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This article challenges the widely held view that the Alien Tort Statute (ATS) imposes liability on private corporations for violations of customary international law. I lay out the modern origins and development of this cause of action in U.S. federal courts and argue that doctrine rests on shaky, indeed illusory, analytical and jurisprudential foundations. Despite the absence of a well defined norm of customary international law that imposed liability upon private corporations, courts, when they even considered the validity of the claims, built a consensus around the fact that no norm existed forbidding the imposition of liability on private corporations. This doctrinal approach was particularly questionable in light of the Supreme Court's position that recognition of causes of action under the ATS be limited to situations involving violations of norms that are specific, universal, and obligatory. Finally, I argue that the rise of this flawed consensus reveals that our system of federal courts is particularly ill-suited to the type of independent lawmaking that modern ATS doctrine has enabled up to this point. These developments indicate that courts should adopt a restrictive approach to corporate liability under the ATS going forward.

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INTRODUCTION

For over two decades, U.S. courts have held that private corporations owe duties under customary international law and can be subject to lawsuits under the Alien Tort Statute (ATS).[1] This approach to corporate

1. Abdullahi v. Pfizer, Inc., 562 F.3d 163, 187 (2d Cir. 2009); *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1258 (N.D. Ala. 2003); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman I*), 244 F. Supp. 2d 289, 314 (S.D.N.Y. 2003); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1303 (C.D. Cal. 2000); *see also* Khulumani v. Barclay Nat'l Bank, Ltd. 504 F.3d 254, 258 (2d Cir. 2008); Bigio v. Coca-Cola Co., 239 F.3d 440, 447 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–04 (2d Cir. 2000); Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir.

liability was so widely accepted that courts barely acknowledged the issue when deciding on cases involving corporate defendants. Meanwhile, legal commentators joined in universal support for corporate liability.[2]

Despite this wide support, the view that corporations can be liable for violations of customary international law under the ATS 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.[3] 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.[4] In sum, 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 troubling because, until very recently, U.S. courts have universally held that the liability of private corporations satisfies the supposedly exacting "specific, universal, and obligatory" standard, set forth by the Supreme Court of the United States in *Sosa v. Alvarez-Machain*,[5] that customary international law norms must meet in order to be invoked under the ATS.[6] This standard, according to the Court, strictly limits the role of federal courts in recognizing new and unsettled causes of action under

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1996); Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1008 (S.D. Ind. 2007); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005); Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 20 (D.D.C. 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999).

2. Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 264 (2004); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 461 (2001); *see also* Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802 (2002); Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in U.S. Courts*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 209, 219 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000).

3. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal arts. 4(3), 9(5), Mar. 22, 1989, 1673 U.N.T.S. 57; *see also id.* art. 2(14) ("'Person' means any natural or legal person[.]"); Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 933–36 (suggesting that most treaties that impose indirect liability on corporations require states to regulate corporate entities).

4. *See, e.g.*, Rome Statute of the International Criminal Court art. 25(1), *adopted* July 17, 1998, 2187 U.N.T.S. 90 ("The Court shall have jurisdiction over natural persons pursuant to this Statute.").

5. 542 U.S. 692 (2004).

6. *Id.* at 731–32.

the ATS.[7] But, as the U.S. Court of Appeals for the Second Circuit recently held in *Kiobel v. Royal Dutch Petroleum*[8] when it applied this standard, corporate liability "is not a rule of customary international law that we may apply under the ATS."[9]

This Article has two goals. First and foremost, it offers the first comprehensive academic challenge to the widely held view that private corporations can be liable for violations of customary international law. Second, the Article uses the rise of the pro-corporate-liability position 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 that would keep out "new and debatable" causes of action, and he argued instead for a complete ban on further judicial recognition of such causes of action.[10] I argue that the manner in which U.S. courts built a consensus that the corporations could be liable under the ATS supports Justice Scalia's skepticism about the system of judicial international lawmaking that is authorized by *Sosa*.

This Article proceeds as follows. Part I will review the rise of litigation under the ATS and the Supreme Court's 2003 decision in *Sosa*, which supposedly imposed rigorous limits on lawsuits that are brought under the ATS. Part II will describe the rise of a judicial consensus in the United States that holds that corporations can be held directly liable for violations of customary international law and can therefore be subject to lawsuits under the ATS. Part III will critique this consensus 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 behind the rise of the flawed consensus on corporate liability. I argue that it reveals problems in the system of independent federal court lawmaking that is authorized by *Sosa*.

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7. *Id.* at 724–29 (describing five reasons for "judicial caution when considering the kind of individual claims" permitted under the Alien Tort Statute).

8. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010); *see also* Khulumani v. Barclay Nat'l Bank, Ltd. 504 F.3d 254, 321 (2d Cir. 2008) (Korman, J., dissenting).

9. Kiobel, 2010 WL 3611392, at * 21.

10. *Id.* at 728, 739–51 (Scalia, J., concurring).

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,[11] the ATS 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 ATS.[12] 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 a tort only, committed in violation of the law of nations."[13]

Federal courts have traditionally invoked customary international law in cases arising in admiralty,[14] in cases involving interstate border disputes,[15] and as a rule of interpretation,[16] but the ATS has become the major contemporary 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 *Filártiga v. Peña-Irala*[17] did not cause serious controversy initially.[18] Indeed, a survey of legal literature at the time suggests that the decision was welcomed as identifying the long-missing entry point for international law and human-rights norms into the U.S. legal system.[19] 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.[20] The "norm development" theory of ATS litigation was especially

11. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789).

12. A list of the cases is on file with the author.

13. 28 U.S.C. § 1350 (2006).

14. *See, e.g.*, Mangone v. Moore-McCormack Lines, Inc. 152 F. Supp. 848, 854 (E.D.N.Y. 1957) ("Maritime jurisprudence is part of the law of nations."); The China, 74 U.S. (7 Wall.) 53 (1868) (same).

15. *See, e.g.*, U.S. v. California, 381 U.S. 139, 166 (1965) (applying international law to determine territorial delimitation dispute between California and the U.S.).

16. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

17. 630 F.2d 876 (2d Cir. 1980).

18. *Id.* at 878.

19. *See, e.g.*, James Crawford, *Application of Customary International Law by National Tribunals*, 76 AM. SOC'Y INT'L L. PROC. 231, 247–48 (1982); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1122 n.54 (1982); Louis Henkin, *International Law: International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 n.9 (1984) (citing *Filártiga* as an example of how international law can become domestic law).

20. *See, e.g.*, Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1414 (1999) [hereinafter Koh, *Human Rights Law*] (describing how *Filártiga* and

attractive because early ATS cases rarely resulted in enforceable money judgments.[21]

Perhaps the most important theorist to use norm-development theory to explain ATS litigation is Harold Koh. In a series of influential articles in the late 1980s and early 1990s, Koh used ATS litigation as a prominent example of how a "transnational legal process" can result in the incorporation of international legal norms by policymakers and courts.[22] 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.[23] This integration could occur even if the ATS litigation was unsuccessful on the merits. Drawing upon the parallel 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.[24]

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 most comprehensive discussions of the customary international law of human rights ever entertained by U.S. courts. For instance, in *Siderman v. Argentina*,[25] the Ninth Circuit offered a lengthy disquisition on the nature of *jus cogens* and the status of torture under customary international law.[26] Similarly, and perhaps more significantly, the Second Circuit in *Kadic v. Karadzic*[27] held that private (as opposed to state) actors could be directly liable for serious violations of international human rights.[28] Putting aside the actual judgments in both cases, the cases were significant because they represented perhaps the first time that U.S. courts had explored these types of international legal questions in depth. *Kadic* in particular has had an important jurisprudential afterlife as a precedent

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subsequent Alien Tort cases helped to build support for ban on torture); Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646–55, 665–66 (1998) (describing process of international law norm internalization and citation of Alien Tort cases as example); *see also* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 489–93 (1989) (defending the use of Alien Tort litigation to vindicate broader abstract norms); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2641 n.209 (1997) (noting failure of some international law theorists to appreciate ability of Alien Tort litigation to internalize international legal norms).

21. Naomi Roht-Ariazza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 166–68 (discussing paucity of enforced judgments against ATS defendants).

22. *See supra* note 20.

23. Koh, *Human Rights Law*, *supra* note 20, at 1415–16.

24. *Id.*

25. 965 F.2d 699 (9th Cir. 1992).

26. *Id.* at 714–19.

27. 70 F.3d 232 (2d Cir. 1995).

28. *Id.* at 239.

for cases and even prosecutions against non-state actors for violations of international law.[29]

B. The Backlash Against the ATS

The first notable dissent to *Filártiga*'s revival of the ATS was set forth by then-Judge Robert Bork of the U.S. Court of Appeals for the District of Columbia Circuit. In his well-known concurring opinion in *Tel-Oren v. Libyan Arabian Republic*,[30] Judge Bork opined that the ATS does not support a cause of action under international law.[31] 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.[32]

Bork's "cause of action" critique of the ATS was rooted in a formalist notion of separation of powers that emphasized the control by the political branches over the formation of causes of action, especially when such causes of action implicate foreign affairs.[33] 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 the duty of implementing international law norms to Congress and the President.[34]

Although powerful, Bork's separation-of-powers critique never gained substantial currency outside of the D.C. Circuit. Most U.S. courts that were presented with ATS cases assumed the power to also recognize causes of action under customary international law, implicitly or explicitly rejecting the Borkian critique.[35] Scholars decried Bork's narrow vision of international law and the judicial role in the development of international law.[36] Courts continue to follow a non-Borkian approach, and 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 that was rooted in federalism. Because almost all early ATS cases involved aliens suing other aliens, courts had to find a basis for federal

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29. See *infra* Part II.A for a discussion of *Kadic*.

30. 726 F.2d 774 (D.C. Cir. 1984).

31. *Id.* at 799 (Bork, J., concurring).

32. *Id.* at 801 (Bork, J., concurring).

33. *See id.* at 801–04 (Bork, J., concurring).

34. *Id.* at 801 (Bork, J., concurring).

35. *See, e.g.*, Chiminya Tachiona v. Mugabe, 216 F. Supp. 2d 262, 268 (S.D.N.Y. 2002); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995).

36. *See* Anthony D'Amato, *Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 92–105 (1985). *See generally* Agora, *What Does Tel-Oren Tell Lawyers?*, 79 AM. J. INT'L L. 92 (1985).

court subject-matter jurisdiction under Article III of the U.S. Constitution. Most courts, including the *Filártiga* court, concluded that ATS cases created "federal questions," thereby satisfying Article III on the theory that customary international law raised a question of federal law.[37]

But the conclusion that customary international law is federal law is hardly self-evident from the text of the Constitution, and it is similarly not well supported in pre-*Filártiga* 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.[38] Despite this uncertain doctrinal record, post-*Filártiga* courts and academic defenders of the ATS simply asserted that customary international law is federal common law without offering a solid basis for such a conclusion.[39] The most egregious example, as two of the sharpest ATS critics pointed out,[40] can be found in the *Restatement (Third) of the Foreign Relations Law of the United States*'s largely unsupported assertion that customary international law is federal common law.[41]

These two lines of attack on *Filártiga* — 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 was aimed primarily at U.S. government actors.[42] Each set of defendants fought back by raising the separation-of-powers and federalism objections to ATS lawsuits. President George W. Bush's administration also intervened by taking a negative view of ATS lawsuits.[43]

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37. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

38. Bergman v. De Sieyes, 170 F.2d 360 (2d Cir. 1948); *accord* Ker v. Illinois, 119 U.S. 436 (1886). For further discussion of these and other decisions applying customary international law as non-federal law, see Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 291–333 (2001).

39. *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 855–59 (1997) [hereinafter Bradley & Goldsmith, *Critique*]; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 2 (1995).

40. Bradley & Goldsmith, *Critique*, *supra* note 39, at 836–37.

41. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 14 cmt. D, 115 cmt. E (1987).

42. *See* Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 105 (2005) (describing waves of ATS litigation).

43. *See, e.g.*, Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003) (Nos. 00-56603, 00-56628).

C. Sosa v. Alvarez-Machain

The rising opposition to ATS litigation set the stage for the Supreme Court's decision in *Sosa v. Alvarez-Machain*.[44] *Sosa* involved a civil lawsuit brought by Dr. Alvarez-Machain, a Mexican national who alleged that 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.[45] The defendants fought back and challenged the entire line of *Filártiga* ATS cases on both separation-of-powers and federalism grounds.[46] As a matter of first impression for the Supreme Court, *Sosa* was 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 customary international law; the ATS merely created jurisdiction.[47] 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 that implicate foreign affairs.[48] All members of the Court agreed that the changes in the nature of common law after *Erie R.R. Co. v. Tompkins*[49] should sharply limit federal court applications of such common law.[50] All members of the Court further agreed that Alvarez-Machain's particular claim — that his detention violated customary international law — was not sufficiently well-accepted and specific to sustain his cause of action.[51]

This agreement among justices 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 customary international law.[52] 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.[53] 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 that plainly encompasses the particular defendant's alleged

44. 542 U.S. 692 (2004).
45. *Id.* at 697–99.
46. *Id.* at 712.
47. *See id.* at 743 (Scalia, J., concurring) (describing agreement with majority opinion).
48. *Id.* at 746–47 (Scalia, J., concurring) (describing agreement on separation-of-powers concerns).
49. 304 U.S. 64 (1938).
50. *Sosa*, 542 U.S. at 744 (Scalia, J., concurring).
51. *Id.* at 725 (majority opinion).
52. *Id.* at 731.
53. *Id.* at 732.

conduct.[54] 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 while their 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."[55]

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*, a detention for only one day, violated that rule.[56]

In sum, under *Sosa*'s approach, the fact that international law appears to prohibit the defendant's conduct, or that international 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 contains a universally accepted rule and defines that rule specifically and uncontroversially to include defendant's alleged conduct.[57] 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 shared about judicial activity in this area.[58]

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 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."[59] 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.[60] He further suggested that

54. *See id.* at 732–33 & nn.20–21 (describing "requirement of clear definition").
55. *Id.* at 733.
56. *Id.* at 737.
57. *Id.*
58. *Id.*
59. *Id.* at 739 (Scalia, J., concurring).
60. *Id.* (Scalia, J., concurring).

leaving such a role for federal courts was at odds with democratic self-government.[61]

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.[62] 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.[63]

In fact, the only real difference between the majority and concurrence lies in their different predictions about the subsequent behavior of federal courts in the administration of the ATS and customary international law. The majority doubted that 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 judiciary's role that had been embraced by academic advocates such as Koh. While Justice Souter thought federal courts should not avert their gaze from international law, his endorsement of what he believed were substantial and serious limitations on ATS activity hardly fulfilled the normative goals of many ATS advocates to unleash a broad federal court power to shape and develop international law. Yet, the more suspicious Justice Scalia expressed fear that advocates would indeed take advantage of the small opening to push an aggressive agenda that was at odds with the goals of the political branches.[64]

One issue that was left open by the *Sosa* Court provides a test (of sorts) as to how federal courts would apply the ATS and fulfill these different predictions.[65] In a footnote, the majority noted that "[a] related consideration" to the main determination as to whether a norm of customary international law is sufficiently well settled is "whether international law extends the scope of liability for violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[66] 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 that was set forth by *Sosa*. The next Part of this Article explains how the treatment of this issue by lower courts confirms Justice Scalia's more pessimistic prediction.

61. *Id.* (Scalia, J., concurring).
62. *Id.* (Scalia, J., concurring).
63. *Id.* at 746 (Scalia, J., concurring).
64. *Id.* (Scalia, J., concurring)
65. *Id.* (Scalia, J., concurring)
66. *Id.* at 732 n.20 (majority opinion).

II. THE JUDICIAL CONSENSUS IN FAVOR OF CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE

At the outset of *Filártiga*'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 because ATS plaintiffs are always alleging a violation of public international law. Indeed, under the traditional conception of public international law, only sovereign governments owe duties or responsibilities.[67] Non-state parties, such as private individuals, organizations, or corporations, owe duties under only domestic laws and cannot violate international law directly.[68]

ATS plaintiffs that bring suit in U.S. courts against foreign sovereigns also have to overcome a general rule granting immunity to foreign sovereigns in the domestic courts of another sovereign.[69] In general, early ATS plaintiffs sued former officials of foreign sovereigns rather than the sovereigns themselves in order to avoid this immunity bar.[70] Hence, the defendants in *Filártiga* were former officials of the Paraguayan government.

While such defendants were not shielded by sovereign immunity, they were often judgment-proof.[71] 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 that would not only be able to satisfy judgments, but that would 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.

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67. *See id.* ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.").

68. 1 OPPENHEIM'S INTERNATIONAL LAW 16 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

69. *See, e.g.*, Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 (2006) ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.").

70. *See, e.g.*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989).

71. For example, the original *Filártiga* plaintiffs won a $10.3 million judgment but were never able to collect that judgment against the defendant, who had been deported. *See* Filártiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980); *see also* Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 459 n.16 (2007) (discussing problems of enforcing ATS judgments).

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.[72] This pattern continued during the first decade and a half of ATS litigation, with all reported decisions of lawsuits against corporations finding other grounds for dismissal.[73] 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 Second Circuit's decision in *Kadic v. Karadzic*[74] took an important analytical step 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.[75] The 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 discussion, that non-state actors such as the defendant could violate certain *jus cogens* norms of international law.[76] This conceptual leap laid an important foundation for future ATS lawsuits against corporations.

For instance, the *Kadic* analysis played an important role in *Doe v. Unocal Corp.*,[77] the first major ATS lawsuit against a private corporation.[78] 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.[79] Like prior cases, the district court in *Unocal* did not analyze the specific question of whether a corporation, as opposed to a natural person, could be

72. Jaffe v. Boyles, 616 F. Supp. 1371, 1381 (W.D.N.Y. 1985) (transferring case because of improper venue).

73. *See, e.g.*, Carmichael v. United Techs. Corp., 835 F.2d 109, 112 (5th Cir. 1988) (dismissing a case against a corporation for lack of personal jurisdiction (service) and lack of subject-matter jurisdiction (no cause of action for aiding and abetting)); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362, 365–66 (E.D. La. 1997) (dismissing a case brought under ATS for lack of cause of action and dismissing the case under TVPA for, among other things, corporation not an "individual" who can be held liable under TVPA); Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991).

74. 70 F.3d 232 (2d Cir. 1995).

75. *Id.* at 239.

76. *Id.* at 239–40.

77. 963 F. Supp. 880 (C.D. Cal. 1997).

78. *Id.* at 883–84.

79. *Id.* at 891–92.

liable for a violation of customary international law. But it did consider the question in a more general sense. Defendant Unocal argued that, as a private actor, it could not be directly liable for violations of international law.[80] Following the Second Circuit's decision in *Kadic*, the court found that private liability could be attributed to a non-state actor.[81] It did not separately analyze whether a private corporation, as opposed to a natural person, could be liable under this theory.[82]

Despite this omission, *Unocal* was a breakthrough for ATS plaintiffs that were 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.[83] Second, and more mundanely, it depended on a finding that corporations could be held liable for complicity with — or aiding and abetting — sovereign states that were themselves committing serious violations of international law.[84]

The second theory of liability became the focus of most subsequent litigation because few ATS corporate defendants were alleged to have committed international law violations directly. 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,[85] 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.

But the question of corporate liability remained unexplored. Subsequent decisions in the *Unocal* litigation at the circuit-court level did not even address the question.[86] Instead, that Court focused on the difficult question of complicity and ended up with enough divisions on that point to avoid reaching the corporate liability question.[87] Other courts hearing

80. *Id.* at 890.

81. *Id.*

82. *Id.* at 891.

83. *Id.*

84. *Id.*

85. *See, e.g.*, Chimene I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 103 (2008) (concluding that "international law, not federal common law, governs the standards for accomplice liability at both the jurisdictional and merits stages"); Ryan A. Tyz, *Searching for a Corporate Liability Standard Under the Alien Tort Claims Act in* Doe v. Unocal, 82 OR. L. REV. 559, 580 (2003) (arguing for the adoption of the federal common law standard of reckless disregard standard corporate liability under the ATS).

86. Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

87. *See id.* at 948–49 (applying international complicity standard); *id.* at 963 (Reinhardt, J.,

ATS lawsuits against corporations 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.[88]

The development of corporate liability in the Eleventh Circuit illustrates how courts adopted the doctrine with almost no reflection or analysis. Corporate defendants had been the subjects of ATS lawsuits in the courts within the Eleventh Circuit since 1999 without the courts taking any notice of the corporate liability issue.[89] Indeed, no court in the circuit analyzed the question until 2008 when the Eleventh Circuit announced that:

> The text of the Alien Tort Statute provides no express exception for corporations and the law of this Circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants.[90]

Amazingly, this paragraph constituted the court's entire analysis of the corporate liability question. What makes this short, conclusory assertion so curious is that the court claimed[91] that it was bound by its prior decision in *Aldana v. Del Monte Fresh Produce*.[92] But, while *Aldana* did analyze the question of whether the defendants' alleged conduct constituted torture, the *Aldana* court *did not* address the corporate liability question *at all*.[93] Despite this lack of analysis by the prior court, or even an acknowledgement of the corporate liability issue, the *Drummond* court then went on to claim that it was "bound by . . . precedent" on the corporate liability question without offering its own analysis.[94] The Eleventh Circuit in *Sinaltrainal v. Coca-Cola*[95] did the same, thus

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concurring) (applying federal complicity standard).

88. *See, e.g.*, Burnett v. Al Baraka Inv. & Dev. Corp., 274 F. Supp. 2d 86, 99–100 (D.D.C. 2003) (adopting the *Kadic* private actor analysis and finding that defendants could be sued under the ATS as accomplices, aiders and abetters, or co-conspirators); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1261 (N.D. Ala. 2003) (allowing the ATS claim to go forward without answering the corporate question for purposes of a motion to dismiss because plaintiffs adequately alleged that defendants violated customary international law); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1352–53 (S.D. Fla. 2003) (permitting lawsuit to go forward against corporations but not considering the issue on the grounds that general allegations that defendants acted under color of state law is all that is necessary at the motion to dismiss stage); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d. 424, 442–45 (D.N.J. 1999) (concluding that plaintiff had jurisdiction to proceed against a corporate defendant without analyzing the corporate issue because the defendants were *de facto* state actors because they acted as an agent of, or in concert with, the German Reich).

89. *See, e.g.*, *Iwanowa*, 67 F. Supp. 2d. at 424; *Sinaltrainal*, 256 F. Supp. 2d at 1345.

90. Romero v. Drummond Co., Inc. 552 F.3d 1303, 1315 (11th Cir. 2008) (citations omitted).

91. *Id.* at 1315.

92. 416 F.3d 1242 (11th Cir. 2005).

93. *Id.* at 1247–53.

94. *Drummond*, 552 F.3d at 1315.

95. 578 F.3d 1252 (11th Cir. 2009).

establishing, without any discussion or analysis, the doctrine of corporate ATS liability in the Eleventh Circuit.[96]

B. Talisman

The Eleventh Circuit's approach to corporate liability reflects the approach taken by most federal courts. Indeed, prior to the Second Circuit's recent decision in *Kiobel*, only two courts had attempted serious judicial analyses of a private corporation's liability under the ATS.[97] All other decisions that have noted the existence of the corporate liability question have typically cited either or both of these opinions with approval.[98] 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 more thorough and detailed discussion of these two cases is *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[99] a case involving a Canadian corporation accused of complicity in international law violations committed by Sudan's government.[100] The *Talisman* Court's discussion of corporate liability is built on two foundations: First, that U.S. case law "make[s] it clear that corporations can be held liable for *jus cogens* violations";[101] and second, that "international precedent and practice reveals that corporate liability, at least for *jus cogens* violations, is contemplated under international law."[102]

Although the *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.[103] Because none of the decisions ended in a dismissal for lack of subject-matter jurisdiction over a private corporation, the *Talisman* court counted each decision as precedent in favor of corporate liability under international law.[104] In fact, although each case

96. *Id.* at 1263.

97. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 55–59 (E.D.N.Y. 2005); Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman I*), 244 F. Supp. 2d 289, 308–19 (S.D.N.Y. 2003).

98. *See, e.g.*, *Agent Orange*, 373 F. Supp. 2d at 52; *In re* S. Afr. Apartheid Litig., 346 F. Supp. 2d 538, 545–49 (S.D.N.Y. 2004).

99. 244 F. Supp. 2d 289.

100. *Id.* at 296.

101. *Talisman I*, 244 F. Supp. 2d at 308.

102. *Id.* at 315.

103. *See id.* at 313 (noting that "[w]hile the Second Circuit has not explicitly held that corporations are potentially liable for violations of the law of nations . . . [it has] acknowledged that corporations are potentially liable for violations of the law of nations that ordinarily entail individual responsibility, including *jus cogens* violations"); *see also id.* at 314–15 (citing numerous cases upholding subject-matter jurisdiction over corporate defendants).

104. *Id.* at 313.

did indeed involve an ATS defendant, not one of the decisions even addressed the question of whether a private corporation could violate international law.[105] Nor is it clear that the argument was even raised by ATS defendants.

Indeed, as I have noted above, no prior U.S. court directly (or indirectly) had analyzed the liability of a private corporation under customary international law. Yet, the *Talisman* court relied heavily on the fact that no U.S. court had ever rejected this theory of corporate liability under international law, thereby assuming that all prior U.S. courts *endorsed* the theory. As a formal matter, federal courts cannot dismiss a case on any ground without having first determined the existence of subject-matter jurisdiction.[106] But, while this might be true as a formal matter, it is also true that no U.S. court ever analyzed the issue prior to *Talisman*.

The analytical foundation for the *Talisman* court's holding lies in *Kadic v. Karadzic*.[107] In *Kadic*, the defendant Karadzic argued that because customary international law governed only state-to-state relations and that private parties owed no duties under it, he, as a private actor, was legally incapable of violating customary international law.[108]

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."[109] In the past, non-state actors such as pirates and slave traders were considered *hosti humani generis* and punished for violations of international law.[110] This precedent for punishing non-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.[111]

Kadic thus provides the precedential basis (in the United States) for extending liability beyond state actors for certain serious *jus cogens* violations. But *Kadic* did not address the question of whether all private ac-

105. *Id.* at 312–13 (acknowledging additional cases that do not address the corporate liability issue in discussing *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 475–79 (2d Cir. 2002), *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 447–48 (2d Cir. 2000), and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 104 (2d Cir. 2000)).

106. *See* Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2876–77 (2010); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94–95 (1998) (requiring federal court to determine existence of subject-matter jurisdiction prior to resolving the existence of a cause of action).

107. 70 F.3d 232 (2d Cir. 1995).

108. *Id.* at 238.

109. *Id.*

110. *Id.*

111. *Id.*

tors, 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.[112]

The court then buttressed its argument with international precedents. Explicitly borrowing the analysis of a law-review article by Steven Ratner,[113] 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.[114] 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.[115] Rather, such tribunals uniformly punished the individuals who owned and managed the corporate entities. 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.[116]

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.[117] While most treaties did not bind corporations, the court concluded that because 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."[118] As I will argue in Part III, these precedents do not establish the international support that the *Talisman* court claimed.

C. *The Effect of* Sosa

After the Supreme Court's 2003 decision in *Sosa*, Talisman Energy reiterated its argument on corporate liability and invoked the heightened and rigorous *Sosa* standard for determining the existence of a cause of action under customary international law.[119] But, in a later district court opinion on the dispute, *Talisman II*,[120] the Southern District of New

112. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman I*), 244 F. Supp. 2d 289, 308–13 (S.D.N.Y. 2003).

113. Ratner, *supra* note 2 (arguing that international law can and should provide for obligations of corporate responsibility and accountability for human rights protection and that the scope of these obligations must be determined in light of the characteristics of corporate activity).

114. *Talisman I*, 244 F. Supp. 2d at 315–16.

115. *Id.* at 311.

116. *Id.* at 316.

117. *Id.* at 316–17.

118. *Id.* at 317.

119. *Id.*

120. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman II*), 374 F. Supp. 2d

York refused to depart from its earlier holding. Because U.S. cases subsequent to *Sosa* had failed to dismiss corporate defendants,[121] the *Talisman II* court found no reason to depart from its prior decision.[122] 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 *nonexistence* of a rule of corporate liability. According to the court, the lack of any objection by member states, including Talisman's home country of Canada, was strong evidence of the existence of corporate liability for customary international law.[123]

As I will explain below, there are good reasons to doubt this understanding of how one should determine customary international law. Indeed, as the Eastern District of New York (the only other pre-*Kiobel* court to analyze this issue) noted, international sources appear to support the view of the *Talisman* defendants. In *Agent Orange*,[124] 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.[125] 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;[126] and second, he noted that there was no obvious policy reason against imposing liability on corporations for customary international law violations.[127] After all, corporations under domestic law are commonly and uncontroversially held liable for violations.[128]

Subsequent courts continued to follow the holding, if not the logic, of *Talisman* and *Agent Orange*. Until *Kiobel*, courts considering ATS lawsuits against corporations barely analyzed the issue[129] or simply assumed jurisdiction with a simple citation of *Talisman*.[130]

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331 (S.D.N.Y. 2005).

121. *See id.* at 335 (discussing *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004) and *Flores v. S. Peru Copper Corp.*, 406 F.3d 65, 69 (2d Cir. 2003)).

122. *Talisman II*, 374 F. Supp. 2d at 335–37.

123. *Id.* at 337.

124. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7 (E.D.N.Y. 2005).

125. *Id.* at 55–57.

126. *Id.* at 58.

127. *Id.*

128. *Id.* at 59.

129. *See, e.g.*, *supra* notes 90–96 and accompanying text (discussing Eleventh Circuit doctrine).

130. *See In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 254–55 (S.D.N.Y. 2009).

Essentially, the argument for corporate liability under the ATS rests on the failure of the U.S. courts even to spot the issue for decades. The long line of cases not discussing the issue became, oddly, the precedent (even binding precedent in some cases) for deciding that 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 a U.S. judicial consensus in favor of corporate ATS liability.

D. *The First Crack in the Consensus:* Kiobel v. Royal Dutch Petroleum

This curious and flawed judicial consensus on corporate liability under the ATS was finally shattered in September 2010 when the Second Circuit issued *Kiobel v. Royal Dutch Petroleum.*[131] *Kiobel* involved an ATS lawsuit by Nigerian plaintiffs against an oil company for allegedly aiding and abetting human-rights violations by the Nigerian government.[132] The majority opinion in *Kiobel* held that actions against corporations alleging violations of customary international law cannot sustain jurisdiction under the ATS.[133]

The *Kiobel* majority's holding rests on two points: First, that customary international law, rather than domestic law, governs the question of whether a corporation can be liable under the ATS;[134] and second, that corporate liability is not a norm of customary international law of sufficient specificity and universality to sustain a cause of action under the ATS.[135] Therefore, liability under the ATS extends only to states and natural persons, not corporations.[136] As I will argue in Part III, the *Kiobel* majority was correct on both of these important points.

What is important to note here, however, is not simply that the *Kiobel* majority's decision was rightly decided. Rather, the points of agreement between the *Kiobel* majority and concurrence confirm that the prior judicial consensus on corporate liability under the ATS was deeply flawed and unsustainable. Although sharply worded, it is worth noting that the concurrence by Judge Leval did not disagree with the *Kiobel* majority on a fundamental point. Judge Leval agreed that there was little or no

131. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010).

132. *Id.* at *5.

133. *Id.* at *23.

134. *Id.* at *7–11.

135. *Id.* at *11–21.

136. *See id.* at *21.

international precedent to support imposing liability on corporations under customary international law.[137] In doing so, he distanced himself from the reasoning and analysis offered by the *Talisman* courts. Rather, Judge Leval's main disagreement with the majority was how to interpret the consequences of the lack of international law precedents in favor of corporate liability under the ATS. In Leval's view, because international law does not speak to this question with respect to civil remedies, states like the United States are free to enforce such remedies against corporations.[138]

The novel reasoning of Leval's support for corporate liability illustrates the weaknesses of the prior judicial development of corporate liability under the ATS. It is striking that Leval's opinion is the first time that this new defense of corporate liability has been articulated by a court, even though courts had accepted jurisdiction of cases against corporations for over twenty-five years. Moreover, the focus of Leval's disagreement with the majority illustrates the larger question that is raised by the debate over corporate liability: How much authority should federal courts have under the ATS to "create" legal remedies that are not specifically sanctioned by Congress? The majority in *Kiobel* plainly believed that recognizing a norm of corporate liability went beyond the proper role of independent judicial lawmaking, while the concurrence did not reach this conclusion. Regardless of where one falls on this question, the proper role of federal courts remains the central question in contemporary ATS cases, just as it was the central dividing line between the majority and concurrence in *Sosa* itself.

E. 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 customary international law violations. Moreover, as my discussion of the academic literature below argues, ATS litigation was, for most scholars, simply a smaller subset of a larger normative campaign to apply international norms to corporations. The emergence of this interest within the legal literature coincided with the first ATS cases against corporations, but it was part of a broader shift in interest

137. *Id.* at *43 (Leval, J., concurring) ("However, when one looks to international law to learn whether it imposes civil compensatory liability on those who violate its norms and whether it distinguishes between natural and juridical persons, the answer international law furnishes is that it takes no position on the question.").

138. *Id.* (Leval, J., concurring) ("But international law does not provide that juridical entities are exempt. And as for civil liability of both natural and juridical persons, the answer given by the law of nations (as discussed above) is that each State is free to decide that question for itself.").

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 multinational corporations.[139] 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.[140] Yet, academic scholarship has been a crucial factor in the creation of a U.S. consensus on ATS corporate liability. In determining whether 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 Steven Ratner's 2001 article exploring a theory for holding private corporations responsible for international human rights obligations[141] — an article that the *Talisman* court explicitly cited in reaching its holding.[142] Ratner's article self-consciously refused to focus specifically on the ATS context in order to derive a more general theory.[143] 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.[144] His purpose was to offer an analytical framework that could lead to the recognition of such duties. 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."[145]

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139. *See, e.g.*, U.N. Econ. & Soc. Council, U.N. Comm'n on Human Rights, Sub-Comm'n on the Promotion & Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

140. *See* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level*, 1999 BYU L. REV. 1139, 1212 (1999); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 638 (2000); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L L. & FOREIGN AFF. 81 (1999) (arguing that the ATS is already sufficiently limited by existing court doctrines — for example, forum non conveniens — and a heavy burden on plaintiffs).

141. Ratner, *supra* note 2.

142. *See supra* notes 113–116 and accompanying text.

143. *Id.* at 450–51.

144. *See* STEVEN R. RATNER & JASON S. ABRAMS, 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.").

145. Ratner, *supra* note 2, at 449 (emphasis added).

Ratner then reviewed the international precedents on private corporate duties arguing that there is a "clear trend" toward the recognition of corporate duties.[146] He 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.[147] The *Talisman* court relied on most of these same sources and essentially the same analysis to reach its conclusion. Unlike the *Talisman* court, however, Ratner describes this evidence as reflecting a "somewhat inconsistent posture among decisionmakers over the role of corporations in the international legal order."[148] Although corporations have many recognized rights under international law, many governments are "somewhat ambivalent" about recognizing corporate duties.[149] Still, Ratner concludes that many decisionmakers recognized that "corporate behavior is a fitting subject for international regulation."[150] 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 customary international law. Yet, this is exactly the burden that the *Talisman* court used Ratner's analysis to establish.

Other scholars have been less reluctant than Ratner to defend corporate liability under the ATS. Harold Koh, for instance, adapted Ratner's arguments to sharply criticize opponents of corporate liability as spreading "myths."[151] Such myths about the inability of private corporations to owe duties under customary international law, Koh argued, are refuted by evidence of Nazi-era prosecutions and subsequent treaty practice.[152] Moreover, Koh emphasizes the illogic and perhaps injustice of recognizing private corporation rights under customary international law while at the same time immunizing such entities from duties.[153]

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 to non-state actors, there is no basis for limiting such extensions to natural per-

146. *Id.* at 477.
147. *Id.* at 477–88.
148. *Id.* at 487.
149. *Id.* at 488.
150. *Id.*
151. Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 263 (2004) (discussing several challenges to ATS corporate claims, particularly by conceptualizing the corporate person and the legal basis for liability in civil claims).
152. *Id.* at 264–68.
153. *Id.* at 265.

sons.[154] Thus far, there has been almost no academic dissent to these arguments.

Outside the United States, scholars have noted the significance of the ATS revolution in corporate liability. Indeed, one non-U.S. scholar arguing in favor of the International Criminal Court's assertion of jurisdiction over corporations found U.S. cases to be an important precedent.[155] But, neither she nor other scholars describe the ATS cases as a reflection of a well-known international consensus in favor of corporate liability for these kinds of violations.[156]

The pre-*Kiobel* judicial consensus for the liability of corporations under international law rested on a very thin reed. Although ATS cases have been brought against U.S. corporations for over two decades, only three courts directly addressed the question of a corporation's liability for *jus cogens* violations. Ironically, the two courts allowing corporate liability relied heavily on the failure of prior courts to analyze or even spot the issue as evidence that precedent favors imposing such liabilities. Only the *Kiobel* court conducted a fresh analysis, and even its concurring judge agreed there was very little international law precedent supporting a norm of corporate liability.[157] Once endorsed by these two lower courts, most subsequent courts treated the question as settled or continued to ignore the issue.[158]

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 the level of specificity required by the *Sosa* Court.[159] In the next

154. *See* Stephens, *supra* note 2, at 209.

155. Kathryn Haigh, *Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns*, 14 AUSTL. J. HUM. RTS. 199, 208 (2008) (noting that "many of the key developments in pursuing corporate liability for human rights violations have been through civil litigation" under the ATS).

156. *See* BINDA PREET SAHNI, TRANSNATIONAL CORPORATE LIABILITY: ACCOUNTABILITY FOR HUMAN INJURY 311–12 (2006); Michael K. Addo, *Human Rights and Transnational Corporations — An Introduction*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 3, 4 (Michael K. Addo ed., 1999); Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, *in* HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, *supra*, at 259, 267–68.

157. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *43 (2d Cir. Sept. 17, 2010) (Leval, J., concurring) ("However, when one looks to international law to learn whether it imposes civil compensatory liability on those who violate its norms and whether it distinguishes between natural and juridical persons, the answer international law furnishes is that it takes no position on the question.").

158. *See* discussion *supra* Part II.A.

159. *See supra* note 142.

Part, I discuss the international sources on corporate liability under customary international law.

III. THE NON-EXISTENT INTERNATIONAL CONSENSUS ON PRIVATE CORPORATE LIABILITY FOR CUSTOMARY INTERNATIONAL LAW VIOLATIONS

Under *Sosa*, federal courts are obligated to limit their recognition of causes of action under customary international law to those norms that are "specific, universal, and obligatory."[160] The requirement of specificity includes questions of whether a private actor can be held liable under international norms.[161] 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 customary international law 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 under customary international law. 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 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:

> 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 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 . . . .[162]

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 and for

160. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

161. *Id.* at 733 n.20.

162. OPPENHEIM, *supra* note 68, at 16.

legal persons when seeking remedies under traditional international law. In one famous case, the International Court of Justice (ICJ) rejected under international law the right of Belgium to bring claims against Spain on behalf of a corporation that was registered under the laws of Canada.[163] The ICJ rejected this claim even though the majority of shareholders claiming injury were nationals of Belgium.[164]

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 Paul Stephan has observed, modern international law self-consciously sought to impose duties on states toward individuals.[165] 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 applying only indirectly toward individuals.[166]

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. As the Nuremberg tribunal famously proclaimed: "[t]hat international law imposes duties and liabilities upon individuals as well as upon states has long been recognized."[167] Quoting the U.S. Supreme Court, the Tribunal declared that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing *individuals* who commit such crimes can the provisions of international law be enforced."[168]

"[T]he 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."[169] But the innovation of Nuremberg, however, was not simply that individuals could be punished for violations of international law. Rather, responsibility extended

163. *See* Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

164. *Id.* at 6.

165. *See, e.g.*, Paul B. Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556–62 (1999); *see also* Julian G. Ku, *The Delegation of Federal Power to International Organizations*, 85 MINN. L. REV. 71, 79–88 (2000).

166. *See* ANTONIO CASSESE, INTERNATIONAL LAW 71 (2d ed. 2005).

167. *The Nurnberg Trial*, 6 F.R.D. 69, 110 (I.M.T. at Nurnberg 1946).

168. *Id.* (emphasis added).

169. Flores v. S. Peru Copper Corp., 414 F.3d 233, 244 n.18 (2d Cir. 2003) (quoting TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 109 (1949) (emphasis in original)).

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).[170] 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 respect and guarantee rights, never directly imposing obligations or granting rights to natural or legal persons, and states remained the primary bearers of rights and obligations under international law. Customary law followed the same indirect approach with the sole exception of serious international crimes like genocide and war crimes. Charges arising from such serious international crimes, however, have only been directed toward natural persons.

B. The World War II Industrialist Cases

Nevertheless, 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 I* court held that U.S. military tribunals also punished corporations for violations of international law by aiding and supporting the Nazi regime's war crimes.[171] But none of these tribunals actually charged corporations. Instead, they charged the natural persons who controlled such corporations. Despite the restricted nature of these prosecutions, defenders of corporate liability have focused on the language of such opinions in cases against officers of German corporations, concluding that the opinions "make[] it clear that while individuals were nominally on trial, the [corporation] itself, acting through its employees, violated international law."[172]

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, many of the judges in the subsequent Control Council Law No. 10 tribunals were, unlike the judges in the

170. For a discussion of the evolution of the individual in international law under international human rights law and international humanitarian law, see Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25 (2010); *see also* Note, *Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2031 nn.43–44 (2001).

171. Presbyterian Church of Sudan v. Talisman Energy, Inc. (*Talisman I*), 244 F. Supp. 2d 289, 315–16 (S.D.N.Y. 2003).

172. *Id.* at 316.

more famous Nuremberg Tribunals, all U.S. lawyers.[173] Such judges were likely accustomed to imposing criminal liability on corporations because U.S. law had long done so,[174] and it is hardly surprising that their opinions reflect some imprecise language. But, read in context, the language hardly suggests that the judges believed they were holding corporations liable.

The first such passage involves the tribunal's finding with regard to I.G. Farben in a case brought against its corporate directors.

> 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].[175]

In a similar case, the tribunal noted that "the confiscation of the Austin plant [a French tractor factory owned by the Rothschilds] . . . and 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 . . . ."[176]

Although such passages suggest that the tribunals were seeking to punish the businesses and their activities,[177] the tribunals at the time clarified their analysis to make it clear that they were not charging the corporations directly:

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173. All members of the Farben tribunal constituted under Control Council 10 were U.S. lawyers. Two were state-court judges, one was a dean of a law school, and one was a practicing attorney. *See* 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 6 (1952) [hereinafter CCL NO. 10 TRIALS].

174. *See, e.g.*, N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 496–97 (1909).

175. *Talisman I*, 244 F. Supp. 2d at 315–16 (alteration in original) (quoting *United States v. Krauch* (I.G. Farben Case), *in* 8 CCL NO. 10 TRIALS, *supra* note 173, at 1140 (1952)).

176. Ratner, *supra* note 2, at 478 n.134 (alteration in original) (quoting *United States v. Krupp*, *in* 9 CCL NO. 10 TRIALS, *supra* note 173, at 1352–53 (1950)). As in the I.G. Farben Case, the *Krupp* court makes it clear that while individuals were nominally on trial, the Krupp company itself, acting through its employees, violated international law.

177. For example, Judge Leval made much of this and similar passages in his stinging *Kiobel* concurrence. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *47–48 (2d Cir. Sept. 17, 2010) (Leval, J., concurring).

> We will now turn to the consideration of the individual responsibility of the defendants for the acts of spoliation [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 spoliation 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.*[178]

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 not the subject of the criminal prosecution.[179] While it is the business conduct that gives rise to liability in these trials, it is almost stunning to a U.S. lawyer to "pierce" the corporate veil and attribute the actions of a corporation to an individual.[180] 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

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178. I.G. Farben Case, 8 CCL No. 10 TRIALS, *supra* note 173, at 1153 (emphasis added).

179. *See In re* Tesch and Others (Zyklon B Case), 13 Ann. Dig. 250 (British Mil. Court 1946).

180. 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." Charter of the International Military Tribunal art. 9, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The effect, however, was not enterprise liability, but rather 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." Control Council Law No. 10, Dec. 20, 1945, pmbl., art. V, *reprinted in* 1 CCL NO. 10 TRIALS, *supra* note 173, at xvi, xix (1949).

by Jonathan Bush.[181] 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.[182] 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 "awaken[ing] legal concerns" with a somewhat controversial and novel legal move, and the evidentiary difficulties of prosecuting entities with complex structures.[183]

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.[184] Not only did the courts explicitly avoid such a theory, but Bush's investigation also 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 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 has been confirmed by subsequent international practice in the 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

181. Jonathan Bush, Essay, *The Prehistory of Corporations and Conspiracy in International Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1102–03 (2009).

182. *Id.* at 1151–52, 1198.

183. *Id.* at 1198–99.

184. *Id.* at 1101.

crimes in the former Yugoslavia and Rwanda. From the outset, the jurisdiction of these tribunals was limited to individuals.[185] Although it was not crystal clear that such jurisdiction excluded legal persons such as corporations or non-governmental organizations, 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." [186] 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.*[187]

The Rome Statute negotiations revealed some of the fundamental legal and practical difficulties of 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.[188] Most importantly, the negotiators debated and disagreed upon the method for determining the *mens rea* of a legal person.[189] Facing 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.[190]

Although the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the ICC deal with criminal liability, they are crucial to the estab-

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185. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Counsel Resolution 808 (1993)*, art. 7(1), U.N. Doc. S/25704 (May 3, 1993); S.C. Res. 955, art. 6(1), U.N. Doc. S/RES/955 (Nov. 8, 1994).

186. Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90.

187. Kai Ambos, *Individual Criminal Responsibility, Article 25 Rome Statute*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 743, ¶ 4 (Otto Trifferer ed., 2d ed. Supp. 2008) (emphasis added) (footnote omitted).

188. *See id.*

189. *See id.*

190. *Id.*

lishment of norms for civil liability in most of the ATS cases. Indeed, the precedents for a variety of important principles of customary international law applied by courts in ATS cases are drawn from international criminal law because no other country or international tribunal permits the imposition of civil liability for what many countries deem uniquely criminal violations.[191]

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 for 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 under customary international law has broad international support.

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. Professor Jordan Paust has even suggested that this practice of regulating corporate behavior can be extended through any reference to private-party conduct.[192] 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.[193] Hence, Professor Paust would support the opposite rule: Unless an international norm specifically exempts corporations from liability, corporate liability should be assumed.[194]

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 because 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,[195] a treaty

191. *See, e.g.*, Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1180 (C.D. Cal. 2005); Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322, 1344 (N.D. Ga. 2002).

192. *See* Paust, *supra* note 2, at 810.

193. *Id.*

194. *Id.*

195. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1.

almost wholly focused on regulating the behavior of private businesses, imposes duties on its member states rather than such businesses.[196] Of course, those states must then 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."[197] But as the official commentary makes clear, member states may be excused from making this liability of corporate entities criminal because many member states do not permit criminal punishment of corporations.[198] 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 the conception of traditional international law that duties should flow 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 where a natural person associated with the legal person has already been convicted.[199] 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 there is a continuing lack of international 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 the *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.[200] In the United States, courts have

196. *Id.* art. 2.

197. *Id.*

198. Org. for Econ. Co-Operation & Dev. [OECD], *Commentaries on the Convention on Combating Bribery of Foreign Officials in Int'l Bus. Transactions*, OECD Doc. DAFFE/IME/BR(97)17/FINAL (Nov. 27, 1997).

199. Working Grp. on Bribery in Int'l Bus. Transactions, Consultation Paper: Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years After Adoption, ¶ 26 (Jan. 2008), http://tinyurl.com/2utk5kb.

200. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

generally interpreted laws implementing those conventions as proscribing conduct by natural persons only.[201]

A Special Representative of the Secretary-General also recognized the difficulty in resolving these conflicts in international opinion in a 2007 Human Rights Council report.[202] 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.[203] 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.[204]

In any event, the survey of treaty practice offers little support for 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 explain the complete lack of international precedent stemming from customary, as opposed to treaty, law imposing 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 treaty-makers feel a need to specifically extend a treaty's obligations to the regulation of legal persons belies the claim that any reference to private-party duties under international law should be assumed to apply to legal persons except when stated otherwise. If it is understood 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 versus indirect distinction draws into clarity what the ATS cases are seeking to do. Rather than impose obligations on

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201. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (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*, 197 F.3d 161 (5th Cir. 1999).

202. Special Representatative of the Sec'y-Gen. on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Report*, 4th Sess., Feb. 9, 2007, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007).

203. *See id.* ¶ 35 (explaining that traditional international law only imposed duties indirectly through states).

204. *See id.* ¶ 28 (noting difference in systems of attributing corporate liability under domestic law).

states, a theory of direct liability on non-state actors imposes obligations regardless of whether that private person is acting on behalf of a state. Even a theory of complicity with state action suggests that the non-state actor owes international duties irrespective of its 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 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 customary international law, Judge Weinstein could not bring himself to dismiss the *Agent Orange* lawsuit on this theory.[205] Put simply, even if there was a dearth of international precedent, he argued that "[l]imiting civil liability to individuals while exonerating the corporation . . . makes little sense in today's world."[206] Adopting the language of an amicus brief, he goes 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."[207] Judge Leval echoes this complaint in his forceful *Kiobel* concurrence: "My colleagues do not even suggest any purpose or goal the nations of the world might hope to derive from such a rule [against corporate liability], and I can think of none."[208]

But there is an obvious policy reason for treating corporate and natural persons differently when it comes to ATS liability. Unlike those imposing liability on 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 in the context of bribery.[209]

An initial draft of the Rome Statute that included jurisdiction over juridical entities, including private corporations, illustrates the range of possible attribution theories.[210] Under the draft, a finding of liability

205. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005).

206. *Id.*

207. *Id.* at 59.

208. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *34 (2d Cir. Sept. 17, 2010) (Leval, J., concurring).

209. *See supra* notes 195–199 and accompanying text.

210. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law*

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.[211] 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.[212] Moreover, there are various possibilities 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.[213] 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.[214] Even on questions of vicarious liability, which the court suggested was well established under customary international law, it 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."[215]

Stephen Ratner is the only scholar to have seriously wrestled 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 has attempted to derive a distinct set of attribution principles for corporations.[216] While interesting and plausible, he does not claim that such principles in any way reflect existing international practice.

Ratner's useful effort, however, does point to the benefits of treaty-making over deriving such rules through court "development" of customary international law.[217] In a treaty context, parties can 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

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over Legal Persons: Lessons Learned from the Rome Conference on an International Criminal Court, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, *supra* note 2, at 139, 150–51 (discussing U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Working Grp. on Gen. Principles of Criminal Law, Working Paper on Article 23, paras. 5, 6, U.N. Doc A/Conf.183/C.1/WGGP/L.5/Rev.2 (Jul. 3, 1998)).

211. *Id.* at 151.

212. *See, e.g.*, United States v. Automated Med. Labs., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (holding that a corporation may be held criminally liable for agents acting within the scope of their employment).

213. *See In re* S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 270 (S.D.N.Y. 2009).

214. *Id.* at 270–71.

215. *Id.* at 271.

216. *See* Ratner, *supra* note 2, at 450.

217. *Id.* at 538–39.

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 or no support from international practice for the imposition of customary international law duties on corporate entities. Such duties are rarely imposed on natural persons, and when instances of such duties do 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 or piercing through such structures to shareholders, management, or parent corporations. No single rule of attribution has been developed under customary international law 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.[218] 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 to account for the unusual size and importance of modern transnational corporations.[219]

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218. *See id.* at 523–24.

219. *See, e.g.*, Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327, 332 (2001) (noting that it is unremarkable in the United States for corporations to be held criminally liable); Simon Chesterman, *Oil and Water: Regulating the Behavior of Multinational Corporations Through Law*, 36 N.Y.U. J. INT'L L. & POL. 307, 327 (2004) (discussing the conceptual difficulties of prosecuting corporations, acknowledging that it is an undeveloped area of international law); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1, 50 (2003) (discussing the concept of corporate legal personality under international law); Anita Ramasastry, *Corporate Complicity: From* Nuremberg *to* Rangoon *An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational*

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 an unjustified reliance on U.S. decisions as a sign of an international consensus. The existence of this curious and misguided consensus prior to *Kiobel* reveals some important characteristics that U.S. courts demonstrate 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 federal court decision-making. 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.[220] 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 seriously considering whether corporations were amenable to such lawsuits.[221] 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.[222]

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

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Corporations, 20 BERKELEY J. INT'L L. 91, 152 (2002) (noting that corporations can commit international crimes and can therefore be tried nationally); Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153, 173 (2003) (advocating for the use of multilateral conventions to regulate corporations).

220. *See, e.g.*, Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254, 262–63 (2d Cir. 2008); Bigio v. Coca-Cola Co., 239 F.3d 440, 453 (2d Cir. 2000); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 104 (2d Cir. 2000); Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996); Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 994–95 (S.D. Ind. 2007); Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005); Estate of Rodriquez v. Drummond Co., 256 F. Supp. 2d 1250, 1260 (N.D. Ala. 2003); Bao Ge v. Li Peng, 201 F. Supp. 2d 14, 24 (D.D.C 2000); Doe v. Unocal Corp., 110 F. Supp. 2d 1294, 1303–04 (C.D. Cal. 2000); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 441 (D.N.J. 1999).

221. *See supra* Part II.A.

222. *See supra* note 208.

tribunals on questions of international law.[223] 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.

Although this is a sensible approach, it is also in tension with the ATS's 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 even more 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 are very few international precedents. 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 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.[224]

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, which is more legitimately and self-consciously shaped by the courts.[225] 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."[226] The temptation to engage in gap-filling will always be very strong because, despite claims to the contrary, very few of the norms that 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 will tempt U.S. courts as they further develop the standards of private corporation liabil-

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223. *See generally* Julian G. Ku, *Structural Conflicts in the Interpretation of Customary International Law*, 45 SANTA CLARA L. REV. 857, 859–73 (2005) (discussing the structural conflicts for U.S. courts in citing to international law precedents).

224. *See, e.g.*, *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring).

225. *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932, 965–66 (9th Cir. 2002) (Reinhardt, J., concurring).

226. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

ity under customary international law. Judicial pronouncements on veil-piercing for foreign corporations and their subsidiaries, enterprise liability, and standards for determining corporate intent will all be justified and explained as gap-filling. As unincorporated associations enter the conversation, one can imagine questions 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.[227] By filling gaps in key international law norms, courts engage in exactly the sort of discretionary norm creation that *Sosa* was supposed to prevent.

C. *An Expansive Conception of Federal Common Law*

Others have also defended corporate liability by, curiously enough, rejecting the applicability of customary international law to the issue.[228] In this view, the question of whether a corporation can be held liable under the ATS is a question of federal common law. Hence, even if customary international law fails to provide (as I have argued) a substantial basis for imposing liability on corporations, federal courts may do so because federal common law plainly does. This reasoning was endorsed by at least two lower courts as an alternative basis for their finding that corporate liability was appropriate under the ATS.[229]

On its face, the "just federal common law" defense to imposing corporate liability under the ATS seems the strongest and most persuasive defense of this practice. Some version of this argument appears to have been adopted by Judge Leval's concurrence in *Kiobel*.[230] But this justi-

227. *See supra* text accompanying note 51.

228. In a recent article, Professor Ingrid Wuerth offers another version of this justification for using federal common law. *See* Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. (forthcoming 2010). In her view, courts should look to Congress' intent when determining whether to use domestic law principles versus international law principles. Congress would have intended for the use of domestic law principles to determine corporate liability due to the lack of applicability of international law precedents. But this analysis really means that whenever international law precedents seem inapplicable, U.S. law can fill any necessary gaps. This result seems at odds with the larger approach of *Sosa*, which is intended to limit federal courts in this area of judicial lawmaking.

229. *See In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 52, 59 (E.D.N.Y. 2005); *In re* S. Afr. Apartheid Litig., 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004).

230. Kiobel v. Royal Dutch Petroleum, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392, at *28 (2d Cir. Sept. 17, 2010) (Leval, J., concurring) ("The law of nations sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts. That body of law, however, takes no position on whether its norms may be enforced by civil actions for compensatory damages.").

fication is seriously in tension with the holding of the *Sosa* Court and the constrained role that court envisioned for federal courts applying the ATS.

The *Sosa* Court made it clear that the courts hearing ATS claims must determine whether international law contains a universally accepted rule and defines that rule specifically and uncontroversially to include defendant's alleged conduct.[231] It further noted that when considering whether to allow a claim to proceed, courts should also consider "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[232] The Court cited two prior lower court decisions that differed on whether a particular norm extended liability to private non-state actors.[233]

Some defenders of corporate liability have suggested that this footnote only indicates that the question of state versus non-state actor liability is a question of international law, while the question of natural-person versus legal-person liability is a matter left to domestic federal common law.[234] This parsing of the Court's language misses the larger point. In the Court's view, the question of a norm extending to a particular type of actor is a question of international law, not domestic law. This makes sense because in many international law contexts, the legal identity of the parties is a necessary factor in determining what type of international law, if any, is applicable to their conduct. For instance, if an ATS claim was brought against an international organization, the amenability of such an organization to ATS liability would almost certainly be a question of international law, not domestic U.S. law, because of *the identity of the actor facing liability*.[235] A lawsuit seeking liability against UN peacekeeping units for sexual abuse in the Congo[236] would have to consider whether the United Nations is a subject of international law capable of owing duties. It would be odd to simply assume that if international law said nothing on this topic, a U.S. court would be authorized to determine under its own authority, and irrespective of the views of Congress or the executive branch, that the United Nations owed such duties.

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231. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004).

232. *Id.* at 733 n.20.

233. *See* Kadic v. Karadzic, 70 F.3d 232, 237–39 (2d Cir. 1995); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring).

234. *See Kiobel*, 2010 WL 3611392 at *36 (Leval, J., concurring).

235. *See* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11).

236. *See, e.g.*, Colum Lynch, *U.N. Sexual Abuse Alleged in Congo*, WASH. POST, Dec. 16, 2004, at A26.

Indeed, the Second Circuit's famous holding in *Kadic v. Karadzic* confirms the necessity of determining whether an ATS defendant is a subject of international law.[237] That seminal decision, which laid the analytical foundation for many corporate ATS lawsuits, offered a careful analysis of whether a private party could owe duties under customary international law.[238] The *Kadic* court did not suggest that the lack of an international norm prohibiting the imposition of liability would therefore authorize a state to impose such liability. Rather, it drew on numerous international sources to argue that such a norm imposing liability on private actors exists.[239] It is hard to understand why this same approach should not apply when considering the liability of a corporate actor for the violation of an international law norm.

CONCLUSION

At the conclusion of his sarcastic and stinging concurrence in *Sosa*, 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."[240] He then predicted that in this "illegitimate lawmaking endeavor, the lower courts will be the principal actors . . . [a]nd no one thinks all of them are eminently reasonable."[241]

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 customary international law 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 customary international law violations was built upon the thinnest of international jurisprudential foundations. For over two decades, federal courts unconsciously and uncontroversially settled on a rule imposing corporate liability with almost no discussion or analysis and resting on a very weak foundation.

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237. *Kadic*, 70 F.3d at 239.

238. *Id.* at 239 ("[W]e hold 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.").

239. *See id.* at 239–41.

240. Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

241. *Id.* at 750–51.

The Second Circuit's recent decision in *Kiobel* offers a useful corrective to this otherwise poor judicial record. Yet the divide between the majority and concurrence in this decision reveals that many federal judges still maintain a broad conception of federal judicial discretion under the ATS. Departing from earlier claims in *Talisman* that there was a broad universal consensus in *favor* of corporate liability, the concurring opinion in *Kiobel* offers a new rationale that is likely to be embraced by other circuits and by plaintiffs in a future appeal to the Supreme Court.

Under this new argument, federal courts should have the independent authority to fashion civil remedies against any type of private actor as long as there is no strong international precedent *prohibiting* such remedies. Even though this position appears to be based on a federal common law theory, such an approach to corporate liability is the exact opposite conception of the limited and constrained judicial role envisioned by the *Sosa* court.

Overall, neither the rise of a consensus in favor of corporate liability nor its latest defense reflects well on the federal courts' exercise of discretion under the ATS. For over two decades, courts either resolved the issue with barely any analysis, as in the Eleventh Circuit, or they rested their reasoning on flawed and unconvincing analysis of international sources. In recent cases, some courts and academic supporters will now argue for a broad federal common law discretion unchained even from international law limitations. Overall, the story of how corporations came to be defendants in ATS lawsuits vindicates much of Justice Scalia's skepticism. It offers a cautionary lesson about the performance of federal courts under the ATS, should the Supreme Court choose to revisit the Alien Tort Statute in future years.

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