The Liberalizing Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement

Richard Herz
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Richard L. Herz*
ABSTRACT

Does allowing U.S. corporations to evade liability for abetting human rights abuses such as genocide or torture ultimately promote democratic reform in countries with repressive regimes? In suits recently filed under the Alien Tort Statute (ATS), the Bush Administration has claimed that it does. It has filed briefs opposing liability, asserting that liability would limit the U.S. government’s ability to adopt a “constructive engagement” policy of using U.S. private sector investment to promote democracy and human rights. This Article challenges the Administration’s position.

The Administration’s argument has inserted the long-running policy debate regarding the efficacy of “constructive engagement” into the equally contentious legal debate regarding whether the ATS encompasses complicity liability. The latter is perhaps the most important ATS question not directly addressed in Sosa v. Alvarez Machain, 542 U.S. 692 (2004), which approved the use of the statute in certain human rights cases.

The fundamental flaw in the Administration’s argument is that it ignores the mechanisms by which engagement is thought by its proponents to promote reform. Engagement theory assumes that companies will, through example and interaction, convey democratic values. While remaining largely agnostic on the efficacy of engagement, this Article shows that liability for abetting abuses creates incentives for companies to actually do what the theory requires. Conversely, without the potential for liability, companies might continue to abet the very abuses engagement is designed to prevent. Thus, contrary to the Administration’s position, liability facilitates a constructive engagement policy. Moreover, the analysis of how these mechanisms actually operate in the real world provides insight into what kind of engagement is most likely to be successful and what counterproductive.
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“The problem is that the good Lord didn’t see fit to always put oil and gas resources where there are democratic governments.”
–Dick Cheney, then-Halliburton CEO, 1996

“The meek shall inherit the Earth, but not the mineral rights.”
–J. Paul Getty

I. Introduction

Does allowing U.S. corporations to evade liability for abetting human rights abuses by agents of foreign governments ultimately promote democratic reform in countries with repressive regimes? Is impunity for such complicity really necessary to increase respect for human rights? The Bush Administration, in briefs recently filed in a number of federal courts, including the U.S. Supreme Court, has claimed that U.S. foreign policy concerns for promoting human rights should preclude complicity liability.

In the past ten years, a variety of federal court cases, small in number but high in profile, have alleged that some of the world’s largest corporations were complicit in (and benefitted from) egregious human rights violations, such as genocide, torture, crimes against humanity, extrajudicial execution and forced labor. These suits have typically been filed at least in part under the Alien Tort Statute (ATS), which permits suits by aliens for violations of well-

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2“Halliburton’s Cheney sees worldwide opportunities, blasts sanctions,” Petroleum Finance Week, April 1, 1996.

3Simpson’s Contemporary Quotations, 2151 (1988).

428 U.S.C §1350 (“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....”)
established and defined international law norms. In some of these cases, the Bush Administration has asserted that courts should not recognize aiding and abetting liability under the ATS because it would limit the ability of the government to use economic engagement as a tool to promote human rights, and is therefore incompatible with U.S. foreign policy. Thus, the Administration argues, such cases should be dismissed, irrespective of whether the alleged victims can prove their claims. This position is, of course, highly controversial.

Indeed, the willingness of some U.S. multinational corporations to form partnerships with governments with poor human rights records has sparked any number of legal and foreign policy disputes. On the policy front, a debate has raged for decades among government officials, academics, international businesspeople and human rights advocates regarding the role Western investment can play in promoting democracy and human rights in countries with repressive regimes. Advocates of “constructive engagement” or the “development model” maintain that investment can be an effective means for catalyzing reform. Critics, by contrast, argue that applying sanctions is more productive, and that investment may only serve to entrench dictatorship. That debate played out prominently with respect to U.S. foreign policy toward South Africa in the 1980s and, subsequently, regarding Cuba, Burma and China.

At the same time, there is a narrower, but equally contentious, legal debate over whether the ATS permits victims of grievous human rights abuses to sue corporations that are actually

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complicit in those abuses. In arguing that ATS suits alleging corporate complicity interfere with U.S. foreign policy, the Administration has explicitly inserted the constructive engagement policy question into the legal discourse, rendering these two debates inextricably intertwined. The business community and individual corporate defendants have made similar arguments. Surprisingly, although constructive engagement and ATS corporate liability have each individually received substantial academic attention, the literature does not consider their interrelationship. This article seeks to fill that gap.

Herein, I seek to demonstrate that complicity liability furthers rather than undermines constructive engagement. The position of the Bush Administration and the business community cannot withstand scrutiny. The starting point for my analysis is to assume for the sake of argument the validity of claims made by proponents of constructive engagement concerning how engagement promotes democracy and human rights. In so doing, this article remains largely agnostic regarding the efficacy of constructive engagement. Likewise, I do not argue that engagement coupled with a vigorous tort regime is the preferred policy option, or even a good option. Those questions are beyond the scope of the issues I consider. Instead, I seek to show that the Administration’s opposition to aiding and abetting liability is fundamentally inconsistent with the development model’s proponents’ theories as to how an engagement policy achieves its goals. Because the tort regime is fully compatible with the theorized mechanisms of constructive engagement, the Administration’s argument is both intellectually incoherent and counterproductive to the Administration’s own stated policy.

According to its proponents, engagement policy is predicated on the belief that Western companies will promote democracy and human rights by, among other things, conveying
democratic values in interactions with host governments and citizens, and pushing for respect for the rule of law. I analyze how the existence of aiding and abetting liability affects those mechanisms. This analysis reveals that engagement is unlikely to work, or at least work well, unless U.S. multinationals behave responsibly abroad. Tort liability, particularly liability for complicity under the ATS, encourages such responsible behavior. Indeed, in some circumstances, an effective tort liability regime may be a necessary, (but not sufficient), enabling condition for a viable constructive engagement policy.

Potential liability for those companies that aid and abet abuses creates incentives for companies to do what the engagement model requires and, thus, to actively promote reform. Without such liability, companies might continue to be complicit in the very abuses constructive engagement is designed to prevent. Thus, engagement, if it works as a tool of U.S. foreign policy at all, will be more effective if U.S. tort law induces American companies to avoid complicity in serious abuses. Conversely, it is unlikely to succeed if legal institutions in the United States do not hold to account American companies that knowingly abet abuses committed on their behalf. In short, complicity liability facilitates U.S. foreign policy in those countries in which the U.S. Government has chosen to use a “constructive engagement” approach.

The Administration’s argument ignores the mechanisms by which the engagement model it purports to defend is thought by that model’s proponents to function. Instead, the position of the Bush Administration and the business community is apparently predicated on two assumptions: (1) that constructive engagement will work simply by virtue of the presence of American multinationals in a country with a repressive regime and (2) that companies will refuse to invest in such countries if the ATS encompasses complicity liability. These assumptions are
never supported in the Administration’s briefs by any empirical evidence, and indeed, there is substantial reason to doubt their validity.

The interrelationship between complicity liability and constructive engagement is critical, for at least two reasons. First, in the ATS context, the availability of complicity liability is perhaps the most important question not directly addressed by the U.S. Supreme Court in Sosa v. Alvarez Machain, which approved the use of the statute in certain human rights cases, despite objections from the Bush Administration.\textsuperscript{7} For human rights advocates, corporations that aid and abet egregious abuses flout clear international law standards, undermine efforts to protect human rights and sully the reputation of the United States. For corporations, the cases present the risk of large verdicts and serious harm to corporate reputation, and might force companies to alter the way they interact with repressive regimes or members of foreign militaries that provide corporate security.

Second, and more broadly, foreign policymakers will benefit from a more nuanced understanding of how complicity liability affects engagement. The analysis below sheds light on how the mechanisms by which the development model is thought by its proponents to promote democracy actually operate in the real world. Understanding this is fundamental for shaping effective policy for promoting human rights, because it provides insight into the circumstances in which constructive engagement might or might not promote reform, and what kind of engagement is most likely to be successful and what counterproductive.

Part II describes the ATS and its use in recent years against corporations allegedly complicit in abuses. Part III presents a brief overview of aiding and abetting liability in

\textsuperscript{7}542 U.S. 692 (2004).
international law and its recognition in ATS jurisprudence. Part IV recounts the arguments made by the Administration and the business community that complicity liability will interfere with U.S. government’s ability to use constructive engagement as a foreign policy tool. Part V notes that the Administration’s argument would not preclude complicity liability even if it were true, because, among other reasons, it ignores the status of aiding and abetting in international law and the proper role of foreign policy considerations in applying the ATS. Regardless, the Administration’s central assumption that the existence of complicity liability will deter investment is unsupported. Part VI considers the mechanisms by which, constructive engagement’s proponents argue, multinational business investment promotes democracy and respect for human rights. Assuming *arguendo* the validity of the proponents’ argument, Part VII demonstrates that ATS liability for complicity actually strengthens the mechanisms by which investment is said to promote adherence to human rights norms.

II. Background: The Alien Tort Statute.

The ATS was passed into law in 1789 as part of the First Judiciary Act. Rarely invoked for almost two-hundred years, the statute rose to prominence as a vehicle for holding human rights abusers accountable in 1980, when the U.S. Court of Appeals for the Second Circuit decided *Filartiga v. Pena-Irala.* There, the family of Joelito Filartiga, a seventeen year old Paraguayan who was tortured to death in Paraguay, sued a Paraguayan police Inspector General, Americo Pena-Irala, who committed the murder. The district court dismissed the case, construing the grant of jurisdiction over torts committed in violation of “the law of nations” as

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8630 F.2d 876 (2nd Cir. 1980)

9Id. at 878.
excluding law governing a state’s treatment of its own citizens.\textsuperscript{10} The Second Circuit, however, reversed, holding that modern international law clearly prohibits state-sponsored torture.\textsuperscript{11} Since the claim was therefore for a “tort. . .committed in violation of the laws of nations,” the Court held that the case could proceed.\textsuperscript{12}

The use of the ATS against corporations began in earnest after the district court in \textit{Doe v. Unocal Corp.} denied the defendants’ motion to dismiss in 1997. The plaintiffs alleged Unocal was complicit in a pattern of gross human rights abuses, including forced labor, rape and other torture, committed by the Burmese military specifically on behalf of Unocal’s natural gas pipeline project in southern Burma.\textsuperscript{13} The court held (1) that plaintiffs’ allegations that the military were agents, co-venturers and co-conspirators of Unocal adequately alleged state action for purposes of those claims such as torture that require state action; (2) that plaintiffs’ forced labor claims did not require any state action at all, and (3) that plaintiffs’ allegations that Unocal knew or should have known the military would use forced labor when it agreed the military would provide labor for the project and that Unocal was aware of and benefitted from abuses committed on its behalf was sufficient to state a claim.\textsuperscript{14}

Similar cases have subsequently been filed alleging that corporations aided and abetted or were otherwise complicit in serious human rights violations. For example, the plaintiffs in \textit{Sarei

\textsuperscript{10}Id. at 880.

\textsuperscript{11}Id. at 884.

\textsuperscript{12}Id. at 887.

\textsuperscript{13}963 F.Supp.2d 880, 883 (C.D.Cal. 1997).

\textsuperscript{14}Id. at 891-92, 896.
v. Rio Tinto PLC alleged that the Papua New Guinean army committed war crimes at the behest of the defendant mining company, after the company sought the assistance of the army to quell an uprising that closed its mine.\(^{15}\) Similarly, in Bowoto v. ChevronTexaco, plaintiffs allege that in Nigeria, Chevron participated in attacks against peaceful protestors at a Chevron oil platform, and in the destruction of two villages near a Chevron rig, by Nigerian government security forces whom Chevron paid.\(^{16}\) In Estate of Rodriguez v. Drummond Co. Inc., plaintiffs allege that Colombian paramilitaries operating on a coal company’s behalf murdered three union leaders who represented employees in contract negotiations with the company.\(^{17}\)

As detailed in the next section, courts have repeatedly held that aiding and abetting liability is actionable, or at least could proceed under proper facts. Not surprisingly, these successes have led to vigorous attacks on ATS litigation by certain segments of the international business community and more disturbingly, by the Bush Administration.

In 2004, the U.S. Supreme Court addressed the ATS in Sosa v. Alvarez-Machain.\(^{18}\) The Bush Administration argued that the ATS was purely jurisdictional, and did not create nor authorize courts to recognize a right of action without a further act of Congress.\(^{19}\) Thus, in its view, the entire, unanimous line of cases dating back to Filartiga interpreting the ATS as allowing suits for violations of established human rights norms was mistaken. The Supreme

\(^{15}\) 456 F.3d 1069, 1075, 1078-79 (9th Cir. 2006).

\(^{16}\) Bowoto v. ChevronTexaco, Eighth Amended Complaint, C 99-2506-SI (N.D. Cal.)

\(^{17}\) 256 F.Supp.2d 1250, 1253-54 (N.D.Ala 2003).


\(^{19}\) 542 U.S. at 712.
Court, however, disagreed, holding that because “torts in violation of the law of nations would have been recognized within the common law” when the ATS was enacted, the law “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.” Accordingly, no further congressional action is required.

In determining whether a current international law norm is actionable, the Supreme Court held that “courts should not recognize private claims under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted.” Critically, however, the Court further observed that this limit is “generally consistent” with prior ATS cases, citing with approval *Filartiga*, and the Ninth Circuit’s holding in *In re Estate of Marcos Human Rights Litigation* that actionable norms are those that are “specific, universal and obligatory.” Thus, the Court affirmed the *Filartiga* line of cases, including the specific (or definable), universal and obligatory standard consistently applied by lower courts prior to *Sosa*.

*Sosa* further held that “practical consequences” can be considered as part of “the determination whether a norm is sufficiently definite to support a cause of action.” The Court

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20 542 U.S. at 714, 724.

21 542 U.S. at 723-24.

22 542 U.S. at 732.

23 542 U.S. at 732 *quoting Filartiga*, 630 F.2d at 890; *Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994).

24 542 U.S. at 732-33.
also suggested in *dicta* that a “possible limitation” is “case-specific deference to the political branches” such that courts applying the ATS should be careful on a case-by-case basis not to interfere with U.S. foreign policy.  

III. Aiding and Abetting Liability Under the ATS.

The Supreme Court in *Sosa* did not consider whether the ATS encompasses aiding and abetting liability. Other courts, however, have overwhelmingly held that it does, in cases against corporations and natural persons, both prior to and subsequent to *Sosa*. Only two decisions, neither of which has proceeded through appeal, have held to the contrary.  

\footnote{542 U.S. at 733 n.21.}


Moreover, the majority opinion of a three judge panel of the U.S. Court of Appeals for the Ninth Circuit found aiding and abetting to be an actionable theory of liability in *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002). As detailed below, the Ninth Circuit subsequently took that decision *en banc*. 395 F.3d 978 (9th Cir. 2003). The case settled before the *en banc* panel ruled. For an in-depth discussion of aiding and abetting under the ATS, see Paul L. Hoffman and Daniel A. Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act*, 26 Loy. L.A. Int’l & Comp. L. Rev 47 (Fall 2003).

As a threshold matter, post-Sosa a vigorous dispute has arisen, as yet not definitively resolved by the courts, as to the proper body of law that should govern whether a defendant can be held liable for the commission of an international law violation. Opponents of aiding and abetting liability have asserted that such liability rules must themselves be universal, obligatory and definable norms of international law. 28 Sosa, however, established that ATS claims are “claims under federal common law.” 29 Thus, the better view, espoused by most human rights plaintiffs, 30 is that courts may therefore apply federal common law liability rules. 31 Indeed,  


29 542 U.S. at 732; accord id. at 724 (“The jurisdictional grant 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.”)

30 See e.g. Br. Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law, In re: Agent Orange Product Liability Litigation, Jan. 18, 2005.

31 Sarei, 456 F.3d at 1078 (“Courts applying the ATCA draw on federal common law.”); see also In re Agent Orange Product Liability Litigation, 373 F. Supp. 2d at 59, quoting Br. Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law at 24-26 (“even if it were not true that international law recognizes corporations as defendants, they still could be sued under the ATS... [because] an ATS claim is a federal common law claim and it is a bedrock tenet of American law that corporations can be held liable for their torts.”); Hoffman and Zaheer at 63-66, 69-70; Stephens, supra, 70 Brook. L. Rev. at 558 (“Sosa does not require that every ancillary rule applied in an ATS case meet the level of international consensus required for the definition of the underlying violation.”) A number of courts adopted this position prior to Sosa. Abebe-Jira v. Negewo, 72 F.3d at 848 (ATS “establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”); Filartiga v. Pena-Irala, 577 F.Supp. 860, 863 (E.D.N.Y. 1984)(In ATS, Congress gave courts the power to develop federal remedies to effectuate the purposes of international law incorporated into federal common law); Xuncax v. Gramajo, 886 F.Supp. 162,
requiring all ancillary rules to be universally recognized principles of international law would make little sense, because international law is often silent regarding many, if not most, issues likely to arise in an ATS (or any other) case.32

Under the federal common law approach, there is no requirement that aiding and abetting liability, or any other liability rule, be “specific, universal and obligatory” in order to be actionable.33 Rather, that requirement only applies in determining whether the underlying abuse violates an international norm that is actionable under the ATS.34 Since international law is part


32See Tel-Oren, 726 F.2d at 778 (Edwards, J. concurring); Xuncax, 886 F.Supp. at 180-81. Hoffman and Zaheer, supra at 52-53.

33In Hamdan v. Rumsfeld, 548 U.S. ___ (2006), four Justices noted that aiding and abetting is a theory of liability for a substantive offense. Opinion of STEVENS, J. at 47-48, n.40.

34E.g. In re: Agent Orange Product Liability Litigation, Br. Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law, Jan. 18, 2005; Hoffman and Zaheer at 52-54, 63-66, 70. The dispute regarding whether international law or federal common law rules apply was foreshadowed in a split between the majority and the concurrence in the pre-Sosa Ninth Circuit decision in Unocal. There, a three-judge panel unanimously held that plaintiffs had presented sufficient evidence to proceed to trial. Doe v. Unocal, 395 F.3d 932 (9th Cir. 2002). The majority held that international law provides for aiding and abetting liability. Id. at 947-51. The concurrence, however, argued that federal common law, not international law aiding and abetting standards, should govern whether a third party can be held liable for a violation of international law. The concurrence concluded that agency, joint venture, and recklessness are

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of federal common law, courts may look to international norms under the federal common law approach.

Nonetheless, aiding and abetting is properly actionable regardless of whether courts adopt the international law or the federal common law approach to determining applicable liability rules. Aiding and abetting is a universally recognized norm of customary international law that meets the Sosa test. Such liability should also be recognized under the federal common law approach, because aiding and abetting is a well-established feature of U.S. tort law as well as because international law is part of federal common law. Moreover, both customary international law and domestic law converge on the same standard.

Aiding and abetting liability is an ordinary and accepted feature of the American common law of torts. U.S. tort law, (like international law), requires only that one knowingly provide

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35Sosa, 542 U.S. at 729-30; Kadic, 70 F.3d at 246.

36Thus, in concluding that agency, joint venture, and recklessness are actionable under the ATS, Judge Reinhardt looked to international law as well as federal common law. 395 F.3d at 967, 971, 973 (Reinhardt, J. concurring); see also Hoffman and Zaheer at 49, 54, 63-66.

37See Sarei, 456 F.3d at 1078, n.5 (noting violations of law of nations has always encompassed aiding and abetting liability).

38Restatement (Second) of Torts §876(b)(1977).
substantial assistance to a person committing a tort.\textsuperscript{39}

Aiding and abetting liability for violations of international law was understood at the time the ATS was enacted.\textsuperscript{40} As the district court in \textit{Agent Orange} noted,

\begin{quote}
[a] 1795 opinion issued by Attorney General Bradford specifically states that individuals would be liable under the ATS for “committing, aiding, or abetting” violations of the laws of war. \textit{Breach of Neutrality}, 1 Op. Att’y Gen. 57, 59 (1795). In that opinion, the Attorney General considered an incident involving private actors, acting in concert with, but not controlling the French naval vessels. \textit{See id.}

Six years after the passage of the ATS, the Supreme Court in \textit{Talbot v. Janson}, 3 U.S. (3 Dall.) 133, 156 (1795), found that Talbot, a French citizen, who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention with the law of nations and was liable for the value of the captured assets. \textsuperscript{41}
\end{quote}

Moreover, such liability has been enshrined in international human rights law since Nuremburg. For example, in \textit{United States v. Goering}, the Nuremberg Tribunals held:

\begin{quote}
When [businessmen], with knowledge of [Hitler’s] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent . . . if they knew what they were doing.\textsuperscript{42}
\end{quote}

Similarly, in \textit{U.S. v. Flick}, Steinbrinck, a German industrialist, was convicted “under settled legal principles” for “knowingly” contributing money to the S.S., an organization committing widespread abuses, even though it was “unthinkable” he would “willingly be a party” to


\textsuperscript{40}\textit{Sarei}, 456 F.3d at 1078, n. 5; \textit{In re: Agent Orange Product Liability Litigation}, 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

\textsuperscript{41}\textit{Id. quoting} Br. Amici Curiae of the Center for Constitutional Rights, Earthrights International and the International Human Rights Law Clinic at the University of Virginia School of Law, Jan. 18, 2005, at 13-17.

\textsuperscript{42}6 F.R.D. 69, 112 (Nuremberg Tribunal 1947).
atrocities.43

The governing Statute of the International Criminal Tribunal for the Former Yugoslavia, likewise provides for aiding and abetting liability.44 Applying that Statute, and after conducting an exhaustive analysis of international law, including the caselaw of the post World-War II tribunals, the ICTY concluded that the “actus reus [of aiding and abetting] consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime,” while the “mens rea required is the knowledge that these acts assist the commission of the offence.”45 U.S. courts have repeatedly held that this standard reflects international law and is actionable under the ATS.46

The Administration itself has, at times, recognized that aiding and abetting is specifically defined in international law. As part of the War Against Terrorism, the Administration sought to impanel military commissions that would prosecute aiding and abetting a host of crimes, including war crimes, murder by an unprivileged belligerent, spying, terrorism, hijacking, and perjury before a military commission.47 The Administration defined aiding and abetting in a


46 E.g. Unocal, 395 F.3d at 950-51; Presbyterian Church, 374 F.Supp.2d at 340; Mehinovic, 198 F. Supp. 2d at 1355-56.

47 Military Commission Instruction No. 2, Art. 6(A), 6(B), 6(C)(April 30, 2003); but see Hamdan v. Rumsfeld, 548 U.S. ___ (2006)(holding that the military commissions lacked the power to proceed).
manner virtually indistinguishable from the standard applied by the courts under the ATS. It did so precisely because the commission standard “derives from the law of armed conflict,” i.e. international law, and is “declarative of existing law.” Indeed, the Administration recognized that aiding and abetting is so well established and defined in international law that, although commissions cannot prosecute offenses that “did not exist prior to the conduct in question,” commissions may prosecute aiding and abetting “crimes that occurred prior to [the] effective date” of Instruction No. 2.

Defendants have often attempted to mischaracterize aiding and abetting liability as liability simply for doing business in a country with a repressive regime. However, merely operating in a country whose government implements oppressive policies is not the basis of liability asserted by plaintiffs in any ATS case of which the author is aware. No ATS decision has ever held that merely investing in a country that has an authoritarian regime is sufficient for liability.

Aiding and abetting is not the only form of liability that is or should be available to hold

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48 Id. at 6(C)(1)(aiding and abetting is “in any . . . way facilitating the commission” of an offense, with knowledge the act would aid or abet). The U.S. definition is actually broader than that applied by courts under the ATS, since the U.S. does not require that assistance have “a substantial effect on the perpetration of the crime.”

49 Id. Art. 3(A).


51 Certainly the defendants in the South Africa litigation have characterized plaintiffs as raising such a claim, and the district court understood the plaintiffs to be doing so, 346 F.Supp. at 551, but the plaintiffs expressly argued they were not relying on this theory.
accountable corporations intimately involved in gross violations of universally recognized human rights. For example, courts have also recognized conspiracy liability under the ATS. Likewise other forms of complicity have been recognized in international jurisprudence and ought to be actionable. In addition, ordinary common law tort theories such as joint venture, agency and recklessness should be available under federal common law. My central thesis, that a vigorous tort regime promotes constructive engagement, applies as equally to these theories of liability as it does to aiding and abetting. I focus on aiding and abetting, however, because that is the theory the Bush Administration has attacked using the constructive engagement argument detailed in the


54 Sarei, 456 F.3d at 1078; Unocal, 395 F.3d at 970-76 (Reinhardt, J. concurring); Bowoto v. ChevronTexaco, 312 F.Supp.2d 1229 (N.D.Cal. 2004)(recognizing agency and subsequent ratification theories of liability as actionable under the ATS, in the context of determining whether a parent corporation can be held liable for the actions of its subsidiary); Doe v. Unocal, 963 F.Supp. at 896 (allegation that Unocal knew or should have known of military’s forced labor practices when it agreed that military would provide labor for their project sufficient to state a claim upon which relief could be granted).
next Section.

IV. The Bush Administration/Business Community Position.

The Bush Administration has vigorously opposed the recognition of aiding and abetting liability under the ATS, and has submitted briefs in a number of cases arguing that such liability should never be available. In part, the Administration has made the policy assertion that aiding and abetting liability interferes with the United States’ ability to use constructive engagement in conducting foreign relations. This is not a case-specific argument against liability in a particular lawsuit; rather the Administration claims this argument should preclude recognition of aiding and abetting liability in all ATS cases.

The Government predicates its argument on the assumption that aiding and abetting liability will deter investment in countries with poor human rights records. For example, in Sosa v. Alvarez-Machain, in support of its argument that no claims are actionable under the ATS, the Government stated:

> [t]he prospect of costly litigation under Section 1350 and potential liability in United States courts for operating in a country whose government implements oppressive policies—policies that the United States Government is seeking to change through diplomatic channels or political sanctions—may discourage U.S. and foreign corporations from investing in precisely the areas of the world where

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55 E.g. Khulumani et al. v. Barclay National Bank, Ltd, et. al. 05-2141-CV, 05-2336-CV (2nd Cir.); Brief for the United States of America as Amicus Curiae at 4 (“[r]ecognition of an aiding and abetting claim as a matter of federal common law would hamper the policy of encouraging positive change in developing countries via economic investment.”); Doe v. Unocal Corp., 00-56603, 00-56628, Supplemental Brief of the United States of America as Amicus Curiae, at 14 (9th Cir.) (“Adopting aiding and abetting liability under the ATS would, in essence, be depriving the Executive of an important tactic of diplomacy and available tools for the political branches in attempting to induce improvements in foreign human rights practices.”); Brief for the United States of America as Amicus Curiae in Support of Affirmance, Corrie v. Caterpillar, Inc., U.S. Court of Appeals for the Ninth Circuit, No. 05-36210 at 16-18 (August 11, 2006).
economic development may have the most positive impact on economic and political conditions. Economic measures, such as promoting investment or the threat of sanctions, are an important tool that the Executive uses in conducting the Nation’s foreign policy.56

Similarly, the Government argued in an amicus brief to the U.S. Court of Appeals for the Second Circuit in Khulumani et al. v. Barclay National Bank, Ltd, et. al:

One of the “practical consequences” of embracing “aiding and abetting” liability for ATS claims would be to create uncertainty that would in some instances interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes with oppressive human rights practices. One of these options is to promote active economic engagement as a method of encouraging reform and gaining leverage. Individual federal judges exercising their own judgment after the fact by imposing aiding and abetting liability under the ATS for aiding oppressive regimes would generate significant uncertainty regarding private liability, which would surely deter many businesses from such economic engagement.57

Not surprisingly, some elements of the business community have presented similar views. Thus, for example, the National Foreign Trade Council and a number of other pro-business organizations argued in Sosa that:

With few exceptions, United States policy is to increase international trade, investment, and economic cooperation as a central means of promoting human rights. . . ATS lawsuits are often thinly veiled attempts to undercut these careful political decisions. . . Even where the policy of the United States is to encourage investment in developing nations as a means of promoting human rights, businesses will hesitate to invest because of the growing threat of ATS

56Brief for the United States as Respondent Supporting Petitioner at 44-45. (Citations omitted).

liability—making this nation’s human rights policy all stick and no carrot.\textsuperscript{58}

In short, the Administration and the business community assume that aiding and abetting liability will deter investment, and argue that such liability therefore conflicts with constructive engagement.

V. Threshold Objections to The Bush Administration/Business Community Position.

Before turning to the merits of the business community/Bush Administration argument that complicity liability undermines a constructive engagement foreign policy, five preliminary points must be made that render that argument largely, if not wholly, irrelevant. First, the plain text of the ATS precludes the Bush Administration’s assertion that foreign policy concerns ought to bar any possibility of aiding and abetting liability. As noted above, international law expressly prohibits aiding and abetting human rights abuses. Moreover, aiding and abetting liability holds a defendant accountable for its own acts.\textsuperscript{59} Further, such liability deems the abettor to have actually committed the underlying tort.\textsuperscript{60} Thus, aiding and abetting is itself a “tort . . . committed in

\begin{footnotesize}
\textsuperscript{58} Brief for the National Foreign Trade Council, USA*engage, the Chamber of Commerce of the United States of America, the United States Council for International Business, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute, and the Us-ASEAN Business Council as Amici Curiae in Support of Petitioner at 13-14, 16.

\textsuperscript{59} Doe v. Unocal, 395 F.3d at 953, n. 30; \textit{but see} Sarei, 456 F.3d at 1078, n.5 (describing aiding and abetting as “vicarious liability.”)

\textsuperscript{60} U.S. Department of Defense, \textit{Military Commission Instruction No. 2}, Art. 6(C), at 16-17 (April 30, 2003) (abettor is responsible “as a principal even if another individual more directly perpetrated the offense.”); Allied Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity 20 Dec. 1945 Art. II.2 (“Any person . . . is deemed to have committed [crimes against peace, war crimes, crimes against humanity or membership in a criminal group] as defined in paragraph 1 of this Article, if he . . . (b) was an accessory to the commission of any such crime or ordered or abetted the same.”)
\end{footnotesize}
violation of the laws of nations.” Accordingly, the text of the statute compels recognition of aiding and abetting liability. Courts therefore should have no occasion to consider the business community/Bush Administration policy argument in deciding whether such liability is cognizable under the ATS.

Second, the argument that courts should preclude all aiding and abetting liability on foreign policy grounds conflicts with Sosa’s dicta regarding the proper role of foreign policy considerations. As noted above, Sosa suggested that a “possible limitation” on ATS adjudication is “case-specific deference” to the political branches’ view of the effect of a particular case on U.S. foreign policy. The Administration’s broad foreign policy objection to complicity liability in all cases cannot be reconciled with Sosa’s clear implication that foreign policy concerns may provide grounds for dismissal, if at all, only on a case-by-case basis. Thus, even a showing by the


62 See Cabello, 402 F.3d at 1157 (“by their terms, the ATCA and TVPA are not limited to claims of direct liability.”) Although Sarei describes aiding and abetting as “vicarious” liability, the description is immaterial. The Ninth Circuit noted that “that violations of the law of nations have always encompassed vicarious liability.” 456 F.3d at 1078, n.5, citing 1 Opp. Att’y Gen. 57, 59 (1795) for the proposition that those who aid or abet hostilities are liable to punishment under the laws of nations.

63 542 U.S. at 733 n.21. Critically, the U.S. government’s views of a particular case are not dispositive. Id. (“courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”); see also Sarei, 456 F.3d at 1079-1086 (reversing dismissal despite Statement of Interest asserting that adjudication risked adverse impact on U.S. foreign policy). Moreover, Sosa did not purport to create a new abstention doctrine that allows courts to dispense with the requirements of existing law regarding when a case can be dismissed for interfering with U.S. foreign policy. Courts ordinarily have the obligation to decide a properly presented case, even where the controversy may potentially implicate foreign affairs. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics, Corp., 493 U.S. 400, 409-410 (1990). Thus, it is “error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.” Baker v. Carr, 369 U.S. 186, 211 (1962).
Administration that aiding and abetting liability usually undermines constructive engagement would not be a basis for dismissal of any specific case. Instead, the Administration or defendant at a minimum bears the burden to demonstrate that the United States has a constructive engagement policy toward the particular country in question, and that this country-specific policy would be undermined by adjudication of the specific case, in light of the political and economic circumstances extant in that country at the time of the suit. The Administration, however, rejects that approach. In *Unocal*, for example, the Administration argued that the need to preserve engagement as a U.S. foreign policy tool precludes recognition of aiding and abetting liability under the ATS, even though the case involved complicity in abuses in Burma, a country towards which sanctions, not engagement, is the official U.S. policy for promoting human rights.

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64 Supplemental Brief of the United States of America as Amicus Curiae, *Doe v. Unocal Corp.*, 00-56603, 00-56628 at 11-15.

65 The Administration argues that courts may consider its generally applicable foreign policy objection to aiding and abetting liability in light of the Supreme Court’s reference to “practical consequences.” *e.g.* *Khulumani*, Brief for the United States of America as *Amicus Curiae* at 12-19; *Doe v. Unocal Corp.*, 00-56603, 00-56628, Supplemental Brief of the United States of America as *Amicus Curiae*, at 10-17. As noted above, however, courts may look to “practical consequences” as part of “the determination whether a norm is sufficiently definite to support a cause of action.” 542 U.S. at 732-733 (emphasis added). This has nothing to do with foreign policy implications. Rather, the consequences the Court seemingly had in mind were those that might follow from accepting a norm that is too broad to be judicially manageable. Indeed, *Sosa* refused to find that the arrest at issue was actionable, noting that the implications of the rule the plaintiff advocated would be “breathtaking” because that rule would support a claim for any arrest “unauthorized by the law of the jurisdiction in which it took place.” 542 U.S. at 736. The Court was clear that foreign policy concerns involved a separate inquiry; the footnote in which the Court considered those concerns immediately followed the “practical consequences” language, and described case-specific deference as “[a]nother possible limitation.” *Id.* at 733, n.21. *Sosa*’s “practical consequences” language therefore provides no basis for considering broad foreign policy arguments divorced from any case-specific analysis.
Third, assuming *arguendo* the Administration’s policy argument is correct, it is insufficient to bar complicity liability because it ignores other Congressionally mandated aspects of U.S. foreign policy. Even if a particular ATS case did interfere with constructive engagement toward a specific nation, that would not mean that the case necessarily impedes U.S. foreign policy towards that nation. Constructive engagement is never the *only* means by which U.S. foreign policy attempts to promote human rights. As a former Assistant Secretary of State for Democracy, Human Rights, and Labor noted in a declaration in support of the plaintiffs in *Doe v. ExxonMobil, Inc.*, U.S. law requires candid, public scrutiny of nations’ compliance with fundamental rights as an integral part of United States foreign policy, by for example, requiring the State Department to comprehensively review and report annually on the status of internationally recognized human rights in virtually every nation in the world. 66 Adjudication of individual human rights claims under the ATS serves the same foreign policy function.

Fourth, the argument that precluding aiding and abetting liability is necessary to preserve engagement has no logical end point. It applies with equal force to any type of legal liability that could conceivably deter investment in any nation towards which the U.S. government might wish to promote human rights. Few would argue that the judiciary should offer companies blanket immunity for any liability that might limit their willingness to invest. It makes no sense to single out for immunity some of the worst types of corporate behavior.

Fifth, since no court has ever held that merely doing business in an autocratic nation is a basis for liability, the argument that corporations might be deterred could only conceivably apply

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to corporations that might in some way be involved in rights abuses. However, neither the
Administration nor the business community has, in any of these cases, presented any empirical
evidence suggesting that corporations will decline significant investment opportunities based on
the possibility that they will be held liable if they aid and abet human rights abuses in
implementing their project. Nor have they provided any evidence that corporations with
substantial investments will pull out of existing projects. The assumption that narrow civil
liability for conduct that already violates international and domestic law will lead to
disinvestment ignores the most likely scenario: that corporations will continue to invest but will
implement due diligence, oversight and operating procedures to avoid abetting rights violations.
This is particularly so since most corporate complicity cases involve resource extraction
companies. Such companies are especially unlikely to refuse to invest or to withdraw from
existing investments.

67A recent monograph, often touted by ATS critics, purports to show that ATS litigation
could significantly diminish U.S. trade and investment. See Hufbauer, Gary Clyde and
International Economics (2003). The authors, however, reach this conclusion by simply
“assuming that a wave of ATS litigation would depress overall US trade with target companies
by 10 percent . . . [and] that the most vulnerable categories of commerce—US imports of oil and
minerals and US exports to government agencies—would each be depressed by 50 percent.” Id. at
38. The report provides no empirical or even anecdotal evidence for these assumptions. Id.

68Examples include Doe v. Unocal, Bowoto v. ChevronTexaco, Wiwa v. Royal Dutch
Petroleum, Presbyterian Church of Sudan v. Talisman, Doe v. ExxonMobil, Estate of Rodriguez

69See Jake Sherman, “Private Sector Actors in Zones of Conflict: Research Challenges
International Cooperation and Conflict Resolution (PICCR) and the International Peace Academy
Project on ‘Economic Agendas in Civil Wars’”, 6 (April 19, 2001)(noting that extractive
industries “may be particularly reluctant to withdraw” from areas of conflict “given their
extensive financial investment and physical presence,” and their need to ensure access to
resources, and because “expected returns on investment may simply outweigh the economic and reputational costs of continuing to operate.”). See also Human Rights Watch, Myths and Facts About the Alien Tort Claims Act, (noting that although Shell and Chevron were sued in 1997 and 1999 respectively for complicity in abuses in Nigeria, each undertook new, multi-billion dollar, multi-year investment projects in Nigeria in 1999.)


The absence of any evidence supporting their position is an obvious flaw in the Administration’s argument against complicity liability. A party asserting that those who have committed wrongful acts should nonetheless be afforded impunity on foreign policy grounds presumably bears the burden to come forward with at least some evidence supporting their policy claims. Mere speculation ought not to suffice.70

Nonetheless, as detailed below, the argument that complicity liability promotes constructive engagement does not in any way depend on a claim that no businesses will be deterred. On the contrary, if ATS liability actually deters investment by corporations unwilling or unable to invest without being complicit in egregious abuses, that would likely further constructive engagement by weeding out those corporations whose engagement would not be constructive.

The Administration appears to suggest that even wholly innocent companies would be deterred from investing. That seems to be the implication of its claim that aiding and abetting liability “would generate significant uncertainty regarding private liability, which would surely
deter many businesses from such economic engagement.”71 Other factors being equal, however, corporations unwilling to aid and abet abuses are even more unlikely to be deterred than those who are. Moreover, aiding and abetting will not create “significant uncertainty,” given the fact that such liability is already well-established in domestic tort law and corporations presumably therefore know what it means,72 and the fact that merely doing business in a country has never been found to be sufficient for ATS liability.

In any event, my argument would not be undermined even if innocent companies did decline to invest in repressive countries as a result of the existence of complicity liability. The Administration’s position that such liability would harm an engagement policy depends on its claim that “many” businesses would be deterred. If only a few refuse to invest, others will presumably still engage, and any effect on engagement would be marginal. Assuming arguendo any companies that are unlikely to abet abuses might nonetheless be deterred, such deterrence would likely affect a limited number of companies–those that are unusually risk-averse.

Moreover, law is rarely perfect. It virtually always presents risks of both underdeterrence (i.e. failure to deter some conduct the law seeks to prevent) and overdeterrence (i.e. deterring innocent conduct because law-abiding citizens do not wish to risk crossing the line into illegality or being accused of doing so). Thus, in assessing the effects on constructive engagement, the risks of overdeterring presumably beneficial investment must be weighed against the fact that

71 Brief for the United States of America as Amicus Curiae at 13, Khulumani et al. v. Barclay National Bank, Ltd, et. al. 05-2141-CV, 05-2336-CV (2nd Cir.).

72 See Hoffman and Zaheer, supra note XXX at 81 (arguing that knowing participation standard did not prove to be so vague as to disrupt markets during the twenty-six years it applied to abettors of securities law violations).
abolishing aiding and abetting liability will underdeter corporate complicity in human rights abuses. As detailed in Part VII, corporate complicity in abuses seriously undermines a constructive engagement policy, and the existence of such liability substantially promotes that policy. The benefits to engagement policy that follow from continued recognition of complicity liability should easily outweigh any marginal benefit to that policy that might be lost if in fact complicity liability actually overdeters investment.73


The Administration’s briefing assumes that the mere existence of aiding and abetting liability will deter investment, and will therefore hamper a constructive engagement approach. Noticeably absent in the Administration’s submissions is any support for these assumptions. The interrelationship between aiding and abetting liability and the development model is not as simple as the Administration would have U.S. courts believe. To properly evaluate that interrelationship, and thus the merits of the Administration’s position, one must first understand the mechanisms by which increased investment is said to promote democracy. Next, one must consider whether ATS liability for complicity impedes, promotes or has any effect at all on those processes. Only then can one make informed suppositions about the effect of complicity liability on constructive engagement. The Administration has made no effort to conduct this analysis. As is demonstrated herein, and contrary to the Administration’s position, Alien Tort liability for companies that aid and abet abuses supports rather than undermines implementation of the

73See also Hoffman and Zaheer, supra note XXX at 81 (arguing that the gravity of offenses for which jurisdiction lies under the ATS is a strong argument for favoring any overdeterrence that might result from complicity liability over underdeterrence.)

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development model.

According to advocates of the development model, increased trade with or foreign investment in countries with repressive regimes promotes democracy and human rights in four primary ways. The first set of mechanisms are educative. Western business officials, the argument posits, impart democratic values to government officials, private citizens and their own local employees through their interactions with those individuals; Western corporations expose local populations to democratic values and contact with Western business promotes greater integration of repressive regimes into the world community and thus increases the regime’s exposure to “Western” values. Engagement proponents often claim these benefits, and others described below, flow automatically from Western investment, without corporations doing anything other than conducting business as usual. Others, however, note that this mechanism includes proactive steps. Unocal, for example, claims that “[o]ften, in the context of discussing our energy development activities with government officials, Unocal is able to raise concerns

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\[\text{E.g. Schoenberger, Levi’s Children at 86, 112 (describing the “passive” engagement position).} \]
about human rights issues and privately present our views.” Indeed, some proponents of engagement note that proactive opposition to abuses is required in order for engagement to be constructive.

Second, proponents claim that regimes with economic ties to Western governments will seek to maintain or increase those ties and thus will act to promote their reputation, presumably through political liberalization. Moreover, Western governments can use the interactions with

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76 Business and Human Rights, formerly available at http://www.unocal.com/responsibility/humanrights/hr4.htm; see also Schoenberger, Levi’s Children at 194-95 (noting success of American businessman in China in intervening with Chinese officials on behalf of political prisoners, and his explanation that government officials see businesspeople as persons with whom they share interests, not as enemies). There is, however, substantial reason to doubt claims that corporations will press governments to improve their human rights policies, without strong incentives to do so. Indeed, Unocal has also asserted that it has “a legal and ethical obligation to remain politically neutral.” Id. at 85, quoting “Human Rights and Unocal: A Discussion Paper; see also id. at 110-111, 114 (noting general opposition of business executives to notion of corporate accountability that includes acting out of concern for repression and describing hostile reaction of U.S. business in China to then-Secretary of State Warren Christopher’s 1994 suggestion that U.S. businesses use their influence to convince China to increase respect for human rights, and fear of business executives in China of offending thin-skinned Chinese officials to the detriment of their business); id. at 115 (describing similar corporate response to 1999 plea by U.N. secretary general Kofi Annan that corporations use their influence with governments to promote human rights); id. at 188-89 (noting that companies cite “passive” engagement argument to deflect argument that they should actively engage); Jake Sherman, “Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses: A Report of the Fafo Institute for Applied Social Science Programme for International Cooperation and Conflict Resolution (PICCR) and the International Peace Academy Project on ‘Economic Agendas in Civil Wars’”, 7 (April 19, 2001)(“[U]ndertaking [quiet] diplomacy [with local authorities], even in the name of universal human rights or international norms of peace and security, exposes corporations to accusations of unwanted interference and to the risk of retaliation by host governments.”); Marina Ottaway, “Reluctant Missionaries,” Foreign Policy 44, 53 (July/Aug. 2001)(noting that oil companies are finding ways to avoid burden of attempting to promote reform). Absent such incentives, corporations may simply make matters worse. See Sherman at 7 (“Private sector diplomacy raises legitimate concerns about the potential for self-interested collusion between powerful multinationals and host governments.”)
and leverage over repressive regimes that comes with economic ties to press those regimes for reform.\textsuperscript{78} Similarly, when Western multinationals go abroad, they bring with them the scrutiny of Western media and activists who might not have focused their attention on particular abuses if Western corporations had not been involved.\textsuperscript{79} On this view, involvement by Western corporations raises the profile of abuses that might otherwise go unnoticed in the West.

Third, investors purportedly will press for at least those forms of liberalization that improve the business environment. Thus, the argument posits that investors will demand respect for the rule of law so that disputes will be resolved fairly.\textsuperscript{80} Likewise, proponents of this approach believe investors will demand access to information where governments keep sources of information tightly controlled.\textsuperscript{81} Where these demands increase access to information for the

\textsuperscript{78}Baker at 80-81, 85; see generally Wesley T. Milner, “Economic Globalization and Rights: An Empirical Analysis” in Alison Brysk, ed. \textit{Globalization and Human Rights} 80, 88 (2002)(finding incorporation into the international community has positive effect on rights to physical integrity).


\textsuperscript{80}USA*Engage, “Economic Engagement Promotes Freedom”; David L. Richards \textit{et al.}, “Money With a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries,” 45 International Studies Quarterly 219, 222, 235 (2001)(“Money With a Mean Streak?”); Fishman, \textit{supra} note XXX at 39. Then-Secretary of State Colin Powell, in a speech extolling the virtues of free trade and investment, suggested that investors so value the rule of law that they simply will not invest in economies that lack property and contract rights and neutral courts to enforce them. Secretary of State Colin Powell, Remarks at the National Association of Manufacturers Board of Directors Meeting (Oct. 31, 2001). His point was that nations need to liberalize in order to attract investment. \textit{Id.} If Powell was correct, his argument would seemingly suggest that liberalization leads to investment more than investment leads to liberalization, and thus that the companies that do invest would presumably either be those least concerned about operating in a nation that respects the rule of law (and therefore perhaps least likely to push for reform) or those that are the least averse to political risk.

\textsuperscript{81}Fishman at 39.
populace at large, the increased exposure to news and debate may prompt more citizens to challenge the status quo.⁸² Fourth, proponents argue that investment will create a middle class empowered and presumably motivated to agitate for political freedom, and that repressive regimes will respond to and seek the support of this newly-minted bourgeoisie.⁸³

To be clear, I make no claim as to whether these mechanisms have succeeded in the past or can succeed in the future. There are, of course, serious objections to the constructive engagement model.⁸⁴ Whether engagement promotes democracy and human rights is hotly

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⁸³Forcese at 6; USA*Engage, “Economic Engagement Promotes Freedom; ” Baker at 80-81, 84-85; Unocal, *Business and Human Rights*; “Money With a Mean Streak?” at 221; Schoenberger, *Levi’s Children* at 112.

⁸⁴See e.g. Forcese at 10-17 (concluding based on review of empirical studies that constructive engagement, at least in some circumstances, may prolong dictatorship, and noting that investment sometimes encourages abuses that otherwise would not occur or increases the government’s repressive capacity); Baker at 81-88, 91 (constructive engagement unlikely to work in Burma, because, *inter alia*, greatest direct benefits of engagement goes to the military junta); “Money With a Mean Streak” at 223-25 (noting arguments of others that increased levels of foreign capital will lead to decreased respect for human rights); Debora Spar, “Foreign Investment and Human Rights– International Lessons”, Challenge, January-February 1999 (noting argument of others that foreign investment impedes human rights progress); Wesley T. Milner, “Economic Globalization and Rights: An Empirical Analysis” in Alison Brysk, ed. *Globalization and Human Rights* at 88, 91-92 (2002)(finding, *contra* the author’s expectations, that economic freedom has negative influence on rights to physical integrity, perhaps because it leads to increased inequality, which might result in governments being less likely to guarantee basic human rights, or in social conflict and reactionary repression); see generally Amy Chua, *World on Fire*, 16 (2003)(arguing that in countries with pervasive poverty and a market-dominant ethnic minority, combined pursuit of laissez-faire free markets and democratization has catalyzed ethnic conflict including genocide and the subversion of markets and democracy).
Money With a Mean Streak” at 220, 231-32 (noting that recent empirical studies of the effect of foreign capital on government respect for human rights in the developing world have been mixed; and concluding based on authors’ own empirical study that foreign direct investment is associated with increased respect for political rights and civil liberties, but has no statistically significant effect on physical integrity rights.)

See Forcense at 32; Thant Myint-U, River of Lost Footsteps, 41, 344-48 (2006)(criticizing current debate over Burma sanctions for ignoring Burmese history and arguing that if Burmese military regime wanted to engage with wider world, sanctions might make sense as form of pressure, but since isolation allows regime to push its agenda, sanctions are counterproductive.)

This further demonstrates the incoherence of the Administration’s policy argument for a blanket prohibition on aiding and abetting liability, and suggests that Sosa’s requirement that any deference to Executive foreign policy concerns must be case-specific makes good policy sense in this particular context.

contested, and is probably best left to social scientists and foreign policy professionals. In any event, it is beyond the scope of this article. Moreover, any assessment of a past or proposed constructive engagement policy should be grounded in rigorous, country-specific analysis. What might work within the unique social, political, economic, and cultural context of one nation may not be effective in another. As will be seen in the next section, however, assuming these mechanisms can work, ATS complicity liability should facilitate most, if not all, of them.

Nonetheless, one general conclusion often made in the social science and foreign policy literature presents a formidable hurdle to those opposing aiding and abetting liability on the policy basis of its purported inconsistency with constructive engagement. As noted above, many if not most of the corporate aiding and abetting cases involve multi-national oil and mining companies. Thus, opponents of complicity liability must necessarily presume not merely that engagement in the abstract promotes democracy, but specifically that engagement by resource extraction companies has this effect. That assumption, however, is difficult to square with the
Nancy Birdsall and Arvind Subramanian, “Saving Iraq From Its Oil,” 83 Foreign Affairs, No. 4, 77 (July/August 2004); accord e.g. Michael Ross, “Does Oil Hinder Democracy?” World Politics, Vol. 53, 325, 342, 356 (April 2001)(concluding based on statistical analysis “that the antidemocratic properties of oil and mineral wealth are substantial.”); Melissa Dell, “The Devil’s Excrement: The Negative Effect of Natural Resources on Development,” Harvard International Review, Vol. 26(3) (Fall 2004)(“the discovery of oil and mineral resources often fuels internal corruption and conflict, encourages unethical corporate behavior, leads to the violation of human rights, and results in environmental degradation.”); Debora Spar, “Foreign Investment and Human Rights– International Lessons”, Challenge, January-February 1999 (model suggesting foreign investment impedes human rights progress most plausible with respect to extractive industries, because corporate interests naturally align with interests of state, which typically owns the resource: both have interest in physically protecting the asset, and since protection is a service states are well positioned to provide, links between firm and state are likely to tighten; moreover, general population tends to have limited interaction with the foreign investor, so possibilities for ameliorating local conditions are relatively weak, and much of the benefits will flow to state coffers, enhancing state’s repressive capabilities).

Ross suggests “three causal mechanisms that link oil and authoritarianism: a rentier effect, through which governments use low tax rates and high spending to dampen pressures for democracy; a repression effect, by which governments build up their internal security forces to ward off democratic pressures; and a modernization effect, in which the failure of the population to move into industrial and service sector jobs renders them less likely to push for democracy.” Ross at 356-57. Although “nonfuel mineral wealth also impedes democratization,” “mineral exporters appear to suffer from a rentier effect but not a repression effect, and there is only weak evidence that they are afflicted by a modernization effect.” Id. See also Birdsall and Subramanian at 81 (noting that where state controls natural resources, tax burdens are reduced and citizens “have little incentive and no effective mechanism by which to hold government accountable. This can lead to the unchecked abuse of state power” and create “conditions [that] make it very hard for political institutions to develop.”)

Moreover, other research suggests that regimes in oil-rich states are on average, more durable than regimes in other developing nations, (although there is wide variation in stability levels in oil dependent states and oil wealth may exert varying effects on durability). Benjamin
particularly tend to be associated with serious human rights problems, mainly because they may not be able to select their locality and may feel compelled to work closely with repressive host States.” Thus, in intervening on behalf of oil and mining companies on development model grounds, the Administration is defending a type of engagement that seems least likely to promote its own stated goals.

VII. The Interrelationship Between Constructive Engagement and Accomplice Liability.

A. Complicity Liability Penalizes Engagement That is Not Constructive.

Constructive engagement theory is in large part predicated on the idea that corporations will encourage reform. Complicity in abuses is not “constructive.” Aiding and abetting liability simply does not challenge investment that actually promotes respect for human rights. This is so for three reasons. First, by definition, complicity in egregious violations of fundamental human rights norms supports the very abuses that a constructive engagement policy seeks to end.

Second, as the Assistant Secretary of State for Economic and Business Affairs has noted, “U.S. companies are models overseas for the kind of business practices we encourage others to adopt. Therefore, it is good not only for American business, but also for the global investment climate that American firms be the best corporate citizens possible.”

A corporation that abets


human rights abuses will not impart “Western” values, or provide a model for positive change. On the contrary, its actions will more likely convey notions antithetical to that goal: that even Westerners do not respect “Western” values; that human rights can be subordinated to economic objectives; or that we agree with the many dictators who have argued that fundamental human rights norms are not universal, but instead are in fact uniquely “Western” values that should not be imposed on non-Western cultures. At a minimum, a corporation’s complicity in abuses will demonstrate that it is not serious about any statements it might make concerning democracy or human rights. Actions speak louder than words.

Third, corporations complicit in abuses may have little or no incentive to do anything that might actually encourage democratic reform. Indeed, such companies may have an enormous stake in maintaining the status quo. After all, democratization might bring to power not only opponents of the regime, but opponents of the company. A democratic opposition would probably not look kindly on the company’s involvement with the regime or its abuses. If it ultimately gains power, such opposition might seek to hold the company to account for its actions. Complicit corporations cannot be expected to promote broad respect for the rule of law, since that might serve to end their own impunity. Put simply, corporations involved in abuses may prefer the stability of their existing partnership with autocratic regimes over the uncertainty of democratization. Consider, for example, Unocal in Burma. The democratic opposition in Burma vehemently opposed the Yadana pipeline project. In these circumstances, one finds it difficult to believe Unocal would relish the prospect of democratization, which would bring that

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added); see also Schoenberger, Levi’s Children at 119 (arguing that given America’s leadership in the world, U.S.-based multinationals will set the ethical tone for the global economy).
opposition to power.\footnote{Similarly, since the legal regime governing multinational corporations operating under, or in conjunction with a repressive regime is by definition negotiated or created by a government that was not accountable to its people, it is likely to be more favorable to the company with respect to human rights, environmental, labor or social standards than would be adopted by a democratic government. Thus, such corporations have reason to be concerned that a democratic government might seek to alter the statutory, regulatory or contractual regime under which the company operates. This concern, of course, apply generally to those doing business with a repressive regime, not just to those complicit in egregious abuses, and thus provides an additional reason why the constructive engagement model’s assumption that corporations will work for reform may not be accurate.}

Perhaps the most famous attempt to differentiate between “constructive” and harmful engagement, the “Sullivan Principles,” illustrates the wide gulf between complicity in human rights abuses and truly “constructive” engagement. The Principles were created by the Reverend Leon Sullivan as a voluntary code of conduct for U.S. corporations in apartheid South Africa. They were conceived in 1977, and periodically amended thereafter.\footnote{Roughly 200 of the 260 U.S. corporations doing business in South Africa as of 1986 had adopted the Sullivan Principles. Douglass Cassel, \textit{Corporate Initiatives: A Second Human Rights Revolution?}, 19 Fordham Int’l. L.J. 1963, 1970 (June 1996) citing Patricia Arnold & Theresa Hammond, \textit{The Role of Accounting in Ideological Conflict: Lessons from the South African Divestment Movement}, 19 Acct., Organizations and Soc. 111, 116 (1994).} The Principles were designed “to promote racial equality in employment practices for U.S. firms operating in the Republic of South Africa to promote programs which can have a significant impact on improving the living conditions and quality of life for the non-white population, and to be a major contributing factor toward the ending of apartheid.”\footnote{The (Sullivan) Statement of Principles” Fourth Amplification, November 8, 1984; \textit{reproduced in} Sullivan Principles For U.S. Corporations Operating in South Africa, 24 I.L.M. 1464, 1496 (1985)(hereinafter “Sullivan Principles”).} Thus, the Principles assumed that U.S. investment could promote the dismantling of apartheid, but only if U.S. businesses actively
opposed apartheid.94

Not surprisingly, the Principles required companies to “eliminate all vestiges of racial discrimination” in their employment.95 They also, however, went much further, requiring companies to take affirmative steps toward “[i]mproving the quality of employees’ lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.”96 Most importantly for present purposes, the Principles as they evolved required companies to intervene in the political process. Signatories agreed to support the elimination of racially discriminatory employment laws and discrimination against “the rights of Blacks to form or belong” to unions, to “secure rights of Black workers to the freedom of association, to support changes in laws that would grant Black migrant workers the right to a normal family life, to support the right of Black businesses to locate in urban areas, to support the freedom of mobility of Black workers and, indeed, to “[s]upport the ending of all apartheid laws.”97

Thus, the Principles recognized that a constructively engaged corporation not only does not abet serious human rights abuses such as apartheid, it actively opposes them, and that corporate passivity, let alone complicity, is antithetical to truly “constructive” engagement.98

94Forcense at 23.

95Sullivan Principles, 24 I.L.M. at 1496, Principle I; see also id. at 1497, Principle II, III.

96Id. at 1498, Principle VI.

97Id. at 1497-99, Principles II, VI.

98Rev. Leon Sullivan, Agents for Change: The Mobilization of Multinational Companies in South Africa, 15 Law & Pol’y Int’l Bus. 427, 435 (1983)(“If companies passively subscribe to the Principles but fail to make aggressively an affirmative thrust inside and outside the workplace and fail to use their considerable economic and political power to help end South Africa’s racial and discriminatory laws, then the Principles and codes will have missed their mark.”)
I do not suggest that merely failing to oppose repressive policies is actionable under the ATS. Corporations might fall in between—neither engaging in conduct that promotes constructive change nor assisting abuses that might lead to ATS liability. A corporation that is complicit in human rights abuses, however, is not a constructive presence. Holding a U.S. corporation liable for aiding and abetting abuses, therefore, cannot conflict with constructive engagement.

Thus, where Congress and/or the Executive have made the broad determination that constructive engagement is the most effective policy for encouraging democratic reform and respect for human rights in a particular nation, ATS complicity liability serves a vital role. It ensures on a case-by-case basis that individual corporations can be held accountable if they subvert that policy by aiding and abetting rights abuses. This kind of fact-specific inquiry, based upon years of investigation and discovery, is a role uniquely suited to courts.

The district court recognized precisely this point in Unocal. There, Unocal asserted that the adjudication of plaintiffs’ claims would interfere with U.S. foreign policy.99 Unocal based its claim on that the fact that Congress, in a newly-enacted sanctions law, granted the President the power to prohibit new investment in Burma.100 According to Unocal, Congress, in not banning existing investment, demonstrated an official U.S. policy of refraining from taking steps “that might serve only to isolate the Burmese Government [i.e. SLORC] and actually hinder efforts toward reform.”101 In other words, Unocal argued that its joint venture with the Burmese junta


100 Id.

101 Id. quoting Unocal Memorandum of Points and Authorities in Support of Motion to Dismiss at 1.
was congressionally-approved constructive engagement.

The district court, however, properly rejected this argument. After casting doubt on Unocal’s interpretation of the sanctions law’s intent, the Court held:

Even accepting the Congressional and Executive decisions as Unocal frames them, the coordinate branches of government have simply indicated an intention to encourage reform by allowing companies from the United States to assert positive pressure on SLORC through their investments in Burma. . . . Plaintiffs essentially contend that Unocal, rather than encouraging reform through investment, is knowingly taking advantage of and profiting from SLORC’s practice of using forced labor and forced relocation, in concert with other human rights violations . . . to further the interests of the Yadana gas pipeline project. Whatever the Court’s final decision in this action may be, it will not reflect on, undermine or limit the policy determinations made by the coordinate branches with respect to human rights violations in Burma.\textsuperscript{102}

The underlying rationale of this holding – that liability for complicity in abuses is perfectly consistent with a constructive engagement policy – obviously applies beyond the context of the \textit{Unocal} case.

Assuming a corporation that aids and abets abuses somehow did promote reform in general, serious objections to absolving complicity in the name of constructive engagement remain. The argument against liability implicitly posits that corporations should be permitted to abet abuses because doing so is necessary to avoid overdeterrence of investment by corporations whose business would facilitate reform. Thus, the impunity argument is predicated on the utilitarian notion that promoting democracy and human rights is more important than deterring

\textsuperscript{102}\textit{Unocal}, 963 F. Supp. at 895 n.17. Subsequently, in the related case, \textit{NCGUB v. Unocal Corp.}, the district court invited the State Department to express its views of the ramifications of the litigation on U.S. foreign policy. 176 F.R.D. at 335. The Department responded that “at this time adjudication of the claims based on allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma.” \textit{Id.} The district court reiterated the passage quoted in the text. \textit{Id.} at 355, n.31.
particular abuses on particular projects or compensating particular victims of those abuses.

Many of the most fundamental human rights prohibitions, however, are non-derogable even in time of national emergency. Thus, international law grants individuals certain protections despite the fact that doing so may result in dire consequences for society at large. The impunity argument’s radical utilitarianism utterly conflicts with this bedrock principle, at least with respect to suits involving allegations that a corporation has abetted violations of non-derogable rights.

Even if one ignores the implications of the non-derogability doctrine, the moral questions inherent in claims that the rights of specific individuals can be trumped by broader societal goals are, at a minimum, exceptionally difficult. This has two relevant implications. First, such a determination should only be made, if at all, by the oppressed society or group, or its legitimate leaders. The Bush Administration’s position, by contrast, does not defer to local desires. Moreover, it abdicates any responsibility on the part of the Executive to consider whether human

103Restatement (Third) of Foreign Relations Law § 702 Reporter’s Note 11 (1987)(genocide, slavery, murder or disappearance, torture or other cruel, inhuman or degrading treatment, prolonged arbitrary detention and systematic racial discrimination); see also International Covenant on Civil and Political Rights, Art. 4.

104See e.g. Daniel Kofman, “Moral Arguments: Sovereignty, Feasibility, Agency and Consequences” in A Matter of Principle: Humanitarian Arguments for War in Iraq, 125, 138-42, Thomas Cushman, ed. (2005)(noting disparate “deontologists” such as Robert Nozick, John Rawls and Ronald Dworkin argue that sacrificing some individuals to increase the aggregate social good is wrong because it ignores the ethical need to respect individuals, and countering that, where the violation of the fundamental rights of some may prevent the violation of the fundamental rights of others, one must weigh the harms and benefits of acting versus not acting.)

105See id. at 141-42 (arguing that, assuming U.S. can succeed in its goal of establishing relatively decent regime in Iraq, given high human toll, only Iraqis are entitled to judge costs and benefits).
rights abuses likely to result from a particular project are somehow “outweighed” by potential engagement benefits, and would preclude the Judiciary from having any role. Instead, the Administration would leave such sensitive moral judgments to the sole discretion of the investing corporations.

That, of course, is tantamount to concluding that the moral calculus always (or virtually always) favors impunity—or, put another way, to denying that any such ethical questions exist. Corporations have an obvious financial stake in the matter, and their executives are obligated to maximize shareholder value, not human rights. Moreover, even if such executives were inclined to take the ethical question seriously, they would have no basis upon which to do so, since they are likely ignorant of local conditions. Those who argue for impunity must somehow explain why a corporation involved in a project it knows will result in abuses should be allowed to decide that it is appropriate to sacrifice the rights of specific individuals for the sake of the broader goal of promoting democracy. For example, as noted above, Unocal chose to proceed with the Yadana pipeline even though the democratically elected opposition in Burma opposed the project. In like circumstances, a defendant’s appeal to the engagement model as a basis for dismissal of complicity claims rings especially hollow.

Second, the party arguing that the rights of individual victims ought to be ignored should bear the burden of proving that the prospective benefits are large and unequivocal. As noted above, however, the Bush Administration declaims any obligation to show even that the U.S. has a constructive engagement policy toward the country involved, let alone that litigation of a particular case will interfere with engagement toward that particular country.

Even considering the question as the Administration would pose it—whether potential
liability interferes with the viability of using an engagement policy anywhere--the Administration’s argument fails. The above discussion demonstrates that “engagement” by companies that are themselves complicit in abuses is not likely to provide substantial impetus toward reform.

In any event, even if one concludes that benefits in terms of promotion of human rights through constructive engagement outweigh the harms to particular individuals harmed by particular projects, that might be an argument against a sanction banning all investment, but it is difficult to see how that argument would support not compensating the victims.

B. The Possibility of Complicity Liability Encourages Corporations To Engage in Actions the Constructive Engagement Model Presumes are Necessary to Promote Democracy.

Alien Tort Statute cases against corporations often involve companies that allegedly abetted abuses committed on their behalf by repressive government security forces.\footnote{E.g. Presbyterian Church of the Sudan, 244 F. Supp. 2d 289; Doe v. Unocal Corp., 963 F. Supp. 880; Bowoto v. ChevronTexaco, 312 F.Supp.2d 1229 (N.D.Cal. 2004).} The potential for ATS liability for such conduct should force companies to conduct due diligence and implement operational safeguards to decrease the risk that their government partners or members of the security forces will commit abuses on their behalf, or that the company will be complicit in such abuses.\footnote{See Jake Sherman, “Private Sector Actors in Zones of Conflict: Research Challenges and Policy Responses: A Report of the Fafo Institute for Applied Social Science Programme for International Cooperation and Conflict Resolution (PICCR) and the International Peace Academy Project on ‘Economic Agendas in Civil Wars’”, 7 (April 19, 2001)(“As profit-driven actors, corporations make decisions about a particular course of action based on its anticipated impact to their bottom line. For policy-makers seeking to advance responsible corporate behavior in conflict zones, much will depend upon engaging corporate actors in a way that resonates with that bottom line.”)} In particular, companies will likely initiate with their government partners
As one commentator has noted with regard to the Nuremburg Tribunal, the trial of Nazi war criminals was “an act staged not simply to punish extreme crimes but to demonstrate visibly the power of the law to submit the most horrific outrages to its sober ministrations. In this regard, the trial was to serve as a spectacle of legality, making visible both the crimes of the Germans and the sweeping neutral authority of the rule of law.” Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, 41 (2001).

A corporation that knows it can be held liable for aiding and abetting will have greater incentive to tell its government partner and the members of the military or police that provide corporate security that it will not be complicit in human rights violations on its project. More to the point, the potential for liability will compel companies to explain to government and military officials at all levels the reasons it cannot tolerate abuses: that international law and the U.S. legal system forbid complicity in human rights violations; that if abuses occur, victims—even the most marginalized peasants— are entitled to present evidence in a U.S. court, against even the most powerful multinationals; that such victims are entitled to do so before a neutral decision-maker who will decide their case in accord with the rule of law rather than the will of the government; and that, if those victims can prove their allegations they will be entitled to redress. In short, the potential for aiding and abetting and other liability ensures corporations will not only explain democratic values and institutions to officials of repressive governments, but will also demonstrate through their actions in attempting to limit the possibility that abuses will occur that those values and institutions are not merely aspirations, but actually govern the conduct of members of democratic societies, including corporations.108

Companies will also convey to government officials that if members of the military or

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security forces engage in abuses on behalf of a company, those abuses will be paraded across a high profile stage in the United States or even the world. To avoid this possibility, authorities may take steps to ensure that lower-level officials do not permit or condone abuses on a company’s project. In this sense, potential liability strongly supports the constructive engagement rationale that assumes nations will seek to improve their reputations.109

Presumably, companies will conduct due diligence and engage in these kinds of discussions with government officials even before they form partnerships or employ government forces as security for their projects. The availability of aiding and abetting liability will encourage companies to do so because they will want to know whether they will likely or necessarily be complicit in abuses on the project, in order to assess litigation risk.

Companies willing to tell foreign governments that they will not be complicit in abuses would not likely be deterred from doing business, and such dialogue is exactly what “constructive” engagement requires. Companies unwilling or unable to do so could conceivably

109 One criticism of the notion that corporations, particularly oil companies, should be cast in the role of political reformers asserts that the prospect of oil company executives lecturing government officials on human rights and democracy “evokes an image from a past that should not be restored: charter company officials who saw themselves as agents of civilizations in distant countries ‘not ruled by Christian kings’ (as they were described during that era).” Marina Ottaway, “Reluctant Missionaries,” *Foreign Policy* 44, 53 (July/Aug. 2001). That concern, assuming it has any validity, should not be implicated by the kind of corporate overtures to government officials that would result from a vigorous tort regime. As described in the text, the corporate argument for human rights protections will not be based, or at least not entirely based, on notions of “universal values.” Rather, it will be grounded in the practical costs that will accrue to corporations and their government partners if human rights abuses are committed. In any event, while Ottaway frames her argument as a criticism of NGOs, it seems equally applicable to the entire idea of constructive engagement, which presumes in part that corporations will voluntarily accept the role of reformers. Indeed, as Ottaway concedes, her argument applies to all attempts to impose human rights norms from the outside. *Id.* I start from the premise that promoting respect for human rights is a valuable endeavor.
be deterred from investing, (although as noted above, critics of complicity liability present no evidence supporting this claim). In rare cases, a corporation may ultimately decide that, given the nature of the project and potential government partner, abuses on behalf of its project are inevitable and that it cannot avoid complicity, and therefore it may elect not to proceed. Thus, if potential liability deters investment, it most likely deters counterproductive, rights violative investment. Moreover, in these circumstances, refusal to invest may promote political liberalization by demonstrating to repressive regimes that there is a cost to committing abuses.110 Under the engagement model, properly conceived, such deterrence is beneficial, in that it sends exactly the right message to dictatorships.

Critics of aiding and abetting liability might consider this a lost opportunity for engagement. On the contrary, however, a dialogue between a corporation and a potential governmental partner regarding human rights, in which the corporation takes rights seriously, is constructive engagement, even, and perhaps especially, where the company ultimately decides not to invest based on human rights concerns. To be constructive, engagement cannot be all carrot and no stick.

The actual filing and litigation of a case against a corporation that has abetted abuses may serve a similar didactic function in transmitting democratic values to repressive regimes.111 To

110 For example, Unocal knew from the inception of the Yadana project that the military guarding the pipeline would force villagers to work on its project and commit other egregious violations of fundamental human rights on Unocal’s behalf. 395 F.3d at 940. One wonders if, had they expected they might be sued, they would have sought assurances from the Burmese military that abuses would not occur, elected not to use the military to provide security, or even decided not to participate in the project.

111 See Sarei 2006 U.S. App. LEXIS 20174 at *74-75 (noting that it is a “plausible hypothesis” that “[f]oreign court rulings against rights-abusing defendants have the effect of
the extent government officials follow the progress of these kinds of suits, they will see how an independent judiciary operates in a free society. If the government protests to our State Department, the most efficacious response under the constructive engagement model would be for the Department to explain that in our system, we have an independent judiciary, and that the Executive will not and cannot step in to end the case. Such a response would send a clear message that U.S. courts adhere to the rule of law, not the whims of the Executive, and that under the rule of law, even the most powerful U.S. multinational corporations can be held accountable by the most politically marginalized, alien peasants. Separation of powers 101. Thus, if one believes, as the engagement model assumes, that exposure to democratic values promotes reform, then one should welcome ATS complicity litigation. Proponents of engagement cannot claim on the one hand that business promotes reform by exposing dictators to Western values while at the same time denying that litigation against corporations complicit in abuses has the same effect.

Indeed, on a more fundamental level, refusal to intercede in cases that inherently place the rights of the victim front and center would demonstrate our belief in the inherent value of every person–including those foreign government officials have sought to dehumanize through the abuses at issue, and that we cherish that value so much we will stand by it even if the foreign government is displeased.

Likewise, a suit in the United States can inspire or protect dissidents in the country at issue. Thus, for example, Joelito Filartiga’s sister Dolly wrote in a New York Times op-ed piece defending the importance of the ATS prior to the Supreme Court’s decision in Sosa: putting pressure from above on the state where the rights abuses occurred.”” quoting Ellen Lutz & Kathryn Sikkink, The Justice Cascade: The Evolution and Impact of Human Rights Trials in Latin America, 2 Chi. J. Int'l L. 1, 4 (2001)).

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“For my family, the [Filartiga] decision put us at risk but also gave protection -- the Paraguayan government threatened us but wouldn't risk retaliating once we had the American legal system on our side. In Paraguay, the case remains a symbol of the injustice of the Stroessner dictatorship, and my brother is considered a martyr for human rights. […]”

Contrast these benefits with the Bush Administration’s actions. By asking U.S. courts, in the name of U.S. foreign policy, to refuse to hold to account U.S. corporations that directly abet the perpetration of human rights abuses, the Administration sends a powerful signal to regimes whose abuses those companies support. That is, that the United States government is not committed to promoting reform, or at least that it is unwilling to sacrifice the narrow economic interests of a few U.S. multinationals to protect human rights by placing even modest limits on their actions abroad. This, in turn, would suggest to foreign regimes that they can ignore pressure for reform without fear of political repercussion from the United States.

Even where the United States is otherwise engaged in efforts to promote democracy and human rights, its staunch advocacy of corporate impunity undermines those measures by conveying a conflicting message. The Administration’s position was revealed at its most inconsistent in the Unocal litigation. The Bush Administration has been a strong critic of Burma’s military government, and has continued and increased trade and investment sanctions. Yet even in this case, where the United States had no policy of constructive engagement, the Administration argued against liability for a corporation involved in human rights abuses. This is the ultimate mixed message: the Administration criticizes Burma’s human rights record, and enacts sanctions against the regime, but then undermines its own diplomacy by giving shelter to corporations accused of abetting the very abuses that the Administration condemns.

Indeed, the U.S. government has repeatedly cited the ATS to the United Nations to show
that the U.S. is fulfilling its international responsibilities.\textsuperscript{112} Against this backdrop, the Administration’s vigorous attempt to circumscribe ATS liability will undoubtedly be perceived as retrenchment in the U.S. commitment to human rights enforcement, or of evidence of a double standard under which the United States turns a blind eye to the transgressions of its own corporate citizens while asking other nations to adhere to human rights norms.\textsuperscript{113} Moreover, if courts ultimately accept the Administration’s position, the failure to provide for liability would miss the opportunity to enlist corporations as advocates for democracy in the way that constructive engagement requires.

Worse, providing impunity for abettors on foreign policy grounds does not merely tolerate complicity, it may encourage or subsidize it. Impunity allows companies to externalize the costs of either taking measures to avoid complicity or compensating the victims. By removing at least some of these costs while permitting companies to retain the benefits of abetting, impunity may tend to encourage companies to invest in projects that will likely involve serious human rights abuses rather than in projects that will not.\textsuperscript{114} Likewise, impunity may


\textsuperscript{113}See Sarah H. Cleveland, \textit{The Alien Tort Statute, Civil Society and Corporate Responsibility}, 56 Rutgers L. Rev. 971, 988 (Summer 2004); see also Sen. Arlen Specter, “The Court of Last Resort,” \textit{The New York Times}, Aug. 7, 2003 (criticizing Administration’s attack on ATS and noting that in context of war on terror, ATS “send[s] the right message to the world: the United States is serious about human rights.”) The Administration’s efforts to preclude aiding and abetting liability under the ATS while asserting in the context of military commissions that such liability is an established international law norm can only increase the perception that the Administration seeks to apply a double standard to U.S. corporations.

\textsuperscript{114}Complicity in abuses, of course, exposes companies to other potential costs. Most notable is the harm to corporate reputation that companies may suffer if their actions become publicly known. See Debora Spar, “Foreign Investment and Human Rights—International
provide at least some competitive advantage for companies willing to invest in the worst projects, at the expense of other companies that are not. The Bush Administration’s approach would encourage the worst companies to invest in the worst projects at the expense of their more ethical competitors. It would therefore stack the deck in favor of those least likely to promote constructive engagement, and put pressure on competitors to race to the bottom.\textsuperscript{115}

The Administration argued in \textit{Sosa} that the ATS undercuts “the threat of sanctions,” which are “an important tool” for promoting democracy.\textsuperscript{116} That argument, however, is not convincing. First, the ATS holds particular parties responsible for their involvement in specific, egregious abuses committed against specific victims. It does not penalize a company merely for having an investment in a particular nation, nor does it have anything to do with ending all

\textsuperscript{115}One might respond that the litigation risks involved are inframarginal–that is, they are not so daunting that their removal would actually tend to encourage corporations to be complicit in abuses. That is an empirical question about which I take no position. The Bush Administration’s argument, however, is predicated on the notion that these risks are so substantial that they will discourage investment, even by ethical companies, in any country with a poor human rights record. If such risks are not sufficiently weighty as to discourage investment, the underlying rationale of the Administration’s attack on complicity liability falls away. Assuming \textit{arguendo} the potential litigation risks are substantial enough to fundamentally alter corporate behavior, impunity will reward and encourage investment that is utterly at odds with constructive engagement.

\textsuperscript{116}BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONER at 44-45.
investment in a given nation. Thus, liability is not equivalent to economic sanctions. Even assuming some corporations will refuse to invest as a result of a complicity liability regime, such refusal is utterly unlike government-imposed sanctions; it is particularized, “free market” engagement in that companies, on a project-by-project basis, determine for themselves *ex ante* whether their own actions are inherently likely to substantially assist or encourage the commission of abuses. This is a very narrow stick.

Second, the Administration’s position is implicitly predicated on the unsupported assumption that the possibility of tort adjudication will not merely deter some investment, but will deter so much investment as to essentially constitute a sanction, thereby rendering empty the threat of any future sanction. That argument seems outlandish in the context of a tort regime requiring aiding and abetting.

Third, the argument is odd, if not perverse. Why permit investment that directly abets precisely the abuses one seeks to prevent, simply to preserve the option of suspending such investment at a later date? As noted above, the very act of an individual corporation telling its government partner that it will not be complicit in abuses, or refusing to do business when it appears that complicity is inevitable, exerts positive pressure for reform. Yet, the Administration’s argument would forgo that pressure. For the Administration’s position to make sense, one must believe that sanctions or the threat of sanctions promotes liberalization in a way that interactions between corporations and governments do not. In other words, one must deny the efficacy of one of the central mechanisms through which constructive engagement is purported to promote reform. Thus, strangely, this argument seems to deny the predicate of the very constructive engagement policy the Administration claims to defend.
Fourth, while the Bush Administration uses this argument to target aiding and abetting liability in human rights cases, it cannot be so limited. The rationale would apply equally to any type of liability that might deter investment in any nation towards which the U.S. government might someday enact sanctions. Moreover, while the U.S. might consider sanctions against countries accused of involvement in terrorism, no one is suggesting that laws prohibiting corporations from aiding and abetting terrorism be relaxed in order to preserve “the threat of sanctions” in the future.

Last, it is difficult to see how the threat of implementing sanctions will be taken seriously when the United States is willing to defend in court those U.S. companies that are directly complicit in abuses. Indeed, any such threat is particularly weak given that opposition to aiding and abetting liability is explicitly justified as part of a policy of constructive engagement. When a foreign government sees that the U.S. commitment to constructive engagement is so strong that it is willing to seek impunity for a complicit corporation, it will have good reason to believe that the Administration will not suddenly reverse course and implement sanctions.

VIII. Conclusion

When the Executive intervenes in an ATS case, either to argue generally that aiding and abetting liability interferes with U.S. foreign policy or that adjudication of a particular case would do so, such intervention inevitably conveys a message: that this particular Administration will defend abettors, and that dictatorships that work with U.S. multinationals have a champion in the White House when they commit egregious abuses on the companies’ behalf. Moreover, intervention in particular cases, especially where successful, undercuts our ability to convey the notion that we have an independent judiciary that decides cases under the rule of law rather than
based upon the political whim of the Executive and the defense of the powerful. Thus, Bush Administration intervention has done serious damage to the very didactic processes upon which proponents of the development model argue that model depends. While the development model posits that engagement conveys values of respect for the rule of law, human rights and democracy, the Bush Administration’s intervention conveys only hypocrisy.