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Xiaoning v. Yahoo! Inc.'s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle

DeNae Thomas

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Xiaoning v. Yahoo! Inc.’s Invocation of the Alien Tort Statute: An Important Issue but an Improper Vehicle

ABSTRACT

U.S.-based Internet service providers (ISPs) are faced with a dilemma when operating in countries with restrictive Internet speech laws: should they comply with these governments’ demands for personally identifying information of Internet dissidents or respect their own country’s dedication to free speech and refuse to comply? On behalf of Chinese dissidents who were imprisoned for violating Chinese speech laws, human rights advocates have invoked the Alien Tort Statute (ATS) in an attempt to hold ISPs accountable for their acquiescence with the Chinese government’s demands. This Note examines one such case, Xiaoning v. Yahoo! Inc., and ultimately concludes that, while the issues presented in the suit are important, the ATS is not the proper vehicle through which to address them.

The ATS, adopted in 1789, gives U.S district courts original jurisdiction over civil actions by aliens for torts committed in violation of the law of nations or a treaty of the United States. In the Supreme Court’s latest holding on the ATS, Sosa v. Alvarez, the Court set a high bar regarding what constitutes a violation of the law of nations, demanding specificity and acceptance by the civilized world. Moreover, the Court encouraged judicial restraint in recognizing new international violations due to the potential implications for the foreign relations of the United States, a lack of clear legislative guidelines, and other considerations. After Sosa, it is uncertain whether China’s free speech restrictions and prolonged imprisonment would constitute violations of international norms with the degree of consensus required by the Sosa court, but the lack of certainty, along with the Court’s emphasis on judicial restraint, would weigh in favor of courts not recognizing such a cause of action. Additionally, it is uncertain whether there is aiding and abetting liability under the ATS, and even if there is, whether complying ISPs would be liable under modern aiding and abetting standards.

Ultimately, courts should not become clogged with litigation regarding the application of an inapplicable statute. Rather, Congress should model its response after legislation that successfully addresses the issue, such as aspects of the Global Online Freedom Act and the Global Compact, and collaborate with other countries and organizations to adequately address the problems presented in suits like Xiaoning's that are likely to arise in the future.

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On September 12, 2003, the People's Republic of China (China) sentenced Wang Xiaoning, a citizen and resident of China, to ten years in prison and two additional years of removed political rights.¹ Xiaoning had published and circulated articles online supporting democratic reform in China, and had been corresponding with an overseas organization the Chinese government considered "hostile."² According to Xiaoning, his experience in a forced labor prison for

1. Second Amended Complaint for Tort Damages at 14, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW (N.D. Cal. July 30, 2007). The deprivation of political rights in China involves a fixed period of time after an individual is released from prison during which he or she is denied the rights of free speech and association granted to other citizens. U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, CHINA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007 (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm> (last visited Sept. 18, 2008). Former political prisoners may also be subject to police surveillance. *Id.*

2. Second Amended Complaint for Tort Damages, *supra* note 1, at 13-14.

political prisoners was highly abusive in nature.³ When Xiaoning's appeal to the Supreme People's Court in China proved unsuccessful,⁴ the World Organization for Human Rights USA filed a lawsuit against the American Internet service provider (ISP) Yahoo! Inc. (Yahoo!) on behalf of Xiaoning and his wife, Yu Ling,⁵ alleging that Yahoo! should be held liable under the Alien Tort Statute (ATS)⁶ for Xiaoning's imprisonment.⁷ Specifically, the complaint charged Yahoo! with "knowingly and willfully aid[ing] and abett[ing] in the commission of [Xiaoning's] torture" by providing the Chinese authorities with information, including Xiaoning's e-mail records and user-identification numbers, that identified Xiaoning online and led to his arrest and imprisonment.⁸

On November 13, 2007, Yahoo!, Xiaoning, and Ling, along with Shi Tao, another individual who was later named as an additional plaintiff,⁹ settled the lawsuit for an undisclosed amount.¹⁰ Even though Xiaoning's case has been settled, the larger issues that arose in this lawsuit are still far from resolved. In fact, some commentators have said that Xiaoning's case represents only the beginning of ATS suits against ISPs.¹¹ The *Xiaoning* plaintiffs' attorney, Morton Sklar, believes that there may be many more dissidents in Chinese prisons because of U.S. companies' cooperation with the Chinese government.¹² Sklar added that there may be future lawsuits filed and more pressure placed on Capitol Hill if U.S. companies do not

3. *Id.* at 13-16.

4. *Id.* at 15.

5. *Id.* at 5.

6. The ATS is also referred to as The Alien Tort Claims Act. The different nomenclature does not turn on anything substantive. See Philip A. Scarborough, Note, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 457 n.1 (2007). This Note uses the term "ATS" unless a source specifically refers to the Alien Tort Claims Act.

7. Second Amended Complaint for Tort Damages, *supra* note 1, at 1-3.

8. *Id.* at 2.

9. See discussion *infra* Part II.A (discussing the role of Shi Tao).

10. Joint Stipulation of Dismissal at 1, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW/JCS (N.D. Cal. Nov. 13, 2007).

11. *Yahoo Settles Lawsuit over Jailed Chinese Journalists*, L.A. TIMES, Nov. 13, 2007 (on file with author).

12. *Id.*

change their business practices in China soon.¹³ Because many other U.S. companies, including Google, Cisco Systems, and Microsoft, continue to face the Chinese government's requests for Internet-user information, Sklar rightfully expects ATS-ISP jurisprudence to continue to develop.¹⁴

In response to the *Xiaoning* settlement, some human rights advocates say other companies operating in China will likely take note of Yahoo!'s experience and "tread more carefully."¹⁵ Similarly, Representative Tom Lantos, the former chairman of the U.S. House Committee on Foreign Affairs, called on Internet companies to "resist any attempts by authoritarian regimes to make them complicit in cracking down on free speech," and advised corporations to exit the Chinese market if this were not possible.¹⁶ While there are moral reasons why corporations should follow the advice of these advocates and resist compliance with the demands of dictatorial governments, the question remains whether corporations will be liable in U.S. courts for their failure to do so.

This Note discusses the potential liability under the ATS of U.S.-based ISPs operating in China. Human rights advocates who find ISPs' compliance with China's restrictive speech laws unacceptable have turned to the ATS in an attempt to hold ISPs accountable for their acquiescence with the Chinese government's demands for personally identifying information of Internet dissidents.¹⁷ To address this novel use of the statute, this Note first tells the story of Xiaoning, Ling, and Tao, the three Chinese citizens who invoked the ATS to sue Yahoo! for complying with China's Internet regulations. Second, this Note provides information about the ATS, including the history of the statute, the U.S. Supreme Court's latest holding involving the statute in *Sosa v. Alvarez-Machain*,¹⁸ and the most recent decisions on aiding and abetting liability under the statute.¹⁹

13. *Id.*; Indeed, shortly after Xiaoning's case was settled, another lawsuit was filed against Yahoo! by Chinese dissidents alleging Yahoo! aided Chinese authorities by handing over e-mail and electronic communications. See Dan Nystedt, *Yahoo Sued Again by Chinese Dissidents*, WASHINGTON POST, Feb. 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/29/AR2008022901240.html>.

14. *Id.*

15. Catherine Rampell, *Yahoo Settles with Chinese Families*, WASHINGTON POST, Nov. 14, 2007, at D4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/13/AR2007111300885.html?hpid=sec-tech>.

16. *Yahoo Settles Lawsuit over Jailed Chinese Journalists*, *supra* note 11.

17. See Second Amended Complaint for Tort Damages, *supra* note 1, at 2.

18. 542 U.S. 692 (2004).

19. See discussion *infra* Part III.D.

Finally, this Note concludes that the ATS does not adequately apply to the issues presented in cases like that of Xiaoning, Ling, and Tao. Moreover, other attempts to solve the issues presented in this case against Yahoo!—such as the Global Online Freedom Act (GOFA) and the Global Compact (GC)—also fail to provide effective, workable answers. Rather than use the ATS to attempt to address this issue in court, those who are concerned about corporate compliance with Internet speech-restricting countries should direct their efforts toward developing an international solution that combines the effective aspects of the GOFA and the GC to directly provide realistic, effective standards for ISPs.

I. BACKGROUND: *XIAONING V. YAHOO! INC.*

A. *Statement of the Facts: The Plaintiffs' Stories*

Wang Xiaoning is a citizen and resident of China who has written about the need for democratic reform and a multiparty system in China.²⁰ From 2000 to 2001, Xiaoning edited the electronic journals *Free Forum of Political Reforms* and *Commentaries on Current Political Affairs*, and his writings in these journals emphasized the need to bring democracy to China.²¹ Xiaoning also published his journals and articles through an e-mail subscriber list, referred to as the “aaabbbccc” Yahoo! Group, but in 2001 his Yahoo! account was blocked by the Chinese government due to the political content of his writings.²² In China, the government strictly monitors the distribution of information that might “harm unification of the country, endanger national security, or subvert government authority.”²³ Communications that are critical of the Chinese government are considered harmful, and those who make them are

20. Second Amended Complaint for Tort Damages, *supra* note 1, at 4, 13.

21. *Id.* at 13; Ariana Eunjung Cha & Sam Diaz, *Advocates Sue Yahoo In Chinese Torture Case*, WASHINGTON POST, Apr. 19, 2007, at D1, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/18/AR2007041802510_pf.html (“‘Outwardly democratic but inwardly despotic’ was how [Xiaoning] described China’s government in one essay.”). During this same time period, Xiaoning also posted pro-democracy commentary on websites based in China and abroad. Second Amended Complaint for Tort Damages, *supra* note 1, at 13.

22. Second Amended Complaint for Tort Damages, *supra* note 1, at 13. Even after Xiaoning’s Yahoo! account was blocked, however, he continued to publish his writings by sending them electronically and anonymously to individual e-mail addresses. *Id.*

23. See PHR2004 - People’s Republic of China, Privacy International, Nov. 16, 2004, <http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-83511> (last visited Sept. 18, 2008).

subject to severe fines and imprisonment.²⁴ The Chinese government strictly monitors the Internet for any such harmful writings; in fact, since 1994, 60 different regulations governing the use of the Internet have been enacted in China, and the country is rumored to have 35,000 “Internet police” officials who enforce those regulations.²⁵

According to Xiaoning’s allegations,²⁶ Yahoo! Hong Kong (Yahoo! HK), a subsidiary of Yahoo! Inc., provided information to the Chinese police that linked Xiaoning to his anonymous e-mails and pro-democracy online articles.²⁷ Upon identifying Xiaoning, Chinese security police, on September 1, 2002, invaded his home, detained him, searched his home, and seized two computers, personal computer files, e-mail records, written notes, address books, and manuscripts.²⁸ On September 30, 2002, Xiaoning was formally arrested and charged with inciting subversion of state power, promoting the creation of a new political party in China, and corresponding with a “hostile” overseas organization.²⁹ Between his arrest and trial, Xiaoning was held at the Detention Center of the Beijing State Security Bureau, where he suffered “severe abuse at the hands of the prison officials.”³⁰ Xiaoning was tried by the Beijing Municipal First Intermediary People’s Court on the three charges on July 25, 2003, and on September 12, 2003, Xiaoning was formally sentenced.³¹

In May 2004 Xiaoning filed an appeal with the Supreme People’s Court of China arguing that “his arrest and conviction for free expression of his opinions was illegal under Chinese and international law.”³² The court rejected this argument and denied the appeal.³³ Xiaoning, acting through his wife of twenty-seven years, Yu Ling, later applied to appeal the conviction again, but the court rejected the application in July 2006.³⁴ But Xiaoning’s cause was not forgotten. A

24. *Id.* See also Marc D. Nawyn, *Code Red: Responding to the Moral Hazards Facing U.S. Information Technology Companies in China*, 2007 COLUM. BUS. L. REV. 505, 515 (2007) (“These regulations . . . have authorized at least twelve different governmental agencies to oversee China’s growing number of ISPs, ICPs, websites (including blogs), Internet cafes, and end users.”).

25. Nawyn, *supra* note 24, at 515, 519.

26. The following facts are all alleged, but, for the sake of readability, the fact that they have not been proven will not be mentioned before each statement.

27. Second Amended Complaint for Tort Damages, *supra* note 1, at 13.

28. *Id.*

29. *Id.* at 14.

30. *Id.* at 13.

31. *Id.* at 14.

32. *Id.* at 15.

33. *Id.*

34. *Id.*

year later, on April 18, 2007, the World Organization for Human Rights USA³⁵ filed a lawsuit against Yahoo! in the United States on behalf of Xiaoning and Ling,³⁶ alleging that Yahoo! “willingly provided Chinese officials with access to private e-mail records, copies of e[-]mail messages, e-mail addresses, user-ID numbers, and other identifying information about the Plaintiffs and the nature of the content of their use of electronic communications.”³⁷ Because Yahoo! provided Chinese authorities with information that led to Xiaoning’s arrest and imprisonment, the complaint alleged that Yahoo! “knowingly and willfully aided and abetted in the commission of torture and other major abuses violating international law that caused Plaintiffs’ severe physical and mental pain and suffering.”³⁸ Furthermore, the complaint, which was also filed on behalf of “Presently Unnamed and To Be Identified Plaintiffs,” stated that at the time of filing “at least sixty individuals [were] arbitrarily imprisoned in China for expressing their support for free elections, democracy, or human rights through Internet communications . . .

35. The World Organization for Human Rights USA states that:

Human Rights USA was founded on the principle that the United States, as a world leader in efforts to enforce international human rights norms, should be held accountable to the same standards it promotes abroad. These include rights to protection from torture and gender-based violence, access to legal remedies (such as habeas corpus) to effectively challenge abuses of power, and observance of other core standards set out in the Universal Declaration of Human Rights and other human rights treaties, such as the Convention Against Torture.

World Organization for Human Rights USA - History, http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=21&Itemid=43 (last visited Sept. 18, 2008). The organization’s website says the case was filed to underscore “the dire need for U.S. corporations to put human rights and international law first in all of their business dealings, especially when operating in countries like China that commit torture and other major human rights abuses on a systematic basis.” World Organization for Human Rights USA - Human Rights USA Sues Yahoo! for Complicity in Human Rights Abuses in China, Apr. 18, 2007, http://www.humanrightsusa.org/index.php?option=com_content&task=view&id=74&Itemid=38 (last visited Sept. 18, 2008).

36. Yu Ling, also a citizen and resident of China, sued “for the injuries, including pain and suffering, she has endured as a result of her husband’s torture, cruel, inhuman, or other degrading treatment, and arbitrary arrest and prolonged detention” Second Amended Complaint for Tort Damages, *supra* note 1, at 5. The complaint alleges that Ling and her family have suffered “severe psychological and emotional suffering” as a result of Xiaoning’s arrest, and that since Xiaoning’s imprisonment, Ling as been subject to continued police surveillance which causes her to fear the police would also “arbitrarily arrest her and subject her to physical abuse like her husband.” *Id.* at 16. Moreover, the complaint alleges that Ling has suffered strained family and social relations, extreme depression and guilt, loss of income, and health complications such as the loss of a substantial amount of weight. *Id.* at 16-17.

37. *Id.* at 2.

38. *Id.*

whose arrests and detention, based on information currently available . . . may be linked to actions by the Defendants.”³⁹

In an amended complaint submitted in May 2007, Shi Tao, one of the formerly unnamed plaintiffs, was added to the lawsuit.⁴⁰ Tao worked as a reporter and head of the editorial department for *Contemporary Business News* from February 2002 to May 2004, and then as a freelance journalist from May 2004 until his arrest.⁴¹ As a freelance journalist, Tao wrote about corruption by government officials in China and called for democratic reform of the Chinese government.⁴² For example, in April 2004 Tao, using a pseudonym, published an essay entitled “The Most Disgusting Day” on an Internet forum, criticizing the Chinese government for detaining a member of the “Tiananmen Mothers,” a group comprised of mothers whose children were killed by the Chinese government during the demonstrations at Tiananmen Square in 1989.⁴³ Furthermore, also in April 2004 Tao learned at a *Contemporary Business News* staff meeting that the Chinese government’s Central Propaganda Bureau sent out a document to journalists regarding security concerns and the government’s preparations for the upcoming fifteenth anniversary of the Tiananmen Square tragedy.⁴⁴ That night, Tao used his personal Yahoo! e-mail account to send his notes from this meeting to a New York-based website *Democracy Forum*.⁴⁵

Sometime between Tao’s email to *Democracy Forum* in April 2004 and Tao’s arrest on November 23, 2004, Yahoo! HK provided Chinese government investigators with information that linked Tao to the anonymous e-mail he sent to *Democracy Forum*.⁴⁶ Specifically, Yahoo! HK, according to the complaint, turned over “the account

39. *Id.* at 5-6.

40. Amended Complaint for Tort Damages at 4, Wang Xiaoning v. Yahoo! Inc., No. C07-02151 CW (N.D. Cal. May 29, 2007).

41. Second Amended Complaint for Tort Damages, *supra* note 1, at 17.

42. *Id.*

43. *Id.* See generally Tiananmen Square Protests of 1989 – Wikipedia, http://en.wikipedia.org/wiki/Tiananmen_Square_protests_of_1989 (last visited Sept. 18, 2008). The 1989 Tiananmen Square protests culminated in what is referred to as the Tiananmen Square Massacre. *Id.* Between April 15 and June 4, 1989 demonstrations were led by Chinese labor activists, students and intellectuals criticizing the ruling Chinese Communist Party and calling for democracy and boarder freedoms. *Id.* The protests resulted in a military action that left many civilian protestors dead or injured. *Id.* The estimated death toll ranges anywhere from 200-300 (Chinese government calculations) to 400-800 (*New York Times* reports) to 2,000-3,000 (Chinese student associations and Chinese Red Cross estimates). *Id.*

44. Second Amended Complaint for Tort Damage, *supra* note 1, at 17.

45. *Id.*

46. *Id.* at 18.

holder information for the e-mail address, the IP address and physical address of the computer from which the email was sent, the date and time the email was sent,” and the content of the e-mail.⁴⁷ Moreover, the complaint alleged that Yahoo! HK provided officials with the physical address of the office where the electronic communication took place, which ultimately led to the association of the anonymous e-mail with Tao.⁴⁸ On the day of his arrest, Tao was walking across a street near his home when several people confronted him, placed a hood over his head, and took him thousands of miles away to Changsha,⁴⁹ the capital city of China’s Hunan Province.⁵⁰ Soon after, his house was searched and police seized his computer, papers, and other property.⁵¹

Before and throughout his trial, Tao was held at the Changsha Detention Center, where, according to the complaint, officials are known to physically abuse and torture detainees on a regular basis.⁵² On April 30, 2005, Tao was sentenced to ten years imprisonment for “illegally providing state secrets overseas.”⁵³ In the verdict, the court specifically stated that Tao’s Internet user information had been furnished by Yahoo! HK.⁵⁴ Since Tao’s appeal was denied, he has been imprisoned at Chishan Prison of Hunan Province, a high-security prison, where his health and mental state have deteriorated.⁵⁵ Tao has suffered from an ulcer, a heart ailment, and skin lesions.⁵⁶ Chishan Prison adheres to a system of forced labor, and, as a result, Tao works days of sixteen hours or more under conditions that are intended to harm his physical and mental capacities.⁵⁷ Tao’s complaint asserts that the guards abuse and torture political prisoners with “constant violence and intimidation,” and that prisoners are denied necessary medical care.⁵⁸

47. *Id.*

48. *Id.*

49. *Id.*

50. Changsha – Wikipedia, <http://en.wikipedia.org/wiki/Changsha> (last visited Sept. 18, 2008).

51. Second Amended Complaint for Tort Damage, *supra* note 1, at 18.

52. Second Amended Complaint for Tort Damages, *supra* note 1, at 18.

53. *Id.* at 19.

54. *Id.*

55. *Id.*

56. *Id.* at 19-20.

57. *Id.* at 20.

58. *Id.*

B. Yahoo!'s Defense

On August 27, 2007, Yahoo! moved to dismiss Xiaoning, Ling, and Tao's lawsuit, arguing that U.S. courts lacked personal jurisdiction,⁵⁹ and that Yahoo! was simply obeying Chinese law and not liable under the ATS or under any other U.S. law.⁶⁰ More specifically, Yahoo!'s principal arguments supporting dismissal were as follows: (1) after the Supreme Court's decision in *Sosa v. Alvarez-Machain*,⁶¹ the plaintiffs' allegations did not meet the high degree of international consensus that the ATS requires because restrictions on free speech and forced labor in prison are not uniformly considered unlawful; (2) principles such as comity and the act of state doctrine advise U.S. courts not to interfere with a sovereign nation's ability to legislate and enforce its own laws; and (3) even if a court were to find that the Chinese government's actions violated international law, Yahoo! still would not be liable because there is no liability for aiding and abetting liability under the ATS.⁶² While Yahoo! expressed sympathy for the plaintiffs and their families, the company denied responsibility for the actions of a sovereign government over which it had no control.⁶³ According to the motion to dismiss, the company was simply obeying a legal government request for evidence relevant to a pending investigation.⁶⁴

In November 2007 the World Organization for Human Rights USA reported that the parties would begin discovery in the case.⁶⁵ Yahoo! submitted a motion to bifurcate the trials of Xiaoning and Tao, but the Northern District of California court granted the

59. Specially Appearing Defendant Yahoo! Hong Kong Ltd.'s Notice of Motion and Motion to Dismiss for Lack of Personal Jurisdiction; Memorandum of Points and Authorities in Support at 3, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW (N.D. Cal. Aug. 27, 2007).

60. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order at 4, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-02151 CW (N.D. Cal. Aug. 27, 2007); see also *Human Rights Activists Bash Yahoo's Cyberdissident Response*, WASH. INTERNET DAILY, Aug. 29, 2007, available at 2007 WLNR 17084703.

61. 542 U.S. 692 (2004). See discussion *infra* Part III.B.

62. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 5, 12, 17, 19.

63. *Id.* at 1.

64. *Id.*

65. World Organization for Human Rights U.S.A. – Yahoo Case Moves to Discovery Phase, http://www.humanrightssusa.org/index.php?option=com_content&task=view&id=86 (last visited Sept. 18, 2008).

organization's motion to begin initial and jurisdictional discovery.⁶⁶ The court ultimately never heard the claims because the case settled on November 13, 2007.⁶⁷

II. ANALYSIS: THE DEVELOPMENT OF THE ATS AND ATS AIDING AND ABETTING LIABILITY

The complaint filed by Xiaoning, Ling, and Tao alleged that Yahoo! was liable under the ATS.⁶⁸ While the World Organization for Human Rights USA argued that the ATS and U.S. courts were proper vehicles for addressing the plaintiffs' allegations in this case,⁶⁹ Yahoo! argued that the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, justiciability doctrines, and current aiding and abetting liability standards necessitated dismissal of the suit.⁷⁰ This section analyzes whether Xiaoning or Yahoo! would have prevailed if Xiaoning's claims had not been settled. Additionally, this section offers a prediction regarding who would prevail in the forecasted claims by imprisoned Chinese Internet dissidents against Yahoo! and other ISPs.

First, this section provides a history of the ATS, including a brief overview of the first cases that invoked the ATS to address human rights abuses. Second, this section discusses *Sosa v. Alvarez-Machain*,⁷¹ the most recent U.S. Supreme Court opinion on the ATS, and the implications it has for the claims against Yahoo!. Third, this section addresses the doctrine of comity in light of the history of the ATS and the Court's opinion in *Sosa*. Lastly, this section provides an overview of current aiding and abetting standards and assesses Yahoo!'s potential liability under each of those standards.

A. History of the ATS

The Alien Tort Statute is a federal law that was adopted in 1789 as part of the original Judiciary Act.⁷² The statute has been

66. Order Granting in Part and Denying in Part Plaintiffs' Motion for Initial and Jurisdictional Discovery, *Wang Xiaoning v. Yahoo! Inc.*, No. C07-2151 CW (N.D. Cal. Oct. 31, 2007).

67. Joint Stipulation of Dismissal, *supra* note 10.

68. Second Amended Complaint for Tort Damages, *supra* note 1, at 3.

69. *Id.*

70. Defendant Yahoo! Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint, *supra* note 60, at 5, 12, 17, 19.

71. 542 U.S. 692 (2004).

72. *Id.* at 712-13 (noting that the original language of the ATS provided that "new federal district courts 'shall also have cognizance, concurrent with the courts of the several

slightly modified several times since its original enactment,⁷³ and now states that “[t]he 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.”⁷⁴

In 1789, the law of nations consisted of two primary elements.⁷⁵ The first element addressed the general norms governing the behavior of nation states with each other—“the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights,”⁷⁶ or “that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other.”⁷⁷ The second element of the law of nations involved the conduct of individuals.⁷⁸ Importantly, at the time the statute was enacted, a significant component of the law of nations involved the respect that sovereign nations should give to other nations’ sovereignty.⁷⁹

Prior to 1980, the ATS had been invoked in only twenty-one cases, none of which involved human rights violations.⁸⁰ However, as a result of increasing international concern with human rights issues, litigants alleging human rights violations began to seek remedies under the statute.⁸¹ In 1980, the United States Court of Appeals for the Second Circuit, in *Filartiga v. Pena-Irala*, brought attention to the statute as a potential vehicle for addressing human rights violations abroad through U.S. courts.⁸² The case was brought by two citizens of Paraguay, Joel Filartiga and his daughter, Dolly Filartiga, who successfully used the ATS to sue a Paraguayan police officer who had

States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” (quoting Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77) (current version at 28 U.S.C. § 1350 (2000)).

73. *Id.* at 713 n.10.

74. 28 U.S.C. § 1350 (2000).

75. *Sosa*, 542 U.S. at 714.

76. *Id.* (quoting E. DE VATEL, LAW OF NATIONS, PRELIMINARIES § 3 (J. Chitty et al. trans. & eds., 1883)).

77. *Sosa*, 542 U.S. at 714 (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW *1).

78. *Sosa*, 542 U.S. at 715.

79. See generally *id.* at 714.

80. Neil J. Conley, Comment, *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*, 111 PENN ST. L. REV. 171, 183 (2006).

81. The Berkman Center for Internet & Society at Harvard Law School, Alien Tort Claims Act, <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html> (last visited Sept. 18, 2007).

82. 630 F.2d 876 (2d Cir. 1980).

tortured and killed Mr. Filartiga's son.⁸³ After the murder, the police officer began living in the United States illegally, which allowed the Filartigas to serve him in the United States and bring suit against him for wrongful death by torture.⁸⁴ In finding the Filartigas' claims actionable, the court stated that (1) the right to be free from torture was a fundamental right and a fundamental part of international law,⁸⁵ (2) Congress was authorized by Article III of the U.S. Constitution to enact the ATS,⁸⁶ and (3) international law had become a part of U.S. common law.⁸⁷ In its opinion, the court wrote, "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."⁸⁸

John Doe I v. Unocal Corporation was also a particularly significant case in the development of ATS human rights jurisprudence. In that case, the United States Court of Appeals for the Ninth Circuit allowed an ATS suit to be brought against a multinational corporation that engaged in overseas violations of international law.⁸⁹ Unocal Corporation and its partners, while involved in a joint venture to build a natural gas pipeline from Myanmar (Burma) to Thailand, received the assistance of the Myanmar military in guarding the pipeline.⁹⁰ According to villagers from Myanmar's Tenassarim region, the rural area through which the pipeline was being built, members of the Myanmar military forced the villagers to work on the pipeline and also committed acts of rape and murder against the villagers.⁹¹ Since there was sufficient evidence that Unocal not only knew of the abuses, but also assisted and encouraged the Myanmar military in committing the abuses, the Ninth Circuit dismissed Unocal's motion for summary judgment, noting that the torture committed in furtherance of forced labor may give rise to corporate actor liability under the ATS even in the absence

83. *Id.* at 878, 887.

84. *Id.* at 878-79.

85. *Id.* at 881.

86. *Id.* at 887.

87. *Id.* at 886.

88. *Id.* at 890.

89. *See 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).

90. *Id.* at 937-38.

91. *Id.* at 939-40.

of state action.⁹² The Ninth Circuit never reheard the case because Unocal settled the claims for an undisclosed amount.⁹³

Filartiga and *Unocal* are both significant cases with respect to *Xiaoning* and future suits against ISPs operating in China because they first established the potential for plaintiffs to invoke the ATS when their claims involve human rights abuses and corporations. However, guidance was still needed regarding the extent to which these claims could be brought. On June 29, 2004, more than 200 years after the creation of the ATS, the U.S. Supreme Court provided clarifications and restrictions in *Sosa v. Alvarez-Machain*.⁹⁴

B. The ATS After *Sosa*

The events that precipitated *Sosa v. Alvarez-Machain* began in 1985 when a U.S. Drug Enforcement Administration (DEA) agent, Enrique Camarena-Salazar, was captured, tortured, and ultimately murdered in Mexico.⁹⁵ DEA officials believed that Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present during the agent's torture and that he prolonged the agent's life in order to extend his interrogation and torture.⁹⁶ In 1990 a federal grand jury indicted Alvarez for the torture and murder of the agent, and the District Court for the Central District of California issued a warrant for his arrest.⁹⁷ The DEA's attempt to obtain the Mexican government's assistance in extraditing Alvarez to the United States failed, so the DEA approved a plan to hire Mexican nationals to capture Alvarez and bring him to the United States for trial.⁹⁸ The group of hired nationals, which included an individual named José Francisco Sosa, abducted Alvarez, held him overnight in a motel, and brought him to El Paso, Texas, where he was arrested by federal officers.⁹⁹ After Alvarez's motion to dismiss, the indictment was denied by the U.S. Supreme Court and the case was tried in 1992.¹⁰⁰

92. *Id.* at 953-54.

93. See Lisa Girion, *Unocal to Settle Human Rights Claims*, L.A. TIMES, Dec. 14, 2004, at A1, available at <http://articles.latimes.com/2004/dec/14/business/fi-unocal14>.

94. 542 U.S. 692 (2004).

95. *Id.* at 697.

96. *Id.*

97. *Id.* at 697-98 (citing *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003)).

98. *Id.* at 698.

99. *Id.*

100. *Id.*

At the close of the government's case, the district court granted Alvarez's motion for a judgment of acquittal.¹⁰¹

After returning to Mexico, Alvarez sued Sosa under the ATS alleging that his abduction violated his civil rights.¹⁰² The District Court for the Central District of California awarded summary judgment and \$25,000 in damages to Alvarez on his ATS claim, and the United States Court of Appeals for the Ninth Circuit affirmed.¹⁰³ A divided en banc court held that, based on a "clear and universally recognized norm prohibiting arbitrary arrest and detention," Alvarez's arrest was a tort in violation of international law.¹⁰⁴ The U.S. Supreme Court disagreed.¹⁰⁵

Sosa argued that the ATS does no more than grant the federal courts jurisdiction over tort actions brought by aliens alleging violations of the law of nations and that the ATS does not authorize the courts to recognize a particular cause of action without further congressional directives.¹⁰⁶ Rejecting this argument, the Court held that while the statute is "in terms only jurisdictional," at the time of its enactment, jurisdiction enabled federal courts to hear a "very limited category" of claims "defined by the law of nations and recognized at common law."¹⁰⁷ The three principal offenses against the law of nations in 1789 included violations of safe conducts,¹⁰⁸ infringement of the rights of ambassadors, and piracy.¹⁰⁹ The Court ruled that "[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy *and at the same time threatening*

101. *Id.*

102. *Id.* Alvarez also sued DEA operative Antonio Garate-Bustamante, five unnamed Mexican civilians, the United States and four DEA agents. *Alvarez-Machain*, 331 F.3d at 610. In *Sosa*, the Court ruled both on Alvarez's ATS claim against Sosa and Alvarez's claim against the United States under the Federal Tort Claims Act. 542 U.S. at 699. Only his ATS claim is relevant to this Note; the Federal Tort Claims Act cause of action will not be discussed.

103. *Sosa*, 542 U.S. at 699 (citing *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001)).

104. *Sosa*, 542 U.S. at 699 (quoting *Alvarez-Machain*, 331 F.3d at 620).

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

106. *Id.* at 712.

107. *Id.*

108. Violations of safe conducts included: (1) wartime injury to enemy aliens who had been granted a safe conduct document (also called a passport) or were otherwise entitled to safety under the law of nations or a treaty with the United States, (2) injury to person or property of a friendly or neutral alien whose relationship had been memorialized in a treaty, and (3) injury to person or property of any alien which the host country was not at war. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 836-37 (2006).

109. *Sosa*, 542 U.S. at 715 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)).

serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.”¹¹⁰ Therefore, the Court reasoned, the first Congress did not pass the ATS “to be placed on the shelf” until a future Congress or state legislature authorized the creation of causes of action; the statute was meant to have immediate practical effect, but only for a “relatively modest set of actions alleging violations of the law of nations.”¹¹¹ This does not mean, however, that in order for a cause of action to exist it must fit within one of the three violations recognized in 1789.¹¹² Rather, courts may consider new causes of action under the ATS, but they should do so with discretion: according to the Supreme Court, “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 features of the eighteenth-century paradigms we have recognized.”¹¹³

In its ruling in *Sosa*, the Court provided five reasons for judicial caution when federal courts are considering what kinds of present-day law of nations violations to recognize.¹¹⁴ First, the conception of federal common law has changed since the enactment of the ATS.¹¹⁵ When the statute was passed in 1789, federal common law was thought of as “found” or “discovered,” but today it is considered “made” or “created”; therefore, a judge deciding whether to hear an ATS claim exerts a “substantial element of discretionary judgment in the decision” that may not have been contemplated in 1789.¹¹⁶

Second, along with this conceptual change, there has been a significant change in the role of federal courts in making common law; today, post-*Erie*,¹¹⁷ the general practice of judges is to look for legislative guidance before exercising authority over substantive law.¹¹⁸ Third, the Supreme Court has frequently held that a decision to create a private right of action is often better left to legislative judgment because “[t]he creation of a private right of action raises

110. *Sosa*, 542 U.S. at 715 (emphasis added).

111. *Id.* at 719-20.

112. *Id.* at 724-25.

113. *Id.* at 725.

114. *Id.* at 725-28.

115. *Id.* at 725.

116. *Id.* at 725-26.

117. *Erie* generally held that federal courts hearing diversity cases must apply the law that would be applied by the courts of the state in which they sit. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

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

issues beyond the mere consideration whether underlying primary conduct should be allowed or not.”¹¹⁹ Therefore, “[t]he possible collateral consequences of making international rules privately actionable argue for judicial caution.”¹²⁰

Fourth, such “collateral consequences,” particularly the potential implications for the foreign relations of the United States, should make courts “particularly wary of impinging on the discretion of the [l]egislative and [e]xecutive [b]ranches in managing foreign affairs.”¹²¹ In the Court’s words, “[i]t is one thing for American courts to enforce constitutional limits on our own [s]tate and [f]ederal [g]overnments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.”¹²² Therefore, because numerous federal courts’ creation of remedies for violations of new international law norms could cause “adverse foreign policy consequences, they should be undertaken, *if at all*, with great caution.”¹²³

Fifth, there has been no congressional mandate to identify new violations of international law.¹²⁴ While Congress provided a clear mandate in the Torture Victim Protection Act of 1991,¹²⁵ that grant of authority is confined to specific subject matter; Congress has not similarly acted to promote violations of customary international law outside of that sphere.¹²⁶ Rather, the Senate has specifically declined to give federal courts the job of interpreting and applying international human rights law.¹²⁷

Because of these five reasons, the Court held that the ATS only provides jurisdiction for causes of action based on violations of modern-day international norms that meet the degree of consensus

119. *Id.* at 727.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 727-28 (emphasis added).

124. *Id.* at 728.

125. The Torture Victims Protection Act (TVPA) was passed largely as a result of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), a case in which Judge Robert Bork took the position that the ATS did not provide a cause of action. Frank Sullivan, Jr., *A Separation of Powers Perspective on Pinochet*, 14 *IND. INT’L & COMP. L. REV.* 409, 470 n.373 (2004). Therefore, the TVPA was passed to provide a cause of action when torture is alleged. *Id.*

126. *Sosa*, 542 U.S. at 728.

127. *Id.* (citing 138 *CONG. REC.* 8071 (1992)).

required in 1789,¹²⁸ subject to judicial restraint.¹²⁹ Ultimately, however, the Court determined that Alvarez's claim for arbitrary arrest and daylong detention could not support a cause of action because the alleged violation of international law was not "so well defined as to support the creation of a federal remedy."¹³⁰ As a result of *Sosa*, however, the "door is still ajar" to further independent judicial recognition of actionable international law violations, but such power is subject to "vigilant door keeping."¹³¹

As the defendant in *Xiaoning*, Yahoo! therefore argued that *Sosa* sets a "high bar" for plaintiffs suing under the ATS.¹³² Noting that the right to free expression is neither guaranteed in China nor in some parts of the Western world, Yahoo! argued that the plaintiffs' arbitrary detention claim "comes nowhere close" to meeting the requirements set forth in *Sosa*.¹³³ Moreover, Yahoo! noted that "forced labor in prison, however offensive, is far from universally condemned."¹³⁴ Reiterating *Sosa's* holding that "an alleged tort *cannot* involve the violation of any norm with 'less . . . acceptance among civilized nations than the historical paradigms,'"¹³⁵ Yahoo! cited William Blackstone's writings from the era that ATS was enacted to conclude that "the only international law violations recognized were those 'in which *all* the learned of *every* nation agree.'"¹³⁶

Since Yahoo! settled this case, it is uncertain whether the district court would have found that free speech restrictions, prolonged imprisonment, and forced labor constituted violations of international norms with the degree of consensus required by *Sosa*. However, even if the court found that these violations did rise to the necessary level of consensus, the practical reasons for judicial restraint must also, according to *Sosa*, be considered in the ultimate

128. *Sosa*, 542 U.S. at 732 ("[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.")

129. *Id.* at 732-33 ("And the determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must, involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.")

130. *Id.* at 738.

131. *Id.* at 729.

132. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 15.

133. *Id.* at 17.

134. *Id.* at 18.

135. *Id.* at 19 (citing *Sosa*, 542 U.S. at 732) (omission in original).

136. *Id.* at 19 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769)) (emphasis in original).

decision of whether or not to recognize a cause of action. It is likely that, in consideration of the lack of clear legislative guidelines and the potential negative impact on U.S. foreign relations such a cause of action would create, the court hearing Xiaoning's case would not have decided to recognize a cause of action.

C. *International Comity*

In addition to the five reasons that the majority in *Sosa* cited for judicial restraint in recognizing causes of action under the ATS, Justice Breyer filed a concurring opinion to emphasize the important role that comity should play in determining whether to hear a claim under the ATS.¹³⁷ Justice Breyer added an important consideration to the majority's holding: "I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement."¹³⁸

The principle of comity was described by the U.S. Supreme Court in its 1895 decision *Hilton v. Guyot* as "the recognition which one nation allows within its territory of the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience."¹³⁹ In considering whether a court's particular exercise of jurisdiction exceeds international law standards, the Restatement (Third) of the Foreign Relations Law of the United States is often invoked.¹⁴⁰ Section 403 states that even when a state has legitimate reasons for applying domestic laws to foreign individuals and events, "a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."¹⁴¹ Section 403 goes on to describe eight criteria to be balanced in determining whether the exercise of jurisdiction over a person or activity is reasonable, including: (1) the extent to which the activity takes place within the territory; (2) the connection between the regulating state and the person responsible for the activity to be regulated; (3) the character of the activity to be regulated, and the importance, extent

137. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

138. *Id.*

139. 159 U.S. 113, 163-64 (1895).

140. The Restatement (Third) of the Foreign Relations Law of the United States is a publication of the American Law Institute prepared by eminent academic international lawyers. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 173-74 (2001).

141. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. § 403(1) (1987).

and degree of such regulation; (4) the existence of justified expectations that might be protected or hurt by the regulation; (5) the importance of the regulation to the political, legal, or economic system; (6) the extent to which the regulation is consistent with the traditions of the international system; (7) the extent to which another state may have an interest in regulating the activity; and (8) the likelihood of conflict with regulation by another state.¹⁴²

In its motion to dismiss, Yahoo! argued that the first two factors weighed against the court exercising jurisdiction over Xiaoning, Ling, and Tao's claims because "the indisputable locus of this case is China."¹⁴³ Yahoo! argued that the third, fifth and sixth factors also weighed in favor of dismissal because "evidence-gathering laws are 'traditional' and important parts of law enforcement efforts the world over."¹⁴⁴ Although Yahoo! believed that China's prohibitions on speech were "misguided," it argued that such kind of speech regulations are "not uncommon" throughout the world and that a sovereign's ability to legislate and enforce its laws is both "generally accepted" and an important part of the "international political, legal, [and] economic system."¹⁴⁵ Yahoo! also argued that the fourth factor weighed in favor of dismissal because companies that choose to operate business abroad have a "justified expectation" that they should comply with the foreign law.¹⁴⁶ Yahoo! noted that not only does the U.S. government mandate that companies comply with foreign law when operating overseas,¹⁴⁷ but also that Xiaoning's complaint itself cited legal authority that required compliance.¹⁴⁸ Lastly, Yahoo! argued that even sovereign states other than China would object to an

142. *Id.* §§ 403(2)(a)-(h).

143. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. §§ 403(a)-(b) (1987)).

144. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. §§ 403(c), (e), (f) (1987)).

145. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. §§ 403(c), (e) (1987)) (alteration in original).

146. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. § 403(d) (1987)).

147. *See* Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 5 (2002)).

148. *See* Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing Second Amended Complaint for Tort Damages, *supra* note 1, at 27).

American court stipulating which laws American companies like Yahoo! must obey when doing business in countries other than the United States.¹⁴⁹

Similarly, in his concurring opinion, Justice Breyer emphasized that by considering the increasing interdependent nature of the world and applying principles of comity, courts can ensure that laws of different nations “work together in harmony.”¹⁵⁰ As an example of a particular instance in which comity concerns arise, Justice Breyer cited the situation in which foreigners injured abroad bring suit under the ATS asking U.S. federal courts to “recognize a claim that a certain kind of foreign conduct violates an international norm.”¹⁵¹ The *Xiaoning* case certainly presents such a situation. In light of the fact that the law of nations included norms governing the rights existing between nations at the time the ATS was enacted, Breyer concluded that considerations of comity are “necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.”¹⁵² Justice Breyer’s concurrence emphasizing comity and the law of nations’ purpose of fostering, rather than harming, foreign relations presents an even stronger case for dismissing claims similar to plaintiffs’ ATS claims against Yahoo!.

D. Aiding and Abetting Liability under the ATS

In the *Xiaoning* case, the plaintiffs, of course, did not allege that Yahoo! directly carried out Xiaoning or Tao’s arbitrary detention and torture. Rather, the plaintiffs alleged that Yahoo! and its subsidiaries “aided and abetted in the carrying out of these abuses, and did not act to prevent or punish these violations of human rights as embodied in international and domestic law.”¹⁵³ Since the U.S. Supreme Court in *Sosa* did not directly address whether aiding and abetting liability exists under the ATS, or what standard would be used to determine whether corporations are responsible for aiding and abetting in the commission of a tort under the ATS, ATS jurisprudence regarding torts committed by non-state actors has yet to

149. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 13 (citing *Rivendell Forest Prods., Ltd. v. Canadian Forest Prods.*, 810 F. Supp. 1116, 1119 (D. Colo. 1993); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE U.S. §§ 403(g), (h) (1987)).

150. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring) (quoting *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S., 155, 164 (2004)).

151. *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

152. *Id.*

153. Second Amended Complaint for Tort Damages, *supra* note 1, at 25.

be clarified.¹⁵⁴ There are various definitions for “aiding and abetting,” and the standard the Supreme Court would use in this situation remains unclear.¹⁵⁵ This section first addresses the argument that post-*Sosa* aiding and abetting liability is not sufficiently recognized by the international community to create a cause of action under the ATS. Next, this section provides examples of the most common aiding and abetting standards courts have used when finding there is aiding and abetting liability under the ATS. Finally, this section assesses Yahoo!’s potential liability under each of these standards.

Unsurprisingly, Yahoo!, in its motion to dismiss, argued that the executive branch, courts, and scholars “who read *Sosa* correctly” have concluded that “there is *no* civil aiding-and-abetting liability under the ATS.”¹⁵⁶ First, Yahoo! argued that the text of the ATS does not contain an express provision for aiding and abetting liability,¹⁵⁷ even though Congress at that time knew how to create—and previously had created—secondary liability for violations of other statutes.¹⁵⁸ Second, Yahoo! argued that under *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*¹⁵⁹ courts may not read secondary liability into federal statutes.¹⁶⁰ In *Central Bank*, the U.S. Supreme Court stated that while Congress had passed a general “criminal” aiding and abetting statute,¹⁶¹ Congress had not enacted a general civil aiding and abetting statute.¹⁶² Quoting *Central Bank*, Yahoo! argued, “While in *criminal* law, aiding and abetting is an ancient doctrine, in civil cases, the doctrine has been at best uncertain in application and its recognition would be a vast expansion of federal law.”¹⁶³ Third, Yahoo! contended that, under *Sosa*, only a “modest

154. Conley, *supra* note 80, at 203.

155. *Id.*

156. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 20 (emphasis added).

157. *Id.* at 21 (citing 28 U.S.C. § 1350 (2000)).

158. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 21 (“The year after [Congress] enacted the ATS, ‘Congress enacted a criminal statute containing specific provisions for indirect liability—for example, for aiding and abetting piracy.’ . . . The ATS is bereft of such language.” (quoting Curtis A. Bradley et al, *Customary International Law and the Continuing Relevance of Erie*, 120 HARV. L. REV. 870, 926 (2007))).

159. 511 U.S. 164 (1994).

160. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 21.

161. *Central Bank*, 511 U.S. at 176 (citing 18 U.S.C. § 2 (2000)).

162. *Central Bank*, 511 U.S. at 182.

163. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 21 (quoting *Central Bank*, 511 U.S. at 181, 183) (internal quotation marks omitted)(emphasis in original).

number” of claims could be brought under ATS without legislative permission.¹⁶⁴ Fourth, Yahoo! claimed that if U.S. courts were to recognize these types of claims, U.S. policy interests would be harmed, and argued that

civil aiding and abetting liability would inevitably lead to greater diplomatic friction for the United States. Such liability would trigger a wide range of ATS suits with plaintiffs challenging the conduct of foreign nations—conduct that would otherwise be immune from suit under the Foreign Sovereign Immunities Act.¹⁶⁵

Lastly, Yahoo! claimed that civil liability for aiding and abetting is “equally disfavored under international law.”¹⁶⁶

All courts, however, do not agree with Yahoo!’s proposition that there is no aiding and abetting liability under the ATS. For example, in *Unocal*, the Ninth Circuit held that aiding and abetting liability exists under the ATS, and requires “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”¹⁶⁷ The court stated that for a private entity to be liable for a tort not requiring state action, such as genocide, slavery and war crimes,¹⁶⁸ a showing of foreseeability by the private actor that such violations would result is all that is necessary.¹⁶⁹ However, all other violations of “customary international law require state action to be actionable” under the ATS.¹⁷⁰ Therefore, private parties must show actual control over the state actors for there to be a showing of proximate causation.¹⁷¹ It is likely that Yahoo! would not be liable under this Ninth Circuit test, as violations of free speech and prolonged detention require state action, which in turn would require plaintiffs to show that Yahoo! controlled the action of the Chinese

164. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 21 (arguing that *Sosa* “made clear that any ‘innovative’ interpretations of the [ATS] must be left to the legislative process.”).

165. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 22. The Foreign Sovereign Immunities Act was passed in 1976 to prevent countries from invoking their sovereign immunity to prevent suits against them that were based solely on commercial grounds. Jonathan C. Lippert, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. INT’L L. REV. 1, 1. The standards for invoking the FSIA, however, are very rigorous, so sovereign countries retain much of their immunity. *Id.*

166. Defendant Yahoo!, Inc.’s Motion to Dismiss Plaintiffs’ Second Amended Complaint; Proposed Order, *supra* note 60, at 22

167. *Doe I v. Unocal*, 395 F.3d 932, 947 (9th Cir. 2002), *vacated by reh’g en banc*, 395 F.3d 978 (9th Cir. 2003).

168. Conley, *supra* note 80, at 204.

169. *Doe I*, 395 F.3d at 954 n.32.

170. Conley, *supra* note 80, at 204.

171. *Id.*

government.¹⁷² Clearly, Yahoo! did not control China's actions, and therefore did not aid and abet the Chinese government under this test.

In *Khulumani v. Barclay National Bank*,¹⁷³ a case from October 2007, the Second Circuit held that aiding and abetting liability exists under the Alien Tort Claims Act (ATCA).¹⁷⁴ The lower court had dismissed plaintiffs' ATCA claim after holding that aiding and abetting violations of customary international law did not provide a basis for ATCA jurisdiction.¹⁷⁵ The Second Circuit vacated this holding, allowed the plaintiffs to amend their complaint, and remanded the case to the district court to determine whether the plaintiffs had adequately pled a violation of international law sufficient to establish jurisdiction under the ATCA.¹⁷⁶ Judges Katzmann and Hall each filed concurring opinions providing their rationales and articulating different aiding and abetting standards under the ATCA.¹⁷⁷

Judge Katzmann determined that while the district court was correct to look to international law to determine the scope of ATCA's jurisdictional grant, the district court erred in finding there was no aiding and abetting liability under the ATCA.¹⁷⁸ Noting that during the second half of the twentieth century and into this century aiding and abetting liability has frequently been recognized in international treaties, Judge Katzmann concluded that "recognition of the individual responsibility of a defendant who aids and abets a violation of international law is one of those rules 'that states universally abide by, or accede to, out of a sense of legal obligation and mutual concern.'"¹⁷⁹ In his opinion, Judge Katzmann described several theories of aiding and abetting liability and ultimately concluded that

172. *Id.*

173. 504 F.3d 254 (2d Cir. 2007). *Khulumani* involved South Africa's National Party imposition of laws that disenfranchised, discriminated against, and repressed not-white residents. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 543 n.7 (S.D.N.Y. 2004). The laws, which became known as apartheid, were enforced by members of South Africa's military and police, and led to numerous occurrences of arbitrary detention, torture and killings by state actors. See *id.* The *Khulumani* plaintiffs' theory was that the defendants "aided and abetted" apartheid, and had they refrained, the apartheid regime would have ended sooner, and plaintiffs would not have suffered the extent of injuries. *Khulumani*, 504 F.3d at 259.

174. *Khulumani*, 504 F.3d at 260. The ATCA and the ATS are the same piece of legislation, and the statute can be referred to by both of these names. See *supra* note 6.

175. *Id.*

176. *Id.* at 260-61.

177. *Id.* at 260.

178. *Id.* at 268 (Katzmann, J., concurring).

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

the Rome Statute of the International Criminal Court (Rome Statute) articulates the proper standard.¹⁸⁰

The Rome Statute provides that a person shall be criminally responsible and subject to punishment for a crime within the jurisdiction of the International Criminal Court¹⁸¹ if that person:

(c) For the *purpose* of facilitating the commission of such crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; [or]

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be *intentional* and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime.¹⁸²

Judge Katzmann offered several reasons why the Rome Statute offers the best standard of aiding and abetting liability with regard to alien tort claims. First, unlike other international agreements, the Rome Statute includes a *mens rea* standard for liability: purposeful action.¹⁸³ This narrows the definition of aiding and abetting by declaring one guilty of aiding and abetting a crime only if he or she does so “for the purpose of facilitating the commission of such a crime.”¹⁸⁴ Also, the Rome Statute has been signed by 139 countries and ratified by 105, including most “mature democracies” in the world.¹⁸⁵ Moreover, Judge Katzmann notes, the Rome Statute’s *mens rea* standard is consistent with the other standards of accomplice liability in numerous sources of international law.¹⁸⁶

180. *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring). Katzmann notes the district court erred in dismissing the significance of criminal sources, concluding that “[t]his distinction [between civil and criminal sources] finds no support in our case law, which has consistently relied on criminal law norms in establishing the content of customary international law for purposes of the ATCA.” *Id.* at 270 n.5 (citing *Kadic v. Karadzic*, 70 F.3d 232, 241-243 (2d Cir. 1995); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63 (2004) (Breyer, J., concurring)).

181. The International Criminal Court, based on a treaty of 108 countries, is an independent, permanent court that tries persons accused of crimes of international concern, such as genocide and war crimes. International Criminal Court: About the Court, <http://www.icc-cpi.int/about.html> (last visited Oct. 18, 2008).

182. Rome Statute of the International Criminal Court art. 25 (3)(c)-(3)(d), July 17, 1998, 2187 U.N.T.S. 90 (emphasis added).

183. See *Khulumani*, 504 F.3d at 275 (Katzmann, J., concurring).

184. *Id.* (quoting Rome Statute art. 25 (3)(c)).

185. See *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring).

186. *Id.*

Therefore, Judge Katzmman concluded that “a defendant may be held liable under international law for aiding and abetting the violation of that law by another when the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with the purpose of facilitating the commission of that crime.”¹⁸⁷ This definition alone, Katzmman stated, is “sufficiently ‘well-established’ and ‘universally recognized’ to be considered customary international law for the purposes of the ATCA.”¹⁸⁸ Judge Korman concurred with Judge Katzmman’s opinion regarding the elements of aiding and abetting liability,¹⁸⁹ since “[t]hese elements are consistent with, if not mandated by, customary international law.”¹⁹⁰ Therefore, because Judges Katzmman and Korman constituted a majority of the panel, the district court was instructed to apply the Rome Statute’s aiding and abetting liability standard to the plaintiff’s ATCA claims on remand.

If a court chooses to apply the Rome Statute’s relatively demanding standard for aiding and abetting liability to the ATS, it is unlikely that companies in Yahoo!’s position will be held liable for

187. *Id.* at 277.

188. *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995)). While Katzmman held that the Rome Statute was the only acceptable aiding and abetting standard, he noted that this definition was not set in stone, pointing out that international law, like domestic law, can change and that the ATCA was meant to change with it. *Id.* Therefore, Katzmman conceded that there is some support for an aiding and abetting standard that allows for liability when “an individual provides substantial assistance with ‘the knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.’” *Id.* at 278 (quoting *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶¶ 102(i)-(ii) (Feb. 25, 2004)). Nevertheless, while Katzmman was mindful of such standards, he still was unable to find that they were sufficiently established and recognized at the time to trigger ATCA jurisdiction. *Khulumani*, 504 F.3d at 279 (Katzmann, J., concurring).

189. *Khulumani*, 504 F.3d at 337 (Korman, J., dissenting in part and concurring in part). Judge Korman articulated three reasons why the court should not have heard plaintiff’s aiding and abetting claim: first, because, under *Sosa*, this was a non-justiciable case; second, because the State Department “filed a persuasive Statement of Interest . . . urging dismissal because of the adverse effect the continued prosecution of these cases would have on the interests of the United States and our relations with other countries”; and, third, because the Republic of South Africa had demonstrated a desire to resolve issues related to reparations for apartheid offenses within its own legal structure. *Id.* at 295. Korman disagreed with the majority’s failure to address the aspects of *Sosa* directing courts to determine the deference owed to the executive branch’s view of this case, stating that this “issue should be resolved at the threshold. *Id.* at 306, 308. Korman chided his colleagues for seeking “desperately to avoid the easiest ground on which to resolve this appeal—that of deference to the judgment of the Republic of South Africa, supported by our State Department, that these cases are none of our business.” *Id.* at 311.

190. *Id.* at 337.

aiding and abetting under the ATS. In *Xiaoning*, there was no evidence that Yahoo!'s purpose was to imprison Xiaoning or Tao when it complied with the Chinese government's request for identification information. Rather, as Yahoo! stated, the corporation was complying with a lawful request for information and was even sympathetic to the plaintiffs' imprisonment.¹⁹¹ In fact, as Yahoo! asserted in its motion to dismiss, Yahoo! could not be held liable under a standard that requires a purposeful mens rea because the plaintiffs did not allege that Yahoo! "intended" to harm them in their complaint.¹⁹² In further support of its argument, Yahoo! cited *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, where the District Court for the Southern District of New York held that the aiding and abetting theory only applies in civil cases if the defendant acted with intent to aid the violation.¹⁹³ In that case, the court refused to find such intent even when the defendant had been accused of actively working with a repressive military government to protect the defendant's oil extraction business.¹⁹⁴ Yahoo! argued that, "[h]ere, the allegations come nowhere close" to the extent of collaboration between the foreign government and the corporation in *Talisman*.¹⁹⁵

In a separate concurring opinion in *Khulumani*, Judge Hall articulated a different standard of aiding and abetting liability that did not persuade a majority and was not applied on remand.¹⁹⁶ Nevertheless, Judge Hall's opinion warrants discussion in this Note in the event that a different circuit court chooses to adopt his approach. Judge Hall opined that the district court erred by assuming that a federal court must look to international law for both primary violations of international law under the ATCA and the standard for aiding and abetting liability.¹⁹⁷ Rather, Judge Hall concluded, a federal court must only turn to international law for standards of primary liability under the ATCA; for standards of accessorial liability, a federal court should consult federal common law.¹⁹⁸ While both customary international law and the federal common law include standards of aiding and abetting liability, Judge Hall chose to follow

191. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 1.

192. *Id.* at 23.

193. 453 F. Supp. 2d 633, 668 (S.D.N.Y. 2006).

194. *Id.* at 638-39; *see id.* at 670.

195. Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 23.

196. *Khulumani*, 504 F.3d at 284 (Hall, J., concurring).

197. *Id.*

198. *Id.*

federal common law standards based on the principles that “international law does not specify the means of its domestic enforcement”¹⁹⁹ and that “when international law and domestic law speak on the same doctrine, domestic courts should choose the latter.”²⁰⁰

Judge Hall chose to follow the aiding and abetting standard articulated in *Halberstam v. Welch*,²⁰¹ which relied substantially on the Restatement (Second) of Torts.²⁰² Section 876(b) of the Restatement states that, “[f]or harm resulting to a third person from the tortuous conduct of another, one is subject to liability if he . . . knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.”²⁰³ Therefore, Judge Hall would have held that liability should only be found in ATCA aiding and abetting claims where “there is evidence that a defendant furthered the violation of a clearly established international law norm in one of three ways:

(1) by knowingly and substantially assisting a principal tortfeasor, such as a foreign government or its proxy, to commit an act that violates a clearly established international law norm; (2) by encouraging, advising, contracting with, or otherwise soliciting a principal tortfeasor to commit an act while having actual or constructive knowledge that the principal tortfeasor will violate a clearly established customary international law norm in the process of completing the act; or (3) by facilitating the commission of human rights violations by providing the principal tortfeasor with the tools, instrumentalities, or services to commit those violations with actual or constructive knowledge that those tools, instrumentalities, or services will be (or only could be) used in connection with that purpose.”²⁰⁴

199. *Id.* at 286 (quoting Brief for the International Law Scholars as Amici Curiae at 5-6, *Khulumani*, 504 F.3d 254 (2d. Cir. 2007) (No. 05-2141)).

200. *Khulumani*, 504 F.3d at 287 (Hall, J., concurring).

201. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

202. *Khulumani*, 504 F.3d at 287 (Hall, J., concurring) (noting that “[t]he Supreme Court described the *Halberstam* opinion as ‘a comprehensive opinion on the subject of aiding and abetting.’” (quoting *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 181 (1994))).

203. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). In *Halberstam*, the Court used § 876 of the Restatement to provide five factors a court should look to when determining whether the defendant’s encouragement or assistance was sufficiently “substantial”: “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.” 705 F.2d at 478 (quoting RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979)).

204. *Khulumani*, 504 F.3d at 288-89 (Hall, J., concurring). In order to demonstrate the limited ways in which aiding and abetting liability should occur, Hall described an examples of how a defendant could be held liable for aiding and abetting violations of customary international law: if “a defendant provides ‘the tools, instrumentalities, or services to commit human rights violations with actual knowledge that those tools,

The Restatement standard does not present as high of a bar for a plaintiff as the Rome Statute standard since it does not require that the defendant have a purpose to assist in the violation of an international norm; it only requires the defendant's knowledge of such assistance.²⁰⁵

Of course, after the majority decision in *Khulumani*, this standard will not be applied in the Second Circuit. However, there are several reasons why other courts may also choose not to adopt this standard for ATS aiding and abetting liability. First, because aiding and abetting liability is traditionally connected with an underlying claim, it is counterintuitive to look to one body of law for the definition of the underlying claim and another body of law for the standard of aiding and abetting liability under that claim. Also, and particularly in cases that involve large corporations with numerous subsidiaries operating internationally, significant litigation may ensue to determine whether a corporation did in fact "know" for what reason the information they were providing would be used.

An application of Judge Hall's Restatement standard to Xiaoning's case against Yahoo! provides an example of the complications that can arise in satisfying this knowledge requirement. In a 2006 hearing before Congress regarding the case, Yahoo!'s general counsel, Michael Callahan, said that Yahoo! knew nothing about the nature of the investigation when it gave Chinese authorities information about Tao's e-mail account and the contents of his e-mails.²⁰⁶ On October 16, 2007, Representative Tom Lantos, the former chairman of the U.S. House Committee on Foreign Affairs, issued a statement accusing Yahoo! of providing false testimony concerning information released in July 2007 by the San Francisco-based Dui Hua Foundation that demonstrated that the Beijing State Security Bureau, a department responsible for collecting information on

instrumentalities or services will be (or only could be) used in connection with that purpose." *Id.* at 290 (quoting Trial of Bruno Tesch and Two Others (The Zyklon B Case), 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg, Mar. 1-8, 1946)). Hall used the Zyklon B case as an example of this type of liability. *Id.* In the Zyklon B case, Bruno Tesch, the sole owner of a firm that distributed Zyklon B, a poisonous gas, to Auschwitz and other concentration camps, allegedly proposed using the gas, which had been previously used to disinfect public buildings, to exterminate human beings, and was aware the gas was being used for this purpose. *Id.*

205. Compare Rome Statute of the International Criminal Court art. 25 (3)(c)-(3)(d)), July 17, 1998, 2187 U.N.T.S. 90), with RESTATEMENT (SECOND) OF TORTS § 876.

206. *Yahoo Execs Asked to Testify On Chinese Journalist's Arrest*, CONGRESSDAILY, Oct. 17, 2007, http://www.nationaljournal.com/congressdaily/am_20071017_34.php.

dissidents, had written Yahoo! requesting evidence about Tao.²⁰⁷ Lantos called both Callahan and Yahoo! CEO Jerry Yang to appear at a hearing of the U.S. House Committee on Foreign Affairs to clarify what happened during the 2006 hearing.²⁰⁸ In response, Yahoo! described the committee's accusations as "grossly unfair" and said that the committee "mischaracterized the nature of our past testimony."²⁰⁹ Callahan explained that he did not realize the order from the Chinese government had mentioned an investigation into state secrets because of a bad translation, and that he had not received the correct translation until after the 2006 hearing.²¹⁰

In defense of the company, Yahoo! spokesman Jim Cullinan reiterated that "[c]ompanies doing business in China are forced to comply with Chinese law."²¹¹ Cullinan also stated that Yahoo! "will not know whether the demand for information is for a legitimate criminal investigation or is going to be used to prosecute political dissidents."²¹² Since Chinese authorities are not required to provide ISPs with the reasons why they are seeking certain user information or the nature of the criminal investigations, Cullinan claimed that, for all Yahoo! knew, authorities in China were seeking information to identify a murderer.²¹³ Cullinan's rearticulation of Yahoo!'s persuasive legal defense regarding the company's compliance with Chinese law was a crucial component of Yahoo!'s legal argument in the *Xiaoning* case.

Had Xiaoning's case not settled, the plaintiffs would have had to demonstrate that the Chinese government's actions violated an international norm with the degree of consensus required by *Sosa*. It is not obvious that China's restrictive speech laws and prison policies constitute such a violation, and even if they do, a court still might not

207. Stephanie Kirchgaessner, *Congress Summons Yahoo Chief Over Jailing of Chinese Dissident*, FT.COM, Oct. 17, 2007, <http://www.ft.com/cms/s/0/c9eb778c-7c4b-11dc-be7e-0000779fd2ac.html>.

208. *Id.*

209. *Id.*

210. Corey Boles, *Yahoo Counsel Apologizes For Staying Quiet on China*, WASHINGTON POST, Nov. 3, 2007, at D03, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201974.html>.

211. Miguel Helft, *Chinese Political Prisoner Sues in U.S. Court, Saying Yahoo Helped Identify Dissidents*, N.Y. TIMES, Apr. 17, 2007, available at <http://www.nytimes.com/2007/04/19/technology/19yahoo.html>.

212. *Id.*

213. Laura Sydell, *Group Targets Yahoo Inc. Over China Cases*, NPR, Apr. 18, 2007, <http://www.npr.org/templates/story/story.php?storyId=9658200>. Cullinan's statements highlight an additional problem with Judge Hall's Restatement standard: under his test, there is also the risk that ISPs and foreign government officials will adopt a "don't ask, don't tell" policy and ISPs will maintain a veil of willful blindness.

find a cause of action in light of the five practical considerations that *Sosa* mandates in the judicial inquiry. If a court found that the Chinese government's actions did constitute a violation of the law of nations *and* that there was aiding and abetting liability under the ATS, Yahoo! would still probably not be liable under the aiding and abetting standard articulated by Judge Katzmann in *Khulumani* because Yahoo! did not have a purpose to aid and abet any violation of the Chinese government. Depending on the outcome of an investigation regarding whether Yahoo! executives knew the reasons for the Chinese government's request, Yahoo! may also not be liable under Judge Hall's aiding and abetting standard.

III. SOLUTION

The ATS is an improper means to address the plaintiffs' claims against Yahoo! for several reasons. First, at the time the ATS was passed, a principal element of the law of nations included the norms that govern nations' interactions with one another.²¹⁴ As Justice Breyer stated in his concurring opinion in *Sosa*, courts must be careful not to entertain claims that risk harming the very purpose of the ATS—fostering better foreign relations.²¹⁵ One can make a strong argument that were a court to have heard this case against Yahoo! under the ATS, U.S. relations with China would have been harmed.

Furthermore, *Sosa* mandates that, for jurisdiction to be properly exercised under the ATS, the violated international norm must be a norm for which there is a high degree of international consensus.²¹⁶ In order for Yahoo! to have been found guilty of aiding and abetting under any standard, China must have been found guilty of Xiaoning's underlying claims, and restrictions on free speech and forced labor in prison do not constitute violations of "universally recognized" international norms for the purpose of *Sosa*'s requirement. Moreover, *Sosa* mandates that the determination of whether or not a norm is sufficiently well recognized internationally to support a cause of action involves a judgment about the "practical consequences of making that cause available to litigants in the federal courts."²¹⁷ It is important not to divorce the determination of the existence of ATS

214. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

215. *Id.* at 761 (Breyer, J., concurring).

216. *See id.* at 725.

217. *Id.* at 732-33; *see also id.* at 727 (noting the adverse "collateral consequences" of ATS litigation).

jurisdiction from the practical considerations the Court requires to be made before recognizing a common law cause of action.²¹⁸

Also significant is that in previous cases like *Unocal*, where the ATS was used as a vehicle to address human rights violations, the corporation accused of aiding and abetting tortious conduct played a much more direct role in the violation of the international norm.²¹⁹ In *Xiaoning*, Yahoo's actions were very different from those of a corporation that actively solicits the aid of a foreign government that is known to torture. Moreover, the invocation of the ATS in Xiaoning's situation is further complicated because the ATS does not clearly include an aiding and abetting standard. Even if there is some consensus about aiding and abetting liability under the ATS, Yahoo! is probably not liable under the most accepted definition of aiding and abetting liability, since Yahoo's "purpose" was not to harm the plaintiffs.²²⁰

Ultimately, courts should not become bogged down in litigation surrounding the application of an inapplicable statute when Congress, being the more appropriate forum to address foreign policy issues, can balance various interests and collaborate with other countries and organizations to directly answer the questions presented in Xiaoning's case and others like it that may arise in the future.

A. *The Global Online Freedom Act*

The most direct congressional response to U.S. corporations' complicity with Internet censorship in China is the proposed Global Online Freedom Act (GOFA).²²¹ This proposed act, which would regulate the activities of American ISPs doing business in specified Internet-restricting countries,²²² was promulgated in response to

218. See generally *id.* at 761 (Breyer, J., concurring) ("Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.")

219. 395 F.3d 932, 937-38 (9th Cir. 2002), *vacated by reh'g en banc*, 395 F.3d 978 (9th Cir. 2003) ("It is undisputed that the Myanmar Military provided security and other services for the Project, and that Unocal knew about this.")

220. See Defendant Yahoo!, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint; Proposed Order, *supra* note 60, at 20 ("[P]laintiffs do not allege that defendants intended to harm plaintiffs.") (emphasis in original).

221. Surya Deva, *Corporate Complicity in Internet Censorship in China: Who Cares for the Global Compact or the Global Online Freedom Act?*, 39 GEO. WASH. INT'L L. REV. 255, 309 (2007) [hereinafter Deva, *Corporate Complicity*].

222. Global Online Freedom Act of 2006, H.R. 4780, 109th Cong. §§ 201-07 (2006). GOFA, introduced on February 16, 2006, by Representative Christopher Smith, is a bill designed to "promote freedom of expression on the Internet, to protect United States businesses from coercion to participate in repression by authoritarian foreign governments,

Representative Christopher Smith's opinion that technology companies have "failed to develop standards by which they can conduct business with authoritarian foreign governments while protecting human rights to freedom of speech and freedom of expression."²²³ The proposed act would prohibit U.S. businesses from "cooperating with officials of Internet-restricting countries in effecting the political censorship of online content."²²⁴

The GOFA provides a potentially good solution because, by imposing hefty fines and possible prison sentences on corporations that improperly disclose user-identification information to Internet-restricting countries, the act will prevent the type of information sharing exhibited by Yahoo! in the *Xiaoning* case.²²⁵ The act is also a positive development in that it covers foreign subsidiaries of U.S. companies to ensure that ISPs will not partner with domestic Chinese Internet companies to avoid liability.²²⁶ Furthermore, the act is praised for bringing a "much-needed element of flexibility to the regulations," including industry and presidential involvement, as well as the allowance of the Office of Global Internet Freedom²²⁷ to make decisions about protected filter terms in light of the particular political and social context of Internet-restricting companies.²²⁸

The GOFA, however, has several limitations. First, the act is unlikely to become law if the incoming administration adopts the

and for other purposes." *Id.* at preamble. GOFA's findings state that "[f]reedom of speech and freedom of the press are fundamental human rights, and free use of the Internet is protected in Article 19 of the Universal Declaration of Human Rights, which guarantees freedom to 'receive and impart information and ideas through any media regardless of frontiers.'" *Id.* § 2(1). The findings also state that the Chinese government has "employed censorship of the Internet in violation of Article 35 of the Chinese Constitution which guarantees freedom of speech." *Id.* § 2(11). The findings continue to state that "[t]his censorship by the Chinese Government promotes, perpetuates, and exacerbates a xenophobic—and at times particularly anti-American—Chinese nationalism, the long-term effects of which will be deleterious to Unites States efforts to prevent the relationship between the United States and China from becoming hostile." *Id.* § 2(12). Lastly, the findings highlight the fact that technology companies have yielded to, rather than resisted, pressure by authoritarian governments by providing governments with information about Internet users that has led to the arrest and imprisonment of Chinese dissidents. *See id.* § 2(15)-(17).

223. *Id.* § 2(17).

224. *Id.* § 101(3).

225. Nawyn, *supra* note 25, at 547-48.

226. *Id.* at 548.

227. The GOFA would establish the Office of Global Internet Freedom within the Department of State to work to develop the code of corporate standards related to Internet freedom. *See* Lindsay Eastwood, Note, "Don't Be Evil": Google Faces the Chinese Internet Market and the Global Online Freedom Act of 2007, 9 MINN. J. L. SCI. & TECH. 287, 305 (2008).

228. *Id.* at 548-59.

same perspective as the Bush administration, as the proposed law would regulate the conduct of very powerful commercial actors such as Yahoo!, Microsoft, Google, and Cisco.²²⁹ Even if the GOFA were enacted, some provisions of the act are arguably impractical or unworkable.²³⁰ For example, there is the possibility that the president's power to annually designate Internet-restricting countries could be misused for political gains: "[w]hereas [s]tates friendly with the U.S. administration may escape such designation, some other [s]tates might be classified as [I]nternet-restricting countries just because they are not on good terms with the administration."²³¹ The GOFA also fails to address the fact that "rights to freedom of speech and expression are not the same everywhere."²³² For example, while the damaging of the national flag is allowed in the United States due to freedom of speech, it is a criminal offense in many countries.²³³ Moreover, the proposal fails to "recognize civil society's role in achieving global Internet freedom" by not prompting the involvement of non-governmental organizations or other entities.²³⁴

Another cited stumbling block is Section 201 of the GOFA's absolute restriction on U.S. ISPs from storing any user-identification information on computer hardware located within Internet-restricting countries.²³⁵ China has implemented a national firewall that makes accessing and using websites operated on servers located outside the country too slow to use efficiently, which has led many U.S. ISPs to develop Chinese versions of its search engines.²³⁶ This requires that U.S. companies be able to store at least some data within these Internet-restricting countries.²³⁷

Ultimately, if enacted, the GOFA would likely become eroded by the Chinese government's response. It is unlikely that China will simply allow U.S. corporations operating within its jurisdiction to refuse to comply with Chinese law regulating ISPs. Rather, China will likely impose harsh penalties on companies that refuse to make user-identification information available to Chinese authorities. This will only lead to U.S. companies being forced to exit the market

229. Deva, *Corporate Complicity*, *supra* note 221, at 314-15.

230. *Id.* at 315.

231. *Id.* at 315-16.

232. *Id.* at 316.

233. *Id.*

234. *Id.* at 316-17.

235. Nawyn, *supra* note 24, at 554.

236. *Id.*

237. *Id.*

entirely, leaving Chinese citizens with nothing but highly censored Chinese websites.

B. The Global Compact

The United States is not the only entity trying to resolve the complicated issues highlighted by Xiaoning's case. Considering the international reach of the Internet, it seems evident that an international solution would be more effective than the regulations of individual countries. The United Nation's Global Compact (GC), perhaps the most recognized example of an international attempt to influence the behavior of international corporations,²³⁸ involves governments, corporations, labor, and civil society organizations in encouraging adherence to "good business practices."²³⁹ The GC requests that corporations "embrace, support and enact, within their sphere of influence, a set of core values" in human rights, labor, environment, and anti-corruption.²⁴⁰

Two of the ten principles of the GC are particularly relevant to ISP cooperation with Internet-restricting countries. Principle One states that "[b]usinesses should support and respect the protection of internationally proclaimed human rights," and Principle Two states that corporations "make sure that they are not complicit in human rights abuses."²⁴¹ In order to participate in the GC, the CEO of an organization must send a letter to the UN Secretary General demonstrating support for the GC and its core values.²⁴² Once the letter has been mailed, the organization is supposed to begin changes to its business operations and publish the steps the organization has taken to implement the GC's values.²⁴³ There is no regulatory instrument incorporated in the GC, however, so no governmental or

238. Evaristus Oshionebo, *The U.N. Global Compact and Accountability of Transnational Corporations: Separating Myth from Realities*, 19 FLA. J. INT'L L. 1, 10 (2007).

239. Deva, *Corporate Complicity*, *supra* note 221, at 291-92 (quoting Ambassador Betty King, *The U.N. Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations*, 34 CORNELL INT'L L.J. 481, 482 (2001). See also What is the Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Sept. 25, 2008).

240. Deva, *Corporate Complicity*, *supra* note 221, at 292 (quoting The Ten Principles of the U.N. Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 25, 2008)).

241. Ten Principles of the U.N. Global Compact, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Sept. 25, 2008).

242. Deva, *Corporate Complicity*, *supra* note 221, at 292.

243. *Id.*

non-governmental entity “polices” or even measures the degree of corporate compliance with these values.²⁴⁴

One of the largest hurdles in using the GC to address the problem that the *Xiaoning* case presents is getting ISPs to agree with the GC’s principles. For example, of the American Internet giants Yahoo!, Google, and Microsoft, only Microsoft has adopted the Compact.²⁴⁵ Moreover, even if all major ISPs were to sign on to the GC, there would still be problems with its effectiveness. First, while one cited advantage of the GC is that its ten principles enjoy universal consensus, the broadness of the principles has unfortunately led to ambiguities regarding the GC’s expectations of corporations.²⁴⁶ While flexibility is important when addressing these complicated issues across different countries, the GC’s general principles are so vague that they are easily subject to manipulation by corporate actors in order to avoid compliance.²⁴⁷ Additionally, the GC does not provide for penalties when leaders of corporations fail to comply with its requirements.²⁴⁸ It is possible that, without enforcement, corporations will use the GC as a “public relations gimmick” to “bluewash their reputation[s]” without actually complying with the GC’s purposes.²⁴⁹ While the GC is a step in the right direction because it involves an attempt to adopt ISP standards on an international scale, its current limitations make it ineffective at fully addressing the problems raised by the *Xiaoning* case.

C. A Compromise

Significant work has gone into the development of the GOFA and the GC, and both of these solutions have much to offer in terms of establishing a solution to the problems raised by ISPs operating in Internet-restricting countries.²⁵⁰ Neither, however, provides an ideal approach. One possible solution, then, is to incorporate the successful aspects of the two approaches and eliminate their faults. In effect, this would be a compromise between the GOFA’s overly rigid scheme and the GC’s overly flexible approach.

244. *Id.*

245. *Id.* at 278.

246. *Id.* at 295.

247. *Id.* at 296.

248. *Id.* at 299.

249. Surya Deva, *Global Compact: A Critique of the U.N.’s “Public-Private” Partnership for Promoting Corporate Citizenship*, 34 SYRACUSE J. INT’L. L. & COM. 107, 146-47 (2006).

250. *See generally id.* at 149-50.

The ultimate solution should retain the overall approach of the GC, involving multiple international actors collaborating to establish guidelines that can achieve universal consensus. However, these guidelines must not be so vague that they can be interpreted so widely as to become meaningless; instead, the GOFA's approach of providing more detailed guidelines should be followed. Of course, learning from the GOFA's faults, these guidelines cannot be so restrictive that they prevent international agreement.

Once the guidelines are made more concrete and are internationally agreed upon, a mechanism must also be in place to enforce those guidelines. The GC's approach of encouraging compliance simply does not work; enforcement is needed to ensure compliance.²⁵¹ The GOFA provides a much more effective solution in that it imposes large fines and possible criminal liability to ensure compliance. Eliminating the ineffective aspects of these two approaches and combining the effective elements is the best way to achieve a workable solution for the problem of ISPs operating in China and other Internet-restricting countries.

IV. CONCLUSION

When it was announced that Yahoo! settled Xiaoning, Ling, and Tao's suit, one Shanghai-based blogger wrote, "Hopefully this settlement will have a long-term restraining effect on the Internet companies beyond this individual case. The way they are making concessions to the Chinese government is unacceptable. They are hiding from their moral obligations and standards."²⁵² Human rights activists who are dismayed with U.S. corporations' compliance with repressive regimes have taken up an important cause, but initiating lawsuits under the ATS is an improper means to pursue the goal of increasing freedom of speech in Internet-restricting countries.

The GOFA, as a legislative solution, represents a step in the right direction because it prescribes action that directly provides U.S. corporations with regulations for operating in foreign, Internet-restricting countries, and eliminates the need for plaintiffs to creatively invoke the ATS. However, since the nature of the Internet presents borderless, international problems, an international solution is preferable to legislation by individual countries. The GC, therefore,

251. See Deva, *Global Compact: A Critique of the U.N.'s "Public-Private" Partnership for Promoting Corporate Citizenship*, *supra* note 249, at 145-46.

252. *Yahoo Settles Dissidents' Suit*, CNN.COM, Nov. 13, 2007, <http://edition.cnn.com/2007/WORLD/asiapcf/11/13/yahoo.china/index.html>.

presents a promising, albeit incomplete, solution. The best answer, then, is to eliminate the ineffective elements of these approaches and combine the effective elements to reach a workable solution on an international scale.

Perhaps, in establishing this compromise, international corporate collaborators should look to what other ISPs are doing well. For example, Google does not offer e-mail or blogging services inside China since those offerings would force them to comply with Chinese law by providing Chinese authorities with dissidents' personal information.²⁵³ Ultimately, the need remains for countries, corporations, legislators, human rights activists, and even Chinese citizens²⁵⁴ to engage in resolving Xiaoning, Ling and Tao's tragic circumstances with a workable, effective solution—the ATS is not the answer.

*DeNae Thomas**

253. Clive Thompson, *Google's China Problem (and China's Google Problem)*, N.Y. TIMES, Apr. 23, 2006 at 7, available at <http://www.nytimes.com/2006/04/23/magazine/23google.html?pagewanted=7&r=1&sq=google%20china&st=cse&scp=1>.

254. See generally *id.* Zhao Jing, a Chinese citizen whose pro-democracy blog was erased by Microsoft, told the *New York Times*, "Google has struck a compromise Yahoo! is a sellout. Chinese people hate Yahoo!" because Yahoo! provides Chinese authorities with dissident identification information while Google avoids the issue entirely. *Id.* at 9.

J.D. Candidate, Vanderbilt University Law School, 2009; M.S., Teaching, Pace University (Teach For America partnership), 2006; B.A., Journalism, *summa cum laude*, Pepperdine University, 2004. The author wishes to thank her mother, father and sister for their unconditional love and support during the note-writing process, and her friends for their encouragement. She would also like to thank the staff of the *Vanderbilt Journal of Entertainment and Technology Law*, particularly Austin Broussard, Nick Lynton, Sara Beth Myers, and Ed Wenger, for their tireless work and attention to detail.