

**CORPORATE AIDING AND ABETTING UNDER
THE ALIEN TORT STATUTE: A PROPOSAL FOR
EVALUATING THE FACIAL PLAUSIBILITY OF A
CLAIM**

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I. INTRODUCTION

In 2004, John Ruggie, the current Special Representative to the Secretary General of the United Nations, estimated the “universe” of multinational corporations (MNCs) consisted of about 65,000 firms and more than 800,000 subsidiaries.¹ The operational girth of many corporations, the nature of the industries in which they function, and the omnipresent necessity to increase profits has prompted many MNCs to pursue revenue opportunities in lesser-developed countries, many of which have poor human rights records.² While some of these opportunities ultimately benefit the corporation, the host state, and the local population, others have allegedly resulted in horrific human rights abuses.³

Overall, there is a lack of domestic and international regulation regarding the transnational activities of MNCs.⁴ Within the context of

1. John Gerard Ruggie, *American Exceptionalism, Exemptionalism, and Global Governance*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 317 (Michael Ignatieff ed., 2005). Ruggie’s article itself is available at http://belfercenter.ksg.harvard.edu/files/american_exceptionalism.pdf (last visited Feb. 10, 2011) (the relevant material is located on page 14 of this draft). A multinational corporation is defined as “[a] company with operations in two or more countries . . . subject to risks such as changes in exchange rates or political instability.” *BLACK’S LAW DICTIONARY* 367 (8th ed. 2004).

2. For access to reports on the human rights records of countries throughout the world, see AMNESTY INTERNATIONAL, *AMNESTY INTERNATIONAL REPORT 2009: THE STATE OF THE WORLD’S HUMAN RIGHTS* (2009), available at <http://report2009.amnesty.org/en/download> (follow “Download Full Report” hyperlink) (last visited Feb. 10, 2011); HUMAN RIGHTS WATCH, *WORLD REPORT 2009* (2009), available at <http://www.hrw.org/world-report-2009> (follow “Amnesty International Report 2009” hyperlink under “English” heading) (last visited Feb. 10, 2011); *2009 Country Reports on Human Rights Practices*, U.S. DEP’T OF ST., available at <http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm> (last visited Feb. 10, 2011).

3. See *infra* note 10 and accompanying text.

4. The United States has some regulatory controls in place to protect its own citizens from exploitation by business activity. However, those regulations typically apply only domestically and do not extend to regulate the activities of corporations in foreign jurisdictions. Only certain federal labor statutes provide for extraterritorial application, but do so only to protect American citizens working for American companies abroad. Title VII of the Civil Rights Act of 1964 provides for limited extraterritorial application to U.S. citizens employed abroad by U.S. firms and to foreign firms under the “control” of a U.S. firm. See 42 U.S.C. § 2000e-1(c) (2006), *declared unconstitutional as applied* by *Miller v. Bay View United Methodist Church, Inc.*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001). International law also provides inadequate regulatory mechanisms to reign in corporate misconduct. There are no existing treaties purporting to regulate the transnational activity of MNCs. The United Nations (U.N.) has made attempts to impose norms of conduct to which MNCs would be obliged to subscribe. See Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.13.pdf>. The success of this document remains to be seen, as previous attempts by the U.N. to impose binding obligations on MNCs were met with

corporate misconduct and human rights violations, the Alien Tort Statute⁵ (ATS) has evolved over the last three decades to help fill this void.⁶ The modern judicial interpretation of the ATS grants federal jurisdiction over civil claims filed by foreign-born human rights victims alleging corporate participation in certain human rights violations.⁷

Human rights violations are often the result of systematic government activity.⁸ In some instances, though, MNCs are involved—sometimes quite significantly—in the perpetuation of such violations.⁹ This reality has prompted many plaintiffs to pursue ATS claims against MNCs under a theory of aiding and abetting liability.¹⁰ However, two recent decisions by the United States Supreme Court may potentially inhibit the ATS's effectiveness as a remedial measure for human rights victims of corporate misconduct.

extreme resistance. See John Gerard Ruggie, *Business and Human Rights: The Evolving International Agenda* 4 (Corporate Soc. Responsibility Initiative, Working Paper No. 38, 2007), available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_38_ruggie.pdf.

5. 28 U.S.C. § 1350 (2006).

6. See Special Representative of the Secretary-General, *supra* note 4 (commenting on the ATS as a means to impose liability on corporations involved in human rights abuses). The current version of the ATS reads, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). The ATS is interchangeably referred to as the Alien Tort Claims Act (ATCA). Any quotes that explicitly refer to the ATCA remain unchanged.

7. 28 U.S.C. § 1350 (2006). In the United States, an "alien" is "a person who was born outside the jurisdiction of the United States, who is subject to some foreign government, and who has not been naturalized under U.S. law." BLACK'S LAW DICTIONARY 79 (8th ed. 2004).

8. Foreign governments and government actors are typically shielded from ATS liability due to the Foreign Sovereign Immunities Act and numerous prudential doctrines. See *infra* note 41 and accompanying text.

9. See *infra* note 10 and accompanying text.

10. See generally *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1288 (S.D. Fla. 2003), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2005) (alleging that defendants participated in torture and other human rights violations with local government security forces designed to put an end to their leadership in trade union activities); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1083, 1092-95 (N.D. Cal. 2008) (alleging that Chevron, acting through its Nigerian subsidiary, paid Nigerian military to carry out attacks on an oil platform they were occupying, during which crimes against humanity were purportedly committed); *Xiaoning v. Yahoo!, Inc.*, No. 07-CV-2151, 2007 U.S. Dist. LEXIS 97566 (N.D. Cal. Oct. 31, 2007) (alleging that Yahoo provided the Chinese government with Internet user identification information, which led to torture, arbitrary arrest, and prolonged detention and other human rights abuses); *Sinaltrainal v. The Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) (alleging Coca-Cola and its subsidiaries were complicit with Colombian paramilitary units in the murder of union leaders); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386(KMW), 2002 WL 319887, at *1-3 (S.D.N.Y. Feb. 28, 2002) (alleging that the defendant directed and aided the Nigerian military in committing torture, extrajudicial killings, arbitrary arrest and prolonged detention); *Doe I v. The Gap, Inc.*, No. CV-01-0031, 2001 WL 1842389, at *4 (D. N. Mar. I. Nov. 26, 2001) (alleging the torts of forced labor and deprivation of other fundamental human rights).

In *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, the Court altered the popular conception of pleading under Federal Rule of Civil Procedure 8(a) by holding that a plaintiff's complaint must do more than merely provide notice to a defendant; it must state a facially plausible claim of relief.¹¹ Under this standard, a complaint must contain enough factual material to permit the reasonable inference that the defendant is liable for the misconduct alleged.¹² According to the *Iqbal* Court, such inferences are to be deduced through "judicial experience and common sense."¹³ In the context of ATS corporate aiding and abetting, a complaint will survive a Rule 12(b)(6) motion to dismiss only if a plaintiff can plead sufficient factual allegations to illustrate that a corporate defendant acted with the requisite *mens rea*, thereby creating a plausible entitlement to relief.¹⁴

The impact of plausibility pleading on ATS corporate aiding and abetting claims has yet to be determined. In the absence of a "smoking gun," a court's reliance on "judicial experience and common sense" is hardly an appropriate standard with which to gauge an ATS complaint's facial plausibility.¹⁵ The likely result is that factual allegations implicating a defendant's *mens rea* will be found plausible in one court and implausible in another court. To that end, this Comment offers guidance by means of a turnkey solution. Lower courts should examine the complaint in search of two primary factual components. First, the plaintiff must allege facts demonstrating that the defendant knew or should have known that their business activities would contribute to human rights violations. Second, the plaintiff must make conduct-specific allegations that would suggest the defendant contributed to such violations. If these two components are present in a plaintiff's complaint, a court should infer that the defendant possessed the requisite *mens rea* for the purpose of surviving a Rule 12(b)(6) motion to dismiss.

Part II of this Comment examines the origins and historical background of the ATS, culminating with its abrupt ascent into legal prominence. In addition, Part II explains the rise of corporate liability

11. *Ashcroft v. Iqbal* 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); see Fed. R. Civ. P. 12(b)(6). For a more detailed discussion of *Twombly* and *Iqbal*, see *infra* Part III. In *Twombly's* immediate wake, lower courts, scholars, and commentators debated as to whether the Court's requirement of legal "plausibility" was confined to anti-trust cases or if such a standard was intended to govern in all civil cases. See *infra* note 106 and accompanying text.

12. *Iqbal*, 129 S. Ct. at 1949.

13. *Id.* (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev'd on other grounds*, *Iqbal*, 129 S. Ct. 1937).

14. See *infra* Part III.

15. See *infra* note 119 and accompanying text.

under the ATS and its extension to encompass a theory of aiding and abetting liability. Part III is an examination of the Supreme Court's opinions in *Twombly* and *Iqbal*, focusing mainly on the Court's determination that plausibility pleading is a context-specific task. Part IV introduces the proposed evaluation standard and offers examples to better illustrate this standard in practice. Part V provides a brief conclusion.

II. THE ALIEN TORT STATUTE AND CORPORATE AIDING AND ABETTING LIABILITY

The ATS was originally passed by the First Congress as part of the Judiciary Act of 1789.¹⁶ The ATS remained mostly dormant for the next 190 years, serving as the basis for substantive claims just over twenty times.¹⁷ In 1980, the United States Court of Appeals for the Second Circuit issued a landmark decision in *Filártiga v. Peña-Irala*, effectively waking the statute from its slumber.¹⁸

In *Filártiga*, Dr. Joel Filártiga and his daughter, both citizens of Paraguay, brought suit against Americo Norberto Peña-Irala, also a citizen of Paraguay.¹⁹ The Filártigas' suit alleged that Peña kidnapped Dr. Filártiga's son and tortured him to death in retaliation for Dr. Filártiga's vocal opposition to the Paraguayan government.²⁰ After a dismissal by the District Court for the Eastern District of New York for lack of subject matter jurisdiction, the Second Circuit reversed.²¹ This reversal paved the

16. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004) (explaining the history of the ATS); *see also* Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79. There are several theories as to why the First Congress felt compelled to provide foreigners access to a federal judicial forum based on injury suffered outside the boundaries of the United States. One theory suggests economics may have been the driving force behind the ATS's enactment. As the United States relied heavily on trade with foreign nations in 1789, this theory posits that the ATS may have been a measure to provide a judicial forum to foreign investors. *See* Jeffrey Rabkin, *Universal Justice: The Role of the Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120, 2125 (1995). Another theory is that the drafters intended to limit the ATS as a tool for foreign ambassadors to obtain access to the United States federal court system. *See id.* at 2125-26. Considering the modern application of the ATS, one scholar suggests that its enactment signaled the United States' willingness to "to shoulder a perceived national duty to enforce international law as it related to individual conduct." *See* Courtney Shaw, *Uncertain Justice: Liability for Multinationals Under the Alien Tort Claims Act*, 54 STAN. L. REV. 1359, 1364 (2002); *see also* GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 3 (2003).

17. *See* HUFBAUER & MITROKOSTAS, *supra* note 16, at 2 n.2.

18. *Filártiga v. Peña-Irala*, 630 F.2d 876, 887 (2d Cir. 1980). The complaint alleged the United States federal courts had jurisdiction under the ATS, because Peña-Irala's conduct violated the law of nations. *Id.*

19. *Id.* at 878.

20. *Id.*

21. *Id.*

way for ATS litigation in U.S. courts based on international human rights violations. As support for its reversal, the Second Circuit stated:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. . . . In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. . . . Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.²²

This decision erected the framework for the modern-day application of the ATS.²³

Filártiga and its progeny have firmly established that the ATS provides for subject matter jurisdiction over claims (1) brought by aliens (2) alleging torts (3) committed in violation of the law of nations or a treaty to which the United States is a signatory party.²⁴ Within the context of the ATS, courts have consistently used the term “customary international law” as a synonym for the term the “law of nations.”²⁵

In its groundbreaking decision, the *Filártiga* court announced that “courts must interpret international law not as it was in 1789, but as it has

22. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The *Filártiga* case dealt primarily with a claim of torture. See generally *id.* The *Filártiga* court ultimately concluded that torture is a violation of the law of nations and is, therefore, an actionable claim under the ATS. See *id.* at 887. In 1992, Congress amended the ATS by including the Torture Victim Protection Act (TVPA). See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (2006)). As a result of the TVPA, U.S. citizens and alien plaintiffs alleging torture may bring actions in federal courts against individuals acting “under actual or apparent authority, or color of law, of any foreign nation.” *Id.* sec. 2(a).

23. After *Filártiga*, a majority of courts interpreted the ATS as providing both a private cause of action and a federal forum where aliens may seek redress for violations of international law. See, e.g., *Kadiç v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995) (“[The] Act appears to provide a remedy for the appellants’ allegations of violations related to genocide, war crimes, and official torture”); *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) (finding that the ATS “creates a cause of action for violations of specific, universal and obligatory international human rights standards”); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (“[The ATS] yields both a jurisdictional grant and a private right to sue for tortious violations of international law”).

24. See *Filártiga*, 630 F.2d at 887; see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 (2d Cir. 2003); *Kadiç*, 70 F.3d at 238 (citing *Filártiga*, 630 F.2d at 887).

25. *Flores*, 414 F.3d at 237 n.2 (citing *Kadiç*, 70 F.3d at 239; *Filártiga*, 630 F.2d at 884).

evolved and exists among the nations of the world today.”²⁶ Thus, the court found that certain human rights abuses were violations of the law of nations for purposes of ATS jurisdiction.²⁷

In the wake of *Filártiga*, federal courts extended ATS subject matter jurisdiction over human rights claims other than torture, including genocide, war crimes, summary execution, forced disappearance, slavery, prolonged detention, and cruel, inhuman, and degrading treatment.²⁸ Other types of claims implicating human rights, however, were dismissed due to the nature of the wrongful conduct alleged. Claims alleging the denial of freedom of expression, environmental destruction, and expropriation of private property were dismissed as not violating universally recognized norms within the meaning of the law of nations.²⁹ While federal courts consistently relied on *Filártiga*'s rationale to identify actionable norms under the ATS, the Supreme Court remained silent on the matter for almost twenty-five years.

A. THE SUPREME COURT WEIGHS IN—THE *SOSA* DOCTRINE

In 2004, the Supreme Court issued its first and only ruling regarding the ATS. In *Sosa v. Alvarez-Machain*, the Supreme Court confirmed that

26. *Filártiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980). Prior to *Filártiga*, plaintiffs alleging human rights violations found no support in ATS precedent. Only twice before *Filártiga* had courts exercised subject matter jurisdiction over claims brought under the ATS. See Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filártiga v. Peña-Irala*, in *THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY* 49, 50-51 (Ralph G. Steinhardt & Anthony D'Amato eds., 1999) (citing *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961)).

27. See *Filártiga*, 630 F.2d at 887-88; see also *id.* at 890 (“[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.”). The *Filártiga* court also noted an “international consensus that recognizes basic human rights and obligations owed by all governments to their citizens.” *Id.* at 884 (quoting DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979, 96TH CONG., REP. BY HOUSE COMM. ON FOREIGN AFFAIRS AND S. COMM. ON FOREIGN RELATIONS 1 (1980)).

28. See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (torture); *Kadiç v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (genocide and war crimes); *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994) (torture); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (summary execution and cruel, inhuman, or degrading treatment); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (causing disappearance); see also Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 815-16 (2005).

29. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003) (holding that excavation practices resulting in air, water, and soil pollution does not trigger federal jurisdiction under the ATS); *Guinto v. Marcos*, 654 F. Supp. 276 (S.D. Cal. 1986) (finding that the denial of free speech was not actionable under the ATS); *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982) (concluding that the taking of private property did not violate the law of nations for purposes of the ATS).

the ATS allows foreign nationals to obtain civil remedies for violations of the law of nations.³⁰ In *Sosa*, Humberto Alvarez-Machain brought a claim against Jose Sosa and several Drug Enforcement Agency (DEA) officials, alleging arbitrary arrest and wrongful detention.³¹

The Court focused on how to determine when a particular claim of wrongdoing is actionable under the ATS.³² In evaluating Alvarez's claim, Justice Souter's opinion surmised that the drafters probably intended to grant jurisdiction to redress specific and limited violations of the law of nations recognized at common law.³³ The Court relied on Sir William Blackstone's list of specific offenses against the law of nations under English common law at the time of the Judiciary Act of 1789.³⁴ It concluded the drafters of the ATS had three universally recognized claims in mind: violation of safe conduct, infringement upon the rights of ambassadors, and piracy.³⁵

Rather than limiting the ATS's application to these three specific offenses, the Court established a two-pronged test to be used by lower courts when evaluating the viability of a plaintiff's claim under the statute. First, the claim must "rest on a norm of international character accepted by the civilized world."³⁶ Second, the alleged wrongful conduct must be "defined with a specificity comparable to the features of the eighteenth-century paradigms."³⁷

30. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

31. *Id.* at 698. Alvarez had been indicted in a U.S. court for his role in the murder of a DEA agent. *Id.* at 697. The Mexican government, however, refused to grant the DEA's extradition request. *Id.* at 698. In response, the DEA hired a group of Mexican nationals, including Sosa, to abduct Alvarez and bring him to the US for trial. *Id.* The group held Alvarez overnight in a motel and brought him by private plane to El Paso, Texas, where federal officers arrested him. *Id.* After acquittal, Alvarez sued Sosa under the ATS alleging arbitrary arrest and detention in violation of the law of nations. *Id.*

32. *Sosa*, 542 U.S. at 712.

33. *Id.* at 724 (concluding the ATS is "best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time").

34. *Id.* at 724-25. Sir William Blackstone was a preeminent English legal scholar. He is the author of *Commentaries on the Laws of England*, a four-volume work considered to be the most thorough summary of the entire body of English law ever compiled by a single author. See RICHARD J. GOLDSTONE, *THE COMMENTARIES OF SIR WILLIAM BLACKSTONE, KNIGHT, ON THE LAWS AND CONSTITUTION OF ENGLAND* (ABA Publishing 2009).

35. *Sosa*, 542 U.S. at 723 (citing 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 68 (1769)).

36. *Id.* at 725.

37. *Id.* The Court explained, "[W]e 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." *Id.* at 732.

Notably, the Court acknowledged that its analysis reaffirmed a methodology applied previously by most federal courts to consider ATS claims.³⁸ While the Court tacitly approved the reasoning in several cases involving egregious and heinous human rights violations, its opinion failed to address which specific claims satisfied the two-prong test and were therefore actionable under the ATS.³⁹ As a result of the Court's limited direction, federal courts have abided by *Sosa's* perceived contours to restrict viable ATS claims to only the most egregious human rights violations.⁴⁰

However, the question addressed by the *Sosa* Court—i.e., *which* violations of international law are cognizable under the ATS—is a different question from *who* may be held liable for those violations. There are numerous impediments that deter plaintiffs from bringing ATS claims against foreign government entities or state actors, most notably the Foreign Sovereign Immunities Act and numerous prudential doctrines.⁴¹ These obstacles, coupled with the increased media exposure of corporate involvement in the committing of human rights abuses, has led many ATS plaintiffs over the last decade to target corporate entities under theories of

38. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (stating that the Court's standard is "generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court"). Apart from validating the lower courts' analytical approach, the Court went a step further by urging caution to lower courts in identifying new norms under international law. *Id.* at 727-28.

39. See generally *id.*; see also *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (stating "the ATS 'applies only to shockingly egregious violations of universally recognized principles of international law'" (quoting *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam))); *Filártiga v. Peña-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (explaining that "only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS]"). In *Filártiga*, the Second Circuit noted "the requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one." *Filártiga*, 630 F.2d at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

40. For a thorough discussion on potentially actionable ATS claims, see generally MICHAEL KOEBELE, *CORPORATE RESPONSIBILITY UNDER THE ALIEN TORT STATUTE* 50-195 (2009).

41. See Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604 (2006). In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court construed the FSIA to grant immunity to a foreign government that violated customary international law. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). In *Amerada Hess*, a Liberian oil tanker was destroyed by the Argentine military. *Id.* at 431-32. The Liberian company sued the Argentine Republic pursuant to the ATS. *Id.* at 432. The Court held that the FSIA superseded the ATCA, making the FSIA the exclusive means for determining jurisdiction over a foreign sovereign. *Id.* at 443. Prudential and discretionary doctrines have also been used to dispose of ATS claims. These doctrines include the political question doctrine, international comity, forum non conveniens, failure to exhaust local remedies, and the act of state doctrine. For a brief explanation of each of these within the context of the ATS, see KOEBELE, *supra* note 40, at 323-56.

direct liability and aiding and abetting liability.

B. DIRECT LIABILITY OF CORPORATIONS UNDER THE ATS

Holding a corporation directly liable for a violation of international law is a somewhat novel proposition. International law traditionally governs only the relations among nation states.⁴² Throughout the nineteenth and early twentieth centuries, international law did not venture into the realm of private conduct.⁴³ In the aftermath of World War II, the creation of the International Military Tribunal in Nuremberg expanded the scope of international law in the criminal context to encompass private actors as well.⁴⁴ Article 6 of the Nuremberg Charter established “Crimes against Peace,” “War Crimes,” and “Crimes against Humanity” as falling within the purview of these tribunals.⁴⁵ The Nuremberg criminal tribunals established courts to hold war criminals accountable for their participation in these “Nuremberg crimes.”⁴⁶ In four cases, *United States v. Flick*, *United States v. Krauch*, *United States v. Krupp*, and the *Zyklon B Case*, leaders of large German industries were prosecuted for war crimes and crimes against humanity stemming from actions taken during the Holocaust.⁴⁷ These four

42. See KOEBELE, *supra* note 40, at 195 (“International law still predominantly regulates the public sphere. It regulates relations between and among sovereign States”); see also MARTIN DIXON, *TEXTBOOK ON INTERNATIONAL LAW* 3 (6th ed. 2007) (“[I]nternational law comprises a system of rules and principles that govern the international relations between sovereign states and other institutional subjects of international law such as the United Nations and the African Union (formerly the OAU).”).

43. See Blum & Steinhardt, *supra* note 26, at 59-61. The authors note that, in the nineteenth century, the domain of international law focused on state sovereignty and the interaction of state governments. *Id.* Under this system, violators of human rights were subject only to individual state law and not to any international legal order. *Id.* at 60; see also 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, 1226 (2005) (commenting on the significance of the *Filártiga* decision in recognizing an international concern for how states treat their own citizens).

44. See DAVID WEISSBRODT ET AL., *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 390 (3d ed. 2001); see also Diskin, *supra* note 28, at 824.

45. WEISSBRODT ET AL., *supra* note 44, at 390-91.

46. *Id.* at 391; see also Diskin, *supra* note 28, at 824.

47. See Diskin, *supra* note 28, at 824-25; see also *United States of America v. Friedrich Flick*, “The Flick Case,” VI Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950), 1192 (convicting Flick, an owner of steel plants, for using slave labor); *United States of America v. Carl Krauch*, “The Farben Case,” VIII Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1952), 1179 (finding Krauch guilty of aiding and abetting the use of slave labor); *United States of America v. Alfried Felix Alwyn Krupp von Bohlen and Halbach*, “The Krupp Case,” IX Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1950), 1440 (finding defendants guilty of aiding and abetting the use of slave labor); *The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1 Law Reports of Trial of War Criminals 93, 101 (1947) (finding defendants criminally liable for selling the poison gas Zyklon B to the Nazis).

cases introduced and solidified the notion that private actors who violate international law may themselves be held criminally liable as either principals or accessories.⁴⁸

Fifteen years after *Filártiga*, the Second Circuit incorporated into ATS jurisprudence this understanding that private actors may be held accountable for violations of international law.⁴⁹ In *Kadiç v. Karadzic*, the court addressed an ATS claim brought against Bosnian Serb leader Radovan Karadzic.⁵⁰ The plaintiffs alleged that military forces under his control had committed genocide, rape, forced prostitution, torture, and summary execution.⁵¹ The *Kadiç* court held that private actors could be liable for certain violations of international law under the ATS, *regardless of state involvement* in the alleged wrongdoing.⁵² In response to the defendant's contention that he could not be held liable as a private actor, the *Kadiç* court stated,

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.⁵³

In other words, a private actor can be held liable under the ATS for *unilateral* action, but only in certain circumstances. Such circumstances have been limited by the courts to acts of genocide, war crimes, forced labor, aircraft hijacking, and other human rights violations committed pursuant to genocide or war crimes.⁵⁴ But these particular types of human

knowing that it would be used in gas chambers).

48. See Diskin, *supra* note 28, at 826; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 477 (2001) (suggesting that these cases demonstrated a willingness among prominent legal thinkers to extend criminal liability to private actors for violations of international law).

49. See *generally* *Kadiç v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); see also Christensen, *supra* note 43, at 1240-41.

50. *Kadiç*, 70 F.3d at 236.

51. *Id.* at 236-37.

52. *Id.* at 239-40.

53. *Id.* at 239.

54. See KOEBELE, *supra* note 40, at 245-51. The author notes that the *Kadiç* court found that state action is not a precondition to liability for certain human rights violations, including murder, rape, and arbitrary detention of civilians when committed in the course of genocide or war crimes. *Id.* One court has implicitly recognized forced labor as a modern variant of slavery, rendering such conduct actionable under the ATS. See *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1308-09 (C.D. Cal. 2000) (stating that “[t]o prevail on their ATCA claim against Unocal, plaintiffs must establish that Unocal is legally responsible for the Myanmar military’s forced labor practices.”), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005).

rights violations are most often the result of systematic government activity. Consequently, the rationale of *Kadiç* and its successors has resulted in limitations regarding when a private actor may be directly liable under the ATS.⁵⁵

In 2004, the *Sosa* Court implicitly affirmed the underlying rationale of the *Kadiç* holding by stating that international law includes “rules binding individuals for the benefit of other individuals” that can be enforced in federal courts.⁵⁶ This statement reinforces *Kadiç*’s extension of ATS liability to private actors. But neither *Kadiç* nor *Sosa* dealt with facts specific to *corporate* liability. However, the *Sosa* Court did acknowledge the potential for corporate liability under the ATS. In a footnote, the Court grouped individuals and corporations together under a “private actors” umbrella, thereby suggesting that if ATS liability extended to individuals, it also extended to corporations.⁵⁷

Following *Sosa*, numerous federal courts have held that the ATS provides for jurisdiction over corporate defendants.⁵⁸ While holding a

55. See Hannah R. Bornstein, *The Alien Tort Claims Act in 2007: Resolving the Delicate Balance Between Judicial and Legislative Authority*, 82 IND. L.J. 1077, 1097 (2007).

56. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004); see also *id.* at 724 (referring to international law violations “with a potential for personal liability”); Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 67 (2008) (commenting that *Sosa* affirmed that the scope of international is broader than just rules governing the conduct of states).

57. *Sosa*, 542 U.S. at 733 n.20. The footnote states, “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor *such as a corporation or individual.*” *Id.* (emphasis added).

58. See, e.g., *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2009); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (per curiam); *In re Sinaltrainal*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006), *aff’d in part, vacated in part*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1289 (11th Cir. 2009); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005). However, in September of 2010, a panel of the United States Court of Appeals for the Second Circuit ruled by a 2-1 decision that corporations cannot be held liable under the ATS. See generally *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). In *Kiobel v. Royal Dutch Petroleum Co.*, the majority opinion found:

[T]he principle of individual liability for violations of international law has been limited to natural persons—not “juridical” persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an “international crime” has rested solely with the individual men and women who have perpetrated it.

Id. at 119. Circuit Judge Pierre Leval wrote a separate opinion. He agreed with the outcome as it pertained to the specific plaintiff in this case, but disagreed that the ATS applies only to individuals. *Id.* at 149 (Leval, J., concurring). In his strident concurrence, Judge Leval wrote:

The majority opinion deals a substantial blow to international law and its undertaking to protect fundamental human rights. According to the rule my colleagues have created,

corporation directly liable is possible in theory, it is much less prevalent in practice. Forced labor claims may often satisfy the criteria for direct corporate liability, but how many corporations unilaterally engage in acts of genocide?⁵⁹ The limitations resulting from *Kadiç* have caused many ATS claims against corporations to be brought pursuant to a theory of aiding and abetting liability.

C. CORPORATE AIDING AND ABETTING LIABILITY AS A VIABLE THEORY OF RECOVERY UNDER THE ATS

In ATS corporate aiding and abetting claims, a foreign government or other state actor is usually the principal violator. The plaintiff seeks to hold the corporate defendant liable as an accomplice to the violation.⁶⁰ Accordingly, claims of ATS aiding and abetting liability depend ultimately on a violation of international law by a foreign state or state actor.⁶¹ If a

one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form. . . . [T]he majority take the position that corporations, and other juridical entities, are not subject to international law, and for that reason such violators of fundamental human rights are free to retain any profits so earned without liability to their victims.

Id. at 149-50 (Leval, J., concurring). Notably, the *Kiobel* decision was the first instance in which an appellate court has altogether rejected corporate liability under the ATS. Yet just one week prior to *Kiobel*, a California district court became the first federal court to dismiss an ATS suit on the grounds that corporations are not governed by customary international law. See *Doe v. Nestle, S.A.*, No. 05-5133 SVW (JTLx), 2010 U.S. Dist. LEXIS 98991, at *192 (C.D. Cal. Sept. 8, 2010). Whether this position will gain traction throughout the federal judiciary remains to be seen.

59. Allegations of direct corporate liability are most commonly seen in the context of forced labor. See, e.g., *Doe v. Nestle, S.A.*, No. 05-5133 SVW (JTLx), 2010 U.S. Dist. LEXIS 98991, at *5 (C.D. Cal. Sept. 8, 2010) (alleging children plaintiffs were forced to work on cocoa plantations in the Ivory Coast, Mali, and other African nations); *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 990 (S.D. Ind. 2007) (alleging children plaintiffs were forced to work in a Bridgestone factory in Liberia); *Doe I v. Unocal*, 110 F. Supp. 2d 1294, 1295 (C.D. Cal. 2000) (alleging a calculated effort by the Burmese military to force the local population to work on the construction of an oil pipeline), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005).

60. See HUFBAUER & MITROKOSTAS, *supra* note 16, at 5 (stating that under a corporate aiding and abetting theory, "foreign state conduct is attributed to the private firm in order to impose liability"); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 336-37 (1985). "The doctrine of complicity (sometimes referred to as the law of aiding and abetting, or accessorial liability) emerges to define the circumstances in which one person . . . becomes liable for the crime of another . . ." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 336-37 (1985). "The secondary party's liability is derivative . . . [I]t is incurred by virtue of a violation of law by the primary party to which the secondary party contributed." *Id.* at 337. The secondary party "aids and abets" the primary party in performing a certain act. *Id.* Even though the secondary party's liability rests on the unlawful conduct of the principal, the legal consequences stem from the secondary party's own actions. *Id.*

61. See HUFBAUER & MITROKOSTAS, *supra* note 16, at 5.

corporation has assisted in perpetrating that violation, it may be held liable under a theory of aiding and abetting.⁶²

The progenitor of ATS corporate aiding and abetting claims is *Doe v. Unocal*.⁶³ Unocal, formerly a California-based natural gas and oil exploration company,⁶⁴ entered into an oil-extraction and pipeline construction joint venture with Total S.A., a French oil company, and the government of Myanmar.⁶⁵ As a result of this agreement, the military of Myanmar provided security during the construction phase of the project.⁶⁶ Plaintiffs' attorneys filed suit in the United States District Court for the Central District of California on behalf of citizens of Myanmar, alleging that military personnel committed acts of rape, torture, forced labor, and other human rights abuses.⁶⁷ The district court granted the defendant's motion for summary judgment despite acknowledging that the evidence suggested "Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice."⁶⁸ On appeal, the Ninth Circuit's partial reversal was based on the conclusion that there were

62. See, e.g., *Sinaltrainal v. Coca Cola Co.*, 578 F.3d 1252, 1258 n.5 (11th Cir. 2009) (acknowledging the potential for accomplice liability in an ATS suit against a corporate defendant. See also Teddy Nemeroff, Note, *Untying the Khulumani Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After Sosa*, 40 COLUM. HUM. RTS. L. REV. 231, 254-55 (2008) (noting that in a corporate aiding and abetting claim, the plaintiff seeks to hold a corporation liable "for state violations of international law because it provided some form of substantial assistance with a requisite mens rea of either 'knowing' or 'purposeful' conduct"). Compare *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254, 267-77, 333 (2d Cir. 2007) (holding that international law required purposeful assistance), with *Doe I v. Unocal Corp.*, 395 F.3d 932, 949-52 (9th Cir. 2002) (relying on the international criminal tribunals to find a standard of "knowing practical assistance"), *reh'g en banc granted* by 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed* by 403 F.3d 708 (9th Cir. 2005). But see note 58. In *Kiobel v. Royal Dutch Petroleum Co.*, the plaintiffs brought an ATS suit against a corporate defendant under a theory of aiding and abetting liability. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). Ultimately, a Second Circuit panel concluded that the ATS does not apply to corporate defendants, thereby extinguishing the potential for ATS corporate liability under either theory of direct liability or aiding and abetting in that circuit. *Id.*

63. *Doe I v. Unocal*, 110 F. Supp. 2d 1294, (C.D. Cal. 2000), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted* by 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed* by 403 F.3d 708 (9th Cir. 2005)

64. Unocal Corporation was one of the world's leading independent natural gas and crude oil exploration and production companies. See Press Release, Chevron, Federal Trade Commission Accepts Chevron's Acquisition of Unocal (June 10, 2005), available at <http://www.chevron.com/news/press/Release/?id=2005-06-10a>. The company's principal oil and gas activities were in North America and Asia. See *id.* It was based in El Segundo, California, until Chevron Corporation acquired the company in 2005. See *id.*

65. *Unocal*, 110 F. Supp. 2d at 1298-1300.

66. *Id.* at 1298-1300.

67. *Id.* at 1298.

68. *Id.* at 1310. Somehow, the district court concluded that evidence of such facts was insufficient to establish liability under international law. *Id.*

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genuine issues of material fact as to “whether Unocal’s conduct met the *actus reus* and *mens rea* requirements for liability under the [ATS] for aiding and abetting forced labor.”⁶⁹ Ultimately, the case was settled in 2005 prior to Unocal’s merger with ChevronTexaco.⁷⁰ The Ninth Circuit’s recognition of corporate aiding and abetting as a viable theory of recovery under the ATS dramatically expanded the statute’s jurisdictional reach.

Since *Unocal*, more than fifty ATS claims have been brought against corporations alleging corporate involvement in human rights violations.⁷¹ In the last ten years, the vast majority of courts to address the issue have upheld aiding and abetting as a viable theory of recovery in ATS cases.⁷²

D. PLEADING ATS CORPORATE AIDING AND ABETTING LIABILITY

Pleading an ATS corporate aiding and abetting claim consists of two components. First, a plaintiff must establish subject matter jurisdiction.⁷³ To exercise subject matter jurisdiction over an ATS corporate aiding and abetting claim, a court must first determine that a corporation assisted a state actor in violating the law of nations.⁷⁴ This Comment will assume that

69. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh’g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005).

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

71. Special Representative of the Secretary-General, *supra* note 4.

72. *See, e.g., Romero v. Drummond Co.*, 552 F.3d 1303, 1316 (11th Cir. 2009) (looking to precedent and other circuit decisions to conclude that pleading a claim of aiding and abetting under the ATS is permitted); *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (confirming that, in the Second Circuit, “a plaintiff may plead a theory of aiding and abetting liability under the [ATS]”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 771 (9th Cir. 1996) (affirming aiding and abetting jury instruction); *Presbyterian Church of Sudan v. Talisman Energy, Inc. (The Presbyterian Church II)*, 374 F. Supp. 2d 331, 341 (S.D.N.Y. 2005) (finding that aiding and abetting was one of the “core principles that form the foundation of customary international legal norms—principles about which there is no disagreement”); *In re Agent Orange Product Liability Litig.*, 373 F. Supp. 2d 7, 53 (E.D.N.Y. 2005) (agreeing with plaintiffs that “[t]here is simply no question that the ATS provides for aiding and abetting liability”); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 (D.D.C. 2003) (allowing aiding and abetting liability for airplane hijacking).

73. *See supra* notes 36, 37. Because corporate aiding and abetting is a theory of derivative liability, a state actor must violate international law. International law primarily addresses the obligations of sovereign states, not private actors. As noted in the discussion of *Kadiç*, courts will impose direct liability on private actors, including corporations, only when the corporate actor is unilaterally committing acts of torture, genocide, war crimes, crimes against humanity, or forced labor. Bornstein, *supra* note 55, at 1097.

74. *See KOEBELE, supra* note 40, at 261-74. In his concurring opinion, Justice Stephen Breyer offered examples of international law violations that would give rise to universal jurisdiction and would therefore be actionable under the ATS, such as “torture, genocide, crimes against humanity, and war crimes.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762 (2004) (Breyer, J., concurring). Notably, the court must first conclude that corporations are a viable defendant under the ATS. While many courts do not dispute this premise, a recent decision in the Second Circuit calls it into

the plaintiff has adequately alleged an actionable violation under the ATS.⁷⁵ Second, and most pertinent to this Comment, a plaintiff must allege the corporate defendant acted with the requisite *mens rea* in providing practical assistance that substantially contributed to the commission of a human right violation.⁷⁶

There is confusion among the circuits as to the proper ATS aiding and abetting standard.⁷⁷ The prevailing standards for aiding and abetting liability in ATS cases have been drawn from international criminal law.⁷⁸ In *Doe I v. Unocal Corp.*, the Ninth Circuit concluded that a “knowledge” standard is appropriate.⁷⁹ The *Unocal* court defined the aiding and abetting standard as “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”⁸⁰ The *Unocal* court relied on international precedent in concluding that a corporation must have either actual or constructive knowledge that its actions would substantially assist in the commission of a law of nations violation.⁸¹

question. See *supra* note 58 and accompanying text.

75. A definitive list of actionable claims is outside the scope of this Comment. For a detailed discussion of claims found actionable under the ATS, see KOEBELE, *supra* note 40, at 50-195.

76. See *infra* note 78 and accompanying text; see also Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Pleading Standard of Bell Atlantic v. Twombly?*, 76 FORDHAM L. REV. 2177, 2185-86 (2008).

77. See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. U. J. INT'L HUM. RTS. 304, 312 (2008).

78. Some circuits require “knowing practical assistance,” a standard derived from numerous international criminal tribunals. See, e.g., *Doe I v. Unocal Corp.*, 395 F.3d 932, 947 (9th Cir. 2002), *reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005). The Second Circuit relied on language from the Rome Statute of the International Criminal Court in finding that a defendant must “purposefully aid and abet a violation of international law.” See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (per curiam)).

79. *Unocal*, 395 F.3d at 947; see, e.g., *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 U.S. Dist. LEXIS 63209, at *18-19 (N.D. Cal. 2006).

80. *Unocal*, 395 F.3d at 947.

81. *Id.* at 950-51; see also *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (Dec. 10, 1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. During the International Criminal Tribunal for the Former Yugoslavia, the tribunal held that if an actor has knowledge that his actions will assist the perpetrator in the commission of a crime, he is guilty as an aider and abettor. *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T (Dec. 10, 1998), available at <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. The Tribunal found that liability was not contingent on the aider and abettor knowing the precise crime that was intended. *Id.*; see also Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 479-80 (2007). In a 2008 report by the Special Representative for the Secretary-General of the UN (UN SRSG), the UN SRSG noted that the “clearest guidance” for measuring corporate complicity is the knowledge standard derived from international criminal law. See Special Representative of the Secretary-General, *Report of*

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However, in 2009, the Second Circuit concluded that a “purpose” standard was more appropriate when analyzing corporate aiding and abetting.⁸² Under this approach, the corporation must “(1) provide[] practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) [do] so with the *purpose* of facilitating the commission of that crime.”⁸³ As it stands, only the Second Circuit has found the purpose standard applicable in ATS corporate aiding and abetting cases; its interpretation requires that a defendant possess the specific intent to substantially assist in the commission of a human rights violation.

One legal commentator suggests that a purpose standard is reconcilable with the prevailing knowledge standard, though it seems to demand a continuous course of activity. Professor Doug Cassel explains that the purpose standard does not necessarily require the human rights violation to be the primary purpose of the complicit party.⁸⁴ As an example, Professor Cassel points to the *Zyklon B* case, in which a British military court convicted two officials of the company that supplied Zyklon B to the Nazi gas chambers.⁸⁵ In that case, the court acknowledged that the defendant’s primary purpose was to generate revenue.⁸⁶ However, the court found that because the defendants were aware of how the gas was being used, one of their purposes, albeit indirectly, was to facilitate the killing of Jewish prisoners.⁸⁷

The facts of the *Unocal* case present a more challenging example of how certain conduct can lead to an inference of indirectly purposeful conduct. In *Unocal*, the Burmese military was hired to guard the corporate defendant’s oil pipeline. If Unocal learned of allegations of forced labor against the military personnel, yet continued to pay the Burmese military

*the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie**, ¶¶ 33-35, U.N. Doc. A/HRC/8/16 (May 15, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/78/PDF/G0813478.pdf?OpenElement>.

82. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). The Second Circuit cited heavily to an earlier decision in *Khulumani v. Barclay National Bank Ltd.* In *Khulumani*, Judge Katzmann’s concurring opinion relied on a provision in the Rome Statute of the International Criminal Court (“Rome Statute”) to conclude a *mens rea* requirement of “purpose” was more appropriate than knowledge to determine liability for aiding and abetting violations of international law. See *id.* (citing *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007)).

83. *Id.* (citing *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007)).

84. Cassel, *supra* note 77, at 312.

85. *Id.* at 312.

86. *Id.*

87. *Id.*; see generally *The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1 Law Reports of Trial of War Criminals 93, 101 (1947).

for their service, it is reasonable to conclude they intended to employ forced labor. Accordingly, even under the purpose standard, complicity may be inferred from “knowledge of the likely consequences.”⁸⁸

In either case, the issue is a corporate defendant’s subjective awareness of the circumstances surrounding the alleged human rights violation. The pleadings phase, therefore, presents a great—and perhaps the greatest—obstacle for ATS plaintiffs asserting a corporate aiding and abetting claim to overcome. Under a plausibility pleading regime, it remains uncertain whether courts will demand specific factual allegations of a defendant’s knowledge or if reasonable inferences drawn from the totality of the circumstances will suffice when faced with a Rule 12(b)(6) motion to dismiss. If the former should occur, the effectiveness of the ATS will be greatly diminished in the realm of human rights litigation.

III. PLAUSIBILITY PLEADING: *BELL ATLANTIC CORP. V. TWOMBLY* AND *ASHCROFT V. IQBAL*

The threshold step in litigation is filing a complaint, in which the plaintiff outlines the allegations against the defendant(s) from whom relief is sought.⁸⁹ Federal Rule of Civil Procedure 8 governs in most civil cases.⁹⁰ In pertinent part, Rule 8(a) states that a complaint must contain: “a short and plain statement of the claim showing that the pleader is entitled to relief”⁹¹

For over fifty years, the Supreme Court consistently reaffirmed Rule 8(a)’s purpose as providing a defendant with notice of a pending claim.⁹² *Twombly* and *Iqbal* tweaked that calculus. Under the new

88. Cassel, *supra* note 77, at 312.

89. See FED. R. CIV. P. 3; see also FED. R. CIV. P. 8.

90. See FED. R. CIV. P. 8. The only pleading variations permitted are those specifically delineated by legislation (i.e., the Private Securities Litigation Reform Act) or those cases dealing with allegations of fraud or mistake. *Id.* Federal Rule of Civil Procedure 9(b) addresses pleading allegations of fraud or mistake and reads: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b).

91. FED. R. CIV. P. 8(a).

92. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (holding a complaint need only contain “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (quoting FED. R. CIV. P. 8(a)(2))), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) (stating that under a notice pleading standard, “it is not appropriate to require a plaintiff to plead facts establishing a prima facie case”); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (declaring that “[t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim” (quoting *Conley*, 355 U.S. at 47)); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 997 (2003) (“[W]hen called upon to address

“plausibility pleading” regime, a complaint must use factual allegations to place the claim in context, thereby giving the defendant a more detailed picture of the circumstances underlying the alleged wrongful conduct.⁹³

In *Twombly*, plaintiffs alleged that local telephone service providers had violated § 1 of the Sherman Act by engaging in anticompetitive parallel conduct through a conspiracy to fix prices and by refusing to compete against one another.⁹⁴ In response, defendants filed a Rule 12(b)(6) motion to dismiss.⁹⁵ In a 7-2 decision, the *Twombly* Court held that the plaintiffs must plead “plausible grounds” for inferring a conspiracy to survive the defendant’s motion to dismiss.⁹⁶

The *Twombly* Court clarified that plausibility pleading was not intended to mimic heightened pleading or even fact-based pleading.⁹⁷ Plausibility pleading “calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the unlawful conduct].”⁹⁸ Fact pleading, on the other hand, requires a plaintiff to “allege ‘specific facts’ beyond those necessary to [simply] state a claim and the grounds showing entitlement to relief.”⁹⁹

Regardless of this distinction, surviving a Rule 12(b)(6) motion to dismiss depends on stating a claim of relief that is facially plausible, rather

pleading issues . . . the Court continually—and unanimously—embrace[d] simplified notice pleading.”).

93. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567, 570 (2007)).

94. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548-52 (2007) (“Liability under § 1 of the Sherman Act . . . requires a ‘contract, combination . . . , or conspiracy, in restraint of trade or commerce.’” (quoting 15 U.S.C. § 1 (2006))).

95. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003), *vacated and remanded* by 425 F.3d 99 (2d Cir. 2005), *rev’d*, *Twombly*, 550 U.S. 544.

96. *Twombly*, 550 U.S. at 570.

97. *Id.*

98. *Id.* at 556.

99. *Id.* at 570 (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002)); *see also* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FACT-BASED PLEADING: A SOLUTION HIDDEN IN PLAIN SIGHT 1, *available at* <http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf> (last visited Feb. 19, 2011). Fact-based pleading requires the use of *material facts* to support a party’s claims and defenses at the earliest stages of the case.

While fact-based pleading has not been a part of the federal civil process since the 1930s, [it is used in numerous] . . . state courts, including California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut and Louisiana.

INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FACT-BASED PLEADING: A SOLUTION HIDDEN IN PLAIN SIGHT 1, *available at* <http://www.du.edu/legalinstitute/pubs/Fact-BasedPleading.pdf> (last visited Feb. 19, 2011) (emphasis added). In fact-pleading systems, the merits of the case are evaluated prior to the commencement of discovery, thus ferreting out frivolous and unsupported claims at the threshold stage of litigation. *See id.* at 3-4.

than merely conceivable.¹⁰⁰ According to the *Twombly* Court, factual allegations provide context to a plaintiff's claim.¹⁰¹ *Twombly*, therefore, established that contextual factual allegations are crucial when seeking to elevate an entitlement to relief from possible to plausible.¹⁰²

The *Twombly* Court's reading of Rule 8(a) does not demand an elaborate factual framework for all types of claims. If a complaint's factual allegations place the claim in context, a defendant has adequate notice and may respond accordingly. "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'"¹⁰³ On the other hand, if a complaint relies on legal conclusions and bare assertions, a defendant "seeking to respond to plaintiffs' conclusory allegations . . . would have little idea where to begin."¹⁰⁴ Plausibility pleading, therefore, still retains the primary function of serving notice to a defendant.¹⁰⁵

The *Twombly* Court failed to explicitly clarify whether the plausibility standard applied only to pleadings in the anti-trust context or to pleadings in all civil cases. This engendered significant speculation among the legal and academic communities.¹⁰⁶ Two years later, however, the Court made clear

100. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

101. *Id.* at 557 (requiring allegations of parallel conduct be "placed in a context that raises a suggestion of a preceding agreement").

102. *Id.* at 549 (dismissing plaintiffs' complaint due to the absence of "some factual context suggesting agreement").

103. *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

104. *Id.* at 565 n.10.

105. The Court concluded that the plaintiffs had failed to adequately allege anti-competitive parallel conduct because they relied on legal conclusions to suggest an agreement between the defendants. *Twombly*, 550 U.S. at 561-62 (criticizing the plaintiffs' complaint for failing to "set forth a single fact in a context that suggests an agreement").

106. *See generally* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A mere two weeks after *Twombly*, the Court decided *Erickson v. Pardus*. *Erickson v. Pardus*, 551 U.S. 89 (2007). In *Erickson*, a plaintiff brought claims against prison officials in Colorado under 42 U.S.C. § 1983, alleging violations of his Eighth and Fourteenth Amendment protections against cruel and unusual punishment. *Id.* at 89-90. The district court dismissed *Erickson*'s claim as too conclusory. *Id.* at 90. The U.S. Court of Appeals for the Tenth Circuit subsequently affirmed. *Id.* The Supreme Court disagreed with both lower courts. *Id.* at 94-95. In vacating and remanding, the Court chastised the Tenth Circuit for failing to apply a liberalized notice pleading standard. *Id.* at 94. Nowhere in the *Erickson* opinion did the Court mention *Twombly*'s plausibility pleading standard. *See generally id.*; *see also* Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 Nw. U. L. REV. COLLOQUY 117, 117 (2007) (arguing that *Twombly* changed the law of antitrust, not of pleading). Even though the Court applied traditional notice pleading in *Erickson*, ATS plaintiffs should attempt to meet the plausibility standard to assure survival beyond the pleading stage, particularly in light of the general judicial reluctance to act expansively in the ATS context.

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in *Ashcroft v. Iqbal* that plausibility pleading applied in all civil actions.¹⁰⁷

In *Ashcroft v. Iqbal*, the plaintiff, Javaid Iqbal, sued John Ashcroft, the former U.S. Attorney General, and Robert Mueller, the FBI Director.¹⁰⁸ In his complaint, the plaintiff alleged both men had implemented and supervised a policy of discrimination on the basis of race, religion, or national origin in the wake of 9/11.¹⁰⁹ In response, defendants filed a Rule 12(b)(6) motion to dismiss for failure to state a claim.¹¹⁰

In *Iqbal*, the Court borrowed heavily from *Twombly*'s general language, but the nature of the claim at hand drove the Court's analysis. Iqbal's claim was one of unconstitutional discrimination on account of race, religion, or national origin.¹¹¹ Such a claim requires a plaintiff to allege a discriminatory purpose.¹¹² In a 5-4 decision, the Court found that Iqbal's allegations were plagued with legal conclusions.¹¹³ The Court cited *Twombly* in reiterating that a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"¹¹⁴ The Court distinguished between legal conclusions and well-pleaded facts by explaining how each is addressed when confronted with a

107. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 & n.3 (2007)).

108. *Id.* at 1942.

109. *Id.* at 1944. The issue in *Iqbal* was narrow. The Court sought to define the elements necessary to plead a claim of unconstitutional discrimination against government officials who assert the defense of qualified immunity. *Id.* at 1947. In so doing, the Court was charged with clarifying the applicable pleading standard. *Id.*

110. *Elmaghraby v. Ashcroft*, No. 04 CV 1809, 2005 U.S. Dist. LEXIS 21434, at *5-6 (E.D.N.Y. Sept. 27, 2005), *aff'd in part, rev'd in part*, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev'd*, *Iqbal*, 129 S. Ct. 1937.

111. *Iqbal*, 129 S. Ct. at 1944.

112. *See id.* at 1952.

113. *Id.* at 1951-52. The Court pointed to the deficiencies in Iqbal's complaint. *Id.* The complaint stated that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" *Id.* at 1944 (quoting First Amended Complaint at ¶ 96, *Elmaghraby v. Ashcroft*, No. 04 CV 1809, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005)). The complaint also alleged that Ashcroft was the "principal architect" of this policy, and that Mueller was "instrumental" in adopting and executing it. *Id.* at 1944 (citing First Amended Complaint at ¶ 10, *Elmaghraby v. Ashcroft*, No. 04 CV 1809, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005)). The Court criticized these statements as "bare assertions, much like the pleading of conspiracy in *Twombly*" and found they "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Iqbal*, 129 S. Ct. at 1951 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

114. *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Rule 12(b)(6) motion to dismiss.¹¹⁵ Legal conclusions must be disregarded entirely, while well-pleaded facts are assumed as true.¹¹⁶

In commenting on the *Iqbal* decision, Professor Adam N. Steinman noted “[t]he dispositive question is then whether those ‘well-pleaded factual allegations’—accepted as true—‘plausibly give rise to an entitlement to relief.’”¹¹⁷ According to the *Iqbal* Court, facial plausibility exists when a pleading permits “the reasonable inference that the defendant is liable for the misconduct alleged.”¹¹⁸ Such inferences are to be derived through an exercise of “judicial experience and common sense.”¹¹⁹ This standard clearly illustrates the flexibility with which the Court intended its plausibility standard to be applied. In fact, the Court acknowledged that both pleading a claim *and* evaluating a claim are context-specific tasks.¹²⁰

Accordingly, under current law, the plausibility of an ATS corporate aiding and abetting claim, like any claim, requires a distinct analysis. The following section offers analytical guidance to lower courts by injecting an objective element into the otherwise purely subjective “judicial experience and common sense” test for facial plausibility.

IV. EVALUATING AN ATS CORPORATE AIDING AND ABETTING CLAIM FOR FACIAL PLAUSIBILITY

Following *Twombly*, many lower courts recognized the decision as providing a flexible analytical standard.¹²¹ Indeed, the decision set forth a

115. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

116. *Id.* at 1949-50 (citing FED. R. CIV. P. 8(a)(2)). The Court stated, “When there are well-pleaded factual allegations, a court should assume their veracity” *Id.* at 1950.

117. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1308 (2010) (quoting *Iqbal*, 129 S. Ct. at 1950).

118. *Iqbal*, 129 S. Ct. at 1949 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

119. *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev'd*, *Iqbal*, 129 S. Ct. 1937).

120. *Id.*

121. *See, e.g.*, *Breaux v. Am. Family Mut. Ins. Co.*, 554 F.3d 854, 862 (10th Cir. 2009) (“The degree of specificity needed to establish plausibility and fair notice, and the need for sufficient factual allegations depend upon the context of the case.” (citing *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008))); *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (“The *Twombly* decision focuses our attention on the ‘context’ of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case”); *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008) (“The Third Circuit has noted, and we agree, that the degree of specificity necessary to establish plausibility and fair notice, and therefore the need to include sufficient factual allegations, depends on context” (citing *Phillips*, 515 F.3d at 231-32)); *Kelley v. N.Y. Life Ins. & Annuity Corp.*, No. 07-cv-01702-LTB-BNB, 2008 WL 1782647, at *3 (D. Colo. Apr. 17, 2008) (“[T]he determination of whether a complaint contains enough allegations of fact to state a claim to relief that is plausible on its face is dependent on the context of the claim raised.”); *see also* *Bell Atl. Corp. v. Twombly*, 550 U.S.

standard, not a rule. Standards are malleable and can be adjusted to fit around the facts of a case. On the other hand, judge-made rules are less adaptable. Rules dictate a result, whereas standards are tools used for evaluation purposes.¹²²

In *Twombly* and *Iqbal*, the Court's demand for "sufficient factual matter" was driven by the precedential fallout of allowing those cases to proceed to discovery.¹²³ *Twombly* dealt with an immense class-action suit involving:

a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of anti-trust violations that allegedly occurred over a period of seven years.¹²⁴

In *Iqbal*, the plaintiff was requesting injunctive relief and monetary damages from the two highest-ranking law enforcement officials in the United States government based on their response to "a national and international security emergency unprecedented in the history of the American Republic."¹²⁵ It is apparent that *Twombly* and *Iqbal* were exceptional cases with exceptional ramifications.

However, ATS corporate aiding and abetting claims do not generate similar discovery concerns. An ATS corporate aiding and abetting claim is more targeted than *Twombly* and less controversial than *Iqbal*. These claims remain so vitally important in human rights litigation that managed judicial oversight during the discovery process would burden none of the parties involved.¹²⁶ Moreover, it will most often be a foreign subsidiary to engage in actionable wrongdoing, rather than the parent company. The parent corporation is brought in through an agency-principal relationship.

544, 580 n.6 (2007) (Stevens, J., dissenting) ("The majority is correct to say that what the Federal Rules require is a 'showing' of entitlement to relief. Whether and to what extent that 'showing' requires allegations of fact will depend on the particulars of the claim" (internal citations omitted)).

122. For example, in dealing with a negligence claim, reasonable care is the *standard*. If an individual fails to exercise reasonable care, he is negligent. That is a *rule*. See RESTATEMENT (SECOND) OF TORTS § 283 (1965).

123. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945, 1953-54 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007).

124. *Twombly*, 550 U.S. at 559.

125. *Iqbal*, 129 S. Ct. at 1953 (*quoting* *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007), *rev'd*, *Iqbal*, 129 S. Ct. 1937).

126. See FED. R. CIV. P. 16(b)(3)(B)(ii).

If a corporate defendant is concerned about excessive and costly discovery, the extent of the process could be restricted to only questions concerning a defendant's *mens rea* and to only communications between the parent and the subsidiary, the parent and the foreign government, and the subsidiary and the foreign government. When compared to anti-trust litigation on the scale of *Twombly* or otherwise, such limited discovery hardly seems burdensome or exceptional.

Discovery is critical to the future success of these claims. ATS corporate aiding and abetting liability has far-reaching implications for both multinational corporations and for human rights victims. Both proponents and opponents of the validity of ATS corporate aiding and abetting liability claims acknowledge the significance of these cases. Some legal commentators argue that opportunistic plaintiffs will exploit the ATS and corporate aiding and abetting claims to diminish corporate goodwill and force large settlements, ultimately inhibiting corporate investment in developing countries.¹²⁷ Others point to the glaring lack of domestic and international regulation regarding the transnational conduct of multinational corporations.¹²⁸ These commentators view the ATS as vital to deter corporate complicity in the perpetration of human rights abuses.¹²⁹ Therefore, in the absence of "smoking gun" evidence, and to discourage frivolous and exploitative lawsuits, it is critical that plaintiffs, when pleading ATS corporate aiding and abetting claims, provide sufficient factual matter to render their claim plausible.

The following section offers guidance to lower courts on how to gauge the plausibility of an ATS corporate aiding and abetting claim. Lower courts should review these complaints for two factual components: awareness and action. If these components are present, a court should infer the requisite *mens rea* for the purpose of surviving a Rule 12(b)(6) motion to dismiss.

A. INFERRING KNOWLEDGE THROUGH AN AWARENESS OF THE LIKELY CONSEQUENCES

The prevailing standard for measuring aiding and abetting liability in ATS cases requires a plaintiff to plead that (1) the defendant provided knowing practical assistance to a government actor, and that (2) this assistance had a substantial effect on the outcome.¹³⁰ To create the reasonable inference of knowing practical assistance, this Comment uses

127. See HUFBAUER & MITROKOSTAS, *supra* note 16, at 3.

128. See *supra* note 4 and accompanying text.

129. See *supra* note 4 and accompanying text.

130. See *supra* note 78.

two specific complaints to exemplify how factual context can be employed to clearly illustrate the “awareness” component.¹³¹ Neither complaint was filed after the *Iqbal* decision, yet both illustrate that narrowly tailored factual allegations are crucial to create a reasonable inference of unlawful conduct.

In filing an ATS corporate aiding and abetting claim, a plaintiff must allege facts that would show the corporate defendant had or should have had actual notice that its business activities would further human rights violations. The following complaints demonstrate how factual allegations can be used to effectively demonstrate awareness.

1. *CORRIE V. CATERPILLAR, INC.*

On March 16, 2003, Rachel Corrie was killed by a Caterpillar bulldozer while protesting the demolition of a Palestinian home.¹³² Her family members and those of other victims brought suit under the ATS against Caterpillar, Inc. (Caterpillar).¹³³ The lawsuit alleged that Caterpillar aided and abetted the Israel Defense Forces (IDF) in committing human rights violations by providing the bulldozers used to demolish Palestinian homes.¹³⁴ The complaint contended that Caterpillar knew or should have known that its bulldozers were being used to commit human rights abuses.¹³⁵

131. See Complaint for War Crimes; Aiding and Abetting Extrajudicial Killing; Cruel, Inhuman, or Degrading Treatment or Punishment; Wrongful Death; and Negligence, *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005) (No. 05-cv-05192-CMP-FOB), 2005 WL 976855; see also Second Amended Complaint for Tort Damages, Jury Trial Demanded, *Xiaoning v. Yahoo! Inc.*, No. 07-CV-2151, 2007 U.S. Dist. LEXIS 97566 (N.D. Cal. Oct. 31, 2007), available at <http://humanrightssusa.org> (follow “Accountability for Torturers” hyperlink; then follow “Corporate Accountability A.” hyperlink).

132. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1022-23 (W.D. Wash. 2005).

133. *Id.*

134. Complaint for War Crimes, *supra* note 131, at ¶¶ 1-2.

135. *Id.* The district court granted the defendant’s Rule 12(b)(6) motion to dismiss claims of aiding and abetting war crimes, extrajudicial killings, and cruel, inhuman, or degrading treatment or punishment. *Corrie*, 403 F. Supp. 2d at 1033. All three of these human rights violations have been recognized as actionable claims under the ATS. See *supra* note 28 and accompanying text. But the *Corrie* court granted the defendant’s motion on the grounds that plaintiffs were not aliens, and that they failed to allege an actionable claim under the ATS. *Corrie*, 403 F. Supp. 2d at 1026. In so doing, the court oversimplified the conduct alleged by the plaintiffs. The court articulated the allegations as “selling a legal, non-defective product to Israel.” *Id.* With regard to aiding and abetting, the *Corrie* court’s analysis was wholly erroneous. First, it analogized its decision with a domestic drug offense. *Id.* at 1027. The case cited for support, *United States v. Blankenship*, dealt with an issue of whether a seller of methamphetamine aids and abets the buyer’s subsequent sale of the controlled substance. See *United States v. Blankenship*, 970 F.2d 283, 287 (7th Cir. 1992). Such an analogy is without merit. The *Corrie* court stated,

One who merely sells goods to a buyer is not an aider and abettor of crimes that the

The plaintiffs' complaint included a timeline, culminating with factual allegations that, accepted as true, illustrated Caterpillar's actual knowledge that its activities were aiding the IDF in committing human rights violations.¹³⁶ The complaint laid out the numerous attempts made by human rights organizations to notify Caterpillar of how its bulldozers were being used by the IDF.¹³⁷ It presented facts regarding letter-writing campaigns and public protests.¹³⁸ Plaintiffs alleged that all of these events were widely reported by the International Press.¹³⁹

This complaint shows how public sentiment and media coverage can serve to provide notice to a corporation of a potential conflict. More importantly, it demonstrates how lower courts can begin to assess a complaint's plausibility. The plaintiffs' factual allegations suggest the defendant knew or should have known that the continued sale of bulldozers to the IDF would perpetuate violations of international law. In other words, the defendant was aware that its activities were ultimately unlawful. The following complaint relies mainly on public information and communications from human rights organizations to allege the corporate defendant had notice that its acts would further human rights violations.¹⁴⁰

2. *XIAONING V. YAHOO!, INC.*

In *Xiaoning*, plaintiffs sued Yahoo!, Inc. (Yahoo), alleging that Yahoo knowingly violated international law by aiding and abetting the Chinese government in the commission of torture and other human rights abuses.¹⁴¹ The factual allegations began with an explanation of China's historical

buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture.

Corrie, 403 F. Supp. 2d at 1027 (citing *Blankenship*, 970 F.2d 285-87). While this may be true for domestic drug offenses, it is not parallel to aiding and abetting international human rights violations. Corporate aiding and abetting requires that a state actor violate the law of nations. See HUFBAUER & MITROKOSTAS, *supra* note 16, at 5. The IDF's arbitrary demolition of Palestinian communities is such a violation. Caterpillar's continued sale of equipment to the IDF, knowing that the equipment would be used to carry out further human rights violations, satisfies the *Unocal* standard for aiding and abetting. The Ninth Circuit subsequently affirmed, but it did so based on the political question doctrine. See *Corrie v. Caterpillar*, 503 F.3d 974, 984 (9th Cir. 2007). The rationale of the district court opinion was left undisturbed. See *id.*

136. Complaint for War Crimes, *supra* note 131, at ¶¶ 31-47.

137. *Id.* at ¶¶ 34-44.

138. *Id.*

139. *Id.*

140. See *id.*

141. Second Amended Complaint, *supra* note 131, at ¶¶ 1-2. Plaintiffs alleged that Yahoo provided Chinese officials with access to private e-mail records, copies of email messages, e-mail addresses, user ID numbers, and other identifying information. *Id.*

treatment of those deemed “dissidents.”¹⁴² It then addressed the Chinese government’s policy of monitoring and censoring Internet communications in China.¹⁴³ Plaintiffs alleged that this policy enabled the government to deter communications related to politically sensitive topics, such as democracy support and human rights.¹⁴⁴

The complaint alleged that dissidents are often identified through the Internet monitoring and censorship program.¹⁴⁵ The plaintiffs alleged that, once caught, dissidents fell prey to a well-documented pattern of “systematic arbitrary arrest and prolonged detention, incommunicado detention, extrajudicial killings, torture, cruel, inhuman or degrading treatment and punishment, and forced labor.”¹⁴⁶

The complaint then alleged that in 2002, Yahoo signed an official, “voluntary” pledge with Chinese authorities to help monitor and censor Internet communications for information that could “jeopardize state security” or “disrupt social stability.”¹⁴⁷ To illustrate that Yahoo was aware of the potential consequences, the plaintiffs cited communications sent by numerous human rights organizations voicing concern about the company’s participation in the governments censoring program.¹⁴⁸

These two complaints illustrate how the use of factual allegations to show that a defendant was aware of the likely consequences can help to facilitate a reasonable inference of wrongdoing. However, a court must always consider the reliability of the source. Certainly, a solitary newspaper article or a one-time warning by a human rights lawyer, for example, is not sufficient to provide the requisite notice. However, many such sources, combined with the more comprehensive reports of human rights organizations, such as Human Rights Watch or Amnesty International, and international bodies, such as the United Nations, will often be sufficient to illustrate the notice component of a corporate aiding and abetting claim. Such non-governmental and inter-governmental

142. Second Amended Complaint, *supra* note 131, at ¶ 23.

143. *Id.* at ¶¶ 24-25.

144. *Id.* at ¶ 24.

145. *Id.* at ¶ 25.

146. *Id.*

147. *Id.* at ¶ 26.

148. Second Amended Complaint, *supra* note 131, at ¶¶ 26-28. Most notably, the complaint points to a letter sent to Yahoo’s CEO by Human Rights Watch, which highlighted the Chinese government’s treatment of dissidents. *Id.* at ¶ 27. The letter also contained a warning to Yahoo that by upholding the pledge, Yahoo would risk assisting the government in furthering human rights violations. *Id.* The complaint also noted an Amnesty International report that stated that the Chinese monitoring and censorship program often resulted in dissidents being subject to arbitrary detention and torture. *Id.* at ¶ 28.

organizations dedicate resources to recording patterns of human rights abuse and reporting on their findings.¹⁴⁹ Additionally, many of them make concerted efforts to notify MNCs of human rights violations committed by governments in countries where they have business operations.¹⁵⁰ These particularized efforts by human rights organizations provide a sound basis for courts reviewing whether a corporation should have known about the alleged wrongdoing. But even when such organizations do not contact these corporations directly, their reports are widely available through various media sources.¹⁵¹

In addition, a *consistent* stream of news reports from international media sources detailing actual and alleged human rights abuses should suffice. It is illogical to propose a firm rule regarding the necessary number of sources and their origin to create the requisite reliability. Instead, lower courts may rely on their judicial experience and common sense, as suggested by the *Iqbal* Court, when evaluating the veracity of the sources described in the plaintiff's factual allegations.

Additionally, the onus should not rest solely on the plaintiff. If a foreign government has a reputation for violating human rights, it is the ethical responsibility of the corporation to perform due diligence to ensure that its business operations will not become entangled with government atrocities.¹⁵² If a corporation fails to do so in light of the multitude of available information, it should not be able to plead ignorance to escape civil liability.¹⁵³

Awareness of the likely consequences is only one of the two proposed

149. *See supra* note 2.

150. *See, e.g., Human Rights Watch Letter to Caterpillar, Inc.*, HUMAN RIGHTS WATCH (Oct. 28, 2004), <http://www.hrw.org/en/news/2004/10/28/human-rights-watch-letter-caterpillar-inc>; *Yahoo! Risks Abusing Rights in China: Human Rights Watch Letter to Terry Semel*, HUMAN RIGHTS WATCH (July 30, 2002), <http://www.hrw.org/en/news/2002/07/29/yahoo-risks-abusing-rights-china>.

151. *See, e.g., Business and Human Rights*, AMNESTY INT'L <http://www.amnestyusa.org/business-and-human-rights/page.do?id=1011004> (last visited Feb. 18, 2011).

152. *See* Special Representative of the Secretary-General, *supra* note 4. The Special Representative's report inquired whether multinational companies have qualitative systems in place that would demonstrate a respect for human rights. *Id.* at ¶ 49. It found that relatively few do. *Id.* The report proposes an ongoing process of human rights due diligence, whereby companies become aware of, prevent, and mitigate adverse human rights impacts. *Id.*

153. The Special Representative for the Secretary General of the United Nations noted that because "the responsibility to respect [human rights] is a baseline expectation, a company cannot compensate for human rights harm by performing good deeds elsewhere." *See* Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, ¶ 55, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>.

requisite components to sufficiently plead corporate aiding and abetting under the ATS. The plaintiff must also provide factual allegations that suggest the corporate defendant knowingly *engaged* in certain conduct that substantially contributed to a human rights violation.

B. INFERRING KNOWLEDGE THROUGH ACTION

The Court qualified both *Twombly* and *Iqbal* by acknowledging that a plausibility determination depends on the nature of the claim and the facts employed to support it.¹⁵⁴ In an ATS corporate aiding and abetting claim, a corporation's awareness of human rights violations in the host country is simply not enough to satisfy this standard when applied to an allegation of knowledgeable complicity. A plaintiff must also allege specific facts related to the corporate defendant's conduct and demonstrate how the defendant's actions knowingly contributed to human rights abuses.

For example, in *Caterpillar*, the plaintiffs alleged that in April 2004, a resolution proposed by Caterpillar shareholders stated the corporation was aware of IDF's use of Caterpillar equipment to destroy homes and agricultural lands.¹⁵⁵ More importantly, though, is the fact that Caterpillar continued to sell its equipment to the IDF.¹⁵⁶ The complaint concluded by acknowledging a letter written by Jean Ziegler, a Special Rapporteur for the United Nations, to Caterpillar in May 2004, one month after the shareholder resolution.¹⁵⁷ The letter criticized Caterpillar for supplying bulldozers to the IDF that it knew were used to commit human rights violations.¹⁵⁸ Ziegler's letter also stated that by supplying the bulldozers to the IDF, Caterpillar was potentially an accomplice to human rights violations.¹⁵⁹ Yet Caterpillar continued to sell bulldozers to the IDF. Thus, the factual allegations of Caterpillar's awareness in this case work in concert with the facts regarding their actions to permit the reasonable inference that Caterpillar had knowledge that its products were assisting in the demolition of housing settlements in violation of international law.¹⁶⁰

Similarly, in *Xiaoning*, the plaintiffs' complaint provided facts to establish Yahoo's involvement in the chain of circumstances leading to the

154. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548-49, 557, 561-62, 565 n.10 (2007); see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

155. Complaint for War Crimes, *supra* note 131, at ¶ 43.

156. *Id.*

157. *Id.* at ¶ 44.

158. *Id.*

159. *Id.*

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

arrest of the plaintiffs.¹⁶¹ The complaint alleged that from 2000 to 2001, Wang Xiaoning published his pro-democracy journals and articles on an e-mail subscriber list, “aaabbbccc” Yahoo! Group.¹⁶² In 2001, Yahoo blocked Wang from sending messages to the “aaabbbccc” Yahoo! Group after administrators noticed the political content of his writings.¹⁶³ Wang continued to publish by anonymously sending his journal to individual e-mail addresses.¹⁶⁴ In 2002, Yahoo! Hong Kong, a subsidiary of Yahoo!, Inc., provided identifying information to police, linking Wang to his anonymous e-mails and other pro-democracy Internet communications.¹⁶⁵

In reviewing these factual allegations, the causal connection is clear. Yahoo was aware of why the Chinese government wanted this information, how it was using it, and its methods for punishing “dissidents.” Yet Yahoo simply handed over the information to the Chinese government upon request.¹⁶⁶ Factual allegations of a defendant’s actions mesh with those of a defendant’s awareness of the likely consequences to render a corporate aiding and abetting claim plausible under the *Iqbal* standard. If both are pled, it is reasonable for the court to infer the requisite *mens rea*.

A cardinal rule when reviewing a plaintiff’s complaint in light of a Rule 12(b)(6) motion is that a court must accept well-pleaded facts as true.¹⁶⁷ It is not the role of the court to search for innocent explanations in an attempt to explain away the alleged wrongful conduct. In the event that a complaint’s factual allegations create a reasonable inference of knowledge of wrongdoing, a Rule 12(b)(6) motion must be denied, and discovery should commence. If evidence of that knowledge is not uncovered during the discovery phase, the case may be appropriately disposed of either by a defendant’s motion for summary judgment or at trial.

C. THE BENEFITS OF THE PROPOSED PLAUSIBILITY ANALYSIS FOR ATS CORPORATE AIDING AND ABETTING CLAIMS

Evaluating a pleading’s plausibility is a context-specific task.¹⁶⁸ In the context of ATS corporate aiding and abetting claims, the proposed analysis is clear and easily administrable. Most importantly, it combats some of the

161. Second Amended Complaint, *supra* note 131, at ¶¶ 34-37.

162. *Id.* at ¶ 33.

163. *Id.* at ¶ 34.

164. *Id.* at ¶ 35.

165. *Id.* at ¶ 36.

166. *Id.*

167. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“[F]or the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true . . .”).

168. *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev’d on other grounds, Iqbal*, 129 S. Ct. 1937).

inherently dysfunctional aspects of ATS corporate aiding and abetting litigation. First, the proposed analytical standard can operate in spite of extreme information asymmetries. With these claims, plaintiffs and defendants are not on equal footing. A lack of capital or access to proprietary information should not prevent otherwise meritorious claims from proceeding to discovery. In the absence of concrete evidence supporting a claim, facts to support allegations of awareness can be obtained through various media sources. Facts to support allegations of unlawful conduct are also available, since a claimant must have suffered a cognizable harm in order to state a claim. Granted, not all claims will survive. Corporations operating in countries with no record of human rights abuse could potentially operate with impunity. In reality, though, the allegations underlying these claims almost always arises in countries with poor human rights records.¹⁶⁹

Furthermore, the proposed standard minimizes the potential for judicial subjectivity infecting what *should* be a purely legal analysis. Lacking in sufficient guidance, it is highly possible that one judge's "legal conclusion" will be another judge's "well-pleaded fact."¹⁷⁰ By pleading factual allegations of awareness and action, a plaintiff can provide context to a claim, thereby enabling courts to operate under a uniform guideline.

169. See, e.g., *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (Colombia); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (Ethiopia); *Xiaoning v. Yahoo!, Inc.*, No. 07-CV-2151 CW, 2007 U.S. Dist. LEXIS 97566 (N.D. Cal. Oct. 31, 2007) (China); *Aldana v. Fresh Del Monte Produce, N.A.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003) (Guatemala), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2005); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003) (Colombia); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (Nigeria); see also *Roe I v. Bridgestone*, 492 F. Supp. 2d 988 (S.D. Ind. 2007) (Liberia); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331 (S.D.N.Y. 2005) (The Sudan); *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000) (Myanmar), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted by* 395 F.3d 978 (9th Cir. 2003), *opinion vacated, appeal dismissed by* 403 F.3d 708 (9th Cir. 2005).

170. This dilemma is exactly what the drafting committee behind the Federal Rules of Civil Procedure sought to avoid. In 1938, Edgar Tolman, the Secretary for the Advisory Committee behind the Federal Rules of Civil Procedure, testified before Congress that the Committee found "thousands of cases that have gone wrong on dialectical, psychological, or technical argument as to whether . . . certain allegations were allegations of 'fact' or were 'conclusions of law . . .'" *Rule of Civil Procedure for the District Courts of the United States; Hearings on H.R. 8892 Before the H. Comm. on the Judiciary*, 75th Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary of the Advisory Committee on rules for Civil Procedure Appointed by the Supreme Court). See also Stephen B. Burbank, *Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENUMBRA 141, 149 (2009) (citing to the same statement by Mr. Tolman). In codifying the Federal Rules of Civil Procedure, the drafting committee sought to create a more "simple, uniform, and transsubstantive" concept of pleading. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 556 (2002).

1. THE PROPOSED ANALYSIS CAN FUNCTION IN SPITE OF INFORMATION ASYMMETRY ISSUES

The facts necessary to *definitively* plead corporate aiding and abetting of human rights violations are often, if not always, in the hands of defendants or hostile third parties.¹⁷¹ Under heightened pleading or fact-pleading, a plaintiff must plead facts to show that a corporate defendant had knowledge that its conduct provided practical assistance to substantially effect the outcome. Therefore, pleading a successful claim hinges on specific and detailed facts showing either a defendant's knowledge of the circumstances or their subjective intent. This greater burden allows such claims to fall prey to "information asymmetr[ies]."¹⁷²

For example, most, if not all, of the facts necessary to illustrate a corporation's aiding and abetting of human rights violations will be found in emails or other confidential corporate documents. A plaintiff may fortuitously discover external evidence that creates a plausible inference of the defendant's intent, such as a public statement or an incriminating photograph. However, to pin the sufficiency of a plaintiff's claim on this gamble may result in the dismissal of meritorious claims through no fault of the plaintiff.

When confronted with a defendant's Rule 12(b)(6) motion to dismiss, the proposed standard suggests that courts should review the awareness and actions components of plaintiffs' allegations to decide whether it is reasonable to infer the requisite *mens rea*. Such an inference will be founded on external documentation, such as human rights reports and related communications to the company, and the company's contemporaneous and subsequent conduct. Under this analysis, there is less risk that meritorious claims will be dismissed prior to discovery,¹⁷³ which satisfies the overriding justice concern of providing access to the civil justice system. When concrete evidence is unavailable, a court must infer the requisite *mens rea*. To subject corporate aiding and abetting claims to an unpredictable standard may result in meritorious claims going unheard. As noted by one commentator, some plaintiffs will be unable to survive a motion to dismiss without formal discovery and will be unable to get access

171. See Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 66 (2010).

172. Dodson, *supra* note 171, at 55, 66; see A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460 (2008) (arguing that plausibility pleading "is likely to impose a more onerous burden in those cases where a liberal notice pleading standard is needed most: actions asserting claims based on states of mind, secret agreements, and the like").

173. See Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 838 (2010) (predicting that plausibility pleading is likely to temper the frequency of both "weakly founded suits" as well as "well-founded suits that now require the assistance of discovery to make their merits clear").

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to formal discovery without surviving a motion to dismiss.¹⁷⁴ The proposed analysis addresses this conundrum by providing a uniform standard of evaluation.

Furthermore, *Iqbal* tasked lower courts with evaluating a complaint's plausibility using judicial experience and common sense.¹⁷⁵ This proposal alleviates the uncertainty that is likely to result from such limited guidance.

2. THE PROPOSED ANALYSIS MINIMIZES JUDICIAL SUBJECTIVITY

The risk of excessive judicial subjectivity is minimized when the *mens rea* is inferred through the factual context of a claim. On some occasions, sole reliance on judicial experience and common sense will likely result in lower and appellate courts reaching different conclusions as to whether an allegation is a "conclusion" or a "well-pleaded fact."¹⁷⁶ ATS corporate aiding and abetting claims are few in number. As a general matter, courts have limited judicial experience in this realm.¹⁷⁷ Applying common sense may seem simple enough, but when a court has yet to hear a similar claim, it will embark on an analytical journey potentially diluted by subjectivity. Some cases will be remanded to the district court, where the litigation process begins anew and costs continue to mount.¹⁷⁸

By using the totality of the facts and circumstances to infer knowledge in ATS corporate aiding and abetting claims, the analysis is less discretionary. More simply, the question becomes: considering as true the facts and circumstances in the complaint, should the corporate defendant have known that its business activities provided practical assistance that had a substantial effect on a particular outcome? If it is reasonable to infer the requisite *mens rea*, the claim is plausible and the case should proceed to discovery.

V. CONCLUSION

Over the last decade, the ATS has obtained legitimacy within the

174. See Dodson, *supra* note 171, at 67.

175. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (citing Iqbal v. Hasty, 490 F.3d 143, 157-58 (2d Cir. 2007), *rev'd on other grounds*, Iqbal, 129 S. Ct. 1937).

176. See *Hearing on Whether the Supreme Court has Limited Americans' Access to Court Before the Committee on the Judiciary*, 111th Cong. 12 (2009) (prepared statement of Stephen B. Burbank) (noting the drafters of the Federal Rules of Civil Procedure rejected fact pleading because "one person's 'factual allegation' is another's 'conclusion'").

177. The Special Representative for the Secretary General of the United Nations estimates there have been about fifty ATS claims against corporations since the beginning of this decade. See *supra* notes 71, 72 and accompanying text.

178. Jason Bartlett, Comment, *Into the Wild: The Uneven and Self-Defeating Effects of Bell Atlantic v. Twombly*, 24 ST. JOHN'S J.L. COMM. 73, 109 (2009).

ambit of human rights litigation. It remains an essential remedial mechanism for human rights victims because of the notable lack of domestic or international regulation concerning the transnational activity of MNCs. As such, it is vitally important that meritorious claims of corporate aiding and abetting survive the pleadings stage of a lawsuit. The impact of the shift from traditional, liberalized notice pleading to plausibility pleading on such claims has yet to be determined.

The proposed analytical framework operates within the confines set out by the Supreme Court in *Twombly* and *Iqbal*. It seeks to provide lower courts with a simple, logical, and workable method of evaluating an ATS corporate aiding and abetting claim for facial plausibility. The *Iqbal* Court's evaluation standard is hardly a cogent proposition. Blind and blanket reliance on "judicial experience and common sense" in an area of law with minimal adjudicative history will inevitably result in the dismissal of meritorious claims, due to nothing more than a lack of structure and discipline.

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