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The Chinese Communist Party's New Comrade: Yahoo's Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability Under the Alien Torts Claim Act

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Comments

The Chinese Communist Party's New Comrade: Yahoo's Collaboration with the Chinese Government in Jailing a Chinese Journalist and Yahoo's Possible Liability Under the Alien Torts Claim Act

Neil J. Conley^{*}

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I. Introduction

On April 20, 2005, Shi Tao, a Chinese journalist, sent an anonymous email that resulted in the Chinese government sentencing him to ten years in prison for leaking state secrets.¹ The "state secrets" contained in the email were already widely circulated materials pertaining to routine instructions on how Chinese officials must safeguard social stability during the fifteenth anniversary of the June 4, 1989, Tiananmen Square democracy movement.² Shi Tao sent the message from a computer at his place of work, Contemporary Business News in Changsha, China, to a Chinese-language website, based in New York.³ Shi Tao used his Yahoo email account to send the message.⁴ The message contained neither Shi Tao's name, nor revealed the source of the

1. Joseph Kahn, *Yahoo Role Documented in Chinese Trial*, N.Y. TIMES, Sept. 8, 2005, at C11 [hereinafter Kahn].

2. *Id.* The Chinese censorship authority warned domestic journalists about the perils of reporting on the anniversary of the 1989 Tiananmen Square demonstrations. Peter S. Goodman, *Yahoo Says It Gave China Internet Data*, WASH. POST, Sept. 11, 2005, at A30. The Tiananmen Square democracy demonstrations were an enormous social uprising against the Chinese government's communist regime. Philip P. Pan, *Tiananmen Figure Recognized, Raising Hopes for Official About-Face on Incident*, WASH. POST, Nov. 19, 2005, at A18. The demonstrations ended in the Chinese military killing an undetermined number of demonstrators. *Id.* Hu Yaobang, a reformist Communist Party chief, was ousted from his position in 1987 for sympathizing with student protestors who were calling for democratic reform. *Id.* His death in 1989 sparked student democracy demonstrations, which culminated in the June 4, 1989, massacre of an undetermined number of protestors in and around Tiananmen Square. *Id.*

3. Kahn, *supra* note 1, at C11.

4. *Id.*

email.⁵ However, Yahoo provided Chinese officials with information that aided them in identifying the source and sender of the email.⁶ Yahoo has declined to comment on the issue, stating only that, “[j]ust like any other global company, Yahoo must ensure that its local country sites operate within the laws, regulations, and customs of the country in which they are based.”⁷

Part I of this Comment will provide a brief overview of the history of the Alien Torts Claim Act (“ATCA”) and some of the major cases involving the ATCA. Part II will provide background information on the ATCA as well as information on how China has regulated the Internet. It will also describe how American companies have provided the Chinese government with technology and assistance to help in the regulation of the Internet. In addition, Part II will provide an overview of some of the major cases involving the ATCA.

Part III will analyze whether Shi Tao could sue Yahoo in U.S. court under the ATCA in light of the Supreme Court’s interpretation of that statute in a recent case. This will first require a determination of whether the Chinese government violated customary international law⁸ by imprisoning Shi Tao for sending an email. Part III will then examine whether multi-national corporations (“MNCs”), such as Yahoo, could be liable for aiding and abetting the Chinese government in committing a violation of international law. In addition, Part III will discuss a few general hurdles to bringing successful ATCA claims.

Part IV concludes by suggesting that the ATCA is needed to provide a check on the activities of corporations operating in foreign countries. In addition, the conclusion will suggest that Shi Tao may be able to sue Yahoo even after *Sosa*. Yahoo’s liability, however, as well as the liability of MNCs in general, remains uncertain until more district courts have had a chance to apply *Sosa*.

Shi Tao will not be able to achieve justice in China for his decade-long imprisonment,⁹ but he may be able to sue Yahoo in United States

5. *Id.*

6. Tina Rosenberg, *Editorial Observer: Building the Great Firewall of China, With Foreign Help*, N.Y. TIMES EDITORIAL DESK—LATE EDITION, Sept. 18, 2005, at 411 [hereinafter Rosenberg].

7. *Id.*

8. States are bound by customary international law. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH* 74-75 (Erwin Chemerinsky et al. eds., 2002). Customary international law is formed through both state practice and *opinio juris*. *Id.* *Opinio juris* is where states follow an international norm out of a sense of obligation. *Id.*

9. See *infra* Part II.A (describing China’s strict Internet regulations and the harsh punishment for those who violate them, which suggests that the government influenced court system will not provide Shi Tao any justice).

federal court under the Alien Torts Claim Act ("ATCA"),¹⁰ which Congress passed in 1789.¹¹

The statute, which now looms so large in the area of international human rights,¹² is a single sentence that reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹³

For almost 200 years, the ATCA was rarely invoked.¹⁴ Then, in 1980, the *Filártiga v. Peña-Irala*¹⁵ trial vaulted the statute into prominence in the area of human rights.¹⁶ The case involved Paraguayan citizens who successfully sued, in U.S. federal court, a Paraguayan police officer who had tortured and killed one of their relatives.¹⁷ The *Filártiga* case exemplified a suit brought under the ATCA because it satisfied all the elements of the statute; it was a suit, brought by an alien, for a tort, in violation of the law of nations.¹⁸ One significant aspect of the case was that it was the first successful suit brought under the ATCA in U.S. courts by a victim of an international human rights violation.¹⁹ *Filártiga* opened the door for ATCA suits involving human rights abuses.²⁰ In addition, the decision in *Filártiga* was significant because it showed that foreign citizens may sue for human rights abuses committed against them by their own government.²¹ Moreover, *Filártiga* provided other courts a method by which to determine whether a wrong or atrocity fell under the law of nations.²²

10. 18 U.S.C. § 1350 (2006). The ATCA is also referred to as the Alien Tort Statute, ("ATS"). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004).

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

12. BETH STEVENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 7 (1996).

13. 28 U.S.C. § 1350 (2006). Customary international law is the "law of nations." Luisa Antonioli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651, 658 (2005).

14. STEVENS & RATNER, *supra* note 12, at 7.

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

16. STEVENS & RATNER, *supra* note 12, at 7.

17. *Filártiga*, 630 F.2d at 878-79.

18. STEVENS & RATNER, *supra* note 12, at 95. See also 28 U.S.C. § 1350 (2006).

19. STEVENS & RATNER, *supra* note 12, at 2.

20. See *id.* at 12.

21. *Id.* See also *Filártiga*, 630 F.2d at 885.

22. STEVENS & RATNER, *supra* note 12, at 51. The framework laid out by the *Filártiga* court to determine whether an international violation triggers ATCA jurisdiction is as follows: the wrong must be internationally recognized as one which is of "mutual" concern; it must be generally accepted by "civilized nations"; and it must be clear and unambiguous. *Id.* "Courts must interpret international law as it has evolved and exists among the nations today and not as it was in 1789." *Filártiga*, 630 F.2d at 881. The law of nations may be determined by consulting the works of jurists, by the

Then, in 1997, the ATCA was used to bring suit against a MNC.²³ Burmese villagers were able to bring a suit under the ATCA against Unocal, a U.S.-based MNC, for human rights abuses committed by the Myanmar government in furtherance of the construction of a Unocal pipeline in Myanmar.²⁴ *Unocal* was significant because it demonstrated that MNCs, and not just individuals, may be accountable under the ATCA for their actions overseas.²⁵

In 2004, the United States Supreme Court heard for the first time in its history²⁶ a case brought under the ATCA. In *Sosa v. Alvarez-Machain*,²⁷ the Court narrowed the scope of the ATCA without completely precluding its use.²⁸ The Court held that any claim brought under the ATCA "must rest on a norm of international character accepted by the civilized world and defined with a level of specificity comparable to the features of the" three violations of the law of nations of the eighteenth century recognized by the Court.²⁹ This Comment will analyze the extent to which the Supreme Court's decision in *Sosa* has narrowed the scope of the ATCA for aliens seeking to find justice in U.S. federal courts for violations of international law committed overseas.

The *Unocal* decision established that, under the ATCA, federal courts have personal jurisdiction over MNCs.³⁰ Thus, U.S. federal courts would undoubtedly have personal jurisdiction over Yahoo.³¹ The

general usage and practice of nations, or by judicial decisions enforcing and recognizing the law. *Id.* at 880 (citing *United States v. Smith*, 18 U.S. 153, 160-61 (1820)).

23. *John Doe I v. Unocal Corp.*, 963 F. Supp 880, 883 (C.D. Cal. 1997) [hereinafter *Unocal I*], *rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

24. *Unocal I*, 963 at 883.

25. *John Doe I v. Unocal Corp.*, 395 F.3d 932, 954-56 (9th Cir. 2002) [hereinafter *Unocal II*] *vacated by reh'g en banc*, 395 F.3d 978 (9th Cir. 2003). Unocal settled the case out of court for an undisclosed amount. Bloomberg News, *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6.

26. Mark J. Leavy, *Discrediting Human Rights Abuse as an "Act of State": A Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts*, 35 RUTGERS L.J. 749, 782 (2004) [hereinafter Leavy].

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

28. *Id.* at 729.

29. *Id.* at 726. According to the Court, the three actions recognized as violations of the law of nations at the time of the Continental Congress' passing of the ATCA in 1789 were: 1) violation of safe conducts; 2) infringement on the rights of ambassadors; and 3) piracy. *Id.* See *infra* note 104 for a description of the violations.

30. Joshua M. Chanin, *"The Regulatory Grass is Greener": A Comparative Analysis of the Alien Tort Claims Act and the European Union's Green Paper on Corporate Social Responsibility*, 12 IND. J. GLOBAL LEGAL STUD. 745, 760 (2005) [hereinafter Chanin]. See also *Unocal II*, 395 F.3d at 954-56 (holding that Unocal may be held liable under the ATCA for aiding and abetting the Myanmar military which subjected plaintiffs to murder and rape).

31. Personal jurisdiction over a defendant requires either the defendant's presence within the territorial jurisdiction of the court or, that a defendant "have certain minimum contacts with the forum state such that the maintenance of the suit does not offend

remaining issue then is whether the Supreme Court's interpretation of the ATCA in *Sosa* would allow Shi Tao to sue Yahoo for aiding and abetting the Chinese government.³²

II. History of the Internet in China and the History of the ATCA

A. *The Internet in China*

The history of the Internet in China is a relatively short one.³³ One reason for this is that, during China's Cultural Revolution from 1966 to 1976, China shut itself off economically from the rest of the world.³⁴ This changed after Mao Zedong's death in 1978 when Mao's successor, Deng Xiaoping, as leader of the People's Republic of China ("PRC"), introduced an economic open-door policy.³⁵ China's first computer network appeared in 1987,³⁶ but actual commercial use of the Internet did not begin until mid-1995.³⁷ Although late in starting, China's Internet use has grown exponentially in the last two decades.³⁸ Today, there are 100 million Internet users in China, second only to the United States.³⁹

China, led by the Chinese Communist Party, ("CCP"), faced a

traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

32. The ATCA does not allow suits against foreign governments; therefore, Shi Tao will not be able to sue the Chinese government. STEVENS & RATNER, *supra* note 12, at 22. See also 28 U.S.C. §§ 1330, 1603(a), & 1605-07 (2005) (the Foreign Sovereign Immunities Act). The Foreign Sovereign Immunities Act grants a district court jurisdiction over a civil action against a foreign state only if one of three exceptions to foreign sovereign immunity apply. *Unocal II*, 395 F.3d at 956. The three exceptions are when the action is based upon: 1) a commercial activity carried on in the U.S. by the foreign state; 2) an act performed in the U.S. in connection with a commercial activity of the state elsewhere; or 3) an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the U.S. *Id.*

33. Richard Cullen & D.W. Choy, *The Internet in China*, 13 COLUM. J. ASIAN L. 99, 103 (1999) [hereinafter Cullen & Choy].

34. *Id.* at 107.

35. Aaron D. McGeary, Comment, *China's Great Balancing Act: Maximizing the Internet's Benefits While Limiting its Detriments*, 35 INT'L LAW. 219, 220 (2001) [hereinafter McGeary].

36. Cullen & Choy, *supra* 33, at 103.

37. *Id.* at 105. Before 1995, most of the computer networks in China operated principally for academic purposes. *Id.*

38. See Timothy L. Fort & Liu Junhai, *Chinese Business and the Internet: The Infrastructure for Trust*, 35 VAND. J. TRANSNAT'L L. 1545, 1547 (2002).

39. David Barboza, *International Business; Yahoo is Paying \$1 Billion for 40% Stake in Alibaba*, N.Y. TIMES, Aug. 11, 2005, at C4 [hereinafter Barboza]. Analysts estimate that by the year 2010 China will surpass the U.S. in number of Internet users. *Id.*

dilemma with the emergence of the Internet.⁴⁰ While China realized it needed the Internet to become economically powerful and to continue modernization, it also realized that the Internet allows for the free exchange of ideas worldwide.⁴¹ This created a challenge for the CCP, which has a policy of maintaining ideological unanimity by controlling all sources of information.⁴² Dissidents during the Student Democratic Movement in 1989 used facsimile ("fax") machines, which were a new communication technology at the time, to disseminate information about the movement between themselves and the outside world.⁴³ The Chinese government, with the 1989 Tiananmen Square "disaster" in mind, realized that the Internet is an even more powerful communication tool than fax machines and, therefore, had to be controlled.⁴⁴ The Chinese government's solution was to pass numerous laws regulating use of the Internet.⁴⁵ The Chinese government has also created a nationwide firewall,⁴⁶ which only allows access to government approved sites.⁴⁷ The Chinese government, in essence, by controlling what information comes and goes, has created a nationwide intranet.⁴⁸ Critics of China's Internet policies have dubbed this intranet "The Great Chinese Firewall."⁴⁹

The systematic regulation of the Internet in China began in 1996 with the Interim Provisions Governing the Management of Computer Information Networks in the People's Republic of China Connecting to the International Network, ("Interim Provisions"), which control international connections to the Internet.⁵⁰ Under the Interim Provisions, the government had to approve all networks with international connections to the Internet.⁵¹ The connections were then subject to

40. Cullen & Choy, *supra* note 33, at 109.

41. *Id.*

42. *Id.*

43. *Id.* at 109-10.

44. *Id.* at 110.

45. Shamoi Shipchandler, *The Wild Wild Web: Non-Regulation as the Answer to the Regulatory Question*, 33 CORNELL INT'L L.J. 435, 441 (2000) [hereinafter Shipchandler].

46. A firewall is a security scheme that prevents unauthorized users from gaining access to a computer network or that monitors transfers of information to and from the network. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 663 (Houghton Mifflin Company 4th ed. 2000) [hereinafter AMERICAN HERITAGE DICTIONARY].

47. Shipchandler, *supra* note 45, at 441.

48. *Id.* at 447. An intranet is a privately maintained computer network that can be accessed only by authorized persons, especially members or employees of the organization that owns it. DICTIONARY, *supra* note 46, at 918.

49. Steve Bird, *U.S. Defends Its Control Over New Domains in Last-Minute Global Deal*, TIMES (UK), Nov. 17, 2005, at 7.

50. Cullen & Choy, *supra* note 33, at 119.

51. *Id.* at 120.

governmental supervision.⁵² The Interim Provisions made it illegal for users of the Internet to transmit or receive certain information that “affects public order” or “endangers national security.”⁵³ These regulations also required Internet service providers (“ISPs”)⁵⁴ to self-regulate, which means that if the content of any messages sent or received through the ISP fell into an illegal category, the ISP is subject to non-compliance penalties.⁵⁵ Additionally, in 1996, the Ministry of Public Security⁵⁶ (“MPS”) required that all Internet users, as well as all ISPs, register with the MPS within thirty days of connecting to the Internet,⁵⁷ subject to being “severely dealt with.”⁵⁸ In 1998, the Chinese government passed the Provisions on Safeguarding the Security of Domestic Computer Networks in Linking with the Internet.⁵⁹ While these were based mostly on previous regulations, they further detailed the responsibilities of interconnecting networks, ISPs, and Internet users.⁶⁰

The 2000 regulations are similar to those passed in 1996,⁶¹ but they more clearly defined which activities are prohibited.⁶² These regulations can be divided into economic and informational regulations.⁶³ The economic regulations focus on websites whose owners operate them for profit.⁶⁴ Owners of websites wanting to do business on the Internet must obtain a license from the Ministry of Information Industry,⁶⁵ which now oversees China’s Internet infrastructure.⁶⁶ Once the owner of the website has received a license, he or she must maintain personnel for “information checks” by the CCP to ensure that any unlawful

52. *Id.*

53. *Id.* at 120-21.

54. An ISP is a company that provides access to the Internet for a fee. Webopedia, <http://www.webopedia.com/TERM/I/ISP.html> (last visited Jan. 5, 2005).

55. Clara Liang, Note, *Red Light, Green Light: Has China Achieved Its Goals Through the 2000 Internet Regulations?*, 34 VAND. J. TRANSNAT’L L. 1417, 1432 (2001) [hereinafter Liang].

56. The MPS’s purpose is to police Chinese society in general. Cullen & Choy, *supra* 33, at 113-14. With respect to the Internet in China, the MPS ensures that the Internet is not used to leak state secrets, to conduct political subversion, or to spread pornography or violence. *Id.*

57. *Id.* at 122.

58. Scott E. Feir, *Regulations Restricting Internet Access: Attempted Repair of Rupture in China’s Great Wall Restraining the Free Exchange of Ideas*, 6 PAC. RIM L. & POL’Y J. 361, 370 (1997).

59. Cullen & Choy, *supra* note 33, at 122-23.

60. *Id.* at 123-24.

61. Liang, *supra* note 55, at 1432.

62. *Id.* at 1436.

63. *Id.* at 1432.

64. *Id.* at 1433.

65. *Id.* at 1431.

66. Cullen & Choy, *supra* note 33, at 120.

information is removed from the website.⁶⁷

The regulations passed in 2000 that deal with information are the Measures for Managing Internet Information Services ("Measures").⁶⁸ The Measures regulate both Internet information services ("IIS")⁶⁹ and ISPs and the types of information they provide.⁷⁰ IIS providers are required to display their license or record number on the home page of their websites and guarantee that their information is legal.⁷¹ The IIS is subject to heavy fines if the government deems any information illegal.⁷² IISs and ISPs that supply information are required to keep records of the type of information they post, the time it was posted, and the website or domain address from which the information originated.⁷³ ISPs and IISs must keep these records for sixty days and must supply them to authorities upon demand.⁷⁴ Violation of the Measures will result in fines or in the government shutting down the website.⁷⁵

In addition to the numerous Internet regulations, the Chinese government has created a nationwide firewall that blocks use of many websites and restricts Internet searches for certain words or subjects.⁷⁶ China has created this firewall with the help of sophisticated filtering software supplied by American corporations⁷⁷ who have their sites on

67. Liang, *supra* note 55, at 1433.

68. *Id.* at 1436.

69. *Id.* at 1435. An IIS is a service that provides Internet users with information via the Internet. *Id.*

70. *Id.* at 1436.

71. *Id.*

72. *Id.*

73. China's Internet Regulations, China ePulse, <http://www.chinaepulse.com/html/regulation.html>, at Article 11 (last visited Jan. 18, 2005) [hereinafter China ePulse].

74. Liang, *supra* note 55, at 1436.

75. China ePulse, *supra* note 73, at Article 19. In 2002, the government shut down 150,000 unlicensed cybercafés. Internet Filtering in China in 2004-2005: A Country Study, <http://www.opennetinitiative.net/studies/china/>, at Part 2.C.2.d. [hereinafter Internet Filtering] (last visited Dec. 14, 2005). In 2004, the government shut down 12,000 more cybercafés and banned children under sixteen from cybercafés altogether. *Id.* The new regulations now require that all cybercafés be licensed and that they install software that filters more than 500,000 banned sites. Jill R. Newbold, Note, *Aiding the Enemy: Imposing Liability on U.S. Corporations for Selling China Internet Tools to Restrict Human Rights*, 2003 U. ILL. J.L. TECH & POL'Y 503, 510 (2003) [hereinafter Newbold]. The laws also ban minors from cybercafés and require owners of cybercafés to register all users. *Id.* Owners must keep records of their patrons' use of the Internet for sixty days and provide the records to authorities upon request. *Id.* Recent regulations force bloggers and those who own websites to register their sites with the government. Howard W. French, *China Tightens Restrictions on Bloggers and Web Sites*, N.Y. TIMES, June, 8, 2005, at A6. Sites that fail to comply will be shut down. *Id.* In addition, the Chinese government has hired online commentators who enter Internet chat rooms to put a pro-government spin on the conversations. *Id.*

76. Newbold, *supra* note 75, at 510.

77. *Id.* at 513.

China's quickly expanding Internet market.⁷⁸ For example, Cisco Systems sold routers to China that form the backbone of China's Internet access.⁷⁹ These routers have the capability to block connections based upon key words and they allow monitoring of email.⁸⁰ Other American companies supplying China with technology to develop its firewall include: Websense, which has given the Chinese government sophisticated filtering and monitoring techniques;⁸¹ Microsoft, whose proxy servers block certain webpages;⁸² and, Nortel, which aids the Chinese government in tracking citizens' surfing habits.⁸³ It seems that Yahoo and most of its rivals have chosen to cooperate with the Chinese authorities rather than risk losing access to China's fast-growing Internet marketplace.⁸⁴

American companies over the last couple of years have shown increased willingness to comply with the Chinese government's Internet regulations.⁸⁵ Google has removed certain controversial stories from its Google News site in China.⁸⁶ Microsoft has agreed to block content from its Chinese blog⁸⁷ site about "dangerous" topics such as "democracy" and "human rights."⁸⁸ In 2002, Yahoo voluntarily signed a pledge of "self-discipline," vowing to refrain from posting "pernicious

78. Barboza, *supra* note 39, at C4.

79. Jonathon Mirsky, *China's Tyranny Has the Best Hi-Tech Help Censoring the Internet*, INT'L HERALD TRIB., Jan. 16, 2006, at 6 [hereinafter Mirsky].

80. Newbold, *supra* note 75, at 513. A whistleblower reported that Cisco created a router especially for the Chinese government. Norman Schorr & Jeremy Main, *China Censors Aided by U.S. Firms*, Overseas Press Club of America, 2004, http://www.opcofamerica.org/events/articles/092005_chinainternet.php. Cisco Systems allegedly modified the router to allow the Chinese government to search for use of "subversive" key words, visits to prohibited websites, and transmissions of "dangerous" email. Dave Kopel, *U.S. Web Firms Aid in Repression: Yahoo!, Google, Microsoft Complicit in China's Stranglehold on Information*, ROCKY MTN. NEWS, Sept. 24, 2005, at 14C.

81. Newbold, *supra* note 75, at 513.

82. *Id.*

83. *Id.*

84. Kahn, *supra* note 1, at C11.

85. See Mirsky, *supra* note 79, at 6 (companies are signing pledges to obey regulations and to block any information the Chinese government tells them must be blocked). Companies justify their compliance by stating that they must try to get along with countries, that they must obey country laws, or that their presence in the country will help create more freedoms concerning information and speech. *Id.*

86. Debra J. Saunders, *Don't be Google*, S.F. CHRON., Jan. 26, 2006, at B9 [hereinafter Saunders].

87. Blog is short for Web log. Webopedia, <http://www.webopedia.com/TERM/b/blog.html> (last visited Jan. 5, 2005). It is a web page that serves as a publicly accessible personal journal for an individual. *Id.* Blogs are typically updated daily and reflect the personality of the author. *Id.*

88. Saunders, *supra* note 86, at B9.

information that may jeopardize state security.”⁸⁹ Most recently, Yahoo showed how far it will bow down to the will of the CCP when it helped the CCP put Shi Tao in jail for ten years for sending an email.⁹⁰ Yahoo’s compliance with the Chinese regulations may be due to the fact that in 2005, Yahoo paid \$1 billion in cash and handed over its operations in China to Alibaba.com in exchange for a forty percent share in Alibaba.com, China’s largest e-commerce company.⁹¹

B. *The Alien Torts Claim Act*

Congress enacted the ATCA as part of the Judiciary Act of 1789.⁹² The ATCA confers federal subject matter jurisdiction when: 1) an alien sues; 2) for a tort; 3) committed in violation of the law of nations, (i.e. international law), or a treaty of the United States.⁹³ The original purpose of the ATCA is unclear, but there are four theories as to what the original purpose might have been.⁹⁴ Two theories suggest that Congress enacted the ATCA to allow federal courts to have jurisdiction over torts committed in the U.S. against foreign diplomats.⁹⁵ Before Congress enacted the ATCA, the federal government could only urge state courts to take action where torts were committed against foreign diplomats.⁹⁶

89. Editorial, *U.S. Firms Help China Censor Fr**dom, D*mocr*cy*, USA TODAY, June 20, 2005, at 14A [hereinafter *China Censor*].

90. Kahn, *supra* note 1, at C11.

91. Barboza, *supra* note 39, at C4.

92. STEVENS & RATNER, *supra* note 12, at 7. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77 (1789).

93. Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995). Piracy, genocide, war crimes, slavery, hijacking of aircraft and perhaps certain acts of terrorism are of universal concern., i.e. crimes that can be punished by states whether or not the offense was committed on their territory or otherwise would have been subject to their jurisdiction. STEVENS & RATNER, *supra* note 12, at 57 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 404 (1987) [hereinafter RESTATEMENT (THIRD)]). In addition, section 404 of the Restatement (Third) identifies *jus cogens* norms, which are binding on all nations whether or not they have consented to them. *Id.* Examples include genocide, slavery, summary execution, disappearance, torture, cruel, inhuman or degrading treatment, prolonged arbitrary detention, and systematic racial discrimination. *Id.* *Jus cogens* norms are peremptory norms, meaning that they are “accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” John Doe I v. Unocal Corp., 395 F.3d 932, 964 (9th Cir. 2002), *vacated by reh’g en banc*, 395 F. 3d 978 (9th Cir. 2003) (citing the Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

94. STEVENS & RATNER, *supra* note 12, at 14.

95. *Id.*

96. *Id.* In 1781, the Continental Congress asked the states to punish violations of rights guaranteed under the law of nations. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The crimes that the congressional resolution asked the states to provide adequate punishment for were violations including “the violation of safe conducts or passports,”

One of the theories based on torts committed against foreign diplomats claims that the purpose of the ATCA was to save the federal government from international embarrassment.⁹⁷ The theory holds that Congress passed the ATCA as a reaction to an attack by a French nobleman on a French diplomat that took place in the United States in 1784.⁹⁸ France demanded action, but the United States government, in what was probably viewed as an embarrassing lack of power, could only urge the state court to take action.⁹⁹

The second theory based on torts committed by foreign diplomats holds that Congress passed the ATCA to allow the federal government the power to quash potential reasons for foreign countries to declare war on a young and weak United States.¹⁰⁰ If a foreign diplomat was denied justice in the U.S. because the U.S. government was powerless to provide justice, this could have been reason for the diplomat's country to declare war on the U.S.¹⁰¹

A third theory suggests that the ATCA was part of a broad statutory scheme to incorporate international law into the law of the United States.¹⁰² The fourth theory holds that the ATCA was passed to afford jurisdiction only for the three international law violations recognized at the time of the law's passage:¹⁰³ 1) offenses against ambassadors 2) violations of safe conduct and 3) piracy.¹⁰⁴ No court has adopted this

"infractions of the immunities of ambassadors" and "infractions of treaties and conventions to which the United States are a party." *Id.* Only one state acted upon Congress' request. *Sosa*, 542 U.S. at 743-44.

97. STEVENS & RATNER, *supra* note 12, at 15.

98. *Id.* at 14. This theory may be the result of a particular episode called the Marbois Affair, which occurred in 1784. *Sosa*, 542 U.S. at 744. A French adventurer, Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. *Id.* Congress again asked for state legislation addressing such issues. *Id.* The French minister lodged a formal protest with the Continental Congress and threatened to leave Philadelphia, "unless the decision of Longchamps should give them full satisfaction." *Id.*

99. STEVENS & RATNER, *supra* note 12, at 14.

100. *Id.* at 15.

101. *Id.*

102. *Id.* at 16.

103. *Id.* at 17. See *infra* note 154 (at least one commentator argues that there were many other violations of the law of nations recognized by the First Congress and early judiciary than just the three recognized by the *Sosa* court).

104. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The violation of safe conducts refers to the privilege granted by a country or international convention that protects a person from arrest or harassment while making a journey abroad. STEVENS & RATNER, *supra* note 12, at 84. Infringement of the rights and immunities of ambassadors refers to international law that a diplomat shall not be detained or arrested. In addition, the receiving state shall take all steps to prevent any attack on the diplomat's personal freedom and dignity. *Id.* See also *supra* note 98 and accompanying text (describing an attack by a French ambassador on a French nobleman that may have been the main reason why the First Congress passed the ATCA). Piracy is one of the oldest recognized

static view and it has been greatly criticized by international law scholars.¹⁰⁵

C. Major Cases Involving the ATCA

1. *Filártiga v. Peña-Irala*¹⁰⁶

Before 1980, only twenty-one cases invoked jurisdiction under the ATCA.¹⁰⁷ Then, in 1980, Joel Filártiga and his daughter Dolly, both citizens of Paraguay, used the ATCA to sue a Paraguayan police officer who had tortured and killed Joel's son and Dolly's brother.¹⁰⁸ The police officer had entered the U.S. illegally and was living in New York when Dolly learned of his presence there, allowing her and her father to bring suit against him for wrongful death by torture.¹⁰⁹

The court in *Filártiga* held that the right to be free from torture was a fundamental human right that had become part of international law.¹¹⁰ The court also held that the First Congress was authorized by Article III to enact the ATCA.¹¹¹ A case arises under the laws of the United States for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States.¹¹² The court reasoned that international law became a part of the common law of the United States by looking at the history surrounding the adoption of the Constitution and the fact that international law is an integral part of the common law.¹¹³ Therefore, a case alleging a violation of international law, under

violations of the law of nations whose traditional definition was "robbery on the high seas." STEVENS & RATNER, *supra* note 12, at 81-82. Today, however, piracy covers any acts of violence or detention, committed for private ends, by the crew or passengers of a ship or aircraft that are directed against another ship or aircraft in an area outside the jurisdiction of any state. *Id.* at 82.

105. STEVENS & RATNER, *supra* note 12, at 17.

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

107. STEVENS & RATNER, *supra* note 12, at 8.

108. *Filártiga*, 630 F.2d at 878-79.

109. *Id.* The venue provision of the ATCA provides that a civil action may be brought against a defendant in any district where the defendant resides, is served, or has an agent. Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent. 18 U.S.C. § 2334(a) (2005).

110. *Filártiga*, 630 F.2d at 884.

111. *Id.* at 886.

112. *Id.*

113. *Id.* During the 18th-century, it was taken for granted that the law of nations formed a part of the common law. *Id.* (citing 1 BLACKSTONE, COMMENTARIES 263-63 (1st ed. 1765-69)). "It is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case." *Id.* This doctrine was brought to America in the colonial years as part of the legal heritage from England. *Id.* One of the principal defects of the Confederation that the Constitution was meant to remedy was the

the ATCA, arises under the law of the United States for Article III purposes.¹¹⁴ The court further held that courts must interpret international law, not as it was in 1789, but as it has evolved and exists among the nations of the world today.¹¹⁵ To determine international law as it exists today, courts must look at the works of jurists, the general usage and practice of nations, and to judicial decisions.¹¹⁶

2. *Kadic v. Karadzic*¹¹⁷

Another significant case involving the ATCA was *Kadic v. Karadzic*, where citizens of Bosnia-Herzegovina sued Rodovan Karadzic, President of the self-proclaimed Bosnian-Serb republic of "Srpska" for human rights abuses committed by Bosnian military forces under his control.¹¹⁸ Karadzic, formerly a citizen of Yugoslavia before becoming a citizen of Bosnia-Herzegovina, became the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina.¹¹⁹ Karadzic had total command of the Bosnian-Serb military forces that carried out systematic human rights violations against Croat and Muslim citizens of Bosnia-Herzegovina.¹²⁰

Karadzic was personally served while in the United States as an invitee of the United Nations.¹²¹ At trial, Karadzic argued that he was not liable under the ATCA because he did not act under color of state law.¹²² The court, however, held that certain violations of the law of nations, such as genocide and war crimes, are not only actionable if committed by those acting under the color of law but also if committed by private individuals.¹²³ Furthermore, the court held that, although crimes such as torture, rape, and summary execution require state action to be actionable under the ATCA, they do not require state action if committed in pursuit of crimes, such as genocide or war crimes, that do

federal government's inability to punish violations of treaties or of the law of nations. *Id.* Thomas Jefferson stated that the very purpose of the Union was "to make us one nation as to foreign concerns and keep us distinct in domestic ones." *Id.*

114. *Filártiga*, 630 F.2 886.

115. *Id.* at 881.

116. *Id.* at 880 (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)).

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

118. *Id.* at 237.

119. *Id.*

120. *Id.*

121. *Id.* See *supra* note 109 (describing service under the ATCA).

122. *Id.* at 238.

123. *Kadic*, 70 F.3d at 240. See also STEVENS & RATNER, *supra* note 12, at 97. The court cites section 404 of the Restatement (Third), which suggests that certain crimes, such as piracy, slave trade, hijacking aircraft, and genocide are of such universal concern that private citizens may be liable under the ATCA for committing these crimes despite lack of state action. *Kadic*, 70 F.3d at 240 n.4. See also RESTATEMENT (THIRD) § 404.

not require state action.¹²⁴ The court also noted that Congress indicated that the ATCA should remain intact to permit suits based on already existing norms in international law or those norms that may in the future become customary international law.¹²⁵

3. *John Doe I v. Unocal Corp. ("Unocal II")*¹²⁶

Subsequently, in *Unocal II*, the Ninth Circuit recognized that suits could be brought under the ATCA against multi-national corporations (MNCs) for their overseas violations of international law.¹²⁷ In 1997, a group of Burmese villagers brought suit against the Unocal Corporation for human rights abuses.¹²⁸ Unocal was part of a joint venture to construct a natural gas pipeline from Myanmar (Burma)¹²⁹ to Thailand.¹³⁰ Unocal and its partners hired the Myanmar military to guard the pipeline.¹³¹ The villagers alleged that the Myanmar military forced them and other villagers to work on the pipeline.¹³² In addition, the villagers alleged that the Myanmar military raped and murdered some of the villagers forced to work on the pipeline.¹³³ There was sufficient evidence that Unocal knew of the abuses and assisted, as well as encouraged, the Myanmar military to commit those abuses.¹³⁴ The Ninth Circuit held that murder, rape, and torture, when committed in the furtherance of forced labor, give rise to liability under the ATCA even in the absence of state action.¹³⁵ The court, therefore, denied Unocal's motion for summary judgment on the villagers' ATCA claims of forced labor, murder, and rape.¹³⁶

124. *Kadic*, 70 F.3d at 244.

125. *Id.* at 241 (citing 1992 U.S.C.C.A.N. 84, 86).

126. *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated by reh'g en banc*, 395 F.3d 978 (9th Cir. 2003).

127. *Id.* at 962.

128. *John Doe I v. Unocal Corp.*, 963 F.Supp. 880, 883 (C.D. Cal. 1997), *rev'd in part*, 395 F.3d 932 (9th Cir. 2002).

129. In 1989, a military dictatorship took control of Burma and renamed the country Myanmar. Janet Love Morrison, *Getting to the Heart of Myanmar*, *GLOBE AND MAIL*, Feb. 12, 2003, at T5. The name Myanmar is recognized by the United Nations but ignored by the citizens of Burma. *Id.* The United States continues to use the name Burma and not Myanmar. Editorial, *Asian Rivals: America's New Challenges in the Far East*, *PITT. POST-GAZETTE*, Jan. 14, 2004, at A18.

130. *Unocal II*, 395 F.3d at 937.

131. *Id.*

132. *Id.*

133. *Id.* at 939.

134. *Id.* at 952.

135. *Id.* at 953.

136. *Unocal II*, 395 F.3d at 962. Following the holding in *Kadic*, the *Unocal II* court held that forced labor is a modern variant of slavery, which is a violation of the law of nations that does not require state action for an individual entity to be liable. *Id.* at 946.

This review by the Ninth Circuit of the *Unocal II* case was vacated by the subsequent decision by the Ninth Circuit to rehear the case en banc.¹³⁷ The Ninth Circuit waited for almost two years to rehear the case, presumably waiting for the Supreme Court to hand down its decision in *Sosa*.¹³⁸ However, the Ninth Circuit did not get a chance to rehear *Unocal II* and apply *Sosa* because on December 13, 2004, Unocal decided to settle the claims for an undisclosed amount.¹³⁹

4. *Sosa v. Alvarez-Machain*¹⁴⁰

On June 29, 2004, the Supreme Court decided the case of *Sosa v. Alvarez-Machain*.¹⁴¹ This was the first time in its history that the Supreme Court had heard a case brought under the ATCA.¹⁴² Alvarez was a Mexican doctor who the Drug Enforcement Administration (“DEA”) believed had prolonged a captured DEA agent’s life in Mexico to allow the agent’s captors to prolong the questioning and torturing of the agent.¹⁴³ A federal grand jury indicted Alvarez and a district court issued a warrant for his arrest.¹⁴⁴ Unable to persuade the Mexican government to extradite Alvarez to the United States, the DEA hired Mexican nationals, one being Jose Francisco Sosa, to capture Alvarez and bring him back to the United States.¹⁴⁵ Sosa and the other Mexican nationals captured Alvarez and brought him to the U.S. where he was subsequently acquitted.¹⁴⁶ Alvarez then returned to Mexico where he sought damages from Sosa under the ATCA based upon a claim of arbitrary detention.¹⁴⁷ The Supreme Court ultimately ruled against Alvarez on his ATCA claim against Sosa.¹⁴⁸

The Court held that the First Congress intended the ATCA to be a jurisdictional statute that would address the power of the courts to entertain cases concerned with certain violations of international law.¹⁴⁹ According to the Court, however, the First Congress did not intend the

137. *Id.* at 978-79.

138. Kenneth J. Rose, *The World Gets a Little Smaller: International Employers May Find Themselves Sued in the U.S. for Egregious Overseas Labor Practices*, Findlaw, Sept. 27, 2004, <http://library.findlaw.com/2004/Sep/27/133590.html>.

139. Girion, *Unocal to Settle Human Rights Claims*, L.A. TIMES, Dec. 14, 2004, at A1.

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

141. *Id.*

142. Leavy, *supra* note 26, at 782.

143. *Sosa*, 542 U.S. at 697.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 698.

148. *Sosa*, 542 U.S. at 738.

149. *Id.* at 714.

ATCA to serve as authority for courts to create new causes of action for torts in violation of international law.¹⁵⁰ The jurisdictional grant by the First Congress was enacted on the understanding that the common law would provide a cause of action for the few international law violations with a potential for personal liability at the time.¹⁵¹ The Court found no reason to believe that the First Congress had in mind any violations of the law of nations beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.¹⁵²

The Court also found that Congress intended the ATCA to have practical effect the moment it became law,¹⁵³ despite the fact that there was no additional statute expressly authorizing adoption of causes of action.¹⁵⁴ The Court, therefore, assumed that the First Congress gave district courts the power to hear private causes of action for certain torts that were in violation of the law of nations.¹⁵⁵ Although the Court assumed that the First Congress had only three violations in mind, the Court found nothing in the 200-year history of the ATCA to preclude federal courts from recognizing any claim under the law of nations as an

150. *Id.* at 724.

151. *Id.*

152. *Id.* This finding of the Court, for some reason, overlooks many violations of international law recognized by the Continental Congress and the early judiciary. Jordan J. Paust, *International Law Before the Supreme Court: A Mixed Record of Recognition*, 45 SANTA CLARA L. REV. 829, 848-49 (2005) [hereinafter Paust]. More specifically, the early Supreme Court recognized that all trespasses committed against the general law of nations are actionable in any nation. *Id.* at 849 (citing *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159-61 (1795)). The Court thereby also recognized universal jurisdiction for all such trespasses. *Id.* at 849 n.101. Confiscation of property was recognized by the Court as a violation of the law of nations. *Id.* at 849 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 227, 229 (1796)). The 1781 Resolution listed two more recognized violations of the law of nations: (1) breaches of neutrality, and (2) all infractions of treaties. *Id.* at 849 n.100. See also *supra* note 96 and accompanying text (listing the violations in the resolution). U.S. tribunals must also address the laws of war. *Id.* at 849 n.104 (citing *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Brown v. United States*, 12 U.S. (8 Cranch) 110, 149, 153 (1814) (Story, J., dissenting); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28, 39 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800); *Ware v. Hylton*, 3 U.S. (3 Dall.) 133, 279 (1796)). Moreover, Blackstone had expressly referred to the "rights of man" and "rights of mankind," which were phrases covering human rights. *Id.* at 849 n.100.

153. See *Sosa*, 542 U.S. at 724. The Court referred to scholars of federal jurisdiction and legal history to determine that the ATCA had practical effect the moment it became law. *Id.* See generally *id.* at 716-18 (referring to the Marbois Affair and the inability of the federal government to punish violations of international law). See also *supra* note 98 and accompanying text.

154. *Sosa*, 542 U.S. at 719. The principal drafter of the ATCA was Oliver Ellsworth who had been a member of the Continental Congress that passed the 1781 resolution asking the states to punish certain violations of the law of nations, and a member of the Connecticut Legislature that followed the Congressional request. *Id.* See *supra* note 96 (describing the resolution).

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

element of common law.¹⁵⁶ This view was also supported by the fact that Congress has neither amended the ATCA nor limited civil common law power by another statute.¹⁵⁷

Although the Court found that the history of the ATCA allows courts to recognize any claim under the law of nations, the Court thought it necessary to limit the scope of ATCA claims that federal courts could hear.¹⁵⁸ The Court did so by requiring "any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."¹⁵⁹ In addition, the Court stressed that determination of whether an international norm meets this standard must involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts.¹⁶⁰ Furthermore, the Court listed five reasons for judicial caution when considering which claims might be heard under the ATCA.¹⁶¹

The first reason for judicial caution is that the conception of the common law has changed since 1789.¹⁶² At that time, common law was viewed as a transcendental body of law outside that of any state but obligatory within the state unless changed by statute.¹⁶³ Now, however, common law is usually considered to be made by courts, rather than found or discovered, creating a need for courts to use discretion when relying on an international norm.¹⁶⁴

The second reason for judicial caution, which is linked to the first, is the effect of *Erie Railroad Co. v. Tompkins*.¹⁶⁵ The Court in *Erie* denied the existence of any federal "general" common law except in certain areas.¹⁶⁶ Despite these exceptions in certain areas, the general practice is

156. *Id.*

157. *Id.* at 725. One legal scholar, Jordan J. Paust, has argued that a violation of the law of nations, (i.e. customary international law), was not intended as a violation of common law but a violation against the laws of the United States. Paust, *supra* note 152, at 850-51. Paust contends that it is strange that Justice Souter in *Sosa* even addressed common law when the law of nations is not common law nor is it limited to or by common law. *Id.* at 851. Paust contends that Justice Souter must have been misled. *Id.* See Paust, *supra* note 152, at 851 n.118 (discussing in depth how Souter was misled).

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

159. *Id.*

160. *Id.* at 732-33.

161. *Id.* at 724.

162. *Id.*

163. *Id.* (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

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

165. *Id.* at 726; *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

166. *Sosa*, 542 U.S. at 726 (citing *Erie*, 304 U.S. at 78). Some of these areas include situations where the Court was authorized by Congress to create a body of law or where

for federal courts to look for legislative guidance before exercising authority over substantive law.¹⁶⁷

The third reason for judicial caution is that the Court has repeatedly held that the creation of a private right of action is usually better left to legislative judgment.¹⁶⁸ Fourth, there may be collateral consequences to

the Court deemed it necessary to create federal common law rules in interstitial areas of particular federal interest. *Id.* The Court has also deemed it necessary to make judicial rules of decision of particular importance to foreign relations. *Id.* Justice Scalia, in his concurrence, argued that *Erie* precludes the federal courts from recognizing any violations in international law other than the three violations that were believed to be recognized by the First Congress in 1789. *Id.* at 749. The majority believed this position to be without merit in light of the fact that for 200 years the Court has affirmed that the domestic law of the United States recognized the law of nations. *Id.* at 729. Scalia's view is also unconvincing in view of legislative history, beginning with the First Congress, some of whose members were Framers. *Id.* The First Congress, when passing the ATCA, assumed that federal courts could properly identify some international norms as enforceable under the ATCA. *Id.* It is unreasonable to think that the First Congress expected federal courts to lose this power simply because "the common law might lose some metaphysical cachet on the road to modern realism." *Id.* Many federal courts, such as *Filártiga*, have taken the majority's position. *Id.* at 753. In addition, Congress has not passed legislation to preclude federal courts from enforcing violations of international norms. *Id.* In fact, when Congress passed the Torture Victim Protection Act, it stated that the ATCA should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." *Id.* at 728.

167. *Id.* at 724. Jordan J. Paust believes that any discussion of the common law with regard to the law of nations is irrelevant. Paust, *supra* note 152, at 851. He believes that customary international law was not mere common law and cases like *Erie* had nothing to do with international law. *Id.* In fact, Paust states that Judge Souter, in discussing common law, was misled by a "radically right-winged" group attempting to ignore the relevant views of the Framers and overwhelming trends in judicial opinions, especially in human rights, and to rewrite 200 years of judicial history. *Id.*

The mere "common law" error had been part of a shockingly ahistorical trap created as part of an effort by a small, radically right-winged flock to ignore directly relevant views of the Founders and Framers and overwhelming trends in judicial opinions (especially concerning human rights) and to rewrite 200 years of judicial history. But [sic] the history they do not wish to conserve cannot be swept away by a few (or many) professorial cantations and highly selective briefings by parroting activists that provide the sometime historic accuracy of a check-out counter rag. Justice Scalia swallowed the trappings of the mere "common law" error with ahistorical statements about the relevance of mere "law merchant," unashamed misreadings of cases like *Erie v. Tompkins*, 304 U.S. 64 (1938) and *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286 (1876), and astonishing misstatements about their supposed effect on the continued use of customary international law in U.S. courts with no attention to numerous directly relevant federal and state cases decided after 1876.

Id. at 851 n.118 (In addition, Paust cites numerous Supreme Court cases as proof that international law was not considered mere common law). But see Daphne Eviatar, *Judgment Day: Will an Obscure Law Bring Down the Global Economy?*, BOSTON GLOBE, Dec. 28, 2003, at D1 (explaining the view of former Supreme Court nominee Robert Bork that an "unholy alliance of imperialistic judges and leftist professors" has turned the ATCA into a tool for "judicial imperialism.").

168. *Sosa*, 542 U.S. at 726.

the federal courts' creation of private rights of action for violations of international norms.¹⁶⁹ Specifically, there may be implications to the foreign relations of the United States.¹⁷⁰ Adverse foreign policy consequences might result when U.S. courts claim that foreign governments have mistreated their citizens.¹⁷¹

The fifth reason for judicial discretion is that, although legislative history includes the remark that the ATCA should remain intact to permit suits based on existing international law and norms that may in the future ripen into rules of customary international law, federal courts have no congressional mandate to define what violates international law.¹⁷²

III. Could Yahoo Be Liable Under the ATCA After *Sosa*?

A. *Analysis of Sosa*

Although the Court's decision in *Sosa* seemingly narrowed the scope of claims that can be brought under the ATCA, its vague standard leaves little guidance for lower courts.¹⁷³ The Supreme Court gave lower courts no guidance on how to compare present day violations of international law with the three violations that were allegedly deemed actionable over 200 years ago.¹⁷⁴ Courts hearing cases under the ATCA now must first try to determine the level of acceptance and specificity of those three 18th-century violations recognized by the Court.¹⁷⁵ Second, courts must try to determine if the claim of a present-day violation of international law reaches that same level in both acceptance and specificity.¹⁷⁶

The Court in *Sosa* held that Alvarez's arbitrary detention of less than a day, followed by transfer to lawful authorities and a prompt arraignment, violated no norm of international law that is well defined enough to support a federal remedy.¹⁷⁷ In so holding, the Court stated

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 728.

173. See Grace C. Spencer, *Her Body Is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503, 520-22 (2005) [hereinafter Spencer].

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

175. Spencer, *supra* note 173, at 522.

176. *Id.* at 522. The Court assumed that Congress had intended only those three violations to be actionable when in fact there is evidence that many other violations of the law of nations were recognized by the early judiciary, Congress, and Blackstone. See *supra* note 152 (listing violations of the law of nations that were recognized during the early history of the United States).

177. *Sosa*, 542 U.S. at 738.

that the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR") were well-known international agreements but had little use under the standard set out in their opinion.¹⁷⁸ This seems contradictory to the Court's earlier statement that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th-century paradigms we have recognized."¹⁷⁹ In light of this standard, it is troubling that the Court dismissed the UDHR and the ICCPR, two of the world's most important human rights instruments.¹⁸⁰ International agreements, covenants, and treaties are all excellent means to determine the state of international law as evidenced by the circuit authority preceding *Sosa* that looked to international agreements as indicative of international law.¹⁸¹

A possible explanation for the Court's dismissal of the UDHR and the ICCPR is that the Court was closely following its holding in *The Paquete Habana*.¹⁸² The Court in *Sosa* cited *The Paquete Habana* in reference to sources that must be examined to determine the current state of international law.¹⁸³ The Supreme Court in *The Paquete Habana* held that courts must look to jurists and commentators to determine the customs and usages of nations.¹⁸⁴ Thus, the Court in *Sosa* may have dismissed the UDHR and the ICCPR because they were not the works of jurists and commentators on the customs and usages of international law in civilized nations. In other words, the Court may have intended to dismiss the UDHR and the ICCPR because these instruments, in and of themselves, do not show whether a violation of international law has reached the level of acceptance and specificity required by the Court. This assumption is troubling, since many commentators have concluded that most, if not all, of the UDHR has become part of binding, customary international law.¹⁸⁵ In addition, the ICCPR may be partly self-executing.¹⁸⁶

178. *Id.* at 733.

179. *Id.* at 725.

180. *See* Spencer, *supra* note 173, at 522-23 n.181 (stating that the UDHR is the single most cited human rights instrument).

181. *Id.* at 522-23 (citing *Alvarez-Machain v. United States*, 266 F.3d 1045, 1050-53 (9th Cir. 2001)); *Filártiga v. Peña-Irala*, 630 F.2d 876, 881-84 (2d. Cir. 1980); *Beanal v. Freeport McMoran, Inc.*, 969 F. Supp. 362, 372-73 (E.D. La. 1997). *See also* *Kadic v. Karadzic*, 70 F.3d 232, 243 n.7 (2d Cir. 1995).

182. *Sosa*, 542 U.S. at 734 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

183. *Id.*

184. *Id.*

185. STEVENS & RATNER, *supra* note 12, at 56.

186. Paust, *supra* note 152, at 852. A self-executing treaty is one that needs no enforcing legislation because it is enforceable as it is. DANA F. KELLERMAN, ET.AL., THE

However, the most plausible explanation of why the Court dismissed the UDHR and ICCPR may be that Alvarez's claim of arbitrary detention was too broad.¹⁸⁷ The Court's decision may reflect a policy concern of allowing any arbitrary detention to be actionable under the ATCA.¹⁸⁸ It seems improbable that the Court was worried about whether arbitrary detention had reached its standard of universal acceptance. This is because arbitrary detention is prohibited in nearly all countries and in all major international instruments, such as the UDHR and ICCPR.¹⁸⁹ Therefore, it seems likely that the Court was concerned about the breadth, (i.e. lack of specificity), of arbitrary detention as a claim.¹⁹⁰ The Court's fear that Sosa's claim was too broad is further supported by the Court's reference to the Restatement (Third), which states that a detention must be prolonged to violate international law.¹⁹¹ Although the Court held that Alvarez's short detention was not actionable, the Court suggested that prolonged arbitrary detention, in certain circumstances, may violate international law.¹⁹²

LIVING WEBSTER: ENCYCLOPEDIA OF THE ENGLISH LANGUAGE (4th ed. 1975). Article 50 of the ICCPR clearly mandates that all parts of the provisions will extend to all States without exception. *Id.* The U.S. understanding upon ratification was compliance with Article 50. *Id.* at 853. In addition, the ICCPR may be referenced through the ATCA even though the U.S. ratified the ICCPR with the intent that it would not itself create a cause of action. *Id.* The Supreme Court stated that the ICCPR binds the United States as a matter of international law, but it does not create a cause of action. *Sosa*, 542 U.S. at 735. The U.S. ratified the ICCPR with the understanding that it will be "implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein." International Covenant on Civil and Political Rights, Declarations and Reservations, http://www.ohchr.org/english/countries/ratification/4_1.htm, at United States, Understanding (5) (last visited Jan. 27, 2006). In addition, "the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." *Id.* However, the U.S. declared that Articles 1-27, which include arbitrary detention and freedom of expression, are not self-executing. *Id.* at United States, Declaration (1).

187. *See Sosa*, 542 U.S. at 735-37.

188. *Id.* at 736. Alvarez's claim would support a cause of action for any arrest not authorized by the law of the jurisdiction in which it occurred. *Id.* This, in essence, would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting actions already provided for under existing statutes and case law. *Id.*

189. *See infra* Part III.B.1 and accompanying text.

190. Office of the High Commissioner for Human Rights, Universal Declaration of Human Rights, <http://www.unhcr.ch/udhr/lang/eng.htm>, Article 9 [hereinafter UDHR High Commissioner] (last visited Jan. 23, 2006) (stating that arbitrary detention is a violation of international law). International Covenant on Civil and Political Rights, Office of the United Nations' High Commissioner for Human Rights, <http://www.ohchr.org/english/law/ccpr.htm>, at Article 9 [hereinafter ICCPR High Commissioner] (last visited Jan. 23, 2005) (stating that arbitrary detention is a violation of international law).

191. *Sosa*, 542 U.S. at 737. RESTATEMENT (THIRD) § 404 (1987).

192. *Sosa*, 542 U.S. at 737.

If the Court was concerned about the repercussions of allowing brief arbitrary detentions to be actionable under the ATCA, it should have explained why brief arbitrary detentions do not violate the guarantee against arbitrary detentions provided in the UDHR and ICCPR, rather than advocating a wholesale dismissal of the validity or applicability of such agreements in ATCA suits.¹⁹³ The Court required that ATCA claims be “gauged against the current state of international law” by referring to the works of jurists and commentators as to what the customs and usages of civilized nations are.¹⁹⁴ Therefore, it seems that the Court would allow reference to international agreements such as the UDHR and ICCPR if jurists and commentators deem them binding international law. In the case of the UDHR, however, the Court either ignored or dismissed the fact that many commentators and scholars believe the UDHR to be binding international law.¹⁹⁵ It makes little sense for the Supreme Court to expect lower courts to recognize international law as it is today and simultaneously dismiss the UDHR, which is the most universally accepted expression of international law to date.¹⁹⁶

B. Possible Violations of International Law Committed by the Chinese Government Against Shi Tao

1. Prolonged Arbitrary Detention

Arbitrary detention is prohibited in nearly all countries by numerous human rights instruments and judicial decisions.¹⁹⁷ It is also recognized as an international law violation by all branches of the U.S. government.¹⁹⁸ A detention is arbitrary when a person is detained without warrant, probable cause, articulable suspicion, or notice of charges and is not brought to trial.¹⁹⁹ Arbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments including Article 9 of both the UDHR and the ICCPR, Article 5 of the European Convention, Article 6 of the Africa Convention, and Article 7 of the American Convention.²⁰⁰

Most human rights instruments, the International Scholars

193. Spencer, *supra* note 173, at 522-23.

194. *Sosa*, 542 U.S. at 733-34.

195. STEVENS & RATNER, *supra* note 12, at 56 (citing numerous commentators who believe that the UDHR is binding customary international law).

196. Spencer, *supra* note 173, at 522-23.

197. STEVENS & RATNER, *supra* note 12, at 75.

198. *Id.*

199. *Id.*

200. RESTATEMENT (THIRD) § 702 reporters' note.

Affidavit,²⁰¹ and various ATCA cases do not require that arbitrary detention be “prolonged.”²⁰² However, the Court in *Sosa* held that an arbitrary detention must be “prolonged” to be actionable under the ATCA, citing the Restatement (Third) as support.²⁰³ The Court did not state what constitutes a prolonged arbitrary detention, but it did hold that a detention of less than a day followed by a transfer to lawful authorities and prompt arraignment did not constitute a prolonged arbitrary detention.²⁰⁴

Technically, Shi Tao’s detention is not arbitrary because he was arrested on a charge of leaking state secrets and was charged within a reasonable time.²⁰⁵ Shi Tao also admitted to sending the email.²⁰⁶ In addition, he was provided counsel, found guilty at trial, and sentenced to ten years in prison according to state secret laws.²⁰⁷ Nevertheless, the Restatement (Third) may provide Shi Tao with a claim of arbitrary detention against Yahoo.²⁰⁸ The Court in *Sosa* referred to the Restatement (Third) to determine the validity of Alvarez’s ATCA claim,²⁰⁹ suggesting that the Court considers the Restatement (Third) a good example of the work of jurists and commentators as to the state of

201. *Affidavit of International Law Scholars, submitted in Ortiz v. Gramajo*, No. 91-11612 (D. Mass. Filed June 13, 1991).

202. STEVENS & RATNER, *supra* note 12, at 76.

203. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (citing RESTATEMENT (THIRD) § 404 (1987)). The Court reasoned that by allowing any arbitrary detention by state officers anywhere in the world to be actionable under the ATCA a situation would arise where there would be a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting existing remedies for such violations. *Id.* It would also create a cause of action against any state officer in the world who exceeded his or her authority. *Id.*

204. *Sosa*, 542 U.S. at 738.

205. Shi Tao was detained on November 24, 2004, arrested on December 14, 2004, and sentenced on April 27, 2005. Changsha Intermediate People’s Court’s Written Judgment in the Shi Tao State Secrets Trial, Congressional—Executive Commission Virtual Academy, Posted 10/04/2005, <http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=19648> [hereinafter Changsha Court]. The ICCPR guidelines for arbitrary detention are: 1) no one shall be subject to arbitrary detention; 2) anyone who is arrested shall be informed of the reason for the arrest and any charges against them; 3) anyone detained on a criminal charge shall be brought before a judge and given a trial within a reasonable time or released; 4) anyone detained or arrested is entitled to proceedings before a court; and 5) anyone who has been the victim of unlawful arrest or detention has the legal right to compensation. *Id.* The Restatement (Third), which the Supreme Court cites with apparent approval, *Sosa*, 542 U.S. at 737, provides that a detention is arbitrary if “it is not accompanied by notice of charges; if the person detained is not given early opportunity to communicate with family or to consult counsel; or is not brought to trial within a reasonable time.” RESTATEMENT (THIRD) § 702 cmt. h.

206. Changsha Court, *supra* note 205.

207. *Id.*

208. See RESTATEMENT (THIRD) § 702.

209. *Sosa*, 542 U.S. at 737.

international law.²¹⁰

The Restatement (Third) states that detention is arbitrary if it is not pursuant to law or if “it is incompatible with the principles of justice or with the dignity of the human person.”²¹¹ It certainly seems that Shi Tao’s imprisonment was incompatible with the principles of justice. He received ten years in prison for exercising his freedom of speech, which is a right guaranteed by the UDHR, the ICCPR, and the Chinese Constitution.²¹² His arrest and detention for sending the email, therefore, meet the Restatement (Third)’s “incompatible with the principles of justice” standard of arbitrary detention.

However, the Supreme Court held that for a prolonged arbitrary detention to be actionable under the ATCA it must be so egregious that those who enforce it may be deemed enemies of the human race with the same certainty afforded by Blackstone’s three common law offenses.²¹³ Therefore, a lower court must first decide whether to apply the Restatement (Third)’s standard of arbitrary detention to a particular case. Then it must determine if the detention was prolonged. Finally, it must determine whether the prolonged detention meets the ambiguous standard set out in *Sosa*.

2. Other Possible Claims Against the Chinese Government Based on the Restatement (Third)

The Restatement (Third) also provides that a customary international law violation includes a consistent pattern of gross violations of internationally recognized human rights.²¹⁴ Certain infringements of human rights would only be violations of customary international law if a state is consistently committing these infringements as state policy.²¹⁵ One of these violations of customary international law includes a state policy of grossly disproportionate punishment.²¹⁶ The Chinese government consistently violates the internationally recognized right of freedom of speech²¹⁷ by systematically intimidating political activists and demonstrators trying to commemorate or disseminate

210. *See id.* at 733-34.

211. RESTATEMENT (THIRD) § 702.

212. McGeary, *supra* note 35, at 221 (stating that the Chinese Constitution is very similar to the United States’ Bill of Rights). *See* ICCPR High Commissioner, *supra* note 190, at Article 19 (guaranteeing freedom of expression). *See* UDHR High Commissioner, *supra* note 190, at Article 19 (guaranteeing freedom of expression).

213. *Sosa*, 542 U.S. at 737.

214. RESTATEMENT (THIRD) § 702 cmt. m.

215. *Id.*

216. *Id.*

217. *See infra* Part III.B.3 (discussing whether freedom of speech is an internationally recognized right).

information about the 1989 Tiananmen massacre.²¹⁸ Shi Tao's imprisonment was a continuation of the Chinese government's policy of suppression of information that would undermine its communist ideology, such as information pertaining to the Tiananmen Square demonstrations.²¹⁹ The Chinese government, using broad and ambiguous state secret laws, regularly arrests citizens on charges of revealing state secrets to suppress political dissent and social advocacy.²²⁰ In addition, the judiciary receives policy guidance from the government and is frequently ordered how to rule on cases.²²¹ Therefore, the Chinese government's ten-year imprisonment of Shi Tao was part of its consistent pattern of grossly disproportionate punishment used to suppress information pertaining to the Tiananmen massacre. Therefore, according to the Restatement (Third), the Chinese government may have violated customary international law.

3. Violation of Freedom of Speech

China may also have violated customary international law by imprisoning Shi Tao for exercising his freedom of speech. Article 19 of both the UDHR and the ICCPR guarantee everyone freedom of expression.²²² The UDHR, passed in 1948, was not intended to be a treaty, an international agreement, or a statement of legal obligation.²²³ The United Nations passed the UDHR with the intention to have it serve as a common standard of achievement for all peoples of all nations.²²⁴ However, there are numerous distinguished commentators and jurists who have concluded that the UDHR has become customary international

218. *Id.*

219. See China (includes Tibet, Hong Kong, and Macau), Country Reports on Human Rights Practices—2004, Released by the Bureau of Democracy, Human Rights, and Labor, Feb. 28, 2005, U.S. Department of State, <http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm> at Respect for Human Rights, Section 1(d) [hereinafter China Country Report]. See also Amnesty International Briefing on EU Concerns Regarding Human Rights in China, <http://www.amnesty-eu.org/>, at 1 (last visited Jan. 22, 2005). The Chinese government continues its harsh punishment and harassment of those who try to keep alive the memory of those killed during the Tiananmen massacre. *Id.*

220. China Country Report, *supra* note 219, at Respect for Human Rights section 1(d).

221. *Id.* at Respect for Human Rights section 1(e).

222. "Regardless of Frontiers:" Protecting the Human Right to Freedom of Expression on the Global Internet, Global Internet Liberty Campaign, <http://www.gilc.org/speech/report/>, at Parts III.A.1-2 [hereinafter *Frontiers*] (last visited Jan. 2, 2006).

223. Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 318 (1996) [hereinafter Hannum].

224. *Id.*

law.²²⁵ Article 19 of the UDHR states that everyone has the right to freedom of opinion and expression, including the right to receive and impart information and ideas.²²⁶ Many jurists consider the first twenty-one articles of the UDHR, including Article 19, to be binding international law.²²⁷ Many countries have also accepted the UDHR as customary international law.²²⁸ In addition to the many scholars who believe that the UDHR has, over time, become binding customary international law, there are some scholars who believe that the UDHR derives binding force from the UN Charter itself.²²⁹ The international community has accepted the UDHR as an elaboration of those human rights that the UN Charter intends to protect.²³⁰ Since the UDHR merely clarifies the intentions of those who drafted the UN Charter, it therefore receives binding force through the Charter.²³¹

The United States rejects the view that the UDHR, as a whole, constitutes customary international law.²³² Nevertheless, many U.S. courts refer to the UDHR to determine the content of international human rights law.²³³ The Supreme Court dismissed the ICCPR and the UDHR as having no utility under its standard in *Sosa*.²³⁴ However, the Court's reasoning in *Sosa* suggests that the level of acceptance of such instruments in the international community may be considered by courts

225. Hannum, *supra* note 223, at 323. Hannum lists numerous scholars and commentators who have recognized that the UDHR has become customary international law. *Id.* at 323-24. See also STEVENS & RATNER, *supra* note 12, at 56 (many commentators have concluded that most, if not all, provisions of the UDHR are binding customary international law). See also Scott L. Porter, *The Universal Declaration of Human Rights: Does it Have Enough Force of Law to Hold "States" Party to the War in Bosnia-Herzegovina Legally Accountable in the International Court of Justice?*, 3 TULSA J. COMP. & INT'L L. 141, 153-55 (1995) (stating that the UDHR is binding on all states because it meets the four prerequisites to be considered customary international law: 1) generality of practice; 2) uniformity of practice; 3) *opinio juris*; and 4) duration of development). At least one commentator has concluded that the UDHR has become binding on all states, including the ones who did not vote for it in 1948. Hannum, *supra* note 223, at 324 n.147 (citing JOHN HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* 155 (Paris: Unesco, 1989)).

226. UDHR High Commissioner, *supra* note 190, at Article 19.

227. Newbold, *supra* note 75, at 524.

228. Hannum, *supra* note 223, at 327. See also *id.* at 327-32 (listing the countries that believe that all of parts of the UDHR to be binding customary international law).

229. Melissa Robbins, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 281 (2005).

230. *Id.*

231. *Id.* There are, however, some nations and scholars who disagree as to which provisions of the UDHR are legally binding, if any. See Hannum, *supra* note 223, at 331-35 (listing comments by nations and some scholars who believe only some, or even none, of the provisions of the UDHR are binding).

232. Hannum, *supra* note 223, at 330.

233. *Id.*

234. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

when determining the state of international law today,²³⁵ despite the fact that such instruments do not give rise to a private cause of action.²³⁶

The ICCPR reiterates and expands upon the UDHR.²³⁷ Today, 140 nations have ratified it.²³⁸ The U.S. ratified the ICCPR in 1992²³⁹ but did so under the condition that it did not create a private cause of action.²⁴⁰ The ICCPR, unlike the UDHR, provided legally binding obligations on the states that ratified it.²⁴¹ Article 19 of the ICCPR, like Article 19 of the UDHR, guarantees all individuals freedom of expression.²⁴² However, the ICCPR also provides two instances where this freedom may be restricted.²⁴³ The restriction pertinent to the Shi Tao case provides that restrictions of one's freedom of expression are allowed when the restrictions are "provided by law and necessary . . . for the protection of national security or of public order."²⁴⁴ Although Shi Tao's imprisonment was according to state secret laws, it does not seem that his imprisonment was necessary to protect national security or public order.

The Chinese government would likely argue that suppression of information pertaining to democracy and the Tiananmen massacre is necessary to prevent another episode like the Tiananmen Square demonstrations and massacre. However, international agreements such as the ICCPR and the UDHR were created, and adopted or ratified, by countries to guarantee the peoples of the world certain basic rights. It seems unlikely that the ICCPR's exceptions to freedom of expression

235. See *id.* at 725 (holding that claims under the law of nations must rest upon a norm of international character accepted by the civilized world).

236. *Id.* at 735.

237. Frontiers, *supra* note 222, at Part III.A.2. The UDHR, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") constitute the International Bill of Human Rights. Elizabet F. Defeis, *Universal Declaration of Human Rights: A Standard for States*, 28 SETON HALL LEGIS. J. 259, 265 (2004) [hereinafter Defeis-Declaration].

238. Frontiers, *supra* note 222, at Part III.A.2.

239. STEVENS & RATNER, *supra* note 12, at 80.

240. Timothy K. Kuhner, *Human Rights Treaties in U.S. Law: The Status Quo, its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419, 426 (2003). Some scholars argue that non-self-executing treaties are unconstitutional. Newbold, *supra* note 75, at 520. The courts created the concept of non-self-executing treaties, but Article IV of the Constitution requires all treaties made under the authority of the United States to be the supreme law of the land. *Id.* at 521. See also Paust, *supra* note 152, at 853 (stating that the Constitution requires that the executive branch comply with and faithfully execute treaty law of the U.S. and that all treaties of the United States are the supreme law of the land). Therefore, Judge Souter erred in stating that the ICCPR does not create obligations enforceable in federal courts. *Id.*

241. Defeis-Declaration, *supra* note 237, at 264.

242. ICCPR High Commissioner, *supra* note 190, at Article 19.

243. *Id.* at Article 19.3.a-b.

244. *Id.* at Article 19.3.b.

were meant to provide repressive regimes, such as the CCP, an excuse to mount a harsh campaign against freedom of expression on subjects that do not conform to its ideology.

Before *Sosa*, the U.S. Courts of Appeals were split as to whether the ICCPR provided a private right of action.²⁴⁵ The Court in *Sosa*, however, held that the ICCPR binds the United States as a matter of international law but that it does not create obligations enforceable in federal courts.²⁴⁶ Nevertheless, courts may still reference the ICCPR under the ATCA.²⁴⁷

In addition to both the UDHR and the ICCPR, many other international and regional agreements and treaties guarantee freedom of speech.²⁴⁸ The International Covenant on Economic, Social, and Cultural Rights ("ICESCR") requires its 136 signatories to respect the free expression of scientific advances.²⁴⁹ In addition, the following international agreements guarantee freedom of speech: the European Convention of Human Rights;²⁵⁰ the Declaration on the Freedom of Expression and Information;²⁵¹ the Charter of Paris for a New Europe;²⁵² the American Declaration of the Rights and Duties of Man;²⁵³ the American Convention on Human Rights;²⁵⁴ The African Charter on

245. The First and Tenth Circuits confirmed that the ICCPR does not provide a private cause of action. Kuhner, *supra* note 239, at 427. See *id.* at 427 n.46 (citing relevant cases: *United States v. Green*, 671 F.2d 46, 50 (1st Cir.), *cert. denied*, 457 U.S. 1135 (1982); *Kyler v. Montezuma County*, No. 99-1052, 2000 U.S. App. LEXIS 1145, at 4 (10th Cir. Jan. 28, 2000) (the ICCPR's provisions "do not, by their terms, confer rights upon individual citizens.")). The Ninth and Eleventh Circuits have said that the ICCPR does provide a private cause of action. *Id.* at 427. See *id.* at 427 n.48 (citing relevant cases: *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1441-03 (9th Cir. 1996) (interpreting the ICCPR); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (applying the ICCPR); *United States v. Duarte-Acero*, 208 F.3d 1282-09 (11th Cir. 2000) (applying the ICCPR, despite citing to the non self-execution RUD, and looking to the HRC for guidance on the ICCPR's meaning). Cf. *United States v. Thompson*, 928 F.2d 1060, 1066 (11th Cir. 1991), *cert. denied*, 502 U.S. 897 (1991)).

246. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004). See Paust, *supra* note 152, at 852 (arguing that the ICCPR is at least partly self-executing).

247. Paust, *supra* note 152, at 852.

248. See Elizabeth F. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57, 74-119 (1992) (listing the international agreements that guarantee freedom of speech). Accord *Frontiers*, *supra* note 222, at Part III.

249. See *Frontiers*, *supra* note 222, at Section III.A.3.

250. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, November 4, 1950, 213 U.N.T.S. 221.

251. Declaration on the Freedom of Expression and Information art. II(c), Comm. of Ministers, 70th Sess. (Apr. 29, 1982).

252. Charter of Paris for a New Europe Nov. 21, 1990, 30 ILM 190 (1991).

253. American Declaration of the Rights and Duties of Man art. IV, 1948, OEA/Ser. L./V/I.4 Rev. (1965).

254. American Convention on Human art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36.

Human and People's Rights,²⁵⁵ and the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁵⁶ Moreover, in addition to the constitutions of democratic countries, many other countries around the world have constitutions that guarantee freedom of speech.²⁵⁷ However, the level of guarantee varies and for some countries there exists no actual enforcement of the freedom.²⁵⁸ The Chinese Constitution, for example, grants its citizens the same rights as those provided in the Bill of Rights of the United States Constitution.²⁵⁹ The Chinese Constitution, for example, grants citizens freedom of speech, freedom of the press, and freedom of assembly.²⁶⁰ However, other laws then limit these rights.²⁶¹ "State secret" laws, for example, allowed the Chinese government to sentence Shi Tao to ten years in prison for exercising his freedom of speech.²⁶² However, even though international law is sometimes violated by nations, such violations do not preclude the norm of international law from being considered binding.²⁶³ Therefore, violations of citizens' freedom of speech by countries such as China do not mean that freedom of speech cannot be considered customary international law.

It therefore appears that freedom of speech may have reached the level of universal acceptance required by the Court in *Sosa*. Nevertheless, it will be up to the lower courts to determine if freedom of speech has reached the same level of universal acceptance and the same level of specificity as the three 18th-century paradigms.²⁶⁴ Freedom of speech may have reached the required level of universal acceptance. However, the *Sosa* standard requires that a violation of international law reach the same level of specificity as the three 18th-century paradigms.²⁶⁵ A general claim of arbitrary detention was held to be too broad in

255. African Charter on Human and People's Rights art. 9, Oct. 21, 1986, 21 I.L.M. 58.

256. See Defeis, *supra* note, 248, at 74-119. *Accord Frontiers*, *supra* note 222, at Part III. Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, Europ. T.S. No. 5.

257. See Freedom of Speech (International), Wikipedia: The Free Encyclopedia, [http://en.wikipedia.org/wiki/Freedom_of_Speech_\(International\)](http://en.wikipedia.org/wiki/Freedom_of_Speech_(International)) (describing the guarantee of freedom of speech in various countries and regions of the world) (last visited Jan. 2, 2005).

258. *Id.*

259. McGeary, *supra* note 35, at 221.

260. *Id.*

261. *Id.*

262. William W. Van Alstyne, *Civil Rights and Civil Liberties: Whose "Rule of Law?"*, 11 WM. & MARY BILL RTS. J. 623, 647, (2003).

263. *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

264. See *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal 1986) (holding that freedom of speech had not yet risen to the level of customary international law).

265. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

Sosa.²⁶⁶ Similarly, a general claim of a violation of freedom of speech may also be too broad.

However, even if courts were to hold that violations of one's freedom of speech do not meet the *Sosa* standard and that Shi Tao's detention was not arbitrary, Shi Tao may still be able to bring a claim under the ATCA combining the two. Article 9 of the UDHR states, "No one shall be subjected to arbitrary arrest, detention, or exile."²⁶⁷ Detention has been interpreted by the Commission on Human Rights, in its 1997/50 Resolution, as any "deprivation of liberty."²⁶⁸ International instruments have not clearly defined arbitrary.²⁶⁹ However, the Working Group on Arbitrary Detention²⁷⁰ determined that a detention is arbitrary if it falls within one of three categories.²⁷¹ One of those categories holds that a detention is arbitrary when it results from the exercise of the rights or freedoms guaranteed by certain articles of the UDHR, one of which is Article 19.²⁷² Article 19 of the UDHR guarantees everyone freedom of speech by providing that, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."²⁷³ Therefore, according to the UDHR, the Chinese government's imprisonment of Shi Tao for exercising freedom of speech is an arbitrary detention. A violation of

266. See *supra* Part III.A (arbitrary detention was too broad of a claim; prolonged arbitrary detention, however, could have been specific enough to meet the *Sosa* standard).

267. UDHR High Commissioner, *supra* note 190, at Article 9.

268. Office of the High Commissioner for Human Rights, Fact Sheet No. 26, The Working Group on Arbitrary Detention, <http://www.unhchr.ch/html/menu6/2/fs26.htm>-IV, Part IV.A [hereinafter Fact Sheet] (last visited Dec. 28, 2005).

269. *Id.* at Part IV.B.

270. *Id.* at Parts II-III. The Working Group on Arbitrary Detention was set up by the Commission on Human Rights to investigate cases of arbitrary detention through various sources and to provide reports of these findings and investigations to the Commission at its annual session. *Id.*

271. *Id.* at Part IV.B. The three categories where there is a deprivation of liberty are:

- a) when it is clearly impossible to invoke any legal bases justifying the deprivation of liberty;
- b) when the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (Category II); and
- c) when the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).

Id.

272. *Id.*

273. UDHR High Commissioner, *supra* note 190, at Article 19.

one's freedom of speech may be too broad of a claim to satisfy the *Sosa* standard. However, prolonged imprisonment for exercising one's freedom of speech may be specific enough to satisfy the standard.

C. *Is Yahoo Liable as a Private Party for Aiding and Abetting the Chinese Government?*

There are two types of violations for which a corporation, or any private entity or individual, may be liable under the ATCA: 1) a violation of any of the per se wrongs—piracy, genocide, war crimes, and slavery; or 2) a violation of an international law that a court finds satisfies the *Sosa* standard²⁷⁴ and to which the private entity sufficiently aided the state actor in perpetrating the crime.²⁷⁵ ATCA jurisprudence has shown that MNCs can be held liable for human rights violations even when the actual violation is committed by a state actor.²⁷⁶ The Supreme Court in *Sosa* did not directly address whether the ATCA affects private actors.²⁷⁷ The only mention the Court made of the issue was in a footnote, which stated that a related consideration is whether the liability under the ATCA extends to a private actor such as a corporation or individual.²⁷⁸ However, the Court in this footnote cited *Kadic* as an example of present-day international law providing sufficient consensus to allow private actors to be liable under the ATCA for certain crimes, such as genocide.²⁷⁹ This suggests that private individuals, including corporations, may still be liable under the ATCA for piracy, slavery, genocide, and war crimes.²⁸⁰ All other crimes, such as violation of freedom of speech and prolonged arbitrary detention therefore, require state action if a private individual is to be held liable under the ATCA.²⁸¹

Yahoo did not directly commit any violations of customary international law, but Yahoo did help the Chinese government to commit

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

275. Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest: Sosa v. Alvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2286-87 (2004).

276. Shaw W. Scott, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497, 1517 (2005) [hereinafter Scott] (citing cases showing that federal courts have repeatedly held that private actors, such as MNCs, can be liable for aiding state actors who commit violations of customary international law).

277. *Sosa*, 542 U.S. at 733.

278. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 239-41 (2nd Cir. 1995)).

279. *Sosa*, 542 U.S. at 733.

280. See *Kadic*, 70 F.3d at 240 (stating that a small number of international law violations, such as slavery, genocide, war crimes, and piracy, are of such "universal concern" that they are capable of being committed by non-state actors).

281. The ATCA requires a tort to be committed "under color of law." 18 U.S.C. § 1350 (2006).

possible violations.²⁸² Yahoo, therefore, may be liable for aiding and abetting the Chinese government.²⁸³ Aiding and abetting is consistent with *Sosa* and the modern understanding of the law of nations.²⁸⁴ In addition, the law of nations in 1789 included aiding and abetting liability.²⁸⁵ However, because the Supreme Court in *Sosa* did not directly address the liability of private actors, the extent of corporate liability remains uncertain.²⁸⁶ Because of this, the standards used to determine the liability of MNCs have yet to be clarified.²⁸⁷

The Ninth Circuit in *Unocal II* applied an international standard of aiding and abetting.²⁸⁸ The court held that aiding and abetting under the ATCA requires “knowing practical assistance or encouragement that has

282. See *supra* Part I.

283. The ATCA reaches conspiracies and accomplice liability. *Aldana v. Del Monte Fresh Produce, N.A., Inc.* 416 F.3d 1242, 1248 (11th Cir. 2005) (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005)). U.S. courts have repeatedly determined that the ATS encompasses aiding and abetting liability in a variety of different circumstances. *In re Agent Orange v. Dow Chemical Co.*, 373 F. Supp.2d 7, 115-17 (E.D.N.Y. 2005) (citing Brief Amici Curiae of the Center for Constitutional Rights, Earthrights International, and the International Human Rights Law Clinic of the University of Virginia School of Law, Jan. 18, 2005, at 13-17 [hereinafter Amici Curiae Brief]). The Amici Curiae Brief in *In re Agent Orange* cites numerous cases that show that the ATCA provides for aiding and abetting. *Id.*

284. Daniel Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability Under the Alien Tort Statute*, 47 ARIZ. L. REV. 805, 827 (2005) [hereinafter Diskin]. A district court recently cited *Sosa* in holding that the ATCA does not allow for aiding and abetting liability. *Id.* at 828 (citing *In re South Africa Apartheid Litigation*, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004)). However, this court misread *Sosa* because aiding and abetting is not a violation that must meet *Sosa*'s standard of specificity, rather aiding and abetting answers the question as to how far liability extends. *Id.* In addition, the court failed to recognize that the ATCA has from the start included aiding and abetting based on the application of aiding and abetting in common law. *Id.* In another post-*Sosa* case, a district court held that the ATCA includes aiding and abetting. *Id.* (citing *In re Agent Orange*, 373 F. Supp. 2d at 53).

285. Diskin, *supra* note 284, at 828. The liability of private actors, as aiders and abettors, for violations of international law was understood at the time the ATCA was enacted. *In re Agent Orange*, 373 F. Supp. 2d at 53-54 (citing Amici Curiae Brief, *supra* note 275, at 13-17). In a 1795 opinion, Attorney General Bradford specifically stated that individuals would be liable under the ATCA for “committing, aiding, or abetting” violations of the laws of war. *Id.* In that opinion, Bradford considered an incident involving private actors, acting in concert with, but not controlling the French naval vessels. *Id.*

286. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.2 (the Court states only that “[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual”).

287. Chanin, *supra* note 30, at 762.

288. *John Doe I v. Unocal Corp.*, 395 F.3d 932, 954-56 (9th Cir. 2002) *vacated by reh'g en banc* 395 F.3d 978 (9th Cir. 2003). The court looked to the aiding and abetting tests applied by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. *Id.* at 949-51.

a substantial effect on the perpetration of the crime.”²⁸⁹ The court, in a footnote, mentioned the section 1983 proximate cause test.²⁹⁰ The court stated that liability of the private entity for torts requiring no state action, (i.e. violations of piracy, genocide, slavery, and war crimes), requires foreseeability by the private actor that its actions would result in one of these violations.²⁹¹ All other violations of customary international law require state action to be actionable under the ATCA and, therefore, require that private parties show control over the state actors for there to be the requisite showing of proximate causation.²⁹²

Yahoo would likely not be liable for helping the Chinese government under the section 1983 proximate cause test. Violation of a person’s freedom of speech and prolonged arbitrary detention are customary international law violations that do require state action.²⁹³ Therefore, Shi Tao would have to show that Yahoo controlled the actions of the Chinese government, which it did not.

The court in *Kadic* addressed the issue of state action, holding that the “color of law” jurisprudence of 42 U.S.C. § 1983²⁹⁴ is a relevant guide to whether a private actor engaged in official action for purposes of the ATCA.²⁹⁵ Subsequent courts, who have heard ATCA claims against private defendants, have applied section 1983 jurisprudence, citing *Kadic* as precedent.²⁹⁶ However, section 1983 jurisprudence best applies to situations where the private entity is the actor.²⁹⁷ In the Shi Tao case, the Chinese government was the actor, not the private entity, which was Yahoo.²⁹⁸ In order for a private individual to be liable for a section 1983 violation when the state actor commits the violation, a plaintiff must establish that the private individual was the proximate cause of the violation.²⁹⁹

However, as Judge Reinhardt pointed out in his concurrence in

289. *Unocal II*, 395 F.3d at 947.

290. *Id.* at 954 n.32.

291. *Id.* The court held that the proximate cause test was not relevant to Unocal’s liability because Unocal’s alleged customary international law violations were perpetrated in furtherance of the small number of violations that do not require state action. *Id.* Therefore, the element of state action was not relevant. *Id.*

292. *Id.*

293. *Kadic v. Karadzic*, 70 F.3d 232, 240 (2d Cir. 1995).

294. 42 U.S.C. § 1983 (2005).

295. *Kadic*, 70 F.3d at 245.

296. Many courts hearing ATCA claims against private actors cite *Kadic* when applying section 1983 jurisprudence to determine if the state action requirement has been fulfilled. See *Estate of Rodriguez v. Drummond Co.*, 265 F. Supp. 2d 1250, 1264 (N.D. Ala. 2003) (citing *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 449 (2d Cir. 2000) (citing *Kadic*, 70 F.3d at 245)).

297. *Kadic*, 70 F.3d at 245.

298. See *supra* Part I.

299. *Brower v. Inyo County*, 817 F.2d 540, 547 (9th Cir. 1987).

Unocal II, proximate cause should not be an issue in cases where the state actor obviously committed the violation.³⁰⁰ A private actor's liability results from the state actor's violations.³⁰¹ Non-state actors are *directly* liable only for violating the few violations that do not require state action.³⁰² Where the violation was committed by a state actor, however, the private actor's liability is derivative of the state actor's liability.³⁰³ Therefore, any reference to *jus cogens* norms is irrelevant.³⁰⁴

Reinhardt, in dismissing the international standard used by the majority and the proximate cause test, concluded that *Unocal*'s liability should be determined by traditional civil tort principles.³⁰⁵ The three principles of third-party liability that he applied were: 1) joint venture;³⁰⁶ 2) agency;³⁰⁷ and 3) reckless disregard.³⁰⁸

The principle of reckless disregard best applies to the Shi Tao case. Yahoo probably did not have the requisite intent to create a joint venture with the Chinese government when it offered information to help identify Shi Tao.³⁰⁹ However, one could argue the existence of a joint venture based on Yahoo's continuing compliance with the Chinese government's policy of restricting free speech, such as Yahoo voluntarily signing a pledge to obey all restrictions and regulations.³¹⁰ In addition, the Chinese government was not an agent of Yahoo because Yahoo did not control the actions of the Chinese government.³¹¹ However, Yahoo could be liable for reckless disregard one could prove that Yahoo knew why the Chinese government wanted Shi Tao's information. Providing the

300. *Unocal II*, 395 F.3d at 976 (Reinhardt, J., concurring).

301. *Id.* at 963.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 965.

306. It is well-established in federal common law that a member of a joint venture is liable for the acts of its co-venturers. *Unocal II*, 395 F.3d at 970. Joint liability exists where: 1) parties intended to form a joint venture; 2) parties share a common interest in the subject matter of the venture; 3) the parties share the profits and losses of the venture; and 4) the parties have joint control or the joint right of control over the venture. *Id.*

307. To establish an agency relationship: "(1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking." *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004).

308. *Unocal II*, 395 F.3d at 970-976. There are two types of reckless disregard: objective and subjective. *Id.* at 974. Objective recklessness is when a person acts or, if the person has a duty to act, fails to act when there is an unjustifiably high risk of harm that is known or so obvious that it should be known. *Id.* Subjective recklessness requires actual knowledge of a substantial risk that the defendant subsequently disregards. *Id.*

309. See *supra* note 306 (parties must have intended to form a joint venture).

310. See *China Censor*, *supra* note 89, at 14A.

311. See *supra* note 306 (the principal must have control of the undertaking).

Chinese government with Shi Tao's personal information could be seen as reckless disregard for Shi Tao's welfare.

The court in *Burnett v. Al Baraka Inv. & Dev. Corp.*³¹² applied another standard of aiding and abetting liability to determine a private actor's liability in an ATCA case.³¹³ The three elements of the aiding and abetting standard are: "1) the party whom the defendant aids must perform a wrongful act that causes an injury; 2) the defendant must be generally aware of his role as part of an overall illegal or tortious [sic] activity at the time that he provides the assistance; and (3) the defendant must knowingly and substantially assist the principal violation."³¹⁴ The court looked to the Restatement (Second) of Torts ("Restatement (Second)") which lists five factors to determine if there was substantial assistance.³¹⁵ Yahoo could be liable under this standard if a court held that the Chinese government's imprisonment of Shi Tao was a wrongful act. Such a holding would satisfy the first element. The second element would be satisfied if it could be proven that Yahoo knew for what purpose the Chinese government needed Shi Tao's information. The third element would be satisfied because, without the information provided by Yahoo, the Chinese government probably would not have been able to discover that Shi Tao sent the email.

Another standard of aiding and abetting liability is found in section 879 of the Restatement (Second).³¹⁶ Subsection 876(b) provides that one is subject to liability for the harm resulting to a third person when one "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."³¹⁷ Yahoo provided "substantial assistance" to the Chinese government in finding Shi Tao. Therefore, Yahoo could be liable if it knew why the Chinese government wanted Shi Tao's information.

Yahoo may also be liable under subsection 876(c) of the

312. *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, (D.C. Cir. 2003).

313. *Id.* at 104-05.

314. *Id.* at 104 (citing *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)).

315. *Burnett*, 274 F. Supp.2d at 105 (citing *Halberstam v. Welch*, 70 F.2d 472, 478 (D.C. Cir. 1983) (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d. (1977) [hereinafter RESTATEMENT (SECOND)]). The five factors relevant to determining if there was substantial assistance by the defendant are: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind." RESTATEMENT (SECOND) § 876 cmt. d. The court in *Halberstam* noted a sixth factor, which was the duration of the assistance provided. *Halberstam v. Welch*, 70 F.2d 472, 484 (D.C. Cir. 1983).

316. RESTATEMENT (SECOND) § 876. One commentator has noted that section 876 is the most important common law expression of civil aiding and abetting liability. Diskin, *supra* note 276, at 832. Federal courts have repeatedly referenced section 876 in civil cases. *Id.* at 832.

317. RESTATEMENT (SECOND) § 876(b).

Restatement (Second).³¹⁸ Subsection 876(c) provides that one is subject to liability for the harm resulting to a third person when one “gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.”³¹⁹ Yahoo gave “substantial assistance” to the Chinese government. In addition, Yahoo’s conduct could be considered a breach of its duty to keep Shi Tao’s email account information private. Therefore, Yahoo could be liable under subsection 876(c) as well.

Interestingly, some claim that Yahoo was not even obligated to give the Chinese government information on Shi Tao.³²⁰ The Yahoo subsidiary, which turned over information that helped Chinese authorities capture Shi Tao, is based in Hong Kong and not in China.³²¹ The subsidiary may not have had any obligation to comply with China’s security laws³²² because Hong Kong has an independent judiciary and a separate legal system from that of Mainland China.³²³ Yahoo, however, claims that it had no choice but to cooperate with the Chinese government, stating that it must follow the rules of the country in which it operates.³²⁴

In summation, it is unclear what standard of complicity the courts will apply in ATCA cases against corporations. Yahoo did give substantial help to the Chinese government. If it is proven that Yahoo knew why the information was needed then it could be liable for aiding and abetting under various standards. Most courts have followed *Unocal II* and applied an international criminal standard law of aiding and abetting.³²⁵ Other courts, misreading *Sosa* and ignoring historical

318. *Id.*

319. *Id.*

320. Rosenberg, *supra* note 6, at 411.

321. *Id.*

322. *Id.*

323. Mure Dickie, *Companies International: Yahoo Admits Role in China Dissident Case*, FINANCIAL TIMES UK, Sept. 12, 2005, at 26. In China, Yahoo is registered in the Hong Kong Special Administrative Region (SAR). Letter from Irene Kahn, Secretary General, Amnesty International, Nov. 17, 2005, <http://209.238.219.111/Amnesty-letter-to-Yahoo-17-Nov-2005.doc> (last visited Jan. 14, 2005). The decision of the Hong Kong SAR based subsidiary to acquiesce with a government request from another part of the PRC is questionable under the one-country two systems model. *Id.* The Basic Law (the PRC statute that serves as Hong Kong’s constitution) establishes independent judicial power and a separate legal system where “national laws shall not be applied . . . except those listed in Annex III of this law.” *Id.* None of the laws in Annex III applies to Shi Tao’s case. *Id.*

324. Kahn, *supra* note 1, at C11.

325. Diskin, *supra* note 284, at 834. One commentator has suggested that the Supreme Court in *Sosa* impliedly supports the use of international law to define the elements of a violation under the ATCA and to determine who is bound by a given norm. Beth Stephens, *Sosa v. Alvarez-Machain “The Door Is Still Ajar” For Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 556 (2004) [hereinafter Stephens-

evidence, have dismissed aiding and abetting by treating it as a separate claim under the ATCA instead of a standard to determine the extent of liability.³²⁶ Some courts have applied principles of tort law as the standard of complicity.³²⁷ In addition, section 876 of the Restatement (Second) provides an excellent standard for determining liability.³²⁸ Which standard will become the one of choice has yet to be determined.

D. Sosa's Reasons for Restraint and Litigation Hurdles for ATCA Claims

In addition to its standard of specificity, the Court in *Sosa* set out other possible limitations for recognizing ATCA claims. The Court stated that a decision of whether a norm is sufficiently definite to support a cause of action must involve a determination about the practical consequences of making that cause available to federal courts.³²⁹ Specifically, the Court in *Sosa* set out five reasons for judicial restraint in accepting new claims under the ATCA.³³⁰ One of those reasons was the potential implications to foreign relations of the U.S.³³¹ The following three doctrines are concerned, to some extent, with the impact of judicial decisions on foreign relations.

1. The Political Question Doctrine

The Political Question Doctrine requires courts to consider if the litigation of the issues in a case may affect foreign relations to such an extent that resolution of the issues is better left to the political branches.³³²

Brooklyn]. The Court in *Sosa* cited with approval two decisions that relied on international law to define who is governed by international law. *Id.* (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.20 (2004)).

326. See *supra* notes 283-85.

327. See *supra* notes 305-08 and accompanying text. Judge Reinhardt, in his concurring opinion in *Unocal II*, suggested that tort principles of third-party liability should be used to determine whether Unocal was liable for its support of the Myanmar military's actions. *Unocal II*, 395 F.3d at 970 (Reinhardt, J., concurring).

328. RESTATEMENT (SECOND) § 876(b)-(c).

329. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004).

330. See *id.* at 725-28.

331. *Id.* at 727.

332. The Political Question Doctrine was articulated by Chief Justice Marshall in *Marbury v. Madison* 5 U.S. (1 Cranch) 137, 170 (1803), when he stated, "questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005). This means that courts must determine whether to defer a case to the political branches. *Id.* *Baker v. Carr*, 369 U.S. 186 (1962), provided the standard formulation for what constitutes a political question:

Prominent on the surface of any case held to involve a political question is

Support by United States' administrations for the ATCA seems to be split down party lines, with Democratic administrations supporting ATCA litigation and Republican administrations opposing ATCA litigation.³³³ Not surprisingly, U.S. courts have split on the appropriateness of accepting these ATCA cases.³³⁴

The Departments of State and Justice, in a joint memorandum under President Jimmy Carter, strongly supported the ATCA and its use in *Filártiga*.³³⁵ The memorandum declared that there was little danger that judicial enforcement of human rights would impair the United States' foreign policy.³³⁶ In fact, refusing to recognize a private cause of action for human rights abuses would seriously damage the credibility of the United States' commitment to the protection of human rights.³³⁷ The memorandum also stated that the ATCA includes international law as it has evolved over time.³³⁸

The Justice Department under President Reagan had an abrupt change of view.³³⁹ The Justice Department filed a brief, which was not joined by the State Department, urging a drastic narrowing of the ATCA.³⁴⁰ The Justice Department argued that ATCA jurisdiction should be restricted to cases where the U.S. government might be liable for violating international law.³⁴¹

The administration of President George Bush, Sr., expressed concern about the impact of the ATCA. However, the administration also expressed support for the goals of ATCA litigation by signing legislation authorizing a significant expansion of human rights

found: 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or 2) a lack of judicially discoverable and manageable standards for resolving it; or 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

333. Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 161 (2003) [hereinafter Schrage].

334. *Id.* at 161.

335. STEVENS & RATNER, *supra* note 12, at 18.

336. Lorelle Londis, *The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence*, 57 ME. L. REV. 141, 188 (2005) [hereinafter Londis].

337. *Id.*

338. STEVENS & RATNER, *supra* note 12, at 18.

339. *Id.* at 19.

340. *Id.*

341. *Id.*

accountability.³⁴²

The Clinton Administration supported the use of the ATCA in *Kadic* and *Unocal I*.³⁴³ The Clinton Administration informed the district court in *Unocal I* that adjudication of the case would have no impact on U.S. foreign policy.³⁴⁴

The administration of President George W. Bush, however, has registered opposition to the justiciability of ATCA claims in many cases.³⁴⁵ The Bush Administration asserts that recognizing corporate liability for aiding and abetting human rights abuses would interfere with U.S. foreign policy because it would deter foreign investment and tie the hands of the executive branch.³⁴⁶ It has been suggested that the Bush Administration has repeatedly opposed judicial review of cases involving ATCA claims because of the possible impact on business investments or because of weakly supported claims about the likely reaction of foreign governments.³⁴⁷

Courts should scrutinize the predictions about the impact of ATCA litigation by the executive branch before giving such predictions much weight.³⁴⁸ Such predictions seem more subjective than factual and may be attempts to protect powerful corporate defendants rather than U.S. foreign policy.³⁴⁹ Nevertheless, these statements by administrations to courts hearing ATCA are persuasive.³⁵⁰ However, the Supreme Court has seemed to give little notice to the Bush Administration's guidance in a series of cases at the end of 2004, even though the suggestions by the

342. Beth Stephens, *U.S. Foreign Policy and Human Rights: Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 189 (2004) [hereinafter Stephens-Harvard].

343. Londis, *supra* note 336, at 189.

344. Stephens-Brooklyn, *supra* note 325, at 566 (citing Letter of Michael J. Matheson, Acting Legal Advisor (July 8, 1997), reprinted in Nat'l Coalition Gov't of the Union of Burma v. *Unocal, Inc.*, 176 F.R.D. 329, 362 (C.D. Cal. 1997) (stating that "adjudication of the claims based on the allegations of torture and slavery would not prejudice or impede the conduct of U.S. foreign relations with the current government of Burma")).

345. Londis, *supra* note 336, at 189.

346. Stephens-Brooklyn, *supra* note 325, at 566.

347. Stephens-Harvard, *supra* note 344, at 196-202 (analyzing arguments made by the Bush Administration in several ATCA cases).

348. Stephens-Brooklyn, *supra* note 325, at 564.

349. *Id.* at 566. See also Schrage, *supra* note 333, at 161 (the Bush administration has appeared to take the strongest position against the ATCA, particularly in cases against private corporations). The message to be taken from the Bush administration's actions in certain ATCA cases appears to be that it opposes enforcement of international law standards by U.S. courts against MNCs. *Id.* One commentator has suggested that the Bush Administration's opposition to human rights litigation should not be given judicial deference. See Stephens-Harvard, *supra* note 344, at 170.

350. See Londis, *supra* note 336, at 191.

administration were based on national security.³⁵¹ It is also interesting that in *Sosa*, the Court makes no mention of the executive branch's views of the danger that ATCA cases pose to U.S. foreign policy.³⁵² The lower courts should take guidance from the Supreme Court and reject the administration's arguments that the ATCA does not recognize actionable claims for violations of customary international law.³⁵³

Arlen Specter, a Republican Senator from Pennsylvania and Chairman of the Senate Judiciary Committee, discounts the Bush Administration's arguments that ATCA litigation would complicate foreign policy and impede the fight against terror.³⁵⁴ Specter argues that the United States must show the world that it is serious about human rights.³⁵⁵ ATCA litigation will advance, not impede, U.S. foreign policy and its fight against terror.³⁵⁶ According to Specter, American credibility in the war on terror will only be helped when the government enforces laws, such as the ATCA, that protect innocent victims.³⁵⁷

Another reason why courts should not give much weight to the executive branch's arguments that ATCA litigation will harm foreign policy is that the global community has willingly recognized and codified individual rights in various ways.³⁵⁸ Therefore, making the argument that courts should avoid adjudication of human rights cases because of the chance for possible embarrassment to certain parties on the world stage is less persuasive now than it used to be.³⁵⁹ In addition, the chance that judicial decisions will embarrass the executive or create conflicts with other nations is not as probable now as it was in the past.³⁶⁰ Today, most governments know how our independent branches of government work, either through common understanding or because they have the same system.³⁶¹ Therefore, there is a wider understanding that decisions by the judicial branch are not necessarily the view of the executive branch.³⁶²

351. Stephens-Brooklyn, *supra* note 325, at 567.

352. *Id.*

353. *Id.* See also Brief for the United States in Support of the Petition at 18, as Amici Curiae Supporting Petitioner, Jose Francisco Sosa, Petitioner v. Humberto Alvarez-Machain, et al., 542 U.S. 692 (2004) (No. 03-339) (arguing that the ATCA grants federal courts subject matter jurisdiction only for: 1) violation of safe conducts; 2) infringements of the rights of ambassadors; and 3) piracy).

354. Arlen Specter, *The Court of Last Resort*, N.Y. TIMES, Aug. 7, 2003, at A23.

355. *Id.*

356. *Id.*

357. *Id.*

358. Londis, *supra* note 336, at 193.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

It is likely that a suit brought by Shi Tao against Yahoo would meet with strong resistance by business groups and the Bush Administration. China's marketplace has incredible economic potential. Large corporations and the Bush Administration would try to protect U.S. corporations trying to achieve or maintain access to the Chinese marketplace.³⁶³ The Bush Administration would likely argue that finding Yahoo guilty for complying with the Chinese government's regulations would be seen by the Chinese government as an attack on its judicial system. However, any arguments by the administration as to the effects of ATCA litigation on the war on terror³⁶⁴ and foreign relations should be tempered with the fact that the Bush Administration may be trying to halt ATCA litigation to protect business interests rather than foreign relations.³⁶⁵

If the judiciary allows assertions by an administration to carry too much weight, then the law will evolve according to the politics of any given administration.³⁶⁶ This is something that the doctrine of the separation of powers tries to avoid.³⁶⁷ Justice Douglas warned that unquestioning deference to executive branch complaints about the foreign policy implications of litigation would render the court "a mere errand boy for the Executive Branch, which may choose to pick some people's chestnuts from the fire, but not others."³⁶⁸ In addition, globalization may require courts to give greater weight to violations of human rights and international norms rather than to possible effects on foreign policy.³⁶⁹

363. Barboza, *supra* note 39, at C4 (stating that China may surpass the U.S. in number of Internet users by 2010).

364. Stephens-Harvard, *supra* note 344, at 181.

365. Stephens-Harvard, *supra* note 344, at 196-202 (analyzing arguments made by the Bush Administration in several ATCA cases). *But see id.* at 180. The Chinese government was furious when lawsuits were filed in United States' courts against current and former government officers by members of the religious group Falun Gong. *Id.* The Chinese government said such suits would cause "immeasurable" harm to relations between the United States and China. *Id.*

366. Londis, *supra* note 336, at 188.

367. *Id.* See also Stephens-Harvard, *supra* note 344, at 171. According to Stephens, "[a]n abdication of judicial oversight would endanger the constitutionality mandated balance of powers, leading to the unchecked executive branch power that so concerned the framers of our Constitution." *Id.*

368. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 733 (1972).

369. Londis, *supra* note 336, at 193. One commentator gives three broad reasons of why the change to a greater concern to human rights rather than foreign relations is long overdue. *Id.* The three reasons are: 1) the "increased institutionalization of interstate relations"; 2) "the disaggregation of the nation-state"; and 3) "heightened international economic competition." *Id.*

2. The Act of State Doctrine

The Act of State Doctrine is a prudential concern based on the notion that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”³⁷⁰ The Supreme Court applies a three-factor test to determine whether the act of state doctrine should apply.³⁷¹ The Supreme Court’s test provides that: 1) the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it; 2) the less important the implications of an issue are for our foreign relations, the weaker the justification for deferring judgment to the political branches; and 3) the balance of relevant considerations may also be shifted if the government that committed the alleged violation is no longer in existence.³⁷² The *Unocal II* court added a fourth factor: “Whether the foreign state was acting in the public interest.”³⁷³

Therefore, with respect to a hypothetical case brought by Shi Tao against Yahoo, the first factor would require the court to determine the level of acceptance of prolonged arbitrary detention and freedom of speech in the international community. This is a determination that the court must already make in order to determine if the claims satisfy the *Sosa* standard.³⁷⁴ Under the second factor, a claim by Shi Tao against Yahoo will require the court to determine how adjudication of the issues will affect foreign relations. The court must then decide if the issues to be adjudicated are better left to the political branches to decide. The second factor, therefore, is very similar to the political question doctrine discussed in the previous section.³⁷⁵ The third factor does not apply because China still exists. The fourth factor is not an issue because Shi Tao’s imprisonment by the Chinese government was arguably not in the public interest. Therefore, a determination of whether the act of state doctrine would apply in a suit by Shi Tao against Yahoo will be based on how the court determines the first two factors.

3. The Forum Non Conveniens Doctrine

The *forum non conveniens* doctrine is used by defendants trying to

370. *John Doe I v. Unocal Corp.*, 395 F.3d 932, 958 (9th Cir. 2002) *vacated by reh’g en banc* 395 F. 3d 978 (9th Cir. 2003).

371. *Id.* at 959 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)).

372. *Banco Nacional de Cuba*, 376 U.S. at 428.

373. *Unocal II*, 395 F.3d at 959.

374. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

375. *See supra* Part D.1.

show that an adequate alternative forum exists.³⁷⁶ The *forum non conveniens* analysis consists of a two-part test: 1) the court must determine the adequacy of the alternative forum recommended by the defendant; and 2) if the alternative forum is found to be adequate, the court weighs the private and public interest factors to determine if the other forum makes practical sense.³⁷⁷ In Shi Tao's case, the Chinese courts found him guilty of the alleged offense.³⁷⁸ American courts usually refrain from condemning a remedy granted by foreign courts unless it appears that the remedy is so clearly inadequate that it is no remedy at all.³⁷⁹ However, the standards that the foreign forum must meet to be "adequate" are very low, largely because of the political and prudential considerations that have become part of the *forum non conveniens* analysis.³⁸⁰

Yahoo may argue that Chinese courts are the appropriate forum for any suits concerning its complicity with the Chinese government. Shi Tao would counter by arguing that conditions in China are so biased against any claim regarding China's Internet policies that to use China as a forum would be inadequate.³⁸¹ When considering *forum non conveniens*, the fact that the defendant's suggested forum is supported by the very government that committed these crimes should weigh heavily in a U.S. court's determination of whether the suggested forum is adequate.³⁸² However, finding Yahoo guilty in U.S. federal court for aiding and abetting the Chinese government may be seen by the Chinese government as an implied condemnation of its government and its judicial system. An American court may be unwilling to make such a decision, especially if faced with strong opposition from the executive branch.

376. *Aguida v. Texaco, Inc.*, 303 F.3d 470, 476 (2d Cir. 2002).

377. *Id.* at 181-82.

378. Kahn, *supra* note 1, at C11.

379. Londis, *supra* note 336, at 181 (citing *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981))).

380. *Id.* Some examples of prudential and political concerns that courts give undue weight to are questions of corporate liability and territorial sovereignty. *Id.* at 185.

381. See STEVENS & RATNER, *supra* note 12, at 153 (conditions in the foreign forum may be so biased against the plaintiff's claim as to render the forum inadequate).

382. See Londis, *supra* note 336, at 185 ("A cursory examination of objectivity and due process in the alternative forum where that forum is supported by the very government alleged to be colluding with the corporation committing the crimes, may fail to take note that the other forum is inadequate.").

E. Why MNCs Should Be Held Liable Under the ATCA for Aiding and Abetting State Actors in Violations of Customary International Law

A MNC is not immune from liability for violating international law.³⁸³ MNCs have duties under international law with respect to human rights.³⁸⁴ They have never been granted immunity under any known treaty or customary law with respect to violations of treaty-based or customary international law.³⁸⁵ The duties and obligations of MNCs to the individuals and communities affected by their operations is destined to increase with globalization.³⁸⁶ Corporations have become extremely powerful players on the international stage.³⁸⁷ Therefore, there must be a way to hold MNCs accountable for their actions overseas. In the race to keep costs down, MNCs have made an exodus from developed countries to undeveloped countries. There the actions of MNCs go unchecked because of their huge financial investments in the developing countries.³⁸⁸

There are existing international covenants that set out international human rights, but MNCs seek out countries that have not signed them, that have ratified them but ignore them, or that have selectively ratified certain provisions and not others.³⁸⁹ The ATCA provides a means to send MNCs a message. If plaintiffs suing MNCs under the ATCA were to win large damage awards, then MNCs may change their policies concerning human rights and their dealings with oppressive governments.³⁹⁰

The House Subcommittee on Africa, Global Human Rights and International Operations, concerned about the censoring activities of American Internet companies in China, recently questioned officials

383. *In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 131 (E.D.N.Y. 2005).

384. *Id.* at 131.

385. *Id.*

386. Scott, *supra* note 276, at 1543.

387. Chanin, *supra* note 30, at 747 (giving as an example British Petroleum, which has the fifth largest global economy; the combined sales for the four largest MNCs exceeds the total GDP for the entire African continent).

388. *Id.* at 748. See Bob Herbert, *Rain Forest Jekyll And Hyde?*, N.Y. TIMES, Oct. 20, 2005, at A27, for an example of the destruction and abuses corporations are capable of if left unchecked in developing countries. The Chevron Corporation has a class action suit being brought against it by villagers of an Ecuadorian village nestled in the rainforest. *Id.* Chevron is accused of dumping eighteen billion gallons of toxic waste, over a twenty-year period, into the soil and water of a previously untouched area of rainforest. *Id.* The waste and oil were dumped into streams and unlined pits, with no care taken to protect the environment or the local people. *Id.* A spokesperson for Chevron stated that they have done tests on the waste and have concluded that "it is not necessarily toxic." *Id.*

389. *Id.* at 751.

390. *Id.* at 764.

from these companies on their compliance with Chinese censorship laws.³⁹¹ Because of their recent activities in China, Internet companies doing business overseas may soon have to comply with U.S. legislation that would govern their activities, irrespective of the local laws of where they operate.³⁹² The proposed legislation, called the Global Online Freedom Act, would forbid Internet companies from filtering certain religious and political terms and it would require the companies to inform users of any filtering they were doing.³⁹³ Most importantly, the Act, much like the ATCA, would allow victims of collaboration between American Internet companies and local officials to sue the companies in United States' courts.³⁹⁴

V. Conclusion

Whether a claim brought under the ATCA, by Shi Tao against Yahoo, would be successful in U.S. federal courts is uncertain. There are uncertainties as to whether a court would view the Chinese government's alleged violations as having reached the level of customary law under the *Sosa* standard. In addition, it is uncertain which standard of aiding and abetting a court would apply. Moreover, there are the reasons for restraint set out by the *Sosa* court and the many doctrinal hurdles to overcome. In addition, there is the confusion from differing views between Democratic and Republican administrations as to whether the ATCA should be used.

Despite these many uncertainties and hurdles, Shi Tao and others who claim MNC complicity in violations of customary international law may still have a chance to hold MNCs accountable for their actions even after *Sosa*. The ATCA is needed, until legislation is passed, to hold MNCs accountable for their actions in countries such as China, which will regulate the activities of these corporations operating overseas. The desire for economic gain should not compromise internationally recognized human rights. The Supreme Court in *Sosa* seemingly narrowed the scope of the ATCA, but its unclear standard of specificity allows the lower courts leeway in determining what violations of international law may be actionable under the ATCA. It will be up to the lower courts to determine the liability of MNCs under the ATCA in an increasingly globalized international community.

391. *Id.*

392. Tom Zeller, Jr., *Internet Firms Facing Questions About Censoring Online Searches in China*, N.Y. TIMES, Feb. 15, 2006, at C3.

393. *Id.*

394. The Act would also forbid storage of user data in China. Comment, *Helping China's Censors*, THE NATION, Mar. 27, 2006, at 8. The Act would also make it illegal to sell equipment or services to law-enforcement agencies in countries like China. *Id.*