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REPORT ON CORPORATE COMPLICITY LITIGATION IN THE AMERICAS: LEADING DOCTRINES, RELEVANT CASES, AND ANALYSIS OF TRENDS

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I. PURPOSE OF THE REPORT

In 2008, the International Commission of Jurists (ICJ) released a three-volume report entitled Corporate Complicity and Legal Accountability. Corporate Complicity is constituted when a business engages, with another actor such as governments, in the commission of grave human right violations. The ICJ, in its report, made a compilation addressing diverse aspects of this complex concept.

The ICJ report considers a company's conduct would constitute Corporate Complicity if its conduct has enabled, exacerbated, or facilitated grave human right abuses; it also contemplates some of the most common excuses the corporations use in order to justify their involvement in the commission of human right abuses and explains why those excuses or defenses aren't valid; the report embraces the commission of all kinds of human right abuses in its report; however for the purposes of this report we have chosen to address cases where those violations are gross; the ICJ explains how both, civil and criminal law, are viable ways to search for reparations yet most of the found cases search through civil proceedings; this, among others, are some of the topics that are approached on the very comprehensive report.

Our report consists in two sections: a section with summaries of a sample of corporate complicity cases and an analytical section. The purpose of this report is first, to establish the jurisprudence that has been developing on the United States of America, Canada and Latin America by presenting some of the recent cases that has been litigated or that are in litigation on those jurisdictions; this cases show how courts are addressing this issue and the answer of the corporations that face this kind of litigation. We focused only on cases of corporate complicity with grave human rights abuses. Thus, we do not include cases where some violations of international human rights norms are being argued; neither do we include cases of direct corporate responsibility.

The analytical section will address different facts common to most of the cases, as well as explain the reasons for successful or unsuccessful results. It should be consider as valuable section on this report since it has considerations that could help the ICJ to decide which steps are the most urgent and appropriate in order to expand the Corporate Complicity conscious and study throughout the continent.

This report intends to strengthen the ICJ report by offering a view of the current situation regarding the Corporate Complicity concept development in the Americas as well as some conclusions we got after its study.

It is hard to talk about impact from the 2008 ICJ report on the cases here presented since most of them were filed and some of them decided prior that date; however the cases summarized here include some of the elements and scenarios contemplated by the ICJ panel.

1. Commonly Used Legal Doctrines and Statutes

Throughout the case summaries that follow, four legal doctrines and three statutes are frequently used or referenced. This section contains a brief summary of each of the doctrines and statutes in order to act as a background for the reader.

a. The Political Question Doctrine

Under the political question doctrine, questions which are political in nature are submitted by the Constitution and the laws to the executive and cannot be answered in the courts.[1] If a court finds that a case contains a political question, it must defer to the executive branch on the issue. In *Baker v. Carr*, the Supreme Court outlined six independent tests for determining whether courts should defer to the political branches on an issue:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[2]

One area in which courts have often found the presence of political questions is foreign affairs; however, the court "will not find a political question merely because [a] decision may have significant political overtones" or touch foreign affairs.[3] Instead, it will "undertake a discriminating case-by-case analysis to determine whether the question posed lies beyond judicial cognizance."[4] "Cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary."[5]

b. The Act of State Doctrine

"The act of state doctrine is a non-jurisdictional, prudential doctrine based on the notion that the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[6] "Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[7] "As a result, an action may be barred if (1) there is an official act of a foreign sovereign performed within its own territory; and (2) the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act."[8] If these two elements are present, the court "may still choose not to apply the act of state doctrine where the policies underlying the doctrine militate against its application."[9]

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[1] Marbury v. Madison, 5 U.S. 137, 170 (1803).
[2] Baker v. Carr, 369 U.S. 186, 211 (1962).
[3] Corrie v. Caterpillar, Inc., 503 F. 3d 974, 980 (9th Cir. 2007)
[4] Alperin v. Vatican Bank, 410 F.3d 532, 545 (9th Cir. 2005).
[5] *Id.* at 559.
[6] Doe I v. Unocal Corp., 395 F.3d 932, 958 (9th Cir. 2002)
[7] W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 406 (1990)
[8] Sarei v. Rio Tinto, 456 F. 3d 1069, 1084 (9th Cir. 2006)
[9] *Id.*

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court addressed three policies underlying the doctrine that the court should address in order to determine whether the act of state doctrine should apply.[10] First, "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . ."[11] Second, "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches."[12] Third, "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . ."[13] In addition, the 9th Circuit added a fourth factor: whether the state was acting in the public interest.[14]

If a court applies these standards and finds that an act of state has occurred, the court must dismiss the case.

c. The Doctrine of International Comity

"Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."[15] Under the doctrine of international comity, courts have the discretion to defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted. The application of the doctrine is limited to cases in which "there is in fact a true conflict between domestic and foreign law."[16] If a conflict of law is found, the court will look to the non-exhaustive standards set forth in Foreign Relations Law Restatement § 403(2):

> Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
> (e) the importance of the regulation to the international political, legal, or economic system;
> (f) the extent to which the regulation is consistent with the traditions of the international system;

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[10] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)
[11] *Id.* at 428.
[12] *Id.*
[13] *Id.*
[14] *Unocal*, 395 F. 3d at 958.
[15] *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 544 n. 27, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987)
[16] *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993)

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.[17]

Official comment B states that the list is not exhaustive and that "[n]ot all considerations have the same importance in all situations; the weight to be given to any particular factor depends upon the circumstances."[18] If the court finds that the factors weigh in favor of declining jurisdiction, it may do so.

d. Forum Non Conveniens

The doctrine of *forum non conveniens* allows the court to decline jurisdiction "when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience, or . . . the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."[19]

"A party moving to dismiss on grounds of forum non conveniens must show two things: (1) the existence of an adequate alternative forum, and (2) that the balance of private and public interest factors favors dismissal."[20] Private interest factors include "(1) relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of hostile witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive."[21] Public interest factors include "(1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law."[22]

When applying the doctrine, the analysis involves a two-step inquiry.[23] First, the court must "determine that an adequate alternative forum is available to hear the case, meaning that all parties are within the jurisdiction of the alternative forum and amenable to process there, and that the parties would not be treated unfairly or deprived of all remedies if the case were litigated in the alternative forum."[24] Where a plaintiff has chosen to litigate in their home forum, "there is a presumption in favor of allowing [the] plaintiff his choice of courts."[25] Accordingly, the defendant bears the threshold burden of demonstrating that an adequate alternative forum exists.[26]

If the court is satisfied that an adequate alternative forum exists, it must then proceed to weigh the private and public interest factors to determine the appropriateness of dismissal.[27]

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[17] Restatement (Third) Foreign Relations Law of the United States § 403(2) (1987).
[18] Restatement § 403, cmt. b.
[19] Sinochem Intern. Co. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 429 (2007) (internal citations omitted).
[20] Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 767 (9th Cir.1991).
[21] Creative Technology, Ltd. v. Aztech System Pte., 61 F.3d 696, 703 (9th Cir. 1995).
[22] *Id.* at 703-04.
[23] AAR Intern., Inc. v. Nimelias Enterprises S.A., 250 F.3d 510, 524 (7th Cir.2001).
[24] *Id.*
[25] Abad v. Bayer Corp., 563 F.3d 663, 666 (7th Cir.2009).
[26] Abiola v. Abubakar, 267 F.Supp.2d 907, 918 (N.D.Ill.2003).
[27] *AAR*, 250 F.3d at 524.

e. The Torture Victim Protection Act

The Torture Victim Protection Act creates liability for "an individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture . . . or . . . to extrajudicial killing . . ."[28] The act defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering, whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining . . . a confession, punishing that individual . . . intimidating or coercing that individual . . . or for any reason based on discrimination of any kind . . ."[29] To bring a claim, the claimant must exhaust domestic remedies.[30] The act has a statute of limitations of ten years.[31]

f. The Alien Tort Statute

The Alien Tort Claims Act (ATCA), commonly referred to as the Alien Tort Statute (ATS), gives the federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[32] In *Sosa v. Alvarez-Machain*, the Supreme Court explained that the ATA is jurisdictional in nature, but that it also provides a cause of action "for the modest number of international law violations with a potential for personal liability at the time [of its enactment]."[33] "According to the Court, causes of action under the ATA are not static; new ones may be recognized if the claim is 'based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized.'"[34] In its exercise of judicial authority, the court should exercise judicial caution by taking a restrained approach when considering a new cause of action under the ATS.[35]

g. The Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA) asserts the rule that foreign sovereigns are immune from liability in the U.S. courts and provides the only exceptions to the rule.[36] The main exceptions to sovereign immunity provided by the FSIA are waiver, claims based upon commercial activity, claims for a tort committed in the United States, and agreements to arbitrate.[37] The act defines "foreign state" to include an agency or instrumentality of a foreign state.[38] An agency or instrumentality of a foreign state is an "entity that is a separate legal person, corporate or otherwise; that is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or

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[28] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73.
[29] *Id.* at § 3(b).
[30] *Id.* at § 2(b).
[31] *Id.* at § 2(c).
[32] Alien Tort Claims Act, 28 U.S.C.A. § 1350 (hereinafter ATS).
[33] Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
[34] Aldana v. Del Monte Fresh Produce, N.A., 416 F.3d 1242, 1246 (11th Cir. 2005).
[35] *Sosa*, 542 U.S. at 712.
[36] Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (2009) (hereinafter FSIA).
[37] *Id.* at § 1605.
[38] *Id.* at § 1603(a).

political subdivision thereof; and that is neither a citizen of a state of the United States nor created under the laws of any third country."[39]

II. CASE SUMMARIES[40]

The following are summaries of twenty-four cases with relevance to corporate complicity for human rights abuses. This section will be separated into three sub-sections, one for cases from the United States, one for cases from Latin America, and one for cases from Canada.

1. The U.S. Cases

*a. **Burger-Fischer v. Degussa AG**, 65 F. Supp. 2d 248 (D.C.N.J. 1999)*

This case is a consolidation of four class actions brought against two German corporations, Degussa AG and Siemens AG. Plaintiffs, victims of the Holocaust, alleged that Degussa refined gold seized from inmates of the Nazi concentration camps with knowledge of its source; used slave labor in its various operations; and manufactured Zyklon B, a gas used in the gas chambers of the concentration camps. Siemens allegedly used slave labor supplied by the Nazi regime during World War II. From Degussa, plaintiffs sought restitution for the gold and damages for the provision of Zyklon B. They also sought compensation and damages from Degussa and Siemens for the use of slave labor. Plaintiffs advanced against Degussa theories of recovery for civil assault and battery, conversion, unjust enrichment, conspiracy with the Nazi regime, and violations of human rights and customary international law as based on numerous treaties, conventions, and declarations. The theories of recovery advanced against Siemens were violations of customary international law and the laws of nations, as well as violations of German law, including false imprisonment, unjust enrichment, and wrongful death.

Degussa moved to dismiss for lack of personal jurisdiction, lack of subject matter jurisdiction, *forum non conveniens*, international comity, statute of limitations, and lack of a private right under international law. Siemens moved for dismissal on the same grounds, as well as for lack of standing to assert the wrongful death claim.

Despite these motions, the district court determined that the critical issue in the case was whether, in light of the post-World War II diplomatic history, plaintiffs could bring an action in the United States. The court looked to the agreements between the Allied powers and Germany following the end of the war to determine the justiciability of plaintiffs' claims. It determined that all private claims were waived by the post-World War II agreements, and that any remedies lie in those agreements and in German legislation. The court dismissed, holding that plaintiffs

[39] *Id.* at § 1603(b).

[40] Because our report focuses on providing an overview of corporate complicity litigation in the Americas through the use of case summaries, we attempted to extract the most important and relevant parts of decisions in corporate complicity cases to incorporate into our summaries. As a result, some of the language of the case summaries in our report may closely track the language of a given court decision despite the fact that a direct citation may not be provided. This is done for fluidity and ease of reading rather than to take ownership of and credit for these words. In some cases, when paraphrasing the language of the court rendering the decision was not practical, direct quotes from the decisions were used; however, these instances are always indicated with a precise citation to the case. Thus, for ease of reading, the only citations found in this report are those that indicate (1) a direct citation, and (2) reference to a case other than the one previously being discussed.

would need to bring their claims in Germany in order for them to be justiciable. Plaintiffs did not appeal.

b. Deutsch v. Turner Corporation, 324 F.3d 692 (9th Cir. 2003)

This case was a consolidation of four cases arising from the actions of various corporations during World War II.[41] Specifically, plaintiffs, citizens of various countries controlled by Japan and Germany during World War II, alleged that they were forced to work as slave laborers for German and Japanese companies during the war. As part of this abuse, plaintiffs were underfed, beaten, exposed to dangerous conditions, and denied medical care. In addition, many were murdered or died as a result of the maltreatment they suffered.

The court of appeals addressed the four cases in two parts. First, the court addressed a single case, *Deutsch v. Turner*, which was brought by an individual against a German company for acts related to the Holocaust. In that case, plaintiff alleged intentional infliction of emotional distress, unlawful business practices under the California Business and Professions Code, *quantum meruit*[42], and wrongful death. Second, the court addressed the three other cases, collectively referred to as *In re World War II Era Japanese Forced Labor Litigation*, which were a consolidation of 28 other suits brought by both nationals of the Allied powers and nationals of other states against Japanese companies. Plaintiffs in these cases alleged assault and battery, unjust enrichment, conspiracy, false imprisonment, intentional infliction of emotional distress, conversion, *quantum meruit*, unfair business practices under the California Business and Professions Code, and violations of the ATS.

All plaintiffs brought their claims under the California Code of Civil Procedure 354.6, a statute that created a cause of action against defendants allegedly responsible for taking part in slave labor abuses during World War II.[43] Under the statute, these claims are not time-barred if brought before December 31, 2010. The district court in *Deutsch* dismissed the claim as a nonjusticiable political question.[44] The district court in *Forced Labor Litigation* dismissed the cases brought by nationals of the Allied Powers on the ground that they were barred by a provision of the peace treaty ending the war between the Allied Powers and Japan.[45] It also dismissed the cases brought by other nationals on the grounds that section 354.6 was an unconstitutional intrusion on the foreign affairs powers of the federal government.

On appeal, the court first looked to the constitutionality of section 354.6. It affirmed the district court's holding of unconstitutionality and expanded this holding to apply to—and thus bar—all of the claims. In doing so, the court reasoned that the statute intruded on the federal government's exclusive power to make and resolve war, including resolving war claims. Since California did not have the power to create a cause of action for war claims or to resurrect time-barred war claims, the statute was unconstitutional. As a result, the statute of limitations applied to all of the claims, and plaintiffs' claims were time-barred.

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[41] Deutsch v. Turner, No. CV 00-4405 SVW(AJWX), 2000 WL 33957691 (C.D. Cal August 25, 2000); In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000); In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 (N.D. Cal. 2001); In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1153 (N.D. Cal. 2001).

[42] "A claim or right of action for the reasonable value of services rendered…Quantum meruit is still used today as an equitable remedy for unjust enrichment…" BLACK'S LAW DICTIONARY 1276 (8th ed. 2004).

[43] CAL. CIV. PROC. CODE §354.6 (West 2006).

[44] Deutsch v. Turner, No. CV 00-4405 SVW(AJWX), 2000 WL 33957691 (C.D. Cal August 25, 2000).

[45] In re World War II Era Japanese Forced Labor Litigation, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

c. Abrams v. Societe Nationale des Chemins de Fer Francais, 389 F.3d 61 (2d. Cir. 2004)

Plaintiffs, Holocaust survivors, filed suit on behalf of themselves, other Holocaust survivors, and their heirs against Societe Nationale des Chemins de Fer Francais (SNCFF) in the U.S. District Court for the Eastern District of New York. Plaintiffs alleged that SNCFF committed violations of customary international law and the law of nations, including war crimes and crimes against humanity, when they knowingly deported Jews and others from France to Nazi death camps during World War II. Although SNCFF was under independent civilian control at the time the offenses were committed, it has since been wholly acquired by the French government. Defendants moved to dismiss the claim, contending that the court lacked subject matter jurisdiction and that it was entitled to sovereign immunity under the FSIA and the laws in effect during World War II.

The district court dismissed plaintiffs' claims for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act, holding that SNCFF was an agency or instrumentality of a foreign sovereign state.[46] Plaintiffs appealed, arguing that the district court impermissibly applied the FSIA retroactively. They argued that since SNCFF was independently owned when it committed the offenses that formed the basis of the claim, applying the FSIA to SNCFF's actions during World War II would be impermissibly retroactive. In its first opinion, the court of appeals held that the record was insufficient to determine whether the FSIA applied to pre-enactment conduct and remanded the case to the district court for further investigation. Defendants appealed to the Supreme Court. The Supreme Court vacated and remanded the case for further consideration in light of a recently released case, *Republic of Austria v. Altman*.[47] In *Altman*, the Supreme Court held that the FSIA applied retroactively to conduct prior to its enactment.[48]

Following this precedent, the court of appeals reasoned that the way an entity would have been treated at the time of the alleged wrong-doing was irrelevant. Although SNCFF was a private entity when it committed the offenses, its present state ownership meant that the FSIA applied. The court of appeals rejected all of plaintiffs' arguments and upheld the lower court's dismissal of the case.

d. Herero People's Reparation Corp. v. Deutsche Bank, A.G. 125 S. Ct. 508 (D.C. Cir. 2004)

Plaintiffs—the Herero Tribe of Namibia, tribe members, and a corporation representing the tribe's interest—brought suit against defendants Deutsche Bank and Woermann Line, two German companies, in the Superior Court of the District of Columbia in 2001.[49] Plaintiffs alleged that defendants participated in atrocities including torture, slavery, and genocide perpetrated against plaintiffs by Imperial Germany in the late 19th and early 20th centuries. They did not, however, identify the law providing the cause of action.

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[46] Abrams v. Societe Nationale des Chemins de Fer Francais, 175 F.Supp.2d 423 (E.D.N.Y. 2001).
[47] Republic of Austria v. Altman, 541 U.S. 677 (2004).
[48] *Id.* at 697.
[49] The Herero People's Reparations Corp. v. Deutsche Bank et al. (Superior Ct. D.C. 2001), *available at* http://www.ipr.uni-heidelberg.de/Mitarbeiter/Professoren/Hess/HessForschung/zwang/herero.pdf.

Defendants removed the complaint to federal district court and plaintiffs unsuccessfully contested the formal adequacy of the removal petition.[50] Both defendants then filed motions to dismiss. The district court granted defendant Woermann Line's motion on personal jurisdiction grounds, holding that the company did not have sufficient contacts to satisfy the District of Columbia long-arm statute. Defendant Deutsche Bank's motion to dismiss for failure to state a claim[51] was also granted because "federal common law provides no private cause of action for violations of customary international law."[52]

In April 2004, plaintiffs appealed this dismissal to the U.S. Court of Appeals for the District of Columbia Circuit.[53] The argument on appeal sought to avoid the decision's preclusive effect on almost identical litigation plaintiffs had pending in another jurisdiction. Thus, plaintiffs argued that the case should have been remanded to the superior court once the district court found that plaintiffs alleged no cause of action.

The appellate court held that determining whether a cause of action exists is a merits decision, not a jurisdictional decision, and rejected plaintiffs' argument, affirming the district court on this issue. The court showed that their decision was on the merits because plaintiffs (1) brought their claim under federal, as opposed to state, law, and (2) did not do so with an "immaterial . . . or wholly insubstantial and frivolous [federal claim] . . . made solely for the purpose of obtaining jurisdiction."[54] Although plaintiffs never detailed their cause of action, they alluded multiple times to federal common law or international law and never presented any non-federal theories. Similarly, plaintiffs hoped to avoid federal jurisdiction, so it stood to reason that they did not fabricate federal claims in order to land in federal court. The court found that because plaintiffs' claims substantially resembled those authorized by legislation such as the ATA, their claims could not be found to be frivolous.

Plaintiffs also argued that their claim against Woermann Line should not have been dismissed because the court could have exercised universal jurisdiction over this defendant. The court held that plaintiffs never made the argument that service would be proper over this defendant—the threshold requirement for exercising universal jurisdiction.[55] Without a statutory basis for jurisdiction over this defendant, the appellate court affirmed the district court's dismissal in 2004.

Plaintiffs submitted a petition for a writ of certiorari to the United States Court of Appeals to the District of Columbia Circuit, which was denied.[56]

In February 2002, while the case in the District of Columbia was still pending, plaintiffs brought suit against defendants for the same cause of action in the United States District Court for the Southern District of New York on the same grounds as the D.C. case.[57]

In November 2003, Deutsche Bank requested a stay in the proceedings, pending a decision in the D.C. case. The New York District Court granted the stay. After the D.C. appellate decision against plaintiffs in 2004, the proceedings in New York continued. In April 2005, the New York District Court dismissed plaintiffs' claims against Woermann Line without prejudice

[50] Mem. Op., *Herero v. Deutsche Bank*, Civ. No. 01-01868 (CKK), 2003 U.S. Dist. LEXIS 27094 (D.D.C. July 31, 2003).
[51] FED. R. CIV. P. 12(b)(6).
[52] Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1194 (D.C. Cir. 2004).
[53] Herero People's Reparations Corp. v. Deutsche Bank, A.G., 370 F.3d 1192 (D.C. Cir. 2004).
[54] *Id.* at 1194.
[55] FED. R. CIV. P. 4.
[56] Herero People's Reparation Corp. v. Deutsche Bank, A.G. 125 S. Ct. 508 (D.C. Cir. 2004).
[57] Herero People's Reparations Corp. v. Deutsche Bank AG, 2006 WL 903197 (S.D.N.Y. 2006).

after plaintiffs acknowledged lack of personal jurisdiction. Deutsche Bank moved to dismiss plaintiffs' complaint, also alleging that plaintiffs should be sanctioned for knowingly initiating an action wholly lacking in merit.

The New York District Court granted Deutsche Bank's motion to dismiss on *res judicata*[58] grounds, due to the preclusive effect of the D.C. decision on plaintiffs' case. It denied the motion for sanctions, taking plaintiffs' counsel's vigorous advocacy as an indication that it believed the case had merit.

In 2005, plaintiffs filed suit against Woermann Line, then known as Deutsche Afrika-Linien.[59] They brought suit in the United States District Court for the District of New Jersey alleging that defendant's status as the principal shipping and ports activity entity during the German presence in South Africa (1890-1915) implicated it in the enslavement of and commission of atrocities against plaintiffs.

Defendant brought a motion to dismiss using statute of limitations, *res judicata* or collateral estoppel due to the D.C. opinion, standing, and non-justiciability arguments, as well as alleging that plaintiffs' complaint failed to make a claim upon which relief can be granted.

The court rejected defendant's *res judicata*/collateral estoppel argument. Not only had defendant been dismissed from the D.C. case before it was resolved, but also defendant decided not to opt back in to the case as a defendant (i.e., to enjoy possible preclusive effects) when given the opportunity to do so by the appeals court. The court also rejected defendant's argument that plaintiffs lacked standing to bring this suit. Defendant ultimately prevailed, however, as the court accepted its statute of limitations argument—although the ATCA does not contain a statute of limitations, courts are meant to reason by analogy and apply the limitations period codified for violations to those comparable to the ones being alleged under the ATCA. The court found that no statute of limitations for a similar violation in New Jersey legislation would authorize the minimum eighty-year limitations period that would be necessary for plaintiffs' case. The court also saw this limitations argument as fundamental support for defendant's motion—which the court also granted—for failure to state a claim on which relief can be granted.

In 2006, plaintiffs appealed the district court ruling to the Court of Appeals for the Third Circuit, arguing that it erred in concluding that they failed to raise a valid cause of action under the ATS or federal common law and that the applicable statute of limitations had run. [60] The appeals court affirmed the trial court because plaintiffs' complaint failed to state a claim upon which relief can be granted. The court emphasized that although the ATA is somewhat open-ended about the law of nations violations for which it will grant jurisdiction, the court should take care to limit the expanse of these provisions to norms of international conduct recognized when the ATA was signed. It thus affirmed the district court's grant of defendants' motion to dismiss.

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[58] "An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties." BLACK'S LAW DICTIONARY 1336 (8th ed. 2004).

[59] The Hereros v. Deutsche Afrika-Linien GMBLT & Co., No. Civ.A.05-1872(KSH), 2006 WL 182078 (D.N.J. Jan. 24, 2006).

[60] Hereros ex rel. Riruako v. Deutsche Afria-Linien Gmblt & Co., 232 Fed.Appx. 90 (3rd Cir. 2007).

e. Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20 (D.D.C. 2005)

Plaintiffs, eleven Indonesian citizens, filed suit in the Federal District Court for the District of Columbia in June 2001 against Exxon Mobil Corporation, Mobil Corporation, Mobil Oil Corporation, Exxon Mobil Oil Indonesia Inc., and PT Arun LNG Company. Plaintiffs alleged that defendants committed violations of the ATS and TVPA in addition to various common-law torts when they hired a unit of the Indonesian military to provide security for an oil pipeline they were building in Indonesia. Defendants allegedly made decisions about where to build security bases, hired mercenaries to train the security troops, and provided logistical support to the security unit. As part of their work for defendants, the security troops allegedly committed genocide, torture, crimes against humanity, kidnapping, extrajudicial killing, and sexual violence.

Defendants moved for dismissal of plaintiffs' ATS and TVPA claims for lack of subject matter jurisdiction and failure to state a claim. They also moved to dismiss the case on grounds of nonjusticiability, *forum non conveniens*, lack of personal jurisdiction over Exxon Mobil Oil Indonesia, and statute of limitations on one plaintiff's claim. The district court granted defendants' motions for dismissal for lack of subject matter jurisdiction and failure to state a claim with respect to the TVPA and ATS. It also dismissed defendant PT Arun LNG Company, a company 55% owned by the Indonesian government, on justiciability grounds. The court found no merit in defendants' arguments for dismissal of plaintiffs' common-law tort claims.

The only issue the court needed to address to determine subject matter jurisdiction under the ATS was whether plaintiffs' properly pled violations of the law of nations. In its preliminary analysis of the claim, the court, citing *In re South Af. Apartheid Litig.*,[61] held that aiding and abetting liability for corporations is not available under the ATS. The court also held that plaintiffs could not maintain a claim for sexual violence because it is not sufficiently recognized under international law. Finally, they held that plaintiffs need not exhaust local remedies because it would be futile.

In a more exacting analysis, the court addressed the ATS claims of genocide, crimes against humanity, torture, kidnapping, and extrajudicial killing. Following the precedent set by *Doe v. Qi*,[62] the court declined to adjudicate the genocide and crimes against humanity claims because they would require the court to evaluate the policy or practice of the Indonesian government. The court also rejected plaintiffs' arguments of color of law liability for torture, kidnapping, and extrajudicial killing. First, the court rejected the use of color of law liability because it would undermine the principle that most international law violations can only be committed by states. Second, the court held that even if color of law liability applied, plaintiffs failed to adequately plead either of the two grounds upon which it can be based—joint action or proximate cause. In regards to joint action, plaintiffs' allegations that Exxon worked with the military in securing the pipeline were not sufficient to allege that Exxon participated in or influenced the military's human rights abuses. As for proximate cause, plaintiffs' failed to properly allege that Exxon had control over the military's actions.

Next, the court addressed Exxon's motion to dismiss plaintiff's TVPA claim for a lack of subject matter jurisdiction. Because the TVPA created liability for an "individual" who subjects another to torture or extrajudicial killing, the court construed individual narrowly to be limited to

[61] 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004).
[62] 349 F. Supp. 2d 1258 (N.D.Cal. 2004).

human beings. Thus, the act did not create liability for Exxon because it is a corporation, rather than an individual.

The remaining arguments by Exxon were quickly addressed by the court. Except for the dismissal of PT Arun, Exxon's justiciability argument was rejected because the case would not turn on the effect of an official action of the Indonesian government. Exxon's *forum non conveniens* argument was rejected because plaintiffs properly pleaded and presented evidence of bias in the alternative forum (Indonesia). The argument of lack of personal jurisdiction was rejected because plaintiffs properly pleaded facts that, if true, would support jurisdiction over Exxon Indonesia as an alter ego of Exxon Mobile. Finally, the statute of limitations claim was denied without prejudice, subject to plaintiffs' response to an Order to Show Cause why the claims should not be dismissed.

Exxon appealed the district court's decision not to dismiss the case on justiciability grounds, and the U.S. Court of Appeals for the District of Columbia released a decision on January 12, 2007.[63] In its decision, the court held that the denial of Exxon's motion to dismiss on political question grounds was not an immediately appealable order and that *mandamus* was not appropriate.

f. John Doe I v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005)

Plaintiffs, Burmese farmers, filed suit against Unocal Corp. (Unocal); Total S.A. (Total); the Myanmar Oil and Gas Enterprise (MOGE); the State Law and Order Restoration Council (SLORC); John Imle, President of Unocal; and Roger C. Beach, Chairman and Chief Executive Officer of Unocal, in the Federal District Court for the Central District of California in 1996. Plaintiffs alleged that, as part of a gas pipeline project in Burma, defendants took part in international human rights abuses.

SLORC is a military junta that seized control of Burma in 1988. According to plaintiffs, SLORC, on behalf of defendants Unocal, Total, and MOGE, used violence and intimidation to relocate villages, enslave farmers, and steal farmers' property for the benefit of the pipeline. As part of these actions, plaintiffs alleged that SLORC took part in the deaths of plaintiffs' family members, and the assault, rape, torture, forced labor, and loss of homes of the plaintiffs.

Plaintiffs alleged violations of domestic law and customary international law. They sought damages under domestic law for violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), intentional infliction of emotional distress, negligent infliction of emotional distress, negligence per se, conversion, negligent hiring, negligent supervision, and violation of California Business & Professions Code § 17200. They sought damages under customary international law for forced labor; crimes against humanity; torture; violence against women; arbitrary arrest and detention; cruel, inhuman, or degrading treatment; wrongful death; battery; false imprisonment; and assault. Plaintiffs argued that defendants Unocal, Total, and MOGE knew prior to beginning the pipeline that SLORC had engaged in human rights abuses and that SLORC was committing human rights violations, including forced labor and forced relocation, in connection with the pipeline project.

[63] Doe v. Exxon Mobile Corp., 473 F.3d 345 (D.C. Cir. 2007).

In response to plaintiffs' claims, defendants filed a motion to dismiss for lack of subject matter jurisdiction, failure to join a party under Rule 19[64], and a failure to state a claim under which relief can be granted. The district court held that SLORC and MOGE were entitled to sovereign immunity, SLORC and MOGE were not indispensible parties under Rule 19, subject matter jurisdiction was available under the ATS, the court did not need to reach the question of jurisdiction under the TVPA, and that plaintiffs pleaded sufficient facts to survive the motion to dismiss for a failure to state a claim.[65]

On appeal, the Ninth Circuit Court of Appeals held that plaintiffs' allegations were sufficient except in regards to torture, and the FSIA did not apply, and that an issue of fact existed as to whether the Act of State Doctrine applied.[66] Shortly thereafter, the court of appeals ordered the case to be reheard and terminated the previous appellate decision's precedential value.[67] Prior to rehearing, the parties settled. The case was closed on August 13, 2005. In its order granting the parties' stipulated motion to dismiss, the court of appeals vacated the district court's opinion; therefore, no precedent was set by this case.

g. Stutts v. De Dietrich Group, 2006 WL 18670060 and 465 F. Supp. 2d 156 (E.D.N.Y. 2006)[68]

Plaintiffs, numerous military servicemen and civilian employees of the United States Department of Defense who were deployed in the Persian Gulf region during the 1991 Gulf War sued the De Dietrich Group and other defendants in the United States District Court for the Eastern District of New York in August 2003. They sought relief for damages sustained as a result of exposure to toxic agents contained in chemical weapons developed or obtained by the Iraqi Government and ultimately detonated by the United States and its allies during the Gulf War conflict.

The claims named two classes of defendants—the supplier defendants and the bank defendants—which were ultimately decided in two separate cases. The supplier defendants included foreign corporations that allegedly sold chemical precursors and manufacturing equipment to Iraq, which were used to develop the chemical weapons to which plaintiffs were exposed. The bank defendants included foreign corporations that acted as correspondent banks under letters of credit issued in favor of the supplier defendants to support the sale of their goods and services to Iraq.

Plaintiffs asserted a cause of action against both sets of defendants under the Anti-Terrorism Act.[69] The relevant part of the Anti-Terrorism Act for plaintiffs' purposes established that "[a]ny national of the United States injured in his or her person . . . by reason of an act of

[64] FED. R. CIV. P. 19 (A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if . . . in that person's absence, the court cannot accord complete relief among existing parties . . .).
[65] Doe v. Unocal Corp., 963 F.Supp. 880 (C.D.Cal. 1997).
[66] Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)
[67] Doe I v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003)
[68] Two cases will be discussed together in this summary because they arise out of the same set of facts and were heard in the same court. There are two decisions because there were two groups of defendants, for whom the court rendered separate decisions—one in June 2006 and one in November 2006.
[69] The Anti-Terrorism Act, 18 U.S.C. §2333 (2001).

international terrorism . . . may sue therefore in any appropriate district court of the United States."[70]

Plaintiffs' allegations against supplier defendants were based on the premise that they assisted the development or acquisition of chemical weapons by Saddam Hussein through the issuance letters of credit. Plaintiffs alleged that Saddam Hussein used chemical weapons against civilians in Iraq and other neighboring countries, and that despite the widespread knowledge of Hussein's illegal actions, the supplier defendants provided him with goods and services that enabled his regime to use chemical weapons.

The Anti-Terrorism Act's definition of international terrorism included activities in violation of U.S. criminal law that are violent or dangerous to human life and intended to have a coercive effect on governments or civilian populations. The court held that bank defendants' involvement in commercial banking activity did not fall within the scope of international terrorism, as defined in the statute.

The bank defendants moved to dismiss plaintiffs' complaint for failure to state a claim upon which relief can be granted.[71] The elements of aiding and abetting under common law that plaintiffs were required to prove are: (1) the existence of a violation by the primary wrongdoer; (2) knowledge of this violation on the part of the aider and abettor; (3) substantial assistance by the aider and abettor in the achievement of the primary violation.[72] The court held that, because plaintiffs failed to sufficiently allege that the bank defendants knew that Iraq would use the chemical weapons illegally or facilitate their illegal use, plaintiffs failed to satisfy the requirement of knowledge. In addition, the court held that where a plaintiff failed to show a causal link between the alleged unlawful act and defendant's participation in the commission of the act, it was more difficult to demonstrate that defendants knowingly and substantially assisted in the unlawful activities.

Bank defendants' motions to dismiss the complaint were granted in its entirety in June 2006.

In addition to the bank defendants' motions, the two supplier defendants, Buchi AG and DDPS-SA, moved for dismissal for lack of personal jurisdiction, and the bank defendants moved to dismiss for a failure to state a claim.

Buchi AG was a manufacturer of laboratory tools for the pharmaceutical and food industries—its principal place of business was Switzerland, but it had a subsidiary operating in New York as Buchi Analytical. Despite the fact that defendant had a subsidiary in New York, the court determined that plaintiffs failed to establish a close relationship between the parent and subsidiary companies, which is required to assert personal jurisdiction.

DDPS-SA, a French company, supplied equipment, systems, solutions, and services to the chemical and pharmaceutical industries through its U.S. subsidiary DDPS-INC. DDPS-SA presented evidence that it had separate facilities, officers, and employees from DDPS-INC, and that the two entities had separate boards of directors. The court held that DDPS-SA proved that the two had separate corporate identities. As a result, the court held that plaintiffs failed to sufficiently allege that DDPS-SA was "doing business" through its U.S. subsidiary or that it had sufficient aggregate contacts with the U.S. to establish personal jurisdiction.

Both supplier defendants' motions to dismiss for lack of personal jurisdiction were granted in November 2006.

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[70] *Id.* at (a).
[71] FED. R. CIV. P. 12(b)(6).
[72] Restatement (Second) of Torts § 876

h. Bowoto v. Chevron, No. C 99-02506 SI, 2006 WL 2455752 (N.D. Cal. August 22, 2006)

In 1999, plaintiffs, Nigerian community organizers, brought suit in the U.S. District Court for the Northern District of California against Chevron Inc., a U.S. corporation, alleging violations of the TVPA and the ATS. Plaintiffs alleged that Chevron supplied helicopters to Nigerian government security forces who attacked plaintiffs during a protest at one of Chevron's oil operations in Nigeria. Plaintiffs also alleged that Chevron supplied helicopters, sea trucks, pilots, and other crew members to Nigerian security forces when they attacked two towns near Chevron's oil and gas operations.

Plaintiffs' ATS claim included causes of action for violations of international law including crimes against humanity; summary execution; torture; CIDT; violation of the rights to life, liberty, security of person, peaceful assembly, and association; and a consistent pattern of gross violations of human rights.

In order to bring a claim under the ATS, the plaintiff must show that defendant violated a sufficiently well-defined norm of international law and that the scope of liability for violation of that norm extends to the defendant. Chevron moved to dismiss the TVPA claim on grounds that it applied only to natural persons, not corporations, and the ATS claim for plaintiffs' failure to state a claim. The district court granted in full the motion to dismiss the TVPA claim and granted in part the motion to dismiss the ATS claim.

The court first addressed the claims for crimes against humanity under the ATS. Since the only violation alleged by plaintiffs that extended to private actors was crimes against humanity, that claim was addressed separately from the others. Plaintiffs alleged that the crimes were committed by the Nigerian military, but that Chevron was liable under aiding and abetting and other indirect liability theories. Chevron argued that a private actor could not be held liable under aiding and abetting theory because such liability is not available under customary international law. The court disagreed with Chevron, referring to numerous other courts that have found aiding and abetting liability was available under the ATS. The court concluded that in order to hold Chevron liable, the plaintiffs must show at trial that Chevron provided practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime, as well as that Chevron knew that the Nigerian military intended to commit the crime.

After addressing the claims for crimes against humanity, the court addressed the remaining claims. Since the violations in the remaining claims did not extend to private actors, plaintiffs attempted to hold Chevron liable under color of law or aiding and abetting theories. Using the U.S. Supreme Court's call for judicial restraint in *Sosa*[73], the district court agreed with Chevron's argument that the ATS should not be extended to include color of law claims. In *Sosa*, the Supreme Court held that liability under the ATS would be decided by international law.[74] Since international law does not recognize the remaining violations, the district court refused to extend the scope of the ATS to include the claims.

The court also held that Chevron could not be held liable for the remaining claims under aiding and abetting theory. To do so would be to hold Chevron liable for aiding and abetting violations that they could not be held liable for committing themselves. The court found that it would make little sense to allow this.

[73] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).
[74] *Id*. at 732 n.20.

The final issue addressed by the court was Chevron's argument that international law does not extend to corporations. The court cited many cases that held that international law extended to corporations and dismissed the argument out of hand.

In December 2008, a jury found in favor of Chevron on the remaining claims. Plaintiffs filed an appeal with the Ninth Circuit Court of Appeals in April 2009.

i. Corrie v. Caterpillar Inc., 503 F.3d 974 (9th Cir. 2007)

Plaintiffs, residents of Palestine and their family members, brought suit in the U.S. District Court for the Western District of Washington against Caterpillar Inc., a U.S. company specializing in manufacturing and selling bulldozers and other large work vehicles. Plaintiffs alleged that Caterpillar Inc. sold bulldozers to the Israeli Defense Forces (IDF) despite having actual and constructive notice that the IDF would use the bulldozers to destroy homes in the Palestinian Territories. As a result of the bulldozing, plaintiffs and members of their families were injured or killed. Although the bulldozers were sold to the IDF, the U.S. Government paid for them on behalf of Israel. Plaintiffs brought suit under the ATS, seeking compensatory and punitive damages, declaratory relief, an injunction directing Caterpillar to stop providing equipment to the IDF as long as its illegal practices continued, and costs and attorneys' fees.

Caterpillar Inc. moved to dismiss on two grounds arguing failure to state a claim and that plaintiffs' claims were barred by the political question doctrine. The district court granted the motion, holding that the act of state and political question doctrines precluded it from reaching the merits of the claim.[75] Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.

On appeal, the court affirmed dismissal of plaintiffs' claim under the political question doctrine. In applying the facts of plaintiffs' claim to the political question doctrine, the decisive factor for the court was that the bulldozers were paid for by the United States. Since plaintiffs' claims rested on the premise that Caterpillar should not have sold the bulldozers to the IDF, and the bulldozers were paid for by the Executive Branch pursuant to a Congressional program, it would be impossible for the court to impose liability on Caterpillar without questioning the United States' decision to pay for the bulldozers. Since the choice to fund the bulldozers on Israel's behalf is a foreign relations matter left to the Executive Branch by the Constitution, it was non-justiciable.[76] By adjudicating the claim, the court would be questioning a political decision already made and would risk the embarrassment caused by multifarious pronouncements by various departments on one question.

Thus, the court held that since political questions were outside the jurisdiction of the court, Caterpillar's motion to dismiss should have been construed by the district court as a motion for dismissal for lack of subject matter jurisdiction rather than a motion for dismissal for failure to state a claim. Despite the change in reasoning, the court of appeals upheld the district court's dismissal of plaintiffs' claims.

[75] Corrie v. Caterpillar, Inc., 403 F.Supp.2d 1019 (W.D. Wash. 2005)
[76] *See* discussion of political question doctrine *supra*, note 5.

j. Xiaoning v. Yahoo, Inc., No. C 07-2151 CW, 2007 U.S. Dist. LEXIS 97566 (N.D. Cal. October 31, 2007)

On April 18, 2007, plaintiffs Wang Xiaoning, Shi Tao, and Yu Ling filed a complaint against Yahoo! Inc. (hereinafter Yahoo) and Yahoo! Hong Kong, Ltd. (hereinafter Yahoo Hong Kong or YHK) in the United States District Court for the Northern District of California under the ATS, the TVPA, and the Communications Privacy Act.[77]

Wang and Shi were citizens of the People's Republic of China and had been imprisoned there since 2002 and 2004 respectively**,** each one sentenced to ten years on charges of incitement to subvert state power and of illegally providing state secrets to foreign entities**.** Yu, also a citizen of China, was Wang's wife. Plaintiffs alleged that Yahoo and Yahoo Hong Kong willfully provided Chinese officials with access to private email records, copies of email messages, and other personal information, the nature and content of which led to their detention as these communications contained pro-democracy literature. As a result, officials in the Chinese government allegedly subjected plaintiffs to torture, cruel and inhumane treatment, arbitrary arrest, and prolonged detention.

On August 27, 2007, Yahoo moved to dismiss the complaint, arguing that the case involved acts of state and political questions and that the ruling would breach standards of international comity. YHK joined Yahoo's motion to dismiss, adding a motion to dismiss for lack of personal jurisdiction. Plaintiffs then asked to begin initial and jurisdictional discovery, arguing that such discovery was needed to enable them to respond fully to defendants' arguments. On October 31, 2007, the court granted in part plaintiffs' motions for initial and jurisdictional discovery, allowing plaintiffs to proceed with discovery on the court's personal jurisdiction over YHK.

The parties were supposed to appear with their oral arguments in December 20, 2007; however, on November 13, 2007, the parties agreed to a private settlement and issued a joint stipulation of dismissal. Yahoo agreed to provide legal help in order to free the imprisoned men, bear plaintiffs' legal costs, and establish a fund to provide humanitarian and legal aid to dissidents imprisoned for expressing their views online. The exact terms of the settlement are confidential.

k. Romero v. Drummond Co., 552 F.3d 1303 (11th Cir. 2008)

In 2002, a Colombian labor union, a group of union leaders, and family members of deceased union members brought suit against Drummond Company, a coal mining company.[78] They brought suit in the District Court for the Northern District of Alabama under the ATS and TVPA, alleging that the president of the company's Colombian subsidiary, Drummond Ltd., obtained the services of Colombian paramilitaries to kill and torture union leaders. They further alleged that these actions were taken with the knowledge of Drummond executives in the United States.

Defendants filed a motion to dismiss, arguing that plaintiffs' claims were barred by the political question doctrine and standards of international comity. They also argued that one of the plaintiffs—the Colombian labor union—lacked standing to sue for wrongful death, that

[77] http://en.wikipedia.org/wiki/Electronic_Communications_Privacy_Act

[78] Romero v. Drummond Co., Inc., 2006 WL 5186500 (N.D.Ala. 2006)

corporations cannot be sued under the TVPA and ATS, and that the TVPA and ATS do not provide liability for aiding and abetting. The district court consolidated the claims and granted partial summary judgment against the plaintiffs, holding that the labor union did not have standing to sue, but that aiding and abetting was an actionable claim and corporations were liable to suit. After the motion for summary judgment was decided, only one of plaintiffs' claims remained: that defendant aided and abetted extrajudicial killings.

In late 2007, plaintiffs appealed the partial summary judgment, as well as various rulings on discovery and evidence made before and during the trial, to the U.S. Court of Appeals for the 11th Circuit. Defendant challenged the subject matter jurisdiction of the district court. The court concluded that subject matter jurisdiction was proper in the district court, rulings on plaintiffs' discovery and evidence were appropriate, and no other reversible error occurred in the rulings. This issue went to trial, and the district court found for defendant in 2008.[79] In December 2008, the appellate court affirmed the lower court's finding for defendant.

Meanwhile, defendants sought State Department intervention. As regards civil procedure, the court refused to allow testimony from new and late-disclosed witnesses after the discovery deadline had passed, thus contributing, plaintiffs alleged, to their failure to meet their burden at summary judgment. Related to their evidentiary problems, plaintiffs argued that the court abused its discretion in excluding so much evidence; however, none of the four such allegations made by plaintiffs were successful. Thus, the first decisions from both the district and appellate courts dealt more with idiosyncratic issues related to the two parties at bar than ones with broader applicability for litigants in corporate complicity cases.

Three of the issues addressed by the court were of primary importance to the substantive law in the area of corporate complicity. First, the court held that the TVPA allowed suits against corporate defendants. Second, the court held that the ATS also applied to corporations and that complaints regarding torture fell within the scope of the statute. Finally, the court applied the jurisdiction's precedent regarding the definition of state action under the TVPA: the state action requirement may be satisfied by the showing of a symbiotic relationship between a private actor and the government involving the torture or killing alleged. Evidence that even a single official actively participated in such a relationship is enough to support the finding of a relationship. The court held that plaintiffs failed to meet their burden under this definition and upheld the district court's holding.

In 2009, two new lawsuits were filed on this issue, one by the children of three killed Colombian union leaders and one alleging that Drummond had paid Colombian paramilitaries to kill labor leaders. Drummond has denied the allegations.[80]

l. Sarei v. Rio Tinto, PLC., 550 F.3d 822 (9th Cir. 2008)

In November 2000, plaintiffs, residents of Bougainville, an island off the coast of Papua New Guinea (PNG), filed suit against Rio Tinto PLC and Rio Tinto Limited (collectively referred to as Rio Tinto), two members of an international mining group, in the Federal District Court for the Central District of California. According to the complaint, Rio Tinto began a

[79] Romero v. Drummond Co., Inc., 552 F.3d 1303 (11th Cir. 2008).

[80] Jay Reeves, *Children Sue Ala. Company in Colombian Mine Deaths*, WASH. TIMES, Mar. 20, 2009, *available at* http://www.washingtontimes.com/news/2009/mar/20/children-sue-ala-company-in-colombian-mine-deat-1/; Bob Johnson, *Suit: Ala. coal firm funded Colombian terror*, MSNBC, May 28, 2009, *available at* http://www.msnbc.msn.com/id/30990336.

mining operation in Bougainville with the support of the PNG government in the 1960s. As part of their operation, Rio Tinto displaced villages; razed massive tracts of rain forest; intensely polluted the land, rivers, and air; and systematically discriminated against its Bougainvillian workers, who lived in slave-like conditions. In November 1988, some members of Bougainville revolted against Rio Tinto. In response, Rio Tinto called upon the PNG government to stop the uprising. Using helicopters and vehicles supplied by Rio Tinto, the PNG military killed many Bougainvillians. Subsequent to the attack, the PNG government instituted a military blockade of the island. Plaintiffs alleged that during the blockade, PNG prevented medicine, clothing, and other necessities from reaching the island, and, under pressure from Rio Tinto, engaged in aerial bombardment of civilian targets, wanton killings and acts of cruelty, village burning, rape, and pillage.

Plaintiffs alleged violations of the ATS including (1) crimes against humanity; (2) crimes of murder and torture; (3) violations of the rights to life, health, and security of the person; (4) racial discrimination; (5) CIDT; and (6) a consistent pattern of gross violations of human rights resulting from the destruction of the environment, racial discrimination, and PNG military activities. Although the district court noted that plaintiffs stated cognizable claims under the ATS of war crimes, crimes against humanity, racial discrimination, and violation of the United Nations Convention on the Law of the Sea (UNCLOS), it dismissed the claim under the political question doctrine. In the alternative, it dismissed the racial discrimination claim under the act of state doctrine and the doctrine of international comity. In addition, it held that the ATS did not require exhaustion of local remedies, but did not address exhaustion as a prudential or discretionary issue.[81]

On appeal, a three judge panel affirmed in part, reversed in part, vacated in part, and remanded. In doing so, the panel addressed four issues. First, it held that the district court had subject matter jurisdiction under the ATS because plaintiffs alleged non-frivolous *jus cogens* violations of international law. [82] Second, it held that the district court erred when it dismissed plaintiffs' claims as non-justiciable political questions. Third, it held that the district court erred in dismissing the racial discrimination claim under the act of state doctrine and that the district court should reexamine its dismissal of the UNCLOS claim. Fourth, the panel held that the ATS does not require exhaustion of local remedies. It reasoned that the language of the statute did not require exhaustion and that the legislative history contained no reference to exhaustion or even to the ATS itself. Furthermore Congress's inclusion of an explicit exhaustion requirement in the TVPA suggests that Congress did not intend to require exhaustion for ATS claims and policy concerns did not justify creating an exhaustion requirement as a matter of judicial discretion.[83]

Soon after releasing the panel decision, the court of appeals ordered that the case be reheard *en banc* in order to address the issue of exhaustion under the ATS. Noting the Supreme Court's direction in *Sosa*[84] that exhaustion of local remedies should be considered in the appropriate case, the court of appeals, deeming the current case appropriate, set out to examine the issue of exhaustion under domestic prudential standards and core principles of international law. The court determined that in cases where the "nexus" with the U.S. is weak, the issue of exhaustion should be carefully considered by the court, particularly with respect to claims that do

[81] Sarei v. Rio Tinto, PLC., 221 F.Supp.2d 1116 (C.D. Cal. 2002)
[82] A mandatory or peremptory norm of general international law accepted and recognized by the international community as a norm from which no derogation is permitted. Black's Law Dictionary (8th ed. 2004).
[83] Sarei v. Rio Tinto, PLC., 456 F.3d 1069 (9th Cir. 2006)
[84] Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004)

not involve matters of *universal* concern. Additionally, the court set up a framework for courts to use in their exhaustion analysis. Under this framework, the defendant has the burden of pleading and justifying an exhaustion requirement; to "exhaust," the plaintiff must obtain a final judgment, and a remedy must be available, effective, and not futile. In making its determination, the court must balance two interests: (1) safeguarding and respecting the principle of comity, and (2) upholding customary international law.[85]

The court of appeals remanded to the district court to determine whether an exhaustion requirement would be appropriate in the case. In making its determination, the district court analyzed the strength of the nexus between plaintiffs' claims and the U.S., as well as the universal nature of each of plaintiffs' claims, and weighed the two against each other.[86]

The court determined that, when making its nexus analysis, it should analyze the spectrum of contacts and connections between the plaintiffs' claims and the United States. In deciding where on the spectrum plaintiffs' claims fall, the court should consider the traditional bases for exercising sovereign jurisdiction to prescribe laws, including nationality, territory, and effects within the United States; other connections between the U.S. and the parties and claims; and the scope and purpose of the ATS. Applying this analysis to the facts of the case, the court determined that the nexus of plaintiffs' claims with the U.S. was weak. The actions underlying the claim did not take place in and had no relationship to the U.S., the plaintiffs were not from the U.S., and Rio Tinto's only contacts with the U.S. had no relationship to plaintiffs' claims.

Next, the court addressed whether plaintiffs' claims were matters of universal concern. Matters of universal concern are offenses "for which a state has jurisdiction to punish without regard to territoriality or the nationality of offenders."[87] In determining whether plaintiffs' claims involved matters of universal concern, the court referred, but did not limit itself, to section 402 of the restatement.[88] The court also referred to Judge Reinhardt's dissenting opinion in the appellate decision, referring to "norm[s] of international character accepted by the civilized world" that all nations have an interest in remedying.[89] The district court determined that the analysis of whether a claim involves a matter of universal concern overlapped to some extent with the evaluation of whether a claim fell within ATS jurisdiction. In summary, the court concluded that it would be appropriate to look to ATS jurisprudence, the works of jurists on public law, the general practice of nations, court decisions that discuss and enforce international law, and section 404 of the restatement.

Applying this analysis to plaintiffs' claims, the court determined that the claims for crimes against humanity, war crimes, and racial discrimination were of universal concern. In addition, the court determined that plaintiffs' CIDT claims did not involve matters of universal concern because multiple elements of their claims did not involve conduct that had been universally condemned as cruel, inhuman, or degrading. Finally, the court determined that plaintiffs' claims of a consistent pattern of gross human rights abuses did not involve matters of universal concern, because their lack of specificity undermined the notion that there was a universal consensus condemning the conduct.

Weighing the universal nature of the claims against the weak nexus of the claims with the U.S., the court held that the claims implicating matters of a universal nature did not require the

[85] Sarei v. Rio Tinto, PLC., 550 F.3d 822 (9th Cir. 2008)
[86] Sarei v. Rio Tinto, PLC., No. CV 00-11695 MMM (MANx), 2009 WL 2762635 (C.D. Cal. July 31, 2009)
[87] *Id.* at *4.
[88] Restatement (Third) of Foreign Relations Law of the United States § 402 (1987).
[89] *Rio Tinto IV*, 550 F.3d at 845 (Reinhardt, J., dissenting)

traditional two-step exhaustion analysis, and that the claims not implicating matters of a universal nature did require the traditional two-step exhaustion analysis. The court gave plaintiffs a choice of amending their complaint to only allege conduct implicating matters of a universal concern or to undergo the exhaustion analysis with respect to the other claims. On August 4, 2009, plaintiffs agreed to forego the additional claims in order to begin discovery and expedite the trial process.

m. Galvis Mujica v. Occidental Petroleum Corp., 564 F.3d 1190 (9th Cir. 2009)

Plaintiffs, residents of Santo Domingo, Colombia and victims of the human rights violations alleged, brought suit against defendants Occidental Petroleum Corporation and AirScan, Inc. in the Federal District Court for the Central District of California in April 2003.[90] Defendant Occidental, based in Los Angeles, California, operated an oil production facility and pipeline near Santo Domingo as part of a joint venture with the Colombian government. Plaintiffs alleged that defendant AirScan, based in Florida, provided security services at Occidental's Santo Domingo operations, protecting them from attacks by left-wing insurgents. Prior to 1998, defendants worked cooperatively with the Colombian military, including providing financial and other assistance. Several times during 1998, Occidental coordinated efforts between AirScan and the Colombian military, including providing facilities for them to plan a raid on Santo Domingo.

Plaintiffs brought charges under the ATS, TVPA, and state law, including allegations of wrongful death and intentional and negligent infliction of emotional distress. These allegations arose out of a December 13, 1998 incident, in which defendants conducted an air raid on Santo Domingo using Occidental's funding, AirScan's pilots, and Colombian Air Force (CAF) equipment (e.g., helicopters) to protect Occidental's pipeline. This air raid included dropping bombs on the town of Santo Domingo. Plaintiffs alleged that in the process of this security operation, homes in Santo Domingo were destroyed, twenty-five civilians were wounded, and seventeen civilians were killed, including six children.

Occidental filed a motion requesting that the Court solicit the State Department's opinion regarding the case's foreign policy implications. The motion was granted on January 20, 2004, and the State Department indicated on April 2, 2004 that it did not yet have an opinion on the issue. On July 22, 2004, the parties agreed to an extended briefing schedule on Occidental's motions to dismiss, which would take into account the Supreme Court's recent decision in *Sosa v. Alvarez-Machain*.[91] The briefings were completed on December 20, 2004; ten days later, the State Department filed documents indicating that it opposed the litigation and viewed it as potentially detrimental to U.S. relations with Colombia. The State Department's correspondence included attached correspondence from the Colombian government indicating that it, too, objected the litigation. After oral argument in January 2005, the court allowed until February 16, 2005 for additional briefings to be filed regarding the State Department opinion.

Defendants filed motions to dismiss under *forum non conveniens*, international comity, the act of state doctrine, and the political question doctrine. The Court addressed their motions in two decisions: one addressing the defendants' *forum non conveniens* and international comity

[90] Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1134 (C.D. Cal 2005).
[91] Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (U.S. 2004).

arguments,[92] and the other addressing its arguments about the act of state and the political question doctrines.[93]

Regarding the *forum non conveniens* issue, defendants attempted to defeat jurisdiction by consenting to jurisdiction in Colombia, arguing that the case would more appropriately be heard there, and pointing out that plaintiffs had previously filed a case in Colombia on the same facts and raising similar issues. Plaintiffs responded by arguing that claims under the ATS and TVPA are almost immune to dismissal for *forum non conveniens* and pointing out that the dangers to their personal safety resulting from having brought suit in Colombia were the reasons the present suit was brought in the United States. Defendants also attempted to show that Colombia is an adequate alternative forum because plaintiffs had been awarded remedies in their previous case there.

According to the court in Decision I, plaintiffs did not need to establish to an absolute certainty that there would be personal harm to them for bringing the case in Colombia. Showing, as it did, that a substantial risk existed sufficed to demonstrate that Colombia was not an adequate alternate forum. The court also arrived at this conclusion on the basis of defendants' evidence that plaintiffs had previously received remedies and the fact that Colombian law effectively limits recovery for injuries arising out the same incident to the first lawsuit—although plaintiffs' lawsuit in Colombia did not involve this case's defendants, plaintiffs would not be able to obtain further remedies under Colombian law.

The court also considered numerous public and private interest factors used in *forum non conveniens* analysis.[94] After considering and weighing these factors, however, the court in Decision I denied all of defendants' motions to dismiss, holding that *forum non conveniens* did not apply as Colombia was not an adequate alternate forum.

Defendants also argued that plaintiffs' case should be dismissed on the grounds of international comity.[95] Although the court acknowledged the potential for such a conflict arising in the future—in other words, a conflict between an eventual decision on the merits in the U.S. and the Colombian court's decision—it held that the relevant consideration is whether or not there was a present conflict. It held there was not. In the related doctrine of international abstention, the court held that it need not abstain from hearing the case due to the potential for future clashes between its decision and the Colombian court's decision. This conclusion emerged from the reality that because defendants in this case are not parties to plaintiffs' Colombia case, the result of that case, though probably determinative of some issues of fact common to the current dispute, would not resolve plaintiffs' case against defendants in this case.

Finally, the court held that the establishment of the adequacy of the alternate forum must precede the application of the doctrine of international comity. Because Colombia was an inadequate forum in the court's eyes, it need not move on to consider the doctrine of international comity, despite a wide variety of arguments, such as Colombia's interest in having this case litigated in its national territory. Thus, in Decision I the court held that the doctrine of international comity neither barred plaintiffs' action nor required the court's abstention from hearing the case.

In addition to moving to dismiss on the grounds of *forum non conveniens* and international comity, defendants also moved to dismiss on the grounds that plaintiffs' ATS and

[92] Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1134 (C.D. Cal 2005) [hereinafter Decision I].
[93] Mujica v. Occidental Petroleum Corp., 381 F. Supp.2d 1164 (C.D. Cal 2005) [hereinafter Decision II].
[94] *See* discussion of *forum non conveniens supra*, at 7.
[95] *See* discussion of international comity *supra*, at 5.

TVPA claims failed, as well as under the act of state doctrine and the political question doctrine.[96]

Defendants argued that plaintiffs' TVPA claims failed on several grounds. First, they alleged that plaintiffs did not exhaust available remedies. Furthermore, they argued that the TVPA did not recognize liability for aiding and abetting, defendants did not act under color of law, corporations do not qualify as "individuals" under the TVPA and thus can not be held liable under this legislation, and plaintiffs inadequately pleaded their claims of torture and extrajudicial killing.

Regarding defendants' arguments about aiding and abetting, the court held first that plaintiffs were not alleging aiding and abetting, so defendants' point was moot; however, it went on to point out that case law did not currently make aiding and abetting liability unavailable under the TVPA. With regards to defendants' arguments about color of law, the court held that plaintiffs made claims about color of law with sufficient specificity to pass muster under the Federal Rules of Civil Procedure. The court ultimately granted defendants' motion to dismiss with respect to plaintiff's TVPA claims, however, due to the fact that a plain language interpretation of the statute excluded corporations from liability under the TVPA because of the legislation's constant reference to "individuals."

The court examined plaintiffs' ATS claims through the lens of the recent decision in *Sosa*[97] in order to decide whether or not these violations fall within binding international law. After examining sources of international law, the court held that there were customary international law norms against all of the abuses alleged by plaintiffs—namely, extrajudicial killing, torture, war crimes, crimes against humanity, and CIDT. Furthermore, the court held that all of plaintiffs' allegations except those regarding CIDT fit within the scope of the violations recognized in international law and did not duplicate causes of action available through other federal legislation.

Finally, after examining statute of limitations issues regarding plaintiffs' state law claims, the court moved to resolve the issues of the foreign affairs, act of state, and political question doctrines. Although the court viewed California as having some interest in the case due to the fact that one of the defendants resided there, the strong federal foreign policy interests outweighed California's interests in the case. Thus, plaintiffs' state law claims should be dismissed in compliance with the foreign affairs doctrine. By contrast, the court held that the act of state doctrine did not apply to bar plaintiffs' suit because plaintiffs' allegations involved violations of customary international law, about which there is, by definition, a high degree of consensus. The court also held that the political question doctrine applied because a judicial resolution might interfere inappropriately with the executive's foreign relations power and had potential to negatively impact foreign policies already in place. Thus, in Decision II, the court dismissed the entire case on political question doctrine grounds.

In May 2009, the Ninth Circuit Court of Appeals remanded the decision to the district court due to the recent decision in *Sarei v. Rio Tinto* regarding the applicability and effects of a prudential exhaustion requirement.[98] The court also requested that plaintiffs' cases in Colombian court be evaluated for their effects on this litigation in the United States.

[96] *See* discussion of act of state and political question doctrines *supra,* at 5.
[97] Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (U.S. 2004).
[98] Sarei v. Rio Tinto, 550 F.3d 882 (9th Cir. 2008) (en banc).

n. Presbyterian Church of Sudan vs. Talisman Energy, Inc., 2009 U.S. App. LEXIS 21688 (2nd Cir. 2009)

In November 2001, the Presbyterian Church of Sudan and four individual plaintiffs brought this case under the ATS against Talisman Energy, Inc., in the United States District Court for the Southern District of New York, representing a class of thousands of southern Sudanese citizens. Plaintiffs, current and former residents of southern Sudan who were subjected to assaults by foot soldiers, attackers on horseback, gunships, and bombers, alleged that defendants collaborated to commit gross human rights violations, including extrajudicial killing, forcible displacement, war crimes, confiscation and destruction of property, kidnapping, rape, and enslavement.

In October 1998, Talisman Energy, a Canadian enterprise, became a 25% shareholder in GNPOC, a Mauritius oil operations corporation, which held rights to oil fields in Southern Sudan. GNPOC's operations took place in the context of a civil war, and security arrangements were made for the consortium's personnel in coordination with the government and military. GNPOC and the Sudanese government built all-weather roads across the oil fields to the military bases, which served the dual purpose of moving consortium personnel and facilitating military activities. Plaintiffs alleged that the government, through forced displacement, created a buffer zone around GNPOC's facilities where no local settlements or commerce were allowed. The evidence showed that Talisman knew of the military activities.

The case survived several motions to dismiss regarding the application of ATS to corporations. In September 2006, the court denied plaintiffs' motion to amend their complaint on the basis that to plead new theories of liability three years after the deadline for amendment would require a good cause of delay, which plaintiffs failed to prove. The court granted the motion for summary judgment because it found that plaintiffs had failed to locate admissible evidence that Talisman had violated international law.[99]

In February 2007, plaintiffs appealed to the U.S. Court of Appeals for the District of Columbia, alleging that Talisman aided and abetted the government of Sudan in violating international law and conspired with the government of Sudan to violate customary international law related to genocide, torture, war crimes, and crimes against humanity.

The court of appeals held that the standard for ATS liability should be derived from international, not domestic law. The court then addressed whether the Ministries Cases are evidence of a knowledge standard being imposed at the Nuremberg trials and mentioned that "sporadic forays" into the use of the knowledge standard by other international criminal tribunals do not constitute the requisite level of universal acceptance as required by customary international law. The court also held that the claim of conspiracy requires the same *mens rea* standard of purpose, and that the plaintiffs did not present sufficient evidence to reach the standard.

The court of appeals affirmed the district court's to deny plaintiffs' amendment to the complaint on the grounds of delay. Because the amendment was properly denied and the case dismissed, the court did not reach the issue of joint venture liability and the elements required for piercing the corporate veil in an ATS context.

[99] 453 F. Supp. 2d 633

o. Bauman v. Daimler Chrysler Corp., 579 F.3d 1088 (9th Cir. 2009)

In 2004, plaintiffs, residents of Argentina, brought suit under the ATS in the U.S. District Court for the Northern District of California against DaimlerChrylser AG (DCAG), a German stock company, for alleged violations of the ATS. Plaintiffs alleged that officials for Mercedes Benz Argentina (MBA), DCAG's Argentinean subsidiary, maintained close ties with military regime in the 1970s and utilized the military forces to rid its plants of individuals it viewed as subversive. The alleged international law violations included kidnapping, detaining, and torturing plaintiffs.

The case turned on the issue of personal jurisdiction in the California courts. Plaintiffs' complaint argued that California had personal jurisdiction over DCAG through its subsidiary in the USA, Mercedes Benz USA (MBUSA). The district court dismissed the claim for lack of personal jurisdiction when it found that DCAG did not have continuous and systematic contacts with California via MBUSA's contacts, and the exercise of jurisdiction would be unreasonable.[100]

On appeal to the U.S. Court of Appeals for the Ninth Circuit, the court addressed the issue whether California had personal jurisdiction over DCAG through MBUSA's contacts with California. On August 28, 2009, the court of appeals upheld the district court's dismissal of the claim.

In order to obtain jurisdiction over DCAG, the plaintiffs argued that the actions of MBUSA should be attributed to DCAG through agency theory, conferring general jurisdiction over DCAG as a result. To obtain personal jurisdiction through agency theory, plaintiffs first had to prove that the parent company exerted control that was so pervasive and continual that the subsidiary may be considered an agent or instrumentality of the parent, notwithstanding the maintenance of corporate formalities. Plaintiffs would then have to show that the agent-subsidiary was sufficiently important to the parent corporation that if it did not have a representative, the parent corporation would undertake to perform substantially similar services.

In determining whether DCAG exerted continual and pervasive control over MBUSA, the court looked to terms of their agreement. The court held that DCAG did not exert pervasive and continual control because the agreement was terminable, MBUSA's goals were negotiable by both parties, title to the cars passed in Germany, DCAG had no control over the ultimate destination of the cars in the U.S., and MBUSA had the power to independently decide against buying DCAG G-class vehicles in California.

The court also held that plaintiffs failed to make a *prima facie* showing that DCAG would perform substantially similar services in the absence of MBUSA. Although the court found that DCAG did not appear to own MBUSA only as an investment, evidence showed that DCAG had previously used independent distributors to market and distribute cars in California.

Since the court of appeals found that DCAG did not have continuous and systematic contacts with California, it did not need to address the issue of reasonableness in order to uphold dismissal of the case.

[100] Bauman v. DaimlerChrysler AG, No. C-04-00194 RMW, 2007 WL 486389 (N.D. Cal. 2007)

p. Abtan v. Blackwater, 611 F. Supp.2d 1 (D.D.C. 2009)

Plaintiffs, Iraqi citizens and their estates, sued Blackwater Lodge and Training Center (Blackwater) in the Federal District Court for the District of Columbia in 2007. Blackwater is a U.S. company that provided armed forces to protect U.S. Department of State personnel in Iraq. Plaintiffs alleged that in two different incidences, Blackwater forces fired on Iraqi civilians. In the first incidence, Blackwater forces allegedly fired, without justification, on a crowd gathered around Al Watahba Square, resulting in multiple deaths and injuries. In the second incidence, Blackwater forces allegedly fired on a group of civilians, none of whom were armed or taking offensive actions against the Blackwater forces. Plaintiffs asserted a claim for war crimes under the TVPA in addition to claims for assault and battery, wrongful death, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent hiring, training, and supervision. The remedies sought included compensatory and punitive damages. In response, defendants moved for dismissal for lack of venue.

To prove proper venue in a court, the plaintiff must show that "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated," in that judicial district.[101] In making its determination, the court should view the entire sequence of events underlying the claim[102], but focus on the place where the allegedly tortious actions occurred and the place where the harms were felt.[103]

In their response to defendant's motion to dismiss, plaintiffs asserted four ways in which the District of Columbia had a substantial connection to their claim. First, plaintiffs asserted that Blackwater was providing services to the Department of State, located in the District of Columbia. Second, they asserted that Blackwater solicited work from the U.S. by falsely holding themselves out to be a legitimate company. Third, many Blackwater shootings were being investigated by the Congressional Committee on Oversight and Government Reform. Fourth, the Department of Justice and the Federal Bureau of Investigation were investigating Blackwater in the District of Columbia.

The court rejected all four of plaintiffs' asserted bases for venue. Were the court to allow the contractual relationship between Blackwater and the Department of State to act as a basis for venue due to the alleged tortious actions not happening but for the signing of the contract, it would allow any tort claim against a contractor to be brought in the district in which the initial contract was entered into, even if that district had no relationship with the alleged tort. The court refused to read the venue statute this broadly.

Similarly, the court refused to read the venue statute so broadly as to allow a criminal investigation in the district to act as the basis for venue for a civil claim arising out of the same actions. To do so would be to conflate the civil venue and criminal venue statutes. In addition, the court refused to treat a Congressional investigation to act as a basis for venue because this would allow any private dispute with public implications being investigated by Congress to be litigated in the District of Columbia.

Finally, the court would not grant venue based on Blackwater receiving money from the U.S. government due to misrepresentations by Blackwater. In its analysis of this argument, the court stated that had plaintiffs alleged acts of obfuscation in the district which enabled Blackwater to engage in the tortious conduct, venue might be proper. However, plaintiffs only

[101] 28 U.S.C. § 1391(b)(2) (2007).
[102] FC Inv. Group LC v. Lichtenstein, 441 F. Supp. 2d 137, 11 (D.D.C. 2006)
[103] 14D Charles Allan Wright et al., Federal Practice & Procedure §3806.1 (6th ed. 2008)

alleged that because the U.S. was injured by misrepresentations by Blackwater, venue would be appropriate for third parties harmed in a different matter by the same defendants. Plaintiffs needed to allege that acts of misrepresentation in the District of Columbia enabled the tortious conduct abroad.

Although plaintiffs did not assert a proper basis for venue, the court did not dismiss their claims. As part of their pleadings, plaintiffs asserted that Blackwater engaged in a series of communications with the Department of State in the District of Columbia. If these communications included misrepresentations which enabled the training, regulation, and discipline of Blackwater's employees, the communications might create a substantial connection with the District of Columbia. Instead of dismissing plaintiffs' claims, the court held in abeyance Blackwater's motion to dismiss to give the plaintiffs an opportunity to present evidence that the communications included misrepresentations which enabled the tortious conduct. The court set a time limit of 30 days in which plaintiffs must file a supplemental opposition with evidence or a motion for venue discovery, or the court would dismiss the claims.

q. Mohamed v. Jeppesen Dataplan, Inc., 579 F.3d 943 (9th Cir. 2009)

Plaintiffs in this case were individuals allegedly processed through the "extraordinary rendition program," operated by the United States Central Intelligence Agency (CIA) in coordination with other agencies in the U.S. government and foreign government officials. Plaintiffs filed suit against defendant Jeppesen Dataplan, subsidiary of Boeing Company, in August 2007 in the U.S. District Court for the Northern District of California.[104] Plaintiffs' claim was grounded in the ATS and alleged that defendant directly provided services including flight planning and logistical support, which enabled U.S. government officials to perpetrate human rights violations including CIDT.

The extraordinary rendition program aimed to apprehend, transfer to, and detain in third countries individuals suspected of terrorist involvement in order to interrogate them for intelligence purposes. Under the guise of the program, plaintiffs were allegedly captured and secretly transferred to U.S. interrogation facilities where they were subjected to treatment such as electric shocks, threats of sexual torture, deprivation of sleep and food, severe physical beatings, and sensory manipulation (i.e., subjection to constant darkness or light and/or loud noise).

Although the first complaint in this case was filed in 2007, the U.S. government intervened before Jeppesen could answer the complaint. The government sought to end the litigation by filing a motion to dismiss, using the rationale of "state secrets privilege" due to the sensitive nature of the extraordinary rendition program.

Plaintiffs' claim against defendants rested on two theories. First, they claimed that Jeppesen was directly liable under the ATS because they violated customary international law by actively participating in torture and CIDT, as well as conspiring to commit CIDT. In the alternative, plaintiffs premised Jeppesen's liability on the theory that it aided and abetted the commission of these human rights abuses by U.S. and foreign governments because it knew or should have known that the services it provided were making possible the commission of human rights violations.

The district court allowed the government to intervene and granted its motion to dismiss. Plaintiffs appealed the dismissal to United States Court of Appeals for the Ninth Circuit.[105] On

[104] Mohamed v. Jeppesen Dataplan, Inc., 539 F. Supp.2d 1128 (N.D.Cal. 2008).
[105] Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009).

appeal, the court addressed the government's state secrets privilege argument by analyzing the limited judicial gloss on this doctrine. It discussed two major precedents in the area—*Totten* and *Reynolds*—and applied *Reynolds*, which adopted a more permissive view of litigation invoking state secrets privilege.[106] The court viewed the *Reynolds* balancing approach as best adapted to protecting all interests involved, including the government interest in keeping state secrets secret, by protecting separation of powers and the co-equality of the branches against the tendency towards executive supremacy in matters of national security.

Defendants alleged that plaintiffs would not be able to make their case without resorting to evidence inadmissible because it qualified as secret information under the state secrets doctrine. The court discussed this argument and held that "classified" information is not necessarily "secret" for the purposes of the doctrine—equating these categories of information, the court argued, would disrupt separation of powers at the expense of the judiciary because executive control over the classification of information would allow that branch to effectively insulate any information it wanted from the judicial process. Thus, while classification may suggest secrecy, courts were entitled to evaluate the evidence independently to make a decision if it fell within the scope of the state secrets doctrine.

Although the government urged the court to find against plaintiffs on the view that the latter could not possibly make their case—and Jeppesen could not defend itself—without the use of privileged evidence, the court found this argument to go against rules of civil procedure by requiring the court to "prospectively evaluate hypothetical claims of privilege that the government has not yet raised and the district court has not yet considered."[107] In April 2009, the appellate court thus reversed the district court, denied the defense's motion to dismiss for failure to state a claim upon which relief can be granted[108], and remanded the case to the district court to determine what evidence was privileged and whether or not the parties would be able to make their cases without resort to such privileged evidence.

In August 2009, the court amended its April decision, clarifying the court's role in determining the secret nature of classified information and the stage at which evidentiary privilege must be invoked (e.g., in the complaint, during discovery, at trial). Rather than evaluate the allegedly privileged evidence itself to determine if it is secret, the court may evaluate merely the claims of privilege to determine if that evidence will be secret within the meaning of the state secrets doctrine. The court concluded that it would not grant a motion to dismiss for failure to state a claim on the grounds that evidentiary privilege will make it difficult to substantiate the complaint later. The rest of the court's decision was unchanged.

r. In re South African Apartheid Litigation, 617 F.Supp.2d 228 (S.D.N.Y. 2009)

In 2002, numerous South African citizens—direct victims or family members of victims of crimes under apartheid including extrajudicial killing, torture, unlawful detention, and CIDT—brought ten separate actions against approximately fifty companies doing business in South Africa during the apartheid era.[109] There were three groups of plaintiffs—the *Ntsebeza* plaintiffs, the *Khulumani* plaintiffs, and the *Digwamaje* plaintiffs—each of which articulated a slightly different set of claims against defendants. The group of defendants included Barclays

[106] Totten v. United States, 92 U.S. 105 (1875); United States v. Reynolds, 345 U.S. 1 (1953).
[107] Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992, 1008 (9th Cir. 2009).
[108] FED. R. CIV. P. 12(b)(6).
[109] In re South African Apartheid Litigation, 346 F.Supp.2d 538 (S.D.N.Y. 2004).

National Bank, Daimler Chrysler Corporation, Citigroup, Bank of America, Shell, Exxon, Merrill Lynch, Coca-Cola Co., Nestle USA, Inc., and 3M Co. The suit also included hundreds of "corporate Does." Plaintiffs accused defendants of providing practical, material, logistical, and financial support and assistance to the South African security forces during the apartheid regime. In December 2002, the actions of the three groups were consolidated into one lawsuit to be tried in the Southern District of New York.

Of the 78 defendants in the case, 49 filed motions to dismiss based on failure to meet the pleading standards of the Federal Rules of Civil Procedure.[110] The government of South Africa submitted an *ex parte* declaration to the court asking it not to interfere in these matters of predominantly South African sovereignty. After consulting with the United States Department of State, which told the court that proceeding with the case might be detrimental to significant national interests, the court granted defendants' motion to dismiss. The court held that plaintiffs failed to establish subject matter jurisdiction because aiding and abetting liability was not available under the ATS. Plaintiffs moved for permission to file an amended consolidated complaint and the court denied this motion.

Plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Second Circuit.[111] The appellate court affirmed the lower court's decisions on two issues—its dismissal of one group of plaintiffs' claim for relief under the TVPA and its determination that diversity does not provide grounds for subject matter jurisdiction—and vacated the lower court's dismissal of plaintiffs' ATS claims, stating that liability for aiding and abetting was available under that legislation. The appellate court also vacated the lower court's denial of plaintiffs' motions to amend. The case was remanded in 2007.[112]

The district court issued a decision in 2009 regarding the *Ntsebeza* plaintiffs and the *Khulumani* plaintiffs, the only ones remaining from the original group of cases.[113]

On remand, the district court recognized the ATS's grant of jurisdiction to hear claims for torts that occurred extraterritorially. Defendants tried to construe narrowly tort liability under the ATS for non-state actors, but the court showed how case law has established broad—but not unlimited—liability in these cases.

Plaintiffs attempted to use two international legal instruments—the International Convention on the Suppression and Punishment of the Crime of Apartheid (the Apartheid convention) and the Rome Statute of the International Criminal Court—to support their argument about racial discrimination as part of customary international law. The court rejected this argument by discrediting the convention based on the fact that the Apartheid convention largely lacked Western European and North American signatories and the convention's signatories were by and large violators of human rights. In the court's view, the Rome Statute could be read to prohibit private apartheid but ultimately held that having to derive a highly specific definition from a single international instrument suggested that the prohibition of private apartheid was not so universally reviled as to be enforceable as customary law. The court thus declined to find tort liability for apartheid by a non-state actor.

The court recognized as a tort arbitrary denationalization by a state actor, despite the fact that no federal case had addressed whether this forms part of customary international law. It then discussed CIDT, which was forbidden in the nearly universally accepted United Nations

[110] FED. R. CIV. P. 8(a).
[111] Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2nd Cir. 2007).
[112] In re South African Apartheid Litigation, 617 F.Supp.2d 228 (S.D.N.Y. 2009).
[113] *Id.*

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Despite the status of CAT in international law, the court found that not all CIDT was a violation of the law of nations. In addition, the court rebuffed defendant's argument that torts in violation of the law of nations did not apply to corporations.

Although the court of appeals held that aiding and abetting was an actionable claim under the ATCA, the district court held that the higher court left it without a standard to apply in such cases or even a source of law from which to derive a standard. The court looked at three sources—judgments of the International Military Tribunal at Nuremberg, decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute of the ICC.

One of the main differences the court emphasized was the "quality of assistance provided to the primary violator"—in other words, the provision of fungible resources, such as money, materials, or certain equipment, was not as egregious as the provision of materials whose unquestionable purpose was to inflict pain or cause death.[114] Only the provision of the latter type of materials was likely to give rise to tort liability for aiding and abetting.

Because the ATS provided a mechanism for the civil treatment of violations of customary international law usually considered crimes, and aiding and abetting fell into this category, the court analyzed the *actus reus* and *mens rea* of defendants' alleged violations. The *mens rea* requirement was of particular concern to the parties. Although the court viewed mere knowledge as the standard predominating in international jurisprudence, it erred on the side of caution and required that actions be taken intentionally in order to give rise to liability. In the end, however, it was a distinction without a difference as the Court concluded under the *mens rea* understandings in the Rome Statute that "there is no difference between…[o]ne who substantially assists a violator of the law [and] desires the crime to occur [and one who] knows it will occur and simply does not care."[115]

Finally, because the corporate defendants argued that the violations alleged were attributable to their subsidiaries, indirect subsidiaries, or affiliates, the court had to determine the amount of liability attributable to the parent company. The court discussed how the principles of tort law were underdeveloped in customary international law, especially as compared with principles of criminal liability, and applied federal common law principles of agency in order to supplement the body of customary international law. The analysis for determining whether it was possible to pierce the corporate veil under an alter ego theory was emphatically based on facts and circumstances, for example:

> (1) disregard of corporate formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the entities are at arm's length; (8) whether the corporations are treated as independent profit centers; (9) payment or guarantee of the corporation's debts by the dominating entity, and (10) the intermingling of property between the entities.[116]

[114] *Id.* at 258.
[115] *Id.* at 262.
[116] *Id*. at 271.

The court similarly rejected mechanical formulas for corporate agency and vicarious liability determinations. It admitted that circumstantial evidence may be enough to give rise to liability, and that even mere acquiescence or failure to protest after learning of unauthorized activities may suffice for liability purposes. In the end, however, the court found that both plaintiff groups had failed to plead appropriately to pierce the corporate veil because their pleadings were comprised primarily of conclusory assertions.

In the area of agency theory, by contrast, the court held that the *Ntsebeza* plaintiffs made substantial allegations under agency theory against GM, Ford, Daimler, and IBM. In general, the *Ntsebeza* plaintiffs were able to show ongoing relations between the parent company and the South African subsidiary, including sending American management and personnel to the South African locations and supplying products and parts to the subsidiary, which then merely distributed them domestically. The *Khulumani* plaintiffs failed to allege a parent company-subsidiary relationship with a sufficient level of specificity. The court gave the *Khulumani* plaintiffs leave to file an amended complaint with a greater level of specificity, in light of the *Ntsebeza* plaintiffs' success in pleading on agency theory.

Defendants filed another motion to dismiss, which the court granted in part and denied in part. The court dismissed claims against companies for merely doing business with the apartheid government of South Africa; the possibility for imposing broad liability for harms under apartheid as a result of aiding and abetting particular acts was also rejected. The court dismissed some cases with leave to amend—for example, in some instances of aiding and abetting apartheid and extrajudicial killing—and denied the motion to dismiss in several instances related to aiding and abetting apartheid, extrajudicial killing, torture, and arbitrary denationalization. Plaintiffs appealed this decision, but the appeal was denied.[117]

s. Sinaltrainal v. Coca-Cola Co., 578 F.3d 125 (11th Cir. 2009)

Plaintiffs, trade union leaders, brought suit under the ATS and the TVPA in the U.S. District Court for the Southern District of Florida in four consolidated cases against their employers, two bottling companies, and the Coca-Cola Company and its Colombian subsidiary. In three of the cases, plaintiffs alleged that defendants conspired with local paramilitary forces to murder and torture members of the union with the goal of eliminating the union from the bottling factories. In the fourth case, plaintiffs alleged that defendants conspired with local police forces to unlawfully arrest, detain, and imprison plaintiffs with the same goal.

In order to connect the Coca-Cola Company with the actions of the Colombian bottling companies, plaintiffs used a series of agency and alter-ego relationship arguments. Specifically, plaintiffs argued that the bottling companies were responsible for the acts of their employees—the bottling companies were alter egos of their owner and manager, who was, in turn, an alter ego of Coca-Cola Colombia, because Coca-Cola Colombia was responsible for manufacturing and distributing Coca-Cola products to the bottlers. Further, Coca-Cola Colombia was an alter ego of Coca-Cola USA, because Coca-Cola Colombia was under the management, control, and direction of Coca-Cola USA to the extent that its separateness was illusory.

In Sinaltrainal I, the district court held that it did not have subject matter jurisdiction over the ATS and TVPA claims against the Coca-Cola defendants.[118] The court held that a bottler's agreement did not give Coca-Cola the requisite control over the actions of the Colombian

[117] In re South African Apartheid Litigation, 624 F. Supp.2d 336 (S.D.N.Y. 2009).
[118] Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345 (S.D.Fla. 2003)

bottlers to be liable for their actions. In Sinaltrainal II, the district court dismissed the claims against the local bottlers for lack of subject matter jurisdiction, holding that all four complaints insufficiently pleaded a conspiracy between the local bottlers' management and the paramilitary officers.[119] Plaintiffs appealed the decision of the district court.

Although it recognized that corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations, the court of appeals affirmed the district court's dismissal. To state a claim under the ATS, plaintiffs had to sufficiently plead that the paramilitaries were state actors or were sufficiently connected to the Colombian government to be acting under the color of law. Additionally, plaintiffs had to show that the defendants conspired with the state actors in carrying out the tortious acts. The appeals court held that plaintiffs' allegation that the Colombian government tolerated the paramilitary's actions was insufficient to transform the paramilitary's actions into state acts. In addition, plaintiffs failed to plead factual content sufficient to allow the court to draw the reasonable inference that defendants conspired with the paramilitary and local police to violate plaintiffs' rights.

The court of appeals also held that the district court erred in dismissing plaintiffs' TVPA claims for lack of subject matter jurisdiction; however, it went on to dismiss the TVPA claim for failure to state a claim. The requirements for surviving a motion to dismiss for a failure to state a claim were the same under the TVPA as under the ATS. As stated above, plaintiffs' failed to meet this burden.

t. Wiwa v. Shell, No. 08-1803-cv, 2009 WL 1560197 (2d Cir. June 3, 2009)

Plaintiffs, Nigerian citizens, brought four suits[120] against various Shell corporate entities for alleged human rights abuses committed by the Nigerian military on behalf of Shell's Nigerian subsidiary, Shell Petroleum Development Company of Nigeria Limited (SPDCN). The four suits were *Wiwa v. Royal Dutch Petroleum Co.* (*Wiwa I*), *Wiwa v. Anderson* (*Wiwa II*)[121], *Wiwa v. Royal Dutch Petroleum Co.* (*Wiwa III*), *and Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel*)[122]. *Wiwa v. Shell* was an appeal from a dismissal for lack of personal jurisdiction in *Wiwa III* and *Kiobel*.

Plaintiffs in the three actions were members of the Movement for the Survival of the Ogoni People (MSOP), an organization formed to contest the appropriation of Ogoni land without adequate compensation, as well as the environmental and economic damage that resulted from Shell's oil operations in the region. In response to the MSOP opposition, SPDCN allegedly recruited and provided logistical support, training, and weapons to Nigerian police and military. While supporting Shell, the police and military allegedly beat, raped, shot, or killed plaintiffs.

In their complaint for *Wiwa III*, plaintiffs alleged violations of international law under the ATS, including summary execution, crimes against humanity, torture, CIDT, arbitrary arrest and detention, wrongful death, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and violation of the rights to life, liberty, security of person, peaceful assembly, and association. In response, defendant Shell filed a motion to dismiss for lack of personal jurisdiction, and the district court granted the motion due

[119] In re Sinaltrainal Litig., 474 F. Supp. 2d 1273 (S.D.Fla. 2006)
[120] The four suits were brought in 1996, 2001, 2002, and 2004.
[121] Wiwa v. Royal Dutch Petroleum Co., No. 96 CIV. 8386(KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (*Wiwa I and Wiwa II* were consolidated for all pre-trial purposes.)
[122] Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457 (S.D.N.Y. 2006)

to plaintiffs' failure to allege the requisite minimum contacts by SPDCN with the United States.[123] The court also denied additional jurisdictional discovery due to appellants' access to discovery previously conducted in *Wiwa I* and *II*.

Plaintiffs appealed the decision, arguing that jurisdiction was proper and that additional jurisdictional discovery was improperly denied. In a short opinion, the court of appeals held that the district court abused its discretion in denying additional jurisdictional discovery for plaintiffs in *Wiwa III*. The court noted that, although discovery in the three actions was consolidated, the cut-off for the discovery period was shortly after *Wiwa II* was filed and prior to SPDCN filing its motion for dismissal for lack of personal jurisdiction. Discovery in the cases was focused on SPDCN's actions in Nigeria, not on matters relating to their contacts with the United States. Further, because most discovery in the related actions took place before SPDCN's filing of the motion to dismiss, the district court denied requests relating to jurisdiction due to lack of relevance. Finding that discovery did not encompass discovery relevant to personal jurisdiction, the court of appeals vacated the district court's dismissal. The court remanded the action to the trial court for the determination of three issues. First, it ordered the trial court to determine the relevance of new documents presented by plaintiffs. Second, it ordered the trial court to determine whether continuing discovery was sufficient for plaintiffs to assert jurisdiction over SPDCN or to show that jurisdiction would not be proper. Third, it ordered the trial court to determine whether to allow further discovery.

In June 2009, the parties announced a settlement of $15.5 million.

u. Boimah Flomo et al. v. Bridgestone Americas Holding, Inc., 492 F. Supp. 2d 988 (7th Cir. 2009)

In November 2005, a group of adults and children who lived and worked on the Firestone rubber plantation in Liberia filed a class action lawsuit under the ATS, the Thirteenth Amendment of the U.S. Constitution, and a U.S. criminal statute in the United States District Court for the Central District of California. Plaintiffs asserted twelve counts against the defendants for all of the alleged wrongs. The named defendants in this lawsuit were Bridgestone Corporation; Bridgestone Americas Holding, Inc.; Bridgestone Firestone North American Tire, LLC; BFS Diversified Products, LLC; Firestone Polymers, LLC; Firestone Natural Rubber Company, LLC; and the Firestone Plantation Company.

Firestone, owned by Bridgestone Corporation, was accused of encouraging and even requiring the adult workers to put their children—some as young as six years old—to work in order to meet the company's high production quotas. The work the children were forced to do involved harvesting latex from trees, which can be physically demanding and dangerous. According to plaintiffs, the daily wage of a Firestone plantation worker was USD$3.19; however, this wage was only paid if worker could tap 1,125 trees in a day. If a worker could only tap 750 trees in a day, the daily wage was halved.

The defendants filed a motion to dismiss and, in the alternative, a motion to transfer venue to the U.S. District Court for the Southern District of Indiana. The motion to transfer venue was based on the case's lack of connection to California. Defendants argued that the case should be dismissed because the workers failed to plead sufficient facts to support their claims of

[123] Kiobel v. Royal Dutch Petroleum Co., Nos. 02 Civ. 7618, 04 Civ. 2665, 2008 WL 591869, at *1 (S.D.N.Y. March 4, 2008).

forced labor. In April 2006, the district court granted the motion to transfer venue without addressing the motion to dismiss.

In June 2006, the U.S. District Court for the Southern District of Indiana ruled on defendants' motion to dismiss. The Court dismissed all but one count of the complaint. The remaining count (Count II) alleged that Firestone Plantations Co. assigned the adult plaintiffs so much work at Firestone's Liberia rubber plantation that they had to conscript their children in order to complete the work.

In light of International Labor Organization Convention 182, the court held that the allegations of child labor in Count II, if true, would sufficiently set forth a claim under the ATS, because that conduct would violate the law of nations. In the court's words, "it would not require great 'judicial creativity' to find that even paid labor of very young children in these heavy and hazardous jobs would violate international norms."[124] Furthermore, these international norms were not inconsistent with Liberian law since both the United States and Liberia had ratified the Convention.

In the same ruling, the court granted defendants' motion to dismiss the claims of adult forced labor, finding that an ATS claim was inadequate since plaintiffs did not sufficiently plead violations of specific universal and obligatory norms of international law.

Plaintiffs later filed a motion for class certification.[125] The court denied the motion on March 4, 2009 because their claims did not meet the requirements that the proposed class be sufficiently cohesive and homogeneous. Because not all labor performed by all of these individuals, regardless of age, would be actionable, the court reasoned that individual inquiries would be required to determine which children performed which tasks at what ages. Finally, the court found that common issues did not predominate because if plaintiffs could show that defendants' managers were, in fact, aware of some unlawful child labor on the plantation, there would still be questions about individual circumstances.[126]

The case is currently pending in the court in Indiana. Plaintiffs must file a complete response to the pending motion for summary judgment by October 9, 2009.

2. Latin American Cases

a. Juzgado Civil No. 33. 1a Inst. Civil Court Number 33. 10/31/2002, "Pedro Norberto Troiani y Otros v. Ford Motor Company Argentina," (Arg.)

On October 31, 2002, plaintiffs—Pedro Norberto Troiani, ex-representative of the internal union at Ford's Argentina subsidiary[127], and other former employees of the same company—started a legal proceeding in Civil Court Number 33 in Argentina.[128] Plaintiffs set out to prove that members of Ford Argentina management established a relationship with the

[124] 492 F. Supp. 2d at 1022.

[125] To obtain class certification, plaintiffs must show "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

[126] 257 F.R.D. 159 (7th Circ.)

[127] Ford's Argentina subsidiary is formally called Ford Motor Company Argentina, Inc. (hereinafter Ford Argentina).

[128] *Ford demandada por su colaboración durante la dictadura*, PÁGINA 12, Feb. 23, 2006, *available at* http://www.pagina12.com.ar/diario/ultimas/20-63526-2006-02-23.html.

Argentine government and armed forces during the period 1976-1983. Part of the relationship consisted of a military command comprised of various security forces operating within the Ford Argentina location in Buenos Aires province—plaintiffs alleged that a detention camp inside the Ford plant in General Pacheco, Buenos Aires province commenced operations on March 24, 1976, the same day that the military government took power. They also alleged that Ford Argentina participated in the detention camp operation with the primary objective of eliminating all union activity at the plant.[129] As a result, both union leaders and some union members were kidnapped and deprived of their freedom by defendants or with defendants' support. Plaintiffs alleged human rights violations of arbitrary detention, as well as CIDT.

At the end of 2006, plaintiffs initiated a criminal complaint in Federal Court Number Three (*Juzgado Federal No. 3)* against Ford Argentina alleging illegal deprivation of liberty. They also requested the appearance of various members of Ford Argentina management at the time of the violations.[130] These individuals included the President and Legal Representative of Ford Argentina, Manager of Manufacturing, Manager of Industrial Relations, Chief of Security, and Assistant Manager of the School of Engineers, who were allegedly responsible for coordinating the kidnappings of several Ford Argentina employees.[131]

Plaintiffs' requests for these individuals to appear aimed to demonstrate Ford Argentina's participation in the violations suffered by the ex-employees of the company's Buenos Aires province plant. The judges in charge of the cases have not made a decision regarding plaintiffs' requests. As a result, the cases are still pending.

b. Leandro Manuel Ibáñez & María Elena Perdighe v. Banks132

On March 19, 2009, plaintiffs Leandro Manuel Ibáñez and María Elena Perdighe, children of individuals who were detained and who disappeared in the city of La Plata in 1976 and 1977, commenced a civil proceeding in federal court in Buenos Aires against foreign banks that granted massive loans to the military government during the period 1976-1983.[133] Some of the foreign banks involved in the lawsuit were: Bank of America, Republic Bank of Dallas, Citibank, Bank of Boston, Chase Manufactures, Lloyds Bank, Wells Fargo, and Citicorp.[134] Despite the fact that the case was brought in March, to date, no court has been found to have competence to hear the case.[135] Plaintiffs premised their claims for bank liability on the argument that the human right abuses perpetrated by the military government during its rule

[129] *Ford sued over Argentine abuses*, BBC NEWS, Feb. 24, 2006, *available at* http://news.bbc.co.uk/2/hi/americas/4746236.stm.
[130] The exact name of the document filed is a *declaración indagatoria*, which is a discovery procedure used by the judge to obtain plaintiffs' version of the facts of the case.
[131] *Presentación de los demandantes en el caso civil por daños contra Ford (sobre imprescriptibilidad de las acciones legales)*, BUSINESS & HUMAN RIGHTS RESOURCE CENTER, *available at* http://www.business-humanrights.org/Documents/FordinArgentina.
[132] This case summary is not based on a judicial opinion. Based on limited availability of court documents, this case summary is based on press coverage of the case, which is ongoing.
[133] INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, CORPORATE ACCOUNTABILITY AND THE ARGENTINE DICTATORSHIP: THE CASE FOR BANK COMPLICITY, *available at* http://www.ictj.org/en/news/event/2510.html.
[134] Alejandro Armengol, *Demandarán a bancos internacionales que cooperaron con la dictadura argentina*, CUADERNO DE CUBA, Mar. 16, 2009, *available at* http://www.cuadernodecuba.com/2009/03/demandaran-bancos-internacionales-que.html.
[135] Rodolfo Mattarollo, *Los Bancos del Desarrollo*, PÁGINA 12, Nov. 22, 2009, *available at* http://www.pagina12.com.ar/diario/elpais/1-135803-2009-11-24.html.

would not have occurred but for the finances made available by defendant banks. Because the country was going through an economic crisis during the period of military rule, the military government would not have been able to finance its reign of terror without the funds provided by foreign banks.

As the Argentinean government has recognized, massive and systematic human right abuses were committed during the military dictatorship, including enforced disappearances, torture, extrajudicial killings, and arbitrary detention.[136] The parents of plaintiffs were victims of those abuses.

Plaintiffs' case intended to prove that the bank loans contributed positively to maintaining the dictatorship in power by providing it with financial support during a time in which the country was suffering extreme financial instability. In 1976, for example, the country's external public debt was US$6.648 million but reached US$31.709 million by 1983. In 1982, two-thirds of Argentina's external public debt corresponded to bank loans, but despite this tremendous increase in indebtedness—or because of it, as argued by plaintiffs—the military budget more than doubled between 1975 and 1983.[137] Thus, plaintiffs alleged that the financing provided by defendants increased the efficiency of the Argentine State Department, through which the crimes were being committed.

In order to prevent defendants from arguing that they were unaware of the general situation of the country and, thus, the human rights violations that were constantly occurring, plaintiffs' lawsuit established that articles published in the international press during the military dictatorship, as well as reports published by the U.S. government and human rights organizations during that period, left no doubt about the grave human rights situation under the military dictatorship. As a result of widespread knowledge about the situation, defendants were in no position to allege ignorance about the crimes against humanity they were helping to finance.[138]

The case is currently pending in federal court in Buenos Aires.

3. Canadian Cases

a. Bil'In (Village Council) v. Ahmed Issa Yassin, [2009] QCCS 4151 (Can.)

In July 2008, plaintiffs, residents of a village in the West Bank near the Israeli border, brought suit in the Quebec Superior Court.[139] They brought suit against Canadian corporations Green Park International, Inc. and Green Mount International Inc. and their representatives, who were involved in constructing residential and other buildings for the state of Israel. Plaintiffs alleged that the state of Israel took their land and that defendants and the state of Israel were currently constructing residences and other buildings on this land. Plaintiffs also alleged that such projects were being undertaken with the purpose of displacing the Palestinian community by populating the West Bank with Israeli civilians. In so doing, plaintiffs argued, defendants

[136] *See, e.g.*, *Archivo: Violación a los Derechos Humanos en la Argentina (1975-1984)*, PORTAL OFICIAL DEL GOBIERNO DE LA REPÚBLICA ARGENTINA, *available at* http://www.argentina.gov.ar/argentina/portal/paginas.dhtml?pagina=270.

[137] *5. Argentina: endeudamiento y dictadura military*, ATTAC ARGENTINA, Feb. 12, 2009, *available at* http://www.argentina.attac.org/beta/index.php?id=96.

[138] Juan Pablo Bohoslavsky, *Responsabilidad legal de los bancos que financiaron la dictadura military argentina*, EL GRITO ARGENTINO: UNA CAUSA JUSTA, Mar. 25, 2009, *available at* http://www.elgritoargentino.com.ar (in the Buscador, do a search for "Bohoslavsky;" the article is the only record turned up).

[139] Bil'In (Village Council) c. Ahmed Issa Yassin, [2009] QCCS 4151 (Can.)

were engaged in aiding, abetting, assisting, and conspiring with the Israeli government to engage in war crimes in violation of international law. Plaintiffs' lawsuit sought: (1) a declaration on the illegality of defendants' conduct; (2) an injunction against defendants' activities, forcing them to cease activity, return lands to prior condition, and provide an accounting of what actions occurred; and (3) punitive damages in the amount of CAN$2,025,000 (as well as costs).

Plaintiffs alleged defendants violated the Fourth Geneva Convention by moving civilian Israeli nationals into the occupied territory of the West Bank; this violation was also built into Schedule V of the Canadian Geneva Conventions Act, which plaintiffs also accused defendants of violating. Transferring one's own country's population into an occupied territory is a war crime under Article 8 of the Rome Statute on the International Criminal Court, which was codified in the Canadian Crimes Against Humanity and War Crimes Act. Plaintiffs thus alleged violations of those statutes, as well as of Article 25 of the Rome Statute and Article 1457 of the Civil Code of Quebec, which addressed expanded liability doctrines including aiding and abetting. Finally, plaintiffs alleged that defendants' actions violated Articles 4, 6, and 8 of the Quebec Charter of Human Rights and Freedoms, concerning human dignity, right to property, and takings of property.

At the superior court level[140], defendants moved to dismiss plaintiffs' action and to decline the court's jurisdiction. Because foreign states are immune to jurisdiction in Canada, defendants attempted to claim jurisdictional immunity by depicting themselves as agents of the Israeli state. The court rejected defendants' argument that it was an agent of the Israeli state on the grounds that this argument was inconsistent with defendants' other legal arguments.

Plaintiffs argued that the court should apply the law of Canada and of Quebec rather than Israeli law, premising this on the view that Israeli courts were likely to refuse to find a violation of international law on the part of defendants.

On September 18, 2009, the superior court released its decision regarding plaintiffs' allegations. It declined to rule on whether or not defendants' actions amounted to illegal acts, focusing instead on jurisdictional issues. Despite plaintiffs' suggestions to the contrary, the court viewed the Israeli High Court of Justice (HCJ) as competent to hear and decide the case impartially. It also viewed plaintiffs' choice of court as a product of forum shopping and argued that the overwhelming majority of evidence and witnesses would be more accessible if the case were heard by the HCJ. The court thus dismissed plaintiffs' case on *forum non conveniens* grounds.

b. Marcia Luzmila Ramírez Piedra, et al v. Copper Mesa Mining Corp., et al (Court File W09-373 5U)[141]

Plaintiffs were local activists and residents of the village of Chaguayaco Alto, Ecuador, which is adjacent to an area in which defendant Copper Mesa Mining Corporation (formerly called Ascendant Copper Corporation; hereinafter Copper Mesa) attempted to carry out mineral exploration activities. Copper Mesa's mineral exploration activities in this area—Junín, Imbabura Province, Ecuador—had potential to lead to the excavation of a large open-pit copper mine, which plaintiffs opposed. In March 2009, plaintiffs brought suit in the Ontario Superior Court of Justice alleging that defendants caused or materially contributed to assaults committed

[140] The Superior Court of Quebec is the highest trial court in the province of Quebec.

[141] Statement of Claim, Marcia Luzmila Ramírez Piedra, et al v. Copper Mesa Mining Corp., et al (Ontario Superior Court of Justice, Court File W09-373 5U), *available at* http://www.ramirezversuscoppermesa.com/lawsuit.html.

against or death threats made to plaintiffs due to their opposition to Copper Mesa's mineral exploration activities. In addition to bringing suit against Copper Mesa and its executive directors, plaintiffs brought suit against defendants TSX Inc. and TSX Group Inc. (hereinafter TSX), alleging that by listing Copper Mesa on the Toronto Stock Exchange, TSX defendants made substantial amounts of capital accessible to Copper Mesa, which in turn caused or materially contributed to actions against plaintiffs.

In 2004, Ascendant began operations in Junín, a copper reserve that they argued was the second largest, if not the largest, unexploited copper/molybdenum deposit in the world, worth at least CAN$32 billion over the life of the proposed mine. Local resistance to mining activity was strong from the beginning, and Ascendant/Copper Mesa caused the development of a non-profit organization called Corporation for the Development of Garcia Moreno (CODEGAM) with the goals of delegitimizing and minimizing community resistance to the projects in Junín. Plaintiffs alleged that CODEGAM's tactics included physical assault of individuals attending anti-mining public meetings, death threats against leaders of community opposition, and (false) criminal prosecutions of these leaders. Plaintiffs also alleged that Ascendant executive officials made statements showing they were aware that some of the funds CODEGAM obtained from Ascendant might have resulted in the threats and abuses alleged.

Beyond CODEGAM's activities, which occurred primarily in 2004 and 2005, plaintiffs suffered from a violent confrontation with defendant Ascendant/Copper Mesa's security forces in December 2006. During this encounter, the security forces drew pepper spray and guns on a small group of unarmed community members, including plaintiffs, that was walking near Junín. The security forces discharged both kinds of weapons, causing injuries among the group. As part of this security operation, Ascendant/Copper Mesa had obtained access to a helicopter belonging to the armed forces of Ecuador, which was in the area during the assault.

In their complaint, plaintiffs alleged legal duty, knowledge, breach of legal duty, causation, and jurisdiction with regards to each of the defendants. For example, plaintiffs argued that TSX should be held liable because this incident was not the first of its type involving Canadian mining companies, including junior mining companies. Furthermore, the Toronto Stock Exchange was under a legal duty to not list a corporation, or at least take precautionary measures when doing so, when there was a foreseeable and serious risk that funds raised would be used to commit human rights violations. They also argued that Copper Mesa should be held vicariously liable for the acts and omissions of its executive officers, also defendants.

Plaintiffs requested general, aggravated, special, punitive, and exemplary damages. Because plaintiffs' action was brought only in March 2009, there have been no further developments in this case.

III. ANALYTICAL SECTION

1. Case Trends

The purpose of this section is to highlight some of the factors recurring in corporate complicity litigation in the Americas, as well as any patterns that emerged in our survey of this body of law. One of the trends we noted in our research is the split between a large volume of corporate complicity litigation brought in the U.S., on the one hand, and very little in Canada and the Latin American countries, on the other hand, As a result, we will address the United States,

Latin American countries, and Canada separately in order to produce a clear and precise analysis about the trends in different jurisdictions.

a. United States

Most of the companies being sued in U.S. Courts are transnational companies doing business legally outside the United States. The companies have ties within U.S. which sometimes allow plaintiffs to sue in this jurisdiction.

Different legal ways have been used in order to carry a legal proceeding in U.S. jurisdiction. Some of the most common are: the Torture Victims Protection Act, the Alien Torture Statute, and the Anti-terrorism Act, among others. These legal instruments are frequently used because they permit foreign nationals to seek relieve in Federal courts for human rights violations that are considered crimes against humanity, war crimes, and other gross human right abuses even though those violations were committed outside U.S. territory.

The violations that were the subject of litigation occurred outside the United States in different countries were the companies make or made business. The violations in a large number of the cases occurred in a labor context where companies were trying to oppress unions. The human rights abuses committed were primarily torture, extrajudicial killing, enforced disappearances, and forced labor, among others. The common denominator was that all of those violations are consider gross human right abuses.

In the context of the ICJ report the most common type of complicity alleged in the cases was facilitating the human right abuses. In the context of the U.S. cases, plaintiffs primarily referred to aiding and abetting.

We believe that settlements have been a way of preventing precedent to be formed. Corporations tend to attempt to dismiss the cases on jurisdictional basis and, if that method fails, settle the case. Usually the terms of the settlements are not public and it is difficult to speculate about the specific clauses within them.

Many of the cases are relatively new and therefore the resolution of most of them is still pending. A significant amount of those which have been solved were dismissed on jurisdictional basis. A few of them have been settled before reaching the merits.

b. Latin America

During the course of our research, we realized that the number of cases addressing corporate complicity being brought in Latin America is significantly less than in the United States. The cases have common patterns that may be influencing negatively the evolution of the concept of corporate complicity in Latin America.

The companies sued in Latin American countries for corporate complicity have been exclusively large multi-national corporations (MNCs), either the parent company or subsidiary. None of our the cases in Latin America went after purely local companies—that is to say, companies without ties to larger MNCs. Within the realm of MNCs, however, the corporate defendants were not exclusively from one area of business, but rather encompassed various types of MNCs, from beverage producers to financial service providers to natural resource extractors.

Plaintiffs in cases brought in Latin America used both civil and criminal domestic legislation to bring their corporate complicity lawsuits. The civil legal proceedings sought mainly monetary reparations, while criminal proceedings sought the imprisonment of those in

charge of the corporations that committed the alleged abuses or aware of the violations or those who committed the abuses. The cases we analyzed suggested that people bringing lawsuits in Latin America were searching for the truth about the violations and the past events more than an economic benefit.

The majority of cases brought in Latin America stemmed from abuses committed during military governments. Specifically, common claims included extrajudicial killing, forced disappearances, and torture; union workers were common plaintiffs and victims of these abuses. The abuses alleged were typically committed directly by government officials.

Government officials were the alleged principal actors in most of the cases brought in Latin America. The role played by corporations in this context was less one of enabling, and more one of facilitating the abuses.

In addition to being limited in number, the cases we found being litigated in Latin America were still pending after several years. This makes the Latin American courts less appealing than other jurisdictions such as the United States. The cases for which there has been a resolution—and these are few--courts in Latin America avoided reaching the merits of a case by dismissing on procedural issues such as jurisdiction. Courts often seemed to purposefully delay resolving these cases, making the litigation a frustrating process. We cannot talk about a general situation but it is important to mention that corruption seems to be present at least in one of the cases we found, this corruption was in the form of bribery to the judge in charge of solving the case and the accusation was proven.

c. Canada

Much as the shortage of corporate complicity cases brought in Latin America hampered our ability to provide a comprehensive look at the phenomenon across legal systems so too did our research on Canada, which turned up little in terms of results. The dearth of lawsuits brought in Latin America can be explained in part by the relatively weak rule of law, lack of confidence in the independence of courts in the region, and dangers associated with bringing politically sensitive cases in some jurisdictions in the region (e.g., in Colombia due to ongoing drug-related violence). The lack of cases brought in Canada, however, is less easily explained away given three factors.

First, Canada's legal system is much better established than those of most Latin American countries, so most of the concerns about bringing cases in Latin America do not apply when considering Canada as a forum. Second, Canada's economic system is much more developed than that of many Latin American countries and there are many Canadian MNCs operating throughout the world—Canada's extractive industry is particularly well-known. Finally, in many cases brought in the U.S. by plaintiffs from other countries, the strategy to pursue U.S. jurisdiction makes sense because the MNCs are based in or have strong ties to the U.S. It is striking, then, in the Canadian case that there have been numerous cases brought against Canadian companies, but very few of these have been brought inside the country.

In addition to this puzzling over why Canada is an unattractive forum, we have also made the following observations.

Due to the limited litigation in Canada to date, there have been few companies actually sued in Canada for corporate complicity. Corporate defendants in corporate complicity cases have been large companies involved in operations outside of Canada in the areas of natural resource extraction and construction.

Plaintiffs in the Canadian cases used international and domestic civil law to ground their claims of human rights abuses. Both cases sought monetary reparations and did not pursue any criminal avenues of accountability for defendants.

The cases brought in Canada arose out of the overseas operations of defendant corporations. Specific allegations included the funding of non-government forces that engaged in activities to intimidate and otherwise reduce resistance to defendant corporation's activities, as well as the aiding and abetting of government officials in the commission of war crimes.

The role played by corporations in both Canadian cases is more of a support role but it has engaged in both enabling and facilitating human rights violations. In one case, for example, the corporation funded activities to suppress opposition for the company's on benefit; meanwhile, in the other case, the corporation provided equipment that supported a government's determined policy, which policy included alleged violations of human rights.

The few cases in Canada are recent—one resolved earlier in 2009 and the other brought the same year. Thus there is a small number of cases on which to evaluate the outcome of corporate complicity litigation. The one case that has been resolved had an unfavorable resolution based primarily on *forum non conveniens* issues, the discussion of which suggested that this will continue to be an obstacle for corporate complicity litigation in Canada.

2. Analysis of Legal Doctrines

As seen in our case summaries, plaintiffs in corporate complicity litigation frequently used the same bases for claims brought in U.S. courts. The most commonly used legal bases for corporate complicity claims were the TVPA, the ATS, and, to a lesser extent, state tort law; however, other bases used included customary international law, the law of nations, and other state and federal legislation. The most common outcome for the cases, regardless of which basis was used, was a dismissal for a procedural deficiency or under one of the legal doctrines previously discussed.

Most important for TVPA claims was its application to corporations. Thus far, only one court, the 11th Circuit, has found that the term "individual" in the TVPA's language includes corporations. This means that in any circuit other than the 11th, plaintiffs risk having TVPA claims against corporations dismissed. If a plaintiff does choose to bring a TVPA claim against a corporation in a circuit other than the 11th, they should be prepared to argue the applicability of the TVPA to corporations.

Even if a plaintiff files a claim in the 11th circuit in order to bypass the interpretation of "individual" as not applying to corporations, they still have to surpass another jurisdictional hurdle—the requirement of pleading state action. In both *Romero*[142] and *Sinaltrainal*,[143] the 11th Circuit dismissed the case because plaintiffs failed to meet their burden of pleading state action. From these two cases, we can take that in order to meet their burden, plaintiffs must show a symbiotic relationship between the state actor and the corporation, that the participation of just one government actor satisfies this burden, and that mere tolerance of a third party's tortious action by the government does not transform those actions into state acts. Thus, a plaintiff wanting to bring a corporate complicity claim under the TVPA must bring the claim in the 11th Circuit and must plead a symbiotic relationship between the corporation and the state actor, ideally a relationship that involved the direct participation of the government.

[142] 552 F.3d 1303 (11th Cir. 2008).
[143] 578 F.3d 125 (11th Cir. 2009).

For ATS claims, plaintiffs must meet the *Sosa* standard—the claim must be "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms [the court has] recognized." Thus far, courts have found torture, CIDT, genocide, war crimes, crimes against humanity, prolonged arbitrary detention, summary execution, and forced disappearance to be actionable under the ATS. If a plaintiff wishes to bring a claim under the ATS for crimes other than those previously recognized, they must be prepared to show that the norm claimed to be violated is universally accepted and specifically comparable to those recognized at the time the ATS was promulgated.

In addition to meeting the *Sosa* standard, a plaintiff bringing an ATS claim must be aware of the jurisprudence on aiding and abetting and color of law liability under the ATS. At least three courts have answered the question of whether aiding and abetting liability is available under the ATS. In *Exxon Mobile*[144], the Federal District Court for the District of Columbia held that aiding and abetting liability is not available under the ATS. The Federal District Court for the Southern District of New York in *In re South Africa Apartheid Litigation* held the same. In contrast, the Federal District Court for the Northern District of California[145] held that aiding and abetting liability is available under the ATS. A plaintiff wishing to bring a claim under the ATS should be familiar with these cases.

Finally, regardless of which basis a plaintiff uses for a claim, they must be prepared to face motions for dismissal under the political question doctrine, the act of state doctrine, and the doctrine of international comity. In contrast to the problems for claims under the TVPA or ATS discussed previously, litigation over these legal doctrines is very fact-specific. Plaintiffs should understand the case law on each of the doctrines and be prepared to argue about the effect that their claims will have on the foreign affairs of the United States.

3. Reasons for Lack of Success

As our survey of corporate complicity litigation in the Americas reveals, litigation in this area has met with very little success across the board. We believe that our case summaries illustrate that the shortcomings in this area of law derive from political, economic, and legal elements, which are often intertwined. Furthermore, the relative salience of these considerations varies depending upon what part of the American region one is considering.

Some obstacles to corporate complicity litigation relate to the established links between the state and big business in many countries, both politically as well as economically. In some countries, large corporations can be important political veto players due to close relationships between the political and business elite. This can be a particularly influential concern in countries such as those in Latin America, where legal institutions are underdeveloped and sometimes lack independence.

Another element of the business-government relationship that may affect corporate complicity litigation in Latin America is the government's need, for political and/or economic reasons, to attract foreign investors. Governments that need to attract foreign investment may be wary of allowing the development of law that may make them havens for anti-corporate litigation, raising the cost of doing business perceived by potential investors. The desire or need to keep the business community happy may be particularly relevant in Latin America, as

[144] 393 F. Supp. 2d 20 (D.D.C. 2005).
[145] *Bowoto v. Chevron***,** No. C 99-02506 SI, 2006 WL 2455752 (N.D. Cal. August 22, 2006).

compared to the U.S. and Canada, because countries in the region vie for investment from abroad to finance their development. Thus, the close relationship between politics and economics may be one reason for limited success of corporate complicity litigation in Latin America.

The courts and polities of the U.S. and Canada are not typically thought of as suffering from the same pathologies as those of Latin American countries, yet the relationship between big business and politics may still be problematic. Because many MNCs, including those that are past, present, or potential future defendants in corporate complicity cases, are based in the U.S. and Canada, these countries may seem to be the ideal fora to bring claims because of the ease of working through procedural issues, such as jurisdiction and forum. However, these courts have stopped cases from going forward using these procedural issues, preferring that cases be litigated where the alleged abuses occurred.

Courts in the U.S. and Canada have also stopped cases through the use of more substantive legal doctrines, such as the political question doctrine. Courts seem to exercise particular caution in the area of corporate complicity and prefer to pass on these difficult issues whenever possible. Although it is possible that there have been jurisdictional problems or separation of powers concerns in all of the cases brought in the U.S. and Canada, it also seems likely that courts are trying to prevent opening the floodgates of corporate complicity litigation on corporations' home turf.

Another possible explanation for the lack of corporate complicity litigation in Canada and Latin America is the dearth of law to support these claims. One of the main findings of our survey of the region is the overwhelming concentration of corporate complicity litigation in the Americas in the U.S., and particularly under the ATS and TVPA. That said, however, Canada is not lacking a framework for corporate complicity liability but arguments for its improvement are many; for example, corporate liability provisions have been substantially fleshed out in Canada's criminal code since 1992, but advocates remain unsatisfied with the state of corporate complicity law as a whole.[146]

In the end, then, the reasons that corporate complicity litigation has been largely ineffectual in the Americas are largely institutional—the challenge of having the legal branch deal with an issue over which it has shared—and at least in the U.S. context, subordinate—competency, the failure or nonexistence of adequate legal institutions, including courts and laws addressing corporate complicity with human rights violations, and the lack of political will to fight the so-called race to the bottom by demanding more from corporations. Many of these institutional problems cannot be easily remedied by litigants and their advocates; however, the corporate complicity agenda can be pushed forward through more attention to the existing case law, focused as it is on procedural technicalities, in order to be able to start have courts have to reach the merits to make a decision.

IV. CONCLUSION

Volume 1 of the 2008 ICJ report attempted to articulate situations when corporations could be held accountable for gross human rights abuses, and in this section, we will present a

[146] *See* Jonathan Clough, *Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability*, 18 CRIMINAL LAW FORUM 267 (2007) (discussing the modifications to the Canadian Criminal Code to incorporate more robust corporate criminal liability provisions). *See also Bill C-300—Corporate Accountability for the Activities of Mining or Gas Corporations in Developing Countries*, MININGWATCH CANADA (Aug. 18, 2009) (discussing an initiative to increase the legal resources available for corporate complicity cases).

comparison of the findings of our analysis to the expected outcomes articulated in the ICJ report. In its analysis, the ICJ focused on three requirements of accountability—causation and contribution, knowledge and foreseeability of risk, and proximity—and postulated that a company whose actions meet the three requirements would be held accountable by both civil and criminal law. Thus, we intended this section of our report to evaluate the conclusions of the ICJ.

However, the focus of this section has shifted somewhat, given the stark contrast between the ICJ report's focus on the substantive requirements for a finding of corporate complicity and our finding that an overwhelming number of corporate complicity cases in the Americas have been decided based on procedural requirements. Although this schism makes it difficult for us to come to concrete conclusions about the accuracy of the ICJ's expectations, we will use the few cases that addressed the substantive issues of corporate complicity litigation to shed some light on the accuracy of the ICJ's substantive conclusions. From these cases, we can glean at least some idea of actions that courts will view as possible bases for corporate liability.

In *Doe v. Exxon Mobile*[147], the District Court for the District of Columbia refused to allow aiding and abetting or color of law liability under the ATS. This was despite the fact that Exxon allegedly helped build security bases, trained troops, and provided logistical support to the security forces—all actions that would fall into the ICJ's definition of causation. In *Bowoto v. Chevron*[148], by contrast, the District Court for the Northern District of California held that the defendant could be held liable if plaintiffs could show that the defendant provided practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime.

Two cases that did not turn on aiding and abetting liability but which did proceed to the merits stage can also shed some light on the actions that courts will view as possible bases for corporate liability. In *Sarei v. Rio Tinto*[149], the District Court for the Central District of California allowed plaintiffs' claims for crimes against humanity, war crimes, and racial discrimination to proceed to the merits. The actions that were the bases of these claims were the request by defendants for military intervention and defendants' supplying of aid to the military during that intervention. In *Romero v. Drummond Co.*, despite articulating a fairly generous definition of the scope of the relationship required to show complicity between the state and the corporate defendant, the court ultimately held that plaintiffs simply had not met their burden to show that even a single corporate official had interacted with the state in order with regards to the alleged abuses.

While the *Rio Tinto* and *Romero* cases addressed issues related to the ICJ's requirement of causation, the court addressed the issue of knowledge in *Stutts v. De Dietrich*[150]. In *Stutts*, the court dismissed the claims against one group of defendants—the bank defendants—because plaintiffs failed to sufficiently allege that they knew that Iraq would use or facilitate the illegal use of chemical weapons.

The outcomes of these cases indicate that at least some U.S. courts are unwilling to hear a claim under the ATS even if the conduct of the corporation meets the ICJ's postulated requirements. That said, however, other courts *have* allowed claims with fact patterns such as these—similar to those identified by the ICJ as giving rise to liability. It seems that whether a court will allow a claim to proceed to the merits depends more on the requirements of the statute

[147] *See* discussion of Doe *supra*, at 17.
[148] *See* discussion of *Bowoto supra*, at 20.
[149] *See* discussion of *Rio Tinto supra*, at 24.
[150] *See* discussion of *Stutts supra*, at 18.

that the plaintiffs use for their claim and the court's interpretation of that statute. In the end, this seems to be the sticking point for corporate complicity litigation in the United States. Since most claims are based on conduct that took place in other countries, plaintiffs must overcome many procedural hurdles. Even if they make it past the procedural limitations, plaintiffs must still plead a factual situation that the court will view as meeting the requirements of the statute that is the basis of the claim.

Finally, the two cases that we found that were able to proceed to the merits and had been decided at the time of the writing of this report were both verdicts in favor of the defendant. Thus, there is a lack of plaintiff-friendly precedent in the U.S. to spur further litigation. Meanwhile, the dearth of cases filed in other jurisdictions in the Americas—Canada and the countries of Latin America—suggests that litigation attempts could be made more robust in this area and that more detailed study of relevant litigation (or lack thereof) that might invite corporate complicity litigation in these countries might be a useful resource for the future.