



Universal Periodic Review – United States of America
Submission to the Office of the High Commissioner for Human Rights
April 2010

1. EarthRights International (ERI) makes this submission for the Universal Periodic Review of the United States of America, focusing on the United States' participation in U.S. civil lawsuits raising international human rights claims over the past four years. Founded in 1995, ERI is a nonprofit, nongovernmental organization dedicated to the protection of human rights and the environment. ERI has had consultative status with ECOSOC since 2004. Our legal program focuses primarily on cases against corporations who are responsible for human rights abuses, frequently litigated in U.S. courts under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. ERI has served as counsel in five ATS lawsuits against multinational corporations, and has submitted *amicus curiae* briefs in at least a dozen similar cases. The addendum, a recent paper from ERI entitled "Returning to Normalcy: Rolling Back the Bush Administration's Radicalism on Human Rights Litigation," provides more detail on the topics discussed herein.

1. Executive Summary and Recommendations

3. The primary focus of this submission is U.S. civil litigation as fulfilling the right to redress for human rights abuses, and the approach that the U.S. courts and the U.S. Government have taken toward such litigation. Overall, the courts have been receptive to human rights litigation, but during the review period—and especially under the administration of George W. Bush—the Government was frequently hostile to such litigation and has repeatedly made submissions to courts suggesting that such cases should be dismissed or making claims that they interfere with U.S. policies. Although there are some signs of positive change in approach in the Obama administration, the Government has yet to repudiate the Bush administration's positions, and must do so in order to meet its international human rights obligations.

4. In order to fulfill the United States' obligations and stated commitments to hold corporations and other actors accountable for human rights abuses, and to provide an effective remedy to all persons within the jurisdiction of the United States, ERI makes the following recommendations:

- **Interpret the law to provide a remedy for human rights abuses:** Both the U.S. courts and, where it expresses its views, the U.S. Government, should ensure that their interpretations of U.S. law are consistent with the obligation to provide a remedy to victims of human rights abuses, and to hold those responsible for abuse accountable. The Government should argue, and the courts should hold, that those who aid and abet abuse or conspire in abuse can be held civilly responsible, that cases should not be dismissed due to perceived interference with foreign policy, that the ATS applies to acts arising abroad, that corporations may be held liable to the same extent as natural persons, and that exhaustion of local remedies is not required.
- **Withdraw current U.S. Government submissions:** The Government should immediately make it clear in all active cases that, pending review, any Statements of Interest and *amicus* briefs previously submitted which make any arguments against human rights litigation are no longer operative.
- **Review Statements of Interest on a case-by-case basis:** Where cases are still pending, the Government should conduct a review of each case in which the Government has



previously submitted a Statement of Interest, to determine whether the concerns articulated are still valid and accurately reflect the interests of the United States.

II. Background and framework

A. Constitution and statutes

5. The United States Constitution, amend. V & amend. XIV, guarantees due process of law, and the U.S. has enacted statutes that allow the vindication of international law rights in civil lawsuits. The ATS provides jurisdiction over any civil actions by aliens only for torts in violation of the “law of nations.” The Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, allows anyone (U.S. citizens as well as aliens) to sue those who are responsible for torture and extrajudicial killing carried out under color of law of a foreign state.

B. International obligations and commitments

6. The United States has endorsed the Universal Declaration on Human Rights, which guarantees, in art. 8, “an effective remedy . . . for acts violating the fundamental rights.” The U.S. is also a party to several treaties guaranteeing a remedy for human rights abuses, including the International Covenant on Civil and Political Rights (see art.2(3)); the Convention Against Torture (art. 14(1)); and the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6). The TVPA was expressly enacted to implement the Torture Convention by providing an effective remedy for torture. Neither the ICCPR nor CERD has been implemented through domestic legislation, but courts have recognized many of the core violations of these conventions as valid bases for legal claims under the ATS, including torture, extrajudicial killing, arbitrary detention, cruel, inhuman, or degrading treatment, and racial discrimination, as well as crimes against humanity, war crimes, and genocide.

7. The United States publicly states that “a central goal” of its foreign policy is “the promotion of respect for human rights,” including “accountability” for abuses. See <http://www.state.gov/g/drl/hr/index.htm>. The U.S. has also publicly committed to promoting corporate accountability for human rights abuses worldwide, stating that “promoting corporate social responsibility around the world contributes to the U.S. foreign policy goals of democracy promotion, free trade, international development, and human rights.” See <http://www.state.gov/g/drl/lbr/>.

C. National jurisprudence

8. As noted above, courts hearing lawsuits under the ATS have recognized that this law provides remedies for a number of violations of internationally guaranteed human rights. Overall, U.S. jurisprudence has recognized the importance of providing remedies for human rights abuses. In 2004, the U.S. Supreme Court confirmed that the ATS could be used to provide remedies for modern human rights violations. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). Further analysis of the courts’ role is provided below.

III. Promotion and protection of human rights on the ground

9. The United States civil litigation system provides some opportunities for redress to victims of human rights abuses, but does not always provide an effective remedy as required by international law. Of greatest concern is the fact that, during the review period, the U.S. Government frequently intervened in civil litigation to argue against the victims of abuse and to suggest that their lawsuits be dismissed.

A. Government submissions in human rights litigation

10. Prior to the administration of George W. Bush, the U.S. Government rarely intervened in

human rights cases. From 1980-2000, the Government made only six submissions in ATS cases against private parties, excluding those arising out of the Holocaust.¹ Before 2001, the U.S. only made submissions where the court asked for the Government's position or, once, in a case where the United States was also a defendant. Only one of these submissions expressed general opposition to human rights litigation under the ATS, and most were supportive of human rights victims. For example, the first submission made by the United States was in the landmark case *Filártiga v. Peña-Irala*, in which the U.S. Government advanced the view that torture violated international law and could be remedied through a lawsuit under the ATS. *See, e.g.*, Memorandum for the United States as Amicus Curiae, *Filártiga*, 630 F.2d 876 (2d Cir. 1980) (No.79-6090). The brief argued that "official torture violates the law of nations," and that "official torture is a tort and gives rise to a judicially enforceable remedy." *Filártiga* marked the first time that a court had allowed a human rights lawsuit pursuant to the ATS, and the court quoted from the government's influential brief. 630 F.2d at 884. The Government's position was consistent with scholarly opinion during this period, which was likewise generally supportive of human rights litigation under the ATS.²

11. The approach to private human rights litigation begun under the Bush administration marked a radical departure the restrained course taken previously, both in procedure and in substance, and a derogation from the United States' obligation to provide redress to victims of human rights abuses. First, the Bush administration regularly submitted *amicus* briefs and Statements of Interest in cases where courts had not requested them, even where actions of the United States were not at issue. Second, largely due to the practice of making unsolicited submissions, the pace of such submissions increased dramatically. While the Government submitted four *amicus* briefs and two Statements of Interest in ATS cases in the twenty years from 1980-2000, the Bush administration submitted *amicus* briefs in at least seven cases and Statements of Interest in at least ten cases during 2001-2008 (again, excluding Holocaust cases). Third, the administration took positions that were diametrically opposed to prior submissions and which, in general, have been squarely rejected by the courts and mainstream legal scholars.

12. The Government's submissions during the past four years have made several arguments that are antithetical to the protection and promotion of human rights:

Claims arising abroad: Most recently in 2006 and 2007, the U.S. Government argued to courts that they could not hear cases for human rights abuses that occurred abroad, despite the obligation of ICCPR art. 2(3) to provide a remedy to "any person." Br. of the United States as *Amicus Curiae* in Supp. of Affirmance, *Corrie v. Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007); Br. for the United States as *Amicus Curiae*, *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) [*Talisman* Br.]. A Government lawyer repeated such arguments at the hearing in *Talisman* in January 2009.

¹ The Holocaust cases are unique because both the Clinton and Bush administrations took actively promoted resolution of those cases through "negotiated resolutions of unresolved claims," such as the German Foundation and the Austrian Fund. *See* <http://www.state.gov/p/eur/rt/hlcst/c11376.htm>.

² *See, e.g.*, Harold H. Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2367 (1991) ("*Filártiga* convincingly rebutted the comity, separation-of-powers, and incompetence objections to domestic judicial decision of human rights cases."); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 493 (1989) (noting that "expanding [the ATS] to cover cases against official torturers is indeed consistent with its letter and its spirit"); Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 Am. J. Int'l L. 92 (1985) (criticizing Judge Bork's opinion in *Tel-Oren*); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 398, 407 (1985) (praising *Filártiga*'s "eloquent" and "sophisticated approach").

Aiding and abetting liability: The Government has repeatedly submitted briefs arguing that those who aid and abet human rights abuses may not be held liable in civil litigation. *See* Br. of the United States as *Amicus Curiae* in Supp. of Affirmance, *Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Talisman* Br.; Br. of the United States as *Amicus Curiae* in Supp. of Pet’r, *Am. Isuzu Motors, Inc., v. Ntsebeza*, 128 S. Ct. 2424, 171 L. Ed. 2d 225 (2008) [*Ntsebeza* Br.]. Immunizing abettors of violations is inconsistent with international law and would essentially give a free pass to those who encourage and assist human rights violations.

Conspiracy liability: The U.S. has also taken the position, in a 2007 brief and again at a 2009 hearing, that defendants cannot be held civilly liable under the ATS for conspiring to commit violations of customary international law. *See Talisman* Br. Like aiding and abetting liability, conspiracy liability is critical for combating human rights abuses.

Exhaustion of remedies: In 2006, the Government argued that foreign victims of human rights abuses could not file suit in U.S. courts, even if the defendant is a U.S. citizen, unless the victims first return to their home countries to “exhaust” remedies there. Br. for the United States as *Amicus Curiae* Supporting Panel Reh’g or Hearing En Banc, *Sarei v. Rio Tinto PLC*, 487 F.3d 1193 (9th Cir. 2007)

Government contractor immunity: In 2006, the Government argued that U.S. Government contractors could not be held liable for human rights abuses that violate international law. Br. of the United States as *Amicus Curiae* in Supp. of Defs-Appellees, *Vietnam Ass’n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).

Foreign policy conflicts: The Government has argued that several human rights cases present conflicts with U.S. foreign policy. The Obama administration has thus far declined to repudiate any of these arguments. For example, in 2004, the Government suggested that a case against corporations who were allegedly complicit in abuses under the South African apartheid regime interfered with foreign policy because South Africa had objected to it. Statement of Interest of the United States, Oct. 30, 2003, *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004). The Government repeated its objections to the Supreme Court in 2008. *See Ntsebeza* Br. In 2009, in another brief in the same case, the Government did not repeat this objection but also declined to repudiate the previously-expressed position, despite the fact that South Africa no longer objected to the litigation. Br. of the United States as *Amicus Curiae* Supporting Appellees, *Balintulo v. Daimler AG*, Nos. 09-2778-cv *et al.* (2d Cir.). Similarly, in 2001, the Government objected to litigation arising out of human rights abuses in Bougainville, Papua New Guinea, arguing that it would interfere with a peace process there. *See* Letter of William H. Taft IV, Legal Adviser, Dep’t of State, to Robert McCallum, Jr., Assistant Attorney General, Oct. 31, 2001, *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). Although the legal issue of whether the case should be dismissed due to foreign policy concerns is now being considered again, the Obama administration recently declined to make any submission to the court. *See* Letter of Lewis S. Yelin, Attorney, Appellate Staff, Civil Div., to Molly C. Dwyer, Clerk of Court of the U.S. Court of Appeals for the Ninth Circuit, Mar. 29, 2010, *Sarei v. Rio Tinto PLC*, Nos. 09-56381 *et al.* (9th Cir.) (en banc). Other cases in which the Government had previously expressed opposition on foreign policy grounds, and in which those submissions are still operative and have yet to be repudiated, include *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, *Doe v. Exxon Mobil Corp.*, and *Mujica v. Occidental Petroleum Corp.*

State secrets: In 2009, the Obama administration repeated arguments made by its predecessor that the courts must dismiss a suit against a corporation for abetting torture in the U.S. “extraordinary rendition” program, because the case could reveal “state secrets.” *See* Pet’n for

Reh'g or Reh'g *En Banc*, *Mohamed v. Jeppesen Dataplan, Inc.* No. 08-15693 (9th Cir.).

B. Court decisions in human rights litigation

13. Despite the Government's position, for the most part, U.S. courts have often continued to allow victims of human rights abuses access to the courts to seek a remedy. Cases against corporations, in particular, have proceeded where there is evidence that the corporation aided and abetted such an abuse—*i.e.*, that the corporation knew that the abuse was likely to occur but nonetheless provided substantial assistance that aided its commission—or where the corporation was a direct participant in a conspiracy to commit the abuse, or where the perpetrators were acting as the corporation's own agents. Notably, no court has accepted any claim that a corporation should be held liable simply for its investment or presence in a country where the government engages in human rights abuses; the corporation's own conduct, or that of its employees or agents, must contribute to the abuses.

14. In recent years, however, the jurisprudence of some courts has been inconsistent with the protection of fundamental human rights, and in a few cases the Government's arguments against human rights litigation have been accepted:

Complicity: In 2009, a federal court of appeals departed from accepted international standards and ruled that liability for aiding and abetting human rights abuses requires that the abettor act with the purpose to facilitate violations of international law. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009). Most prior court decisions have found that liability for aiding and abetting requires that the abettor knowingly provide substantial assistance for the abuse, regardless of shared purpose. Two decisions have rejected liability for aiding and abetting entirely, but one of these was subsequently reversed. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 549-51 (S.D.N.Y. 2004), *rev'd by Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 24 (D.D.C. 2005). Additionally, although the overwhelming majority of courts has accepted that conspirators can be held liable, one court in 2009 rejected conspiracy liability. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263 (S.D.N.Y. 2009).

Corporate liability: Several courts have ruled that corporations cannot be held liable for torture and extrajudicial killing under the TVPA, *e.g.*, *Doe I v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005), although others have disagreed. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009). No court has ruled that corporations cannot be sued under the ATS, but one court did recently question whether corporations could be held liable, and asked for supplemental briefing on the issue. *See* Additional Briefing Order, *Balintulo v. Daimler AG*, Nos. 09-2778-cv *et al.* (2d Cir. Dec. 4, 2009).

Foreign policy: Several decisions have ruled that cases involving serious human rights abuses are "non-justiciable," because they implicate foreign policy or political concerns. *E.g.*, *Corrie v. Caterpillar*, 503 F.3d 974 (9th Cir. 2007); *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002). As noted above, the U.S. Government has often encouraged dismissal of such cases.

Exhaustion of remedies: Although an earlier case rejected any exhaustion requirement, *see Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005), a 2008 decision suggested that victims of human rights abuses might need to return to their home countries to file claims before bringing an ATS lawsuit in the United States. *Sarei v. Rio Tinto PLC*, 550 F.3d 822 (9th Cir. 2008).

ADDENDUM

RETURNING TO NORMALCY

Rolling Back the Bush Administration's Radicalism on
Human Rights Litigation



EarthRights International
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Southeast Asia Office
P.O. Box 123
Chiang Mai University
Chiang Mai 50202
Thailand
Tel: 66-1-531-1256
infoasia@earthrights.org

U.S. Office
1612 K St. NW
Washington, D.C. 20006
United States
Tel: 1-202-466-5188
Fax: 1-202-466-5189
infousa@earthrights.org

www.earthrights.org

Overview

For the past 30 years, the Alien Tort Statute (ATS), 28 U.S.C. § 1350, has provided a valuable mechanism for advancing the important U.S. policy goal of protecting human rights, by allowing the vindication of human rights abuses in U.S. courts. From 1980-2000, successive administrations took a restrained approach to the ATS, generally allowing the courts to adjudicate human rights cases without involvement by the Government. In ATS cases against private parties, excluding those arising out of the Holocaust,¹ the United States made only six submissions during this period, always in cases where the court asked for the Government's position or, once, in a case where the United States was also a defendant. The Government's position was adopted by the courts in all but one case, and that outlier was the one time prior to the Bush administration that the Government had expressed general opposition to human rights litigation under the ATS.

The Bush administration's approach to ATS litigation marked a radical departure the restrained course taken previously, both in procedure and in substance. During the Bush years, the Government filed *amicus curiae* briefs in at least seven cases and Statements of Interest regarding foreign policy impacts in at least ten. The positions advocated in these submissions have been outside the mainstream of legal thought on the ATS, and the result has been that the administration's views and legal positions have been rejected by courts with increasing frequency. In the words of Harold Koh, the Bush administration's approach was "singularly misguided."²

This paper argues that the submissions of the Bush administration in ATS cases should be withdrawn; that the substantive positions should be reviewed and, in most cases, reversed; and that the Obama administration should return to the practice of remaining silent in ATS cases unless a court solicits the Government's views. The primary focus of this study is the legal positions advocated by the Government in cases to which the United States is not a party, rather than the specific statements relating to foreign policy impacts of individual cases, although those statements (taken as a whole) appear to have been part of a concerted effort to limit accountability for human rights abuses. Moreover, although this paper explains why the positions advanced by the Bush administration should be abandoned, a full legal analysis of these positions is beyond its scope; the legal arguments have been set forth at great length in numerous briefs and court decisions.

I. The Alien Tort Statute

The Alien Tort Statute was originally enacted as part of the First Judiciary Act, in 1789. In its current form, it reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."³ The original purpose of the ATS was likely to avoid foreign conflicts by ensuring that, where an alien sought to vindicate rights guaranteed by international law, such a case could be handled by the federal courts, rather than relegated to state court.⁴

Filártiga and its progeny

The ATS became an important tool for protecting and vindicating human rights after the 1980 decision in *Filártiga v. Peña-Irala*,⁵ where the U.S. Court of Appeals for the Second Circuit ruled that state-sponsored torture fell within the definition of “a tort . . . in violation of the law of nations.” In cases following *Filártiga*, courts found that suits under the ATS could be filed for a small number of egregious human rights abuses, principally state-sponsored extrajudicial killing, crimes against humanity, war crimes, and genocide.⁶

The *Filártiga* precedent was not yet well-established in the 1980s. In 1984, in *Tel-Oren v. Libyan Arab Republic*,⁷ a divided Court of Appeals for the D.C. Circuit dismissed a case challenging torture by the Palestine Liberation Organization, although the judges could not agree on their reasoning. Judge Edwards favored the *Filártiga* rule, but found that the prohibition on torture did not reach the PLO, a private organization.⁸ Judge Bork rejected *Filártiga*,⁹ and Judge Robb thought the case implicated the political question doctrine.¹⁰ In the cases that followed, however, not a single court endorsed Judge Bork’s view, and the courts were in general agreement that *Filártiga* was the correct approach. In 1992 Congress added its voice to the debate, passing the Torture Victim Protection Act, which provided an unambiguous statutory basis for lawsuits regarding state-sponsored torture and extrajudicial killing, as well as allowing U.S. citizens to bring such suits.¹¹

While the number of ATS cases remained small, their importance was significant. ATS cases helped establish that the Ferdinand Marcos dictatorship in the Philippines committed thousands of abuses,¹² and that genocide was occurring in Bosnia.¹³ More recently, ATS cases have helped ensure that multinational corporations are a positive presence in the countries where they operate, by recognizing that corporations can be held liable for complicity in state-sponsored abuses when they violate well-established aiding and abetting principles by knowingly substantially assisting abuses.¹⁴

Sosa: The Supreme Court weighs in

The Supreme Court weighed in on the ATS in 2004. In *Sosa v. Alvarez-Machain*,¹⁵ the Court concluded that the ATS did indeed allow suits for violations of contemporary norms of international law, including human rights abuses such as torture, extrajudicial killing, and genocide. The Court clarified the criteria for asserting claims under the ATS, and noted that there were several checks on the judiciary in allowing such cases to go forward. First, any claim under the ATS must rest upon “a norm of international character accepted by the civilized world and defined with a specificity comparable to” the norms recognized at the time the ATS was passed.¹⁶ This rule, the Court held, is “generally consistent with the reasoning of many of the courts and judges” that previously ruled on the issue, specifically mentioning *Filártiga*, Judge Edwards’s opinion in *Tel-Oren*, and the Ninth Circuit’s decision in the *Marcos* case.¹⁷ Second, “the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹⁸ Thus, in *Sosa* itself, the Court rejected a proposed norm that would have allowed a suit for “a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment.”¹⁹ Last, the Court noted that in some cases, “a policy of case-specific deference to the political

branches” might be appropriate,²⁰ presumably referring to established doctrines such as the political question doctrine and the act of state doctrine.

A narrow class of cases

Following *Sosa*'s guidance, the courts in recent years have allowed ATS cases to proceed only where claims implicate well-established norms of international law. The types of cases that are the subject of ATS claims fall into a narrow class, and the courts have exercised a high degree of scrutiny over such claims. Cases have typically proceeded against individual defendants where they have been participants in torture, extrajudicial killing, crimes against humanity, war crimes, or genocide, or when they have exercised command authority over the perpetrators. Cases against corporations have proceeded where there is evidence that the corporation aided and abetted such an abuse—*i.e.*, that the corporation knew that the abuse was likely to occur but nonetheless provided substantial assistance that aided its commission²¹—or where the corporation was a direct participant in a conspiracy to commit the abuse,²² or where the perpetrators were acting as the corporation's own agents.²³ Notably, no court has accepted any claim that a corporation should be held liable simply for its investment or presence in a country where the government engages in human rights abuses; the corporation's own conduct, or that of its employees or agents, must contribute to the abuses.²⁴

Courts have dismissed cases more often than they have allowed them to proceed.²⁵ Few ATS cases have reached trial, including only five cases against corporations; the corporate defendants prevailed in two of those trials,²⁶ prevailed on ATS claims but lost on other claims in one case,²⁷ defaulted in one case,²⁸ and lost ATS claims in one case.²⁹ A handful of other cases have resulted in settlements.³⁰ But the ATS remains an important tool for reining in the worst offenders, who commit or are complicit in the most egregious violations of international law.

II. The Government's submissions prior to the Bush administration

Before 2001, the U.S. Government rarely submitted its views on ATS cases, and generally only did so when asked by the courts. During the period 1980-2001, the Government generally expressed support for human rights litigation under the ATS; it expressed opposition to ATS litigation in only one court submission and opposition to the recognition of the particular norms at issue in one more case. Scholarly opinion during this period was likewise generally supportive of human rights litigation under the ATS.³¹ The following summary excludes submissions in cases arising out of the Holocaust, in which the administration promoted negotiated settlements.³²

Filártiga v. Peña-Irala

Prior to the landmark *Filártiga* decision, the Second Circuit requested the Government's views on the proper interpretation of the ATS. The United States submitted an *amicus curiae* brief that was jointly prepared by the Department of State, under the auspices of Legal Adviser Roberts B. Owen, and the Department of Justice, under the auspices of Assistant Attorney General for Civil Rights Drew S. Days III.³³ The brief argued that “official torture violates the law of nations,” and that “official torture is a tort and gives rise to a judicially enforceable remedy.”³⁴ The brief's views were quite influential; the Second Circuit's decision adopted its reasoning and quoted directly from it.³⁵

Tel-Oren v. Libyan Arab Republic

The Government did not make another submission in an ATS case until 1985, when the Supreme Court asked the Reagan administration for its views on the certiorari petition in the *Tel-Oren* case. There, the Justice Department argued against certiorari, taking the position that the result in *Tel-Oren* presented no conflict with *Filártiga*. The brief implied that the Government had little problem with the *Filártiga* precedent, suggesting that in future cases “any arguable inconsistencies between” *Filártiga* and the opinions in *Tel-Oren* might be “reconciled without the need for review by this Court,” and that Supreme Court review might only be necessary if further decisions present a “sharper conflict” between the circuits.³⁶ As in *Filártiga*, the Supreme Court followed the Government’s position, denying certiorari.³⁷

In re Estate of Marcos Human Rights Litigation

Two years later, the Justice Department, again without apparent involvement from the State Department, submitted a very different brief to the Ninth Circuit Court of Appeals in one of the *Marcos* cases. Again, the brief was filed in response to the court’s solicitation of the Government’s views, but for the first time, the Reagan administration expressed opposition to ATS litigation. The primary question before the Ninth Circuit was not related to the ATS; the district court had dismissed the case based on the act of state doctrine,³⁸ and that is presumably what the Ninth Circuit was interested in hearing about from the Government. Instead, the administration’s brief was a departure from both previous briefs, arguing that the ATS does not provide jurisdiction for claims of abuse by officials of foreign states occurring abroad, and that no claim could be pursued under the ATS in any event because the statute is merely jurisdictional and provides no cause of action.³⁹ Although the brief stated that the case “would not embarrass the relations between the United States and the Government of the Philippines,”⁴⁰ it did not even address the act of state doctrine, arguing that the case “should be dismissed . . . without reaching the question whether the ‘act of state’ doctrine would require dismissal.”⁴¹ The Ninth Circuit disregarded the Government’s views, and summarily reversed and remanded without a published opinion.⁴² When the Ninth Circuit considered the ATS questions in a subsequent *Marcos* decision, it gave little weight to the administration’s position, noting that the Government’s “change of position in different cases and by different administrations is not a definitive statement by which we are bound on the limits of § 1350.”⁴³ (A later *Marcos* decision, which set out the definitive test in the Ninth Circuit for assessing claims under the ATS, was cited favorably by the Supreme Court in *Sosa*.⁴⁴)

Torture Victim Protection Act

Although the number of ATS cases continued to grow into the 1990s, the number of court submissions by the Government did not. The administration made no submissions in ATS cases between 1987 and 1995. In 1992, however, President George H.W. Bush signed the Torture Victim Protection Act into law. While the President expressed concern over “potential abuse of this statute,” he ultimately supported “the fundamental goals that this legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.”⁴⁵

Doe v. Karadzic, Kadic v. Karadzic

In 1995, the Government submitted a Statement of Interest in the litigation against Bosnian Serb leader Radovan Karadzic, which was on appeal to the Second Circuit Court of Appeals.⁴⁶ Like previous submissions, the *Karadzic* statement was submitted in response to a request from the court, and the administration returned to the practice of a joint filing by the Department of State, represented by Legal Adviser Conrad K. Harper, and the Department of Justice, again represented by Drew Days, who had become Solicitor General.⁴⁷ In a Statement of Interest that effectively presented a memorandum of law, the Government articulated several case-specific positions suggesting that Karadzic was not entitled to immunity and that the political question doctrine did not apply. The bulk of the submission, however, relates to the substance of the law applicable in ATS cases. The Government argued that “conduct by non-state actors may in some circumstances violate customary international law,”⁴⁸ and that “the Alien Tort Statute may encompass violations of customary international law committed by non-state actors.”⁴⁹ In particular, the administration took the position that claims of “genocide, war crimes, and crimes against humanity . . . are of a substantially different nature” than the acts of torture considered in *Filártiga* and *Tel-Oren*, and that these acts violated international law even when committed by private actors.⁵⁰ Finally, the Government argued that the *Karadzic* plaintiffs could not bring an ATS claim for a treaty violation, in addition to a violation of the “law of nations,” because the treaties at issue were not self-executing.⁵¹ As in *Filártiga*, the Second Circuit largely adopted the Government’s position in the *Karadzic* opinion, agreeing that private individuals may be held liable for committing genocide and war crimes.⁵²

Doe v. Unocal, Roe v. Unocal

The only submission to a District Court in an ATS case during this period was in 1997 in the *Unocal* litigation, concerning abuses connected to a natural gas pipeline in southern Burma. This marked the first time that any administration had weighed in on an ATS case against a corporation.⁵³ Again acting in response to a specific request from the court, the Justice Department submitted a Statement of Interest transmitting a letter from the State Department’s acting Legal Adviser, Michael J. Matheson. The only position articulated in the letter was that “adjudication of the claims” at issue “would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.”⁵⁴ Unlike prior submissions, this Statement did not take any positions on any questions of law, and specifically cautioned against interpreting the letter “to imply that we have reviewed or taken a position on any other legal issues in the litigation.”⁵⁵ The court relied on this submission in declining to dismiss the action pursuant to the act of state doctrine.⁵⁶

Alvarez-Machain v. Sosa

The final submission by the Government in an ATS case prior to the Bush administration was an *amicus* brief in the appeal to the Ninth Circuit in *Alvarez-Machain v. Sosa*, the case that would result in the *Sosa* decision at the Supreme Court. The facts of *Sosa* concerned a Mexican doctor, Alvarez, who was suspected of involvement in the killing of a U.S. DEA agent; the DEA organized an operation in which Dr. Alvarez was kidnapped in Mexico by Sosa, a former Mexican policeman, and delivered to federal agents in the U.S. for arrest.⁵⁷ The Ninth Circuit was considering whether Sosa was liable for violating international norms regarding respect for territorial sovereignty and prolonged arbitrary detention; the U.S. submission argued that Sosa was not liable on relatively narrow grounds, taking the position that the norm of territorial sovereignty was not a personal right, and that the detention here was neither arbitrary nor

prolonged.⁵⁸ This brief was the first unsolicited submission by the Government, but the case was somewhat unique in that the United States itself was also a defendant,⁵⁹ and was participating as a party as well as an *amicus*. The Ninth Circuit agreed with the Government on the question of territorial sovereignty but disagreed on arbitrary detention;⁶⁰ as noted below, however, the Supreme Court's ultimate decision reversed the Ninth Circuit on arbitrary detention.

III. The activism of the Bush administration

The Bush administration's activity in Alien Tort Statute cases departed from prior submissions in several respects. First, the Bush administration regularly submitted *amicus* briefs and Statements of Interest in cases where courts had not requested them, even where actions of the United States were not at issue. Second, largely due to the practice of making unsolicited submissions, the pace of such submissions increased dramatically. While the Government submitted four *amicus* briefs and two Statements of Interest in ATS cases in the twenty years from 1980-2000, the Bush administration submitted *amicus* briefs in at least seven cases and Statements of Interest in at least ten cases during 2001-2008 (again, excluding Holocaust cases⁶¹). Third, the administration began making submissions at the District Court level. Before 2001, the *Unocal* case was the only instance in which the Government submitted a Statement of Interest to a District Court, while all of the Bush administration's Statements have been submitted at the District Court level. Last, the administration took positions that were diametrically opposed to prior submissions and which, in general, have been squarely rejected by the courts and mainstream legal scholars. The Bush administration had no reservations about reversing prior interpretations to advance its agenda.

Pre-Sosa filings

The Bush administration's first submission on the scope of the ATS came in the appeal in the *Unocal* litigation, before the Ninth Circuit.⁶² In an unsolicited 2003 *amicus* brief, the Government argued that the ATS did not provide a cause of action and provided no basis for inferring a cause of action for violations of international law, and that the ATS could not apply to any conduct occurring abroad.⁶³ Both positions had already been rejected by the Ninth Circuit in prior *Marcos* decisions.⁶⁴ Shortly after the *Unocal* submission, the Government reiterated these positions in a Statement of Interest submitted to the D.C. District Court in *Doe v. ExxonMobil*.⁶⁵ Neither of the positions advocated by the Government has ever been accepted by any court; the *Unocal* case was settled prior to a final decision on the appeal,⁶⁶ and the District Court in *ExxonMobil* dismissed the ATS claims on other grounds.⁶⁷

Filings in Sosa

The Government again presented these arguments in its briefing to the Supreme Court in *Sosa v. Alvarez-Machain* in 2004, arguing that the ATS does not provide a cause of action, that no cause of action may be inferred for violations of international law, and that the ATS does not apply to conduct outside the United States.⁶⁸ Essentially, the Bush administration's position was that, when it was passed, the ATS had no effect: no cause of action would lie under the ATS unless and until Congress, by statute, created one; the ATS was merely "a jurisdictional convenience to be placed on the shelf for use by a future Congress . . . that might, someday, authorize the creation of causes of action."⁶⁹

The Supreme Court rejected this position and showed no inclination to defer to the administration's views. While the Court agreed that the ATS itself was jurisdictional only and did not provide a cause of action, the Court found that the ATS was "enacted on the understanding that the common law would provide a cause of action" for violations of international law;⁷⁰ in other words, "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations."⁷¹ No statutory authorization was required in order to bring a claim for a violation of the law of nations pursuant to the ATS.

While the Supreme Court rejected the Bush administration's arguments, its ultimate conclusion hewed closely to the arguments made in the Clinton administration's submission to the Ninth Circuit: the Court concluded that Dr. Alvarez's injuries simply did not constitute a violation of international law, in that they did not meet the requirements of any established norm against arbitrary detention.⁷²

Post-Sosa filings

Following the rejection of its principal argument by the Supreme Court, the Bush administration proceeded to make a series of new legal arguments about the scope of the ATS in subsequent filings, both solicited and unsolicited. In the four years following *Sosa*, the Bush administration submitted at least nine briefs or Statements of Interest making legal arguments about the scope of the ATS, in at least seven different lawsuits. Among others, these submissions make the following arguments:

- **Claims arising abroad:** The Bush administration continued to press its position that the ATS either does not apply to any conduct abroad, or that it does not apply to the conduct of foreign officials within their own territory, or that courts should not make ATS claims available to litigants for abuses occurring abroad.⁷³
- **Aiding and abetting liability:** Beginning immediately after *Sosa*, the administration argued that aiding and abetting liability was not cognizable for ATS claims, taking this position in its supplemental *amicus* brief in the *Unocal* appeal⁷⁴ and in several briefs and Statements of Interest subsequently.⁷⁵
- **Conspiracy liability:** In addition to aiding and abetting liability, the Bush administration has taken the position that defendants cannot be held civilly liable under the ATS for conspiring to commit violations of customary international law.⁷⁶
- **Vicarious liability:** In at least one submission, the Bush administration distinguished vicarious liability from secondary liability in general, and argued that in addition to aiding and abetting liability, vicarious liability doctrines such as agency liability should not apply in ATS cases.⁷⁷
- **Exhaustion of remedies:** In one case, the Bush administration argued that ATS litigants should be required to "exhaust" remedies available in their home country before filing suit in the United States.⁷⁸
- **Government contractor defense:** In one case, the administration argued that the so-called government contractor defense articulated by *Boyle v. United Technologies Corp.*⁷⁹ applies to ATS claims, despite the fact that such a defense is not found in international law.⁸⁰

The Bush administration's attack on human rights litigation was not limited to interpreting common-law claims under the ATS and the scope of international law. For example, the administration also took the position that aiding and abetting liability was not cognizable under the TVPA,⁸¹ a statute that reflected an explicit Congressional endorsement of human rights lawsuits.

Case-specific concerns

A full analysis of the individualized concerns expressed by the Bush administration in particular cases, as opposed to their legal analysis of the ATS, is beyond the scope of this paper. Nonetheless, it is worth noting that the Bush administration weighed in on such concerns in numerous ATS cases, both prior to and following *Sosa*, and nearly always suggested concerns that would militate in favor of dismissal of the case. The most common arguments made were that the case interferes with some stated U.S. foreign policy interest, that the defendant at issue enjoys immunity from suit, and that the claims are barred by the political question doctrine. The foreign policy interests put forward include safeguarding the stability of a foreign country,⁸² deferring to other countries' mechanisms for addressing human rights abuses,⁸³ promoting cooperation with antiterrorism⁸⁴ and anti-drug programs,⁸⁵ promoting U.S. investment in foreign countries,⁸⁶ or simply respecting the views of another country that the litigation not proceed.⁸⁷

While these positions are necessarily tied up with the facts of each case, it is worth noting that no similar concerns were expressed by previous administrations in any case. In *Filártiga*, for example, the defendant had been an official of the Alfredo Stroessner government, and had acted in his official capacity. Even though the Stroessner regime still ruled Paraguay at the time of the suit, the Government expressed no concern that the case would interfere with foreign relations. Similarly, in *Karadzic*, the case concerned a highly volatile political situation—the Bosnia war—and the defendant was served while in the U.S. to attend a peace conference, yet the administration argued that it did not present a political question.⁸⁸ The *Unocal* case concerned abuses committed by a foreign military against its own citizens on its own soil, but the Clinton administration's State Department expressed no concerns in its submission in that case.⁸⁹ Even in the *Marcos* litigation, where the Government argued that the ATS did not provide a cause of action, the administration's brief stated that the case would not affect U.S. foreign relations, and declined to take a position on any case-specific legal doctrine.⁹⁰ Like its legal positions on the scope of the ATS, the Bush administration's expression of case-specific concerns in numerous cases was a departure from past practice.

A number of these cases are still pending before the courts, and the Bush administration's submission, although years old in many instances, remains the Government's operative statement. The following is a non-exhaustive list of cases in which the Bush administration had expressed concerns and in which that submission has yet to be withdrawn:

- *Sarei v. Rio Tinto, PLC*:⁹¹ Plaintiffs from Bougainville, Papua New Guinea (PNG), sued a U.K. mining conglomerate for its direct participation in abuses by the PNG military forces during conflict there. In 2001, the Bush administration submitted a Statement of Interest to the Central District of California, arguing that the case posed a risk to U.S. foreign policy interests, and in particular that the case could jeopardize the PNG-Bougainville peace process.⁹² The District Court accepted that the plaintiffs' claims could be brought under the ATS,⁹³ but dismissed all claims on case-specific political

question and act of state grounds, based upon the U.S. submission.⁹⁴ On appeal, a panel of the Ninth Circuit reversed, finding no political question problems.⁹⁵ The Bush administration submitted an *amicus* brief arguing for *en banc* rehearing, which primarily argued for an exhaustion requirement⁹⁶ and no longer made any case-specific arguments.⁹⁷ The *en banc* panel remanded to the District Court to determine whether exhaustion of local remedies should be required,⁹⁸ and after the District Court ruled that the case could proceed,⁹⁹ the defendants appealed again. The *en banc* panel is now considering all outstanding issues, including political question.¹⁰⁰ The United States recently declined to make a further submission to the Ninth Circuit,¹⁰¹ but has never formally withdrawn the 2001 Statement of Interest.

- *Presbyterian Church of Sudan v. Talisman Energy, Inc.*:¹⁰² Residents of Sudan sued Canadian corporation Talisman Energy under the ATS, seeking compensation for war crimes, genocide, crimes against humanity and other violations of international law in connection with abuses committed in order to clear an area for oil development. The Government's Statement of Interest transmitted objections from the Canadian government and expressed concerns over the foreign policy implications of the case.¹⁰³ The Southern District of New York rejected these concerns¹⁰⁴ but later dismissed the case on other grounds;¹⁰⁵ the Second Circuit affirmed the dismissal last year,¹⁰⁶ and a petition for certiorari may soon be filed.
- *Doe v. Exxon Mobil Corp.*:¹⁰⁷ Indonesian villagers from Aceh brought suit against ExxonMobil for its alleged responsibility for murder, torture, and other abuses committed by security forces it contracted to provide security for its natural gas extraction and processing facility. After the U.S. submitted a Statement of Interest arguing that the ATS claims interfered with foreign policy, including antiterrorism efforts, and jeopardized Indonesia's stability,¹⁰⁸ the D.C. District Court dismissed the ATS claims on various grounds but retained state law claims,¹⁰⁹ rejecting the notion that the entire case was non-justiciable.¹¹⁰ After discovery and the denial of summary judgment, the state law claims were subsequently dismissed on standing grounds;¹¹¹ the dismissal of the ATS claims (and the state law claims) is currently on appeal to the D.C. Circuit.¹¹²
- *Mujica v. Occidental Petroleum Corp.*:¹¹³ Residents of a Colombian village bombed by the Colombian air force brought suit under the ATS against Occidental and security contractor Airscan for providing support and target identification to the Colombian military, and for helping to plan the airstrike. Plaintiffs alleged extrajudicial killing, torture, crimes against humanity, and war crimes. The Bush administration's Supplemental Statement of Interest argued that that the case could interfere with relations with Colombia by demonstrating a lack of faith in Colombian institutions, that the case might deter "present and future U.S. investment in Colombia," and that this might "detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil."¹¹⁴ The Central District of California, relying on this submission, dismissed all claims pursuant to the political question doctrine and federal foreign affairs preemption.¹¹⁵ On appeal to the Ninth Circuit, the Government's *amicus* brief, in addition to making arguments about the scope of the ATS, argued that both the political question doctrine and international comity provided case-specific bases for dismissal.¹¹⁶ The appeal was remanded to consider a question of exhaustion of remedies,¹¹⁷ but after the District Court recently ruled that exhaustion was unnecessary,¹¹⁸ the case is back before the Ninth Circuit.

- *In re South African Apartheid Litigation (Khulumani v. Barclay National Bank Ltd., Balintulo v. Daimler AG)*:¹¹⁹ Victims of abuses in South Africa brought suit against several corporations who were complicit with the apartheid government. The Bush administration submitted a Statement of Interest to the Southern District of New York in 2003, arguing that the ATS does not create a cause of action, that opposition to the lawsuits by the government of South Africa threatened significant policy interests of the United States, and that litigation of these cases “may deter foreign investment” in countries with “oppressive policies.”¹²⁰ After the District Court dismissed the case, rejecting the notion of aiding and abetting liability,¹²¹ the Bush administration submitted an amicus brief to the Second Circuit again arguing against aiding and abetting liability.¹²² The Court of Appeals rejected this argument, holding that claims for aiding and abetting abuses could be brought under the ATS.¹²³ The Bush administration continued to press its arguments regarding foreign policy concerns and aiding and abetting in another *amicus* brief supporting a petition for certiorari;¹²⁴ the Supreme Court lacked a quorum to consider the petition.¹²⁵ On remand, the District Court allowed the case to proceed against several defendants;¹²⁶ the defendants appealed again, and last year the Obama administration made a submission addressing the question of appealability only but not withdrawing the earlier submissions¹²⁷—despite the fact that the Government of South Africa no longer opposed the cases.¹²⁸ The appeal is pending before the Second Circuit.

IV. Wrong on policy, wrong on the law

Although a full analysis of the legal positions advanced by the Bush administration in ATS cases is beyond the scope of this paper, it is worth noting that these positions have frequently been rejected by the courts and criticized by mainstream legal scholars. The Bush administration’s positions mark a retreat from longstanding United States policy in favor of promoting human rights, and typically defended particular corporate interests without considering the overall ramifications of these positions for the goals of the United States.

Diminishing U.S. influence

As the above summary demonstrates, the Bush administration’s approach marked a radical shift from prior administrations. Writing about the Bush administration’s first submission in *Unocal*, Harold Koh noted:

The Bush Administration’s Justice Department under John Ashcroft had four choices. Like the Clinton Administration, it could have supported the plaintiffs; it could have supported the defendants on case-specific grounds; or it could have declared neutrality. . . . Instead the Administration chose a fourth, radical option, urging a position that would wipe out nearly twenty-five years of appellate precedent. . . . The administration’s position is wrong, as both law and foreign policy.¹²⁹

The result of this radicalism has been, in most cases, not to change the interpretation of the law, but to reduce the weight of the views of the United States. As professor Beth Stephens wrote in 2008, “The judiciary has been remarkably skeptical of the administration’s views in corporate-

defendant [ATS] cases.”¹³⁰ At that point, aside from cases against U.S. contractors and those arising out of World War II, only one ATS lawsuit against a corporation had been dismissed based on the rationale advanced in that case by the Bush administration; as noted above, in that case, *Mujica v. Occidental Petroleum*, an appeal remains pending.¹³¹ “Several short-comings in the Bush administration approach led the judiciary to refuse to defer to administration views: excessive claims for deference, exaggerated predictions of harm, ill-supported economic claims, and a perceived bias towards corporate interests.”¹³²

Indeed, prior to the Bush administration, it was virtually unheard of for a court to refuse to dismiss a case where the Government articulated foreign policy concerns. The courts did so in at least five ATS cases since 2000.¹³³ The Obama administration would do well to step away from the activism of its predecessor and return to the earlier, more restrained approach to intervention in ATS cases.

Harming U.S. goals

The Bush administration’s attempts to protect corporations from liability for their own complicity in crimes against humanity have not furthered important United States policy goals; in fact, they have hindered such goals. The Bush administration advanced arguments that U.S. foreign policy, specifically the promotion of “active economic engagement by private U.S. corporations as a method of encouraging reform and gaining leverage in the foreign country,” would be impaired by holding corporations liable for aiding and abetting gross human rights abuses.¹³⁴ But the State Department also takes the position that “promoting corporate social responsibility around the world contributes to the U.S. foreign policy goals of democracy promotion, free trade, international development, and human rights.”¹³⁵ The Government thus recognizes that it is not merely economic engagement, but *responsible* economic engagement, that leads to the desired foreign policy objectives.

Corporations without high standards of respect for human rights will not be productive agents for reform; to the contrary, they could send the message that the United States tolerates severe human rights abuses by allowing its own corporations to contribute to such abuses. As Harold Koh has argued, “litigation is not a bad way” to promote high corporate standards of human rights protection;¹³⁶ although other approaches should also be used, litigation against corporations who are complicit in abuses may help to “internalize” norms of conduct into the corporate community and transform these corporations into advocates for clear human rights standards.¹³⁷

Pushing controversies into state courts

The Bush administration has made a number of arguments to limit the scope of the ATS that would have the ultimate result of pushing transnational cases into state courts, rather than federal court where the Founders thought they belonged. The ATS was motivated in part by fears that state courts could not be trusted to give aliens a fair hearing and might come to divergent conclusions about the law of nations.¹³⁸ That motivation would be ill-served by a policy that ordinary tort doctrines, although applicable to common-law claims, do not apply to ATS claims.

Perhaps the most quixotic argument made by the Bush administration was its insistence that the ATS does not apply to claims arising abroad, or to claims by foreign nationals regarding abuse

by their own governments. It suggests that the ATS is very narrow indeed: since only aliens can be plaintiffs, the statute would apply only to claims brought by foreign citizens for abuses suffered in the United States, or perhaps on the high seas. Such an interpretation, however, would simply result in cases like *Filártiga* being litigated in state courts. The courts of New York, for example, know no geographic limitations on their general subject-matter jurisdiction; as the *Filártiga* opinion itself notes, the principle of transitory torts is a long-held and deeply embedded common law principle.¹³⁹

The same holds true for other arguments advanced by the Bush administration, such as its position that complicity liability (including doctrines of aiding and abetting, conspiracy, and vicarious liability) does not apply to ATS claims, or that litigants must attempt to “exhaust” potential remedies available in the country where the abuse occurred before filing an ATS suit. Neither set of limitations applies to ordinary tort cases in state court. In the *Unocal* case, for example, victims of slave labor and other abuses sued a U.S. corporation under the ATS.¹⁴⁰ When the District Court dismissed the case, the plaintiffs re-filed battery and negligence claims in California state court;¹⁴¹ these claims proceeded to trial (and settlement in the midst of trial).¹⁴² If victims cannot sue a defendant for complicity in gross human rights abuses in federal court, and must exhaust remedies before filing suit, they will simply file such suits in state court, where tort doctrines such as aiding and abetting are well-recognized and where no exhaustion is required.

In recent years, Congress has attempted to protect defendants against perceived abuses in state court systems by making federal jurisdiction *more* expansive, not less.¹⁴³ Leaving transnational human rights abuses to state courts would not serve the goal of creating a uniform federal jurisprudence on questions of international law and cases touching foreign affairs. The better position is that standard tort doctrines that are applicable in ordinary state tort suits—such as the doctrine of transitory torts, theories of complicity, and the notion that corporations are liable to the same extent as natural persons—are equally applicable in ATS cases.

A poor reception in the courts

In addition to being bad policy, many of the Bush administration’s arguments to limit the ATS have been repeatedly rejected by the courts.

Since *Filártiga*, no court has ever accepted the argument that the ATS does not apply to acts arising abroad. The Bush administration made this argument to the Supreme Court in *Sosa* (a case where the alleged abuse occurred in Mexico). Although the Court in *Sosa* did not expressly address the Government’s argument regarding extraterritoriality, the day before *Sosa* was decided, the Court handed down its decision in *Rasul v. Bush*. *Rasul* concluded that ATS claims were available to aliens detained by the U.S. military outside the United States, noting that “[t]he courts of the United States have traditionally been open to nonresident aliens.”¹⁴⁴ *Sosa* itself approved the reasoning of both *Filártiga* and the third *Marcos* opinion¹⁴⁵—both of which concerned abuses by foreign officials acting within their own territory, against their own citizens, and wholly outside the United States. Moreover, nowhere in the Court’s discussion of the history of the ATS is there any mention of a limitation on its extraterritorial application,¹⁴⁶ and such a limitation would be fundamentally inconsistent with the Court’s suggestion that a future case might consider the appropriateness of requiring “the exhaustion of any remedies available in

the domestic legal system”—a requirement that would only apply in cases arising outside the United States.¹⁴⁷

Aiding and abetting liability, which has been most frequently litigated, has been accepted by both Courts of Appeals that have considered the issue¹⁴⁸ as well as the vast majority of District Court cases.¹⁴⁹ Only two District Court cases have squarely rejected aiding and abetting liability; one of these was reversed on appeal,¹⁵⁰ and an appeal is pending in the other.¹⁵¹ Neither opinion relied on the arguments made by the Government.

Although fewer cases have considered conspiracy liability, the courts to do so have generally disagreed with the Bush administration’s position, finding that one who conspires in a violation of international law—who agrees that such a violation should be carried out, and takes some step toward its completion—may be held liable for that violation.¹⁵² Only one case has rejected conspiracy liability,¹⁵³ and its analysis may reflect a misunderstanding of the difference between conspiracy as a theory of liability and conspiracy as an inchoate or incomplete offense.¹⁵⁴

Similarly, no court has accepted the Bush administration’s view that theories of vicarious liability, such as agency liability, do not apply to ATS claims in the same way that they apply to other federal claims.¹⁵⁵ And in the single case where the Bush administration advocated application of the government contractor defense to ATS claims, the court found it unnecessary to decide the issue, dismissing the ATS claims on other grounds.¹⁵⁶

On exhaustion of remedies, the courts have been divided. No court has accepted the Bush administration’s position that exhaustion of local remedies is an absolute requirement,¹⁵⁷ and the Eleventh Circuit has expressly rejected any exhaustion requirement.¹⁵⁸ The Ninth Circuit, however, recently adopted a “prudential exhaustion” test for district courts to apply in deciding whether to require exhaustion of local remedies.¹⁵⁹ The divided *en banc* ruling held that an exhaustion requirement may be “discretionary” in the appropriate case, especially for cases lacking a “nexus” to the United States.¹⁶⁰

V. Steps in the right direction?

The Obama administration’s first submissions in ATS cases suggest that the administration may be moving in the right direction, but only tentative steps have been taken thus far. We are aware of only two submissions in ATS cases to which the United States is not a party,¹⁶¹ neither of which addresses any substantive issue regarding interpretation of the ATS itself. Both submissions, however, offer some support to the victims of abuse in the application of case-specific doctrines and defenses, although the administration’s failure to repudiate prior submissions of the Bush administration risks having those courts rely on those submission.

The first of these submissions was in November 2009, in the *South African Apartheid* litigation before the Second Circuit. The brief studiously avoids taking any position on any of the legal issues discussed in this paper. It does address the case-specific concerns, but only in a roundabout way, by emphasizing that although the earlier Statement of Interest highlighted foreign policy concerns, “it did not ask the district court to dismiss the case.”¹⁶² The brief therefore backs away from the Statement of Interest, but does not formally withdraw that

statement. Moreover, it does nothing to counter the Bush administration's previously-submitted legal arguments regarding the ATS; the Obama administration has yet to make any submissions taking any position on the legal issues relating to the ATS.

The next submission was the Government's *amicus* brief to the Supreme Court in *Samantar v. Yousuf*.¹⁶³ Again, although *Samantar* is an ATS case, the brief addresses only the case-specific question of the defendant's claim of immunity as a former foreign government official.¹⁶⁴ The *amicus* brief takes the position that the district court was wrong to dismiss the case on the basis that the Foreign Sovereign Immunities Act (FSIA) provided immunity to an individual official.¹⁶⁵ While the brief does argue that suggestions of immunity are primarily within the province of the Executive, leaving open the question of whether the Executive could immunize a foreign official for gross human rights abuses, it rejects the absolute FSIA immunity claimed by the defendant.¹⁶⁶

Most recently, the Government declined to make a new submission in the *Rio Tinto* case before the Ninth Circuit.¹⁶⁷ The decision not to intervene in a case where the court had not requested the views of the United States may signal a return to pre-Bush administration practices; however, as in *Apartheid*, the Bush-era submissions in *Rio Tinto* have yet to be withdrawn, leaving open the possibility that the court will rely on those submissions.

VI. On the horizon: corporate liability

One issue on which the Bush administration never weighed in, but which is being considered by several courts, is the basic question of whether corporations can be held liable under the ATS. Although every court to consider the question has found that corporations can be held liable,¹⁶⁸ at least one judge has expressed skepticism,¹⁶⁹ and the issue is increasingly raised by defendants (and, in one case, by the Second Circuit itself¹⁷⁰).

While the Government has yet to take a position on corporate liability, the considerations discussed above apply with equal force to this issue. Excluding corporations from the reach of the ATS would simply move suits charging corporate complicity from the federal courts to the state courts. Diminishing corporations' responsibility for their own participation in gross abuses would lessen the effectiveness of U.S. economic engagement as a tool for promoting reform with repressive regimes. Moreover, deeming corporations immune from liability would be contrary to the fundamental principles of U.S. jurisprudence, in which corporations have long been held liable to the same extent as natural persons.¹⁷¹

VII. Recommendations

Turning back the radicalism of the Bush administration in ATS cases requires several simple steps. These measures will restore the credibility of the Government and allow the Obama administration to advance its policy goals more effectively:

- **Withdraw current submissions:** The Government should immediately make it clear in all active cases that, pending review, the Statements of Interest and *amicus* briefs submitted by the Bush administration do not reflect the current position of the United States.

- **Review Statements of Interest on a case-by-case basis:** Where cases are still pending, the administration should conduct a review of each case in which the Government has previously submitted a Statement of Interest, to determine whether the concerns articulated are still valid and accurately reflect the interests of the United States.
- **Refrain from unsolicited legal advice:** Prior to the Bush administration, the Government made no unsolicited submissions except in one case where the United States was also a defendant. In order to rebuild the authority of the Government, the current administration should return to this practice, and generally let the courts do their job.
- **Adopt positions that advance U.S. policy goals:** Where the United States does take a position in ATS cases, it should ensure that its positions will advance the goals of U.S. policy, and are consistent with the overarching policy of support for human rights. The Government should advocate that tort doctrines applicable in ordinary common law cases also apply in ATS cases, in order to ensure that cases touching upon foreign affairs remain in the federal courts, and should also recognize that a liability regime for corporate complicity in human rights abuses makes multinationals into more effective agents for positive economic engagement, rather than assisting the very abuses that U.S. policy seeks to prevent. In particular, the Obama administration should argue that the ATS applies to acts arising abroad, that tort doctrines of aiding and abetting liability, conspiracy liability, and vicarious liability apply to ATS claims, that corporations may be held liable to the same extent as natural persons, and that exhaustion of local remedies is not required.

ENDNOTES

¹ This paper generally excludes the Holocaust cases from its discussion because both the Clinton and Bush administrations took a unique approach to those cases, actively promoting resolution through “negotiated resolutions of unresolved claims,” such as the German Foundation and the Austrian Fund. U.S. Dep’t of State, Nazi-Era Claims, at <http://www.state.gov/p/eur/rt/hlcst/c11376.htm>.

² Harold H. Koh, *Separating Myth From Reality About Corporate Responsibility Litigation*, 7 J. Int’l Econ 263, 271 (2004).

³ 28 U.S.C. § 1350.

⁴ William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 Hastings Int’l & Comp. L. Rev. 221, 234–37 (1996).

⁵ 630 F.2d 876 (2d Cir. 1980).

⁶ E.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide, war crimes, crimes against humanity, state-sponsored extrajudicial killing); *Hilao v. Estate of Marcos (Marcos IV)*, 103 F.3d 767 (9th Cir. 1996) (torture, state-sponsored extrajudicial killing, forced disappearance); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (crimes against humanity); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999) (forced labor), *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (torture, state-sponsored extrajudicial killing, arbitrary detention).

⁷ 726 F.2d 774 (D.C. Cir. 1984).

⁸ *Id.* at 775 (Edwards, J., concurring).

⁹ *Id.* at 781 (Bork, J., concurring).

¹⁰ *Id.* at 823 (Robb, J., concurring) (“But both Judges Bork and Edwards fail to reflect on the inherent inability of federal courts to deal with cases such as this one. It seems to me that the political question doctrine controls. This case is nonjusticiable.”)

¹¹ See Torture Victim Protection Act, 28 U.S.C. § 1350 note.

¹² *Marcos IV*, 103 F.3d at 772 (describing jury trial returning class action jury verdict against Marcos estate for ATS claims).

¹³ *Karadzic*, 70 F.3d at 242 (“Appellants’ allegations . . . clearly state a violation of the international law norm proscribing genocide.”).

¹⁴ *Doe I v. Unocal Corp. (Unocal IV)*, 395 F.3d 932 (9th Cir. 2002), *vacated by, reh’g en banc granted by* 395 F.3d 978 (9th Cir. 2003).

¹⁵ 542 U.S. 692, 724 (2004)

¹⁶ *Id.* at 725.

¹⁷ *Id.* at 732.

¹⁸ *Id.* at 732–33.

¹⁹ *Id.* at 738.

²⁰ *Id.* at 733 n.21.

²¹ *E.g. Unocal IV*, 395 F.3d at 947; *Bowoto v. Chevron Corp.*, No. 99-cv-02506, Dkt. 2251 at 33 (N.D. Cal. Nov. 25, 2008) (jury instructions).

²² *Doe v. Drummond Co.*, No. 09-CV-01041, Dkt. 30 at 33 (N.D. Ala. Nov. 9, 2009) (recognizing conspiracy but dismissing claims without prejudice); *Bowoto*, Dkt. 2251 at 34; *Rodriguez Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (bench judgment against Curacao company for conspiring with Cuba to enslave workers).

²³ *Bowoto v. Chevron Corp.*, No. 99-cv-02506, Dkt. 2251 at 29–32 (N.D. Cal.); *In re South African Apartheid Litigation (Apartheid IV)*, 617 F. Supp. 2d 228, 270, 272–273, 274–276 (S.D.N.Y. 2009). *See also Chowdhury v. Worldtel Bangl. Holding, Ltd.*, 588 F. Supp. 2d 375, 387 (E.D.N.Y. 2008) (noting that defendants could be held liable as principals for the acts of agents that violate customary international law); *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, No. 08 Civ. 1659, Dkt. 52 (E.D.N.Y. Sept. 16, 2009) (in denying defendants’ motion for judgment as a matter of law, finding that evidence on ATS torture claim was “sufficient for agency or conspiracy”).

²⁴ As one court recently put it, “It is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability.” *Apartheid IV*, 617 F. Supp. 2d at 257.

²⁵ Beth Stephens, *Corporate Liability for Grave Breaches of International Law: Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 Brooklyn J. Int’l L. 773, 814 (2008) (noting that, of 85 ATS cases filed against corporations since 1960, at least 57 have been dismissed, and 48 of those dismissals are final).

²⁶ The jury in *Bowoto* returned a verdict for the defendants on all claims. *See* Karen Gullo, *Chevron Wins Verdict Against Nigerian Protesters Over Killings*, Bloomberg.com, Dec. 2, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601116&sid=aOy1KI8BBIsA&refer=africa>. The defendants prevailed on all claims at trial in *Drummond*, as well. *See* Associated Press, *Labor undeterred by Drummond verdict*, July 27, 2007, available at <http://www.abcmoney.co.uk/news/272007110323.htm>.

²⁷ *Jama v. Esmor Corr. Servs.*, Civ. No. 97-3093, 2008 U.S. Dist. LEXIS 20530, at *5 (D.N.J. Mar. 17, 2008) (describing mixed jury verdict).

²⁸ *Curacao Drydock*, 584 F. Supp. 2d at 1357.

²⁹ The jury returned a verdict against defendants on ATS claims in *Chowdhury v. Worldtel Bangl. Holding, Ltd.*, No. 08 Civ. 1659, Dkt. 47 (E.D.N.Y. Aug. 4, 2009).

³⁰ A settlement was reached in the *Unocal* litigation in 2005. The parties also agreed to settle all claims in the *Wiwa* litigation – *Wiwa v. Royal Dutch Petroleum Corp.*, No. 96 Civ. 8386 (S.D.N.Y.), *Wiwa v. Anderson*, No. 01 Civ. 1909 (S.D.N.Y.), and *Wiwa v. Shell Petroleum Dev. Co. of Nigeria Ltd.*, No. 08-1803-cv (2d Cir.). Other cases that have settled include those against Xe Services (formerly Blackwater) settled in early 2010. *See* Order of Jan. 6, 2010, *In re Xe Servs. Alien Tort Litig.*, Nos. 1:09cv615 *et al.* (E.D. Va.). For information on more ATS settlements, *see* Stephens, *supra* note 25, at 816.

³¹ *See, e.g.*, Harold H. Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2367 (1991) (“*Filartiga* convincingly rebutted the comity, separation-of-powers, and incompetence objections to domestic judicial decision of human rights cases.”); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int’l L. 461, 493 (1989) (noting that “expanding [the ATS] to cover cases against official torturers is indeed consistent with its letter and its spirit”); Anthony D’Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork’s Concept of the Law of Nations is Seriously Mistaken*, 79 Am. J. Int’l L. 92 (1985) (criticizing Judge Bork’s opinion in *Tel-Oren*); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 398, 407 (1985) (praising *Filartiga*’s “eloquent” and “sophisticated approach”).

³² The Clinton administration made submissions supportive of negotiated resolutions in *In re Nazi Era Cases Against German Defendants Litig.*, MDL No. 1337 (D.N.J.), and in *Anderman v. Austria*, No. CV 01-01769 (C.D. Cal.), one of the constituent cases in the *Nazi Era Cases* multidistrict litigation.

³³ Memorandum for the United States as Amicus Curiae, *Filartiga*, 630 F.2d 876 (2d Cir. 1980) (No.79-6090).

³⁴ *Id.* at 3, 20.

³⁵ *Filártiga*, 630 F.2d at 884.

³⁶ Brief for the United States as Amicus Curiae at 12, *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985) (No. 83-2052).

³⁷ *Tel-Oren v. Libyan Arab Republic*, 470 U.S. 1003 (1985).

³⁸ *See In re Estate of Marcos Human Rights Litig. (Marcos II)*, 978 F.2d 493, 496 n.3 (9th Cir. 1992) (discussing case history).

³⁹ Brief for the United States of America as Amicus Curiae at 3, 5, *Trajano v. Marcos (Marcos I)*, 878 F.2d 1438 (9th Cir. 1989) (Nos. 86-2448, 86-15039, 86-2449, 86-2496, 87-1706, 87-1707).

⁴⁰ U.S. Amicus Brief in *Marcos I*, *supra* note 39, at 32.

⁴¹ *Id.* at 6.

⁴² *See Marcos I*, 878 F.2d 1438; *see also Marcos II*, 978 F.2d at 496 n.3 (discussing later case history).

⁴³ *Marcos II*, 978 F.3d at 500.

⁴⁴ 542 U.S. at 748 (quoting *In re Estate of Marcos Litigation (Marcos III)*, 25 F.3d 1467, 1475 (9th Cir 1994) for “specific, universal, and obligatory” standard).

⁴⁵ Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Doc. 465, 466 (Mar. 12, 1992).

⁴⁶ Statement of Interest of the United States, *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

⁴⁷ *Id.* at 1, 19.

⁴⁸ *Id.* at 5.

⁴⁹ *Id.* at 11.

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 18.

⁵² *Karadzic*, 70 F.3d at 242-43.

⁵³ This was not the first case involving an organizational defendant, however. In *Tel-Oren*, the PLO was a defendant; neither the judges of the D.C. Circuit nor the Government in its *amicus* brief expressed any view that the PLO’s status as a legal person had any relevance to the case. *See* U.S. Amicus Brief in *Tel-Oren*, *supra* note 36.

⁵⁴ Letter of Michael J. Matheson, Acting Legal Adviser, Dep’t of State, to Frank W. Hunger, Assistant Attorney-General, Civil Div., July 8, 1997, *submitted as Ex. A to* Statement of Interest of the United States, *Nat’l Coalition Gov’t of the Union of Burma v. Unocal, Inc. (Unocal II)*, 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112), *reprinted in Unocal II*, 176 F.R.D. at 362.

⁵⁵ *Id.*

⁵⁶ *Unocal II*, 176 F.R.D. at 352, 354.

⁵⁷ *See Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001) (factual background of the case).

⁵⁸ Brief for the United States as Amicus Curiae in Support of Reversal of the Judgment Against Defendant-Appellant Francisco Sosa, *Alvarez-Machain*, 266 F.3d 1045 (9th Cir. 2001).

⁵⁹ *See Alvarez-Machain*, 266 F.3d at 1049 (district court substituted the United States for the DEA agents).

⁶⁰ *Id.* at 1050, 1052.

⁶¹ Like the Clinton administration, the Bush administration made several submissions in cases arising out of the Holocaust, and its approach to these claims appears not to have differed significantly from that of the prior administration. *Compare* Statement of Interest of the United States, *In re Nazi Era Cases*, 129 F. Supp. 2d 370 (D.N.J. 2001) (MDL No. 1337) (Clinton administration submission arguing for dismissal of individual cases in deference to special fund created by German government) *with* Statement of Interest of the United States, Feb. 23, 2001, *Bodner v. Banque Paribas*, Nos. 97 Civ. 7433, 98 Civ. 7851 (E.D.N.Y.) (Bush administration submission making same argument for French government commission) *and* Letter Brief of the United States of America as Amicus Curiae, *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2d Cir. 2006) (Nos. 02-9361, 02-3087) (Bush administration submission making same argument for Austrian government fund).

⁶² The Bush administration had previously filed Statements of Interest in several ATS cases in 2001 and 2002, but these addressed only case-specific concerns, not the interpretation of the ATS itself.

⁶³ Brief for the United States of America, as Amicus Curiae, *Unocal IV*, 395 F.3d 932 (9th Cir. 2004) (Nos. 00-56603, 00-56628).

⁶⁴ *Marcos III*, 25 F.3d at 1474-76 (finding that plaintiffs may assert a cause of action under the ATS for violations of international law); *Marcos II*, 978 F.2d at 501 (concluding that ATS claims may be brought for official conduct outside the United States).

- ⁶⁵ Supplemental Statement of Interest of the United States of America, *Doe I v. Exxon Mobil Corp. (Exxon Mobil I)*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357).
- ⁶⁶ See, e.g., Marc Lifsher, *Unocal Settles Human Rights Lawsuit over Alleged Abuses at Myanmar Pipeline*, Los Angeles Times (Mar. 22, 2005).
- ⁶⁷ *Exxon Mobil I*, 393 F. Supp. 2d at 24–27.
- ⁶⁸ Brief for the United States Supporting Petitioner, *Sosa*, 542 U.S. 692 (No. 03-339); Reply Brief for the United States as Respondent Supporting Petitioner, *Sosa*, 542 U.S. 692 (No. 03-339).
- ⁶⁹ *Sosa*, 542 U.S. at 719.
- ⁷⁰ *Id.* at 724.
- ⁷¹ *Id.*
- ⁷² *Id.* at 757.
- ⁷³ E.g., Brief of the United States as *Amicus Curiae* in Support of Affirmance at 5, *Corrie v. Caterpillar Inc.*, 503 F.3d 974 (9th Cir. 2007) (No. 05-36210); Brief of the United States as *Amicus Curiae* in Support of Affirmance at 5, *Khulumani v. Barclay Nat'l Bank Ltd. (Apartheid II)*, 509 F.3d 148 (2d Cir. 2007) (Nos. 05-2141, 05-2326).
- ⁷⁴ Supplemental Brief for the United States of America as *Amicus Curiae* at 7–26, *Doe I v. Unocal*, Nos. 00-56603, 00-56628 (9th Cir. Aug. 25, 2004).
- ⁷⁵ E.g., U.S. Amicus Brief in *Apartheid II*, *supra* note 73, at 9–27; Brief of the United States as *Amicus Curiae* in Support of Affirmance at 20–28, *Mujica v. Occidental Petroleum Corp. (Mujica II)*, 564 F.3d 1190, (9th Cir. 2009) (Nos. 05-56175, 05-56178, 05-56056); Letter of William H. Taft IV, Legal Adviser, Dep't of State, to Daniel Meron, Principal Deputy Assistant Attorney General, Civil Div. at 3, Feb. 11, 2005, *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman II)*, No. 01 Civ. 9882, 2005 U.S. Dist. LEXIS 18399 (S.D.N.Y. Aug. 31, 2005) (referring to argument from U.S. Statement of Interest in *Unocal II* on aiding and abetting).
- ⁷⁶ See Brief for the United States as *Amicus Curiae* at 12–28, *Presbyterian Church of Sudan v. Talisman Energy Inc. (Talisman IV)*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016).
- ⁷⁷ Brief for the United States as *Amicus Curiae* Supporting Panel Rehearing or Hearing En Banc at 22–26, *Sarei v. Rio Tinto PLC (Sarei II)*, 487 F.3d 1193 (9th Cir. 2007) (Nos. 02-56256, 02-56390).
- ⁷⁸ *Id.* at 26–30.
- ⁷⁹ 487 U.S. 500, 512 (1988).
- ⁸⁰ Brief of the United States as *Amicus Curiae* in Support of Defendants-Appellees at 37–40, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008) (No. 05-1953).
- ⁸¹ U.S. Amicus Brief in *Corrie*, *supra* note 73, at 4.
- ⁸² Letter of William H. Taft, IV, Legal Advisor, Dep't of State, to Hon. Louis F. Oberdorfer, Judge, United States District Court for the District of Columbia, at 3–5, Jul. 29, 2002, *Exxon Mobil I*, 393 F. Supp. 2d 20 (No. 01-1357); Declaration of Rand Beers, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on United States National Security and Foreign Policy Matters at 3–4, *Arias v. Dyncorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1908).
- ⁸³ Letter of William H. Taft, IV, Legal Adviser, Dep't of State, to Daniel Meron, Principal Deputy Assistant Attorney-General, Civil Div., at 2, Dec. 23, 2004, *Mujica v. Occidental Petroleum Corp. (Mujica I)*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (No. 03-2860); Letter of William H. Taft IV, Legal Adviser, Dep't of State, to Shannen W. Coffin, Deputy Assistant Attorney General, Civil Div., Oct. 27, 2003, *submitted as Ex. B to Statement of Interest of the United States*, Oct. 30, 2003, *In re South African Apartheid Litigation (Apartheid I)*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (No. 02 MDL 1499).
- ⁸⁴ Taft Letter in *Exxon Mobil I*, *supra* note 82, at 3; Beers Letter in *Dyncorp*, *supra* note 82, at 7–8.
- ⁸⁵ Taft Letter in *Mujica I*, *supra* note 83, at 2; Beers Letter in *Dyncorp*, *supra* note 82, at 6–7, 9–10.
- ⁸⁶ Taft Letter in *Mujica I*, *supra* note 83, at 2; Taft Letter in *ExxonMobil*, *supra* note 82, at 5.
- ⁸⁷ Taft Letter in *Talisman II*, *supra* note 75, at 2–3; Taft Letter in *Apartheid*, *supra* note 83.
- ⁸⁸ U.S. Statement of Interest in *Karadzic*, *supra* note 46, at 3.
- ⁸⁹ Matheson Letter in *Unocal II*, *supra* note 54, at
- ⁹⁰ U.S. Amicus Brief in *Marcos I*, *supra* note 39, at 33, 39.
- ⁹¹ No. 00-cv-11695 (C.D. Cal.); Nos. 02-56256, 02-56390, 09-56381 (9th Cir.).
- ⁹² Letter of William H. Taft IV, Legal Adviser, Dep't of State, to Robert McCallum, Jr., Assistant Attorney General, Oct. 31, 2001, *Sarei v. Rio Tinto PLC (Sarei I)*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (No. 00-cv-11695).
- ⁹³ *Sarei I*, 221 F. Supp. 2d at 1130-63.
- ⁹⁴ *Id.* at 1183-99.
- ⁹⁵ *Sarei v. Rio Tinto, PLC (Sarei II)*, 487 F.3d 1193, 1208-10 (9th Cir. 2007).

⁹⁶ Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 26-30, *Sarei v. Rio Tinto, PLC (Sarei III)*, 550 F.3d 822 (9th Cir. 2008) (en banc) (Nos. 02-56256, 02-56390).

⁹⁷ *Id.* at 3 n.1 (expressing no views on portions of the panel's opinion not addressed, including the discussion of case-specific foreign policy concerns).

⁹⁸ *Sarei III*, 550 F.3d at 832-33.

⁹⁹ *Sarei I*, 650 F. Supp. 2d 1004, 1032 (C.D. Cal. 2009).

¹⁰⁰ See Order of Sept. 29, 2009, *Sarei v. Rio Tinto, PLC*, Nos. 02-56256 *et al.* (9th Cir.).

¹⁰¹ See Letter of Lewis S. Yelin, Attorney, Appellate Staff, Civil Div., to Molly C. Dwyer, Clerk of Court of the U.S. Court of Appeals for the Ninth Circuit, Mar. 29, 2010, *Sarei v. Rio Tinto PLC*, Nos. 09-56381 *et al.* (9th Cir.) (en banc).

¹⁰² No. 01 Civ. 9882 (S.D.N.Y.); No. 07-0016-cv (2d Cir.).

¹⁰³ Taft Letter in *Talisman II*, *supra* note 75.

¹⁰⁴ *Talisman II*, 2005 U.S. Dist. LEXIS 18399 at *15-30.

¹⁰⁵ *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman III)*, 453 F. Supp. 2d 633 (S.D.N.Y. 2006).

¹⁰⁶ *Talisman IV*, 582 F.3d 244 (2d Cir. 2009)

¹⁰⁷ Nos. 01-1357, 07-1022 (D.D.C.); Nos. 09-7125, 09-7127, 09-7134, 09-7135 (D.C. Cir.).

¹⁰⁸ Taft Letter in *Exxon Mobil I*, *supra* note 82.

¹⁰⁹ *Exxon Mobil I*, 393 F. Supp. 2d at 28-30.

¹¹⁰ *Id.* at 29.

¹¹¹ *Doe VIII v. Exxon Mobil Corp. (Exxon Mobil II)*, 658 F. Supp. 2d 131, 135 (D.D.C. 2009).

¹¹² Appeal docketed, No. 09-7125 (D.C. Cir. Oct. 22, 2009).

¹¹³ No. CV 03-2860 (C.D. Cal.); Nos. 05-56056, 05-56175, 05-56178 (9th Cir.).

¹¹⁴ Taft Letter in *Mujica I*, *supra* note 83.

¹¹⁵ *Mujica I*, 381 F. Supp. 2d at 1185-88, 1191-95.

¹¹⁶ US Amicus Brief in *Mujica II*, *supra* note 75.

¹¹⁷ *Mujica II*, 564 F.3d 1190.

¹¹⁸ Ruling on Limited Remand as to the Prudential Exhaustion Issue at 13, *Mujica v. Occidental Petroleum Corp. (Mujica III)*, No. CV 03-2860 (Mar. 8, 2010).

¹¹⁹ Nos. 02 MDL 1499, 02 Civ. 4712, 02 Civ. 6218, 03 Civ. 1024, 03 Civ. 4524 (S.D.N.Y.); Nos. 09-2778-cv, 09-2779-cv, 09-2780-cv, 09-2781-cv, 09-2783-cv, 09-2785-cv, 09-2787-cv, 09-2792-cv, 09-2801-cv, 09-3037-cv (2d Cir.).

¹²⁰ Taft Letter in *Apartheid I*, *supra* note 83.

¹²¹ *Apartheid I*, 346 F. Supp. 2d at 549-51.

¹²² Brief of the United States of America as Amicus Curiae, *Apartheid II*, 504 F.3d 254 (2d Cir. 2007) (Nos. 05-2141-cv, 05-2326-cv).

¹²³ *Apartheid II*, 504 F.3d at 260 (per curiam).

¹²⁴ Brief of the United States as Amicus Curiae in Support of Petitioners, *Am. Isuzu Motors, Inc., v. Ntsebeza (Apartheid III)*, 128 S. Ct. 2424, 171 L. Ed. 2d 225 (2008).

¹²⁵ *Apartheid III*, 128 S. Ct. 2424 (affirming as if by an equally divided court pursuant to 28 U.S.C. § 2109).

¹²⁶ See *In re South African Apartheid Litig. (Apartheid IV)*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

¹²⁷ Brief of the United States as Amicus Curiae Supporting Appellees, *Balintulo v. Daimler AG*, Nos. 09-2778-cv *et al.* (2d Cir. Nov. 30, 2009).

¹²⁸ See *id.* at 6-7.

¹²⁹ Harold Hongju Koh, *Wrong on Rights: The Bush administration would exempt US corporations from responsibility for their abusive behavior abroad*, Yale Global Online, July 18, 2003, <http://yaleglobal.yale.edu/content/wrong-rights>.

¹³⁰ Stephens, *supra* note 25, at 794.

¹³¹ *Id.* at 795

¹³² *Id.* at 802.

¹³³ See *id.* at 794-800 (discussing *Arias v. DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007); *Exxon Mobil I*, 393 F. Supp. 2d 20; *Apartheid II*, 504 F.3d at 260 (per curiam); *Talisman III*, 453 F. Supp. 2d 633; *Sarei II*, 487 F.3d 1193, *reh'g granted*, 499 F.3d 923).

¹³⁴ U.S. Amicus Brief in *Mujica II*, *supra* note 75, at 23.

¹³⁵ U.S. Dep't of State, Labor and Corporate Social Responsibility, at <http://www.state.gov/g/drl/lbr/> (last visited Mar. 26, 2010).

¹³⁶ Koh, *supra* note 2, at 272; *see also generally* Richard L. Herz, *The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 Harv. Hum. Rts. J. 207 (2008).

¹³⁷ *Id.* at 273-74.

¹³⁸ Dodge, *supra* note 4, at 235–36.

¹³⁹ *Filártiga*, 630 F.2d at 885.

¹⁴⁰ *See Doe I v. Unocal Corp. (Unocal I)*, 938 F. Supp. 880, 883-85 (C.D. Cal. 1997).

¹⁴¹ *See Doe I v. Unocal Corp. (Unocal III)*, 110 F. Supp. 2d 1294, 1311-12 (C.D. Cal. 2000) (dismissing ATS claims and declining to continue to exercise jurisdiction over state law claims); *see also* Complaint, *Doe I v. Unocal Corp.*, No. BC 237980 (filed Oct 2, 2000, L.A. Super. Ct.) (re-filing the same claims).

¹⁴² The Phase I trial of *Doe v. Unocal* in the Superior Court of California for the County of Los Angeles, which concerned corporate alter ego issues, concluded on January 21, 2004. *See* Statement of Decision Regarding the Phase I Trial at 1, *Doe I v. Unocal Corp.*, No. BC 237980 (L.A. Super. Ct. Apr. 14, 2004). The court subsequently denied judgment, allowing the case to proceed to the Phase II trial. *See* Ruling on Unocal Defendants' Motion for Judgment at 1, *Doe v. Unocal Corp.*, No. BC 237980 (L.A. Super. Ct. Sept. 14, 2004). A trial date had been set for June 2005 when the case settled in March 2005. *See* EarthRights Int'l, *Doe v. Unocal Case History*, at <http://www.earthrights.org/legal/doe-v-unocal-case-history>.

¹⁴³ *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

¹⁴⁴ *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

¹⁴⁵ *Sosa*, 542 U.S. at 732.

¹⁴⁶ *Id.* at 712-24.

¹⁴⁷ *Id.* at 733 n.21.

¹⁴⁸ *Apartheid II*, 504 F.3d at 260 (per curiam); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-58 (11th Cir. 2005).

¹⁴⁹ *See, e.g.*, *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 490-91 (D. Md. 2009); *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 286-89 (E.D.N.Y. 2007); *Bowoto v. Chevron Corp.*, No. 99-02506, 2006 U.S. Dist. LEXIS 63209, *13-19 (N.D. Cal. Aug. 22, 2006), *reconsidered in other parts in unpublished order*, Docket No. 1636 (Aug. 14, 2007); *In re "Agent Orange" Product Liability Litig.*, 373 F. Supp. 2d 7, 52-54 (E.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003); *Talisman I*, 244 F. Supp. 2d at 320-21; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1355-56 (N.D. Ga. 2002); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 128 (E.D.N.Y. 2000).

¹⁵⁰ *See Apartheid I*, 346 F. Supp. 2d at 549-51, *rev'd by Apartheid II*, 504 F.3d at 260 (per curiam).

¹⁵¹ *See Exxon Mobil I*, 393 F. Supp. at 24 (D.D.C. 2005), *appeal docketed*, No. 09-7125 (D.C. Cir. Oct. 22, 2009).

¹⁵² *See, e.g.*, *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Lizarbe*, 642 F. Supp. 2d at 490; *In re Terrorist Attacks on September 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); *Burnett*, 274 F. Supp. 2d at 100; *Talisman I*, 244 F. Supp. 2d at 320-21 (S.D.N.Y. 2003); *see also Marcos IV*, 103 F.3d at 776 (noting that jury instructions included conspiracy liability).

¹⁵³ *See Apartheid IV*, 617 F. Supp. 2d at 263. The Second Circuit also questioned conspiracy liability in *Talisman IV*, but did not rule on the viability of this theory under the ATS because it found that the plaintiffs had not met the elements regardless. *See* 582 F.3d at 260.

¹⁵⁴ The *Apartheid* decision, 617 F. Supp. 2d at 263, relies on the Supreme Court's rejection of conspiracy as an international crime in *Hamdan v. Rumsfeld*, 548 U.S. 557, 610-12 (2006) (plurality op.), but *Hamdan* itself distinguishes between conspiracy as "a crime on its own," which is not recognized by international law, and conspiracy "as a species of liability for the substantive offense," which has been adopted by international tribunals. *Id.* at 611 n.40. Indeed, conspiracy as its own offense is never recognized in civil cases: "The crime of conspiracy may be inchoate, but there is no corollary inchoate tort of conspiracy. In civil cases conspiracy is a theory of liability available only when a completed tort exists." *In re: Ross Securities Litig.*, 1994 U.S. Dist. LEXIS 21263, *12, Fed. Sec. L. Rep. (CCH) P98,363 (N.D. Cal. 1994).

¹⁵⁵ *See, e.g.*, *Apartheid IV*, 617 F. Supp. 2d at 271-73; *Bowoto v. ChevronTexaco Corp.*, 312 F. Supp. 2d 1229, 1238-40 (N.D. Cal. 2004); *Chowdhury*, 588 F. Supp. 2d at 387 (if a private party makes a state actor his agent for the purpose of violating claims cognizable under the ATS, "he should be liable as a principal for the violation").

¹⁵⁶ *See Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 123 (2d Cir. 2008).

¹⁵⁷ U.S. Amicus Brief in *Sarei III*, *supra* note 96, at 26–30.

¹⁵⁸ *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005).

¹⁵⁹ *Sarei III*, 550 F.3d at 832 & n.10 (McKeown, J., concurring).

¹⁶⁰ *Id.* at 824–25.

¹⁶¹ In June 2009, the United States petitioned for rehearing en banc in the ATS case *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir.), after a panel opinion rejected the Government’s assertion that the case was barred by the state secrets doctrine. *See* 563 F.3d 992 (9th Cir. 2009). The United States formally intervened in *Mohamed* before the district court, however, such that the United States is now a party to the litigation. Nonetheless, like the other submissions discussed, the U.S. submission in *Mohamed* addressed only a case-specific issue, state secrets, rather than any substantive issue under the ATS; en banc rehearing has been granted. *See* United States Petition for Rehearing or Rehearing En Banc, *Mohamed v. Jeppesen, Inc.*, 586 F.3d 1108 (9th Cir. 2009) (No. 08-15693).

¹⁶² U.S. Amicus Brief in *Balintulo*, *supra* note 127, at 10.

¹⁶³ *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, 2008 U.S. Briefs 1555 (No. 08-1555).

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 13-27.

¹⁶⁶ *Id.* at 8-13. The brief suggests that a foreign official would not enjoy immunity for acts taken “outside his official capacity,” *id.* at 13, but does not indicate whether the Government believes that abuses such as torture necessarily fall outside the bounds of official capacity, as some courts have held. *E.g.*, *Marcos III*, 25 F.3d at 1472 & n.8.

¹⁶⁷ *See* Yelin Letter in *Rio Tinto*, *supra* note 101.

¹⁶⁸ *See, e.g.*, *Apartheid IV*, 617 F. Supp. 2d at 254–55; *Bowoto v. Chevron Corp.*, No. 99-02506, 2006 U.S. Dist. LEXIS 63209, *37-38 (N.D. Cal. Aug. 22, 2006), *reconsidered in other parts in unpublished order*, Dkt. 1636 (Aug. 14, 2007); *Agent Orange*, 373 F. Supp. 2d at 58–59; *Talisman I*, 244 F. Supp. 2d at 308–19 (S.D.N.Y. 2003).

¹⁶⁹ *Apartheid II*, 504 F.3d at 321–26 (Korman, J., dissenting).

¹⁷⁰ Additional Briefing Order, *Balintulo v. Daimler AG*, Nos. 09-2778-cv *et al.* (2d Cir. Dec. 4, 2009).

¹⁷¹ *E.g.*, 1 Blackstone, *Commentaries on the Laws of England* at 463 (1765) (among the capacities of a corporation is “[t]o sue and be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may”); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 667 (1819) (“An aggregate corporation at common law . . . possesses the capacity . . . of suing and being sued in all things touching its corporate rights and duties.”) (op. of Story, J.); *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (noting that by the 19th century “the common understanding” was “that corporations were ‘persons’ in the general enjoyment of the capacity to sue and be sued”).