NOTES

RISKY BUSINESS: THE ALIEN TORT CLAIMS ACT AND THE FOREIGN CORRUPT PRACTICES ACT EXPAND THE REACH OF U.S. COURTS IN A GLOBAL ECONOMY

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I. INTRODUCTION

It is safe to say that we are living in a global economy. In 2007, there were an estimated 79,000 multinational corporations (MNCs) with a total of 790,000 foreign affiliates.[1] These MNCs generated approximately thirty-one trillion dollars in sales and employed eighty-two million people.[2] Corporations are no longer creatures of their home turf and have now greatly expanded, taking advantage of opportunities throughout the world.[3] "It has been said that arguing against globalization is like arguing against the law of gravity."[4] In a 2000 address, Kofi Annan pointed out that society has truly become a "global phenomenon."[5] He aptly stated that globalization should be a tool used to lift the world's "people out of hardship and misery" and

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1. U.N. Conference on Trade and Development, Sept, 24, 2008, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge,* xvi,¶2, UNCTAD/WIR/2008 (July 2008), http://www.unctad.org/en/docs/wir2008intro_en.pdf.

2. *Id.*

3. *See* Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 900 (2008) ("[T]hese opportunities may be found in the developing world where resources are plentiful, labor is cheap, and regulation weak or non-existent.").

4. The Secretary-General, Opening Address to the Fifty-Third Annual Department of Public Information Non-Governmental Organizations Conference (Aug. 28, 2000), *available at* http://www.un.org/dpi/ngosection/annualconfs/53/sg-address.html.

5. *Id.*

that the global economy should be based on widely-shared values so that it can benefit everyone.[6] While corporations have the financial capacity and the manpower to accomplish the goals set forth by Annan, they face many hurdles in trying to achieve it. Following global expansion are the immense challenges of operating in unfamiliar territory, interacting with unfamiliar people, learning unfamiliar customs, and abiding by unfamiliar laws.[7]

As a result of operating abroad, U.S. corporations risk being held liable for any wrongdoings that were committed by their foreign subsidiaries.[8] MNCs have found themselves defending civil claims for human rights violations that were committed by foreign governments or by foreign actors with whom they have conducted business.[9] These civil claims have recently been based on an aiding and abetting liability where the defendants themselves have not directly participated in the violating actions.[10] Corporations have also found themselves defending criminal claims for aiding in the bribery of foreign government officials even though contact with the offender appears to have been minimal.[11]

In an age where corporations are expanding their operations throughout the world, U.S. courts are presiding over claims that stem from events that took place in all parts of the world.[12] The Alien Tort Claims Act (ATCA) allows an action to be brought in federal court for torts committed in violation of international law[13]

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6. *Id.; see also* Barbara Crossette, *Globalization Tops 3-Day U.N. Agenda for World Leaders*, N.Y. TIMES, Sept. 3, 2000, at A1.

7. *See, e.g.*, Paul L. Hoffman & Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L & COMP. L. REV. 47, 48 (2003) ("[G]lobalization brought multinational corporations into closer relationships with repressive military authorities in developing nations . . . .").

8. H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1, 2 (1998).

9. *See Contemporary Practice of the United States Relating to International Law: International Human Rights and International Criminal Law: Second Circuit Issues Divided Ruling on "Aiding and Abetting" Rights Violations*, 102 AM. J. INT'L L. 155, 183 (John R. Crook ed., 2008).

10. *Id.*

11. *See* Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV 2897, 2920-27 (2005) (discussing two cases in particular that appear to hold corporations liable for the actions of subsidiaries with very minimum contacts).

12. *See* Hoffman & Zaheer, *supra* note 7, at 48 (noting that the U.S. has been asked to resolve civil claims by people harmed by multinational corporations who participated in human rights violations).

13. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); *see generally* Hoffman & Zaheer, *supra* note 7, at 49-51.

while the Foreign Corrupt Practices Act (FCPA) holds companies criminally liable for bribing foreign officials.[14] Neither of these acts was originally intended for their modern expanded application.[15] Today they are both used to pursue claims against MNCs when the companies appear to have had little contact with the foreign actor.[16]

Where horrendous human rights violations occur as a matter of operation abroad, or bribery occurs as a way of conducting business in foreign nations, it is obvious that a resolution is needed.[17] Where MNCs are at fault, they should be held accountable. However, bringing claims into U.S. courts is not the answer when the contact, intent, and fault are not apparent.[18] The U.S. judiciary should not allow claims under the ATCA unless they are universally recognized in international law, and prosecution under the FCPA should focus on offenders who have a clear connection to the U.S. or a U.S. corporation. Furthermore, the U.S. government should encourage foreign governments to resolve violations that took place in their own countries, while acting as a role model by eliminating human rights abuses and corruption at home.

This Note will explore and compare the two Acts – the Alien Tort Claims Act (ATCA) and the Foreign Corrupt Practices Act (FCPA). Part I will examine the history, structure, and purpose of each. Part II will discuss how each Act has been applied to corporations and will focus on aiding and abetting liability. Part III will explore the possible effects each of these Acts will have on corporations and foreign affairs and will discuss arguments in favor and opposing each statute. Finally, Part IV will give some concluding remarks as well as recommendations for improving the application of each statute.

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14. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, amended by Omnibus Trade & Competitiveness Act of 1988, Tit. V, Pub. L. No. 100-418, 5001-5003, 102 Stat. 1415, 1415-1425, amended by The International Antibribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78m(b)(2) -(3), 78dd-1 to -3, 78ff (2006)).

15. *See, e.g.*, John Haberstroh, *The Alien Tort Claims Act & Doe v. Unocal: A Paquete Habana Approach to the Rescue*, 32 DENV. J. INT'L L. & POL'Y 231, 236-51 (2004) (discussing the history and original intent of the ATCA and its modern application).

16. *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (ATCA); United States v. KPMG Siddharta Siddharta & Harsono, Accounting and Auditing Enforcement Act Release No. 1446, 75 SEC Docket 1841 (Sept. 12, 2001).

17. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 876 (2d Cir. 1980). *See also* Ashe, *supra* note 11, at 2902-03 (discussing the extent of admissions of bribery coming out of the Watergate scandal).

18. *See, e.g.*, Ashe, *supra* note 11, at 2918 (discussing criticisms of the FCPA's extended reach).

II. A COMPARISON OF HISTORIES: ATCA AND FCPA

There are some differences between the ATCA and the FCPA that are immediately clear. The ATCA is a statute that imposes civil liability on the offender[19] while the FCPA is a criminal statute. [20] The historical significance of each is also quite different, with one enacted at the time of the U.S. Constitution[21] and the other passed in more modern times. [22] However, today both of the statutes work to combat offenses that are part of everyday operation in a global economy.

A. Background and History of the ATCA

An understanding of the cases brought under the ATCA should begin with a look into the history and original purpose of the statute. With origins beginning along with the federal judiciary, the ATCA was adopted as part of the landmark Judiciary Act of 1789[23] and is codified at 28 U.S.C. § 1350.[24] This statute grants "[t]he district courts . . . original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[25] Reading the plain language of the statute, it seems clear that the ATCA allows claims to be brought in U.S. district courts by foreign plaintiffs against alleged violators of international law.[26] However, little is known about why this statute was enacted, making courts hesitant to apply the statute's plain meaning.[27] Scholars in the legal community point out that at the time of the statute's enactment the U.S., being militarily weak, was looking for a way to both assert its voice and to avoid international conflict.[28]

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19. *See* 28 U.S.C. § 1350 (2006) ("[C]ivil action by an alien for a tort only . . . .").

20. *See* 15 U.S.C. § 78dd-2(g) (2006) (outlining penalties under FCPA).

21. Hoffman & Zaheer, *supra* note 7, at 49.

22. 15 U.S.C. § 78dd (2006).

23. The Judiciary Act of 1789 was signed into law on September 24, 1789. Edward A. Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283, 284 (2003). It is the same Act that created the federal judiciary and devised the structure of the Supreme Court and U.S. district courts. *Id.* at 284-85. This may be the reason the ATCA is considered "obscure," as it was most likely over-shadowed by its statutory siblings. *See* Joshua Ratner, *Back to the Future: Why a Return to the Approach of the* Filartiga *Court is Essential to Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 COLUM. J.L. & SOC. PROBS. 83, 84 (2002).

24. Haberstroh, *supra* note 15, at 236.

25. 28 U.S.C. § 1350 (2006).

26. *See* Haberstroh, *supra* note 15, at 236.

27. "[S]tatutes always have some purpose of object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Id.* (quoting Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945)).

28. "[T]hose who drafted the Constitution and the Judiciary Act of 1789 wanted to open federal courts to aliens for the purpose of avoiding, not provoking, conflicts with

Other theorists suggest that the U.S. enacted the ATCA because denial of a judicial forum was perceived as an official approval of the offense committed against the foreigner.[29] Furthermore, it is said that enactment of the ATCA was an assertion "against rival Anglo-French doctrine." [30]

While the original intent is not well-established, the ATCA clearly states that the plaintiff must be an alien who is bringing a tort claim that involves a violation of international law.[31] There are no express limits to whom can be sued, so the defendants may include U.S. citizens or aliens.[32] In the early days after enactment, claims were rarely brought under the ATCA and the statute went unused for almost two hundred years.[33]

After a long hibernation, the ATCA was revived in several seminal cases that have established jurisdiction,[34] defined the possible defendants,[35] and developed a standard for determining which causes of action are incorporated in the "law of nations."[36] In *Filartiga v. Pena-Irala*, the plaintiffs, citizens of Paraguay, alleged that the defendant, a former Paraguayan official, kidnapped the plaintiff's son and tortured him to death.[37] Those at fault told the family that this act was in response to Filartiga's political activities.[38] Filartiga's case failed to progress in Paraguayan courts

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other nations." *Id.* (quoting Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (Bork, J., concurring)). In enacting the ATCA, the legislature may have also given the judiciary the power to wage a moral battle with the stronger world powers. *Id.* at 237.

29. *See id.* at 238.

30. *Id.* at 242. For a full discussion of the historical context and various theories regarding the ATCA's original purpose, see *id.* at 235-47.

31. *See* Hoffman & Zaheer, *supra* note 7, at 49.

32. Haberstroh, *supra* note 15, at 236.

33. *See* Hoffman & Zaheer, *supra* note 7, at 49-50. There were, however, several early claims under the ATCA. *See, e.g.*, Bolchos v. Darrel, 3 F. Cas. 810, 810-11 (D.S.C. 1795) (finding jurisdiction under ATCA when a French privateer captured slaves from an enemy ship); M'Grath v. Candalero, 16 F. Cas. 128, 128 (D.S.C. 1794) (denying jurisdiction in a tort claim for attachment); Moxon v. Fanny, 17 F. Cas. 942, 946-47 (D. Pa. 1793) (denying jurisdiction based on political question grounds); *see also* Adra v. Clift, 195 F. Supp. 857, 859 (D. Md. 1961) (involving an alien child custody suit).

34. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

35. *See* Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

36. *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995); *Filartiga*, 630 F.2d at 876.

37. *Filartiga*, 630 F.2d. at 878; *see also*, Edwin V. Woodsome, Jr. & T. Jason White, *Corporate Liability for Conduct of a Foreign Government: The Ninth Circuit Adopts a "Reason to Know" Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 26 LOY. L.A. INT'L COMP. L. REV. 89, 92 (2003).

38. *Filartiga*, 630 F.2d at 878.

after activists kidnapped the family's lawyer and threatened his life.[39]

In its decisions, the Second Circuit made two important findings. First, it held that the ATCA creates jurisdiction in federal courts for these claims. [40] Second, it held that the ATCA also creates a cause of action in cases involving international human rights violations.[41] With regard to this second finding, the court urged that the lower "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[42] In Filartiga's case, the court held that under the ATCA, torture by a state official is a violation of the law of nations.[43]

The scope of liability appeared to be expansive under *Filartiga,* and in 1984, the D.C. Circuit Court struggled to apply the holding when deciding *Tel-Oren v. Libyan Arab Republic.*[44] The plaintiffs in *Tel-Oren* were victims of a 1978 armed attack on a bus in Israel.[45] Plaintiffs filed suit against several Middle Eastern groups who were known to support terrorism, alleging that the defendants' actions violated the law of nations.[46]

In contrast to the *Filartiga* court, the D.C. Circuit dismissed the lawsuit and filed three concurring opinions, each adopting different rationales for this result.[47] Two of the judges, Judge Bork and Judge Robb, criticized the *Filartiga* decisions for finding that the ATCA creates a cause of action. [48] Both of these judges believe that there must be an independent cause of action before a plaintiff can enter federal court under the ATCA.[49] In his concurrence, which garnered the most attention,[50] Judge Bork asserted that the ATCA was intended only to concern acts in violation of the "law of nations" as

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39. *Id.*

40. *Id.* at 887.

41. *Id.* at 878 ("[D]eliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus whenever an alleged torturer is found and served with process by an alien within our borders, §1350 provides federal jurisdiction.").

42. *Id.* at 881.

43. *Id.* at 884.

44. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984).

45. *Id.* at 775.

46. *Id.*

47. *Id.* The three judges who wrote concurring opinions were Judge Bork, Judge Robb, and Judge Edwards. *Id.* Judge Bork and Judge Robb criticized the *Filartiga* decision that the ATCA itself provided a cause of action. *Id.* at 801 (Bork, J., concurring); *id.* at 826 (Robb, J., concurring).

48. *Id.* at 801 (Bork, J., concurring); *id.* at 826 (Robb, J., concurring).

49. *See* Haberstroh, *supra* note 15, at 249-51.

50. *See, e.g., id.* (calling Judge Bork's opinion "weak in scholarship").

defined in 1789.[51] After *Tel-Oren* was decided, the circuits were split over whether a claim under ATCA required an independent cause of action, and this debate continued until the Supreme Court considered the ATCA.[52]

The Supreme Court offered its long-awaited view of the ATCA[53] in its *Sosa v. Alvarez-Machain* decision.[54] In *Sosa*, the United States Drug Enforcement Agency (DEA) hired the defendant to bring Alvarez-Machain to stand trial in the United States for assisting in the torture of a DEA agent.[55] Alvarez-Machain sued Sosa and other DEA agents, alleging violations of international law pursuant to ATCA.[56] The Supreme Court held that the ATCA allows victims to bring claims in federal court for human rights abuses that are recognized by the law of nations. [57] However, the Court found that ATCA did not offer a remedy for Alvarez-Machain's claims and that Sosa's actions did not violate any international norms.[58]

Although the holding seemed broad, the Supreme Court urged the lower courts to be restrictive and to use discretion.[59] While not announcing a specific rule for determining whether a cause of action violated the "law of nations," the Court provided guidelines for the lower courts in evaluating a plaintiff's claim.[60] For a claim to be

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51. *Tel-Oren*, 726 F.2d at 816.

52. *See* James Goodwin & Armin Rosencranz, *Holding Oil Companies Liable for Human Rights Violations in a Post-*Sosa *World*, 42 NEW ENG. L. REV. 701, 707 (2008) (discussing the two extreme views of the ATCA). Up until that point, it still was also not clear whether international law covered private actors in addition to government actors. *See* Kadic v. Karadzic, 70 F.3d 232, 239-40 (2d Cir. 1995). In *Kadic*, plaintiffs, victims of atrocities committed in Bosnia, sued the president of the self-proclaimed Bosnia-Serb Republic of Srpska. *Id.* at 236-37. The court recognized ATCA to govern claims against private actors holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Id.* at 239.

53. In *Tel-Oren*, Judge Edwards had called out to the Supreme Court for a view on the ATCA:

> This case deals with an area of law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the "law of nations." As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

Tel-Oren, 726 F. 2d at 775 (Edwards, J., concurring). *See also* Rachel Chambers, *The* Unocal *Settlement: Implication for the Developing Law on Corporate Complicity in Human Rights Abuses*, 13 HUM. RTS. BR. 14, 15 (2005).

54. 542 U.S. 692, 712 (2004).

55. *Id.* at 697-98.

56. *Id.* at 698 (referring to 28 U.S.C. § 1350 as the Alien Tort Statute or ATS).

57. *Id.* at 724-25.

58. *Id.* at 738.

59. *Id.* at 730.

60. *Id.* at 725; *see also* Goodwin & Rosencranz, *supra* note 52, at 708-09 (outlining the guidelines set forth by the *Sosa* Court).

considered under the ATCA, it must be "based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."[61] The *Sosa* Court noted that in order to make such a determination, the courts will have to look to treaties, executive or legislative acts, or judicial decisions.[62] In the absence of such guidance, courts are to look to the "customs and usages of civilized nations . . . [based on] the works of jurists and commentators, who . . . have made themselves peculiarly well acquainted with the subjects."[63]

While the Supreme Court's conclusion appears to have brought more clarity in applying the ATCA to new claims, *Sosa* has left open the decision for lower courts as to (1) whether the alleged violation is recognized under the ATCA; and (2) whether the violation extends to the defendant at hand.[64] Courts continue to be unsure as to whether the ATCA extends to corporate defendants and whether defendants can be held liable for aiding and abetting human rights violations.[65]

B. Background and History of FCPA

More entwined in scandal and politics than in history, the FCPA had its beginnings in modern times. Investigations following the Watergate scandal[66] revealed that MNCs used funds to finance U.S. elections as well as to bribe foreign officials in order to promote profitable business arrangements.[67] These investigations further revealed that more than 400 American corporations had participated in bribery at a total of 300 million dollars.[68] Congress unanimously enacted the FCPA with the goal of limiting the use of bribery in

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61. *Sosa*, 542 U.S. at 725. This analysis fell under the "specific, universal, and obligatory" standard for evaluating claims set forth by the Court. *Id.* at 748 (Scalia, J., concurring).

62. *Id.* at 733-34.

63. *Id.* at 734 (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)). The *Sosa* majority concluded that the ATCA did not support a remedy for Alvarez-Machain's claim because the plaintiff failed to provide evidence that international law prohibited "arbitrary detention." 542 U.S. at 736 (quotations in original omitted). The Court found that recognizing his broad claim under the ATCA would result in "breathtaking" implications. *Id.*

64. *See* Goodwin & Rosencranz, *supra* note 52, at 740 (discussing in particular claims against corporate defendants).

65. *Id.* at 740-41. For a detailed analysis of the *Sosa* opinion, see *id.* at 705-13.

66. *See* Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 AM. J. COMP. L. (SUPP.) 593, 593-96 (2002).

67. Ashe, *supra* note 11, at 2902-03. One of the most notable foreign recipients was the Prime Minister of Japan, who received four million dollars from Lockheed Martin. *Id.* at 2903 n.40.

68. *Id.* at 2903. Of the 400, 177 of these American corporations were ranked in the Fortune 500. *Id.*

foreign corporate affairs as well as to promote upright business practices among all nations.[69]

The FCPA makes it a criminal act for a U.S. corporation to bribe foreign officials while conducting business abroad[70] and it requires companies to meet certain accounting practices[71] as well as to maintain proper mechanisms to prevent any illegal payments.[72] Specifically, the anti-bribery provisions of the FCPA make it unlawful to offer or pay any foreign official in order to influence decisions or to gain an advantage in business affairs or to retain business.[73]

From the beginning, many found that the FCPA put a "unilateral burden" on American businesses operating abroad[74] and it was considered vague and difficult to enforce.[75] The U.S. initiative against corporate bribery also failed to motivate the international community to follow suit and enact their own laws against bribery.[76] In response to these problems, Congress amended the FCPA in 1988.[77]

The 1988 amendments called for the President to pursue an international accord with other nations who would agree to enact similar statutes.[78] They also addressed the high burden of recording all small payments as well as the problems with vagueness and enforcement by creating exceptions for "grease payments" (small payments for regular government operations and services such as obtaining licenses, permits, and other documents), which are made

69. *Id.* Congress believed that "American businesses would benefit from the goodwill [that came] with upright [business] practices" as well as the integrity and skill that developed as it learned to compete using lawful means. *Id.* at 2904.

70. 15 U.S.C. §§ 78dd-1(a), 2(a), 3(a) (2006).

71. 15 U.S.C. § 78m(b)(2)(A) (2006).

72. 15 U.S.C. § 78c(8)(a) (2006). The proper mechanisms include accurate books and records, which are meant to ensure that any illegal payments cannot be kept hidden from auditors. *See* Brown, *supra* note 8, at 15 n.44.

73. § 78dd-1(a)(1).

74. Ashe, *supra* note 11, at 2905; *see also id.* at 2905 n.50.

75. One of the biggest issues in enforcement was determining how to address a "borderline violation." *Id.* at 2905 n.53 (quoting Endy Zemenides et al., *LPIB Roundtable on Global Corruption*, 31 LAW & POL'Y INT'L BUS. 195, 198 (1999) (comments of Pat Head)). Some potential violations include the hiring of a foreign official's child or an increase in commission for a particular agent. *Id.* While these activities may be legitimate, the details would have to be examined to determine the legality. *Id.*

76. *Id.* at 2905.

77. *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 867-70 (2001) (discussing the position that anti-bribery provisions put American companies at a disadvantage when bribery is a reality in many other nations).

78. Ashe, *supra* note 11, at 2906.

regularly in business practices abroad.[79] In addition, Congress added two affirmative defenses. First, "[a] person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country."[80] Second, the person charged may assert "that the money was spent as part of demonstrating a product or performing a contractual obligation."[81]

In 1998, Congress further amended the FCPA and greatly expanded its scope by allowing claims against foreign businesses and foreign nationals for bribery of public officials in their own countries.[82] Today, a violation of the FCPA requires proof of the following elements:

> (i) a U.S. "issuer," "domestic concern," or "any person," including the officers, directors, employees, agents, or shareholders acting on behalf of the issuer, domestic concern, or person, (ii) makes use of the mails or any means or instrumentality of interstate commerce, (iii) in furtherance of an offer, payment, promise to pay, or authorization to pay anything of value, (iv) to any foreign official, any foreign political party or official thereof, or any candidate for foreign political office, or other person, knowing that the payment to that other person would be passed on to a foreign official, foreign political party or official thereof or candidate for foreign political office, (v) inside the territory of the United States or, for any United States personality, outside the United States, (vi) to corruptly (vii) influence any official act or decision, induce an action or an omission to act in violation of a lawful duty, or to secure any improper advantage, (viii) or induce any act or decision that would assist the company in obtaining, retaining, or directing business to any person.[83]

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79. 15 U.S.C. §§ 78dd-1, -2(b) (2006); *see also* Ashe, *supra* note 11, at 2906.

80. §§ 78dd-1(c)(1), -2(c)(1); U.S. DEP'T OF JUSTICE, LAY-PERSON'S GUIDE TO FCPA, http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html (last visited March 17, 2009) [hereinafter DOJ].

81. DOJ, *supra* note 80; §§ 78dd-1(c)(2), 2(c)(2).

82. *See* Ashe, *supra* note 11, at 2899. During the 1990s, the view of corruption in business practices changed. *See id.* at 2909. Studies began to show that instead of furthering growth, bribery was simply moving money from the people who needed it into the hands of public officials. *Id.* at 2910. Eventually, corruption and bribery was viewed not as a necessity for growth, but as a serious international problem that could seriously harm the global economy. *Id.* Prior to the 1998 amendments, the Office of Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transaction was implemented by more than thirty nations. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998), 37 I.L.M. 1; *see also* Ashe, *supra* note 11, at 2900. For an analysis of the OECD convention, see *id.*at 2908-17.

83. Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 588-90 (2008). An "issuer" is a company that "either [has] securities registered with the SEC

The 1998 amendments not only allowed a claim against "any person," but also removed the required connection between the corrupt act and the United States.[84] As a result, FCPA may be used to reach foreign agents and U.S. employees living abroad who may not have had any contact with the United States.[85] Importantly, the FCPA prohibits payments to third parties made "while knowing" that some of that money will be used in bribery.[86] The "knowing" standard includes any action prohibited by the FCPA that is taken with "actual knowledge" of the results as well as other actions that demonstrate a "conscious disregard or deliberate ignorance" of circumstances that signal a violation of the FCPA.[87] This encompasses those corporate officers who fail to act in the face of a FCPA violation.[88] Thus, mere negligence is not sufficient to trigger the FCPA.[89]

Enforcement of the FCPA falls in the hands of the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).[90] The DOJ mainly covers the criminal investigation, but may also initiate civil proceedings.[91] The SEC conducts civil investigations of issuers and may also refer a case to the DOJ in the event that criminal matters arise during its investigation.[92] Private parties cannot bring actions under the FCPA, but they may bring violations of the FCPA to the attention of these agencies.[93]

The penalties[94] for individuals who willfully violate the anti-bribery provisions of the FCPA include imprisonment for up to five

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under Section 12 of the Exchange Act or [is] required to file reports under Section 15(d) of the Exchange Act." *Id.* at 583-84.

84. *See* 15 U.S.C. § 78dd-3; *see* Sebelius, *supra* note 83, at 587-88 (describing the SEC's and DOJ's ability to prosecute someone even if he does not do business in the U.S.).

85. *See* Sebelius, *supra* note 83, at 587-88.

86. *See* 15 U.S.C. § 78dd-1(a)(3) (issuers); 15 U.S.C. § 78dd-2(a)(3) (domestic concerns); 15 U.S.C. § 78dd-3(a)(3) (any person); *see* Sebelius, *supra* note 83, at 590-91.

87. Sebelius, *supra* note 83, at 591.

88. *Id.*

89. *See id.*

90. *Id.* at 593.

91. *Id.*

92. *Id.*

93. Sebelius, *supra* note 83, at 594.

94. Along with the standard penalties for civil and criminal offenses, the U.S. may prohibit or temporarily suspend the offender from doing business with an agency of the U.S. government. *Id.* at 595. The criminal sentences for the FCPA are determined with regard to the U.S. Sentencing Guidelines. *Id.* at 595; *see* U.S. SENTENCING GUIDELINES MANUAL §2B4.1 (2007).

years and fines of up to $100,000.[95] Corporations can be fined up to two million dollars for willful violations of FCPA anti-bribery provisions.[96] Fines for violations of accounting provisions are considerably higher.[97]

In comparison to the ATCA, the FCPA has a clear and documented history and it garnered strong support in Congress upon enactment.[98] Furthermore, inspired by the practices discovered after the Watergate scandal, the FCPA was clearly intended to put a limit on corrupt activities abroad, but the original intentions of the ATCA are not as clear.[99] Even though the FCPA had once been criticized for being vague, actions that are prohibited by the FCPA are clearly set out within the act itself and violations give rise not only to monetary penalties, but also to the possibility of imprisonment.[100] In contrast, the ATCA defines prohibited acts as being violations of the "law of nations," which is not clearly defined in the statute.[101] The scope of liability under each ACT has greatly expanded over years of application.[102] Both Acts are now used not only to hold individuals liable, but also to hold corporate defendants liable for even remote connections with questionable business practices and should be of great concern to all U.S. corporations operating abroad. [103]

III. CORPORATE DEFENDANTS AND THE ATCA AND FCPA

While the FCPA was enacted in order to hold corporations liable for corrupt business practices, courts have only recently recognized corporate defendants under the ATCA. This Part will first discuss the general principle of "corporate complicity." It will then examine how each statute has been applied to corporate defendants, with a special focus on corporate complicity.

A. General Principles of Corporate Complicity

Allegations against corporations do not usually stem from a

95. *See* 15 U.S.C. § 78dd-2(g)(2)(A) (2006); § 78dd-3(e)(2)(A) (addressing penalties for persons other than issuers and domestic concerns); 15 U.S.C. § 78ff(c)(2)(A) (2006) (addressing penalties for issuers); *see also* Sebelius, *supra* note 83, at 596-97.

96. Sebelius, *supra* note 83, at 597.

97. *Id.*

98. *See* Zaha Hassan, *When Caterpillars® Kill: Holding U.S. Corporations Accountable for Knowingly Selling Equipment to Countries for the Commission of Human Rights Abuses Abroad,* 6 SAN DIEGO INT'L L.J. 341, 345-46 (2005); Sebelius, *supra* note 83, at 579-82.

99. *See* Schroth, *supra* note 66, at 598-99; Hassan *supra* note 98, at 346.

100. Schroth, *supra* note 66, at 607.

101. Hassan, *supra* note 98, at 346.

102. *See id.* at 348-52.

103. *See id.* at 354.

direct action taken by the company.[104] Instead, it is generally alleged that the corporation provided some assistance to those who committed the abuse or crime, either financially or through some other type of support or encouragement.[105] U.S. courts have experienced difficulties in defining the scope of "corporate complicity."[106] When taking into account the ideals and perceptions of the international community, these difficulties become even more enhanced.

Under early law, corporations were not held criminally or civilly liable for any violent acts.[107] Today, however, it is commonly accepted that a corporation has the ability to commit most offenses.[108] It is difficult to envision how criminal law can be applied to a corporation when it lacks a single, independent mind or body.[109] As a result, a body of law has developed, so that corporations are held responsible for the criminal acts and other violations of those individuals who comprise it.[110] However, complex corporate structure, including multi-tiered groups and parent-subsidiary relationships, makes it difficult, if not impossible, to determine who is at fault and who should be held responsible.[111]

Under both the ATCA and the FCPA, a corporation can be held secondarily liable for the offenses committed by those it conducts business with, those it has control over, and those who manage its operations. [112] This creates a vast landscape of liability stemming

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104. Clough, *supra* note 3, at 905.

105. *Id.*

106. Under a complicity standard, the accomplice is "punished because of his or her knowing involvement in the crime of another." *Id.* In order for complicity to exist, there must first be the commission of an offense by the principal actor. Most commonly, "the accused will be liable as an accessory if he or she 'aids, abets, counsels, or procures' the commission of the principal offense." *Id.* at 907 (citing 18 U.S.C. § 2(a) (1951)). That is, the person being charged as an accomplice did something to make the commission of the crime more likely. *Id.* at 907-08. The accused may merely have failed to intervene in the principal offense, or "turn[ed] a blind eye." *Id.* at 909.

107. *Id.* at 914. (citing People v. Rochester Ry. & Light Co., 88 N.E. 22, 23-24 (N.Y. 1909)). Holding corporations criminally liable began "primarily in [the] nineteenth century" in response to increased presence of "corporations during the industrial revolution." *Id.* at 913.

108. Of course, those offenses that logistically can only be committed by an individual are excluded. *Id.* at 914.

109. "[T]he individualistic nature of the criminal law, with its emphasis on guilty acts and guilty minds, presents particular challenges for the imposition of corporate criminal liability." *Id.*

110. *Id.*

111. For a full discussion on the difficulties that arise in this context, see *id.* at 913-19.

112. *See* 28 U.S.C. § 1350 (2006); 15 U.S.C. §§ 78m(b)(2)-(3); 78dd(1)-78dd(3); 78ff (2000).

from the many interactions of the corporate world.

B. Liability of a Corporation under the ATCA

When widespread use of the ATCA began in U.S. courts, it was accepted that the statute only applied to foreign government officials for human rights abuses that occurred abroad.[113] This understanding stems from the ATCA's underlying requirement that the defendant had committed a tort in violation of the law of nations.[114] Because it was generally understood that only state actors were subject to the law of nations,[115] private citizens and corporations were not subject to liability under the ATCA unless they acted under official state authority.[116] However, if the private individual or corporation commits an action that would attach individual responsibility under international law, the ATCA may be applied.[117] Actions to which this exception apply include piracy, slave trade, genocide, and war crimes.[118]

The ATCA has only recently been used to bring suits against private corporations for violations that occurred abroad. One of the most significant ATCA cases against a corporation is *Doe v. Unocal*.[119] In *Unocal*, residents of a village in Myanmar claimed that Unocal was responsible for acts of torture, rape, forced labor, and displacement committed by the Myanmar military, which was hired to provide security for a pipeline construction project.[120] The district court granted summary judgment in favor of Unocal.[121] It found that the plaintiffs failed to show that Unocal was involved in a state action, nor did they prove that Unocal had any control over the Myanmar military with respect to the tortious acts.[122] Moreover, the court found that Unocal did not take "active steps" in hiring forced laborers.[123]

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113. *See Kadic*, 70 F.3d at 244 (discussing the state action requirement); Hassan, *supra* note 98, at 347.

114. *See* 28 U.S.C. § 1350 (2006); Hassan, *supra* note 98, at 347.

115. *Tel-Oren*, 726 F.2d at 817 (Bork, J., concurring); *see also* Hassan, *supra* note 98, at 347.

116. Hassan, *supra* note 98, at 347.

117. *Kadic*, 70 F.3d at 238-44.

118. *Id.*

119. Doe I v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000). It should be noted that this case was decided prior to the Supreme Court's decision in *Sosa*. However, it is one of the first decisions involving the liability of a corporation under the ATCA.

120. *Id.* at 1298.

121. *Id.* at 1296.

122. *Id* at 1306-07.

123. *Id.* at 1309-10 (discussing "The Flick Case" in which the Nuremberg Military Tribunal convicted defendants Weiss and Flick of taking part in the Third Reich's

On appeal, the Ninth Circuit held that because Unocal used forced labor, a variation of slavery, international law would recognize individual responsibility for this act and any other acts committed by the Myanmar military in furtherance of forced labor, including rape, torture, and murder.[124] In this decision, the court defined two elements that must exist for private parties to be held responsible for a foreign government's violation of human rights laws.[125] First, the private entity must have provided "knowing practical assistance or encouragement that ha[d] a substantial effect on the perpetration of the crime."[126] Second, the private entity must have had actual or constructive knowledge that these actions would assist in the commission of the crime.[127]

The Ninth Circuit found that by hiring the military for security and sharing with it maps and photos of the construction site, Unocal gave "knowing practical assistance" to the Myanmar military and furthermore, that Unocal knew that the military used forced labor and it "benefitted from the practice."[128] Moreover, the court found that Unocal had actual or constructive knowledge that its conduct assisted or encouraged the Myanmar military to subject the plaintiffs to forced labor.[129] This decision would bring on a rash of cases using the ATCA as a basis for holding private entities responsible for assisting in human rights abuses abroad.[130]

One of the most interesting turn of events in recent years has been the numerous ATCA claims against multinational banks and corporations. [131] In these claims, the plaintiffs allege that the

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slave labor program because they took "active steps" to increase the number of forced laborers who worked at their firm (citing Flick v. Johnson, 174 F.2d 983, 984 (D.C. Cir. 1949))).

124. Doe I v. Unocal Corp., 395 F.3d 932, 945-46 (9th Cir. 2002), *vacated, reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003). The Ninth Circuit found that "[c]ourts have included forced labor in the definition of the term 'slavery' in the context of the Thirteenth Amendment." *Id.* at 946. In fact, the Supreme Court, has stated that :[t]he undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of *completely free and voluntary labor* throughout the United States." *Id.* (quoting Pollock v. Williams, 322 U.S. 4, 17 (1944) (emphasis in original))

125. *Unocal*, 395 F.3d at 947, 950.

126. *Id.* at 947.

127. *Id.* at 950-51. The court based its standards for actus reus and mens rea on a number of International Criminal Tribunal decisions including *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Dec. 10, 1998), *reprinted in* 38 I.L.M. 317 (1999).

128. *Unocal*, 395 F.3d at 952.

129. *Id.* at 953.

130. *See* Hassan, *supra* note 98, at 350 (discussing the "wildfire" of cases that followed *Unocal* in which the plaintiffs claim that the corporation hired the host country's military for security or that the corporation invested in a government that committed human rights abuses).

131. *See, e.g.*, Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. Oct. 12,

defendants conducted business with foreign governments that committed human rights violations and are therefore liable for those violations.[132]

In *Khulumani v. Barclay National Bank, Ltd.*,[133] the Second Circuit found that corporations can be held liable under the ATCA for aiding and abetting others who commit human rights abuses in violation of international law.[134] *Khulumani* involved ten separate actions taken by three groups of plaintiffs against approximately fifty major corporate defendants as well as numerous "corporate Does" who conducted business with the South African government during the years of apartheid.[135] The plaintiffs claimed that the "defendants actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as 'apartheid,' which restricted the majority black African population in all areas of life while providing benefits for the minority white population."[136] The various groups of plaintiffs brought claims under the ATCA[137] on behalf of the "victims of the apartheid related atrocities, human rights violations, crimes against humanity, and unfair [and] discriminatory forced labor practices."[138]

In July 2003, as the cases were pending in the Southern District of New York, the South African Minister of Justice and Constitutional Development requested that the district court dismiss the case.[139] The Minister feared that the law suit would interfere with its attempts to address matters regarding apartheid, in which it

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2007) (per curiam); *see also* Hassan, *supra* note 98, at 350.

132. *See* Hassan, *supra* note 98, at 350.

133. 504 F.3d 254, 260 (2d Cir. 2007) (per curiam).

134. *Id.*; Teddy Nemeroff, Note, *Untying the* Khulumani *Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After* Sosa, 40 COLUM. HUM. RTS. L. REV. 231, 232 (2008).

135. *Khulumani*, 504 F.3d at 258.

136. *Id.* Apartheid was introduced by the white South African Nationalist Party in 1948 in an effort to preserve the unity of the Afrikaner people, who descended from the first European settlers in South Africa. Daisy M. Jenkins, *From Apartheid to Majority Rule a Glimpse into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. LAW 463, 466 n.20 (1996). Apartheid was meant to preserve the dominance "of the white man over the black man" in all activities. *Id.*

137. Plaintiffs also brought claims under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (2006), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2006). *Khulumani*, 504 F.3d at 258.

138. *Id.*

139. Crook, *supra* note 9, at 183-84. The Supreme Court referenced this case, which was pending at the time of its *Sosa* decision, when it discussed the need to consider the "practical consequences" of allowing such a suit to go forward, evidencing its concern for the effects it would have on foreign affairs. *Sosa*, 542 U.S. at 733 n.21; Nemeroff, *supra* note 134, at 259-60.

had the main interest.[140] The U.S. Department of Justice also formally filed a statement of interest with the district court, indicating that this lawsuit would risk adversely affecting significant U.S. interests.[141]

The district court dismissed all of the plaintiffs' claims and found that aiding and abetting violations were not actionable claims under the ATCA.[142] The Second Circuit partially vacated the district court's dismissal of the ATCA claims and found that the plaintiffs could move forward with their aiding and abetting claims under the statute.[143] In response to the defendants' arguments that these claims were political questions and thus non-justiciable, the Second Circuit remanded these issues for further consideration and it encouraged the district court to take into account the declarations made by the South African and United States governments.[144] The court stated that "not every case touching foreign relations is nonjusticiable and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considerations on a case-by-case basis."[145]

While the Second Circuit's rulings on the procedural issues are explained in the opinion, the court did not set forth a "common theory of aiding and abetting liability."[146] Rather, the three panel judges each wrote separate opinions defining individual theories regarding the issue.[147] In order to fully understand where corporations stand with regard to indirect liability under the ATCA, this Note will give each theory a closer look and examination.

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140. Crook, *supra* note 9, at 183-84.

141. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 2, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919 (U.S. May 12, 2008); Crook, *supra* note 9, at 184.

142. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004). The decision was based on the fact that *Sosa* required that the causes of actions be found in international law. *Id.* at 547-48. The district court refused to find that aiding and abetting is a norm under international law. *Id.* at 550. The court also found a presumption against aiding and abetting as a civil claim under federal statutes. *See id.* at 550-51.

143. *Khulumani*, 504 F.3d at 260.

144. *Id.* at 262-63. The district court did not address these arguments because the case was dismissed on other grounds. *In re* S. African Apartheid Litig., 346 F. Supp. 2d at 543 n.4.

145. *Khulumani*, 504 F.3d at 263 (quoting Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 69 (2d Cir. 2005)).

146. *See* Crook, *supra* note 9, at 184.

147. *See id.* Judge Katzmann and Judge Hall concurred with the per curiam opinion, while Judge Korman concurred in part and dissented in part. *Id.*

In finding for the plaintiffs, Judge Katzmann concluded that "recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules 'that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern.'"[148] Judge Katzmann found that aiding and abetting liability satisfied the standard for an ATCA claim set forth by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*.[149] In support of his view, Judge Katzmann referenced a number of international authorities such as the Nuremberg Tribunal, and the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) which all imposed criminal liability for aiding and abetting.[150] According to Katzmann, ATCA liability for aiding and abetting exists "when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime."[151]

In finding that aiding and abetting liability is established in international law, Judge Katzman complied with the standard set forth in *Sosa*.[152] However, he failed to show the judicial restraint and concern for the "practical consequences" that the Supreme Court called for.[153] Furthermore, the international laws cited by Judge Katzmann did not include aiding and abetting liability specifically for a corporation.[154]

In contrast to Judge Katzmann, Judge Hall argued that the standard for aiding and abetting liability should not be based on international law, but rather on federal common law.[155] His argument relied on the principle that domestic law should be the

148. *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring) (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 248 (2d Cir. 2003)).

149. *See id.* at 268, 277 (Katzmann, J., concurring). Judge Katzmann specifically referred to footnote twenty in *Sosa*, which requires that liability for private actors should be based on international law. *Id.* at 269. However, he notes that this footnote did not specifically apply to aiding and abetting liability, but to direct liability, but he urges that it "should extend to aiders and abettors." *Id.* at 269.

150. *Id.* at 270.

151. *Id.* at 277. The standard here for mens rea is much higher than that used in *Unocal* as it requires purposeful assistance rather than knowing assistance, thus setting the bar quite high for plaintiffs. *See* Nemeroff, *supra* note 134, at 264 n.161.

152. *Khulumani*, 504 F.3d at 277 (Katzmann, J., concurring).

153. *Sosa*, 542 U.S. at 732; *see also* Nemeroff, *supra* note 116, at 265.

154. *See* Nemeroff, *supra* note 134, at 264-65 ("Thus, a general principle of aiding and abetting liability may not have the 'definite content and general acceptance' required by *Sosa*.").

155. *Khulumani*, 504 F.3d at 286 (Hall, J., concurring). Judge Hall concluded that *Sosa* did not provide guidance as to whether the source for aiding and abetting liability is federal common law or international law. *Id.* Therefore, he chose what he calls the "traditional source" of the standard, the federal common law. *Id.*

source of domestic enforcement.[156] In his view, the appropriate test is set out in the *Restatement (Second) of Torts*, which provides that aiding and abetting liability exists if the defendant "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[157] Therefore, according to Judge Hall, aiding and abetting liability under the ATCA can exist when the accused provided the principal offender "with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose."[158]

Straying from the *Sosa* holding, Judge Hall found that aiding and abetting liability should be based on federal common law.[159] Judge Hall would only require "knowing" assistance on the part of the offender, rather than "purposeful" conduct, as supported by Judge Katzmann.[160] While it is clear and decisive, his simplistic standard could allow many more claims against corporations than had ever been permitted before, and it clearly expands the *Sosa* opinion beyond where the Supreme Court envisioned.[161]

In his forceful, forty-five page opinion, Judge Korman had a narrower view of what *Sosa* requires when determining if there is a cause of action under the ATCA.[162] Korman supported Judge Katzmann's view that international law should be the source of the cause of action for aiding and abetting liability.[163] However, Judge Korman focused the attention on whether international law extends liability to the particular "perpetrator being sued" rather than whether it extends liability for the "violation of a given norm."[164] Thus, Judge Korman set the bar for plaintiffs even higher than Judge Katzmann did. He required that not only must the principal violation be generally accepted in international law, but so must the aiding and abetting liability for that violation.[165] Furthermore, he

156. *Id.* at 286-87; *see also* Nemeroff, *supra* note 134, at 273 ("By advancing in this way, Judge Hall avoids the need to find a norm for aiding and abetting liability in international law.").

157. *Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (internal quotations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 876(b) (1979)).

158. *Id.* at 289.

159. *Id.* at 286.

160. *Id.* at 276-77; *see id.* at 291 (Katzmann, J., concurring).

161. *See* Nemeroff, *supra* note 134, at 275-76.

162. *See Khulumani*, 504 F.3d at 311 (Korman, J., concurring in part and dissenting in part).

163. *Id.* at 311-12.

164. *Id.* at 311 (quoting *Sosa*, 542 U.S. at 732 n.20).

165. *Id.* at 311-12.

concluded that international law must recognize that the particular defendant can be held liable for such a violation.[166]

Setting forth a framework for his analysis, Korman first asked "whether, at the time the alleged crimes were committed, there was a well established and universally recognized international norm providing for liability of private parties who aid and abet apartheid."[167] Second, he noted that "while officers and employees of a corporation may be held responsible for using the entity as the vehicle for the commission of crimes against humanity," the issue of "whether the entities themselves may be held responsible" remained unresolved.[168]

Judge Korman's approach is incredibly narrow and conservative in only allowing aiding and abetting claims that are based on international law. While his approach maintains the *Sosa* Court's requirements, his attempt to draw such a bright line between federal common law and international law has been viewed as a fiction that is not supported by precedent.[169]

The future of the *Khulumani* case is difficult to predict,[170] but whatever the outcome, these opinions will ultimately affect how corporations operate in the global economy. In looking at the opinions, it is difficult to say whose approach is right, especially when there are so many possible scenarios to consider as well as many consequences to keep in mind. In light of these considerations, this Note will later explore the implications of aiding and abetting liability on MNCs.

C. Liability of a Parent Corporation for the Acts of a Subsidiary Under the FCPA

Similar to the concerns about corporate liability (especially aiding and abetting liability) brought about by the ATCA, the FCPA has provoked concerns regarding the liability of parent corporations

166. *Id.*

167. *Id.* at 312.

168. *Id.*

169. *See* Nemeroff, *supra* note 134, at 272-73.

170. The corporate defendants in *Khulumani*, backed by the Bush administration and the South African government, asked the Supreme Court to reverse the Second Circuit's decision. Simon Barber, *Apartheid Victims' Lawsuit Against Multinationals Grinds On,* BUSINESS DAY (Mar. 6, 2009) (discussing developments in the district court case). However, four justices (Chief Justice John Roberts Jr. and Justices Anthony Kennedy, Stephen Breyer and Samuel Alito Jr.) had to recuse themselves. *Id.* Since this would leave only five justices to make a decision, the Court would lack the required six-justice quorum. *Id.* Roberts, Breyer and Alito seem to have recused because they own stock in several of the companies, while Kennedy's son Gregory is a partner at Credit Suisse, another defendant. *Id.* Without a quorum, the lower court ruling is affirmed, meaning that this case remains alive. *Id.*

for their subsidiaries operating abroad.[171] Generally, parent corporations and their subsidiaries are viewed as separate entities, each having limited liability.[172] However, this corporate veil may be pierced under certain circumstances.[173] Courts will analyze all of the dealings between the parent and its subsidiary to determine if the subsidiary is merely the "alter ego" of the parent corporation.[174] Looking at the totality of the circumstances, courts will then decide whether the corporate separateness should be disregarded, thus allowing the parent corporation to be held liable for its subsidiary.[175]

Under the FCPA, the parent company is required to have a certain degree of involvement in the subsidiary's operations, especially with regard to the accounting and controls provisions.[176] Because of this required involvement, not only is the parent company responsible for the subsidiary's compliance with the FCPA's accounting and controls provisions, but the parent company will now have the requisite knowledge that may serve as the basis for the parent's liability under the anti-bribery provisions.[177] Consequently, the parent corporation may give up the limited liability provided by separate incorporation in order to operate in a way that would avoid liability under the FCPA.[178]

Looking solely at the anti-bribery provisions of the FCPA, both parent corporations and their subsidiaries are prohibited from making payments with actual or constructive knowledge that the payments were made corruptly in order to influence a foreign official to obtain or retain business.[179] Essential to finding a parent liable

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171. *See, e.g.*, Brown, *supra* note 8, at 17-19 (discussing the parent-subsidiary relationship and its effects on liability under the FCPA).

172. *Id.* at 17.

173. *Id.*

174. *Id.* at 18.

175. *Id.*

176. *Id.*

177. *Id.* at 18-19.

178. [A] parent-issuer is damned if it reports, and it is damned if it fails to report. A failure to report on corrupt payments by subsidiaries constitutes a failure to comply with the express demands of [the FCPA] that require management to exercise adequate control over assets, and criminality ensues. If, however, an issuer reports on improper payments under [the FCPA], then it may be inferred that the parent-issuer had "reason to know" about the payment. If the parent-issuer had "reason to know," then the criminal sanctions of [the FCPA] may obtain because one must only have "reason to know" that a proscribed payment will be made "to any person" to have violated the law.

Brown, *supra* note 8, at 28 n.91 (quoting Hubert Lenczowski, *Questionable Payments by Foreign Subsidiaries: The Extraterritorial Jurisdictional Effect of the Foreign Corrupt Practices Act of 1977*, 3 HASTINGS INT'L & COMP. L. REV. 151, 157 (1979)).

179. 15 U.S.C. §§ 78dd-1(a), dd-2(a) (2006); *see also supra* Part I.B.

for payments made by its subsidiary is a showing that either "[1] [the] person is aware that [he or she] is engaging in [the] conduct . . . or [2] [the] person has a firm belief . . . that [a] result is substantially certain to occur."[180] Under the FCPA, knowledge of a circumstance can be established "if a person is aware of a high probability of the existence of such circumstance."[181] The standard of knowledge under the FCPA, which includes "willful blindness" and "conscious disregard," is meant to address the problem of managers looking the other way as their foreign subsidiaries make bribes.[182] For that reason, every funded account and payment made must be properly recorded by both the parent corporation and the foreign subsidiary.[183]

Even if a parent corporation did not have actual knowledge of a corrupt payment made by its subsidiary, the requirements under the FCPA's accounting provisions may lead to its liability if such a payment occurs.[184] If records are maintained accurately, then the parent corporation will consequently be on notice of any unlawful payments.[185] If the parent fails to take action in response, it may be found that it had constructive knowledge of the payments and would be liable under the anti-bribery provisions of the FCPA.[186]

> [In enacting the FCPA,] [t]he House-Senate Conference made clear, however, that despite the conferees reluctance to extend the FCPA's jurisdictional reach to foreign subsidiaries, the U.S. parent, whether issuer or domestic concern, would remain liable for corrupt payments made indirectly through its foreign subsidiary. The U.S. Department of Justice has also made clear its position that a U.S. parent that authorizes, directs or participates in a subsidiary's activity in violation of the FCPA will be held responsible.

Brown, *supra* note 8, at 30 (citing H.R. CONF. REP. NO. 95-640, at 14 (1977)).

> The committee found it appropriate to extend the coverage of the bill to non-U.S. based subsidiaries because of the extensive use of such entities as a conduit for questionable or improper foreign payments authorized by their domestic parent.
>
> The committee believes this extension of U.S. jurisdiction to so-called foreign subsidiaries is necessary if the legislation is to be an effective deterrent to foreign bribery. Failure to include such subsidiaries would only create a massive loophole in this legislative scheme through which millions of bribery dollars will continue to flow.

Id. at 29 n.93 (citing H.R. Conf. Rep. No. 95-640, at 12 (1977).

180. 15 U.S.C. §§ 78dd-1(f)(2)(A) (2006); *see also* 15 U.S.C. §78dd-2(h)(3)(A)(I) (2006).

181. 15 U.S.C. §§ 78dd-1(f)(2)(B), dd-2(h)(3)(B) (2006).

182. Brown, *supra* note 8, at 32 (citing H.R. CONF. REP. NO. 100-579, at 919-20 (1988) and S. REP. NO. 95-114, at 11 (1977)); *see also supra* Part I.B.

183. Brown, *supra* note 8, at 32 (citing S. REP. NO. 95-114, at 11 (1977)).

184. *Id.* at 32-33.

185. *Id.*

186. If a U.S. company "looks the other way" in order to claim that it was "ignorant of bribes made by [its] foreign subsidiary," it could be in violation of 15 U.S.C. §

Further, corporations may be held vicariously liable for the criminal acts of their employees that are committed within the scope of employment.[187] These principles also apply to parental liability for the actions of their foreign subsidiaries. Thus, under the FCPA, there are several ways a parent can be held liable for a violation. If the parent company has control over more than fifty percent of the subsidiary's voting shares, the parent has the requisite control over the subsidiary and is thus required to ensure compliance with the FCPA.[188] The parent will have to ensure that the records accurately account for all payments made by the subsidiary, including any that are deemed corrupt.[189]

Consequently, if corrupt payments are properly recorded in the subsidiary's books, it is likely that the parent's actual or constructive knowledge of those payments will be established.[190] If payments only occurred in the past, the parent will not be found to have knowledge.[191] However, if the payments continue to appear on the subsidiary's records, this will be grounds to establish actual or constructive knowledge.[192]

Even if the parent does not control more than fifty percent of the voting shares of a subsidiary, the parent company could be found liable for the subsidiary's violations if the parent exercises enough control over the subsidiary's actions that the subsidiary is found to be an alter ego of the parent.[193] The parent will be held vicariously liable for the subsidiary's criminal actions if the subsidiary is deemed to be acting as the parent's agent.[194]

The 1998 amendments expanded the FCPA's effect by creating liability for "foreign nationals whose employees or agents commit acts in the United States that are in furtherance of a corrupt

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78m(b)(2), which "require[es] companies to devise and maintain adequate accounting controls." S. REP. NO. 95-114, at 11 (1977). The accounting section mandates that off-the-books funds cannot be maintained by a U.S. parent company or by a foreign subsidiary. *Id.* It also states that improper payments cannot be hidden or disguised. *Id.*

187. Brown, *supra* note 8, at 35-36. Brown discusses the *Exxon* case in which the Exxon Valdez tanker was grounded, resulting in damage to Alaskan environment. *Id.* (citing United States v. Exxon Corp., No. A90-015-1CR, at 2-8 (D. Alaska Oct. 29, 1990) (order denying motions to dismiss). In that case, the district court rejected Exxon's argument that it should not be held liable for the actions of its subsidiary, Exxon Shipping Company. Brown, *supra* note 8, at 35-36.

188. *Id.* at 37.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 37-38.

193. *Id.* at 38.

194. *Id.*

payment to a foreign official."[195] Thus, practically any contact with the United States will subject the agent to prosecution.[196] Two cases brought under the FCPA have demonstrated this minimal contact. First, in *SEC v. KPMG Siddhartha*, an action was brought against an Indonesian accounting firm for bribing an Indonesian tax official to the benefit of an Indonesian subsidiary of a U.S. corporation.[197] Second, in *United States v. ABB Vetco Gray, Inc.*, a claim was brought against a Swiss parent corporation who had a subsidiary in America, for the bribery of Nigerian oil officials.[198] In each case, the amount of contact with the United States appears to be very little.[199]

The prospect of parental liability under the FCPA may create significant obstacles for the parent's board of directors and the managers in charge of operations.[200] The main challenge is maintaining a balance between the FCPA's required oversight with the degree of corporate separateness needed to maintain the corporate veil.[201] In fact, compliance with both the FCPA and the ATCA requires intense watchfulness by corporations over their foreign subsidiaries, since even remote violations by the foreign subsidiary may result in liability.[202]

IV. THE IMPACT OF THE ATCA AND THE FCPA ON FOREIGN AFFAIRS AND THE GLOBAL ECONOMY

As a result of globalization, U.S. MNCs benefit greatly from operating in foreign host countries. Particularly in the developing world, labor is cheap and resources are easy to come by.[203] However, MNCs can often find themselves having to deal with foreign governments with significantly different environmental, economic and labor practices than those in the United States.[204] These governments are frequently fueled by corrupt business practices and secured by militant forces that are known for committing human

195. Ashe, *supra* note 11, at 2917 (quoting H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed its Grasp?*, 26 N.C.J. INT'L L. & COM. REG. 239, 349 (2001)).

196. Ashe, *supra* note 11, at 2917.

197. Accounting and Auditing Enforcement Act Release No. 1446 (Sept. 12, 2001); *see also* Ashe, *supra* note 11, at 2920-25.

198. Accounting and Auditing Enforcement Act Release No. 2049, 83 SEC Docket 849 (July 6, 2004); *see also* Ashe, *supra* note 11, at 2920, 2925-2927.

199. Ashe, *supra* note 11, at 2920-27.

200. *See* Brown, *supra* note 8, at 39-40.

201. *Id.* at 62.

202. *See id.* at 62-63..

203. Clough, *supra* note 3, at 900.

204. *See id.* at 899-902.

rights abuses.[205] The mix between the MNCs and these foreign governments may result in unintentional, yet disastrous, human rights abuses and corruption. [206]

Courts have not been clear on when corporations can be held liable for aiding and abetting human rights abuses committed by a foreign government under the ATCA.[207] Under the FCPA, a corporation could find itself liable for a bribery payment that was made by its foreign subsidiary, while the subsidiary itself may not be held responsible under the laws of its own country.[208] These facts, accompanied by the increased number of claims arising under the ATCA and the increased enforcement of the FCPA, will surely hale companies into court and subject them to great cost in legal expenses, penalties, and payment of damages. [209] This potentially could affect their operating costs as well as how efficiently they conduct business.

There are many arguments for and against the use of these acts against corporations and all revolve around how these statues will impact foreign affairs, international business, and the global economy. For example, the ATCA has been denounced as interfering with the President's authority in the war on terrorism.[210] Opponents find evidence of this interference in the *Sosa* case where the lawsuit apparently threatened a decision made by a government agency.[211] A similar argument is that the ATCA interferes with the executive branch's control of foreign affairs.[212] When *Khulumani* was pending in the district court, both the South African government and the U.S. government implored the court to dismiss the case due to these concerns.[213]

However, doctrines (including the political question doctrine and the act of state doctrine) were long ago instituted in order to ensure that the judicial branch does not interfere with sensitive political cases.[214] Furthermore, failing to adjudicate ATCA claims may have

205. *Id.*

206. *Id.*

207. *See, e.g.,* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 261-63 (2d Cir. 2007); *see also* discussion *supra* Part II.B.

208. *See* discussion *supra* Part II.C.

209. *Id.*

210. Ralph G. Steinhardt, *Theoretical and Historical Foundations of the Alien Tort Claims Act and its Discontents: A Reality Check,* 16 ST. THOMAS L. REV. 585, 594-95 (2004). *But see* Terry Collingsworth, *Separating Fact from Fiction in the Debate over Application of the Alien Tort Claims Act to Violations of Fundamental Human Rights by Corporations,* 37 U.S.F. L. REV. 563, 574-75 (2003).

211. Steinhardt, *supra* note 210, at 594-95.

212. *Id.* at 595.

213. Crook, *supra* note 9, at 183-84; *see also supra* text accompanying notes 90-97.

214. *See* Sarei v. Rio Tinto, PLC, 550 F.3d 822, 845 (9th Cir. 2008) (Reinhardt, J., dissenting).

the opposite effect on international relations.[215] If courts refuse to look into claims of human rights abuses, the international community may view this as approval of the offenses.[216]

The FCPA likewise has been criticized for intruding in foreign affairs.[217] The 1998 amendments expanded jurisdiction under the Act, allowing claims for which the connection between the offender and the United States appears to be minimal.[218] Foreign nations may perceive this as an imposition in their own legal affairs.[219] As a result, international tensions could be created in a scenario where the United States has little to no interest.[220]

Political affairs are generally not the main focus in the day-to-day operations of a corporation, however. Corporations oppose the ATCA for a number of reasons in addition to those with a political background. First, they consider the scope of "international law" under the Act to be expansive and the standard set forth by courts as not defined enough to put corporations on notice.[221] Moreover, the list of violations for which corporations could be held liable might expand depending on judicial interpretation at that point in time.[222]

Even more unclear are the activities for which a company may be held liable under an aiding and abetting theory. The *Sosa* court did not specify what standard the plaintiffs must meet in those cases,[223] and the confusion can be found in the opinions of the *Khulumani* court.[224] In particular, corporations are concerned that they will be held liable for simply investing in a country that has a

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> The exercise of AT[CA] jurisdiction may, of course, at times trigger institutional concerns regarding sovereignty and comity. But we have an arsenal of judicial doctrines that protect the sovereignty interests of other countries or the foreign policy and comity interests of this country from judicial intervention: political question, act of state, sovereign immunity, and international comity, for example. In fact, one survey of the cases in 2004 found that approximately 80% of the human rights cases brought under AT[CA] and TVPA since 1980 have been dismissed on the bases of these and other similar doctrines.

Id.

215. Steinhardt, *supra* note 210, at 597. This has also been given as one of the reasons the ATCA was enacted in the first place, as it may appear to be an official approval of the tortious act. *See* discussion *supra* p. 6-7.

216. *See supra* text accompanying notes 25-33.

217. Ashe, *supra* note 11, at 2927.

218. *Id.; see also supra* text accompanying notes 90-97.

219. Ashe, *supra* note 11, at 2927.

220. *Id.*

221. Collingsworth, *supra* note 210, at 566.

222. Steinhardt, *supra* note 210, at 594.

223. *See supra* text accompanying notes 54-65.

224. *See supra* text accompanying notes 133-70.

"bad government."[225] At this point in the ATCA's judicial history, the fear of being held liable for something as remote as a simple investment seems to be unsubstantiated.[226] No court has held a company responsible for simply doing business in a country where human rights abuses have occurred.[227] Nevertheless, the *Khulumani* case is still grinding on[228] while some newer cases have led to landmark settlements.[229] Multinational corporations cannot simply look away and go about their normal operations with the hopes that a court will dismiss an ATCA case if one ever does arise. Even if the case is dismissed, the corporation may suffer losses of legal expenses, time, and bad press due to an unsubstantiated aiding and abetting claim.

However, it has been argued that the standards for claims are clearly set forth in international law and include only a defined number of violations.[230] A corporation will only be held liable if it commits these violations or if it gave knowing assistance to the offender.[231] According to proponents, simple investment has not yet and will never result in liability for an MNC.[232]

The global economy stands to suffer, however. With the prospect of being sued for aiding and abetting, corporations will hesitate to invest abroad.[233] While mere investment may not bring about liability, corporations may wish to avoid frivolous and legitimate claims alike. Furthermore, the possibility of being sued will put the corporations at a competitive disadvantage to their foreign counterparts.[234] While foreign companies do not face being sued for acts of complicity abroad, U.S. corporations will have to take this risk into consideration.

On the same front, the FCPA raises concerns for businesses that operate in the international sphere. The Act makes it less efficient for the businesses to operate, as they may find themselves litigating

225. Collingsworth, *supra* note 210, at 568.

226. *Id.*

227. Steinhardt, *supra* note 210, at 602-03.

228. *See supra* text accompanying note 170.

229. *See, e.g.*, Khurram Nasir Gore, Xiaoning v. Yahoo!: *Piercing the Great Firewall, Corporate Responsibility, and the Alien Tort Claims Act*, 27 TEMP. J. SCI. TECH. & ENVTL. L. 97, 97 (2008) (discussing settlement reached between Yahoo! and the families of two Chinese citizens who alleged to have been tortured by the Chinese government).

230. This list includes "genocide, war crimes, extrajudicial killing, slavery, torture, unlawful detention, and crimes against humanity." Collingsworth, *supra* note 210, at 566.

231. *Id.* at 568-69.

232. *See id.* at 568-70.

233. *See* Collingsworth, *supra* note 210, at 570.

234. *See id.* at 570-71.

bribery claims because of minor contact they had with their foreign subsidiaries.[235] This incurs unnecessary time and legal costs on the company, the foreign agents, and the government.[236] Furthermore, foreign businesses may avoid transacting with U.S. companies in order to avoid prosecution.[237] This could have long-term significant effects on MNCs.[238]

In sum, the costly implications for international business may outweigh the benefits of pursuing remote claims against corporations. In addition to the political tensions that may arise due to claims under both the ATCA and FCPA, corporations may end up defending claims related to remote connections they have with foreign governments, subsidiaries, or agents.

V. CONCLUSION

The ATCA and the FCPA both have heroic and meaningful purposes. They stand for noble objectives such as human rights, anti-corruption, integrity, and dignity – all of which are causes of which the United States has long been a strong proponent. The United States also works to be (or hopes to be) a role model in these aspects for the international community.

Human rights abuses do not have a place in the business world and U.S. corporations should take all steps necessary to avoid supporting governments that commit such offenses. However, when the claims become remote, involving little else but investment abroad, they should clearly be dismissed. Corporations should not be haled into court when the violation has not been defined by international law or the connection between the offender and the MNC is remote.

The ATCA is not the ideal solution nor is it the ultimate deterrent for human rights abuses in the U.S. or abroad, but complete repeal of the Act is not the appropriate answer. The violations should first be dealt with in the country where they occurred. Foreign governments should take responsibility for the offenses and their own judicial body should seek out justice for the victims. For those claims that make it into U.S. courts, the judiciary must take some steps to define more clearly when a corporation will be held liable under an aiding and abetting theory. The principal violation should be based on a consensus of international law and the

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235. *See* Christopher J. Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism?*, 1 ASIAN-PAC. L. & POL'Y J. 14, 31-33 (2000).

236. *Id.* at 33.

237. *Id.*

238. *Id.* at 33-34.

connection between the acts of the corporation and the acts of the principal offender should be strong. Furthermore, the courts should proceed with caution as they venture into territory that may cause political tensions and disrupt U.S. foreign policy.

Corruption and bribery also cause great harm to the corporate and political worlds as well as to society as a whole.[239] Making bribery a criminal act under the FCPA was an important step for the United States to take against such poisonous acts. However, like the ATCA, jurisdiction under the FCPA has expanded to an extent that will only harm the business community and cause tension abroad. [240] The relationship between the U.S. corporations and the principal offenders has become more and more remote. A possible resolution is to cut back on this expansion, and focus on violations that present a strong connection between U.S. corporations and the offenders.

While all of the implications and consequences discussed herein are speculative, both Acts appear to be evolving into grander versions of the original and the potential impacts are unpredictable. The United States should hesitate to become a moral barometer to the world. As the U.S. jurisdictional arm reaches further and further, the benevolent act of opening the courts to these claims may end up backfiring. Instead of trying to continuously expand its judicial reach, the United States should cooperate with foreign nations in determining a resolution and it should encourage those countries to follow its lead in respecting fundamental human rights and maintaining integrity in business practices.

239. *Id.* at 16.

240. *Id.* at 35.

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