

University of Chicago Law School

Chicago Unbound

Journal Articles

Scholarship

2010

State Action and Corporate Human Rights Liability

Curtis A. Bradley

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Bradley, Curtis A., "State Action and Corporate Human Rights Liability" (2010). *Journal Articles*. 10168.
https://chicagounbound.uchicago.edu/journal_articles/10168

This Article is brought to you for free and open access by the Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

STATE ACTION AND CORPORATE HUMAN RIGHTS LIABILITY

*Curtis A. Bradley**

This Essay considers the requirement of state action in suits brought against private corporations under the Alien Tort Statute (ATS). It argues that, in addressing this requirement, courts have erred in applying the state action jurisprudence developed under the domestic civil rights statute, 42 U.S.C. § 1983. It also argues that, even if it were appropriate to borrow in this manner from the § 1983 cases, such borrowing would not support the allowance of aiding and abetting liability against corporations, and that this liability is also problematic on a number of other grounds. The Essay assumes for the sake of argument that corporations are not categorically excluded as defendants under the ATS, although this is currently a matter of some controversy.¹

I. BACKGROUND

Enacted in 1789 as part of the First Judiciary Act, the ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the

© 2010 Curtis A. Bradley. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format, at or below cost, for educational purposes, so long as each copy identifies the authors, provides a citation to the Notre Dame Law Review, and includes this provision and copyright notice.

* Richard A. Horvitz Professor, Duke Law School. For helpful comments and suggestions, I thank Bill Dodge, Sam Estreicher, Jack Goldsmith, Mike Ramsey, and Paul Stephan. An early draft of this Essay was presented at a panel session of the Annual Meeting of the Association of American Law Schools.

1 It has generally been thought that corporations can be sued under the ATS, but this proposition has recently been called into question. *See* *Kiobel v. Royal Dutch Petroleum Co.*, No. 06-4800-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010) (holding, in a 2-1 decision, that ATS suits may not be brought against private corporations); *Doe v. Nestle, S.A.*, No. CV05-5133, 2010 WL 3969615 (C.D. Cal. Sept. 8, 2010) (same); *cf.* *Bowoto v. Chevron Corp.*, No. 09-15641, 2010 WL 3516437 (9th Cir. Sept. 10, 2010) (holding that corporations may not be sued under the Torture Victim Protection Act).

law of nations or a treaty of the United States.”² By its terms, the ATS covers only cases involving an alleged violation of international law. For a variety of reasons, the alleged international law violation in ATS cases is almost always a violation of the “law of nations,” also known today as “customary international law,” rather than a violation of a treaty. As with violations of most provisions of U.S. constitutional law, violations of international law, whether customary or treaty-based, generally require state action.³ This is true even for violations of many international human rights norms, such as the prohibition on torture.⁴

The use of the ATS for international human rights litigation can be traced to the Second Circuit’s 1980 decision in *Filartiga v. Pena-Irala*,⁵ in which two Paraguayan citizens sued a former Paraguayan police official for torturing and murdering a member of their family.⁶ The court in *Filartiga* held that “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties,” and that, as a result, “whenever an alleged torturer is found and served with process by an alien within our borders, [the ATS] provides federal jurisdiction.”⁷ In this and similar cases brought against foreign government officials, the defendant is alleged to have perpetrated the abuse, and to have acted under color of state law in doing so, so there is usually little difficulty in these cases in meeting the state action requirement.⁸

In recent years, however, a large number of ATS cases have been brought against private corporations, relating to their involvement with abusive regimes. For a variety of reasons, corporate defendants

2 28 U.S.C. § 1350 (2006).

3 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note (1987); 1 OPPENHEIM’S INTERNATIONAL LAW § 6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

4 See RESTATEMENT (THIRD), *supra* note 3, § 702 & cmt. b. For example, the U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment covers only torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

5 630 F.2d 876 (2d Cir. 1980).

6 See *id.*

7 *Id.* at 877.

8 See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 924 (2007); Note, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2039–41 (2001).

are attractive targets for ATS suits: corporations are not thought to benefit from the sovereign immunity doctrines that apply to governmental defendants;⁹ most large corporations have a presence in the United States, making it easy to obtain personal jurisdiction over them in this country; they typically have substantial assets that can be reached by U.S. courts; and they have an incentive to settle cases in order to avoid bad publicity.

The Supreme Court considered the scope of the ATS in its 2004 decision, *Sosa v. Alvarez-Machain*.¹⁰ That case, like the corporate cases, involved a suit against a private actor. A Mexican national who had been abducted from Mexico at the behest of the United States was suing a private Mexican citizen for his role in the abduction. After reviewing the history of the ATS, the Court concluded that although the statute was “a jurisdictional statute creating no new causes of action,”¹¹ it served to “underwrite litigation of a narrow set of common law actions derived from the law of nations.”¹² The Court also held that claims could not be brought today under the ATS “for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted,”¹³ and the Court identified these paradigms as the norms against violation of safe conducts, infringement of the rights of ambassadors, and piracy.¹⁴ The Court explained that “[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.”¹⁵

9 Foreign governments generally have immunity from ATS suits, pursuant to the Foreign Sovereign Immunities Act (FSIA). See, e.g., 28 U.S.C. § 1605(a)(5) (2006) (allowing suits against foreign states for tort claims only if the damage or injury from the tort occurs in the United States); *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989) (holding that ATS suits are subject to the restrictions in the FSIA). The Supreme Court has held that the FSIA does not apply to suits brought against individual foreign officials, but it has indicated that these officials may be entitled to some form of common law immunity. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010).

10 542 U.S. 692 (2004).

11 *Id.* at 724.

12 *Id.* at 721.

13 *Id.* at 732.

14 *Id.* at 715. The Court based this list on a discussion by Blackstone of offenses against the law of nations that violated English criminal law. See 4 WILLIAM BLACKSTONE, COMMENTARIES *68. For discussion of the right of safe conduct, see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

15 *Sosa*, 542 U.S. at 715.

In articulating this standard for ATS cases, the Court in *Sosa* noted that “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹⁶ Of particular relevance to this Essay, the Court attached a footnote to this sentence containing a reference to corporations. The much discussed “footnote 20” states that, in determining whether a norm is sufficiently specific to support a claim under the ATS, “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”¹⁷ The implications of this footnote will be explored below.

II. STATE ACTION AND SECTION 1983

The state action requirement under international law is a potential obstacle to ATS suits against private corporations. In considering this requirement, it is useful to divide the corporate ATS cases into three categories: (1) cases in which the corporate defendant is alleged to have violated one of the few international law norms applicable to private actors; (2) cases in which the corporate defendant is alleged to have violated a norm that requires state action and to have qualified as a state actor when doing so; and (3) cases in which the corporate defendant is alleged to have “aided and abetted” an international law violation by a state actor.

With respect to the first category, there are a few international norms, such as the prohibitions on genocide, war crimes, and crimes against humanity, that are thought to apply to private actors, at least for the purpose of criminal prosecution of individuals before international tribunals.¹⁸ It is uncertain whether these norms are sufficient to support civil corporate liability in a domestic court, but, even if they are, corporations are rarely alleged to have committed a breach of one of these norms. A possible exception would be for situations involving private security contractors, and, in fact, ATS cases have

16 *Id.* at 732.

17 *Id.* at 732 n.20.

18 The statutes for the International Criminal Court and for the ad hoc criminal tribunals for the former Yugoslavia and Rwanda allow for the prosecution of individuals for these international crimes. *See* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, arts. 2-5, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, arts. 2-4, U.N. Doc. S/RES/955 (Nov. 8, 1994).

been brought against such contractors, although these cases encountered other legal obstacles.¹⁹

It is more common to see cases in the second category, in which the corporation is alleged to have violated an international law norm that requires state action and to have qualified as a state actor when doing so. In considering these suits, some courts have analogized to the state action jurisprudence that has been developed under the domestic civil rights statute, 42 U.S.C. § 1983.

The § 1983 analogy has its genesis in a Second Circuit decision from the mid-1990s, *Kadic v. Karadzic*,²⁰ the facts of which are far removed from the context of corporate liability. In that case, Croat and Muslim citizens of Bosnia-Herzegovina sued Radovan Karadzic, the leader of a breakaway Bosnian-Serb republic, for allegedly directing and overseeing the commission of human rights abuses by military forces under his command. The Second Circuit first noted that the violation of some norms of international law, such as the prohibitions on genocide and war crimes, do not require state action.²¹ As for the violations that do require state action, the court reasoned that the breakaway republic might properly be considered a state for these purposes.²² Even if it was not a state, however, the court concluded that Karadzic's actions could still be considered state action for purposes of liability under the ATS if he had "acted in concert" with the Yugoslav government. The court derived this proposition from the Supreme Court's § 1983 decisions, stating without explanation that "[t]he 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the [ATS]."²³ Courts have continued to recite this reference to § 1983 without further analysis.²⁴

19 See *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D. Va. 2009).

20 70 F.3d 232 (2d Cir. 1995).

21 *Id.* at 241–44.

22 *Id.* at 244–45.

23 *Id.* at 245. In support of this statement, the Second Circuit cited a district court decision from California, *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), but the district court's reference to § 1983 was for the different and less controversial purpose of arguing that even an abuse of official authority can constitute the requisite state action, and that, as a result, the existence of state action for purposes of the ATS will not necessarily trigger the act of state doctrine. See *id.* at 1546.

24 See, e.g., *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 188 (2d Cir. 2009) (citing 42 U.S.C. § 1983 as a guide for whether a defendant engaged in official action); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1247 (11th Cir. 2005) (same).

Relying on § 1983 state action jurisprudence to determine the requisite state action under the ATS is problematic for several reasons. First, it is in tension with the approach outlined in *Sosa*. The Court there made clear that only a “narrow set” of claims could be brought under the ATS and that these claims had to be based on international law norms that were both widely accepted and specifically defined.²⁵ The Court also repeatedly emphasized the need for “judicial caution” in allowing claims under the ATS in light of the foreign relations, separation of powers, and other considerations implicated by ATS litigation.²⁶ In addition, the Court observed that its “general practice has been to look for legislative guidance before exercising innovative authority over substantive law” and that “[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”²⁷ Using domestic civil rights concepts to extend international law liability to private actors beyond what is widely accepted under international law is difficult to reconcile with these mandates.²⁸

In addition, there are important differences between § 1983 and the ATS. Section 1983 expressly provides a cause of action, whereas the ATS is simply a jurisdictional provision, albeit one that has been interpreted by the Supreme Court as “underwriting” limited federal common-lawmaking.²⁹ Moreover, § 1983 refers to conduct “under color of” law, whereas the ATS refers more narrowly to torts “commit-

25 See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721, 732 (2004).

26 See *id.* at 721, 725, 728.

27 *Id.* at 726.

28 *Accord* *Bowoto v. Chevron Corp.*, No. C99-02506-SI, 2006 WL 2455752, *6 (N.D. Cal. Aug. 22, 2006) (“Because an integral feature of international law is that it is only binding on specific defendants, allowing a private party to be held liable based upon notions of ‘color of law’ developed in this country would blur the applicability of the obligations that international law imposes. Expanding the reach of the ATS in this way would be inconsistent with the Supreme Court’s repeated calls for judicial restraint.”); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (“Grafting § 1983 color of law analysis onto international law claims would be an end-run around the accepted principle that most violations of international law can be committed only by states.”).

29 *Compare Sosa*, 542 U.S. at 724 (“[T]he ATS is a jurisdictional statute creating no new causes of action . . .”), and *id.* at 729 (“All Members of the Court agree that [the ATS] is only jurisdictional.”), with *id.* at 712 (referring to the ATS’s “limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789”); *id.* at 721 (concluding that “the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations”); and *id.* at 738 (referring to the Court’s “residual common law discretion”).

ted in violation” of law.³⁰ Section 1983 also was enacted against the backdrop of a particular problem of public-private violence in the South during Reconstruction, and its jurisprudence has developed as a response to historical and structural features unique to the United States.³¹

By contrast, although it is unclear precisely what the 1789 Congress intended when enacting the ATS, many commentators have concluded that the ATS was designed to reduce potential friction with foreign countries by channeling sensitive tort cases involving aliens to the federal courts, especially in situations in which the United States would have had an obligation to provide redress.³² As noted above, the Supreme Court adverted to this purpose in *Sosa* in referring to “this narrow set of violations of the law of nations . . . threatening serious consequences in international affairs.”³³ That purpose has little connection to the purposes of § 1983, which neither concerned foreign affairs nor sought to avoid friction with the relevant governmental actors. Moreover, applying principles derived from § 1983 to

30 *Cf. Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995) (“Because the [ATS] requires that plaintiffs plead a ‘violation of the law of nations’ at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible ‘arising under’ formula of section 1331.”). The Torture Victim Protection Act (TVPA), which was enacted in 1992, contains “color of law” language that is closer to the language of § 1983, but applies only to causes of action for torture or “extrajudicial killing,” not to ATS suits more generally. *See Sosa*, 524 U.S. at 728 (noting that the TVPA’s “affirmative authority is confined to specific subject matter,” and that “Congress as a body has done nothing to promote” ATS suits not covered by the TVPA). In addition, the historical background and purposes of § 1983 differ substantially from those of the TVPA, which (as stated in its preamble) was designed to “carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.” Torture Victim Protection Act of 1991, Pub. L. No. 102-256, pmb., 106 Stat. 73, 73 (1992).

31 *See, e.g., Monroe v. Pape*, 365 U.S. 167, 174 (1961) (noting that § 1983 “was passed by a Congress that had the Klan ‘particularly in mind,’” and that “[t]he debates [in Congress] are replete with references to the lawless conditions existing in the South in 1871”); *see also* 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 1.03, at 1-14 (4th ed. 2003 & 2010 supp.) (describing history of § 1983).

32 *See, e.g., William R. Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 481 (1986); Lee, *supra* note 14, at 882; John M. Rogers, *The Alien Tort Statute and How Individuals “Violate” International Law*, 21 VAND. J. TRANSNAT’L L. 47, 48-60 (1988); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782 (D.C. Cir. 1984) (Edwards, J., concurring) (“There is evidence . . . that the intent of [the ATS] was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis.”).

33 *Sosa*, 542 U.S. at 715.

broaden the scope of potential liability under the ATS for torts committed in foreign countries is, if anything, likely to *generate* foreign relations friction—precisely the opposite of the likely goal of the ATS.³⁴

This erroneous analogy to § 1983 is material because international law governing state action appears to be substantially narrower than the color of law jurisprudence under § 1983. For example, according to the Articles on State Responsibility formulated by the United Nations’s International Law Commission, in order for the actions of a private party to be attributable to a state, the private party must be either “acting on the instructions of, or under the direction or control of” the state.³⁵ The International Court of Justice endorsed this test in its 2007 decision in the *Genocide Convention Case* and expressed the view that the test reflected customary international law.³⁶

Few, if any, of the corporate ATS cases would meet this standard. Consider, for example, *Abdullahi v. Pfizer*,³⁷ in which it was alleged that Pfizer pharmaceutical company violated international law by administering a drug in Nigeria without the patients’ informed consent. Relying on the § 1983 cases, a 2-1 majority of the Second Circuit concluded that there were sufficient allegations of state action because the plaintiffs alleged that Nigeria had facilitated Pfizer’s administration of the drug and had acted to silence critics of Pfizer’s actions.³⁸ Importantly, there were no allegations that, in failing to obtain the requisite consent, Pfizer acted on the instructions of, or under the direction or control of, the Nigerian government.

34 See, e.g., John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 2 (2009) (“[T]he ATS has given rise to friction, sometimes considerable, in our relations with foreign governments, who understandably object to their officials or their domestic corporations being subjected to U.S. jurisdiction for activities taking place in foreign countries and having nothing to do with the United States.”).

35 See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY* 110 (2002).

36 See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)* ¶ 401 (I.C.J. Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>; see also Jessica Priselac, Note, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT’L L. REV. 789, 823 (2007) (“Applying principles of state responsibility, rather than § 1983 jurisprudence, would likely result in U.S. courts finding that conduct that qualifies as a state action under § 1983 would not be considered state action under the doctrine of state responsibility.”).

37 562 F.3d 163 (2d Cir. 2009), cert. denied, 130 S. Ct. 3541 (2010).

38 *Id.* at 188–89. The dissent argued that these allegations were insufficient even to meet the § 1983 standard. See *id.* at 211–12 (Wesley, J., dissenting).

My claim here is not that courts are always confined to settled principles of international law when developing the contours of ATS litigation. If they were, the reliance on § 1983 jurisprudence would have been an obvious category mistake. Instead, as Ingrid Wuerth has argued, *Sosa* can reasonably be read to allow for the development of statutorily authorized federal common law, with international law being a relevant, but not exclusive, consideration in such development.³⁹ Indeed, if ATS litigation does not involve federal common law and instead merely involves direct application of customary international law, there would be a serious Article III question in many ATS cases. Suits between aliens do not fall within Article III diversity jurisdiction,⁴⁰ and it is far from clear that a case involving customary international law automatically arises under the laws of the United States for purposes of Article III federal question jurisdiction.⁴¹ Hence, my argument is not that the reliance on § 1983 jurisprudence is *inherently* a mistake, but rather that, in light of the limitations suggested in *Sosa* and the differing purposes of § 1983 and the ATS, the § 1983 jurisprudence is ill-fitted for ATS litigation.

III. AIDING AND ABETTING LIABILITY

Even if it were appropriate to borrow from the § 1983 state action jurisprudence, however, this jurisprudence would not support the third, and potentially broadest, category of corporate ATS cases—the cases that are premised on an aiding and abetting theory. In these cases, the corporate defendant is not alleged to have perpetrated the abuse or to have itself violated a substantive norm of international law. Instead, it is alleged to have in some way supported or facilitated a foreign government’s international law violation.

39 See Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010). While the majority opinion in *Sosa* is far from a model of clarity, a number of statements in that opinion appear to provide support for this federal common law approach. See, e.g., *Sosa*, 542 U.S. at 712 (referring to the ATS’s “implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789”); *id.* at 732 (referring to the recognition of claims in ATS cases “under federal common law”); *id.* at 738 (referring to the federal courts’ “residual common law discretion” in ATS cases); see also Bradley, Goldsmith & Moore, *supra* note 8, at 895 (“[T]he Court [in *Sosa*] inferred, from a jurisdictional statute that enabled courts to apply [customary international law] as general common law, the authorization for courts to create causes of action for [customary international law] violations, in narrow circumstances, as a matter of post-*Erie* federal common law.”).

40 See, e.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800).

41 See Bradley, Goldsmith, & Moore, *supra* note 8, at 885–86 (describing differing views on this issue).

The most prominent aiding and abetting case is the South African apartheid case, in which various corporations are being sued for having aided and abetted the South African government's human rights abuses during the apartheid era.⁴² The Second Circuit allowed for this theory of liability in a 2-1 decision, with one of the judges in the majority relying on the fact that there was support for aiding and abetting liability in international criminal tribunals, and the other judge relying on the fact that there was support for it in U.S. common law.⁴³ The Ninth Circuit had similarly endorsed this type of liability before *Sosa*, relying on U.S. common law, although the decision was subsequently vacated when the Ninth Circuit agreed to rehear the case en banc and the case was settled.⁴⁴

The analogy to § 1983 does not support this theory of liability. While the Supreme Court has acknowledged that its state action jurisprudence “has not been the model of consistency,”⁴⁵ it is possible to identify a variety of factors or tests that the Court has employed in these cases.⁴⁶ Most of these factors or tests have been formulated for situations in which the private party is alleged to be the principal wrongdoer, “and the question is whether the State was sufficiently involved to treat that decisive conduct as state action.”⁴⁷ The factor or test that comes closest to aiding and abetting liability is for situations in which a private party acts as a “willful participant in joint activity

42 See *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007); *Ntsebeza v. Daimler AG (In re S. Afr. Apartheid Litig.)*, 624 F. Supp. 2d 336 (S.D.N.Y. 2009).

43 See *Khulumani*, 504 F.3d at 260 (“We hold that in this Circuit, a plaintiff may plead a theory of aiding and abetting liability under the [ATS].”); *id.* at 270 (Katzmann, J., concurring) (relying on international criminal law); *id.* at 287 (Hall, J., concurring) (relying on U.S. common law as reflected in the Restatement (Second) of Torts). The Second Circuit subsequently held that the standard for aiding and abetting liability under the ATS must be derived from international law rather than U.S. common law. See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

44 See *Doe I v. Unocal Corp.*, 395 F.3d 932, 945–47 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003). *But cf.* *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202–03 (9th Cir. 2007) (reserving judgment on whether aiding and abetting liability is appropriate under the ATS after *Sosa*), *vacated*, 499 F.3d 923 (9th Cir. 2007).

45 *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

46 See 1A SCHWARTZ, *supra* note 31, § 5.12 (noting that “five state action tests can be distilled from the Supreme Court’s state action decisional law: the symbiotic relationship, public function, close nexus, joint participation, and pervasive entwinement tests”); see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (noting “a host of facts that can bear on the fairness of such an attribution”).

47 *NCAA v. Tarkanian*, 488 U.S. 179, 192 (1988).

with the State or its agents.”⁴⁸ Unlike for aiding and abetting liability, however, this “joint participant” basis for state action “requires a showing of conspiratorial or other concerted action.”⁴⁹ Moreover, “[i]t is settled that the mere fact that a private party has induced a public official to act does not constitute joint action.”⁵⁰ The dissenting judge in the apartheid decision recited this case law and noted that there was no support in it for aiding and abetting liability, and the judges in the majority did not disagree.⁵¹

Without explanation, courts stop looking to the § 1983 state action jurisprudence when they address ATS aiding and abetting liability, and, in fact, do not even purport to look for state action at all on the part of the private defendant. They follow this approach on the apparent assumption that state action is required only for direct liability, not indirect liability.⁵² As discussed above in Part II, the analogy between the ATS and § 1983 is problematic, so, in a sense, the lack of borrowing from § 1983 for the aiding and abetting issue might be seen as a step in the right direction. The problem, however, is that courts are *selectively* using the § 1983 jurisprudence, and the result is doctrinal incoherence.

More importantly, the resulting ATS corporate liability regime is functionally anomalous. Under this regime, courts in corporate ATS cases only apply state action requirements when the corporation is alleged to be a direct perpetrator of the abuse. The result is that corporations are less likely to be held liable under the ATS when they directly commit abuses than when they merely facilitate them. It seems highly unlikely that Congress would enact such a liability regime if it addressed the issue.

Although one might argue that this consequence is simply the product of applying international law—which, it could be argued, allows for liability for state actors and aiders and abettors but not non-state direct perpetrators—in fact, when courts determine the allowable contours of ATS litigation they are not simply applying international law. Instead, as discussed above, they are most accurately

48 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

49 1A SCHWARTZ, *supra* note 31, § 5.16[A], at 5-133.

50 *Id.* at 5-142.

51 *See Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 312–17 (2d Cir. 2007) (Korman, J., dissenting).

52 *See, e.g., id.* at 281 (Katzmann, J., concurring) (“It is of no moment that a private actor could be held liable as an aider and abettor of the violation of a norm requiring state action when that same person could not be held liable as a principal.”).

described, particularly after *Sosa*, as developing statutorily authorized federal common law.⁵³ In this context, as the Court noted in *Sosa*, the existence of undesirable “collateral consequences” is “itself a reason for a high bar to new private causes of action for violating international law.”⁵⁴

In addition to this anomaly whereby corporations are less likely to be held liable when they directly commit abuses than when they are merely alleged to facilitate abuses, there are a number of independent reasons to question the allowance of corporate aiding and abetting liability under the ATS. First, as noted, the text of the ATS refers to torts “committed in violation” of international law, not behavior that merely facilitates such violations.⁵⁵ By contrast, just a year after the enactment of the ATS, Congress enacted a criminal statute containing specific provisions for indirect liability—for example, for aiding or assisting piracy.⁵⁶ The First Congress knew how to provide for aiding and abetting liability and did not do so in the ATS.

Second, the Supreme Court has held in other contexts that it is inappropriate to allow for civil aiding and abetting liability when Congress has not specifically provided for it. In *Central Bank of Denver v. First Interstate Bank of Denver*,⁵⁷ for example, the Court declined to extend the implied private right of action for securities fraud to aiders and abettors, noting, among other things, that allowing for this liability would expand the litigation in ways that would implicate policy tradeoffs best resolved by the legislative branch.⁵⁸ The Court reached

53 See *supra* text accompanying note 39.

54 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004).

55 Some courts and commentators have cited to a 1795 attorney general opinion as evidence that the ATS was intended to encompass aiding and abetting liability. In that opinion, the attorney general, William Bradford, considered the potential criminal and civil liability of U.S. citizens who had allegedly assisted the French in attacking a British settlement in Sierra Leone. See *Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795). While Bradford notes at the beginning of the opinion that there were allegations that U.S. citizens “voluntarily joined, conducted, aided, and abetted a French fleet” and then later in the opinion says that the injured parties could sue under the ATS, he nowhere suggests that the ATS allows for mere aiding and abetting liability. Nor did he need to make such a suggestion, since the U.S. citizens in question were direct perpetrators. See *Khulumani*, 504 F.3d at 329 (Korman, J., dissenting) (“[B]ecause the conduct involved direct participation by American citizens, who acted with the intent to make the attack succeed, it seems likely that Bradford recognized all of the perpetrators as joint tortfeasors, as that term was understood at the time.”).

56 See Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114.

57 511 U.S. 164 (1994).

58 See *id.* at 188–89; see also *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (reaffirming *Cent. Bank of Denver*).

this conclusion even though it recognized that aiding and abetting liability was well established in U.S. criminal law.⁵⁹ The Court further observed that, if aiding and abetting liability were presumed to exist under federal civil statutes that did not specifically provide for such liability, there would be a “vast expansion of federal law.”⁶⁰

In an instructive decision applying the *Central Bank of Denver* decision in the context of a terrorism liability statute, Judge Richard Posner, writing for the Seventh Circuit en banc, observed that “statutory silence on the subject of secondary liability means there is none.”⁶¹ The court also reasoned that judicial implication of aiding and abetting liability is particularly inappropriate for claims relating to foreign conduct, because allowing for this liability “would enlarge the federal courts’ extraterritorial jurisdiction,” something that normally requires clear congressional support.⁶² If anything, these considerations apply with even greater force to the ATS, a mere jurisdictional provision that was largely dormant for the first 190 years of its history, and which today almost always involves claims concerning foreign conduct.⁶³

This conclusion does not change merely because there is some support in international criminal law for aiding and abetting liability. As noted above, the Supreme Court in *Central Bank of Denver* declined to imply aiding and abetting liability despite the existence of such liability under U.S. criminal law. Moreover, the fact that nations have agreed to agree to allow for a particular type of liability in an international tribunal does not imply that it is appropriate for a nation unilat-

59 See *Cent. Bank of Denver*, 511 U.S. at 181.

60 *Id.* at 183. Tellingly, the Second Circuit has acknowledged that the only reason it has found corporate aiding and abetting liability to be proper under the ATS is because it has looked solely to international law rather than to considerations of federal common law. See *Kiobel v. Royal Dutch Petrol. Co.*, No. 06-4800-cv, 2010 WL 3611392, *23–24 (2d Cir. Sept. 17, 2010).

61 *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 689 (7th Cir. 2008) (en banc).

62 *Id.* at 689–90. For application of the general presumption against extraterritoriality, see, for example, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2881–83 (2010) and *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). For discussion of extraterritoriality issues implicated by ATS suits against corporations, see, for example, Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271 (2009). In the *Boim* case, the court went on to conclude, based on a “chain of explicit statutory incorporations by reference,” 549 F.3d at 690, that providing material support to a terrorist organization could form the basis for direct liability.

63 *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (“[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.”).

erally to impose that liability in its own courts. In any event, the liability allowed for in international criminal tribunals, including aiding and abetting liability, extends only to natural persons, not to corporations.⁶⁴

Third, aiding and abetting liability is in tension with several aspects of the *Sosa* decision. As previously discussed, the Court in *Sosa* made clear that only a “modest number” of widely accepted and well-defined claims should be allowed under the ATS.⁶⁵ Allowing corporate aiding and abetting liability, however, substantially expands the number of potential claims, something that the Court took into account when rejecting aiding and abetting liability in *Central Bank of Denver*. In addition, as discussed above, the Court’s “footnote 20” in *Sosa* provides that, in deciding whether to allow a claim under the ATS, one consideration “is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.”⁶⁶

In support of that statement, the court cited two lower court decisions that discussed the narrow circumstances under which private actors could themselves directly violate international law.⁶⁷ The Court in *Sosa*, therefore, did not seem to envision that the ATS could be used as a basis for secondary liability for private actors. The uncertainties surrounding the appropriate standard for aiding and abetting liability, and the policy implications of adopting one standard over another in terms of the impact on foreign investment and U.S. relations with other nations, also suggest the desirability of congressional input on the issue, especially in light of the Court’s repeated emphasis in *Sosa* of the need for judicial caution.⁶⁸

64 See, e.g., ROME STATUTE, *supra* note 18, art. 25 (giving the International Criminal Court jurisdiction only over natural persons).

65 See *Sosa*, 542 U.S. at 724.

66 *Id.* at 733 n.20. Similarly, Justice Breyer stated in his concurrence in *Sosa* that “[t]he norm must extend liability to the type of perpetrator (e.g., a private actor) the plaintiff seeks to sue.” *Id.* at 760 (Breyer, J., concurring).

67 The Court cited to Judge Edwards’s concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), and *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995). In the former, Judge Edwards concluded that the international law prohibition on torture did not apply to private actors. See *Tel-Oren*, 726 F.2d at 795 (Edwards, J., concurring). In the latter, the court concluded that the international law prohibition on genocide did apply to private actors. See *Kadic*, 70 F.3d at 241–42. Neither decision appeared to contemplate that private actors could be sued under the ATS for aiding and abetting violations of international law by public actors.

68 Cf. *Sosa*, 542 U.S. at 728 (“We have no congressional mandate to seek out and define new and debatable violations of the law of nations . . .”).

For all of these reasons, the best conclusion, as a matter of post-*Sosa* federal common law, is that courts should leave the development of aiding and abetting liability to Congress, which can determine both its desirability as well as its appropriate standards and limitations.⁶⁹ Although the lower courts have been grappling with this issue for a number of years, there is little basis for concluding at this point that Congress has “acquiesced” in broad corporate ATS liability.⁷⁰ Reading anything into congressional inaction is hazardous,⁷¹ but it is a particularly dubious enterprise with respect to the corporate liability issue, given its highly unsettled nature. Moreover, the proper effect of the Supreme Court’s 2004 decision in *Sosa* on this litigation is still the subject of significant controversy, and there is a reasonable expectation that the Supreme Court will address the topic in the foreseeable future.⁷² Under these circumstances, there is no reason to conclude that Congress’s failure to enact legislation restricting corporate ATS liability constitutes an endorsement of, or even acquiescence in, such liability. Indeed, one could just as easily argue that, in the face of the ongoing controversies over this litigation, Congress’s failure to enact legislation supporting it constitutes disapproval.

CONCLUSION

In sum, there are a number of reasons to doubt the propriety of looking to § 1983 jurisprudence in discerning whether there is state

69 *Accord* Brief of the United States as Amicus Curiae in Support of Petitioners at 8, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (“[T]he creation of civil aiding and abetting liability is a legislative act separate and apart from the recognition of a cause of action against the primary actor, and one that the courts should not undertake without congressional direction.”); Supplemental Brief for the United States as Amicus Curiae at 10, *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628) (“Ultimately, the questions of whether and, if so, how to expand the reach of civil liability under international law beyond the tortfeasor would present difficult policy and foreign relations considerations that should be determined by Congress, not the courts.”).

70 *Cf. Sosa*, 542 U.S. at 731 (allowing some ATS litigation to continue because “Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail,” and observing that “nothing Congress has done is a reason for us to shut the door to the law of nations entirely”).

71 *See* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 95–108 (1988).

72 The executive branch supported Supreme Court review in the South African apartheid case, but the Court was unable to muster a quorum because four of the Justices owned stock in the defendant companies. *See* Linda Greenhouse, *Justices’ Conflicts Halt Apartheid Appeal*, N.Y. TIMES, May 13, 2008, at A14.

action in an ATS case. In addition, even if this analogy were appropriate, it would not support corporate aiding and abetting liability under the ATS, and the judicial development of such liability is otherwise problematic.