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I. INTRODUCTION

In *Khulumani v. Barclay National Bank Ltd.*, a coalition of South African plaintiffs' groups sued dozens of major U.S. and foreign multinational corporations under the Alien Tort Statute.[1] The plaintiffs alleged that the corporations, including household names such as GM, Citigroup, Royal Dutch Shell and BP, had aided and abetted the South African government in its maintenance of the apartheid regime.[2] While historically many ATS cases focused on governments or individual officials,[3] *Khulumani* is part of a growing trend of suits against corporations.[4] This trend raises issues of accomplice liability[5] because while few companies directly commit acts that amount to international crimes, there is a significant risk that companies will face allegations of "complicity" in such crimes.[6]

Although the Supreme Court has implied that international law should provide the standard for liability in ATS cases where non-state actors directly

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1. 504 F.3d 254 (2d Cir. 2007) (per curiam).

2. *Id.*

3. *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

4. Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271, 276 (2009).

5. This paper will use the term "accomplice liability" as shorthand for the various forms of third-party liability including aiding and abetting.

6. U.N. Human Rights Council, Report of the Special Representative of the Secretary-General, *Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts*, ¶ 30, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) (*prepared by* John Ruggie), *available at* http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf.

violate the law of nations,[7] the source of law potentially applicable to accomplice or "complicity" liability is less certain. The issue is important and centrally relevant in a growing number of cases. Yet few courts have considered the issue in sufficient detail;[8] indeed, the issue remains unresolved in most circuits.

This article will evaluate the reasoning and persuasiveness of the two competing theories on the choice of law for accomplice liability: first, the minority opinion that courts should analyze accomplice liability under federal common law, and second, the majority opinion that courts should derive accomplice liability standards from international law. After this descriptive analysis of the positions, this article will argue that the latter position is correct.

The trend towards ATS suits against accomplice corporations stems from the substantive and procedural rules of ATS jurisprudence, which have left many plaintiffs mired in legal dilemmas. Governments, or governmental officials, are often the main perpetrators of violations against the laws of nations. However, plaintiffs have difficulty suing such actors in their own country, especially when the government which committed such abuses remains in power. The ATS, with the ability to bring suits in U.S. courts, overcomes some of this difficulty, but raises new problems. For example, the doctrine of sovereign immunity restricts plaintiffs' ability to bring successful actions against foreign governments. Meanwhile, suits against government officials might fail for lack of personal jurisdiction, and even if plaintiffs' win, the official may have few resources on which a court can attach damages.

ATS suits against corporations offer a potential solution to these legal barriers because corporations, unlike foreign governments, cannot necessarily rely upon sovereign immunity. Furthermore, corporations, unlike individual government officials, more likely have assets and presence inside the United States.[9] To adequately and accurately resolve ATS cases, courts and counsel should understand the choice of law issues regarding the ATS and accomplice liability and whether international or national law applies.

II.
THE SEARCH FOR RULES OF DECISION: HOW DOMESTIC COURTS IMPLEMENT SUITS ALLEGING INTERNATIONAL LAW VIOLATIONS.

The Supreme Court's decision in *Sosa* read the ATS to rely upon the established principle that while domestic courts can implement international law, such courts resolve international law violations within the framework of domestic legal procedures because international law does not prescribe the

7. Sosa v. Alvarez-Machain, 542 U.S. 692, 707 (2004).

8. *But see, e.g., Khulumani,* 504 F.3d 254 (2007); *John Doe I v. Unocal Corp.*, 395 F.3d 932, 965 (9th Cir. 2002).

9. Ramsey, *supra* note 4 at 279.

means and methods of enforcement.[10] Furthermore, "*Sosa* clarified the central choice of law issues in ATS cases by holding: (1) the substantive violation is governed by international law; and (2) federal common law provides the cause of action and, therefore, governs non-substantive issues."[11]

While nations can agree on a binding set of international principles, these states do not have to reach a consensus on the types of actions available and how those actions should proceed in their respective courts.[12] Thus, the "international system relies on domestic courts to provide the rules necessary to resolve complex claims. International law does not provide the level of detail necessary to resolve the many ancillary issues triggered by domestic litigation."[13]

International law cannot provide every rule of decision in a national court case. The law of nations does not define with great specificity, let alone to the level of a specific, universal, and obligatory norm, many of the procedural issues arising in these cases, such as rules bearing on the statute of limitations, standing, or evidence.[14] A reading of the ATS to require every rule of decision to meet a universal obligatory norm would by definition incapacitate every case and defeat the purpose of the ATS to provide a remedy for violations of the law of nations.[15] Supreme Court precedent requires only that the substantive violation in ATS cases reach that level of specificity.[16] Nevertheless, this uncontroversial principle only introduces the problem of choice of law in ATS accomplice liability cases; it does not resolve it.

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10. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring).

11. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 36-37 (2d ed. 2008). The *Sosa* Court had ample historical support for a this position going back to at least 1792 when the Supreme Court stated that "the law of nations, or of nature and reason, is . . . enforced by . . . the municipal law of the country; which latter may . . . facilitate or improve the execution of its decisions, by any means they shall think best, provided the great universal law remains unaltered." Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 162 (1792).

12. Xuncax v. Gramajo, 886 F. Supp. 162, 180 (D. Mass. 1995); *see also* Kadic v. Karadzic 70 F.3d 232, 246 (2d Cir.1995) (holding that "[t]he law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.").

13. STEPHENS, *supra* note 11 at 37.

14. Paul Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 53 (citing *Xuncax v. Gramajo*, 886 F. Supp at 180, which held that "while it is demonstrably possible for nations to reach some consensus on a binding set of principles, it is both unnecessary and implausible to suppose that, with their multiplicity of legal systems, these diverse nations should also be expected or required to reach consensus on the types of actions that should be made available in their respective courts to implement those principles.").

15. Hoffman, *supra* note 14, at 53 (stating "This is true because every rule of law requires subsidiary rules in order to be applied to a particular fact situation. As courts become more involved in the analysis of a particular case, however, subsidiary rules will also develop their own subsidiaries, and so on. Thus, in order for all levels of subsidiary rules to gain universal acceptance, every case would have to be identical.").

16. STEPHENS, *supra* note 11, at 36-37.

Both sides of the debate over the source of aiding and abetting liability generally agree that international law cannot provide all the rules of ATS decisions. The two sides disagree over whether accomplice liability constitutes a substantive violation, and whether international or domestic federal common law should provide the standard for liability.

III.
THE ANCILLARY QUESTION APPROACH: FEDERAL COMMON LAW SHOULD PROVIDE THE STANDARD FOR ACCOMPLICE LIABILITY

In *Doe v. Unocal*, Judge Reinhardt, concurring, argued that domestic federal common law provides the standard for accomplice liability.[17] The plaintiffs claimed that Unocal, a California-based oil company, aided and abetted the Burmese military regime in committing various international law violations while constructing a gas pipeline through the country.[18] Judge Reinhardt differed from the majority in finding that Unocal's liability for aiding and abetting Burma stemmed from federal common law rather than international law.[19] Judge Reinhardt stated that the text of the ATS demonstrates that international law applies to determine whether a substantive violation has occurred, but that ATS remains silent as to what body of law applies to "ancillary issues" that may arise in the case.[20] He concluded that accomplice liability standards constituted an "ancillary issue."[21]

Judge Reinhardt argued that federal courts apply federal common law in areas where the U.S. government has an interest in a uniform body of law.[22] ATS cases fit this description as these cases often implicate the United States' relations with foreign nations.[23] He also cited *United States v. Kimbell Foods*[24] for the proposition that courts must apply federal common law to resolve ancillary issues and fill "the interstices of federal legislation."[25] Because Congress passed the ATS to create a federal tort action for violations of international law,[26] Reinhardt believed that the judiciary should resort to domestic common law principles to fill the gaps in the ATS policy of

17. John Doe I v. Unocal Corp., 395 F.3d 932, 965 (9th Cir. 2002). Although the Ninth Circuit vacated the *Unocal* decision as part of the settlement in that case the decision still stands on its persuasive value. *See also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 320 (2008).

18. *Unocal Corp.*, 395 F.3d at 932.

19. *Id.* at 963 (Reinhardt, J., concurring).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. 440 U.S. 715, 727 (1979).

25. *Unocal Corp.*, 395 F.3d at 965-966 (Reinhardt, J., concurring).

26. *Id.* at 966.

establishing a forum and remedies for violations of customary international law, including in that category the choice of law to govern accomplice liability.[27] These arguments stemmed in part from an article written by plaintiff's counsel in *Unocal,* Paul Hoffman and Daniel A. Zaheer, two years before the case reached the appellate court. The authors argued that using federal domestic common law protects uniquely federal interests, and effectuates the congressional intent of the ATS.[28] Hoffman and Zaheer argued that while *Erie*[29] generally restricts the creation of federal general common law, the Constitution and federal statutes[30] support the conclusion that federal institutions should determine matters of international significance.[31] Hoffman and Zaheer used the *Boyle v. United Techs. Corp.*[32] two-part test to demonstrate how courts can decide whether to use federal common law.[33] First, courts consider whether the federal interest is strong enough to displace state law.[34] Second, courts consider whether the use of federal common law avoid otherwise significant conflicts between a federal policy or interest and the operation of state law.[35] Hoffman and Zaheer argued that in ATS cases, the federal interest in providing a uniform application of international law and maintaining federal control over foreign relations satisfy these two prongs.[36]

Judge Reinhardt also wrote that absent a statutory mandate, courts should not substitute international law principles for established federal common law.[37] Nevertheless, courts can still apply constructive or helpful rules of international law, as federal common law sometimes incorporates principles of the laws of nations.[38] Thus, according to Reinhardt, federal courts can use the vast experience of federal common law, as well as appropriate supplemental international law principles to provide the appropriate rule of decision.[39]

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27. *Id.* Courts have applied this principle by using federal common law implement policies underlying a federal statute. *E.g.* Illinois v. City of Milwaukee, 406 U.S. 91, 100-04 (1972) (holding that federal courts may fashion federal common law remedies to implement the policies of federal water pollution statutes, because the federal legislation did not address the specific legal issue presented).

28. Hoffman, *supra* note 14, at 54-55.

29. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

30. U.S. CONST. art. I, §§ 8, cls. 3, 10 art. III, § 2; 28 U.S.C. §§ 1251 (a)(2), (b)(1), (b)(3), 1332 (a)(2), 1333, 1350-51.

31. Hoffman, *supra* note 14, at 55 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

32. Boyle v. United Techs. Corp., 487 U.S. 500, 507 (1988).

33. Hoffman, *supra* note 14, at 55.

34. *Id.* at 55-56.

35. *Id.* at 56 (citing Boyle, 487 U.S. at 507).

36. *Id.*

37. *Unocal*, 395 F.3d at 967 (Reinhardt, J., concurring).

38. *Id.* (citing The Paquete Habana, 175 U.S. 677, 700 (1900)).

39. *Id.*

Finally, Judge Reinhardt applied the Restatement (Second) of Conflict of Laws' seven- part analysis,[40] and held that almost all the factors, including ease of determination of the applicable law, certainty and predictability, militate in favor of applying federal common law.[41]

Hoffman and Zaheer also argued that international decisions such as *United States v. Flick*,[42] and *Prosecutor v. Furundzija*,[43] point to the application of federal common law, where the courts must first look to international and federal positive law addressing the particular subject.[44] If the standard under these sources is not the same, the court should look to the underlying policies in the ATS and the international norm in choosing which source of law furnishes the most appropriate rule.[45] Hoffman believes that this approach would allow a uniform application of international law in U.S. courts and protect the foreign relations interests of the political branches as these are impacted by the ATS.[46]

In *Khulumani*, Judge Hall agreed that federal common law should provide the standard for accomplice liability.[47] Citing an *amici curiae* brief for International Law Scholars, Judge Hall stated that it is a "hornbook principle that international law does not specify the means of its domestic enforcement."[48] Judge Hall felt that this principle required courts to apply

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40. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

41. *Unocal*, 395 F.3d at 967 (Reinhardt, J., concurring).

42. United States v. Flick, (Dec. 22, 1947), *in* 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIB. UNDER CONTROL COUNCIL LAW NO. 10 (1952) (involving the International Military Tribunal presiding over the Nuremberg trials referring to the common law in finding rules for applying the necessity defense. The court in *Flick* also found that international law provided a basis for mitigating a punishment under a claim of necessity or coercion by violence).

43. Prosecutor v. Furundzija, Case No. IT-95-17/1-A (July 21, 2000) involved the International Criminal Tribunal for the Former Yugoslavia (ICTY) (deriving an aiding and abetting standard by looking to the precedent of military courts which had tried individuals for violations of international humanitarian law). These courts relied, in part, on common law. The *Furundzija* court ruled that finding legal rules for international claims must start with international authority, but that if such authority cannot provide express rules, courts can supplement such international norms with generally recognized principles of criminal law.

44. Hoffman, *supra* note 14, at 88.

45. *Id.*

46. *Id.* at 54.

47. 504 F.3d 254, 284 (Hall, J., concurring).

48. *Id.* at 286. Judge Hall based this conclusion on other authorities including: Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir.1995); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 703 cmt. c (1987) (stating that in general "individuals do not have direct international remedies against a state violating their human rights except where such remedies are provided by international agreement. Whether they have a remedy under the law of a state depends on that state's law"); and various international law scholars including L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 224 (1972) (stating that "while international law is part of the law of the United States . . . [i]nternational law itself . . . does not require any particular reaction to violations of law specifically . . . [w]hether and how the United States wished to react to such violations are domestic, political questions: the courts will not assume any particular reaction, remedy, or consequence");

domestic law to establish accomplice liability standards.[49] None of the authorities Judge Hall cited, however, directly address the issue of whether domestic law provides the sole standard for accomplice liability in any case applying international law norms.

Judge Hall also noted that when faced with a choice between domestic and international law, courts should follow Oppenheim's admonishment to choose domestic law.[50] As to the ATS specifically, Judge Hall stated that *Sosa* at best lends "Delphian guidance" as to whether federal common law or international law should provide the standard for aiding and abetting liability.[51] Without greater guidance, Judge Hall argued that courts should derive the standard from the traditional source of federal common law.[52]

In another ATS case, *Bowoto v. Chevron*, Professor Ralph Steinhardt argued in a declaration for the plaintiffs that the ATS' application to claims in "tort only, committed in violation of the law of nations"[53] established that common law tort doctrine determines what conduct amounts to an actionable violation of international law.[54] Professor Steinhardt's declaration argued that requiring international consensus on accomplice liability does not accord with the use of "tort" in the statute, which indicates that courts should use principles of tort law, not international law, to effectuate the jurisdiction granted in the ATS.[55]

Furthermore, several historical statements and cases seem to assume that domestic common law rules would provide the standard for third party liability. In 1795, Attorney General Bradford interpreted the ATS stating that the statute included liability for committing aiding or abetting violations of the laws of war.[56] Because there were no law-of-war treaties or customary norms defining an "aiding or abetting" standard, the Attorney General Bradford's statement implied that courts could draw upon the common law of torts.[57] In the same

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OPPENHEIM, 1 INTERNATIONAL LAW 44-46 (8th ed.1955); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW 116 (1980); 4 WILLIAM BLACKSTONE, COMMENTARIES *72 (noting that the law of nations recognized certain universal offenses but that accessorial liability can be made available "by statute").

49. *Khulumani*, 504 F. 3d. at 287.

50. OPPENHEIM, *supra* note 48, at 44-46.

51. *Khulumani*, 504 F.3d at 286.

52. *Id.* Paul Hoffman and Daniel A. Zaheer support Judge Hall's position and have written that "[c]ourts must look first to international and federal positive law addressing the particular subject" and that only after such an inquiry, and if federal domestic law cannot provide an answer, should courts look to customary international law. Hoffman, *supra* note 14, at 68.

53. 28 USC § 1350.

54. Declaration of Ralph G. Steinhardt, Bowoto v. Chevron, 312 F.Supp.2d 1229 (N.D. Cal. 2004), *available at* http://ccrjustice.org/files/Raplgh%20Steinhardt%20Declaration%20in%20Bowoto.pdf.

55. *Id.*

56. Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795).

57. *Id.*

year, the Supreme Court held that a French citizen who aided a U.S. citizen in unlawfully capturing a Dutch ship acted in violation of the law of nations.[58] The Court imposed civil liability upon the French citizen although the Court did not provide an international law standard for accomplice liability.[59] Finally, Blackstone stated that individuals who aid or abet pirates are liable as pirates.[60] Nevertheless, no treaty or law of nations defined the standard for aiding or abetting pirates.[61] Thus, because international law recognized that pirates could violate the law of nations with varying degrees of complicity, national courts would have to provide the standard for such complicity.[62]

The referenced arguments rely heavily upon the claim that a third party's complicity in such a primary violation constitutes an ancillary question properly analyzed under federal common law. Other courts, however, have ruled that accomplice liability is to be categorized as a primary violation, and that the ATS thus requires that international law provide the standard for accomplice liability.

IV.
THE CONDUCT-REGULATING APPROACH: INTERNATIONAL LAW SHOULD PROVIDE THE STANDARD FOR ACCOMPLICE LIABILITY.

The idea of a "conduct-regulating norm"[63] underpins much of the view that international law should provide the standard for accomplice liability. Professor William Casto has argued that in accordance with the general principle that tort plaintiffs must prove that the defendant has violated a substantive norm regulated by law, and read *Sosa* to hold that in ATS cases the federal courts must find a conduct-regulating norm in international law.[64] For other rules of decision which do not regulate conduct, courts should use ordinary federal common law.[65]

Professor Casto argued that the ATS provides the rules of decision for conduct-regulating norms by analogy to 41 U.S.C § 1983,[66] which authorizes a remedy for violations of rights protected by the U.S. Constitution.[67] In § 1983

58. Talbot v. Jansen, 3 U.S. (3 Dall.) 133 (1795).

59. *Id.*

60. 4 WILLIAM BLACKSTONE, COMMENTARIES * 5.

61. *Id.*

62. *Id. See* STEPHENS, *supra* note 11 at 319, for a valuable and thorough evaluation of this position.

63. A "conduct-regulating norm" would include any rule which determined what a defendant could do and actions were substantive violations.

64. William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L. J. 671, 695 (2005) [hereinafter *Regulating*].

65. *Id.*

66. William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L. J. 635, 639-641 (2005) [hereinafter *New Federal Common Law*].

67. 42 U.S.C. § 1983 (2008).

cases, the right or norm—regulating conduct—derives from the Constitution, but courts apply their own procedural rules. In ATS cases, this principle would mean that international law answers all questions as to whether the defendant has acted unlawfully.[68] The Supreme Court has agreed that aiding and abetting, a form of accomplice culpability, is a conduct-regulating norm.[69] Thus, while domestic law governs procedural issues, "the norm for which a remedy is provided in ATS litigation is clearly governed by international law."[70]

Several courts have agreed with Professor Casto's analysis of conduct-regulating norms as applied to the ATS. In *Khulumani*, Judge Katzmann's concurrence concluded that international law provides the standard for aiding and abetting violations.[71] Judge Katzmann read *Sosa* to stand for the proposition that courts should use international law to provide the standard for ATS aiding and abetting claims.[72] *Sosa*, in footnote twenty, discussed the liability of non-state actors and held that "whether a norm is sufficiently definite to support a cause of action" raises a "related consideration [of] whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[73] Thus, the *Sosa* Court implied that courts should look to international law when deciding whether each particular norm extends liability to non-state actors, which would logically include accomplice liability. Judge Katzmann held that in accord with *Sosa*'s emphasis on the narrowness of the ATS jurisdictional grant, the court's most effective means of maintaining the narrow scope of jurisdiction required it to allow ATS suits only against defendants who commit violations of international law.[74]

If Judge Katzmann and Professor Casto are correct in reading *Sosa* and the characterization of the relationship between federal common law and international law, courts should use international law for accomplice liability standards. The ATS's jurisdictional grant "enable[s] federal courts to hear claims in a very limited category *defined by the law of nations*."[75] Under this framework, if a court finds that a defendant's conduct violates the modest number of international law norms, then the court considers whether the common law provides a cause of action for plaintiffs' claims.[76] "Subject to

68. *New Federal Common Law*, *supra* note 66, at 639.

69. *Id.* at 650.

70. *Id.* at 643.

71. Judge Katzmann left open the possibility that federal common law might also provide aiding and abetting liability "even if such liability did not exist under international law." *Khulumani*, 504 F.3d at 277 n.13. (Katzmann, J., concurring).

72. *Id.* at 269.

73. *Sosa*, 542 U.S. at 732 n.20.

74. *Khulumani*, 504 F.3d at 269-70 (Katzmann, J., concurring).

75. *Sosa*, 542 U.S. at 712 (emphasis added).

76. *Id.* at 724.

vigilant doorkeeping," courts determine whether the common law permits judicial recognition of actionable international norms.[77] This narrow jurisdictional grant forces courts to exercise caution in determining whether to hear a claim under the ATS, and thus they "should first determine whether the alleged tort was in fact 'committed in violation of the law of nations' . . . and whether this law would recognize the defendants' responsibility for that violation."[78] This determination should include not just the primary responsibility of a state, but a non-state actor's responsibility as well.

While *Sosa* did not consider this issue, Judge Katzmann also rejected the argument that *Central Bank of Denver v. First Interstate Bank of Denver*[79] precludes aiding and abetting liability under the ATS.[80] In *Central Bank* the Supreme Court held that

> [w]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.[81]

The *Khulumani* defendants interpreted *Central Bank* as stating that courts impose civil aiding and abetting liability only when Congress deliberately chooses to do so.[82] Judge Katzmann disagreed, and citing the Casto article,[83] argued that the Court's reliance on congressional intent in *Central Bank* did not apply to ATS cases because "under the [ATS], the relevant norm is provided not by domestic statute but by the law of nations."[84] While Judge Katzmann dismissed the applicability of the direct holding in *Central Bank*, Professor Casto argued that in fact both the majority and dissenting justices in *Central Bank* agreed that accomplice liability is a conduct-regulating norm.[85] "In other words, there is no liability unless the aiding-and-abetting norm proscribes assisting direct violators of another norm."[86] *Central Bank* holds that courts should analyze the source of the principal norm—in ATS cases, international law—when deciding upon the availability of accomplice liability.

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77. *Id.* at 729.

78. *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring).

79. Cent. Bank, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 182 (1994).

80. *Id.* at 282 (Katzmann, J., concurring).

81. *Cent. Bank*, 511 U.S. at 182.

82. *See* Brief for the United States of America as Amicus Curiae at 12, *Khulumani*, 504 F.3d 254 (Nos. 05-2141-cv, 05-2326-cv). Defendants commonly make such a claim in ATS aiding and abetting cases. *See, e.g.*, Brief for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee Talisman Energy, Inc., and in Support of Affirmance at 19-22, Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 07-0016-cv (2d Cir. May 8, 2007).

83. *New Federal Common Law*, *supra* note 66, at 650.

84. *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring).

85. *New Federal Common Law*, *supra* note 66, at 650.

86. *Id.*

The *Khulumani* decision, although discussing the issue of choice of law on accomplice liability in detail, produced no definitive ruling on the matter.[87] The court could not arrive at a consensus on the issue, and thus accomplice liability remained an unsettled issue in the Second Circuit. And although the Ninth and Second Circuit courts have ruled upon a number of ATS claims, until October 2009, neither court had produced a binding ruling on ATS accomplice liability choice of law.

The Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[88] has at last provided a definitive ruling on the issue. The Second Circuit drew heavily upon Judge Katzmann's opinion in *Khulumani* and found that international law provides the standard.[89] The *Talisman* court, like Judge Katzmann, relied upon *Sosa*'s footnote twenty and the command that ATS cases apply to violations of international law with definite content and acceptance among civilized nations.[90] The court read footnote twenty as standing for the principle that scope of liability in ATS cases should "be derived from international law."[91] Accomplice or secondary liability would fall under the principle's scope. Also, "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place."[92] Thus, the *Sosa* Court's admonishment to allow actions based only upon certain definite violations of the laws of civilized nations applies equally in force to secondary liability.

Many scholars agree that international law should provide the standard as to choice of law.[93] Professor Keitner classifies the two approaches to choice of law for accomplice liability in ATS cases as the "ancillary question" approach and the "conduct-regulating" approach.[94] Professor Keitner rejected Judge Reinhardt's approach to ancillary questions in *Doe v. Unocal* stating "[t]he ancillary question approach fails because it does not offer a principled account of why a defendant's mode of liability should be treated differently from the state's underlying violation for choice of law purposes."[95] Instead, Professor Keitner applied a conduct-regulating rules approach which treats the defendant's

87. In line with Judge Hall and Katmann's concurrence, Judge Korman also agreed that accomplice liability standards should arise under international law, but argued that courts must separately consider each norm of international law, and whether that norm provides for accomplice liability. *Khulumani*, 504 F.3d at 326, 331 (Korman, J., concurring in part and dissenting in part).

88. 582 F.3d 244 (2d Cir. 2009).

89. *Id.* at 258-59.

90. *Id.*

91. *Id.*

92. *Id.* at 259.

93. Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

94. *Id.* at 73-74.

95. *Id.* at 79.

accomplice participation as an integral part of the alleged violation.[96] While the ancillary question approach applies domestic common law, the conduct-regulating approach applies international law to both the conduct of the state and the accomplice.[97]

Professor Keitner argued that some confusion results from the language in both the ATS and *Sosa*.[98] For instance, the *Sosa* Court held that the ATS was "in terms only jurisdictional" and that this grant "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at *common law*."[99] Nevertheless, Keitner argued that the First Congress viewed international law as part of the common law, such that the ATS provides a "federal forum for violations of international law that were already cognizable at common law."[100] This meant that for the First Congress, there was no choice of law issue since both domestic and international law were part of natural law.[101] Thus, much of the discussion of the ATS and *Sosa*'s reading must take into account the fact that references to "common law" do not signify a preference for domestic law.

Professor Keitner dismisses the view of Judge Reinhardt and Judge Hall and the ancillary question approach as not providing a principled reason why applying domestic law should be a court's default in ATS cases.[102] "To the contrary, given that ATS was intended to provide a federal forum for adjudicating international law violations, one should not "substitute" domestic law standards for well-established international law standards on accomplice liability, as the ancillary question approach does."[103] The conduct-regulating approach avoids this conceptual and doctrinal inconsistency by providing a principled method to differentiate between substantive and ancillary matters through the application of international law to a statute remedying international law violations.[104] For Professor Keitner, and in contrast to Judge Reinhardt, a company liable under the ATS for aiding and abetting an international law violation will have itself acted in violation of international law and thus have committed a substantive offense.[105] Supplemental domestic law simply provides the particular type and contours of remedy in a tort action.[106]

Keitner also argues that besides being conceptually and doctrinally

96. *Id.* at 74.
97. *Id.*
98. *See id.* at 65-66.
99. *Sosa*, 542 U.S. at 712 (emphasis added).
100. Keitner, *supra* note 93, at 77.
101. *Id.*
102. *Id.* at 76.
103. *Id.*
104. *Id.* at 79.
105. Keitner, *supra* note 93, at 79.
106. *Id.*

inconsistent, applying domestic law to aiding and abetting liability raises the specter of "illegitimately applying U.S. law to the extraterritorial conduct of non-U.S. defendants, exceeding the limits of domestic prescriptive jurisdiction based on territory or nationality."[107]

Finally, in the *Sosa* litigation, other international bodies, including the European Commission, called for the Court to "rigorously apply international law" to both "determine the conduct that gives rise to a violation of the law of nations" and "to determine the actors who may be subject to liability."[108] Part of determining what actors may be subject to the ATS includes accomplice liability.

Although both sides of the debate concerning choice of law in ATS accomplice liability cases have merit, the better position is that U.S. courts should apply international law as the standard for accomplice liability. This position is more coherent with regards to the purpose of the ATS.

V.
THE CONDUCT-REGULATING APPROACH PROVIDES A MORE COMPELLING ANSWER TO THE QUESTION OF ACCOMPLICE LIABILITY IN THE ATS.

Professor Keitner's approach to accomplice liability is the only approach that accords with the intent and purpose of the ATS. Although little legislative history survives regarding the ATS, the statute makes clear that the First Congress intended to provide federal jurisdiction for certain violations of the law of nations. Corporations, or other entities, engage in unlawful conduct when they aid and abet other violators of international law. Aiding and abetting is itself a substantive violation of the law. To hold otherwise would contravene the congressional intent of the ATS and apply domestic law to substantive violations of international law.

While federal courts should apply international law to find accomplice liability standards, it makes sense for courts to apply domestic law for matters such as personal jurisdiction, evidence, damages, etc. Nevertheless, accomplice liability shares little with these procedural issues. Although the comparison is not exact, domestic principles on choice-of-law help demonstrate why federal courts should apply international law to accomplice liability. *Erie v. Tompkins* generally requires that federal courts apply state law in diversity jurisdiction cases.[109] "Under the *Erie* doctrine, federal courts sitting in diversity apply state

107. *Id.* at 77. *See, e.g.*, Ramsey, *supra* note 4 (discussing how extraterritorial application of national law may conflict with international law).

108. Brief of Amicus Curiae the European Commission in Support of Neither Party at 3-4 (Jan. 23, 2004), *Sosa*, 542 U.S. 692 (2004).

109. *Erie*, 304 U.S. at 78.

substantive law and federal procedural law."[110] This situation is comparable to ATS cases where federal courts must apply the substantive international law while utilizing federal procedures.

Several cases provide precedent for federal courts in deciding whether a rule is procedural or substantive. The logic of these cases applied to the question of accomplice liability in the ATS point to the application of international law. In *Guarantee Trust Co. v. York* the Court created the "outcome-determinative test" where the Court held that if a rule determines the outcome of the case, federal courts should apply state law.[111] The Court created the test with the aim that the outcome of litigation in federal court should be substantially the same as if the case were tried in state court.[112]

This reasoning applies to ATS cases to support courts using international norms of accomplice liability. The question of accomplice liability goes to the very heart of a tort case; were the defendant's actions illegal? Accomplice liability governs the conduct, and thus legality of a defendant's actions. Furthermore, while international plaintiffs have few options for tort cases, the principle of *Guarantee Trust* counsels that courts applying another system's substantive law should strive to reach the same conclusion. Here, allowing multifarious nations to apply their own accomplice liability standards could substantially alter the outcome of a case depending upon which jurisdiction plaintiffs brought a case. Such a situation would conflict with a general purpose of *Erie* to alleviate "forum-shopping."[113]

Furthermore, the United States does not have a strong federal interest to apply domestic law to aiding and abetting liability as federal courts necessarily apply international law in ATS cases.[114] Accomplice liability standards are quite different from the Federal Rules of Civil Procedure (FRCP) which *Hanna v. Plumer* allowed federal courts to apply.[115] *Hanna* thus signified that at least part of the distinction between substantive and procedural law concerns whether the rule fits within the FRCP. Unlike the rules in the FRCP, accomplice liability determines what conduct is illegal. Thus, the logic of federal practice and precedent calls for courts to use the "conduct-regulating approach."

Although recourse to the "conduct-regulating approach" does solve a primary matter for choice of law in ATS accomplice liability cases, in no small fashion the issue relocates to a lower-level matter. Primarily, it seems

110. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 427 (1996).

111. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

112. *Id.*

113. *See Erie*, 304 U.S. at 78. Although I am aware of no state which has a similar statute to the ATS, every state is capable, under international law, of enacting such a statute. Thus, while the fear of forum shopping may not currently be present, the danger remains.

114. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) (discussing how a strong federal interest can override the outcome-determinative test).

115. Hanna v. Plumer, 380 U.S. 460 (1965).

unavoidable that federal courts must have some recourse to domestic law to apply international law norms to particular fact situations. For instance, if a court applied an international law "mere knowledge" test to determining accomplice liability, substantial questions may arise applying that international norm to the facts of a particular case. Furthermore, while this hypothetical international law norm may not speak as to all issues, this silence should not suggest that the rule is not universal or binding. This dilemma arises at the heart of public international law, for while an established rule of public international law governs an issue, each nation interprets its details individually, and sometimes contradictorily. ATS cases are no different, and while federal courts should use international law to provide the standard for accomplice liability, federal common law understandably still retains a place.

Although the "ancillary question" approach does not accord with the purpose of the ATS, or the logic of federal precedent, it is understandable why many judges and plaintiffs wish courts to apply domestic federal common law; courts and judges often have greater familiarity with domestic common law. It may be more difficult in certain situations to discern principles of international law as opposed to domestic law, but this does not excuse federal courts from the task of applying the law of nations. In ATS cases, federal courts must necessarily apply international law to the substantive violation, whether this includes accomplice liability or not. Going one step further in applying international law for accomplice liability should present few unique problems.

Beyond doubt, international law cannot provide every rule for courts to apply in reaching a decision in international law cases. Nevertheless, because Judge Reinhardt and other commentators have not provided compelling reasons why accomplice liability standards fall within this "ancillary question" category, courts should apply international law. Nevertheless, federal common law very likely retains a place in deciding ATS accomplice liability cases and primarily when the facts of an individual's actions amount to a violation of that international law standard.

VI.
CONCLUSION

The two sides of the debate concerning choice of law for ATS accomplice liability argue that federal courts should use either domestic or international law. For judges and commentators arguing for the application of domestic law, accomplice liability is often viewed as an "ancillary question." Despite this view, the emerging consensus is that international law should provide the standard. Using international law to find accomplice liability standards gives effect to both the purpose and intent of the ATS, and accords with the logic of federal precedent. This approach avoids applying U.S. domestic law extraterritorially. Finally, the conduct-regulating approach provides a more principled basis to determine what law courts should apply beyond accomplice

liability.