this particular context.

respect for human rights. As the Assistant Secretary of State for Economic and Business Affairs has noted, "U.S. companies are models overseas for the kind of business practices we encourage others to adopt. Therefore, it is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible."⁶⁹ A corporation that abets human rights abuses will not impart democratic values or provide a model for positive change. On the contrary, its actions will more likely convey notions antithetical to that goal: that even Westerners do not respect democratic values; that human rights can be subordinated to economic objectives; or that we agree with the many dictators who have argued that fundamental human rights norms are not universal but are instead uniquely "Western" values that should not be imposed on non-Western cultures. At a minimum, a corporation's complicity in abuses will demonstrate that it is not serious about any statements it might make supporting democracy or human rights: actions speak louder than words.

Third, complicit corporations have little incentive to encourage reform; indeed they may have enormous legal and economic incentives to maintain the status quo. Democratization might bring to power a democratic opposition that would not look kindly on the company's involvement with the former regime or its abuses, and that might seek to hold the company legally responsible for its actions. Complicit corporations cannot therefore be expected to promote broad respect for the rule of law since doing so might ultimately serve to end their own impunity and thereby bring about disastrous legal and financial consequences for the company. In short, corporations involved in abuses may prefer the stability of their existing partnerships with autocratic regimes over the uncertainty of democratization. Consider, for example, the position of Unocal in Burma. There, the democratic opposition vehemently opposed Unocal's Yadana pipeline project.⁷⁰ In these circumstances, one finds it difficult to believe that Unocal would have promoted democratization that would bring that opposition to power.⁷¹

69. E. Anthony Wayne, Assistant Sec'y of State for Econ. & Bus. Affairs, U.S. Dep't of State, Announcement of "Voluntary Principles on Security and Human Rights" (Dec. 20, 2000), http://www.state.gov/www/policy_remarks/2000/001220_wayne_principles.html; see also SCHOENBERGER, *supra* note 55, at 119 (arguing that America's global leadership means U.S.-based multinationals set the ethical tone for the global economy).

70. See Democracy Now, *Oil Giant Chevron Urged to Cut Ties with Burmese Military Junta*, Oct. 12, 2007, http://www.democracynow.org/2007/10/12/oil_giant_chevron_urged_to_cut (quoting Burmese democracy leader Aung San Suu Kyi stating in December 1996 interview that "Unocal is one of those companies which are not interested in justice or freedom or human rights" and that companies like Unocal should withdraw from Burma "until [the regime] understands that the way forward for the country is not through repression, but through reconciliation . . .").

71. Since the legal arrangements governing corporate projects in countries with repressive regimes are negotiated or created by a government that is not accountable to its people, they are likely to be more favorable to the corporation in terms of environmental, labor, and social standards than they would have been under a democratically elected government. Thus, corporations have reason to be concerned that democratization might lead to changes in the statutory, regulatory or contractual terms

Perhaps the most famous attempt to differentiate between “constructive” and harmful engagement, the “Sullivan Principles,” illustrates the wide gulf between complicity in human rights abuses and truly “constructive” investment. Conceived in 1977 and periodically amended thereafter, the Principles were written by the Reverend Leon Sullivan as a voluntary code of conduct for U.S. corporations in apartheid South Africa.⁷² They were designed to promote equal employment practices by U.S. corporations in South Africa, improve living conditions and quality of life for non-whites, and be a major contributing factor in ending apartheid.⁷³ The Principles assumed that U.S. investment could promote the dismantling of apartheid, but only if U.S. businesses actively opposed it.⁷⁴

Not surprisingly, the Principles required companies to “eliminate all vestiges of racial discrimination” in their employment.⁷⁵ They also went much further, however, requiring companies to take affirmative steps toward “[i]mproving the quality of employees’ lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.”⁷⁶ Most importantly for present purposes, the Principles evolved to require companies to intervene in the political process. Signatories agreed to support the elimination of racially discriminatory employment laws and discrimination against “the rights of Blacks to form or belong” to unions, to “secure rights of Black workers to the freedom of association,” to support changes in laws that would grant Black migrant workers the right to a normal family life, to support the right of Black businesses to locate in urban areas, to support the freedom of mobility of Black workers and, indeed, to “[s]upport the ending of all apartheid laws.”⁷⁷ In short, the Principles recognized that successful constructive engagement requires active opposition to human rights violations; passive engagement and merely avoiding abetting abuses are insufficient.⁷⁸ I do not mean to suggest that failure to oppose repressive policies alone is actionable

under which they operate. Since this would provide a disincentive for *any* company doing business in a dictatorship to promote reform, it undercuts the engagement model’s confidence that corporations will actively encourage democratization.

72. Roughly 200 of the 260 U.S. corporations doing business in South Africa as of 1986 had adopted the Sullivan Principles. See Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 FORDHAM INT’L L.J. 1963, 1970 (1996) (citing Patricia Arnold & Theresa Hammond, *The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement*, 19 ACCT., ORG. & SOC. 111, 116 (1994)).

73. The (Sullivan) Statement of Principles (Fourth Amplification), Nov. 8, 1984, reprinted in *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1496 (1985) [hereinafter Sullivan Principles].

74. Forcese, *supra* note 55, at 23.

75. Sullivan Principles, *supra* note 73, at 1496 (Principle I); see also *id.* at 1497 (Principles II, III).

76. *Id.* at 1498 (Principle VI).

77. *Id.* at 1497-99 (Principles II, VI).

78. Rev. Leon Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POLY INT’L BUS. 427, 435 (1983) (“If companies passively subscribe to the Principles but fail to make aggressively an affirmative thrust . . . to help end South Africa’s racial and discriminatory laws, then the Principles and codes will have missed their mark.”).

under the ATS. Corporations can fail to promote constructive change without assisting abuses and thus being potentially liable under the ATS. But certainly, active complicity is not constructive, and holding a U.S. corporation liable for it will not interfere with constructive engagement.

Thus, where the political branches have made the broad determination that constructive engagement is the most effective policy for encouraging democratic reform and respect for human rights in a particular nation, ATS complicity liability serves a vital role; it ensures that individual corporations are held accountable on a case-by-case basis if they subvert that policy by aiding and abetting rights abuses. This kind of fact-specific inquiry, based upon years of investigation and discovery, is a role uniquely suited to courts.

The district court in *Unocal* recognized precisely this point. In its motion to dismiss, Unocal asserted that the adjudication of plaintiffs' claims would interfere with U.S. foreign policy.⁷⁹ It based this claim on a newly-enacted sanctions law that granted the President the power to prohibit new investment in Burma.⁸⁰ According to Unocal, in not banning existing investment, Congress demonstrated an official U.S. policy of refraining from steps "that might serve only to isolate the Burmese Government [i.e. SLORC] and actually hinder efforts toward reform."⁸¹ In short, Unocal argued that its joint venture with the Burmese junta was congressionally-approved constructive engagement.

The district court, however, properly rejected this argument. After casting doubt on Unocal's interpretation of the sanctions law's intent, the Court held:

Even accepting the Congressional and Executive decisions as Unocal frames them, the coordinate branches of government have simply indicated an intention to encourage reform by allowing companies from the United States to assert positive pressure on SLORC through their investments in Burma Plaintiffs essentially contend that Unocal, rather than encouraging reform through investment, is knowingly taking advantage of and profiting from SLORC's practice of using forced labor and forced relocation, in concert with other human rights violations . . . to further the interests of the Yadana gas pipeline project. Whatever the Court's final decision in this action may be, it will not reflect on, undermine or limit the policy determinations made by the

79. *Doe I v. Unocal*, 963 F. Supp. 880, 892, 895 n.17 (C.D. Cal. 1997).

80. *Id.* at 895, n.17.

81. *Id.* (quoting Unocal Memorandum of Points and Authorities in Support of Motion to Dismiss at 1).

coordinate branches with respect to human rights violations in Burma.⁸²

The underlying rationale of this holding—that liability for complicity in abuses is perfectly consistent with a constructive engagement policy—obviously applies beyond the context of the *Unocal* case.

Assuming a corporation that abets abuses somehow did promote reform in general, serious objections to immunity would still remain. The argument against complicity liability implicitly posits that such liability will overdeter investment by corporations that would facilitate reform. Thus, this argument is predicated on a utilitarian calculation that promoting democracy and human rights in general is more important than deterring particular abuses on particular projects or compensating particular victims of those abuses.

Many of the most fundamental human rights prohibitions, however, are non-derogable even in time of national emergency.⁸³ Thus, international law grants individuals these protections despite the fact that doing so may result in dire consequences for society at large. The impunity argument's radical utilitarianism utterly conflicts with this bedrock principle to the extent that a corporation has abetted violations of non-derogable rights.

Even if one ignores the non-derogability doctrine, the moral questions inherent in claims that the rights of specific individuals can be trumped by broader societal goals are, at a minimum, exceptionally difficult.⁸⁴ This has two relevant implications. First, such a determination should only be made, if at all, by the oppressed society or group, or its legitimate leaders.⁸⁵ The Administration's position, by contrast, does not defer to local desires. Moreover, it abdicates any responsibility on the part of the Executive to consider whether human rights abuses likely to result from a particular project are somehow "outweighed" by potential engagement benefits, and it would

82. *Id.* at 895 n.17. Subsequently, in the related case *Nat'l Coal. Gov't Union of Burma v. Unocal*, 176 F.R.D. 329, 335 (C.D. Cal. 1997), the district court invited the State Department to express its views of the ramifications of the litigation on U.S. foreign policy. The Department responded that "at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma." *Id.* The district court reiterated the passage quoted in the text. *Id.* at 355, n.31.

83. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 reporter's note 11 (1987) (identifying fundamental human rights prohibitions against genocide, slavery, murder or disappearance, torture or other cruel, inhuman or degrading treatment, prolonged arbitrary detention and systematic racial discrimination); see also International Covenant on Civil and Political Rights art. 4, entered into force Mar. 23, 1976, 999 U.N.T.S. 171.

84. See e.g., Daniel Kofman, *Moral Arguments: Sovereignty, Feasibility, Agency and Consequences*, in A MATTER OF PRINCIPLE: HUMANITARIAN ARGUMENTS FOR WAR IN IRAQ, 125, 138–42 (Thomas Cushman ed., 2005) (noting that disparate "deontologists" such as Robert Nozick, John Rawls and Ronald Dworkin argue that sacrificing some individuals to increase the aggregate social good is wrong because it ignores the ethical need to respect individuals, but countering that, where the violation of the fundamental rights of some may prevent the violation of the fundamental rights of others, one must weigh the harms and benefits of acting versus not acting).

85. See *id.* at 141–42 (arguing that only the Iraqis are entitled to judge the costs and benefits of establishing a new regime in Iraq, given the high human toll involved).

preclude the Judiciary from considering the issue. Instead, the Administration would leave these sensitive moral judgments to the sole discretion of the investing corporations. This, of course, is tantamount to denying that such ethical questions exist, (or at least to concluding that the moral calculus virtually always disfavors individual victims); corporations have an obvious financial stake in the matter and their executives are obligated to maximize shareholder value, not human rights. Even if such executives were inclined to take the ethical question seriously, they would have no basis upon which to do so, since they are likely ignorant of local conditions. Those who argue against liability should explain why a corporation involved in a project it knows will result in abuses should be allowed to decide that it is appropriate to sacrifice the rights of specific individuals for the sake of the broader goal of promoting democracy. For example, Unocal chose to proceed with the Yadana pipeline even though the democratically elected opposition in Burma opposed the project. In such a case, a defendant's appeal to the engagement model rings especially hollow.

The second implication of these moral questions is that the party seeking to subordinate the rights of individual victims to the "greater good" should at least bear the burden of proving that the prospective benefits are large and unequivocal. The Bush Administration, however, denies any obligation to show that the U.S. even *has* a constructive engagement policy toward the country involved, let alone that litigation of a particular case will interfere with engagement toward that particular country.

Even considering the question as the Administration would pose it—whether potential liability interferes with the viability of using an engagement policy anywhere—the Administration's argument fails. The above discussion demonstrates that "engagement" by companies that are themselves complicit in abuses is not likely to provide substantial impetus toward reform. In any event, even if one concluded that the general human rights benefits of constructive engagement outweigh the harms to particular individuals caused by particular projects, this might be a reason to advocate for investment and against sanctions, but it would hardly support barring compensation for the victims.

B. The Possibility of Complicity Liability Encourages Corporations To Behave in Ways that Promote Democracy According to the Constructive Engagement Model

Alien Tort Statute cases often involve companies that allegedly abetted abuses committed on their behalf by repressive government security forces.⁸⁶ The potential for ATS liability for such conduct should force com-

86. See, e.g., *Bowoto v. ChevronTexaco*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Doe I v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

panies to conduct due diligence and implement operational safeguards to decrease the risk that their government partners or members of the security forces will commit abuses on their behalf, or that the company will be complicit in such abuses.⁸⁷ In particular, companies will likely initiate with their government partners exactly the kind of dialogue the engagement model deems to be necessary if foreign investment is to promote democracy and respect for human rights.

A corporation that knows that it can be held liable for aiding and abetting will have greater incentive to tell its government partner and the members of the military or police that provide corporate security that it will not be complicit in human rights violations. More to the point, the potential for liability will compel companies to explain to government and military officials at all levels the reasons it cannot tolerate abuses: that international law and the U.S. legal system forbid complicity in human rights violations; that if abuses occur, victims—even the most marginalized peasants—are entitled to present evidence in a U.S. court against even the most powerful multinational corporations; that such victims are entitled to do so before a neutral decision-maker who will decide their case in accordance with the rule of law rather than the will of the government; and that, if those victims can prove their allegations, they will be entitled to redress. In short, the potential for aiding and abetting liability ensures that corporations will not only explain democratic values and institutions to repressive governments, but will also demonstrate through their efforts to avoid liability that those values and institutions are not merely aspirations but actually govern the conduct of members of democratic societies.⁸⁸

Companies will also convey to government officials that any abuses committed on their behalf by government military or security forces will be paraded across a high profile stage in the United States and perhaps throughout the world. To avoid this visibility, authorities may take steps to ensure that lower-level officials do not permit or condone abuses on a company's project. In this sense, potential liability strongly supports the constructive engagement rationale that assumes nations will seek to improve their reputations.⁸⁹

87. See Sherman Report, *supra* note 57, at 7 (“As profit-driven actors, corporations make decisions about a particular course of action based on its anticipated impact to their bottom line. For policy-makers seeking to advance responsible corporate behavior in conflict zones, much will depend upon engaging corporate actors in a way that resonates with that bottom line.”).

88. As one commentator of the Nuremberg Tribunal noted, the trial of Nazi war criminals was: an act staged not simply to punish extreme crimes but to demonstrate visibly the power of the law to submit the most horrific outrages to its sober ministrations. In this regard, the trial was to serve as a spectacle of legality, making visible both the crimes of the Germans and the sweeping neutral authority of the rule of law.

LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* 41 (2001).

89. One critic of the notion that corporations should be cast in the role of political reformers argues that the prospect of company executives lecturing government officials on human rights and democracy “evokes an image from a past that should not be restored: charter company officials who saw themselves

The existence of aiding and abetting liability will encourage companies to engage in these kinds of discussions with government officials and conduct due diligence even before they form partnerships with government entities or employ government forces as security. Companies will want to assess the risk of being complicit in abuses and therefore subject to litigation. Those able to secure in advance the cooperation of foreign governments in avoiding rights violations would presumably not be deterred from doing business abroad, and such dialogue is exactly what constructive engagement requires. A corporation conceivably may decide not to proceed with an investment if it deems complicity liability likely given the nature of the project and the potential government partner. Although critics of complicity liability present no evidence to support this deterrence theory, if potential liability were a deterrent in this situation, it would be deterring counterproductive, rights violative investment.⁹⁰ Moreover, in these circumstances, refusal to invest may promote political liberalization by demonstrating to repressive regimes that there is a cost to committing abuses. Under the engagement model properly conceived, such deterrence is beneficial in that it sends exactly the right message to dictatorships.

Critics of aiding and abetting liability might consider this a lost opportunity for engagement. On the contrary, however, a dialogue between a corporation and a potential government partner, in which the corporation takes human rights seriously, *is* constructive engagement, even, and perhaps especially, where the company ultimately decides not to invest because of human rights concerns. To be constructive, engagement cannot be all carrot and no stick.

The filing and litigation of a case against a complicit corporation may itself serve a similar didactic function in transmitting democratic values to repressive regimes.⁹¹ To the extent that government officials follow the pro-

as agents of civilizations in distant countries 'not ruled by Christian kings' (as they were described during that era)." Ottaway, *supra* note 57, at 53. Assuming this concern is even valid, it should not be implicated in the kind of corporate-government dialogue that would result from a vigorous tort regime; the corporate argument for human rights will not be primarily based on notions of "universal values" but rather will be grounded in the practical costs to corporations and their government partners if human rights abuses are committed. While Ottaway frames her argument as a criticism of NGOs, it could equally apply to the idea of constructive engagement, (except the argument that purely passive engagement is sufficient), since that model presumes in part that corporations will voluntarily accept the role of reformers. Indeed, Ottaway concedes that her criticism extends to *all* attempts to impose human rights norms from the outside. *Id.* I start from the premise that promoting respect for human rights is a valuable endeavor.

90. For example, Unocal knew from the inception of the Yadana project that the military would force villagers to work on the project and would commit other egregious violations of fundamental human rights on Unocal's behalf. *Doe I v. Unocal*, 395 F.3d 932, 940 (9th Cir. 2002). One wonders whether Unocal, had it contemplated that it might be sued, would have sought assurances from the Burmese military that abuses would not occur, elected not to use the military to provide security, or even decided not to participate in the project altogether, (an unlikely prospect given the profits involved).

91. See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1222 (9th Cir. 2007), *vacated upon grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007) (noting that it is a "plausible hypothesis" that "[f]oreign court

gress of these kinds of suits, they will see how an independent judiciary operates in a free society. If the government protests to our State Department, the most efficacious response under the constructive engagement model would be for the Department to explain that in our system, we have a co-equal judicial branch, and that the Executive cannot and will not step in to end the case. Such a response would send a clear message that U.S. courts adhere to the rule of law, not the whims of the Executive, and that under the rule of law, huge, politically connected companies can be held accountable by politically powerless individuals. Thus, if one believes, as the engagement model assumes, that exposure to democratic values promotes reform, then one should welcome ATS complicity litigation. Proponents of engagement cannot claim on the one hand that business promotes reform by exposing dictators to these values while at the same time denying that litigation against corporations complicit in abuses has the same effect.

Indeed, on a more fundamental level, cases that place the rights of the victim front and center demonstrate our belief in the inherent value of every person (even those whom foreign government officials have sought to dehumanize through the abuses at issue) and reflect our determination to defend this value even if a foreign government is displeased.

Likewise, a suit in the United States can inspire or protect dissidents in the country at issue. Thus, for example, Joelito Filártiga's sister Dolly noted in a *New York Times* op-ed in which she defended the importance of the ATS that:

For my family, the [*Filártiga*] decision put us at risk but also gave protection – the Paraguayan government threatened us but wouldn't risk retaliating once we had the American legal system on our side. In Paraguay, the case remains a symbol of the injustice of the Stroessner dictatorship, and my brother is considered a martyr for human rights.⁹²

All of these benefits would be lost if the Administration's position were to prevail. Indeed, simply by asking U.S. courts, *in the name of U.S. foreign policy*, to refuse to hold to account U.S. corporations that directly abet the perpetration of human rights abuses, the Administration sends a powerful signal to abusive regimes: that the United States government is not committed to promoting reform, or at least that it is unwilling to sacrifice the narrow economic interests of a few U.S. multinationals in order to protect human rights by placing even modest limits on their actions abroad. This, in turn, would suggest to such regimes that they can ignore pressure for reform without fear of political repercussion from the United States.

rulings against rights-abusing defendants have the effect of putting pressure 'from above' on the state where the rights abuses occurred") (quoting Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 4 (2001)).

92. Dolly Filártiga, *American Courts*, *Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21.

This message conflicts with the efforts that the United States is otherwise engaged in to promote democracy and human rights around the world. The Administration's position in the *Unocal* litigation exemplifies this inconsistency. There, the Bush Administration argued against liability for a corporation involved in human rights abuses in Burma, despite its longstanding criticisms of the Burmese military government, reflected in continued and increased trade and investment sanctions. This mixed message—criticizing Burma's human rights abuses while attempting to shelter a U.S. corporation accused of abetting those very abuses—undermines the credibility of the Administration's efforts to promote reform.

Indeed, the U.S. government has repeatedly cited the Alien Tort Statute to the United Nations to show that the U.S. is fulfilling its international responsibilities.⁹³ Against this backdrop, the Administration's vigorous attempts to circumscribe ATS liability will undoubtedly be perceived as retrenchment of the U.S. commitment to human rights enforcement, or as evidence of a double standard under which the United States turns a blind eye to the transgressions of its own corporate citizens while asking other nations to adhere to human rights norms.⁹⁴ Circumscribing ATS liability would also mean losing the opportunity to enlist corporations as advocates for democracy in the way that constructive engagement requires.

Worse, providing impunity for abettors on foreign policy grounds does not merely tolerate complicity, it may encourage or subsidize it. Impunity allows companies to externalize the costs of taking measures to avoid complicity and compensating the victims.⁹⁵ By removing at least some of these costs while permitting companies to retain the benefits of abetting, impunity may tend to encourage companies to invest in the worst kinds of projects. What's more, these companies will have a competitive advantage over more ethical competitors who are not willing to invest in projects that jeopardize human rights. This stacks the deck in favor of those companies

93. See, e.g., Brief of Amici Curiae International Jurists in Support of Affirmance at 9–10, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2002 WL 398960.

94. See Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 988 (2004); see also Sen. Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, Aug. 7, 2003, at A23 (criticizing Administration's attack on ATS and noting that in context of war on terror, ATS "send[s] the right message to the world: the United States is serious about human rights."). The Administration's efforts to preclude aiding and abetting liability under the ATS while asserting in the context of military commissions that such liability is an established international law norm can only increase the perception that the Administration seeks to apply a double standard to U.S. corporations.

95. Loss to corporate reputation is another cost faced by complicit corporations if their abuses become publicly known. See Spar, *supra* note 60, at 75. That risk, however, is diminished if the corporation is immune from suit. Often, the filing of a lawsuit induces the media to report on the abuses at issue, and subsequent litigation developments may tend to keep the media focused on those abuses long after they otherwise would have lost interest. Thus, while reputational risk certainly exists independent of litigation risk, immunity from complicity liability removes some of the incentive that corporations have to reduce the risk of bad publicity by ensuring good practices.

least likely to promote constructive engagement and puts pressure on competitive businesses to race to the bottom.⁹⁶

The Administration argued in *Sosa* that the ATS undercuts “the threat of sanctions” by the U.S. government, which are “an important tool” for promoting democracy.⁹⁷ This position relies on the unsupported assumption that the possibility of tort adjudication will deter so much investment as to essentially constitute a sanction. The argument, however, is not convincing because liability is not equivalent to economic sanctions. On the contrary, the ATS holds particular parties responsible for their involvement in specific, egregious abuses committed against specific victims. It does not penalize a company merely for having an investment in a particular nation. Accordingly, complicity liability is unlikely to end investment in a given nation, nor does it seek to do so. Even assuming some corporations will refuse to invest as a result of a complicity liability tort regime, such refusal is utterly unlike government-imposed sanctions; it is particularized, “free market” engagement in that companies, on a project-by-project basis, determine for themselves whether their own actions are inherently likely to substantially assist or encourage the commission of abuses. This is a very narrow stick.

The sanctions argument is also odd, if not perverse. Why permit investment that directly abets precisely the abuses one seeks to prevent, simply to preserve the option of suspending more investment at a later date? As noted above, the very act of a corporation telling its government partner that it will not be complicit in abuses, or refusing to do business when it appears that complicity is inevitable, exerts positive pressure for reform. Yet, the Administration’s argument would forgo that pressure. For this position to make sense, one must believe that sanctions, or the threat of sanctions, promote liberalization in a way that interactions between corporations and governments do not. In other words, one must deny the efficacy of one of the central mechanisms of the constructive engagement policy that the Administration claims to defend.

Moreover, if correct, this argument would logically apply to any type of liability that might deter investment in any nation towards which the U.S. government might someday enact sanctions. For example, while the U.S. might consider sanctions against countries accused of involvement in terror-

96. One might respond that the litigation risks involved are inframarginal—that is, they are not so daunting that their removal would actually tend to encourage corporations to be complicit in abuses. That is an empirical question about which I take no position. The Bush Administration’s argument, however, is predicated on the notion that these risks are so substantial that they will discourage investment, even by ethical companies, in any country with a poor human rights record. If such risks are not sufficiently weighty as to discourage investment, the underlying rationale of the Administration’s attack on complicity liability falls away. Assuming *arguendo* the potential litigation risks are substantial enough to fundamentally alter corporate behavior, impunity will reward and encourage investment that is utterly at odds with constructive engagement.

97. Brief for the United States as Respondent Supporting Petitioner at 44, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581.

ism, no one is suggesting that laws prohibiting corporations from aiding and abetting terrorism be relaxed in order to preserve “the threat of sanctions” in the future.

Last, it is difficult to see how the threat of sanctions will be taken seriously when the United States is willing to defend in court those U.S. companies that are directly complicit in abuses. Instead, foreign regimes will most likely conclude that the Administration is not serious enough about punishing abuses to impose sanctions that would harm U.S. companies. But even if such regimes were to take the Administration’s position at face value and conclude that efforts to dismiss complicity suits demonstrate a commitment to constructive engagement, they will have little reason to believe that the Administration will suddenly reverse course and impose sanctions.

VII. OTHER OBJECTIONS TO THE BUSH ADMINISTRATION AND BUSINESS COMMUNITY POSITION

Even if the Bush Administration and business community argument that complicity liability undermines a constructive engagement foreign policy were not internally incoherent, a series of other objections render it largely, if not wholly, irrelevant.

First, the Alien Tort Statute precludes the Administration’s foreign policy argument, because the plain text of the statute compels recognition of aiding and abetting liability.⁹⁸ The ATS gives U.S. courts jurisdiction over torts committed in violation of the law of nations.⁹⁹ As detailed in Sections II and III of this article, the law of nations prohibits aiding and abetting human rights abuses; indeed, such liability holds a defendant accountable for its own acts,¹⁰⁰ and deems the abettor to have actually committed the underlying tort.¹⁰¹ Thus, aiding and abetting is a tort committed in violation of the law of nations. Since the statute therefore requires aiding and abetting liability, courts should have no occasion to consider the Administration’s policy argument.

Second, the argument that foreign policy concerns should preclude all aiding and abetting liability conflicts with *Sosa*’s dicta regarding the potential relevance of such concerns. As noted above, *Sosa* suggested that a “possible limitation” on ATS adjudication is “case-specific deference” to the

98. See *Cabello v. Fernández-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (“by their terms, the ATCA and TVPA are not limited to claims of direct liability.”).

99. 28 U.S.C. § 1350 (1992).

100. *Doe I v. Unocal*, 395 F.3d. 932, 953 n.30 (9th Cir. 2002).

101. U.S. Department of Defense, *Military Commission Instruction No. 2*, Art. 6(C), at 16–17 (Apr. 30, 2003) (abettor is responsible “as a principal even if another individual more directly perpetrated the offense.”); Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II(2), Dec. 20, 1945 (“Any person . . . is deemed to have committed [crimes against peace, war crimes, crimes against humanity or membership in a criminal group] as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same”).

political branches' view of the effect of a particular case on U.S. foreign policy.¹⁰² The Administration's broad foreign policy objection to complicity liability in all cases cannot be reconciled with *Sosa's* clear implication that foreign policy concerns may provide grounds for dismissal, if at all, only on a case-by-case basis.¹⁰³ Thus, even a showing by the Administration that aiding and abetting liability *usually* undermines constructive engagement would not be a basis for dismissal of any specific case. At a minimum, the Administration or defendant bears the burden of demonstrating that the United States has a constructive engagement policy toward the particular country in question and that this country-specific policy would be undermined by adjudication of the specific case in light of the political and economic circumstances extant in that country at the time of the suit. The Administration, however, rejects that approach. For example, in *Unocal*, it argued against recognition of complicity liability, citing the need to preserve engagement as a U.S. foreign policy tool,¹⁰⁴ even though the case involved abuses in Burma, a country toward which sanctions, not engagement, is the official U.S. policy for promoting human rights.

Third, assuming *arguendo* that the Administration's policy argument is correct in suggesting that complicity liability might interfere with constructive engagement, it still would be insufficient to bar such liability. Constructive engagement is never the *only* means by which U.S. foreign

102. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Critically, the U.S. government's views of a particular case are not dispositive. *Id.* ("[C]ourts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."); see also Sarei, 487 F.3d 1193 (reversing dismissal despite Statement of Interest asserting that adjudication risked adverse impact on U.S. foreign policy), *vacated upon grant of reh'g en banc*, 499 F.3d 923 (9th Cir. 2007). Moreover, existing doctrines such as the political question and act of state doctrines determine when a case can be dismissed for interfering with U.S. foreign policy; *Sosa* did not purport to create a new abstention doctrine that allows courts to dispense with the requirements of existing law. Courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. *W.S. Kirkpatrick & Co. v. Envtl Tectonics Corp.*, 493 U.S. 400, 409–10 (1990). Thus, it is "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962).

103. *Sosa* held that courts may look to "practical consequences" as part of "the determination whether a norm is sufficiently definite to support a cause of action." *Sosa*, 542 U.S. at 732–733 (emphasis added). The Administration takes this language to mean that courts may consider its general foreign policy objections to aiding and abetting liability among these practical consequences. See, e.g., Brief for the United States of America as Amicus Curiae at 12–19, *Khulumani v. Barclay Nat'l Bank*, 509 F.3d 148 (2d Cir. 2007) (No. 05-2141); Supplemental Brief for the United States of America as Amicus Curiae at 10–17, *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628). However, the consequences the Court seemingly had in mind were those that might follow from accepting a norm too broad to be judicially manageable. *Sosa* refused to find that the arrest at issue was actionable, noting that the implications of the rule the plaintiff advocated would be "breathhtaking" as it would support a claim for any arrest "unauthorized by the law of the jurisdiction in which it took place." *Id.* at 736. The Court was clear that foreign policy concerns involved a separate inquiry; the footnote in which the Court considered those concerns immediately followed the "practical consequences" language, and described case-specific deference as "[a]nother possible limitation." *Id.* at 733, n.21. *Sosa's* "practical consequences" language therefore provides no basis for considering broad foreign policy arguments divorced from any case-specific analysis.

104. Supplemental Brief for the United States of America as Amicus Curiae at 11–15, *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628).

policy attempts to facilitate reform. The Administration's position ignores the fact that there are other congressionally mandated efforts in place to promote human rights. Thus, even if a particular ATS case interfered with constructive engagement toward a specific nation, it would not necessarily impede U.S. foreign policy. As a former Assistant Secretary of State for Democracy, Human Rights, and Labor noted in a declaration in support of the plaintiffs in *Doe v. ExxonMobil*, U.S. law requires candid, public scrutiny of nations' compliance with fundamental rights as an integral part of United States foreign policy by, for example, requiring the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world.¹⁰⁵ Adjudication of individual human rights claims under the ATS serves the same foreign policy function.

Fourth, the argument that precluding aiding and abetting liability is necessary to preserve engagement has no logical end point. It applies with equal force to any type of legal liability that could conceivably deter investment in any nation where the U.S. government might wish to promote human rights. Few would argue that the judiciary should offer companies blanket immunity for ordinary torts, environmental degradation, contracts breaches, U.S. tax violations, or indeed, every other liability that might limit their willingness to invest. It makes no sense to single out for immunity some of the worst types of corporate behavior, particularly since they assist the very conduct the policy at issue is designed to prevent.

Fifth, neither the Administration nor the business community has, in any of these cases, presented any empirical or other evidence suggesting that corporations will decline significant investment opportunities based on the possibility that they will be held liable if they aid and abet human rights abuses in implementing their projects. Nor have they provided any evidence that corporations with substantial investments will pull out of existing projects.¹⁰⁶ The absence of any evidence supporting their position is an obvious flaw in the Administration's argument against complicity liability. A party asserting that those who have committed wrongful acts should nonetheless be afforded impunity on foreign policy grounds presum-

105. Decl. of Harold Hongju Koh ¶ 14, *Doe I v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357) (arguing ATS case does not interfere with U.S. relations with Indonesia). For U.S. laws regarding nations' compliance with fundamental rights, see 22 U.S.C.A. §§ 2151n (2000); 19 U.S.C.A. § 2464 (2000).

106. A 2003 monograph, often touted by ATS critics, purports to show that ATS litigation could significantly diminish U.S. trade and investment. See generally, GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* (Institute for International Economics 2003). The authors, however, reach this conclusion by simply "assuming that a wave of ATS litigation would depress overall US trade with target companies by 10 percent . . . [and] that the most vulnerable categories of commerce—US imports of oil and minerals and US exports to government agencies—would each be depressed by 50 percent." *Id.* at 38. The report provides no empirical or even anecdotal evidence for these assumptions. *Id.* One is reminded of the Yiddish expression: "Az di bobbe volt gehat beytsim volt zi geven mayn zeyde," which roughly translates to: "If my grandmother were a man, she'd be my grandfather."

ably bears the burden to come forward with at least some evidence supporting their policy claims. Mere speculation ought not to suffice.¹⁰⁷

Sixth, there is substantial reason to doubt such speculation. Since no court has ever held that merely doing business in an autocratic nation is a basis for liability, the deterrence argument should only apply to corporations that might in some way be involved in rights abuses. The assumption that narrow civil liability for conduct that already violates international and domestic law will lead to disinvestment ignores the most likely scenario: that corporations will continue to invest but will implement due diligence, oversight and operating procedures to avoid abetting rights violations. This is particularly so since many, if not most, corporate complicity cases involve resource extraction companies.¹⁰⁸ Such companies are especially unlikely to refuse to invest or to withdraw from existing investments.¹⁰⁹

Notwithstanding the fact that merely doing business in a country has never been found to be sufficient for ATS liability, the Administration appears to suggest that even wholly innocent companies would be deterred from investing. That seems to be the implication of its claim that aiding and abetting liability “would generate significant uncertainty regarding private liability, which would surely deter many businesses from such economic engagement.”¹¹⁰ Other factors being equal, however, corporations unwilling to aid and abet abuses are even more unlikely to be deterred than those who are. Moreover, aiding and abetting will not create “significant uncertainty,” given the fact that such liability is already well-established in domestic tort law and corporations therefore presumably know what it means.¹¹¹

107. For example, in certain limited circumstances, the act of state doctrine bars suits that interfere with U.S. foreign relations. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963). A defendant who seeks to assert the doctrine bears the burden of proving that it applies. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). This means showing a demonstrable, not speculative, threat to foreign relations. *Envtl Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1061 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1989).

108. *See e.g.*, *Doe I v. Unocal*, 395 F.3d 932 (9th Cir. 2002); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000); *Doe v. Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005); *Mujica v. Occidental Petroleum*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005); *Bowoto v. ChevronTexaco*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 289 (S.D.N.Y. 2003); *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

109. *See Sherman Report, supra* note 57, at 6 (noting that extractive industries “may be particularly reluctant to withdraw” from areas of conflict “given their extensive financial investment and physical presence,” and their need to ensure access to resources, and because “expected returns on investment may simply outweigh the economic and reputational costs of continuing to operate”). *See also* Human Rights Watch, *Myths and Facts About the Alien Tort Claims Act*, <http://www.hrw.org/campaigns/atca/myths.htm> (last visited Mar. 7, 2008) (noting that Shell and Chevron each undertook new, multi-billion dollar, multi-year investment projects in Nigeria almost immediately after being sued for complicity in abuses).

110. Brief for the United States of America as Amicus Curiae at 13, *Khulumani v. Barclay Nat'l Bank*, 509 F.3d 148 (2d Cir. 2007) (No. 05-2141).

111. *See Hoffman & Zaheer, supra* note 28, at 81 (arguing that knowing participation standard did not prove so vague as to disrupt markets during the twenty-six years it applied to abettors of securities law violations).

Nonetheless, as detailed above, the argument that complicity liability promotes constructive engagement does not in any way depend on a claim that *no* businesses will be deterred. On the contrary, if ATS liability actually deters investment by corporations unwilling or unable to invest without being complicit in egregious abuses, it would likely further constructive engagement by removing those corporations whose engagement would not be constructive.

Indeed, my argument would not be undermined even if innocent companies did decline to invest in repressive countries as a result of the existence of complicity liability. The Administration's position that such liability would harm an engagement policy depends on its claim that "many" businesses would be deterred. If only a few refuse to invest, others will presumably still engage, and any effect on engagement would be marginal. Assuming *arguendo* any companies that are unlikely to abet abuses might nonetheless be deterred, such deterrence would likely affect a limited number of companies—those that are unusually risk-averse.

Moreover, law is rarely perfect. It virtually always presents risks of both underdeterrence (*i.e.* failure to deter some conduct the law seeks to prevent) and overdeterrence (*i.e.* deterring innocent conduct because law-abiding citizens do not wish to risk crossing the line into illegality or being accused of doing so). Here, the risks of overdetering potentially beneficial investment must be weighed against the fact that abolishing aiding and abetting liability will underdeter complicity in human rights abuses. For the reasons noted in Part VI, the benefits to engagement policy that follow from continued recognition of aiding and abetting liability should easily outweigh any marginal loss to that policy that might occur if in fact complicity liability does overdeter investment.¹¹²

Finally, although the majority of the corporations that are sued under the ATS, and thus that the Administration seeks to protect, are oil and mining companies, these are the companies least likely to spread development and democratic values. A rich body of social science and foreign policy literature demonstrates that resource extraction often results in a variety of negative political and economic consequences.¹¹³ One aspect of this "resource curse"

112. See also Hoffman & Zaheer, *supra* note 28, at 81 (arguing that the gravity of offenses subject to ATS liability offers a strong argument for favoring overdeterrence).

113. See, e.g., Terry Lynn Karl, *Oil-led Development: Social, Political and Economic Consequences* at 3 (Ctr. on Democracy, Dev., and the Rule of Law, Working Paper, 2007) ("[C]ountries that depend on oil for their livelihood eventually become among the most economically troubled, the most authoritarian, and the most conflict-ridden in the world."); Melissa Dell, *The Devil's Excrement: The Negative Effect of Natural Resources on Development*, HARV. INT'L REV., Fall 2004, at 38, 38–39 ("[T]he discovery of oil and mineral resources often fuels internal corruption and conflict, encourages unethical corporate behavior, leads to the violation of human rights, and results in environmental degradation."); Spar, *supra* note 60, at 60 (model suggesting foreign investment impedes human rights progress most plausible with respect to extractive industries; since corporations and the state both have interest in physically protecting the asset, links between firm and state are likely to tighten; population tends to have limited interaction with the foreign investor, so possibilities for ameliorating local conditions are relatively weak; and much of the benefits will flow to state coffers, enhancing state's repressive capabilities).

is that “[o]il and mineral wealth can be bad for growth and bad for democracy, since they tend to impede the development of institutions and values critical to open, market-based economies and political freedom: civil liberties, the rule of law, protection of property rights, and political participation.”¹¹⁴ As the U.N. Economic and Social Council has noted, “[e]xtraction industries particularly tend to be associated with serious human rights problems, mainly because they may not be able to select their locality and may feel compelled to work closely with repressive host States.”¹¹⁵ In arguing in the abstract that engagement promotes democracy, without considering the fact that most corporate ATS defendants are resource extraction companies, opponents of complicity liability utterly ignore the implications of the resource curse. The Administration’s intervention on behalf of oil and mining companies on development model grounds defends a type of engagement that is antithetical to its own stated goals.

VIII. CONCLUSION

When the Executive intervenes in an ATS case to argue either that aiding and abetting liability interferes with U.S. foreign policy generally or that adjudication of a particular case would do so, such intervention inevitably conveys a message: that this particular Administration will defend abettors, and that dictatorships that work with U.S. multinationals have a champion in the White House when they commit egregious abuses on a company’s behalf. Moreover, intervention in particular cases, especially where successful, undercuts our ability to convey the notion that we have an independent judiciary that decides cases under the rule of law rather than

114. Nancy Birdsall & Arvind Subramanian, *Saving Iraq From Its Oil*, FOREIGN AFF. July/Aug. 2004, at 77, 77; see also, Michael Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 342, 356 (2001) (concluding based on statistical analysis “that the antidemocratic properties of oil and mineral wealth are substantial,” though this effect is greater in countries with fuel wealth than those with mineral wealth). See Ross at 356–57 (describing three causal mechanisms that link oil and authoritarianism: governments using low taxes and high spending to dampen pressures for democracy; governments building up internal security forces to ward off such pressures; and the failure to create industrial and service sector jobs, which renders the population less likely to push for democracy). See also Birdsall & Subramanian, *supra*, at 81 (noting that where the state controls natural resources, tax burdens are reduced and citizens “have little incentive and no effective mechanism by which to hold government accountable. This can lead to the unchecked abuse of state power” and create “conditions [that] make it very hard for political institutions to develop.”).

Moreover, research suggests that oil-rich regimes are on average more durable than those in other developing nations, though there is wide variation in stability and durability among oil dependent states. Benjamin Smith, *Oil Wealth and Regime Survival in the Developing World, 1960–1999*, 48 AM. J. POL. SCI. 232, 242–43 (2004); see also Karl, *supra* note 113, at 23–24 (noting that “oil wealth is robustly associated with more durable regimes” but is not associated with durability when “initial oil exploitation coincides with regime and state building,” in which case “these regimes are especially fragile and vulnerable during oil busts”).

115. U.N. Econ. & Soc. Council [ECOSOC], *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises*, ¶ 5, U.N. Doc. E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1 (Feb. 2002).

based upon the political whim of the Executive and the defense of the powerful. Thus, Bush Administration intervention has done serious damage to the very didactic processes upon which proponents of the development model argue that model depends. While the development model posits that engagement conveys values of respect for the rule of law, human rights and democracy, the Bush Administration's position conveys only hypocrisy.

