SANCTIONS AGAINST NON-STATE ACTORS FOR VIOLATIONS OF INTERNATIONAL LAW

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I. INTRODUCTION

Numerous forms of non-state actor conduct in violation of treaty-based and customary international law have been subject to criminal and civil sanctions in various international and domestic fora for centuries. Within United States domestic legal processes, early types of non-state actor violations included, among others, piracy, war crimes, the counterfeiting of foreign currency, violation of passports, the slave trade, breaches of neutrality, violations of territorial rights, other acts of hostility, violence against foreign officials, general trespasses against the law of nations, conduct of poisoners and assassins, and violations of human rights.[2] Thus, statements that private actor liability did not begin until the twentieth century or that private actor liability with respect to human rights did not begin until after World War II would be in serious error. More recently, the landmark case of *Kadic v. Karadzic*[3] provides continued recognition of private actor liability for, among others, piracy, slave trade, passport violations, breaches of neutrality, hijacking of aircraft, crimes against humanity, genocide, and war crimes.[4] The United States Executive

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2. *See, e.g.*, *United States v. Haun*, 26 F. Cas. 227, 231 (C.C.S.D. Ala. 1860) (No. 15,329) (Campbell, J., on circuit) (private human rights duties); JORDAN J. PAUST ET AL, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 8, 15-17, 23-24, 120-32 *passim* (2000); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7-8, 34 n.38, 48-49 ns.60-80, 50 n.88, 182, 201-03, 205, 264-70, 274-76, 289-91 *passim* (1996).

3. 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

4. *See id.* at 236, 239-43(2d Cir. 1995).

branch has also recognized on numerous occasions that private actors, including private companies, can violate international law, including human rights law, especially when non-state actors have been prosecuted by the government for violations of international law.[5]

II. PROSECUTION OF AND LAWSUITS AGAINST BIN LADEN *ET AL.*

In view of such trends and recognitions, it should not be surprising that Mr. bin Laden and his entourage, if reasonably accused, as well as the companies or corporations they control or that are complicit in their illegal schemes, as private actors, are subject to criminal and civil sanctions in the United States for violations of international law. For example, if captured,[6] prosecution of Mr. bin Laden and others acting outside the United States in connection with the September 11th terroristic attack on the United States and on United States nationals is possible under the United States Antiterrorism Act.[7] Section 2332(a) of the Act is not applicable to homicide as such arising from the attacks because although the section applies to "Whoever kills a national of the United States" it adds the limiting phrase "while such national is outside the United States." Yet, such language would cover prosecution of homicide against United States nationals abroad in the case of the bombings of United States

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5. *See, e.g.*, *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) ("both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court"—there, liability for unlawful killing); *Haun*, 26 F. Cas. at 231 (President Jefferson's recognition in an address to Congress of "violations of human rights" by private "citizens of the United States"); 26 Op. Att'y Gen. 250, 252-53 (1907) (U.S. dredging company is liable for harm caused by dredging activity); 1 Op. Att'y Gen. 68, 69 (1797); 1 Op. Att'y Gen. 61, 62 (1796); 1 Op. Att'y Gen. 57, 58 (1795); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 617-18 (also quoting Memorandum for the United States as Amicus Curiae in *Filartiga v. Pena-Irala*, 630 F.2d 876 at 621 (human rights under international law "'directly create rights and duties of private individuals . . . ' do create such rights and duties," (quoting the "highly respected" Constitutional Court of Germany)), 623-24 n.502 (quoting President Washington and E. MCDOWELL, DIGEST OF UNITED STATES PRACTICE, *supra*, at 171), 630-31 (1989), *revised in* PAUST, *supra* note 1, at 199-201, 204-05, 269 n.504.

6. I assume that capture of Mr. bin Laden or others in Afghanistan would be permissible under international law either as lawful acts undertaken during a process of self-defense under Article 51 of the U.N. Charter or as lawful acts undertaken during a U.N. Security Council authorized use of armed force under S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001), which reaffirmed "the need to combat by all means... threats to international peace and security caused by terrorist acts," *id.* at pmbl., and called upon all states "to prevent terrorist attacks and take action against perpetrators of such acts," *id.* at ¶ 3(c)). Concurring in the general propriety of arrests in foreign states in such circumstances, *see, e.g.*, PAUST, ET AL., *supra* note 2, at 479.

7. 18 U.S.C. § 2331 *et seq.*

Embassies in Kenya and Tanzania and the attack on the U.S.S. Cole. Section 2332 (b) does not contain the limiting phrase noted above regarding the location of United States victims and can cover attempts and conspiracy in connection with the killing of a national of the United States (apparently anywhere) although the accused must be "outside the United States" at the time of the attempt or the engagement in a conspiracy to kill. Section 2332(c) should also be applicable, since it reaches an accused "outside the United States" who "engages in physical violence—(1) with intent to cause serious bodily injury to a national of the United States; or (2) with the result that serious bodily injury is caused to a national of the United States." Section 2332(d) requires written certification by the United States Attorney General "or the highest ranking subordinate" that offenses under Section 2332 were "intended to coerce, intimidate, or retaliate against a government or a civilian population"—a certification that would be relatively easy to make.

Section 2332(b) applies to "acts of terrorism transcending national boundaries" and can form the basis for prosecution, for example, of any person who kills, maims, or assaults (if the latter results in serious bodily injury) any person within the United States or "creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure . . . or other real or personal property within the United States . . . " if such involves "conduct transcending national boundaries" and one of the circumstances listed in subsection (b) is present. Relevant circumstances in subsection (b) could include:

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States.

The listed circumstances would be met if Mr. bin Laden used any facility of foreign commerce to plan, finance, order, or carry out the September 11th attack; if the targeting of the World Trade Center affected interstate or foreign commerce; if the United States Government and Pentagon personnel were victims; and/or if the Pentagon was targeted.

Prosecution of non-state and state actors is also possible under United

States legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation[8] (which in Article 7 thereof also requires all signatories to bring into custody those reasonably accused of international crimes covered by the treaty and either to initiate prosecution of or to extradite such persons, without any exception or limitation of such duty whatsoever). 18 U.S.C. § 32(a) should be applicable to "[w]hoever willfully—(1) . . . destroys, disables, or wrecks, any aircraft in the special aircraft jurisdiction of the United States" and to whoever "(5) performs an act of violence against or incapacitates any individual on any such aircraft . . . " and such persons should include any co-conspirators who were involved in the willful destruction of United States commercial aircraft flying within United States airspace.

Since international terrorism[9] and crimes against humanity[10] are international crimes over which there is universal jurisdiction and a universal responsibility either to initiate prosecution of or to extradite those reasonably accused,[11] the United States should also be able to enact new legislation that operates retroactively for prosecution of what were already recognizable international crimes under customary international law, and such legislation should not be challengeable under prohibitions of ex post facto laws. The permissibility of such retroactive legislation was affirmed, for example, in the *Eichmann* case in Israel[12] (also addressing similar rulings in the Netherlands and Germany); in the United States extradition decision in *Demjanjuk v. Petrovsky*;[13] and by the Executive officials applying the 1863 Lieber Code to acts that were already war crimes under customary international law.[14] Certain persons accused of international crimes before the International Military Tribunals at Nuremberg and for the Far East made claims that Charters of the Tribunals incorporating such crimes were violative of ex post facto or *nullum crimen sine lege* precepts,

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8. Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 21, 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention].

9. *See, e.g.*, S.C. Res. 1373, U.N. SCOR, 4385th mtg., U.N. Doc. S/RES/1373 (2001); S.C. Res. 579, U.N. SCOR, 2637th mtg., U.N. Doc. S/RES/579 (1985); G.A. Res. 40/61, U.N. GAOR, 108th mtg., Supp. No. 53 at 301, U.N. Doc. A/RES/40/61 (1986); JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW 995, 1005, 1007 (2d ed. 2000).

10. *See, e.g.*, PAUST ET AL., *supra* note 9, at 855-916.

11. *See, e.g.*, *id.* at 9, 16-17, 132-35, 140-41.

12. Attorney General of Israel v. Eichmann, *reprinted in* PAUST ET. AL., *supra* note 2, at 455.

13. 776 F.2d 571 (6th Cir. 1985).

14. *See, e.g.*, DIGEST OF OPS. OF JAG, ARMY 244 (1866); PAUST ET. AL., *supra* note 9, at 244-48.

but the Tribunals correctly ruled that the crimes existed under international law at the time of their commission and that no such precepts were violated.[15] Similarly, a new International Criminal Tribunal could be created by Executive Agreement to prosecute international crimes arising out of the September 11th attack.

Civil lawsuits are also possible against non-state persons or corporations under the Antiterrorism Act, assuming that Mr. bin Laden or other persons outside the United States are captured and brought to the United States and process has been served. Section 2333 allows civil remedies in a lawsuit brought by "[a]ny national of the United States injured in his or her person, property, or business, by reason of an act of international terrorism, or his or her estate, survivors, or heirs . . . and [such plaintiff] shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees." The main problem after winning such a lawsuit will involve execution of a judgment on any properties of the defendants located within the United States (no real problem) or execution abroad (at the discretion of some foreign court). Perhaps bank accounts of Mr. bin Laden, his entourage, and companies involved in terrorism could be frozen not merely for purposes of preventing the financing of terrorism, but also for recompense and other types of damages for victims.

Foreign plaintiffs can also sue non-state persons or corporations under the Alien Tort Claims Act (ATCA)[16] for any wrong in violation of customary international law and/or treaties of the United States, such as the International Covenant on Civil and Political Rights[17] or the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[18] Punitive damages are recoverable in such lawsuits. Under the ATCA, plaintiffs could sue any companies or corporations complicit in relevant violations of international law, *e.g.*, companies or corporations used to finance terroristic attacks in violation of human rights. Whether lawsuits by United States or foreign plaintiffs are possible under the Torture Victim Protection Act (TVPA)[19] depends on interpretation of phrases such as "extrajudicial killing" and on whether Mr. bin Laden and

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15. *See, e.g.*, PAUST ET AL., *supra* note 9, at 625, 628-29.

16. 28 U.S.C. § 1350.

17. International Covenant on Civil and Political Rights, Dec. 9, 1966, art. 6, 7, 9, 974 U.N.T.S. 171 (in particular, plaintiffs should stress violations of the right to life (art. 6), cruel and inhumane treatment (art. 7), and liberty and security of person (art. 9). Concerning human rights duties of non-state actors, see, e.g. *supra* note 1 and *infra* notes 26-31, 33-40.).

18. Montreal Convention, *supra* note 8.

19. Torture Victim Protection Act of 1992, Pub. L. No. 102-256, 106 Stat. 73 1992.

his entourage were acting "under actual or apparent authority, or color of law, of any foreign nation" (such as Iraq or Afghanistan). Of course, Mr. bin Laden is not a leader of any foreign nation, state, belligerency, or insurgency within the meaning of international law and is merely a private actor. However, under certain circumstances, private actors can be acting under actual or "apparent authority" or "color" within the meaning of the TVPA.[20] Appropriate tests recognized in *Kadic* include inquiry whether the non-state actor acts "together with" a state, "in concert with" a state, or with "significant state aid";[21] and tests recognized in *Iwanowa v. Ford Motor Company*[22] include whether the non-state actor acts "in close cooperation with" or has "worked closely with" a state.[23]

If relevant acts were committed by Mr. bin Laden and his entourage without direct participation in any armed conflict, the acts would not be war crimes. However, if they were committed in direct connection with an armed conflict—*e.g.*, as an extension of the armed conflict between Iraq and the United States and other countries in the ongoing Gulf War or as an extension out of the insurgency that was occurring prior to September 11th in Afghanistan between the Taliban and the Northern Alliance—prosecution is possible under 10 U.S.C. §§ 818 and 821, as supplemented for purposes of jurisdiction in the federal courts by 18 U.S.C. § 3231,[24] whether or not other war crimes legislation is available alternatively. When "grave breaches" of the 1949 Geneva Conventions (including "willful killing, willfully causing great suffering or serious injury to body or health . . . " to persons protected by the Conventions) have been committed by any person "inside or outside the United States" against a United States national, the War Crimes Act of 1996 is operative.[25]

Mr. bin Laden and others are also under indictment for various other crimes in connection with the first bombing of the World Trade Center, including conspiracy to murder United States nationals, to use weapons of mass destruction against United States nationals, to destroy United States buildings and property, and to destroy United States defense utilities.[26]

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20. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d at 244-45.

21. *Id.* at 245.

22. 67 F. Supp.2d 424 (D.N.J. 1999).

23. *Id.* at 445-46 and n.27.

24. *See, e.g.*, PAUST ET. AL., *supra* note 9, at 243-44, 253-59; Jordan J. Paust, *The Case for War Crime Jurisdiction Over Civilians in Federal District Courts*, 50 TEX. L. REV. 6 (1971).

25. *See generally* 18 U.S.C. § 2401 (1996).

26. *See United States v. Usama bin Laden, et al.*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

III. PRIVATE RESPONSIBILITY OF COMPANIES AND CORPORATIONS MORE GENERALLY

With respect to corporate liability for violations of international law, it should be noted that a private company or corporation as such is simply a juridic person and has no immunity under domestic United States or international law. In each nation-state, private corporations, like private individuals, are bound by domestic laws.[27] Similarly, private corporations and entities are bound by international laws applicable to individuals. For example, in the United States and elsewhere, companies and other non-state associations and organizations have been found to have civil and criminal responsibility for various violations of international law, including human rights and related international proscriptions.[28] Further, the

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27. This widespread pattern of legal responsibility and nonimmunity of private corporations under domestic law is itself a general principle of law relevant to international legal decisionmaking. Concerning the relevance of general principles of law, *see, e.g.*, Statute of the International Court of Justice, art. 38 (1) (c).

28. *See, e.g.*, cases *infra* notes 28-41; *Weisshaus v. Swiss Bankers Ass'n* (*in re* Holocaust Victim Assets Litigation), 225 F.3d 191 (2d Cir. 2000) (participation of Swiss banks in war crimes, crimes against humanity, and genocide); *Linder v. Portocarrero*, 963 F.2d 332, 336-37 (11th Cir. 1992) (the Contras can be civilly liable for torture and unlawful killing); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (the PLO and various organizations can be civilly liable for murder); 739 F. Supp. 854, 858, 860 (S.D.N.Y. 1990); *In re Nazi Era Cases Against German Defendants Litigation*, 2000 U.S. Dist. Lexis No. 18148 (D.N.J. Dec. 5, 2000); *In re Holocaust Assets Litigation*, 105 F. Supp.2d 139 (E.D.N.Y. 2000); *In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp.2d 164 (S.D.N.Y. 2000); *Doe I v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D.D.C. 1998); PAUST ET AL., *supra* note 2, at 16, 106-107 (Japanese court found Japanese store liable for discrimination against foreigners in violation of the International Convention on Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195); PAUST ET. AL., *supra* note 9, at 43-44, 617; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213, RN 7 (1987) ("Multinational enterprises have been under increasing scrutiny by international bodies"); 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT 21, 104, 230 (M.C. Bassiouni ed. 1987); Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. H.R. J. 51 (1992); Beth Stephens, *Human Rights Accountability: Congress, Federalism and International Law*, 6 ILSA J. INT'L & COMP. L. 277, 284-85 (2000) ("corporations can be held liable for human rights abuses when they are responsible for violations of international human rights norms that apply to private actors, or when they act in complicity with government officials to commit other human rights violations."). *See also In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000) (U.S. nationals' claims against Japanese corporations concerning slave labor of former prisoners of war in violation of the 1907 Hague Convention No. IV, 36 Stat. 2277, T.S. No. 539, and thus claims concerning war crimes, had been settled by a 1951 U.S.-Japan Treaty of Peace); Sean D. Murphy, *Contemporary Practice of the United States*, 95 AM. J. INT'L L. 139 (2001); MYRES S. MCDOUGAL ET. AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 103-04 (1980) ("deprivations and nonfulfillment" of human rights values by corporations); 2 OPPENHEIM'S INTERNATIONAL LAW 211 n.3 (H. Lauterpacht ed., 7th ed. 1952) ("observance of fundamental human rights is not dependent upon the recognition of a specific status"); Charter of the International Military Tribunal at Nuremberg, arts. 9-10, Annex to the London Agreement (8 Aug. 1945), 82 U.N.T.S. 279 (discussing criminal groups and

propriety of lawsuits against companies and corporations under the ATCA for violations of international law has been recognized in several United States cases,[29] and liability can attach directly as a private actor, as an actor colored by a connection with a state or other public actor, or as a participant in a joint venture or complicitous relation with another violator. For example, in 1997 in *Doe v. UNOCAL Corp.*,[30] it was recognized that several human rights and other international law claims made by farmers from Burma against a private corporation and others were viable under the

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organizations); Control Council Law No. 10, art. II (1) (d) (20 Dec. 1945), *reprinted in* PAUST ET AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 151, 152 (2000) (discussing criminal groups and organizations).

29. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 2001 U.S. Lexis 2488 (Mar. 26, 2001) (human rights claims re: imprisonment, torture, killing); *Bodner et al. v. Banque Paribas et al.*, 114 F. Supp.2d 117 (E.D.N.Y. 2000); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-95 (S.D. Fla. 1997); *Doe v. UNOCAL Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997); *National Coalition Gov't of the Union of Burma v. UNOCAL, Inc.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997) (private company utilizing slave labor may be subject to liability under the ATCA); 26 Op. Att'y Gen. 250, 251-53 (1907). *See also Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Nguyen da Yen v. Kissinger*, 528 F.2d 1194, 1201-02, n.13 (9th Cir. 1975) (private adoption agencies seemed to be joint tortfeasors under the ATCA, but there was no briefing on such and they were not joined in the complaint); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 445 (D.N.J. 1999); *Burger-Fisher v. Degussa AG*, 65 F. Supp.2d 248, 272-73 (D.N.J. 1999); *Bao Ge v. Li Peng*, 1999 U.S. Dist. Lexis 10834, at 6-7 (D.C. 1999); *Doe v. The Gap, Inc.*, No. CV99-717 (D. Haw.) (settled—see CALIFORNIA LAWYER 17 (Jan. 2000)); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 B.Y.U. L. REV. 1139 (1999); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act*, 40 VA. J. INT'L L. 545 (2000); Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANS'L L.J. 167 (1997); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 347, n.37, 391-95 (1997); Kenneth C. Randall, *Further Inquiries Into the Alien Tort Statute and a Recommendation*, 18 N.Y.U. J. INT'L L. & POL'Y. 473, 501-03 (1986); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 W&M L. REV. 447, 521-22 (2000); Stephens, *supra* note 28, at 284-85.

Other ATCA cases and opinions addressing private actor duties under international law include the following: *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1, 607); *Jama v. I.N.S.*, 22 F. Supp.2d 353, 362-63 (D.N.J. 1998); *Doe I v. Islamic Salvation Front*, 993 F. Supp. at 8; *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996); Adra v. Clift, 195 F. Supp. 857, 864 (D. Md. 1961); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795). See also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (Rehnquist, J.) ("The Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after passage of the FSIA as before with respect to defendants other than foreign states."); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (Scalia, J., op.) ("Alien Tort Statute . . . may conceivably have been meant to cover only private, nongovernmental acts . . . "); *M'Grath v. Candalero*, 16 F. Cas. 128 (C.D. S.C. 1794) (No. 8,810) (dictum).

30. 963 F. Supp. 880 (C.D. Cal. 1997).

ATCA, including claims of slave or "forced" labor, torture, violence against women, and other human rights violations and crimes against humanity that also occurred in complicity with Burmese military, intelligence groups, and police.[31] Addressing universal jurisdiction through the ATCA and nonimmunity of corporate actors for cruel, inhumane treatment and slave or forced labor, the district court in *Iwanowa v. Ford Motor Co.*[32] added: "No logical reason exists for allowing private

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31. *Id.* at 891-92. Later, the district court dismissed such claims, "finding no evidence that UNOCAL 'participated in or influenced' the military's unlawful conduct,'" and no evidence that UNOCAL conspired with the military, or that UNOCAL's conduct amounted to "participation or cooperation in the forced labor practices" beyond mere knowledge of and benefits from the unlawful military practices. 110 F. Supp.2d 1294, 1306-07, 1310. *Compare Kadic v. Karadzic*, 70 F.3d at 245 ("color of law" responsibility exists when a private actor acts "together with" or "in concert with" a state or "with significant state aid"); *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 445-46, n.27 (when defendant was "in close cooperation with" or had "worked closely with" a state).

Apparently the district court did not realize that various human rights prohibitions other than those relating to slavery or forced labor, genocide, other crimes against humanity, or war crimes can form the basis for private actor liability in the absence of conspiratorial state involvement, complicity with a state actor, or "color of law," and that United States tests for "color of law" or "state action" responsibility are not part of international law and are inappropriate and too limiting with respect to non-state actor liability for various other human rights violations. *Compare* 110 F. Supp.2d at 1304-05, 1307-08 (apparently unaware of judicial recognitions and opinions of Attorneys General not cited therein, the Executive's Amicus brief in *Filartiga v. Pena-Irala* (quoted *supra* note 5), and other recognitions of private actor liability noted herein).

The district court also seemed to be unaware of the full range of complicity standards under international law. Concerning standards regarding criminal complicity that can include both action and inaction amounting to participation, assistance, aiding, encouragement, reinforcement, or inducement (each with some minimally demonstrated criminal intent). *See, e.g.*, PAUST ET AL., *supra* note 9, at 39-43. However, civil liability should pertain under a lower threshold than criminal intent, *e.g.*, negligence or fault. *See, e.g.*, PAUST ET AL., *supra* note 2, at 510-12 (addressing the Soering Case, 161 Eur. Ct. H.R. (Ser. A), ¶¶ 80-92 (1989) (conduct by one actor when such involves a foreseeable "real risk" of a human rights violation by another actor leads to an independent violation, an "associated" violation, or a form of complicitous violation of human rights)), 517 (addressing a similar decision in Chahal v. United Kingdom, Eur. Ct. H.R. (15 Nov. 1996)), 557, 561 (Jefferson's recognition), 565-66 (also addressing a 1994 Human Rights Committee decision), 626 (addressing *Cicippio v. Islamic Republic of Iran*, 18 F. Supp.2d 62 (D.D.C. 1998) and complicity of Iran in hostage-taking). Civil liability for fault is normal in international law. *See, e.g.*, *id.* at 406-07, 410, 869, 871; RESTATEMENT (THIRD), *supra* note 28, at § 601.

Clearly, if the military had acted as a *de facto* agent of UNOCAL, liability also could have been based on negligence under the customary "knew or should have known" standard. *See, e.g.*, PAUST ET AL., *supra* note 2, at 17, 21, 288-90, 293, 302, 305-07, 310-11, 329, 332-34, 342 (also addressing application of the standard where persons who commit violations are under one's effective authority or control). Concerning such a standard under international criminal law, see, e.g., PAUST ET AL., *supra* note 9, at 29-30, 46-76, 99, *passim*.

32. 67 F. Supp.2d 424 (D.N.J. 1999). With respect to nonimmunity, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330(a), 1602 *et seq.*, recognizes immunity

individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."[33] In 1907, an Opinion of the United States Attorney General recognized that a private United States dredging company violated a treaty by dredging activities diverting the Rio Grande, noted that an International Water Boundary Commission "found . . . that the . . . Company . . . violated the stipulations of that treaty," and recognized that injuries included "damage to property," including injury to "riparian rights," and "[a]s to indemnity for injuries which may have been caused to citizens of Mexico, I am of the opinion that existing statutes provide a right of action and a forum . . . the statutes [including the ATCA] provide a forum and a right of action."[34]

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merely for foreign states and foreign state entities. *Id.* § 1603(b). It clearly does not apply to individuals (official or private) or to private juridic entities. *See also Amerada Hess*, 488 U.S. at 438, quoted *supra* in note 28. Moreover, even when the FSIA reaches foreign state entities, the violation of treaties exception to immunity contained in §§ 1330(a) and 1604 assures that violations of human rights treaties are not entitled to immunity, especially since human rights law requires access to courts and application of the right to an effective remedy.

33. *Id.* at 445.

34. 26 Op. Att'y Gen. 250, 251-53 (1907). It had been recognized near the time of formation of the ATCA that the ATCA provides both a right of action or "remedy by a civil suit" and a forum. *See* 1 Op. Att'y Gen. 57, 58 (1795). Access to courts by aliens and rights to a remedy for violations of international law were of great importance in order to not "deny justice" to aliens, which would constitute a violation of international law by the United States and exacerbate relations with foreign states. An original purpose of the ATCA was to avoid a "denial of justice" to aliens in violation of customary international law by providing them access to our courts with respect to injuries received here or abroad at the hands of United States nationals or others found within the U.S. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782-83 (D.C. Cir. 1984) (Edwards, J.), (quoting THE FEDERALIST NO. 80 (A. Hamilton) and adding: "Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state's territory.") *See also* RESTATEMENT (THIRD), *supra* note 28 § 711, cmts. a, c, e, RN 2 (denial of access to courts, judicial denial of human rights, and denial of remedies for injury inflicted by state actors or private persons); 1 Op. Att'y Gen. 57, 58 (1795) (Bradford, Att'y Gen.); PAUST, *supra* note 2, at 199, 258-61 ns.479, 481; 385 n.87; Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64-65 (1988); Stephens, *supra* note 28, at 522.

Today, it is also well-recognized that the ATCA provides a cause of action or right to a remedy and that the only relevant inquiry is whether suit is brought by an alien, for a tort only, alleging a violation of international law. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1474-75 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424-25 (2d Cir. 1987), *rev'd on other grounds.*, 488 U.S. 428 (1989); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 777, 779-80 (Edwards, J.); *Filartiga v. Pena-Irala*, 630 F.2d at 880-82, 884-85, 887; *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 441-43 (D.N.J. 1999); *Jama v. I.N.S.*, 22 F. Supp.2d at 362-63; *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass.

In addition to cases involving claims under the ATCA, lawsuits brought against companies under other United States statutes or domestic legal provisions have led to recognition of the applicability of relevant human rights precepts in varied contexts.[35]

1995); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987); *Guinto v. Marcos*, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1379 (W.D.N.Y. 1985) (court can fashion remedies); 26 Op. Att'y Gen. 250, 252-53 (1907); 1 Op. Att'y Gen. 57, 58 (1795); PAUST, *supra* note 2, at 203, 206-08, 212, 281 ns.560-61, 282 ns.570-71. *See also Filartiga v. Pena-Irala*, 577 F. Supp. 860, 862-63 (E.D.N.Y. 1984) (international law provides "substantive principles" and "tort" means wrong under or in violation of international law). *But see Tel-Oren v. Libyan Arab Repub.*, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J. concurring). Judge Bork's views were in error, were opposed by Judge Edwards in *Tel-Oren*, and have not been followed. *See, e.g.*, *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 442 n.20 (Bork's "highly criticized opinion," "reasoning is flawed"); *Kadic v. Karadzic*, 70 F.3d at 238; *Forti v. Suarez-Mason*, 672 F. Supp. at 1539.

Even if the ATCA did not provide a right to a remedy, human rights treaties incorporated through the ATCA provide rights enforceable by private parties, and human rights law requires access to domestic courts and enforcement of the right to an effective remedy. *See, e.g.*, PAUST, *supra* note 2, at 75 n.97, 198-203, 256-72 ns.468-527, 280 n.556, 292, 362, 375-76, *passim*; PAUST ET. AL., *supra* note 2, at 72-73, 266-68, 273, 344, 459, 726; *Dubai Petroleum Co. et al. v. Kazi*, 12 S.W.3d 71, 82 (Tex. 2000) ("The Covenant [ICCPR] not only guarantees foreign citizens equal treatment in the signatorie's courts, but also guarantees them equal access to these courts.").

It should also be noted that the ATCA is congressional legislation that executes, implements or incorporates by reference treaties of the United States. *See, e.g.*, PAUST ET. AL., *supra* note 2, at 194; PAUST, *supra* note 2, at 207, 282 n.571, 371-72; Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301, 327 & n.126 (1999); Paust, *Suing Karadzic*, 10 LEIDEN J. INT'L L. 91, 92 (1997). The ATCA performs the very role that implementing legislation plays with respect to non-self-executing treaties and it also provides a cause of action and a remedy. Thus, treaties that are not self-executing for the purpose of creating a private cause of action are executed or implemented by the ATCA. *Ralk v. Lincoln County*, 81 F. Supp.2d 1372, 1380 (S.D. Ga. 2000) ("because the ICCPR is not self-executing, Ralk can advance no private right of action under the" treaty, but "could bring a claim under the Alien Tort Claims Act for violations of the ICCPR"). *But see Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d at 439 n.16 (missing this point when suggesting in false dictum that two law of war treaties (1) do not "confer rights enforceable by private parties," *but see Kadic*, 70 F.3d at 242-43; Paust, *Suing Saddam: Private Remedies for War Crimes and Hostage-Taking*, 31 VA. J. INT'L L. 351, 360-69 (1991), and (2) are entirely non-self-executing–and then falsely concluding, in terse, unreasoned and unsupported dictum beyond what plaintiff had argued or briefed, *see id.* at 439, that "[s]ince neither . . . provide a private action, they cannot provide a basis for suit under the ATCA." (even under *Iwanowa*'s false dictum, human rights treaties are clearly distinguishable because they provide a private action). More generally, the ATCA expressly incorporates all treaties of the United States by reference and it is the ATCA that provides the direct basis for a lawsuit or private action, not the treaties as such. Further, it is not the prerogative of courts to rewrite a long-standing statute to apply merely to some treaties but not to others.

35. *See, e.g.*, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 155 (1989) ("fundamental human right to privacy"); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 483, 487 (1974); *Novotny v. Great American Federal Savings*, 584 F.2d 1235, 1248, 1254, 1261 (3d Cir. 1978) ("human right" of equal opportunity for female employees and the 1964 Civil Rights

Recognition of human rights responsibilities of private persons, companies, and corporations also exists in judicial decisions outside the United States. For example, Japanese[36] and German[37] cases have recognized such forms of private responsibility, and the European Court of Human Rights has recognized that private "terrorist activities . . . of individuals or groups . . . are in clear disregard of human rights."[38] More recently, the British House of Lords recognized that a private corporation's responsibilities under domestic employment law are also "[s]ubject to observance of fundamental human rights . . . ."[39] In 1998, the Supreme Court of Canada also recognized that it is possible "for a non-state actor to perpetuate human rights violations on a scale amounting to persecution" within the reach of the Refugee Convention and, thus more generally, that private actors can engage in human rights violations.[40] Previously, the Supreme Court of Canada had also recognized that sexual harassment in the workplace can involve a corporate violation of human rights precepts concerning sex-based discrimination that were actionable under Canadian human rights legislation.[41] An Israeli Supreme Court Justice has also recognized that "basic human rights are not directed only against the

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Act); *Aetna Life Ins. Co. v. Allen*, 32 F.2d 490, 494 (1st Cir. 1929); *In re Nazi Era Cases*, 2000 U.S. Dist. Lexis No. 18148 (D.N.J. Dec. 5, 2000) (voluntary dismissal of human right and other claims occurred because of agreement re: redress through an available fund); *Continental Data Systems, Inc. v. Exxon Corp.*, 1986 U.S. Dist. Lexis No. 23490 (E.D. Pa. 1986) (quoting *Kewanee Oil Co.*); *Premier-Pabst Corp. v. Elm City Brewing Co.*, 9 F. Supp. 754, 758 (D. Conn. 1935); *Behrens v. Illinois Central Railway Co.*, 192 F. 581, 582 (E.D. La. 1911) (act of Congress reaching a private company provides "betterment of human rights"). *See also Trotter v. Jack Anderson Enterps., Inc.*, 818 F.2d 431 (5th Cir. 1987) (indirect attention to alleged Coca-Cola plant involvement in human rights violations in Guatemala); *Jacobs v. Martin Sweets Co., Inc.*, 550 F.2d 364, 370 (6th Cir. 1977) ("basic civil rights of man" in the employment arena); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1011 (S.D.N.Y. 1915) (not "right of mankind" to contract out of all courts); *Jones v. Great Southern Fireproof Hotel Co.*, 86 F. 370, 375-76 (6th Cir. 1898) (liberty of contract is one of the "inalienable rights of man"); *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894, 942 (D.N.J. 1978) (discussing sex-based discrimination claims in the employment arena).

36. See *supra* note 28.

37. See *supra* note 5.

38. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (Ser. A) at ¶ 149 (1977).

39. Johnson v. Unisys, Ltd., UKHL/13, at 37 (Mar. 22 2001) (Lord Hoffmann).

40. Pushpanathan v. Canada, 1 S.C.R. 982 (1997) also noting a related practice of Australia. The Court recognized that private violations of human rights fell within the scope of Article 1 F (c) of the Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, which deals with denial of refugee protections to persons "guilty of acts contrary to the purposes and principles of the United Nations." U.N. Charter purposes and principles include the need to respect and observe human rights.

41. Janzen v. Platy Enterprises Ltd., 1 S.C.R. 1252 (1989). Sex-based discrimination is a violation of human rights law. *See, e.g.*, U.N. Charter, arts. 1 (3), 55 (c); International Covenant on Civil and Political Rights, *supra* note 17, arts. 2 (1), 26.

authority of the state, they spread also to the mutual relations between individuals themselves."[42]

IV. CONCLUSION

From the above, it is clear that non-state actors involved in terrorism and other violations of human rights law are vulnerable to prosecution and civil suits in domestic fora. In particular, various international crimes and infractions allegedly engaged in by bin Laden and his followers, including companies and corporations under his control, can be addressed in United States courts. Civil liability can reach private actors directly and as private actors participating in a joint venture or complicitous conduct with other actors or as actors colored by a connection with a state, state entity, or other public actor.

42. Hevra Kadisha, Jerusalem Burial Company v. Kestenbaum, C.A. 294/93, 46(2) P.D. 464, 530 (S. Ct. Israel 1992) (Barak, J.).