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The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking

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There is a widespread consensus in the United States that private corporations owe duties under customary international law and can be subject to lawsuits under the Alien Tort Statute. The consensus is so broad that there is not a single court decision in the United States, and barely any legal scholarship, that dissents from this view. Despite this wide support, the consensus in favor of corporate liability for violations of customary international law is wrong. A survey of international legal sources would find embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law. This lack of an international consensus is both surprising and embarrassing because U.S. courts that have analyzed the issue have held the liability of private corporations satisfies the supposedly exacting “specific, universal, and obligatory” standard set forth by the U.S. Supreme Court in Sosa v. Alvarez-Machain. This curious and unjustified judicial consensus, I argue, demonstrates that the system of judicial lawmaking endorsed by Sosa is fundamentally flawed.

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There is a widespread consensus in the United States that private corporations owe duties under customary international law and can be subject to lawsuits under the Alien Tort Statute. This consensus is reflected in U.S. court decisions stretching back over two decades as well as in the academic writing of U.S. legal scholars. Indeed, the consensus is so broad that there is not a single court decision in the United States, and barely any legal scholarship, that dissents from this view.

Despite this wide support, the consensus in favor of corporate liability for violations of customary international law is wrong. Customary, as opposed to treaty-based international law, has never recognized the imposition of direct duties on private corporations. Even if some treaties impose direct liability on corporations in some instances (as opposed to imposing obligations on states to regulate corporations), such treaties do not support a general across-the-board rule of imposing direct liability on private corporations for any or all violations of customary international law. Indeed, customary law has only endorsed direct private actor liability in the context of international criminal law, and even this somewhat uncertain liability extends only to natural persons. In sum, a survey of international legal sources would find

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3 One exception can be found in a dissenting opinion. See Khulumani v. Barclay’s Nat’l Bank, Ltd. 504 F.3d 254, 321 (2d Cir. 2008) (Korman, J. dissenting). Additionally, the U.S. Court of Appeals for the Second Circuit is currently considering the issue in Balintulo v. Daimler.

embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law.

This lack of an international consensus is both surprising and embarrassing because U.S. courts have uniformly held that the liability of private corporations satisfies the supposedly exacting “specific, universal, and obligatory” standard set forth by the U.S. Supreme Court in Sosa v. Alvarez-Machain. This standard, according to the Court, strictly limits the role of federal courts in recognizing new and unsettled causes of action under the Alien Tort Statute.

This Article has two goals. First and foremost, it challenges the deeply mistaken consensus that upholds the liability of private corporations for violations of customary international law. Second, the Article uses the U.S. judicial development of a consensus in favor of corporate liability to undertake a broader assessment of post-Sosa lawmaking under the ATS. In his concurrence in Sosa, Justice Scalia voiced skepticism about the ability of federal courts to act as effective doorkeepers who would keep out “new and debatable” causes of action, and argued instead for a complete ban on such judicial activity. The manner in which U.S. courts have built a judicial consensus in favor of corporate liability in the United States by relying almost exclusively on U.S. (rather than international) legal precedents and concepts, I argue here, suggests that Scalia’s skepticism about the system of judicial international lawmaking authorized by Sosa was justified.

This Article proceeds as follows. First, I will review the rise of litigation under the Alien Tort Statute and the Supreme Court’s 2003 decision in Sosa, which supposedly imposed rigorous limits on lawsuits brought under the Alien Tort Statute. Then, I will then describe the judicial consensus in the United States holding that corporations can be held directly liable for violations of customary international law and can therefore be subject to lawsuits under the Alien Tort Statute. Next, I critique this consensus view and conclude that there is no serious case to be made that corporations can be liable for violations of customary international law, especially under the supposedly heightened standard imposed by Sosa. Finally, I consider the reasons for the curiously unpersuasive consensus on corporate liability. I argue that the curious consensus reveals flaws in the system of independent federal court lawmaking authorized by Sosa. These flaws include a tendency by federal courts to rely upon U.S. law over international law, confusion over the nature and persuasiveness of different

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international law sources, and a preference for pragmatic rather than formal analysis of problems under the ATS.

I. The Debate Over the Alien Tort Statute and the Sosa Standard

A. The Rise of the Modern ATS

Although originally enacted as part of the Judiciary Act of 1789, the Alien Tort Statute has only recently become the primary legal mechanism for the direct application of customary international law in the U.S. court system. Since its revival in 1980, U.S courts have issued 173 opinions in cases brought, at least in part, under the Alien Tort Statute.\(^7\) In almost all of those cases, the plaintiffs pleaded violations of customary international law under the ATS’s grant of jurisdiction over cases involving “an alien for tort only in violation of the law of nations…”\(^8\)

Although federal courts have traditionally invoked customary international law in cases arising in admiralty, in cases involving foreign sovereigns, and as a rule of interpretation, the Alien Tort Statute has become the major battleground for scholars and advocates debating the proper role of customary international law in the U.S. judicial system.

The revival of the ATS in *Filartiga v. Pena-Irala*\(^9\) did not initially cause serious controversy. Indeed, a survey of legal literature at the time, as well as press coverage and the reaction of government officials, suggested that the decision was welcomed as identifying the long-missing entry point for international law and human rights norms into the U.S. system.\(^10\) As ATS cases became more frequent, legal scholars and advocates began to herald the ATS as an important tool for developing international law, especially international human rights law. The “norm development” theory of ATS litigation was especially attractive since early ATS cases rarely resulted in enforceable money judgments.

Perhaps the most important theorist of ATS litigation as norm development is Harold Koh. In a series of influential articles in the late 1980s and early 1990s, Koh used ATS litigation as a

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\(^7\) A list of the cases is on file with the author.

\(^8\) 28 U.S.C. §1350

\(^9\) *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

prominent example of how a “Transnational Legal Process” can result in the incorporation of international legal norms by policymakers and courts.\textsuperscript{11} By allowing advocates to gain entry into U.S. courts to pursue claims under international law, Koh explained, ATS judgments resulted in the development and sometimes the incorporation of international human rights norms by U.S. policymakers and courts.\textsuperscript{12} This integration could occur even if the ATS litigation was unsuccessful on the merits. Drawing upon the theory of developing the civil rights movement through public law litigation, Koh suggested that ATS litigation could support a similar strategy for advocates of international human rights.\textsuperscript{13}

Koh’s theory accurately depicted many of the trends in ATS litigation. Although the number of enforced or collected judgments remained modest, ATS litigation resulted in some of the more comprehensive discussions of the customary international law of human rights ever entertained by U.S. courts. For instance, in \textit{Siderman v. Argentina}, the Ninth Circuit offered a lengthy disquisition on the nature of jus cogens and the status of torture under customary international law.\textsuperscript{14} Similarly, and perhaps more significantly, the Second Circuit in \textit{Kadic v. Karadzic} held that private (as opposed to state) actors could be directly liable for serious violations of international human rights.\textsuperscript{15} Putting aside the actual judgments in both cases, the cases were significant as representing perhaps the first time U.S. courts (or any domestic court) had explored these types of international legal questions in depth. \textit{Kadic} in particular has had an important jurisprudential afterlife as an important precedent for cases and even prosecutions against non-state actors for violations of international law.

\textbf{B. The Backlash Against the ATS}

The first notable dissent to the Filartiga-inspired approach to the ATS was set forth by then-Judge Robert Bork of the U.S. Court

\begin{footnotesize}
\bibitem{12} Koh, \textit{Human Rights Law}, supra note 11, at 1400
\bibitem{13} Id.
\bibitem{14} Siderman de Blake \textit{v.} Republic of Argentina, 965 F.2d 699 (9th Cir. 1992)
\bibitem{15} Kadic \textit{v.} Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).
\end{footnotesize}
of Appeals for the DC Circuit. In his well-known concurring opinion in *Tel-Oren v. Libya Arabian Republic*, Judge Bork opined that the ATS does not support a cause of action under international law. Rather, the ATS merely created jurisdiction in federal court. Congress must further intervene, according to Bork, to create a cause of action for any particular claim of international law to be heard in federal courts.

Bork’s “cause of action” critique of the ATS was rooted in a formalist notion of separation of powers which emphasized the control by the political branches over the formation of causes of action, especially when such causes of action implicate foreign affairs. By demanding congressional action before recognizing a cause of action under customary international law, Bork was implicitly rejecting the vision of the ATS as a mechanism for developing international law norms. Instead, Bork sought to seal off federal courts from this process and shift that duty to Congress and the President.

Although powerful, Bork’s separation of powers critique never gained substantial currency outside the D.C. Circuit. Most U.S. courts presented with ATS cases assumed the power to also recognize causes of action under customary international law, implicitly or explicitly rejecting the Borkian critique. Scholars decried Bork’s narrow vision of the judicial role in the development of international law and of international law itself. Cases brought under the ATS continue to be filed and decided.

In the late 1990s, the ATS became the subject of a second line of attack not only rooted in separation of powers but also in federalism. Because almost all early ATS cases involved aliens suing other aliens, courts had to find a basis for federal court subject matter jurisdiction under Article III of the U.S. Constitution. Most courts, including the *Filartiga* court, concluded that ATS cases created “federal questions” thereby satisfying Article III because customary international law raised a question of federal law.

But the conclusion that customary international law is federal law is hardly self-evident from the text of the Constitution or even

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16 *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Bork, J., concurring).
17 *Id.* at 801
18 *Id.* at 801.
21 *Filartiga*, 630 F.2d at 890.
well-supported in pre-\textit{Filartiga} precedent. For example, in a 1946 decision, Judge Learned Hand applied a rule of customary international law under the assumption that it formed part of New York’s state common law rather than part of federal law.\footnote{Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948). \textit{Accord Ker v. Illinois}, 119 U.S. 436 (1886).} Despite this uncertain doctrinal record, post-\textit{Filartiga} courts and academic defenders of the ATS simply asserted that CIL is federal common law without offering a solid basis for such a conclusion.\footnote{Curtis A. Bradley and Jack L. Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position}, 110 Harv. L. Rev. 815 (1997)[hereinafter Bradley & Goldsmith, \textit{Critique}]; A.M. Weisburd, \textit{State Courts, Federal Courts, and International Cases}, 20 Yale J. Int’l L. 1 (1995).} The most egregious example of such conclusory assertions, as two of the sharpest ATS critics pointed out, was the Restatement Third of U.S. Foreign Relations Law’s largely unsupported assertion that CIL is federal common law.\footnote{Bradley and Goldsmith, \textit{Critique}, supra 23 at 820.}

These two lines of attack on \textit{Filartiga} – one rooted in separation of powers and the other rooted in federalism – eventually migrated into judicial considerations of ATS lawsuits. While early ATS defendants were usually former foreign government officials, the second wave of ATS lawsuits targeted U.S. and foreign corporations and a third wave aimed at U.S. government actors. Each set of defendants fought back by raising the separation of powers and federalism objections to ATS lawsuits. The Bush Administration’s negative view of ATS lawsuits played an important role in increased judicial skepticism of ATS lawsuits.\footnote{See, e.g., \textit{Doe I et al. v Unocal Corporation et al}, Brief for the United States of America as \textit{amicus curiae}, (9th Cir. 8 May 2003), 00-56603, 00-56628, argued en banc 17 June 2003.}

\textbf{C. Sosa v. Alvarez Machain}

The rising opposition to ATS litigation set the stage for the Supreme Court’s decision in \textit{Sosa v. Alvarez-Machain}.\footnote{542 U.S. 692 (2004).} \textit{Sosa} involved a civil lawsuit brought by Dr. Alvarez-Machain, a Mexican national who alleged he was abducted by Sosa at the behest of U.S. Drug Enforcement Agency officials. Alvarez-Machain sued both Sosa and the U.S. agents. The defendants fought back and challenged the entire line of \textit{Filartiga} ATS cases on both separation of powers and federalism grounds. As the Supreme Court’s first consideration of the ATS, both supporters and critics saw \textit{Sosa} as a decisive case for the future of the ATS.

Despite the sharp divisions among commentators and litigants leading up to the case, the Court reached a surprisingly high level
of consensus. All members of the Court agreed with the defendants that the ATS did not by itself create a cause of action for claims under CIL and that the ATS merely created jurisdiction. All members of the Court further expressed concern that existing and future ATS litigation could raise separation of powers problems by involving federal courts in matters implicating foreign affairs. All members of the court agreed that the changes in the nature of common law after *Erie v. Tompkins* should sharply limit federal court applications of such law. And all members of the Court further agreed that Alvarez-Machain’s particular claim – that his detention violated CIL – was not sufficiently well-accepted and specific to sustain his cause of action.\(^{27}\)

This consensus did not, however, lead the Court to eliminate the possibility of future ATS lawsuits. The Court went on to uphold a limited federal court power in recognizing causes of action under CIL. Such a power, the Court cautioned, must be carefully used and only invoked to recognize causes of actions that are specific, obligatory, and universally accepted.\(^ {28}\) The Court emphasized that even where international law rules obtain undisputed acceptance as a general matter, they must be defined to a level of specificity to plainly encompass the particular defendant’s alleged conduct.\(^ {29}\) It is not sufficient to show agreement upon an abstract rule; there must also be uncontroversial agreement that the defendant’s specific alleged conduct violated that rule. This insistence on specificity reflects the Court’s concern with the dangers of federal court lawmaking. Many rules might have widespread and universal agreement in the abstract, but whose application remains highly unsettled. Additionally, the Court noted that the question of specificity includes the question of “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued.”\(^ {30}\)

The importance of the specificity requirement was made clear in the Court’s application of this requirement to the facts in the *Sosa* case itself. While the Court accepted that a rule against arbitrary detention in some forms might command universal agreement, there was insufficient agreement that the specific conduct in *Sosa* violated that rule.\(^ {31}\)

In sum, under *Sosa*’s approach, the fact that international law appears to prohibit the defendant’s conduct, or that international

\(^{27}\) *Sosa*, 542 U.S. at 720.

\(^{28}\) *Id*.

\(^{29}\) See *Sosa*, 542 U.S. at 732-33 & n.21 (describing “requirement of clear definition.”).

\(^{30}\) *Sosa*, 542 U.S. at 733.

\(^{31}\) *Id*. at 737.
law contains a universally-recognized general principle arguably extending to the defendant’s conduct, is insufficient to permit federal court jurisdiction. Rather, the court must determine whether international law (1) contains a universally accepted rule, and (2) defines that rule specifically and uncontroversially to include defendant’s alleged conduct.\textsuperscript{32} The Court reasoned that such a federal role, as long as it was sharply limited, would not interfere with the concerns that all members of the Court had shared about judicial activity in this area.\textsuperscript{33}

Despite these rather onerous-sounding requirements for the recognition of a cause of action, Justice Scalia and two other justices still found this approach insufficiently restrictive of federal court jurisdiction. While declaring his almost complete agreement with the Court, Justice Scalia rejected the majority’s “reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms . . . [that] would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.”\textsuperscript{34} Justice Scalia suggested that leaving any discretion with federal courts would lead inexorably to conflict and confrontation with Congress and the President’s management of foreign affairs.\textsuperscript{35} He further suggested that leaving such a role for federal courts was at odds with democratic self-government.\textsuperscript{36}

The agreement between the Souter majority and Scalia concurrence is striking. Both agreed that the courts should play no role in creating “new and debatable” causes of action or act in ways that would conflict with the political branches or depart from international practice.\textsuperscript{37} Both believed that courts should only be able to act in a very narrow set of actions that would cause no disagreement at home or abroad.\textsuperscript{38}

In fact, the only real difference between the majority and concurrence lies in their predictions about the subsequent behavior of federal courts in the administration of the ATS and CIL. The majority doubted federal courts would cause such problems as long as they were subjected to strict limitations, while Justice Scalia firmly predicted that such restrictions would prove ineffectual.

Notably, neither justice endorsed the more expansive conception of the federal court role embraced by academic advocates such as Koh. While Justice Souter thought federal courts should not avert their gaze from international law, his

\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} \textit{Sosa}, 542 U.S. at 739 (Scalia, J. concurring).
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} \textit{Sosa}, 542 U.S. at 746.
endorsement of what he believed were substantial and serious limitations on ATS activity hardly fulfilled the normative goals of many ATS advocates. Yet the more suspicious Justice Scalia expressed fear that advocates would indeed take advantage of small opening left to push an aggressive agenda at odds with the goals of the political branches.  

One issue left open by the *Sosa* Court suggested a test (of sorts) as to how federal courts would apply the ATS to these different predictions. In a footnote, the majority noted that “a related consideration” to the main determination as to whether a norm of customary international law was sufficiently well-settled, is “whether international law extends the scope of liability for a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” The question of whether and in what circumstances non state actors could be liable for violations of customary international law was, as the Court noted, an issue that could be subjected to the test for recognizing causes of action set forth by *Sosa*. The next Part of this article explains how the treatment of this issue by courts confirms Justice Scalia’s more pessimistic prediction.

II. The Judicial Consensus in Favor of Corporate Liability Under the Alien Tort Statute

At the outset of *Filartiga’s* ATS revolution, plaintiffs faced serious challenges finding defendants against whom they could acquire jurisdiction. The most obvious defendants in many ATS cases are foreign sovereigns since ATS plaintiffs are always alleging a violation of public international law. Indeed, under the traditional conception of public international law, only sovereign governments owed duties or responsibilities. Non-state parties, such as private individuals, organizations or corporations, only owed duties under domestic laws and could not violate international law directly.

ATS plaintiffs bringing suit in U.S. courts against foreign sovereigns also had to overcome a general rule granting immunity to foreign sovereigns in the domestic courts of another sovereign. In general, early ATS plaintiffs sued former officials of foreign sovereigns rather than the sovereigns themselves in order to avoid

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39 *Id.*
40 *Id.*
41 *Sosa*, 542 U.S. at 732 n. 20.
42 *Id.*
Hence, the defendants in *Filartiga* were former government officials of the Paraguayan government. While such defendants were not shielded by sovereign immunity, they were often judgment-proof. Nor did lawsuits against former government officials appear to have any serious deterrence effect on the actions of foreign sovereigns. Perhaps for this reason, ATS plaintiffs began to search for another set of defendants who would not only be able to satisfy judgments but also be deterred by actual or threatened ATS lawsuits enforcing international norms. This search naturally turned up private multinational corporations who cooperated with or worked with foreign sovereigns.

### A. The ATS and Corporations

The first reported ATS case against a corporate defendant was brought in 1985, but the lawsuit was dismissed on other grounds and never reached the question of whether a corporation was a proper defendant under customary international law. This pattern continued during the first decade and a half of ATS litigation with all reported decisions on lawsuits against corporations finding other grounds for dismissal. Indeed, it is not even clear whether ATS defendants in these cases raised the issue of corporate liability under customary international law.

Although it did not directly consider the amenability of corporations to ATS lawsuits, the U.S. Court of Appeals for the Second Circuit’s decision in *Kadic v. Karadzic* took an important analytical step forward toward addressing corporate liability. In *Kadic*, the defendant argued that as a private party, who was not acting under the authority of a foreign sovereign, he could not be liable for violations of international law. Defendant was the leader of a breakaway regime of Serbs based in Bosnia but it was not recognized as a state nor was it part of the Yugoslav or Serbian governments. The *Kadic* court concluded, after an extended

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46 See, e.g., Carmichael v. United Technologies Corp., 835 F.2d 109 (5th Cir. 1988) (case against corporations dismissed for lack of personal jurisdiction (Service) and lack of subject matter jurisdiction (no cause of action for aiding and abetting); Amlon Metals, Inc. v. FMC Corp., 775 F.Supp. 668 (S.D.N.Y. 1991); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078 (S.D. Fla. 1997); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997) (case brought under both ATS and TVPA and dismissed under ATS for lack of cause of action and under TVPA for, among other things, corporation not an “individual” who can be held liable under TVPA).

47 Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996).
discussion, that non-state actors such as the defendant could violate certain jus cogens norms of international law. This conceptual leap opened the door to considerations of corporations.

Courts began to address corporate liability more directly in the mid-1990s in Doe v. Unocal Corp.\(^{48}\) when ATS plaintiffs finally achieved their first breakthrough in a lawsuit against a private corporation. In this case, the U.S. District Court for the Central District of California permitted some of the ATS plaintiffs to proceed with a lawsuit alleging that a U.S.–based multinational corporation was complicit in serious human rights abuses by the government of Burma.\(^{49}\) Like prior cases, the district court in Unocal did not analyze the question of whether a corporation, as opposed to a natural person, could be liable. But it did consider the question in a more general sense. Defendant Unocal had argued that, as a private actor, it could not be directly liable for violations of international law. Following the Second Circuit’s decision in Kadic, the court found that private liability could be attributed to a non-state actor.\(^{50}\) It did not separately analyze whether or not a private corporation, as opposed to a natural person, could be liable under this theory.\(^{51}\)

Despite this omission, Unocal was a breakthrough for ATS plaintiffs seeking redress against corporations. It relied on two possible theories of liability. First, as discussed, it depended on a holding that private non-state actors, including corporations, could be held directly liable for certain serious violations of international law. Second, and more commonly, it depended on a finding that corporations could be held liable for complicity with – aiding and abetting – sovereign states that were themselves committing serious violations of international law.\(^{52}\)

The second theory of liability became the focus of most litigation because few ATS corporate defendants were alleged to have directly committed international law violations. Most corporate ATS defendants, at worst, were alleged to have been complicit in such violations. The litigation on this front, accompanied by substantial academic discussion, focused on what the standards for complicity should be and whether those standards should be drawn from international or domestic law. This latter dispute is important for the purposes of this article because if the question of complicity is also a question of international law, the complicity theory of liability also depends on the assumption that a private corporation can violate international law.

\(^{49}\) Id.
\(^{50}\) Id.
\(^{51}\) Id. at 891.
\(^{52}\) Id.
But the question of corporate liability remained unexplored. The first circuit court to seriously consider an ATS case against a corporate defendant did not even address the question. Instead, that Court focused on the difficult question of complicity and ended up with enough divisions on that question to avoid reaching the corporate liability question. Subsequent courts hearing ATS lawsuits either accepted the *Kadic* private actor analysis or simply did not analyze the question at all while still permitting lawsuits to go forward against corporations.

B. Talisman

It was not until 2003, the year before that the Supreme Court decided *Sosa*, that a court explicitly analyzed the question of corporate liability under the ATS. In *Presbyterian Church of Sudan v. Talisman Energy*, the District Court for the Southern District of New York issued a lengthy analysis of the defense raised by a Canadian corporation accused of complicity with international law violations by Sudan’s government. Indeed, the first *Talisman* opinion, along with a subsequent 2005 opinion by Judge Weinstein in the Eastern District of New York, remain the only two serious judicial analyses of a private corporation’s liability under the ATS. All other decisions which noted the existence of the corporate liability question have typically cited either or both of these opinions with approval. A discussion of these two opinions, therefore, represents a fair (and indeed, quite comprehensive) survey of U.S. judicial thinking on the question of ATS corporate liability.

The *Talisman* Court’s discussion of corporate liability is built on two foundations. First, it concluded that U.S. caselaw “make[s] it clear that corporations can be held liable for jus cogens violations.” Then, it found that “international precedent and

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53 *Id.*


57 *Talisman*, 244 F. Supp. 2d at 308.
practice reveals that corporate liability, at least for jus cogens violations, is contemplated under international law.\textsuperscript{58}

Although the \textit{Talisman} court relied heavily on U.S. case law to support its conclusion, none of the cases it relied upon actually held, or even explicitly analyzed, whether a private corporation can be liable under international law. Because none of the decisions ended in a dismissal for lack of subject matter jurisdiction over a private corporation, the \textit{Talisman} court counted each decision as precedent in favor of corporate liability under international law.\textsuperscript{59}

In fact, although each case did indeed involve an ATS defendant, not one of the decisions even addressed the question of whether a private corporation could violate international law.\textsuperscript{60} Nor is it even clear that the argument was even raised by ATS defendants.

Indeed, as I have argued before, no prior U.S. court directly (or indirectly) had analyzed the liability of a private corporation under CIL. Yet the \textit{Talisman} court relied heavily on the fact that no U.S. court had ever adopted this theory, thereby assuming that all prior U.S. courts endorsed this theory. As a formal matter, federal courts cannot assert subject matter jurisdiction, even in cases it dismisses on alternative grounds, without having found that the case satisfied this requirement. But while this might be true as a formal matter, no U.S. court ever analyzed the issue prior to \textit{Talisman}.

The analytical foundation for the \textit{Talisman} Court’s holding lies in the Second Circuit’s seminal decision in \textit{Kadic v. Karadzic}.\textsuperscript{61} In \textit{Kadic}, the Second Circuit considered whether an ATS action under CIL could proceed against the defendant, the head of a Bosnian Serb government not recognized under international law as a sovereign state. The defendant Karadzic argued that because CIL governed only state-to-state relations and that private parties owed no duties under it, as a private actor, he was legally incapable of violating CIL.\textsuperscript{62}

The Second Circuit rejected this defense and held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”\textsuperscript{63} In past, non-state actors such as pirates and slave traders were considered hosti humani generis and punished for violations of international law. This precedent for punishing non-

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} See, e.g., \textit{Talisman}, 244 F. Supp. 2d at 310 (discussing \textit{Aguinda v. Texaco, Inc.}, 303 F.3d 470 (2d Cir. 2002); \textit{Bigio v. Coca-Cola Co.}, 239 F.3d 440 (2d Cir. 2000); \textit{Wiwa v. Royal Dutch Petroleum Co.}, 226 F.3d 88 (2d Cir.2000) and acknowledging that none address the corporate liability issue.

\textsuperscript{61} 74 F.3d 377 (2d Cir. 1996).

\textsuperscript{62} Id.

\textsuperscript{63} 74 F.3d at 239.
state actors for certain serious international violations of “universal concern” had modern analogues in the prohibition of genocide, torture, and certain war crimes. In the cases of such serious jus cogens violations, the Kadic court reasoned, non-state actors could be held liable even without any pretense of state authority.\(^{64}\)

Kadic thus provides the precedential basis (in the U.S) for extending liability for certain serious jus cogens violations beyond state actors. But as the Talisman court acknowledged, Kadic did not address the question of whether all private actors, including private corporations, could be held equally liable. Still, the fact that courts subsequent to Kadic did not reject subject matter jurisdiction in ATS cases involving corporate defendants, according to the Talisman Court, meant that the U.S. courts had extended jus cogens liability to such defendants.\(^{65}\)

The Court then buttressed their argument with international precedents. Explicitly borrowing the analysis of a law review article by Steven Ratner,\(^{66}\) the Court relied on precedents from trials of Nazi-era war criminals after World War II and international treaties that have imposed obligations on corporations. As for the Nazi cases, the Court conceded that the key Allied tribunal tasked with punishing businesses that had cooperated with the Nazis did not punish any corporations.\(^{67}\) Rather, such tribunals uniformly punished the individuals who owned and managed the corporate entities. But although no corporation was punished, the Talisman Court relied on the Allied tribunal’s descriptions of “firms” committing crimes to seek support for private corporation liability.\(^{68}\)

As for international treaty precedents, the Court noted that a number of international regulatory treaties directly imposed duties on private individuals, and some even defined such individuals as both private and corporate. While most treaties did not bind corporations, the fact that some treaties could hold parties liable for unintentional torts suggests that “they can be held liable for intentional torts such as complicity in genocide, slave trading, or torture.”\(^{69}\) As I will argue in Part II, these precedents do not establish the international support that the Talisman court claimed.

C. The Effect of Sosa

\(^{64}\) Id.
\(^{65}\) Talisman, 244 F. Supp. 2d at 311.
\(^{67}\) Talisman, 244 F. Supp. 2d at 311.
\(^{68}\) Id.
\(^{69}\) Talisman, 255 F. Supp. 2d at 319.
After the Supreme Court’s 2003 decision in Sosa, Talisman reiterated their argument on corporate liability and invoked the heightened and rigorous Sosa standard for determining the existence of a cause of action under CIL. But the Talisman II Court refused to depart from its earlier holding. Because U.S. cases subsequent to Sosa had failed to dismiss corporate defendants, the Talisman II Court found no reason to depart from its prior decision. Moreover, The Talisman defendants’ observation that no treaty or international tribunal decision had ever imposed liability on a corporation for violations of jus cogens crimes did not resolve the question. Rather, the burden lay on the Talisman defendants to establish the non-existence of a rule of corporate liability. According to the Court, the lack of any objection by member states, including Talisman’s home country Canada, was strong evidence of the existence of corporate liability for CIL.

As I will explain below, there are good reasons to doubt this understanding of how one should determine CIL. Indeed, as the only other court to analyze this issue in detail acknowledged, international sources appear to support the view of the Talisman defendants. In Agent Orange, Judge Jack Weinstein noted the weaknesses in the plaintiff’s international precedential support from the Nazi-era cases as well as the lack of jurisdiction over corporations in the ICC statute or the two main UN ad hoc international criminal tribunals. Yet Judge Weinstein rejected the defendants’ argument on two grounds. First, he reiterated the Talisman court’s view that the long line of ATS cases against corporations inherently affirmed the existence of corporate liability. Second, he noted that there was no obvious policy reason against imposing liability on corporations for CIL violations. After all, corporations under domestic law are commonly and uncontroversially held liable for violations.

Subsequent courts have continued to follow the holding, if not the logic, of Talisman and Agent Orange. With one exception, courts considering ATS lawsuits against corporations have continued to ignore the issue or simply assumed jurisdiction with a simple citation of Talisman. Essentially, the argument for corporate liability under the ATS rests on the failure of the U.S. courts to even spot the issue for decades. The long line of cases not discussing the issue became, oddly, the basis for deciding that

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70 Id.
73 Id.
such liability was accepted. In a similar twist of logic, the lack of any international precedent against such a finding became further support for the existence of corporate liability. At the center of this analysis is the first district court decision in *Talisman*, which remains the most influential statement of the U.S. judicial consensus.

**D. The Scholarly Contribution to the Consensus on Corporate Liability**

Unlike U.S. courts, most scholars who considered the issue recognized the difficulties and complexities of holding corporations liable under the ATS for CIL violations. Moreover, ATS litigation was, for most scholars, simply a smaller subset of a larger normative campaign to apply international norms to corporations. This interest in the legal literature coincided with the first ATS cases against corporations, but it was part of a broader shift in interest among scholars toward the role of multinational corporations in the world sphere. This interest was reflected in an early effort by the United Nations to articulate global norms governing conduct by multinationals. Although much of the early academic consideration of these questions made strong normative claims for holding corporations accountable for international human rights law obligations, few claimed that the applicability of such law to corporations was settled or obvious. Yet academic scholarship has been a crucial factor in the creation of a U.S. consensus on ATS corporate liability. In determining whether or not there is private corporate liability for violations of jus cogens, U.S. courts have essentially adopted wholesale the views of U.S. international law scholars.

The clearest example of the connection between scholarship and the courts is Professor Stephen Ratner’s 2001 article exploring a theory for holding private corporations responsible for international human rights obligations. Ratner’s article self-
consciously refused to focus specifically on the ATS context in order to derive a more general theory.\textsuperscript{77} Nor did Ratner make the claim that international law at that time already recognized international law duties for corporations in the context of human rights. Indeed, some of his other work was cited for the proposition that no consensus yet existed.\textsuperscript{78} His purpose was to offer an analytical framework that could lead to the recognition of such duties. As he explains, “My thesis is that international law should and can provide for [international duties on corporations], and that the scope of these obligations must be determined in light of the characteristics of corporate activity.”\textsuperscript{79}

Ratner then reviewed the international precedents on private corporate duties arguing that there is a “clear trend” toward the recognition of corporate duties.\textsuperscript{80} He then examined the World War II cases against Nazi industrialists, certain treaty regimes that impose duties on business enterprises, treaty interpretation bodies, European Union treaties, and soft law on corporate responsibility. The \textit{Talisman} Court relied on most of these same sources and essentially the same analysis to reach its conclusion. Unlike the \textit{Talisman} Court, however, Ratner describes this evidence as reflecting “somewhat inconsistent posture among decisionmakers over the role of corporations in the international legal order.”\textsuperscript{81} Although corporations have many recognized rights under international law, many governments are “somewhat ambivalent” about accepting corporate duties.\textsuperscript{82} Still, Ratner concludes that many decisionmakers recognized that “corporate behavior is a fitting subject for international regulation.”\textsuperscript{83} But Ratner does not claim, nor was it the burden of his article to establish, that there was wide international consensus on the existence of private corporation duties under CIL. Yet this is exactly the burden that federal courts have used Ratner’s analysis to establish.

Other scholars have also weighed in and most have been less reluctant than Ratner to defend corporate liability under the ATS. Harold Koh, for instance, adapted Ratner’s arguments to sharply

\textsuperscript{77} \textit{Id.}
\textsuperscript{78} See also Steven R. Ratner & Jason S. Abrams, \textit{Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy} 16 (2d ed. 2001) (“It remains unclear [ ] whether international law generally imposes criminal responsibility on groups and organizations.”).
\textsuperscript{79} \textit{Id.} at 449. (Emphasis added)
\textsuperscript{80} \textit{Id.} at 452.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 450.
criticize opponents of corporate liability as spreading “myths.”

Such myths about the inability of private corporations to owe duties under CIL, Koh argued, are refuted by evidence of Nazi-era prosecutions and subsequent treaty practice. Moreover, Koh emphasizes the illogic and perhaps injustice of recognizing private corporation rights under CIL while at the same immunizing such entities from duties. The unfairness of immunizing corporations from liability is a common theme to scholars defending this position. As Beth Stephens argued, to the extent that international law obligations extend non-state actors, there is no basis for limiting such extensions to natural persons. Thus far, there has been little or indirect dissent to these arguments.

Most scholars outside the United States have welcomed the ATS revolution in corporate liability, while at the same time recognizing that it represents a new development in the law that is almost wholly U.S.-based. Indeed, non-U.S. scholars focusing their attention on U.N. efforts to develop norms for corporations and the debate in the International Criminal Court over jurisdiction over corporations have found American ATS cases as a rare safe harbor. Most interestingly, the judicial consensus in the United States over corporate liability in ATS cases is usually cited as evidence of a trend that has yet to be followed or accepted abroad. Few discussions describe the ATS cases as a reflection of a well-known international consensus.

The judicial consensus for the liability of corporations under international law rests on a very thin reed. Although numerous ATS cases have been brought against U.S. corporations, only two courts have directly addressed the question of a corporation’s liability for jus cogens violations. Ironically, both of these courts relied heavily on the failure of prior courts to analyze or even spot

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85 *Id.*

86 *Id.* at 265.


the issue as evidence that precedent favors imposing such liabilities. Once endorsed by these two lower courts, subsequent courts treated the question as settled.\textsuperscript{89}

This questionable approach to precedent is further exacerbated by these courts’ heavy reliance on legal scholarship on the level of international consensus on the question of corporate liability. While such scholarship argued for a tentative trend toward corporate liability, such articles failed to establish the existence of a universal acceptance of the norm at a level of specificity required by the Court as a whole. In the next Part, I discuss the international sources on corporate liability under CIL.

III. The Non-Existent International Consensus on Private Corporate Liability for CIL Violations

Under \textit{Sosa}, federal courts are obligated to limit their recognition of causes of action under CIL to those norms that are “specific, universal, and obligatory.”\textsuperscript{90} The requirement of specificity includes questions of whether “a private actor can be held liable for under international norms.”\textsuperscript{91} Hence, all courts that have considered this question have sought to establish that there is wide and universal international consensus that private corporations owe duties under CIL or at least for jus cogens violations. As I will detail in this Part, the question of private corporation liability is far from universally settled and agreed upon under CIL. The traditional rule of international law limiting rights and duties to states has only been partially abrogated. Moreover, neither historic nor contemporary international precedents establish a consensus in favor of imposing liability on private corporations, particularly with respect to the imposition of liability for violations of jus cogens norms.

A. The Basis for Non-State Actor Liability for Violations of International Law

Under traditional international law, legal rights and duties flowed between sovereigns alone. As a leading treatise explains,

\begin{quote}
States are the principal subjects of international law. This means that international law is primarily a law for the international conduct of States, and not of
\end{quote}

\textsuperscript{89} See discussion, \textit{supra}, part II.A.
\textsuperscript{90} Sosa, 542 U.S. at 733.
\textsuperscript{91} Sosa, 542 U.S. at 733 n. 22
their citizens. As a rule, the subjects of the rights and duties arising from international law are states solely and exclusively, and international law does not normally impose duties or confer rights directly upon an individual human being.  

Hence, non-state actors could not in their own capacity make claims against states. Non-state actors who suffered injuries at the hands of foreign sovereigns, for instance, could only seek recovery under international law through their states of nationality. For this reason, determining nationality has been a crucial factor both for natural persons as well as for legal persons when seeking remedies under traditional international law. In one famous case, the ICJ rejected the right under international law of Belgium to bring claims against Spain on behalf of a corporation that was registered under the laws of Canada. The ICJ rejected this claim even though the majority of shareholders claiming injury were nationals of Belgium.

These formal and rigid categories of traditional international law began to relax in the aftermath of World War II and the rise of the international human rights movement. As a number of scholars have observed, international human rights law self-consciously sought to impose duties on states toward their own nationals as well as toward foreign nationals. Indeed, many of the key international human rights treaties were primarily focused on regulating the internal conduct of a state with respect to its own nationals. Yet even human rights treaties impose duties on states to grant rights to individuals rather than granting rights to individuals directly. This preserves the traditional conception of international law obligations flowing between states, and only indirectly toward individuals. The expansion of individual rights under international law occurred at the same time that international law began to impose duties on individuals in their private capacity. The most famous example of this phenomenon was the imposition of criminal liability on individuals by international tribunals formed by the victorious Allied Powers in World War II. In the famous Nuremberg formulation, “[t]hat international law imposes duties and liabilities upon individuals as well as upon states has long been

94 Id.
95 See e.g.
96 See Antonio Cassese, INTERNATIONAL LAW (2005).
recognized."

Quoting the U.S. Supreme Court, the Tribunal declared that “crimes against international law are committed by men, not by abstract individuals, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”

“The major legal significance of the [Nuremberg] judgments lies … in those portions of the judgments dealing with the area of personal responsibility for international law crimes.” But the innovation of Nuremberg, however, is not simply that individuals could be punished for violations of international law. Rather, responsibility extended to individuals even when their conduct was explicitly sanctioned or even required by their country of nationality (in this case, Germany).

The result of these developments is that certain forms of international law extended the scope of its protections to nationals against their own states (international human rights law) and other forms of international law extended the scope of its duties to individuals (international humanitarian law). But although revolutionary, these developments did not replace the traditional operation of international law via state-to-state relations. Treaties continued to operate by imposing duties on states to carry out obligations within its territory and with respect to its nationals while states remained the primary bearers of rights and obligations under international law. Treaties imposed duties on states to respect and guarantee rights, never directly imposing obligations or granting rights to natural or legal persons. Customary law followed the same indirect approach with the sole exception of serious international crimes like genocide and war crimes. Such serious international crimes, however, have only been directed toward natural persons.

B. The World War II Industrialist Cases

Nonetheless, U.S. courts and scholars have suggested that the military tribunals established to punish World War II war criminals went even further than described above. The *Talisman* Court held that U.S. military tribunals also punished corporations for

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violations of international law by aiding and supporting the Nazi regime’s war crimes. But none of these tribunals actually charged corporations. Instead, they charged the natural persons who controlled such corporations. Despite this restricted prosecution, defenders of corporate liability have focused on the language of such opinions in cases against officers at German corporations that “makes it clear that while individuals were nominally on trial, the [corporation] itself, acting through its employees, violated international law.”

This analysis is based almost entirely on the language of two opinions from U.S. military tribunals established by Control Council Law No. 10 after the initial Nuremberg tribunals completed their work. While applying international law, the judges in the subsequent Control Council Law No. 10 tribunals were, unlike the more famous Nuremberg Tribunals, all U.S. military lawyers and U.S. state court judges. Such judges were accustomed to imposing both civil and criminal liability on corporations, and it is hardly surprising that their opinions should reflect some imprecise language. But the language hardly suggests that they believed they were holding corporations liable.

The first passage involves the tribunal’s finding with regard to I.G. Farben in a case brought against Krauch.

With reference to the charges in the present indictment concerning Farben’s [a German corporation] activities in Poland, Norway, Alsace-Lorraine, and France, we find that the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben, and that these offenses were connected with, and an inextricable part of the German policy for occupied countries. [...] The action of Farben and its representatives, under these circumstances, cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich. [...] Such action on the part of Farben constituted a violation of the Hague Regulations [on the conduct of warfare].

In a similar case, the tribunal noted that “the confiscation of the Austin plant [a tractor factory owned by the Rothschilds] [...] and

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100 Talisman I, 242 F. Supp. 2d at 315.
101 Talisman I, 242 F.Supp.2d at 316.
102 Talisman I, 242 F.Supp.2d at 315-16. (quoting United States v. Krauch, quoted in Ratner, at 478 (emphasis added).)
its subsequent detention by the Krupp firm constitute a violation of Article 43 of the Hague Regulations [...and] the Krupp firm, through defendants[... ] voluntarily and without duress participated in these violations."\(^{103}\)

Although such passages suggest that the tribunals were seeking to punish the businesses and their activities, the tribunals at time clarified their analysis to make it clear that they were not charging the corporations directly.

We will now turn to the consideration of the individual responsibility of the defendants for the acts of spoilation [in various countries].... It is appropriate here to mention that the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings. We have used the term “Farben” as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoilation were committed. But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it. . . .\(^{104}\)

It is noteworthy that when U.S. trained prosecutors and U.S.-trained judges sought to punish the business activities of corporations, all of them chose to act by charging the individual officers or owners of these corporations rather than the corporation itself. For instance, where a business was charged with supplying Zyklon B gas to Nazi concentration camps, the Nuremberg prosecutions were against the individual who owned the firm, his immediate deputy and the senior technical expert for the firm; the firm itself was the not the subject of the criminal prosecution.\(^{105}\)

\(^{103}\) United States v. Krupp, quoted in Ratner, at 478 n. 134. As in Krauch, the Krupp court makes it clear that while individuals were nominally on trial, the Krupp company itself, acting through its employees, violated international law.


While it is the business conduct that gives rise to liability in these trials, it is almost stunning to a U.S. lawyer to “reverse pierce” and attribute the actions of a corporation to an individual. The U.S.-trained lawyers who ran these tribunals may have intended to punish the corporations at issue here, but the only punishments were inflicted on natural persons like Krupp and Krauch.

Why did the tribunals refuse to try the corporations directly? This question has been the subject of a recent detailed historical investigation by Jonathan Bush. Based on interviews with surviving participants and a review of various underlying documents, Bush discovered that a number of prosecutors did indeed consider charging the German businesses directly. But Bush has been unable to find a single explanation for why this plan was eventually rejected or dropped. He suggests that the failure to prosecute the corporations directly was a result of a combination of factors including allied interest in maintaining the German economic structure, the weariness of “awakening legal concerns” with albeit a somewhat controversial and novel legal move, and the evidentiary difficulties of prosecuting entities with complex structures.

It is likely that all of these reasons contributed to the ultimate decision. But whatever the reason, Bush acknowledges that it is simply wrong for courts and scholars to suggest that these trials provide an important precedent for imposing international law duties on corporations. Not only did the courts explicitly avoid such a theory, but Bush’s investigation makes it clear that they considered and rejected this option. Nuremberg and related tribunals have an honored and iconic place in the modern development of international law. It is not surprising that courts and scholars have tried to rely on these decisions as supportive precedent. Unfortunately, the practice of these tribunals provides

106 Whether as unaffiliated individuals or as members of organizations, the accused were natural persons, not legal entities. Provision was made for declaring and proving that “the group or organization of which the individual was a member was a criminal organization.” Id. at 290 (Art. 9). The effect, however, was not enterprise liability but to make membership in such an organization a punishable offense – to give a signatory state “the right to bring individuals to trial for membership [in the criminal organization].” Id. (Art. 10). Similarly, Control Council Law No. 10 speaks only of punishment of “persons,” not entities; of “war criminals and others similar offenders, other than those dealt with by the International Military Tribunal”; and of “[t]he delivery … of persons for trial” (preamble, Articles II & V).
108 Id. at 1100
109 Id.
110 Id. at 1101
no meaningful support to the imposition of legal liability on private corporations under customary international law.

C. Contemporary International Precedents

Nuremberg established the principle of responsibility of natural individuals or states for certain violations of international law. This expansion of liability for the most serious violations of international law to natural persons has been confirmed by subsequent international practice in the international criminal tribunals that were established in the 1990s. But such tribunals also confirm the limitation of liability to natural persons. The tribunals’ limited view is also shared by the most recent effort of the United Nations Human Rights Council to foster international norms regulating transnational corporations.

1. International Criminal Tribunals

The successors to the World War II tribunals were the international criminal tribunals established by the United Nations to prosecute war crimes in the Former Yugoslavia and Rwanda. From the outset, these tribunals had limited jurisdiction that was limited to individuals. Although it was not crystal clear that such jurisdiction excluded legal persons, no legal person was ever charged in either of the tribunals.

This practice of limiting jurisdiction to natural persons was confirmed in Article 25(1) of the Rome Statute establishing the International Criminal Court, “The Court shall have jurisdiction over natural persons pursuant to this Statute.” This decision was not without controversy. One of the most important founding states, France, had initially proposed extending jurisdiction to legal as well as natural persons.

[But] the proposal was rejected for several reasons which as a whole are quite convincing. The inclusion of collective liability would detract from the Court’s jurisdictional focus, which is on individuals. Furthermore, the Court would be confronted with serious and ultimately overwhelming problems of evidence. In addition, there are not yet universally recognized common

standards for corporate liability; in fact, the concept is not even recognized in some major criminal law systems.\textsuperscript{112}

The Rome Statute negotiations revealed some of the fundamental legal and practical difficulties in extending liability to corporate entities. For instance, during the negotiations, several parties raised concerns about the proper procedures for indicting a corporation and how evidence would be obtained from such an entity.\textsuperscript{113} Most importantly, the negotiators debated and disagreed upon the method for determining the \textit{mens rea} of a legal person.\textsuperscript{114} When combined with time constraints on negotiations as well as an enormous number of other issues, the Rome Statute parties decided to focus on areas of consensus and uniformity.\textsuperscript{115}

Although the ICTY, ICTR, and Rome Statute deal with criminal liability, they are crucial to the establishment of norms for civil liability in most of the ATS cases. Indeed, the precedents for a variety of important principles of CIL applied by courts in ATS cases are drawn from these international criminal law precedents. For those looking for international precedents, there is no choice because no other country or international tribunal permits the imposition of civil liability for what many countries deem uniquely criminal violations.

Arguing that civil liability standards can or should be different is certainly defensible, but such arguments cannot then rely on widespread international consensus. Courts in ATS cases already draw on these tribunals for evidence of an international consensus on principles of direct private actor liability as well as aiding and abetting liability. But such courts must take the bitter with the sweet, and the lack of any support for imposing liability on corporations from the modern international criminal tribunals is a serious blow for those claiming that corporate liability is universally accepted.

\textbf{2. Treaties Imposing Duties on Business Entities}

Defenders of corporate liability also point to a number of treaties that have imposed duties on business entities. Some have even suggested that this practice of regulating corporate behavior can be extended through any reference to private party conduct.

\textsuperscript{113} \textit{Id}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id}.
As Professor Jordan Paust argues, while there is no evidence of international law extending to private corporations, there is also no evidence that international law uniquely immunizes corporations from international law obligations. Hence, Professor Paust would support the opposite rule: unless an international norm specifically exempts corporations from liability, corporate liability should be assumed.\footnote{See Jordan J. Paust, \textit{Human Rights Responsibilities of Private Corporations}, 35 \textit{VAND. J. TRANS. L.} 801 (2002).}

This analysis ignores the central difference between direct and indirect liability under international law. Almost every treaty regime imposes liability indirectly by formally imposing an obligation on state parties to impose duties on private parties. Treaties cannot impose duties on private parties directly since private parties are not competent to make treaties under international law.

For example, the OECD Convention Against Bribery of Foreign Government Officials in International Business Transactions,\footnote{See \textit{Convention on Combating Bribery of Foreign Public Officials in International Business Transactions}, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1 (1998).} a treaty almost wholly focused on regulating the behavior of private businesses, imposes duties on its members rather than such businesses. Of course, those states must transpose those duties onto persons. But even here, the OECD Convention provides member states with flexibility. Article 2 of the Convention requires each member state to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”\footnote{OECD Convention, art. 2.} But as the official commentary makes clear, member states may be excused from making this liability of corporate entities criminal since many member states may not permit criminal punishment of corporations.\footnote{Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions, \textit{available at }<//www.oecd.org> [hereinafter “Commentaries on OECD Convention”]}

Allowing states to flexibly implement the broader obligation reflects the traditional deference of international law to the primacy of domestic legal mechanisms. Moreover, the “indirect” framework comports with traditional international law’s conception of duties flowing between states rather than directly onto individuals.

Even the flexible OECD Convention has run into complications and confusing issues with respect to punishing legal persons. As a 2008 Working Group paper reports, some countries have limited the liability of the legal person to situations where a senior official of the legal person committed the illegal act or


\footnote{118 OECD Convention, art. 2.}

where a natural person associated with the legal person has already been convicted. This does not comport with the practice of other member states and possibly undermines the effectiveness of the treaty itself. The larger lesson from the OECD Convention is that continuing lack of consensus on how and when to impose liability on corporations.

This lack of consensus is not limited to treaties like the OECD, which are plainly concerned with business conduct. Treaties codifying jus cogens norms most frequently invoked in ATS cases (especially after Sosa) reveal a similar lack of clarity and consensus. Neither the Torture Convention nor the Genocide Convention mentions legal persons although the Genocide Convention expressly contemplates state liability as well as natural person liability. In U.S. law, courts have generally interpreted laws implementing those conventions as proscribing conduct by natural persons only.

The difficulty in resolving these conflicts was also recognized by the U.N. Human Rights Council’s Special Representative on Business and Human Rights in a 2008 report. Noting that corporate liability is essentially non-existent at the international tribunal level, the Special Representative further conceded that any such liability would be the result of “indirect” duties imposed in the first instance on member states. The variation in domestic laws governing the organization and structure of such organizations imposed a further obstacle to uniform and direct imposition of corporate duties.

121 Convention on the Repression and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art. 4; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85.
122 See Desert Palace, Inc. v. Costa, 539 U.S. 90, 101, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003) (noting that “[a]bsent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue”); see also Beanal v. Freeport-McMoRan, Inc., 969 F.Supp. 362, 381-82 (E.D.La.1997) (“[T]he plain meaning of the term ‘individual’ does not ordinarily include a corporation.”), aff’d by 197 F.3d 161 (5th Cir.1999).
124 Id.
125 2008 Report (John Ruggie, Special Representative of the Sec’y-Gen. on the Issue of Human Rights and Transnational Corp. and other Bus. Enterprises, Promotion and Protection of All Human Rights, Civil Political, Economic,
In any event, the survey of treaty practice offers little support to the imposition of liability directly on corporations. In general, such treaties have always been careful to impose liability indirectly. The purpose of such indirect liability has been in part to permit states to adjust the international norms to the variations of their domestic law relating to legal persons. Such domestic complications probably explains the complete lack of international precedent stemming from customary, as opposed to treaty, law which imposes liability on corporations. When one considers the wide variety of international norms, the idea that all such norms should be understood to extend to both natural and legal persons seems fanciful.

Moreover, the fact that many treatymakers feel a need to specifically extend a treaty’s obligations to the regulation of legal persons belies the claim that any private party duty under international law should be assumed to apply legal persons except when stated otherwise. If it is understand that references to individuals or private parties in treaties automatically includes legal persons, then why do so many treaties make it clear that they are extending to cover legal as well as natural persons?

Finally, the direct vs. indirect distinction draws into clarity what the ATS cases are seeking to do. Rather than impose obligations on states, a theory of direct liability on private persons imposes obligations whether or not that private person is acting on behalf of a state. Even a theory of complicity with state action suggests that the private person owes international duties irrespective of their status as a representative or agent of a state. The starkness of this departure from traditional conceptions of international law explains why the Nuremberg tribunals are deemed foundational and revolutionary. It also may explain why courts have only been willing to extend liability beyond states only for those most serious and widely accepted jus cogens norms.

D. The Problem of Attribution

Although he acknowledged the lack of international support for corporate liability under CIL, Judge Weinstein could not bring himself to dismiss the Agent Orange lawsuit on this theory. Put simply, even if there was a dearth of international precedent, he argued that “limiting civil liability to individuals while exonerating the corporation … makes little sense in today’s world.”


126 In re ‘Agent Orange’ Product Liability Litigation, 373 F Supp 2d 7, 58 (E.D.N.Y. 2005);
on to argue that, “[d]efendants present no policy reason why corporations should be uniquely exempt from tort liability under the ATS, and no court has presented one either.”

But there is an obvious policy reason for treating corporate and natural persons differently when it comes to ATS liability. Unlike a natural person, courts imposing liabilities on corporations must also determine how and when to attribute the acts of a corporate agent or actor to the corporate entity. This problem is particularly acute with respect to the importation of criminal law norms that require a showing of specific intent. As we have seen in the context of the OECD Convention, there is little international consensus on what the appropriate rule of attribution should be.

An initial draft of the Rome Statute that included jurisdiction over juridical entities, including private corporations, illustrates the range of possible attribution theories. Under the draft, a finding of liability against a legal person is conditioned on a simultaneous criminal conviction of a natural person “who was in a position of control” of the juridical entity and who was acting on behalf of and with the explicit consent of the juridical person. These requirements are far more onerous than U.S. practice with respect to corporate criminal liability (much less corporate civil liability), where the intent and action of an agent within the scope of his or her authority can establish liability for the whole corporation. Moreover, there are various possibilities in between these two extremes.

The problem of attribution for private corporations has further variations. In one recent ATS case, plaintiffs sought to hold the parent companies liable on a theory of alter ego and agency. As the District Court openly acknowledged, the utter lack of customary international law standards for “piercing the corporate veil” required the District Court to rely instead on federal common law. Even on questions of vicarious liability, which the District Court suggested was well established under customary international law, the District Court fell back on U.S. domestic law principles because “the international law of agency has not developed precise standards to apply in the civil context.”

Stephen Ratner is the only scholar to have seriously wrestled

127 Id. at 59.
129 Id.
130 See In re S. Africa Apartheid Litig., 617 F. Supp 2d at 270.
131 Id. at 271.
with the problem of attribution in the corporate context. Recognizing that neither state rules of responsibility nor the limited individual rules of responsibility fit precisely, he attempts to derive a distinct set of attribution principles for corporations. While interesting and plausible, he does not claim such principles in any way reflect existing international practice.  

Ratner’s useful effort, however, does point to the benefits of treatymaking over deriving such rules through court “development” of CIL. In a treaty context, parties can either specify such rules, or even specify that such rules are left to the domestic laws of state parties. This is the approach taken by the OECD Convention. But in the ATS context, courts are left to derive such rules without guidance from international sources. Such rules will be applied to both domestic and foreign corporations regardless of the laws of the states of their incorporation. Corporations of diverse national origins, attempting in good faith to avoid liability, will be faced with an extended period of judicial experimentation and uncertainty. There is little if no support from international practice for the imposition of CIL duties on corporate entities. Such duties are rarely imposed on natural persons and if they occur, these norms are generally imposed through treaty-imposed indirect duties on states. The only exception to this treaty process, arguably, is in the context of jus cogens violations. But even in this context, as reflected in treaties codifying jus cogens norms and in the practice of international criminal tribunals, there is almost no international support for the imposition of liability on corporations. The reason for this reluctance is not hard to understand. Corporate structures differ from country to country, as do rules of attributing liability within such structures. No single rule of attribution has been developed under CIL or even in many treaty systems.

IV. Explaining the Curious Consensus on Corporate Liability

There are persuasive and plausible arguments for why corporations should be held liable for violations of customary international law. For instance, Professor Ratner offers a sophisticated normative theory emphasizing the uniquely important role acquired by multinational corporations in the world community. The larger academic literature on corporations and international law, including the discussion of corporate social responsibility, is engaged in this important conversation as to how

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132 Ratner, supra note 2, at 450.
133 Id.
to account for the unusual size and importance of modern transnational corporations.

This complex discussion, however, is not the basis for the U.S. judicial consensus on corporate liability. Instead, the judicial consensus is based on poor understandings of international law, especially the difference between treaty-based and customary international law. It is also based on unreflective reliance on U.S. decisions as a reflection of an international consensus. The existence of this curious and misguided consensus reveals some important characteristics of U.S. courts when exercising their Sosa-granted common law powers over customary international law.

A. Preference for U.S. precedents over International Precedents

First, the ATS corporate liability saga reflects the almost overriding importance of U.S. law over international law norms in the federal court decisionmaking. When entertaining ATS claims, U.S. courts will typically cite other U.S. court opinions for statements about the content of international law before they will cite to international and foreign sources. While this may seem sensible, it also exposes courts to a cascade of missed issues and errors that can compound over time because courts continue to cite only each other.

The rise of ATS corporate liability is a classic example of this phenomenon. Courts considered lawsuits against corporations as early as 1985 and exercised jurisdiction in cases involving corporations for almost two decades without considering the amenability of corporations to such lawsuits. One reason for this failure to spot the issue was the consistent citation of courts to each other rather than to international or foreign sources. Indeed, a surprisingly high number of the key opinions in this area offer barely one or two citations to international and foreign sources in reaching their conclusions.\[134\]

To be sure, as I have argued in other work, there are structural reasons for courts to prefer citing U.S. courts over international and foreign tribunals on questions of international law.\[135\] When courts cite foreign and international sources of law, they run the risk of coming into conflict with the views of the political branches on those same sources of law. These structural conflicts are unavoidable and courts might well try to minimize such conflicts by citing mainly domestic sources.

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\[134\] *Id.*

Although this is a sensible approach, it is also in tension with the ATS’ mandate to ensure the application of only those norms of customary international law that are specific, universal, and obligatory. The universality requirement is difficult to satisfy with a few or no citations to international and foreign sources. It is further difficult to do so when courts misunderstand the conceptual distinction between treaty-based and customary international law.

B. The Temptation to Fill Gaps

The very nature of the ATS enterprise often leaves U.S. courts with the task of resolving legal questions for which there is very little international precedent. This is not simply a question of assessing the universality of a particular norm. There are innumerable secondary and underlying issues that require courts to fashion answers with very little guidance. Hence, courts attempting to derive standards for accomplice liability have found very few precedents from international sources, little of which is clear or unambiguous. Courts have debated following a standard derived from the ICC Rome Statute, a standard invoked by the ICTY, or standards supposedly invoked in the post-Nuremberg military tribunals.136

But the difficulty of determining international precedents has tempted U.S. courts into gap filling. Courts have argued that such questions ought to remain a matter of federal common law whose development is more legitimately and self-consciously shaped by the courts.137 Some scholars have also argued that international law itself provides authority to fill gaps with municipal law through the concept of “general principles of law.”138

The temptation to gap filling will always be very strong because, despite claims to the contrary, very few of the norms which ATS courts apply have been developed to the same level of detail and complexity as most areas of domestic law.

Harmless but seemingly useful gap filling has and already will tempt U.S. courts as they further develop the standards of private corporation liability under CIL. Judicial pronouncements on veil piercing for foreign corporations and their subsidiaries, enterprise liability, as well as standards for determining corporate intent will all be justified and explained as gap-filling. As unincorporated associations enter the conversation, one can imagine questions

137 See, e.g., Doe v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (Reinhardt, J. concurring).
138 Statute of the International Court of Justice, Art. 38(1).
over determining the intent of a limited liability partnership or its foreign law equivalent.

The temptation to fill gaps will be hard to resist in these contexts. But gap filling is fundamentally inconsistent with the overall Sosa framework. In that decision, both the majority and concurrence agreed that federal courts should be prevented from creating new norms of international law. By filling gaps in key international law norms, courts engage in exactly the sort of discretionary norm creation that Sosa was supposed to prevent.

V. Conclusion

At the conclusion of his sarcastic and stinging concurrence, Justice Scalia offered a sharp recapitulation of the separation of powers critique of the ATS. He described federal court ATS jurisprudence as “usurping” the democratic lawmaking process “by converting what they regard as norms of international law into American law.” He then predicted that in this “illegitimate lawmaking endeavor, the lower courts will be the principal actors….and no one thinks all of them are eminently reasonable.”

Justice Scalia’s vision of federal courts engaged in unreasonable lawmaking seems, at first glance, overly pessimistic. And the performance of U.S. courts in evaluating and developing the question of corporate liability for CIL does not, at first glance, seem unreasonable.

But if the Sosa majority believed that it was truly creating a set of standards that would constrain and limit federal court activity to the recognition of uncontroversial norms, it too was mistaken. The judicial consensus in favor of corporate liability for CIL violations is built upon the thinnest of international jurisprudential foundations. Although it may be settled as a matter of U.S. law, which is by far the most influential source of law on U.S. courts in ATS cases, it is far from settled as a matter of international law and practice. The fact that federal courts could unconsciously and uncontroversially settle on a rule with such a weak foundation calls into the question the efficacy of the Sosa limitations and the wisdom of leaving such discretionary authority to the federal courts.

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140 Id.