Article

Liability of Secondary Actors under the Alien Tort Statute: Aiding and Abetting and Acquiescence to Torture in the Context of the Femicides of Ciudad Juárez

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Since 1993, more than 400 women have been murdered in Ciudad Juárez, Mexico. Few, if any of these crimes have been solved, largely because local Mexican officials have failed to adequately investigate them. This Article argues that femicide victims could hold those officials civilly liable as third parties for these femicides in U.S. federal courts under the Alien Tort Statute (ATS). Although aiding and abetting liability is the most common form of third-party liability sought in ATS cases, several high profile cases have challenged whether it should exist under the ATS. The author agrees with many courts and scholars that aiding and abetting liability should be sustained. However, the author argues that none of the previously proposed standards for aiding and abetting would reach the Mexican officials. Instead, the author proposes "acquiescence to torture" as an innovative form of third-party liability. Acquiescence to torture, as it has been defined in U.S. non-refoulement cases, would broaden the scope of the ATS to allow a suit against Mexican officials for their failure to adequately prevent or investigate the femicides in Ciudad Juárez.

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† Assistant Professor of Political Science, Arizona State University. Ph.D., Louisiana State University 1996. This Article is dedicated to Diana Washington Valdez and Lourdes Portillo, courageous and talented women who have been instrumental in calling attention to the femicides in Ciudad Juárez. The author is grateful to Rebecca Coplan and Stacy Nykorchuk for their tireless and invaluable research assistance. Thanks also to Sarah Bennett, Zeenat Hasan, and several classes of students who helped me develop the ideas in this Article while completing problem-based learning assignments. Special thanks to the fine editorial team of the *Yale Human Rights & Development Law Journal*.

INTRODUCTION

Since 1993, more than 400 women have been murdered in Ciudad Juárez, Mexico. Over 120 of these murders have been deemed sexual homicides. Several high profile national and international reports have placed blame on the local Mexican authorities for failing to exercise due diligence in the investigation, prosecution, and punishment of these crimes and for failing to take reasonable steps to prevent these murders.[1] The "femicides" and the local Mexican government's poor response have been widely publicized internationally by groups in Ciudad Juárez, Mexico, the United States, and other countries through organized protests, petition drives, and other actions.[2] Several family members and NGOs have initiated cases in the Inter-American Commission of Human Rights against the national government of Mexico[3] and these will most likely lead to action by the Commission and, eventually, by the Inter-American Court of Human Rights. However, the Inter-American Commission and Court have both been faulted for their lengthy procedures, and the Commission, especially, has a poor record of state compliance with its decisions.[4] These institutions can make rulings against national governments, but they cannot hold specific individuals in the Mexican government directly accountable. This paper argues that in order to hold local Mexican officials

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1. AMNESTY INTERNATIONAL, MEXICO-INTOLERABLE KILLINGS: 10 YEARS OF ABDUCTIONS AND MURDERS OF WOMEN IN CIUDAD JUÁREZ AND CHIHUAHUA (2003) [hereinafter AI Report]; Inter-Am. C.H.R., *The Situation of the Rights of Women in Ciudad Juárez Mexico: The Right to Be Free from Violence and Discrimination*, OEA/Ser.L/V/II.117, doc. 44 (March 7, 2003) [hereinafter Inter-American Commission Report]; Comicion Nacional de los Derechos Humanos, Mexico (CNDH), *Evaluacion Integral De Las Acciones Realizadas Por Los Tres Ambitos De Bobierno en Relacion A Las Feminicisios En El Municipio De Juárez, Chihuahua* (2005), *available at* http://www.cndh.org.mx/lacndh/informes/espec/espec.htm [hereinafter CNDH 2005]; Committee on the Elimination of Discrimination against Women, *Report on Mexico produced by the Committee on the Elimination of Discrimination Against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico*, U.N. Doc. CEDAW/C/2005/OP.8/MEXICO (Jan. 27, 2005) [hereinafter CEDAW Report].

2. *See* CEDAW Report, *supra* note 1, ¶¶ 244-254; KATHLEEN STAUDT & IRASEMA CORONADO, FRONTERAS NO MAS: TOWARD SOCIAL JUSTICE AT THE U.S.-MEXICO BORDER (2002); DIANA WASHINGTON VALDEZ, COSECHA DE MUJERES: SAFARI EN EL DESIERTO MEXICANO (2005); Melissa W. Wright, *Paradoxes, Protests and the Mujeres de Negro of Northern Mexico*, 12 GENDER, PLACE & CULTURE 277 (2005).

3. *See* Inter-American Commission Report, *supra* note 1, ¶ 26. The Commission reviewed petitions 104/02, 281/02, 282/02, 283/02 and declared three cases admissible. Inter-American Commission Case Reports on Admissibility Nos. 16/05, 17/05, 18/05, Feb. 24, 2005, *available at* http://www.cidh.org/annualrep/2005eng/toc.htm.

4. For an in-depth discussion of potential remedies in the Inter-American Court of Human Rights, see William Paul Simmons, *Remedies for the Women of Ciudad Juárez through the Inter-American Court of Human Rights*, 4 NW. U.J. INT'L HUM. RTS. 492 (2006). Almost three years elapsed from the time of the first petitions in these cases (March 6, 2002) to the time the commission declared them admissible (February 24, 2005). *See* Louie Gilot, *OAS Will Review 5 Murders of Women in Juárez*, THE EL PASO TIMES, July 28, 2006, *available at* http://groups.yahoo.com/group/mujuresdeJuárez/message/53 (reporting that the proceedings were going at a "snail's pace" and that "officials at the Commission said they did not know how many years would pass before the families can see results").

directly accountable for failing to adequately investigate and prevent the femicides, victims of the femicides or their families could sue the officials in U.S. federal courts on a theory of third-party liability under a once obscure American law, the Alien Tort Statute (ATS).[5]

Although the ATS was passed as part of the Federal Judiciary Act of 1789, it was relatively unused and unknown until 1981. Since then, victims of human rights abuses from dozens of countries have used the ATS to bring civil suits in U.S. courts against governmental officials and multinational corporations for a range of abuses. The 2004 Supreme Court case *Sosa v. Alvarez-Machain* cleared up, for the most part, the most fundamental legal issue in ATS jurisprudence: whether or not the ATS affords new subject-matter jurisdiction.[6] The next major controversy in ATS jurisprudence appears to be whether the ATS allows for third-party liability,[7] especially under theories of aiding and abetting.[8] This issue is particularly contentious because most, if not all, of the high-profile ATS cases against multinational corporations involve theories of third-party liability. The federal courts have divided on this issue. Some have ruled that there is no aiding and abetting liability under the ATS, but most courts have found aiding and abetting liability and other third-party liability under a range of legal theories.[9] Congress recently considered a bill, the Alien Tort Statute Reform Act,[10] that would have greatly reduced or even eliminated third-party liability under the ATS. Several legal scholars have argued for some form of aiding and abetting liability under the ATS, although they differ on the standards that should be used to determine such liability.[11] I argue below that third-party liability, including aiding

5. 28 U.S.C. § 1350 (Supp. IV 2000). *See* Grace C. Spencer, *Her Body is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juárez, Mexico*, 40 GONZ. L. REV. 503 (2004/2005) (examining whether the ATS could be used to remedy the working conditions of the women in Juárez, especially after the *Sosa* decision, but not exploring whether the ATS could be used to remedy the femicides themselves).

6. *See* discussion *infra* Part III.

7. I use the term 'third-party liability' to refer to the liability of parties other than the perpetrator (first party) and the victim (second party). Third-party liability is broader than secondary liability in that it includes the primary liability of secondary actors. Third-party liability thus is an umbrella term that includes, *inter alia*, aiding and abetting, command responsibility, conspiracy, and the primary liability of secondary actors. I contend that acquiescence, in the torture context, is a form of primary liability of secondary actors and is thus a form of third-party liability. *See* discussion *infra* Part IV.

8. The liability of secondary actors under the command responsibility doctrine appears to be well settled in ATS jurisprudence. *See, e.g.*, Cabello v. Fernandez-Larios, 402 F.3d 1148, 1153-59 (11th Cir. 2005); Chavez v. Carranza, 413 F. Supp. 2d 891, 899 (W.D. Tenn. 2005); Doe v. Liu Qi, 349 F. Supp. 2d 1258, 1328-34 (N.D. Cal. 2004).

9. *See infra*, Part III.D.

10. S. 1874, 109th Cong. (2005). The bill was withdrawn within a week by its sponsor, Senator Feinstein. *See* Anthony J. Sebok, *Senator Feinstein's Now-Withdrawn Statute Limiting Non-Citizens' Tort Claims: How Would It Have Affected Abu-Ghraib-Related Civil Suits and Other Similar Civil Actions?*, http://writ.news.findlaw.com/sebok/20051031.html (last visited Apr. 9, 2007).

11. David D. Christensen, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After* Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219 (2005); Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort*

and abetting, should remain under the ATS, but that none of the proposed standards would reach the actions or inactions of the local Mexican authorities for the Juárez femicides. I then introduce acquiescence to torture, as specified by the Convention Against Torture (CAT),[12] as an alternative form of third-party liability that would reach the local Mexican officials. This theory would comport well with the law of nations as defined by the ATS, and, since it is not a form of secondary liability but rather primary liability for secondary actors, it could survive potential court rulings against aiding and abetting liability under the ATS and might even survive Congressional action intended to restrict third-party liability.

To summarize, acquiescence to torture is important to consider in the ATS context for three reasons. First, if the Supreme Court ultimately holds that the ATS does not extend to aiding and abetting liability, some primary liability for secondary actors would likely still be imposed on those who have acquiesced to torture. Second, if Congress acts to restrict third-party liability under the ATS, it would not necessarily affect primary liability for acquiescence to torture. Finally, a developing body of jurisprudence defines acquiescence to torture to include a state's failure to prevent or investigate abuses. This definition would broaden the scope of the ATS to allow for claims against Mexican officials for their failure to adequately prevent or investigate the femicides in Ciudad Juárez.

The first part of this paper provides an overview of the femicides in Ciudad Juárez, highlighting the actions and inactions of the local Mexican officials. Part II briefly outlines the development of ATS jurisprudence to the present with a special emphasis on the *Sosa* case. Part III provides an in-depth analysis of the aiding and abetting controversy, focusing on the *Doe v. Unocal* cases, in which this issue received its most extensive legal hearing, as well as recent post-*Sosa* cases and scholarly writings advocating various standards for aiding and abetting liability. Part III concludes with the argument that none of the proposed standards for aiding and abetting liability would reach local Mexican officials for the femicides in Juárez. Part IV introduces the "acquiescence" language from the CAT, discusses how various international and national courts have defined this language, and argues that such an interpretation can lead to primary liability of secondary actors under the ATS. A major focus of Part IV is the definition of acquiescence in U.S. non-refoulement cases, which includes the failure to adequately prevent and investigate torture. Part V considers possible

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Statute, 47 ARIZ. L. REV. 805 (2005); 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 (2003); 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 (2003). *But see* Helena Lynch, *Liability for Torts in Violation of International Law: No Hook Under* Sosa *for Secondary, Complicit Actors*, 50 N.Y.L. SCH. L. REV. 757, 758 (2005/2006) ("[S]ince neither the aiding and abetting nor other asserted standards for rendering liable secondary actors satisfy *Sosa*, complicit actors are essentially untouchable under the ATS unless they are in direct control of the primary actors.").

12. Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), Article 2 (1) [hereinafter CAT].

objections to the use of acquiescence as a form of third-party liability in ATS cases. The concluding section places my proposals in the context of the progressive development of human rights law, including the evolving jurisprudence on state responsibility for the actions of private actors, particularly in the context of violence against women.

I. THE FEMICIDES IN CIUDAD JUÁREZ: ACTIONS AND INACTIONS OF THE MEXICAN GOVERNMENT

Ciudad Juárez is a large, sprawling border town that has experienced rapid growth due to increased cross-border trade, massive migration, and the proliferation of *maquiladoras* – assembly plants mostly owned by American companies that are attracted to the area by low wages and lax labor and environmental regulations.[13] The greater Juárez/El Paso metropolitan area is also one of the largest transit points for illegal drugs and illegal immigrants into the United States, and over the past decade Juárez has experienced a substantial rise in organized crime and gang activities.[14] Juárez's rapid growth has far outpaced social services, has created large areas of destitution, and has substantially disrupted the traditional social fabric.[15]

Since 1993, over 400 women have been murdered in Juárez[16] and many women have disappeared.[17] Overall, the murder rates for men in Juárez still far exceed those for women. However, the murder rates for women have increased much faster than the murder rates for men in Juárez, and are much higher than in comparable cities.[18] Of the murdered women,

13. *See* Inter-American Commission Report, *supra* note 1, ¶¶ 37-40; AI Report, *supra* note 1, at 22-24; ROSA LINDA FREGOSO, MEXICANA ENCOUNTERS: THE MAKING OF SOCIAL IDENTITIES ON THE BORDERLANDS 7 (2003) (reporting that in the 1990s 350 *maquiladoras* in Juárez employed approximately 180,000 employees).

14. Inter-American Commission Report, *supra* note 1, ¶ 39.

15. CEDAW Report, *supra* note 1, ¶¶ 22-25.

16. The number of murders has been the subject of much controversy, with estimates ranging from 230 to 470. *See* Inter-American Commission Report, *supra* note 1, ¶ 41 (noting that the Mexican government reported to the IACHR Special Rapporteur that 268 women were killed from 1993 to 2002); CEDAW Report, *supra* note 1, ¶ 61 (reporting over 320 murders, but noting that NGOs report 359); Mark Ensalaco, *Murder in Ciudad Juárez A Parable of Women's Struggle for Human Rights*, 12 VIOLENCE AGAINST WOMEN 417, 419 (2006) (concluding that, in general, the Mexican authorities' numbers are the lowest, followed by the press, and then the NGOs); Gilot, *supra* note 4 (noting that Amnesty International reported approximately 470 murders between 1993 and 2005); SEAN MARIANO GARCIA, *THE LATIN AMERICA WORKING GROUP EDUCATION FUND, SCAPEGOATS OF JUÁREZ: THE MISUSE OF JUSTICE IN PROSECUTING WOMEN'S MURDERS IN CHIHUAHUA, MEXICO* (2005), *available at* www.lawg.org/docs/ScapegoatsofJuárez.pdf (reporting that the Special Prosecutor's office is looking into 349 murders).

17. The number of disappeared is even more disputed, ranging from the government's estimate of forty-four to the National Human Rights Commission's figure of 4,500. *See* CEDAW Report, *supra* note 1, ¶ 73. *See also* AI Report, *supra* note 1, at 31-33, 82-83.

18. *See* Inter-American Commission Report, *supra* note 1, ¶ 42; AI Report, *supra* note 1, at 25; Ginger Thompson, *In Mexico's Murders, Fury is Aimed at Officials*, N.Y. TIMES, Sept. 26, 2005, at A1.

approximately 140 were sexually assaulted[19] and a large proportion of these have been labeled "serial killings"[20] because they fit a very specific pattern of rape, mutilation, and killing. Many of the victims were held captive for days and perhaps even months or years, during which they were subjected to brutal torture.[21] Most of the victims were young (approximately eleven to twenty-two years old)[22] and poor.[23] A substantial number (perhaps one-fourth to one-third) worked in the *maquiladoras*,[24] and many were students.[25] Many of the other murders, labeled situational murders by the Mexican authorities, stem from domestic violence, drug trafficking, gang violence, intra-familial violence, quarrels, etc. Many have claimed that because violence against women appears to be tacitly accepted by the authorities, the impunity for the so-called serial murders has fueled an increase in the situational murders.[26] Both types of murders share similar root causes in gender discrimination[27] and a series of structural factors.[28]

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19. Inter-American Commission Report, *supra* note 1, ¶ 44 (noting a government estimate that, as of 2002, seventy-six "killings fit this pattern" of sexual homicide); AI Report, *supra* note 1, at 7 (reporting 137 sexual assaults among the 370 murders); Alfredo Corchado, *Report: Juárez Victims Sexually Assaulted: Higher Number Lends Credence to Theory of Serial Killer or Killers*, THE DALLAS MORNING NEWS, May 20, 2005, at A20 (citing a Colegio de la Frontera Norte study that found 142 of 382 murder victims were sexually assaulted). *See generally* CEDAW Report, *supra* note 1, ¶140 (arguing that the controversy over the number of dead could easily be resolved and urging "the government to put forth the exact data, explain the motives and report on the status of the investigations").

20. *See* Inter-American Commission Report, *supra* note 1, ¶44.

21. CEDAW Report, *supra* note 1, ¶ 70; AI Report, *supra* note 1, at 80-81 (detailing specific types of abuses).

22. AI Report, *supra* note 1, at 27, 79-80.

23. AI Report, *supra* note 1, at 79-80; FREGOSO, *supra* note 13, at 2.

24. For an excellent analysis of the victims, *see* Julia Monarrez Fragoso, *Serial Sexual Femicide in Ciudad Juárez: 1993-2001*, 25 DEBATE FEMINISTA 279 (2002) (reporting that 15.7% of victims worked in *maquiladoras*). *See also* AI Report, *supra* note 1, at 80 (approximately one-third, or thirty-two of ninety-five, of sexual homicide victims worked in *maquiladoras*). Several scholars have disputed the much publicized link between the femicides and the maquiladoras. *See* FREGOSO, *supra* note 13, at 7-8; Alicia Schmidt Camacho, *Body Counts on the Mexico-U.S. Border: Feminicidio, reification, and the Theft of Mexicana Subjectivity*, 4 CHICANA/LATINA STUDIES 22, 34 (2004) (arguing that "the maquiladoras narrative can easily absorb the feminicido into a totalizing account of global maldevelopment so that it is unclear precisely what crime is actually being prosecuted, and who the victims ultimately are."). *But see* Griselda Vega, *Maquiladora's Lost Women: The Killing Fields of Mexico-Are NAFTA and NAALC Providing the Needed Protection?* 4 J. GENDER RACE & JUST. 137 (2006); Alicia Gaspar de Alba, *The Maquiladora Murders, 1993-2003*, 28 AZTLAN: J. CHICANO STUD. 1 (Fall 2003); Deborah M. Weissman, *The Political Economy of Violence: Toward an Understanding of the Gender-Based Murders of Ciudad Juárez*, 30 N.C.J. INT'L L & COM. REG. 795 (2005) (tracing links between economic liberalization and the femicides).

25. *Cf.* CEDAW Report, *supra* note 1, ¶ 63; Monarrez Fragoso, *supra* note 24.

26. *See* Inter-American Commission Report, *supra* note 1, ¶ 36 ("The denial of an effective response both springs from and feeds back into the perception that violence against women — most illustratively domestic violence — is not a serious crime."); *id.* ¶ 7 ("The impunity in which such crimes are then left sends the message that such violence is tolerated, thereby fueling its perpetuation.").

27. Inter-American Commission Report, *supra* note 1, ¶ 164.

28. For nuanced discussions of the structural (economic, social, cultural) factors behind

Despite local and international pressure, the murders have continued unabated, and recently have expanded to Chihuahua City, the capital of the state of Chihuahua, approximately 200 miles away, and perhaps to other Mexican cities.[29] A wide range of theories have been advanced regarding the motives of the perpetrators, including violent pornography, the harvesting of body parts, satanic rituals, and some sort of macabre ritual or even sporting event for wealthy young men of the city or drug traffickers.[30] Sorting through these various theories and structural factors is beyond the scope of this paper. Instead, this paper concentrates on the failure of the local authorities to exercise due diligence in the investigation and prevention of the murders.

A. Actions and Inactions of the Mexican Government

For the first ten years or so after the femicides began, the Mexican authorities did little to investigate or prevent them. Typical complaints of victims' families, NGOs, and international organizations included: little investigation especially in missing persons cases,[31] missing evidence from case files,[32] chronic delays in launching investigations into disappeared women,[33] sloppy autopsies,[34] delays in conducting DNA testing,[35] and contamination and confusion of DNA evidence, in particular in the case of the eight bodies found in a cotton field in 2001.[36] Other complaints include: the failure to follow up leads,[37] failure to gather evidence from crime scenes,[38] and failure to seal off crime scenes.[39] Investigations have been irrevocably and inexplicably botched by leaking information to the press,[40] and in numerous cases of sexual assaults there has been no forensic

these murders, see Ensalaco, *supra* note 16, at 420-21, and Rosa Linda Fregoso, *'We Want Them Alive!': the Politics and Culture of Human Rights*, 12 SOCIAL IDENTITIES 109 (2006).

29. Inter-American Commission Report, *supra* note 1, ¶ 56, and Lydia Alpízar, *Impunity and Women's Rights in Ciudad Juárez*, 2 HUMAN RIGHTS DIALOGUE 27, 27 (2003).

30. For the most thorough discussion of these theories based upon years of hands-on investigative reporting, see Washington Valdez, *supra* note 2. *See also* AI Report, *supra* note 1, at 12-13; Melissa W. Wright, *From Protest to Politics: Sex Work, Women's Worth, and Ciudad Juárez Modernity*, 94 ANNALS OF THE ASS'N. OF AM. GEOGRAPHERS 364, 369 (2004); SEÑORITA EXTRAVIADA (Xochitl Films 2001).

31. AI Report, *supra* note 1, at 37-41.

32. Inter-American Commission Report, *supra* note 1, ¶ 70.

33. Inter-American Commission Report, *supra* note 1, ¶¶ 54-55.

34. *Id.* ¶ 71.

35. *Id.* ¶ 47.

36. AI Report, *supra* note 1, at 43-46; CEDAW Report, *supra* note 1, ¶ 95.

37. AI Report, *supra* note 1, at 58.

38. Diana Washington Valdez, *Families, Officials, Claim Cover-Ups Keep Killings from Being Solved*, EL PASO TIMES, June 23, 2002 at 1A.

39. *See* CEDAW Report, *supra* note 1, ¶ 88 (presenting an overview of investigative mistakes). *See also* AI Report, *supra* note 1, at 48. *Cf.* Monarrez Fragoso, *supra* note 24, at 280 (quoting the new Governor of Chihuahua who said "all we've got from the previous administration is 21 bags with bones. . . . We don't know what the circumstances were for those acts. The files are poorly put together . . . How do we investigate these homicides?").

40. CEDAW Report, *supra* note 1, ¶ 81.

analysis.[41] The Mexican National Human Rights Commission found that "in the 36 cases it reviewed, authorities failed to perform many of the 37 separate procedures required in homicide cases involving sexual assault."[42] In one case, the "the ground was dug up [by the authorities] in the vicinity of the discovery [of the body], apparently to conceal any evidence."[43] Family members have reported returning to crime scenes several months after the initial police investigation and finding clothing and other evidence that the police had not gathered.[44] The failure to adequately investigate the murders and disappearances has led to a local practice called "rastreo," where the families and friends of missing and murdered women join together to comb through the surrounding desert looking for remains and other clues.[45] The authorities have also spurned international efforts, from the FBI and others, to assist in the investigations.[46]

The investigations have also been plagued by claims of cover-ups by government authorities and claims that the police planted or falsified evidence to implicate specific individuals.[47] Several members of the investigative teams have resigned, and they later discussed pressure to plant evidence and even alleged complicity between police and the murderers.[48] Finally the reluctance to transfer cases to the federal level, even after the members of the Mexican Congress urged it, has slowed investigations, especially into allegations of complicity of local authorities in the murders.[49]

The failure to adequately conduct investigations is often linked to the failure to prevent crimes because a culture of impunity is established that perpetuates crimes.[50] Also, the systemic delays in investigating missing persons cases signal a failure to adequately prevent these crimes, especially in several well-known cases where witnesses observed the forcible abduction of women.[51] The Mexican authorities have also failed to take adequate operational steps to prevent the crimes. Since 1998, when the Mexican Human Rights Commission issued its first report on the femicides, several organizations have outlined a series of measures to prevent the murders, but the local authorities have failed to adequately

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41. *Id.* ¶ 82. *See also* AI Report, *supra* note 1, at 42, 46-48.

42. Ensalaco, *supra* note 16, at 422.

43. CEDAW Report, *supra* note 1, ¶ 90.

44. Inter-American Commission Report, *supra* note 1, ¶ 48.

45. *See* Schmidt Camacho, *supra* note 24, at 43-48 (presenting a moving personal account of a "rastreo").

46. *See generally* Monarrez Fragoso, *supra* note 24.

47. AI Report, *supra* note 2, at 49-50; Washington Valdez, *supra* note 38; Thompson, *supra* note 18 (quoting Commissioner Morfín: "[W]hy did the authorities go to such lengths to fabricate cases? Maybe it was because of incompetence. Or maybe it was because they didn't want to be exposed.").

48. CEDAW Report, *supra* note 1, ¶¶ 96-97.

49. *Id.* ¶¶ 151-158.

50. *Cf.* Kilic v. Turkey, 2000-III Eur. Ct. H. R. 77, 100, ¶ 78 (holding that the obligation to protect life includes, by implication, effective investigation when individuals are killed by force).

51. CEDAW Report, *supra* note 1, ¶¶ 80-81.

follow up with these recommendations. The Inter-American Commission on Human Rights in 2003 found that the Mexican authorities had failed to adequately follow up on the recommendations of its own human rights commission and that when the Mexican government has acted, it has failed to provide enough attention to the more general problem of violence against women, focusing instead on the so-called "serial killings."[52] The State has also failed to increase its outreach efforts to civil society groups or to conduct a general educational campaign to prevent violence against women.[53] Finally, the authorities have failed to protect those it should know are at risk of harm.[54]

Although not specifically a failure to investigate or prevent the murders, the authorities' treatment of the victims' families clearly evinces their view of these crimes. The authorities have spurned repeated attempts by victims' families to gain information on the progress of investigations.[55] The authorities have even been accused of intimidating or harassing family members[56] and being reluctant to follow up on threats to family members.[57] In addition, families and activists have often faced incrimination from local government officials and business leaders, because the publicity of the crimes and their demands for justice supposedly tarnish the image of the city and reduce investment and tourism.[58] One activist was led to declare "that the governor and his attorney general had 'declared war' on civil organizations instead of declaring war against the criminals."[59]

The Mexican officials have spent a great deal of effort creating alternative discourses that attempt to explain away the murders. They have blamed the victims themselves by creating a discriminatory discourse, in which they claim that the murders could be justified because the victims were prostitutes, because of the victims' manner of dress, or because the victims frequented specific bars or areas of the city.[60] Rosa Linda Fregoso argued that the authorities have attempted to justify or divert attention away from their inadequate investigations by emphasizing the

52. Inter-American Commission Report, *supra* note 1, ¶ 154.

53. *Id.* ¶ 158.

54. *See, e.g., Politically Explosive Murder Rocks Mexican City*, FRONTERA NORTE SUR, Jan. 30, 2006, *available at* http://www.mexidata.info/id770.html.

55. *See, e.g.*, AI Report, *supra* note 1, at 10.

56. CEDAW Report, *supra* note 1, ¶¶ 113-131; Marina Montemayor, *Second Suspect Held in Mexico Slayings*, ASSOCIATED PRESS, Aug. 21, 2006, http://www.foxnews.com/printer_friendly_wires/2006Aug21/0,4675,MexicoBorderSlayings,00.html (reporting that the federal government closed 14 case files that they were reviewing even though the crimes had not been solved).

57. CEDAW Report, *supra* note 1, ¶¶ 130-131.

58. Alicia Schmidt Camacho, *Ciudadana X Gender Violence and the Denationalization of Women's Rights in Ciudad Juárez, Mexico* 5 THE NEW CENTENNIAL REVIEW 255, 273-74 (2005). *See also* Wright, *supra* note 2, at 286, 288 (noting that members of the local business community and other community leaders have urged the victims' families to keep quiet so as to not hurt the public image of Juárez and some have even accused the victims' families of exploiting the murders for their own gain).

59. Wright, *supra* note 2, at 286. *See also* AI Report, *supra* note 1, at 60-62.

60. *See* Inter-American Commission Report, *supra* note 1, ¶¶ 73, 80; CEDAW Report, *supra* note 1, ¶ 67.

"nonnormative behaviors" of the women and girls, "accusing them of transgressing sexual norms, either of lesbianism or of leading a 'doble vida' (double life) – that is, engaging in respectable work by day and sex work by night – as though nontraditional sexual behavior justified their killings."[61] The Mexican officials also have also attempted to "normalize" the murder statistics by disaggregating the serial and situational murders[62] or by claiming that a large number of the murders had been solved. For example, the Mexican government claimed to the Special Rapporteur of the Inter-American Commission on Human Rights that 179 of the 268 murders had been resolved.[63] However, the government claimed a case was resolved if:

> it had enough information upon which to make a presumption as to the motive and culpability of a presumed perpetrator and that the person had been presented before a judge ("*consignado*"). It did not necessarily signify that a particular individual had been formally charged or tried. It was not clearly explained, however, how indicia not yet sufficient to support formal accusation and prosecution was nonetheless sufficient to make a determination as to motive and to declare the crime "resolved."[64]

The authorities have also blamed the murders on structural factors such as the supposed "social disintegration of victims' families"[65] as if to absolve the criminals of the murders and the authorities of their own failure to adequately investigate and/or prevent these crimes.

The national and international reports on the femicides have all reached very similar conclusions. The Inter-American Commission concluded that "there had been no real commitment to an effective response" and that the official response "has been markedly deficient."[66] Amnesty International concluded that the investigations exhibit "a pattern of intolerable negligence"[67] and that "the pattern of non-compliance with the minimum requirement of the 'due diligence' standard has been so marked that it calls into question whether the authorities have the will and commitment to put an end to the murders and abductions in Chihuahua and the violence against women they exemplify."[68] A comprehensive report drafted in line with Article 8 of the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) found "grave and systematic violations"[69] of the

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61. FREGOSO, *supra* note 13, at 3; *See also* Wright, *supra* note 30, at 377 (reporting that police frequently ask victims' families "are you sure she didn't lead a double life?").

62. *See* Inter-American Commission Report, *supra* note 1, ¶ 81.

63. *Id.*

64. *Id.* ¶ 82.

65. Wright, *supra* note 30, at 378.

66. Inter-American Commission Report, *supra* note 1, ¶¶ 4, 34.

67. AI Report, *supra* note 2, at 71.

68. *Id.* at 72.

69. CEDAW Report, *supra* note 1, ¶ 259.

Convention and that there had been "systematic violations of women's rights, founded in a culture of violence and discrimination that is based on women's alleged inferiority, a situation that has resulted in impunity."[70]

The Mexican government's commissions have reached similar conclusions. A 1998 report by the Mexican National Human Rights Commission (CNDH) documented a series of inadequacies in the investigation and concluded that the impunity resulting from the local government officials has perpetuated the crimes.[71] A spokesman for the CNDH says that its 2003 report "provides evidence of everything said so far by international and local groups regarding negligence and carelessness in the conduct of the investigations."[72] Guadelupe Morfín, the head of the Commission for the Prevention and Elimination of Violence Against Women in Ciudad Juárez, the official who was charged by President Fox with reviewing the investigation of these murders, concluded that the investigations were a "façade, an apparent cover-up."[73] The CNDH in 2005 concluded that, "because the Mexican State was allowing these crimes to remain in impunity, it was encouraging their persistence."[74]

Many official reports have laid the blame on specific individuals or offices within the Mexican government. The CNDH, based on an analysis of thirty-six murders, called for the "sanctioning of the officials who had failed to comply with their duties under the law."[75] After reviewing 150 case files, a federal Special Prosecutor "concluded that there was probable cause for criminal and administrative investigations into more than 100 Chihuahua state public officials for negligence, omission and other related offences."[76] However, attempts to bring indictments against these officials have been stymied by local courts.[77]

The Mexican government has made some arrests in the cases, and several of the alleged perpetrators were ultimately prosecuted. These included two bus drivers[78] and several members of local gangs.[79] Most of the activists working to end the femicides believe that few, if any, of these men were connected to the crimes, in part because many of those arrested confessed only after being subjected to systematic torture.[80] It is now clear

70. *Id.* ¶ 261.

71. Inter-American Commission Report, *supra* note 1, ¶¶ 72-73. *See also* CEDAW Report, *supra* note 1, ¶ 28 (parts of the CNDH 1998 report "were rejected by State authorities"); AI Report, *supra* note 1, at 35 (representatives were told in 2003 that the recommendations "only referred to the previous government and that therefore they could not comply with it").

72. Latin American Weekly Report, November 25, 2003, at 5.

73. Alfredo Corchado, *Report: Juárez Suspects Tortured: Mexican Sees Troubling Pattern in cases of U.S. Woman, Others*, DALLAS MORNING NEWS, May 12, 2005, at 17A.

74. Inter-American Commission Report, *supra* note 1, ¶ 34.

75. *Id.* ¶ 5.

76. Amnesty International, *Mexico: Justice Fails in Ciudad Juárez and in the City of Chihuahua*, AI Index AMR 41/007/2005, Feb. 28, 2005.

77. *Id.*

78. Kent Patterson, *Amnesty International Revisits Mexican Mass Femicide*, FRONTERA NORTE SUR, Aug. 17, 2005, http://www.mexidata.info/id577.html.

79. Inter-American Commission Report, *supra* note 1, ¶ 83.

80. *Id.* ¶ 49 (noting that some Mexican officials "expressed" to the IACHR's Special

that a secondary human rights abuse has occurred: the torture of a series of "scapegoats" by Mexican authorities.[81] In addition, two of the attorneys working on the case involving the bus drivers were gunned down in nearly identical fashion three years apart.[82] One of the bus drivers, Gustavo Gonzalez Mesa, was found dead under suspicious circumstances in his prison cell[83] while the conviction of the other, Victor Garcia Uribe, was eventually overturned.[84]

In the face of increased local and international pressure, the Mexican authorities made some attempts, often cosmetic, to investigate and prevent the murders, but these investigations have been plagued by little or no institutional follow-up.[85] Mexican President Vicente Fox appointed a special prosecutor to oversee the investigations in 1998,[86] and a Commission for the Prevention and Elimination of Violence against Women in Ciudad Juárez was established in 2003 with human rights activist Guadalupe Morfín in charge.[87] The most promising recent reform was a forty-point action plan, drafted by Special Commissioner Morfín, that attempts to deal with the problem both with specific immediate action steps and from a structural perspective, including prevention of crime, social advancement, and human rights of women.[88] To date, the program has produced mixed results.[89]

However, the situation on the ground in Juárez has not improved significantly.[90] Several scholars and activists have suggested that the Juárez

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Rapporteur "serious concerns about allegations that these detainees had been tortured to coerce confessions").

81. AI Report, *supra* note 1, at 50-54, (discussing general allegations of torture in Mexican investigations). *Cf.* Special Report, *Presumed Guilty? Criminal Justice and Human Rights in Mexico*, 24 FORDHAM INT'L L. J. 801 (2001) (providing an overview of the role of torture in Mexican investigations and attempts at reforms). One independent report estimates that "torture may have been used to extract false confessions in almost half of the Juárez crimes in which arrests have been made." MARIANO GARCIA, *supra* note 16, at 12. *See also* Alma Guillermoprieto, *Letter from Mexico: A Hundred Women*, THE NEW YORKER, Sept. 29, 2003, at 88-93 (explaining that those tortured included a U.S. citizen and her husband who were later released). In July 2006, Miguel David Meza, who was accused of one of the Chihuahua City murders was released after claiming that his confession was given under torture. An investigation has now been launched into the torture allegations, and a former Chihuahua Attorney General is under investigation for the torture. Angel Zubia Garicia and Sonia Aguilar, *Femicide Suspect Freed: Former Top Law Enforcement Official Eyed* FRONTERA NORTE SUR, July 10, 2006, http://www.nmsu.edu/~frontera/.

82. Inter-American Commission Report, *supra* note 1, ¶ 66.

83. *Id.* ¶ 50.

84. Patterson, *supra* note 78.

85. Inter-American Commission Report, *supra* note 1, ¶ 75.

86. MEXICO SOLIDARITY NETWORK, FEMICIDES IN CIUDAD JUÁREZ (2004), *available at* http://www.mexicosolidarity.org/site/specialreports/2004femicides.

87. Press Release, Amnesty International, Mexico: Justice Fails in Ciudad Juárez and the City of Chihuahua (Feb. 28, 2005), *available at* http://news.amnesty.org/index/ENGAMR4 10072005.

88. CEDAW Report, *supra* note 1, ¶¶ 172-191. *See also* MEXICO SOLIDARITY NETWORK, *supra* note 86.

89. CEDAW Report, *supra* note 1, ¶¶ 200-211.

90. Townhall.com, Police Recover Woman's Body in Mexico,

police may have been directly complicit in these murders,[91] but I argue that even if they are not directly complicit, some Mexican authorities could face civil liability because of their systematic failure to investigate and prevent the killings.

II. THE ATS THROUGH *SOSA*

This Article argues that the families of the femicide victims should bring suit in the United States federal courts under the ATS,[92] which in its current wording states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[93] The ATS was passed by the first U.S. Congress as part of the Federal Judiciary Act of 1789 but lay virtually dormant before being revived in 1980 by *Filartiga* v. *Pena-Irala*.[94]

In *Filartiga*, plaintiffs alleged that Peña, while serving as Inspector General of Police in Paraguay, had kidnapped and tortured to death the seventeen-year-old son of Dr. Filartiga, because of the doctor's opposition to the Paraguayan government led by President Alfredo Stroessner.[95] Upon learning that Peña was living in the United States, Dr. Filartiga and his daughter brought suit in federal district court claiming damages under the

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http://www.townhall.com/News/NewsArticle.aspx?ContentGuid=807e82cb-00ec-473a-a674-19666ae66925 (last visited Mar. 15, 2007) (noting that as of the end of July, fourteen women had been killed in Juárez in 2006).

91. CEDAW Report, *supra* note 1, ¶ 89; Washington Valdez, *supra* note 2; Ensalaco, *supra* note 16, at 424-25; SEÑORITA EXTRAVIADA, *supra* note 30.

92. In order to hear a claim under the ATS, the federal court must have personal jurisdiction over the defendant(s), which is established when the defendant "receives sufficient notice of the complaint and action against them." *Doe v. Qi*, 349 F. Supp. 2d 1258, 1276 (N.D. Cal. 2004). Generally, the defendant must be served with a summons in the United States in order for the court to exercise personal jurisdiction. Considering that Juárez is a border town, and that officials frequently visit the United States for business and personal reasons, this should be less of a problem than it has been with defendants from other countries. Another potential obstacle to ATS claims is the Foreign Sovereign Immunities Act (FSIA). On this issue, the circuit courts have been split. Some have ruled that the FSIA only applies to national governments and therefore all government officials, besides heads of states, can be sued under most circumstances. Other circuits have ruled that the Act applies only to government officials acting in their official capacity. Under this interpretation, the FSIA "will not shield an official who acts beyond the scope of his authority," *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990), and officials found to acquiesce in torture would be acting beyond their authority. Other hurdles common in ATS cases, such as statute of limitations and forum non conveniens, would most likely not be applicable in a case related to the femicides, or might only restrict the specific cases that could be brought.

93. 28 U.S.C. § 1350 (Supp. IV 2000).

94. 630 F.2d 876 (2d Cir. 1980). For thorough historical accounts of the ATS, see Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445 (1995).

95. *Filartiga*, 630 F.2d at 878. *See generally* RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS (2004).

ATS and several other statutes and treaties.[96] The Second Circuit Court ultimately held that "[h]aving examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the works of jurists — we conclude that official torture is now prohibited by the law of nations"[97] and thereby is actionable under the ATS. On remand, the district court granted a default judgment in favor of the Filartigas, and each of the plaintiffs was awarded five million dollars in punitive damages.[98]

Since then, dozens of ATS cases have been brought in federal courts. At first, the claims were mainly against foreign government officials, but recently, more of the cases are focusing on claims against private individuals and multi-national corporations.[99] Until 2004, the Supreme Court had only issued one ruling on the ATS, which primarily addressed the tangential issue of whether the Foreign Sovereign Immunities Act protected foreign governments from suits under the statute.[100] Without direction from above, the meaning of the ATS was found amongst many conflicting federal court decisions.[101]

In the most important controversy, some judges and scholars claimed that the ATS did not grant new subject-matter jurisdiction to the federal district courts or create a private right of action, but basically allowed aliens a federal forum to bring suits under pre-existing U.S. law. The Supreme Court in *Sosa v. Alvarez-Machain* finally addressed this substantive jurisdiction issue.[102] The procedural history of the case is long and complex. Dr. Alvarez-Machain was allegedly present at a home in Mexico in 1985 where a DEA agent was held and tortured before being killed.[103] Dr. Alvarez-Machain allegedly prolonged the agent's life for additional torture.[104] Several people had been convicted in this incident, and an indictment was issued in 1990 for the arrest of Dr. Alvarez-Machain.[105] The U.S. hired a former Mexican police officer named Jose Francisco Sosa to bring the doctor into the United States.[106] Sosa and several accomplices abducted Alvarez-Machain and, after spending one evening in a motel, they flew him across the U.S.-Mexico border where U.S. authorities took him into custody.[107] The ensuing criminal case, which led to a separate

96. *Filartiga*, 630 F.2d at 879.

97. *Id.* at 884.

98. Filartiga v. Pena-Irala, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

99. *See* Christensen, *supra* note 11, at 1237 (noting that "[t]he initial wave of post-*Filartiga* suits involved victims suing individuals acting in their official capacity").

100. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

101. *Cf.* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) ("This case deals with an area of the 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.'").

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

103. *Id.* at 697.

104. *Id.* at 697-98.

105. *Id.* at 697.

106. *Id.* at 698.

107. *Id.*

ruling in the Supreme Court,[108] was eventually dismissed as too speculative.[109] Upon his return to Mexico, Alvarez-Machain commenced a suit against the United States and Sosa for numerous tort claims under the Federal Tort Claims Act (FTCA) and the ATS. His ATS claim argued that his abduction and transport to the United States was a violation of the law of nations. The district court granted the Government's motion to dismiss on the FTCA claim, but awarded Alvarez-Machain summary judgment and $25,000 in damages for his detention in Mexico under the ATS.[110] The circuit court then affirmed the ATS ruling and reversed the FTCA dismissal.[111] The United States and Sosa appealed to the Supreme Court.

The Court, in an opinion written by Justice Souter, first reversed the circuit court's ruling on the FTCA claim, finding that "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred."[112] The Court went on to hold that the ATS does not create a new cause of action; instead, the ATS is only a jurisdictional statute, based in part on the fact that the ATS was originally included in Section 9 of the Judiciary Act of 1789, which dealt with jurisdictional issues.[113] However, the Court's inquiry did not end there. If the statute was purely jurisdictional, what was its function? Was the ATS moot until Congress passed further laws, or was it operational from the time it was passed? After examining the "ambient law" of the time, the Court concluded that the ATS was not "stillborn," but that it was intended to cover a very specific set of violations "of the law of nations [that] would have been recognized within the common law of the time."[114] This interpretation of the ambient law is reinforced by some early cases and by Attorney General Bradford's 1795 opinion on participation by American citizens in "the French plunder of a British slave colony in Sierra Leone."[115] Bradford clearly referenced the ATS when he wrote, "[b]ut there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States."[116]

In *Sosa*, the majority concluded that Congress in 1789 most likely intended the ATS to cover only three types of offences under the law of nations: 1) violation of safe conduct; 2) infringement of the rights of

108. United States v. Alvarez-Machain, 504 U.S. 655 (1992).

109. Alvarez-Machain v. United States, 331 F.3d 604, 610 (9th Cir. 2003) ("The [district] court concluded that the case against Alvarez was based on 'suspicion and . . . hunches but . . . no proof,' and that the government's theories were 'whole cloth, the wildest speculation'.")

110. *Sosa*, 542 U.S. at 699.

111. *Id.* at 698.

112. *Id.* at 712.

113. *Id.* at 713-14.

114. *Id.* at 714.

115. *Id.* at 720-21.

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

ambassador; and 3) piracy.[117] It then contended that the ATS was a living statute that could cover a very limited number of additional offenses as the law of nations evolves.[118] However, the majority warned that courts should exercise considerable constraint in expanding this list for several reasons. First, the role of the courts in determining common law has changed since 1789.[119] Second, the role of the federal courts in making common law has been greatly reduced, especially after *Erie R. Co. v. Tompkins*.[120] Third, "this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases."[121] Further, the courts should be wary of interfering in issues that affect foreign affairs, "since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[122] Finally, the courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity."[123] But the Court held that these reasons for caution are not reasons to completely disregard something akin to federal common law in this instance; after all, the ATS is a living statute. Therefore, the courts can exercise what the majority calls "residual common law discretion,"[124] but it warned "the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today."[125]

The majority then outlined what I will call the "*Sosa* Test" to determine what claims are actionable under the ATS: "We are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[126] The Court then gave credence to how the

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117. *Sosa*, 542 U.S. at 724.

118. *Id.* at 724-25 ("We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.") (citation omitted).

119. *Sosa*, 542 U.S. at 725 ("Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.").

120. *Id.* at 749-50.

121. *Id.* at 727.

122. *Sosa*, 542 U.S. at 727-28.

123. *Id.* at 728.

124. *Id.* at 738.

125. *Id.* at 729.

126. *Sosa*, 542 U.S. at 732. Justice Scalia did not join the majority on this section, arguing that the reasons for urging judicial caution in this area are so overwhelming that the courts should never expand on the original list. He wrote, "creating a federal command (federal common law) out of 'international norms,' and then constructing a cause of action to enforce

ATS has been interpreted in *Filartiga* and after by the circuit courts:

> This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga*, ("[F]or purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind"); *Tel-Oren*, (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions--each of which violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation* ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory").[127]

The Court adds one further important caveat: "the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the *practical consequences* of making that cause available to litigants in the federal courts."[128] Justice Breyer's concurrence adds an additional layer of specificity to the norms considered actionable under the ATS. He argues that any consideration of international law should also consider international comity and therefore should limit the tortious actions to those that border on universal jurisdiction. He writes, "[t]oday international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. *That subset includes torture, genocide, crimes against humanity, and war crimes.*"[129]

Finally, as to the facts of the case, the Court compared Alvarez-Machain's claim to the *Sosa* Test and found it wanting: "[A] single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy."[130]

In the wake of *Sosa* dozens of ATS cases have been working their way through the federal courts alleging a plethora of human rights abuses that involve dozens of countries and multinational corporations. For example, cases have been brought against U.S. government contractors for alleged abuses at Abu Ghraib prison[131] and Guantanamo Bay,[132] against Osama Bin Laden,[133] and against multinational corporations, such as Pfizer,[134] Exxon-

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that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts." (*Id.* at 743).

127. *Id.* at 732 (citations omitted).

128. *Sosa*, 542 U.S. at 732-33 (emphasis added).

129. *Id.* at 762 (emphasis added) (internal citations omitted).

130. *Id.* at 738.

131. Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005).

132. *In re* Guantanamo Detainee Cases, 355 F.Supp.2d 443 (D.D.C. 2005).

133. Mwani v. Osama Bin Laden, 417 F.3d 1 (D.C. Cir. 2005).

Mobil,[135] and Caterpillar.[136] Claims include allegations against a banking group for aiding and abetting Saddam Hussein's use of chemical weapons,[137] and for actions of governmental officials from Sudan,[138] China,[139]and Israel.[140] Substantively, cases have involved abuses stemming from slavery in the United States before the Civil War,[141] apartheid in South Africa,[142] the 9/11 terrorist attacks,[143] and mistreatment of aliens in private prisons in the United States.[144] For the most part, these cases have either not met the *Sosa* test or they have been denied based upon other legal hurdles such as the statute of limitations[145] or the doctrine of *forum non conveniens*.[146]

However, several large settlements have resulted from ATS claims, including two cases involving abuses during the Salvadoran civil war of the 1980s. In a much-publicized case, three Salvadoran refugees brought claims against the former Minister of Defense of El Salvador and the Director General of the El Salvador National Guard for torture under the ATS (for two plaintiffs as the third was not an alien) and the Torture Victims Protection Act. After several appeals, most notably on a statute of limitations claim, the plaintiffs were awarded $54.6 million in a jury trial.[147] In another recent case, a jury found the former Vice-Minister of Defense of El Salvador liable for the torture of four Salvadorans and awarded them five million dollars in compensatory damages and four million dollars in punitive damages.[148]

III. AIDING AND ABETTING LIABILITY UNDER THE ATS

Third-party liability is shaping up to be the most important current controversy in post-*Sosa* cases, and this issue is mostly framed in the context of aiding and abetting liability. In the past few years, the district courts have split on the aiding and abetting issue. *Doe v. Unocal*, the Court of Appeals for the Ninth Circuit case that many thought would decide the issue was settled out of court and hence does not provide guidance in this

134. Abdullahi v. Pfizer, Inc., 77 Fed.Appx. 48 (2d Cir. 2003).

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

136. Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005).

137. Stutts v. De Dietrich Group, 2006 U.S. Dist. LEXIS 47638 (E.D.N.Y. June 30, 2006).

138. Presbyterian Church of Sudan v. Talisman Energy, Inc., 2005 U.S. Dist. LEXIS 20414 (S.D.N.Y. Sept. 20, 2005).

139. Doe v. Liu Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

140. Doe v. State of Israel, 400 F. Supp. 2d 86 (D.D.C. 2005).

141. *In re* African-American Slave Descendants Litig., 304 F.Supp.2d 1027 (N.D. Ill. 2004).

142. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D. N.Y. 2004).

143. Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks), 349 F. Supp.2d 765 (S.D.N. Y. 2005).

144. Jama v. Esmor Corr. Servs., civ., 2005 U.S. Dist. LEXIS 26060 (D. N.J. Nov. 1, 2005).

145. *E.g.*, Deutsch v. Turner Corp., 217 F.3d 1005 (9th Cir. 2003).

146. *E.g.*, Auginda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002); Abdullahi v. Pfizer, 2005 U.S. Dist. LEXIS 16126 (S.D.N.Y. Aug. 9, 2005).

147. Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006).

148. Bruce Zagaris, *International Human Rights*, 22 INT'L ENFORCEMENT L. REP. 78 (2006).

area.[149] Legal scholars are now chiming in.

A. Violations of International Law by Non-State Actors

The aiding and abetting issue is closely related to the question of whether the law of nations can be applied to non-state actors. Traditionally, the law of nations applied, for the most part, only to the actions of states and state actors. Some independent individual actions such as piracy and slave trading have risen to the level of violations of the laws of nations. Also, in the post-World War II tribunals, several individuals and private corporations were found guilty of violating what would best be considered the law of nations. Finally, some international treaties such as the Rome Statute have clearly recognized individual responsibility for human rights abuses.

However, several ATS cases have limited the reach of the statute to state actors. In an early case, the Ninth Circuit ruled that "[o]nly individuals who have acted under official authority or under color of such authority may violate international law. . . ."[150] Although a district court will still follow this holding occasionally,[151] most courts now are abiding by the standard set in *Kadic v. Karadzic*.[152] Karadžić, who was the titular head of state for the unrecognized Republic of Srpska, was accused of "genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death."[153] The district court accepted Karadžić's claim that he was not acting as a state actor and "acts committed by non-state actors do not violate the law of nations."[154] The Second Circuit reversed after examining treaties, U.S. codes, and previous international cases. It held that individual actors could commit some offenses against the law of nations (genocide and war crimes, for example), while others could not. The court concluded:

> We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold 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.[155]

149. Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002).

150. *In re* Estate of Marcos Human Rights Litig., 978 F.2d 493, 501-02 (9th Cir. 1992).

151. *E.g.*, Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005).

152. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

153. *Id.* at 237.

154. *Id.* (citing Doe v. Karadzic, 866 F. Supp. 734, 739 (S.D.N.Y. 1994).

155. *Id.* at 239. *See also* Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). *Cf.* Christensen, *supra* note 11, at 1242 (noting that "[t]orture, extrajudicial killing, and crimes against humanity would be the most obvious examples of *jus cogens* norms still requiring state action.").

B. Third-Party Liability: *Doe v. Unocal*

Once it is established that non-state actors can violate the law of nations, it remains to be determined whether state or non-state actors can be held liable as third parties to torts in violation of the law of nations. The most extended discussion on this issue surrounds the *Doe v. Unocal* cases that were brought in state and federal courts for violations that occurred in Myanmar, formerly known as Burma.

It had been alleged that the Myanmar military regime had committed massive human rights abuses for several years, including a much-publicized crackdown on a pro-democracy movements in 1988 and 1990. Even after these allegations were made public, Unocal entered into several contracts with the government of Myanmar to extract natural gas and transport it via pipeline through the Tenasserim region of the country. The Myanmar military provided labor and security forces and cleared roads for the pipeline project. Unocal, in the planning stage of pipeline construction, was warned that the Myanmar government was likely to employ forced labor in the pipeline project. Despite complaints from villagers and human rights groups, the project proceeded with forced labor.

In 1996, several villagers brought claims under the ATS against Myanmar and Unocal alleging that they had been forced to work on this project; two plaintiffs alleged that Myanmar soldiers had raped them.[156] Further, several villagers were forcefully relocated, and some were executed, raped, tortured, and/or beaten. The Ninth Circuit held that the claims against Myanmar were barred by the Foreign Sovereign Immunities Act. The pertinent remaining question was whether Unocal could be held liable under some type of third-party liability, even though none of their employees actively engaged in the forced labor or other abuses. There was strong evidence that Unocal knew or should have known of the abuses perpetrated by the Myanmar army in pursuit of their joint project and yet, Unocal continued to support the project and, indirectly, the military's actions. Several reports from human rights groups and cables from the U.S. Embassy and the U.S. State Department[157] discussed the use of forced labor in the project. A letter from a Unocal consultant concluded that "egregious human rights violations have occurred, and are occurring now, in southern Burma . . . . Unocal, by seeming to have accepted SLORC's [The Myanmar ruling council's] version of events, appears at best naïve and at worst a willing partner in the situation."[158]

The parties to the lawsuit contested the standard for determining third-party liability in several court proceedings over several years. The district court's ruling considered theories of secondary liability only in its discussion of forced labor. Here the court relied heavily on its interpretation of three post-WWII trials of German industrialists when it

156. Doe v. Unocal, 395 F.3d 932, 936-40 (9th Cir. 2002).

157. Doe v. Unocal, 110 F. Supp. 2d 1294 at 1299-1301 (C.D. Cal. 2000).

158. *Id.* at 1299-1300.

concluded that "liability requires participation or cooperation in the forced labor practices."[159] Although the defendants "knew that forced labor was being utilized and . . . benefited from the practice," there was no evidence "that Unocal sought to employ forced or slave labor."[160] Therefore, the district court granted summary judgment in favor of Unocal.

A three-judge panel of the Ninth Circuit first decided that the alleged abuses of forced labor, murder, rape (as a form of torture), and torture each violate *jus cogens* norms and thus are violations of the law of nations under the ATS.[161] Second, non-state actors could be held liable under the ATS for crimes such as forced labor, which "is a modern variant of slavery to which the law of nations attributes individual liability,"[162] as well as for the crimes of murder, rape, and torture when perpetrated in pursuit of forced labor.[163]

The court split on the standard for third-person liability but was unanimous in reversing the grant of summary judgment on the ATS claims. Instead of the "active participation" standard applied by the district court, the circuit court chose to apply standards of aiding and abetting liability derived from international law precedent, specifically from decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The court explained its decision to apply standards established in international criminal cases to a domestic civil case:[164]

> International human rights law has been developed largely in the context of criminal prosecutions rather than civil proceedings. But what is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law. Moreover, . . . the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the choice between international and domestic law even less crucial.[165]

In a concurring opinion, Judge Reinhardt declined to look to international law ("a nascent criminal law doctrine recently adopted by an ad hoc international criminal tribunal"[166]), but argued that the court should apply "general federal common law tort principles, such as agency, joint venture, or reckless disregard."[167] Judge Reinhardt reached for common

159. Doe v. Unocal, 110 F. Supp.2d 1294 at 1310.

160. *Id.*

161. Doe v. Unocal, 395 F.3d at 945.

162. *Id.* at 946.

163. *Id.* at 956.

164. The civil-criminal distinction is relevant to the current debate over third-party liability under the ATS. See the discussion of the *Central Bank* case, *infra*.

165. Doe v. Unocal, 395 F.3d at 949 (citations omitted).

166. Doe v. Unocal, 395 F.3d at 965.

167. *Id.* at 963. Judge Reinhardt also disagreed with the majority's conclusion that a

law principles because "federal common law principles provide the traditional and time-tested method of filling in the interstices and resolving the type of ancillary legal questions presented by this case." [168]

Shortly thereafter, the Ninth Circuit Court agreed to re-hear the case *en banc*.[169] The distinction between the criminal and civil contexts was a contentious issue, as the parties disputed the meaning and application of *Central Bank v. First Interstate Bank,* in which the Supreme Court held that there was no civil liability for aiding and abetting under certain securities statutes and regulations.[170] The plaintiffs argued that because *Sosa* relied on "federal common law principles," the court should rely on "federal common law to determine aiding and abetting, joint venture, recklessness, and agency liability."[171] Further, since "international law is part of federal common law" aiding and abetting standards from international law are also applicable. [172]

The United States Department of Justice (DOJ) filed an amicus brief on behalf of Unocal in which it emphasized the cautious, "vigilant doorkeeping" side of Justice Souter's opinion in *Sosa,* especially because the ATS deals with foreign affairs. DOJ argued that aiding and abetting liability, like any standards associated with the ATS, must be 'accepted by the civilized world' and 'defined with a specificity,' and in both respects the norms must be 'comparable to the features of the 18th-century paradigms.'"[173] Moreover, the DOJ argued that Congress, not the courts, should determine aiding and abetting liability, and since it has not done so, there can be none. The DOJ introduced and relied heavily on the *Central Bank* case, which it claimed, "is key to this case."[174] In *Central Bank,* the Supreme Court concluded, "when 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.*"[175] After all, the Congress did not insert aiding and abetting language in the Act at issue (the Securities Exchange Act) and yet they did in other statutes of the New Deal period. "Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability."[176] Further, the Court held that even where Congress

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violation must rise to the level of a *jus cogens* norm in the context of the law of nationsunder the ATS.

168. *Id.* at 966.

169. *Id.* at 978.

170. Central Bank of Denver v. First Interstate Bank, 511 U.S. 164 (1994).

171. Doe and Roe Plaintiffs' and Appellants' Supplemental Brief at 2, Doe v. Unocal, No. 00-56603 (9th Cir. Aug. 30, 2004).

172. *Id.* at 18.

173. Supplemental Brief for the United States of America as Amicus Curiae at 17, Doe v. Unocal, No. 00-56603 (9th Cir. Aug. 25, 2004) (quoting Sosa v. Alvarez-Machain, 124 S.Ct. 2739, 2761 (2004)).

174. *Id.* at 8.

175. Supplemental Brief for the United States of America as Amicus Curiae, Doe v. Unocal, No. 00-56603 (9th Cir. Aug. 25, 2004) at 8-9. (quoting Central Bank of Denver v. First Interstate Bank, 511 U.S. at 182 (1944) (emphasis added).

176. Central Bank, 511 U.S. at 182 (1994).

has established criminal aiding and abetting liability, it remains up to Congress to establish civil liability for aiding and abetting in private causes of action.[177] If aiding and abetting must meet the *Sosa* Test, as the DOJ argued, and if there is a clear line between civil and criminal aiding and abetting as decided in *Central Bank*, then the plaintiffs would have to show that aiding and abetting liability for *civil* claims is universal and specific (and perhaps obligatory). The DOJ argued that even if previous international tribunals at Nuremberg, Arusha, and The Hague have adopted aiding and liability for *criminal* acts, that does not mean that there is universally accepted *civil* aiding and abetting liability. Thus, the DOJ concluded that the holding from *Central Bank*, in the light of the cautious approach to the ATS recommended in *Sosa*, "lead(s) to the unmistakable conclusion that aiding and abetting liability should not be recognized under the ATS, absent further congressional action."[178]

In early 2005, the *Doe v. Unocal* case settled out of court.[179] This was a major milestone in ATS jurisprudence because it was the first case where a multinational corporation paid compensation to victims. However, the settlement meant that the aiding and abetting question was left for another day.

C. Post *Sosa/Unocal* Aiding and Abetting Cases

Since the *Doe v. Unocal* settlement, the federal courts have had several opportunities to weigh in on the aiding and abetting liability question. The *Central Bank* decision has played a prominent role in these cases. Some courts have agreed with the DOJ that the caution of *Sosa*, combined with the deference to Congress in establishing civil aiding and abetting liability from *Central Bank*, precludes any aiding and abetting liability under the ATS. For example, in *In re S. African Apartheid Litig.*, a case that sought damages from a plethora of multinational corporations for a wide range of abuses suffered during Apartheid in South Africa, the court held that the ATS does not reach aiding and abetting.[180] The plaintiffs alleged defendants' direct liability as well as secondary liability under theories of color of law and aiding and abetting. The color of law theory was quickly dismissed because, although the defendants may have benefited from the

177. *Id.* at 190-91 ("And thus, given 18 U.S.C. § 2, we would also have to hold that a civil aiding and abetting cause of action is available for every provision of the Act. There would be no logical stopping point to this line of reasoning: Every criminal statute passed for the benefit of some particular class of persons would carry with it a concomitant civil damages cause of action.").

178. Supplemental Brief for the United States., *supra* note 173, at 10.

179. Paul Magnusson, *A Milestone for Human Rights*, BUS. WK., Jan. 24, 2005, at 63.

180. *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 548 (S.D.N.Y. 2004). This wide-ranging case involved three sets of plaintiffs with cases filed in eight different district courts. Two sets of plaintiffs claimed that they represented a class of all those who lived in South Africa since 1948 who suffered "a veritable cornucopia of international law violations" during apartheid.

apartheid regime, they did not participate in joint action with the regime.[181] As for aiding and abetting liability, the court wrote:

> *Central Bank* applies with special force here. Although the ATCA points to international law for the causes of action over which it grants jurisdiction, the ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute. In refusing to do so, this Court finds this approach to be heedful of the admonition in Sosa that Congress should be deferred to with respect to innovative interpretations of that statute.[182]

However, most courts have found that aiding and abetting liability can be sustained under the ATS.[183] In *In re Agent Orange*, Vietnamese citizens and a Vietnamese victims' organization brought suit against various corporations for the damages they suffered from the use of Agent Orange during the U.S.-Vietnamese war. [184] The plaintiffs made a series of federal and state tort claims, including theories of aiding and abetting under the ATS. In a lengthy opinion the court considered and quickly dismissed the argument against aiding and abetting liability based on *Central Bank*. Instead, the court concluded, "[t]here is simply no question that the ATS provides for aiding and abetting liability."[185] The court also quoted approvingly details of two opinions nearly contemporaneous to the passing of the ATS that found aiding and abetting liability under international law.[186] The court then derived its standard for aiding and abetting from the rulings of the ICTY.

D. Analysis of Aiding and Abetting After *Sosa*

The aiding and abetting controversy in ATS cases can be dissected into three interrelated questions with the *Central Bank* case cutting through Questions two and three. This analysis will help clarify and locate the

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181. *Id.* at 548-49.

182. *Id.* at 550. *See also* Doe v. Exxon Mobil, 393 F. Supp. 2d 20 (D.D.C. 2005) (dismissing aiding and abetting claims in a case alleging human rights violations in the construction of a natural gas extraction and liquification plant in Aceh, Indonesia).

183. *See, e.g.*, Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) and *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539 (S.D.N.Y. 2005).

184. *In re* Agent Orange, 373 F. Supp. 2d 7 (E.D.N.Y. 2005). Ultimately the court dismissed the case for failure to state a claim, writing, "The use of herbicides in Vietnam does not fit within the definition of either torture or extrajudicial killing. Plaintiffs were not within the defendants' custody or physical control, nor that of the United States, when herbicides were used. Nor were herbicides used to intentionally inflict pain and suffering. They were used to kill or harm plants." *Id.* at 112.

185. *Id.* at 53. The court quoted at length from an amicus brief filed by the Center for Constitutional Rights and others that argued for aiding and abetting liability based upon precedent in several ATS cases.

186. *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795); Talbot v. Jansen, 3 U.S. 133 (1795).

holdings of the courts and the arguments of attorneys and scholars.

Question 1. Does the aiding and abetting of crimes need to meet the *Sosa* Test by itself, or is it an ancillary question? If yes, go to Question 2. If no, skip to Question 3.

Question 2. Does aiding and abetting liability, as defined in international law, meet the *Sosa* test of universal and specific (and perhaps obligatory) jurisdiction? To answer this question, we must first ask:

(A) Is *Central Bank* controlling?

(i) If yes, then the question is: are there universal and specific standards for aiding and abetting liability in international *civil* law? If yes, then those standards must be met. If no, there can be no aiding and abetting liability under the ATS.

(ii) If no, are there universal and specific standards for aiding and abetting in either international *civil or criminal* law? If yes, then those standards must be met. If no, there can be no aiding and abetting liability under the ATS.

Question 3. What standards should be used to determine aiding and abetting liability?

(A) Is *Central Bank* controlling?

(i) If yes, then the standards must be sought within civil law, including the ATS itself.

(ii) If no, then a host of standards could be consulted.

The first question is whether there is a two-step process in the application of aiding and abetting liability. In *Doe v. Unocal*, the plaintiffs argued that a court must first determine whether the underlying abuse by itself (and not the ancillary question of aiding and abetting) meets the *Sosa* Test. Then, the aiding and abetting question is a second, ancillary legal question. In other words, "[w]hat a violation of the law of nations entails and how far liability should extend are analytically distinct questions. *Sosa* decided the former without resolving the latter."[187] The DOJ, however,

187. Diskin, *supra* note 11, at 827.

argued that aiding and abetting is not a secondary question: "This court should examine: 1) whether aiding and abetting liability is broadly, if not universally accepted, by the international community in a manner comparable to the '18th century paradigms' [discussed in *Sosa*], and 2) whether the principle, as accepted by the international community, is defined with 'specificity.'"[188]

A second and subsidiary question would be whether aiding and abetting liability meets the *Sosa* Test. If *Central Bank* is controlling then one would have to show that there are sufficiently universal and specific standards for aiding and abetting in international civil law. But, considering the under-developed nature of international civil law for human rights abuses,[189] such a case most likely could not be made. If *Central Bank* is not controlling, then the question is whether the standards for aiding and abetting found in international criminal law, developed in such places as the ad hoc criminal tribunals (Nuremburg, ICTR, ICTY, etc.) and various treaties, such as the Rome Statute, are sufficiently universal and specific. In the *Doe* case, both sides argued this point in their supplemental briefs. Though the plaintiffs considered aiding and abetting an ancillary question (Question 1), they claimed that the standards set in the ad hoc criminal tribunals were sufficiently universal and specific. Though the DOJ claimed that *Central Bank* was controlling (Question 2(A)), it argued that the standards from the ad hoc criminal tribunals were not sufficiently universal and specific. Another relevant issue concerns how much disagreement will be tolerated before a court will be unable to hold that a standard of aiding and abetting is universal. For instance, the ICTY's interpretation of the *actus reus* standard includes "moral support," but the *Doe v. Unocal* court was reluctant to include that component in their 'universal' definition of aiding and abetting [190]

The third question is what standards should be applied for aiding and abetting liability, if aiding and abetting, by itself, need not meet the *Sosa* Test. If *Central Bank* is controlling here, the standards must be sought within civil law, or preferably within the statute.[191] One could argue that,

188. Supplemental Brief for the United States, *supra* note 173, at 17. *See also* Lynch, *supra* note 11, at 787 ("Complicity in international law violations is a distinct cause of action that must be assessed under an international law standard. However, complicity fails the international law standard articulated by Sosa.").

189. *See generally* Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L. L. 142 (2006).

190. *Doe v. Unocal*, 395 F.3d at 950. *Cf.* Presbyterian Church of the Sudan v. Talisman Energy, 374 F. Supp. 2d 331, at 340-41 (S.D.N.Y. 2005) ("Therein lies the flaw in Talisman's argument. The ubiquity of disagreement among courts and commentators regarding the fringes of customary international legal norms is unsurprising. The existence of such peripheral disagreement does not, however, impugn the core principles that form the foundation of customary international legal norms-principles about which there is no disagreement.").

191. *See* Arar v. Ashcroft, 414 F. Supp. 2d 250, 261-62 (E.D.N.Y. 2006) ("But the principle enunciated in *Central Bank* does not, as defendants contend, require an unequivocal congressional mandate before allowing a claim for secondary liability. Rather, the case holds that the scope of liability must be based on a fair reading of statutory text.").

based upon the Attorney General's opinion of 1795, aiding and abetting was already part of the statute. If *Central Bank* is not controlling and if aiding and abetting is an ancillary question, then a host of alternatives for aiding and abetting standards are available, including those from civil and criminal law and from international and domestic sources. I will discuss these below.

I argue that Congressional intent, as much as it can be ascertained, was that aiding and abetting was part of the original meaning of the statute. Therefore, *Central Bank* is not on point; the courts are not creating aiding and abetting liability for the ATS, because it was always Congress's intent that it would be there. This is most clearly evidenced by the 1795 Attorney General's opinion, and can also be seen in the "ambient laws" of the time. As Hoffman and Zaheer write, "[a]s is clear by the *Talbot* decision, the Bradley opinion, and various other sources of early authority, aiding and abetting liability was applicable to torts committed in violation of the law of nations in 1789 when the ATS was passed."[192]

Congressional understanding of this issue can also be inferred from the most closely analogous statute, the Torture Victim Protection Act (TVPA). Although secondary liability is not referenced in the text of the TVPA, "every court construing this question" has held "that the TVPA can be interpreted to allow claims for secondary liability."[193] That interpretation is based largely on the legislative history of the TVPA.[194] Moreover, the courts, until the *Apartheid* case, have generally held that there is secondary liability under the ATS.[195]

E. Proposed Standards for Aiding and Abetting under the ATS

Several different standards for aiding and abetting have been proposed. In this section I will briefly outline three proposed standards and argue that none of them would reach the failure to investigate or

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192. Hoffman & Zaheer, *supra* note 11, at 82. *Cf.* Diskin, *supra* note 11, at 829 ("Admittedly, Congress did not expressly use the words "aid" and "abet" in the original legislation; however, to do so would have been superfluous given the widespread application of aiding and abetting to all areas of the law at the time.").

193. *Arar*, 414 F. Supp. at 261 (E.D.N.Y. 2006). *See also* Cabello v. Fernandez-Larios, 402 F.3d at 1157-58.

194. *Id.* ("Although the plain language of the statute does not expressly call for secondary liability, its legislative history offers proof of an intention to impose it. As noted in the Senate Report, 'a higher official need not have personally performed or ordered the abuses in order to be held liable . . . anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.'") (citation omitted).

195. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 320 (S.D.N.Y. 2003) ("[W]hile many courts have addressed situations in which corporations were alleged to have conspired with or aided and abetted states, Talisman [the defendant] is unable to cite a single decision in which a court held that the ATS does not recognize an action for aiding and abetting or conspiracy."). The court also noted that "[t]he district court in *Kodak v. Kavlin,* drawing heavily on Second Circuit precedent, held that 'it would be a strange tort system that imposed liability on state actors but not on those who conspired with them to perpetrate illegal acts through the coercive use of state power." *Id.* at 321 (citation omitted).

prevent the femicides in Juárez.

1. The *Furundžija* Standard

Several courts have held, and some scholars have argued, that the standards for aiding and abetting should be found in the federal common law.[196] Hoffman and Zaheer offer the most nuanced argument for this approach. They argue that courts often rely on federal common law to protect uniquely federal interests and to implement the intent of Congress.[197] In these situations, courts should craft federal common law based upon federal and international precedents, which they argue, should "be viewed as constituents of the federal common law of international affairs."[198]

Hoffman and Zaheer examine previous instances of the crafting of federal common law as well as attempts to craft international customary law in order to formulate a step-by-step strategy for choosing sources for this "federal common law of international affairs":

> Courts must look first to international and federal positive law addressing the particular subject. If that inquiry does not yield appropriate rules of decision, as will be the situation in the majority of cases, then the court should next look to customary international law as reflected by the writings of jurists, international decisional law, treaties, and the conduct of nations. In filling the gaps, courts may also look to generally accepted legal principles found in the federal common law. At each phase of this analysis, though, it will be important for U.S. courts to be cognizant of "the needs of the interstate and international systems," as well as "the policy of the United States, as expressed in the ATS, to provide a remedy for violations of the law of nations."[199]

Hoffman and Zaheer agree with the majority opinion in *Doe III*, which draws from the *Prosecutor v. Furundžija* decision of the ICTY for the actus reus and mens rea of aiding and abetting. The *Doe III* court wrote, "the actus reus of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. . . . [A]s for the mens rea

196. Hoffman & Zaheer, *supra* note 11, at 54.

197. *Id.* at 54-55 (citation omitted).

198. Hoffman & Zaheer, *supra* note 11, at 64 (citation omitted).

199. *Id.* at 68 (citation and quotation omitted). *But see* Diskin, *supra* note 11, at 835 (arguing that combinations of domestic and international laws are problematic. "Either the ATS calls for domestic law to set a standard for aiding and abetting liability, or it calls for international law to do so. Picking and choosing from other countries' domestic legal systems would yield arbitrary judicial decisions and would be a truly bizarre method of interpreting a U.S. statute.").

of aiding and abetting . . . what is required is actual or constructive (i.e., 'reasonable') 'knowledge that [the accomplice's] actions will assist the perpetrator in the commission of the crime.'"[200] Therefore, an aider and abettor would be one who "gives some sort of assistance and support with the knowledge however that torture is being practiced. . . ."[201]

2. The Common Law of Torts Approach

In his concurrence in *Doe III*, Judge Reinhardt recommends three theories of liability for aiding and abetting derived from the common law of torts: joint venture, agency, and recklessness.[202] This represents perhaps the widest definition of third-party liability under the ATS.

Diskin agrees with Judge Reinhardt that aiding and abetting standards should be found in domestic law, but he disagrees with the use of the federal common law principles of joint venture, agency, and reckless disregard. Instead, Diskin prefers the standards found in section 876(a) of the Restatement (Second) of Torts.[203] The Restatement approach has a stricter scienter requirement than common law tort principles. A person would be liable under section 876 if he:

> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered,

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200. Doe v. Unocal, 395 F.3d 932, 950 (9th Cir. 2002) (quoting Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment of the Trial Chamber, ¶ 235 (December 10, 1998)). *See also* Prosecutor v. Kunarac, et al., Case No. IT-96-23&IT-96-23/1-A, Appeals Judgment (June 12, 2002); *In re* Agent Orange, 373 F. Supp. 2d 7, 125 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d at 323-24. *But see*, Doe v. Unocal, 395 F.3d at 970 (Reinhardt, J. concurring) (expressing reservations at the adoption of the Furundžija standard for aiding and abetting, especially the "moral support" portion of actus reus.).

201. *Furundžija*, Case No. IT-95-17/1-T, ¶ 252.

202. The majority also expressed support for these standards in a footnote: "Joint venture, agency, negligence, and recklessness may, like aiding and abetting, be viable theories on the specific facts of this ATCA case. Moreover, on the facts of other ATCA cases, joint venture, agency, negligence, or recklessness may in fact be more appropriate theories than aiding and abetting." *Doe v. Unocal*, 395 F.3d at 947 n.20. *See also* Christensen, *supra* note 11, at 1256 (the question of "whether the conduct of the state actor can be imputed to the multinational corporation for tort liability purposes . . . can be answered by well-established tort and agency law principles; after all, it is the Alien *Tort* Statute.").

203. This approach was taken by the district court in Wiwa v. Royal Dutch Petroleum, No. 96 Civ. 8386 (KMW), 2002 U.S. Dist. LEXIS 3293, at *50 (S.D.N.Y. Feb. 28, 2002).

constitutes a breach of duty to the third person.[204]

Diskin argues that application of section 876's requirements of "knowledge and substantial assistance" would allay the fears of multinational corporations that they would be held strictly liable for overseas investments.[205] Under Judge Reinhardt's common law standard, according to Diskin, a multinational corporation could be held accountable even where "a corporation could not be expected to know that its investment would cause human rights violations."[206] Diskin argues that the section 876 standard is similar in substance to the ICTY's *Furundžija* decision,[207] but that it is more appropriate for ATS cases from an "historical perspective."[208] If courts use the international tribunal standards (established almost two centuries after the ATS), they would be claiming "either the ATS did not allow for aiding and abetting liability *until* standards were agreed upon by the international community; or historically, the ATS allowed aiding and abetting liability, but international law standards of criminal aiding and abetting *displaced* the domestic law standards."[209]

F. Aiding and Abetting in the Juárez Situation

In the Juárez situation the failure to **prevent** the femicides would most likely not be actionable under any of the three proposed aiding and abetting standards—the *Furundžija* standard, the Restatement, or standard common law tort principles. If one could show that the government

204. RESTATEMENT (SECOND) OF TORTS § 876 (1977).

205. *Id.* at 833.

206. Diskin, *supra* note 11, at 831.

207. Several authorities argue that Section 876 standards mirror, in relevant respects, the *Furundžija* standards. E.g., Doe v. Unocal, 395 F.3d at 951 ("At least with respect to assistance and encouragement, this standard is similar to the standard for aiding and abetting under domestic tort law.") and Hoffman and Zaheer, *supra* note 11, at 80 (concluding that domestic and international standards for aiding and abetting "are the same in all substantive respects.").

208. Diskin, *supra* note 11, at 830.

209. *Id.* at 830 (internal citation omitted). I agree with Diskin's reasoning on the first Point—that Congress did not intend that the courts wait until international tribunals created aiding and abetting standards. After all, Attorney General Bradford's opinion assumes that they are there. But Diskin's second point, that the international standards can replace pre-existing domestic standards, begs two questions. First, if, as Diskin concedes, aiding and abetting is a distinct legal question from substantive jurisdiction, then should ancillary legal questions such as *forum non conveniens*, exhaustion of domestic remedies, statute of limitations, and equitable tolling also evolve over time just as the *Sosa* Court has said that the law of nations would evolve? Second, Diskin appears to be suggesting that we seek international standards such as customary law for substantive claims under the ATS, but that on the all-important question of aiding and abetting liability (or other ancillary questions), we seal off international law. This not only appears to neglect the important role that international law can play in the crafting of federal common law but is somewhat extreme especially considering that the core area of law that we are exploring, namely, violations of the law of nations, often do not have a corollary in U.S. civil law.

authorities "perceived substantial risk" that was "closely and immediately tied to" one of the victims, then one might reach an opposite conclusion.[210] However, the failure to take specific operational steps, such as the installation of more lighting or the provision of more training on sex crimes, would be too attenuated to qualify as aiding and abetting under any of the theories.[211]

Creating a theory of aiding and abetting liability for the failure to provide due diligence in the investigations is more complicated. Using the *Furundžija* definition for aiding and abetting ("knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime"), one could argue that the failure to investigate the murders has had a substantial effect on subsequent crimes, and the authorities should have known that an improper or cursory investigation would contribute to the crimes. According to the ICTY, the actus reus of aiding and abetting can occur before, during, or after the commission of a crime,[212] and it includes actions as well as omissions.[213] Further, the aider and abettor need not share "the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal."[214] The Mexican authorities may not have desired that the women be tortured and killed. They may have had other motives or pressures that kept them from adequately investigating or preventing the femicides, but they were most likely aware of the mens rea of the perpetrator. Further, unlike conspiracy, "no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan."[215]

The ICTY has ruled that the mens rea of aiding and abetting must be prior or simultaneous to the act of the principal.[216] In a case regarding the reburial of victims in mass graves from the Srebrenica massacre, the ICTY held that the reburial was not foreseeable at the time of the massacre, and thus, it could only be characterized "as *ex post facto* aiding and abetting."[217] The ICTY further explained that "[i]t is required for *ex post facto* aiding and abetting that at the time of the planning, preparation or execution of the

210. *See* Medina v. Denver, 960 F.2d 1493, 1496 (10th Cir. 1992).

211. *See Id.* ("[G]iven the fact that reckless intent involves an unreasonable disregard of a known great risk rather than intent to cause a particularized harm, the defendant's reckless conduct may be considered to be directed toward the plaintiff if the plaintiff is closely and immediately tied to the perceived substantial risk.").

212. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment at the Appeals Chamber, ¶ 48 (July 29, 2004).

213. *Id.* ¶ 47.

214. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment at the Appeals Chamber, ¶ 162 (March 24, 2000).

215. Prosecutor v. Tadić, Case No. IT-94-1A, Judgment of the Appeals Chamber, ¶ 229 (July 15, 1999).

216. The ICTY Statute holds that an individual can be held criminally responsible when he or she "aided and abetted in the planning, preparation, or execution of a crime." Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7 (1), S.C. Res. 827, 25 May 1993.

217. Prosecutor v. Blagojević, Case No. IT-02-60T, Judgment of the Trial Chamber, ¶ 730 (January 17, 2005).

crime, a prior agreement exists between the principal and the person who subsequently aids and abets in the commission of the crime."[218] Such a prior agreement between the perpetrators and the authorities is not readily found in the Juárez situation. At most, one could show that the authorities foresaw that their actions and/or inactions would lead to further murders. This, however, would be best discussed under the common law notion of reckless disregard, or as I discuss below, as acquiescence to torture.

Judge Reinhardt's three common law principles for aiding and abetting would not be applicable to the Juárez femicides either, as they would require evidence of a stronger relationship between the police force and the perpetrators of specific crimes. Specifically, joint venture requires evidence of "an agreement, express or implied," "a community of pecuniary interest" or "an equal right to a voice in the direction of the enterprise, which gives an equal right of control."[219] An agency relationship requires a "decision to create or participate in an agency relationship in anticipation of certain benefits."[220] There is no evidence of either relationship between the police force and the perpetrators of the Juárez murders.

Recklessness is a more appropriate theory for the Juárez situation.[221] Recklessness is defined in the U.S. Model Penal Code as:

> when [a person] consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[222]

Recklessness has rarely been used in a third-party liability context. When it has, it appears to be rooted in the context of a special relationship between the perpetrator and the third party. Judge Reinhardt explained that:

> The common law principle of recklessness has typically been applied to acts by a defendant that directly cause harm to a plaintiff. Nevertheless, I see no reason why the general principle

218. *Id.* ¶ 731.

219. Giverny Gardens Limited Partnership v. Columbia Housing Partners Limited Partnership, 147 F. App'x 443, 450 (6th Cir. 2005).

220. Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1040 (1998).

221. *Cf.* Diskin, *supra* note 11, at 831 ("The reckless disregard standard has some merit because it better approximates criminal standards of culpability. A showing of reckless disregard might go some way toward proving that a corporation acted with knowledge that it would cause a violation of international law. The wisest application of the reckless disregard standard, however, is to incorporate it into section 876 of the Restatement (Second) of Torts' requirement that a defendant be knowledgeable that his conduct will effectuate a tortious result. Under this approach, a showing of reckless disregard, while not determinative of liability, may provide strong circumstantial evidence of intent.") (footnote omitted).

222. Model Penal Code § 2.02(2)(c) (Proposed Unofficial Draft 1962).

> that liability arises for one party's conscious disregard of unreasonable risks to another should not apply when a defendant consciously disregards the risks that arise from its decision to use the services of an entity that it knows or ought to know is likely to cause harm to another party.[223]

Recklessness is also used as a form of third-party liability in special relationships, such as agency relationships in 42 U.S.C. § 1983 cases[224] and in command responsibility cases.[225] The facts of the Juárez situation, in contrast, do not evince a joint enterprise or other type of special relationship between the authorities and the perpetrators.[226]

Nonetheless, where the state has a special duty to protect individuals but fails to act to prevent a foreseeable risk, it could be held liable as a third party. For instance, "[p]rison officials have a duty under the 8th and 14th amendments to protect prisoners from violence at the hands of other prisoners."[227] This duty appears to stem from a special relationship between the state and the prisoners, created by the confinement and the prisoners' vulnerability that inevitably results from the prison context.[228] If one could establish such a special duty, then general principles for reckless disregard would apply. The liability of the third party would arise from the reckless disregard of a specific risk, not from the intention to harm.[229] Since liability is tied to the disregard of a risk, the failure to act does not require a

223. Doe v. Unocal, 395 F.3d at 975 (Reinhardt concurring) (referring to the alleged joint venture between Unocal and the Myanmar government). *Cf.* Angela A. Barkin, *Corporate America - Making a Killing: An Analysis of Why it is Appropriate to Hold American Corporations Who Fund Terrorist Organizations Liable for Aiding and Abetting Terrorism*, 40 CAL. W. L. REV. 169, 180 (2003) ("Reckless disregard, on the other hand, provides a strong basis for holding the American corporations liable for aiding and abetting terrorism."); Christensen, *supra* note 11, at 1267-68 ("[I]f an MNC recklessly fails to monitor or oversee those agents that it knows or should know are committing *jus cogens* violations, the MNC can and should be held liable. MNCs cannot hide behind willful blindness.").

224. *E.g.*, Medina v. Denver, 960 F.2d 1493 (10th Cir. 1992).

225. *See* Johan D. Van der Vyver, *The International Criminal Court and the Concept of* Mens Rea *in International Criminal Law*, 12 U. MIAMI INT'L & COMP. L. REV. 57, 75 (2004) ("Willful blindness will therefore be a strong indication of at least *dolus eventualis* or of recklessness and might found liability in cases where those forms of fault would suffice to establish accountability. Willful blindness is particularly relevant in the case of command responsibility.") (footnote omitted).

226. Again, I am assuming that complicity would not be established between the authorities and the perpetrators of the femicides. Many scholars and activists do not share this assumption. *See* Part I, *supra*.

227. Leonardo v. Moran, 611 F.2d 397, 398-99 (1979).

228. DeShaney v. Winnebago Cty. Soc. Servs. Dept., 489 U.S. 189, 198 (1989); Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.") (internal citations omitted).

229. Medina v. Denver, 960 F.2d at 1496 ("reckless intent involves disregard of a particular risk rather than intent to cause a particularized harm."). *See also*, Farmer v. Brennan, 511 U.S. 825 (1994).

direct relationship with the victim, as long as the victim is "closely and immediately tied to the perceived substantial risk."[230]

In the Juárez situation, the special relationship leading to a duty to act does not derive from agency theory or command responsibility, but from the state's duty to protect its citizens from torture.[231] Under the CAT, "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."[232] Additionally, each state is required to "ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed."[233] Thus, since the CAT outlines special duties for the state to prevent and investigate torture, failure to do so could serve as a form of actus reus, with recklessness serving as a type of mens rea. I develop this formulation in the next section as "acquiescence to torture."

IV. ACQUIESCENCE TO TORTURE AS THIRD PERSON LIABILITY UNDER THE ATS

This section proposes acquiescence to torture as an innovative way to establish third-party liability under the ATS. Acquiescence to torture would be a useful addition to ATS jurisprudence because it extends liability under the ATS to cover failure to prevent and investigate torture. Even if the courts ultimately accept the argument from the DOJ's *Unocal* brief that *Central Bank* is "key" and thus remove aiding and abetting liability from the scope of the ATS, some form of third-party liability, primary liability for secondary actors, would remain.

A. The Aftermath of *Central Bank* and Primary Liability for Secondary Actors

In *Unocal*, the DOJ emphasized the central finding of *Central Bank*: that the Court refused to create a right of private action for aiding and abetting liability for securities fraud under the 1934 Securities Exchange Act. Overlooked almost entirely in the arguments surrounding the importance of the *Central Bank* decision for the ATS context is that the case does not eliminate all liability for secondary actors. The Court's opinion ends with the reminder that, although secondary liability may be ruled out under the 1934 Act, secondary actors may still face liability for primary violations of the Act.[234]

230. Medina v. Denver, 960 F.2d at 1496.

231. Mexico ratified the Convention Against Torture in 1987. *See* Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principal Human Rights Treaties, as of 9 June 2004, at 7, *available at* www.unhchr.ch/pdf/report.pdf.

232. CAT, *supra* note 12, art. 2(1).

233. CAT, *supra* note 12, art. 12(1).

234. *Central Bank*, 511 U.S. at 191 ("The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability

In the aftermath of *Central Bank*, there has been a great deal of controversy about what behavior of secondary actors meets the standards for primary liability in the securities context. Some courts have embraced a "bright line"[235] test where the secondary actor must have actually created the statement upon which "the purchaser or seller of securities relies."[236] Other courts, most notably the Ninth Circuit, have argued for a substantial participation test where a secondary actor may be primarily liable even if they did not make the statements but "played a significant role in drafting and editing" documents that contained the statements.[237] Many commentators have argued that the more liberal substantial participation test effectively eviscerates the *Central Bank* holding by merely re-labeling secondary violators as primary violators. In this reading, the substantial participation test is merely aiding and abetting in poor disguise.[238]

The aftermath of *Central Bank* is instructive for the ATS context. If the courts strip secondary liability from the ATS, then, as in securities law after *Central Bank*, primary liability of secondary actors would remain. However, the courts would be wary of theories of primary liability that would attempt an end run around the prohibition of aiding and abetting. Therefore, the primary liability of secondary actors should be clearly ensconced in the statute, which for the ATS means that it should be clearly part of the law of nations. For example, command responsibility is so well ensconced in international and domestic law that it would most likely remain. In a like manner, acquiescence to torture is part of the very

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under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.").

235. Filler v. Hanvit Bank, 156 F. App'x 413, 415-16 (2d Cir. 2005) (citing Shapiro v. Cantor, 123 F.3d 717, 720 (2nd Cir. 1997)).

236. *Filler*, 156 F. App'x at 415 (citing Wright v. Ernst & Young, LLP, 152 F.3d 169, 174 (2nd Cir. 1998)).

237. *In re* Software Toolworks, Inc. v. PaineWebber Inc., 50 F.3d 615, 628 n.3 (9th Cir. 1994). *See also* Tracy A. Nichols & Stephen P. Warren, Aiding and Abetting Liability under Section 10(G): Can Plaintiffs "Scheme" a Way around Central Bank under Subsections (a) and (c) of Rule 10b-5?, www.hklaw.com/content/whitepapers/aidingandabetting.pdf (last visited Feb. 20, 2007) (discussing district court holdings concerning aiding and abetting liability in securities misstatement cases); Celia R. Taylor *Breaking the Bank: Reconsidering Central Bank of Denver after Enron and Sarbanes-Oxley*, 71 MO. L. REV. 367 (2006) (criticizing holding in Central Bank and proposing a new judicial approach to aiding and abetting liability).

238. *See* Shapiro v. Cantor, 123 F.3d 717, 720-21 (2d Cir. 1997) ("Allegations of 'assisting,' 'participating in,' 'complicity in' and similar synonyms used throughout the complaint all fall within the prohibitive bar of Central Bank."). *See also* Andrew S. Gold, *Reassessing the Scope of Conduct Prohibited by Section 10(b) and the Elements of Rule 10b-5: Reflections on Securities Fraud and Secondary Actors*, 53 CATH. U. L. REV. 667, 670 (2004) ("Although certain forms of participation by secondary actors may [constitute] participation . . . they cannot support a primary claim without conflicting with the test of Section 10(G)."). *But see* Scott Siamas, *Primary Securities Fraud Liability for Secondary Actors: Revisiting Central Bank of Denver in the Wake of Enron, WorldCom, and Arthur Andersen*, 37 U.C. DAVIS L. REV. 895, 915 (2004) ("'Participation' . . . infers knowing involvement in a fraudulent activity. Such a distinction should be the standard for the imposition of liability on a secondary actor.").

definition of torture accepted as the law of nations for ATS purposes,[239] so courts would uphold it even if aiding and abetting were eliminated.

B. International Definitions of Torture

Article 1 of the CAT contains the authoritative international definition of torture. As of 2004, 136 countries had approved the CAT;[240] dozens of domestic and international cases reference it, and its definition of torture has been labeled "customary international law."[241] The CAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by *or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.* It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[242]

Under the CAT state parties have the affirmative duties, *inter alia,* to "prevent acts of torture"[243] and "ensure that its competent authorities proceed to a prompt and impartial investigation."[244] Nor can states "expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."[245]

The international definition of torture has four main aspects: the severity of the abuse, intentionality in the commission of the act, the objective of the action,[246] and official involvement of some type.[247] The

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239. *E.g.,* Aldana v. Del Monte, 416 F.3d 1242, 1251 (11th Cir. 2005) ("When courts seek to define torture in international law, they often look to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . Accordingly, we, for ATA purposes, too look to the Convention when deciding what constitutes torture according to the laws of nations."). In addition, the ICTY treated the CAT as part of customary international law. Prosecutor v. Delalic, No. IT-96-21-T, ¶ 459 (ICTY 1998) ("It may . . . be said that the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and this reflects a consensus which the Trial Chamber considers to be representative of customary international law.").

240. CAT, *supra* note 12.

241. Prosecutor v. Delalic, No. IT-96-21-T (ICTY 1998).

242. CAT, *supra* note 12, art. 1(1) (emphasis added).

243. *Id.* art. 2(1).

244. *Id.* art. 12.

245. *Id.* art. 3(1).

246. Several courts and commentators have noted that the clause beginning "for such purposes" was not intended to be exhaustive. *See, e.g.,* Prosecutor v. Delalic, No. IT-96-21-T, ¶

extent of official involvement is the key question in my analysis. It is clear from the definition that torture need not be directly perpetrated by the public official but could be at the "instigation of" or with the "the consent or acquiescence" of an official.[248] The drafting history of the CAT reinforces this conclusion. The CAT grew out of the UN Declaration on Torture, which defined torture without the "consent or acquiescence" language.[249] The addition of this language clearly marked an additional area of state responsibility for third party liability. Further, the terms "consent" and "acquiescence" were not meant to be synonymous: acquiescence refers to a less overt form of approval of torture than consent.[250]

During the drafting of the CAT, the French "considered that the definition of the act of torture should be a definition of the intrinsic nature of the act of torture itself, irrespective of the status of the perpetrator,"[251] but most states held that the definition should only apply to actions imputing responsibility on state actors. As two drafters of the CAT write, "the Convention does not deal with cases of ill-treatment which occur in an exclusively non-governmental setting. It only relates to practices which occur under some sort of responsibility public officials or other persons acting in an official capacity."[252] The drafting history is not clear as to what extent the definition applies to the failure to prevent or investigate private acts of torture. Is the act only considered torture when it is directly

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470 (ICTY 1998) ("The use of the words 'for such purposes' in the customary definition of torture, indicates that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative."). Nevertheless, violence against women, such as the femicides, is often perpetrated with the intent to intimidate or coerce, or out of discrimination against women. *See, e.g.*, Barbara Cochrane Alexander, *Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims*, 15 AM. U. INT'L L. REV. 895, 928 (2000) ("[D]omestic violence victims . . . fit within the enumerated Article 1 purposes of punishment, intimidation, coercion, and discrimination of any kind; that is, domestic violence is widely recognized as a situation in which the man seeks to dominate and control the woman."); Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALB. L. REV. 371, 406-07 (2003) (claiming that domestic violence, a form of "private torture," resembles "official torture," in that both share the same "general purpose," *viz.*, "the attainment of control.").

247. Anthony Cullen, *Defining Torture in International Law: A Critique of the Concept Employed by the European Court of Human Rights*, 34 CAL. W. INT'L L.J. 29, 32 (2003).

248. "Instigation" and "consent or acquiescence" also appear in CAT's Article 16 discussing states' responsibilities to prevent torture as well as in art. 4 of the CAT Optional Protocol discussing state visits. *See* CAT, *supra* note 12, arts. 4, 16.

249. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, Annex, 30 U.N. GAOR Supp. (No. 34), U.N. Doc. A/10034 (Dec. 9, 1975), *available at* http://www.unhchr.ch/html/menu3/G/h_comp38.htm.

250. Patricia J. Freshwater, *The Obligation of Non-Refoulement Under the Convention Against Torture: When has a Government Acquiesced in the Torture of its Citizens?* 19 GEO. IMMIGR. L.J. 585, 598 (2005) ("The definitions of consent and acquiescence, as intended by the drafters of the Convention, must necessarily differ; if they did not, there would be no reason to include them both. The dictionary definition of consent is 'to give assent, as to the proposal of another.'").

251. HERMAN BURGERS & HANS DANELIUS, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 45 (1988).

252. *Id.* at 1.

perpetrated by a member of the state apparatus, or could it be a member of the state apparatus failing to investigate or prevent an act by a private individual?[253] J. Herman Burgers and Hans Danelius, who were among the drafters of the CAT, saw pre-existing state responsibility for investigating and preventing private acts of torture. "If torture is committed without any involvement of the authorities, but as a criminal act by private persons, it can be expected that the normal machinery of justice will operate and that prosecution and punishment will follow under the normal conditions of the domestic legal system."[254] Their gloss on Article 1, though, is not conclusive as to the meaning of the "consent or acquiescence" language. They write:

> It could be that the torture is not directly connected with any public authority but that the authorities have hired him to help gather information or have at least accepted or tolerated his act. All such situations where the responsibility of the authorities is somehow engaged are supposed to be covered by the rather wide phrase appearing in article 1.[255]

However, the Special Rapporteur on Torture of the UN Commission on Human Rights wrote that the "consent or acquiescence" language "makes the State responsible for acts committed by private individuals which it did not prevent from occurring or, if need be, for which it did not provide appropriate remedies."[256] Several scholars also argue for a liberal reading of the "consent or acquiescence" language to cover underlying acts by private individuals.[257]

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253. *Cf. In re* S-V-, 22 I & N Dec. 1306 (BIA 2000) (Concurring and Dissenting Opinion of Schmidt, P., Chairman) (noting that the meaning of the consent or acquiescence clause "is not transparent.").

254. BURGERS & DANELIUS, *supra* note 251, at 119-20.

255. *Id.* at 120.

256. The Special Rapporteur on Torture, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Special Rapporteur*, ¶ 73, U.N. Doc. E/CN.4/2001/66/Add.1 (Nov. 14, 2000).

257. *See, e.g.*, Samuel L. David, *Foul Immigration Policy: U.S. Misinterpretations of the Non-Refoulement Obligation under the Convention Against Torture*, 19 N.Y.L. SCH. J. HUM. RTS. 769, 783-89 (2003) (arguing that the CAT "commands" an "analytic stance [that] militates for an expansive construction of 'other persons acting in an official capacity' given contemporary trends in international relations and the nature of state power."); Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 304 (2003) ("[W]here torture occurred at the hands of a private group and was reported to authorities, but the torture was not prevented or the torturer was not punished, the state would be seen to "acquiesce" in the torture."); David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 11 (1999) ("Persons who are in danger of being subjected to intentionally inflicted pain by private actors are not generally protected from refoulement under the Convention Against Torture, unless a government official consented or acquiesced to that abuse."); and Andreea Vesa, *International and Regional Standards for Protecting Victims of*

For further clarification, I will examine rulings from the Committee Against Torture (hereinafter, Committee or CAT Committee), the ICTY, and U.S. non-refoulement cases that address two questions: first, whether a state can be held liable when it fails to investigate or prevent private acts of torture, and second, what types of governmental actions or inactions could lead to a finding of a failure to investigate or prevent private acts of torture. No single case adequately addresses this issue, but a series of non-refoulement cases from U.S. courts provide some guidance.

1. The Committee Against Torture

The Committee has had three occasions to consider torture by non-state actors.[258] These cases show that a state's consent or acquiescence to private acts of torture would qualify as torture under the CAT definition. In *G.R.B. v. Sweden*, a Peruvian national sought asylum because she feared that her return would lead to torture at the hands of either the Peruvian government or the "Sendero Luminoso" (Shining Path) guerrilla movement.[259] The Committee concluded that she was not at risk from torture by the state.[260] In its one-paragraph discussion of the potential for torture at the hands of the Shining Path, the Committee first recalled that it had to base its decision upon the CAT definition of torture.[261] It then concluded without further commentary that "the issue whether the State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention."[262] Parsing this wording shows that if the

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Domestic Violence 12 AM. U.J. GENDER SOC. POL'Y & L. 309, 335 (2004) ("[U]nder CAT, States' Parties are not only obligated to protect citizens who are subjected to torture at the hand of public officials, but could also be obligated to protect victims of domestic violence who are subjected to certain grave abuses by their partners.").

258. *Sadiq Shek Elmi v. Austl.*, Communication No. 120/1998, Comm. Against Torture, 22d Sess., ¶ 5.2, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (holding that torture by quasi-state actors constitutes torture under the CAT definition because it had "effective control in the absence of a central government."). *See also* David, *supra* note 257, at 777-78 (reading the Elmi case as conflicting with the two concerning private actors discussed below; noting "[f]or the moment, the Committee seems to have seized upon the criterion of the existence of a central government as the dispositive factor in evaluating whether a non-state actor can be considered a 'person acting in an official capacity.' This reading of the case law seems to be the only way to reconcile *S.V.* with *Elmi*."). In my analysis, I draw a more marked distinction than David between non-state and quasi-state actors in these cases.

259. G.R.B. v. Sweden, CAT/C/20/D/83/1997 (May 15, 1998).

260. *Id.* ¶ 7.

261. *Id.* ¶ 6.5.

262. *Id.* The BIA quotes this sentence without the "consent or acquiescence" acquiescence clause in *In re S-V-*, 22 I. & N. Dec. at 1313, and thus, gives the passage an entirely different meaning, namely, that states are not responsible for private acts of torture. I disagree with this reading. In *S.V. v. Canada*, the Committee likewise ruled against a Sri Lankan national who was seeking asylum in Canada to avoid potential abuse by the Tamil Tigers and the Sri Lankan government. The Committee used identical wording from *G.R.B. v. Sweden*. S.V. v. Canada, ¶ 9.5, CAT/C/26/D/49/1996 (May 15, 2001).

government had consented or acquiesced to torture by a non-governmental entity, then this activity would constitute torture. Otherwise there would be no need to include the "without the consent or acquiescence of the Government" clause. But since the government in these cases did not directly perpetrate, instigate, consent, or acquiesce to the torture, the Committee did not attribute responsibility to any "public official or other person acting in an official capacity."

A case involving the persecution of a Roma settlement in Yugoslavia further reinforces this interpretation. When a Montenegrin girl reported being raped by two young Roma, a crowd of Montenegrins conducted a "pogrom,"[263] burning property and forcing the Roma to flee.[264] The police did very little to stop the destruction and conducted a cursory investigation. The Committee concluded that the failure to prevent the destruction and to conduct an adequate investigation represented violations of Articles 13 (right to present claims of torture) and 16 (duty "to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I."[265]). Although the majority stopped short of labeling the incident as acquiescence to torture, two members of the Committee filed a separate opinion concluding that the acts constituted torture, and "the failure of the State authorities to react" constituted acquiescence to torture.[266]

2. Torture in the ICTY

The ICTY has heard many torture cases and has made an interesting albeit overdrawn distinction between state involvement under the CAT and in customary international humanitarian law.[267] One chamber of the ICTY, contrary to the CAT Committee, interprets consent or acquiescence to apply only when someone in a non-private capacity perpetrates the underlying act.

In *Furundžija*, the Trial Chamber first held that the definitions of torture may differ between international humanitarian law (the laws of war) and international human rights law. In the absence of a definition of torture in the ICTY Statute or a settled definition in international humanitarian law, the ICTY relied heavily, although not exclusively, on the definition from Article 1 of the CAT, which the tribunal said was part of customary international law.[268] It then laid out the five elements of torture

263. Dzemajl v. Yugoslavia, ¶¶ 2.1-2.12, CAT/C/29/D/161/2000 (Nov. 21, 2002).

264. *Id.* ¶¶ 9.2-9.5.

265. CAT, *supra* note 12, art. 16(1).

266. *Dzemajl*, CAT/C/29/D/161/2000 (individual opinion by Fernando Mariño and Alejandro González Poblete).

267. In the ICTY, torture can be considered as a war crime or a crime against humanity. ICTY Statute, *supra* note 207, arts. 2, 5. The tribunal has held that the definition for torture is the same under each of these articles. *E.g.* Prosecutor v. Brdjanin, Case No. IT-99-36, Judgment, ¶ 482 (Sept. 1, 2004).

268. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 161 (Dec. 10, 1998).

in an armed conflict, one of which is that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.* as a de facto organ of a State or any other authority-wielding entity."[269] In the *Kunarac* case, the trial chamber modified the *Furundžija* definition based on the fact that human rights law has traditionally been most concerned with abuses by states, while humanitarian law concerns itself with abuses by states *or* private actors. The chamber concluded that the CAT definition, especially its emphasis on the involvement of state actors, does not necessarily apply to humanitarian war. The chamber found reinforcement from the fact that the CAT makes clear in its first article that its definition is "[f]or the purposes of this convention"[270] and the CAT's preamble suggests that other treaties may have broader definitions of torture. The Appeals chamber in *Kunarac* agreed with the Trial chamber that the *Furundžija* definition might be valid for customary human rights law, but torture, when committed during a time of war, does not require the involvement of state actors.[271]

While this distinction is valid and important, the ICTY overstates the requirement of state involvement in perpetrating torture under human rights law as defined by the CAT. It writes, "[t]he requirement . . . that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture *only when those acts are committed by 'a public official . . . or any other person acting in a non-private capacity.'*"[272] Requiring that the underlying act be committed by a public official contradicts the implications of the CAT Committee's rulings discussed above. The CAT definition, as interpreted by the CAT Committee, suggests that, yes, only a public official could be prosecuted for torture, but a public official need not have directly committed the torturous acts. This has been the interpretation in one of the most developed lines of cases on this issue: non-refoulement cases in U.S. courts.

C. Domestic Definitions of Torture through CAT Claims in Non-Refoulement Cases

The U.S. federal code defines torture in three places. Congress enacted the TVPA in 1998 to codify the United States' ratification of the CAT. It defines torture as "an act committed by a person acting *under the color of law* specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control."[273] The Foreign Affairs

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269. *Id.* ¶ 162.

270. CAT, *supra* note 12, art. 1(1).

271. Prosecutor v. Kunarac, Case No. IT-96-23&23/1-A, Judgment, ¶ 148 (June 12, 2002).

272. *Kunarac*, Case No. IT-96-23&23/1-A, ¶ 146 (quoting CAT, *supra* note 12, art. 1(1)) (emphasis added). *Cf.* Suzannah Linton, *Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor*, 25 MELB. U. L. REV. 122, 167-69 (2001).

273. 18 U.S.C. § 2340 (1) (Supp. IV 2000) (emphasis added).

Reform and Restructuring Act (FARRA) of 1998 was drafted in part to comply with Article 3 of the CAT, which requires the non-refoulement of immigrants who fear being tortured upon return to their own country. It uses the CAT definition of torture, including the "consent or acquiescence" language. Finally, the Torture Victims Relief Act of 1998 refers to the definition of torture from the TVPA and adds a statement defining rape and other forms of sexual violence as torture. The TVPA and CAT definitions contain pertinent distinctions for third-party liability, discussed below. In this section I concentrate on the definition of acquiescence as defined by FARRA in non-refoulement cases.

1. The Controversy Over Willful Blindness and Willful Acceptance Standards

President Reagan transmitted the CAT to the Senate with a series of understandings that critics claimed would undermine its very purpose. One of these was that the United States would interpret *acquiescence* to require "that the public official, prior to the activity constituting torture, have *knowledge* of such activity."[274] The Senate balked at these understandings and in 1990 the Bush I administration sent a new list of understandings for the ratification of CAT. This time the Senate substituted the word "knowledge" with the word "awareness" in the definition of acquiescence. The Senate ultimately accepted most of President Bush's recommendations. The regulations clarify what constitutes acquiescence of a public official: "the public official, prior to the activity constituting torture, [must] have *awareness* of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity."[275]

Whether willful blindness or willful acceptance comports better with acquiescence to torture has been a central issue in non-refoulement cases. This distinction has hinged upon the Senate's substitution of "knowledge" with "awareness." In *In Re S-V-*, the Board of Immigration Appeals (BIA) defined acquiescence as willful acceptance of torture.[276] S-V-, a Colombian national, came to the United States as a Legal Permanent Resident in 1981, but was convicted of grand theft, resisting arrest and driving with a suspended license in 1998.[277] S-V- argued that if he returned to Colombia, certain guerilla groups would kidnap and torture him because he had family in the United States and did not speak Spanish correctly.[278] For relief under CAT, S-V- had to show that the guerillas were operating with the consent or acquiescence of governmental officials. The BIA cited the definition of acquiescence from 8 C.F.R. § 208.18(a)(7)[279] and noted that the

274. S. EXEC. REP. 101-30, at 15 (emphasis added).

275. 8 C.F.R. § 208.18(a)(7) (2006) (emphasis added).

276. *In re S-V-*, 22 I. & N. Dec. at 1312.

277. *Id.* at 1307.

278. *Id.*

279. *Id.* at 1311-12 (citing 8 C.F.R. § 208.18(a)(7), which states that "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have

Senate had replaced the word "knowledge" with the word "awareness" in the definition of acquiescence. It noted further that "[t]he purpose of this condition is to make it clear that both actual knowledge and 'willful blindness' fall within the definition of the term 'acquiescence.'"[280] Nevertheless, the BIA stressed that the Senate report emphasized that torture "includes only acts that occur in the context of governmental authority."[281] The BIA effectively ignored the stated definition of acquiescence and limited the definition of torture to those situations where the government willfully accepted torture or had effective control.[282] From this willful acceptance standard, the BIA concluded, "that a government's inability to control a group ought not lead to the conclusion that the government acquiesced to the group's activities."[283] The Chairman of the BIA and two other board members dissented in part and another board member, Rosenberg, wrote that the definition in 8 C.F.R. § 2098.18(a) included "both actual knowledge and 'willful blindness'" and thus, "[t]he interpretation does not expressly exempt actions by entities outside a government's control."[284]

The Attorney General gave his imprimatur to the willful acceptance standard from *In Re S-V-* in the combined case of *In re Y-L-*, *In re A-G-*, *In re R-S-R-* (from Haiti, Jamaica, and the Dominican Republic, respectively).[285] Each of the three respondents was convicted, *inter alia*, of either cocaine possession or trafficking—"particularly serious crimes"—so the Attorney General ruled that they were ineligible for withholding of removal.[286] Each claimed that their removal should be deferred because they would more likely than not be tortured upon removal.[287] The Attorney General, citing the BIA's ruling in *In re S-V-*, held that "willful acceptance" and not "willful blindness" was the appropriate standard for determining acquiescence.[288] They were each denied deferral.

A-G-'s case is illustrative. In order to receive reduced prison time, A-G- helped the federal authorities gather evidence against another Jamaican man, K-C-.[289] K-C- and several of his associates threatened A-G-'s life if he returned to Jamaica. The Immigration Judge (IJ) agreed with A-G-'s claim that the Jamaican authorities were complicit because they were unable or refused to control the private actors who threatened A-G-.[290] The IJ made this finding based on corruption in the Jamaican police and a perceived close relationship between drug dealers and police officers. The BIA

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awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.").

280. *Id.* at 1312 (citing S. EXEC. REP. NO. 101-30, at 6 (1990)).

281. *In re S-V-*, 22 I. &. N. Dec. at 1312. (citing S. TREATY DOC. NO. 100-20, at 19 (1988)).

282. *In re S-V-*, 22 I. &. N. Dec. at 1312.

283. *Id.*

284. *Id.* at 1318.

285. *In re Y-L-* , *In re A-G-*, *In re R-S-R-*, 23 I. & N. Dec. 270 (BIA 2002).

286. *Id.* at 270.

287. *Id.* at 279.

288. *Id.* at 283.

289. *Id.* at 281.

290. *Id.* at 282.

upheld the IJ's ruling. Attorney General Ashcroft wrote: "Incredibly, the BIA found this reasoning both 'thorough' and correct. I do not agree."[291] He cited a State Department report finding that the Jamaican government may commit some abuses, but that in general, civilian authorities controlled the security forces.[292] Therefore, there is no evidence that the Jamaican authorities "would approve or 'willfully accept' atrocities."[293]

Most circuit courts have since overruled the willful acceptance standard from *In re S-V-* in favor of the willful blindness standard.[294] In *Zheng v. Ashcroft*,[295] the Ninth Circuit considered the case of a 16-year old Chinese boy whose parents had already emigrated to the U.S. when he was smuggled into Guam and captured by the government. He identified and testified against the smugglers, leading to a series of threats against him. In his subsequent removal hearing, Zheng stated that he feared that if he returned to China, he would face torture or death at the hands of the smugglers, and that the Chinese government would not protect him because the smugglers had connections among government officials.[296] The IJ granted Zheng's withholding of removal under CAT, holding that the government acquiesced in the smuggler's conduct. The Immigration and Naturalization Service (INS) appealed to the BIA, which followed the willful acceptance standard of *In re S-V-* and ordered Zheng removed to China. In its decision, the Board approvingly quoted the INS argument:

> Even if some Chinese police take bribes to let refugees pass through checkpoints, this is a purely non-violent and relatively benign offense[.] It does not raise any inference whatsoever that such bribe-takers would be amenable to violence; i.e., that with *prior knowledge* they would allow the commission of acts of . . . torture.[297]

The Ninth Circuit disagreed with the BIA's analysis and ruled based upon Congressional intent that willful blindness was the more appropriate standard, and all the boy had to show was that a government official had "awareness of such activity and thereafter breach[ed] his or her legal responsibility to intervene to prevent such activity."[298] Thus, "[t]o the extent that decisions such as *Matter of S-V-* and *In re Y-L, A-G, R-S-R-*, require actual knowledge and 'willful[] accept[ance]' — contrary to clear congressional intent to require only awareness — we disapprove of those

291. *Id.*

292. *Id.*

293. *Id.* at 283.

294. *See* discussion of cases, *infra*. *But see* Freshwater, *supra* note 250, at 599 n.91 (arguing that some courts not only ignore the willful blindness standard of the Senate, but also ignore the acquiescence part of the torture definition and require active governmental involvement in torture).

295. Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003).

296. *Id.* at 1190.

297. *Id.* at 1192.

298. *Id.* at 1194 (citing 8 C.F.R. § 208.18(a)(7) (2002)).

decisions."[299] The court vacated the BIA's decision and ordered a new hearing for Zheng.

Other circuits have also adopted the willful blindness standard,[300] but since FARRA was enacted only in 1998, the case law on acquiescence to torture is still in its early stages. Courts tend to defer to BIA decisions because of its position as the Attorney General's designee in deportation decisions,[301] and the IJ's findings of fact are conclusive unless clearly erroneous.[302] Nonetheless, some general principles are beginning to emerge.

2. Systematic Deficiencies in the Government's Response to Private Torture

Patricia Freshwater has analyzed many of these cases and derived three factors to determine whether a state has acquiesced to torture. They are: 1) "Do systematic deficiencies in the government's response to private torture exist?"; 2) "Are government officials involved in the torture?" and; 3) "Is the de jure government the de facto government?"[303] I confine my analysis to the first factor because the third is not relevant to the Mexican situation, and U.S. courts have yet to consider the second a decisive factor.[304]

First, it is clear from non-refoulement cases that the government must take appropriate steps to prevent acts of torture committed by non-state actors. In *Azanor v. Ashcroft*, the Ninth Circuit, considering whether female genital mutilation constituted torture, held that withholding of removal under CAT was appropriate where the petitioner showed the likelihood of torture while in the custody or control of a private, as opposed to

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299. *Id.* at 1196. *See also* Ornelas-Chavez v. Gonzales, 458 F.3d 1052 (9th Cir. 2006) (holding that reporting persecution by private parties to governmental authorities is not a prerequisite for relief); Amir v. Gonzales, 467 F.3d 921, 927 (6th Cir. 2006) ("Today we explicitly hold that the IJ's reliance on *In Re S-V* was manifestly contrary to the law.").

300. *E.g.*, Khouzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) ("[T]orture requires only that government officials know of or remain willfully blind to an act and thereafter breach their legal responsibility to prevent it.")

301. Lopez-Soto v. Ashcroft, 383 F.3d 228, 233 (4th Cir. 2004).

302. 8 U.S.C. § 1252(b)(4)(B) (2005) ("[T]he administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.").

303. Freshwater, *supra* note 250, at 601-06.

304. *See* BURGERS & DANELIUS, *supra* note 251, at 119 ("Only in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture as meant in the definition on the ground that he acted for purely private reasons."). *But see* Khan v. Gonzales, 164 F. App'x 486, 488 (5th Cir. 2006) (holding that even when the actions are perpetrated by a member of parliament it must be shown that the torture occurred "while acting in his official capacity as a member of parliament or at the instigation or acquiescence of another public official acting in an official capacity."); Builes v. Nye, 239 F. Supp. 2d 518, 525 (M.D.Pa. 2003) ("Even if a substantial number of government officials are corrupt, we cannot conclude that others in the government are failing to resist such conduct.").

governmental, party.[305] Similarly, in *Reyes-Reyes v. Ashcroft*, the Ninth Circuit disagreed with an IJ decision that withholding of removal under CAT required a showing that torture would be committed by a governmental party.[306]

Second, there is no strict liability for acquiescence to torture. A state must either have actual knowledge of, or be willfully blind to torture. In *Adeniyi v. Bureau of Immigration*, the Second Circuit threw out a CAT challenge because there was no evidence that the state of Nigeria was aware that a family member would punish a man for his religious beliefs. The court held that failure to report torture can undermine a claim of government acquiescence.[307] However, the failure to report the torture is not fatal to an acquiescence claim: "It is enough that public officials could have inferred the alleged torture was taking place, remained willfully blind to it, or simply stood by because of their inability or unwillingness to oppose it."[308] The authorities, though, must be aware of the specific activities that constitute torture.[309]

Third, if the state is actively fighting the perpetrators or taking all reasonable steps to investigate the abuses, they are less likely to be acquiescing to torture. For example, the Third Circuit held that governmental acquiescence could not be found when the government of Uganda was "in continuous opposition" to the Lord's Resistance Army, which allegedly perpetrated acts of torture.[310] If a government reacts in a timely manner and takes steps to investigate, even if it does not solve the crime, then it is less likely to be acquiescing. Here *Menjivar v. Gonzales* is instructive.[311] Sandra Menjivar fled El Salvador to escape a gang member who was angered when she shunned his request to be his girlfriend.[312] The gang member allegedly shot at but missed Menjivar, but killed her grandmother and paralyzed her niece.[313] The police investigated, and the gang member reportedly fled to Honduras but eventually returned to El Salvador.[314] In fear Menjivar fled to the United States.[315] The Eighth Circuit affirmed the IJ and BIA ruling denying her CAT claim, noting that the

305. Azanor v. Ashcroft, 364 F.3d 1013, 1019 (9th Cir. 2004).

306. Reyes-Reyes v. Ashcroft, 384 F.3d 782, 787 (9th Cir. 2004) (holding that the IJ's interpretation of the CAT was inconsistent with the plain language of the governing regulations).

307. Adeniyi v. Bureau of Immigration, 157 F. App'x 461, 465 (2d Cir. 2005) ("There is no indication in the record that any authorities were aware of what was happening in Famola's village . . . [H]is failure to report any of his uncle's actions to the authorities undermines his claim that they would not take any action to protect him."). *Cf.* Cruz-Funez v. Gonzales, 406 F.3d 1187, 1192 (10th Cir. 2005) (holding that the respondent failed to show a compelling connection between a private creditor to whom they owed debt and the Honduran government).

308. Ornelas-Chavez, 2006 U.S. App. LEXIS 21311, at 22.

309. *See* Lopez-Soto, 383 F.3d at 241.

310. Lukwago v. Ashcroft, 329 F.3d 157, 183 (3d Cir. 2003).

311. Menjivar v. Gonzales, 416 F.3d 918 (8th Cir. 2005).

312. *Id.* at 920.

313. *Id.*

314. *Id.*

315. *Id.*

police responded as quickly as possible and that they did investigate the shooting: "the government responded to the report of [the gangmember's] criminal activity, and acted upon the information that Menjivar and other witnesses provided."[316] Menjivar produced newspaper articles documenting the police's difficulty in tackling the gang problem in El Salvador, but the court stated that such difficulties were "insufficient to compel a finding of willful blindness toward the torture of citizens by third parties."[317]

Operational steps to prevent acts of torture also show that the state has not acquiesced to torture. In *Ferry v. Gonzales*, the government had informed the petitioner that his name was on a paramilitary group's death list and had given him and his father "financial assistance to prevent torture" in the form of a security grant that they used to "secure the front door of their home."[318]

The factual pattern in *Ontunez-Tursios v. Ashcroft*,[319] with its close involvement of the authorities, is instructive for the Juárez situation. The petitioner and other Honduran citizens formed a land cooperative to protect their rights during a land dispute, and five landlords attempted to remove them. After being driven off the land and having their homes burned down, the cooperative returned and rebuilt their homes. An officer of the cooperative was killed, and one of their guards was gunned down at a public meeting. The BIA concluded that "even if the landlords had general support in some sectors of the Honduran government, that support alone did not establish that Honduran officials would acquiesce in his torture."[320] Ontunez challenged this finding, reiterating the governmental connections in his story, including a police escort to the assassination, the fact that the police never apprehended the landlords for the assassination, the police clearing of the cooperative, "and the Honduran government's policy of dislodging squatters."[321] Despite these facts, the court affirmed the BIA's decision, noting that the police eventually arrested and convicted an alleged assassin, and that it was understandable that the landlords were not prosecuted because they denied complicity in the assassination.[322] The court explained that "reasonable factfinders could be unpersuaded that the landlords were motivated by the political aspects of Ontunez's struggle," and therefore it was inappropriate to overturn the BIA's decision.[323]

Fourth, several non-refoulement cases have suggested that a state's failure to adequately investigate or prevent domestic violence or sexual violence qualifies as acquiescence to torture. In *Ali v. Reno*, the Sixth Circuit upheld the BIA's decision that the Danish police had not acquiesced in a case of domestic violence where police investigated and arrested the family

316. *Id.* at 922.
317. *Id.* at 923.
318. 457 F.3d 1117, 1131 (10th Cir. 2006).
319. 303 F.3d. 341 (5th Cir. 2002).
320. *Id.* at 354..
321. *Id.*
322. *Id.*
323. *Id.* at 352.

members until they were asked by the applicant not to punish them.[324] Nevertheless, the court suggested that CAT relief might be appropriate where authorities ignore or consent to severe domestic violence.[325]

In Re D-K- continued this line of reasoning in granting a CAT claim to a Congolese woman who suffered extreme forms of domestic violence, including rape by her husband.[326] D-K- claimed that the government "maintained a policy of willful blindness because it was aware of the prevalence of domestic violence in its country, yet did not act upon that knowledge."[327]

Although the courts did not find for the appellants in many of these cases, it is becoming clear what kinds of questions the courts ask to determine if the government "would turn a blind eye to torture."[328] General government corruption and under-funding of law enforcement will most likely not count as acquiescence to torture.[329] Likewise, the failure to solve crimes is not sufficient to show government acquiescence. But failure to respond in a timely fashion, to follow up on leads, and to take operational steps to prevent torture all contribute to a finding of acquiescence.[330] Family members, NGOs, and even the Mexican National Human Rights Commission have made precisely these types of allegations against local officials in Juárez.

Whereas aiding and abetting will not reach the actions and inactions of

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324. Ali v. Reno, 237 F. 3d 591 (6th Cir. 2001).

325. *Id.* at 598 ("[T]his is not to say that domestic violence of the sort alleged in this case could never be the basis for relief under the Convention against Torture. In different circumstances, such as a situation in which the authorities ignore or consent to severe domestic violence, the Convention appears to compel protection for a victim.").

326. *See* Lori Nessel, *Willful Blindness to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture*, 89 MINN. L. REV. 71 (2004) (discussing *In re D-K-*); Center for Gender and Refugee Studies, http://cgrs.uchastings.edu (last visited Feb. 20, 2007) (searchable database of lawyer-provided summaries of unpublished IJ opinions on gender issues including claims of rape and domestic violence). *See also* Freshwater, *supra* note 250, at 601-02 (discussing government acquiescence to domestic violence). *Cf.* Zubeda v. Ashcroft, 333 F.3d 463, 472 (3d Cir. 2003) ("Rape can constitute torture. Rape is a form of aggression constituting an egregious violation of humanity.") (citation omitted).

327. Nessel, *supra* note 326, at 74 (quotations and citation omitted).

328. Ontunez-Tursios v. Ashcroft, 303 F.3d. 341, 355 (5th Cir. 2002).

329. *See* Cruz-Funez v. Gonzales, 406 F.3d at 1192 (finding petitioners' "evidence of corruption in the Honduran government and underfunding of police" insufficient to sustain CAT claim); Builes v. Nye, 239 F. Supp. 2d at 525 ("We do not believe that evidence of widespread bribery, corruption and intimidation of government officials, or of the government's powerlessness to prevent torture, satisfies Petitioner's burden of showing acquiescence by the government in torture.").

330. Similar factual patterns are also considered in persecution cases where the state is unwilling or unable to control private actions. In *Mashiri v. Ashcroft*, 383 F.3d 1112, 1121 (9th Cir. 2004) members of a family of Afghani descent that had been living in Germany for many years complained of governmental inaction to a series of threats based upon their country of origin. In particular, they "testified that the police made no arrests," "that [school] officials . . . flatly refused to help [and] the police quickly closed their investigation." *Id. See also* Freshwater, *supra* note 250, at 600 (noting that the two standards are "contrasted" but they "are similar in that both are trying to determine the extent of the home government's involvement in the applicant's situation.").

the Mexican officials in the Juárez femicides, a state's failure to conduct an adequate investigation or to take preventative measures can constitute acquiescence to torture, which would be actionable under the ATS. Such a ruling would not only break new ground in ATS jurisprudence, but also further a gender-sensitive reading of the CAT, a reading that accounts for the private ways that women suffer violence condoned by a state through its indifference.[331]

V. POSSIBLE OBJECTIONS

My use of acquiescence to torture to determine third-party liability under the ATS relies on the CAT definition of torture, as interpreted in U.S. non-refoulement cases. One could object that a more relevant definition of torture for ATS cases should be found in the TVPA. After all, courts have looked to the TVPA in several ATS cases to answer other ancillary issues, such as the statute of limitations, because the TVPA is the "closest analogous federal statute" to the ATS.[332]

If courts were to rely on the TVPA's definition of torture, acquiescence to torture would be in question because the TVPA does not explicitly refer to acquiescence. Instead, it refers to person(s) "acting under the color of law."[333] It could be argued that the TVPA's "color of law" language was intended to cover acquiescence to torture because the TVPA was explicitly designed to "carry out the intent" of the CAT.[334] Nonetheless, the Senate in defining the scope of the TVPA – to "provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law" commits torture[335] – appears to rule out state acquiescence to torture. The Senate report suggests that 42 U.S.C. § 1983 principles should guide the interpretation of color of law, and agency theory principles should guide the interpretation of 'under actual or apparent authority.'[336] Since neither set of principles encompasses acquiescence to private acts of torture, the TVPA definition would not include acquiescence to torture.[337]

This analysis hinges upon a more fundamental question: the relationship between the ATS and the TVPA. Does the TVPA definition of torture preempt the CAT definition? If not, then the CAT definition with its

331. *See* Nessel, *supra* note 326, at 161-62.

332. *See, e.g.*, Wiwa, 2002 U.S. Dist. LEXIS 3293, at 60-61; Papa v. United States, 281 F.3d 1004, 1012 (9th Cir. 2002) (collecting cases).

333. 18 U.S.C. § 2340 (1).

334. S. REP. NO. 102-249, at 3 (1991); Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005) (defining torture with "color of law" language).

335. S. REP. NO. 102-249, *supra* note 334.

336. *Id.* at 8.

337. *Id.* at 14. That acquiescence would be in addition to the color of law is also clear from the Senate Committee on Foreign Relations' analysis when considering ratification of the CAT. After discussing color of law, their report continues *"in addition,* in our view, a public official may be deemed to 'acquiesce' in a private act of torture." (emphasis added). (S. EXEC. REP. NO. 101-30 at 14 (1990)). *See also* Johan D. van der Vyver, *Torture as a Crime Under International Law*,. 67 ALB. L. REV. 427, 435 (2003) (noting that the TVPA "confines perpetrators of torture to state actors.").

acquiescence language could still be applied in ATS cases. Several courts have considered this question and almost all have held that the TVPA was intended to enhance the ATS and thus should not limit it.[338] Recently, the circuits have split on this issue. In *Enahoro* v. *Abubakar*, the Seventh Circuit heard plaintiffs' claims under both the TVPA and the ATS and concluded that the TVPA "does, in fact, occupy the field. If it did not, it would be meaningless."[339] Under this reasoning, claims of torture must be made under the TVPA and not the ATS. The court argued that *Sosa*'s caution against creating new private rights of action reinforces this conclusion. "It is hard to imagine that the *Sosa* Court would approve of common law claims based on torture and extrajudicial killing when Congress has specifically provided a cause of action for those violations and . . . how those claims must proceed."[340]

The dissent in *Enahoro* argued that "both the plain text and the legislative history of the TVPA indicate that it was meant to expand, not restrict, the remedies available under the ATCA."[341] Indeed, in passing the TVPA, Congress intended to extend the ATS rights granted in *Filartiga* to U.S. citizens.[342] The *Enahoro* dissent also points out that the *Sosa* Court cited approvingly several cases that found torture actionable under the ATS:

> The majority, in claiming *Sosa* as authority for the preclusive effect of the TVPA, stands *Sosa* on its head. That case in fact relies on the TVPA as evidence of Congressional acceptance of torture as a norm *enforceable via the ATCA*. There is nothing, express or implied, in *Sosa* to suggest anything about preclusion.[343]

In *Aldana v. Del Monte*, the Eleventh Circuit agreed with the *Enahoro* dissent that the TVPA was not meant to occupy the field and held that a plaintiff may bring distinct claims for torture under both the TVPA and the ATS.[344] Since ATS claims have to be "committed in violation of the law of nations" the torture definition for the ATS should be based on the customary international law definition found in the CAT.[345] The logic of the *Aldana* court, coupled with many courts holding that the TVPA does not preempt the ATS, strongly suggests that acquiescence as torture as found in the

338. *E.g.*, Wiwa, 2002 U.S. Dist. LEXIS 3293; Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 380 (E.D. La. 1997) (Arguing that because the TVPA "enhances" rather than shrinks the scope of remedies under § 1350, there is no reason to conclude that by enacting the TVPA Congress took away causes of action for torture and extrajudicial killings under § 1350).

339. Enahoro v. Abubakar, 408 F.3d 877, 884-85 (7th Cir. 2005).

340. *Id.* at 886.

341. *Id.* at 886-87 (Cudahy dissenting).

342. *Id.* at 888 n.5 (Cudahy dissenting) ("The TVPA . . . would also enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens . . . . Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350.") (citation omitted).

343. *Id.* at 889.

344. Aldana v. Del Monte, 416 F.3d at 1250.

345. *Id.* at 1251.

CAT can be employed in the ATS context.

Another potential objection to the acquiescence theory is that reliance on the acquiescence language in the CAT skirts the vigilant doorkeeping of claims actionable under the ATS that the *Sosa* Court recommended. Is such an innovative application of third-party liability at odds with the caution of *Sosa*? To counter this objection, one must recall the context of Sosa's caution: the development of new private rights of action, especially in foreign affairs. The use of acquiescence to torture does not create a new right of action because the prohibition against torture itself is clearly part of the law of nations and of U.S. law. And since *Filartiga*, with the exception of *Enahoro*, courts have recognized torture as actionable under the ATS. The *Sosa* Court was clear that Congressional intent should be an important consideration when innovating in areas related to foreign relations: "[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law [in the area of foreign relations]. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[346] However, Congressional intent is quite clear in this area in two respects. First, the Senate in its report on the TVPA made it clear that it was codifying and expanding the *Filartiga* decision.[347] Second, Congress clearly stated its concern about the femicides in Juárez with the passage of a resolution in May 2006.[348] Therefore, the proposal to use acquiescence to torture, especially in the context of an ATS case on the femicides, would be consistent with Congressional intent and would not be a new cause of action.

CONCLUSION:
THE PROGRESSIVE DEVELOPMENT OF HUMAN RIGHTS

Since 1993, hundreds of women in Ciudad Juárez have been brutally murdered and many have been raped and subjected to other types of torture. Although it is still not clear who is perpetrating many of these crimes, the Mexican authorities have not taken sufficient steps to investigate and prevent them. This Article examined two major types of third-party liability under the ATS in the context of these femicides. Several high profile cases and a proposed Senate bill have challenged whether aiding and abetting liability exists under the ATS. I agree with many scholars and most courts that aiding and abetting liability should remain intact under the ATS. However, the theories of aiding and abetting

346. Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (Scalia concurring) (citing the majority opinion approvingly).

347. S. REP. NO. 102-249, at 4-5.

348. H.R. Con. Res. 90, 109th Cong. (2006) (enacted) (*Inter alia*, condemning the femicides, expressing support for the victims' families, condemning torture in the investigation of the femicides). In its Resolution, Congress encouraged the Secretary of State "to urge the State of Chihuahua to hold accountable those law enforcement officials whose failure to adequately investigate the murders, whether through negligence, omission, or abuse, has led to impunity for these crimes." *Id.* at 3.

proposed by the courts and scholars would most likely not reach the actions and inactions of the Mexican authorities. Instead, I offer acquiescence to torture as an alternative form of third party liability. As primary liability for secondary actors, acquiescence to torture would most likely survive even a challenge to aiding and abetting and other forms of secondary liability. Moreover, as interpreted through the FARRA and subsequent non-refoulement case law, acquiescence to torture extends to government officials' failure to prevent and/or investigate private acts of torture. It could thus reach Mexican government officials in Juárez case, because they have been willfully blind to private acts of torture.

Though *Sosa* stands for vigilant doorkeeping of permissible claims under the ATS, it has also established a framework for the progressive development of ATS jurisprudence. As international human rights norms become universal, specific, and obligatory, they should become actionable under the ATS.[349] Such a progressive development of human rights law is crucial because legal institutions and instruments need to be constantly interrogated to determine if they marginalize those that they should protect.[350] For the CAT to meet its stated objective "to make more effective the struggle against torture,"[351] courts should increasingly hold state actors accountable for the actions of non-state actors under theories of aiding and abetting and acquiescence. Anything less would authorize the most prevalent types of torture.[352] State responsibility for the actions of non-state actors is especially important in the context of gender violence. The CAT was drafted in an era not especially sensitive to the gender aspect of torture and thus did not "take into account the different ways in which women experience torture."[353] The sexual homicides, brutal torture, and extreme forms of domestic violence prevalent in Juárez may not be the type of torture that the drafters of the CAT envisioned, but they represent types of actions that are increasingly recognized as torture.[354] Courts need to

349. *See* Sosa, 542 U.S. at 730 ("It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.").

350. *See generally* Schmidt Camacho, *supra* note 58, at 281-83.

351. CAT, *supra* note 12, pmbl.

352. Miller, *supra* note 257, at 310 ("[I]n the modern world, torturers are less often organized states and more often non-state, or quasi-governmental bodies."). *See also* Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81, 94 (1999) ("It is the erroneous conceptual leap from states as essential *vehicles* for protection, to states as exclusive *sources* of abuse, that has the dangerous capacity to create a class of individuals who are cut off from international protection: victims of non-state agents of repression.").

353. Nessel, *supra* note 326, at 80.

354. *See, e.g.*, World Organisation Against Torture (OMCT), *Interpretation of the Definition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment in the Light of European and International Case Law*, October 30, 2004 at 35 ("The State's unwillingness to take all possible measures to prevent domestic violence and to protect women from such violence suggests official consent or acquiescence to torture under Article 1 of the convention.") (internal citation omitted); Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 356 (1994) ("Where domestic violence is a matter of common knowledge and law enforcement and affirmative prevention measures are

increasingly interpret the CAT from a gendered perspective, and a liberal interpretation of "acquiescence" is crucial for such progressive development.[355]

inadequate, or where complaints are made and not properly responded to, the state should be held to have "acquiesced" in the continued infliction of violence.").

355. *See* Nessel, *supra* note 326, at 144 ("[A] restrictive interpretation of acquiescence' leaves the nation state unaccountable for harm that it effectively tolerates by private actors within its borders.").